UNITED STATES OF AMERICA

U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

DONALD NIHIPALI,

Respondent.

Docket Number CG S&R 01-0247
CG Case No. PA1000440

DECISION AND ORDER

Issued: September 26, 2002

Issued by: Thomas E. McElligott, Administrative Law Judge

APPEARANCES:

FOR THE U.S. COAST GUARD
LCDR Craig A. Petersen,
LTJG James Stellflug, and
BM1 Tony Leiato
United States Coast Guard
Marine Safety Office
433 Ala Moana Boulevard
Honolulu, Hawaii 96813

FOR THE RESPONDENT
Robert Frame, Esquire and
Randall Geuy, Esquire
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I. PRELIMINARY STATEMENT

The United States Coast Guard Investigating Officers (IOs) initiated this administrative action against License Number 779470 issued to the captioned Respondent Donald Nihipali. This administrative action was brought pursuant to the legal authority contained in 46 U.S.C. Chapter 77, including 7703 and its underlying regulations codified at 46 C.F.R. Part 5, and 33 C.F.R. Part 20. The Coast Guard issued a Complaint on or about April 6, 2001, which was then served personally on Respondent. It charged Respondent Nihipali with a total of four (4) counts, including Misconduct, Negligence, and two (2) counts of Violation of Law or Regulation. It resulted from a close quarters situation created by Respondent (R) between R's motorized tour boat, the MANA O KALANI (hereinafter usually "MANA"), operated and maneuvered by Respondent, and a kayak on the Wailua River, Island of Kauai, Hawaii, containing three members of the Webb family from Riverbank, California.

The Misconduct charge against Respondent Nihipali is supported by two (2) factual allegations, which read as follows:

1. The Coast Guard alleges that on December 21, 2000 at approximately 12:35 PM, while operating the vessel MANA O KALANI on the Wailua River, the Respondent wrongfully assaulted Darren, Evelyn and Xavier Webb by maneuvering the MANA O KALANI towards the kayak carrying the Webb family.

2. As a result of the Respondent's actions, the Webb family feared that the MANA O KALANI would collide with their kayak and cause bodily harm.

The additional Negligence charge against Respondent Nihipali is supported by one (1) factual allegation, which reads as follows:

1. The Coast Guard alleges that on December 21, 2000 at approximately 12:35 PM, while operating the vessel MANA O KALANU on the Wailua River, the Respondent knowingly and willfully turned the MANA O KALANI toward a kayak carrying Darren, Evelyn, and Xavier so as to endanger the Webb family.

The first violation of law or regulation charge or count against Respondent Nihipali is supported by one (1) factual allegation, which reads as follows:

1. The Coast Guard alleges that on December 21, 2000 at approximately 12:35 PM, while operating the vessel MANA O KALANI on the Wailua River, the Respondent neglected to comply with the Inland Navigation Rules by turning the MANA O KALANI around, navigating toward the self-propelled kayak carrying the Webb family, and creating a close quarters situation with said kayak, a violation of 33 U.S.C. 1602, Rule 2 – Responsibility (commonly known as the rule of good seamanship).

The additional second violation of law or regulation charge or count against Respondent Nihipali is supported by one (1) factual allegation, which reads as follows:

1. The Coast Guard alleges that on December 21, 2000 at approximately 12:35 PM, while operating the vessel MANA O KALANI on the Wailua River, the Respondent failed to navigate with due caution and failed to sound one prolonged

blast as he approached a bend in a narrow channel where other vessels may have been obscured, a violation of 33 U.S.C. 1602, Rule 9(f) – Narrow Channels.

The Respondent filed a formal written Answer to the Investigating Officer's (IO's) Complaint in which he admitted all jurisdictional allegations and denied all factual allegations. The Respondent also requested a hearing before a U.S. Administrative Law Judge. This case was originally assigned to Administrative Law Judge (ALJ) Parlen L. McKenna, stationed in Alameda, California, for its adjudication. The hearing was initially scheduled on May 31, 2001, in Hawaii, by Judge Parlen McKenna.

Exactly one week before the hearing was to commence, Respondent's counsel filed a motion for continuance, as well as a motion for Disqualification or Recusal of Judge Parlen McKenna because of Judge P. McKenna's personal bias arising from the prior association of Respondent's attorney Robert Frame with a particular law firm in Honolulu, Hawaii. Following a pre-hearing conference held on May 29, 2001, Judge Parlen McKenna granted both Respondent's attorney's motions and disqualified himself as the judge from adjudicating this captioned case.

Later on June 12, 2001, this case was reassigned to the undersigned judge for adjudication. The hearing was later held on November 14, 2001 in Lihue, Island of Kauai, Hawaii before Thomas E. McElligott, U.S. Administrative Law Judge deciding cases brought by the United States Coast Guard Investigating Officers and by other U.S. government agencies. The hearing was conducted in accordance with the U.S. Administrative Procedure Act, as amended and codified at 5 U.S.C. 551-559, 46 U.S.C. Chapter 77, and the Coast Guard procedural rules located at 33 C.F.R. Part 20 and 46 C.F.R. Part 5, and the Inland Navigation Rules at 33 U.S. Code Sections 2001 through

2038, plus five Annexes; effective since about 01 March 1983; e.g., 33 U.S.C. Section 2001 includes Rule 1, Section 2034 includes Rule 34.

The International Navigations Rules are found at 33 U.S. Code Sections 1602 and following. The three relevant Rules of Navigation referred to and discussed during this hearing, both International and Inland, and their paragraphs are worded exactly the same, i.e., Rule 2 "Responsibility," Rule 9 "Narrow Channels," and Rule 34 "Warning Signals," per Commandant Instruction M16672.2D, dated March 25. 1999, and 33 U.S. Code 2001 through 2038.

Investigating Officers Lieutenant Commander Craig A. Petersen, Lieutenant Junior Grade James Stellflug, and Boatswain Mate First Class Tony Leiato, then stationed in the Port of Honolulu, represented the United States Coast Guard at the hearing. Respondent Nihipali was present throughout the entire hearing accompanied and represented by his two attorneys, Robert Frame, Esq. and Randall Geuy, Esq. of the law firm of Frame, Formby & O'Kane, of Honolulu, Hawaii.

In the Complaint served upon the Respondent and/or his attorney, the first violation of law or regulation, charge or count against Respondent Nihipali, is supported by one factual allegation quoted above. After citing the fact that Respondent Nihipali neglected to comply with the Inland Navigation Rules by turning the MANA O KALANI around, navigating toward the self-propelled kayak carrying the Webb family and creating a close quarters situation with said kayak, a violation of Rule 2, entitled "Responsibility," also commonly known as the "Rule of Good Seamanship," the Investigating Officer then cited 33 U.S.C. 1602, Rule 2, which is the citation for the identical International Navigation Rule. The correct citation should have been 33 U.S.C.

2002, Rule 2, entitled "Responsibility." However, Rule 2 in both the Inland Navigation Rules and in the International Navigation Rules is worded exactly the same.

The additional second violation of law or regulation cites the Rule 9(f), entitled "Narrow Channels Rule." This too cited factual allegations and then cited the Rule 9(f), entitled "Narrow Channels Rule" and again gave a citation of 33 U.S.C. 1602 Rule 9(f), which should have been 33 U.S.C. 2009, Rule 9(f), entitled "Narrow Channels." Here again the wording is exactly the same in both Rules. That is, exactly the same in the Inland Navigation Rules as well as the International Navigation Rules.

In addition, there was talk by the witnesses and in the hearing of Rule 34 of the Navigation Rules, which is entitled "Maneuvering and Warning Signals." The specific rule under Rule 34 that was mentioned, again is the exact same in both the Inland Navigation Rules and the International Navigation Rules, Rule 34(e).

Rule 2, the Responsibility Rule, reads as follows:

> "(a) Nothing in these Rules shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
>
> "(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger."

Rule 9(f), the Narrow Channels Rule, reads as follows:

> "A vessel nearing a bend or an area of a narrow channel or fairway where other vessels may be obscured by an intervening obstruction shall navigate with particular alertness and caution and shall sound the appropriate signal prescribed in Rule 34(e)."

Rule 34(e), Maneuvering and Warning Signals, reads as follows:

> "A vessel nearing a bend or an area of a channel or fairway where other vessels may be obscured by an intervening obstruction shall sound one prolonged blast."

