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

UNITED STATES COAST GUARD
Complainant / Appellant

vs.

MARK STEVEN STINZIANO

Respondent / Appellee

Docket Number 2020-0328
Enforcement Activity No. 5783758

COAST GUARD APPEAL BRIEF

June 17, 2022

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I. INTRODUCTION

The Coast Guard (hereinafter "Appellant") initiated an enforcement action against the Merchant Mariner Credential (MMC) of Mr. Mark Steven Stinziano (hereinafter "Appellee"), by filing a Complaint on August 20, 2020 charging four counts of misconduct for acts of abusive sexual contact in violation of 18 U.S.C. § 2244(b) and one count of misconduct for several violations of Maersk Line Limited's Anti-Discrimination, Anti-Harassment, and Equal Opportunity Policy ("MLL Policy"). The Coast Guard filed an Amended Complaint on April 30, 2021, adding an additional charge of misconduct for additional violations of the MLL Policy. The suspension and revocation (S&R) hearing was held in this matter before the Hon. Michael J. Devine as Administrative Law Judge ("ALJ") on June 8-9, 2021, in Baltimore, Maryland and the final day of testimony was conducted via Zoom for Government on June 14, 2021. ALJ Devine issued his Decision and Order (D&O) on April 20, 2022.

Appellant is seeking relief from both the Decision and the Order in this case as provided in 33 C.F.R. Part 20, Subpart J. Appellant appeals the ALJ's findings of fact as not supported by substantial evidence; his conclusions of law as not in accordance with applicable law, precedent and public policy; and that he abused his discretion. Specifically, Appellant appeals: (1) the ALJ's finding as not proven all of Appellee's acts against the Second Mate, including acts of abusive sexual contact in violation of 18 U.S.C. § 2244(b) and acts of sexual harassment in violation of the MLL Policy; (2) the ALJ's holding that Appellee's actions against Deck Cadet 1 was not abusive sexual contact in violation of 18 U.S.C. § 2244(b) but rather a lesser included charge of assault and battery constituting interference with a government official; (3) the ALJ's determination that none of Appellee's actions constituted an act or offense of sexual molestation or perversion under

46 C.F.R. § 5.61(a); and (4) the ALJ's finding that none of Appellee's actions were sexual misconduct, which is not in accordance with public policy. Accordingly, Appellant respectfully seeks the Decision of the ALJ be vacated, modified or reversed and the appropriate Order of revocation be issued.

II. BASES OF APPEAL AND SHORT ANSWERS

1. Was the ALJ's ultimate finding of fact and conclusion of law number 3 a proper application of discretion, in accordance with applicable law and precedent and supported by substantial evidence when he found the allegations of abusive sexual contact in Charges 1 and 2 and the Appellee's violations of MLL Policy in Charge 5 against the Second Mate not proven? No. The ALJ's ultimate finding of fact and conclusion of law number 3 is an abuse of discretion, is not in accordance with applicable law and precedent, nor is it supported by substantial evidence because: the ALJ incorrectly required corroboration of the Second Mate's testimony; the ALJ accorded disproportionate weight to several unsworn crewmember statements created under questionable circumstances; the ALJ did not properly consider the credibility of the Second Mate's testimony; and the ALJ improperly determined Appellee's testimony of unsubstantiated poor performance by the Second Mate in conjunction with the Second Mate's performance evaluation was conclusive evidence of bias sufficient to overcome the preponderance of evidence showing Appellee committed acts of sexual misconduct against the Second Mate.

2. Was the ALJ's ultimate finding of fact and conclusion of law numbers 4, 5, 6 and 8 a proper application of discretion, in accordance with applicable law and precedent and supported by substantial evidence when the ALJ found Appellee's actions of groping Deck Cadet 1's

buttocks, pressing his groin against Deck Cadet 1's buttocks and simulating a sex act in front of crew members, and threatening to punch Deck Cadet 1 in the genitals, all without Deck Cadet 1's permission and causing Deck Cadet 1 substantial emotional distress, to be hazing consisting of assault and battery? No. The ALJ's ultimate finding of fact and conclusion of law numbers 4, 5 and 8 is an abuse of discretion, is not in accordance with applicable law and precedent, nor is it supported by substantial evidence because: offenses charged as violations of Title 18 of the United States Code are appropriate basis for misconduct by a preponderance of the evidence standard; Appellee's actions against Deck Cadet 1 meet the plain language and statutory intent of 18 U.S.C. § 2244(b); 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 Appellee violated 18 U.S.C. § 2244(b).

3. Was the ALJ's ultimate finding of fact and conclusion of law numbers 3, 6, 7 and 9 a proper application of discretion, in accordance with applicable law and precedent and supported by substantial evidence when the ALJ found none of Appellee's actions constituted sexual molestation or perversion under 46 C.F.R. § 5.61(a)? No. The ALJ's ultimate finding of fact and conclusion of law numbers 3, 6, 7 and 9 is not a proper application of discretion, is not in accordance with applicable law and precedent nor is it supported by substantial evidence. Several Commandant Decisions on Appeal support a finding that Appellee's actions of touching the Second Mate's inner thigh, slapping the Second Mate's genitals, groping and pressing his groin against Deck Cadet 1's buttocks, threatening to punch Deck Cadet 1's genitals, drawing a penis on Deck Cadet 1's hard hat and requiring him to wear

it in front of crewmembers, telling sexually oriented jokes, using sexual oriented nicknames, and showing pornographic pictures and movies to Engine Cadet 2 constitute acts or offenses that should be defined as sexual molestation or perversion under 46 C.F.R. § 5.61(a).

4. Was the ALJ's Decision and Order in this case in accordance with the Coast Guard's public policy goals of S&R to further the progress of safety at sea by providing remedies to actions that create risks to the maritime industry and the public as a whole? No. The ALJ's Decision and Order in this case is not in accordance with the Coast Guard's public policy goals of S&R to further the progress of safety at sea by providing remedies to actions that create risks to the maritime industry and the public as a whole. The ALJ's decision to define all of Appellee's acts of abusive sexual contact and sexual harassment against male crew members as non-sexual actions is a regressive application of remedial intention and actively frustrates the public policy goals of preventing sexual abuse and sexual harassment in the maritime industry.

III. STANDARD OF REVIEW

"On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law or precedent, and public policy, and whether the ALJ committed any abuses of discretion." Appeal Decision 2691 (JORY) 2010 WL 5790335 (December 22, 2010); See 46 C.F.R. § 5.701; 33 C.F.R. § 20.1001. "The ALJ's findings of fact will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence." Appeal Decisions 2720 (ARGAST) 2018 WL 8244642 (November 5, 2018); 2687 (HANSEN) 2010 WL 8500125 (June 8, 2010); 2451 (RAYMOND)

1992 WL 12008774 (June 9, 1992). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622, (1993) (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Furthermore, an abuse of discretion occurs where a ruling is based on an error of law, or where based on factual conclusions, is without evidentiary support. Appeal Decisions 2702 (CARROLL) 2013 WL 7854263 (October 10, 2013), 2700 (THOMAS) 2012 WL 3135355 (July 13, 2012), 2692 (CHRISTIAN) 2011 WL 1042740 (February 28, 2011).

Where the Commandant definitively and firmly believe that the ALJ abused his discretion, his findings of fact were not supported by substantial evidence, or conclusions of law are not in accordance with applicable law, precedent or public policy, she may modify or reverse the ALJ's decision or remand the case for further proceedings consistent with the Commandant's decision on the appeal. 33 C.F.R. § 20.1004(a); 46 C.F.R. § 5.701. See Appeals Decisions 2721 (TOWNSEND) 2018 WL 8244643, at *4 (December 27, 2018) (Commandant remanded case for further action consistent with finding the ALJ's decision to dismiss a case was not supported by substantial evidence and his finding was contrary to law and the evidence); 2437 (SMITH) 1987 WL 874503, at *3-4 (November 25, 1987) (Commandant determined an ALJ's decision on remand, although not appealed, was appropriate for review and vacated the ALJ decision on remand for procedural errors including ex parte discussions and failure to rule motions.). As discussed below, the ALJ did abuse his discretion, his findings of fact are not supported by

substantial evidence, and his conclusions of law are not in accordance with applicable law, precedent or public policy.

IV. PROCEDURAL HISTORY AND FACTS

Appellant charged Appellee with six charges of misconduct as described by 46 U.S.C. § 7703(1)(B) and defined by 46 C.F.R. § 5.27. Charges 1 through 4 were based on Appellee's violation of 18 U.S.C. § 2244(b) when, while acting as Chief Mate of the M/V MAERSK IDAHO, he perpetrated abusive sexual contact against the Second Mate and Deck Cadet 1 by touching the Second Mate's inner thigh, slapping the Second Mate's genital area, touching Deck Cadet 1's buttocks and pressing his groin against Deck Cadet 1's buttocks to simulate a sex act. Coast Guard Amended Complaint. Charges 5 and 6 alleged twelve (12) separate violations of MLL's Policy against sexual harassment, to include drawing a penis on Deck Cadet 1's hard hat and ordering him to wear it in front of the crew, using sexually explicit nicknames, telling sexually oriented jokes and showing Engine Cadet 2 pornographic movies and pictures. Id.

An in-person hearing was held on June 8th and 9th, 2021, in Baltimore Maryland, and continued on June 14th 2021, remotely via the Zoom for Government application. After the conclusion of the hearing Appellee filed seven Motions for Directed Findings, claiming Appellant failed to present both specific evidence of intent to harass or interfere with work and a connection between the alleged behaviors to the promotion of safety at sea. On June 30, 2021, the ALJ denied Appellee's Motions for Directed Findings, finding the Appellant presented sufficient witness testimony and documentary evidence to survive a motion for a directed verdict. Order Denying Respondent's Motions for Directed Findings (June 30, 2021).

The ALJ issued the D&O in this matter on April 20, 2022. The ALJ did not find Appellee committed any acts of sexual misconduct, nor that any of his actions constituted sexual molestation or perversion under 46 C.F.R § 5.61(a). Instead the ALJ found the facts in Charges 3 and 4, which alleged Appellee's groping of Deck Cadet 1's buttocks and pressing his groin against Deck Cadet 1's buttocks to simulate a sex act, to be hazing by nonconsensual touching. The ALJ found this nonconsensual touching sufficient only to prove the lesser included offense of assault and battery against Deck Cadet 1, which constituted interference with a government official under 46 C.F.R. § 5.61(a)(10). D&O at 24, 27, 41. The ALJ also found proven Appellee's actions of threatening to punch Deck Cadet 1 in the genitals alleged in Charge 5 to be violations of the MLL Policy constituting interference with a government official under 46 C.F.R. § 5.61(a)(10). D&O at 33, 39. However, the ALJ found this action to be multiplicious with the acts proven in Charges 3 and 4 and merged them for the purposes of sanction determination. D&O at 42.

The ALJ found none of the alleged acts in Charges 1, 2, and 5 Appellee committed against the Second Mate proven. Finally, the ALJ held all other allegations of sexual harassment in violation of MLL Policy as time barred because Appellee's actions did not constitute an offense under 46 C.F.R. § 5.61(a), thus limiting the statute of limitations to three years under 46 C.F.R. § 5.55(a)(3). D&O at 36-37, 39. The ALJ Ordered a sanction of four (4) months outright suspension, followed by eight (8) months suspension remitted upon completion of a twelve (12) month probation period. Id. at 43.

