

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF HOMELAND SECURITY  
**UNITED STATES COAST GUARD**

---

UNITED STATES COAST GUARD

Complainant

vs.

JOHN K. PARKER

Respondent.

---

Docket Number: CG S&R 05-0403  
CG Case No. 2423837

**ORDER DENYING RESPONDENT'S MOTION TO SET ASIDE FINDING OF  
DEFAULT**

**Issued: November 8, 2005**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

This matter came to be heard on Respondent's October 25, 2005 "Motion to Vacate Order of Default and to Conduct a Hearing in this Matter." This matter is considered as a Motion to Set Aside a Finding of Default pursuant to 33 CFR 20.310(e).

**Summary**

Respondent's Answer to the Coast Guard's Amended Complaint was due on or before September 28, 2005. When Respondent did not file his Answer, the Coast Guard motioned for Default Order which the undersigned granted on October 5, 2005. The Default Order found the allegations in the Amended Complaint proved and ordered that Respondent's licenses, certifications, and other documents suspended for a period of 12 months followed by 12 months probation.

**Law**

Title 33 CFR 20.308(a) provides "[t]he respondent **shall file** (emphasis added) a written answer to the complaint 20 days or less after service of the complaint. The answer must conform to the requirements of this subpart for filing and service." Subsection (b) provides "[e]ach answer must state whether the respondent intends to contest any of the allegations set forth in the complaint. It must include any affirmative defenses that the respondent intends to assert at the

hearing. The answer must admit or deny each numbered paragraph of the complaint. . . . “ Subsection (d) provides, “[a] respondent’s failure without good cause to file an answer admits each allegation made in the complaint.”

Title 33 CFR 20.310 (a) provides “[t]he ALJ may find a respondent in default upon failure to file a timely answer to the complaint. . . .” (b) Each motion for default must conform to the rules of form, service . . . The respondent alleged to be in default shall file a reply to the motion 20 days or less after service of the motion. ( c ) Default by respondent constitutes, for purposes of the pending action only, an admission of all facts, alleged in the complaint and a waiver of her or his right to a hearing on those facts. (d) Upon finding a respondent in default, the ALJ shall issue a decision against her or him. (e) For **good cause shown**, (emphasis added) the ALJ may set aside a finding of default.”

### Issue

This issue is whether Respondent has shown good cause to set aside the October 5, 2005 finding of default.

### Procedural Background

#### a. Original Complaint

The Coast Guard served Respondent with the Original Complaint on July 21, 2005. The Complaint charged 2 counts each of Negligence and Misconduct alleging that on March 4, 2005 the Respondent unlawfully entered both a safety zone and a security zone in Boston Harbor established for the outbound transit of the Liquefied Natural Gas Carrier (LNGC) MATTHEW. The Negligence and Misconduct First Offenses are comprised of 12 paragraphs alleging conduct violating a safety zone. The Negligence and Misconduct Second Offenses are also comprised of 12 paragraphs alleging conduct violating a security zone.

#### b. Respondent’s Late Answer to Original Complaint

On September 6, 2005, 27 days after the Answer was due, the ALJ Docketing Center received a letter from Respondent’s counsel enclosing 1) his Motion to Serve Answer More than Twenty Days After Service of Charges; and 2) Respondent’s belated Answer to the Complaint. Respondent’s Motion to Serve Answer More than Twenty Days After Service of Charges states that the Answer to the Complaint was due on August 10, 2005; that he and the Coast Guard have been engaged in settlement discussions but the discussions had broken down; and, that the (late) response will have no effect on the Government or the Respondent’s preparation or readiness for a hearing on the dates suggested by the Respondent.

