



UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)	DOCKET NUMBER
Hai Van Nguyen,)	PI1401544, F/V Lady Luck
Respondent.)	

INITIAL DECISION AND ORDER

Date: August 22, 2016

Before: Susan L. Biro, Chief Administrative Law Judge¹
U.S. Environmental Protection Agency

Appearances: For the Agency:

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¹ Pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, the U.S. Office of Personnel Management approved an Interagency Agreement authorizing the Administrative Law Judges of the United States Environmental Protection Agency to hear cases pending before the National Oceanic and Atmospheric Administration, effective for a period beginning September 8, 2011.

I. PROCEDURAL HISTORY

On February 22, 2015, the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”), on behalf of the Secretary of Commerce, issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to Respondent Hai Van Nguyen. Respondent is the operator and owner of the fishing vessel (“F/V”) Lady Luck. The NOVA charges Respondent with violating the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857, and regulations implementing the Act, 50 C.F.R. §§ 600.725(o), (t). NOVA at 1. Specifically, the NOVA alleges in a single count that Respondent, “or persons under his supervision and control, did unlawfully harass or interfere with a NMFS-approved observer” between March 31, 2014, and May 11, 2014. NOVA at 1. The Agency proposes a \$5,500 penalty. NOVA at 2.

Respondent requested a hearing in a letter dated May 12, 2015. Pursuant to the applicable procedural rules, 15 C.F.R. Part 904 (“Rules”), I assigned Administrative Law Judge Christine D. Coughlin to preside over this matter in a July 16, 2015 Order. Judge Coughlin issued an Order to Submit Preliminary Positions on Issues and Procedures (“PIIP Order”) on August 3, 2015. Both parties timely submitted their PIIPs and two supplements each. I assigned this case to my docket in a November 17, 2015 Order of Redesignation.

The hearing in this matter was held December 1-2, 2015, in Honolulu, Hawaii.² Three witnesses testified for the Agency: Richard Kupfer, Special Agent Brandon Jim On, and observer Alfonso (“Hanalei”) Mesa. Tr. at 9, 65, 69. Respondent offered his own testimony³ and that of Caleb McMahan.⁴ Tr. at 158, 266. Also admitted into the record were 14 exhibits, including

² Citations to the hearing transcript appear as follows: “Tr. at [page].”

³ Respondent testified with the assistance of a Vietnamese interpreter. Tr. at 264-65. His testimony was given primarily through the interpreter, but at times, he spoke in halting English, as reflected in the hearing transcript. Tr. at 265.

⁴ Mr. McMahan appeared at hearing under a subpoena I issued at Respondent’s request. *See* Order (Nov. 24, 2015). Respondent asked for the subpoena to ensure Mr. McMahan’s presence at hearing because NOAA allegedly threatened to retaliate against him after he had agreed to testify in this case voluntarily. Respondent’s Motion to Subpoena Caleb McMahan (Nov. 16, 2015). Thus, at hearing, Mr. McMahan was voir dired on the matter prior to providing substantive testimony. Tr. at 168. Mr. McMahan said that after he first agreed to testify, he discussed the matter with Scott Bloom, the NOAA Program Officer overseeing the primary grant that funds Mr. McMahan’s current videography and documentary work. Tr. at 161-62, 171. Mr. Bloom suggested to Mr. McMahan that he “might want to stay away from” testifying in this case. Mr. McMahan denied feeling explicitly or implicitly “threatened” by this remark. Tr. at 165, 167, 172, 175 (“Scott [Bloom] did not tell me that it would be a bad career move to testify.”). Rather, Mr. McMahan stated that before their conversation he was already feeling “hesitant,” “unsure,” “on the fence,” and “weird” about appearing because, although he is familiar with observers on boats and the conflicts that arise, he was not “sure about his role in testifying” given that “he’s not currently an observer” and has “close ties with the agency.” Tr.

eight Agency exhibits (AX 1-4, 6-7, 8 (pages 2-5 only), 9), five exhibits offered by Respondent (RX 1-3, 6-7),⁵ and one joint exhibit consisting of the parties' Joint Stipulations of Facts and Agreement on Admission of Evidence.⁶ Tr. 4, 24, 25, 45, 67, 68, 126, 147, 152, 154, 157, 215, 357, 358.

On December 29, 2015, this Tribunal emailed digital copies of the hearing transcript to the parties and issued a Post-Hearing Scheduling Order. On March 1, 2016, I granted the Agency's Motion to Conform Transcript to Actual Testimony.

The Agency filed its initial post-hearing brief ("AB") on March 4, 2016, and a reply brief ("ARB") on April 1, 2016. Respondent filed his post-hearing brief ("RB") on March 19, 2016, and his reply brief ("RRB") on April 15, 2016. Respondent also emailed to this office on April 5, 2016, a letter in which he asked to strike the Agency's reply brief, and the parties filed further arguments on that issue.⁷ Thereafter, the record closed.

II. LAW AND REGULATIONS APPLICABLE TO LIABILITY

A. Relevant Statutory Provisions

Congress passed the Magnuson-Stevens Fishery Conservation Management Act ("Magnuson-Stevens Act" or "the Act") in 1976 to establish "[a] national program for the conservation and management of the fishery resources of the United States . . . to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources." Pub. L. No. 94-265, § 2(a)(6), 90 Stat. 331, 332. The Act, codified as amended at 16 U.S.C. §§ 1801-

at 164-65. He said Mr. Bloom's comment just "steered" his decision "the other way." Tr. at 164-65. In addition, McMahan said that immediately after his conversation with Mr. Bloom, he ran into Mr. Kupfer, the Agency's witness, who asked him, "Where are you going to be at the beginning of the month?," a statement that Mr. McMahan took as a reference to this hearing. Tr. at 165-67. Although Mr. McMahan said at the hearing that he replied to Mr. Kupfer at the time, "Don't worry. I'm not doing it," Mr. McMahan confirmed that he was willing to voluntarily testify and was being paid to do so. Tr. at 165-67, 168-69, 246, 250. Under questioning by the Agency, Mr. McMahan indicated that he spoke to five NOAA staff members about testifying, including his own fiancé, and they did not threaten, interfere, or try to dissuade him. Tr. at 171-73, 177, 179. However, he acknowledged telling Respondent's counsel that he had spoken to a "handful of people at NOAA" and thought it would be a bad career move for him to testify. Tr. at 176, 182. In view of all of this, while the comment that Mr. Bloom made to Mr. McMahan was inappropriate, there is insufficient evidence of witness tampering or intimidation.

⁵ Subsequent to their initial admission, Respondent withdrew his exhibits 8-10. Tr. at 263.

⁶ Citations to the Agency's exhibits and Respondent's exhibits will be respectively in the following form: "AX _" or "RX _." Citations to the Joint Stipulations are made as "JX 1, ¶ _."

⁷ To the extent that Respondent's letter qualifies as a motion, and given that this Initial Decision finds no liability on the part of Respondent, the motion is **DENIED as MOOT**.

1891d, aims to “promote domestic commercial and recreational fishing under sound conservation and management principles” and “provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.” 16 U.S.C. § 1801(b)(3)-(4). These principles and plans are implemented by eight Regional Fishery Management Councils, including the Western Pacific Council, which has authority over fisheries in the Pacific Ocean seaward of Hawaii, American Samoa, Guam, and the Northern Mariana Islands. 16 U.S.C. § 1852(a)(1). The Act further provides that:

Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

* * *

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery[.]

16 U.S.C. § 1853(b)(8). An “observer” is “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act.” 16 U.S.C. § 1802(31).

The Act makes it generally unlawful “for any person – to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). Additionally, it is specifically unlawful “for any person – to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this Act, or any data collector employed by the National Marine Fisheries Service or under contract to any person to carry out responsibilities under this Act.” 16 U.S.C. § 1857(1)(L). A “person” is “any individual . . . , any corporation, partnership, association, or other entity . . . , and any Federal, State, local, or foreign government or any entity of any such government.” 16 U.S.C. § 1802(36).

B. Relevant Regulatory Provisions

Regulations promulgated in Part 600 of Title 50 of the Code of Federal Regulations “contain[] general provisions governing the operation of the eight Regional Fishery Management Councils established by the Magnuson-Stevens Act and describe[] the Secretary’s role and responsibilities under the Act. The Councils are institutions created by Federal law and must conform to the uniform standards established by the Secretary” in Part 600. 50 C.F.R. § 600.5(a). “This part also . . . collects the general provisions common to all domestic fisheries governed by [Part 600].” 50 C.F.R. § 600.5(b). Among these provisions are general prohibitions that apply to all federally-managed domestic fisheries, including those that relate to observer harassment:

It is unlawful for any person to do any of the following:

* * *

(o) Harass . . . an observer.

* * *

(t) Assault, oppose, impede, intimidate, or interfere with a NMFS⁸-approved observer.

50 C.F.R. §§ 600.725 (o), (t). “*Harass* means to unreasonably interfere with an individual’s work performance, or to engage in conduct that creates an intimidating, hostile, or offensive environment.” 50 C.F.R. § 600.10. An “*observer* means any person serving in the capacity of an observer employed by NMFS, either directly or under contract, or certified as a supplementary observer by NMFS.” *Id.*

C. **Burden of Proof**

The law is well-settled that conservation-related violations of the Magnuson-Stevens Act are strict liability offenses and that an alleged violator’s state of mind is irrelevant in determining whether a violation occurred. *See, e.g., Northern Wind, Inc., v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties for violations of the Act and the implementing regulations); *Alba*, 2 O.R.W. 670, 1982 NOAA LEXIS 29, at *7 (NOAA App. 1982)) (“Scienter is not an element of a civil offense under . . . 16 U.S.C. § 1857. Because conservation-related offenses under the [Act] are strict liability offenses, [the respondent’s] protests as to his state of mind are irrelevant . . .”).

Nevertheless, to prevail on its claim against Respondent, the Agency must prove facts supporting the alleged violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (NOAA Aug. 17, 2001) (citing *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100-03 (1981)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely than not to be true. *Fernandez*, 1999 NOAA LEXIS 9, at *8-9 (NOAA Aug. 23, 1999) (citing *Herman v. Huddleston* (459 U.S. 375, 390 (1983))). To meet this burden, the Agency may rely upon either direct or circumstantial evidence. *Cuong Vo*, 2001 NOAA LEXIS 11, at *17 (citing *Paris*, 4 O.R.W. 1058 (NOAA 1987)). Once the Agency “has established the allegations . . . by a preponderance of the evidence, the burden of producing evidence then shifts to the Respondent[] to rebut or discredit the Agency evidence.” *Roque*, 1999 NOAA LEXIS 8, at *69, *aff’d*, *Roque v. Evans*, 2003 U.S. Dist. LEXIS 541 (D. Mass. 2003).

⁸ NMFS is the National Marine Fisheries Service, the NOAA office responsible for stewardship of the nation’s ocean resources and habitat. Tr. at 184; *see also* http://www.nmfs.noaa.gov/aboutus/our_mission.html.

III. FACTUAL BACKGROUND

A. Overview

This enforcement action arises from events that took place on a fishing vessel, the F/V Lady Luck, during a six-week voyage from San Francisco, California, to Honolulu, Hawaii, between March 31 and May 11, 2014.

Since 1999, Respondent Hai Van Nguyen has owned and operated the F/V Lady Luck, a 130 ton, 72 long by 22 feet wide, two story, steel, longline commercial fishing vessel. Tr. at 266-67, 269, 296, 315, 331, JX 1, ¶¶ 2, 3; AX 1 at 26; AX 6, 9. The F/V Lady Luck is properly documented and possessed the federally-required permits to engage in longline fishing on the high seas and in the waters around Hawaii. JX 1, ¶¶ 2, 4. On March 31, 2014, the F/V Lady Luck set off on a shallow-set swordfishing expedition, departing from San Francisco and sailing for Honolulu. JX 1, ¶ 6; Tr. at 270, 310. Respondent captained the vessel, which was manned by a Vietnamese crew of five young, unmarried men who spoke very little English, including Respondent's nephew,⁹ and an older Vietnamese deaf-mute gentleman hailing from Hawaii. Tr. at 108, 117-18, 136-139, 268, 332-33.

