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

USCG Docket No. 2020-0328

UNITED STATES COAST GUARD, Complainant/Appellant v. MARK STEVEN STINZIANO, Respondent/Appellee	USCG Enforcement Activity No: 5783758

RESPONDENT'S REPLY BRIEF

I INTRODUCTION

This case originates from an Amended Complaint filed by the Coast Guard on April 29, 2021 ("Amended Complaint"). [1]The matter was tried live before the Honorable Administrative Law Judge Michael J. Devine ("Judge Devine" or "ALJ") in Baltimore Maryland on June 8 and 9, 2021, with further evidence taken remotely on June 14, 2021. Judge Devine issued his Decision and Order ("D & O") on April 20, 2022, from which the Coast Guard appealed on June 17, 2022. Respondent Mark Steven Stinziano ("Capt. Stinziano" or "Respondent") submits herewith his brief in reply to the Coast Guard's appeal ("CG Appeal" and Appeal Brief").

[1] For convenience and ease of reference, this brief will use the following abbreviations: Coast Guard Amended Complaint, "Amended Complaint"; Administrative Law Judge Hon. Michael J. Devine, "Judge Devine" or "ALJ"; Judge Devine's April 20 2022 Decision and Order, "D & O"; Respondent, Mark Steven Stinziano, "Capt. Stinziano" or "Respondent"; Coast Guard Appeal, and Appeal Brief, "CG Appeal", or "CG Appeal Brief", or when the context permits, "Brief"; Commandant Decisions on Appeal, "APP. DEC. XXXX (NAME) (Date)"; and, the ALJ's Ultimate Findings of Fact and Conclusions of Law are cited as "ALJ Finding(s) " or where the context allows, "Finding(s)".

II STANDARD OF REVIEW

The Administrative Procedures Act ("APA"), at 5 USC ss. 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. 5 U.S.C. §556(d). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 C.F.R. §§20.701, 20.702(a). The term 'preponderance of the evidence' is synonymous with the term 'substantial evidence.' APP. DEC. 2477 (TOMBARI) (1988); See also Steadman v. Securities & Exchange Comm'n, 450 U.S. 91, 107 (1981). 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) (quoting In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) (brackets in original)). US Coast Guard v. Hatch, 2019 WL 8643829 (2019). Any appeal of the decision of a Coast Guard ALJ is limited to the following issues: (a) Whether each finding of fact is supported by substantial evidence; (b) Whether each conclusion of law accords with applicable law, precedent, and public policy; (c) Whether the ALJ abused his or her discretion. 33 CFR §20.1001 (b); 46 CFR §5.701; APP. DEC. 2691 (JORY) (2010).

Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence. APP. DEC. 2685 (MATT). The ALJ is the arbiter of facts and it is his or her duty to evaluate the testimony and evidence presented at the hearing. APP. DEC. 2610 (BENNETT). Under governing precedent, the findings of fact of the ALJ will be

upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous. APP. DEC. 2610 (BENNETT) *citing* APP. DECs. 2557 (FRANCIS), 2452 (MORGRANDE) and 2332 (LORENZ). Moreover, the ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. APP. DEC. 2639 (HAUCK) *citing* APP. DECs. 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH) and 2614 (WALLENSTEIN). The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. See APP. DEC. 2685 (MATT) *citing* APP. DECs. 2395 (LAMBERT) and 2282 (LITTLEFIELD)." APP. DEC. 2691 (JORY).

III LEGAL ARGUMENT

(A) The Administrative Law Judge's Ultimate Findings of Fact and Conclusions of Law Number 3, That There was Not Sufficient Proof By A Preponderance Of Reliable And Credible Evidence of the Allegations of Misconduct in Charges 1 and 2, and Accordingly Paragraphs 6 & 7 of Charge 5, Was A Proper Application of Discretion, In Accordance With Applicable Law and Precedent And Supported By Substantial Evidence

(1) D & O Findings Being Appealed

Under this section of the CG Appeal Brief, the Coast Guard appeals D & O Finding No. 3. This Finding concluded that Charges 1 and 2 (Misconduct, Abusive Sexual Contact under 18 USC §2244(b), and sexual molestation under 46 CFR §5.61 against the Second Mate were not proven by virtue of the fact that the ALJ did not consider the Second Mate a credible witness.

(2) Coast Guard Appeal Argument

This section of the CG Appeal Brief is identified as subsection A and found at pages 9-22. In this section, the Coast Guard takes issue with the ALJ's determination of credibility of the Second Mate as a witness, (CG Brief, pp. 10-12); argues that the ALJ gave improper evidentiary weight to lack of corroboration of the Second Mate's testimony (CG Brief, pp. 12-18); and argues that he gave improper evidentiary weight to bias on the part of the Second Mate resulting from an unfavorable performance evaluation (CG Brief, pp. 18-22).

(3) Respondent's Arguments In Reply

The Administrative Law Judge correctly asserted that the burden of proof in this matter rested with the Coast Guard as the Complainant. It was therefore the Coast Guard's burden to prove its charges and specifications by a preponderance of the evidence that the alleged misconduct occurred. There were only two individuals capable of providing direct evidence of the events at issue. The ALJ received the testimony of both and considered that testimony alongside written statements by Second Mate recounting "the same, or substantially similar, allegations[,]" summaries of interviews, and an audio recording of an interview Second Mate gave to Coast Guard investigators. D & O at *12. After considering all of this evidence, the ALJ stated that he had reason to doubt Second Mate's credibility, specifically citing the lack of corroboration of his allegations until a later date, and evidence of bias against Respondent arising from that same later date. Doubting Second Mate's credibility for those reasons, the ALJ ultimately found the Coast Guard failed to provide sufficient credible evidence to meet its burden. Coast Guard undoubtedly disputes the ALJ's conclusions and even the rationale, but for the reasons provided herein, there is no basis for reversing the ALJ's findings on Second Mate's

credibility nor its findings about the sufficiency of evidence for purposes of proving Charges 1 & 2.

The standard of review for abuse of discretion is highly deferential to the ALJ. APP. DEC. 2733 (SCHWIEMAN), 2020 WL 7060225. The ALJ is the "arbiter of fact" charged with evaluating testimony and evidence presented at the hearing and weighing that evidence. Appeals Decision 2691 (JORY) 2010 WL 5790335 at *3, citing APP. DEC.s 2685 (MATT), 2010 WL 323919 and 2610 (BENNETT) 1999 WL 33595178; see also APP. DEC. 2357 (GEESE), 1984 WL 564470 ("The question of what weight to accord the evidence is committed to the discretion of the Administrative Law Judge, and will not be set aside unless it is shown that the evidence he relied upon is inherently incredible."); APP. DEC. 2116 (BAGGETT), 1978 WL 198999 at *3 (It is a responsibility of the ALJ to weigh the evidence presented, which includes evaluating "the credibility of witnesses in determining what version of events under consideration is correct."). The ALJ "is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeals Decision 2691 (JORY) 2010 WL 5790335 at *3, citing APP. DEC.s 2639 (HAUCK), 2527 (GEORGE), 1991 WL 11007459, 2522 (JENKINS), 1991 WL 11007454, 2519 (JEPSON), 1991 WL 11007451, 2516 (ESTRADA) 1990 WL 10011241, 2503 (MOULDS), 1990 WL 10011228, 2492 (RATH), 1989 WL 1126149, and 2614 (WALLENSTEIN), 2000 WL 33965627; APP. DEC. 2695 (AILSWORTH), 2011 WL 6960129. "A discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion…. [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions, is without evidentiary support." APP. DEC. 2702 (CARROLL) at 3, 2013 WL 7854263 (quoting APP. DEC.s 2692 (CHRISTIAN), 2011 WL 1042740 & 2610

(Bennett), 1999 WL 33595178 at *11)). The ALJ is not required to issue findings that are "consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." Appeals Decision 2691 (Jory) 2010 WL 5790335 at *3, citing APP. DEC.s 2685 (MATT), 2010 WL 323919, 2395 (LAMBERT), 1985 WL 668751, and 2282 (LITTLEFIELD), 1982 WL 607842. "The findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." APP. DEC. 2610 (BENNETT), 1999 WL 33595178, *citing* APP. DEC.s 2557 (FRANCIS), 1994 WL 16009228, and 2332 (LORENZ), 1983 WL 483024; APP. DEC. 2632 (WHITE), 2002 WL 32061807 at *5 ("The ALJ's Decision is not subject to reversal on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence."). It must be remembered that an appellate reviewing body should not substitute its own determination of credibility for that of the fact finder. APP. DEC. 2616 (BYRNES), 2000 WL 33965629 at *4; 2628 (VILAS), 2002 WL 32061803 ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious."). "The findings of the ALJ will not be disturbed on appeal unless inherently incredible." Appeals Decision 2675 (MILLS), 2008 WL 918525.

The rationale for these rules is that the fact-finder can be influenced by the demeanor of the witness, his tone of voice, his body language, and other matters that are not captured within the pages of a "cold" appellate record. APP. DEC. 2616 (BYRNES), 2000 WL 33965629 at *4, citing APP. DEC. 2474 (CARMIENKE), 1988 WL 1024599, Charles A. Grahn, Respondent, 3 NTSB 214 (Order EA-76, 1977), Reagan v. United States, 157 U.S. 301, 15 S. Ct. 610, 39 L.Ed.

709 (1895), Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975). In evaluating the evidence presented at a hearing, the ALJ is in the best position to weigh the testimony of witnesses and assess the credibility of evidence." APP. DEC. 2632 (WHITE), 2002 WL 32061807 at *5, citing APP. DECs. 2584 (SHAKESPEARE), 1997 WL 33480812, 2421 (RADER), 1986 WL 721387, 2589 (MEYER), 1997 WL 33480817, 2592 (MASON), 1997 WL 33480820, 2598 (CATTON), 1998 WL 34073110); "The trier of fact, by virtue of his unique opportunity to observe witnesses and weigh their testimony, is assigned the duty of assessing evidence adduced and making credibility determinations." APP. DEC. 2654 (HOWELL), 2005 WL 4052560.

As the Coast Guard has correctly noted, "the question of credibility is almost the exclusive purview of the Administrative Law Judge." Coast Guard Appeal Brief, at 10 (citing APP. DEC. 2731 (McLIN), 2020 WL 5221930 at *5 (July 23, 2020). As stated in McLin, the hearing-level adjudicator's credibility determination will be followed "absent exceptional circumstances." Id. The responsibility of the ALJ in making credibility determinations is to consider and review all evidence presented and admitted and to make "specific credibility findings." Id.