Respondent’s late Answer to the Original Complaint admits all jurisdictional allegations and denies the allegations in paragraphs 3,4,5,6,7,8,9, and 10 of Negligence First Offense and paragraphs 3,4,5,6,7,8,9, and 10 of Misconduct First Offense. Respondent’s late Answer further states, “The second Negligence and Misconduct charges are redundant.” Even if Respondent’s Answer to the Original Complaint was timely, the effect of Respondent’s failure to file an

Answer to the Negligence and Misconduct Second Offenses technically places Respondent in Default as to the Second Negligence and Misconduct Offenses. Under 33 CFR 20.308(d), failure to answer deems the allegations in those counts admitted.

c. Amended Complaint

On September 7, 2005, the Chief Administrative Law Judge assigned this case to the undersigned and on September 8, 2005 the Coast Guard filed its Amended Complaint. The Amended Complaint alleges one count each of Negligence and Violation of Law or Regulation. The Negligence count alleges the safety zone violation and the Violation of Law or Regulation count alleges the security zone violation. Specifically, the “Negligence” count states:

1. On 04 March 2005, [t]he Coast Guard activated moving Safety and Security Zones for outbound transit of the Liquefied Natural Gas Carrier MATTHEW in accordance with 33 Code of Federal Regulations 165.110. [This language is the same as in paragraph 1 of Negligence and Misconduct First and Second Offenses in the Original Complaint and the same as paragraph 1 of the Violation of Law or Regulation count in the Amended Complaint].

2. The described perimeter for the moving Safety Zone was: All navigable waters of the United States within the Captain of the Port (COTP) Boston zone, as defined in 33 Code of Federal Regulations 3.05-10, two miles ahead and one mile astern, and 500 yards on each side of any liquefied natural gas carrier (LNGC) vessel while underway. [This language is the same as paragraph 2 of Negligence and Misconduct First and Second Offenses in the Original Complaint and the same as paragraph 2 of the Violation of Law or Regulation count in the Amended Complaint except that Security Zone and Safety Zone are located as described above].

3. At approximately 1940 on 04 March 2005, the passenger vessel AURORA left from Hingham, MA, in a transit to Rowes Wharf located in the Boston Inner Harbor. [This language is the same as in paragraph 3 of Negligence and Misconduct First and Second Offenses in the Original Complaint and the same as paragraph 3 of the Violation of Law or Regulation count in the Amended Complaint].

4. You were the Master aboard the M/V Aurora (O.N. 1087449) while the vessel was underway from approximately 1940 to 2030 on 04 March 2005. [This language is the same as in paragraph 4 of Negligence and Misconduct First and Second Offenses in the Original Complaint and the same as paragraph 4 of the Violation of Law or Regulation count in the Amended Complaint].

5. You were aware or should have been aware that the Captain of the Port had activated a moving Safety Zone within the main ship channel for the outbound transit of the LNGC MATTHEW and that all vessels operating within Boston Harbor were to comply with orders given by Coast Guard assets on scene. [Paragraph 5 of Negligence First Offense in the Original Complaint reads, “[y]ou were aware of the activation (sic) Safety and Security Zones for the outbound transit of the LNGC MATTHEW.” The Amended Complaint is different in that it adds the words “should have been aware.” This is a material change because proving actual knowledge is different from proving circumstances permitting an inference of knowledge].

6. You were aware or should have been aware that no person or vessel may enter or remain within the *Safety Zone* without the permission of the Captain of the Port. [Paragraph 6 of Negligence First Offense in the Original Complaint reads, “[a]t approximately 1950 you contacted the U.S. Coast Guard Officer in Tactical Control (OTC), who was the person in charge of maintaining perimeter safety and security for the LNGC MATTHEW, stated your position as abeam Spectacle Island approaching buoy number 5, and requested permission from the OTC to continue inbound.” This Amended Complaint language is different to the extent that it adds, “no person or vessel may enter or remain within the Safety Zone without permission of the Captain of the Port.” The Negligence First Offense language in paragraph 6 of the Original Complaint is found in paragraph 8 of the Amended Complaint].

