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

UNITED STATES COAST GUARD,

Complainant,

vs.

MARK STEVEN STINZIANO,

Respondent.

Docket Number 2020-0328
Enforcement Activity No. 5783758

DECISION AND ORDER

Issued: April 20, 2022

By Administrative Law Judge: Honorable Michael J. Devine

Appearances:

JENNIFER A. MEHAFFEY, ESQ.
LINEKA N. QUIJANO, ESQ.
LCDR BRETT L. SPRENGER
Suspension & Revocation National Center of Expertise

For the Coast Guard

WILLIAM HEWIG, III, ESQ.
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For Respondent

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I. PROCEDURAL HISTORY

The United States Coast Guard (USCG or Coast Guard) initiated this administrative action seeking revocation of Mark Steven Stinziano's (Respondent) Merchant Mariner Credential (MMC) Nos. [redacted] and [redacted]. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

The Coast Guard issued the original Complaint on August 20, 2020, charging Respondent with five counts of misconduct under 46 U.S.C. § 7703(1)(B), as defined by 46 C.F.R. § 5.27. Specifically, in Charges 1 through 4, the Coast Guard alleged Respondent committed acts that constitute abusive sexual contact, which is prohibited by 18 U.S.C. § 2244(b), while acting as Chief Mate aboard the MAERSK IDAHO between December 7, 2014, and March 10, 2015. In Charge 5, the Coast Guard alleged the acts described in the prior counts, plus other alleged behavior, constituted sexual harassment in violation of Maersk Line, Limited's (MLL) Anti-Discrimination, Anti-Harassment, and Equal Employment Opportunity Policy (MLL Policy).

Respondent, through counsel, filed an Answer on September 9, 2020, admitting that he holds MMC Nos. [redacted] and [redacted], that he was employed by MLL as Chief Mate aboard the MAERSK IDAHO between December 7, 2014, and March 23, 2015, and that the MAERSK IDAHO was a U.S. flagged vessel during his employment, but denying all other jurisdictional and factual allegations. Respondent also asserted various affirmative defenses.

The parties then engaged in extensive discovery, including requesting the issuance of subpoenas under 33 C.F.R. § 20.608 and 46 C.F.R. § 5.301, and production of documents under 33 C.F.R. § 20.601(d).

On April 29, 2021, the Coast Guard filed an Amended Complaint, adding a sixth count of misconduct based on alleged acts of Respondent while aboard the MAERSK IDAHO between November 1, 2015, and February 28, 2016, which purportedly constituted sexual harassment in violation of MLL Policy. Respondent moved to dismiss the Amended Complaint, which was denied, and sought additional discovery, including seeking a subpoena of a Coast Guard witness's academic file from the United States Merchant Marine Academy in King's Point, New York, which was also denied. Respondent's request for remote testimony via Zoom for Government of a supplemental witness was granted. Respondent filed an Answer to the Amended Complaint on June 3, 2020, denying the substantive allegations.

The parties in this case desired from the outset to have an in-person hearing. The hearing was initially scheduled to commence in February 2021, but the closure of courtrooms for in-person hearings due to COVID-19 impacted the trial schedule. By agreement of the parties, the hearing commenced in person in Baltimore, Maryland, on June 8 and 9, 2021. One additional day of testimony was taken through the Zoom for Government video-conferencing application, on June 14, 2021.

After the conclusion of the hearing, Respondent filed seven Motions for Directed Findings, on June 14, 2021, contending the Coast Guard failed to present specific evidence of intent to harass or interfere with work or a connection between the alleged behaviors to the promotion of safety at sea. On June 30, 2021, the ALJ denied Respondent's Motions for Directed Findings, on the basis that the Coast Guard presented sufficient witness testimony and documentary evidence to survive a motion for a directed verdict.

During the hearing, the ALJ made a preliminary ruling denying the Coast Guard's request for official notice that A Serbian Film was pornography, but deferred a final ruling. I still find

this question is not a proper matter for official notice under 33 C.F.R. § 20.806 or Federal Rule of Evidence 201, and to the extent the Coast Guard motion seeks official notice, it is denied. There was significant evidence that the film contained pornography and graphic matters but in view of the finding that Charge 6 of the Amended Complaint is time-barred, the issue is moot.

On August 3, 2021, the parties submitted post-hearing briefs setting forth legal argument and proposed findings of fact and conclusions of law. On August 23, 2021, MLL, a non-party, filed a Motion and Memorandum in Support for Leave to File Amicus Curiae Brief. The ALJ denied the motion in an Order issued on November 1, 2021. The record is now closed and the case is ripe for decision. After careful review of the entire record, including witness testimony, documentary evidence, applicable statutes, regulations, and case law, I find Charges 3, 4, and 5 **PROVEN**, with modifications, as discussed below. I find Charges 1 and 2 **NOT PROVEN**, and Charge 6 is **DISMISSED**.

II. FINDINGS OF FACT

1. At all relevant times mentioned herein, Respondent was a holder of United States Coast Guard-issued MMC No. [redacted], issued August 26, 2014, with an expiration date of August 26, 2019, and MMC No. [redacted], issued August 27, 2019, with an expiration date of August 27, 2024. (Ex. CG-001; Tr. Vol. 1 at 7; Answer to Am. Compl. at Jurisdictional Allegations, No. 1).

2. On December 7, 2014, through March 23, 2015, and from November 1, 2015, through February 28, 2016, the MAERSK IDAHO (O.N. 1217920) was a U.S. flagged vessel, owned and operated by MLL. (Ex. CG-011).

3. On December 7, 2014, through March 23, 2015, Respondent was employed by MLL and assigned to the MAERSK IDAHO as Chief Mate. (Ex. CG-012; Tr. Vol. 2 at 170; Answer to Am. Comp. at Factual Allegations – 1, No. 3).

4. On November 1, 2015, through February 28, 2016, Respondent was employed by MLL and assigned to the MAERSK IDAHO as Chief Mate. (Tr. Vol. 2 at 174-175; Answer to Am. Comp. at Factual Allegations – 6, No. 5).

5. From on or about July 30, 2016, until March 16, 2020, Respondent was embarked on oceangoing deep-draft vessels in operation outside of the United States for 566 days. (Ex. CG-012; Tr. Vol. 1 at 154).

6. From November 2014 through March 2015, [redacted] (hereinafter "Deck Cadet 1"), a midshipman from the U.S. Merchant Marine Academy, was assigned to and working aboard the MAERSK IDAHO as a deck cadet. (Ex. CG-005; Tr. Vol. 1 at 54).

7. Between December 7, 2014, and March 10, 2015, on several occasions, Respondent, with his hand, touched Deck Cadet 1's buttocks, through clothing, and without his permission. (Tr. Vol. 2 at 57).

8. Between December 7, 2014, and March 10, 2015, on two occasions, Respondent pretending to make a joke in front of other crewmembers approached Deck Cadet 1 from behind and simulated performing a sex act by contacting Deck Cadet 1's buttocks, through clothing, with other crew members present and without Deck Cadet 1's permission. (Tr. Vol. 2 at 58-59; Ex. CG-005; Ex. CG-005A at 09:46, 24:07).

9. Between December 7, 2014, and March 10, 2015, MLL's Anti-Discrimination, Anti-Harassment and Equal Opportunity Policy (MLL Policy) was in effect and applicable to all MLL employees. (Tr. Vol. 1 at 85-86; Tr. Vol. 2 at 127; Ex. CG-007).

10. Between December 7, 2014, and March 10, 2015, Respondent drew genitalia on Deck Cadet 1's hardhat and required him to wear it in front of the crew. (Tr. Vol. 2 at 63-64, 97-98).

11. Between December 7, 2014, and March 10, 2015, on the bridge of the MAERSK IDAHO Respondent placed a pen in Respondent's buttocks, and then held out the pen to Deck Cadet 1 to indicate that it now smelled like Respondent's buttocks. (Tr. Vol. 1 at 171-172; Tr. Vol. 2 at 66-67; Ex. CG-018).

12. Between December 7, 2014, and March 10, 2015, Respondent directed Deck Cadet 1 to use nicknames when they spoke over the radio, wherein Deck Cadet 1 was "butter cake" and Respondent was "daddy." (Tr. Vol. 2 at 64, 96).

13. Between December 7, 2014, and March 20, 2015, Respondent pretended to make a joke by threatening to punch Deck Cadet 1 in the genitals. (Tr. Vol. 1 at 175; Tr. Vol. 2 at 61).

III. PRINCIPLES OF LAW

The purpose of Coast Guard Suspension and Revocation (S&R) proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Pursuant to 46 C.F.R. § 5.19, Administrative Law Judges have the authority to suspend or revoke a credential or endorsement in a hearing for violations arising under 46 U.S.C. §§ 7703 and 7704, including charges of misconduct under 46 U.S.C. § 7703(1)(B).

A. Burden of Proof

The Administrative Procedure Act (APA), codified at 5 U.S.C. §§ 551-559, applies to Coast Guard S&R trial-type hearings before United States Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. See 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof to prove the charges are supported by a preponderance of the evidence. See 33 C.F.R. §§ 20.701, 20.702(a).

"The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Securities & Exchange Comm'n, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California, 508 U.S. 602, 622 (1993). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that the respondent more likely than not committed the charged violation.

B. Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). For S&R actions based on charges of misconduct, the Coast Guard must establish the mariner was acting under the authority of the credential when the misconduct occurred. See 46 U.S.C. § 7703(1)(B). A mariner acts under the authority of his or her credential when 1) employed in the service of a vessel and the holding of

the credential is required by law, regulation, or the employer's conditions; or 2) engaging in official matters regarding the credential, such as applying for renewal, taking examinations for endorsements, or requesting duplicate or replacement credentials. 46 C.F.R. § 5.57.