The Coast Guard's selection of the McLin decision is curious because factually, it is analogous to the present matter in supporting the ALJ's authority to make credibility determinations. In McLin, three of the four charges at issue relied principally on the testimony of two deckhands, whose testimony was the only direct evidence of certain essential elements of those three charges. Id. Moreover, there was no directly conflicting evidence presented by the opposing party in that matter. Id. Therefore, there was no dispute that the only evidence the ALJ considered was the testimony of the deckhands themselves. Nevertheless, the ALJ exercised his

discretion not to credit the deckhands' statements, "as was his prerogative as the hearing-level trier of fact." Id. The Coast Guard in that matter objected to the ALJ's failure to make specific findings as to why he did not credit the deckhands' statements, but that objection was not sustained on appeal. Rather, it was determined that "to discount the deckhands' testimony was well within the ALJ's discretion." The dismissal of three charges in McLin on the basis that the Coast Guard failed to meet its burden of proof was upheld on appeal, as the ALJ admitted the testimony of the deckhands, decided not to credit their statements, weighed the evidence before him following that conclusion, and determined the Coast Guard had not presented sufficient evidence to meet its burden of proof. "The mere absence of evidence directly conflicting with the deckhands' testimony does not establish proof of violation or misconduct by the preponderance of the evidence." McLin at *6.

In the present matter, the ALJ carried out his duty to review all evidence in the record, and after concluding that review, made a determination that the Coast Guard's case failed for insufficiency of evidence. The Coast Guard in our case makes a similar argument to the one that failed in McLin—it disputes the weight granted or not granted to the evidence submitted, but there is no claim of evidence the ALJ outright failed to consider. Rather, after careful consideration of all the evidence, the ALJ expressed reservations with giving full weight to Second Mate's testimony. As shown by the McLin decision, an ALJ's duty to make "specific credibility findings" amounts to a requirement that the basis for the findings be provided. The ALJ made such specific credibility findings, not only stating that he questioned Second Mate's credibility and would not accord the testimony full weight, but identifying reasons for this decision.

Despite the Coast Guard's cursory repetition of the limited standard for disturbing an ALJ's findings of fact, its arguments on these points amount to nothing more than an attempt to have the Commandant substitute its judgment for the trier of fact, re-evaluate the hearing evidence, and give it different weight, and then reverse the ALJ's. The clearest indication of this is the Coast Guard's reference to certain "elements" of witness credibility espoused by federal trial courts in the Sixth Circuit, which have no particular binding effect on these proceedings. The suggestion that the ALJ's credibility determinations are an abuse of discretion because they are based on "lack of corroboration" and "evidence of bias", and not based on the several factors cited by the Coast Guard, is a blatant invitation to the Commandant to substitute its judgment for that of the ALJ, violating that most sacred preserve of the trial fact finder, discretion to weigh witness credibility. Entering that minefield, the Coast Guard complains that "ALJ does not appear to have given any weight to the consistency and accuracy of the Second Mate's statements and testimony." Critically, ALJ is not required to give any weight to consistency in Second Mate's statements and testimony, and the suggestion that the Commandant ought to is an open invitation to substitute judgment. The Coast Guard appropriately caps its argument by giving us the benefit of pronouncing its own judgment: "Second Mate was entirely credible in his demeanor while testifying." CG Appeal Brief, 11.

The Coast Guard's case for Charges 1 and 2 case turned entirely on the credibility of the Second Mate's testimony about the alleged incidents on January 14th and 17th, 2015. The ALJ found, well within his discretion as the fact finder that, for the reasons set forth at pages 11-16 of the D & O, the Second Mate was not a credible witness. In so doing, the ALJ was well within the purview of his time-honored discretion, and the Coast Guard has failed to show any reason why

those findings should be disturbed. APP. DEC. 2519 (JEPSON) (1991) at *3 and APP. DEC. 2160 (WELLS) (1979) at * 3.

(a) Lack of Corroboration as a Basis for a Credibility Determination is Permissible

The ALJ "is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. "APP. DEC. 2691 (JORY) 2010 WL 5790335 at *3 (determination that captain was a credible witness was undisturbed on appeal, even in the face of Coast Guard allegation that captain had provided false testimony and lied in prior correspondence). ALJ discretionary acts are presumptively correct, with the party seeking to reverse such acts bearing the burden of proving the ALJ abused his or her *discretion*. The ALJ here noted that corroboration of a witness' version of events is not required, but is important in weighing evidence. The Coast Guard challenges that contention but, critically, fails to meet its burden of showing why the ALJ's discretionary findings should be reversed.

In APP. DEC. 2731 (McLIN) (2020), two witnesses presented uncontroverted testimony regarding an essential element of the charge, yet the ALJ did not credit the testimony of either. Id. at *6 ("The mere absence of evidence directly conflicting with the [witnesses'] testimony does not establish proof of violation or misconduct by the preponderance of the evidence."). In the present matter, the ALJ also considered testimony of two witnesses, the only two witnesses with first-hand knowledge of what happened on January 14th and 17th, 2015, but here, the accounts of the two witnesses directly contradicted each other. Where, as here, the testimony of the Second Mate conflicted with that of Respondent, the ALJ must determine whether Second Mate's or Respondent's account most accurately reflects what actually took place, it is natural for the ALJ to seek corroboration of Second Mate's account. Moreover, the fact that legislative

history may *permit* fact finders to accept an alleged victim's account without corroboration is not the same as saying the ALJ is *required* to do so. The Coast Guard's argument here suffers from a lapse of logic. .

Similarly, an ALJ is not required to accept a witness' characterization of events simply by virtue of the fact that the witness offers the only testimony about the events in question. See APP. DEC. 2731 (McLin), 2020 WL 5221930. In McLin, the Coast Guard presented direct evidence in support of the charges sought in the limited form of testimony of two deckhands. The respondent in that case did not present any evidence to contradict their testimony. Nevertheless, the ALJ, exercising his broad discretion in witness and evidentiary evaluation, gave no weight to the witnesses' testimony.

In keeping with its other multiple and heroic challenges to citadel of ALJ discretion, the Coast Guard objects to the weight the ALJ granted to unsworn statements provided as part of the internal investigation performed by Captain [redacted] following receipt of Second Mate's statement about the February 3, 2015, incidents. But here, the Coast Guard adds a strange new twist: it raises the speculative and unfounded claim that the ALJ transmuted the unsworn statements to written testimony, and that this was improper. This strange claim finds no basis in fact and is instead a transparent attempt to fabricate facts to bolster a failing abuse of discretion claim. The ALJ's obligation is to review all evidence before him or her and to make findings of fact and conclusions of law that are, in his or her judgment and discretion supported by substantial evidence from the record. The ALJ acknowledged that there existed both oral testimony and written statements gathered during an investigation which undermine Second Mate's version of events. The ALJ is of course allowed to give such evidence the weight that he deems appropriate. The ALJ properly found ample credibility problems with the Second Mate's

version of events. The Coast Guard has failed to show any legally sufficient basis for disturbing those findings.

(b) Evidence of Bias Affecting the ALJ's Determination of Second Mate's Credibility is Supported by the Record

The ALJ is not required to issue findings that are "consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." Appeals Decision 2691 (Jory) 2010 WL 5790335 at *3. Here, the material in the record that supports the ALJ's finding Charges 1 & 2 not proven is the statement prepared by the Second Mate and attached to the February 3, 2015, performance evaluation. This was the first time a report was made alleging misconduct by Respondent on January 14th or 17th, 2015. To Coast Guard claims that the ALJ should have considered alternative theories behind the "disagreement and friction" between Second Mate and Respondent. The ALJ was under no obligation to do so, and the Commandant, of course, need not entertain the suggestion.

It is the ALJ's responsibility, as fact finder, to make specific credibility findings. Here, one of the specific reasons underlying the ALJ's skepticism about the Second Mate's credibility about the events of January 14th and January 17th, 2015, is clear: the Second Mate received a poor performance evaluation from Respondent on February 3, 2015. This was supported by the finding that the Second Mate provided raised allegations against Second Mate only after the performance evaluation. D&O, p. 14. The Coast Guard again tries to storm the citadel by pushing a version of testimony from Second Mate, found not credible by the ALJ. When challenging the legal sufficiency of a fact finder's credibility determination, more is required than simply repeating the mantra: "the ALJ should have believed this."

The Coast Guard arguments generally disregard the showing required to overcome an ALJ's discretionary finding about witness credibility, and are instead, mostly (as noted) efforts to second-guess the ALJ's credibility findings and by claiming "he should have seen it our way". Included in the vein, the Coast Guard finds an issue with the fact that the ALJ credited some, but not all, parts of each Second Mate's and Respondent's testimony, as if to suggest an ALJ's credibility determinations must be all-or-nothing, and anything in between is "dissociative" or "inconsistent" requiring further explanation. CG Appeal Brief, p. 19. Repeatedly, the Coast Guard seems unable to comprehend the scope and breadth of judicial discretion in evaluating credibility. The ALJ made his findings and cited his reasons from the record. The scope of the ALJ's discretion unquestionably permits him to credit some, but not all, of what a witness states. The Coast Guard also offers up a smorgasbord of theories and manners of weighing the evidence that the "ALJ failed to consider" or "failed to discuss." CG Appeal Brief, p. 21. When making specific credibility findings, the ALJ is not obligated to provide an exhaustive list of every possible theory and the manner for disqualifying those theories. As stated at the outset, an ALJ's exercise of authority permits him or her to make findings of fact and conclusions of law that may not be completely consistent with all of the record, so long as there is sufficient material in the record to justify the decision. See, APP. DEC. 2685 (MATT); *citing APP*. DEC. 2395 (LAMBERT). The Coast Guard has not met its burden of showing why the ALJ's credibility determinations underlying Finding No. 3 should be reversed. The ALJ's decision is soundly within his discretion and must not be disturbed.