V. ARGUMENT

The ALJ abused his discretion and committed several errors in his application of the facts and evidence. Additionally, the ALJ's conclusions of law are not in accordance with applicable law,

precedent and public policy. Specifically, the ALJ's finding all of Appellee's actions against the Second Mate not proven because of the lack of corroboration testimony and evidence of bias is an abuse of discretion, is not supported by substantial evidence, nor is it in accordance with applicable law and precedent. The ALJ's findings that Appellee's actions against Deck Cadet 1 to be the lesser included offense of assault and battery based on actions determined to be hazing by non-consensual touching, rather than abusive sexual contact as defined in 18 U.S.C. § 2244, is also an abuse of discretion, is not supported by substantial evidence, nor is it in accordance with applicable law, precedent and public policy. Additionally, the ALJ finding all allegations of misconduct for violations of MLL Policy that did not include physical contact to be time barred is also an abuse of discretion, is not supported by substantial evidence, nor is it in accordance with applicable law, precedent and public policy.

Finally, the ALJ's determination that none of Appellee's actions were sexual misconduct nor did they constitute acts of sexual molestation or perversion under 46 C.F.R. § 5.61(a) is not in accordance with public policy. Specifically, the ALJ's findings incorrectly categorize acts of sexual misconduct as assault and battery, which contradicts the current law and policies of maritime safety requiring consistent application of legal precedent in Coast Guard administrative proceedings, as well as a modern and expansive view of behavior that is impermissibly sexual in nature. The ALJ's determination that abusive sexual contact and non-physical sexual harassment from a senior officer towards victims who are crewmembers of the same sex is not any type of sexual misconduct or offense does not further the progress of safety at sea, nor does it provide remedies to actions that create risks to the maritime industry and the public as a whole.

A. THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE FINDING OF FACT AND CONCLUSION OF LAW NUMBER 3 IS AN ABUSE OF DISCRETION, IS NOT IN ACCORDANCE WITH APPLICABLE LAW AND PRECEDENT AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN HE FOUND THE ALLEGATIONS OF ABUSIVE SEXUAL CONTACT IN CHARGES 1 AND 2 AND VIOLATIONS OF MLL POLICY IN CHARGE 5 AGAINST THE SECOND MATE NOT PROVEN.

In the August 20, 2020 Coast Guard Complaint, Appellant alleged Appellee committed four acts of sexual misconduct against the Second Mate. Specifically, Appellant charged two counts of abusive sexual contact and two allegations of violations of the MLL Policy prohibiting sexual harassment. The ALJ found all Appellee's actions against the Second Mate not proven. D&O at 17, 29. In making such a finding, the ALJ stated there was a lack of corroboration of the Second Mate's testimony and evidence of bias to determine the Second Mate was not "fully credible". Id. at 16.

Despite finding the charges against Appellee not proven, the ALJ cited the significant amount of evidence presented in support of the Second Mate's allegations of sexual misconduct by the Appellee, with both the documentary and testimonial evidence having the "same, or substantially similar" recounting of the allegations. D&O at 12-13; Tr. I at 220. This consistent evidence included the Second Mate's testimony at the hearing, his 2015 written statement in response to his performance evaluation, a 2019 grievance form submitted to the International Order of Masters Mates and Pilots, ("IOMMP"), two audio and written interview summaries of the Coast Guard Investigative Service ("CGIS") interviews with the Second Mate in 2019 and 2020, and the audio and written summary of the Coast Guard Investigating Officer interview of the Second Mate in 2020. D&O at 12; Tr. I at 156-223; Tr. II at 4-50; CG Exs. 2, 2A, 3, 4, 5, 5A, 9, 10A.

To counter the evidence supporting the Second Mate's allegations, Appellee provided his own testimony and six unsworn statements from crewmembers of the MAERSK IDAHO. D&O at 16; Tr. II at 133, 163-169; Resp. Exs. R-U, R-V, R-X, R-Z, R-AA, and R-BB. Appellee denied ever touching Second Mate in the manner alleged. D&O at 13, 16; Tr. II at 163, 166, 168. Appellee also testified to the Second Mate's alleged poor performance, although the majority of these performance issues were never documented and raised only for the first time during his testimony. D&O at 14-15; Tr. II at 37, 39-41, 149-162; CG Ex. 03. Appellant objected several times to Appellee's testimony regarding incidents that were not documented on the Second Mate's Performance Evaluations, but was overruled. Tr. II at 39, 153, 157. Despite the significant and "substantially similar" written statements, CGIS and Coast Guard Investigating Offer interviews and testimony of the Second Mate, the ALJ failed to ascribe sufficient weight to the testimony because of "disagreements and friction" between Appellee and Second Mate and the lack of corroboration by other witnesses supporting the Second Mate's testimony regarding Appellee's abusive sexual contact against him. D&O at 12, 16-17.

The question of credibility is almost the exclusive purview of the Administrative Law Judge. See Appeal Decisions 2731 (McLIN) 2020 WL 5221930 at *5 (July 23, 2020) ("[I]f an ALJ fails to make specific credibility findings, ambiguity as to the basis for each finding of fact and conclusion of law may result. If an ALJ makes a finding as to a disputed factual issue without acknowledging evidence that contradicts that finding, a question may arise as to whether the ALJ fulfilled the duty to review all the evidence. Such ambiguity as to why and how an ALJ reached a given result frustrates meaningful appellate review."); 2616 (BYRNES) 2000 WL 33965629 at *4 (February 2, 2000) (the rationale for the rule where an ALJ's finding of credibility can only be

reversed if arbitrary, capricious, clearly erroneous, and unsupported by law is because the ALJ can be influenced by the demeanor of the witness, his tone of voice, his body language, and other matters that are not captured within the pages of a "cold" appellate record). Courts have described elements of witness credibility to include:

> (1) the demeanor of the witness, (2) the inherent plausibility of the witness's testimony, (3) the consistency of the testimony of the witness with prior statements of the witness, (4) the internal consistency of the witness's statements, (5) the consistency of the testimony with other evidence, (6) the accuracy of the witness's testimony, and (7) the interest of the witness in the outcome of the proceeding. St. Claire Marine Salvage, Inc. v. Bulgarelli, 2014 WL 3827213, at *6 (E.D.Mich. Aug. 4, 2014), aff'd (6th Cir. 14-2135) (July 22, 2015).

In the present case, the ALJ does not appear to have given any weight to the consistency and accuracy of the Second Mate's statements and testimony, and was silent on the interest of either the Second Mate or the Appellee in the outcome of the proceeding when evaluating their credibility. The record shows the Second Mate was entirely credible in his demeanor while testifying, as Appellee's attorney himself noted when he stated the Second Mate "who came into the courtroom yesterday was calm, cool, collected, articulate, and presented himself as an excellent witness." Tr. II at 13. Additionally, the Second Mate testified his interest the outcome of the proceeding was to protect people from Appellee, and in fact his maritime career was "destroyed" as a result of his coming forward and speaking out about what Appellee perpetrated against him. Tr. I at 209, 221-222. Appellee's interest in denying the allegations and discrediting the Second Mate is apparent, aside from the ALJ finding them not proven. Appellee never admitted he acted inappropriately, and as a consequence of the Second Mate's allegations he only received a letter of reprimand from his employer, attended a training, and is now a Captain with Maersk Line Limited. Tr. II at 122, 196-197; Resp Ex. X.

In his determination of the Second Mate's credibility, the ALJ appears to rely entirely on two points to find the Second Mate's testimony not credible: lack of corroboration and evidence of bias. For the reasons discussed below, such a finding is arbitrary, capricious, clearly erroneous, and not in accordance with applicable law, precedent and public policy.

1. LACK OF CORROBORATION

The ALJ found the lack of corroboration of the Second Mate's testimony to be a significant factor in finding him not credible and affording little weight to his testimony. D&O at 13, 16. Prior to discussing the inappropriateness of requiring corroboration of a victim's testimony for proving abusive sexual contact under 18 U.S.C. § 2244(b), it is important to address the ALJ's inconsistent approach relating to the Second Mate's testimony regarding Appellee's actions against him with the Second Mate's testimony regarding Appellee's actions towards Deck Cadet 1. Notably, the ALJ found the Second Mate's testimony not credible relating to Appellee's inappropriate actions towards him, but credible when describing the offenses perpetrated by Appellee against Deck Cadet 1. D&O at 19, 20. The ALJ's differing standard for determining the credibility of the Second Mate regarding Appellee's abusive sexual contact against him versus his observations of Appellee's abuse towards Deck Cadet 1 is not explained anywhere in the Decision, and it is in direct contradiction to the weight of evidence presented regarding Charges 1, 2 and 5 involving the Second Mate. As such, the ALJ abused his discretion regarding the Second Mate's credibility, his decision is arbitrary and capricious, and not supported by substantial evidence.

A finding of abusive sexual contact when charged under 18 U.S.C. §2244(b) is entirely appropriate based solely on the victim's testimony. Courts have consistently held a victim's testimony alone is sufficient to support a guilty verdict for abusive sexual contact, even when there

is inconsistent evidence. United States v. Seibel, 712 F.3d 1229 (8th Cir. 2013); United States v. Kenyon, 397 F.3d 1071, 1076 (8th Cir. 2005). Additionally, the legislative history of 18 U.S.C. § 2244(b) makes clear corroboration was never intended as a required element in order to demonstrate abusive sexual contact occurred. Congress explained that the "offenses set forth in H.R. 4745[1] do not require that the victim's testimony be corroborated. The Committee did not approve of the corroboration doctrine, which would not permit conviction of a defendant based solely upon the testimony of the victim." H.R. REP. NO. 99-594, 99th Cong., 1986 U.S.C.C.A.N. at 6192, 6199, 1986 WL 31966 (May 9, 1986). The Commandant has long considered legislative history when analyzing statutory language and intent. Appeal Decisions 2733 (SCHWEIMAN), 2020 WL 7060225 (November 20, 2020); 2566 (WILLIAMS) 1995 WL 17010116 (May 2, 1995); 2483 (TOMBARI) 1989 WL 1126140 (April 14, 1989); 1959 (HOGAN) 1973 WL 164953 (June 27, 1973).

Despite historically strong disapproval of utilizing a lack of corroboration to discount a victim's testimony of acts committed against him or her under 18 U.S.C. § 2244(b), the ALJ begins his analysis by stating, "corroboration of a single witness's testimony is not required, but is an important consideration in weighing the evidence." D&O at 13. To support this position, the ALJ cited as legal precedent Appeal Decisions 1980 (PADILLA), 1973 WL 164974 (July 27, 1973) and 1173 (YOUNG), 1960 WL 63735 (June 7, 1960), noting that "testimony of a single credible witness may be considered sufficient…the ALJ must consider all the evidence of record in resolving conflicting versions of events." D&O at 13.

[1] H.R 4745 was codified at 18 U.S.C § 109(A) and the language of 18 U.S.C. § 2244(b) was adopted without change (Available at https://www.congress.gov/bill/99th-congress/house-bill/4745/text).

As a threshold matter, both the cases relied on by the ALJ were decided in 1986, well before the enactment of 18 U.S.C § 2244(b), when the corroboration doctrine for sexual crimes under 18 U.S.C. Ch. 109A was already antiquated. See H.R. REP. NO. 99-594 at 6193 ("At present, corroboration is not required in Federal prosecutions, and most States no longer require it. In view of this, the Committee did not believe that Federal courts would engraft such a requirement onto the language of the offenses described in the bill."). Additionally, the facts in both cases cited by the ALJ are significantly dissimilar to the present case so as to afford their holdings little weight in this matter.

In YOUNG, the Commandant vacated an Examiner's (ALJ) finding of sexual misconduct for a mariner's acts against a seven-year-old girl because the Examiner did not consider material issues in the case. The Commandant stated the "entire balance of the brief decision pertains solely to the reasons why the Examiner accepts the testimony of the seven-year-old passenger as representing the truth as to what happened." Id at *1. The Commandant did not address the weight afforded to corroboration and held only that "the absence or presence of corroborating evidence" is one of six matters the Examiner failed to consider when he accepted as true the testimony of the seven-year-old victim. Id.