7. The Officer in Tactical Control (OTC) was the person in charge of maintaining the safety and security perimeter for the LNCG MATTHEW and was the direct representative of the Captain of the Port. [The language in paragraph 7 of Negligence First and Second Offenses in the Original Complaint read, “[t]he Officer in Tactical Control (OTC) ordered you to hold your position until the LNGC MATTHEW has passed.” The Amended Complaint language stating that the Officer in Tactical Control who was the person in charge of maintaining perimeter safety and security is found in paragraph 6 of Negligence First and Second Offenses. However, the Amended Complaint further defines the Officer in Tactical Control as being the direct representative of the Captain of the Port. This is a material difference because the regulations at 33 CFR 165.23 and 33 provide, among other things, that no person may enter a safety or security zone without permission of the Captain of the Port. The Amended Complaint puts Respondent on notice that the Officer in Tactical Control is the direct representative of the Captain of the Port. Violating an order of a Coast Guard Officer in Tactical Control (OTC) would not necessarily amount to violating 33 CFR 165.23 and 165.33, absent pleading that the Coast Guard Officer in Tactical Control is the direct representative of the Captain of the Port].

8. At approximately 1950 you contacted the U.S. Coast Guard OTC, stated your position as abeam Spectacle Island approaching channel marker number 5, and requested permission from the OTC to continue inbound. [The language in paragraph 8 of Negligence First Offense in the Original Complaint reads, “[a]t approximately 0800, on 04 March 2005, you failed to obey the order of the Officer in Tactical Control and entered the LNG Safety Zone.” This Amended Complaint language is the same as paragraph 6 of Negligence First and Second Offenses in the Original complaint except that the Amended Complaint refers to channel marker number 5 while the Original Complaint referred to buoy number 5. Also, the Amended Complaint recites a different time of day].

9. The OTC ordered you to hold your position until the LNGC MATTHEW had passed. The former language in paragraph 9 read, “[f]rom approximately 0800 to 0810 you remained inside the LNG Safety Zone with an approximately (sic) 70-yard separation between your vessel and the LNGC MATTHEW closest point.” The language in the Amended Complaint is the same as paragraph 7 of Negligence First and Second Offenses in the Original Complaint].

10. At approximately between 1950 and 2000, on 04 March 2005, you brought or caused to be brought into the established LNG *Safety Zone* the P/V Aurora without permission of the

COTP and failed to obey a lawful order or direction of the OTC. The language in Negligence First Offense of the Original Complaint paragraph 10 reads, “[y]our unauthorized entry into the Safety Zone surrounding the LNCG (sic) MATTHEW and failure to obey orders of the Coast Guard Officer in Tactical Control constitutes an act of negligence as describes (sic) by Section 5.29 of Title 46, Code of Federal Regulations.”

11. You remained inside the LNG Safety Zone with an approximately 70 yards or less of separation between your vessel and the LHGC MATTHEW from approximately 2000 to 2010. [This language is similar to the language in paragraph 9 of the Negligence First and Second Offense in the Original Complaint with the major exception that the time alleged in paragraph 9 of the Original Complaint is 0800 in the morning vice 2000 in the evening.]

12. Your unauthorized entry into the Safety Zone surrounding the LNGC MATTHEW and the disregard of the orders by the Coast Guard Officer in Tactical Control placed the personnel aboard the P/V AURORA, the crew of the LNGC MATTHEW, the crews of the law enforcement vessel and the crews of the tugs escorting the LNGC in danger. Your actions constitute an act of negligence as described by Section 5.29 of title 46, Code of Federal Regulations. [This language is substantially different from the language in paragraph 10 of the Negligence First Offense count because it puts Respondent on notice that in entering the Safety Zone and disregarding the orders by the OTC, he placed personnel in danger and that those actions constituted negligence, whereas paragraph 10 of the Negligence First Offense in the Original Complaint merely states that unauthorized entry and failure to obey the orders of the OTC constitutes negligence].