(B) The ALJ's Ultimate Findings Number 4, 5, 6, and 8 Were Correctly Determined Because A Preponderance Of Reliable And Credible Evidence Showed That Respondent's Actions Toward Deck Cadet 1 Constituted Misconduct For Assault And Battery Only And Did Not Support A Finding Of Abusive Sexual Contact In Violation of 18 USC s. 2244(b), or Sexual Molestation In Violation Of 46 CFR s. 5.61 (a)(3),

(1) D & O Findings Being Appealed

Under this section of the CG Appeal Brief, the Coast Guard appeals D & O findings Nos. 4, 5, 6, and 8. These findings concluded that Respondent's actions toward Deck Cadet 1 did not constitute Abusive Sexual Contact in violation of 18 USC s. 2244(b), or sexual molestation in violation of 46 CFR s. 5.61 (a) (3), but did constitute nonconsensual physical contact sufficient to prove Assault and Battery, and therefore Misconduct in violation of 46 USC s.7703 (1) (b) and 46 CFR s.5.27. D & O, p.39.

(2) Coast Guard Appeal Arguments

This section in the CG Appeal Brief is identified as subsection B, and found at pages 22-32 of the Appeal Brief. In this section, the Coast Guard argued: No proof of criminal intent is required for a violation of 18 USC s. 2244 (b) (CG Brief, p. 24-5); Respondent's acts relating to the Deck Cadet met the elements of s. 2244 (b) because they were knowingly abusive and sexual, without permission and with intent to harass (CG Brief, pp. 25-8); and that the Deck Cadet's statement of perception of Respondent's state of mind is not sufficient to overcome what the Coast Guard claims was a preponderance of evidence of abusive sexual contact, (CG Brief, pp. 28-32).

(3) Respondent's Argument in Reply

(a) The Coast Guard Has Failed To Show That the ALJ Decision Was Not Supported By Substantial Evidence

In cases raising the substantial evidence challenge to an ALJ decision, the Commandant has reiterated that the ALJ possesses broad discretion in determining witness credibility and resolving discrepancies in the record. APP. DEC. 2711 (TROISCLSAIR) (2015). Reliance on unrebutted testimony in the record has been found to support an ALJ's decision and defeat a claim of insubstantial evidence. APP. DEC. 2718 (LEWIS) (2018). And significantly, an ALJ's findings need not be consistent with all the evidence as long as *sufficient material exists* on the record to justify the finding. APP. DEC. 2655 (KILGROE) (2006).

The Deck Cadet's own testimony supplies clear and ample evidence in the record from which the ALJ in his discretion, could have found as he did, that Respondent's actions did not rise to the level of abusive sexual contact under 18 USC s. 2244 (b), or sexual molestation under 46 CFR s. 5.61 (a) (3). The following evidence was presented at the hearing. The act complained of was, according to the Deck Cadet, this: On two occasions, Respondent was alleged to have come up from behind the Deck Cadet, touched the Deck Cadet's buttocks with his groin and simulated a groping or sexual like act. D & O, p. 18. But context is everything and here in his own words is how the Deck Cadet presented the mitigating context of the events: He admitted under oath that Respondent's treatment of him was intended as horseplay and a joke, Tr. V 2, at 92-3; He admitted under oath that he understood that there was no malice intended towards him, Tr. V 2, at 93; He admitted that he personally did not feel threatened or scared, Tr. V2 at 93-4; He understood that Respondent acted as if his actions were "jokes" and he did not consider Respondent to be acting with "malice" or that he was "a rapist" Tr. V2, at 93. Specifically, the ALJ quotes this statement by Deck Cadet 1 from the record: "… I guess you would consider it, it was like groping, like a playful groping, and then like touching behind, like as part of it, he'd consider it a joke." D & O, p. 19. In brief, the Deck Cadet's own testimony

was more than sufficiently probative and substantial for the ALJ to find, as he did, that the acts complained about were "nonconsensual touching", constituting "assault and battery and hazing." D& O, p. 22. The Deck Cadet's testimony in this respect was unrebutted, and the Commandant has found that reliance by an ALJ on testimony that is unrebutted qualifies as substantial evidence. APP. DEC. 2718 (LEWIS) (2018).

The ALJ also heard and considered evidence from the record that Deck Cadet 1 had written a prior inconsistent statement to the ship's captain, Captain [redacted], who called for an investigation shortly after the events occurred in 2015. The ALJ noted that the statement indicated that Deck Cadet 1 "considered Respondent's humor off-color but not abusive or sexually violative." D & O, p. 20. The ALJ also noted that this testimony conflicted with Deck Cadet 1's hearing testimony and subsequent statements, but in resolving the inconsistencies, as he is allowed to do, the ALJ concluded:

> Deck Cadet 1's testimony that Respondent was not acting with malice or that he was 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 USC §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-yer limitation period. 46 CFR §5.55 (a) (2). However, based on all of the evidence, an ALJ may find a lesser included violation of misconduct proved. (Citation omitted). D& O pp.23-4.

Citations of ample evidence from a record, and relied upon by the ALJ, has served as a basis for the Commandant to sustain an ALJ's finding against a challenge of insubstantial evidence. APP. DEC. 2711 (TROISCLAIR) (2015). Citing and relying upon unrebutted testimony has also served as a basis to defeat a Coast Guard's challenge of insubstantial evidence, APP. DEC 2718

(LEWIS) (2018), as has resolving inconsistent evidence, APP. DEC. 2655 (KILGROE) (2006). ALJ findings need not be consistent with all evidence as long a sufficient material exists on the record to justify the finding. APP. DEC. 2655*, supra.* The record is replete with evidence, from which the ALJ could have found, and from which the ALJ did find and cite in support of his findings. The Coast Guard's claim in subsection B of its Brief that Findings 4, 5, 6, and 8, relating to Deck Cadet 1 are not supported by substantial evidence, are without merit and must be dismissed.

(b) The Coast Guard Has Failed To Make A Case For Error Of Law

In subsection B of its Brief, the Coast Guard appears to raise two error of law arguments. The first error of law argument is a claim that it was error of law for the ALJ to read a criminal intent into 18 USC §2244 (b) arguing that no proof of criminal intent is required for a criminal violation serving as a basis for a Coast Guard charge of misconduct under 46 USC §7703 (1) (B), as defined by 46 CFR §5.27. CG Brief, pp. 22-28. The second error of law argument appears to be that the ALJ committed error by relying solely on "one statement by Deck Cadet 1 made during cross examination that "he did not think the Appellee was a rapist", CG Brief, pp. 28-32.

(i) "Knowing" Conduct is not the Equivalent of Criminal Intent

The Coast Guard begins subsection B of its Brief by stating:

> The ALJ committed an error of law when he found the facts, as proven, regarding Appellee's conduct towards Deck Cadet 1 did not constitute abusive sexual contact in violation of 18 USC §2244 (b). The ALJ *found proven* that Appellee *knowingly* groped Deck Cadet 1's buttocks with his hand on at least two occasions and simulated a sex act by pushing his groin against Deck Cadet 1's buttocks and "humping" Deck Cadet 1 in front of other crew members between December 7, 2014 and March 10, 2015. D & O at 18-19, 20, 22, 29. CG Brief, p. 22.

That representation is not correct. The claim that the ALJ found that Respondent "knowingly groped" Deck Cadet 1 is not found anywhere in pages 18-19, 20, 22, 29, or anywhere among the ALJ's findings at D & O, pp.38-9. To the contrary, here is what the ALJ did find:

> (t)here is not sufficient evidence to show Respondent *knowingly engaged* in abusive sexual contact or a sexual act or an attempted sexual act. (emphasis added) (citation omitted). D & O, p. 23.

And:

> 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 and humiliating. D & O, p. 20.

And further:

> I find the Coast Guard presented substantial and preponderant testimony and evidence that Respondent did engage in nonconsensual touching set forth in Charges 3 and 4 and this conduct constitutes an assault and battery and hazing of Deck Cadet 1. D & O, p. 22.

And finally:

> 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 were not taken as *knowing* abusive sexual contact. (emphasis added) D & O, p. 23.

With respect to the underlying statutory offense, 109A of Title 18 - Sexual Abuse - the ALJ stated

> 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 limitation period in 46 CFR s. 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. D & O, p. 23.

From this, the Coast Guard proceeds to argue, from a series of cases, that it was error of law for the ALJ to require criminal intent as a required element to prove misconduct under 46 USC §7703 (1)(B), which states that a license may be "suspended or revoked for an act of misconduct

or negligence"; and 46 CFR §5.2, which defines misconduct as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order,….."(etc.).

In general, the cases cited by the Coast do not support the proposition offered, that is, that no proof of criminal intent is required to prove an underlying charge of misconduct. And, to whatever extent they make the suggestion they are clearly distinguishable from our case on one important point: Knowing conduct is not the same as criminal intent. The first two cases cited by the Coast Guard, do not even address the legal proposition that no proof of criminal intent is required to prove misconduct: APP. DEC. 2725 (JORY) ("when a criminal act of assault 'is committed by a merchant mariner while serving under authority of a credential, the matter may well justify proceeding against the credential"); and APP. DEC. 2658 (ELSIK) ("the fact that criminal violations were available for the charged offenses does not preclude the Coast Guard from initiating a suspension and revocation action "). The third case is equivocal on the point sought to be made: APP. DEC. 605 (BARROS) (1952) ("Misconduct *does not necessarily* require evidence of criminal intent to sustain a charge lodged under the law administered here.") This case may easily be limited to its facts because the Coast Guard returned to his ship and stabbed another crew member, and then claimed no criminal intent because he was intoxicated. The fourth case, APP. DEC. 423 (CAMPBELL) (1950) is even more factually distinguishable; there, the mariner had been acquitted of the criminal charge in a civilian court before the ALJ found misconduct for possessing 455 grains of marijuana. In any event, the Examiner's finding that misconduct was proven was reversed and remanded for additional testimony or dismissal. This is hardly a persuasive showing of the "long history" of Commandant cases supporting the

claimed error of law that no proof of criminal intent is required to sustain a charge of misconduct.[2]

The Coast Guard's argument is severely strained for another reason: it is not at all clear that the reason the ALJ *DID* find against the Coast Guard in Findings 4, 5, and 6, as the Coast Guard seems to assume, was the absence of proof of a criminal intent. The only actual statement made by the ALJ which could come close to being interpreted as requiring proof of criminal intent was

> Although the statute has broad language it includes a *criminal intent element of knowingly engaging* in abusive sexual contact. D & O, p.23.