Also aboard the F/V Lady Luck was an NMFS observer, Alphonso "Hanalei" Mesa. JX 1, ¶ 6. As a condition of its U.S. fishing permits, the F/V Lady Luck was required to carry an observer to collect scientific data and document the vessel's fishing activities. JX 1, ¶ 5. On May 13, 2014, shortly after returning from the trip, Mr. Mesa reported a series of incidents that had occurred onboard the vessel that the Agency alleges constitute unlawful observer harassment. AE 1 at 11; Tr. 76.

B. The Observer Program

In the Pacific Islands, the observer program has two primary goals: protection of endangered species and maintenance of fisheries resources. Tr. at 11-12. The observer's primary role is to collect biological data that allow these goals to be met. Tr. at 13-14, 203-04; JX 1, ¶ 7. "It's critical. We could not perform our duties without the information observers provide us," testified Mr. Kupfer, an observer program coordinator in NOAA's Pacific Islands Regional Office.¹⁰ Tr. at 9, 14; AX 4. Mr. Mesa added: "[W]e're the ears and eyes out at sea. We're out there collecting data that no one else is getting, and we're bringing it back, and that's the only information that's brought back from out at sea on our [marine] resources." Tr. at 72-73. Given the important role that observers play, the Agency places a premium on observer safety. Tr. at 14-15, 207-08; JX 1, ¶ 8.

⁹ Respondent's nephew was "like, the head boss, the deck boss, the operator." Tr. at 93, 137. Respondent describes his nephew as "very young and immature" and says he talks a lot and is always "running back and forth." Tr. at 281.

¹⁰ Prior to serving as an observer coordinator, Mr. Kupfer was the program's training coordinator for five years. Tr. at 10. He has also served as an observer on more than 30 longline fishing trips. Tr. at 11; AX 4.

Federal training for observers consists of a three-week long course. Tr. at 17. In the course, observers-in-training learn about safety precautions, procedures for recording data and completing various forms, marine species handling and identification, ways of being sensitive to cultural differences, and conflict resolution. Tr. at 17-18, 56-58, 72. For ships crewed largely by Vietnamese, observers are instructed about shrines set up in the wheelhouse that contain incense and are viewed as sacred, flowers kept on the bow of the vessel that should not be touched, and departure ceremonies that observers are asked not to participate in. Tr. at 57. Another focus of instruction is more nuanced cultural differences surrounding TV, smoking, and food choices. Tr. at 57-58. Food is viewed as especially important to life at sea because, as explained by Mr. Kupfer, “it’s the only respite you have other than television.” Tr. at 58. Mr. Kupfer instructs new observers that “[t]he food may not be what you’re used to. So try and be adventurous; try what they’re having; and if you don’t find it’s to your liking, supplement it. So I give them advice, like, “Bring out tortillas, or bring out wasabi.” Tr. at 59.

In Hawaii, it is standard protocol for fishing vessels to notify the Agency of their trip at least 72 hours before departure. Tr. at 19, 270. Upon notification, an observer is assigned to the vessel. Tr. at 19. For boats leaving from ports in California, as the F/V Lady Luck did, observers are in charge of procedures to officially place them aboard the vessel because the necessary Agency staff are not located in the state. Tr. at 20. Placement begins with the observer walking through the vessel with the captain to conduct a safety check, and then proceeds to a telephone conference among the observer, captain, and a port coordinator in Hawaii to discuss the responsibilities of both the observer and captain and to make sure the vessel is qualified to carry the observer. Tr. at 20-21, 39-40, 206, 209; RX 2. They should also discuss any “house rules” that might exist on board the vessel. Tr. at 21-22. House rules are specific expectations about how an individual vessel and crew will operate. Tr. at 21-22. Such rules might dictate what food can be brought on board, when meals can be cooked, when the TV can be watched, or how water may be used. Tr. at 21-22. The vessel may also have certain expectations about where an observer will stand during fishing operations. Tr. at 28. Observers are instructed to abide by house rules, including those related to meals and housekeeping duties, and captains are directed to provide observers the same meals, snacks, and amenities they provide the crew.¹¹ Tr. at 60, 100; RX 1 at 2-3 – 2-5. Typically, two forms are completed during placement meetings: a checklist of safety equipment the boat must possess and a written agreement signed by the observer and captain setting forth the various responsibilities of each. Tr. at 206-07. This agreement is “a commitment to the integrity of the job [an observer’s] going to do” and “a guideline for how to compose [oneself] on the vessel.” Tr. at 209.

Among their responsibilities during a fishing trip, observers are instructed to watch the first hour of any setting operation “to get an idea of the number of birds potentially interacting with the vessel and how many hooks the vessel is setting, how fast they’re setting, [and] how deep they’re setting [as a way of determining] the makeup and composition of the gear that’s going out that day.” Tr. at 26. They also watch the entire hauling operation so they can “account for every single hook that comes up, whether there’s a fish on it or whether it’s blank or there’s a species of special interest on it.” Tr. at 27. The goal is to sample every third fish that gets caught. Tr. at 27. Observer duties aboard a trip targeting swordfish, like the one at issue in this

¹¹ Captains are reimbursed \$20 per day for every day an observer is aboard their vessel. RX 1 at 2-5 – 2-6.

case, require “a lot more work” than one targeting tuna because the swordfishing trips are generally twice as long and involve gathering data on birds in addition to fish. Tr. at 49-50, 99. For that reason, new observers are typically sent on “one or two” tuna fishing trips before a swordfishing trip. Tr. at 49.

Because all vessels on shallow-set trips targeting swordfish, like the F/V Lady Luck, must carry observers, the captain and crew are generally familiar with observer duties. Tr. at 27-28, 271. They know and expect that these duties require the observer to be on deck during setting and hauling operations. Tr. at 28. At the same time, observers are instructed to perform their duties in a way that minimizes interference with fishing operations and to obtain permission from the captain prior to using any boat equipment. Tr. at 100-01; RX 1 at 2-3 – 2-4.

According to Mr. Kupfer, the life of an observer, by its very nature, is “difficult.” Tr. at 12. “[O]ut at sea, it’s not normal life,” and “[i]t can be like a prison.” Tr. at 58, 196. As explained by Respondent’s expert witness, Mr. McMahan,¹² a fishing vessel frequently consists of “a very confined space,” and the living conditions for observers and crew can be “cramped.” Tr. at 196, 219. Privacy and personal space are “basically nonexistent You’re always in contact with someone. The boat’s rocking, and you’re walking down the hall, and it’s – the proximity takes a lot of getting used to.” Tr. at 196-97. “[Y]ou’re always likely to get bumped or bump into something.” Tr. at 219.

Mr. McMahan further explained that the work of an observer is not for the thin-skinned: “The captain is the master of the vessel, and you have to be able to check your ego. . . . [Y]ou can’t get your feelings hurt by being yelled at.” Tr. 205. He also drew the following analogy:

[W]hen you’re on a fishing boat, it’s not like you’re in the line of a supermarket. If somebody at Safeway tells you to hurry up or get out of their way, it might make the hairs on the back of your neck stand up. On a fishing boat, if it makes the hairs on the back of your neck stand up, you’re not going to do so well.

¹² As noted above, Mr. McMahan appeared at hearing under subpoena but thereafter testified voluntarily. Mr. McMahan was qualified as an expert witness “in the area of longline fishing and the role and duties therein,” and Respondent paid him \$1,500 for his testimony. Tr. at 196, 246. Mr. McMahan worked as an NMFS observer between 2010 and 2014 before transitioning into a career as a fisheries videographer and documentarian. Tr. at 184-85. The videos he produces are designed in part to educate observers and potential observers about different aspects of the job. Tr. at 189-92. He completed at least 20 trips as an observer, about half of which were on Vietnamese boats, and prior to that worked on commercial fishing vessels in Alaska. Tr. at 185-86, 192. For the past two years, he has served as the head trainer in the Alu Like program. Tr. at 195. Like Mr. Mesa, his own observer training occurred under Mr. Kupfer. Tr. at 236.

Tr. at 205. According to Mr. McMahan, practicing preemptive courtesy can go a long way: “You have to show a lot of courtesy before you can expect it a lot of the times[,] especially when you’re dealing with some salty individuals[,] . . . [the] rough-and-tumble fisherman-type.” Tr. at 205. At sea, captains are in charge; “[t]hey are responsible for the safety of everyone aboard their vessel, including the observer; so what the captain says goes.” Tr. at 205-06. On board vessels operated by Vietnamese captains, it can be especially helpful for observers to exercise a “degree of humility.” Tr. at 248-49. “[W]ith Vietnamese captains, you can’t – it’s very difficult to approach them and tell them that they’re doing something wrong. It’s – you have to kind of paint it in a – ‘You’re doing something good.’” Tr. at 249. Observers are considered “ambassador[s] of fisheries management,” and while the Hawaii Longline Observer Program Field Manual (“Observer Field Manual”) can instruct observers how to do the technical aspects of their job, managing relations onboard the vessel is open to interpretation and must be learned through experience. Tr. at 202 (referring to RX 1).

Mr. McMahan testified that he made an educational training video for observers called “Real Talk” (or “Observe This Volume II”), which Respondent presented at hearing. Tr. at 183, 187-89; RX 6. Mr. McMahan also made a short educational video for observers called “Tips for Sea” on how to get along on a Vietnamese vessel. In that video he interviewed a Vietnamese captain, provided language tips, and offered “some do’s and don’ts on the boat.” Tr. at 190-91; RX 7. The video indicated that a good gesture for observers is to bring “a gift or an offering” on board to show that they are contributing to the crew. It also noted that the cadence and guttural nature of the Vietnamese language may make the captain sound like he is yelling when he is not, and reminded viewers that Vietnamese captains often have limited English language skills and can become upset and overwhelmed if bombarded with questions. Tr. 191-92; RX 6-7.

C. Observer Mesa

Mr. Mesa was born and raised in Hilo, Hawaii. Tr. at 70. He is of Hawaiian, Mexican, and Spanish descent. Tr. at 135. After finishing high school and spending time working for the state of Hawaii, he entered a three-week observer training program at the Alu Like Native Fisheries Observers Program.¹³ Tr. at 71, 98. Next, he completed the three-week federal training course. Tr. at 98. In that course, he was instructed by Mr. Kupfer, and he learned how to identify marine species, how to handle protected species, safety precautions, how to work with field manuals, how to properly record data and fill out various forms, and how to “deal[] with mixed cultures.” Tr. at 10, 72. Mr. Mesa then began work as an observer for Tech/Sea International, Inc. Tr. at 137.

¹³ The Alu Like program prepares prospective observers who lack a bachelor’s degree to take the federal observing course. Tr. at 98, 195. Mr. McMahan was the head trainer of the program for the two years preceding the hearing and was responsible for designing and implementing the curriculum during that time. Tr. at 195.

Prior to his trip on the F/V Lady Luck, Respondent had served as an observer on approximately nine other fishing trips.¹⁴ Tr. at 99. More than half were with Vietnamese crews, and with the exception of the F/V Lady Luck, he testified that he has not had any problems or confrontational interactions on Vietnamese boats. Tr. at 73, 135-36. His trip on the F/V Lady Luck was his first targeting swordfish, and when asked to characterize it, he testified that it stands out as “[b]y far the worst trip I ever had.” Tr. at 76, 99. This was because “[i]t was just tough. You know, ‘Do your job, and handle your composure.’” Tr. at 76.

Mr. McMahan, who has known Mr. Mesa as an acquaintance since early 2014, described him as follows:

Being the instructor of [the observer training program], I’ve heard good things about him, about his performance in the class. I know he works a lot; I know he does a lot of trips; and when I’ve encountered him in the office, he’s cordial and nice; and it’s always a pleasure to exchange with him. . . . [H]e’s a good guy and a good observer.

Tr. at 210-11.

D. Respondent Nguyen and the F/V Lady Luck

Respondent has been a fisherman in the United States and Vietnam for 47 years. Tr. at 266. He is a United States citizen and California resident who began working on longline fishing vessels in the United States in 1999, and he has been a captain for that entire time. Tr. at 266, 296, 298; JX 1, ¶ 1. While fishing for swordfish during the past ten years, he has hosted at least five or six observers on his boat, and on “maybe about two or three occasions,” he had “a hard time with the observer.” Tr. at 272. Mr. McMahan testified that he thought of Respondent as being “a notorious asshole” after hearing about these “observer troubles” in 2014 and that the F/V Lady Luck had a reputation of being “a tough boat” among observers. Tr. at 216, 243-44. However, when Mr. McMahan met Respondent for the first time a week prior to hearing, he discovered that “[c]ontrary to what I’d heard about him, he seemed like a nice Vietnamese gentleman.” Tr. at 233. Notwithstanding any issues he has encountered with observers, Respondent spoke of recognizing the importance of cooperation between an observer and captain: “[W]e need to work together, so need to be happy, harmony, and work together.” Tr. at 271-72.