In PADILLA, the Commandant dismissed an ALJ's finding of misconduct for assault based in part on a lack of corroboration of the victim/witness's testimony. However, the Commandant made clear his inability to assess credibility was because the alleged victim's testimony was not in person and instead was submitted only via "highly irregular" deposition. Id. at *1. The Commandant dismissed the ALJ's finding of proved because the original testimony by deposition was so unreliable there was no opportunity for the ALJ – or the Commandant – to independently

determine the victim's credibility regarding the physical assault resulting from a drunken interaction between the victim and Respondent. Id. at *1, 3.

Both cases are distinguishable from the present matter. In both YOUNG and PADILLA, the victim / witness presented unique difficulties when determining credibility: In YOUNG, the victim / witness was a 7-year-old, while in PADILLA, the victim / witness was wholly absent from the hearing. In the instant case, the Second Mate is an adult with an active law license and valid USCG issued MMC. Tr. I at 157. Further, he testified at the hearing under oath and in-person, was subjected to extensive direct and cross-examination, and provided consistent testimony supported by an abundance of documentary evidence reporting Appellee's actions of sexual misconduct against him. Tr. I at 156-223; Tr. II at 4-50; CG Exs. 2, 2A, 3, 4, 5, 5A, 9, 10A.

In situations more closely aligned with the present case, the Commandant found corroboration unnecessary. In Appeal Decision 2573 (JONES), the Commandant stated that corroboration is not required for the victim of sexual misconduct and the fact that there were others who reported appellant being involved in similar incidents, as is the case here, added considerable credibility to the victim's statements. 1996 WL 33408494 at *3 (January 17, 1996); see also Appeal Decision 1876 (PENDERGRASS) 1972 WL 126076, at *4 (May 1, 1972) (Commandant did not require corroboration of a victim's testimony when the testimony is of "the quality and weight" to support a finding of credible).

The ALJ also considered as evidence of a lack of corroboration several unsworn, written statements by crewmembers of the MAERSK IDAHO, which were produced as part of a shipboard investigation into the Second Mate's allegations. These unsworn statements conflicted with both the Second Mate's sworn testimony and the authenticated documentary evidence describing

Appellee's acts against the Second Mate. D&O at 16-17; Resp. Ex. U, V, X, Y, Z, AA, BB. However, the ALJ failed to acknowledge the circumstances in which these crew statements were made prior to assigning them evidentiary weight in assessing credibility, which impacts the reliability of these unsworn statements—to the extent they are reliable at all. The other victim on that same voyage aboard the MAERSK IDAHO, Deck Cadet 1, provided testimony that the crew was told a Maersk lawyer would be listening on the phone while they provided statements to the Captain of the MAERSK IDAHO. Tr. II at 80. This type of pressure and intimidation on young cadets and crew, some sailing for the first time in their careers, to speak against the Appellee—the Chief Mate and a senior officer—with the company lawyer listening on the phone, at the very least, raises serious questions about the weight these statements should be given as evidence. Based on the analysis of the Decision, none of these external factors that may have influenced the content of these unsworn statements was considered by the ALJ.

Additionally, the ALJ improperly considered the unsworn statements as witness testimony and afforded the statements undue evidentiary weight. Under 33 C.F.R. § 20.808,[2] witness testimony may be entered into the record only when the witness has been available for cross examination and must be sworn or affirmed under penalty of perjury. The ALJ posited these unsworn statements as witness testimony when he stated he reviewed evidence "in combination with conflicting evidence from other witnesses, and *including* the statements and responses to interviews provided by other crewmembers to Capt. [redacted]." D&O at 17 (emphasis added). The only testimony

[2] "**Written testimony**: The ALJ may enter into the record the written testimony of a witness. The witness shall be, or have been, available for oral cross-examination. The statement must be sworn to, or affirmed, under penalty of perjury." 33 C.F.R. § 20.808.

conflicting with the Second Mate's account is Appellee's testimony, who is not characterized a witness in this matter. The ALJ attributes no other witnesses as conflicting the Second Mate's accounting other than the unsworn crew statements, and as Appellant stated on the record, the unsworn crew statements were entered into evidence with no ability to cross-examine any of the crewmembers on the content of their statements. Tr. II at 114. If these unsworn statements were considered as written testimony, either in fact or in effect, the ALJ considered and weighed them in contravention to the regulatory requirements at 33 C.F.R. part 20.

Furthermore, while hearsay is admissible in these administrative hearings, it is apparent from the lack of analysis regarding hearsay in the Decision that the ALJ treated these statements as written testimony. The ALJ may consider the fact that evidence is hearsay when considering its probative value. 33 C.F.R. § 20.803. In this case, while the statements may have been admissible as hearsay, the ALJ did not provide any explanation, either on the record or in the Decision, as to why he afforded such evidentiary weight to the statements when they are clearly hearsay and not written testimony. In Appeal Decision 2732 (CAMP), the Commandant upheld an ALJ's determination to give no weight to a hearsay document as the ALJ discussed the reasons why he considered the document unreliable. 2020 WL 7060224 (November 10, 2020). In this case, the ALJ did not discuss why, over objection, he gave the statements the evidentiary weight he did. The ALJ failed to recognize or analyze the circumstances surrounding the creation of the statements that support their untrustworthiness and unreliability. From this, it is clear the ALJ improperly treated the statements as witness testimony. Accordingly, the ALJ gave improper evidentiary weight to the unsworn statements and, in so doing, he disregarded the clear facts presented at the hearing that support a finding the statements should not be treated as witness

statements and failed to consider the statements were made under circumstances demonstrating their unreliability, such that they should be afforded no evidentiary weight at all.

2. PERFORMANCE EVALUATION AS EVIDENCE OF BIAS

The ALJ also based his finding that the Second Mate's testimony was not credible after considering "the evidence indicating a basis for bias because of the disagreements and friction between Second Mate" and Appellee, as evidenced by the Second Mate's alleged poor performance on the MAERSK IDAHO. D&O at 16. Similar to the ALJ's dissociative finding of the Second Mate credible when testifying about allegations involving Deck Cadet 1, the ALJ gave Appellee's testimony significant weight in relation to his denial of sexual misconduct against the Second Mate, including the Appellee's assertion that the Second Mate was biased against him, but simultaneously found the entirety of Appellee's testimony not credible in his denial of "all of the alleged conduct regarding sexual jokes, crude behaviors, and mistreatment of cadets." Id. This inconsistent finding is also not explained anywhere in the Decision, rendering the ALJ's finding not supported by substantial evidence.

In addition to Appellee's testimony, the ALJ also based his finding on his determination that the allegations were first made by the Second Mate in response to his negative performance evaluation. As such, the ALJ concluded that no contemporaneous reporting occurred and he considered the timing of the reporting as evidence of bias against Appellee. D&O at 14, 15. However, this finding is not supported by the evidence. The Second Mate made a full reporting to the Captain of the MAERSK IDAHO of his allegations against Appellee approximately two weeks after they occurred. D&O at 15-16; Tr. I at 189. Two weeks, while arguably not immediate, must be considered contemporaneous as the Second Mate reported Appellee's actions to the

Captain before he departed the vessel. As additional support of the contemporaneous reporting, the Second Mate also testified that he took time to consider all the implications of submitting a report against Appellee, as the possible consequences to Appellee's career could be significant. Tr. I at 184-186.

Furthermore, in his finding of no contemporaneous reporting, the ALJ did not consider the Second Mate's testimony that he began keeping a contemporaneous and ongoing record of the Appellee's actions after the lifeboat incident in mid-January 2015, which was ultimately attached as Comments to his Professional Performance Evaluation ("Comments") submitted on February 3, 2015. Tr. I at 182-184, 187, 189; CG Ex. 3. The ALJ characterizes Second Mate's testimony on his submission of the report as "when he received the copy of his evaluation he was not happy about Respondent's comments regarding his attitude going downhill and that it was around the time of the second alleged assault by Respondent so *he decided to write* the report." D&O at 15 (emphasis added) (citing to Tr. I at 187). This summary of the Second Mate's testimony characterizing his decision to write a report only after he got his performance evaluation is incorrect. In fact, the testimony the ALJ cites supports a finding that the Second Mate maintained an ongoing and contemporaneous record, which is further evidenced by the length and detail apparent in his Comments produced within a short timeframe. The Second Mate testified that he "decided that I was going to, you know, *turn in* this Report[,]" which constitutes evidence a report was already in existence. Tr. I at 187 (emphasis added). Furthermore, the Second Mate explicitly stated he began keeping a contemporaneous record of Appellee's actions beginning in mid-January, when he:

> "started writing it. I started trying to write down everything I could remember that he had done. And I tried to turn it into a coherent narrative, you know, that listed specific things that I had seen and a few things that I'd heard about from second hand. And by the time we got to Algeciras [sic] or around that time, we got to, I don't know if we went to North Africa first or Algeciras [sic] first, but by that time I had this Report, you know, pretty well organized, and it was pretty long. And I didn't know what I was going to do with it, and I struggled, I was struggling with what I was going to do with it." Tr. I at 184.

Accordingly, any anger on the part of the Second Mate resulting from his performance evaluation occurred *after* he wrote his Report, and not as an impetus for the record he kept.

The ALJ also gave significant weight to Appellee's testimony describing the Second Mate's performance on the MAERSK IDAHO as the reason for the evidence of bias. D&O at 14-15. On the February 3, 2015 Performance Evaluation document, there is only brief reference to specifics of the Second Mate's performance, including a decline in attitude "post Aqaba," charts being out of order, negative attitude during a port inspection, and needing a better understanding of mooring practices. CG Ex. 03. Appellee ultimately gave the Second Mate an overall rating of satisfactory. Id. However, at the hearing, Appellee testified to additional instances of poor performance by the Second Mate that were not documented in the February 3, 2015 Performance Evaluation. These instances included the Second Mate's failure to act during a lifeboat drill and that he, the Appellee, "sprang into action" to save the boat from falling in the water, which could have resulted in serious injury, and the Second Mate acting "distressed and uneasy" about plotting additional waypoints for re-routing the vessel. D&O at 14-15; Tr. II at 153. When these instances were brought up for the first time during cross-examination, Appellant's objections were overruled and the Second Mate denied these additional issues occurred. D&O at 14-15; Tr. I at 41, Tr. II at 37-41. Accordingly, in spite of the documentary evidence of a satisfactory performance and the Second Mate's consistent accounts of what occurred between himself and Appellee, when the ALJ was

presented with conflicting testimony between the Second Mate and the Appellee, the ALJ relied wholly on Appellee's characterization of the Second Mate's poor performance, finding that persuasive as evidence of bias. D&O at 16.

Additionally, the ALJ failed to consider that Appellee's actions of abusive sexual contact against the Second Mate could, at the very least, result in "disagreements and friction" between the Second Mate and Appellee, if not righteous anger on the part of the Second Mate, which has nothing to do with the February 3, 2015 Performance Evaluation. The ALJ also failed to discuss the possibility that Appellee's improper behavior against Deck Cadet 1, which the ALJ found proven in part because of the Second Mate's corroboration of Appellee's actions, may also have contributed to any negative relationship between Appellee and Second Mate.

The above finding is made all the more incongruous by the ALJ's explanation he did not find Appellee's denials of his mistreatment of the cadets as credible, but yet found him entirely credible in his characterization of his interactions with the Second Mate, to include the fact that the Second Mate was biased due to the performance evaluation. D&O at 16. Additionally, the ALJ acknowledges the Appellee's attack on the Second Mate's credibility in his post-hearing brief is not supported, and that Appellee's own credibility was successfully impeached during cross-examination when he denied making sexual jokes. D&O at 14, 31; Tr. II at 191-192.