Specifically, the “Violation of Law of Regulation” count states:

1. On 04 March 2005, the Coast Guard activated moving Safety and Security Zones for outbound transit of the Liquefied Natural Gas Carrier MATTHEW in accordance with 33 Code of Federal Regulations Section 165.110. [This language is the same as in paragraph 1 of Negligence and Misconduct First and Second Offenses in the Original Complaint and the same as paragraph 1 of the Negligence count in the Amended Complaint].

2. The described perimeter for the moving Security Zone was: All navigable waters of the United States within the Captain of the Port (COTP) Boston zone, as defined in 33 Code of Federal Regulations 3.05-10 two miles ahead and one mile astern, and 500 yards on each side of any liquefied natural gas carrier (LNGC) vessel while underway. [This language is the same as in paragraph 2 of Negligence and Misconduct First and Second Offenses in the Original Complaint except that “Safety Zone” is used in place of “Security Zone” in the First Offenses. This language is also the same as paragraph 2 of the Negligence count in the Amended Complaint with the exception that “Security Zone” is substituted for “Safety Zone” in the Violation of Law or Regulation count in the Amended Complaint].

3. At approximately 1940 on 04 March 2005, the passenger vessel AURORA left from Hingham, MA in a transit to Rowes Wharf located in the Boston Inner Harbor. [This language is the same as paragraph 3 of all counts in the Original Complaint and the same as paragraph 3 of the Amended Complaint].

4. You were the Master aboard the M/V AURORA (O.N. 1087449) while the vessel was underway from approximately 1940 to 2030 on 04 March 2005. [This language is the same as paragraph 2 of all counts in the Original Complaint and the same as paragraph 2 of the Negligence count in the Amended Complaint].

5. You were aware or should have been aware that the Captain of the Port had activated a moving Security Zone within the main ship channel for the outbound transit of the LNGC MATTHEW and that all vessels operating within Boston Harbor were to comply with orders given by Coast Guard assets on scene. [Paragraph 5 of Misconduct First and Second Offenses in the Original Complaint reads, “[y]ou were aware of the activation (sic) Safety and Security Zones for the outbound transit of the LNGC MATTHEW.” These paragraphs are different to the extent that the Amended Complaint adds the words “should have been aware.” This is a material change because proving actual knowledge is different from proving circumstances permitting an inference of knowledge].

6. The Officer in Tactical Control (OTC) was the person in charge of maintaining the safety and security perimeter for the LNGC MATTHEW and was the direct representative of the Captain of the Port. [Paragraph 6 of Misconduct First and Second Offenses in the Original Complaint reads, “[a]t approximately 1950 you contacted the U.S. Coast Guard Officer in Tactical Control (OTC), who was the person in charge of maintaining perimeter safety and security for the LNGC MATTHEW, stated your position as abeam Spectacle Island approaching buoy number 5, and requested permission from the OTC to continue inbound.” The Misconduct First and Second Offense language is found in paragraph 8 of the Amended Complaint].

7. The Officer in Tactical Control (OTC) was the person in charge of maintaining the safety and security perimeter for the LNGC MATTHEW and was the direct representative of the Captain of the Port. [The language in paragraph 7 of Misconduct First and Second Offenses in the Original Complaint reads, “[t]he Officer in Tactical Control (OTC) ordered you to hold your position until the LNGC MATTHEW has passed.” The Amended Complaint language stating that the Officer in Tactical Control who was the person in charge of maintaining perimeter safety and security is found in paragraph 6 of Misconduct First and Second Offenses. However, the Amended Complaint further defines the Officer in Tactical Control as being the direct representative of the Captain of the Port. This is an important difference because the regulations at 33 CFR 165.23 and 165.33 provide, among other things, that no person may enter a safety or security zone without permission of the Captain of the Port. The Amended Complaint puts Respondent on notice that the Officer in Tactical Control is the direct representative of the Captain of the Port. Violating an order of a Coast Guard Officer in Tactical Control (OTC) would not necessarily amount to violating 33 CFR 165.23 and 165.33, absent pleading that the Coast Guard Officer in Tactical Control is the direct representative of the Captain of the Port].