In this case, the Coast Guard established, and Respondent did not contest, the facts that demonstrate Respondent was acting under the authority of his MMC at the time of the alleged acts of misconduct. Respondent admitted in his Answer that he holds Coast Guard-issued MMC Nos. [redacted] and [redacted]. (Answer to Am. Compl. at Jurisdictional Allegations, No. 1; Ex. CG-001; Tr. Vol. 1 at 14). Respondent admitted in his Answer that he served as Chief Mate on the vessel MAERSK IDAHO from December 7, 2014, until March 23, 2015, and also from November 1, 2015, until February 28, 2016. (Answer to Am. Comp. at Factual Allegations – 1, No. 3; Factual Allegations – 6, No. 5). At the time he served as Chief Mate, MAERSK IDAHO was required by regulation to have a properly-credentialed Chief Mate, and thus the Coast Guard established Respondent was acting under the authority of his credential at the time of the alleged acts. (Tr. Vol. 1 at 123; Ex. CG-011). 46 C.F.R. § 5.57(a)(1).

C. Misconduct

Misconduct is human behavior which violates some formal, duly established rule. 46 C.F.R. § 5.27. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, shipping articles, and similar sources. Id. Furthermore, it is an act which is forbidden, or a failure to do that which is required. Id.

Here, the Coast Guard asserted six charges of misconduct in the Amended Complaint. In Charges 1 through 4, the Coast Guard alleged Respondent committed misconduct by engaging in abusive sexual contact, which is prohibited by 18 U.S.C. § 2244(b), while serving as Chief Mate on the MAERSK IDAHO. In Charges 5 and 6, the Coast Guard alleged Respondent

committed misconduct by engaging in sexual harassment while serving as Chief Mate on the MAERSK IDAHO, in violation of MLL's Anti-Discrimination, Anti-Harassment, and Equal Employment Opportunity Policy.

D. Time Limitations for Serving a Complaint

The Coast Guard must serve an S&R action on a mariner within the limitations period prescribed by 46 C.F.R. § 5.55, which varies depending on the charged offense. If the Coast Guard fails to serve the mariner within the limitations period, it is barred from bringing the Complaint. See Appeal Decision 2608 (SHEPHERD) (1999) at *3-4.

For a charge based on conviction of a dangerous drug law, or based on use of a dangerous drug, the respondent must be served with a complaint within ten years of the conviction or the use of a dangerous drug. 46 C.F.R. § 5.55(a)(1). For a charge of misconduct for an offense listed in 46 C.F.R. §§ 5.59(a) or 5.61(a),[1] the Coast Guard must serve the respondent within five years of the alleged commission of the offense. 46 C.F.R. § 5.55(a)(2). For all other offenses, the Coast Guard must serve the mariner within three years of the alleged prohibited acts. 46 C.F.R. § 5.55(a)(3). When computing the limitations periods, the Coast Guard may exclude any period of time when the respondent could not attend a hearing, or be served charges, by reason of being outside of the United States or by reason of being in prison or hospitalized. 46 C.F.R. § 5.55(b).

[1] These misconduct offenses are: wrongful possession, use, sale, or association with dangerous drugs; assault with a dangerous weapon; misconduct resulting in loss of life or serious injury; rape or sexual molestation; murder or attempted murder; mutiny; perversion; sabotage; smuggling of aliens; incompetence; and interference with master, ship's officers, or government officials in performance of official duties; and wrongful destruction of ship's property.

IV. DISCUSSION

A. Time Limitations for Serving Complaint and Amended Complaint

The Coast Guard brings six charges of misconduct under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27 in the Amended Complaint. In Charges 1 through 4, the Coast Guard alleges Respondent violated 18 U.S.C. § 2244(b), which prohibits abusive sexual contact. In Charges 5 and 6, the Coast Guard alleges Respondent violated his employer's Anti-Harassment Policy. The Coast Guard served the original Complaint on Respondent on September 1, 2020. (See Ret. of Svc. filed September 2, 2020). The Coast Guard served the Amended Complaint on May 4, 2021. (See Ret. of Svc. of Am. Compl. filed May 4, 2021).

The Coast Guard alleged in its Complaint and Amended Complaint, as a matter in aggravation to each Charge, that Respondent's conduct constituted sexual molestation pursuant to 46 C.F.R. § 5.61(a)(3). If the undersigned ALJ finds that the charged violations constitute an offense listed in 46 C.F.R. § 5.61(a), the limitations period is five years from the date of the alleged acts, excluding any time that Respondent could not be served by reason of being outside of the United States, on foreign voyages. 46 C.F.R. § 5.55(a)(2) and (b).

If the ALJ finds a charged violation is misconduct but does not constitute any of the offenses listed in 46 C.F.R. § 5.61(a), the limitations period is three years from the date of the alleged misconduct. 46 C.F.R. § 5.55(a)(3); See Appeal Decision 2608 (SHEPHERD) (1999), supra.

1. Respondent's Sea Time Outside United States Excluded from Time Limitations Period

When computing the limitations period, any time that Respondent could not be served by reason of being outside of the United States, including time Respondent was serving on foreign voyages, is excluded from the limitations period. 46 C.F.R. § 5.55(b); see Appeal Decision 2608

(SHEPHERD) (1999) at *4. The Coast Guard presented the Sea Service Report of Respondent through the testimony of Investigating Officer LCDR Brett Sprenger. (Ex. CG-012). The report shows Respondent was serving aboard vessels on foreign voyages for up to 624 days between July 30, 2016, and March 16, 2020. LCDR Sprenger testified that Respondent was at sea on foreign voyages for 566 days during that time period. (Ex. CG-012; Tr. Vol. 1 at 126).

LCDR Sprenger noted the Sea Service Report is not entirely accurate. The Sea Service report did not include the November 1, 2015 through February 28, 2016 voyage on the MAERSK IDAHO, referenced in Charge 6, to which Respondent admitted in his Answer to the Amended Complaint. (Tr. Vol. 1 at 151-153). LCDR Sprenger testified that the Coast Guard calculated Respondent's foreign sea time by referring not only to the Sea Service Report, but also discharge paperwork and crew lists prepared for each voyage by his employer. (Tr. Vol. 1 at 126-127, 151; Ex. CG-014). I find that through the testimony of LCDR Sprenger and the evidence of the Sea Service Report and crew list of the MAERSK IDAHO for the November 2015 through February 2016 voyage, the Coast Guard established Respondent was not available to be served with a complaint by reason of being outside of the U.S. for at least 566 days.

2. Application of Five-Year Limitations Period

a. Charges 1 – 5 of the Original Complaint

For Charges 1 through 5, the earliest alleged acts of misconduct occurred December 7, 2014, and the latest alleged acts occurred March 10, 2015. The Coast Guard served Respondent with the original Complaint, which included Charges 1 through 5, on September 1, 2020. If the three-year limitations period of 46 C.F.R. § 5.55(a)(3) governs, the Coast Guard was required to

serve Respondent with the Complaint no later than September 27, 2019.[2] The Coast Guard did not serve Respondent with the original complaint until September 1, 2020; therefore, violations within the three-year limitations period are time barred unless a longer limitations period is applicable. If the five-year limitations period of 46 C.F.R. § 5.55(a)(2) applies, the Coast Guard served its Complaint, for Charges 1 through 5, within the limitations period, as the earliest expiration of the limitations period would have been June 25, 2021.[3] Therefore, Charges 1 through 5 should be analyzed on the merits; however, a finding of proved for Charges 1 through 5 must also include a finding that the violation constitutes an offense within 46 C.F.R. § 5.61(a) to apply the five-year limitations period set forth in 46 C.F.R. § 5.55(a)(2), or the charge will be time-barred.

b. Charge 6 of the Amended Complaint

For Charge 6, which was not included until the Coast Guard filed its Amended Complaint, the latest alleged offense occurred February 28, 2016. Under a three-year limitations period, the latest the Coast Guard could have served Respondent with notice of this charge was September 16, 2020.[4] The Coast Guard served the Amended Complaint on May 4, 2021. If a five-year limitations period under 46 C.F.R. § 5.55(a)(2) applies, the Coast Guard would have served the Amended Complaint, for purposes of Charge 6, within the limitations period.[5]

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[2] This calculation considers the latest alleged offense date of March 10, 2015, adding three years for the limitations period, which brings the service date to March 10, 2018, and then adding an additional 566 days, which brings the service date to September 27, 2019.

[3] This date was calculated considering the earliest alleged offense date of December 7, 2014, adding five years, to bring the service date to December 7, 2019, and then adding 566 days, bringing the service date to June 25, 2021.

[4] This date was calculated considering the latest alleged offense date of February 28, 2016, adding three years, to bring the service date to February 28, 2019, and then adding 566 days, bringing the service date to September 16, 2020.

[5] The earliest expiration of the time limitations period for Charge 6 would be May 21, 2022. This date was calculated considering the earliest alleged offense date of November 1, 2015, adding five years to bring the service date to November 1, 2020, and adding 566 days to bring the service date to May 21, 2022.

Accordingly, the undersigned ALJ will consider the merits of each charge to determine if the alleged acts were proven to be acts of misconduct within the governing statute and regulation. If the charges are sufficiently supported by the evidence, the ALJ will then consider whether such acts constitute an offense listed within 46 C.F.R. § 5.61(a), triggering the five-year limitations period. 46 C.F.R. § 5.55(a)(2).

B. <u>Analysis of Misconduct Charges</u>

The Coast Guard alleges in each of the six charges of the Amended Complaint that Respondent committed misconduct, but the underlying duly established rule alleged to have been violated varies between the charges.

