



UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:)	DOCKET NUMBER
)	
Eliman S. Bah,)	AK1802015, F/V Alaskan Lady
)	
Respondent.)	

INITIAL DECISION AND ORDER

Date: March 7, 2022

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

Appearances: For the Agency:

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Respondent:

Eliman S. Bah, Pro Se



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 October 7, 2020, 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 Eliman S. Bah. The Agency reissued the NOVA to Respondent on December 16, 2020, and issued a Superseding NOVA on June 28, 2021. The Superseding NOVA charges Respondent with violating the Magnuson–Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891d, and its implementing regulations. Specifically, it alleges in a single count that “[f]rom on or about February 14, 2018 to on or about March 18, 2018, Eliman S. Bah, a person subject to the jurisdiction of the United States, did, while onboard the F/V Alaskan Lady (O.N. 591678), harass B.D.², a female observer assigned to and onboard said vessel . . . by conduct that had sexual connotations, had the purpose or effect of interfering with the observer’s work performance, or otherwise created an intimidating, hostile, or offensive environment, in violation of 16 U.S.C. § 1857(1)(A) and (L) and 50 C.F.R. § 679.7(g)(5).” Superseding NOVA at 1. The Agency proposed imposition of a \$24,000 penalty for the alleged violation. Superseding NOVA at 2.

Respondent denied the charges and requested a hearing in a letter dated January 6, 2021. Pursuant to the applicable procedural rules, 15 C.F.R. pt. 904 (“Rules”), on February 2, 2021, I assigned myself as the Administrative Law Judge to preside over this matter. I simultaneously issued an Order to Submit Preliminary Positions on Issues and Procedures (“PPIP Order”). The Agency timely submitted its PPIP and thrice supplemented it. The Respondent did not file a PPIP. By Order dated June 23, 2021, I granted the Agency’s unopposed Motion in Limine to Exclude Respondent’s Witnesses, Documents, and other evidence, precluding Respondent from introducing at hearing any documentary or testimonial evidence other than his own, reserving his right to engage in cross-examination of any witnesses called by the Agency.³

Due to the ongoing pandemic, a virtual hearing in this matter was held September 1–2, 2021.⁴ Six witnesses testified for the Agency: Fisheries Observers B.D. and Claire Engelhardt; National Marine Fisheries Service Law Enforcement Officers George Miller and Sonya Jordan; Captain Randy Adkins; and the Director of NOAA’s Fisheries Monitoring and Analysis Division, Jennifer Ferdinand. Tr. Vol. I at 8–9, 165–66, 184; Tr. Vol. II at 6, 55–56, 76–77. Respondent offered his own testimony. Tr. Vol. II at 130–31. Also admitted into the record were nineteen exhibits, including eighteen Agency exhibits (AX 2–10; 12–13, 19–21, 25 (pps. 5–8, 14, 18, 21, 23–27, 38, 40–43, 45–46), 26 (p. 2), 27 (p. 2) and 28, and one exhibit offered by

² The observer who is the subject of this action alleging sexual harassment is identified herein solely by the initials “B.D.” to protect her confidentiality.

³ After that Order was issued, Respondent submitted certain documents to the Tribunal *ex parte*. A Notice of Ex Parte Communication in regard to those documents was issued on July 14, 2021.

⁴ A transcript for each day of the hearing was produced, with the pages of each volume separately numbered. Citations to the hearing transcript appear as follows: “Tr. Vol. [I or II] at [page].”

Respondent (RX 1).⁵ Tr. Vol. I at 13, 25, 28, 47, 50, 85, 96, 105, 110, 173, 176, 179–80, 181, 222; Tr. Vol. II at 18, 21, 30, 32, 46.

On September 22, 2021, this Tribunal emailed digital copies of the hearing transcript to the parties and issued a Post–Hearing Scheduling Order. On October 28, 2021, I granted the Agency’s Motion to Conform Transcript to Testimony, and the Agency filed its Post–Hearing Brief that same day. The Respondent did not file a post–hearing brief. Therefore, the record closed with the Agency’s filing of its Brief.

II. LAW AND REGULATIONS APPLICABLE TO LIABILITY

A. Relevant Statutory Provisions

Congress passed the Magnuson–Stevens Fishery Conservation Management Act (“MSA” 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 [sic] 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. §§ 1801–1891d, 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 North Pacific Council, which has authority over fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. 16 U.S.C. § 1852(a)(1)(G). 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 defined as “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this chapter.” 16 U.S.C. § 1802(31).

⁵ RX 1 is Officer Jordan’s Memorandum of Interview dated November 10, 2018. It was previously identified in the record by NOAA in its PPIP as pages 2–5 of AX 11. Despite my prior Order granting the Agency’s Motion in Limine, I admitted the exhibit into the record, at Respondent’s request and over NOAA’s objection, after Respondent made frequent references to it during his cross–examination of Officer Jordan. Tr. Vol. II at 35–37, 40–46.

The Act makes it unlawful “for any person – to violate any provision of this chapter or any regulation or permit issued pursuant to this chapter[.]” 16 U.S.C. § 1857(1)(A). Specifically prohibited is “for any person – to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel under this chapter, or any data collector employed by the National Marine Fisheries Service⁶ or under contract to any person to carry out responsibilities under this chapter[.]” 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 applicable nationwide to all eight of the Regional Fisheries Management Councils established under the MSA are contained in part 600 of Title 50 of the Code of Federal Regulations. 50 C.F.R. § 600.5. The North Pacific Fishery Management Council developed the regulations promulgated in Part 679 of Title 50 to implement the Fishery Management Plans for commercial fishing by vessels of the United States in the waters under its governance pursuant to the MSA and the Northern Pacific Halibut Act of 1982 (Halibut Act). 50 C.F.R. § 679.1. The regulations implement, *inter alia*, “elements of the Groundfish and Halibut Observer Program.” 50 C.F.R. § 679.1(f). *See also Cloud*, Docket No. AK1202525, 2017 WL 10845065, at *1 (NOAA Oct. 16, 2017) (Order Modifying Initial Decision) (citing 50 C.F.R. pt. 679; 16 U.S.C. § 1853(b)(8)).

The Groundfish and Halibut Observer Program, set out in 50 C.F.R. §§ 679.50–55, provides that vessels harvesting groundfish and halibut must have at least one observer aboard the vessel at all times. *See* 50 C.F.R. §§ 679.4 (b); 679.50(a); 679.51(a)(2)(i)(A), (a)(2)(ii), (a)(2)(iv). Consistent with the Act, Part 679 further includes provisions prohibiting observer harassment:

In addition to the general prohibitions specified in § 600.725 of this chapter, it is unlawful for any person to do any of the following:

* * *

(g) *North Pacific Observer Program – Observers.*

* * *

(5) Harass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer’s work performance, or otherwise creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context

⁶ The National Marine Fisheries Service (“NMFS”) is the office within NOAA “responsible for the stewardship of the nation’s ocean resources and their habitat.” *See About Us*, NOAA, <https://www.fisheries.noaa.gov/about-us#:~:text=NOAA%20Fisheries%20is%20responsible%20for,ocean%20resources%20and%20their%20habitat.>; Tr. Vol. I at 166.

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.

50 C.F.R. § 679.7(g)(5). Under the Act, to “[h]arass 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.

C. Burden of Proof

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.” *Cloud*, 2017 WL 10845065, at *5 (citing 5 U.S.C. § 556(d), *Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994), and *Steadman v. SEC*, 450 U.S. 91, 100–03 (1981)); *Vo*, Docket No. SE010091FM, 2001 WL 1085351, at *6 (NOAA Aug. 17, 2001) (same); *Bui*, Docket No. SE1603549, 2019 WL 7579972, at *5 (NOAA Mar. 25, 2019) (citing 5 U.S.C. § 556(d)); 15 C.F.R. §§ 904.251(a)(2), 904.270(a). This standard requires the Agency to establish that the facts it relies upon are more likely than not to be true. *Bui*, 2019 WL 7579972, at *5 (citing *Fernandez*, Docket No. NE970052FM/V, 1999 WL 1417462, at *8–9 (NOAA Aug. 23, 1999)). To satisfy this burden of proof, the Agency may rely upon either direct or circumstantial evidence. *Id.* (citing *Vo*, 2001 WL 1085351, at *6 (citing *Paris*, Docket No. 635–242, 1987 WL 119993 (NOAA Sept. 30, 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’s evidence.” *Roque*, Docket No. NE970229FM/V, 1999 WL 1417458, at *27 (NOAA Apr. 30, 1999) (citing *Steadman*, 450 U.S. at 101), *aff’d*, *Roque v. Evans*, No. CIV.A. 01-CV-10709-R, 2003 WL 131725, at *1 (D. Mass. Jan. 16, 2003).

Under the Rules, all evidence that is “relevant, material, reliable, and probative” is admissible at the hearing. 15 C.F.R. § 904.251(a)(2). Formal rules of evidence do not necessarily apply and hearsay evidence is not inadmissible as such. 15 C.F.R. § 904.251(a)(2). The test for admitting hearsay evidence in an administrative proceeding requires that the hearsay “must be probative, its use must be fundamentally fair, and it must bear satisfactory indicia of reliability.” *Swanson*, Docket No. AK022198, 2005 WL 705422, at *11 (NOAA Jan. 27, 2005); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (citing, *inter alia*, *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978), modified 586 F.2d 755 (9th Cir. 1978)); *Roque*, 1999 WL 1417458, at *8. “[T]here is not a bright line test to determine if there is an indicia [sic] of reliability, but there are several factors to consider: (1) independence or possible bias of the declarant; (2) whether the statements are signed and sworn as opposed to anonymous, oral, or unsworn; (3) whether the statements are contradicted by direct testimony; (4) whether declarant is available to testify; (5) whether the declarant is unavailable and no other evidence is available; (6) the credibility of the declarant if a witness; and (7) whether the hearsay is corroborated.” *Swanson*, 2005 WL 705422, at *11 (citing *Bailar*, 626 F.2d at 149; *Roque*, 1999 WL 1417458). “While certain evidence admissible in an administrative hearing may be inadmissible under the Rules of Evidence, the weight attached to such evidence must be considered in light of its

deficiencies.” *Id.* (citing *Roque*, 1999 WL 1417458).

III. COMPLAINANT’S EVIDENCE

A. B.D.’s Testimony

As primary proof of the violation, NOAA offered the extended testimony of B.D. Tr. Vol. I at 8–163. B.D. averred that she is 35 years old and holds a bachelor’s of arts degree in biology from the College of Wooster in Ohio. Tr. Vol. I at 8, 10–11, 156. In May 2011, she underwent training and testing to become a fisheries observer on commercial fishing vessels leaving out of Alaska. Tr. Vol. I at 10–11. She subsequently qualified to serve as a “lead” observer, capable of soloing on certain boats and being the “one in charge” if a boat has multiple observers. Tr. Vol. I at 11. *See also* Tr. Vol. 2 at 90. From 2011 to 2018, B.D. worked as an observer out of Alaska, and then in March of 2021, she trained, qualified and began serving as an observer on fishing vessels leaving out of Hawaii. Tr. Vol. I at 9, 11. As an observer, B.D. has engaged in a total of seventeen deployments, twenty–four different assignments, and spent 1,135 days at sea. Tr. Vol. I at 12.

