

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

UNITED STATES COAST GUARD

Complainant

vs.

MARK STINZIANO

Respondent

Docket Number: 2020-0328
Enforcement Activity No. 5783758

COAST GUARD POST REMAND BRIEF:

**RESPONDANT'S ACTS ARE ABUSIVE SEXUAL CONTACT
IN VIOLATION OF 18 U.S.C. § 2244(b)**

Attorney

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I. INTRODUCTION

The United States Coast Guard initiated an administrative action against Mark Steven Stinziano on August 20, 2020, seeking revocation of Mark Steven Stinziano's ("Respondent") Merchant Mariner Credential (MMC) Nos. [REDACTED] and [REDACTED].¹ The Decision and Order ("D&O") issued by the Honorable Michael J. Devine, Administrative Law Judge ("ALJ") on April 20, 2022, dismissed Charges 1 and 2 as not proven and dismissed Charge 6 as time barred, but found the acts charged as abusive sexual contact in charges 3,4 and 5 to be proven as non-sexual assault and battery. USCG v. STINZIANO Decision and Order (D&O), Docket No. 2020-0328, 2022 WL 1907412, at 39 (April 20, 2020). On January 6, 2023, the Vice Commandant for the Coast Guard remanded the case for review of the ALJ's interpretation 18 U.S.C. §§ 2244(b) and 2246(3) as applied to Charges 3, 4 and 5 of the Complaint. Appeal Decision 2737 (STINZIANO) 2023 WL 2584472 at 8, 11 (January 6, 2023).

This Post Remand Brief addresses the questions remanded by the Vice Commandant. The Coast Guard respectfully requests this Court find 18 U.S.C. §§ 2244(b) and 2246(3) be properly applied to Respondent's acts of non-consensual physical contact as found proven by the original ALJ in Charges 3, 4 and 5.

II. PROCEDURAL HISTORY AND FACTS

The Coast Guard initiated this administrative action against Respondent's MMC on August 20, 2020. Charges 1 through 4 were based on Respondents violation of 18 U.S.C. § 2244(b), that while acting as Chief Mate of the MAERSK IDAHO, he perpetrated abusive sexual contact against

¹ The Coast Guard charged the Respondent with five counts of misconduct under 46 U.S.C § 7703 (1)(B), as defined by 46 C.F.R. § 5.27. Through counsel, respondent filed a timely answer denying all five counts. The Coast Guard amended the complaint on April 29, 2021, adding a sixth count of misconduct alleging Respondent committed a further act of sexual harassment in violation of MLL's policy. Respondent filed a timely answer, also denying the sixth count.

Deck Cadet 1 and Second Mate by, touching the Second Mates inner thigh and genital area; and touching Deck Cadet 1's buttocks and pressing his groin against his buttocks to simulate a sexual act. Charges 5 and 6 each alleged twelve separate violations of Maersk Line Limited's Anti-Discrimination, Anti-Harassment, and Equal Opportunity Policy ("MLL's Policy") for Respondent's harassing behavior against the Second Mate, Deck Cadet 1 and Engine Cadet to include the acts of physical contact against Deck Cadet 1.

An in-person hearing was held on June 8 and 9, 2021, in Baltimore Maryland, and continued June 14, 2021, remotely via zoom for Government Application. The Honorable Michael J. Devine issued the D&O on this matter on April 20, 2022, ultimately finding Respondent did not commit any sexual misconduct in any of his actions. The ALJ dismissed all charges alleging Respondent committed abusive sexual contact against Second Mate based on credibility issues. D&O at 16, 39. The ALJ also dismissed the charges of violation of MLL's policy not involving physical contact because although they were sexual jokes, the ALJ determined Respondent's actions did not amount to sexual molestation under 46 C.F.R. §5.61(a) and where therefore time barred. Id. at 33, 39. The ALJ did determine Respondent's impermissible touching of Deck Cadet 1 buttocks with his hand and groin to be the lesser offense of assault and battery, constituting interference with a government official under 46 C.F.R § 5.61(a)(10). Id. at 39. The ALJ determined these acts also violated MLL's Policy, however he held they were multiplicitous with the acts proven in Charges 3 and 4 and merged them for sanction determination purposes. Id. at 42. The ALJ ordered a sanction of four months outright suspension, followed by 8 months suspension remitted upon completion of a 12-month probation period. Id. at 43.

