



Issue Date: 18 February 2003

CASE No. 2002-SCA-13

UNITED STATES DEPARTMENT OF LABOR,
Plaintiff.

v.

JAMES E. BAKER
Complainant,

**ORDER OF DEFAULT JUDGMENT
ON MOTION FOR RELIEF FROM DEFAULT JUDGMENT
AND ON ORDER TO SHOW CAUSE**

Pending is Respondent, James Baker's January 8, 2003 motion for relief from default judgment filed in response to the undersigned's November 21, 2002 order to show cause why the Respondent should not be held in default, which is also pending determination.

Since no final order on the order to show cause has been issued, the motion for relief from default judgement is construed as a response to the order to show cause, and is denied for the following reasons:

The order to show cause was served upon Respondent on November 21, 2002. 29 U.S.C. § 18.5 (4). The order provided ten days from receipt of the order, for a response. While Plaintiff, the United States Department of Labor, "DOL" herein, filed a response on November 22, 2002, no reply to that document was received from the Respondent within the ten days provided, and no other document was filed other than the present motion for relief. Therefore, Respondent is subject to a finding of default on that basis, alone. See, 29 U.S.C. § 18.5 (c). However, since an appearance of counsel for the Respondent has now been filed by virtue of the motion for relief, and construed as the reply to the order to show cause, I will consider the points raised in the document.

Initially, the notice of filing the complaint, dated July 24, 2002, clearly sets forth the requirement that the Respondent file an answer to the complaint in thirty days, as required by 29 U.S.C. § 18.5 (a) which Respondent did not do. Respondent is, therefore, subject to a finding of default on this matter under the provisions of 29 U.S.C. § 18.5 (b). In addition, the prehearing order of November 4, 2002 required the submission of certain information which was not submitted by the Respondent, even though the Solicitor served the above response to my order on

November 15, 2002. Again, Respondent is subject to a finding of default by virtue of his failure to respond.

Further, no evidence has been submitted in support of the positions stated by Respondent in the current motion/position statement, either by a sworn affidavit from James Baker, or by any other documentary evidence. Those positions are, therefore, considered to be unsubstantiated, and without merit.

Respondent attributes part of his action or inaction to advice by an attorney Larry Eldridge, from whom there has been no appearance, and concerning whom no evidence has been offered to support any alleged misconduct before this court by him. These allegations exist solely between Mr. Baker and Mr. Eldridge, as a matter of any attorney/client relationship that may be found to exist between them under law. These allegations will not be considered in this order.

Respondent next argues that he was offered use of the Settlement Judge procedure as an option, which he is now apparently arguing as an exclusive alternative to the hearing procedure. The regulations governing the appointment of a Settlement Judge under 29 U.S.C. § 18.9 (a) state:

At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the administrative law judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties and the probability of reaching an agreement which will result in a just disposition of the issues involved.

29 U.S.C. § 18.9 (e) (1) states:

This paragraph establishes a voluntary process whereby the parties may use a settlement judge to mediate settlement negotiations. A settlement judge is an active or retired administrative law judge who convenes and presides over settlement conferences and negotiations, confers with the parties jointly and/or individually, and seeks voluntary resolution of issues. Unlike a presiding judge, a settlement judge does not render a formal judgment or decision in the case; his or her role is solely to facilitate fair and equitable solutions and to provide an assessment of the relative merits of the respective positions of the parties.

While settlement is offered as an option to the hearing, the Regulations governing such settlement discussions at 20 C.F.R. § 18.9(a) and (e), supported by the statement by the DOL, show that when a party objects to the procedure, and settlement discussions have not been agreed by both parties, the procedure may not be utilized. (See, Notice of Docketing of the Complaint, dated July 24, 2002.) It should be noted that, in the present case, the Settlement Judge procedure had previously been invoked by the Respondent without objection from the DOL, but was unsuccessful in reaching a settlement agreement. See, the prior appointment of Settlement Judge Roketenetz, and subsequent referral of the matter to the undersigned for hearing upon the

conclusion of those discussions. (See Notice of Conclusion of Settlement Judge Proceeding, dated October 2, 2002.) Therefore, Plaintiff had every right to reject the new invocation of the procedure, and it did not affect Respondent's obligation to proceed.

Nothing in these provisions, or in the documents which offer the Respondent the alternative to participate in the Settlement Judge procedure, state that the utilization of the Settlement Judge process constitutes, itself, the alternative to the compliance with the determination of the DOL. The Settlement Judge procedure is only a method for resolving the issues between the parties, and the Regulations make it clear that all parties must agree to the procedure for it to be utilized. 29 U.S.C. § 18.9 (e) (2) (i). The final result of this method or procedure may result in an alternative to the resolution that would otherwise have been that of the trial judge, again, provided that all of the participants have agreed to that outcome. Otherwise, the requesting party to the procedure has only two other meaningful options: (1) oppose it in the established procedure, which at this level is the hearing, or (2) acquiesce in the position of the other party. A possible third alternative, doing nothing may result in compulsive litigation; here, against the Respondent for not complying with the DOL order. That is already occurring in the present matter. The Respondent must proceed, or be found in default. It has not. It is in default, and the belated motion/answer to the show cause order does not accomplish this end.

For the above reasons, I find that the reasons stated for relief from an order of default, are insufficient to overcome the many orders and notices that have been served upon the Respondent, without timely response. Therefore,

IT IS ORDERED that Respondent is in default, and is ordered to pay the United States Department of Labor the amount of \$21,907.90 in back wages under the Service Contract Act, 42 U.S.C. § 351, *et seq.*

IT IS ALSO ORDERED that the U.S. Postal Service to release \$3,008.55 in withheld funds under Contract No. HCR 49028 to the Wage and Hour Division of the U.S. D.O.L. for disbursement to employees.

IT IS FURTHER ORDERED that Respondent has failed to demonstrate the existence of unusual circumstances and that the name of the Respondent be, therefore, placed on the ineligible list pursuant to Section 5 of the Service Contract Act, and that he be barred from holding government contracts for a period of three years.

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THOMAS F. PHALEN, JR.
Administrative Law Judge