In early 2018, B.D. was assigned by her then employer, Alaskan Observers, Inc., to be the sole observer on the fishing vessel *Alaskan Lady* out of Dutch Harbor, Alaska, for three commercial fishing trips scheduled to occur between January 22, 2018 and March 18, 2018. Tr. Vol. I at 12, 14, 189–190. *See also* AX 6, 7. The *Alaskan Lady* is a 170–180-foot catcher–processor longline vessel,⁷ USCG Documentation No. 591678, owned by Shelford’s Boat Ltd. and operating in the Gulf of Alaska, Bering Sea and Aleutian Islands under Federal Fisheries Permit No. 4306. AX 2; AX 3; AX 21; Tr. Vol. I at 185, 188–89; Tr. Vol. II at 29–32. The vessel intended on those winter fishing trips in 2018 to catch Pacific cod in the Bering Sea, 150–200 miles offshore. Tr. Vol. I at 15–16, 189, 201.

A fisheries observer generally serves as the “biologist onboard” the ship, generally recording the count and a weight of fish, preparing biological samples and documenting any potential fishing violations, B.D. advised. Tr. Vol. I at 9–10. The work on the *Alaskan Lady* involved standing and watching as the catch was hauled onboard, tallying the different species of fish, and twice each day weighing sixty sample fish. Tr. Vol. I at 17–18. The tasks are physically demanding, often undertaken in winter, while occasionally being soaked with seawater, for 10–20 hours per day, on no set schedule, until the vessel is filled to capacity with fish. Tr. Vol. I at 17–19, 29; AX 7 at 10. *See also* Tr. Vol. I at 187 (noting the boat operates “around the clock”). In addition, the job requires the observer to contemporaneously document other aspects of the voyage, such as the staff onboard and when fishing gear was launched and hauled back. Tr. Vol. I at 19–20. The data recorded and/or calculated by the observer must be accurate, detailed, and transmitted in “real–time,” that is each day, to the on–shore NMFS “in season advisor” via the onboard Atlas communication system, and in turn, the ship receive backs updates and instructions from NMFS to maintain the sustainability of the fishery. Tr. Vol. I at 20–21, 27–28; AX 19.

⁷ A catcher–processor vessel harvests fish and processes, freezes and packs it in its onboard factory into a “preliminary product.” Tr. Vol. II at 89; Tr. I at 187. A longline vessel fishes with hooks and lines that are set in the water for a period of time and later retrieved. Tr. Vol. II at 88; Tr. I at 188–89.

B.D.'s first trip onboard the Alaskan Lady left port on January 23, 2018. Tr. Vol. I at 29; AX 7 at 3. Its fishing crew consisted of approximately 20 men, with B.D. being the only woman onboard.⁸ Tr. Vol. I at 14–15, 189, 201–02. The captain assigned B.D. to a stateroom shared with the male cook. Tr. Vol. I at 15, 190–91; AX 7 at 3–4. B.D. averred that such room assignment was consistent with common vessel protocol as both she and the cook had irregular schedules. Tr. Vol. I at 15, 158. *See also* Tr. Vol. I at 190–92.

Respondent was onboard and employed on that first trip as a processor. Tr. Vol. I at 29–30, 205; AX 30; AX 7 at 4. In such capacity, he worked occasionally at the “bleeder” adjacent to the sample area where B.D. worked on the vessel and during such times assisted her in performing her sampling work. Tr. Vol. I at 30–31; AX 4 at 2; AX 7 at 3; AX 12 at 10–11. B.D. testified that while working besides each other on this first trip, she and Respondent engaged in friendly chit-chat about travel and their families, etc. Tr. Vol. I at 31, 126–27; AX 4 at 2. She further recalled that at some point during this trip, Respondent disclosed to her that he was divorced with children, she mentioned that she was single, and they shared tea and chocolates. Tr. Vol. I at 31–32, 147; AX 4 at 2, 3; AX 12 at 13–14. B.D. stated that during this trip “[n]one of our conversations were flirtatious,” Respondent was always “polite and respectful,” and she considered him someone onboard with whom she had the “best rapport.” AX 4 at 2. *See also* Tr. Vol. I at 147–48 (B.D. denies “flirting” with Respondent, stating she was never “interested in” Respondent).

The Alaskan Lady's first fishing trip with B.D. ended on February 8, 2018, without incident, at which point the cook choose to leave his position. Tr. Vol. I at 32; AX 7 at 14. Respondent was “voted” to be the cook on the next trip and assigned to share a stateroom with B.D. Tr. Vol. I at 32; AX 4 at 2; AX 7 at 14. The Alaskan Lady left port for its second trip with B.D. as observer on Valentine's Day, February 14, 2018. Tr. Vol. I at 33; AX 7 at 15. To mark the occasion, Respondent gave B.D. several candies. Tr. Vol. I at 33; AX 4 at 2. B.D. testified that she accepted such sweets without hesitation as she believed it was simply “tradition” and meant as a “kind gesture, no more.” Tr. Vol. I at 33; AX 4 at 2.

As the cook, Respondent primarily performed his work in the galley, and B.D. often sat in the adjacent sitting area to complete her paperwork. Tr. Vol. I at 35; AX 25 at 7; AX 4 at 2. Respondent was “an incredibly chatty guy,” B.D. recalled, and he would often engage in a “monologue” on a variety of topics. Tr. Vol. I at 35, 136–37, 140–41; AX 4 at 2–3. On one such occasion, Respondent showed her a handwritten list of his summer plans which included “take a beauty to Vancouver for her birthday.” Tr. Vol. I at 37, 136–37; AX 4 at 3. B.D. believed “a beauty” referenced her because Respondent had previously told her that if they were in Seattle at the time of her birthday, he would take her to his favorite Thai restaurant in Vancouver. Tr. Vol. I at 37, 128–29, 136; AX 4 at 2. She stated that she was “a little taken aback at him calling me a beauty, but at the same time I didn't think too much of it.” Tr. Vol. I at 37. So, she ignored it. AX 4 at 3. A couple of days later while together in the galley, Respondent showed her that he had added to the list “something in regards to making sure I did

⁸ B.D. indicated that it is common on long liners with only one observer for the observer to be the sole woman onboard, and that she had been the sole woman assigned to other vessels. Tr. Vol. I at 158.

not go home a single woman,” while extending his hand as if intending a handshake. Tr. Vol. I at 37–39; AX 4 at 3. B.D. testified that she found this raw expression of Respondent’s intent unexpected and was “a bit startled by [it] because we had not discussed dating and I was not interested in dating.” Tr. Vol. I at 38; AX 4 at 3. As such, she felt “at a loss for words,” and admitted responding “[n]ot well,” with just with a nervous laugh, while reciprocally extending her hand. Tr. Vol. I at 38; AX 4 at 3. Instead of shaking her hand, Respondent took her hand in his and kissed the back of it. Tr. Vol. I at 39; AX 4 at 3.

On four to ten separate occasions while they were alone together in the galley, B.D. averred, Respondent recounted for her recent telephone conversations he had purportedly had with his brother or sister-in-law, Annie, using the ship’s onboard satellite phone. Tr. Vol. I at 40–41; AX 4 at 3. Specifically, Respondent told B.D. that his family members had inquired about her “butt” and how it would look in jeans and suggested to him that the fact that she “enjoyed his travel stories” and “one time” said “his kids were cute,” was evidence of her romantic interest in him, with Annie allegedly telling him “you’ve got this one in the bag, you just have to put a bow on her.” Tr. Vol. I at 40, 42–43; AX 4 at 3, 4. B.D. also recalled Respondent telling her that “Annie owned part of the restaurant in the Eiffel Tower and that if Eli [Respondent] and I ever wanted to date there that she could hook us up.” Tr. Vol. I at 42, 134; AX 4 at 3–4. The observer said she found these comments about dating “odd” and was not “entirely sure how to react,” in that during the first trip she and Respondent had become friends, but she had not “picked up on him being flirty” or giving her any reason to be concerned, and she wanted to maintain the friendship. Tr. Vol. I at 41, 44. Nevertheless, in response to the dinner date suggestion, B.D. testified that “I flat out told him we would not be dating.” Tr. Vol. I at 45; AX 4 at 4. She hoped that her declaration had been “sufficient for politely but clearly shutting him down, and it gave him a reason to no longer view me romantically.” AX 4 at 4. “Somehow it didn’t work,” B.D. testified, in that thereafter Respondent told her that Annie had asked him whether he had kissed B.D. yet, to which he responded “no,” “but at one point he would” and claimed Annie was surprised that they had been “sharing a room together for the last two weeks and hadn’t, quote done anything.” Tr. Vol. I at 43–44, 160; AX 4 at 4. Respondent reassured B.D. that he responded to these comments explaining to his family that such onboard interactions were not appropriate, stating “that’s not how we do on a boat.” Tr. Vol. I at 44, 145–46; AX 4 at 4. B.D. indicated she was amazed at Respondent’s “audacity” and responded sarcastically that he would not want to be with her as she is one of those narrow-minded conservative Christians, he had previously indicated he negatively views as hypocrites. AX 4 at 4.

At hearing, B.D. further recalled that Respondent had inquired as to her interest in certain African necklaces which he indicated his sister-in-law Annie could acquire for her. Tr. Vol. I at 45; AX 5; AX 4 at 4. B.D. testified that she initially expressed to Respondent interest in the offer, believing they both understood that she would be purchasing these items, since gifts to observers were prohibited. Tr. Vol. I at 45, 143–44; AX 4 at 4. However, one day during the second voyage, she found Respondent had left on her bunk, near her pillow, his handwritten note suggesting his sister-in-law’s intent to gift her the necklaces as well as Masai sandals (size 8) and silver bracelets. Tr. Vol. I at 46–52, 128, 151; AX 5; AX 4 at 4. The note also referred to her as “beautiful.” AX 5. Upon receiving the note, she stated she told Respondent “thank you but no thank you, I did not want the items.” Tr. Vol. I at 52; AX 4 at 4. *See also* AX 4 at 4 (“he [Respondent] kept insisting, “it’s ok, she’s [Annie’s] loaded. She wants to buy them for you, and

if I say it's ok, then it's ok.”). Concerned that offers of gifts can be “seen as bribery,” B.D. kept the note and placed it in her log book to present during her post-trip debriefing.⁹ Tr. Vol. I at 52.

