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

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| UNITED STATES OF AMERICA<br>UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | VICE COMMANDANT |
| v. | : | |
| | : | ON APPEAL |
| | : | NO. 2737 |
| MERCHANT MARINER CREDENTIAL | : | |
| | : | |
| Issued to: MARK STEVEN STINZIANO | : | |

APPEARANCES

For the Government:
Jennifer A. Mehaffey, Esq.

For Respondent:
William Hewig III, Esq.

Administrative Law Judge:
Michael J. Devine

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5, and 33 CFR Part 20.

On April 20, 2022, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O), finding proved three charges of misconduct against the Merchant Mariner Credential (MMC) of Respondent Mark Steven Stinziano. The ALJ ordered Respondent's credential suspended for four months outright, with a further suspension of eight months suspended on twelve months probation.

Found proved were allegations under the three charges that on several occasions from December 2014 to March 2015, Respondent engaged in assault and battery or simple assault of a crew member, also constituting violations of his employer's anti-harassment policy.

In view of the dates of the conduct at issue, the ALJ addressed the possibility that the charges were time-barred under 46 CFR § 5.55. The ALJ noted that the assaults were committed against a crew member who was serving aboard the vessel as part of his federal service as a midshipman of the U.S. Merchant Marine Academy. The ALJ concluded that during such service, a midshipman is a government official, and an assault upon such a midshipman constitutes interference with a government official in the performance of his duties, within the scope of 46 CFR § 5.61(a)(10). Hence the allegations of assault found proved were not time-barred.

Certain other allegations were found not proved. The Coast Guard appeals.

## FACTS

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 3.] From December 7, 2014, through March 23, 2015, and from November 1, 2015, through February 28, 2016, Respondent was employed by Maersk Line, Ltd. (MLL) and assigned to the MAERSK IDAHO, a U.S. flagged vessel, as Chief Mate. [*Id.*] Between December 7, 2014, and March 10, 2015, MLL's Anti-Discrimination, Anti-Harassment and Equal Opportunity Policy (MLL Policy) was in effect and applicable to all MLL employees. [*Id.* at 4.]

From November 2014 through March 2015, B.M. (hereinafter "Deck Cadet"), a male midshipman from the U.S. Merchant Marine Academy, was assigned to and working aboard the MAERSK IDAHO as a deck cadet. [D&O at 4.] Between December 7, 2014, and March 10, 2015, on several occasions, Respondent, with his hand, touched Deck Cadet's buttocks, through clothing, without his permission. [*Id.*] Between December 7, 2014, and March 10, 2015, on two occasions, Respondent approached Deck Cadet from behind and simulated performing a sex act by contacting Deck Cadet's buttocks, through clothing, with other crew members present and without Deck Cadet's permission. [*Id.*]

Between December 7, 2014, and March 10, 2015, Respondent drew genitalia on Deck

Cadet's hardhat and required him to wear it in front of the crew. [D&O at 4.] Between December 7, 2014, and March 10, 2015, on the bridge of the MAERSK IDAHO, Respondent placed a pen in Respondent's buttocks and then held out the pen to Deck Cadet to indicate that it now smelled like Respondent's buttocks. [*Id.*] Between December 7, 2014, and March 10, 2015, Respondent directed Deck Cadet to use nicknames when they spoke over the radio, wherein Deck Cadet was "butter cake" and Respondent was "daddy." [*Id.*] Between December 7, 2014, and March 10, 2015, Respondent pretended to make a joke by threatening to punch Deck Cadet in the genitals. [*Id.*]

From on or about July 30, 2016, until March 16, 2020, Respondent was embarked on oceangoing deep-draft vessels in operation outside of the United States for 566 days. [*Id.* at 3.]