The ALJ's ultimate finding of fact and conclusion of law number 3 finding all of Appellee's actions against the Second Mate not proven is improper for the reasons discussed above. Specifically, the ALJ's finding of the Second Mate as not credible did not properly discuss the Second Mate's testimony, did not consider contradictory evidence, should not have relied on a lack of corroborating evidence, and improperly weighted Appellee's testimony of alleged bias

against other possible considerations. Accordingly, the ALJ finding all of Appellee's actions against the Second Mate not proven is not supported by substantial evidence, is not in accordance with applicable law and precedent and was an abuse of discretion.

B. THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW NUMBERS 4, 5, 6 AND 8 FINDING THE APPELLEE'S ACTS AGAINST DECK CADET 1 TO BE ASSAULT AND BATTERY ARE ABUSES OF DISCRETION, ARE NOT IN ACCORDANCE WITH APPLICABLE LAW AND PRECEDENT AND ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The ALJ committed an error of law when he found the facts, as proven, regarding Appellee's conduct towards Deck Cadet 1 did not constitute abusive sexual contact in violation of 18 U.S.C. §2244(b). The ALJ found proven that Appellee 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 between December 7, 2014 and March 10, 2015. D&O at 18-19, 20, 22, 29. The ALJ also found proven Deck Cadet 1 never gave permission for Appellee to touch him in this manner, and Appellee's actions made him feel degraded, humiliated and "like less of a person." D&O at 18-19, 20, 21, 23. These proven facts fit the plain statutory language of 18 U.S.C. § 2244(b), which states, "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." Sexual contact is defined as: "[t]he 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).

Accordingly, the ALJ's determination that Appellee's actions against Deck Cadet 1 did not violate the 18 U.S.C. § 2244(b) is not supported by substantial evidence, is not in accordance with applicable law, precedent and public policy, and is an abuse of discretion.

1. APPELLEE'S ACTIONS VIOLATING 18 U.S.C. § 2244 ABUSIVE SEXUAL CONTACT IS AN APPROPRIATE BASIS FOR A MISCONDUCT CHARGE UNDER 46 U.S.C §7703(1)(B) AS DEFINED BY 46 C.F.R. § 5.27.

The ALJ found Appellee's actions of touching Deck Cadet 1's buttocks with his hand and his groin without Deck Cadet 1's consent in such a way that Deck Cadet 1 was harassed, humiliated and degraded did not violate the duly established rule of 18 U.S.C. §2244(b), Abusive Sexual Contact. D&O at 23. Instead, the ALJ found Appellee's actions of "hazing [Deck Cadet 1] by nonconsensual touching" to be a lesser included charge of assault and battery. D&O at 23, 27. 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.

However, the ALJ does not fully explain the basis for his determination that "touching Deck Cadet 1 multiple times on the buttocks and in simulating a sex act without permission is sufficient to be a lesser included offense of an assault and battery." D&O at 27. He does provide a conclusory statement that the criminal intent element of knowingly engaging in abusive sexual contact "should not be expanded beyond its intent to address felonious sexual abuse conduct" and, presumably, is therefore not the appropriate basis for the misconduct charges alleged here. D&O at 23. Appellant disagrees as this conclusion of law is not supported by substantial evidence nor is it in accordance with applicable law and precedent.

a) No proof of criminal intent is required for a finding of misconduct as described by 46 U.S.C. § 7703(1)(B) and defined by 46 CFR §5.27 for a violation of 18 U.S.C. § 2244(b).

The Commandant has a long history of finding that criminal acts, including acts defined under Title 18 of the U.S. Code, do not require proof of criminal intent in order to be an appropriate basis for a misconduct charge under 46 U.S.C § 7703(1)(B), as defined by 46 C.F.R. §5.27. See Appeal Decisions 2725 (JORY) 2020 WL 2114560, at *2 (March 8, 2020) (upholding ALJ's denial of petition to reopen because when a criminal act of assault "is committed by a merchant mariner while serving under authority of a credential, the matter may well justify proceedings against the credential, as innumerable Commandant's Decisions on Appeal demonstrate"); 2658 (ELISK), 2006 WL 1519584 at *1 (May 17, 2006) (finding ALJ erred as a matter of law when she dismissed misconduct allegations based on violations of 18 U.S.C. § 1001 and 46 U.S.C. § 2303(a) because the "fact that criminal violations were available for the charged offenses does not preclude the Coast Guard from initiating suspension and revocation action for those offenses"); 605 (BARROS), 1952 WL 47432 at *2 (September 3, 1952) (disagreed with Examiner's finding that a misconduct charge for the stabbing of a mariner requires evidence of criminal intent "to sustain a charge lodged under the law administered here by the Coast Guard"); 423 (CAMPBELL), 1950 WL 42727 at *3 (April 7, 1950) (finding it unnecessary "in these proceedings, to prove or find a 'criminal' intent as a condition precedent to revocation of a seaman's document for possession of marijuana).

Additionally, this ALJ himself has previously found misconduct proven when the duly established rule is a criminal statute addressing felonious conduct requiring specific intent. The statutory language in 18 U.S.C § 1001 requires a person to "knowingly and willfully" make a false

or fraudulent statement in a matter within the jurisdiction of the U.S. Government. To meet the statutory element of "knowing and willfully," the "statement must have been made with an *intent to deceive*, a design to induce belief in the falsity or to mislead." United States v. Lichenstein, 610 F.2d 1272, 1276-77 (5th Cir.) (Emphasis added). In USCG v. HATCH-GARCIA, this ALJ found Respondent's submission of documents he knew were false constituted misconduct, stating "Respondent's behavior violated 18 U.S.C. §1001 because he knowingly and willfully used a false document or fraudulent representation." Docket No. 2018-0407, 2019 WL 8643829, at *9 (July 11, 2019). See also USCG v. BUTLER, 2019-0447, 2021 WL 1243979 (March 10, 2021) (this ALJ found proven a violation of 18 U.S.C. § 1001 as an appropriate basis for the misconduct charge.) Thus, a violation of a "formal duly established rule," which forms the basis for misconduct, may also violate a criminal statute, and proof of criminal intent is not required. 46 C.F.R. § 5.27.

2. APPELLEE COMMITTED ACTS OF ABUSIVE SEXUAL CONTACT IN VIOLATION OF 18 U.S.C. § 2244(B) AGAINST DECK CADET 1.

Based on the ALJ's findings of fact that Appellee touched Deck Cadet 1 on the buttocks with his hand and groin, Appellee 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.

a) Appellee Knowingly Engaged in Abusive Sexual Contact against Deck Cadet 1

The administrative record in this case supports a finding that Appellee knowingly engaged in abusive sexual contact. Courts have interpreted "knowingly" in 18 U.S.C. § 2244(b) as applying only to the perpetrator's knowledge that they are engaging in sexual contact. 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)).

In the instant case, the Appellee provided no affirmative defense or explanation for the unpermitted touching but instead denied it outright. D&O at 16, 22. The ALJ found Appellee's denial as not credible. Id. Instead, the ALJ found both the Second Mate and Deck Cadet 1 provided credible testimony that Appellee acted as alleged and, consequently, found Appellee touched Deck Cadet 1 on the buttocks with his hand and groin. The ALJ also found there was no basis to excuse Appellee's actions as jokes or horseplay. D&O at 24, 32, 33. Accordingly, given there is no innocent reason for Appellee's conduct, the evidence supports a finding that Appellee knowingly touched Deck Cadet 1's buttocks with his hand and his groin.

b) Appellee committed sexual contact against Deck Cadet 1 without his permission

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). Accordingly, to prove its case, the government must only show the victim did not objectively give consent to the sexual contact, not that Respondent subjectively understood consent to be given. Id. at 1228. 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. Jenning, 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, because and intent, 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, the government need only show the victim did not give permission for the sexual contact, not that Respondent subjectively understood permission to be given.

Here, the ALJ found proven Appellee acted without permission when he touched Deck Cadet 1's buttocks with his hands and groin. D&O at 4, 20, 27. Accordingly, the second element of abusive sexual contact under 18 U.S.C. § 2244(b) should have been found proven.

c) Appellee Intended to Harass, Humiliate, or Demean Deck Cadet 1

Whether or not Appellee subjectively knew or intended his actions to harass Deck Cadet 1 is not dispositive. In fact, based on the credible testimony of the Second Mate and Deck Cadet 1, Appellee's actions were so clearly harassing on their face, a finder of fact could reasonably infer Appellee's touching of Deck Cadet 1's groin and buttocks was to harass, humiliate, or demean. The analysis of intent, given the plain language of 18 U.S.C § 2244(b), remains the same for an intent to arouse or gratify sexual desire or if the perpetrator intends to harass, humiliate or degrade the victim. In all analyses, 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).

In the present case, Appellee intended to harass, humiliate, or demean Deck Cadet 1 when he groped Deck Cadet 1's buttocks and pressed his groin against Deck Cadet 1's buttocks to simulate a sex act in front of other crewmembers. The ALJ determined Appellee did perpetrate these actions, found his denial not credible, and attributed no innocent reason for the contact. D&O at 22, 31. The ALJ found credible Deck Cadet 1's testimony that he felt demeaned and "like less of a person" because of Appellee's acts against him. D&O at 19, 23.

Accordingly, the nature of the contact perpetrated by Appellee is so clear that a finder of fact would infer he acted to harass, humiliate or degrade Deck Cadet 1. Appellant, therefore, met its burden of proving is it more likely than not Appellee acted with an intent to harass, humiliate, or demean Deck Cadet 1 with this element of the charge.

3. DECK CADET 1'S SINGLE STATEMENT OF HIS PERCEPTION OF APPELLANT'S STATE OF MIND IS NOT SUFFICIENT TO OVERCOME THE PREPONDERANCE OF EVIDENCE SHOWING APPELLEE COMMITTED ACTS OF ABUSIVE SEXUAL CONTACT AGAINST DECK CADET 1.

In finding there was "not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act", the ALJ relied "specifically" on a single statement made by Deck Cadet 1 during cross examination to support his finding that Appellee's actions were "inappropriate hazing, but not taken as knowing abusive sexual contact." D&O at 23. The ALJ focused on the Deck Cadet's statement that he thought Appellee "was not acting with malice and was not a rapist." Id. When the context of this statement is considered, and when weighed against Appellee's actions already found proven by the ALJ, the finding that

Appellee did not knowingly engage in any sexual misconduct is not supported by substantial evidence nor is the conclusion of law in accordance with applicable law and precedent.

As discussed *supra,* although a violation of a "formal duly established rule," which forms the basis for misconduct in these proceedings may also violate a criminal statute, proof of criminal intent is not required. Additionally, the standard of proof for S&R administrative cases remains at a preponderance of evidence standard even if criminal statutes form the basis of the misconduct charge. JONES at *2 (citing Steadman v. Securities Exch. Comm'n., 450 U.S. 91 (1981)). In the present case, when considering the totality of the evidence in the record, it is more likely than not Appellee violated 18 U.S.C. § 2244(b) by: (1) knowingly engaging in abusive sexual contact; (2) without permission; (3) by touching the buttocks and pressing his groin to the buttocks of Deck Cadet 1 to simulate a sex act; and (4) with an intent to harass.[3]

The ALJ found proven Appellee touched Deck Cadet 1's buttocks, performed a sex act against Deck Cadet's buttocks without permission, and found credible Deck Cadet 1's testimony that his actions caused Deck Cadet 1 to feel "demeaned" and "like less of a person." D&O at 19-20; Tr. II at 84, 93. The ALJ's findings all conform to the plain language elements of 18 U.S.C. § 2244(b) and the definition of "sexual contact" at 18 U.S.C. § 2246(3). However, despite this alignment, the ALJ refused to find the charge proven, attributing significant weight and relying almost solely on one statement by Deck Cadet 1 made during cross-examination that he did not think the Appellee was a rapist. However, that single statement is not sufficient to overcome the

[3] Harassment is defined as "Words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation." Black's Law Dictionary, 11th Ed. (2019).)

preponderance of the evidence in the record showing that Appellee knowingly engaged in abusive sexual contact.