Respondent’s fishing trips typically last 30-45 days. Tr. at 306. At sea, Respondent is in charge, and the crew members follow his orders as well as his lead in how they see him interact

¹⁴ As of December 2015, Mr. Mesa had made 18 trips as an observer, with the last trip lasting 51 days and ending approximately four days prior to the start of the hearing. About half of these trips were aboard vessels crewed primarily by Vietnamese. Tr. at 73.

with people. Tr. at 312. He has particular authority because he is both the owner¹⁵ and the captain of the boat. Tr. at 331. Although Respondent was typically inside during fishing operations on this trip, he told Mr. Mesa that “if there’s any problem, [he] should let me know so I can take care of it.” Tr. at 291. However, Respondent said, Mr. Mesa “hardly say anything or talking anything with me. So, he just keep quiet most of the time.” Tr. at 340. Respondent further testified that Mr. Mesa never said that he was unhappy with conditions on the ship. Tr. at 340. Finally, Respondent said that his relationship with Mr. Mesa stayed professional and that he understood his responsibility to take care of the crew, including Mr. Mesa. Tr. at 340.

According to Respondent, he reads “very little” English and has encountered communication barriers with observers even though he is the most fluent English speaker on the boat among the Vietnamese crew. Tr. at 271, 290-91. On this trip, he spoke “[a] fair amount” of English but was not fully fluent. Tr. at 136, 294. Still, Respondent speaks English well enough to pass the U.S. citizenship test and to communicate on the radio with the Coast Guard if necessary. Tr. at 299. He also speaks in English to observers when they come on board to tell them about the “house rules.” Tr. at 334. In particular, “I tell him my way that I can cook for you two times a day. Then I got some noodle in there. If you hungry, you can go do yourself. I working. . . . I tell him you wash some dishes. Around. That one guy one day, one guy one day. Have to be clean.” Tr. at 335. Respondent said that he also advised Mr. Mesa during the first meal not to eat in the bunk room because “somebody sleep in there; that night time, they sleep in there. No dirty, no—just keep cleaning. No eat. No smoke in there.” Tr. at 336, 346. Respondent testified that it was his usual practice to communicate this house rule during the first meal: “For every trip with the observer, this is, like, my house rule on the boat, that every first meal, I tell everybody about not eating inside the bunk.” Tr. at 348. However, the language barrier between Respondent and Mr. Mesa may have been a source of friction at sea. As Mr. Mesa wrote in his Documentation Notebook, “I would ask him questions and he would say he don’t understand.” AX 2 at 9.

This case is also not the first time Respondent has been accused of harassing an observer. In 2013, the Agency issued a NOVA alleging that on a 2012 fishing trip, Respondent failed to provide data requested by an observer, attempted to bias observer data, and directed abusive and threatening language toward the observer regarding the observer’s duties. AX 3 at 4. Specifically, the Agency contended that Respondent made remarks to an observer that he had been in the military during the Vietnam war and “during the war . . . we shooting and killing” people. Tr. at 326, 329. At hearing, Respondent said that he was making a joke that was misinterpreted. Tr. at 325-26. However, he agreed at the time to pay a \$7,200 fine¹⁶ because “I did say it like that, . . . it’s no good for me to say that I never say that.” Tr. at 327; AX 3 at 12.

¹⁵ About four months before the hearing, Respondent sold the F/V Lady Luck because of his age and intention not to continue working much longer. Tr. at 283. Also, “I can see that there are many rules or regulations, you know, over the fishing business, so I, you know, just don’t want any more headaches.” Tr. at 283.

¹⁶ The Agency sought a \$9,000 fine but suspended \$1,800 of that amount so long as Respondent did not violate the Magnuson-Stevens Act or its implementing regulations for two years. AX 3 at 12.

E. The Trip

Shortly before the trip began on March 31, 2014, Mr. Mesa flew to San Francisco where the F/V Lady Luck was docked. This was his first swordfishing trip, although he had served as an observer on nine previous fishing trips. Tr. at 73, 99. He boarded the vessel and conducted the pre-departure safety check with Respondent and, by teleconference, the Hawaii-based port coordinator. Tr. at 39-40, 74, 267. Respondent does not recall being presented with any documents but “heard over the phone that they read the instruction.” Tr. at 300-01. However, Mr. Mesa testified they “did not go step-by-step” through the instructions for observers and captains. Tr. at 74. Also, the Agency was unable to produce a signed copy of the placement agreement form reflecting the responsibilities of Mr. Mesa and Respondent that should have been discussed before the voyage.¹⁷ Tr. at 21, 40.

According to Mr. Mesa, no house rules were discussed during the placement meeting; “[e]verything was mutual at that time.” Tr. at 74. Further, there is no documentary evidence in the record that any house rules were brought to the attention of the port coordinator. Tr. at 22. Still, Respondent alleges he said then that he would cook only two meals each day for Mr. Mesa and that the observer would be responsible for any additional food he wished to eat. Tr. at 277. Respondent also testified that he did not believe he was responsible for providing Mr. Mesa with the same meals, snacks, and amenities provided to the crew, but nevertheless, “I bought on the food, you know, put in the rooms or get everything ready. And I told everyone if they’re hungry, need to eat, they can go and get it.” Tr. at 299. When questioned further on the subject, he again testified, “I just say that . . . they can use all my food that I bought on the boat.” Tr. at 305.

According to Mr. Mesa, although both he and Respondent were “happy” during the placement meeting, once it ended, Respondent motioned for Mr. Mesa “to shoo away like a fly.” Tr. at 74. Mr. Mesa left the boat and walked around the docks until the departure time later that day. However, he took Respondent’s gesture as “a sign that it was going to be a tough trip.” Tr. at 75, 123-24.

Conflicts between the men began to arise early on. A few days into the trip, around April 4, 2014, Respondent told Mr. Mesa he was having problems with the engine block. AX 2 at 3. Mr. Mesa walked out on deck and discovered “a one-inch hose – approximately a one-inch hose hanging off of the rail, going into the ocean with oil all over the deck and just a sheen of oil on the surface of the ocean.” Tr. at 78; AX 2 at 3, 8. He observed Respondent’s nephew draining what he estimated to be 10 gallons of oil into the ocean that day, and again the next. AX 2 at 3, 8. Mr. Mesa knew this was “a serious situation,” but when he notified Respondent of the issue, “[Respondent] said that it was international waters and that I better not tell anyone.” Tr. at 78;

¹⁷ According to Mr. Kupfer, the Hawaii-based port coordinator either lost the form or did not complete it in the first place. Tr. at 21. Additionally, Mr. Kupfer did not know whether an older or newer version of the form was used because the Agency was transitioning to a different form around the time of this fishing trip. Tr. at 42-43. Mr. McMahan described the lack of a signed form as “a blunder.” Tr. at 209.

AX 2 at 8. From that point forward, Mr. Mesa felt his relationship with Respondent “was going to be bad.” Tr. at 78. However, at hearing, Respondent denied saying this. Tr. at 305. Respondent testified that he tried to fix the problem when he noticed the engine not working properly and that he also attempted to call the Coast Guard on the radio at the time, but the connection was not clear.¹⁸ Tr. at 280.

On April 11, 2014, the F/V Lady Luck made its first set, and the vessel began its first haul on April 12, 2014. AX 1 at 29; Tr. at 79. As he went to retrieve his sunglasses from his camera bag to observe the haul, Mr. Mesa discovered they were gone. AX 1 at 11; AX 2 at 6; Tr. at 79. He reported this to Respondent,¹⁹ but according to Mr. Mesa, Respondent “just shrugged his shoulders and did not care.” Tr. at 80, 277; AX 1 at 11. Respondent, however, testified that he investigated “and asked all the crew members if anyone . . . take it. They all said they don’t have it.” Tr. at 277; *see also* AX 2 at 8 (“[I] asked Captain if he could please ask[] crew members who went into my bag and took my glasses[.] [H]e told me the next day he is sorry but [no] one took my glasses.”). Later in the trip, Mr. Mesa testified, Respondent remarked how Mr. Mesa’s eyes had become red and dehydrated, which Mr. Mesa perceived to be a mocking reference to his missing glasses. AX 1 at 11; Tr. at 80-81. Mr. Mesa believed that one of the crew members stole his glasses and kept them hidden from him for the remainder of the trip and that Respondent knew about the theft. AX 1 at 11; AX 2 at 6-7; Tr. at 108.

Also around April 11, while Mr. Mesa was in the galley preparing for work, Respondent “came down and told me that – what was I doing? That I looked lost; that I did not look like I know – that I was not capable of doing my job and that, if I made mistakes, [observer boss] Josee was his friend and I could lose my job.” Tr. at 77; AX 1 at 11; *see also* AX 2 at 9 (Mr. Mesa noting that he was reviewing his paperwork after the first set and that Respondent “insulted me by saying I don’t know what I am doing”). At hearing, Respondent testified that “Josee” was “not my friend” but rather more of an acquaintance. Tr. at 275. According to Mr. Mesa, Respondent also told Mr. Mesa that he had videos of him sleeping and playing games during haul hours. AX 1 at 11; AX 2 at 7. Mr. Mesa complained in his Documentation Notebook that Respondent and crew members were “always watching me, coming behind deck checking on me, making it very difficult and making me very upset due to the fact that I as a Federal employee have to be very professional and hold my integrity.” AX 2 at 7. Respondent also later wrote in his Documentation Notebook that he “did not feel comfortable with the pressure of doing my job after those threats.” AX 2 at 9.

Early in the morning on April 14, 2014, Mr. Mesa was brushing his teeth and shaving in front of the mirror when Respondent jumped out of bed and came up behind him. “And . . . he was, like, ‘You gotta hurry up.’ He waited for, like, a few seconds; then he grabbed the glass mirror right past my head and pulled it open; and if I had not moved my head, the glass mirror would have hit me right in my face.” Tr. at 81; AX 1 at 11; *see also* AX 2 at 3. “I was going to elbow him in the face, but I knew I had to hold myself and be professional and hold my

¹⁸ After the trip was over, Respondent said that he received and paid a fine from the Coast Guard for the oil spill violation. Tr. at 280.

¹⁹ Although Mr. Mesa discovered his glasses missing on April 11, it appears he did not report this to Respondent or ask Respondent to investigate until May 9. AX 2 at 8.

integrity,” Mr. Mesa later wrote in his Documentation Notebook. AX 2 at 4. For his part, Respondent testified that Mr. Mesa was taking too long to use the bathroom facilities – “like, half an hour” – and that he needed to open the mirrored medicine cabinet to get his toothbrush so he could go somewhere else and brush his teeth. Tr. at 285. “And then, I think I just, like, little bit open a little bit too hard, but I know that it’s not hitting him, anything, at all,” Respondent said. Tr. at 285.

Mr. Mesa and Respondent also clashed over food. Crew members brought their own snacks and soda on board, and as Mr. Mesa testified at hearing, Respondent objected when Mr. Mesa tried to consume them. Tr. at 82, 126. “I would go to get a soda [and Respondent] would yell at me in front of the crew,” Mr. Mesa later wrote. AX 2 at 8. Mr. Mesa felt that he was entitled to their snacks and complained that the vessel was supposed to provide him food equivalent to that available to the crew. Tr. at 82, 126-27, 137. “Everyone was supposed to have [adequate] snacks and meals. . . . So what they eat, I eat, and that was the principle that I felt when they were eating muffins when we were out at sea for a long time. Eating snacks in front of me,” Mr. Mesa testified. Tr. at 126-27. As Mr. Mesa complained in his Documentation Notebook, “crew member[s] would always be snacking in front of me and would never offer.” AX 2 at 8. He noted at hearing that “[t]he captain is supposed to handle our food situation.” Tr. at 127. According to Respondent, he typically buys snacks for every trip, but they “probably last for about maybe two weeks only, and then the remaining of the trip, you know, only have rice or meat such as beef, chicken, or pork left.” Tr. at 278. He told the crew, and possibly Mr. Mesa,²⁰ that if they wanted any additional snacks after those first two weeks, they would need to bring it themselves. Tr. at 278, 310. Respondent spent \$300-\$400 on snacks, including pancakes, donuts, cookies, and candies. Tr. at 334. At hearing, Mr. Mesa conceded that he no longer feels entitled to snacks that other crew members bring onto the boat themselves, but believes it is common for a vessel to provide some sort of snack for the crew and observer. Tr. at 127-28, 130. “They are very serious about that,” he said. Tr. at 132.