In the following subsections, the undersigned ALJ will discuss Charges 1 and 2 together, as they both concern alleged abusive sexual contact against [redacted] (hereinafter "Second Mate"); the ALJ will discuss Charges 3 and 4 together, as they both relate to alleged abusive sexual contact against Deck Cadet 1; the ALJ will discuss Charge 5 separately, as this charge concerns alleged violations of MLL's Anti-Discrimination, Anti-Harassment, and Equal Employment Opportunity Policy from December 2014 through March 2015; and finally, the ALJ will also discuss Charge 6 separately, as this charge concerns alleged violations of MLL's Anti-Discrimination, Anti-Harassment, and Equal Employment Opportunity Policy from a different voyage of the MAERSK IDAHO from November 2015 through February 2016.

1. <u>Charges 1 and 2 – Acts of Alleged Abusive Sexual Contact Against Second Mate</u>

In Charge 1 of the Complaint and Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct on or about January 14, 2015, while conducting a lifeboat drill onboard the MAERSK IDAHO, by intentionally placing his hand on Second Mate's inner thigh, through clothing, without Second Mate's permission, with the intent to harass Second Mate. The Coast Guard asserts this behavior

was abusive sexual contact, which is prohibited under 18 U.S.C. § 2244(b). The Coast Guard further asserts this behavior constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

In Charge 2 of the Complaint and Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct on or about January 17, 2015, by approaching Second Mate from behind and, using his hand, touching Second Mate's buttocks and genitals, through clothing, without his permission, with the intent to harass Second Mate. The Coast Guard asserts this behavior was abusive sexual contact, which is prohibited under 18 U.S.C. § 2244(b). The Coast Guard further asserts this behavior constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

The Coast Guard presented the testimony of Second Mate in support of these charges. (See Tr. Vol. 1 at 156-222; Tr. Vol. 2 at 4-48). The Coast Guard also submitted written statements by Second Mate that recounted the same, or substantially similar, allegations. The first of two statements was attached to Second Mate's February 3, 2015 performance evaluation. (Ex. CG-003). The other statement was included in a grievance form submitted by Second Mate on April 19, 2019, to the International Organization of Masters, Mates & Pilots. (Ex. CG-004). The Coast Guard additionally moved summaries of interviews and an audio recording of an interview that Second Mate gave to Coast Guard investigators into evidence. (Exs. CG-002, CG-002A, CG-009). The Coast Guard did not present testimony or statements by any witnesses other than Second Mate, with direct knowledge of the actions alleged to have occurred in the life boat on or about January 14, 2015, or the bridge on or about January 17, 2015.[6]

The ALJ must assess the credibility of testimony and weight of the evidence presented at the hearing to determine whether or not the charges are proven. On direct examination, Second

[6] The Coast Guard also presented the testimony of Special Agent Denise Robinson of the Coast Guard Investigative Service, and Investigating Officer Charles Wolfe of USCG Sector New York, who each testified to information they received from Second Mate during their investigation of this matter.

Mate testified regarding the two alleged instances of physical contact by Respondent without his permission. (Tr. Vol. 1 at 159-170). According to Second Mate, during a lifeboat drill on or around January 14, 2015, Respondent and he were in a lifeboat together. Second Mate testified that Respondent sat directly next to him in the small space of the lifeboat, and Respondent placed his hand on Second Mate's inner thigh and said something to the effect of, "We're trapped in here, now." (Tr. Vol. 1 at 164-165). For the second alleged incident, Second Mate testified that on or around January 17, 2015, Respondent came up behind him on the bridge and slapped Second Mate's buttocks, also touching his testicles, through his clothing, and Respondent stated, "I got a good one there." (Tr. Vol. 1 at 169).

On cross examination, Second Mate admitted there were no witnesses that could corroborate his version of the alleged incidents. (Tr. Vol. 2 at 34). There was no evidence presented that anyone else present on the MAERSK IDAHO at the same time as Second Mate had any knowledge of the alleged incidents. There is also no corroboration of the allegations of Charges 1 and 2 in any of the witness statements entered into evidence by the Coast Guard. (See Tr. Vol. 2 at 69, 72). Respondent testified, wholly denying Second Mate's accounts of both incidents. (Tr. Vol. 2 at 163-168).

Determinations regarding the credibility of witnesses and inconsistencies in the evidence are within the purview of the ALJ. See Appeal Decision 2519 (JEPSON) (1991) at *3 and Appeal Decision 2160 (WELLS) (1979) at *3. Corroboration of a single witness's testimony is not required, but it is an important consideration in weighing the evidence. Although the testimony of a single credible witness may be considered sufficient in some cases, the ALJ must consider all the evidence of record in resolving conflicting versions of events. See Appeal Decision 1173 (YOUNG) (1960) and Appeal Decision 1980 (PADILLA) (1973).

The broad-based attack on Second Mate's credibility contained in Respondent's Post-Hearing Brief is not supported by the record and it appears to be based at least in part on Respondent exhibits that were rejected and not admitted into evidence. Special Agent Denise Robinson testified that at one point she discussed Second Mate's allegations with an Assistant United States Attorney from the Southern District of New York who eventually declined to pursue a criminal case against Respondent. (Tr. Vol. 1 at 45, 52). The determination by the U.S. Attorney for the Southern District of New York to decline prosecution of a criminal action against Respondent does not affect an independent administrative action regarding Respondent's suitability to hold an MMC.[7] Appeal Decision 2430 (BARNHART) (1986). The purpose of the S&R process is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. However, there are questions of concern regarding the weight to be accorded Second Mate's testimony. There was no evidence that he raised a contemporaneous concern regarding Respondent's alleged physical abusive sexual contacts at the time the incidents allegedly occurred. The evidence shows that Second Mate's first complaint regarding the alleged incidents occurred on his final day aboard the MAERSK IDAHO, February 3, 2015, after receiving his performance evaluation. (Ex. CG-003). That performance evaluation was written by Respondent, and Respondent was critical of several aspects of Second Mate's performance. Id.

Respondent testified to three specific instances where he criticized Second Mate's performance of duties during the voyage. In one instance, Respondent said Second Mate failed to take decisive action to get a lifeboat under control when it was being lowered into the water during a lifeboat drill. (Tr. Vol. 2 at 150-153). According to Respondent, the brake controlling

[7] Tr. Vol. 1 at 65-66, testimony of Special Agent Robinson.

the lowering mechanism started to fail, but Second Mate, who had the responsibility to activate the brake, did nothing. (Tr. Vol. 2 at 153). Seeing Second Mate freeze, Respondent purportedly sprang into action to stop the lifeboat from falling all the way to the water. Id.

In the second instance, Respondent testified that Second Mate exhibited a poor attitude toward an inspector during a port inspection of the vessel. (Tr. Vol. 2 at 155-156). According to Respondent, the inspector found errors in the charts and navigation equipment which were the responsibility of the Second Mate. (Tr. Vol. 2 at 155). Further, Respondent testified—and Second Mate's testimony and written statements corroborate this account—that Second Mate accidentally deployed a flare and caused the bridge to fill with orange smoke during the inspection. (Tr. Vol. 2 at 156).

Finally, in the third instance, Respondent testified that the vessel had to be re-routed at one point, and Second Mate was tasked by the Captain with plotting the new waypoints. (Tr. Vol. 2 at 158-159). Respondent testified that Second Mate acted very distressed and uneasy about having to plot the additional waypoints, even though this task was well within the Second Mate's duties. (Tr. Vol. 2 at 159).

Second Mate testified that 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. (Tr. Vol. 1 at 187).

In addition to the lack of an immediate complaint, there is no corroboration of Second Mate's version of the incidents from any witness with first-hand knowledge. [redacted] [redacted] was the master of the MAERSK IDAHO at the time Second Mate first reported the incidents in his comments he submitted in response to his performance evaluation. [redacted]

had joined the vessel only about one week prior to Second Mate's departure. (Tr. Vol. 1 at 162). ████████ started an investigation into the incidents after receiving Second Mate's comments attached to the performance evaluation. He interviewed several crewmembers, including ██ ████ (hereinafter "Engine Cadet 1"), a midshipman from the U.S. Merchant Marine Academy who was assigned to work on the MAERSK IDAHO as an engine cadet, and who was Deck Cadet 1's sea partner. (Tr. Vol. 2 at 54). Engine Cadet 1's interview statement, and the interview statements of other crewmembers obtained by ████████, do not support the evidence presented by the Coast Guard regarding Second Mate's allegations. (Exs. R-U, R-V, R-X, R-Z, R-AA, and R-BB). Respondent testified that Second Mate's allegations that he touched him in the lifeboat and on the bridge never occurred. (Tr. Vol. 2 at 163-169). Respondent also denied all of the allegations regarding sexual joking and hazing of cadets. (Tr. Vol. 2 at 169-212). I do not find Respondent's testimony denying all of the alleged conduct regarding sexual jokes, crude behaviors, and mistreatment of cadets to be credible. Respondent admitted to "off color" humor. (Tr. Vol. 2 at 188-193). However, when viewing the issue of hazing or harassment the intent of the respondent is not the proper focus. See generally MLL Policy. (Ex. CG-004). The impact on the individual and their perception on the receiving end of the conduct is a critical part of deciding the issue. Overall, the evidence, including witness testimony and documentary evidence, does not support Respondent's blanket denial of the assertions regarding his conduct in relation to the cadets.

After consideration of all of the evidence of record, I do not find the testimony of the Second Mate fully credible. In view of the lack of any corroboration of the alleged abusive sexual contact, and considering the evidence indicating a basis for bias because of the disagreements and friction between Second Mate and Respondent, the weight to be given Second

Mate's testimony regarding Charges 1 and 2 is limited. This consideration is reviewed in combination with conflicting evidence from other witnesses, and including the statements and responses to interviews provided by other crew members to [redacted]. (Exs. R-U, R-V, R-X, R-Z, R-AA, and R-BB).