As noted, Deck Cadet 1 made the statement at issue under cross examination. Appellant objected to the question as an improper characterization of what Deck Cadet 1 had previously said, but was overruled. The testimony is as follows:

> Q. So in your testimony you talked a little bit about jokes, and someone may have thought it was a joke, and somebody else may not have thought it was a joke. Let me ask you this, this wasn't the first time you had seen horseplay of jokes in the general nature of this, was it?
>
> A. I've seen horseplay similar between friends, not in a superior/inferior situation like this.
>
> Q. Fair enough. Did you see it at the United States Merchant Marine Academy, for example?
>
> A. There would be similar horseplay there, yes.
>
> Q. Dirty jokes?
>
> A. Yes, there were dirty jokes.
>
> Q. Porn movies on computer screens of cadets?
>
> A. Yup.
>
> Q. Yup. So we may be talking here in matters of degree going from MMA to a ship. But this is a culture you had been somewhat acclimated to before you went on this ship, isn't that fair to say?
>
> A. Yes, I had been acclimated to that culture. But the dynamics were different I would say. It was just too, I mean, I was on a vessel with people I had no idea who they were and going to places I had never been. Versus at a school with people around my age.
>
> Q. Sure. I understand, I understand. And I'm not trying to downplay or belittle anything you said. I'm just trying to explore it a little more deeply. Now, it's fair to say, isn't it that you understood or you thought you understood that whatever it's claiming Mark Stinziano did to you was intended by him to be joke or to be horsing around, you appreciated and perceived that, didn't you?
>
> MS. MEHAFFEY: I object, Your Honor, I don't think that was his statement at all.
>
> THE COURT: I'm not worried about it, overruled, I'll let him answer the question is, there was testimony about whether the chief mate was joking or not. So to the extent that it goes to that, overruled, he can answer the question.

> A. In his mind, yes, I, it was, I believe there was not malice, I did not believe him to, he's not a rapist. But, I mean, so yes, in his mind he believed, he perceived it as a joke to him.
>
> Q. And you've just said there was no malice. And he wasn't a rapist. Does that mean that while you might have been uncomfortable as you testified and while you later reflected on it, and perhaps a different way. Does it mean that at the time you didn't feel threatened by what he was doing?
>
> A. I, personally no, I didn't feel threatened, I felt demeaned. And I, you, that was the feeling I felt. I didn't feel scared for my life. Tr. II at 91-93.

As a threshold matter, nothing in this case alleges Appellee is a rapist. Therefore, whether or not Deck Cadet 1 thought Appellee was a rapist is not relevant as it does not "tend to make the existence of any material fact more or less probable." 33 C.F.R. § 20.802(a).

Regarding Deck Cadet 1's statement of not believing there was malice, a review of the entire exchange shows Deck Cadet 1 was responding to a series of questions about the "joking" nature of Appellee's actions. The ALJ found several times in his decision that Appellee's blanket denials regarding his jokes, crude sense of humor and contact with Deck Cadet 1 were not credible, and that there is no "factual basis in this case for excusing the acts of nonconsensual touching as a joke or horseplay." D&O at 22, 24. Additionally, Deck Cadet 1's answer was made in a highly stressful situation, under cross examination and with Appellee in the room directly in front of him. For the ALJ to find, without further analysis or explanation, this solitary statement so persuasive as to outweigh the totality of Deck Cadet 1's testimony, his two interviews with CGIS and the Second Mate's corroboration of Deck Cadet 1's allegations of abusive sexual contact, is a decision not supported by substantial evidence, is an abuse of discretion, and contrary to law. See Appeal Decision 1788 (GUERRERO) 1970 WL 117034, at *4 (May 1, 1970) (a child victim's answer to question on cross examination that she was "confused" about the sexual assault incident did not

overcome the entirety of reliable and probative evidence, including the specifics of Respondent's physical actions against the victim).

Appellee's actions against Deck Cadet 1 are more than hazing by nonconsensual touching constituting an assault and battery. The record supports a finding that it is more likely than not that Appellee committed acts of abusive sexual contact against Deck Cadet 1, as defined by 18 U.S.C. § 2244(b) when he knowingly grouped Deck Cade 1's buttocks and pressed his groin against Deck Cadet 1's buttocks to simulate a sex act in front of the crew, without permission and with the intent to harass, degrade or humiliate Deck Cadet 1. Accordingly, the ALJ's ultimate findings of fact and conclusions of law numbers 4, 5, 6 and 8 finding the Appellee's acts against Deck Cadet 1 to be assault and battery are an abuse of discretion, are not in accordance with applicable law and precedent and are not supported by substantial evidence

C. THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW NUMBERS 3, 6, 7 AND 9 FINDING APPELLEE'S ACTS DID NOT CONSTITUTE SEXUAL MOLESTATION UNDER 46 C.F.R. § 5.61(a)(3) ARE NOT IN ACCORDANCE WITH APPLICABLE LAW AND PRECEDENT AND ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant charged Appellee with several acts of misconduct constituting sexual molestation under 46 C.F.R. § 5.61(a)(3) against the Second Mate and Deck Cadet 1 between December 7, 2014 and March 23, 2015, and again against Engine Cadet 2 between January 14 and February 8, 2016.[4] The time limitation for serving a complaint containing a misconduct charge is three years,

[4] The ALJ concluded the Appellee's actions against Engine Cadet 2 alleged in Charge 6 were time barred, in part, because the matter in aggravation for Charge 6 referencing the Second Mate and Deck Cadet 1 had no "factual connection to any conduct" occurring between Appellee and Engine Cadet 2. D&O at 37, 39. The retention of the "Second Mate and Deck Cadet" language from the previous matters in aggravation was a drafting mistake on the part of Appellant, and the victim should have been changed to "Engine Cadet". Amended Complaint. As a threshold matter, the inclusion of matters in aggravation on a complaint do not go to prove or disprove the facts in question and are generally considered only for questions of sanction. Appeal Decisions 2707 (CHESBROUGH) 2015 WL 525653,

rendering all charges in this case beyond the standard time limitation for serving a complaint. 46 C.F.R. §5.55(a)(3). However, if the misconduct charged is based on an offense specified in 46 C.F.R. §5.61(a), the time limitation is extended to five years. 46 C.F.R. § 5.55(a)(2). Additionally, the time limitation for serving a complaint may be extended by any days a Respondent "could not attend a hearing or be served charges by reason of being outside the United States." 46 C.F.R. §5.55(b). The ALJ found proven Appellee was on foreign voyages for at least 566 days, which prevented him from attending a hearing or from being served charges; thereby extending the time limitation for serving the complaint by 566 days. D&O at 9. Accordingly, if the ALJ had found Appellee's acts constituted sexual molestation or perversion under 46 C.F.R. §5.61(a), the Complaint and the Amended Complaint would have been properly served within the time limitation allowed and none of the charges would be time barred.

*1 (January 23, 2015); 2694 (LANGLEY) 2011 WL 6960128, *1 (May 25, 2011). Therefore, a drafting mistake in a matter in aggravation should not be dispositive in an ALJ's decision on whether or not the factual allegations stated in Charge 6 constitute an act or offense under 46 C.F.R. §5.61(a). Furthermore, there is no requirement to plead matters in aggravation on a complaint. Appellant's policy of inclusion of matters in aggravation on a complaint is primarily for the event of a default to allow the ALJ to consider all the facts alleged on the complaint as admitted. 20 C.F.R. § 20.310(c). Additionally, the Commandant has allowed an ALJ to amend the pleading to conform to the proof, provided it complies with 33 C.F.R. § 20.305, where no amendment "may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues." Appeal Decisions 2630 (BAARSVIK) 2002 WL 32061805 (August 6, 2002); 2613 (SLACK) 1999 WL 33595181 (December 23, 1999); See 2545 (JARDIN) 1992 WL 12008778, at *2 (June 11, 1992) (When the record clearly indicates that the parties understand exactly what the issues are, the parties cannot afterward make a claim of surprise, lack of notice, or other due process shortcoming.); See also Kirkland v. District of Columbia, 70 F.3d 629, 633, D.C. Cir. (1995) (citations omitted) ("The essential inquiry is the understanding of the parties as to whether the unpleaded [or improperly pleaded] issue was being contested…. It must be clear that the parties understand exactly what the issues are when the proceedings are had. Actuality of notice there must be, but the actuality, not the technicality, must govern."). In the present case, Appellant never argued, neither at the hearing nor in post hearing briefing, any factual connection between Appellee's actions against the Second Mate and Deck Cadet 1 and his actions against Engine Cadet 2 during a subsequent voyage. Additionally, Appellee never contested the matter in aggravation for Charge 6 mistakenly referencing the Second Mate and Deck Cadet 2. Appellant had always argued Appellee's actions against the Engine Cadet 2 constituted sexual molestation as described in 46 CFR § 5.61(a)(3). Coast Guard Post Hearing Brief at 28-34. Because a matter in aggravation is not included to prove or disprove a factual allegation and because the correct substitution of "Engine Cadet" into the matter in aggravation was properly argued at the hearing and in post hearing, briefs with ample opportunity for Appellee to reply, the ALJ improperly relied on a drafting mistake as dispositive to his finding of Charge 6 being dismissed as time barred. D&O at 37, 39.

Absent a finding that the misconduct alleged constituted an act or offense under 46 C.F.R. §5.61(a), the statute of limitations for the misconduct charges is three years and, even with the 566 extra days, Appellant was time barred from filing a complaint. However, provided Appellee's acts constituted an act or offense under 46 C.F.R. §5.61(a), Appellant properly served the complaint on August 1, 2020 for the acts beginning in December 2014, and the amended complaint was properly served on May 4, 2021 for the acts occurring in January 2016.

In this case, the ALJ found none of Appellee's actions while acting as Chief Mate on the MAERSK IDAHO constituted acts of sexual molestation under 46 C.F.R. § 5.61(a)(3). D&O at 17, 27, 33, 36, 38. Instead, the ALJ found Appellee's physical acts against Deck Cadet 1 to be interference with a government official under 46 C.F.R. § 5.61(a)(10) and properly charged within the five-year time period. D&O at 27, 33, 37, 38. Regarding the remainder of the charges against Appellee, the ALJ found none of the charges related to actions against the Second Mate proven, and he determined all of Appellee's other acts against Deck Cadet 1 and Engine Cadet 2 were time barred because none of the acts constituted an offense under 46 C.F.R. §5.61(a). D&O at 37, 38. The ALJ's decision to find none of Appellee's actions as acts or offenses constituting sexual molestation or perversion under 46 C.F.R. § 5.61(a) is an abuse of discretion, is not in accordance with applicable law and precedent and is not supported by substantial evidence.

1. APPELLEE'S ACTS OF MISCONDUCT CONSTITUTE ACTS OF SEXUAL MOLESTATION OR PERVERSION.

Appellee's actions while Chief Mate on the MAERSK IDAHO are acts of sexual misconduct and, therefore, should be understood as acts of sexual molestation or, in the alternative, acts of perversion. 46 C.F.R. § 5.61(a)(3), (6). The ALJ noted in his decision that the regulations do not define sexual molestation. D&O at 25. As such, the ALJ looked to Coast Guard precedent for

guidance, but limited his review to several Appeal Decisions in search of a "reasonable person's definition". Id. Although the Commandant has considered several appeals concerning acts of sexual molestation or perversion, or both, none of these Appeal Decisions have actually defined these terms. In the absence of binding precedent defining these terms, it is also appropriate to look to credible secondary sources for a definition. Black's Law Dictionary defines sexual molestation as "the act of making unwanted and indecent advances to or on someone, esp. for sexual gratification." Black's Law Dictionary, 11th Ed. (2019). Indecent is the adjective form of indecency, which is "the quality, state, or condition of being outrageously offensive, esp. in a vulgar or sexual way." Id. A pervert is defined as a person "whose behavior, esp. sexual behavior, is considered abnormal and unacceptable." Id. Accordingly, perversion is behavior that is considered "abnormal or unacceptable." Id.