It has been held in several Commandant's Appeal Decisions that the pleadings may be amended to conform to the proof, such as Commandant's Appeal Decision 2630 (BAARSVIK), decided in August 2002, and Appeal Decision 2581 (DRIGGERS). See also Appeal Decisions 2326 (McDERMOTT) (28 Sep 1983); 2013 (BRITTON) (13 Dec 1974); 2309 (CONEN) (12 May 1983); Kuhn v. Civil Aeronautics Board 183 F.2d 839 (1950), 87 U.S. App. D.C. 130, supporting the fact that the ALJ is authorized to amend the Complaint to conform it to the issues noticed, litigated and heard and to the proof; and not to be bound to the rigid formalisms of obsolescent Common Law pleading rules. Kuhn v. C.A.B. and Commandant's Appeal Decisions, *supra*.

As is stated in Appeal Decision 2581 (DRIGGERS), Opinion, Section I,

> "Before proceeding to the merits, I find it necessary to address the statutory basis of the specification. Because the Appellant was charged with violation of law or regulation, the specification must state a specific statute or regulation. 46 C.F.R. section 5.33. Although the specification states an inland navigation rule, it incorrectly cites 33 C.F.R. Part 81, Appendix A, which contains the international navigation rules. The correct citation for the inland lookout rule is 33 U.S.C. section 2005 ('Rule 5').
>
> "The fact that the specification cites the incorrect law does not constitute reversible error in this case. The wording of the lookout rule is identical for both the inland and the international rules. Compare 33 U.S.C. foll. section 1602 Rule 5 (International Rules) with 33 U.S.C. section 2005 (Inland Rules). Furthermore, '[f]indings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated.' Appeal Decision 2422 (GIBBONS), citing Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950); Appeal Decision 1792 (PHILLIPS). The record clearly shows that the Appellant

> understood that the substance of the charge was his failure to maintain a proper lookout while underway on inland waters. [Transcript (TR) Vol. I at 37-38; Appellant's Brief (Brief) at 6]. This is the offense that was actually litigated by the parties, and decided upon by the Administrative Law Judge, regardless of the incorrect citation in the specification. [TR Vol. I at 37-38; D&O at 6]."

The conclusion of the last page of the Appeal Decision 2581 (DRIGGERS) stated, "As discussed in Section I of my Opinion, the specification is properly amended to cite 33 U.S.C. section 2005 ('Rule 5')."

Here in this case involving Respondent Nihipali, these matters were properly given notice and litigated throughout the hearing and I ruled upon them and both sides knew what the allegations were and what was being defended against so they had actual notice and the questions were litigated. Thus, in accordance with *these* Appeal Decisions, *supra*, and Kuhn v. C.A.B., *supra*, as well as 33 C.F.R. 20.305, amendments may be made to conform the citations to the proof and the evidence involved. Here, it is ruled that there are no consequences for the incorrect citation to the rules because the rule was clearly identified and how it was violated was clearly identified and litigated. As discussed above, the two citations in the specifications or counts are amended to read 33 U.S.C. 2002 and 33 U.S.C. 2009(f).

A total of ten (10) witnesses, including Respondent Nihipali, testified under oath in this hearing. At the hearing, the Coast Guard introduced its five (5) witnesses and four (4) exhibits into evidence; whereas, the Respondent introduced his five (5) witnesses and two (2) exhibits into evidence. The ten (10) witnesses and six (6) exhibits are listed in Appendix A, attached.

On December 5, 2001, the Respondent filed Proposed Findings of Fact. Rulings on the Respondent's proposed findings are in Appendix B. In this case, the Investigating

Officers opted not to file proposed findings, but instead chose to only file a reply to the Respondent's proposed findings of fact.

Respondent's Attorneys' Second Motion to Disqualify or Recuse Second Judge

Also, on December 5, 2001, a full three weeks following the conclusion of the November 14, 2001 evidentiary hearing in this case before this ALJ, Respondent's attorney first filed a Motion to Disqualify or Recuse this second judge in this case again on the grounds of personal bias pursuant to 33 C.F.R. 20.204(b). The disqualification motion argues that the undersigned committed the following three acts during the hearing that allegedly evidences personal bias:

> (1) The ALJ identified himself as an agent of the Coast Guard; (2) the ALJ conducted inappropriate and argumentative cross-examination over the objection of Respondent's counsel; and (3) the ALJ unevenly applied his authority in favor of the Coast Guard.

Succinctly stated, Respondent's attorneys belatedly claim that the undersigned exhibited personal bias in favor of the Coast Guard based solely on the manner in which the hearing was conducted. Respondent's motion dated December 5, 2001, requesting disqualification of the second Administrative Law Judge in this case is denied. See Commandant's Appeal Decision 2626 (DRESSER), decided February 19, 2001, where two similar motions to disqualify the Commandant himself were denied by Commandant Thomas H. Collins; and the ALJ's Decision and Order were affirmed.

This paragraph will address Respondent's attorneys' first argument for recusal. The phrase, an "Administrative Law Judge of the U.S. Coast Guard" has been used as a phrase in many of the Commandant's Appeal Decisions. "...an Administrative Law

Judge of the United States Coast Guard..." is used in the first pages or paragraphs of the Commandant's Appeal Decisions 2624 (DOWNS), dated October 22, 2001; 2625 (ROBERTSON), dated February 13, 2002; 2627 (SHAFFER), dated February 25, 2002; and often in many prior Appeal Decisions in the past 50 years, too numerous to mention. Respondent's attorneys are criticizing the use of such terms as they are and have been used by the Commandants and Vice Commandants in these Appeal Decisions. These officers are the two highest ranking admirals in the U.S. Coast Guard on active duty, at the time they signed these Appeal Decisions, prepared for them by the Legal Counsel of the U.S. Coast Guard. This judge in Respondent Nihipali's case was merely identifying himself to a distant witness, Mrs. Webb, testifying by telephonic conference call. This judge was merely identifying himself as not one of the three IOs or the two Respondent's attorneys, but as the judge in the case.

As a preliminary matter, the Respondent's disqualification or recusal motion was not accompanied by an affidavit as is required under 33 C.F.R. 20.204(b). Instead, the Respondent cites to various portions of the transcript, taken out of context, for support. Although failure to comply with the filing requirements may form the sole basis upon which to deny the Respondent's motion, I decline to deny the Respondent's attorneys' second recusal or disqualification motion solely on those grounds. (The first disqualification or recusal motion was against Judge Parlen L. McKenna above.) See Appeal Decision 2495 (ZELVICK) (affirming an ALJ's denial of a disqualification motion that was not supported by exhibits, affidavits, or other offers of proof as required in accordance with Coast Guard procedural regulations). After reviewing the claims of Respondent's counsel and thoroughly reviewing the entire record considered as a whole,

including the transcript in its entirety, it is found that the factual bases alleged for support of recusal or disqualification of the second judge on this same case on the grounds alleged, including personal bias, are totally without merit.

The Respondent's attorneys' second disqualification or recusal motion is also subject to denial because it is late or untimely. While Coast Guard procedural regulations authorize the filing of a motion for disqualification up until the issuance of the ALJ decision, it is incumbent on the party seeking disqualification to file the motion with the judge promptly upon discovery of the facts or other reasons allegedly constituting cause. 33 C.F.R. 20.204(b). In other words, timeliness or an early motion is a vital element of the disqualification motion. When a party voices its misgivings in a late, tardy or dilatory fashion, the claimant's good faith is placed in doubt. See, Marcus v. Dir. Of Office of Workers' Comp. Programs, 548 F.2d 1044, 1050 (D.C. Cir. 1976).

In this case, no objection or statement to the claimed bias or prejudice was ever made prior to the hearing or on the hearing record by Respondent Niphali's two attorneys or Respondent during the entire hearing before the undersigned judge. The motion for disqualification was only filed about twenty-one days later after the conclusion of the evidentiary hearing that was held on November 14, 2001. Under the circumstances, the failure of Respondent's attorney to timely or early raise an objection of bias or prejudice during the hearing or trial, courts have ruled it constitutes a waiver. See above cited case Marcus, of the District of Columbia U.S. Circuit Court, 1976, *supra.*

It is important to note that the mere filing by Respondent's attorneys of a claim of bias or prejudice under 33 C.F.R. 20.204 does not automatically result in the disqualification or recusal of the judge deciding the case. This is especially true when the

motion for disqualification fails to meet the requirements imposed by law. In such instances, the judge has an obligation not to disqualify himself unnecessarily. See generally Jackson v. Fort Stanton Hosp. and Training Sch., 757 F. Supp. 1231, 1240-1243 (D. NM 1990), *rev'd on other grounds* 964 F.2d 980 (10th Cir. 1992) (holding that a motion for disqualification filed several months after the deposition of a witness was too late); Cranston v. Freeman, 290 F. Supp. 785, 815-816 (N.D.N.Y. 1968), *rev'd on other grounds sub. nom.* Cranston v. Hardin, 428 F.2d 822 (1970) (holding that a motion for disqualification filed more than eleven months after commencement of trial was frivolous and was not timely).

