

United States  
Department of the Treasury

---

**DIRECTOR, OFFICE OF PROFESSIONAL RESPONSIBILITY,  
Complainant-Appellee**

v.

**Complaint No. 2014-00004**

**(b)(3)/26 USC 6103**

**Respondent-Appellant**

---

**DECISION ON APPEAL**

Pursuant to General Counsel Order No. 9 (January 19, 2001) and Office of Chief Counsel Notice CC-2014-008 (September 8, 2014), I decide disciplinary appeals to the Secretary of the Treasury filed under 31 C.F.R. Part 10 (Practice Before the Internal Revenue Service (IRS), hereinafter referred to as Circular 230 - all references are to Circular 230 as in effect for the periods at issue). This is such an appeal from a Decision and Order entered into this proceeding by Administrative Law Judge Parlen L. McKenna. By this Appeal, Respondent-Appellant **(b)(3)/26 USC 6103** ("Respondent") contests the granting of a Default Decision in this matter.

In my capacity as Appellate Authority, I review the entire administrative record in the proceeding. Under Circular 230, the Appellate Authority's standard of review differs depending upon whether the issue being reviewed is a purely factual issue or a mixed question of fact and law (in either instance, reviewable under a "clearly erroneous" standard), or a purely legal issue (which the Appellate Authority reviews de novo). § 10.78 of Circular 230. The Appeal of the granting of a Default Decision in this case is a mixed question of fact and law.

**Background**

This proceeding was commenced on March 12, 2015<sup>1</sup> when Timothy E. Heinlein, an attorney acting as the authorized representative of the Complainant-Appellee Office of Professional Responsibility (henceforth, "OPR" or "Complainant") filed a Complaint against Respondent under the authority of 31 C.F.R part 10<sup>2</sup> (Circular 230), alleging that

---

<sup>1</sup> As will be discussed, *infra*, a first Complaint was erroneously filed with the Administrative Law Judge for the United States Department of the Interior on March 12, 2015. That Complaint was returned, unfiled, to OPR; however, a copy of this first Complaint was mailed to the Respondent.

<sup>2</sup> Portions of Circular 230 were amended on June 12, 2014. See 79 Fed. Reg. 33685 (June 12, 2014); Circular 230 (Rev. 6-2014). The savings clause contained at 31 C.F.R. § 10.91 of the revised regulations provides that any proceeding under this part based on conduct engaged in prior to June 12, 2014 which is instituted after that date shall apply the procedural rules of the revised regulations contained in Subparts D and E. Conduct engaged in prior to the effective dates of these revisions will be judged by the regulations in effect at the time the conduct occurred.

the Respondent engaged in disreputable conduct under § 10.51 of Circular 230, based upon eight separate counts and two aggravating factors alleged in the Complaint. The Complainant requested that the Respondent be disbarred from practice before the Internal Revenue Service (IRS).

On October 15, 2015, Administrative Law Judge Parlen L. McKenna ("the ALJ") issued an Order ("the Default Decision") to the parties granting OPR's Motion for Default Decision in this matter. On November 25, 2015, the Respondent filed a "Notice of Appeal (Short Version)," requesting additional time within which to file an "extended" Notice of Appeal, due to (b)(6)

(b)(6) By Order dated April 6, 2016, I denied OPR's Motion to Dismiss Appeal as Untimely, and directed OPR to file a Response brief within 30 days of that Order. On May 6, 2016, the Complainant-Appellee Director, Office of Professional Responsibility submitted its Opposition to Respondent's Appeal. I have reviewed the materials submitted by the parties.

The record in this case is replete with instances of mailings by OPR and the ALJ to the Respondent, with virtually no responses generated by the Respondent; however, in some instances, the Respondent did respond. This record frames the question important to the granting of the Default Decision in this case: Whether, when and how was the Respondent served with copies of the pleadings and orders in this case?

Suffice it to say that at least two addresses were used in communications by OPR and the ALJ to the Respondent. One address in (b)(3)/26 USC 6103 and one address in Same

The "Same" address", stated in full is:

(b)(3)/26 USC 6103/(b)(6)

The "(b)(3) / 26 USC 6103" address" is:

(b)(3)/26 USC 6103

This case began on March 12, 2015, with an error; essentially, a procedural foot-fault by OPR, by which the original Complaint filed against Respondent was filed by OPR's attorney with the improper Administrative Law Judge. On April 15, 2015, after being notified of this error, OPR's attorney filed an identical second Complaint with the correct ALJ, and attempted to serve the Respondent with a copy of this second Complaint. However, these events appear to have started things off on the wrong foot, from which it appears the proceedings never recovered.