Here, Appellee's actions as a senior officer on the MAERESK IDAHO fits squarely within the dictionary definitions of sexual molestation and perversion when he committed abusive sexual contact and engaged in sexually harassing remarks and behavior, resulting in an intimidating, hostile, and offensive working environment. Neither the Second Mate, Deck Cadet 1, nor Engine Cadet 2 gave Respondent permission for Appellee's sexually harassing and molesting actions towards them, rendering Appellee's actions "unwanted" as the definition states. D&O at 4, 20, 27; Tr. I at 159-170; Tr. II at 57, 210; Tr. III 15-17; CG Exs 5, 2, 2A, 3, 4, 5, 5A, 6, 6A, 13, 13A. Additionally, Appellee's continued and systematic harassment, utilizing sexually-themed materials and behavior towards the Second Mate, Deck Cadet 1, and Engine Cadet 2 can objectively be considered perverse or indecent as his actions were "vulgar, offensive, abnormal or unacceptable." This is especially so because Appellee's actions were conducted within a professional environment

on a seagoing vessel, where the chain-of-command structure is paramount and requires deference and adherence to higher-ranking officers' orders.

As detailed below, the ALJ's determination that none of Appellee's actions constitute acts or offenses of sexual molestation or perversion is not in accordance with applicable law and precedent and is not supported by substantial evidence.

a) Acts of Abusive Sexual Contact in Violation of 18 U.S.C. § 2244(b) Constitute Sexual Molestation Under 46 C.F.R. § 5.61(a)(3).

The ALJ's finding that Appellee groped Deck Cadet 1's buttocks at least twice and pressed his groin against Deck Cadet 1's buttocks to simulate a sex act in front of other crewmembers support a finding that Appellee's actions constitute sexual molestation or perversion. D&O at 20, 23. Instead, the ALJ found Appellee's acts alleged as abusive sexual contact against the Second Mate not proven, and his acts against Deck Cadet 1 to be a lesser-included offense of non-sexual assault and battery. D&O at 38-39. In support of his decision regarding Deck Cadet 1, the ALJ again found persuasive Deck Cadet 1's statement he thought Appellee "was joking and had no malice and was not a rapist" to support his finding that none of Appellee's acts of abusive sexual contact rose to the level of sexual molestation or perversion under 46 C.F.R. § 5.61(a). D&O at 27. Additionally, Appellee's acts against the Second Mate of placing his hand on the Second Mate's inner thigh and touching the Second Mate's buttocks and genitals, if proven, also constitute acts of sexual molestation or perversion.

As discussed more in depth in Section D (Public Policy *infra*), the ALJ's decision in this case finding Appellee's actions constituting abusive sexual contact not "egregious" enough for sexual molestation exhibits an antiquated view of sexual roles. D&O at 25. If Deck Cadet 1 or the Second

Mate were females, it is hard to fathom the ALJ would have found Appellees actions to be "hazing by non-consensual touching." D&O at 23. The drafters of 18 U.S.C. § 2244(b) attempted to remedy this limited view of sexually abusive actions by stating the statute's intent included modernizing and reforming offenses under 18 U.S.C. § 109A by: "(1) defining the offenses in gender neutral terms; (2) defining the offenses so that the focus of a trial is upon the conduct of the defendant, instead of upon the conduct or state of mind of the victim; [and] (3) expanding the offenses to reach all forms of sexual abuse of another". H.R. Rep. 99-594 at 6191. It is unfortunate in the year 2022, the antiquated argument that sexual abuse is only sexual when members of the opposite sex are involved must again be so plainly stated. However, the ALJ's finding that Appellee's actions are something other than sexual molestation or perversion, when viewed as "unwanted and indecent advances to or on someone" in such a way that is "outrageously offensive, especially in a vulgar or sexual way," only becomes clear if viewed through such a limited lens of sexual actions. See Black's Law Dictionary, definition of "sexual molestation" and "indecent".

b) Acts of Sexual Harassment Constitute Sexual Molestation Under 46 C.F.R. §5.61(a)(3)

In addition to Appellee's actions of abusive sexual contact, Appellant also charged Appellee for twelve acts of sexual harassment in violation of MLL's Policy. Coast Guard Amended Complaint, Charges 5 and 6. In total, nine violations occurred on the December 7, 2014, through March 10, 2015 voyage of the MAERSK IDAHO and the additional three violations occurred when Appellee was again serving as Chief Mate on the MAERSK IDAHO between January 14, 2016 and February 8, 2016. Id. The ALJ's ultimate findings of fact and conclusions of law on these charges are as follows:

COUNT 5	**COUNT 6**
Allegation 6, 7 and 12 (against Second Mate) not proven because ALJ found the Second Mate's testimony not credible and evidence insufficient to prove the allegations	Allegations 6, 7 and 8 (against Engine Cadet 2) time barred because the ALJ did not find Appellee's actions to be neither sexual molestation nor interference with a government official because no physical contact was alleged.
Allegation 8, 9 and 13 (against Deck Cadet 1) proven as non-sexual harassment and within the time limitations for service of the complaint because his actions against Deck Cadet 1 were interference with government official under 46 C.F.R. 5.61(a)(10)	
Allegations 10, 11 and 14[5] (against Deck Cadet 1) time barred because the ALJ did not find Appellee's actions to be neither sexual molestation nor assault and battery of a government official.	

The only violations of MLL's Policy the ALJ found proven and not time barred were the three physical acts against Deck Cadet 1, which the ALJ found constituted a non-sexual assault and battery against a government official. D&O at 32-33; 46 C.F.R. §5.61(a)(10). The ALJ determined the remainder of actions against Deck Cadet 1 and Engine Cadet 2 were time barred because the actions were not sexual molestation nor were they interference with a government official because there was no physical contact. D&O at 38.

The ALJ again found Appellee's actions against the Second Mate not proven. The ALJ dismissed the allegation of sexual harassment against the Second Mate with no further explanation other than it was consistent with his "findings above, that there is not sufficient evidence to find

[5] ALJ found Allegation 15 time barred, but it is assumed he meant allegation 14 since he does not address 14 and allegation 15 is not an allegation of misconduct

this allegation proven, due to lack of corroboration and witness bias because of the disagreements and friction between the Second Mate and [Appellee]". D&O at 30. As argued in Section V.A. *supra,* the ALJ's determination that the Second Mate's testimony and the documentary evidence were not sufficient to find the allegations involving the Second Mate proven is not in accordance with applicable law and precedent and was an abuse of discretion. Further, the ALJ's finding is not supported by the substantial evidence presented by the Coast Guard demonstrating consistent, reliable testimony from the Second Mate, in contrast to the unsworn written statements and unreliable testimony provided by Appellee.

The ALJ did find, however, Appellant presented substantial evidence Appellee engaged in "sexually oriented jokes and teasing" toward Deck Cadet 1. D&O at 30. Specifically, the ALJ found that Appellee drew a penis on Deck Cadet 1's hard hat and made Deck Cadet 1 wear it in front of other crew, required Deck Cadet 1 to call him "Big Daddy" and "Buttercup", inserted a pen in his buttocks and held the pen out to Deck Cadet 1 to smell, and generally engaged in a significant amount of "sexually oriented jokes." D&O at 30-31. Although the ALJ found Appellee's denial of his actions not credible and Deck Cadet 1's testimony at least partially corroborated by the Second Mate, he made no final determination as to whether Appellee's actions were sexual harassment in violation of MLL's Policy. D&O at 32. Instead, the ALJ found all these acts to be time barred by determining none of these actions constituted sexual molestation or perversion, thereby removing them from the purview 46 C.F.R § 5.61(a). D&O at 33. Thus, since none of Appellee's action were found to constitute an act or offense under 46 C.F.R §5.61(a), only the three (3) year statute of limitations applied, and those charges were time barred.

The ALJ provided no further analysis other than what he "noted above" in support of his finding Appellant did not prove Appellee's harassing behavior and conduct to be sexual molestation under 46 C.F.R. § 5.61(a)(3). D&O at 33. At a minimum, the ALJ should have presented at least a rudimentary analysis of the evidence showing Appellee's behavior was or was not sexual molestation of Deck Cadet 1, as he did in his previous discussion that considered only Appellee's physical acts against Deck Cadet 1. D&O at 25-27, 33. Accordingly, his findings on allegations of 10, 11 and 14 of Count 5 are not supported by substantial evidence and are clearly lacking in legal support.

Regarding the Appellee's actions against Engine Cadet 2, the ALJ found all the allegations to be time barred, but also stated that "[e]ven if it were not time-barred the Coast Guard failed to present sufficient proof by preponderant evidence that Respondent engaged in the alleged conduct". D&O at 38. Given that Appellee's actions properly constitute an act or offense under 46 C.F.R. § 5.61(a) and should not be time barred, the ALJ's summarily dismissing the allegations in Charge 6 is not supported by substantial evidence and is not in accordance with applicable law, precedent or public policy.

The ALJ recounted Engine Cadet 2's testimony of Appellee using the term "kiddie fucker", that he showed Engine Cadet 2 pornographic movies, he showed him nude images of women, and drew a flip book of a penis becoming erect. D&O at 34-35. Additionally, the ALJ incorrectly characterized LCDR Sprenger's testimony regarding Engine Cadet 2 as the testimony as hearsay because it was "not first-hand information but a summation of information told to USCG investigators by Engine Cadet 2." D&O at 34. However, LCDR Sprenger participated in the interview of Engine Cadet 2, rendering his testimony not a summary of what the investigators told

him, but a firsthand account of what he witnessed. Tr. I at 134; 137-140; CG ex. 13, 13A. Appellee presented one witness, Deck Cadet 2, who contradicted all of Engine Cadet 2's testimony.

As a corollary to finding Charge 6 time barred, the ALJ determined, with minimal explanation, that LCDR Sprenger and Engine Cadet 2's testimony, and Engine Cadet 2's interview with CGIS which provided a consistent account to the testimony, as insufficient evidence to find Appellee's actions were sexual harassment in violation of MLL's Policy or to prove any allegations under 46 C.F.R. §5.61(a). D&O at 35-37. However, the basis for the ALJ's findings are not expressed in terms of witness credibility, which has long been determined almost the exclusive purview of the ALJ. Instead, the ALJ found that "Charge 6 does not contain any allegations of sexual contact or physical contact and even if the allegations are assumed arguendo to be true, none of this conduct if proven would constitute an act or offense within 46 C.F.R. § 5.61(a)." D&O at 36-37. As the ALJ himself recognized, contact, whether sexual or otherwise, is not a required element to demonstrate the occurrence of sexual molestation. D&O at 26 (citing Appeal Decision 1275 (LOVELETTE) 1961 WL 64936 (December 1, 1961)). Because the ALJ made no determination on witness credibility, the ALJ had in the record sufficient evidence to support a finding by a preponderance of the evidence that the Appellee's actions violating MLL's Sexual Harassment Policy constituted acts of sexual molestation against Engine Cadet 2. Accordingly, under 46 C.F.R. § 5.61(a)(3), Appellant should have been afforded the five (5) year statute of limitations, making it timely service of the complaint and appropriately before the ALJ. Accordingly, the ALJ's brief analysis finding that due solely to the lack of physical contact Appellee's actions could not be an act or offense under 46 C.F.R. §5.61(a) is not supported by substantial evidence nor is it in accordance with applicable law or precedent.

c) Binding precedent in Appeal Decisions support a finding that Appellee actions constitute acts of sexual molestation or perversion under 46 C.F.R. § 5.61(a)

Although the Commandant does not specifically define sexual molestation or perversion, the ALJ cites to several Appeal Decisions to support his finding that actual touching is required to demonstrate sexual molestation under 46 C.F.R. §5.61(a). The ALJ's findings, however, are not IAW the applicable law and precedent. Contrary to the ALJ's analysis, a review of the cited Appeal Decisions demonstrate they are indistinguishable from the present case. Had the ALJ correctly viewed Appellee's actions as abusive sexual contact and sexual harassment, rather than "hazing by non-consensual, touching," and "sexually oriented jokes and teasing," the cited cases actually support a finding that Appellee's acts constituted sexual molestation under 46 C.F.R. § 5.61(a). D&O at 23, 30.