Even assuming that the Respondent's motion for disqualification met all of the legal requirements prescribed in 33 C.F.R. 20.204, the Respondent's claim of bias and prejudice still fails. In these proceedings, the ALJ is presumed to be impartial and not biased. Appeal Decision 1554 (MCMURCHIE); Schweiker v. McClure, 456 U.S. 188, 195 (1982). The burden is on the party moving for disqualification to affirmatively show bias or prejudice by tendering sufficient evidence for the judge to consider whether proceeding in light of such evidence would create an appearance of impartiality. (MCMURCHIE); Appeal Decision 2495 (ZELVICK). Frivolous and improperly based suggestions or claims of bias or prejudice by a party are insufficient bases for disqualification or recusal of a judge. Wandschneider v. Indus. Incomes, Inc., No. 87 Civ. 6252(ELP), 1989 U.S. Dist. Lexis 5563, at *2 (S.D.N.Y. May 23, 1989).

In reviewing a disqualification motion, the undersigned is guided by the standard of review enunciated in many federal court cases. The test is whether a reasonable person would have a factual basis upon which to doubt the impartiality of the judge under

the circumstances set forth in a party's affidavit supporting the disqualification motion. See generally A.J. ex rel. L.B. v. Kierst, 56 F.3d. 849, 861 (8th Cir. 1995); Parrish v. Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975).

The standard for successfully demonstrating bias on the part of a judge is quite strict in order to prevent abuse by a party, who may otherwise use disqualification or recusal motions as a tool to shop for a judge who better suits that party's preference. Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497, 514 (S.D. S.C. 1975). In order to prevail on a recusal or disqualification motion, a party must show that the bias is "personal," and not judicial, in nature. Parrish, 524 F.2d at 100; Duplan, *supra*, 400 F. Supp. at 519 (S.D. S.C. 1975); Appeal Decision 950 (RALEIGH). Bias that will disqualify a judge refers to an opinion or prejudgment formed from an extra judicial source, i.e., information obtained outside the hearing or trial room. Duplan, *supra*, 400 F. Supp. at 516; Appeal Decision 950 (RALEIGH); Climaco v. Sullivan, 1989 U.S. Dist Lexis 12071, at 7 (N.D. Ill. 1989). Adverse rulings by a judge, comments made by the judge, and the judge's demeanor during a hearing or proceeding alone are not sufficient to compel disqualification. Duplan, *supra*, 400 F. Supp. at 514-519; A.J. ex rel L.B., 56 F.3d at 862.

In this case, all of the Respondent's arguments for disqualification stem from the manner in which the proceedings were conducted and do not evidence personal bias. As such, they are rejected. For example, Respondent's assertion that the ALJ acted as an agent for the Coast Guard by referring to the agency's exhibit as being "admitted for our purposes" is unpersuasive as this was a transcription mistake made by the court reporter. *(Transcript ("Tr.") 142)*. The phrase, "admitted for our purposes" should have read an

exhibit was "admitted for all purposes." It has long been well established in the law that the undersigned judge is authorized to correct a transcript if the transcript contains mistakes or errors made directly by the court reporter. See 33 C.F.R. 20.709(b).

Next, the Respondent's allegation that the ALJ applied rulings in a disparate fashion using double standards is unfounded. The Respondent's counsel attempts to compare two very different instances during the hearing where one environmental police witness was allowed to refer to his own official written report about one year old while testifying and Respondent was not permitted to look at his attorneys' prepared statement for Respondent during Respondent's cross-examination. In the first instance, the agency's witness, a State of Hawaii environmental police officer who about one year before the hearing investigated the incident at hand, was allowed to refresh his recollection by being allowed to refer, if necessary, to his official report prepared by him shortly following the investigation of about one year prior. *(Tr. 142).* In the second instance, however, the Respondent, who was being questioned by LCDR Craig Petersen under cross-examination at the time, was being difficult, evasive and belligerent. In addition, Respondent's credibility was in serious question by that time. Respondent's attorneys had already completed their direct questioning of Respondent. Respondent had been present throughout the entire hearing, had heard all the other witnesses testify and heard all the remarks about exhibits already entered into evidence and was about the 10th or last witness. In the midst of LCDR C. A. Petersen's cross-examination, the Respondent's attorney suddenly interrupted and offered to give the Respondent a previously prepared written statement to read. *(Tr. 346).* Since this written statement was previously prepared by Respondent's counsel in anticipation of litigation, the

Respondent's reading of the written statement during his cross-examination would have been an improper use of the document. In addition, as the Respondent's credibility was a serious issue, it would not be appropriate to allow him to be so brazenly coached by his attorneys in this fashion while Respondent was under cross-examination and still under oath on the witness stand.

Similarly, the Respondent's assertion that the ALJ attempted to impeach only the Respondent's witnesses through hostile cross-examination and interrogation is incorrect and wholly without merit. In his Motion to Disqualify, the Respondent quotes limited sections in the hearing transcript when referring to the ALJ's questioning of a witness. However, when the relevant testimony and sections are read in their entirety, it becomes clear that the witness, a hula dancer on the Respondent's tour boat at the time of the incident, and then a fellow-employee of Respondent, was being evasive. Moreover, the witness' credibility became an issue after she gave contradictory or false testimony. Her credibility was being tested when the ALJ asked whether she had spoken with the Respondent's counsel before testifying at the hearing. She testified twice that she "never" talked to them before the day of the hearing at lunch *(Tr. 184)*. Respondent's attorneys had prior listed her as their witness. The witness replied that she just met the Respondent's attorneys for the first time on the day of the hearing at lunch and had never conversed with them before. As the ALJ tried to continue with this line of questioning, the Respondent's counsel suddenly interrupted the witness' testimony and the judge to state that he had in fact "contacted" her a "few weeks" before the hearing but that she probably did not remember it. *(Tr. 185)*. Respondent's attorney said this well within her hearing. She was within about five feet from Respondent's attorney and between him

and the judge. She was seated closer to Respondent's attorney than the judge. At which point, the ALJ properly instructed the attorney to refrain from prompting or coaching his own witness, while she was being questioned under oath. Furthermore, when the ALJ then resumed questioning this hula dancer, she proceeded to turn away from the judge and ask the Respondent's attorney for assistance with her answers. Specifically, while still on the witness stand, she abruptly turned to the attorney and asked the Respondent's attorney who had said he contacted her, "Did you call me?" *(Tr. 185).* Because the hula dancer witness was seeking coaching while still on the witness stand, the judge properly instructed the witness to look away from Respondent's attorneys and directly at him and to answer his question. *(Tr. 185-186).* She could not recall being "contacted" by Respondent's attorneys "a few weeks before," but she claimed she could recall much of what happened on the vessel about one year before. Such testimony by her shows she is not a credible witness.

Likewise, the ALJ's inquiry into the Respondent's ability to read the Inland Navigation Rules constitutes neither improper interrogation nor intimidation. The ALJ's question on this matter arose only after LCDR Craig Petersen during his cross-examination of Respondent asked the Respondent to read from the Inland Navigation Rules. Instead of complying with the LCDR's request, the Respondent remained silent for several minutes, without answering or reading from the rulebook. Respondent just kept looking or staring at the rulebook in his hands for several minutes without answering. At which point, the ALJ then asked the Respondent whether he had difficulty with reading. The Respondent, however, remained unresponsive, which prompted the ALJ to pursue his line of questioning. Upon review of the relevant sections in the

transcript, it becomes evident that the ALJ was not badgering the Respondent, but rather was merely inquiring into the Respondent's ability to read the Inland Navigation Rules and other matters. Respondent should not only be able to read them, but he is supposed to know and follow them as a licensed captain.