## PROCEDURAL HISTORY

The Coast Guard filed a complaint against Respondent's Merchant Mariner Credential on August 20, 2020. The complaint alleged, in Charges 1 through 4, that Respondent engaged in abusive sexual contact with intent to harass against Deck Cadet and J.M. (hereinafter "Second Mate") in violation of 18 U.S.C. § 2244(b). Further, the complaint alleged each of the alleged acts constituted sexual molestation under 46 CFR § 5.61(a)(3). The complaint alleged, in Charge 5, that the acts described in the prior four charges, plus other alleged noncontact acts, constituted sexual harassment in violation of the MLL Policy. Respondent filed an Answer on September 9, 2020, admitting he held an MMC, that he was employed by MLL as Chief Mate aboard the MAERSK IDAHO between December 7, 2014, and March 23, 2015, and that the MAERSK IDAHO was a U.S. flagged vessel during his employment, but denied all other jurisdictional and factual allegations.

The Coast Guard filed an Amended Complaint on April 29, 2021, adding a sixth charge of misconduct based on alleged acts of Respondent relating to B.H. (hereinafter "Engine Cadet") while aboard the MAERSK IDAHO between November 1, 2015, and February 28, 2016, alleging that they constituted sexual harassment in violation of the MLL Policy. The specific allegations were that Respondent told sexually-oriented jokes to Engine Cadet, including jokes relating to children in a sexual nature; and that without advance warning, Respondent showed

Engine Cadet pornographic movies and nude pictures of a woman. The sixth charge was ultimately dismissed as time-barred. [D&O at 38.]

Charges 1 and 2 relating to the Second Mate were found not proved. Also found not proved were allegations in Charge 5 relating to the Second Mate.

The Hearing was held in person on June 8 and 9, 2021, and via Zoom on June 14, 2021. The ALJ issued his D&O on April 20, 2022. He found proved certain specific allegations of nonconsensual physical contact within Charges 3, 4, and 5 of the Amended Complaint. The ALJ found that Respondent's nonconsensual physical contact with Deck Cadet, found proved under Charges 3, 4, and 5, was the lesser offense of assault and battery (rather than abusive sexual contact), constituting misconduct. [D&O at 39.] The ALJ further found that Respondent's nonconsensual physical contact with Deck Cadet found proved in Charges 3, 4, and 5 constituted interference with a government official in the performance of his duties. [*Id.*] Having found misconduct proved, the ALJ imposed the sanction of four months outright suspension, with a further suspension of eight months suspended on twelve months probation. [D&O at 43.]

The Coast Guard appealed, and perfected that appeal by filing an appellate brief on June 17, 2022. Respondent filed a reply brief on July 22, 2022. This appeal is now properly before me.

## ISSUES ON APPEAL

The Coast Guard raises the following issues on appeal:

*I.* *The ALJ erred in finding the allegations relating to the Second Mate not proved.*

*II.* *The ALJ erred in finding Respondent's actions relating to the Deck Cadet did not constitute abusive sexual contact in violation of 18 U.S.C. § 2244(b).*

*III.* *The ALJ erred in finding Respondent's actions did not constitute sexual molestation under 46 CFR § 5.61(a)(3) and were therefore time barred under 46 CFR § 5.55.*

*IV.* *The ALJ's D&O was not in accordance with the Coast Guard's public policy goals.*

## OPINION

I.

*The ALJ erred in finding the allegations relating to the Second Mate not proved.*

The Coast Guard argues that the ALJ acted improperly in finding not proved the allegations of abusive sexual contact in Charges 1 and 2 and related violations of MLL Policy in Charge 5 because the ALJ improperly determined that the Second Mate's testimony was not "fully credible" and because of a lack of corroboration. [CG Appellate Brief at 9.]

The Coast Guard acknowledges that credibility of witnesses "is almost the exclusive purview of the Administrative Law Judge," citing *Appeal Decision 2731 (McLIN)*, 2020 WL 5221930. Nevertheless, the Coast Guard asserts that "the ALJ finding all of [Respondent's] actions against the Second Mate not proved is not supported by substantial evidence." [CG Appellate Brief at 22.]

In S&R proceedings, the Coast Guard bears the burden of proof as to allegations. 33 CFR § 20.702(a). "Insufficiency of evidence to prove an allegation, as found by an ALJ in the role of factfinder, is a failure to meet that burden of proof. Such a finding is not of the same character as a finding of proved, or a finding of fact that supports a finding of proved." *McLIN* at 11, 2020 WL 5221930 at 6. Indeed, a so-called "finding of not proved" is not a finding at all for the purposes of appellate review of findings, but is better understood as "not a finding of proved." To contend that a finding of not proved must be supported by substantial evidence is to turn the burden of proof on its head.