Mr. Mesa testified that Respondent would further question why Mr. Mesa was hungry when “[a]ll I do is just stand around.” Tr. at 82-83. Respondent also told him, “[i]n a very disrespectful way in front of everyone,” to call the Coast Guard if he wanted more food. AX 1 at 11; Tr. at 83. At hearing, Respondent denied saying these things. Tr. at 304. “I even told observer I cook for him, too,” Respondent noted. Tr. at 311. Respondent said that Mr. Mesa stopped listening to him about the meal schedules and eating on time, and after that, “I don’t want to see him or talk to him anymore.” Tr. at 342.

On the whole, Mr. Mesa said, he felt “totally unwelcome” “[f]rom the very first meal.” Tr. at 91. According to Mr. Mesa, this feeling of being unwelcome sharply contrasted with his experience on other vessels:

Every trip that I’ve been on previous, they’re very respectful; they make you feel very welcome. They’re always trying to make you eat first, but I really don’t care about eating first. I respect them.

²⁰ During cross examination, Respondent conceded “that I don’t know that I actually relay that message to the observer or not.” Tr. at 310-11.

They work so hard; so I respect those guys; and I don't mind going last.

Tr. at 91. Conversely, Mr. Mesa never felt like a guest aboard the F/V Lady Luck. Tr. at 92. He discovered that at mealtimes, he frequently had to use chopsticks instead of utensils. Tr. at 91-92. "And I felt that was kind of different for me from my previous trips. It was kind of a shock for me," Mr. Mesa said. Tr. at 92. During his testimony, Respondent confirmed that "the Vietnamese people use chopsticks" and that the vessel carries "a lot of chopsticks" and ten sets of dishes. Tr. at 269-70.

Around April 16, 2014, Mr. Mesa called his boss to tell him that he "was about to get in a fight" due to the dispute over snacks and because he was "being disrespected" and not treated with "common courtesy . . . like a human with dignity." AX 1 at 11; Tr. at 83-84, 109. In particular, as Mr. Mesa later recorded in his Documentation Notebook, Respondent scolded him that day when he came in from working to get something to eat:

I told him we had a talk that food was not going to be a problem. [Yet,] [s]ince day one of this trip, [Respondent] made me feel unwelcomed when I made my plate. He said he only cooks for the workers. I need to make my own food. He also said call a helicopter to bring me food. All we have is noodles and . . . the icebox is empty. I was very upset being we always get into this argument at the dinner table with the crew being there and me getting talked to in a disrespectful way. [Respondent's nephew] was laughing [the] whole time. I was going to kick the nephew in the face and fly the fish stew in the captains [sic] face in front of the crew, but I again had held myself together, stayed professional, and maintained my integrity.

AX 2 at 4-5; *see also* AX 1 at 11 ("I got extremely angry.").

Also around April 16, 2014, Mr. Mesa was, as part of his observer duties, counting hooks being deployed while the vessel was setting its gear. AX 2 at 7; Tr. at 85, 110. Mr. Mesa was standing behind the crew members in the same place he had for previous sets. AX 2 at 7; Tr. at 85, 87, 110-11. During the setting process, Respondent's nephew came across an entangled line, which he grabbed out of the way and "threw . . . with force" at Mr. Mesa as he "was standing right behind him," causing the line and hook to hit Mr. Mesa's feet. AX 1 at 11; AX 2 at 7; Tr. at 87-88, 110-11. Respondent's nephew then made eye contact with Mr. Mesa, and as Mr. Mesa testified, "we looked at each other for a few seconds. . . . He looked at me, like, what am I going to do about it? . . . It could have been an accident. But, no, I don't think it was a mistake because, like I said, it was thrown with force." Tr. at 88-89. When questioned further about the incident, Mr. Mesa maintained, "He intentionally tried to hit me." Tr. at 111; *see also* Tr. at 132. Mr. Mesa was ready "to defend myself due to the fact that [Respondent's nephew] looked straight at me and did not say sorry." AX 1 at 11; AX 2 at 7; Tr. at 88.

Typically, however, shallow setting operations are fast-paced. *See* Tr. at 29, 222. Respondent's expert, Mr. McMahan, testified that he has not experienced "that exact" scenario reported by Mr. Mesa because "[d]uring a set, I've never found myself in that close of a proximity to the crew . . . where the lines are being tossed." Tr. at 221. But "during the haul, I've been smacked with buoys or had a gaff tossed at me, and even though it's a little jarring, I recognize that it's not done in malice or out of spite." Tr. at 221. He further said that the act of coiling and throwing defective line out of the way during the process of setting gear makes sense, and the line thrown "doesn't fly far" because it weighs only a few grams. Tr. at 222. He elaborated as follows:

I know a crew – if they're setting gear and they find a defective line, they're trying to get it out of there as quickly as possible because they're setting the hooks. And if they find one that's defective, they need to remove it; so they'll unsnap it and get the hook out and then quickly pull it out so that they can continue putting good branch lines on the line. So it makes sense they would coil it and throw it in and of itself. That makes perfect sense.

Tr. at 222. "If everyone's outside on the stern of the boat setting," Mr. McMahan further testified, it would be "extremely likely" for the defective line to land at someone's feet when thrown out of the way. Tr. at 223.

On April 17, after finishing a haul in the afternoon, Mr. Mesa took photographs and video of what he contends was Respondent committing a "no wheel-watch" violation when Respondent left the wheel house to help load fish.²¹ AX 2 at 5, 8. This apparently created further friction between Mr. Mesa and Respondent. As Respondent describes it:

[Mr. Mesa] told me that I had to sit . . . by the wheel. So, even . . . when I need to use . . . the bathroom, go . . . shishi or had to have BM, so I had to sneak out to do it, because he said if . . . I . . . leave my post – I mean, the chair, then . . . I will die one minute. And then, he try taking picture that I leave . . . the post.

²¹ "Wheel watch" violations are administered by the Coast Guard rather than NOAA. Tr. at 224-26. However, according to Mr. McMahan, the Coast Guard had asked for observers' assistance in reporting these incidents due to "a number of accidents out at sea in our fishery that resulted from no wheel watch." Tr. at 224. The Observer Field Manual instructs that vessel captains "are to operate the vessel safely and according to established Coast Guard safety regulations. This includes conducting proper wheel watches . . ." RX 1 at 2-6. The Manual then references an international regulation for preventing collisions at sea that requires vessels to "maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision." RX 1 at 2-6. Mr. McMahan further explained that the term does not mean literally watching the wheel of the boat but rather keeping a safe lookout so that the boat does not get into a collision. Tr. 239. Wheel watch requirements are satisfied so long as the crew is on deck, he suggested. Tr. at 225.

Tr. at 343. For his part, Mr. McMahan opined that it was surprising that Mr. Mesa would document this incident in the first place, as there normally would be “several steps to get through before there was a report filed.” Tr. at 224. “[T]aking photos and videos is kind of . . . a drastic means of addressing that. . . [T]he other thing was that, if everyone’s on deck, I’m not sure that someone needs to be at the wheel. So I’m not sure that it is a case of no wheel watch.” Tr. at 225.

On April 18, during a haul, Mr. Mesa was measuring fish on the deck as part of his duties. As he lowered himself on one knee to take a measurement, “the nephew came up to my area I was working and stomped his foot right by my face as I was measuring my fish, doing my job,” Mr. Mesa testified. Tr. at 89. “I stood up very quick, and he yelled at me, ‘What?’ . . . I took it as he was asking me what am I going to do about it?” Tr. at 89-90, 112; AX 1 at 11; AX 2 at 7. “We were probably four feet apart. . . . We were very close to each other.” Tr. at 112. The stomping splashed Mr. Mesa with blood and water, which are ubiquitous on the deck of the F/V Lady Luck. Tr. at 90, 112, 287-88. In response, “I was going to rush him but I held myself together,” Mr. Mesa later wrote. AX 2 at 7; Tr. at 113. “I was very upset,” Mr. Mesa admitted at hearing. Tr. at 113. While Mr. Mesa admits that “[y]ou can’t avoid blood” in the conditions in which he works, he had never before experienced someone intentionally stomping blood on him. Tr. at 114. “I get bloody. But I’ve never had someone stomp in my face by the fish.” Tr. at 115, 133. “In the federal regulations and laws, we’re supposed to be treated with respect. Our jobs are supposed to be treated with respect,” he added. Tr. at 115.

Mr. Mesa recounted that at dinner that evening, as Mr. Mesa went to make his plate, Respondent “was looking at me with very, very – a very angry look on his face that made me feel very unwelcome and uncomfortable. I didn’t know why he was looking at me with that anger.” Tr. at 91, 115; AX 1 at 11. Mr. Mesa said that he felt intimidated by the look and became “very upset” himself. Tr. at 92, 115-16. He then described the events that followed:

So as I was making my food, they were having conversations, and I was very upset. The nephew came behind me, . . . standing right behind me, and he was just mocking me, swaying his body side to side. I was making my plate, and they were all talking to each other. So I decided to go to the bunk because I just felt I was very angry and upset. So I went to the bunk. I thought it was better to go to the bunk, and I just got angry. I was furious, and I went to the bunk to eat. As I went to the bunk room, the nephew came in and started yelling at me, telling me that I needed to return back outside of the bunk room and return next to them and eat. And I was, like, ‘No. I’ll just stay here in my bunk and eat.’ . . . I couldn’t even understand what he was saying. But he told me to come out of the bunk room and go outside eat with them, and I was, like, ‘No. I’ll just remain in my bunk,’ because I was very, very upset. And this second worker came in, just swearing. He came, like, running in, swearing; and I thought he was going to try to get physical with me. So I thought, ‘You better just go back outside of the room.’ And they were very upset about me going to my bunk and eating.

Tr. at 51-52, 92-93, 115, 279; *see also* AX 1 at 11 (“I got very upset and went to my bunk to eat. [The nephew] came in the room yelling at me to go back to the kitchen. I said no because I did not want to do anything wrong out of anger.”). According to Mr. Mesa, Respondent’s nephew and the other crew member demanded that Mr. Mesa return to eat dinner with the crew because the crew construed his departure from dinner “as disrespect. That’s total disrespect of their culture.” Tr. at 140. Although Mr. Mesa apparently knew the significance of his behavior, he also stated that Respondent never said anything to him to indicate that it was disrespectful in Vietnamese culture for him to take his food to eat in his bunk. Tr. at 116-17. When Respondent’s nephew followed Mr. Mesa to his bunk, Mr. Mesa threatened to punch him in the face and told him to “get the fuck out the room.” AX 2 at 6; Tr. at 119-120. Respondent then came to the bunk room, retrieved his nephew and the other crew member, and, as Mr. Mesa testified, “told them to leave me alone.” Tr. at 116.

As Respondent recalled of the incident, “I did not show, you know, angry face at all” to Mr. Mesa prior to his departure from dinner. Tr. at 279. Respondent testified that normally, at mealtime, he asks everyone to come and sit down to eat. Tr. at 279. Respondent further explained that “our tradition”²² is that everyone goes out and works together, “[a]nd then, by the time we go to eat, then we want everybody sitting down eating together and talk about, you know, any problems so we can open up and discuss while we was eating.” Tr. at 283. Additionally, he does not like anyone to bring food or smoke in the bunk room because of its tight quarters and because people have to sleep there. Tr. at 279. This is a “house rule.” Tr. at 279. Consequently, he advised Mr. Mesa against it:

I just tell [Mr. Mesa] that I don’t like people eating in the bunk because people sleeping in there. And then, after he went inside there, then few crew members follow him And he became angry and look like he just want to hit those one, but – and I saw that. I just call everybody come out.

Tr. at 279-80.