8. The OTC ordered you to hold your position until the LNGC MATTHEW has passed. [This is the same language as in paragraph 7 of the Misconduct First and Second Offenses in the Original Complaint and the same language as in paragraph 9 of the Negligence count in the Amended Complaint].

9. At approximately between 1950 and 2000 on 04 March 2005, you entered the established LNG Security Zone without permission of the Officer in Tactical Control. [Paragraph 9 of the Misconduct First and Second Offenses reads, “[f]rom approximately 0800 to 0810 you remained inside the LNG Security Zone with an approximately 70-yard separation between your vessel and the LNGC MATTHEW at the closest point.” The Amended Complaint language is similar to paragraph 8 of the Misconduct First and Second Offense; however, it is significant that the time alleged for entry into the Security Zone is 1950 to 2000 vice 0800 to 0810 as alleged in the Original Complaint].

10. At approximately 2000 on 04 March 2005, you failed to obey the order of the Officer in Tactical Control and entered the LNG Security Zone and main channel. [This language is the same as the language in paragraph 8 of the Misconduct Second Offense charge.]

11. From approximately 2000 to 2010 you remained inside the LNG Security Zone with approximately 70 yards or less of separation between your vessel and the LNGC MATTHEW without the permission of the Officer in Tactical Control. [This language is the same as the language in paragraph 9 of Misconduct Second Offense in the Original Complaint except the time alleged in the Amended Complaint is 2000-2010 - vice 0810, a material difference].

12. You brought the M/V AURORA into a Security Zone and remained inside the zone without the permission of the Officer in Tactical Control in direct violation of 33 CFR 165.33(a) and (b). Your unauthorized entry into the Security Zone surrounding the LNCG (sic) MATTHEW and failure to obey the orders of the Coast Guard Officer in Tactical Control constitutes a Violation of law or regulation as described by Section 5.33 of Title 46, Code of Federal Regulations. [This language is substantially different from the language in paragraph 10 of the Misconduct Second Offense in the Original Complaint because it explains on the circumstances that gave rise to what constitutes a Violation of Law or Regulation as described in 46 CFR 5.33].

#### d. Pre-Hearing Telephonic Conference

Also on September 8, 2005, the undersigned called for a pre-hearing telephonic conference to discuss Respondent’s late Answer to the Original Complaint as well as the Amended Complaint. During the pre-hearing telephonic conference the Coast Guard Investigating Officer advised that since the parties had been in settlement discussions and since he was filing an Amended Complaint, he was not going to pursue a motion for default for Respondent’s late Answer. I reminded Counsel for Respondent that unlike his late Answer to the Original Complaint, he must respond to the Amended Complaint within 20 days in accordance with the procedural regulations. Counsel for Respondent advised that he would file his Answer within 20 days.

#### e. Default Order and Respondent’s Late Answer to the Amended Complaint

Respondent’s Answer to the Amended Complaint was due on or before September 28, 2005. There being no Answer from Respondent, the Coast Guard Investigating Officer filed his

Motion for Default Order on October 4, 2005 and on October 5, 2005, I issued a Default Order. On October 6, 2005, Respondent filed his Answer to the Amended Complaint admitting paragraphs 1 through 7 on each count and denying paragraphs 8 through 12 of each count.

f. Respondent's Opposition to the Coast Guard's Motion for Default Order

On October 11, 2005, Respondent filed his Opposition to the Coast Guard's Motion for A Default Order. In his motion in opposition, Respondent moved to extend the time within which to respond to the Amended Complaint to October 10, 2005. In his motion, Respondent states that the Amended Complaint is "merely a redraft of the Original Complaint." Further, Counsel for Respondent states that he takes full responsibility for the tardy filing of the Answer to the Amended Complaint and apologizes for "this administrative error." Since Counsel for Respondent provided no reasons for filing his Answer late and no reasons for the need for additional time in which to file his Answer to the Amended, I did not find good cause to set aside the Default Order.