Respondent's level of personal interactions with B.D. significantly escalated on Saturday, March 3, 2018, as the ship was returning to port from its second voyage. Tr. Vol. I at 56, 63; AX 4 at 6. Early that morning, at about 3–4 a.m., after a 15-hour shift, B.D. returned to her stateroom to find Respondent still awake and reclining on his bottom bunk. Tr. Vol. I at 57; AX 4 at 6. She prepared herself for bed in the bathroom, and upon returning to the room, noted that Respondent had transited to sit on the edge of his lower bunk specifically blocking the dip therein which she needed to access the top bunk. Tr. Vol. I at 57; AX 4 at 6. Respondent then proceeded to relay to her a conversation which he had purportedly had with Annie about B.D.'s “butt,” stating that Annie had inquired if it was “jam or jelly.” Tr. Vol. I at 58; AX 4 at 6. Respondent said he told Annie that “he did not know, but he would find out.” Tr. Vol. I at 58; AX 4 at 6. B.D. swore that as Respondent stated this “he smiled and then held out his arms in a come-hither sort of movement,” wiggling his fingers. Tr. Vol. I at 58, 125; AX 4 at 6. B.D. said she “was surprised” by the gesture and “backed up towards the [closed room] door and told him absolutely not, he was not allowed to touch me.” Tr. Vol. I at 59, 124–25; AX 4 at 6. In response to this declaration, B.D. recalled, Respondent “crossed his arms and stuck out his bottom lip in a pouting gesture.” Tr. Vol. I at 59; AX 4 at 6. Then, after a moment, “he asked for a hug and he stood up quickly and approached [her]” and wrapping his arms around her. Tr. Vol. I at 60–61; AX 4 at 6. As he hugged B.D., he commented that “now I know it's jelly.” Tr. Vol. I at 61; AX 4 at 6.

“It was a full on straight hug. So his chest was against mine and his arms were around me,” B.D. recalled, that she had not given permission for nor wanted. Tr. Vol. I at 60–61. She felt “uncomfortable” as “I had already told him no, you cannot touch me, and then for him to then [] give me a hug right after that was uncalled for. But especially to then say now I know it's jelly was very unnecessary and very discomfoting.” Tr. Vol. I at 61. As her back was already against the door, B.D. stated “I couldn't go back much further,” but “brought my arms up in a defensive posture and pulled back as far as I could.”¹⁰ Tr. Vol. I at 61–62; AX 4 at 6. Respondent then retreated to recline on his bunk as if he was going to bed, and once she felt safe that he would be unable to reach for her, B.D. stated she climbed up to the top rack. Tr. Vol. I at 62; AX 4 at 6; AX 7 at 22; AX 20. B.D. testified that it took her “awhile” to fall asleep after this incident, because –

⁹ On cross examination, B.D. testified that Respondent also offered her a computer bag which he indicated he had no use for, which she accepted, although she too, had no use for it, but intended to leave it in the bunkhouse “in case anyone wanted it.” Tr. Vol. I at 151–52.

¹⁰ The stateroom measured approximately seven by seven feet, with approximately four feet of space between the edge of the bunk and the door. AX 27. AX 27 is among the photographs, measurements, and drawings of the Alaskan Lady taken and/or created on June 21 2021, by NFMS Enforcement Officer George Miller aboard the F/V Alaskan Lady. Tr. Vol. I at 167–81. *See also* AX 25 at 5–8, 14, 18, 21, 23–27, 38, 40–43, 45–46; AX 26 at 2; AX 27 and AX 28. Capt. Adkins also testified as to the layout of parts of the ship as shown in AX 25 at 5–8, 14, 18, 21, 23, 45; AX 28. Tr. Vol. I at 192–200.

I was very uncomfortable. I was very taken aback by the whole interaction and I wasn't sure if he was done. We're still in the same room with the door shut and the [first] mate, our neighbor, was up in the wheelhouse so there wasn't anyone around outside the door nearby. So I was stressed and it took a while to fall asleep.

Tr. Vol. I at 62–63.¹¹

The following day, Sunday March 4, 2018, at about 4 p.m., the Alaskan Lady docked at Dutch Harbor. Tr. Vol. I at 67; AX 4 at 6; AX 7 at 22–23. As the boat was to be docked for twenty–four hours for offloading, B.D. decided to pack up, get off and stay overnight in town with friends. Tr. Vol. I at 67. While she packed, she set her backpack on one of the boxes which crowded the narrow corridor directly outside her stateroom.¹² Tr. Vol. I at 68; AX 25 at 23, 25. While she was packing, traversing from her room to the hallway, Respondent took a stance blocking her way back into the stateroom and “asked for a hug,” B.D. asserted. Tr. Vol. I at 69; AX 4 at 6. She described what happened next as follows:

I didn't want one [a hug], but at the time I was very focused on just getting off the boat and what I needed to pack in my bag in order to get off the boat. And because he was blocking my way then I just quickly gave him one to appease him so he would move.

* * *

. . . at first it was just a normal hug, but very quickly then he reached down and grabbed my butt.

* * *

His hand was below my waist on my butt cheek.

* * *

There was a slight squeeze [of his hand], but it was a very quick moment.

* * *

As soon as I realized that his hand was on my butt I backed up away from him down the hall towards the head and put my hands up in front of me again defensively and told him that that was not okay, that I had already told him he could not touch me and he knew that that was not okay.

* * *

Once I backed up and told him that he knew that that was not okay he immediately said sorry and held out his hand like a handshake.

* * *

¹¹ On cross-examination, B.D. admitted that she maintained a pocket knife in her stateroom during the voyages, and that she did not immediately promptly report this incident to the captain. Tr. Vol. I at 117, 123–24.

¹² The hallway width was five–feet. AX 27. B.D. testified it was cluttered that day with three–by–three–foot boxes. Tr. 66. The width of the adjacent hallway going towards the bathroom or “head” was two–feet. AX 27.

He was saying sorry, but he did not seem sincere at all. He had a smile on his face. I couldn't tell if that was a smile like he was embarrassed for being called out, but it seemed like he still had some smug satisfaction that he got what he wanted.

* * *

. . . I told him a couple of times again that was not okay. He kept repeating sorry and so I figured the handshake was kind of a way to say like we're done with the conversation. And so I took his hand and shook it to say we're done.

* * *

. . . When I took his hand and shook it and said okay, we're fine, then I released his hand. My hand was open [but] he kept a hold of my hand.

* * *

. . . I was stressed, but it was probably a good 30 seconds.

* * *

Once I said we're done he said are you mad at me and I said I will be if you don't let go of my hand. And at that point he let go.

* * *

. . . Once he let go then he reached up and pinched my cheek, kind of like how grandparents will often do to little kids.

* * *

. . . I thought it was incredibly condescending. He had already grabbed me in a way that was inappropriate, that I told him not to do. And then to be smiling while he's apologizing in a way that so did not seem sincere. And then to reach up and pinch my cheek in this way, like you would do to a little kid then it just seemed like just to add insult to injury. It was very frustrating.

Tr. Vol. I at 69–74. *See also* Tr. Vol. I at 132–33; AX 4 at 7. B.D. stated unequivocally at hearing that there is no question in her mind that Respondent “grabbed her butt,” and that he did so intentionally. Tr. Vol. I at 71. Further, that she had not given Respondent permission to “grab her butt,” to engage in the long handshake, or to pinch her cheeks, stating “I did not want him to touch me.” Tr. Vol. I at 74.

She stated the interaction caused her feel –

incredibly stressed and uncomfortable especially with no one else in the hallway. There were no witnesses then. There was no one to kind of back me up. Because I was in the hall and blocked in by the walls and the boxes then there wasn't a way for me to easily get away from him. I couldn't just step aside. I either had to crawl over the boxes or push him away. So it was just a very vulnerable, uncomfortable feeling.

Tr. Vol. I at 75. On cross-examination, B.D. conceded that “in hindsight,” agreeing to allow Respondent to hug her again at that point “wasn’t the best way to deal with [the situation].” Tr. Vol. I at 132–33.

After this interaction, B.D. stated she went into her stateroom to finish her packing, where Respondent joined her, taking a position sitting on his bunk, holding his smartphone. Tr. Vol. I at 75–76. After another few trips back and forth to her backpack in the hall, B.D. stated that Respondent turned his phone around and showed her a somewhat blurry picture he had just taken of her backside. Tr. Vol. I at 76–77; AX 4 at 7. Respondent advised B.D. that he and his brother had a bet as to how good her butt looked in jeans, and so he was going to send him that picture. Tr. Vol. I at 77. *But see* AX 4 at 7 (B.D. recalling that Respondent “reported he was going to send it [the picture] to Annie.”). Then Respondent stood up and aimed the camera at B.D.’s face, stating he had promised to send pictures of her face to Annie. Tr. Vol. I at 77; AX 4 at 7. In response, B.D. testified that she held up her hands in front of her face and told Respondent “no.” Tr. Vol. I at 78. *But see* AX 4 at 7 (B.D. indicating that after saying “no,” she then “gave a half grin to appease him to put the camera away.”). At hearing, the observer said she felt at the time that Respondent was being “very audacious,” stating she had “already called him out to tell him no, you couldn’t grab me, and then . . . most people would then back off if they know they’ve made the observer uncomfortable and he was not.” Tr. Vol. I at 78. Again, she described the interaction with Respondent as making her “uncomfortable” and that “I did not want him to take the picture nor to be sending it to anyone.” Tr. Vol. I at 77–78. However, she acknowledged on cross-examination that she did not immediately report this incident, while there might still be photographic proof of it, to the captain. Tr. Vol. I at 124.

Additionally, B.D. recalled that after that incident, Respondent opened a package from his brother that arrived in the mail that day containing a camera as a birthday gift. Tr. Vol. I at 78–79; AX 4 at 7. On a prior occasion, Respondent had mentioned to B.D. the impending arrival of the camera and requested that she take it into town and take pictures with it. Tr. Vol. I at 79, 149; AX 4 at 5. When Respondent repeated the request that day, B.D. stated said told him she did not want to take the camera. Tr. Vol. I at 79. However, Respondent refused to readily accept her declination, and instead argued with her. Tr. Vol. I at 79–80; AX 4 at 5, 7–8. When she still refused to capitulate to his request, Respondent declared “I really want to bite you right now,” B.D. testified. Tr. Vol. I at 80–81; AX 4 at 7. B.D. recalled responding to this angrily telling Respondent that if he bit her, she would elbow him, to which Respondent replied “now I really want to bite you just to see how sharp your elbow is[.]” Tr. Vol. I at 80–81; AX 4 at 8; AX 7 at 22–23. B.D. stated at hearing that this interaction regarding the camera was particularly alarming to her because it “made me realize that not only was he not accepting when I would say no, but if I -- even if I didn’t say anything he was translating that as a yes.” Tr. Vol. I at 80. Further that, Respondent seemed to have a “kind of an arrogance and a dominance,” “like he was confident that he could get away with this.” Tr. Vol. I at 81. B.D. recalled that although she was clearly “very angry” and irritated at this point, Respondent “kept pushing the envelope and I had told him no multiple times to multiple things and he just kept persisting.” Tr. Vol. I at 81. “I wasn’t sure what he was going to do or say next[.]” Tr. Vol. I at 82. As a result, she recalled feeling “very eager” to get off the vessel “[l]argely because I could not wait to get away from Eli [Respondent][,]” “I just wanted to get away from him at that time.” Tr. Vol. I at 82.