But because “[t]hey were very angry,” Mr. Mesa became concerned for his safety and in the next hour made several calls from his satellite phone in search of assistance.²³ Tr. at 31-32,

²² Although Respondent gave his testimony in the context of questions about “Vietnamese culture,” it is not entirely clear whether his answer referred to Vietnamese culture generally or the culture he tried to cultivate on the F/V Lady Luck specifically.

²³ The satellite phone is generally used only in emergencies. Tr. at 140. However, as discussed above, Mr. Mesa indicated he had previously called his boss when he felt disrespected by the shortage of snacks.

94, 139; AX 1 at 11.²⁴ One of those calls was to Mr. Kupfer.²⁵ Tr. at 9, 94, 120; AX 1 at 11. He is a point of contact for enforcement- and safety-related matters with the program. Tr. at 9. Mr. Mesa called Mr. Kupfer directly, which Mr. Kupfer characterized as “very unusual,” and he stated that “my initial assumption was that [Mr. Mesa] was scared.” Tr. at 31, 33, 51. “I’ve never heard him that agitated, upset,” recalled Mr. Kupfer, who at that point had known Mr. Mesa for about ten months. Tr. at 32. He further testified:

He said that he was concerned that there was going to be a physical altercation. He had tried to – things had been building up throughout the trip. He had tried to leave the situation, and he was being pursued. And he had locked himself in his room to escape his pursuers, and they continued to harass him, and he was worried that this would escalate into something far more serious.

Tr. at 32. Mr. Kupfer added: “I was having a difficult time hearing him because I could hear muffled – what sounded like yelling in the background. . . . [I]t sounded like angry yelling, but it was muffled.” Tr. at 52-53. Mr. Kupfer then tried to calm Mr. Mesa. Tr. at 33. As he explained, “I wanted to make sure that the way he had assessed the situation was accurate. So after I felt his emotional state was a little more calm, I asked him again about the situation and what had happened.” Tr. at 33. Mr. Mesa told Mr. Kupfer that “there had been some conflict about food and eating throughout the trip and that, at this particular meal, things had gotten a lot worse and he just – rather than incite conflict, he got up and walked away. He said, ‘They won’t leave me alone. They pursued me.’” Tr. at 51.

Mr. Kupfer told Mr. Mesa to stay away from the crew and to start recording in his Documentation Notebook the things that had happened. Tr. at 51, 145. He also directed him to call the Coast Guard, who could provide the most immediate help, and to make sure he was seen by the crew using his satellite phone so they would know they were communicating. Tr. at 33, 51, 94-95. The entire conversation lasted a little more than five minutes.²⁶ Tr. at 56. Later, Mr. Kupfer followed up with the Coast Guard himself and was told the situation was in hand. Tr. at 37, 56, 94-95. Further, the Coast Guard did not think it was necessary to set up a call-in schedule to monitor Mr. Mesa’s safety. Tr. at 56. “They thought they had alleviated the source of the conflict enough,” Mr. Kupfer testified.²⁷ Tr. at 56.

²⁴ On cross examination, however, Mr. Mesa agreed that he called Mr. Kupfer and the Coast Guard to notify them of the situation because he was “so angry” about the look Respondent allegedly gave him and about the rocking by Respondent’s nephew, without any reference to the anger of the crew. Tr. at 119-20. He also apparently believed Respondent and his crew were trying to provoke him to anger so he would get into trouble. Tr. at 120.

²⁵ Mr. Mesa also called his boss and the port coordinator in Hawaii, but he could not recall the content of the conversations he had with them. Tr. at 139.

²⁶ Mr. Kupfer did not make any written documentation of this conversation. Tr. at 55-56.

²⁷ He added that in his experience, it generally is not expected that everyone eat together:

After speaking with Mr. Kupfer, Mr. Mesa on April 18 began documenting the prior incidents in his Documentation Notebook, which is used if needed to record information about any injuries, harassment, and potential infractions and how the observer dealt with those situations. Tr. at 35, 77; AX 2. Mr. Mesa had not written in the notebook before that date “because he didn’t think [the previous incidents were] a big deal.” Tr. at 36, 105. But after the incident at dinner on April 18, “I was angry.” Tr. at 104. Thus, he concedes that the events described in his Documentation Notebook were not all recorded contemporaneously as they happened. Tr. at 102, 104-05. Mr. Mesa said that he kept some contemporaneous notes on sticky pads, but it is not clear that he transferred those notes to the notebook. Tr. at 102, 104-05. Unlike data collection forms, the Documentation Notebook is not designed or expected to be filled out at the same time as the events that are being documented. Tr. at 144. For instances of possible harassment, intimidation, or interference, observers are instructed to record the facts as well as their feelings about the incidents. Tr. at 36-37.

After the dinner incident, Mr. Mesa asked Respondent to have the crew “just kind of stay their distance and mellow things down a little.” Tr. at 95. But, according to Mr. Mesa, Respondent “said there’s nothing he could do.” Tr. at 95, 120; AX 1 at 11. Mr. Mesa believed that Respondent was, in fact, “telling [the] crew members to sabotage me and make things very hard so I get upset and get into serious trouble.” AX 2 at 6.

Around May 4, 2014, two dead birds turned up in the haul. Tr. at 97; AX 1 at 11. Part of Mr. Mesa’s observer duties was to keep the birds’ remains, but when he did so, Respondent allegedly became “very angry.” Tr. at 97; AX 2 at 9. “[H]e was telling me that previous observers do not follow up with that job duty; that the birds are thrown back to sea; but I was not going to do that. I was going to follow through with my job and keep the specimens as required by federal laws.” Tr. at 97, 121. In his post-trip incident report, Mr. Mesa stated that Respondent “got very upset and began yelling” at Mr. Mesa when he placed the two dead birds in the bait freezer. Tr. at 121; AX 1 at 11; AX 2 at 9. At hearing, however, Mr. Mesa seemed uncertain about where he stored the birds: “I don’t clearly recall. I thought I put them in the freezer. I don’t remember going down in the ice hold. It’s dangerous to go down in the ice hold when you’re in heavy seas.” Tr. at 120. Then, a short time later he asserted, “[n]ot in the food freezer. I put them in the bait freezer. The food goes down in the ice hold.” Tr. at 121. Mr. Mesa was also “extremely upset” and “repeatedly asked [Respondent] not to yell at me.” AX 1 at 11; AX 2 at 9. Respondent testified that he was upset because Mr. Mesa “mistakenly” put the bird carcasses in the food freezer rather than the bait freezer. Tr. at 304. “I did not yell at him,” Respondent added. “Just angry. That’s all.” Tr. at 304. Although he saved the birds, at the end of the trip, Respondent left them on the boat. Tr. at 121-22.

In fact, I’ve only encountered that one time on a boat. . . . I was on a vessel where a crew member had passed away recently; so every meal we set out a plate for that individual; and we all sat around the table together and ate. Other than that, it’s “Fend for yourself.” Tr. at 59-60.

Respondent voiced his own complaints about Mr. Mesa at hearing. In addition to feeling forced to remain at the wheel of the vessel at all times to avoid being accused by Mr. Mesa of “no wheel-watch,” he was particularly frustrated by Mr. Mesa going outside by himself at night, which required Respondent to follow him: “I had to be responsible for the safety of our crew member including himself, so I had to follow him to see what he does outside because I don’t want, like, something accident happen and then he’s gone. So, I have to watch all the time. I am tired.” Tr. at 342. Respondent also testified that during the hauling process, Mr. Mesa “keep, you know, strolling back and forth. And I told him don’t do it. Seem like he doesn’t listen. Then, after that, I just ignore him.” Tr. at 292.

Respondent agreed that good communication is essential, and that for the first few weeks he and Mr. Mesa continued to talk and tried to understand each other. Tr. at 291-92, 341. “But, after that, I don’t know. It seems like he’s angry with me somehow and that he did not talk with me at all,” Respondent said. Tr. at 292. Respondent recalled one incident in particular that struck him as peculiar: “He stay in the back of the ship, and he start, like, kicking, you know, do any kind weird thing in the back. . . . He make lots of noise.” Tr. at 341. “I just pass by and then saw it. . . . He probably just, like, you know, joking, playing around by himself.” Tr. at 343. “But I heard from other crew member that he did that sometimes, like, an hour.” Tr. at 348. This would typically occur halfway through the hauling process, Respondent claimed. Tr. at 348-49.

The F/V Lady Luck’s trip ended in Honolulu on May 11, 2014. JX 1, ¶ 6. When Mr. Mesa returned to port, he met with Mr. Kupfer, who interviewed him and helped him prepare an incident report for the Agency’s Office of Law Enforcement. Tr. at 33-34. Agent Smith then investigated the matter and prepared the investigation file. Tr. at 68.

IV. ANALYSIS

A. Agency’s Argument

The Agency contends that the facts outlined above “paint[] a clear picture of the intimidating,²⁸ hostile, and offensive work environment in which Observer Mesa was trapped during his forty-two day trip aboard LADY LUCK.” AB at 6. The combined incidents add up to “a regular and systematic course of conduct by Respondent and his crew that can only be described as harassment, intimidation, and interference,” the Agency argues. AB at 6. The Agency goes on to support this conclusion primarily by restating the facts; the Agency does not offer any meaningful legal authority for its assessment. AB at 6-8. But the Agency takes pains to point out that all Mr. Mesa wanted, “and what he deserved, both as a matter of common decency and in order to ensure Respondent complied with the regulations designed to protect observers from interference and harassment, was ‘common courtesy,’ to be ‘treated like a human

²⁸ In its post-hearing briefs, the Agency refers to “intimidation” in a somewhat indiscriminate manner, grouping it with references to “interference” and “harassment.” Just to be clear, the NOVA does not charge Respondent with “intimidation” under 50 C.F.R. § 600.725(t). Consequently, “intimidation” is only at issue to the extent it is an aspect of “harassment.” See 50 C.F.R. §§ 600.10, 600.725(o).

with dignity.” ARB at 6. Further, the Agency adds, Respondent set the tone for how the crew treated Mr. Mesa. AB at 7.

The Agency additionally argues that it is “misdirection” to place blame on Mr. Mesa’s character as the root cause of conflict, and lauds Mr. Mesa for recording his feelings and emotions “with remarkably unfiltered truth and candor.” ARB at 3. Despite Mr. Mesa’s evident anger and frustration, “he refused to give in to that frustration and to lash out,” the Agency observes. ARB at 3. “Observer Mesa is a humble man, committed to maintaining his integrity and acting with professionalism, who just wanted to be treated like a human – with dignity, and to be allowed to do his job as an observer without interference or harassment.” ARB at 4. In contrast, Respondent’s nephew was young and immature, the Agency recalls, and the accounts of his misdeeds “remain[] completely unchallenged.” ARB at 4. Meanwhile, at hearing, the Agency contends that Respondent’s candor was called into question because he “had to be repeatedly forced to admit even the most mundane of facts,” and because he had faced prior allegations of observer harassment. ARB at 5.

Agency regulations prohibit Respondent’s conduct, the Agency concludes, because Mr. Mesa deserved to be treated with “common courtesy” and “like a human with dignity.” ARB at 6 (internal quotation marks omitted). “Respondent would have the court believe that it is okay to treat an observer as somehow less than human or without any common courtesy; it is not,” the Agency asserts. ARB at 6. After restating the Part 600 definition of harassment, the Agency declares that “[t]his is what the Agency regulations proscribe and this is what Respondent violated, not some imagined ‘requirement of political correctness on the part of boat captains.’” ARB at 6. “Respondent and his crew chose to engage in a course of conduct that interfered with Observer Mesa’s job performance and that created a work environment that could only be described as intimidating, hostile, and offensive,” the Agency claims. ARB at 7-8.

B. Respondent’s Argument

Respondent asserts that, whether taken individually or collectively, the incidents as alleged “amount at best to disrespectful behavior,” and “[t]he law does not require [Respondent] to treat [Mr.] Mesa with respect.” RB at 2. In fact, Respondent notes, Mr. Mesa’s own claims are not that he was harassed but rather that he was angry that Respondent and his crew were not showing him sufficient respect. RB at 2-3. This is because Mr. Mesa “is an alpha male with anger issues,” and when his allegations are considered in the context of his own actions and perceptions and the general fishing environment, they do not amount to harassment.²⁹ RB at 3-4. The voyage was “tainted from the outset” because Mr. Mesa was new to trips targeting swordfish, had unreasonable expectations for the trip and how he should be treated, and did not conduct a proper placement meeting that could have prevented future misunderstandings. RRB at 1-2.³⁰

²⁹ For example, Respondent states, Mr. Mesa’s own documentation reveals that he consistently had to restrain himself from physically attacking Respondent and his crew. RB at 4.