Throughout the S&R process, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a). I find the evidence presented in this matter is not sufficient to prove Charges 1 and 2 by a preponderance of the evidence. Therefore, I find Charges 1 and 2 alleging Respondent committed misconduct by engaging in abusive sexual contact or sexual molestation against Second Mate on or about January 14, 2015, and January 17, 2015, are not proven.

2. Charges 3 and 4 – Alleged Misconduct by Acts of Abusive Sexual Contact Against Deck Cadet

In Charge 3 of the Complaint and Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct against Deck Cadet 1, between December 7, 2014, and March 10, 2015, by touching Deck Cadet 1's buttocks, through clothing, without Deck Cadet 1's permission, and with the intent to harass Deck Cadet 1. The Coast Guard asserts this behavior was abusive sexual contact, which is prohibited under 18 U.S.C. § 2244(b). The Coast Guard further asserts this behavior constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

In Charge 4 of the Complaint and Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct between December 7, 2014, and March 10, 2015, while conducting a lifeboat drill, by grabbing Deck Cadet 1 from behind and simulating sexual acts, without Deck Cadet 1's permission, and with the intent to harass Deck Cadet 1. The Coast Guard asserts this behavior was abusive

sexual contact, which is prohibited under 18 U.S.C. § 2244(b). The Coast Guard further asserts this behavior constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

Deck Cadet 1 attended the United States Merchant Marine Academy (USMMA) at Kings Point, New York. He served as a deck cadet aboard the MAERSK IDAHO from November 2014 to March 2015, as part of required training in keeping with 46 U.S.C. § 51307. (Tr. Vol. 2 at 54; Tr. Vol. 3 at 9).[8] While serving on the MAERSK IDAHO, Deck Cadet 1 was a direct report subordinate to Respondent, the Chief Mate. (Tr. Vol. 2 at 56). Deck Cadet 1 testified Respondent "was in charge of whatever I did every day, what tasks I would be given, what watches I would stand, and things like that." (Tr. Vol. 2 at 56).

Deck Cadet 1 testified that Respondent generally engaged in "a lot of sexual, sexually natured jokes" with regard to him and other cadets on the MAERSK IDAHO, which made Deck Cadet 1 feel uncomfortable. (Tr. Vol. 2 at 61). Second Mate, who served with Deck Cadet 1 aboard the MAERSK IDAHO, also testified to behaviors that he witnessed Respondent engaging in with regard to Deck Cadet 1, including pretending to punch Deck Cadet 1's testicles, using sexually-oriented nicknames, and stating "cadets are not people." (Tr. Vol. 1 at 175-176).

Regarding the specific allegations of Charge 3, Deck Cadet 1 testified that "on several occasions" Respondent engaged in nonconsensual touching as part of a joke by groping Deck Cadet 1's buttocks, which Deck Cadet 1 referred to as his "behind." (Tr. Vol. 2 at 57). Regarding Charge 4, Deck Cadet 1 testified that on two occasions, Respondent came up behind him and engaged in nonconsensual touching simulating "a groping or sexual like act." (Tr. Vol. 2 at 58). Deck Cadet 1 clarified that Respondent touched Deck Cadet 1's "behind" with his (Respondent's) groin. (Tr. Vol. 2 at 58-59). The Deck Cadet stated that the contact was

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[8] Cadets of the United States Merchant Marine Academy are also appointed as midshipmen and obligated to complete sea year training. 46 U.S.C. §§ 51307, 51311.

intentional and although Respondent may have considered this contact to be a joke, Deck Cadet 1 did not consider it funny. (Tr. Vol. 2 at 59-60). Deck Cadet 1 testified that this occurred on two occasions, once when conducting a lifeboat drill and once when Deck Cadet 1 was plotting at the chart table. (Tr. Vol. 2 at 58-59). In an interview given by Deck Cadet 1 to the Coast Guard Investigative Service on September 20, 2019, Deck Cadet 1 gave a consistent account, stating Respondent stood behind him and pretended to "hump" him or have sex with him and did this "in front of everyone," and that Respondent "touched my butt." (Ex. CG-005, Ex. CG-005A at timestamps 9:46, 24:07). Second Mate testified that he witnessed Respondent "come up behind him [Deck Cadet 1], wrap his arms around him, like, and then just start humping him…" (Tr. Vol. 1 at 177).

Deck Cadet 1 also testified to the effect of Respondent's behavior. He stated "…I guess you would consider it, it was like groping, like a playful groping, and then like touching behind, like as part of, he'd consider a joke." (Tr. Vol. 2 at 57). When the Coast Guard inquired, "Was there some indications from Chief Mate Stinziano that he intended it as a joke or he wanted you to think that it was a joke?" Deck Cadet 1 responded, "I'm not quite sure what his intentions for me were. But I didn't consider it very funny." (Tr. Vol. 2 at 60). When testifying regarding Respondent making sexual remarks, Deck Cadet 1 said, "I didn't feel very comfortable with it, I would say. I didn't join, not that I can recall did I join in the joking." Deck Cadet 1 said during his testimony, "it just made me feel like less of a person, I would say, the treatment I received on the vessel." (Tr. Vol. 2 at 84).

In his interview with the Coast Guard Investigative Service, Deck Cadet 1 stated Respondent's actions "messed me up pretty good." (Ex. CG-005, Ex. CG-005A at timestamp 8:20). Also during that interview, Deck Cadet 1 stated that when he left the MAERSK IDAHO,

he wanted to drop out of school due to his experience on the ship. (Ex. CG-005, Ex. CG-005A at timestamp 22:42). Deck Cadet 1 testified at the hearing, regarding Respondent's behaviors, "I perceived it as demeaning, I'd say. It didn't make me feel very great about myself." (Tr. Vol. 2 at 64, 93).

As discussed above, after Second Mate made complaints about Respondent in Second Mate's comments attached to his performance evaluation, [redacted] performed an investigation, including interviewing members of the crew. Deck Cadet 1 was interviewed by [redacted] and provided a typewritten statement. (Exs. CG-015, CG-016). Deck Cadet 1's responses in these documents indicate he considered Respondent's humor off-color but not abusive or sexually violating. This clearly conflicts with Deck Cadet 1's hearing testimony and subsequent statements. When questioned about the differences between his statements in February 2015 and his later statements and current testimony, Deck Cadet 1 testified that he wanted to get through his time on the ship to complete sea time and training for graduating and sitting for a license. (Tr. Vol. 2 at 70-71). Additionally, he testified that he was now able to testify about the alleged events in a safe environment. (Tr. Vol. 2 at 75-80).

Considering all of the evidence, including having observed all of the witnesses' demeanor at the hearing, I find the testimony of Deck Cadet 1 credible and persuasive that he did not give permission for the physical contact by Respondent, and even if Respondent was intending a joke, Deck Cadet 1 did not join in the activity and considered Respondent's behavior degrading or humiliating. Deck Cadet 1's testimony at the hearing which differed from prior statements was at least partially corroborated in regard to Respondent's off-color or crude sense of humor. Second Mate also testified regarding the actions of Respondent in regard to sexually-oriented jokes and conduct in relation to the cadets onboard the MAERSK IDAHO. (Tr. Vol. 1

at 174-181; Ex. CG-003, Ex. CG-004). Engine Cadet 1's interview form responses to [redacted] [redacted] did not support Second Mate's allegations and did not consider Respondent's conduct to be inappropriate but did indicate Respondent's statement that "cadets are not people" was obviously kidding and not serious. (Ex. R-V). The statements of [redacted] (hereinafter "Engine Cadet 2") also support the evidence of Respondent's sense of humor related to sexually oriented matters and pornography (Exs. CG-13, CG-13A; Tr. Vol. 3 at 11-20). Respondent's own testimony supports the position that his humor was off-color and can be characterized as profane at times. (Tr. Vol. 2 at 190-194).

Respondent's argument regarding Deck Cadet 1's credibility in relation to his prior statements has been fully considered. The evidence shows Deck Cadet 1 gave conflicting accounts regarding Respondent's conduct in a written statement to [redacted] and in an interview with [redacted]. (Exs. CG-015, CG-016). Deck Cadet 1's previous statement and interview responses were made in 2015 while he was still onboard the MAERSK IDAHO. At the hearing, Deck Cadet 1 testified his statements at the time were not accurate, but that he gave them because he "wanted to keep everything as easy as possible for…the rest of my time on the vessel. I didn't want to…stir up anything. I figured it'd be easiest just to say nothing happened and make it go away than make any noise about it." (Tr. Vol. 2 at 78). In view of the senior status of Respondent and the junior status of Deck Cadet 1, who needed to complete USMMA qualifications on the vessel under the authority of Respondent, Deck Cadet 1 was intimidated from complaining about Respondent's conduct at the time.

Engine Cadet 1 provided a statement to [redacted], as well, in which he stated the allegations against Respondent were grossly exaggerated, but that is not inconsistent with Respondent having an off-color sense of humor. (Ex. R-U; Ex. R-V). The record shows that

after Second Mate reported the alleged behaviors in his response to his evaluation, MLL issued Respondent a letter that stated the "findings of this investigation were inconclusive" but suggested that Respondent take a training course on harassment and discrimination. (Ex. R-W). I find Respondent's complete denial of his conduct in regard to his jokes, crude sense of humor, and contact with Deck Cadet 1 not credible. (Tr. Vol. 2 at 169-170). Considering all of the testimony and evidence, I find the Coast Guard presented substantial and preponderant evidence that Respondent did engage in the nonconsensual touching set forth in Charges 3 and 4 and this conduct constitutes an assault and battery and hazing of Deck Cadet 1.

a. Did Respondent's Actions Against the Deck Cadet Constitute "Abusive Sexual Contact"?