The ALJ cites to Appeal Decisions JONES, PENDEGRASS and 2132 (KEENAN) 1978 WL 199015 (September 3, 1978) to support his finding Appellee's actions do not constitute sexual molestation. In analyzing JONES, the ALJ distinguished Appellee's actions from the actions in JONES, where the Respondent fondled a crewmember's anal area and penis while he slept. D&O at 25, 27. In his analysis, the ALJ noted that the behavior in JONES was "egregious behavior that clearly fits within a reasonable person's definition of sexual molestation". Id. The ALJ, however, does not explain how a crewmember "fondling" another crewmember's anal area and penis without permission is any more or less egregious than Appellee touching the Second Mate's inner thigh and slapping the Second Mate's genital area, touching Deck Cadet 1's buttocks with his hands and groin, drawing a penis on Deck Cadet 1's hard hat and threatening to punch Deck Cadet 1 in the genitals, imposing sexually oriented nicknames on Deck Cadet 1, and uninvitingly showing Engine Cadet 2 pornographic pictures and movies as sexual molestation.. Although the ALJ does not

explain his analysis as to what acts rise to the level of egregiousness sufficient to constitute sexual molestation, it is worth noting that degree of egregiousness is not an element or found in any definition of sexual molestation, and a reasonable person may well find Appellee's actions do meet that threshold. KEENAN is similarly a poor precedent to rely upon as support that Appellee's actions are not sexual molestation or perversion. In KEENAN, the issues addressed on appeal involved several administrative and due process questions and the Commandant only singularly mentioned "acts of sexual perversion" when referring to the fact of respondent "placing a hand on [the crewmembers'] private parts". At *1. Accordingly, the Commandant made no reference as to why or why not the Respondent's actions were "acts of sexual perversion" and provided no in-depth analysis on how to define. Id. Similarly, the Commandant in PENDERGRASS also affirmed the decision that an improper touching of the "private parts" of a crewmember was an act of perversion, with no discussion of the appropriate scope of such a finding. At *4.

The ALJ also relied on Appeal Decisions 1596 (TORRES) 1966 WL 87860 (December 15, 1966) where the Commandant affirmed the finding of molestation for a mariner who put his arms around female passengers and kissed them without permission, and the decision in LOVELETTE finding that physical contact is not required for a finding of molestation where a mariner stood over a female passenger while she was sleeping. Here, the ALJ distinguished Appellee's actions from the Commandant's findings of sexual molestation in LOVELETTE and TORRES "because they are consistent with past precedent that passengers are to be provided special protection. See Appeal Decision 920 (MALLON) (1956)." D&O at 26. While precedent establishes that passengers are owed a heightened duty of care, protection from sexual assault or sexual harassment must not, as the ALJ suggests, be limited only to passengers, particularly when the perpetrator is in a position

of authority and victimizes those within their chain of authority. The ALJ even acknowledged that Appellee's defense of "joking or not intending harassment does not excuse the effect of his conduct and comments on other individuals in the workplace." D&O at 32. Both Deck Cadet 1 and Engine Cadet 2 were young men, students at the U.S. Merchant Marine Academy (USMMA), and away at sea for the first time in an unfamiliar environment. Both relied on the seniority and expertise of the Appellee as Chief Mate of the MAERSK IDAHO to guide them in their duties and behavior. Instead, Appellee engaged in systematic and consistent sexual abuse, sexual harassment, humiliation and degradation as his chosen form of leadership towards students, mischaracterizing and downplaying his actions as mere jokes. Instead of summarily excluding the cadets from any special level of protection, the ALJ should have considered the special protection that should be afforded a young student at sea for the first time when accosted by a vulgar, abusive and unacceptable method of leadership from the Chief Mate of the vessel.

2. IN THE ALTERNATIVE, THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW NUMBERS 6 AND 7 FINDING PHYSICAL CONTACT IS NEEDED TO SHOW INTERFERENCE WITH GOVERNMENT OFFICIAL UNDER 46 C.F.R § 5.61(A)(10) IS NOT IN ACCORDANCE WITH APPLICABLE LAW AND PRECEDENT AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The ALJ determined all of Appellee's actions not involving physical contact were time barred because such actions could not constitute an offense under 46 C.F.R. § 5.61(a) and, therefore, the complaint should have been served within three (3) years from the offense. D&O at 36, 37, 38, 39. As discussed *supra,* the offenses constituting sexual molestation do not necessarily require physical touching. See LOVELETTE at *2. Similarly, the ALJ's determination that offenses constituting interference with a government official under 46 C.F.R. § 5.61(a)(10) also require physical contact is not in accordance with applicable law and precedent.

Instead of finding any of Appellee's actions to be sexual misconduct, the ALJ instead found USMMA Cadets during their sea year training to be government officials as described in 46 C.F.R. §5.61(a)(10). D&O at 27, citing 46 U.S.C. §51311. The ALJ further extended his finding for what constitutes interference with a government official to require a physical assault as a basis for extending the time limitation to serve a complaint to five years. D&O at 27, 33, 36-37.

The Commandant has spoken directly on what constitutes interference with a government official in Appeal Decision 2609 (SHEPARD) 1999 WL 33595176 (June 24. 1999). In that case, the Commandant held that physical assault is not a requirement, as "interference within the meaning of 46 CFR § 5.61(a)(10) is generally intended to encompass affirmative acts (e.g. a physical motion or verbal pronouncement) which have the effect of preventing a government official, master, or ship's officer from discharging his or her duties." Id at *1.

In the present case, if the ALJ's logic of determining the USMMA cadets to be government officials is upheld, all of Appellee's sexually harassing acts against Deck Cadet 1 and Engine Cadet 2 should constitute interference with a government official and therefore be subject to the five-year statute of limitations. All of Appellee's actions were affirmative acts, specifically harassing verbal pronouncements (e.g. dirty jokes, inappropriate nicknames) or physical motions and activities (e.g. drawing a penis on a hard hat, showing obscene movies). Accordingly, the ALJ's holding that interference with a government official as contemplated under 46 C.F.R. § 5.61(a)(10) requires physical contact is not in accordance with applicable law and precedent.

D. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER IN THIS CASE IS NOT IN ACCORDANCE WITH THE PUBLIC POLICY GOALS OF THE COAST GUARD'S SUSPENSION AND REVOCATION ADMINISTRATIVE ACTIONS

In addition to not being in accordance with applicable law and precedent, the ALJ´s Decision and Order in this case is not in accordance with the Coast Guard's public policy goals, nor is it in accordance with the larger public policy goal of addressing sexual assault and sexual harassment awareness and prevention. The Coast Guard's statutory mandate at 46 U.S.C. § 7701 states the primary purpose of S&R proceedings is to "promote safety at sea." The regulations governing and guiding S&R administrative actions are promulgated under this authority and the statement of purpose for the implementing regulations at 46 C.F.R. Part 5 clarifies the intent of promoting safety at sea. Specifically, it states S&R administrative actions are remedial in nature and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. §5.5. Accordingly, the public policy goals underpinning the Coast Guard's legal mandates in S&R administrative actions are to further the progress of safety at sea by providing remedies to actions that create risks to the maritime industry and the public as a whole.

In order to ensure maritime safety, implementing public policy goals to address abusive sexual actions is a preeminent concern in the maritime industry. The International Maritime Organization created a working group to develop international training provisions addressing bullying, harassment, sexual assault, and sexual harassment in the maritime sector.[6] Further, the Coast Guard published a Marine Safety Information Bulletin (MSIB) providing guidance on reporting sexual assault on U.S. vessels. MSIB No. 11-21 (December 16, 2021). There is currently pending

[6] https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MSC-105th-session.aspx

bipartisan legislation to provide statutory "protections against sexual harassment and sexual assault." Safer Seas Act, H.R.6866, 117th Congress, 2nd Session.[7] In support of the draft legislation, the Chair of the Maritime Transportation Subcommittee issued a statement addressing the "heartbreaking stories from survivors of sexual assault, harassment, and abuse from within our maritime industry – and I know that keeping our seas safe is a mission that will not be complete without eradicating these threats to our seafarers."[8] Specific to USMMA cadets, the Department of Transportation, Maritime Administration (MARAD) recently published a Notice and Request for Comments on its published guidance entitled Every Mariner Builds a Respectful Culture (EMBARC). 87 Fed. Reg. 18461 (March 30, 2022). This guidance enumerates sexual assault and sexual harassment (SASH) prevention and response safety criteria for commercial vessel operators approved to carry cadets for training purposes. EMBARC's stated policy goal is to help strengthen the maritime industry's efforts to prevent and respond to incidents of SASH and other forms of misconduct and help ensure a safer training environment for all cadets.

The ALJ's decision to find none of Appellee's actions as sexual misconduct is not only contrary to the law, but also 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. His findings are also an impediment to the S&R public policy of providing remedies for sexual abuse and sexual harassment in the maritime industry, as well as the Coast Guard's ability to positively influence solutions by providing public awareness and

[7] H.R.6866 - 117th Congress (2021-2022): Safer Seas Act | Congress.gov | Library of Congress

[8] https://transportation house.gov/news/press-releases/tandi-committee-introduces-bipartisan-legislation-to-prevent-sexual-assault-and-harassment-at-seaprotect-survivors

defining systemic sexual abuse issues. Accordingly, the ALJ's analysis and decision should be reevaluated and overturned as not in accordance with public policy.

1. CHARACTERIZING ABUSIVE SEXUAL CONTACT AS HAZING BY NONCONSENSUAL TOUCHING IS NOT IN ACCORDANCE WITH PUBLIC POLICY

The ALJ's analysis and decision to not find Appellee committed sexual misconduct for his acts of abusive sexual contact against the Second Mate and Deck Cadet 1 in violation of 18 U.S.C. § 2244(b) is not only in direct contravention to the public policy expressed by current academic, legislative, and executive actions, but also directly contradicts the stated policy goals of 18 U.S.C. § 2244(b).

In his analysis, the ALJ found the Second Mate's allegations not credible based, in large part, on a lack of corroboration. D&O at 16. The House Report 99-594 on Sexual Abuse Act of 1986 (codified at 18 U.S.C. Chapter 109A), made abundantly clear requiring corroboration of a victim's testimony was no longer in accordance with public policy considerations and such a requirement was antiquated and unnecessary. Id. at 6192. The drafters further explained the concern of finding sufficient evidence of an offense without corroboration is addressed by the elements of the crime being proven beyond a reasonable doubt in a criminal case, or by extension, by a preponderance of the evidence in an S&R administrative hearing. Id. at 6192-3.

Additionally, the weight the ALJ gave to a single statement by Deck Cadet 1 that he did not consider Appellee "to be acting with malice or that he was a rapist" as supporting his finding that Appellee's actions were "inappropriate hazing but not taken as a knowing sexual abusive contact" is also against public policy goals. Treating a victim's perception of what the perpetrator was thinking as dispositive, especially in an unequal power dynamic such as a 17-year-old cadet and

an experienced Chief Mate on a commercial vessel, is contrary to the "explicit, well-defined, and dominant public policy against sexual harassment in the workplace." Newsday Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990), cert. denied, 111 S. Ct. 1314 (1993); see also H.R. Rep. at 6190 (18 U.S.C. §109A modernizes federal rape provisions by "defining the offenses so that the focus of a trial is upon the conduct of the defendant, instead of upon the conduct or state of mind of the victim defining.") In contravention to public policy, the ALJ's conclusion of law focused on the victim's perception of the perpetrator, rather than the facts.