After disembarking on March 4, 2018, B.D. spent “pretty much the entire offload” reflecting on all the incidents with Respondent that had occurred during the second trip. AX 4 at 8–9; AX 7 at 23. Her thoughts included –

some self-doubt, like making sure that I hadn't done anything to lead him on. So I was just playing through the progression of events, wondering okay, did I tell him no enough times. Did I make it obvious enough times that I was not comfortable. Just replaying everything in my head.

Tr. Vol. I at 82–83. She also recalled a sense of feeling “uncomfortable,” “anxious,” and “vulnerability” “because I knew I would be going back to the boat and back to rooming with him.” Tr. Vol. I at 82. B.D. testified that she had never experienced behavior like Respondent’s on any of her previous sixteen observer trips. Tr. Vol. I at 83.

While she was in town on March 5, 2018, Respondent sent B.D. a series of pictures through Facebook Messenger of African sandals and jewelry. Tr. Vol. I at 83–84; AX 9.¹³ B.D. testified that she felt compelled to acknowledge these initial messages because Respondent would know that she had seen them, so gave what she intended as “non-committal answer” and/or “generic response,” stating “Oh wow!! Those are cool!” Tr. Vol. I at 86; AX 9. When Respondent continued to send her messages, B.D. stopped replying. Tr. Vol. I at 86.

The observer additionally recalled returning to the vessel briefly on March 5th, “to drop a few things off” and check with the captain as to when she needed to be back. Tr. Vol. I at 87. Upon her return, she said that she did not approach Respondent, but that he spoke to her, inquiring whether she had seen his messages. Tr. Vol. I at 87. She curtly responded that she “hadn't really had a chance to look[.]” Tr. Vol. I at 87.

While in town later during the offload, B.D. met with “Elaine,” her field supervisor from Alaskan Observers, but did not then disclose the uncomfortable interactions with Respondent to her. Tr. Vol. I at 87–88. As the reason therefor, the observer stated –

At that point I was still processing everything that had happened and I know that if you report someone as an observer, if you report a fisherman for sexual harassment, or assault, or any sort of harassment there can be pretty severe penalties. And I just wanted to be sure kind of where I was, where I felt about things before I reported it because I did not want to potentially damage his reputation or his career if I felt that there was a misunderstanding or anything that way. So I just wanted to fully finish processing my thoughts on it before I reported it to anybody.

Tr. Vol. I at 88. B.D. stated she decided “to approach Eli [Respondent] and make it clear in no uncertain terms that I was not interested in him, that I did not want the gifts that he had talked about giving me, and that my lack of no was not a yes.” Tr. Vol. I at 89.

¹³ Respondent identifies himself on Facebook as “Eli Simpson.” AX 9; Tr. Vol. I at 84.

On the evening of Monday, March 5, 2018, B.D. returned to the ship and began her third trip on the F/V Alaskan Lady shortly after midnight on Tuesday, March 6, 2018. Tr. Vol. I at 89; AX 7 at 23. She testified that upon returning, she pulled Respondent aside in the galley and asked to speak to him in their stateroom, to avoid creating a scene. Tr. Vol. I at 89–90. Once in the stateroom, she intentionally left the door open because she “was uncomfortable with him” and “it had not turned out well the last time it was closed.” Tr. Vol. I at 90. There she flatly told Respondent “that I was not interested in him, that we would not be dating, that I did not want the gifts and that my lack of no was not a yes.” Tr. Vol. I at 90; AX 4 at 8–9 (told him they could be “friends, but only friends”). Respondent replied that “Annie had already gotten [the] gifts, but that he would give them to someone else,” to which B.D. retorted “that was a good idea.” Tr. Vol. I at 90–91. B.D. described Respondent’s demeanor during the conversation as “timid,” “nervous and on edge, but serious.” Tr. Vol. I at 91.

Later that day, the observer approached the ship’s Captain, Randy Adkins, and conveyed to him in brief, “what had been going on.” Tr. Vol. I at 92; AX 4 at 9; AX 6; AX 5 at 23. “I told him that Eli had grabbed my butt, that he had talked about his sister-in-law giving me gifts that I did not want, and just that I was uncomfortable with Eli at that time.” Tr. Vol. I at 92; AX 4 at 9; AX 7 at 23; AX 10 at 1. She further advised the captain that she had spoken to Respondent, that she was hopeful that the situation was taken care of, and that she did not feel he needed to talk to Respondent. AX 4 at 9; AX 7 at 23; AX 10 at 1. At hearing, B.D. explained her rationale for making the disclosure to the captain at that point stating –

I wasn't sure if Eli would try to do anything else because he had been so persistent previously. I wasn't sure if his actions would continue or if he was really done, and so I wanted to make Randy aware of the situation so that if it continued and I had to go to him for help and to -- for backup for Eli then he was already aware that there was a situation.

Tr. Vol. I at 92, 142. B.D. admitted at hearing that during this meeting she did not request from the captain a roommate change, explaining there were not very many extra bunks on the vessel and “it seemed very difficult logistically to try and figure out a way where we could change the bunk assignment.” Tr. Vol. I at 97, 141. In addition, she asserted that she did not want to be a burden to the captain or crew, or come off as “being a nag” or “difficult to get along with.” Tr. Vol. I at 97–98, 141; AX 19 at 5. On March 6, 2018, B.D. made her first entry in her log book regarding Respondent’s inappropriate conduct and composed the bulk of a 10–page narrative debriefing statement describing Respondent’s conduct in detail. Tr. Vol. I at 95; AX 4; AX 7 at 23.

The next day, March 7, 2018, B.D. recorded a “blip” about the incidents with Respondent in her logbook and sent an in-season message to Monica Mocaer, who served as her NMFS advisor onshore. AX 4 at 9–10; AX 7; AX 19 at 5, 20. In the logbook, B.D. wrote that Respondent “has been flirty since the first trip, but nothing too extreme,” “[b]ut his actions accelerated quickly at the very end of the last trip to the point of harassment.” AX 7 at 23. She also noted her report to Capt. Adkins and wrote that she didn’t “feel uncomfortable enough to be

taken off the boat or even change roommates, but I'm documenting so there is a record of his behavior." AX 7 at 23–24. To Ms. Mocaer, B.D. wrote that she was sending the message because Respondent is "so well liked by the company and I want there to be a record that he's done this before if another observer has a problem." AX 19 at 5. She also said that Respondent had been "flirty" the first trip and that "things escalated quickly towards the end of the second trip[.]" but after she spoke to Respondent and to Adkins, Respondent ceased talking to her, so she thought the conflict had been sufficiently handled and she did not need the assistance of law enforcement or to be taken off the boat, nor was she requesting a new roommate. AX 19 at 5.

On March 18, 2018, B.D.'s third and final trip aboard the Alaskan Lady ended without further incident. AX 7 at 1, 31; AX 10 at 1; AX 15. At termination, the observer recalled feeling that "tensions were still high with Eli and I was ready to just get off the boat and be away from him." Tr. Vol. I at 98–99. B.D. recalled going out drinking in town with two other observer friends on the evening of March 18th, and relaying to them the events involving Respondent. Tr. Vol. I at 99–100. Further, upon briefly returned to the vessel that night to use the bathroom, B.D. disclosed to Dan Harden, the first mate, her interactions with Respondent, the fact that he had made her feel uncomfortable, and her intent to address the incidents with NMFS enforcement. Tr. Vol. I at 101; AX 7 at 15.

B.D. subsequently completed the winter fishing season in Alaska by undertaking two more vessel assignments. Tr. Vol. I at 102; AX 7 at 2. Thereafter, she flew to Seattle Washington, and on May 2, 2018, was debriefed by an NMFS official. At that debriefing, her log book, data, and samples were reviewed and submitted. Tr. Vol. I at 102–03. On May 5, 2018, B.D. executed an affidavit (AX 6) that briefly describes Respondent's conduct, referencing her log book and attaching her personal debriefing statement as well as Respondent's note (AX 5). Tr. Vol. I at 103–06; AX 4, 6.

On June 15, 2018, B.D.'s complaint was forwarded by NMFS to NOAA's Office for Law Enforcement ("OLE"). AX 1 at 7. On or about October 18, 2018, B.D. was contacted by telephone by OLE Officers Roy Fisher and Sonya Jordan, who advised her "that several observers have recently had serious trouble with several crew members" on the Alaskan Lady. AX 1 at 7–8; AX 8 at 2; Tr. Vol. I at 106. *See also* Tr. Vol. II at 11–13. After considering this information, on November 11, 2018, B.D. advised NOAA that she wanted OLE to pursue charges against Respondent, although she had initially not planned to do so. AX 1 at 7–8; AX 8 at 2; Tr. Vol. I at 106–12. As further justification for instigating the charge, B.D. explained at hearing that while crew members on other vessels frequently attempted to flirt with her, they generally stopped doing so, when she replied with a comment intended to "shut them down," and thereafter respected her decision. Tr. Vol. I at 157–58. However, Respondent continued flirting with her even after she told him "several times we will not be dating," and "he did not appear to respect that decision[.]" Tr. Vol. I at 158. More importantly, no one on other vessels had touched her as Respondent did. Tr. Vol. I at 159.

At hearing, B.D. expounded on the impact Respondent's conduct had on her work as an observer onboard the Alaskan Lady. Specifically, she claimed that it added "a lot more stress and anxiety" and an "uncomfortable living arrangement" to job that already has a strenuous work schedule and physical demands, requires accuracy, and as to which she was "trying to maintain

professionalism.” Tr. Vol. I at 112–13. Further, that Respondent’s actions affected her sleep, particularly since she was aware that “he was still in the room with me and there's only so far I can get away from him on the boat while I'm assigned there[.]” Tr. Vol. I at 113. In addition, she felt “self-doubt and “some humiliation wondering if I had done enough[.]” stating – “[a]t the time I responded the best way to each situation that I knew how, but then in hindsight just wondering if I had been assertive enough, if I could have done more, if I should have done more. And just kind of beating myself up over the fact that it had progressed as quickly as it did.” Tr. Vol. I at 113–14.

Likewise, the observer said the situation with Respondent caused her to experience a sense of humiliation, stating –

Because I prided myself on how I was able to handle situations on boats, and my supervisors knew that I was someone they could put on a boat where there was a difficult situation because I had the experience to be able to handle it. And to then have a situation like this where I had to go to my supervisors and say there's been a situation, and I feel I've lost control, and I need help with this, and to go to enforcement for it, then yes, there was a level of humiliation with it.

Tr. Vol. I at 114. B.D. acknowledged that she lost the feeling of enjoying life while on the ship, which continued thereafter, due to the time and energy she spent on the case and stress caused thereby. Tr. Vol. I at 114–15. In addition, at hearing, the observer asserted the litigation had caused her a significant loss of income, in that she had to forgo a deployment to be assured of her availability to attend the hearing. Tr. Vol. I at 115.