The Coast Guard asserts that Respondent's actions constitute "abusive sexual contact" pursuant to 18 U.S.C. 2244(b). That statute is titled "Abusive sexual contact," and provides:

> (b) In other circumstances – **Whoever, in the special maritime** and territorial **jurisdiction of the United States** or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, **knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both**.
>
> 18 U.S.C. 2244(b) (emphasis supplied).

The definition of "sexual contact" is found in 18 U.S.C. 2246, which is titled "Definitions for this chapter":

> (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
>
> 18 U.S.C. 2246(3).

The statute referenced as the basis for the misconduct charges is a felony offense in Chapter 109A of Title 18 United States Code – Sexual Abuse. Although the statute has broad

language it includes a criminal intent element of knowingly engaging in abusive sexual contact. It may provide a basis for the Coast Guard to argue the 5-year limitations period in 46 C.F.R. § 5.55(a)(2) applies to these charges, however, the intent of the statutory scheme should not be expanded beyond its intent to address felonious sexual abuse conduct. As discussed above, the Coast Guard presented evidence that Respondent engaged in hazing by nonconsensual touching of Deck Cadet 1's buttocks through his clothing, and that on two occasions, Respondent approached Deck Cadet 1 from behind and as a supposed joke pressed his groin against the buttocks of Deck Cadet 1, to simulate Respondent having sex with Deck Cadet 1.

The Coast Guard also presented evidence that Respondent performed these actions in front of other crew members, in the context of a pattern of crude, sexually-oriented joking behavior. (Exs. CG-005, CG-006, CG-009, CG-018, CG-017A; Tr. Vol. 1 at 138-139; 171-176). Deck Cadet 1 testified that Respondent acted as if these behaviors were all "jokes," and that he did not consider Respondent to be acting with malice or that he was a rapist; however, Deck Cadet 1 did not find them funny and these actions left Deck Cadet 1 feeling demeaned. (Tr. Vol. 2 at 57-61, 64, 93-96). However, Deck Cadet 1's testimony that Respondent was not acting with malice and was not a rapist is also credible and persuasive and supports a finding that Respondent's actions were inappropriate hazing but not taken as a knowing abusive sexual contact. Considering all of the evidence as a whole and specifically including Deck Cadet 1's testimony that he did not consider Respondent to be acting with malice, there is not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act. Cf. U.S. v. Sneezer, 900 F2d 177 (9th Cir. 1990). I find that the Coast Guard did not prove Respondent's conduct was "abusive sexual contact" within the meaning of 18 U.S.C. § 2244(b). I also find the Coast Guard did not prove Respondent's conduct was sexual

molestation which would also be a basis to fit within the 5-year limitation period. 46 C.F.R. § 5.55(a)(2). However, based on the evidence an ALJ may find a lesser included violation of misconduct proved. E.g. Appeal Decision 2452 (MORGANDE) (1987) (finding mutual combat a lesser included offense of one of the specifications).

As noted above, Respondent's motion for a directed verdict was denied, and Respondent's argument that there is insufficient evidence of misconduct as a matter of law because of Respondent's denial and characterization of his "joking" is rejected. I find there is no factual basis in this case for excusing the acts of nonconsensual touching as a joke or horseplay. See Appeal Decision 1845 (MAULL) (1971). Intent to injure is not an element of assault, so a specific intent to physically injure Deck Cadet 1 is not required to prove misconduct. Appeal Decision 2273 (SILVERMAN) (1982). It is clear from the testimony of Deck Cadet 1 that he did not appreciate Respondent's actions in touching him, did not join in the joke, and did not care for Respondent's sexual jokes. Respondent's conduct as a senior officer aboard MAERSK IDAHO in relation to a very junior subordinate is hazing and also constitutes an assault and battery of the Deck Cadet.

An assault is a demonstration of unlawful intent by one person to inflict immediate injury or offensive contact on the person of another then present. Am. Jur. Proof of Facts 3d 613. It is frequently defined as an intentional attempt by a person, by force or violence, to do an injury to the person of another, or to attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it, an immediate attempt to commit a battery, or any threatening gesture, showing in itself or by words accompanying it, an immediate intention coupled with a present ability to commit a battery. 6 Am.Jur. 2d Assault and Battery § 1. Commandant decisions follow these general descriptions of an assault as (1) putting another

person in apprehension of harm, (2) when there is a present ability to inflict injury. Appeal Decision 1218 (NOMIKOS) (1961); Appeal Decision 2697 (JORY) (2010). As such, an assault constitutes an act of misconduct. Id. Where an assault is consummated by a battery, apprehension by the victim may be irrelevant. Appeal Decision 2171 (DEIBAN) (1979); Appeal Decision 2050 (WIJNGAARDE) (1976). In this case it is clear that Deck Cadet 1 was not consenting to Respondent's physical contact. Likewise the "joke" of attempting to punch a cadet in the genitals also constitutes an assault even though not consummated by a battery.

While it does not constitute sexual abuse or molestation, this type of conduct is not consistent with good order and discipline and safety at sea and fits within the definition of misconduct under 46 C.F.R. § 5.27.

b. Did Respondent's Actions Against the Deck Cadet Constitute "Sexual Molestation"?

The issue of whether actions alleged to constitute "abusive sexual contact" under 18 U.S.C. § 2244, and considered as an assault and battery, may constitute "sexual molestation" under 46 C.F.R. § 5.61(a)(3) appears to be a matter of first impression in S&R proceedings.

Sexual molestation is listed as an offense within 46 C.F.R. § 5.61(a)(3), but the regulations do not define the term. To analyze what conduct may be considered to be sexual molestation for purposes of this proceeding, we turn to the Commandant's decisions on appeal. These decisions are binding authority for Administrative Law Judges. 46 C.F.R. § 5.65.

In Appeal Decision 2573 (JONES) (1996), the respondent approached a crew member while he slept, placed his hand inside the crew member's clothing, and fondled his anal area and penis. Id. at *1-2. The Commandant upheld the ALJ's determination that this behavior constituted sexual molestation. Id. at *3. The facts of the case demonstrate egregious behavior that clearly fits within a reasonable person's definition of sexual molestation. The decision does

not contain any specific guidance for determining what conduct may constitute sexual molestation. The respondent's appeal in that case did not dispute the nature of the alleged conduct and instead argued different points, including contending that the witness's testimony was not credible. Id. at *3.

In Appeal Decision 1596 (TORRES) (1966), the respondent, without consent, kissed two female passengers. Id. at *1. The Commandant upheld the Examiner's decision finding these acts to constitute molestation. The decision does not elaborate on the issue because the respondent's appeal did not argue that the behavior does not constitute molestation, but rather that the witnesses who recounted the events were not credible. Id. at *2.

In Appeal Decision 1275 (LOVELETTE) (1961), the Commandant did provide some explanation of the kind of behaviors that may constitute molestation in regard to a passenger's right to personal privacy. There, the respondent entered the passenger stateroom of a man and his wife, and stood over the woman as she slept, with his hand on her bunk. Id. at *1. The Examiner found that this behavior constituted molestation. On appeal, the respondent "urged that the specification alleging molestation should be dismissed because Appellant did not touch [the woman] or intend to do any harm." Id. at *1. The Commandant upheld the Examiner's decision, finding that molestation can occur without physical touching occurring. The Commandant upheld the Examiner and found the behavior wrongful because it constituted an "unjustifiable interference with her personal privacy." Id. at *2. Cases such as LOVELETTE and TORRES are distinguished from this case because they are consistent with past precedent that passengers are to be provided special protection. See Appeal Decision 920 (MALLON) (1956).

I find Deck Cadet 1's testimony that Respondent in his mind was joking and had no malice and was not a rapist, persuasive in regard to the nature of the physical contact. (Tr. Vol. 2 at 92-93). Therefore, I find the evidence is not sufficient to find that Respondent's contact constituted either sexual contact or a sexual act under 18 U.S.C. §§ 2246(3) and 2244(b). I also find that the Coast Guard did not prove that Respondent's conduct was sexual molestation under 46 C.F.R. § 5.61(a)(3). While maltreatment or abuse of crewmembers certainly may be misconduct and a proper subject of S&R proceedings, the evidence in this matter does not prove actions that would be comparable to Appeal Decision 2573 (JONES) (1996), Appeal Decision 2132 (KEENAN) (1978), or Appeal Decision 1876 (PENDERGRASS) (1972). However, as noted above, I find Respondent's conduct in 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. See Appeal Decision 2452 (MORGANDE) (1987).

The evidence shows that U.S. Merchant Marine Cadets, including Deck Cadet 1, were serving on the MAERSK IDAHO as part of their federal service as a U.S. Merchant Marine Academy midshipman. (Tr. Vol. 2 at 53-54; Tr. Vol. 3 at 9). 46 U.S.C. § 51311. Cadets/midshipmen are required to complete sea year training. 46 U.S.C. § 51307. I find that during such service they are government officials. I find Respondent's inappropriate touching of Deck Cadet 1 constitutes an assault and battery without injury.[9] This assault also constitutes interference with a government official in the performance of his official duties within the scope of 46 C.F.R. § 5.61(a)(10). Although assault and battery varies from the allegation of sexual assault or abusive sexual contact or sexual molestation, Respondent was on fair notice of the charged conduct of abusive sexual contact or a sexual assault, so a modification finding his

[9] This violation would be considered "violent acts against other persons (without injury)" in Table 5.569 of 46 C.F.R. § 5.569.

conduct was a lesser included violation of an assault and battery and also a violation within 46 C.F.R. § 5.61(a)(10) is appropriate. See Appeal Decision 2687 (HANSEN) (2010); Appeal Decision 2691 (JORY) (2010); Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950).