This statement at the top of p. 23 appears to have been a summary by the ALJ of the interconnection between two statutes, 18 USC §2244 (b) ("knowingly engages in sexual contact") and 18 USC §2246 (3) (defining sexual contact as "intent to abuse, …" etc.). The conjunction of words from the two separate statutes into the phrase "criminal intent element of knowingly engaging in abusive sexual contact" may have been conceived for convenience only, but not for legal parsing. Was it a criminal intent element because of the presence of the word "knowingly"? Did the ALJ see the phrase as having one legal concept, or two? As more fully discussed below, the distinction does have significance.

"Knowing" engagement is an element of the underlying rule, law, or statutory violation needed to support misconduct under 46 CRF §5.27. It could not have been a statutory violation of 18 USC §2244 (b) if the conduct complained of was not *knowing*. "Knowing" conduct, as an element of the underlying law, had to be found or there would have been no statutory violation,

[2] On page 25 of its Brief, the Coast Guard embarked on a discussion of two non-binding ALJ decisions by Judge Devine. Significantly, both cases involved violations of 18 USC §1001, which, similar to 18 USC §2244 (b), requires as an element of proof, *knowledge* . Cf. 18 USC §1001 (a) ["(w)hoever, in any manner…..*knowingly* and willfully…." etc;] with 18 USC §2244 (b) ["Whoever, in the special maritime and territorial jurisdiction….*knowingly* engages in sexual contact…." etc.]. The point of this discussion remains unclear.

and accordingly no misconduct. "Knowing" conduct is *not* however the equivalent of *criminal intent.* Morissette v. United States, 342 US 246; 72 S. Ct. 240, 276 (1952) ("That the removal [of goods from government land] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal") Phrased another way, Morisette means that the mere fact that the defendant's removal of property was a conscious and intentional (i.e., a knowing) act did not give rise to a presumption of criminal intent. Even if, as the Coast Guard claimed but struggled to show, there is a "long history" of Commandant cases saying that no proof of criminal intent is required to find an underlying claim of misconduct, that may not be what Judge Devine found. Judge Devine may have found, on the one clear and definitive statement in the D & O relating to Findings 4, 5, 6, and 8, that there was insufficient evidence to show *knowing* violation of the law, *not* that there was insufficient evidence to show *criminal intent* to violate the law. The Coast Guard has not demonstrated with any clarity what the rule of law is, or that the ALJ's Findings 4, 5, 6, and 8 are based on a clear violation of any law.

(ii) The ALJ's Findings Did Not Rely "Solely on One Statement"

The Coast Guard's second error of law claim begins at p. 28 and continues to p. 32 of its brief. Here, the Coast Guard continues tilting at windmills, by arguing:

> The ALJ's findings all conform to the plain language elements of 18 USC §2244 (b) and the definition of "sexual contact" at 18 USC §2246 (3). However, despite this alignment, the ALJ refused to find the charge proven, attributing significant weight and relying almost *solely on one statement* by Deck Cadet 1 made during cross examination that he did not think the Appellee was a rapist. CG Brief, p. 29.

This statement is erroneous and misrepresents several important elements of the ALJ's findings. First, the ALJ's findings do not, as claimed, "conform to the plain language elements of 18 USC s. 2244 (b) and the definition of "sexual contact" at 18 USC §2246 (3), *if* the ALJ did not find, as

noted in the previous section, a *knowing* violation, a requisite element of s. 2244 (b). Secondly, it is a (yet another) misrepresentation of the ALJ's findings for the Coast Guard to claim that the ALJ "relied *almost solely* on one statement by Deck Cadet 1 made during cross examination that he did not think Appellee was a rapist". It is a misrepresentation because, as noted previously in subsection (B) (3) (a) and in (B) (3) (b) (i), the ALJ in his D & O relied on other distinct and varied representations by Deck Cadet 1, including the representation that he didn't think Respondent was acting with malice[3]; the representation that he thought Respondent's actions were playful groping; the representation that Respondent's actions were jokes; and the representation that Respondent's actions were not taken as knowing and abusive sexual contact. D & O, pp. 19; 23. Moreover, the Coast Guard's contention that Deck Cadet 1's testimony was somehow unreliable because he was in a "highly stressful situation" "under cross examination" and with "Appellee in the room directly in front of him" is hardly enough to convert the finding into an error of law. It is after all, the ALJ's evaluation of the credibility of witnesses that counts, not that of the Coast Guard. APP. DEC. 2639 (HAUCK) *citing* APP. DEC. 2527 (GEORGE); APP. DEC. 2522 (JENKINS); APP. DEC. 2519 (JEPSON). Moreover, the case cited by the Coast Guard does not support its proposition. APP. DEC. 1788 (GUERRERO) (1970) involved a 12-year-old girl who was sexually assaulted by a ship's steward aboard a passenger ship. When examined, the girl admitted being "confused" by the incident. The Examiner's evaluation of the 12-year old's testimony as reliable and probative was upheld, and the Examiner's decision against the crew member was affirmed. Deck Cadet 1, on the other hand, was not a 12-year old; he was a mature adult, who had graduated from King's Point in

[3] The Cast Guard goes out of its way to take exception to this statement by Deck Cadet 1 which, from the cross-examination shown on page 30 of its Brief, can be seen to have been offered voluntarily and unsolicited, and was also quite obviously intended to be illustrative of the fact that the Deck Cadet did not feel sexually threatened, and not, as the Coast Guard seems to think, to be taken literally.

[redacted], and at the time of the hearing in June 21 was aroun [redacted]. T. V1, pp. 52-4. Furthermore, he didn't admit to confusion. GUERRERO, in short, can hardly serve as a sufficient foundation for the Coast Guard's second claim of error of law. Where no citations are made to an authoritative decision supporting the claimed error of law, no error of law can be found. APP. DEC. 2702 (CARROLL) (2013). The Coast Guard's second clam of error of law is also without merit.

(c) The Coast Guard has Failed to Make a Case for Facts or Conclusions Without Evidentiary Support

Respondent incorporates his discussion in subparagraph (B) (3) (a) above, describing in detail the ALJ's numerous findings from the record supporting his conclusions, as well as the numerous additional facts from the record from which the ALJ could have found additional support for his finding that Respondent's conduct did not rise to the level of Abusive Sexual Contact, a Sexual Act, or Attempted Sexual Act. ALJ findings need not be consistent with all evidence as long as sufficient material exists on the record to justify the findings reached. APP. DEC. 2655 (KILGROE) (2006). Sufficient material exists on the record here and the ALJ's decision as arbiter of facts and broad discretion in evaluating evidence and the credibility witnesses should not be disturbed. APP. DEC. 2685 (MATT) (Great deference is given to the ALJ in weighing the evidence); APP. DEC. 2610 (BENNETT) (The ALJ is the arbiter of facts, and it is his or her duty to evaluate testimony and evidence at the hearing).

(d) Because the Coast Guard Has Failed To Prove Error Of Law And Facts Unsupported By Evidence, It Has Failed To Prove Abuse of Discretion

Abuse of discretion will be found where a ruling is based on error of law, or where based on factual conclusions without evidentiary support. 5 AM JUR 2d, *Appellate Review*, s.695

(1997) (footnotes omitted); APP DEC. 2702 (CARROLL)(2013) (citing APP. DEC. 2692 (CHRISTIAN); APP. DEC. 2686 (SALAMON) (2010)(citing APP. DEC. 2610 (BENNETT). The standard of review for abuse of discretion is highly deferential. A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court. APP. DEC.2686 (SALAMON) (2010). Respondent incorporates his previous argument in subsection (B)(3) (b) that the Coast Guard has failed to make a case for Error of Law, and in (b) (3) (c) that the Coast Guard failed to prove facts unsupported by evidence. Accordingly, its case for Abuse of Discretion on the part of the ALJ must also fail.

(C) The Administrative Law Judge's Ultimate Findings of Fact and Conclusions of Law Nos. 3, 6, 7, and 9, Comprising Findings that Respondent's Conduct Did Not Constitute Sexual Molestation under 46 C.F.R. § 5.61(a)(3), Are In Accordance With Applicable Law and Precedent, Supported by Substantial Evidence, and a Proper Exercise of Discretion.

(1) D & O Findings Being Appealed

Under this section of the CG Appeal Brief, the Coast Guard appeals D & O Findings Nos. 3, 6, 7 and 9. These Findings concluded that Respondent's actions did not constitute Sexual Molestation in violation of 46 CFR §5.61 (a) (3). D & O, p. 39.

(2) Coast Guard Appeal Arguments

This section in the CG Appeal Brief is identified as subsection C and found at pages 32-46. In this section, the Coast Guard argued: Acts of abusive sexual contact in violation of 18 USC §2244 (b) constitute sexual molestation under 46 CFR §5.61 (a) (3) CG (CG Brief, pp, 36-37; Acts of Sexual Harassment constitute Sexual Molestation in violation of 46 CFR §5.61 (a) (3) (CG Brief, pp. 37-42); Binding Coast Guard precedent supports a finding of Sexual Molestation in violation of 46 CFR §5.61 (a) (3); and, Finding physical contact is not needed to show

interference with a government official in violation of 46 CFR §5.61 (a) (10) (CG Brief, pp. 44-46.

(3) Respondent's Arguments In Reply

The ALJ correctly found that Respondent's Conduct did not constitute sexual molestation under 46 C.F.R. §5.61(a)(3). The evidence presented was insufficient for the ALJ to conclude that Respondent's conduct constituted sexual molestation or perversion under 46 C.F.R. §5.61(a)(3). A finding that Respondent's conduct violated the MLL Policy does not alter the validity of that conclusion.

(a) **The Administrative Law Judge Correctly Determined That The Evidence Was Insufficient To Conclude that Respondent's Conduct Constituted Sexual Molestation or Perversion Under 46 C.F.R. § 5.61(a)**

The ALJ's determination that the evidence was not sufficient to find sexual molestation or perversion under 46 C.F.R. § 5.61(a) is neither inconsistent with applicable precedent, nor lacking support by substantial evidence, nor an abuse of discretion.

Coast Guard suggests that the ALJ's findings are flawed because the Commandant has not expressly defined "sexual molestation" under 46 C.F.R. § 5.61(a).[4] This suggestion stems from a distorted view of the Decision and Order. Clearly, the ALJ did not limit the scope of his review to a search for a reasonable person's definition of sexual molestation. Rather, in the absence of a definition of "sexual molestation" under the regulations, the ALJ turned to the Commandant's decisions on appeal to "analyze what conduct may be considered to be sexual molestation . . . ." D&O, at 25 (emphasis supplied).