And here's why: On April 17, 2015, the Respondent attempted to submit a timely Answer to that original, erroneously-filed Complaint by OPR. He served a copy of this

Answer on both the "incorrect" ALJ with whom OPR's attorney had filed the original Complaint, as well as with OPR's attorney. It is not disputed that OPR's attorney received that Answer, some 30 pages in length, and received it prior to filing his Motion for Entry of Default Decision. Indeed, it appears this Answer literally crossed in the mail with OPR's mailing of the identical "correct" second Complaint. Thus, OPR's attorney received Respondent's detailed Answer within days of mailing their corrected Complaint that now forms the basis of the Default Decision. Directly underneath Respondent's signature to that Answer, Respondent gave his address of record as the [REDACTED] address.

(b)(3) / 26 USC 6103

It is also uncontested by the parties that this second Complaint was identical to the erroneously-filed Complaint for which this Answer was received. So, the Answer submitted by Respondent and received by OPR appears to be responsive to the allegations both in the erroneously filed original Complaint and the correctly filed second Complaint (no opinion is being made here with respect to the merits of the allegations contained in the Answer, as they are not at issue).

Respondent did not directly file an Answer with the correct ALJ, however, and this ultimately led to the granting of a Default Decision. Respondent asserts that this failure is because he did not receive any notification of the second ALJ and second Complaint until he received a copy of the Default Decision from OPR. From an inspection of the record, it appears that all intervening communications from Complainant and the administrative law judges might not have been received by Respondent. In these communications the Complainant and the ALJs exclusively used the [REDACTED] Same address, rather than the [REDACTED] Same address contained in Respondent's Answer.

As stated, it is clear that OPR's attorney received a copy of Respondent's 30 page Answer to the Complaint (albeit the version filed by OPR's attorney with the incorrect ALJ) on April 22, 2015. This Answer was substantively responsive to the contents of the allegations contained in both the original erroneously-filed original Complaint and the identical "correctly-filed" second Complaint. Despite this, on June 3, 2015, approximately six weeks after having received the Respondent's Answer to the (first) Complaint, OPR's counsel mailed a letter to Respondent alleging the improper filing of the Answer by Respondent. OPR warned that if an Answer were not *properly* mailed to the ALJ by June 19, 2015, OPR would move for entry of a Default Decision (emphasis mine). One wonders: Why? Could not OPR, given its own initial misstep in the case, have simply forwarded Respondent's Answer to the correct ALJ, asking it to be incorporated into the record as substantially compliant, and begun to use the [REDACTED] Same address contained in that Answer?

Indeed, it appears the Default Decision in this case is based upon the insistence that Respondent file a second, duplicative, Answer in this case with the correct ALJ, even though OPR's attorney was properly served with a copy of an Answer that substantively responded to its Complaint.

There is an email in the record, from OPR's counsel to Curtis E. Renoe, Attorney-Adviser to the ALJ, dated July 14, 2015 (one week after the issuance of the Order to Show Cause Regarding Filing of Answer). By this email, OPR's counsel provided ("without comment") a copy of Respondent's Answer to the first Complaint, which had been delivered to OPR's counsel approximately 12 weeks before. There is no explanation as to why the Answer was being forwarded to the ALJ in July, having been received by Complainant in April. No mention is made in the email from OPR's counsel of the (b)(3)/IRC 6103 address contained on the Respondent's signature line of the Answer. It seems reasonable to conclude from this email that OPR had not previously provided a copy of this Answer to the (correct) ALJ's office prior to July 14, 2015, and did so only after beginning the process of seeking a Default Decision against Respondent. The Respondent was not included on a "cc" line to this email to the ALJ's office; it is not known if the Respondent was included as a recipient of this message in a hard copy.

The Default Decision in this case was entered for a Complaint to which a detailed Answer had been provided by the Respondent to OPR's Counsel months before, and a copy of which OPR had belatedly provided to the ALJ, because of an insistence that Respondent "correctly" file a second and identical 30 page Answer. Unfortunately, that insistence was not mailed to the address provided by Respondent in his Answer. The ALJ's granting of the Default request by Complainant was based on a conclusion that the record demonstrated several factual determinations, including:

- a) That the revised "correct" Complaint was delivered to the Respondent on April 15, 2015;
- b) That Complainant advised Respondent a second time via the Notice of Failure to Properly File Answer that Respondent was obligated to file an Answer not later than June 19, 2015; and
- c) That OPR Counsel served Respondent with a copy of the Motion for Default on Respondent's last known address.

