UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	
	:	NO. 2676
MERCHANT MARINER LICENSE & MERCHANT MARINER DOCUMENT	:	
	:	
Issued to: JOHN KENNETH PARKER	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By an Order Denying Respondent's Motion to Set Aside Finding of Default (hereinafter "D&O") dated November 8, 2005, Judge Walter J. Brudzinski, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New York, New York, upheld a previously issued Default Order suspending the merchant mariner credentials of Mr. John Kenneth Parker (hereinafter "Respondent") for 12 months upon finding proved charges of *negligence* and *violation of law or regulation.*

The specifications found proved alleged that Respondent committed an act of negligence and violated a law or regulation by violating a Safety and Security Zone while serving as the master aboard the M/V AURORA on March 4, 2005.

PROCEDURAL HISTORY

The instant case is the result of a Default Order issued by the ALJ. The progression of the case is integral to a thorough understanding of the issue raised on appeal. The case progressed as follows:

- On July 21, 2005, the Coast Guard issued a Complaint against Respondent alleging that he committed two acts of negligence and two acts of misconduct by violating a Safety and Security Zone established near Boston, Massachusetts, while serving as the master of the M/V AURORA on March 4, 2005. [Complaint at 1-4]

- On September 6, 2005, Respondent filed a motion with the ALJ Docketing Center requesting an extension of time within which to file an Answer to the Complaint because then ongoing settlement negotiations between Respondent and the Coast Guard had broken down. [Respondent's Motion to Serve Answer More than Twenty Days After Service of Charges; D&O at 2]

- Along with the above referenced motion, Respondent contemporaneously included an Answer to the Complaint. [Id.] In his Answer, Respondent admitted all jurisdictional allegations, but denied paragraphs 3 through 10 of the factual allegations for the first negligence and the first misconduct charges. [Respondent's Answer to Complaint] In addition, Respondent noted that the second negligence and misconduct charges were "redundant" and, as a result, did not specifically deny the numbered paragraphs associated with those charges in his Answer. [*Id.*]

- On September 7, 2005, the ALJ Docketing Center assigned the case to the ALJ.

- On September 8, 2005, the ALJ noted in a Memorandum Order that he found that Respondent's Answer to the Complaint was timely filed. [Memorandum Order of Pre-Hearing Conference Call at 1] Moreover, the ALJ noted that, since issuance of the initial Complaint, the Coast Guard had filed an Amended Complaint to which Respondent agreed to file an Answer within 20 days. [Id.]

- The Amended Complaint was served on Respondent on September 8, 2005, and alleged that on March 4, 2005, Respondent committed an act of negligence by violating a safety zone and violated a law or regulation by, at the same time, violating a security zone. [Amended Complaint at 1-4, 6] The allegations arise out of the same underlying facts predicating the Original Complaint. [*Id.*]

- The ALJ ordered a hearing on the matter to convene on November 17, 2005, in Boston, Massachusetts. [Order Rescheduling – Notice of Hearing]

- On October 4, 2005, the Coast Guard filed a Motion for Default Order alleging that Respondent failed to file an Answer to the Amended Complaint which was due on September 28, 2005. [Motion for Default Order at 1] The Coast Guard noted that failure to file an Answer to the Amended Complaint constituted an admission to all of the facts alleged in the Complaint and a waiver of Respondent's right to a hearing. [*Id.*]

- The ALJ granted the Coast Guard's motion for Default Order on October 5, 2005. [Default Order at 2]

- Respondent subsequently filed an Answer on October 6, 2005, along with a supporting motion in opposition of the Default Order on October 11, 2005. [Respondent's Answer to Amended Complaint; Respondent's Opposition to the Coast Guard's Motion for a Default Order] Respondent essentially admitted to the tardy filing of the Answer to the Amended Complaint, however, he argued that there was no harm to the Coast Guard for the delay, that the Amended Complaint was merely a redraft of the Original Complaint (eliminating redundant allegations and clarifying the specific allegations), and that sufficient time remained for both parties to prepare for the hearing that was already scheduled. [Respondent's Opposition to the Coast Guard's Motion for a Default Order at 1]

- On October 12, 2005, the Coast Guard filed a brief supporting the Default Order and outlined numerous aspects of the Amended Complaint that differed from the Original Complaint. In reply, Respondent filed a Motion to Vacate the Default Order and requested that a hearing be conducted because he had shown good cause for the late filing of his Answer to the Amended Complaint. [Respondent's Motion to Vacate Order of Default and to Conduct a Hearing in this Matter]

- Via an order dated November 8, 2005, the ALJ denied Respondent's motion and upheld his previously issued Default Order. [D&O at 12]

Respondent filed his Notice of Appeal on December 7, 2005, and, thereafter, perfected his appeal by filing his Appellate Brief on January 7, 2005. Both parties properly and timely filed an added brief after receiving permission to do so. Therefore, this appeal is properly before me.