The Coast Guard timely appealed the ALJ's finding in their entirety, arguing the ALJ had not supported his findings by substantial evidence; his conclusions of law were not in accord with applicable law, precedent, and public policy; and he had abused his discretion in finding none of Respondent's actions constituted sexual misconduct. Respondent filed his Reply, alleging the D&O was correctly decided.

On January 6, 2023, the Vice Commandant issued his decision on appeal. The Vice Commandant affirmed all the ALJ's findings, except the findings regarding Respondent's impermissible physical contact towards Deck Cadet 1. STINZIANO at 11. The ALJ's Order of suspension was set aside and the case remanded because of the "uncertainties with respect to the [ALJ's] interpretation of 18 U.S.C. § 2244(b) and 18 U.S.C. § 2246(3)." Id. The Vice Commandant noted the ALJ had not provided an explanation why Respondent's acts could be considered "hazing" and "harassment" for the purposes of assault and battery and violations of MLL's policy prohibiting sexually harassing physical contact, but these same acts do not prove the statutory definition of sexual contact, which defines the requisite intent to be to "...abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." Id. at 7-8; 18 U.S.C. § 2246(3) [emphasis added].

The ALJ who issued the D&O retired and is unavailable to preside over this Remand. Accordingly, on February 16th, 2023, this Court was assigned this matter to adjudicate the remanded issues. On September 14, 2023, this Court held a pre-hearing conference to discuss the procedure of this remand case. The Court identified two issues to be discussed on this remand: (1)

the applicability of 46 U.S.C. § 7704a² to Respondent’s acts of non-consensual physical contact as found proven by the original ALJ in Charges 3, 4 and 5 and (2) if the ALJ erred in his interpretation of 18 U.S.C. §§ 2244(b) and 2246(3) by not applying its provisions to Respondent’s acts of non-consensual physical contact as found proven by the original ALJ in Charges 3, 4 and 5. Order Memorializing Pre-Hearing Conference and Scheduling Order, October 4, 2023, at 3 (“October 4th Order”).

This Post Remand Brief addresses the questions remanded by the Vice Commandant regarding the original ALJ’s interpretation of 18 U.S.C. §§ 2244(b) and 2246(3) and the proper application of its provisions to Respondent’s acts of non-consensual physical contact as found proven by the original ALJ in Charges 3, 4 and 5. The Coast Guard respectfully requests this Court find Respondent’s acts to be abusive sexual contact in violation of 18 U.S.C. §2244(b).

III. ARGUMENT

The issue before this Court is whether the ALJ committed an error of law when he found the facts, as proven, regarding Respondent’s conduct towards Deck Cadet 1 did not constitute abusive sexual contact in violation of 18 U.S.C. §2244(b).³ Abusive sexual contact requires a knowing act of impermissible sexual contact. Sexual contact is defined 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”. 18 U.S.C. §2246(3)

² On December 23, 2022, 46 U.S.C. Chapter 77 Suspension and Revocation, was amended by the *2023 National defense Authorization Act (NDAA)*, Pub. Law 117-263, Title CXVI, 136 Stat. 2395 (2022) (codified at 46 U.S.C. §§ 2101, 7704a, 7541, 11101, 2114(a), 3203, 4901, 10104, 10105).

³ “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.” 18 U.S.C. §2244(b).

In this case, the ALJ found proven that Respondent, while acting as Chief Mate, knowingly groped Deck Cadet 1's buttocks with his hand on at least two occasions and simulated a sex act by pushing his groin against Deck Cadet 1's buttocks and "humping" Deck Cadet 1 in front of other crewmembers. D&O at 18-19, 20, 22, 29. The ALJ also found proven Deck Cadet 1 never gave permission for Respondent to touch him in this manner and found Deck Cadet 1 credible when he stated Respondent actions made him feel degraded, humiliated and "like less of a person." D&O at 19, 20, 21. Further, the ALJ found proved that the "Respondent's actions were inappropriate hazing" by nonconsensual touching, and this act to be a lesser included charge of assault and battery. D&O at 23, 27.⁴ The ALJ extended his finding that Respondent's actions of non-consensual contact towards the Deck Cadet 1 were not sexual in nature but were "harassment" sufficient to be violative of MLL's Policy. D&O at 38, 39. Therefore is it questionable how the ALJ could not find Respondent's acts to be "intentional touching, [...] through the clothing, of the [...] buttocks of [Deck Cadet 1] with an intent to abuse, humiliate, harass, degrade". 18 U.S.C. §2246(3) [emphasis added].