3. Charge 5 –Violation of MLL Anti-Harassment Policy Concerning Alleged Behavior Toward Second Mate and Deck Cadet

In Charge 5 of the Complaint and Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct between December 7, 2014, and March 10, 2015, by engaging in actions that purportedly violated MLL's Anti-Discrimination, Anti-Harassment, and Equal Employment Opportunity Policy (MLL Policy). The Coast Guard detailed the specific actions or incidents that allegedly constitute the misconduct in nine separate paragraphs (Paras. 6 – 14) under Charge 5. Some of the incidents were the same as those listed in Charges 1 through 4. The Coast Guard asserts this behavior constituted sexual harassment under the MLL Policy in that it unreasonably interfered with Second Mate's and Deck Cadet 1's individual work performance and created an intimidating, hostile, and offensive working environment. The Coast Guard further asserts this behavior constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

The Coast Guard established the MLL Policy was in force and was applicable to Respondent during the times of the alleged offenses. (Tr. Vol. 1 at 85-86; Tr. Vol. 2 at 127; Ex. CG-007).

The MLL Policy defines sexual harassment as follows:

> Unwelcomed sexual advances, requests for sexual favors, and other physical, verbal, or visual conduct based on sex constitute sexual harassment when:
>
> - Submission to the conduct is an explicit or implicit term or condition of employment
> - Submission to or rejection of the conduct is used as a basis for an employment decision

- The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment

(Ex. CG-007 at 1-2).

The MLL Policy then provides examples of behavior that may constitute sexual harassment, as follows:

> Sexual harassment is conducted based on sex, whether directed towards a person of the opposite or same sex, and may include:
>
> - Explicit sexual propositions
> - Sexual innuendo
> - Suggestive comments
> - Sexually oriented "kidding", "teasing" or "practical jokes"
> - Jokes about sexually oriented printed or visual material
> - Physical contact such as patting, pinching, or brushing against another person's body
>
> (Ex. CG-007 at 2).

Paragraphs 6 and 7 of Charge 5 are the same allegations related to Second Mate which were alleged in Charges 1 and 2. As set forth above, I found the Coast Guard did not meet its burden of proving Respondent engaged in the alleged conduct. Therefore, I also find those allegations with regard to Charge 5 are not proven.

Paragraphs 8 and 9 of Charge 5 are similar to the allegations of Charge 4, related to Deck Cadet 1. In Paragraph 8, the Coast Guard alleges Respondent grabbed Deck Cadet 1 from behind during a lifeboat drill and simulated sex acts with him. In Paragraph 9, the Coast Guard alleges Respondent approached Deck Cadet 1 from behind and pretended to perform a sex act on him in front of other crew members. As set forth above, the Coast Guard presented sufficient preponderant evidence that Respondent grabbed Deck Cadet 1 from behind and simulated sex acts with him and touched against Deck Cadet 1's buttocks on at least two different occasions—once during a lifeboat drill and once on the bridge, in front of other crew members.

Paragraphs 10 through 14 allege Respondent told sexually-oriented jokes to Second Mate, Deck Cadet 1, and Engine Cadet 1; required Deck Cadet 1 to use sexually-oriented nicknames for himself and Respondent; engaged in sexually-oriented teasing toward Second Mate by asking him what he was wearing when he answered the bridge phone; threatened to punch Deck Cadet 1's genitals; and used a pen to draw genitalia on Deck Cadet 1's hard hat and required Deck Cadet 1 to wear the hard hat displaying the drawing.

Regarding paragraph 12 of Charge 5, which alleges Respondent engaged in sexually-oriented teasing toward Second Mate, I find, consistent with my findings above, that there is not sufficient evidence to find this allegation proven, due to lack of corroboration and witness bias because of the disagreements and friction between the Second Mate and Respondent.

The Coast Guard presented substantial evidence that Respondent directed sexually-oriented jokes and teasing toward Deck Cadet 1. (Exs. CG-005, CG-006, CG-009, CG-018, CG-017A; Tr. Vol. 1 at 171-176). Deck Cadet 1 testified that Respondent drew a penis on his hard hat when they were in the cargo control room with other members of the crew, and that Deck Cadet 1 did not enjoy that treatment but did not feel he could express his discomfort to Respondent. (Tr. Vol. 2 at 63-64, 97-98). Deck Cadet 1 also testified to an incident in which Respondent unzipped his coveralls and inserted a pen into his (Respondent's) buttocks in front of Deck Cadet 1, and then held out the pen to Deck Cadet 1 to indicate that it now smelled like his buttocks. (Tr. Vol. 2 at 66-67; Ex. CG-018). This was apparently a strategy Respondent employed to discourage others from chewing the pens. (Tr. Vol. 2 at 66). Second Mate corroborated this account. (Tr. Vol. 1 at 171-172). Deck Cadet 1 further testified that Respondent directed him to use nicknames when they spoke over the radio, wherein Deck Cadet 1 was "butter cake" and Respondent was "daddy." (Tr. Vol. 2 at 64, 96). In addition, Deck

Cadet 1 and Second Mate testified that Respondent generally made a lot of sexually-oriented jokes, including pretending to make a joke by threatening to punch Deck Cadet 1's genitals. (Tr. Vol. 1 at 174-178; Tr. Vol. 2 at 61, 94).

Respondent denied all of the allegations in their entirety. (Tr. Vol. 2 at 169-173). Regarding the allegations of the nicknames "butter cake" and "daddy," Respondent presented a photo of a deck grinder with the name "buttercup" etched into it, claiming he only referred to the deck grinder as buttercup, but never used the nickname for deck cadets. (Tr. Vol. 2 at 177; Ex. R-CC). Respondent testified that he may have made "off-color" jokes occasionally, but never made sexual jokes. (Tr. Vol. 2 at 190-192).

I find Respondent's blanket denial of all of the allegations regarding treatment of Deck Cadet 1, and blanket denial of making sexually-oriented jokes in general, not credible. I find the testimony from Deck Cadet 1, which is at least partially corroborated by Second Mate, and the interview statement from Engine Cadet 1, regarding Respondent's comments or statement that "cadets are not people" not being serious supports a finding that Respondent did engage in these behaviors. (Ex. R-V). In addition, the Coast Guard presented evidence that undermined Respondent's claim of never making sexual jokes when it presented evidence of a photo of an evaluation that Respondent wrote, facetiously, for another deck cadet. (Ex. CG-017A). Respondent admitted to writing the evaluation. (Tr. Vol. 2 at 191-192). Respondent wrote, "Crew enjoyed cadet often. Possible homosexual. Often heard crying himself to sleep at 2100." (Ex. CG-017A). Respondent contended the comment "crew enjoyed cadet often" was not sexual in nature, but instead referred to the deck cadet being sent to the engine department to help out. (Tr. Vol. 2 at 192). As noted above, I find Respondent's general denial of that behavior not credible and reject his characterization of this evidence, given the context of the rest of the

cadet's evaluation. Whether Respondent considers his comments and actions as joking or not intending harassment does not excuse the effect of his conduct and comments on other individuals in the workplace.

a. Did Respondent's Actions Constitute Violations of MLL Policy?

The Coast Guard asserts that Respondent's actions constitute sexual harassment. As stated above, the MLL Policy defined "sexual harassment" to include "physical, verbal, or visual conduct based on sex" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." (Ex. CG-007 at 1-2).

As discussed above, I find the Coast Guard did present sufficient evidence to prove Respondent touched Deck Cadet 1's buttocks on at least two occasions, grabbed Deck Cadet 1 from behind and jokingly pretended to simulate sexual acts on him on two occasions, and engaged in several instances of sexually-oriented verbal and physical conduct toward Deck Cadet 1. (Tr. Vol. 1 at 171-172, 177; Tr. Vol. 2 at 57-59, 61-67, 97-98; Ex. CG-005, Ex. CG-005A at timestamps 9:46, 24:07). Deck Cadet 1's testimony regarding the effect this behavior had on his mental state is sufficient to demonstrate Respondent's actions did interfere with Deck Cadet 1's work performance. (Tr. Vol. 2 at 64, 84, 93; Ex. CG-005, Ex. CG-005A at timestamps 8:20, 22:42). The MLL Policy prohibits sexually oriented "kidding", "teasing," or "practical jokes," and also prohibits physical contact such as patting, pinching, or brushing against another person's body. (Ex. CG-007). As noted above, I find Respondent's actions in making physical contact with Deck Cadet 1 constituted an assault and battery. I also find Respondent's conduct involving physical contact with Deck Cadet 1 was also harassment in violation of the MLL Policy. I also find violation of the MLL Policy constitutes misconduct under 46 C.F.R. § 5.27.

b. Did Respondent's Actions Constitute an Act or Offense Under 46 C.F.R. § 5.61(a)?

The Coast Guard alleged in Charge 5 that Respondent's course of conduct constituted sexual molestation under 46 C.F.R. § 5.61(a)(3). As noted above, I find the Coast Guard did not prove that Respondent's behavior and conduct constituted sexual molestation under 46 C.F.R. § 5.61(a)(3). See e.g., Appeal Decision 2573 (JONES) (1996); Appeal Decision 2132 (KEENAN) (1978); Appeal Decision 1876 (PENDERGRASS) (1972). However, I find Respondent's conduct in nonconsensual touching of Deck Cadet 1 multiple times on the buttocks and in simulating a sex act as a supposed joke is sufficient to be an assault and battery. The assault and battery of a Merchant Marine cadet and midshipman under 46 U.S.C. § 51311 who was performing duties in keeping with under 46 U.S.C. § 51307 constitutes interference with a government official. See 46 C.F.R. § 5.61(a)(10). See Sec. IV.B.2.b, supra. I also find Respondent's argument of joking or horseplay as a defense is rejected. See Appeal Decision 1845 (MAULL) (1971).