None of the examples cited above by the Respondent provide credible evidence that the undersigned improperly acted as an agent for the Coast Guard. The innocuous or other comments that the undersigned made during the hearing, which Respondent's attorney has taken out of context, do not evidence any bias or prejudice. The comments, themselves, are innocuous, harmless and unbiased. A judge has as one of many duties to keep the parties and their clients and witnesses from breaking the rules, especially in the hearings.

Moreover, the United States Supreme Court recognizes impartiality as a basic element of due process that applies in all federal administrative hearings. See Schweiker v. McClure, 456 U.S. 188, 195 (1982). Although I am assigned to adjudicate Coast Guard cases and other U.S. agencies cases, the U.S. Supreme Court acknowledges that the process of agency adjudication is structured so as to assure that U.S. Administrative Law Judges exercise independent judgment - - free from agency pressures. Butz v. Economou, 438 U.S. 478, 513 (1978). *Id.*[1] In addition, the undersigned judge's

[1] The U.S. Office of Personnel Management's Office of Administrative Law Judges recruits and selects candidates for ALJ positions and places them on a ranked register from which agencies obtain judges. The Administrative Procedure Act ("APA"), codified at 5 U.S.C. § 551-559, implicitly guarantees the impartiality of ALJs by establishing statutory safeguards to ensure the independence of such judges. Butz v. Economou, 438 U.S. at 513. Under the APA, ALJs are not "responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d)(2); *Id.* at 514. Moreover, ALJs are not paid, promoted, evaluated nor subject to discharge at the mere whim of the agency on whose behalf the judges adjudicate cases. See 5 U.S.C. §§ 3105, 7521; see also Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 142, *rehearing denied* 345 U.S. 931 (1935).

questioning of witnesses and rulings were made in accordance with the duties and authority granted to me as an ALJ under the applicable statutes, regulations and case law, including the APA and Coast Guard procedural regulations. See 5 U.S.C. 556(c); 33 C.F.R. 20.202 and 20.802. Therefore, in the absence of any supportive evidence of actual bias or prejudice, the Respondent's attorneys' second motion for disqualification or recusal of the second judge on the ground of personal bias is **DENIED**.

Further, after careful review of the entire record considered as a whole, including all the facts and applicable law in this case, I find that the Investigating Officers have proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent Donald Nihipali committed the charged one act of misconduct, one act of negligence, and two acts of violation of law or regulation on December 21, 2000 when he maneuvered the vessel MANA much too close and into a kayak carrying the Webb family. In doing so, the Respondent wrongfully assaulted the three members of the Webb family and endangered their lives and limbs.

II. FINDINGS OF FACT

The Findings of Fact and Conclusions found herein are based on thorough and careful analysis of the documentary evidence, the testimonies of the witnesses taken under oath, the entire record considered as a whole and the applicable statutes, regulations and case law.

1. On December 21, 2000, a close quarters situation occurred along a narrow river bend on the Wailua River in Kauai, Hawaii, in which a motorized tour boat, operated by Respondent Captain Nihipali, steered dangerously close to a kayak

carrying two teachers, Mr. Darren Webb and Mrs. Evelyn Webb, and their three-year-old son, Xavier Webb. *(Entire Transcript and record).*

2. After considering the entire record as a whole, and carefully listening to and watching the witnesses who appeared at the hearing, I make findings that in general I find the five (5) IO's witnesses much more credible than the five (5) Respondent's witnesses. *(Entire Transcript and record).*
3. Respondent Donald Nihipali is the holder of U.S. Coast Guard License No. 779470. Respondent has been granted a license by the U.S. Coast Guard to operate motor vessels of less than one hundred tons on the Wailua River, Island of Kauai, Hawaii. *(Tr. 314).*
4. On the date and afternoon in question, Captain Nihipali was operating, maneuvering and controlling the steering of the tour boat MANA. The MANA is a sixty-six (66)-passenger vessel, owned by the Waialeale Boat Tours, Inc., that carries passengers on sightseeing excursions between the mouth of the Wailua River and the area of the river known as the Fern Grotto area. *(Tr. 9).*
5. The tour boat MANA is approximately fifty feet long and fourteen feet wide (55 feet by 14 feet). It is rectangular in shape. It has a square, blunt bow 14 feet wide. It displaces twenty-three (23) gross tons of water and weighs about fifteen (15) net tons. The MANA is a powered vessel and typically cruises about eight knots along the Wailua River, in Kauai Island, Hawaii. *(Tr. 9).*
6. The Webbs: Darren, Evelyn are two teachers and their son Xavier, were on a guided kayak tour, which included several kayaks on the Wailua River. *(Tr. 16).* The three Webbs were alone in one kayak. They were seated in one kayak, a

sixty-five pound self-propelled (by two paddles) plastic kayak that is approximately sixteen feet long, two feet wide, and sits eight to ten inches off the water. *(Tr. 9, 76)*..It is very much like a small canoe propelled by paddles.

7. Before the tour began, the Webb parents received basic paddling and kayaking instructions from the tour guide, in which they were instructed to remain approximately five feet from the riverbank, staying close to the north side of the river both up and back down the river, and to keep out of the middle of the river or channel where the bigger power driven boats or vessels are supposed to travel. *(Tr. 17, 28, 46-47, 115).* These instructions were repeated by the tour guide a second time after lunch before the Webb family resumed the tour. *(Tr.19, 48, 84, 117).*

8. The customary rule according to the guide, practiced by kayaks only on the Wailua River, is to travel along and near the north bank, which entails remaining on the right side of the river when proceeding up river towards Fern Grotto and staying to the left near the north bank when heading down the river to finish the tour and return the rented kayaks. *(Tr. 78).*

9. About halfway through the tour, the Webbs approached a slight bend or turn in the river that curves to the left. *(Tr. 20, 88).* The Webbs remained about three to four feet from the north bank; they were close enough to reach out their hands and touch the hibiscus plants and branches growing on the shoreline. *(Tr. 20, 50).* As Mr. and Mrs. Webb paddled along the north side of the curve, the MANA suddenly appeared about seven feet in front of them and continued to approach head on, while they were only about three feet from the bank. *(Tr. 20, 29).*

10. Another kayaker on the tour, Mr. Edward Cormode, a firefighter from San Diego, California on vacation like the Webbs, who was approximately fifty yards behind the Webbs in his own rented kayak, witnessed the Respondent's MANA make a U-turn in the river. As a result of the wide U-turn by Respondent, the side of the Respondent's vessel came into close contact with the Webb's kayak. Mr. Webb had to push off from Respondent's vessel with his paddle to protect his family. *(Tr. 118-119, 134).*

11. Instead of passing the kayak, while Respondent remained in mid river or on the other side of the river where there was plenty of room, the Respondent's MANA remained in very close proximity to the Webbs, at times approximately two to three feet away from their kayak. *(Tr. 50).*

12. When Captain Nihipali claims he first noticed the Webb family, he asserts he attempted to turn the MANA hard left to avoid a head on collision. As a result, the Webb's kayak became caught in the Respondent's vessel's wake and was pushed into the bank and its branches. *(Tr. 115, 125).* Respondent as an experienced captain on that river for years with those type of boats must or should have known this is what would result from Respondent's maneuvers so close to the Webb's kayak.

13. As the MANA passed too close, Mr. Webb attempted to keep the tour boat away from his family and kayak by using an oar to push off the side of the vessel's hull. *(Tr. 21, 30-31,53, 134).* As a result, water may have splashed onto the MANA's deck, allegedly wetting some of the passengers aboard. *(Tr. 22, 168, 190, 192).* It

was also rainy and windy at the time, which could cause wetting of the MANA's passengers. *(Tr. 20).*

14. Mr. Webb, fearing for the safety of his family, became irate and yelled at Respondent, "What are you doing? This is assault with a deadly weapon!" *(Tr. 22, 41, 51, 192).*

15. Captain Nihipali shouted back at the Webb family, including yelling at them to move out of Respondent's way. *(Tr. 43, 56, 190, 327).*

16. Witnesses on both the MANA and the kayak tour observed both Captain Nihipali and Mr. Webb exchanging angry words and obscenities. *(Tr. 56-57, 119-120, 192).*

17. After the first close situation with the tour boat, the Webbs repositioned themselves back towards the north riverbank and continued to paddle down the river towards the dock. *(Tr. 34, 51).*

18. Captain Nihipali placed his vessel in reverse and proceeded up the river. *(Tr. 90-92).* Shortly afterwards, Respondent in the MANA suddenly made a U-turn and headed back downriver towards the Webbs. *(Tr.22,*118-119). This time, the MANA, at all times controlled and steered by Respondent Nihipali, proceeded directly toward the Webb's kayak at a ninety-degree angle. *(Tr.118-119).*

19. When Captain Nihipali turned the tour boat around to head back towards the Webbs, he did not sound the vessel's whistles or horns as he neared or approached the river bend or turn. *(Tr.30, 48, 55, 88-89, 191, 202).* This violated another safety rule of the Inland Navigation Rules. See below.