When applying the plain statutory language to Respondent's actions, the Vice Commandant held also questioned if the initial ALJ's "erred in his interpretation of 18 U.S.C § 2244(b) and 18 U.S.C. § 2246(3)" and remanded this case on that issue. STINZIANO at 8, 11. It has been the Coast Guard's consistent position that Respondent's acts against Deck Cadet 1 are abusive sexual contact as defined by statute, and the initial ALJ erred in finding Respondent's actions to be entirely non-sexually abusive.

⁴ The ALJ relies on the Commandant's definition of assault as "(1) putting another person in apprehension of harm, (2) when there is a present ability to inflict injury" as the act of misconduct under 46 U.S.C. § 7703(1)(B). D&O at 24-25. The ALJ further held the assault and battery of Deck Cadet to be interference with a government official under 46 C.F.R. §5.61(a)(10). Id. at 38.

A. THE ADMINISTRATIVE LAW JUDGE ERRED IN HIS INTERPRETATION OF 18 U.S.C § 2244(B) AND 18 U.S.C. § 2246(3) AND RESPONDENT’S ACTS OF NON-CONSENSUAL TOUCHING CONSTITUTE ABUSIVE SEXUAL CONTACT.

As the Vice Commandant noted, the ALJ’s rationale for his determination that Respondent’s acts were not abusive sexual contact indicated he had applied a statutory requirement for “action or intent much closer to a sexual act” than the plain language of 18 U.S.C. §2244(b) requires. STINZANO at 7. Specifically, the ALJ had erroneously reasoned that because there was insufficient evidence to show “Respondent to be acting with *malice*, there is not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact, or a sexual act, or an attempted sexual assault.” D&O, at 23 [emphasis added]. In fact, the ALJ mentioned this reading of the statutory elements multiple times:

“...However, Deck Cadet 1’s testimony that Respondent *was not acting with malice and was not a rapist* is also credible and persuasive and *supports a finding that* Respondent’s actions were *inappropriate hazing but not taken as a knowing abusive sexual contact*. D&O at 23 [emphasis added].

“... I find ... Respondent in his mind was joking and had no *malice and was not a rapist*, persuasive in regard to the nature of the physical contact. (Tr. Vol. 2 at 92-93). *Therefore, I find the evidence is not sufficient* to find that Respondent’s contact constituted either sexual contact or *a sexual act* under 18 U.S.C. §§ 2246(3) and 2244(b).” D&O at 27 [emphasis added].

Based on his analysis, the ALJ erroneously required an additional element of malice on behalf of the Respondent creating intent for physical sexual gratification of some sort. Further evidencing the ALJ’s confusion of the issues, he references “sexual act” which is defined under 18 U.S.C. §2246(2) and is not at issue in this case. Accordingly, there is clear error as the definition of sexual contact under §2246(3) does not require these showings.

Accordingly, the Coast Guard respectfully submits the administrative record in this case supports a finding that Respondent violated 18 U.S.C. §2244(b) by: (1) knowingly engaging in

abusive sexual contact against Deck Cadet 1; (2) without permission; and (3) with an intent to harass, humiliate or degrade. Although the Vice Commandant focused his discussion on the ALJ's interpretation of the requisite intent, all the elements of 18 U.S.C. §2244(b) are discussed below to conclusively show Respondent's actions met all the required elements.

1. RESPONDENT KNOWINGLY ENGAGED IN ABUSIVE SEXUAL CONTACT AGAINST DECK CADET 1

Respondent provided no affirmative defense or explanation for his unpermitted touching of Deck Cadet 1's buttocks through his clothing and instead denied his intentional acts and claimed his actions were all jokes and horseplay, a denial which the ALJ did not find credible. D&O at 16, 22, 33. Instead, the ALJ found both the Second Mate and Deck Cadet 1 provided credible testimony that Respondent acted as the Coast Guard alleged and, consequently, found Respondent did knowingly touch Deck Cadet 1 on the buttocks with his hand and groin. Id. at 24, 32.

Courts have interpreted "knowingly" in 18 U.S.C. § 2244(b) as applying only to the perpetrator's knowledge as to his conduct (the touching, harassing etc), and not as requiring specific intent. See United States v. Price, 980 F.3d 1211, 1219 (9th Cir. 2020) ("[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct" (citing Elonis v. United States, 575 U.S. 723 (2015))).