B. Captain Adkin’s Testimony

At NOAA’s request, Capt. Adkins briefly provided his recollection of relevant events as well at the hearing, including providing confirmation of B.D.’s conversation with him on March 6, 2018.¹⁴ Tr. Vol. I at 184. With regard thereto, the captain testified –

She told me that she felt that he had been making passes at her, and that at one point he had asked her to give him a hug, and that in this -- during this hug she thought that she felt him touch her back side. And she also believed that he was taking pictures of her back side in their stateroom or at some point with his phone.

¹⁴ Captain Adkins testified that he has been a commercial fisherman for over twenty years and obtained his captain’s license in about 2012–13. Tr. Vol. I at 184. He worked on the Alaskan Lady for Shelford Boats from 2014 until October of 2020, alternating between captain and first mate. Tr. Vol. I at 185. B.D.’s logbook indicates that Mr. Adkins served on the Alaskan Lady as its first mate on B.D.’s first voyage and as captain on her second and third trips. AX 7 at 1, 3–4, 15.

Tr. Vol. I at 214–15. *See also* AX 10, AX 15. Capt. Adkins responded to these disclosures by asserting his desire to speak to Respondent, however B.D. expressed that that was unnecessary because –

she had already spoken with him [Respondent], and told him that she wasn't interested, and that everything was cool and calm, and that she was only notifying me of this previous thing because in the event that anything else happened and she came to me that I wouldn't be blind-sided with all this information. And at that point I told her that if anything else did happen between them that she needed to tell me immediately. This was at the beginning of that last fishing trip. I checked with her again the next day after she told me about this. She said everything was still good. And then after that I didn't hear anything about [it] till however many days later, I think it was two weeks later when we were in port again.

Tr. Vol. I at 216–17. *See also* Tr. Vol. I at 227; AX 10 at 1, AX 15. The captain opined that B.D.'s request for him not to take action at that point made sense to him because “I got the impression from her that she wasn't really concerned about any future interactions at that point. I think she [had a] . . . just water under the bridge I guess type of attitude is how I interpreted it.” Tr. Vol. I at 217. He noted that B.D. would have known that he could have possibly fired Respondent at that point.¹⁵ Tr. Vol. I at 217.

As to the events of two weeks later, Capt. Adkins testified that on the morning of March 18, 2018, his first mate, Daniel Harden –

told me that -- that night or early morning [B.D.] had come back to the boat, and she had a couple of friends with her, and that they had been drinking, and that she told Dan that she wanted to make sure that Eli saw some repercussions for the way that he had behaved.

Tr. Vol. I at 218. *See also* AX 10 at 1; AX 15; AX 23.

Thereafter, Capt. Adkins took it upon himself to speak to Respondent –

When I told Eli that [B.D.] had said these things about him he told me that it was actually completely reversed, that it was her that was making advances at him, and that she was probably upset because he did not take her up on her passes at him.

¹⁵ Capt. Adkins confirmed that Respondent was advised that harassment of observers and crew, such as making offensive comments about “body parts” or touching in a way to make another employee uncomfortable, was a firing offense in the two employment contracts he signed with the ship. Tr. Vol. I at 207–08, 210–12; AX 30 at 4–25. In addition, Capt. Adkins confirmed that the ship's bulletin board at all relevant time displayed a placard warning against observer harassment and the crew is orally advised as part of the mandatory safety briefing conducted before each trip to treat the observer with respect and not to engage in sexual harassment. Tr. Vol. I at 199–200, 212–14. *See also* AX 25 at 5; AX 28.

* * *

At that point in time I had no reason to not believe him. In my mind it seemed like he said, she said type of situation and I didn't really feel I could come up with any solid judgment either way.¹⁶

Tr. Vol. I at 219–20.¹⁷ See also AX 10 at 1–2; AX 15. On March 26, 2018, Capt. Adkins emailed Mike Shelford, vice president of Shelford's Boat, Ltd. notifying him of the relevant events. Tr. Vol. I at 219, 221–22; AX 10 at 1.

At hearing, Capt. Adkins described B.D. as a “great observer[,]” “a pleasure to work with[,]” declaring that “she had a really good attitude[,]” “she was very professional” and “very low maintenance[.]” Tr. Vol. I at 202–03. He said he would rank B.D. high among the other 20 or so observers he had worked with, noting that unlike some she was very attentive to the boat schedule and did not need “our constant input and notification of when we'd be hauling gear.” Tr. Vol. I at 203. “She was on it and kind of had things figured out on her own.” Tr. Vol. I at 203. Similarly, he described Respondent was a “very smart guy[,]” who was “very well spoken,” despite his thick accent. Tr. Vol. I at 228–29. He testified that he had never personally experienced an incident of miscommunication with Respondent, or with B.D., or untruthfulness.¹⁸ Tr. Vol. I at 229.

C. Officer Jordan's Testimony

OLE Officer Jordan testified at hearing regarding her investigation into B.D.'s harassment allegations on behalf of NOAA/NMFS.¹⁹ As part thereof, she stated that she interviewed and solicited documentation from B.D., Respondent, Capt. Adkins, Observer Claire Engelhardt, and First Mate Dan Harden. Tr. Vol. II at 13, 15, 27–28; AX 1 at 7; AX 10 at 2; AX 14–16, 23. Her initial interview with B.D. occurred by telephone on October 17, 2018. Tr. Vol.

¹⁶ Capt. Adkins testified that it was only several months later, after Officer Jordan had shown him a note (AX 5) with the salutation “beautiful” and told him that Respondent had suggested it was intended for him, that he began to think B.D. “was being truthful.” Tr. Vol. I at 220.

¹⁷ In an interview with OLE, Capt. Adkins also recalled that during this conversation Respondent showed him a piece of paper asserting that the day before B.D. had provided her phone number and address to him, and offered to let Capt. Adkins check his phone for photos of B.D., an offer the captain declined. AX 15. Capt. Adkins further recalled Respondent telling him that when B.D. first got to the boat, a condom had fallen out of her luggage onto the floor, she made some comment about it, and Respondent had told her “that's not going to happen.” AX 15.

¹⁸ Character evidence is generally inadmissible in federal civil proceedings, but not specifically prohibited by the Rules applicable to this proceeding. Fed. R. Evid. 404(a)(1); 15 C.F.R. § 904.251(b).

¹⁹ An NMFS enforcement officer since December 2016, Officer Jordan was specially trained in “interview and interrogation” and fisheries observers. Tr. Vol. II at 7–8. She estimated investigating five to ten observer harassment cases each year of her approximately five-year assignment to Dutch Harbor. Tr. Vol. II at 9–10. For twelve years prior to that assignment, Officer Jordan was a law enforcement officer for the Department of the Army. Tr. Vol. II at 6.

II at 13. In brief, the Officer recalled that B.D. told her that “that Mr. Bah [Respondent] had grabbed her buttocks without consent,” explaining further that she had –

had casual conversation [with Respondent], however it began to make her uncomfortable as he offered her gifts. She further became uncomfortable when he shared conversations that he had with his sister-in-law and that she felt it was inappropriate. She felt that Mr. Bah was initiating a relationship that she was not interested in pursuing.

Tr. Vol. II at 12–13. On November 9, 2018, Officer Jordan conducted a 45 minute in-person interview with Respondent at the Unalaska Police Department, which was audiotaped, videotaped, and transcribed. Tr. Vol. II at 15–19; AX 12, 13.²⁰ At the interview, Respondent identified himself as being 48 years old, 5-foot, 9-inches, and 210 pounds. Tr. Vol. II at 14, 22. As to his interactions with B.D. –

Mr. Bah stated that they flirted. Mr. Bah stated that she [B.D.] wore jeans one time and he told her she looked good in jeans.

Mr. Bah then stated when [B.D.] asked him how her butt looked, he responded by telling her, and I quote, "If it's shaking, it must be jelly because jam doesn't shake like that." Mr. Bah stated he talked to her about her butt, but never grabbed her.

Mr. Bah stated that when things did not go as wanted, she stopped talking to him and he backed off.

Tr. Vol. II at 22–23. *See also* AX 12 at 11; RX 1 at 3.

Upon OLE’s inquiry, Respondent denied writing any notes to B.D, Officer Jordan recalled. Tr. Vol. II at 23–24; AX 12 at 34, 37. Even when presented with AX 5, the note regarding gifts, with the word “beautiful” covered by the Officer’s thumb, Respondent claimed he wrote the note “for Heath and the Captain.” Tr. Vol. II at 25, 33–34; AX 12 at 37, 40. Then, upon being shown the full note and directly asked to whom the word “beautiful” referred, at first Respondent did not answer and, later in the interview, the Officer averred, Respondent claimed he was referring to his sister-in-law. Tr. Vol. II at 26, 38–39; AX 12 at 40, 42. At hearing, Officer Jordan swore she observed a change in Respondent’s demeanor during the interview when they began discussing the word “beautiful” in the note, specifically that “the volume of his tone seemed to elevate and become much sharper.” Tr. Vol. II at 26; AX 12 at 39–40, 42–44, 46; RX 1 at 4. She further declared that Respondent first asserted that he placed the note on a common table in his stateroom and later on during the interview stated the note “was inside of a

²⁰ Also present at the interview was Alaska Wildlife Trooper Alex Arduser. Tr. Vol. II at 16; AX 11. The transcript of the interview, with certain personally identifying information redacted, is marked as AX 12 and the video of the interview is AX 13. At hearing, Officer Jordan noted an error in the transcript of the interview (AX 12) beginning on page 15, line 23. Tr. Vol. II at 20.

notebook, and identified the table as not being common.” Tr. Vol. II at 26–27; AX 12 at 37–38, 42–43. During the interview, Respondent admitted in regard to B.D. that “I told her she was cute and all that[.]” Tr. Vol. II at 27–28. He also asserted that observer Claire [Engelhardt] had approached him at a bar and told him that B.D. “was at the bunkhouse all over talking about [him]. He mimicked Claire stating that, man, she likes you, and Eli, Eli, Eli.” Tr. Vol. II at 27–28, 50; AX 12 at 8, 29–31.²¹

D. Testimony of Observer Engelhardt

Observer Engelhardt was next called as a witness by NOAA. Tr. Vol. II at 55. Ms. Engelhardt stated that from approximately June of 2016 until March 2020, she served as a fisheries observer for Alaska Observers, completing ten deployments totaling 600 days at sea. Tr. Vol. II at 56–57. She acknowledged being familiar with both B.D. and Respondent. Observer Engelhardt described B.D. as a “work acquaintance[.]” having met in the summer of 2017, when B.D. was serving as her supervisor when she filled in as the “field coordinator.” Tr. Vol. II at 63–65. Ms. Engelhardt described B.D.’s as being “very well-talked about, being very professional, doing well at her job. Boats say she’s fun to work with, you know, she’s friendly, and I believe that she hasn’t had any problems on boats.” Tr. Vol. II at 64. While she said there was likely a time when she and B.D. socialized as part of a group of observers in Dutch Harbor, Observer Engelhardt stated that she never socialized with B.D. on-on-one. Tr. Vol. II at 65. Most significantly, Ms. Engelhardt testified B.D. never discussed her personal or romantic life with her, never mentioned Respondent to her at all, and never indicated to her that she was romantically interested in Respondent. Tr. Vol. II at 65–66.