APPEARANCE: Prior to filing his Appeal, Respondent was represented by Timothy R. McHugh, P.O. Box 211, Southborough, Massachusetts, 01772. On appeal, Respondent is represented by David J. Farrell, Jr., 2355 Main Street, P.O. Box 186, S. Chatham, Massachusetts, 02659. The Coast Guard was represented by LT Edward X. Munoz and ENS Christin C. Carothers, of U.S. Coast Guard Sector Boston, Massachusetts.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credentials at issue in these proceedings. [Complaint at 1; Amended Complaint at 1; D&O at 23; Default Order at 3]

Respondent acted under the authority of his merchant mariner credentials by serving as the master of the passenger ferry M/V AURORA on March 4, 2005. [Id.] On that date, Respondent allegedly violated a Safety and Security Zone established ahead, astern and abeam of the Liquid Natural Gas (hereinafter "LNG") carrier M/V MATTHEW while she transited out to sea from Boston, Massachusetts. [*Id.*] The record indicates that Respondent piloted the M/V AURORA within the established Safety and Security Zone. [Complaint at 2-4; Amended Complaint at 2-3; D&O at 3-7] There is disagreement in the record as to whether Respondent had permission to enter the Safety and Security Zone and whether there was a miscommunication between the Coast Guard, Respondent, and other vessels in the area as to their transit at that time. [*Id.*; Appellate Brief 2, 4]. Since the ALJ found the allegations of negligence and violation of law or regulation proved due to the failure of Respondent to timely file an Answer to the Amended Complaint, the factual details and circumstances of the incident were not fully developed in the case file.

BASIS OF APPEAL

Respondent raises several issues on appeal. However, after careful review of the record, it appears that the dispositive issue is whether the ALJ erred by issuing a Default Order as a result of Respondent's failure to file an Answer to the Amended Complaint.

On appeal, both parties have devoted considerable time discussing whether Respondent had "good cause" to file his Answer to the Amended Complaint late under 33 C.F.R. § 20.308(d). However, the key issue is not if Respondent had "good cause" to file late; rather, it is whether Respondent was required to file an Answer to the Amended Complaint in the first instance.

OPINION

I have long stated that I will only overturn the decision of the ALJ if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2647 (BROWN), 2645 (MIRGEAUX), 2642 (RIZZO), 2641 (JONES), 2640 (PASSARO), 2584 (SHAKESPEARE), 2570 (HARRIS), aff' NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). After a thorough review of the record, I find that the decision of the ALJ was clearly erroneous and I will remand this case for a hearing.

Pursuant to Coast Guard regulation, an "ALJ may find a respondent in default upon a failure to file a timely Answer to the Complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown." 33 C.F.R. § 20.310(a). The regulation further states that the ALJ may set aside a finding of default for "good cause shown." 33 C.F.R. § 20.310(e). As a consequence, it logically follows that if a Respondent timely files an Answer to a Complaint, the ALJ may not issue a default order unless the Respondent fails to appear at a hearing without good cause shown. 33 C.F.R. § 20.310(a). This principle is grounded in fundamental fairness and supported in other

Federal administrative law practices. *See, e.g.,* In re Service Oil, Inc., 2006 WL 3406347 (E.P.A.)(2006) and James Michael Shull, 291 NLRB 342 (1988).

In this case, Respondent filed an Answer to the Original Complaint. [Respondent's Answer to Complaint; Memorandum Order of Pre-Hearing Conference Call at 1] The ALJ initially determined that the Answer was timely filed and proceeded to order a hearing in the matter. [Id.] Simultaneously, the Coast Guard filed an Amended Complaint. [Amended Complaint] The Amended Complaint was silent concerning the Original Complaint, i.e., there was no indication that the Original Complaint was being withdrawn or dismissed. The Amended Complaint sought only to clarify the exact nature of the Coast Guard's allegations against Respondent. [Id.] To this end, the factual circumstances and the nature of the incident (allegedly violating a Safety and Security zone on a particular date) are identical as between the Original Complaint and the amended version. [Complaint at 2-4; Amended Complaint at 2-3] Additionally, the proposed sanction (twelve months suspension outright followed by twelve months probation) is identical between the Original and Amended Complaint. [Complaint at 5; Amended Complaint at 4]

Since the record shows that Respondent filed an Answer to the Original Complaint, the question becomes whether Respondent is obligated to file a response when the Coast Guard amends the Complaint. To answer this question, it is important to note that a prior Commandant Decision on Appeal (hereinafter "CDOA") has made clear that the purpose of a Complaint in these proceedings is to provide the "legal and factual bases under which the Coast Guard is proceeding." Appeal Decision 2655 (KILGORE).