#### Law and Analysis

This is a serious matter: we are dealing with the disbarment from practice of a professional's livelihood. Additionally, there is a general disfavor with default judgments; there is instead a strong preference favoring resolution of genuine disputes on their merits. Jackson v. Beech, 636 F.2d 831 (D.C. Cir. 1980). Other circuits have expressed similar sentiments, using similar approaches. Harvey v. United States, 685 F.3d 939 (10th Cir. 2012); Colleton Preparatory Academy v. Hoover Universal, Inc., 616 F.3d 412 (4th Cir. 2010); United States v. Signed Personal Check No. 730, 615 F.3d 1085 (9th Cir. 2010).

Respondent asserts that he had received only two documents in these proceedings: the Complaint (that is, the first Complaint filed with the Department of the Interior), and a copy of the Order of Default (sent by OPR in a transmittal letter dated October 22, 2015). Seen from the Respondent's point of view, the record in this proceeding would be brief and puzzling: it consisted of the receipt of the first Complaint and his mailing of his Answer, followed by silence until the Order granting the default decision was

provided to him by a transmittal letter to the (b)(3)/26 USC 6103 address (after the fact) dated October 22, 2015.

On the other hand, from OPR's point of view, the record reflects numerous documents mailed to the Respondent with no response. At least some of these documents were returned to OPR and the ALJ. On closer inspection, though, the circumstances surrounding this latter view of the record are not clear, and can be confusing in some instances.

For example, the record in this case reflects that only two items can be confirmed as having been received by the Respondent prior to the Notice of Appeal in this case: the erroneously filed first Complaint, and the October 22, 2015 transmittal letter conveying the Order of Default. With respect to the first Complaint, the Respondent filed an Answer, and mailed that to OPR and the first ALJ. With respect to the October 22, 2015 transmittal letter, the Respondent filed his Notice of Appeal. Thus, in both cases where the record shows that Respondent actually received a document in this proceeding, the record also shows the Respondent provided a response. Indeed, in every case where the Same address has been used, the Respondent has timely responded. For example, in this Appeal, with the requirement to serve the Respondent at the Same address in place, the Respondent has timely fulfilled all filing requirements.

In contrast, in every other instance below where it is alleged Respondent failed to respond to a document mailed by OPR, the available record does not demonstrate delivery of that document, and only the Same address was used. Additionally identifying this record of non-delivery was available to OPR through a simple internet search using the certified mail number affixed to the envelopes (which is presumably why these numbers are used). Despite having received Respondent's Answer noting the Same address, all documents mailed by OPR or the ALJ after April 22<sup>nd</sup> failed to use that address; only the Same address was used.

I am not convinced that the Respondent is entirely without fault with respect to the troubling level of responsiveness to events in these proceedings; however, I have significant doubts with respect to which items, if any, the Respondent might have received between the time of his submission of his Answer in this case (which appears to have crossed in the mail with the notification of the new, correct forum), and October 22, 2015, when a copy of the Order of Default Decision was mailed – importantly – to Respondent at his Same address. It is entirely possible, as Respondent alleges, that he heard nothing between those two events. The record is confused and unclear, but appears to support this view.

Indeed, there is other confusion with respect to the mailing of some items. For example, on June 3, 2015, OPR asserts it mailed to Respondent, solely at the Same address, a letter that it refers to as a Notice of Improper Filing (which the ALJ referenced in his Default Decision as the Notice of Failure to Properly File Answer). On the Certificate of Service for this letter, Complainant's secretary certifies that the letter was mailed to Respondent, bearing certified mail number 3547. However, the

mailing record is confused here. Attached to the exhibit copy in the record of this June 3<sup>rd</sup> correspondence is a copy of the official USPS Track and Confirm website information, for certified mail number [REDACTED] **3530** (emphasis mine and henceforth "3530"), as having been mailed on June 3, 2015 (received by the USPS on June 4, 2015). However, this is not the certified mail number reflected on the Certificate of Service for the June 3, 2015 "Notice of Improper Filing" letter.

This "3530" certified mail number reflected in the June 2015 Track and Confirm information relates to the certified mail number referenced in OPR's Certificate of Service attached to the second Complaint to the Respondent, which is alleged to have been mailed on April 15, 2015 (some six weeks earlier). Thus, it is unclear what was mailed on June 3, 2015, and what was mailed on April 15, 2015, and why the Certificates of Service are incorrect. Was the second Complaint only mailed on June 3<sup>rd</sup> (and not April 15<sup>th</sup>) as this document would appear to show? Such confusion makes it difficult, if not impossible, to determine the delivery of items in the record. The accuracy of the Certificates of Service themselves are now called into question, and would likely be impossible to unravel using USPS Track and Confirm to determine actual mailing dates of the various correspondence. In short, the Certificates of Service for key documents, upon which the Default Decision are based, are unreliable.