It is true that an error of law in applying the law to the facts may justify appellate scrutiny of a finding of not proved. The Coast Guard contends the ALJ abused his discretion in considering the lack of corroboration of the Second Mate's testimony. [CG Appellate Brief at 12-18.] The Coast Guard raises the cases of *Appeal Decision 2573 (JONES)* at 7-8, 1996 WL 33408494 at 3, and *Appeal Decision 1876 (PENDERGRASS)*, 1972 WL 126076 at 4, to support the conclusion that corroboration is unnecessary. [CG Appellate Brief at 15.] Neither case supports a conclusion that the ALJ erred or abused his discretion in considering a lack of

corroboration to a witness' testimony. The ALJ did not require corroboration of the victim's testimony. As the Coast Guard admits [CG Appellate Brief at 13], the ALJ stated, "Corroboration of a single witness's testimony is not required, but is an important consideration in weighing the evidence." [D&O at 13.] Clearly, his reference to a lack of corroboration did not mean that he believed corroboration was required. There is no basis for the notion that a lack of corroboration cannot be considered at all, or that the ALJ made an error of law in his consideration. The Coast Guard's contention that the ALJ erred on this point is rejected.

As to the Coast Guard's persistent underlying argument that the ALJ abused his discretion in not accepting the Second Mate's testimony as credible, it bears repeating that "[t]he ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." *McLIN* at 10, 2020 WL 5221930 at 6. The ALJ did not act improperly in his fact-finding concerning the Second Mate.

II.

*The ALJ erred in finding Respondent's actions relating to the Deck Cadet did not constitute abusive sexual contact in violation of 18 U.S.C. § 2244(b).*

The Coast Guard asserts that the ALJ committed an error of law when he decided that the facts regarding Respondent's conduct, as proved, did not constitute sexual assault but hazing consisting of assault and battery.

Respondent was charged in the third and fourth charges of the Amended Complaint with abusive sexual contact in violation of 18 U.S.C. § 2244(b) for touching the buttocks of Deck Cadet and grabbing Deck Cadet from behind while simulating sex acts, both without Deck Cadet's permission and with the intent to harass Deck Cadet. The same conduct was alleged as a violation of the MLL Policy, along with non-contact conduct, in the fifth charge. The ALJ found proved the factual allegations set forth in the third, fourth and portions of the fifth charge of the Amended Complaint. [D&O at 39.] However, the ALJ did not find that Respondent's conduct amounted to abusive sexual contact. [*Id.* at 23.] The ALJ noted that based on the evidence, an ALJ may find a lesser included violation of misconduct proved, and he did so, finding that Respondent had committed assault and battery, and one instance of assault not consummated by

battery, all of which constituted misconduct. [*Id.* at 24-25.]

18 U.S.C. § 2244(b), titled "Abusive Sexual Contact," provides: "Whoever, in the special maritime and territorial jurisdiction of the United States . . . knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both." The phrase "sexual contact" is defined by 18 U.S.C § 2246(3) as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."

Based on Deck Cadet's testimony that "Respondent acted as if [his] behaviors were all 'jokes,' and that he did not consider Respondent to be acting with malice or that he was a rapist," the ALJ concluded that Respondent's actions were inappropriate hazing, but "there is not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act." [D&O at 23.]

The ALJ's invocation of "a sexual act or an attempted sexual act" along with "abusive sexual contact" raises the suspicion that he interpreted 18 U.S.C. § 2244(b) and 18 U.S.C. § 2246(3) as requiring action or intent much closer to a sexual act[1] than their plain language conveys. Reinforcing this suspicion, he commented that "the intent of the statutory scheme should not be expanded beyond its intent to address felonious sexual abuse conduct." [D&O at 23.] Yet the plain language of 18 U.S.C. § 2246(3) calls for "an intent to abuse, humiliate, harass, degrade" as alternatives to an intent to "arouse or gratify the sexual desire of any person." These alternative terms do not imply sexual intent.