20. The width of the Wailua River at Taiau bend or turn is approximately sixty-six feet per Respondent's own admission. *(Tr. 346, 348).* At other areas this river is much wider. Respondent testified he took two (2) tour boats up or down the river side by side. Although the width of the river at the bend is one of the narrowest parts of the channel, there was ample room for a tour boat to safely pass a kayak without hitting or crowding the kayak while the kayak remains within about five feet from the riverbank. *(Tr. 106-108).*

21. At the time of the incident, there were no other vessels in the immediate area. *(Tr. 172).* More specifically, there were no boats in the middle of the river or on the south side or opposite side of the MANA, and the rest of the kayakers on the tour had paddled ahead of the Webb family or were well behind the Webb's kayak. *(Tr. 35, 54).* Thus, there was more than ample room for the Webb's kayak and Respondent's tour boat to meet or pass each other in that turn or bend without Respondent getting too close and striking or colliding with the kayak.

22. Captain Nihipali turned the tour boat around and proceeded to speed towards and close in on the Webb family in an effort allegedly to get the kayak's identification number. *(Tr.331).*

23. The Waialeale Boat Tours, Inc., which employs Captain Nihipali and owns the MANA, tries to maintain a logbook containing the details of all incidents and contact situations between their vessels and kayaks on the Wailua River. *(Tr. 331).* In order to maintain the necessary information in the logbook, the company has instructed their captains to either stop the kayaks and inquire about the kayak company or to get the kayaker's identification number. *(Tr. 220).* This can be

done by calling out loud to the kayaks from a safe distance. See IO's exhibits in evidence of photographs of the tour boat and kayaks sharing this river together safely and with plenty of room for both type vessels.

24. As the Webbs continued to paddle down the river towards the dock, they suddenly felt the MANA's bow or front collide, strike or ram into the back of their kayak and them. *(Tr. 34, 51, 65).* Mrs. Webb, a teacher of handicapped children, compared it to a "car running over" a skateboarder. *(Tr. 73, 74).* Mrs. Webb: "...like you know if a skateboard goes running down the street and happens to splash a big beautiful Corvette? Does the Corvette have a right to turn around and cut down the skateboarder and run them over or push them up against the side of a wall?"..."I mean that's a big boat." *(Tr. 74).* About that time, Mr. Webb outstretched his oar to fend off the tour vessel from striking his family's kayak a second time or to avoid having the Webbs pushed against the north bank of the river. *(Tr. 24,34, 66).*

25. The impact from the collision pushed the Webbs and their kayak sideways out toward the starboard side of the MANA and in front of the much larger vessel's 14-foot wide bow. *(Tr. 35, 53-54).* All the while, the Webbs attempted to paddle closer to the bank and away from the tour boat. *(Tr. 53).*

26. The Webbs became frightened for their lives, believing that Captain Nihipali was attempting to tip their kayak and dump them into the river. *(Tr. 52-53).* In particular, Mr. Webb feared for the safety of his family since his wife was not a good swimmer and their three-year-old son could not swim at all. *(Tr. 21, 25-26).*

27. After the crowding and collision by Respondent and his tour boat, the Webb family finally regrouped with the kayak guide and paddled back to the dock. *(Tr. 26).*

28. Captain Nihipali telephoned the office manager at Waialeale Boat Tours from the tour boat and told her that a kayaker had splashed water onto the tour boat and wet some of the passengers onboard. Apparently he did not also tell her it had also been rainy and windy. *(Tr. 20, 223, 240).* In addition, he provided the kayak's identification number, which permits the office manager to identify which tour group company owns the kayak. *(Tr. 223).*

29. Upon receiving word that an incident had occurred on the river between the MANA and a kayaker, the Respondent's company's office manager and owner's daughter telephoned the State of Hawaii's Department of Land and Natural Resources ("DLNR") to file a complaint against the kayak or kayak company. *(Tr. 223).* This Department dispatched one of their officers, Officer Corey Aguano, to the vessels' departure and docking areas to investigate these matters.

30. Officer Corey Aguano from the DLNR responded to the complaint by proceeding first to the marina to gather the kayaker's statements. *(Tr. 126, 138, 140-141, 224).* Some or all of the kayakers finished their tour and docked before the Respondent's MANA did.

31. After Officer Aguano was questioning and talking with the kayakers, the MANA eventually returned to the marina area to dock. Officer Aguano then finished interviewing and taking the kayakers' statements and then proceeded over to the docking tour boat. *(Tr. 143).*

32. Upon approaching the larger tour boat, Officer Aguano informed Captain Nihipali that he was investigating the kayak incident that transpired earlier on the river and that he wished to interview and take statements from both the staff and passengers onboard Respondent's vessel. *(Tr.144).*

33. Captain Nihipali responded to Officer Aguano's investigation in a very uncooperative manner and boldly and brazenly told the passengers they were under no obligation to talk to or fill out statements for the State of Hawaii's environmental uniformed officer. *(Tr. 144, 209-210).*

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Donald Nihipali, his U.S. Coast Guard issued captain's license and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S. Code 6301 and 46 U.S. Code Chapter 77, including Section 7703(1)(B) (West Supp. 2002); 5 U.S. Code Sections 551-559, U.S. Administrative Procedure Act; 46 C.F.R. Part 5 (2001); and 33 C.F.R. Part 20 (2001); and the Inland Navigation Rules, 33 U.S. Code Sections 2001 through 2038, plus five Annexes, effective since about 01 March 1983. For example 33 U.S.C. 2001 indicates Inland Navigation Rule 1, and 33 U.S.C. 2034 indicates Rule 34.

2. At all relevant times, Respondent Nihipali was the holder of, and acted under the authority of, his U.S. Coast Card issued Vessel Operator's License No. 779470 while serving as captain and steersman aboard the tour boat or vessel named the

MANA O KALANI (often referred to herein as "MANA") on and about December 21, 2000, on said river.

3. The testimony of Captain Nihipali that he was traveling up the middle of the river when the Webb's kayak, which was several feet away from the bank, continued to approach the MANA dead center of the tour boat's front or bow is not found credible. The testimony of the Investigating Officers' five witnesses, including the two teachers Mr. and Mrs. Webb, the kayak tour guide, Environmental Police Officer Aguano and the California fireman Mr. Cormode in a kayak behind them, who described paddling along the edge of the river as close to the north river bank as possible when the MANA passed too close, only a couple of feet away and then collided into the kayak, is considered and found to be a more truthful, credible and accurate representation of the true or correct facts.
4. The testimony of Captain Nihipali that he reversed the MANA and attempted to hold it in place to avoid an encounter with the kayak while the Webbs continued to approach his vessel in anger and intentionally splash water onto the deck and passengers is not found credible. The testimony of the Webbs, along with the testimony of Firefighter Cormode, another tourist on the kayak trip, who described the MANA as suddenly appearing and continuing to approach the Webb's kayak until it pushed them against the branches and plants along the river bank is considered a more truthful and accurate representation of the facts. In addition, the testimony of the Webbs and Firefighter Cormode that water may have unintentionally splashed onto the MANA's deck as Mr. Webb tried to keep the vessels apart is deemed credible.