[4] See CG Brief at 35 ("The ALJ noted in his decision that the regulations do not define sexual molestation. D&O at 25. As such, the ALJ looked to Coast Guard precedent for guidance, but limited his review to several APP. DEC.s in search of a "reasonable person's definition". Id. Although the Commandant has considered several appeals concerning acts of sexual molestation or perversion, or both, none of these APP. DEC.s have actually defined these terms.").

While there can be no dispute that an express definition of "sexual molestation" would benefit the instant appellate proceedings, this absence is by no means fatal. Coast Guard dismisses the value of defining an act through analysis of prior conduct found to constitute that act. This is an appropriate course of action in the absence of an express definition.[5] The ALJ's analysis of these decisions establishes a reasonable baseline for understanding "what conduct may be considered to be sexual molestation for purposes of this proceeding." D&O at 25.[6] In this case, that foundation was sufficient to enable the ALJ to answer the question of whether the conduct alleged in the instant case constituted sexual molestation under 46 C.F.R. § 5.61(a)(3).

(i) The ALJ Properly Found That Respondent's Acts against Deck Cadet 1 Did Not Constitute Sexual Molestation Under 46 C.F.R. § 5.61(a)(3)

At the outset, it must be mentioned that Coast Guard characterizes Respondent's conduct as "Acts of Abusive Sexual Contact." See, e.g., Coast Guard Brief at 36 ("Acts of Abusive Sexual Contact in Violation of 18 U.S.C. § 2244(b) Constitute Sexual Molestation under 46 C.F.R. § 5.61(a)(3)); Coast Guard Brief at 36 ("As discussed more in depth in Section D (Public Policy *infra*), the ALJ's decision in this case finding Respondent's actions constituting abusive

[5] See, e.g., APP. DEC. 2573 (JONES) (Upholding ALJ's determination that Respondent's acts of "fondling the anal area or genitals of [a sleeping] deck hand" on three separate occasions constituted sexual molestation); APP. DEC. 2132 (KEENAN) (Coast Guard wrongfully "engaged in acts of sexual perversion with two other (named) members of the crew of the vessel" by "[i]n the morning hours . . . accost[ing], separately, two ordinary seamen of the crew, who were asleep in their bunks in different rooms, by placing a hand on their private parts."); and APP. DEC. 1876 (PENDERGRASS) (Examiner found Coast Guard's act to comprise perversion, where Coast Guard entered victim's room, "turned the bunk light off [after victim turned the bunk light on], addressed [victim] as "Twiggy" and "sweetheart," and touched [victim's] testicles.").

[6] Adjudicatory bodies have long examined whether conduct and behavior constitutes a particular legal concept—*i.e.*, in this case, whether the conduct and behavior constitutes sexual molestation under 46 C.F.R § 5.61(a)(3)—by reviewing prior precedent and the determinations regarding such conduct therein. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."). Indeed, if the absence of an express definition was the imposing roadblock that Coast Guard so believes, no adjudicatory body would be able to fulfill its purpose. The act of understanding present through the review of prior judicial analysis of similar conduct is a cornerstone of the adjudicatory process.

sexual contact not "egregious" enough for sexual molestation exhibits an antiquated view of sexual roles.") (citing D&O at 25).

Coast Guard inaccurately characterizes the ALJ's findings.[7] The ALJ found "[in]sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act." D&O at 23 (citing United States v. Sneezer, 900 F.2d 177 (9th Cir. 1990) (emphasis supplied). The "abusive sexual contact" provision of 18 U.S.C. § 2244(b) incorporates the definition of "sexual contact" set forth at 18 U.S.C. § 2246(3): "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 . . . ." (emphasis supplied). Subsection (b) of the "Abusive Sexual Contact" statute, in turn, states that:

> 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). The ALJ found that the Respondent's actions lacked the requisite intent element required for "sexual contact" as defined at 18 U.S.C. § 2246(3), as used in 18 U.S.C. § 2244(b). The ALJ found that the requisite intent element lacking because, among other grounds, Deck Cadet 1's credible testimony that "[Respondent] was not acting with malice and was not a rapist." D&O at 23. The ALJ's findings, being supported by substantial evidence, are to be

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[7] Respondent suggests that the Commandant consider carefully how the meaning of Coast Guard's argument can change with no more than a slight tweak of language: Compare ("[T]he ALJ's decision in this case finding Appellee's actions constituting abusive sexual contact "egregious" enough for sexual molestation . . . .") with ("[T]he ALJ's decision in this case finding ***that*** Appellee's actions constitut***[ed]*** abusive sexual contact "egregious" enough for sexual molestation . . . .") (illustrative editorial additions reflected in ***bold/underline/italic***). Let there be no uncertainty: the ALJ's decision in this case did not find that Appellee's actions constituted abusive sexual contact.

accorded deference on this appeal. See APP. DEC. 2212 (LAWSON) ("It is well settled, both in Administrative Law generally and in R.S. 4450 proceedings that the credibility of witnesses and the weight to be assigned evidence adduced are matters within the sound discretion of the Administrative Law Judge. Only a showing that the judgment in a given case was arbitrary or capricious can found a rejection of the determinations made by the trier of fact.") (citing APP. DEC. Nos. 2052 and 2003)).

Coast Guard next contends that the ALJ erred in finding that "Appellee's acts of "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" comprised a lesser-included offense of non-sexual assault and battery, rather than sexual molestation or perversion. Compare Coast Guard Brief at 36 with D&O at 23.[8] The ALJ's determination was neither erroneous nor an abuse of discretion. A lesser-included offense is a "concept of criminal law in which all the elements of the lesser offense are included in the greater offense and the common elements are identical." 2680 (McCarthy, III). See also APP. DEC. 2452 (MORGANDE) (finding mutual combat as a lesser-included offense of a specification alleged). A lesser-included charge is, as the name suggests, included within the greater charge; to enumerate the lesser-included charge alongside the greater charge is "mere surplusage to [a] specification." APP. DEC. 2184 (BAYLESS).

[8] Here again, Coast Guard appears to mischaracterize the ALJ's findings. Coast Guard introduces this section of its argument by stating that "[T]he ALJ's finding that [Respondent] groped Deck Cadet 1's buttocks at least twice and pressed his groin against Deck Cadet's 1's buttocks to simulate a sex act in front of other crewmembers support[s] a finding that Respondent's actions constitute sexual molestation or perversion." CG Brief at 36 (citing D&O at 20, 23). Note carefully the difference in how Coast Guard characterizes the ALJ's findings. The ALJ framed Respondent's acts as "non-consensual touching of Deck Cadet 1's buttocks through his clothing"—see D&O at 23 (emphasis supplied)—whereas Coast Guard states that "the Respondent groped Deck Cadet 1's buttocks at least twice." CG Brief at 36 (emphasis supplied).

Here, the ALJ's finding that Respondent's acts were a lesser-included offense of non-sexual assault and battery rests on a proper reading of applicable precedent. Assault and Battery consists of "apparent present ability to inflict injury whether or not the aggressor actually intends to inflict or is capable of inflicting harm," coupled with "some degree of physical contact." APP. DEC. 1447 (BERTI) (emphasis supplied). Significantly, the victim's apprehension is irrelevant where the assault is consummated by a battery. See APP. DEC. 2171 (DEIBAN); APP. DEC. 2050 (WIJNGAARDE). Reduced to essential components, the elements of Assault and Battery are (1) apparent present ability to inflict injury; and (2) some degree of physical contact. It is reasonable to conclude that each of these elements is likewise required for a charge of sexual molestation.[9]

The ALJ's review of the APP. DEC.s and "abusive sexual contact" statutes reflect an additional element of proof not prerequisite to a finding of Assault and Battery—intent. Once again, an express definition of "sexual molestation" is not prerequisite to understanding that evidence must reflect intent for the ALJ to find that acts constitute sexual molestation under 46 C.F.R. § 5.61(a)(3). For example, the ALJ's findings reflect that the Respondent did not intend to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of another. See D&O at 27 ("I find Deck Cadet 1's testimony that Respondent's in his mind was joking and had no malice and was not a rapist, persuasive in regard to the nature of the physical contact . . . [t]herefore, 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)," nor 'sexual molestation under 46 CFR § 5.61(a)(3).").

[9] For example, the actions described in KEENAN—in which the respondent (1) turned off the light (shortly after victim had turned it on) before calling the victim "Twiggy" and "sweetheart" and (2) touched the victim's testicles without consent—reflect both an apparent present ability to inflict injury, and some degree of physical contact.

(ii) The ALJ Properly Found that Respondent's Conduct Did Not Constitute Sexual Molestation under 46 C.F.R. § 5.61(a)(3)—Notwithstanding Whether Such Conduct Constituted "Sexual Harassment" Under the MLL Policy.

Coast Guard next contends that the ALJ erred by not finding that conduct alleged to be "sexual harassment" under the MLL Policy also constituted sexual molestation under 46 C.F.R. § 5.61(a)(3):

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

Coast Guard Brief at 39.

The issue, as framed by Coast Guard, is whether the ALJ erred in not finding that Count 5, allegations 10, 11, and 14—alleged as "sexual harassment" in violation of the MLL Policy—constitute sexual molestation under 46 CFR § 5.61(a)(3). Coast Guard fails to recognize the nuanced distinction between "sexual harassment" and "sexual molestation" in violation of 46 C.F.R. § 5.61(a)(3). While these concepts encompass overlapping conduct, "sexual molestation" under 46 C.F.R. § 5.61(a)(3) contemplates a span of conduct more narrow than "sexual harassment" as defined under the MLL Policy.

Under the MLL Policy, "sexual harassment" includes "physical, verbal, or visual conduct based on sex" that "has the purpose of effect of unreasonably interfering with an individual's

work performance or creating an intimidating, hostile or offensive working environment." D&O at 32 (quoting Ex. CG-007 at 1-2).

Assessed in terms of *prima facie* elements, conduct constitutes "sexual harassment" under the MLL where that conduct:

1. Involves physical, verbal, or visual conduct;
2. Based on sex;
3. With the purpose or effect of
    a. Unreasonably interfering with an individual's work performance; or
    b. Creating an intimidating, hostile or offensive environment.