Another CDOA has clarified this notion stating: "[t]he thrust of modern pleading, especially in administrative proceedings, is toward fulfillment of a notice requirement." Appeal Decision 2326 (MCDERMOTT). Finally, addressing the content of Complaints in these proceedings, past CDOAs have stated that the "purpose of a specification is to provide notice to the charged party so that he had an adequate opportunity to prepare his defense." See Appeal Decisions 2013 (BRITTON) and 460 (DUGAS).

On appeal, Respondent asserts that the Original Complaint provided him both notice of the nature of the charges against him and ample opportunity to prepare his defense in anticipation of a scheduled hearing. [Respondent's Motion to Vacate Order of Default and to Conduct a Hearing in this Matter at 2-3; Appeal Brief at 4, 8] A review of the record supports Respondent's assertions in this regard. Indeed, a review of the Amended Complaint and the Original Complaint reveals that they are predicated upon the same operative facts and relate to an alleged violation of the same regulation, 33 C.F.R. § 165.110, on March 4, 2005. As such, Respondent was clearly on notice of the nature of the charges against him when the Original Complaint was issued. *See* Appeal Decision 2655 (KILGORE). Both the Original and Amended Complaints relate to whether Respondent piloted the M/V AURORA in the Safety and Security zone without proper authorization. [Complaint 2-4, Amended Complaint 2-3] The Amended Complaint served only to remove the redundant allegations of *misconduct* and *violation of law or regulation.* Therefore, the Amended Complaint did not operate to obviate the Original Complaint, it simply amended it. *See* Appeal Decisions 2655 (KILGORE), 2630 (BAARSVIK), 2326 (MCDERMOTT) and 2013 (BRITTON). As such, the Amended

Complaint is not a new Complaint that would require an Answer under 33 C.F.R. § 20.308. Instead, the Amended Complaint, in this case, is an amendment to a previously filed document under 33 C.F.R. § 20.305. According to 33 C.F.R. § 20.305(b), "[t]he ALJ may allow other amendments or supplements to previously filed pleadings or other documents." There is no requirement that a party must file a reply or Answer to any amendment or supplementation of a filed document. 33 C.F.R. § 20.305. Since Respondent was not required to file an Answer to the Amended Complaint under 33 C.F.R. § 20.310(a), it was inappropriate for a default order to be entered against him for this inaction. The requirement for an Answer contained in 33 C.F.R. § 20.308 does not apply to a genuine Amended Complaint.

Inasmuch as the ALJ may have been influenced by Respondent's Answer to the Original Complaint, I will address the sufficiency of Respondent's Answer. In addition to determining that the Answer to the Original Complaint was timely filed, the ALJ also determined that Respondent's failure to specifically deny the numbered paragraphs of the factual allegations for the second negligence and misconduct offenses would have constituted an admission of those allegations in the Original Complaint. [D&O at 10] In the Original Complaint, the Coast Guard charged Respondent with two counts of negligence. [Complaint at 2-3] Both counts relate to a violation of 33 C.F.R. § 165.110 which is titled "Safety *and* Security Zone; Liquefied Natural Gas Carrier Transits and Anchorage Operations, Boston, Massachusetts." 33 C.F.R. § 165.110 (emphasis added). The regulation delineates that certain anchorage areas, as well as a zone surrounding any LNG carrier, are designated as security and safety zones within the Captain of the Port of

Boston, Massachusetts' zone. 33 C.F.R. § 165.110(b)(1)-(3). The Coast Guard alleged that Respondent violated a "safety zone" in one specification each for the negligence and misconduct allegations, and violated a "security zone" in the second specification each for the negligence and misconduct allegations. [Complaint at 2-4] The regulation that Respondent is charged with violating, 33 C.F.R. § 165.110, does not distinguish between separate safety and security zones; in fact, the regulation is written in terms of a safety *and* security zone. 33 C.F.R. § 165.110. As a result, there is one zone that is described as a safety *and* security zone. [*Id.*] Therefore, Respondent was correct when he stated in his Answer to the Complaint that the second specifications to the negligence and misconduct charges were redundant. [Answer] Consequently, it is clear that Respondent has denied the allegations for the second specifications for the charges of negligence and misconduct in the same manner as he denied the allegations for the first specifications of those charges. Thus, it is inapposite that Respondent did not specifically deny the numbered paragraph of the second specifications.

CONCLUSION

Respondent timely filed an Answer to the Complaint and was under no obligation to file an Answer to the Complaint as amended. As such, there was no basis for the ALJ to determine that Respondent was in default under 33 C.F.R. § 20.320 and the ALJ erred in denying Respondent a hearing.

ORDER

The order of the ALJ, dated at New York, New York, on November 8, 2005, is

VACATED and **REMANDED** for a hearing in this matter to be convened consistent with this opinion.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28th of February, 2008.