In regard to Respondent, Ms. Engelhardt testified that she served as the NMFS observer on the Alaskan Lady for two voyages in late December 2017, until early January 2018, immediately prior to B.D.’s assignment to the vessel. Tr. Vol. II at 57–59, 64; AX 7 at 3; AX 19 at 20. She recalled that during her first voyage on the vessel, Respondent was initially a processor, but when the cook was fired mid-trip, Respondent became the cook until a new cook was hired for her second voyage. Tr. Vol. II at 60. Like B.D., Observer Engelhardt was assigned to share a stateroom with Respondent when he was the vessel’s cook. Tr. Vol. II at 59–60.

As to her onboard interactions with Respondent, Observer Engelhardt stated –

They were friendly. As most of the crew on that vessel, he was very helpful as a processor. And then when he was a cook, we would see each other if we were in the room. My schedule is very weird. When you’re the only observer on the boat, you’re up and asleep at very odd times. And then as a processor, you would see them down in the factory occasionally.

²¹ On cross-examination Respondent questioned the credibility of Officer Jordan alleging inconsistencies between her Memorandum of Interview (RX 1) and the Transcript (AX 12). Tr. Vol. II at 48–49. He further suggested that NOAA attempted to get him to settle this action premised upon false statements in the Officer’s Memorandum. Tr. Vol. II at 48–49.

* * *

He seemed like a talkative person. He seemed to be very friendly with everyone on the boat. He seemed to do his job well, and that the boat was happy with how he was performing.

* * *

As in working on any boats, you just talk to people when you see them in the galley. You know, say hey, how are you doing, talk about what's going on on the boat, but that's about it.

Tr. Vol. II at 61–62.

However, Officer Engelhardt testified that she never discussed Respondent's personal, dating or romantic life with him at any point. Tr. Vol. II at 62. More particularly, she denied ever discussing B.D. with him or ever inferring to him that B.D. was romantically interested in him, stating that she had no reason to ever believe that was the case. Tr. Vol. II at 66–67. Further, upon cross-examination, Observer Engelhardt unequivocally denied Respondent's assertion that, upon meeting in a bar, she had advised him that B.D.'s was romantically interested in him.²² Tr. Vol. II at 66–69.²³

IV. RESPONDENT'S TESTIMONY

Respondent, appearing pro se in this matter, testified on his own behalf at hearing in narrative fashion. Tr. Vol. II at 130. Respondent stated he was born in Gambia, and raised in Sierra Leone, Korea, and elsewhere, as his father was a diplomat. Tr. Vol. II at 220. He asserted that he speaks nine languages.²⁴ Tr. Vol. II at 154. He went to boarding school in Sierra Leone and England and "came to America to go to college." Tr. Vol. II at 220. Respondent spent two years studying physics and mathematics at Bethany College in West Virginia and a year studying project management at McGill University in Canada. Tr. Vol. II at 220–21. After leaving school, he returned home to work for his parents' company. Tr. Vol. II at 221. Respondent

²² During his cross-examination of Ms. Engelhardt, Respondent suggested that the two had met at the harbor's UniSea bar, where Respondent had shared his food with her, held her hand, and she had inquired of him as to what was between him and B.D. Tr. Vol. II at 67–70, 72–73. At no point did Respondent provide a time frame in regard to this alleged meeting and so it is impossible for this Tribunal to determine what role, if any, that alleged conversation may have played in the events at issue here.

²³ NOAA's last witness at hearing was Jennifer Ferdinand, the Director of the Fisheries Monitoring and Analysis Division at NOAA's Alaska Fisheries Science Center in Seattle Washington. Tr. Vol. II at 75–77. She had no personal contact with either B.D. or Respondent and no knowledge of their interactions. Tr. Vol. II at 91. Her testimony discussed below with regard to penalty.

²⁴ Like all litigants in NOAA proceedings, the Tribunal offered Respondent the assistance of a translator to provide his testimony at hearing. Respondent did not request such assistance.

subsequently secured several consecutive positions with companies in the United States, including Whole Foods, and was next employed at Bombardier, the airplane and train manufacturer in Canada. Tr. Vol. II at 221. In 2001, he started working off and on as a crewmember on commercial fishing vessels out of Alaska with companies such as Blue North Fisheries, Glacier Fisheries, Austin Fisheries. Tr. Vol. II at 221. In or before 2016, Respondent started working for Shelford Boats, a position for which he was recruited by “Pete,” a Chief Engineer. Tr. Vol. II at 192–93, 222. Respondent estimated he has crewed over 100 commercial fishing trips, including the three voyages on the Alaskan Lady with B.D. discussed here. Tr. Vol. II at 222. He acknowledged that he executed employment contracts and policy statements in connection with those trips on the Alaskan Lady which outlined that prohibited behavior included harassment of fisheries observers, for example, by touching in a way that makes the other person uncomfortable. Tr. Vol. II at 192–195. He was also informed of the policy against harassment of observers in onboard briefings and posted notices. Tr. Vol. II at 195–96; AX 28.

During his testimony, Respondent admitted as true the basic facts underlying the events at issue here. He stated that he worked as a crewmember on the Alaskan Lady from January to March of 2018 as it fished “way offshore” in the Bering Sea; and that B.D. was the fisheries observer and the only woman aboard the vessel from January 22 to March 8, 2018. Tr. Vol. II at 149–50. Likewise, he acknowledged that he became the vessel’s cook and shared a very small stateroom with B.D. starting on her second voyage.²⁵ Tr. Vol. II at 187–188.

As to the history of his personal interactions with B.D., Respondent recollected –

I was on the bleeding station, bleeding and she walked up to me and told me that I have a beautiful smile. And I turn around and I said, oh no, you are the one, the cute, the pretty one or whatever.

And then, she proceeded by asking me if I was, you know, dating anyone or if I was seeing anyone and I said, the other time, that I was divorcing my wife.

And then, she was asking me if I was interested in any woman or how long did [sic] I stay single and stuff like that. So I do, I asked her a little bit about, you know, that how come she was single, and she told me that was her choice, and she was dating a guy, a black guy at college, and now it's her choice.

And, once in a while she would come and bring me tea and we would sit there and would talk about, you know, clubbing and stuff like that, what kind of music I like and stuff.

So, and then it from there, it progressed into, you know, what type of girl I like, and, you know, if I would date, if I leave my wife would I date and stuff like that.

And that's how things started. And then when, that was the first trip because we weren't seeing each other that much. But when

²⁵ Describing the size of the stateroom, Respondent stated: “I called it the chicken coop.” Tr. Vol. II at 188. He acknowledged that within that small room, B.D. had top bunk, he had lower bunk, and to reach her bunk B.D. had to step on the side of his bunk. Tr. Vol. II at 188.

we were in the room, it's came, it stopped from being normally asked what to do.

And she was telling me about, inside, that she used to do work on butterflies and love and she said, do you want to know how they reproduce and stuff.

And then, she would tell me about all the insects and every time we were in the room, she would talk about sex. And this is when I'm like, okay, maybe she wanted more.

So I tried to avoid her, I started avoiding her, you know. And so when I was a cook she come, this is a nice meal. Do you cook at home and stuff, like stuff like that but to me, I just think that it was a flirt because most observers would come in and they would flirt with the guys and leave and that's it. Nothing else.

I've been doing this since, I've seen pretty much observers that were really beautiful then they will come and talk to us and leave. Sometimes we would exchange Facebook addresses and that's it.

We would not communicate after the boat or whatever. And she asked me if I, if I come to Ohio and he said yes I do because my sister in law is from Akron, so she said now next time you come through Ohio she gave me her address and she said we have a festival in the town.

And she would like me to go, and I remember telling her specifically that I am a city boy. Festivals and stuff like that, it's not part of my week.

But for me it was this flirting then, you know, when things start progressing, I draw a line somewhere because I am 51 years old now. Never had a crime in my life, never been in a police station until they called me for this interview.

I don't even have traffic tickets because I always draw my line. My father always tell me that as a black man, you have to be extra careful because little things that you do, the law will some take it and stretch it and make it something that it is not.

So I was always extra careful and in 2018 the reason why I put a distance between me and [B.D.], if you look at TV, a lot of black men were accused of grabbing or something.

Even a nine-year-old kid was accused of grabbing a woman's butt. Luckily, there was cameras all over and, you know. So I was really careful about dealing with [B.D.].

I stopped talking to her completely on the second trip. And yesterday she admitted, she would come and say hello. Any time she saw me walking by she would come, sometime bring me tea while I wasn't even talking to her. You know?

So I, if a guy did that to a woman, how would you? What would you think? Don't you think that she likes you? You know, so I felt the same way.

I thought that she likes me, and I knew she likes me because she, whenever I talk about traveling, she was really interesting about traveling.

Really, because she told me that she just had a passport and had only [travelled to] Peru with her church. And because I have been to nearly all the continents except Antarctica and stuff, so we'd talk about, I told her that, you know, I was talking about going to Vancouver Island.

So I mentioned Tofino. I said Tofino is a wonderful place to be . . . I recommended that she stayed in a hostel.

* * *

Those are the things that I talked about. . . . She listen[ed] to me and Pete's conversation and whoever was talking about traveling.

And she would come and ask questions that she doesn't know. At first, we talk about the Eiffel Tower. I told Pete that the most expensive lunch I ever had in my life was at that restaurant at the Eiffel Tower . . . that's where that Eiffel Tower conversation came in and since. So these are things that she would listen to my conversation, things that she interested, she would ask.

So it was just back and forth. But, you know, I could tell that her interest was great. She wanted more because, and I didn't want that. I just leave my wife. I was like, now I'm free. . . .

And she always tell about how beautiful my kids were and she would like to have a daughter like mine and stuff like that. So, those are the little flirt that went around but that was it, you know. I never said, she admitted that I never talked to her about sex, you know.