5. The testimony of Captain Nihipali is not found truthful and credible, that he carefully turned the tour boat around and headed back towards the Webbs in an effort to obtain the name of the kayak company and the identity of the individuals involved. The testimony of the Webbs and Firefighter Cormode that the MANA passed the Webb's kayak, turned around, and struck or rammed into the rear of the Webb's kayak, causing Mr. Webb to fend off the vessel with his oar a second time is found to be a more credible, truthful and accurate representation of the correct facts.
6. The testimony of Chelsea Alesna, a hula dancer and entertainer working as Respondent's co-worker on board the MANA at the time of the incident is not found credible. She claimed that the Webbs were in the middle of river, approaching the tour boat as they intentionally splashed water onto the deck and passengers is not found credible. Ms. Alesna was dancing facing the tour boat's passengers at the time of the incident with her back turned towards the front of the tour vessel and, therefore, was distracted from observing the events unfolding. She denied under oath ever talking to Respondent's two attorneys before having lunch with them the day of the hearing. Even after this Respondent's attorney interrupted her questioning and said to her and the judge he "contacted her a few weeks" before the hearing, she did not correct this incredible, untruthful testimony.
7. At no time throughout the boating incidents, did Captain Nihipali sound the vessel's horns or whistles to indicate danger or a close approach to the kayak in or

near a narrow river bend or turn. This violated the vessel safety rules known as the Inland Navigation Rules 33 U.S.C. 2001-2038, including Rules 2 and 34(e).

8. The evidence in the record as a whole demonstrates that Respondent Nihipali, as the captain operating the MANA on December 21, 2000, failed to conform to the standards of safety and care required of a reasonably prudent captain and steersman under the circumstances by willfully navigating towards and colliding with the paddling kayak carrying the Webb family. Respondent created a close quarters situation, and assaulted the Webb family with a dangerous weapon, namely, his bigger, faster vessel. In addition, Respondent Nihipali failed to navigate his vessel with due caution by not sounding the required vessel's whistle or signal blast when approaching an obscured bend or turn in a narrow channel or river.

9. The first charge of "**MISCONDUCT**" against the Respondent is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the entire record considered as a whole.

10. The second charge of "**NEGLIGENCE**" against the Respondent is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the entire record considered as a whole.

11. The third charge of "**VIOLATION OF LAW OR REGULATION**" against the Respondent is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the entire record considered as a whole.

12. The fourth charge of "**VIOLATION OF LAW OR REGULATION**" against the Respondent is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the entire record considered as a whole.

IV. OPINION

As a preliminary matter, and although not mentioned by Respondent Nihipali's attorneys, it is noted that certain charges alleged in the Complaint can be considered duplicative for the purpose of determining a sanction or order. More specifically, the charge of negligence is based upon Respondent's willful endangerment of the Webb family by the manner in which he operated his vessel. Likewise, the first of the two charges alleging a violation of law or regulation is based upon Respondent's failure to comply with Inland Navigation Rule 2 (commonly known as the rule of good seamanship) by creating a close quarters situation. It is well recognized that the exigencies of proof may require multiplicative or alternative charging in a particular case. See Appeal Decision 2503 (MOULDS); see also, Appeal Decision 2496 (MCGRATH). As such, both charges will stand for the purpose of determining the findings but will be considered jointly, rather than separately, in awarding a sanction. See Appeal Decision 2503 (MOULDS); see also Appeal Decision 2496 (MCGRATH).

Now we shall discuss the merits of this case.

A major purpose of Coast Guard suspension and revocation proceedings and evidentiary hearings and Decisions and Orders by U.S. Administrative Law Judges is to

promote safety at sea, in ports and also on navigable rivers and channels. See 46 U.S.C. Chapter 77, including 46 U.S.C. 7701 (West Supp. 2002) and Inland Navigation Rules, 33 U.S.C. 2001 through 2038, plus five Annexes. If it is shown that a license holder has committed an act of negligence, misconduct, and/or a violation of law or regulations in performing his duties relating to the vessel, his U.S. Coast Guard issued licenses and documents may be suspended or revoked if warranted and called for by the facts and applicable laws. See 46 U.S.C. Chapter 77, including 46 U.S.C. 7703(1)(B), and the U.S. Administrative Procedure Act 5 U.S.C. 551 through 559.

In suspension and revocation proceedings, the burden of proof is on the Investigating Officers (IOs) to establish a prima facie case of negligence, misconduct, or a violation of law or regulation by a preponderance of the evidence. See 33 C.F.R. 20.701-20.702 (2000); see also Appeal Decision 2485 (YATES). Negligence is defined in 46 C.F.R. 5.29 (2000) as "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." This definition includes the failure of an individual to exercise the degree of care, vigilance and forethought that a person of ordinary caution and prudence ought to exercise under the facts and circumstances. See Appeal Decision 2550 (RODRIQUES). In order to establish negligence, the IOs must prove that the Respondent's conduct, in some manner, failed to conform to the standard of care required of a reasonably prudent mariner acting as captain and steersman under the same circumstances. See Appeal Decision 2321 (HARRIS); see also Appeal Decision 2282 (LITTLEFIELD).

Similarly, misconduct is defined in 46 CFR 5.27 (2000) as "human behavior that violates some formal, duly established rule," such as those found in the common law, the general maritime law, a ship's regulation or order, or shipping articles. It is an act that is forbidden or a failure to do what is required. In the absence of such a rule, misconduct is human behavior that a reasonable person would consider to constitute a failure to conform to the standard of conduct that is required in the light of all the existing facts and circumstances. See Appeal Decision 2152 (MAGIE). In addition, specific intent is not an essential element of the charge of misconduct in these administrative proceedings. In other words, the IOs do not have to prove Respondent had a specific intent under the charge of misconduct. See Appeal Decision 2607 (ARIES); see also, Appeal Decision 2286 (SPRAGUE).

Finally, a violation of law or regulation includes a failure to comply with any law or regulation intended to promote marine safety and to protect the people and vessels involved. See 46 CFR 5.33 (2000). Inland Navigational Rule 2, titled "Responsibility," and commonly referred to as "the rule of good seamanship," as well as Inland Navigational Rule 9, which governs the navigation of vessels through narrow rivers or channels, fall within the scope of 46 CFR 5.33.

Here, the IOs have proved that Respondent Nihipali committed acts of negligence, misconduct and violations of law or regulation on December 21, 2000, which created and resulted in a close quarters situation and collision between his larger motorized tour boat and a smaller plastic kayak carrying three people or passengers. More specifically, Respondent Nihipali was negligent because he knowingly and willfully turned his larger, more powerful and faster vessel towards the kayak and

riverbank. He thereby endangered the three lives of the Webb family, as well as the lives of the passengers and crew aboard his tour boat, especially if his vessel struck the riverbank. Likewise, Respondent Nihipali committed an act of misconduct when he proceeded to push the Webb's kayak near or against the riverbank and wrongfully assault the Webbs by placing them in fear of grave bodily harm. By navigating his vessel towards the kayak and creating a close quarters situation, Captain Nihipali violated Inland Navigation Rule 2, which governs the use of good seamanship.

Similarly, Captain Nihipali violated Inland Navigation Rule 9 when he failed to navigate with due caution and sound one prolonged signal or whistle blast as he neared or approached the Taiau river bend or turn. As such, the actions of Captain Nihipali failed to conform to the standards of care required of a reasonably prudent licensed captain and steersman of the same station under the same circumstances.

In defense of his actions taken on December 21, 2000, the Respondent's attorneys raise the following arguments, which will all be addressed in further detail:

I) Captain Nihipali did not assault the Webb family when he turned his vessel around in the direction of their kayak in an effort to comply with company policy and obtain the necessary information;

II) Captain Nihipali followed the rule of good seamanship by taking action to stop the momentum of his vessel and avoid a collision; and

III) Although Captain Nihipali failed to sound one prolonged signal blast as he approached the Taiau river bend, the appropriate danger signal was given.

But I find no sounds or signals were sounded or given by Respondent at all, with regard to Respondent's Argument III.

For all the reasons stated herein, all of the Respondent's arguments are rejected after considering the entire hearing record as a whole.

I. Captain Nihipali Wrongfully Assaulted the Webb Family when He Maneuvered His Larger Vessel in the Direction of Their Kayak and thereby Placed Them in Fear and Grave Danger of Bodily Harm

The Respondent and his attorneys contend that although he deliberately turned the larger tour boat, the MANA, around to head in the direction of the Webb family's kayak, he did so in compliance with company policy to obtain necessary information. Respondent Nihipali further argues that his actions, which were conducted safely and in accordance with the Inland Navigation Rules, presented no danger to the Webbs. In addition, the Respondent alleges that the record is devoid of sufficient evidence to establish whether an actual vessel-to-vessel collision occurred between the MANA and the Webb's kayak. This contention is based solely on the existence of contradictory testimony among the witnesses who testified at the Respondent's hearing. More specifically, the Respondent refers to the testimony of the Coast Guard's witnesses, who state that after the MANA initially came into close contact with the Webb family, it proceeded to close in on the Webbs at a ninety-degree angle and Respondent eventually collided or rammed his much larger vessel into the back of the Webb's kayak. The Respondent's witnesses, however, testified that the two vessels never made contact with

each other, but rather it was Mr. Webb who struck the side of the MANA with a paddle. Given the vast contradiction in witness testimony, the Respondent argues that the administrative law judge cannot properly determine whether a collision occurred.