g. Coast Guard's Brief in Opposition to Respondent's Opposition Motion

On October 12, 2005, the Coast Guard filed its Brief in Opposition to Respondent's Opposition Motion. The Coast Guard states that Respondent's Opposition Motion does not rise to the level necessary to show good cause to set aside the Default Order under 33 CFR 20.310(e). Specifically, the Coast Guard disagrees that the Amended Complaint is merely a redraft. The Coast Guard refers to allegations 5 and 6 of the Amended Complaint's Negligence count concerning the language that Respondent was aware, or should have been aware, that he has a duty to "comply with orders given by Coast Guard assets on scene." The Coast Guard also alluded to the language (in paragraph 7 of the Amended Negligence count) stating that the Officer in Tactical control (OTC) "was the direct representative of the Captain of the Port." The Coast Guard points out Respondent's argument that "the substance of the allegations in the Amended Complaint was denied in the respondent's original answer" is not accurate and that Respondent's statement, "each material factual allegation is denied, just as it was in the Respondent's Answer to the Coast Guard's original complaint" is also incorrect. Further, the Coast Guard points out that Respondent Answer which was faxed to the Docketing Center denies only allegations 8-12 for each offense

The Coast Guard's Brief in Opposition goes on to say that Respondent's failure to make timely Answer should not be excused due to "administrative error" because he had ample notice, through counsel and in person, both in writing and verbally. The Coast Guard Investigating Officer sent Counsel for Respondent an e-mail on September 19, 2005 inquiring about the Answer to the Amended Complaint. However, Counsel did not reply. Moreover, the Respondent's Instructions on Page 5 of the Amended Complaint clearly state that the Respondent must respond to the complaint within 20 days. The Coast Guard continues by stating that it had been patient and flexible with Respondent by not filing for a default motion in the original complaint due to ongoing settlement discussions and that Counsel for Respondent advised he would file his Answer to the Amended Complaint during the pre-hearing conference call.



Finally, the Coast Guard argues Respondent's claim that there will be no material harm resulting from this one week delay in responding to the Amended Complaint and that sufficient time remains for both sides to prepare for hearing, is misleading because it suggests the issue of timeliness is only germane to case preparation. The Coast Guard argues that the issue is much broader because regulatory deadlines exist to support the integrity of the process, and to allow this Respondent and other respondents the latitude to abuse deadlines for which they have had sufficient advance notice would be contrary to the intent of 33 CFR 20.308(a). I agreed with the Coast Guard's arguments and saw no reason to vacate or set aside the Default Order.

#### h. Respondent's Motion to Vacate Order of Default and Conduct Hearing

On October 25, 2005, counsel for Respondent filed his motion in the nature of a motion to set aside the default order. In his motion, Respondent admits that he did not file his Answer to the Amended Complaint when it was due on September 28, 2005 but he has now done so. Further, Respondent argues that the Amended Complaint does not vary from the Original Complaint in any material respect and that there is no difference in the substance of the Coast Guard's allegations between the Original and the Amended Complaint. Respondent further argues that he had already met the Original Complaint's allegations in the first Answer and met them again in his Answer to the Amended Complaint. Therefore, the only issue is that the Answer to the Amended Complaint was "filed out of time."

Respondent further states that there is good cause for the untimely Answer in that "there were circumstances beyond his control which resulted in minimal delays in joining issue with respect to the Amended Complaint. Counsel requests a conference *in camera* with respect to certain of those factors...." In addition, counsel for Respondent argues "that the length of time the [A]nswer was delayed was minimal, and does not impair the Coast Guard's ability to prepare for a hearing scheduled for November 17, 2005 in any respect. . . [n]o other party or witness has been effected by the delay, and the delay was only one week." These arguments appear to be more in the nature of a request to be excused from filing an Answer than a showing of good cause.