Tr. Vol. II at 223–31. *See also* AX 12 at 6

In direct contradiction of B.D.'s testimony, Respondent unequivocally asserted at hearing that "I never, ever was interested" in B.D. Tr. Vol. II at 209–10. He repeatedly insisted that it was B.D. who initiated all the flirtatious interactions, and he only responded in kind or rejected her advances. Tr. Vol. II at 197 (Respondent acknowledged flirting with B.D, claiming "she started it."); Tr. Vol. II at 204 ("Because it was [B.D.], who was interested in me from the beginning."); Tr. Vol. II at 132, 197 ("She was the one that told me that I was cute, and asked if I was single and asked if I have a girlfriend."); Tr. Vol. II at 197 ("[S]he came in and told me . . . I have a beautiful smile what do you expect me to tell a lady? That I move on? Of course I told her that she was cute."); Tr. Vol. II at 207 ("[S]he always thought about sex when we were in the room together."); Tr. Vol. II at 208 ("[W]hy would you come in a room with a guy trying to sleep and talk about sex? Not once, so many times. . . . And I never one day raised a topic about sex when we were alone."); Tr. Vol. II at 132–33 ("[S]he was making advances on me, and I was rejecting her."); Tr. Vol. II at 209 (denying BD bruised his ego stating "It's the other way[.]");

Tr. Vol. II at 208 (“[I]f I had wanted her I would have had her because she was . . . presenting herself to me[.]”).²⁶

Consistent with this stance, Respondent admitted to hugging B.D., but insisted such physical contact was initiated by B.D. “Anytime she's going out [leaving the boat], she would come and tell me she is going out and give me a hug. Yes, I did hug her. . . . I hugged her twice, not one time.” Tr. Vol. II at 201. *See also* Tr. Vol. II at 212. However, Respondent defiantly denied that during any hug or otherwise he touched her buttocks, stating – “I never grabbed her butt. Never, it never happens.” Tr. Vol. II at 132, 201–03. *See also*, Tr. Vol. II at 148 (“Because I never do grab her. Never, it never happened. I give a hug, but that's it. I never grab her.”); Tr. Vol. II at 213, 215 (“Because it never happened. I didn't even think of doing it.”); Tr. Vol. II at 217, 219; AX 12 at 7–9, 20, 23 (Respondent maintains that he never touched or grabbed B.D.'s buttocks.). Respondent stated “I knew that it was wrong to do it to any woman, just not, not just [B.D.]. I never did.” Tr. Vol. II at 215. *See also* AX 12 at 34 (Respondent does not think it would be OK for him to grab B.D.).

Likewise, Respondent admitted that he did once comment on the appearance of B.D.'s buttocks, but offered ameliorating circumstances, stating – “[s]he wore jeans. As she was leaving the boat . . . she was the one that asked me how does her butt look in the jeans.” Tr. Vol. II at 198. “I told her if it shaking it must be jelly and yes, I did say that. But she asked me.” Tr. Vol. II at 199. *See also* Tr. Vol. II at 212, 219 (Respondent agreeing that B.D. testified truthfully as to him stating to her that “her butt looked good in jeans and that she had a nice butt.”). Respondent denied, however, ever relaying to B.D. conversations he purportedly had with his sister-in-law Annie or his brother regarding B.D.'s buttocks or otherwise.²⁷ Tr. Vol. II at 199–200, 219.

Likewise, Respondent denied ever photographing B.D.'s buttocks or any other part of her declaring “[t]hat never happened.” Tr. Vol. II at 203, 213. *See also* AX 12 at 7–9, 23 (Respondent maintains that he never took pictures of or with B.D.). He did, however, acknowledge asking B.D. to take photographs for him with his camera while in town stating –

We were told that we would not leave the boat. I wanted pictures of the eagles. So I asked her, I said, can you take my camera and take pictures of the eagles?

She told me, no. And that was it. That was it. I went to the dock. And I asked one of the guys and they take pictures of eagles.

²⁶ Respondent also asserted that while B.D. mostly changed in the bathroom, on four occasions, she came into the room when he was present, with only a towel over her “private parts[.]” and he excused himself and left. Tr. Vol. II at 142, 189–90. *See also* Tr. Vol. II at 142 suggesting B.D. was offended by this spurning of her overtures (“But I would leave. I give her, her space. You know that she got hurt.”).

²⁷ At hearing, Respondent acknowledged that he did speak to his sister-in-law Annie during the voyages via the crew phone, and that he told B.D. he wanted to introduce her to Annie, stating – “I was the one that wanted to introduce her with my sister-in-law that I admit. Because they were from Ohio. But when I told my sister-in-law, she had no interest about are talking to her. Because my sister-in-law was trying to hook me up with her friend. So see, whenever I tell her, oh see, I'm busy, I'm busy. So I get the pictures.” Tr. Vol. II at 139.

Tr. Vol. II at 137–38.

As to gifts, Respondent admitted “I give her chocolates because I have a lot and I left it on the dining room table. It wasn't just her.” Tr. Vol. II at 140. However, he denied that he ever had, or ever expressed to B.D., any intent to buy her gifts from Africa, and more specifically denied that his note regarding such gifts (AX 5) was written to her.²⁸ Tr. Vol. II at 214.

Respondent further stated it was completely untrue that he ever expressed to B.D. any interest in vacationing with her in Vancouver. Tr. Vol. II at 214 (that “I was going to travel with her to Vancouver. That never happened.”); Tr. Vol. II at 146 (“I didn't invite her to Vancouver. That never happened. I didn't write a note saying I'm going to take you, beauty, to Vancouver.”). *See also* AX 12 at 26. He suggested that B.D. only became aware his intent to go to Vancouver as a result of overhearing conversations he had with “Em” about his travels.²⁹ Tr. Vol. II at 134–35, 147, 230. He testified –

. . . Me and her, the only conversation we had about traveling, is when we talk about Tofino.³⁰

And talk about staying in a hostel, which she told me that she was going to do. Because I was supposed to travel to Vancouver Island. And I avoid staying in a hotel. Why go spend \$75 or \$100, or more, when you can spend \$10 or \$20 in a hostel.

And she told, that makes sense. And she knows the importance of staying in a hostel. That's the only proper conversation I ever had with her. I never told her I was going to take her to --

Her birthday was in April. We finished in March, March 14. Why would I stay in Seattle for one month? Waiting for her to come, so I could take it to Vancouver? When there are a lot of beautiful women in Seattle.

And why would I spend a month in a hotel or hostel waiting for her? It makes no sense to me. So that's all I have. Because I cannot sit here and tell you about a lie that I never, that never happened.

Tr. Vol. II at 147–48. *See also* AX 12 at 25–26.

²⁸ Respondent agreed with B.D.'s testimony that the computer bag was not really a gift from him to her, stating he had no use for it and that “it was never intended for her. I was going to give it to the boys, and she said, she likes it. . . . So take it away, whatever, and give it to girls. And I said, okay, fine, you can have it. Because it was going out. I [w]as going to get rid of it, anyway.” Tr. Vol. II at 140–41.

²⁹ At hearing, Respondent identified “Em” only as a crew member who was attending the University of Southern California. Tr. Vol. II at 154–55.

³⁰ Tofino is a town on the west coast of Vancouver Island in the Canadian province of British Columbia. *See* <https://mytofino.com/>.

To the contrary, Respondent asserted, he expressly rejected a request B.D. made to travel with him, recalling –

. . . she asked that if she could travel with us. And I said, no. You just don't take son to the beach. And when she said, what do you mean by that? I said, well as a single man when I'm traveling I'm going to have fun.

I meet girls and stuff like that. And I tell her that, you know, she wasn't, I wasn't going to travel with anyone who wasn't my girlfriend. And who I wasn't attracted to. And she didn't like that.

* * *

She was upset. She was upset at my response. . . .

That's when, she reported me for throwing cardboard overboard,³¹ and then she stopped talking to me for like, two days.

And then, . . . she would get pissed off over little things like . . . my laundry bag right on my bed . . . I was doing it before and she never said anything but she, started complaining about that so I stopped doing that.

* * *

And when I noticed that she was getting upset over little stuff I just cut her off. I said I'm not going to talk to her anymore. I don't want to have nothing to do with her. . . .

That was after [the last time I hugged her] because we, she stopped talking to me and then we start talking again. But when I cut her off totally was after the second time that we hugged.

Tr. Vol. II at 231–33, 239–40.

Respondent asserted at numerous points during his testimony that it was he, not B.D., who was responsible for limiting the terms of their relationship to friendship, stating –

³¹ At hearing, upon cross-examination, B.D. acknowledged that during the first voyage she reported Respondent to the captain for throwing cardboard overboard. Tr. Vol. I at 119. She explained that as an observer she was trained to log and report violations of “MARPOL,” The International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319, 1340 U.N.T.S. 184 (entered into force on Oct. 2, 1983). Tr. Vol. I at 153–54. MARPOL and its implementing legislation and regulations prohibit dumping fuel, oil and cardboard at sea. Tr. Vol. I at 153–54, 163; Act to Prevent Pollution from Ships, Pub. L. No. 96–478, 94 Stat. 2297 (1980) (codified as amended at 33 U.S.C. §§ 1901 et seq.); *Angelex, Ltd. v. United States*, 907 F.3d 612, 615 (D.C. Cir. 2018). B.D. testified that the first time she witnessed Respondent dumping cardboard overboard she gave him a warning, and the second time, she reported it to the captain. Tr. Vol. I at 120–121, 153–54. Afterwards there were no further incidences. Tr. Vol. I at 163. During his testimony, Capt. Adkins did not recall B.D. reporting an incident to him regarding Respondent throwing cardboard overboard. Tr. Vol. I at 228.

So I knew where she was going. I draw the line somewhere. I said, okay, maybe flirting with her was okay, but if she wants to go further, this is not what I wanted. I never liked her for girlfriend or whatever. As a friend on the boat, was okay.

Tr. Vol. II at 140. *See also* AX 12 at 78, 10, 12 (Respondent suggesting B.D. “fell for me” “And that’s where it stopped. I didn’t try to visit her or call her . . . she was hurt or whatever, but I wasn’t interested at all.”); 28–29 (“[S]he fell for me, and I wasn’t interested. That was it. . . . [I]f I was interested, I would have got her . . . 100 percent sure I would have.”); 34 (“[W]hen she realized that I wasn’t interested, you know, dating her or whatever, things changed. She stopped talking to me. And I could swear to my mother and father and grand – if I wanted to have, I would have got her. She was all over me. I – I just didn’t like. And I – she didn’t like that. You know?”).

Respondent attributed the allegations made against him here by B.D. as retribution for his rejection of her amorous advances, stating she instigated this case “because she was embarrassed and hurt, she made it look like I was the one.” Tr. Vol. II at 133. B.D. is “someone who was angry, because I saw through her nonsense. And she knew that she has a privilege over me. She could go out and say that I do whatever, and the police and the nurse would believe her,” Respondent declared. Tr. Vol. II at 143–44. *See also* Tr. Vol. II at 133 (“[T]his case is nothing but a lady who’s been hurt and tried to blame me, knowing, knowing that the police would lie, and the lawyers would do anything to pin that on me. And which, they did.”); Tr. Vol. II at 215 (“[B.D.] uses her privilege by accusing me of all this stuff, knowing that you guys would go over the hill to send me to hell.”).³²

V. ARGUMENTS

NOAA contends that Respondent unlawfully harassed B.D. by engaging in conduct that: (1) had sexual connotations; and/or (2) otherwise created an intimidating, hostile or offensive environment. Agency’s Post-Hearing Brief at 18 (citing 50 C.F.R. § 679.7(g)(5)) (hereinafter cited as “Brief” or “Br.”).