In finding proved the allegation in Charge 5 that Respondent violated the MLL policy, the ALJ found, "Respondent engaged in teasing or hazing and harassing conduct." [D&O at 39.] This finding of harassing conduct raises the question of why the ALJ did not find an intent to

[1] 18 U.S.C § 2246(2) defines "sexual act" as "contact between the penis and the vulva or the penis and the anus," "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus," and "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object . . ."

harass in his consideration of whether Respondent committed abusive sexual contact. The ALJ's meaning of "hazing" cannot be assumed to coincide with "harassing," and the term "harass" in the MLL policy might not have the same meaning as "harass" in 18 U.S.C. § 2246(3). Also, Respondent engaging in hazing and harassing conduct might not inevitably be accompanied by an intent to harass; but it does imply such an intent.

These uncertainties suggest that the ALJ erred in his interpretation of 18 U.S.C. § 2244(b) and 18 U.S.C. § 2246(3); even if not, the findings lack clarity. I am therefore remanding this case for new findings of fact concerning the third, fourth and fifth Charges.

III.

*The ALJ erred in finding Respondent's actions did not constitute sexual molestation under 46 CFR § 5.61(a)(3) and were therefore time-barred under 46 CFR § 5.55.*

The Coast Guard claims that the ALJ erred in finding that Respondent's actions did not constitute sexual molestation under 46 CFR §5.61(a)(3), implicating a time bar under 46 CFR § 5.55. In all of the charges, the Coast Guard asserted that the alleged misconduct constituted sexual molestation. For an offense listed in § 5.61(a), "service [of the complaint] shall be within five years after commission of the offense alleged therein." 46 CFR § 5.55(a)(2). Otherwise, the limitation period is generally three years. 46 CFR § 5.55(a)(3). Given the dates of the alleged offenses and other information bearing on time limitations,[2] if an allegation involved misconduct under 46 CFR § 5.61(a), such as sexual molestation as asserted by the Coast Guard, then proceedings on the allegation would not be time-barred, whereas if it did not fall within 46 CFR § 5.61(a), it would be time-barred.

As the ALJ observed, the term "sexual molestation" is not defined by the regulations and he therefore turned to Commandant's Decisions on Appeal (CDOAs) for guidance. [D&O at 25-26.] In the case of *Appeal Decision 2573 (JONES)*, 1996 WL 33408494, as summarized by the ALJ, the respondent approached a crew member while he slept, placed his hand inside the crew member's clothing, and fondled his anal area and penis. *JONES* at 3-4, 1996 WL 33408494 at *1-2. The ALJ noted that the behavior found proved "clearly fits within a reasonable person's

[2] The ALJ found 566 days excludable under 46 CFR § 5.55(b).

definition of sexual molestation," but the case did not go beyond its facts to provide guidance for determining what conduct may constitute sexual molestation. [D&O at 25-26.][3]

The ALJ decided Respondent's nonconsensual physical contact with Deck Cadet did not amount to sexual molestation under 46 CFR § 5.61(a)(3). [D&O at 27, 33.] This was reasonable. I agree with the ALJ that the actions found proved are not comparable to actions labeled as sexual molestation or perversion[4] (another term included in 46 CFR § 5.61(a)) in *JONES* and in other CDOAs.[5] Moreover, the actions by Respondent are of a decidedly less serious character than the other acts listed in 46 CFR § 5.61(a).[6] To say Respondent's actions that were found proved are included in 46 CFR § 5.61(a) would be a highly questionable interpretation of that regulation.[7]

However, the issue is moot as to the nonconsensual physical contacts with Deck Cadet, because the ALJ found proceedings concerning those actions were not time-barred for a different reason – that the actions constituted interference with a government official.