The Respondent, however, fails to recognize that the ALJ is the decider or arbiter of facts. As such, it is part of the ALJ's duties to evaluate the credibility of the witnesses and the weight of the evidence in determining what version of events under consideration is correct. See Appeal Decision 2116 (BAGGETT). There is longstanding precedence in these suspension and revocation proceedings that the ALJ's findings of fact, including credibility, are upheld unless they are shown to be arbitrary and capricious or clearly erroneous. See Appeal Decision 2227 (MANDLY). The rational for these rules is that the fact-finder can consider among other things the demeanor of the witnesses, their tone of voice, body language and other matters that are not captured within the pages of a cold record or hearing transcript. See Appeal Decision 2616 (BYNES). In short, the ALJ is free to find credible or incredible or accept or reject the testimony of any witness so long as his final decision is supported by substantial evidence. See Appeal Decision 1952 (AXEL); see also, Appeal Decision 1958 (NORTON).

After considering the totality of the evidence, the demeanor of the witnesses and their respective interests in the outcome of the proceedings, the undersigned exercises his duties by assigning a greater truthfulness and weight to the testimony of the government's witnesses regarding the events of this case. In light of the more accurate and credible representation of the facts and the truth, the undersigned finds that Captain Nihipali came too close to the Webb family and their kayak when he made a wide turn to back out of the dock. In an effort to fend off the MANA and avoid being pushed further

into the riverbank, Mr. Webb used a paddle to push away from the side of the tour boat. In the process, however, water inadvertently splashed onto the MANA's deck. Thereupon, Captain Nihipali became irate and deliberately turned his vessel around to approach the Webb's kayak a second time. In his anger, Captain Nihipali collided or rammed his larger, more powerful vessel into the back of the Webb's kayak, placing them in grave danger and fear and wrongfully assaulting and battering them with a dangerous weapon, namely his larger, faster, more powerful vessel.

After considering the entire record as a whole, and carefully listening to and watching the witnesses who appeared at the hearing, I make findings that in general I find the five (5) IO's witnesses much more credible than the five (5) Respondent's witnesses. *(Entire Transcript and record).*

The law generally recognizes two types of assault. The first type of assault may be defined as an unlawful attempt, coupled with the present ability to inflict injury on another person. In other words, an attempt to commit a battery with the apparent ability to do so constitutes an assault. In order to prove this first type of assault, the state of mind of the actor is at issue. The second type of assault, however, merely involves putting another person in apprehension of harm when there is the apparent present ability to inflict harm. With this second type of assault, it is enough that the victim is placed in reasonable apprehension of immediate harm. Therefore, it does not matter whether the actor actually intends to inflict harm or whether he is even capable of inflicting such harm. See Appeal Decision 2551 (LEVENE); see also, Appeal Decision 1776 (REAGAN).

Under the above rules, the assault was completed in this case when Respondent placed the Webb family in reasonable apprehension of immediate harm. More specifically, the Webbs became frightened for their lives, believing that Captain Nihipali was attempting to strike or tip their kayak and dump them into the river. The level of danger was elevated when the Webbs, who were sitting only inches off the water in a small plastic boat, watched as Captain Nihipali continued to approach head-on in a large faster motorized vessel, weighing approximately fifteen net tons. After an exchange of angry words and obscenities, Captain Nihipali made a U-turn up the river to navigate back to and close in on the Webbs a second time and actually rammed or collided into the back of their kayak. These actions constitute an assault and battery on the Webbs and their rented kayak. Given the nature of this confrontation, the Webb's apprehension of being thrown into the water and drowning was reasonable. Moreover, the Respondent's claimed desire or intent to obtain the kayak's identification number does not negate the assault and battery by collision. See Appeal Decision 2551 (LEVENE). As such, there is substantial evidence of a reliable and probative nature to establish proof of assault and battery against the Webbs and Respondent deliberately causing a collision between two vessels both containing people.

Finally, actions taken in accordance with company policy are no defense for Captain Nihipali's reckless disregard for safety and caution. The Respondent, as the licensed operator and steersman of the MANA, alone bears the responsibility for turning his vessel around and maneuvering and steering into the Webb family's rented kayak. See Appeal Decision 674 (MILLER). Moreover, it is well-established law that the captain or operator of a vessel is the person in command and, therefore, has the ultimate

responsibility for the safe navigation of the vessel. See Appeal Decision 2293 (SMITH & RUBY); see also, Appeal Decision 2321 (HARRIS). As such, orders from an employer to obtain information such as the kayak's number by any means possible will not excuse the Respondent's negligence and improper operation of his vessel. See Appeal Decision 2367 (SPENCER). The inherent danger of such a practice is that by deliberately getting too close to another vessel and thereby creating a close quarters situation may lead to a collision with another vessel, or in the very least, place the passengers in fear of a collision, which is exactly what happened in this case. While there may be situations in which obtaining information from another vessel is necessary, this does not excuse the vessel operator from failing to use due care to ensure that the vessels do not come into collision with each other and to ensure that the passengers aboard are not placed in danger. In short, Captain Nihipali's actions did not meet the level of a reasonable and prudent person when he deliberately turned his vessel around to wrongfully assault the Webbs and, thereby, endanger the vessels as well as the passengers and crew onboard. Thus, there is ample credible evidence to conclude that Respondent Nihipali's actions and behavior on December 12, 2000 support the charges of misconduct and negligence.

II. Captain Nihipali Violated the Rule of Good Seamanship by Navigating His Vessel Towards a Self-propelled (Paddling) Kayak and Creating a Close Quarters Situation Eventually Resulting in Collision

Respondent Nihipali's attorneys argue that although there is some contradicting testimony among the witnesses regarding the location of the Webb's kayak at the time of the incident they argue, the more credible testimony evinces that the Webbs were wrongly in the middle of the river. Respondent further contends that when he saw the Webb's kayak, he immediately slackened the speed of his tour boat in an attempt to avoid a collision, thereby complying with the Inland Navigation Rules. Despite his efforts to pass safely, however, the Respondent claims that the Webbs proceeded to approach his vessel, violently strike the side of the boat with an oar, and deliberately splash water onto the deck and passengers. I find Respondent's and the hula dancer C. Alesna's testimony not to be credible. Two of Respondent's other witnesses were not present at the scene on the river at the collision and close quarters situation. They were the son and daughter of the Tour Boat Company Owner.

The undersigned is not convinced that the Respondent took all necessary actions to avoid a collision with the Webb's kayak. More specifically, Captain Nihipali's testimony that he slackened the vessel's speed and reversed its momentum when he first observed the Webbs is not deemed credible in light of his refusal to maneuver away from and around the Webb's kayak. Further, when asked why Respondent simply did not move over and avoid the kayakers, Captain Nihipali defiantly and belligerently replied that the starboard or right or south side of the river belongs to him. *(Tr. 320, 351-352).* However, the kayakers also have a right to safely use and share the same river at the same time.

More importantly, the record reviewed as a whole shows that it was Captain Nihipali who reversed his vessel, made a U-turn on the river, and navigated towards, at

and into the Webb's kayak under the guise or claim of obtaining an identification number of the Webb's kayak. Regardless, of whether the vessels were three feet from the bank or slightly closer to the middle of the river, Captain Nihipali alone bears the responsibility for deliberately maneuvering his vessel in the direction of the Webbs and creating a close quarters situation. This is supported even by the testimony of the hula dancer, as well as passengers on board the MANA at the time of the incident, describing how Captain Nihipali turned the boat around after the parties began yelling at each other. *(Tr. 172-173, 90-191).* The hula dancer further testified that the tour boat was so close to the kayak that she could not actually see the kayak from where she stood on deck. *(Tr. 175-176).* Similarly, the kayak tour guide testified credibly that he observed the MANA turn around and proceed back in the direction of the Webb family. *(Tr. 92-93).* Soon afterwards, the Webbs felt the tour vessel's bow or front ram into the back of their kayak. *(Tr. 34, 51, 64-65).* At this point, the MANA was so close to the kayak that Mr. Webb, in an attempt to save his family, was able to fend off the faster tour boat with his short oar as they passed. *(Tr.53-54, 134).* Finally, Captain Nihipali admitted that he turned his vessel around because his employer instructed him to get the name or number of the kayak company and the individuals involved using any way, means or form. *(Tr. 331).*

Three of the IO's witnesses were disinterested witnesses who would tend to tell the truth. I find their testimony and that of the Webb's credible.