These quasi-*prima facie* elements illustrate that "sexual harassment" under the MLL Policy contemplates four distinct "classes" of conduct:

		Could conduct alleged also constitute:	
		Assault and Battery?	Sexual Molestation?
Class 1	"The conduct has the <u>purpose</u> . . . of unreasonably interfering with an individual's work performance . . . ."	Yes	No.
Class 2	"The conduct has the <u>purpose</u> . . . of . . . creating an intimidating, hostile or offensive working environment. . . ."	No	Yes
Class 3	The conduct has the . . . <u>effect</u> of unreasonably interfering with an individual's work performance . . . ."	No	No
Class 4	The conduct has the . . . <u>effect</u> . . . of . . . creating an intimidating, hostile or offensive working environment.	Yes	No

As the preceding table demonstrates some—but not all—the conduct meeting MLL Policy's definition of "sexual harassment" also constitutes "sexual molestation under 46 CFR § 5.61(a)(3). When conduct constituting sexual harassment under the MLL Policy is that of the second "class"—*i.e.*, having a "<u>purpose</u> . . . of . . . creating an intimidating, hostile or offensive working environment"—such conduct might also constitute sexual molestation under 46 C.F.R. § 5.61(a)(3). The same cannot be said for conduct contemplated under the first, third, and fourth

"classes" in the table above, however. Conduct encompassed by this latter grouping lacks the requisite intent necessary for the ALJ to find "sexual molestation" under 46 C.F.R. § 5.61(a)(3).

As the ALJ did not find that Respondent's conduct constituted sexual harassment under the MLL Policy by virtue of "involv[ing] physical, verbal, or visual conduct,.. [based] on sex. . [w]ith the purpose . . . of . . . creating an intimidating, hostile or offensive environment," the ALJ neither abused his discretion, nor committed error of law in finding that Appellee's conduct—though "sexual harassment" under the MLL Policy—was not sexual molestation under 46 C.F.R. § 5.61(a)(3).

Finding No. 6

The ALJ's Finding No. 6, expressly finding that 10, 11, and 14[10] constituted neither assault, nor assault and battery of a government official—nor, by implication, sexual molestation under 46 C.F.R. § 5.61(a)—was in accordance with applicable law and precedent and supported by substantial evidence. The finding was in accordance with applicable law and precedent because the ALJ determined that Coast Guard failed to establish intent—an element universal to the analysis of prior Commandant Appeals examining this issue.

Coast Guard contends that the ALJ "provided no further analysis other than what he 'noted above' in support of his finding Coast Guard did not prove Respondent's harassing behavior and conduct to be sexual molestation under 46 C.F.R. § 5.61(a)(3)." Coast Guard Brief at 40 (discussing D&O at 33). The ALJ's determination was sufficiently supported. The "as noted above" dismissed by Coast Guard in fact provides a straightforward explanation for why allegations 10, 11, and [14] of Charge 5 do not constitute "sexual molestation" under 46 C.F.R. § 5.61(a)(3):

[10] Erroneously referenced in the Ultimate Findings of Fact and Conclusions of Law as allegation no. 15. See also CG Brief at 38, n.5.

> 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., APP. DEC. 2573 (JONES) (1996); APP. DEC. 2132 (KEENAN) (1978); APP. DEC. 1876 (PENDERGRASS) (1972)

D& O at 33. While at least one Commandant Decision found that "molestation can occur without physical touching occurring," D&O at 26 (examining APP. DEC. 1275 (LOVELETTE)), the ALJ's "as noted above" reference at D&O 33 is simply an acknowledgment that allegations 10, 11, and 14 to Count 5, did not constitute sexual molestation because they—like the physical allegations discussed above—were simply not "actions that would be comparable to APP. DEC. 2573 (JONES) (1996), APP. DEC. 2132 (KEENAN) (1978), or APP. DEC. 1876 (PENDERGRASS) (1972)." D&O at 27.

Additionally, notwithstanding that the ALJ found that the Coast Guard presented sufficient evidence to prove that Respondent's "engaged in several instances of sexually-oriented verbal and physical conduct toward Deck Cadet 1," see D&O 32 (emphasis supplied), the ALJ ultimately concluded that "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." D&O at 32. Note carefully the language used in describing the ALJ's assessment of Deck Cadet 1's testimony with respect to the question of whether the Respondent's actions violated the MLL Policy. The ALJ's conclusion was concerned not with the purpose of Respondent's actions, but with their effect. Likewise, the effect in question was the interference with work performance—not the creation of an intimidating, hostile or offensive working environment. The ALJ's assessment would place the conduct in the third class of conduct constituting "sexual harassment" under the MLL Policy. Such conduct, being of a class more benign and outcome-centric than the purpose-focused conduct described by "Class 2" in the preceding table, simply does not occupy the same plane as the conduct described in APP.

DEC. 2573 (JONES) (1996), APP. DEC. 2132 (KEENAN) (1978), or APP. DEC. 1876 (PENDERGRASS) (1972)."

Coast Guard also challenges the ALJ's dismissal of Charge 6. The ALJ found that "[t]he Coast Guard failed to present evidence sufficient to find sexual molestation or any physical contact with Engine Cadet 2," and concluded that there was "no evidence that would support finding any violation that would fit within 46 CFR § 5.61(a)." D&O at 38. The ALJ ultimately found Charge 6 time-barred by 46 C.F.R. § 5.55(a)(3) and dismissed the charge, reasoning that "[e]ven if [Charge 6] if it were not time-barred the Coast Guard failed to present sufficient proof by preponderant evidence that Respondent engaged in the alleged conduct." D&O at 38. Coast Guard opposed this dismissal, arguing:

> Given that Appellee's actions properly constitute an act or offense under 46 C.F.R. § 5.61(a) and should not be time barred, the ALJ's summarily dismissing the allegations in Charge 6 is not supported by substantial evidence and is not in accordance with applicable law, precedent or public policy.

Coast Guard Brief at 40. Coast Guard fails to present a basis for reversing the ALJ's dismissal of Charge 6. Coast Guard further contends that

> [T]he basis for the ALJ's findings are not expressed in terms of witness credibility, which has long been determined almost the exclusive purview of the ALJ. Instead, the ALJ found that "Charge 6 does not contain any allegations of sexual contact or physical contact and even if the allegations are assumed arguendo to be true, none of this conduct if proven would constitute an act or offense within 46 C.F.R. § 5.61(a)."

Coast Guard Brief at 41 (citing D&O at 36–37).

First, Coast Guard's assertion that the ALJ failed to "express [his findings] in terms of witness credibility" is incorrect. The ALJ explained that "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." D&O at 35. As the ALJ ultimately found that the Coast Guard failed to present substantial evidence of the allegations alleged, it is clear that the ALJ found Deck Cadet 2's contradictory testimony more credible than that testimony provided by Engine Cadet 2. See D&O at 35–36 ("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."). See also APP. DEC. 2573 (JONES) ("Where there is conflicting testimony it is the function of the Administrative Law Judge, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence.") (quoting APP. DEC. 2474 (CARMIENKE)).

Coast Guard provides no support for its assertion that "[b]ecause the ALJ made no determination on witness credibility, the ALJ had in the record sufficient evidence to support a finding by a preponderance of the evidence that the Respondent's actions violating MLL's Sexual Harassment Policy constituted acts of sexual molestation against Engine Cadet 2." Even assuming, *arguendo*, that Coast Guard's assertion that ALJ "made no determination on witness credibility," Coast Guard fails to explain how that in turn would compel the conclusion that the ALJ had in the record sufficient evidence "evidence to support a finding by a preponderance of the evidence that the Respondent's actions violating MLL's Sexual Harassment Policy constituted acts of sexual molestation against Engine Cadet 2." The connection is not apparent.

Finally, Coast Guard's arguments ignore the applicable standard of review. The applicable standard of review does not direct the Commandant to reject the ALJ's findings because there could be evidence in the record from which a different finder of fact could depart from the ALJ with respect to a particular finding. So long as the ALJ's "findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even

if there was evidence on which he (or [the Commandant] sitting in his stead) might reach a contrary conclusion. Stated another way, [the Commandant] will not substitute [his or her] findings of fact for the ALJ's unless the ALJ's [[[findings] are arbitrary and capricious." APP. DEC. 2685 (MATT) (citing APP. DEC. 2628 (VILAS)). Indeed, the "[f]indings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding." APP. DEC. 2690 (THOMAS) (quoting APP. DEC. 2639 (HAUCK)). As Coast Guard presents no basis for the Commandant to determine the ALJ's findings arbitrary and capricious with respect to Charge 6, the ALJ's determination that the Coast Guard failed to meet its burden with respect to Charge 6 must be affirmed.[11]

(iii) Binding Precedent Supports the ALJ's Finding that Respondent's Actions Did Not Constitute Acts of Sexual Molestation or Perversion Under 46 C.F.R. § 5.61(a).

Coast Guard argues that the ALJ's determination that Respondent's conduct did not constitute "sexual molestation" under 46 C.F.R. § 5.61(a)(3) is not in accordance with binding precedent.

(A) The ALJ Did Not Find That "Actual Touching" is Required to Find that Conduct Constitutes Sexual Molestation Under 46 C.FR. § 5.61(a)(3).

Coast Guard's mischaracterization of the ALJ's findings again requires a response. Coast Guard's arguments open with a challenge to the ALJ's finding that "actual touching is

[11] Coast Guard concludes by asserting that "[a]ccordingly, under 46 C.F.R. § 5.61(a)(3), Coast Guard should have been afforded the five (5) year statute of limitations, making it timely service of the complaint and appropriately before the ALJ. Accordingly, the ALJ's brief analysis finding that due solely to the lack of physical contact Appellee's actions could not be an act or offense under 46 C.F.R. §5.61(a) is not supported by substantial evidence nor is it in accordance with applicable law or precedent." CG Brief at 41.

required to demonstrate molestation under 46 C.F.R. § 5.61(a)." Coast Guard Brief at 42. Coast Guard continues:

> The ALJ's findings, however, are not IAW the applicable law and precedent. Contrary to the ALJ's analysis, a review of the cited APP. DEC.s demonstrate they are indistinguishable from the present case. Had the ALJ correctly viewed Appellee's actions as abusive sexual contact and sexual harassment, rather than "hazing by non-consensual, touching," and "sexually oriented jokes and teasing," the cited cases actually support a finding that Appellee's acts constituted sexual molestation under 46 C.F.R. § 5.61(a).