4. Charge 6 –Violation of MLL Policy Concerning Alleged Behavior Toward Engine Cadet

In Charge 6 of the Amended Complaint, brought under 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27, the Coast Guard asserts Respondent committed misconduct between November 1, 2015, and February 28, 2016, by engaging in actions that purportedly violated the MLL Policy. The Coast Guard specifically alleged Respondent told sexually-oriented jokes to Engine Cadet 2, including jokes relating to children in a sexual nature; showed a pornographic film and pictures of a nude woman to Engine Cadet 2 without advance warning; and drew a sexually-explicit drawing and showed it to Engine Cadet 2. The Coast Guard asserts this behavior constituted sexual harassment under the MLL Policy and further asserts it constitutes sexual molestation under 46 C.F.R. § 5.61(a)(3).

The Coast Guard established the MLL Policy was in force and was applicable to Respondent during the times of the alleged offenses. (Tr. Vol. 1 at 85-86; Tr. Vol. 2 at 127; Ex. CG-007).

In support of Charge 6, the Coast Guard presented the testimony of Engine Cadet 2, who served on the MAERSK IDAHO from November 2015 through February 2016. (Tr. Vol. 3 at 9). Engine Cadet 2 attended the USMMA in Kings Point, New York, and was serving on the MAERSK IDAHO as part of his requirements for graduation. (Tr. Vol. 3 at 8-9). The Coast Guard also presented the testimony of LCDR Brett Sprenger of the USCG Suspension and Revocation National Center of Expertise, who helped conduct the investigation of this matter; however, LCDR Sprenger's testimony was not first-hand information but a summation of information told to USCG investigators by Engine Cadet 2. (Tr. Vol. 1 at 118-119, 133-140). Hearsay is admissible in these proceedings and the ALJ will determine what weight to give such evidence. 33 C.F.R. § 20.803.

Engine Cadet 2 testified he heard Respondent use the term "kiddie fucker." (Tr. Vol. 3 at 13). When asked to elaborate on instances when Respondent used the term, Engine Cadet 2 could not recall specific instances and said, "So I would really only be paraphrasing about that statement, because you know, I, it's just been a while." (Tr. Vol. 3 at 14).

Engine Cadet 2 also testified he was shown pornographic movies, a movie with graphic sexual violence called A Serbian Film, and images of nude women by Respondent. (Tr. Vol. 3 at 14-16). Engine Cadet 2 said Respondent showed him these images while he was in Respondent's room with another cadet, [REDACTED] (hereinafter "Deck Cadet 2"). Deck Cadet 2 was Engine Cadet 2's "sea partner," or a fellow cadet from USMMA. (Tr. Vol. 3 at 10).

Engine Cadet 2 further testified he had requested assistance from Respondent with one of his sea projects, and Respondent said he would draw Engine Cadet 2 a diagram, but instead drew a "flip book" animation of a penis becoming erect, and showed it to Engine Cadet 2 and Deck Cadet 2. (Tr. Vol. 3 at 16-17).

Respondent countered Engine Cadet 2's testimony by calling Deck Cadet 2 as a witness. Deck Cadet 2 testified that he and Engine Cadet 2 did watch movies in Respondent's room, but denied that Respondent ever showed them pornographic movies or photos. (Tr. Vol. 3 at 54-55). Deck Cadet 2 also denied that Respondent made any explicit drawings. (Tr. Vol. 3 at 55). Regarding the allegation that Respondent told sexually-oriented jokes, Deck Cadet 2 said he found Respondent's sense of humor reminiscent of middle school, stating, "The jokes he said were I guess dirty, but not sexual if that makes sense." (Tr. Vol. 3 at 59). LDCR Sprenger testified to having spoken with Deck Cadet 2 during the investigation, wherein Deck Cadet 2 stated that he did not recall ever watching pornography or viewing pornographic photos with Respondent. (Tr. Vol. 2 at 143-144).

With regard to the allegations that Respondent showed Engine Cadet 2 pornographic videos and photos, and showed him an explicit drawing, Engine Cadet 2's testimony on these subjects was very brief, and his statements were contradicted by the testimony of Deck Cadet 2. The Coast Guard also submitted into evidence a recording of an interview given by Engine Cadet 2 to CGIS on August 31, 2020, but the information provided by Engine Cadet 2 in that interview was similarly brief. (Exs. CG-013, CG-013A). Respondent then produced testimony from an individual—Deck Cadet 2—who was purportedly present during these incidents, who denied that the events occurred. Considering the dearth of information that the Coast Guard elicited from

Engine Cadet 2, and the contradictory testimony of Deck Cadet 2, I do not find the Coast Guard met its burden of proof on these counts.

Regarding the remaining allegation that Respondent told sexually-oriented jokes to the Engine Cadet 2, including jokes relating to children in a sexual nature, the only testimony on that subject was sparse, in that Engine Cadet 2 recalled Respondent using the term "kiddie fucker." (Tr. Vol. 3 at 13-14). Engine Cadet 2 was not able to recall any specific details or specific instances. (Tr. Vol. 3 at 13-14). Further, there was no evidence presented from which I could infer that Respondent made such comments with the intent of creating an intimidating, hostile, or offensive working environment. While Engine Cadet 2 did state, in reference to his claims that Respondent showed him explicit films and an explicit drawing, that it made him feel "uncomfortable," Engine Cadet 2 did not provide any testimony regarding the effect on the work environment or his mental state when he allegedly heard Respondent use the term "kiddie fucker." The record does not contain sufficient evidence to find an allegation of sexual harassment as defined in MLL Policy proved. Likewise, the record does not contain sufficient evidence to find an allegation of sexual molestation under 46 C.F.R. § 5.61(a)(3) proven.

Misconduct requires proof that the respondent violated a duly established rule. 46 C.F.R. § 5.27. The Coast Guard presented evidence of the MLL Policy. (Ex. CG-007; Tr. Vol. 1 at 85-86; Tr. Vol. 2 at 127). The MLL policy which prohibits conduct such as sexual joking, sexual innuendo, and jokes about sexually-oriented printed or visual material, where the conduct interferes with the victim's work performance or creates an offensive or intimidating environment fits within the definition of misconduct as a duly established rule. However, 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). The charge also contends Respondent's actions constituted sexual molestation under 46 C.F.R. § 5.61(a)(3), by alleging facts relating to Respondent's conduct relating to the Deck Cadet and Second Mate from the previous voyage from December 7, 2014, through March 23, 2015. Those allegations have no factual connection to any conduct involving Charge 6 regarding the later voyage (November 1, 2015, through February 28, 2016) during which the Engine Cadet served onboard MAERSK IDAHO. Violation of the MLL Policy, if proven, is misconduct subject to the three-year limitations period of 46 C.F.R. § 5.55(a)(3). Therefore, I find Charge 6 is time-barred under 46 C.F.R. § 5.55 and must be dismissed. See Appeal Decision 2608 (SHEPHERD) (1999).

C. Conclusion

The Coast Guard brought six charges of misconduct against Respondent, pursuant to 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.27.

For the reasons stated in Section IV.B.1, above, I find the Coast Guard failed to prove by preponderant evidence that Respondent engaged in the conduct alleged in Charges 1 and 2. Therefore, I find Charges 1 and 2 **NOT PROVEN**.

For the reasons stated in Section IV.B.2, above, I find that for Charges 3 and 4, the Coast Guard presented sufficient evidence that Respondent committed misconduct by engaging in assault and battery of Deck Cadet 1, the Deck Cadet of the MAERSK IDAHO, between December 7, 2014, and March 10, 2015. I also found that Respondent's assault and battery of Deck Cadet 1 also constitutes interference with a government official in the performance of duty. 46 C.F.R. § 5.61(a)(10). Therefore, the five-year limitations period of 46 C.F.R. § 5.55(a)(2) applies to Charges 3 and 4, and I find Charges 3 and 4 as modified to the lesser included violation of assault and battery and interference with a government official **PROVEN**.

For the reasons stated in Section IV.B.3, above, I find the Coast Guard did not prove Charge 5 with regard to the allegations involving Second Mate. I did find the Coast Guard proved by preponderant evidence that Respondent engaged in some of the alleged conduct with regard to Deck Cadet 1. I further found Respondent's conduct did constitute harassment as defined by the MLL Policy. The portion of the charge related to MLL Policy that did not involve physical contact is time barred by 46 C.F.R. § 5.55(a)(3). However, the unwanted physical contact with Deck Cadet 1 is an assault and battery which constituted misconduct and is also interference with a government official under 46 C.F.R. § 5.61(a)(10). Therefore, I find Charge 5, as to the allegations involving physical contact with the Deck Cadet, **PROVEN**.

Finally, in Charge 6, the Coast Guard contended Respondent committed misconduct between November 1, 2015, and February 28, 2016, by engaging in behavior directed toward Engine Cadet 2 of the MAERSK IDAHO that violated the MLL Policy. The Coast Guard further contended the behavior constituted sexual molestation under 46 C.F.R. § 5.61(a)(3). The Coast Guard failed to present evidence sufficient to find sexual molestation or any physical contact with Engine Cadet 2. There is no evidence that would support finding any violation that would fit within 46 C.F.R. § 5.61(a). I find that Charge 6 is time-barred by 46 C.F.R. 5.55(a)(3). Even if it were not time-barred the Coast Guard failed to present sufficient proof by preponderant evidence that Respondent engaged in the alleged conduct. Therefore, Charge 6 is **DISMISSED**.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. §§ 7703-7704, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

2. From on or about July 30, 2016, until January 16, 2020, Respondent was embarked on oceangoing deep draft vessels in operation outside of the United States for at least 566 days.