#### Decision

Upon consideration of the entire record as well as Respondent's arguments, I find that good cause has not been shown to set aside the finding of default.

#### Analysis

When Respondent filed his motion to file a late Answer in the Original Complaint, no reason or good cause was shown – just that he was filing late and that "the response will have no effect on the Government or the respondent's preparation or readiness for a hearing...." After the Coast Guard served Respondent with the Amended Complaint on September 8, 2005, the Investigating Officer sent Counsel for Respondent an e-mail on September 19<sup>th</sup> to inquire on the status of the Answer. Counsel for Respondent did not reply. Having previously been excused from filing a late Answer in the Original Complaint because the Coast Guard was going to proceed on the Amended Complaint and having been admonished to file his Answer to the

Amended Complaint within 20 days as prescribed in the regulations, Counsel for Respondent did not think it important enough to at least pick up the phone or send an e-mail during that 20 day period that he needed more time to file his Answer. Instead, Counsel for Respondent simply acknowledges that he was late again in filing his Answer but that it really does not make any difference because he believes it's substantially the same conduct in both Complaints.

Counsel for Respondent is asking, in effect, to be excused from showing good cause because he has concluded that the Amended Complaint does not warrant an Answer. As reasons therefore, Counsel for Respondent argues that the allegations are the same as in the Original Complaint and that his late, and partial Answer to the Original Complaint should also serve as his Answer to the Amended Complaint. This argument fails for several reasons: 1) it's not up to the Respondent to choose whether to file an Answer to any Complaint because the regulations are clear that he shall file an Answer; 2) his Original Answer was not timely filed; 3) even if the Original Answer were timely filed, it was not complete because did not admit or deny each numbered paragraph in the Negligence Second Offense and in the Misconduct Second Offense. The Respondent simply stated that those Second Offenses were redundant and therefore did not answer them. The result would have been his admission to all the allegations in both the Negligence and the Misconduct Second Offenses in the Original Complaint.

The argument that the allegations are substantially the same in both Complaints is also without merit. Respondent's course of conduct, i.e., what he did at or around 2000 on March 4, 2005 obviously has not changed, but the charges and the allegations are different. The Amended Complaint eliminated the Misconduct charge and replaced it with the Violation of Law or Regulation charge. Further, the allegations are different as noted in the bracketed language following each allegation. Paragraph c. Amended Complaint, supra.

The issue before the undersigned is not whether the allegations in the Amended Complaint are materially or substantially different from the allegations in the Original Complaint. The Coast Guard had already decided that the changes are material enough to warrant re-filing an Amended Complaint to ensure Respondent his full due process rights so that he has an adequate opportunity to prepare his defense. See Appeal Decision 2309 (CONEN) (1983). . Once the Coast Guard has decided to re-file an Amended Complaint, "[t]he respondent shall file a written answer..." 33 CFR 20.308(a). By arguing that the Complaints are substantially the same, Respondent is implying that there is no issue of notice or due process and that filing an Amended Complaint and an Answer was not necessary. That issue was rendered moot when the Coast Guard decided to file its Amended Complaint. Having been served with an Amended Complaint, Respondent may not unilaterally conclude, after the time to file Answer has run, that no Answer is required.

Respondent's remaining argument that he should be excused from showing good cause because the delay in filing his Answer was minimal and therefore does not impair the Coast Guard's ability to prepare for a hearing is also without merit. Good cause is not established by how late the Answer is filed. Good cause goes to the reasons why the Answer was filed late to begin with and no such reason has been given in this case, either in Respondent's Opposition to the Coast Guard's Motion for a Default Order or in his Motion to Vacate Default Order.

Finally, Counsel for Respondent argues that “there were circumstances beyond his control which resulted in minimal delays in joining issue with respect to the Amended Complaint. Counsel requests a conference *in camera* with respect to certain of those factors....”