Coast Guard Brief at 42 (discussing D&O at 23, 30). Coast Guard's description of the ALJ's findings reflect creative liberties that detract from the proper subject of this appeal—whether, under the applicable standard of review, the Commandant should overturn the Administrative Law Judge's findings of fact and conclusions of law. Such analysis must be based on the ALJ's actual findings.

First, contrary to Coast Guard's description, the ALJ did not find that actual touching is required to demonstrate sexual molestation under 46 C.F.R. § 5.61(a). The ALJ actually found:

> 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. APP. DEC. 2452 (MORGANDE) (1987) (finding mutual combat a lesser included offense of one of the specifications).

The preceding paragraph, together with the legal analysis that follows, does not suggest a conclusion that "actual touching is required to demonstrate sexual molestation under 46 C.F.R. § 5.61(a)." Coast Guard Brief at 42. Again, consider the ALJ's findings below, in the ALJ's own words:

> 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).
>
> D&O at 30–31.

Where the ALJ found that Respondent's conduct did not constitute sexual molestation under 46 C.F.R. § 5.61(a)(3), such finding was not predicated upon lack of physical contact. The ALJ's finding that the "sexually oriented jokes and teasing" allegations did not constitute sexual

molestation was predicated on the ALJ's findings regarding Respondent's intent. As discussed above, intent is the critical element in the 46 C.F.R. § 5.61(a)(3) "sexual molestation" analysis.

Consider again the language used by the ALJ in making his findings with respect to the physical and non-physical acts which Coast Guard alleged to constitute "sexual molestation" under 46 C.F.R. § 5.61(a)(3):

Findings and Conclusions with respect to **physical** acts alleged to be sexual molestation.	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. D&O at 23 (citing United States v. Sneezer, 900 F.2d 177 (9th Cir. 1990)) (emphasis supplied).
Findings and conclusions with respect to **non-physical** acts alleged to be sexual molestation.	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., APP. DEC. 2573 (JONES) (1996); APP. DEC. 2132 (KEENAN) (1978); APP. DEC. 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 APP. DEC. 1845 (MAULL) (1971). D&O at 33 (emphasis supplied).

As the preceding demonstrates, Coast Guard's description of the ALJ's findings as "finding that actual touching is required to demonstrate sexual molestation under 46 C.F.R. § 5.61(a)[3]" is inaccurate at best.

(B) The Administrative Law Judge's Finding that Respondent's Actions Do Not Constitute Sexual Molestation Under 46 C.F.R. § 5.61(a)(3) Accords with Applicable Law and Precedent.

Having reestablished that the ALJ found that the non-physical allegations did not constitute sexual molestation under 46 C.F.R. § 5.61(a)(3) because the evidence did not reflect a requisite intent (and not because sexual molestation under 46 C.F.R. § 5.61(a)(3) requires physical contact, as Coast Guard mistakenly contends), analysis can proceed to Coast Guard's substantive argument that "[b]inding precedent in APP. DEC.s support a finding that Appellee actions constitute acts of sexual molestation or perversion under 46 C.F.R. § 5.61(a)."

Under the applicable standard, "a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion." APP. DEC. 2685 (MATT) (citing 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001). Respondent will address each of Coast Guard's arguments in sequence. Coast Guard argues that the ALJ cited APP. DEC.S 2573 (JONES), 1876 (PENDERGRASS), and 2132 (KEENAN) to "support his finding that Appellee's actions do not constitute sexual molestation." As explained above, the ALJ reviewed the APP. DEC.s cited in the Decision and Order to "analyze what conduct may be considered to be sexual molestation" for purposes of the proceedings. D&O at 25.[12]

1. APP. DEC. 2573 (JONES)

Coast Guard contends that the ALJ's discussion of the distinction between the Respondent's actions and those of the JONES respondent is flawed. Coast Guard argued that the ALJ's Decision and Order "does not explain how a crewmember 'fondling' another

[12] To say that the ALJ cites these APP. DEC.s "to support his finding" that Respondent's actions do not constitute sexual molestation not precisely accurate. The ALJ cites these decisions to analyze what conduct constitutes sexual molestation. The ALJ then made findings as to whether the Respondent's conduct constituted sexual molestation.

crewmember's anal area and penis without permission is any more or less egregious than" Respondent's actions (both physical and non-physical) against the Second Mate, Deck Cadet 1, and the Engine Cadet 2. Coast Guard Brief at 42. Continuing, Coast Guard states that "[a]lthough the ALJ does not explain his analysis as to what acts rise to the level of egregiousness sufficient to constitute sexual molestation, it is worth noting that degree of egregiousness is not an element or found in any definition of sexual molestation, and a reasonable person may well find Appellee's actions do meet that threshold." Coast Guard Brief at 42–43.

Summarizing his analysis of JONES, the ALJ wrote that "the facts of the [JONES] case demonstrate egregious behavior that clearly fits within a reasonable person's definition of sexual molestation." D&O at 25. The ALJ was not, as Coast Guard argues, opining that a sufficient "degree of egregiousness" is an element of "sexual molestation' under 46 C.F.R. § 5.61(a)(3). The ALJ was merely analyzing the conduct of JONES and concluded that such conduct clearly fit in a reasonable persons' definition of sexual molestation. Though the ALJ did not expressly elaborate on the distinction between Respondent's actions and the Conduct in JONES, the distinction is self-evident—the JONES conduct was of a different nature, and a different intent, than that of Respondent.

2. APP. DEC.S 2132 (KEENAN) and 1876 (PENDERGRASS)

Coast Guard next contends that the ALJ's citations to KEENAN and PENDERGRASS were misplaced. Coast Guard contends that KEENAN does not support the ALJ's findings because "the issues addressed on appeal involved several administrative and due process questions and the Commandant only singularly mentioned 'acts of sexual perversion' when referring to the fact of respondent 'placing a hand on [the crewmembers'] private parts.'" Coast

Guard Brief at 43. Coast Guard further contends that the ALJ's citation to PENDERGRASS is misplaced because "also affirmed the decision that an improper touching of the 'private parts' of a crewmember was an act of perversion." Coast Guard Brief at 43.

Coast Guard misses the forest for the trees. The ALJ was simply looking to Commandant APP. DEC.s to analyze what conduct might constitute sexual molestation and perversion under 46 C.F.R. § 5.61(a)(3) and (6). KEENAN is relevant both for its reflection of the effect of the acts and the intent of the Respondent's actions. As the Commandant in KEENAN summarized:

> In the morning hours of that day Coast Guard accosted, separately, two ordinary seamen of the crew, who were asleep in their bunks in different rooms, by placing a hand on their private parts. The first seaman so accosted threatened Coast Guard with bodily harm if he did not leave the room. Coast Guard did leave. The second seaman so accosted did, in response to the touching, strike Appel-lant with open hand or fist, upon which that seaman left the room and Coast Guard went to bed.

APP. DEC. 2132 (KEENAN). Notwithstanding that the Commandant in KEENAN made no reference as to why Respondent's acts were acts of sexual perversion, the APP. DEC. was nonetheless supported by the ALJ's analysis. For example, the Coast Guard in KEENAN touched the victim's genitals while they were sleeping. The victims' responses—the first threatening Coast Guard with bodily harm, the second actually striking Coast Guard with an open hand or fist—are highly distinguishable from the responses of the recipients of Respondent's conduct in this case. Additionally, PENDERGRASS involved conduct in which the Respondent in that case approached a crew messman (the "Messman") at work while out at sea, called him "Twiggy" and "honey," invited the Messman to his room, saying that he would give him a beer, and proposed to [the Messman] that when the vessel reached port they should go together to a motel and Coast Guard would buy clothes for the messman. All of those events preceded the central conduct in question, in which the Respondent entered the Messman's darkened room, at which time

> The messman turned on the bunk light and saw Coast Guard with the upperpart of his body extending over the bunk. [Respondent] turned the bunk light off, addressed [the Messman] as "Twiggy" and "sweetheart," and touched [the Messman's] testicles. He invited the messman to come to his room, as he wished to talk to him. [The Messman] made a noise, got out of the bunk, and climbed up into the bunk above his. Coast Guard left the room.

The distinction between the conduct in PENDERGRASS and the conduct of Respondent (as found by the ALJ) are informative. Coast Guard's apparent ignorance of the utility of this distinction and alternative focus on the Commandant's decision on appeal tracks with Coast Guard's prior arguments.

Coast Guard's discussion of the ALJ's analysis at D&O 25–28 overcomplicates the issue under consideration. As has been repeatedly stated, the ALJ analyzed the conduct to determine what actions constituted "sexual molestation" and "perversion" under 46 C.F.R. § 5.61(a). Coast Guard, having apparently declined to examine and discuss the ALJ's analysis, proceeded to discuss the utility (or lack thereof) of the Commandant's conclusions and analysis in these APP. DEC.s.

(b) **The Administrative Law Judge's Ultimate Findings of Fact and Conclusions of Law ("Findings and Conclusions") Numbers 6 and 7—Physical Contact Is Needed To Show Interference With Government Official Under 46 C.F.R. § 5.61(A)(10)—Is In Accordance With Applicable Law And Precedent, And Is Supported By Substantial Evidence.**

Coast Guard's alternative argument contends that the ALJ's determination that offenses constituting interference with a government official under 46 C.F.R. § 5.61(a)(10) also require physical contact is not in accordance with applicable law and precedent.[13] The ALJ argues that "the ALJ's determination that offenses constituting interference with a government official under

[13] Coast Guard also argues that "the offenses constituting sexual molestation do not necessarily require physical touching." CG Brief at 44 (citing LOVELETTE). As has been repeatedly addressed above, the ALJ did not find that the non-physical allegations were not sexual molestation because they did not involve contact.

46 C.F.R. § 5.61(a)(10) also require physical contact is not in accordance with applicable law and precedent." Coast Guard Brief at 44–45.

Respectfully, Respondent has struggled to understand Coast Guard's basis for this particular argument. The ALJ did not conclude that offenses constituting interference with a governmental official under 46 C.F.R. § 5.61(a) require physical touching, in contravention of APP. DEC. 2609 (SHEPARD). In writing "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)", the ALJ was implicitly suggesting that physical contact—while not required generally to establish interference with a governmental official in violation of 46 C.F.R § 5.61(a)(10)—would be necessary for the Coast Guard to prevail on Charge 6 because the ALJ had previously found that Coast Guard failed to meet its burden of proof with respect to the Charge 6 Allegations. See D&O at 35–36 (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.").[14] Nothing in the ALJ's Decision and order would suggest that the ALJ determined that physical contact was required to establish misconduct in violation of 46 C.F.R. § 5.61(a)(10), and that based on that determination, the ALJ subsequently determined that the

[14] See also D&O at 36 ("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.") (emphasis supplied).