The ALJ found proven that Respondent's conduct was made intentionally and with his knowledge. D&O at 22. Therefore, Respondent violated 18 U.S.C. § 2244(b) when he "either directly or through the clothing" with his hand and his groin "knowingly" touched Deck Cadet 1's "buttocks". 18 U.S.C. §§ 2244(b), 2246(3).

2. RESPONDENT COMMITTED SEXUAL CONTACT AGAINST DECK CADET 1 WITHOUT HIS PERMISSION

The ALJ determined Deck Cadet 1's testimony credible and persuasive that he did not give permission for Respondent to press his groin and slap his hand against Deck Cadet 1's buttocks. D&O at 20.

Courts have not required the government to prove a perpetrator initiating the sexual contact knew or understood the contact to be permissible, or even that the victim thought the perpetrator's actions were conducted with or without malice. To require the government to demonstrate the perpetrator's subjective understanding of his actions creates impossible results by allowing the perpetrator to rely on their own interpretation of consent. See Price 980 F.3d at 1216, 1221 (rejecting perpetrators defense that victim, who was asleep in the seat next to him on a plane, consented because the perpetrator believed she consented to his sexual touching). Courts have specifically declined to interpret the statutory language as requiring the government to prove the perpetrator knew or understood the sexual contact to be permissible. See United States v. Jennings, 438 F. Supp. 2d 637, 645 (E.D. VA 2006) (government not required to prove defendant's state of mind when committing abusive sexual contact). This interpretation is consistent with the law's purpose, since requiring the government to demonstrate the perpetrator's subjective understanding of permission creates impossible results by allowing the perpetrator to rely on their own interpretation of consent. Price, 980 F.3d at 1221.

Accordingly, when the ALJ found proven Respondent acted without permission, 18 U.S.C. § 2244(b) is further satisfied as Respondent "either directly or through the clothing" with his hand and his groin "knowingly" touched Deck Cadet 1's "buttocks" without Deck Cadet 1's "permission". 18 U.S.C. §§ 2244(b), 2246(3).

3. RESPONDENT INTENDED TO ABUSE, HUMILIATE, HARASS, OR DEGRADE DECK CADET 1

The Vice Commandant's analysis of the ALJ's application of 18 U.S.C. §§ 2244(b) and 2246(3) is focused on the ALJ's failure to provide a rationale as to why his Respondent's actions of knowingly and impermissibly touching Respondent's buttocks with his groin and hand could not be considered as "harassing" for the purpose of finding Respondent committed abusive sexual contact against Deck Cadet 1. STINZIANO at 7-8. The Vice Commandant's questions on remand highlight the ALJ's inconsistencies in his determination that Respondent's behavior is "hazing" and "harassment" when finding Respondent committed non-sexual assault and violated MLL's Policy but this same determination did not find Respondent's behavior to meet the statutory definition of sexual contact, which allows for an "intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.". Id.; 18 U.S.C. §2246(3) [emphasis added].

In support of his decision that Respondent's actions were not sexual contact as defined in 18 U.S.C. §2246(3), the ALJ stated he relied on the evidence "as a whole" but focused "specifically" on a statement made by Deck Cadet 1 to support his finding that Respondent's actions were only "inappropriate hazing". D&O at 23. The Deck Cadet 1's statement at issue was made under cross-examination with Respondent sitting feet away from him, when he testified he didn't consider Respondent to be a "rapist" and that although he did not feel threatened, he felt "demeaned." Tr. II at 91-93. The ALJ held, without further analysis or explanation, this to be the primary determinative fact the "evidence is not sufficient to find that Respondent's contact constituted either sexual contact or a sexual act", thereby excluding Respondent's actions from the definition of abusive sexual contact. D&O at 27: STINZIANO at 7.

Despite the ALJ's reliance on Deck Cadet 1's statement that he did not feel he would be raped by Respondent, there is ample evidence in the administrative record to support a finding that

Respondent's acts are abusive sexual contact. Deck Cadet 1 stated multiple times that as a result of Respondent's acts of impermissible touching his buttocks, he felt "humiliated" "demeaned" and that he was "less of a person". D&O at 19, 23; Tr. I at 174, 177-178; Tr. II at 70, 84-85, 93; CG Ex. 2, 2A, 5, 5A, 6, 6A. Furthermore, the ALJ determined Respondent's same acts to be harassment sufficient to violate the MLL's Policy prohibiting sexually harassing physical contact, but without an explanation of why a determination of harassment would not also apply to the definition of sexual contact at 18 U.S.C. §2246(3). D&O at 29, 32; STINZIANO at 7.