As to the non-contact actions of Respondent against Deck Cadet, alleged as sexual harassment in violation of the MLL policy, they are even less serious than the nonconsensual physical contacts. There is no basis for considering them to be sexual molestation within 46 CFR § 5.61(a) as it presently exists; the Coast Guard does not offer any serious basis.[8] Accordingly, the ALJ did not err in determining those allegations to be time-barred. Likewise, there is no basis for considering the allegations of noncontact sexual harassment involving Engine Cadet (Charge 6) to be sexual molestation within 46 CFR § 5.61(a).[9]

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[3] The ALJ considered two other cases affirming findings of molestation (when the regulatory term was "molestation of passengers), but distinguished them because they involved passengers.
[4] Before the ALJ, the Coast Guard urged that Respondent's acts be considered sexual molestation or perversion.
[5] Two other cases noted by the ALJ, *Appeal Decision 2132 (KEENAN)*, 1978 WL 199015, and *Appeal Decision 1876 (PENDERGRASS)*, 1972 WL 126076, provide similar examples of "perversion," where respondents had touched the private parts of crewmembers who were in their bunks.
[6] 46 CFR § 5.61(a) includes murder, mutiny and sabotage, as well as "rape or sexual molestation" and interference with ship's officers or government officials.
[7] This is so whether or not the actions constituted abusive sexual contact within the meaning of 18 U.S.C. § 2244(b).
[8] The Coast Guard offers definitions from Black's Law Dictionary, which are too vague to be useful on the matter.
[9] In any event, the ALJ found violation of the MLL policy, as alleged in Charge 6, not proved.

IV.

*The ALJ's D&O was not in accordance with the Coast Guard's public policy goals.*

The Coast Guard's final argument asserts the ALJ's decision not to find that Respondent's actions constituted abusive sexual contact or molestation is contrary to public policy. [CG Appellate Brief at 46-52.] The basis for this argument is 33 CFR § 20.1001(b)(2), in which one of the issues that may be appealed to the Commandant is "whether each conclusion of law accords with applicable law, precedent, and public policy." The Coast Guard argues strongly that the ALJ's decision was contrary to the "increased awareness and significant efforts to achieve the important public policy goals of eradicating sexual misconduct in the maritime industry through education and enforcement." [CG Appellate Brief at 47.]

*Appeal Decision 2710 (HOPPER)*, 2015 WL 6777337, provides an example of appropriate use of public policy goals on appeal, although it did not use the term "public policy." The ALJ in that case was held to have erred in his interpretation of the regulation governing the selection of crewmembers for random drug testing. "Where it is necessary to consider the meaning of words [in a regulation], it is important to look at them in the context of the regulation and the goals they are meant to achieve." *Id.* at 8, 2015 WL 6777337 at 6.

However, there is no basis for the idea that the interest in achieving public policy goals in itself would justify disturbing an ALJ's order. See *Appeal Decision 2702 (CARROLL)* at 7, 2013 WL 7854263 at 4. The idea that public policy alone should override established law is unacceptable.

In this case, the Coast Guard invokes public policy goals to challenge, primarily, the ALJ's factfinding concerning charges 1 and 2; his interpretation of abusive sexual contact; and his conclusion that sexual molestation under 46 CFR § 5.61(a) does not include the assault and battery (hazing) and non-contact sexual harassment found proved in this case. The notion that high public policy goals would justify rejection of established law concerning factfinding would be inimical to the rule of law. *See Appeal Decision 2732 (CAMP)* at 12, 2020 WL 7060224. If the ALJ made an error of law in this case, public policy contributes nothing additional to resolution of the error. Likewise inimical to the rule of law would be applying a new

interpretation of a longstanding regulation to support recent public policy goals.

## CONCLUSION

Concerning Charges 1, 2, and 6 and the allegations in Charge 5 relating to the Second Mate, the ALJ's findings and rulings were lawful and consistent with law and precedent. He exercised his lawful discretion in assessing the credibility of the evidence presented. In view of uncertainties with respect to the interpretation of 18 U.S.C. § 2244(b) and 18 U.S.C. § 2246(3), the case will be remanded.

## ORDER

The ALJ's Order dated April 20, 2022, is set aside and the case is REMANDED for proceedings consistent with this opinion.

ADM, USCG

Signed at Washington, D.C., this 6th day of January, 2022~~2~~3