Charge 6 allegations did not constitute interference with government officials in performance of official duties.

The ALJ's Ultimate Findings of fact and Conclusions of Law Numbers 6 and 7 are in accordance with applicable law and precedent and supported by substantial evidence. Coast Guard has failed to establish any basis upon which the Commandant could overturn the ALJ's findings of fact or conclusions of law.

D. The Public Policy Goals of the Coast Guard's Suspension and Revocation Administrative Actions Do Not Warrant Reversal of the Administrative Law Judge's Findings of Fact and Conclusions of Law

Coast Guard next argues for the reversal of the ALJ's Decision and Order on the grounds that it contravenes public policy. As further discussed below, Coast Guard effectively attempts to assert public policy grounds to overturn findings of fact—an impermissible basis of appeal. Under the applicable standard of review, a "a party may challenge whether [1] each finding of fact rests on substantial evidence, [2] whether each conclusion of law accords with applicable law, precedent, and public policy, [3] and whether the ALJ committed any abuses of discretion." APP. DEC. 2685 (MATT) (citing 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001). Though Coast Guard commits several pages to establishing the broad foundations of its public policy arguments, those "broad foundations" come at the expense of specificity. Coast Guard's arguments are nearly silent as to which specific conclusions of law should be overturned on public policy grounds.

(1) The Administrative Law Judge's Finding that Coast Guard Did Not Establish Intent Prerequisite to a "Abusive Sexual Contact" Determination under 18 U.S.C. § 2244(b) Does Not Contravene Public Policy.

Coast Guard first contends that "characterizing abusive sexual contact as hazing by nonconsensual touching is not in accordance with public policy." Coast Guard Brief at 48. The

very premise of the argument rests on conclusory reasoning. The ALJ did not "characteriz[e] abusive sexual contact" as hazing by nonconsensual touching; the ALJ "characterized" conduct—conduct which the ALJ found to constitute hazing by nonconsensual touching. Coast Guard's arguments blur the line between factual allegations—*i.e.*, Respondent's conduct—and conclusions of law regarding those factual allegations—*i.e.*, whether the alleged acts constituted "abusive sexual contact" under 18 U.S.C. § 2244(b). To be clear, the ALJ certainly examined conduct alleged to constitute abusive sexual contact. See D&O at 22, supra at 26. The ALJ then explained that an "abusive sexual contact" determination includes "a criminal intent element of knowingly engaging in abusive sexual contact."[15] D&O at 23 (discussing 18 U.S.C. § 2244(b)) (emphasis supplied). The ALJ found that Coast Guard failed to present evidence sufficient for a finding on the element of intent, stating that "Deck Cadet 1's testimony that Respondent was not acting with malice and was not a rapist is also credible and persuasive and supports a finding that Respondent's actions were inappropriate hazing but not taken as a knowing abusive sexual contact." D&O at 23.

Coast Guard's arguments, once deconstructed, reflect a thinly-veiled attempt to overturn the ALJ's credibility determination with respect to Deck Cadet 1 on public policy grounds. This is an impermissible basis for appealing an ALJ's credibility determination. If, *arguendo*, the ALJ found that Respondent intended to or knowingly engaged in sexual contact (as defined at 18 U.S.C. § 2246(3)) with Deck Cadet 1, and if the ALJ again found Respondent's actions to be "inappropriate hazing but not taken as a knowing abusive sexual contact" (notwithstanding the

[15] In section (B) (3) (b) (i) of this Reply Brief, Respondent argued that, at least with respect to the ALJ's Findings Nos. 4, 5, 6, & 8, relating to the allegations of Deck Cadet 1 against Respondent, that it is not clear from the passage at the top of D & O, p. 23 that the reason the ALJ did find against the Coast Guard, as the Coast Guard seemed to assume in its in its argument section (B) was the absence of proof of criminal intent. Respondent's argument in this regard is premised on a legal distinction between conduct that is "knowing" and conduct that has actual "criminal intent", the two terms not being interchangeable.

alternative findings regarding intent), then perhaps Coast Guard might have an argument that the ALJ's finding of no abusive sexual contact should be overturned by virtue of contravening public policy.

But the ALJ made no such findings. The ALJ, after "[c]onsidering 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," concluded that there was not "sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act." D&O at 23 (emphasis supplied). As presented, Coast Guard's arguments would appear to argue for the reversal of conclusions of law on public policy grounds. However, once stripped of their veneer, these arguments can only be construed as an attempt to assert public policy as a means to overturn the ALJ's findings as to Respondent's intent. Such findings are findings of fact, which cannot be reversed on the grounds of contravening public policy. See APP. DEC. 2685 (MATT) (citing 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001).

The outcome Coast Guard seeks is not in accordance with applicable law and precedent. See, e.g., APP. DEC. 2695 (WORTH) ("[G]reat deference is given to the ALJ in evaluating and weighing the evidence.") (citing APP. DEC. 2685 (MATT)); APP. DEC. 2685 (BENNETT) ("[T]he findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous.") (citing APP. DEC. 2557 (FRANCIS)); APP. DEC. 2639 (HAUCK) ("the ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence."); and APP. DEC. 2628 (VILAS) ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another

way, I will not substitute my findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious.").

Coast Guard next argues that "[t]he definition of sexual contact was expanded beyond acting with an intent for sexual desire or gratification to include the intent to abuse, humiliate, harass, or degrade." Coast Guard Brief at 49 (citing 18 U.S.C. §2246(3)). However, the ALJ's reasoning reflects consideration of this definition of intent. See D&O at 22. The ALJ credited Deck Cadet 1's testimony that Respondent was not acting with malice. Based on this credibility finding, it is clear that the ALJ considered the complete definition of "sexual act" under 18 U.S.C. § 2246(3) in concluding that there was insufficient evidence to find that Respondent "knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act." D&O at 23.

Finally, with respect to the allegations of two acts constituting abusive sexual contact against the Second Mate and two acts constituting abusive sexual contact against Deck Cadet 1, Coast Guard argues that "[t]he ALJ's conclusions of law finding the Second Mate not credible was not in accordance with public policy because he should not have considered the victim's lack of corroboration as dispositive in proving abusive sexual contact." Coast Guard Brief at 49–50. Once again, public policy is not a basis for overturning findings of fact. In any case, the ALJ did not consider Deck Cadet's 1's "lack of corroboration" as dispositive. The ALJ's found that there was "not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an attempted sexual act" only after "[c]onsidering 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 . . . ." D&O at 23.[16]

[16] Coast Guard's arguments are grounded in a fictionalized interpretation of the ALJ's Decision and Order; the Commandant's review must examine the Decision and Order actually issued in this matter. Even the most cursory

(2) The ALJ's Characterization of Respondent's Acts as Non-Sexual Misconduct Does Not Violate Public Policy.

Coast Guard next contends that "[the ALJ's decision to find all Respondent's acts non-sexual is a regressive application of the core Coast Guard policy of ensuring maritime safety." Coast Guard Brief at 50. Coast Guard's sweeping public policy generalizations leave no space for identifying the specific conclusions of law that should be overturned, and on which public policy grounds. For example, Coast Guard in one instance urges the Commandant to discard Respondent's intent altogether, writing:

> Regardless of Appellee's intent, the above facts are on their face clearly sexual in nature. For the ALJ's decision to find these actions as hazing and non-sexual is not in accordance with the progressive public policy stance which expanded sexual misconduct from only those cases in which a perpetrator derived sexual gratification from the acts to acts in which a perpetrator was using acts sexual in nature to degrade, humiliate or intimidate. As such, the ALJ's decision to turn clearly proven acts of sexual misconduct into instances of hazing are not in accordance with public policy and not supported by substantial evidence.

Coast Guard Brief at 51. Coast Guard fails to identify a legitimate basis for reversing the ALJ's finding that the acts constituted "non-sexual misconduct."

Indeed, to even refer to the ALJ's findings in this manner is somewhat inaccurate. Coast Guard does not identify or reference a specific instance in which the ALJ found acts to be so-called "non-sexual misconduct." Indeed, the ALJ made no such finding. Rather, the ALJ concluded that the evidence supported a finding that "Respondent's actions were inappropriate hazing but not taken as a knowing abusive sexual contact," and that "there is not sufficient evidence to show Respondent knowingly engaged in abusive sexual contact or a sexual act or an

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review of the Decision and Order actually issued makes clear that the ALJ did not consider Deck Cadet 1's lack of corroboration as dispositive to the Coast Guard's failure to establish evidence that the alleged acts constituted abusive sexual contact.

attempted sexual act." D&O at 23 (citing United States v. Sneezer, 900 F.2d 177 (9th Cir. 1990)).

The ALJ did not "find" that Respondent's Acts were "non-sexual misconduct." Instead, the ALJ found:

(1) That Coast Guard "did not prove Respondent's conduct was 'abusive sexual contact' within the meaning of 18 U.S.C. § 2244(b)";
(2) That Coast Guard "did not prove Respondent's conduct was sexual molestation" under 46 C.F.R. § 5.61(a)(3); and
(3) That "based on the evidence an ALJ may find a lesser included violation of misconduct proved."

D&O at 23–24.

Here, as before, Coast Guard's reserves minimal space for discussing the conclusions of law that should be overturned on public policy grounds. Such discussion should have been the proper focus of Coast Guard's public policy arguments, under the applicable standard of review. See APP. DEC. 2685 (MATT) ("On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion.") (citing 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001) (emphasis supplied).

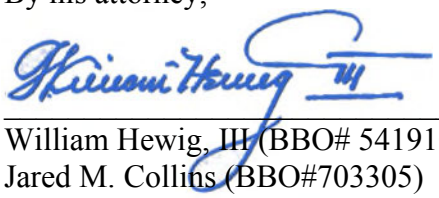
IV CONCLUSION

For all of the reasons set forth herein, Respondent respectfully requests that the Commandant DENY the Coast Guard's appeal dated June 17, 2022, and AFFIRM the Decision and Order of ALJ Michael Devine dated April 20, 2022.

Respectfully Submitted,

CAPT. MARK STEVEN STINZIANO
RESPONDENT

By his attorney,



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