Additionally, regarding the ALJ's decision as discussed *supra* in Section V.C., it is incredible to believe that the ALJ would reach the same decision, finding the proven acts not sexual misconduct, if the victims of Appellee's physical assault were female. The drafters of 18 U.S.C. § 2244 also contemplated the limited view of sexual abuse as being a male perpetrator against a female victim. The scope of Chapter 109A was intended to remedy the federal laws of 1986 as "gender-biased and incomplete in the protection it offers from sexual abuse." Additionally, the definition of sexual contact was expanded beyond acting with an intent for sexual desire or gratification to include the intent to abuse, humiliate, harass, or degrade. 18 U.S.C. §2246(3). The legislative intent being to not only protect victims only from "unconsented-to sexual intercourse" but also proscribe against "other forms of sexual abuse". H.R. REP 99-594 at 6192-3. The drafter's goal was for the statutory language to cover "the widest possible variety of sexual abuse, and to protect both males and females from that abuse." Id. at 6193.

The administrative record in this case supports a finding it is more likely than not Appellee committed two acts of abusive sexual contact against the Second Mate and two acts of abusive sexual contact against Deck Cadet 1. The ALJ's conclusions of law finding the Second Mate not

credible was not in accordance with public policy because he should not have considered the victim's lack of corroboration as dispositive in proving abusive sexual contact. Additionally, the ALJ's basing his conclusion of law significantly on Deck Cadet 1's interpretation of Appellee's intent to find Appellee's actions were not sexual but merely hazing is in opposition to the public policy goals of preventing sexual abuse. The ALJ's analysis, turning clearly proven allegations of sexual contact into hazing by nonconsensual contact, is not supported by public policy and was an abuse of discretion.

2. CHARACTERIZING APPELLEE'S ACTS AS NON-SEXUAL MISCONDUCT IS NOT IN ACCORDANCE WITH PUBLIC POLICY

In addition to the above, the ALJ's decision to find all Appellee's acts non-sexual is a regressive application of the core Coast Guard policy of ensuring maritime safety. The evidence in the record supports a finding that Appellee's actions of abusive sexual contact and harassment against the Second Mate, Deck Cadet 1 and Engine Cadet 2 are sexual misconduct constituting acts of sexual molestation or perversion under 46 C.F.R. §5.61(a). The ALJ found proven that Appellee groped Deck Cadet 1's buttocks, simulated a sex act against him in front of crewmembers, and physically threatened to punch him in the genitals. D&O at 39. The ALJ also found credible that Appellee drew a penis on Deck Cadet 1's hardhat and made him wear it in front of the crew, made him use inappropriate nicknames on the ship's radio, and Appellee stuck a pen in Appellee's buttocks and held the pen out to him to smell. D&O at 4. The ALJ further determined the evidence showing a performance evaluation for a cadet written "facetiously" by Appellee and posted on Facebook stating "why do my tax dollars go towards his education – complete waste of time – crew enjoyed cadet often – possible homosexual. Heard crying himself to sleep at 2100" countered Appellee's claims he never made sexual jokes. D&O at 31; Tr. II at

192-193; CG Ex. 17A. Furthermore, although the ALJ rejected Appellee's rationale that he was only joking as well as his blanket denials of his actions against Deck Cadet 1 and Engine Cadet 2, it is notable the ALJ accepted as fully credible Appellee's denials of his actions against the Second Mate. Regardless of Appellee's intent, the above facts are on their face clearly sexual in nature. For the ALJ's decision to find these actions as hazing and non-sexual is not in accordance with the progressive public policy stance which expanded sexual misconduct from only those cases in which a perpetrator derived sexual gratification from the acts to acts in which a perpetrator was using acts sexual in nature to degrade, humiliate or intimidate. As such, the ALJ's decision to turn clearly proven acts of sexual misconduct into instances of hazing are not in accordance with public policy and not supported by substantial evidence.

Finally, Coast Guard's role in remedying acts of sexual misconduct perpetrated by senior officers against junior members of a crew go to the very essence of the public policy goals underlying S&R administrative proceedings. The Commandant has expressed the public policy underpinning the presumption of a mariner's incompatibility with safety at sea arising when one of the offenses under 46 C.F.R. §5.61(a) is found proven as the "removal of an unfit mariner from the industry and elimination of further risk of harm to the public." Appeal Decision 2499 (AILSWORTH) 1990 WL 10011224, at *1-2 (May 3, 1990); See 46 C.F.R. §5.707(c). As a credentialed Chief Mate and Master, Appellee is afforded the highest level of trust to ensure the safety of life at sea and he is held by the Coast Guard, as a vessel officer, to the highest standards of safety and suitability. Appeal Decisions 2698 (HOCKING) 2012 WL 2252257 (April 25, 2012); 2464 (FUTCHER) 1987 WL 874525 (January 1, 1987); 2439 (FREDERICKS) 1986 WL 721404 (December 5, 1986). Those that serve under his command are obligated to obey his

direction and respect the experience, training, and judgment of their superior officer. Accordingly, allowing Appellee's actions of sexual misconduct to go unrecognized and unaddressed are at the very center of the policy considerations for prohibiting a mariner from holding a credential if his "*character and habits of life* would support the belief that permitting such a person to serve under the MMC and/or endorsement sought *would clearly be a threat to the safety and security of life or property, detrimental to good discipline.*" (emphasis added) 46 C.F.R. §10.107

The ALJ's decision to characterize none of Appellee's actions as sexual abuse and harassment constituting sexual molestation or perversion under 46 C.F.R. 5.61(a) is contrary to public policy because it is a regressive view of what constitutes sexual misconduct. The ALJ's decision to diminish the effect of Appellee's actions on the victims by finding impermissible physical contact on a protected body part with the intent to humiliate, abuse, harass or degrade to be only a lesser offense of assault and battery actively frustrates the Coast Guard's role in protecting mariners from sexual abuse. Furthermore, the ALJ's characterization of Appellee's physical actions as hazing by nonconsensual touching discourages victims and advocates (and those who are both) to be progressive in reporting to the Coast Guard allegations of sexual abuse. Additionally, the ALJ's refusal to consider modernizing the Coast Guard's view of what acts or offenses constitute sexual molestation or perversion under 46 C.F.R. 5.61(a) does provide any remedy to the serious and pervasive problem of sexual abuse in the maritime industry. Accordingly, the ALJ's decision is not in accordance with Coast Guard public policy of furthering the progress of safety at sea by providing remedies to acts of sexual abuse and sexual harassment that create risks to the maritime industry and the public as a whole.

VI. SANCTION

The ALJ's Order in this case ultimately imposed a sanction of four months suspension of Appellee's MMC and 12 months of probation. D&O at 43. The ALJ considered the "fact that that a senior officer engaged in hazing of a junior member of the crew" as aggravation, and Appellee's "prior good record and the fact that no physical injury occurred" as mitigation. D&O at 41. Additionally, the ALJ further mitigated any sanction by considering Appellee's act of threatening to punch Deck Cadet 1 in the groin proven in Charge 5 multiplicious with the acts proven in Charge 3 (grouping Deck Cadet 1's buttocks) and Charge 4 (simulated sex act against Deck Cadet 1's buttocks) and therefore all three charges were merged for the purposes of sanction. D&O at 42.

Appellee's actions of abusive sexual contact and harassment are sexual misconduct constituting acts or offenses for which revocation of an MMC is properly sought. 46 C.F.R. § 5.61; *See also* JONES (revocation appropriate where multiple incidents of perversion were found proven and Appellant held a position of authority over the crewmembers he victimized). Although revocation is not mandated for acts or offenses classified under 46 C.F.R §5.61(a), if found proven there is a regulatory presumption the mariner is "presumed not compatible with safety at sea, subject to rebuttal" by the mariner. 46 C.F.R. § 5.707(c). Additionally, the Commandant has continuously ordered revocation when the misconduct involves acts of sexual misconduct. The Coast Guard "has a duty to protect lives and property at sea. This extends to protection against immorality and moral perversion. The only suitable order for such an act of moral baseness is one of revocation in order to prevent the offender's malignant influence from affecting other seafarers." Appeal Decision 1042 (MOLINA) 1958 WL 58775, *3 (June 2, 1958); *See also* PENDERGRASS (ALJ found the touching of a crewmember's testicles merits an order of revocation, without the

need to consider the additional charges). In FUTCHER, Appellant's argument that sexual misconduct does not make him "a hazard to the navigation of any vessel" was not sufficient to allow him to overcome an order of revocation and operate under a temporary MMC.

As the Chief Mate on the MAERSK IDAHO, Appellee's actions toward the Second Mate, the Deck Cadet and the Engine Cadet were extremely detrimental to the crew's safety, security, and had a deleterious impact upon good order and discipline and order, rendering Appellee wholly unqualified to hold a MMC. Accordingly, Appellant respectfully petitions the Commandant to modify or reverse the ALJ's finding and find proven Appellee's acts of sexual misconduct constituting sexual molestation or perversion under 46 C.F.R. §5.61(a) allowing for the appropriate sanction of revocation to be ordered.

VII. CONCLUSION.

Accordingly, Appellant respectfully requests the Commandant provide relief from both the Decision and the Order in this case as provided in 33 C.F.R. Part 20, Subpart J and 46 C.F.R. Part 5, Subparts J and K, as the ALJ abused his discretion, his findings of fact are not supported by substantial evidence; and his conclusions of law as not in accordance with applicable law, precedent and public policy.

Firstly, the ALJ's finding as not proven all of Appellee's acts against the Second Mate, including acts of abusive sexual contact in violation of 18 U.S.C. § 2244(b) and acts of sexual harassment in violation of the MLL Policy was improper because the ALJ did not correctly consider all the evidence when determining the Second Mate's credibility. Secondly, the ALJ's decision finding Appellee's actions against Deck Cadet 1 were not abusive sexual contact in

violation of 18 U.S.C. § 2244(b) but rather a lesser included charge of assault and battery constituting interference with a government official was improper because Title 18 of the United States Code offenses are a proper basis for a misconduct charge under 46 C.F.R. § 5.27, there is not requirement for a showing of criminal intent in S&R administrative hearings, Appellee'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 Appellee committed acts of abusive sexual contact. Thirdly, the ALJ's determination that none of Appellee's actions constituted an act or offense of sexual molestation or perversion under 46 C.F.R. § 5.61(a) was improper because Commandant Appeal Decisions, as well as modern interpretation of sexual acts, support a finding that Appellee's actions constituted an act or offense of sexual molestation or perversion. Finally, the ALJ's decision to define all of Appellee's acts of abusive sexual contact and sexual harassment against male crew members as non-sexual actions is not in accordance with Coast Guard public policy because it is a regressive application of remedial intention and actively frustrates the public policy goals of preventing sexual abuse and sexual harassment in the maritime

industry. Accordingly, Appellant respectfully seeks the Decision of the ALJ be vacated or modified and the appropriate Order of revocation be issued

RESPECTFULLY SUBMITTED

For the U.S. Coast Guard,

Jennifer A. Mehaffey, Esq.
Counsel for the U.S. Coast Guard
DATE: June 17, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have electronically served Respondent's counsel, Mr. William Hewig III, Esq. the foregoing document at the following

WHewig@k-plaw.com

I hereby certify that I have filed the foregoing document with the ALJ Docketing Center and ALJ's Office electronically.

Done this 17th Day of June, 2022.

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