³⁰ Counsel for Respondent misnumbered the pages of Respondent’s reply brief by not numbering the first page. This Initial Decision references pages of the reply brief as if it had been properly numbered.

Respondent characterizes the Agency's claim as based on concerns that Mr. Mesa was provided inadequate food; the April 18, 2014 dinner incident that led to Mr. Mesa's phone call to Mr. Kupfer; and the allegation involving Respondent's nephew throwing a branch line at Mr. Mesa. RB at 5. Respondent then argues that Mr. Mesa had access to adequate food and that he was not required to provide the observer with snacks or a welcoming atmosphere at dinner, to cook more than two meals for him, or to feed him something different than what he cooks for the rest of the crew. RB at 6. "Events surrounding meals cannot reasonably be considered harassment or interference," Respondent maintains. RRB at 4. Further, Mr. Mesa "knew that leaving the dinner table to eat in his bunk was a 'total disrespect' of Respondent and the crew's culture," yet he did so anyway and then became angry and confrontational. RB at 6-7. Regarding the branch line, Respondent asserts that this was a much more innocuous event than suggested and a common hazard of life on a fishing vessel. RB at 6-7.

Respondent blames Mr. Mesa's reactions on being unfamiliar with the cultural and language differences present on the F/V Lady Luck. RB at 8. He also argues that Mr. Mesa embarked on the trip with an "idealized version of what life as an Observer was like" and without appreciating "the harshness of life at sea." RB at 8-9. "Likely because [Mr.] Mesa boarded the Lady Luck with a combative and confrontational disposition, [Mr.] Mesa unreasonably interpreted all ambiguous events in the most malicious possible way," Respondent adds. RRB at 4. Thus, Respondent alleges, any intimidating, hostile, or offensive environment that Mr. Mesa experienced "was due to [Mr.] Mesa's own inadequate training, emotional instability, and ego." RB at 9; *see also* RRB at 5-6 (recounting Mr. Mesa's "hyper-sensitive" overreactions to being splashed with blood, nearly being struck by the medicine cabinet door, and missing sunglasses). Mr. Mesa, Respondent states, "developed his own interpretation of what it is he does and the degree of deference he is entitled to." RB at 10. Respondent further contends that Mr. Mesa disregarded advice in the Observer Field Manual and "impermissibly placed the entire onerous [sic] of the quality of his trip on the shoulders of [Respondent] and his crew." RB at 13.

Consequently, the Agency is unable to meet its burden of proof and has unlawfully attempted to shift that burden to Respondent, he alleges. RB at 13-14; RRB at 10. The Agency cannot show that Mr. Mesa was "harassed" because it did not introduce any evidence that his "job performance was in any way compromised," and Mr. Mesa's own writings indicate that he was combative and angry, not afraid or intimidated. RRB at 7-8.

C. Discussion

To sustain the Agency's burden of proof by a preponderance of the evidence that Respondent violated the law as alleged in the NOVA, the Agency must prove 1) that Respondent is a person subject to the jurisdiction of this Tribunal; 2) that Mr. Mesa was a NMFS-approved observer; and 3) that Respondent (or his crew) did harass or interfere with Mr. Mesa. *See Sang Yeol Kim*, 2011 NOAA LEXIS 4, at *19 (NOAA July 26, 2011). The first two elements are not in dispute and are deemed satisfied. Thus, the remaining issues are whether Respondent unlawfully "interfered" with Mr. Mesa in violation of 50 C.F.R. § 600.725(t) or whether he unlawfully "harassed" Mr. Mesa under 50 C.F.R. § 600.725(o). NOVA at 1. When all of

Respondent's alleged misconduct and the circumstances surrounding the incidents are considered in total, it is apparent that Respondent's conduct does not rise to the level of a violation under these rules.

1. Interference

As set forth above, the regulations at 50 C.F.R. § 600.725(t) make it unlawful for any person to “[a]ssault, oppose, impede, intimidate, or interfere with a NMFS-approved observer.” There is no regulatory definition for “interfere” in Part 600. According to the Merriam-Webster Dictionary, “interfere” means “to interpose in a way that hinders or impedes; come into collision or be in opposition.” See Merriam-Webster, <http://www.merriam-webster.com/dictionary/interfere>. “Hinder” means “to delay, impede, or prevent action.” *Id.*, <http://www.merriam-webster.com/dictionary/hinder>. Thus, in the context of the regulation at issue, “interfere” essentially refers to actions that prevent an observer from performing his duties. Related regulations support this interpretation. See, e.g., 50 C.F.R. § 648.14(e)(1) (forbidding, under the Magnuson-Stevens Act in fisheries of the northeastern United States, interference with an “observer or sea sampler conducting his or her duties”); 50 C.F.R. § 660.12(e)(2) (forbidding, under the Magnuson-Stevens Act in fisheries off the west coast, interference with “the sampling procedure employed by an observer”); 50 C.F.R. § 679.7(g)(2) (forbidding, under the Magnuson-Stevens Act in fisheries of the exclusive economic zone off Alaska, interference with “the sampling procedure employed by an observer”); 50 C.F.R. § 229.3(b) (forbidding, under the Marine Mammal Protection Act, actions that interfere “with an observer’s responsibilities”); 50 C.F.R. § 635.71(a)(35) (forbidding, under the Atlantic Tunas Convention Act, interference with “anyone collecting information for NMFS . . . relating to the scientific monitoring or management of” highly migratory fish species); 697.7(c)(2)(vi) (forbidding, under the Atlantic Coastal Fisheries Cooperative Management Act, interference with “any NMFS-approved . . . observer aboard a vessel conducting his or her duties aboard a vessel”).

Perhaps because “interfere” has frequently been lumped together or conflated with other terms listed in § 600.725(t), other administrative tribunals have not expressly defined it on its own. However, it is clear from past decisions that interference occurs when an observer’s duties are hindered, disrupted, or blocked by an intentional act. For example, in *Fahey*, the respondents caused a seal bomb attached to a milk carton to explode about four feet from an observer, who subsequently experienced hearing loss, ringing in the ears, headaches, earaches, sensitivity to sound, and dizziness. 2013 NOAA LEXIS 7, at *23 (NOAA May 23, 2013). As a result, the observer “was unable to complete any of his sampling duties, thereby depriving NOAA of any data and information he would have collected over the remaining nearly eighteen days of the fishing trip.” 2013 NOAA LEXIS at *29. The tribunal concluded that through their actions, respondents “forcibly impede[d] and interfere[d]” with the observer’s “ability to carry out his duties while onboard” the fishing vessel. 2013 NOAA LEXIS at *24, 28.

In *Daniels*, the respondent was found to have interfered with an observer’s duties “when he did not permit [the observer] to measure the cod end of the fishing nets used during the trip.” NOAA Docket No. NE0904013, 2014 NOAA LEXIS 7, at *46 (ALJ, Oct. 24, 2014). Specifically, the respondent told the observer ““you ain’t measuring no codends on this boat”” and “pulled the net tightly on the reel leaving none of the cod end accessible” for the observer to

measure. 2014 NOAA LEXIS at *46. The tribunal concluded that the respondent's "failure to provide [the observer] access to measure the cod ends of his fishing nets, a measurement that was vital to the Agency's data collection efforts, interfered with . . . observer duties" and therefore violated NOAA regulations. 2014 NOAA LEXIS at *47. Additionally, the respondent's harassment and intimidation of the observer hindered her ability to conduct sampling on the vessel, and he directly interfered with her data collection efforts by throwing fish overboard "because he did not want her to record any bycatch." 2014 NOAA LEXIS at *62-63. This "curtailed the Agency's ability to gather critical bycatch information through the Observer Program, thereby negatively impacting its ability to effectively monitor fisheries." 2014 NOAA LEXIS at *63.

In *Cronce*, the respondent made unwanted romantic overtures toward a female observer. 1994 NOAA LEXIS 6 (NOAA Sept. 12, 1994). While the observer was in her bunk one night, the respondent, smelling of alcohol and standing in only his boxer shorts, put his hands on the observer's shoulders and moved to kiss and climb in bed with her. *Id.* at *23. Afterward, the observer became concerned for her physical safety. *Id.* at *24. She testified "that the harassment interfered with the performance of her duties, because it disrupted her state of mind." *Id.* As a result, the observer was unable to gather as much data as required, and the tribunal ruled that the respondent had interfered with the performance of the observer's duties. *Id.* at *24-25.

Thus, as illustrated by the common meaning of the term "interfere," related regulations administered by NOAA under various statutory authorities, and the cases described above, "interference" entails behavior by respondents that has the effect of delaying, impeding, or preventing an observer from completing his or her duties. The question here is whether NOAA has proven by a preponderance of the evidence that Respondent's actions had this effect on Mr. Mesa. As the Agency puts it, any reasonable observer, "forced to endure the course of conduct" alleged by Mr. Mesa, "would find it difficult if not impossible to do her job." AB at 8. However, little evidence in the record supports the conclusion that Respondent's behavior did, in fact, delay, impede, or prevent Mr. Mesa from fulfilling his lawful duties as an observer.

In general, the Agency contends that Mr. Mesa "presented detailed, credible testimony, consistent with and corroborated by the records he kept while still on the vessel regarding his treatment by Respondent and Respondent's crew," on the following events:

[Mr. Mesa's] placement aboard the vessel, Respondent's threatening to call Observer Mesa's boss, an incident where [sic] the vessel improperly discharged oil into the sea, the theft of his sunglasses, Respondent nearly striking Observer Mesa in the face with the medicine cabinet door, Respondent's failure to provide the observer with food, Respondent's nephew throwing a branch line and hook at him, Respondent's nephew stomping in a puddle and splashing him with a mixture of fish blood and water, the way he was treated generally at mealtime and in particular during the evening meal on April 18, 2014, and an incident where Respondent complained that Observer Mesa was retaining the carcasses of two seabirds killed by Respondent's fishing gear.

AB at 5 (citations omitted). In the course of testifying about these events, however, Mr. Mesa never pointed to any specific duties that he was delayed in performing as a result of his alleged treatment on the vessel, and while he did testify that he failed to remove from the vessel the carcasses of the two seabirds brought onboard during a haul that he had retained as required,³¹ it was not evident from the record that this failure was attributable to Respondent's conduct or that of the crew.

Specifically, the following testimony was elicited from Mr. Mesa regarding the birds being left behind on the vessel at the conclusion of the fishing trip:

Q: When you departed Mr. Nguyen's vessel, you left the two birds in the exact same place, didn't you, Mr. Mesa?

A: I don't clearly recall. Because, when we got to the docks, Mr. Hai was still being – was not working with respecting our job.

Q: That's why you left the birds there?

A: Yeah. Well, my port coordinator – we were in kind of bad situation. We were, like, being verbal to each other. Not verbal. But we just had some words going back and forth. I offloaded my gear, and we forgot the birds on the boat. Yes, we did.

Tr. at 121. This testimony is equivocal in several respects, namely as to who Mr. Mesa was having "some words going back and forth" with and whether his failure to remove the birds from the vessel was anything more than mere forgetfulness on his part, as opposed to an act by Respondent that hindered his efforts to do so. Thus, I find that this incident and the evidentiary record as a whole do not sufficiently demonstrate that Respondent unlawfully interfered with Mr. Mesa in violation of 50 C.F.R. § 600.725(t), as alleged. Accordingly, the Agency has not sustained his burden of proof on this issue.

The allegation that Respondent "shooed" Mr. Mesa off the boat after the placement inspection was complete is, if true, of trivial significance to the Agency's allegations. At most, this represents rudeness or intemperance, not some effort to interfere with Mr. Mesa's duties. Mr. Mesa may have found this response unusual, but there was not testimony or indication that it deprived him of the ability to do his job or to adequately prepare for the trip.