OPR asserts that it used the "last known address" for the Respondent, and that service on the (b)(3)/26 USC 6103 address is sufficient. This is not a last known address case. While it is certainly relevant that the last known address may be relied upon to mail the Complaint to the Respondent, it is uncontested that Respondent received that Complaint. However, having been so served, the Respondent then provided Complainant with a different address of record in his Answer, received within days of the correctly filed Complaint. The Complainant failed to use this address (the **Same** address) in subsequent mailings relating to this litigation.

This is litigation, and OPR had in its possession an Answer filed by Respondent that, in the signature line, contained the **Same** address as the Respondent's address of record for this case. Having been received in such manner by Complainant, that **Same** address should have been used with regard to subsequent correspondence relating to this case.

Specifically, I find to be clearly erroneous the ALJ's factual determinations:

- a) That the revised "correct" Complaint was delivered to the Respondent on April 15, 2015;
- b) That Complainant advised Respondent a second time via the Notice of Failure to Properly File Answer that Respondent was obligated to file an Answer not later than June 19, 2015; and
- c) That OPR Counsel served Respondent with a copy of the Motion for Default on Respondent's last known address.

Documents within the record, from the official website of the United States Postal Service, state that the second "correct" Complaint, using the tracking number identified

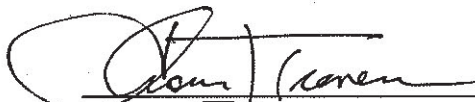
by the Complainant in its Certificate of Service, was mailed on June 3, 2015, and not April 15, 2015. Further, this calls into question the mailing date for other items served on Respondent, including the Notice of Improper Filing/Notice of Failure to Properly Answer, dated June 3, 2015. Lastly, I find that the Motion for Default was not properly served by Complainant on the Respondent's address of record, which address was conspicuously contained on the Answer served on Complainant on April 20, 2015.

Again, overarching all of this discussion, it is clear that OPR had a copy of Respondent's Answer, even as it insisted on procedural exactitude by Respondent to "correctly" file a second, identical Answer, demanding this exactitude by continually using an address which generated no response, while ignoring the conspicuous address of record used by the Respondent in that detailed Answer. Under these circumstances, and given the confusion of the mailing record, I find that it was clearly erroneous to enter a Default Decision against the Respondent.

Therefore:

For the reasons stated, the ALJ's Default Decision is **REVERSED** and I **REMAND** this matter to the ALJ directing that a copy of the Answer in the possession of OPR's Counsel is to be filed as the Answer of Respondent, and a hearing on the merits to be undertaken pursuant to the procedures identified in Circular 230.

It is further **ORDERED** that all future correspondence directed to Respondent in this matter is to be served upon Respondent at the two addresses indicated on the Certificate of Service to this Order, or to such other address that the Respondent provides to OPR and the Administrative Law Judge.



Thomas J. Travers  
Appellate Authority  
Office of Chief Counsel  
Internal Revenue Service  
(As Authorized Delegate of the  
Secretary of the Treasury)

June 6, 2017  
Lanham, MD

**CERTIFICATE OF SERVICE**

I hereby certify that the DECISION ON APPEAL dated June 6, 2017 in Complaint No. 2014-00004 was sent this day by UPS Next Day Air and by First Class U.S. Mail to the addresses listed below:

UPS Next Day Air:

(b)(3)/26 USC 6103  
[Redacted]

First Class U.S. Mail:


**Honorable Parlen L. McKenna**  
United States Coast Guard  
Coast Guard Island  
Building 54A  
Alameda, CA 94501

**Stephen A. Whitlock**  
Director, Office of Professional Responsibility  
Internal Revenue Service  
1111 Constitution Avenue, NW  
SE:OPR 7238IR  
Washington, DC 20224

**Timothy E. Heinlein, Senior Counsel**  
Office of Chief Counsel (IRS)  
100 First Street, Suite 1800  
San Francisco, CA 94105

(b)(3)/26 USC 6103/(b)(6)  
[Redacted]

(b)(3)/26 USC 6103  
[Redacted]

  
\_\_\_\_\_  
Thomas J. Travers  
Appellate Authority  
Office of Chief Counsel  
Internal Revenue Service  
Lanham, MD