By requesting “a conference in camera” it was not clear whether Counsel for Respondent wanted to talk to the judge with or without the Coast Guard participating. Trying to avoid any *ex parte* discussions which might affect the outcome of a case, I asked my paralegal assistant, Ms. Regina V. Thompson, to place a “status call” to Counsel for Respondent and ask him to clarify what he means by an *in camera* conference. Counsel for Respondent advised Ms. Thompson that he wanted to discuss the nature of his personal problem with the judge, outside the presence of the Coast Guard and that he wanted the judge to take into consideration those personal matters. Counsel for Respondent further disclosed to Ms. Thompson the nature of his personal problem and that he had been experiencing this problem from on or about September 1, 2005 to two weeks ago, which would be on or about October 24, 2005. Ms. Thompson disclosed those facts to the undersigned.

To further develop the record concerning Counsel for Respondent’s disclosure, the undersigned called a pre-hearing telephonic conference on November 8, 2005. During the pre-hearing telephonic conference, I informed the Coast Guard Investigating Officers, that Counsel for Respondent had disclosed to my assistant the personal problem that Counsel for Respondent previously referred to as “circumstances beyond his control.” I further advised the parties that my assistant disclosed those circumstances to me. I also advised the parties that out of respect for Counsel’s privacy, I was not going to disclose those personal matters unless the Coast Guard objects.

The Coast Guard Investigating Officer advised that he had no objection to those communications between Counsel for Respondent and my paralegal assistant. However, the Investigating Officer argued that personal matters aside, Counsel for Respondent had plenty of time to take appropriate action. I advised the parties that the nature of Counsel’s personal issue had been transpiring from early September to two weeks ago and that I found the circumstances did not affect Counsel for Respondent’s ability to communicate or otherwise pay attention to the filing deadline. Therefore, I concluded and advised the parties that good cause to set aside the Default Order has not been shown.

WHEREFORE,

**ORDER**

IT IS HEREBY ORDERED that Respondent's Motion to Vacate Order of Default and to Conduct a Hearing in this Matter is **DENIED**.

PLEASE TAKE NOTICE that issuance of this Order Denying Respondent's Motion to Vacate Order of Default and to Conduct a Hearing in this Matter serves as the parties' right to appeal under 33 CFR Part 20, subpart J. A copy of Subpart J is provided as Attachment E - Appeal.

Done and dated November 8, 2005  
New York, NY

---

**WALTER J. BRUDZINSKI  
ADMINISTRATIVE LAW JUDGE  
U.S. COAST GUARD**

**ATTACHMENT A – APPEALS**

**TITLE 33 - NAVIGATION AND NAVIGABLE WATERS**

**CODE OF FEDERAL REGULATIONS**

**PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL  
ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD**

**§ 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

**§ 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

**§ 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    - (i) Basis for the appeal;
    - (ii) Reasons supporting the appeal; and
    - (iii) Relief requested in the appeal.
  - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
  - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
  - (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

**§ 20.1004 Decisions on appeal.**

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

## Certificate of Service

I hereby certify that I have served the foregoing document upon the following parties (or their designated representatives) to this proceeding as follows:

LT E. MUNOZ, USCG  
CWO J. P. HINDE, USCG  
USCG Sector Boston  
427 Commercial Street  
Boston, MA 02109-1045  
*(Via facsimile - (617) 223-3032)*

Timothy R. McHugh, Esquire  
135 Great Plain Avenue  
Wellesley, MA 02482  
*(Via first class mail)*

ALJ Docketing Center  
40 S. Gay Street  
Baltimore, MD 21202-4022  
Facsimile:  
*(Via facsimile - (410) 962-1746)*

Done and dated November 8, 2005  
New York, NY

---

Regina V. Thompson  
Paralegal Specialist, Assistant to the  
Administrative Law Judge  
Phone: (212) 668-2970  
Facsimile: (212) 825-1230