³¹ Mr. Mesa explained this requirement as follows: "One of our job requirements is, when we come across a protected species – any sea turtles, marine mammals, seabirds – if they're contacted or hooked or when they're landed, if they're dead, we're required to keep the specimens." Tr. at 97. In accordance with this requirement, and notwithstanding the anger that Respondent purportedly directed at Mr. Mesa as a result, Mr. Mesa "did [his] protocols and did [his] job." *Id.* As he testified further, "[Respondent] was telling me that previous observers do not follow up with that job duty; that the birds are thrown back to sea; but I was not going to do that. I was going to follow through with my job and keep the specimens as required by federal laws." *Id.*

More closely resembling intimidation, if not interference, was Respondent's insinuation that Mr. Mesa's boss was his friend and "if [Mr. Mesa] made mistakes . . . [Mr. Mesa] could lose [his] job." Tr. at 77. Mr. Mesa later recorded in his Documentation Notebook that he "did not feel comfortable with the pressure of doing [his] job after those threats." AX 2 at 9. But NOAA has not produced sufficient evidence about this incident to determine whether a reasonable observer in Mr. Mesa's position would or should feel threatened. *See Sang Yeol Kim*, 2011 NOAA LEXIS at *19-20 (applying a reasonable person standard to determine whether an observer was intimidated – placed in fear – by the respondent). Respondent did not suggest he would fabricate grounds for firing Mr. Mesa; he at most indicated he would report incidents in which Mr. Mesa did not do his job correctly. Presumably, any captain would and could report an observer's poor performance, and presumably, Mr. Mesa began the trip intending to properly complete the job he was assigned. It would be unreasonable for him to feel threatened or intimidated simply because Respondent informed him that he would report his errors. Mr. Mesa, like any other observer, should expect such reports from any ship on which he serves.

Regarding the discharged oil, Mr. Mesa did not initially document the incident in his log book because he "was compassionate toward [Respondent], and . . . was hesitant on getting him into trouble." Tr. at 103. That is, compassion, not fear or intimidation, was Mr. Mesa's reaction to that situation. The nature of this response also undermines Mr. Mesa's claim that Respondent threatened him not to report the incident – a claim that Respondent disputes. *See* Tr. at 78, 305. Consequently, Respondent's request that Mr. Mesa not report the incident can barely be suggestive of a threat, let alone interference.

The Agency has not presented any evidence that Mr. Mesa's sunglasses were stolen by Respondent, at Respondent's direction, or even with Respondent's knowledge. All that is evident is that the sunglasses were not in Mr. Mesa's bag where he expected them to be. *See* Tr. at 79, 108. Mr. Mesa had no personal knowledge of when or how the glasses were removed from where he allegedly left them. Additionally, there is evidence Respondent at least made an effort to find out if the glasses were stolen. *See* Tr. at 277; AX 2 at 6. While it is certainly plausible a crew member took Mr. Mesa's glasses, without more evidence, I cannot accept this as a proof of a rule violation.

The morning dispute at the medicine cabinet is exactly that – a dispute. Although there is some disagreement about how long Mr. Mesa was spending in front of the mirror, testimony about that incident does not substantively conflict: Respondent opened the mirror quickly and with some force, coming close to striking Mr. Mesa. *See* Tr. at 81, 285. It seems clear that both parties were frustrated – Respondent with how long Mr. Mesa was taking, and Mr. Mesa with Respondent's reaching past him in tight quarters to retrieve his toothbrush. Both parties also restrained themselves from physically contacting the other. Respondent opened the mirror knowing it would not actually strike Mr. Mesa, and Mr. Mesa considered elbowing Respondent in the face but did not actually do so. *See* AX 2 at 4; Tr. at 285. There is no indication Mr. Mesa felt threatened or intimidated by Respondent; rather, he was angry, and an equal participant in the exchange. Both parties could have modified their behavior to avoid this incident.

The food supply on board the F/V Lady Luck seems to be the genesis of bad feelings that infected relations throughout the trip. This is perhaps no surprise given the extent to which food represents an important diversion from the rigors and monotony of longline fishing. *See* Tr. at 58. It is clear that Respondent purchased only a limited supply of snacks prior to the trip and that, while the crew was aware of this, he probably did not advise Mr. Mesa to bring additional food he would otherwise want. *See* Tr. at 278, 310-11. However, although the lack of available snacks might evidence poor planning, negligence, or frugality on Respondent's part, it does not amount to interference or harassment. There is no evidence that Mr. Mesa was denied food or meals needed for sustenance; he simply missed the opportunity to experience food as a form of pleasure, entertainment, or distraction because he did not know he should bring his own snack supply. Mr. Mesa has even recognized, since this trip, that he is not entitled to snacks that other crew members bring for themselves. *See* Tr. at 127-28, 130. The result of this misunderstanding, however, appears to have created increasingly hostile tensions, particularly at meal times. These tensions manifested themselves in Respondent's remarks that Mr. Mesa ate too much, worked too little, and should call the Coast Guard if he wanted more food. *See* Tr. 82-83; AX 2 at 4. However, although statements like these have the air of rudeness or complaint, they do not seem designed to threaten, interfere, or intimidate. Likewise, Mr. Mesa did not take them as such; rather, they made him feel disrespected and unwelcome. *See* AE 2 at 4-5. But the rules barring harassment and interference do not inherently require a warm welcoming atmosphere or that observers feel like they are sufficiently respected by the captain and crew. And in this case, the Agency has not shown by a preponderance of the evidence that the various food-related statements were anything more than expressions of annoyance.

Also lacking evidence of interference or harassment is the hook-throwing incident. There is no indication that Respondent's nephew intentionally threw the hook at Mr. Mesa. At the time, Mr. Mesa was standing in close proximity behind the crew members and Respondent's nephew quickly grabbed and discarded an entangled line as he was setting up the gear. Although Mr. Mesa may think he was deliberately targeted, he also admits the hook and line could have been thrown at him by accident. *See* Tr. at 88. This is entirely possible given the nature of the work and the speed and close quarters in which it was being conducted. Moreover, Respondent's expert testified that it would not be unusual for a line to be thrown in this manner, particularly during the setting process as occurred here. *See* Tr. at 221-22. Consequently, without more evidence of intent, this incident cannot sustain charges of interference or harassment.

Similar to the thrown hook, Mr. Mesa's complaint that Respondent's nephew splashed him by stomping in a puddle of bloody water does not indicate wrongdoing given the apparent lack of intent and the context in which it occurred. The deck was awash in blood and seawater, and based on his prior experience, Respondent did not find it unusual to be splashed with blood. *See* Tr. at 30, 114. The only suggestion that he was intentionally splashed in this case is his subjective assessment based on the response of the nephew, an immature crew member who did not speak English. That is insufficient evidence.

In viewing the trip in its entirety, the most potentially concerning incident occurred when Mr. Mesa and members of the crew got into an argument during the evening meal on April 18, 2014. However, even that cannot be characterized as interference. Like the mirror incident

involving Respondent and Mr. Mesa, the events at dinner centered on a dispute in which Mr. Mesa and the crew were equal participants and instigators. Mr. Mesa became upset because he did not like the way Respondent and his nephew were looking at him. Respondent's nephew became upset because he did not like that Respondent violated the "house rules" that he eat with the rest of the crew in the galley and not eat in the bunk. Mr. Mesa knew that it was a "total disrespect" of the culture on the boat for him to leave the dinner table and eat in the bunk, yet he left anyway. *See* Tr. at 140. Further, he threatened to punch the nephew in the face and told him to "get the fuck out the room" when the nephew followed him to the bunk. *See* AX 2 at 6; Tr. at 119-120. It is difficult to characterize the conduct of Respondent or his nephew as interference or harassment when Mr. Mesa played a role in escalating the conflict to potential violence from what otherwise was perceived rudeness. Similarly, Mr. Mesa's phone call to Mr. Kupfer may reflect the seriousness with which Mr. Mesa viewed the climate on board the F/V Lady Luck – assuming the call was not made out of anger – but it does not reflect the reasonableness of that view nor should the fact of the phone call discount the role Mr. Mesa played in elevating tensions. As Respondent's expert indicated, if confronted with a similar situation upon entering the galley for dinner, "I would like to think that I would sit down and eat my meal and not be phased [I]n my experience . . . I recognize that it's really important to diffuse a situation at all costs." Tr. at 227-28. Also, when Mr. Mesa called the Coast Guard at Mr. Kupfer's direction to report the incident, the Coast Guard did not think it was necessary to set up a call-in schedule to monitor his safety. Tr. at 56. Ultimately, there is no evidence that this incident impacted Mr. Mesa's work or, notwithstanding his call to Mr. Kupfer, reasonably put him in fear or apprehension of doing his work. There would be little here to consider had Mr. Mesa not provoked the crew by eating in the bunk and threatening physical violence.

Finally, like most of the issues that arose on this fishing trip, the argument over the dead birds that appeared in the haul seems largely driven by conflicting personalities and the feuding that had gone on previously. It also appears there was confusion over where the bird carcasses were placed – in the food freezer or the bait freezer – that created further tension. Regardless, the fact that both Mr. Mesa and Respondent were angered in the exchange again indicates not interference or harassment, but a dispute for which both parties share blame.

2. Harassment

As previously noted, the regulations at 50 C.F.R. § 600.725(o) make it unlawful for any person to "[h]arass . . . an observer," and the term "harass," as defined by 50 C.F.R. § 600.10, "means to unreasonably interfere with an individual's work performance, or to engage in conduct that creates an intimidating, hostile, or offensive environment." 50 C.F.R. § 600.10. As discussed above, the record lacks sufficient evidence that Respondent and the crew engaged in conduct that led to unlawful "interference" of Mr. Mesa. Accordingly, none of the conduct in question could have "unreasonably interfere[d] with [Mr. Mesa's] work performance," and "unreasonable interference" cannot be grounds for a finding of harassment in this case.

I now turn to the second half of the regulatory definition of "harass," which is "conduct that creates an intimidating, hostile, or offensive environment." Though not specifically stated in 50 C.F.R. § 600.725, similar harassment-related regulations administered by NOAA indicate that "in determining whether certain conduct amounts to harassment, 'the totality of the

circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.” *Fahey*, 2013 NOAA LEXIS 7, at *13-14 (NOAA May 23, 2013)(citing 50 C.F.R. § 679.7(g)(5)); *see also Chan Song Kim*, 2003 NOAA LEXIS 4 (NOAA Jan. 7, 2003)(citing *Evans*, 1996 NOAA LEXIS 7 (NOAA Apr. 10, 1996); *Palmer*, 1996 NOAA LEXIS 8 (NOAA Apr. 10, 1996)).

In determining whether a respondent’s behavior rose to the level of harassment, other administrative tribunals have also borrowed analysis from hostile work environment claims made under Title VII of the Civil Rights Act of 1964. *See, e.g., Daniels*, 2014 NOAA LEXIS at *41 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)); *Chan Song Kim*, 2003 NOAA LEXIS at *18-19 (citing same); *Palmer*, 1996 NOAA LEXIS at *18-19 (citing same); *Evans*, 1996 NOAA LEXIS at *15-16 (citing same). To establish a hostile work environment, it must be shown that the employee “[1] was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1206 (9th Cir. 2016) (quoting *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1109-10 (9th Cir. 2000)) (quotation marks omitted). *See also Daniels*, 2014 NOAA LEXIS at *41; *Evans*, 1996 NOAA LEXIS at *15; *Palmer*, 1996 NOAA LEXIS at *18-19. “Conduct must be extreme to amount to a change in the terms and conditions of employment,” and the environment must be “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Arizona ex rel. Horne*, 816 F.3d at 1206 (quoting *Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir. 1999) (quotation marks omitted); *see also Daniels*, 2014 NOAA LEXIS at *41; *Evans*, 1996 NOAA LEXIS at *15; *Palmer*, 1996 NOAA LEXIS at *19. To determine whether an environment is sufficiently hostile or abusive requires “looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Arizona ex rel. Horne*, 816 F.3d at 1206 (quoting *Kortan*, 217 F.3d at 1110); *see also Daniels*, 2014 NOAA LEXIS at *42; *Evans*, 1996 NOAA LEXIS at *15; *Palmer*, 1996 NOAA LEXIS at *19. Because NMFS observers essentially live where they work, it is appropriate to examine how the alleged misconduct impacts their living conditions in addition to their work environment.