3. The Coast Guard bears the burden of proof in regard to all charges. Considering all of the evidence presented by both parties, I do not find sufficient proof by a preponderance of reliable and credible evidence of the allegations of misconduct in Charges 1 and 2. Therefore, Charges 1 and 2 (Misconduct) are found **NOT PROVEN**. Paragraphs 6 and 7 of Charge 5 allege the same conduct contained in Charges 1 and 2 and is also **NOT PROVEN.**

4. Respondent engaged in nonconsensual physical contact that constitutes assault and battery in regard to his actions and treatment of Deck Cadet 1. Therefore, allegations 1, 2, 3, 4, and 5 of Charge 3 (Misconduct) are found **PROVEN** by a preponderance of reliable and credible evidence.

5. Respondent engaged in nonconsensual physical contact that constitutes assault and battery in regard to his actions and treatment of Deck Cadet 1. Therefore, allegations 1, 2, 3, 4, and 5 of Charge 4 (Misconduct) are found **PROVEN** by a preponderance of the reliable and credible evidence.

6. Respondent engaged in teasing or hazing and harassing conduct including nonconsensual physical contact that constitutes assault and battery in regard to his actions and treatment of Deck Cadet 1. Therefore, allegations 1, 2, 3, 4, 5, 8, 9, 13, and 16 of Charge 5 (Misconduct) are found **PROVEN** by a preponderance of reliable and credible evidence. The allegations in paragraphs 10, 11, 12 and 15 of Charge 5 do not constitute assault or assault and battery of a government official and therefore are time barred under 46 C.F.R. § 5.55(a)(3). For the reasons stated in Section IV.B.2. a. and b., allegation 17 of Charge 5 is **NOT PROVEN.**

7. The alleged aggravation in paragraph 10 of Charge 6 regarding alleged facts from a previous voyage cannot be used to create a basis for Charge 6 to be a violation listed in 46 C.F.R. § 5.61(a). Additionally, there is no physical contact alleged in Charge 6 and the entire charge is time barred in accordance with 46 C.F.R. § 5.55(a)(3). Therefore, Charge 6 (Misconduct) is **DISMISSED**.

8. Respondent's nonconsensual physical contact with Deck Cadet 1 found proven in Charges 3, 4, and 5 is an assault and battery without injury and constitutes "misconduct." Appeal Decision 1218 (NOMIKOS) (1961); Appeal Decision 2171 (DEIBAN) (1979); Appeal Decision 2697 (JORY) (2010).

9. Respondent's nonconsensual physical contact with Deck Cadet 1 found proven in Charges 3, 4, and 5 constitutes interference with a government official in the performance of his duties. E.g. Appeal Decision 1418 (POPE) (1963); Appeal Decision 2452 (MORGANDE) (1987).

VI. SANCTION

These proceedings are remedial, not penal, 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; Appeal Decision 2294 (TITTONIS) (1983). If a charge is proven, sanctions are to be determined based on the concerns of safety at sea and pursuant to the regulations.

In this case, the Coast Guard seeks revocation based on the combination of the charged offenses. I have considered all relevant evidence in determining an appropriate sanction pursuant to 46 C.F.R. § 5.569. Title 33 C.F.R. Part 20, Subpart H (Evidence) provides guidance on what may properly be presented as evidence in S&R proceedings generally. Evidence presented in the case-in-chief to prove a violation may also be considered by the ALJ in determining an appropriate sanction. See 46 C.F.R. § 5.569.

After consideration of the charges and the evidence in the record, I found that only Charges 3, 4, and part of Charge 5 are proven. These charges are considered under the guidance contained 46 C.F.R. § 5.569.

Although there was no evidence of prior misconduct presented at the hearing in this matter, I find Respondent's senior position aboard the vessel as Chief Mate requires consideration of his actions with respect to hazing junior personnel just beginning a career in the U.S. Merchant Marine. Engaging in hazing conduct of a junior is inconsistent with a substantial position of authority and should not be tolerated.[10] The MLL Policy constitutes a duly authorized rule that may not be ignored by senior individuals under claims of jokes or off-color humor. Likewise, Respondent's hazing conduct amounting to assault and battery of a midshipman of the U.S. Merchant Marine Academy under a claim of joking or teasing is not consistent with the need for a cooperative and cohesive crew aboard ships and may lead to injury, dangerous situations, and liability to others. The general maritime law clearly recognizes a ship may be considered unseaworthy if a sailor is prone to violence and may attack other crew

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[10] Hazing is also prohibited at U.S military academies e.g. 10 U.S.C. § 8464.

members. E.g. Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U.S. 336 (1955). The unseaworthiness doctrine impugns liability to not only the owner, but the vessel as well, both of which may have to answer for damages caused by a dangerous seaman. Solet v. M/V Capt. H.V. Dufrene, 303 F. Supp. 980, 985 (E.D. La. 1969). Conduct that amounts to assault and battery even without physical injury may impact the seaworthiness of a vessel in the same manner. Additionally, Congress enacted 46 U.S.C. § 51322 in 2017 (also amended in 2018) to address concerns regarding Merchant Marine Cadets in training.

Respondent's prior good record of service and the fact that no physical injury occurred have been fully considered in mitigation. The fact that a senior officer engaged in hazing of a junior member of the crew has been considered in aggravation. There is no specific guidance for the exact misconduct violations in this matter, but I have considered the suggested range of orders contained in 46 C.F.R. Part 5 (Table 5.569). The Table includes a potential sanction of two to six months' suspension for violent acts against other persons without injury. That is the closest guidance comparable to an assault and battery without injury and the ALJ finds it appropriate as guidance in regard to the conduct proven in Charges 3, 4, and 5.

It is within the duties of the ALJ to order any of a variety of sanctions. See 46 C.F.R. § 5.569; see also Appeal Decision 2569 (TAYLOR) (1995); Appeal Decision 2680 (MCCARTY) (2006). The ALJ is not bound by 46 C.F.R. § 5.569 or the average order table. See Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Consideration of mitigating or aggravating factors and evidence may justify a lower or higher sanction than the range suggested in the average order table. See 46 C.F.R. § 5.569(d). However, exceeding the limits of the suggested sanctions in the table must include substantial justification. E.g., Commandant v. Ailsworth, NTSB Order EM-185 (2011).

The Amended Complaint contained six charges. The Coast Guard was entitled to proceed on all charges to meet the exigencies of proof, but multiplicity may be considered as a mitigating factor with regard to sanction. Whether the case arises from a single incident or course of conduct is not dispositive for consideration of alternative charges. "The exigencies of proof may require multiplicious or alternative charging in a particular case." Appeal Decision 2496 (MCGRATH) (1990); Appeal Decision 2503 (MOULDS) (1990). If any of the charged violations are proven, any matters that are considered multiplicious may be merged for purposes of determining a potential sanction. See Appeal Decision 2496 (MCGRATH) (1990).

After consideration of the charges and the evidence in the record, I find that Charge 5 covers the same conduct that was found proven in Charges 3 and Charge 4 and should be merged as multiplicious for sanction determination purposes. Although the violations that were proven in Charges 3 and 4 arise from the same voyage, they involved several separate incidents for determination of a sanction. In view of the record as a whole, including all of the testimony and exhibits admitted at the hearing, the evidence establishes that in keeping with the interests of maritime safety as provided in 46 C.F.R. § 5.5, the appropriate sanction in this matter is a 12-month suspension of Respondent's Merchant Mariner Credentials with four (4) months suspended outright and eight (8) months suspension on probation remitted after completion of a 12-month probationary period. If Respondent is proven to have committed any violation under 46 U.S.C. §§ 7703 or 7704 during the period of probation, the additional eight (8) month period of suspension will be imposed.

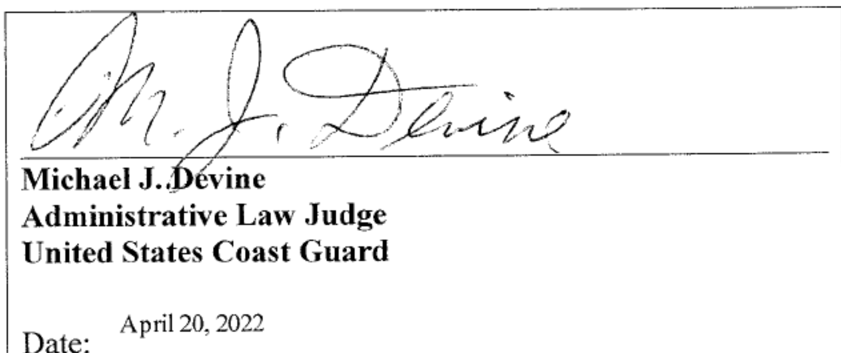
WHEREFORE,

ORDER

IT IS HEREBY ORDERED, Merchant Mariner Credential No. [redacted] and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent Mark Steven Stinziano, are **SUSPENDED FOR 12 MONTHS, WITH FOUR (4) MONTHS SUSPENDED OUTRIGHT AND EIGHT (8) MONTHS SUSPENSION ON PROBATION REMITTED AFTER COMPLETION OF A 12-MONTH PROBATION PERIOD. THE 12-MONTH PROBATIONARY PERIOD WILL COMMENCE AFTER RESPONDENT COMPLETES THE FOUR (4) MONTH OUTRIGHT SUSPENSION.**

IT IS HEREBY FURTHER ORDERED, Respondent must immediately surrender his Merchant Mariner Credential and any other Coast Guard-issued credentials to the U.S. Coast Guard Suspension and Revocation National Center of Expertise, 100 Forbes Drive, Martinsburg, WV 25404, Attn: Jennifer A. Mehaffey, Esq. If you knowingly continue to use your documents during a period of outright suspension, you may be subject to criminal prosecution.

PLEASE TAKE NOTICE: service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of the appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, and which are attached to this Decision and Order as **Attachment B**.



Michael J. Devine
Administrative Law Judge
United States Coast Guard

Date: April 20, 2022