By placing the Webb's kayak in a dangerously close position to his own faster and larger vessel, Captain Nihipali failed to comply with Inland Navigation Rule 2, which demands the level of caution exercised by the ordinary practice of seamen. Inland Navigation Rule 2 further provides in relevant part that "due regard shall be had to all

dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved." *See* 33 U.S.C. 2002. Given the testimony of witnesses from both sides, along with the Respondent's own admission, it is undisputed that Captain Nihipali turned his vessel around and proceeded to power up his vessel, steer and navigate towards the Webb's kayak. The Respondent's actions created a danger to his vessel and to near-by kayakers. In addition, the Respondent neglected to anticipate or allow for the fact that other vessels may have been nearing the river bend or turn. As such, the Respondent failed to navigate with the necessary level of caution and disregarded the inherent dangers of navigation and collisions, thereby violating Inland Navigation Rule 2.

III. Captain Nihipali Failed to Navigate with Due Care and Particular Alertness when He Again Violated the Inland Navigation Rule 9(f) when Respondent Neglected to Sound One Prolonged Blast or Whistle as He Neared or Approached the Taiau River Bend or Turn

Respondent and his attorneys contend that sounding one prolonged blast, as required in Inland Navigation Rule 9(f), 33 U.S.C. 2009(f), was inappropriate under the circumstances, and that once a close quarters situation seemed imminent, the emergency or danger blast of five (5) or more sounds or signals as required by Inland Navigation Rule, 33 U.S.C. 2009(d) or Rule 9(d) was the more appropriate signal to use. Although Respondent Nihipali's attorneys fail to cite the applicable law or regulation that details

the use of this purported "emergency signal," he describes it as "five rapid blasts." Captain Nihipali further contends that in this particular case, the danger signal of five rapid blasts trumps the requirement to sound one prolonged blast because he never actually entered the bend, but rather met the Webb's kayak on the straightway. However, Respondent never sounded the danger signal of five (5) rapid blasts nor the required one (1) blast. Respondent sounded no blasts or warning signals.

Respondent fails to recognize that Inland Navigation Rule 9(f), which requires a vessel operator to navigate with due caution when approaching a river bend or turn, is not optional. The applicable safe Inland Navigation Rule specifically states that a vessel "nearing" a bend or turn in a river or narrow channel, where other vessels may be obscured by an intervening obstruction, "shall navigate with particular alertness and caution and shall sound the appropriate signal prescribed in Rule 34(e)." *See,* 33 U.S.C. 2009 and 2034(e) (2002). In turn, Inland Navigation Rule 34(e) requires or mandates that vessels nearing or approaching a bend in a narrow channel, as described above, "shall sound one prolonged blast." *See,* 33 U.S.C. 2034 (2002). Further, there is no provision in the Navigation Rules to substitute the danger signal of five (5) successive blasts in place of one (1) prolonged signal when nearing or approaching a blind river or channel bend or turn. See Appeal Decision 2503 (MOULDS). As such, Navigation Rule 9(f) is mandatory in nature, and a thorough review of the record reveals that no special

circumstances or dangers of navigation existed in this case to permit a departure from the required rules and procedures.[2]

It is irrelevant whether the incident took place in the Taiau Bend or turn or on a straight river section near the bend as the applicable regulations are enforced when a vessel approaches or nears a bend in a river or channel. Therefore, Respondent Nihipali's argument that sounding one prolonged blast was unnecessary since he met the Webbs on the straightaway is unavailing. When Captain Nihipali made a U-turn in the river and proceeded to navigate towards the Webb's kayak, he headed in the direction of the Taiau river bend. At that moment, he was required by Rule 9(f) to notify the Webbs and other vessels that may have been obscured on the opposite side of the Taiau Bend by sounding one prolonged blast. The importance of this safety rule is further evidenced by Captain Nihipali's own admission that he was unable to see whether another vessel was traveling down river as he approached the bend traveling upstream until he actually entered the bend. *(Tr. 323).* Given the credible testimony of witnesses from both parties that no horns or danger signals of any kind were heard from Respondent's vessel, along with the Respondent's own assertion that Rule 9(f) was inappropriate under the circumstances, it is undisputed that no single prolonged blast was ever sounded. As such, Respondent Nihipali failed to navigate with particular alertness and caution as he approached a

[2] In construing and complying with the Inland Navigation Rules, due regard shall be had to avoid all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger. *See*, 33 U.S.C. 2002 (2002). Exceptions to the Rules, however, should only be allowed with great caution and only when imperatively required by the special circumstances of the case. *See,* Appeal Decision 807 (DOEPFNER). The special circumstances rule has been construed as arising only in those dire situations when adherence to the ordinary rules would place the vessels in certain danger and, therefore, should not be treated as a license to disobey the ordinary rule when the navigator takes it in his head to do so. There must be a sudden danger or an unexpected development. *See,* Appeal Decision 2070 (PAYNE); *see also*, Appeal Decision 1925 (ABBOTT).

narrow river bend; thereby Respondent again violated another Inland Navigation Rule, namely, Rule 9(f), *supra*. Respondent also never sounded any five (5) short and rapid blasts as a danger signal either. So Respondent and his attorneys' arguments about it do not apply.

V. CONCLUSION

The preponderance of evidence in the entire record considered as a whole supports finding that the Respondent acted carelessly and recklessly with respect to the navigation and operation of the tour boat MANA O KALANI, resulting in negligence, misconduct and violations of laws or regulations by Respondent. Specifically, Respondent failed to comply with the Inland Navigation Rules by maneuvering his vessel towards, too close and into collision with a kayak carrying the Webb family, wrongfully assaulting the Webbs by creating a close quarters situation, and striking their kayak with his vessel, and failing to navigate with due caution by not sounding the required signal when nearing or approaching a blind river bend or turn. The Respondent's disregard for the inherent dangers of navigation and collision placed the Webb family, as well as the passengers and crew aboard his vessel, in grave danger.

It is well within the duties of the undersigned to order any of a variety of sanctions. See 46 C.F.R. 5.569; see also Appeal Decision 2569 (TAYLOR). The undersigned, however, is not bound by this or the Table of Suggested Orders. See Appeal Decision 2569 (TAYLOR). The Table of Suggested Orders merely serves only as some guidance to an ALJ, and consideration of mitigating or aggravating factors and

evidence does justify a lower or higher Order than the range suggested in the average order table. 46 C.F.R. 5.569(d). After thoughtful and careful consideration of all the circumstances and facts surrounding this case as discussed above, an outright suspension plus probation of Respondent's license and further schooling in the Navigation Rules by Respondent is found to be the appropriate order in this particular case. WHEREFORE,

VI. ORDER

ORDERED that the service of this Decision on the Respondent or his attorneys will serve as notice to the Respondent of his right to appeal, the procedure for which is set forth in 33 C.F.R. 20.1001-20.1003. (Attachment A).

IT IS FURTHER ORDERED that U.S. Coast Guard License No. 779470 and any later such issued licenses or documents issued to the captioned Respondent are hereby Suspended for Twelve (12) Months Outright, Plus an Additional Twenty-four (24) Months on Probation, which if violated and proved will result in Eighteen (18) Months Additional Outright Suspension of Respondent's Coast Guard Issued Licenses and Documents. Respondent is further Ordered to take and pass a proper course on the Inland Navigation Rules. If he cannot pass such a course and test within six (6) months of the date this Order goes into effect, satisfactorily to the course giver and to the Senior Investigating Officer of Marine Safety Office Honolulu, Respondent's license will be Revoked. Respondent is ordered to immediately deposit his License by mail or in person with the Senior Investigating Officer at U.S. Coast Guard Marine Safety Office Honolulu, Hawaii. The Twelve (12) Month Suspension will commence when

Respondent Donald Nihipali's license is so deposited, followed by the Twenty-four (24) Month Probation.

THOMAS E. MCELLIGOTT
Administrative Law Judge
U.S. Coast Guard

Dated this 26th day of September 2002
Houston, Texas