Applying this standard to the totality of the circumstances presented in this case, I find that the Agency has failed to establish that conduct aboard the F/V Lady Luck “create[d] an intimidating, hostile, or offensive environment.” Undoubtedly, the record reflects instances of tension and dispute between Mr. Mesa, Respondent, and members of the crew. Nevertheless, the Agency has not proven by a preponderance of the evidence that Respondent’s actions or those of the crew were so severe and pervasive as to alter the conditions of Mr. Mesa’s employment or living arrangements and create an abusive environment. Most of the incidents of alleged misconduct, where established, are simply too trivial to amount anything that serious, whether considered individually or together.

First, the allegation regarding Mr. Mesa’s missing sunglasses was far from proven. The Agency did not present any evidence that Mr. Mesa’s sunglasses were stolen by Respondent, at

Respondent's direction, or even with Respondent's knowledge. Mr. Mesa had no personal knowledge of when or how the glasses were removed from where he purportedly left them. All that is evident is that the glasses were not in Mr. Mesa's bag as he expected them to be and that Respondent made some effort to locate them. *See* Tr. at 79, 108, 277; AX 2 at 6.

With respect to the discharge of oil and the related interaction between Respondent and Mr. Mesa, it also is the subject of some dispute. Mr. Mesa testified that he did not initially document the incident because he "felt sorry for [Respondent] that he has these engine troubles. . . . I was compassionate towards him, and I just was hesitant on getting him into trouble." Tr. at 103. The fact that Mr. Mesa expressed a sense of compassion, rather than fear or hostility, in reaction to the incident undermines a finding that Respondent told Mr. Mesa not to report it—which Mr. Mesa claims and Respondent disputes—or that the statement, if made, was delivered in a threatening or hostile manner. *See* Tr. at 78, 305. Consequently, Respondent's purported statement, even if true, can barely be suggestive of a threat or act of harassment.

The allegation that Respondent "shooed" Mr. Mesa off of the vessel at the conclusion of the placement meeting, while not denied by Respondent, also does not, by itself, support the Agency's allegation of harassment. At worst, Respondent's gesture amounted to an offensive utterance, but it also seemingly could have been construed in a much more benign manner—for example, Respondent simply could have chosen to communicate his message through a hand gesture given due to his limited English language skills—given that, as Mr. Mesa testified, both he and Respondent were "happy" during the placement meeting immediately preceding the incident. Thus, a reasonable person similarly situated to Mr. Mesa would not necessarily have construed Respondent's gesture as hostile or offensive.

Other incidents alleged to be a part of the pattern of harassment of Mr. Mesa are also questionable in that regard. For example, the only evidence that Respondent's nephew acted to threaten or offend Mr. Mesa with respect to the thrown line and splash of bloody water was Mr. Mesa's very subjective assessment of those incidents based on the response of Respondent's nephew, who was described at hearing as being very immature and lacking in English language skills. In particular, while Mr. Mesa claims that the nephew's act of throwing entangled line at him during the setting process was intentional because of the way the nephew looked at him afterwards, I am not convinced that the nephew targeted Mr. Mesa as alleged. At the time of the incident, Mr. Mesa was standing in close proximity to the crew, and given the nature of their work and the speed and close quarters in which it was being performed, it seems to be entirely plausible that the nephew accidentally threw the entangled line in Mr. Mesa's direction as he attempted to quickly remove it and continue the setting process. Indeed, Respondent's expert testified that such an occurrence would not be unusual and that he has been struck by fishing gear on multiple occasions himself. *See* Tr. at 221-22. Thus, a reasonable person similarly situated to Mr. Mesa seemingly could have construed the thrown line as a simple mishap, rather than an act of hostility. Mr. Mesa's claim that Respondent's nephew intentionally splashed him with bloody water is similarly lacking.

With regard to the dispute that occurred in front of the medicine cabinet, it appears to have been exactly that – a dispute. Although some disagreement exists as to how long Mr. Mesa had spent in front of the mirror before Respondent approached, the evidence about that incident

does not otherwise conflict: Respondent opened the mirror quickly and with some force, coming close to striking Mr. Mesa. *See* Tr. 81, 285. Both parties clearly felt frustrated (Respondent by the amount of time Mr. Mesa was taking in front of the mirror and Mr. Mesa by Respondent's act of reaching past him in tight quarters to retrieve his toothbrush), and both parties restrained themselves from physically contacting the other (Respondent opened the mirror knowing that it would not actually strike Mr. Mesa, and Mr. Mesa considered elbowing Respondent but refrained from doing so). This incident appears to have resulted from momentary irritation, rather than an environment of hostility, and it cannot be viewed as objectively offensive given Mr. Mesa's role in the dispute. Additionally, considering the context of the tight quarters in which it occurred, such interactions reasonably can be expected on occasion.

Turning to the allegation that Respondent insinuated that Mr. Mesa's supervisor was his friend and that Respondent would report to her any mistakes made by Mr. Mesa to get him fired, such statements, if true, resemble intimidation. "The common meaning of intimidation is to place someone in fear," *House*, 2011 NOAA LEXIS 8, at *16 (NOAA July 12, 2011) (citing Black's Law Dictionary (6th Ed. 1991)); *Sang Yeol Kim*, 2011 NOAA LEXIS at *19 (same), and Mr. Mesa later recorded in his Documentation Notebook that he "did not feel comfortable with the pressure of doing [his] job after [Respondent's] threats," AX 2 at 9. However, in determining whether unlawful intimidation of an observer has occurred, the Administrative Law Judge presiding in *House* and *Sang Yeol Kim* applied a "reasonable person similarly situated" standard to the facts surrounding the incidents that occurred, *House*, 2011 NOAA LEXIS at *16; *Sang Yeol Kim*, 2011 NOAA LEXIS at *19, and it is not clear here that a reasonable person in Mr. Mesa's position would have felt intimidated. Respondent did not suggest that he would fabricate grounds for reporting Mr. Mesa; at most, he indicated that he would report incidents in which Mr. Mesa did not fulfill his duties correctly. Presumably, any captain could report an observer's poor performance, and presumably, Mr. Mesa began the trip intending to properly complete the job he was assigned. It seems to be unreasonable for Mr. Mesa to feel anxious or fearful simply because Respondent told him that he would report his errors. Mr. Mesa, like any other observer, should expect such reports from any vessel on which he serves.

With respect to the food supply on board the vessel, it seems to have been the genesis of bad feelings between Mr. Mesa, Respondent, and the crew that impacted their dealings throughout the trip. This is perhaps no surprise given the extent to which food represents an important diversion from the rigors and monotony of longline fishing. *See* Tr. at 58. It is clear that Respondent purchased only a limited supply of snacks for the trip and that, while the crew was aware of this, he likely failed to advise Mr. Mesa that he was expected to supply any snacks he may wish to eat beyond the first two weeks. *See* Tr. at 278, 310-11. However, although the shortage of available snacks might reflect poor planning, negligence, or frugality on Respondent's part, it does not amount to harassment. The record lacks evidence that Mr. Mesa was denied food needed for sustenance; he simply missed the opportunity to experience food as a form of pleasure, entertainment, or distraction because he did not know to bring his own supply. Since the trip, Mr. Mesa has even recognized that he is not entitled to snacks that members of a crew bring for themselves. *See* Tr. at 127-28, 130. This misunderstanding appears to have led to escalating tensions on board, particularly at meal times. These tensions manifested themselves in Respondent's remarks that Mr. Mesa ate too much, worked too little, and should call the Coast Guard if he wanted more food. *See* Tr. 82-83; AX 2 at 4. While statements like these have an

air of rudeness or complaint, they do not seem to this Tribunal to be designed to threaten. Mr. Mesa does not appear to have taken them as such; rather, the statements made him feel disrespected and unwelcome. *See* AE 2 at 4-5. But the rules barring harassment do not inherently require that vessels provide a warm, welcoming atmosphere or that observers feel like they are sufficiently respected by the captain and crew. And in this case, the Agency has not shown by a preponderance of the evidence that the various food-related statements were anything more than expressions of annoyance.

In viewing the trip in its entirety, the most potentially concerning incident occurred when Mr. Mesa and members of the crew argued during the evening meal on April 18, 2014. I find, however, that even that incident cannot be characterized as harassment. Like the mirror incident involving Respondent and Mr. Mesa, the events at dinner centered on a dispute in which Mr. Mesa and the crew were equal participants and instigators. In particular, Mr. Mesa became upset because of the way that Respondent and his nephew were purportedly looking at him. Respondent's nephew then became upset because he did not like that Respondent violated the "house rule" that required him to eat meals with the rest of the crew. Mr. Mesa knew that it was a "total disrespect" of the culture on the boat for him to leave, yet he left anyway. *See* Tr. at 140. Further, he swore at the nephew and threatened to physically assault him when the nephew followed him to the bunk. *See* AX 2 at 6; Tr. at 119-120. It is difficult to characterize the conduct of Respondent or his nephew as harassment when Mr. Mesa played a role in escalating the conflict to potential violence from what otherwise could have been perceived as rudeness. Similarly, Mr. Mesa's phone call to Mr. Kupfer may reflect the seriousness with which Mr. Mesa viewed the climate on board the F/V Lady Luck—assuming that the call was not prompted by Mr. Mesa's own anger—but it does not reflect the reasonableness of that view nor should the fact of the phone call discount the role that Mr. Mesa played in elevating tensions. As Respondent's expert indicated, if confronted with a similar situation upon entering the galley for dinner, "I would like to think that I would sit down and eat my meal and not be phased. . . . [I]n my experience . . . I recognize that it's really important to diffuse a situation at all costs." Tr. at 227-28. Also, when Mr. Mesa called the Coast Guard at Mr. Kupfer's direction to report the incident, the Coast Guard did not think it was necessary to set up a call-in schedule to monitor his safety. Tr. at 56. Ultimately, the record lacks evidence, notwithstanding his call to Mr. Kupfer, that this incident reasonably put Mr. Mesa in fear or apprehension of performing his job. There would be little here to consider had Mr. Mesa not provoked the crew by eating in the bunk and threatening physical violence.

Finally, the alleged exchange between Respondent and Mr. Mesa regarding Mr. Mesa's insistence on retaining the dead seabirds, while not totally denied by Respondent, also does not support the Agency's allegation of harassment. The exchange seems to have been driven largely by the tensions that had arisen earlier in the trip, and there also appears to have been some confusion over where Mr. Mesa placed the bird carcasses that created further tension. However, Respondent's reaction, at most, appears to have been an offensive utterance that a reasonable person similarly situated to Mr. Mesa would not have construed to be an act of abuse.

In the end, even when all of the foregoing events are considered in their totality, they are insufficiently severe to alter the conditions in which Mr. Mesa worked or lived. There is no evidence that the nature of the alleged misconduct ever turned physical. Perhaps more importantly, the circumstances under which these disputes arose did not involve a bully-victim dynamic or jeopardize Mr. Mesa's safety. Rather, the disputes appear to have been created by individuals, namely Mr. Mesa, Respondent, and Respondent's nephew, whose personalities conflicted and who faced language and cultural barriers that prevented more harmonious relations. As Mr. McMahan noted after reviewing Mr. Mesa's notes, "[i]t became immediately apparent that [Mr. Mesa] was very upset and that the dynamics – the observer and captain, crew dynamics on this trip – had deteriorated." Tr. at 212. This set the stage for small slights to escalate and perhaps feel more consequential than they actually were. The rigors of everyday life on a commercial fishing vessel exacerbated some of these incidents, but as the Observer Field Manual warns, an observer's "environment can be lonely, unwelcome, cramped, and sometimes hostile. Your sleeping and eating habits will definitely be disrupted. The quality of your working relationship with the crew can be more important to the overall nature of the trip than the nature of the vessel itself." RX 1 at 2-1 – 2-2. When looking at the nature of the complained-about conduct and the context in which it occurred, it is clear that this fishing trip was marred by poor working relationships. But there is no indication these poor relationships morphed into harassment.

Consequently, a finding of harassment as prohibited by 50 C.F.R § 600.725(o) simply is not sufficiently supported by the evidentiary record, and the Agency has not sustained its burden of proof on this issue.

ORDER

IT IS HEREBY ORDERED that the Notice of Violation and Assessment of Administrative Penalty against Respondent Hai Van Nguyen is **NOT PROVED** and must be **DISMISSED with prejudice**. No penalty is assessed.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271-273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Dated: August 22, 2016
Washington, D.C.

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN
TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content

requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an

Administrator's decision to remand the initial decision to the Judge is not final agency action.

(1) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.