As a threshold matter, Congress expanded the definition of sexual contact beyond acting with an intent for physical sexual desire or gratification to include the intent to abuse, humiliate, harass, or degrade to ensure victims are protected not only from "unconsented-to sexual intercourse" but also proscribe against "the widest possible variety of sexual abuse". House Report 99-594 on Sexual Abuse Act of 1986 (codified at 18 U.S.C. Chapter 109A), at 6192-3. The inclusion of the emotional effects of sexual abuse as requisite intent is an important evolution in the definition of abusive sexual contact. In the present case, Respondent's acts against Deck Cadet 1 are the exact application of the expanded definition of sexual contact Congress envisioned. The Coast Guard never asserted Respondent was seeking to perform a physical sexual act to Deck Cadet 1. Instead, Respondent knowingly utilized sexually explicit actions to abuse, humiliate, harass and degrade a young cadet crew member in his chain of command. The ALJ's reliance on the need for Respondent to have a physically sexually based intent is a retractive view of the definition of abusive sexual contact and contrary to the plain language of 18 U.S.C. §2246(3).

Under 18 U.S.C § 2244(b), all the possible basis of intent are co-equal and the analysis for each is the same. In cases involving physical sexual intent, Courts have held the government is

not required to show intent where the nature of the contact is so clear that a finder of fact could infer the intent. See United States v. Lee, 232 F.3d 653, 655 (8th Cir. 2000) (absence of evidence of intent “is no defect in the government’s case where the contact alleged is so clearly sexual that the jury may infer the defendant’s intent”) (citing United States v. Demarrias, 876 F.2d 674, 676 (8th Cir.1989)); see also United States v. Hollow Horn, 523 F.3d 882, 890-891 (8th Cir. 2008) (government not required to show any evidence of perpetrator’s intent because his actions were clearly sexual).

Here, the ALJ found proven that Respondent knowingly and impermissibly groped Deck Cadet 1’s buttocks with his hand and simulated a sex act by pushing his groin against Deck Cadet 1’s buttocks and “humping” Deck Cadet 1 in front of other crewmembers. D&O at 18-19, 20-23, 29. The ALJ also found credible Deck Cadet 1’s testimony that Respondent’s actions made him feel demeaned and humiliated. D&O at 19, 23. The ALJ determined Respondent’s acts to be sexually harassing physical contact in violation of MLL’s policy. D&O at 32, 39, STINZIANO at 7-8. Finally, the ALJ dismissed Respondent’s defense that his actions were jokes and determined there was sufficient bad intent to support a finding of assault. D&O at 24. Accordingly, the administrative record has a preponderance of evidence to support a finding that Respondent’s acts of knowingly and impermissibly touching Deck Cadet 1’s buttocks were so clearly abusive, harassing, humiliating or demeaning on their face, a finder of fact could reasonably determine the intent required in the definition of sexual contact.

This satisfies the third element of 18 U.S.C. § 2244(b) as Respondent “either directly or through the clothing” with his hand and his groin “knowingly” touched Deck Cadet 1’s “buttocks”

without Deck Cadet 1's "permission" with the "intent to abuse, humiliate, harass, [or] degrade."
18 U.S.C. §§ 2244(b), 2246(3).

IV. Conclusion

The original ALJ erred in his interpretation of, and failure to apply, 18 U.S.C. §§ 2244(b) and 2246(c) to Respondent's actions of impermissible physical contact as found proven in Charges 3, 4 and 5 of the Complaint. Respondent's actions met both the plain language and the intent of the statute, and a single statement by Deck Cadet 1 elicited under cross examination was not sufficient to overcome the preponderance of documentary and testimonial evidence supporting the finding that Respondent committed acts of abusive sexual contact. Specifically, Respondent violated the provisions of 18 U.S.C. §§ 2244(b) when he slapped the Deck Cadet 1's buttocks and pressed his groin against Deck Cadet 1's buttocks simulating sex acts in front of other crew members without Deck Cadet 1's permission, and with the intent to humiliate, harass, or degrade Deck Cadet 1.

Accordingly, the Coast Guard respectfully requests this Court find Respondent's acts to be abusive sexual contact in violation of 18 U.S.C. §2244(b).

RESPECTFULLY SUBMITTED

For the U.S. Coast Guard,



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DATE: November 13, 2023