In support of its argument that “a reasonable female observer similarly situated” to B.D. would have found Respondent’s statements and conduct had “sexual connotations,” the Agency notes that Respondent statements included:

- (1) referring to B.D. as “beauty” on his future travel list [];
- (2) referring to B.D. as “beautiful” in the note he left on her bunk [];
- (3) mentioning a future date at the Eiffel Tower [];
- (4) writing a to-do list that he wanted to be sure B.D. did not go home a single

³² At hearing, Respondent accused Officer Jordan of not conducting a proper investigation in regard to this matter, suggesting she made “up stories, make up her own answers. I gave them the answers. When they asked if I did, I said, no, I never did.” Tr. Vol. II at 134. He also asserted that the Officer made false inquiries to turn witnesses against him. Tr. Vol. II at 136.

woman []; and (5) his unsolicited comments about having discussed with his sister-in-law and/or his brother B.D.'s butt, kissing, B.D.'s interest in Bah, having B.D. "in the bag," and whether Bah and B.D. had "done anything." []. Additionally, in the early morning hours of March 3, when Bah and B.D. were alone in their stateroom, Bah mentioned wondering if B.D.'s butt was "jam or jelly," made a provocative gesture with his hands beckoning B.D., and hugged her. [] As a coda, he stated, "Now I know it's jelly." []

Br. at 19 (citations omitted).

As to Respondent's conduct, the Agency cites to the fact that on March 4, 2018, he –

hugged her, squeezed her buttocks, held on to her hand, and pinched her cheek. []. Bah then proceeded to photograph B.D.'s buttocks against her will and talked about sending the photos, while saying that he and his brother had a bet about how good B.D.'s butt looked in jeans. []. Notably, Bah undertook all of this conduct when he and B.D. were alone. [].

Br. at 19 (citations omitted).

Additionally, the Agency declares, "[s]ubjectively, B.D. believed Bah's conduct and statements to her during the second trip had sexual connotations and, indeed, they prompted B.D. to tell Bah directly that they would not be dating." Br. at 19 (citing Tr. Vol. I at 44–45).

In support of its argument that Respondent's conduct created an intimidating, offensive, and hostile environment, the Agency cites B.D.'s testimony that Respondent's actions left her feeling "very uncomfortable" and "very vulnerable." Br. at 21 (citing Tr. Vol. I at 61–62, 75, 78, 82, 90, 92, 124, 132–133, 143). It further observes that B.D. "documented and reported" the harassment promptly. Br. at 21 (citing AX 4; Tr. Vol. I at 101; AX 7 at 23; AX 19 at 5; AX 6). Additionally, it claims that Respondent committed "multiple batteries against B.D.," by engaging in "seemingly slight, but intentional, offensive touching[.]" Br. at 21 (citing and quoting *United States v. Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007)). In this regard, NOAA cites B.D.'s testimony that Respondent "hugged her," "squeezed her buttocks," pinched her cheek. Br. at 21–22 (citing Tr. Vol. I at 56–60, 69–71, 73–74). Likewise, the Agency alleges that Respondent harassed B.D. by taking a photo of her on his cell phone, "despite B.D. telling him not to do so" and pressing B.D. to take his camera into Dutch Harbor. Br. at 22 (citing Tr. Vol. I at 76–78).

Respondent did not submit a post-hearing brief in connection with this matter. However, the substance of his arguments can be easily gleaned from his testimony, the statements made to the OLE, as well as his letter responding to the charges dated January 6, 2021 (AX 22 at 2). Generally, he denies having engaged in any inappropriate, unwanted, and unsolicited conduct which had sexual connotations with regard to B.D., insisting that any conduct which had sexual connotations was initiated by B.D. or did not occur at all. Tr. Vol. II at 132, 146, 203, 215; AX

12; AX 22 at 2. On that same basis, he would assert his conduct did not create in regard to B.D. an “intimidating, hostile or offensive environment.”

In addition, at various points Respondent has also challenged the logic and/or consistency of B.D.’s account of events asserting:

- “yesterday, she admitted that the sandals . . . was a gift that she was going to pay for. And I do not understand how can someone who knew that [s]he was going to pay for something referred to that as a gift.” Tr. Vol. II at 131. *See also* Tr. Vol. II at 131–32 (suggesting NOAA never offered “evidence to show . . . never proved that my sister-in-law was going to buy the sandals.”);
- “[B.D. said] [s]he was afraid of me because she didn't feel safe. Well, when I avoided [] talking to her, she admitted yesterday that she was talking to me because she wanted it to be nice. How can you say that I was such a threat? And then, I stopped talking to you, . . . if someone is a threat to me and stopped talking to me, I'll be like Hallelujah.” Tr. Vol. II at 132–33;
- “[s]he keeps changing her story. And she told on me that my hands were near her back. And then, I grabbed. If someone helps you and put h[is] hand down near to your backside or whatever, you think next time, you will come to that person and give him a hug? I wouldn't, common sense tells me that. Who would do that?” Tr. Vol. II at 137;
- “if I was such a sexual predator trying to hire yourself for sex, why . . . she was the one talking about sex in the room. . . . I never talked about sex with her.” Tr. Vol. II 138;
- “we did not have internet on the boat. So, if I took picture of her . . . why didn't she go to the captain? She said, she thought I was going to delete it. So if I was going to take pictures that I would sent around, weeks from now, why would I delete it?” Tr. Vol. II at 139. *See also* Tr. Vol. II at 203 (Respondent querying that if, in fact, he had taken her picture, why did she not promptly report it to the captain, as the “truth was right there if there was,” suggesting B.D. did not report the incident “because she knew she was lying.”);
- “[W]here is the harassment that she's talking about? When I asked her, did [I] . . . asked you for sex? She said no.” Tr. Vol. II at 141;
- “she gave me her address. Invited me over to Ohio . . . If I was such a sexual predator, why would you invite me to your home? Tr. Vol. II at 142–43;
- “[B.D.] never mentioned that she was uncomfortable around me. She never said that she didn't like whatever I do because, like I said, she said I was interrupting her work. And then that's when all that stuff coming.” Tr. Vol II at 234; and

- Respondent suggested that if he were really interested in B.D., he would have lied about being divorced and having kids. AX 12 at 50.

VI. DISCUSSION

To sustain the Agency’s burden of proof by a preponderance of the evidence that Respondent violated the law as alleged in the Superseding NOVA, the Agency must prove – 1) that Respondent is a person subject to the jurisdiction of this Tribunal; 2) that B.D. was a NMFS–approved observer; and 3) that Respondent did “harass” B.D. by conduct that “has sexual connotations” and/or “otherwise creates an intimidating, hostile, or offensive environment. 16 U.S.C. § 1857(1)(L); 50 C.F.R. § 679.7(g)(5).

The first element of the violation does not appear to be in dispute. This Tribunal has jurisdiction over hearings involving alleged violations of the MSA and is authorized to assess civil penalties for violations of the Act. *See* 15 C.F.R. §§ 904.1(c)(21), 904.200(b), 904.204; *see also* 16 U.S.C. § 1858(a). The MSA prohibits “any person” from sexually harassing any observer on a vessel covered by federal fisheries management law, and from violating any regulation issued under the Act. 16 U.S.C. §§ 1857(1)(A), (L). A “person” is defined under the Act as “any individual (whether or not a citizen or national of the United States).” 16 U.S.C. § 1802(36). As an individual, Respondent is a “person” subject to the jurisdiction of the United States. Tr. Vol. II at 130–31. At all times pertinent to the Superseding NOVA, Respondent worked as a crewmember on the F/V Alaskan Lady. Tr. Vol. II at 149. The F/V Alaskan Lady was a “vessel,” 1 U.S.C. § 3, and was federally documented and permitted as a fishing vessel. AX 2; AX 3. Thus, this element is deemed satisfied.

Likewise, the second element does not appear to be contested. An observer is defined under the MSA as “any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this chapter.” 16 U.S.C. § 1802(31). The record evidences that B.D. was an “observer,” who was required by regulation to be carried on the F/V Alaskan Lady from January 22, 2018, to March 8, 2018. Tr. Vol. I at 190; Tr. Vol. II at 90, 150; 50 C.F.R. §§ 679.50(a), 679.51(a)(2)(i)(A), (ii), (iv), (vi)(E). Thus, this element too is deemed satisfied.

As such, it is only the third, two-part, element of the violation which remains disputed.

A. Conduct that has Sexual Connotations

The MSA and its regulations make it unlawful to “sexually harass” an observer, that is “[h]arass an observer by conduct that has sexual connotations.” 16 U.S.C. § 1857(1)(L); 50 C.F.R. § 679.7(g)(1), (g)(5). “Harass means to unreasonably interfere with an individual's work performance, or to engage in conduct that creates an intimidating, hostile, or offensive environment.”³³ 50 C.F.R. § 600.10. “In determining whether conduct constitutes

³³ This definition of “harass,” makes the pertinent regulation, 50 C.F.R. § 679.7(g)(5), seem like a tautology as it already provides that *any* conduct which, by itself, “has the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile, or offensive environment,” is illegal. Moreover, it makes *(footnote continued on following page)*

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.” 50 C.F.R. § 679.7(g)(5).

The phrase “sexual connotations” is not defined in the MSA or its regulations. However, in *Cusick*, the Court found that conduct having “sexual connotations” included making requests for sex or to share showers or beds; referencing sex, sexual body parts or clothing for such parts; threats to “slap her buttocks;” and standing in the observer’s way, telling her that the only way he would let her through was if she shook his hand, and when the observer extended her hand, taking it “and massag[ing] the middle of her palm in a sexual manner.” *United States v. Cusick*, No. 11CR10066–LTS, 2012 WL 442005, at *2–4 (D. Mass. Feb. 9, 2012) (criminal action for violation of 16 U.S.C. § 1857(1)(L)). See also e.g., *United States v. Wetuski*, No. ACM 39485, 2019 WL 7166774, at *17 (A.F. Ct. Crim. App. Dec. 20, 2019) (suggesting a reference to “dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts [] may have a sexual connotation”); *Sock It to Me, Inc. v. Aiping Fan*, No. 91230554, 2020 WL 3027605, at *18 (June 3, 2020)(“The idiom “sock it to me” is an expression from the late 1960s that literally means “give it to me, and generally had a[n] underlying sexual connotation.”) (citing, inter alia, The Free Dictionary, TheFreeDictionary.com 2/4/2019, Urban Dictionary, UrbanDictionary.com 2/4/2019)); *In Re Crow Hop Brewing Co., Ltd.*, No. 86359090, 2016 WL 4775485, at *4 (Sept. 1, 2016) (holding both the terms “nooner” and “afternoon” “could convey a slang sexual connotation.”). But see, *Mullenix v. Forsyth Dental Infirmary for Child.*, 965 F. Supp. 120, 154 (D. Mass. 1996) (calling woman “hysterical” is “devoid of any sexual connotation”); *Claimant v. Transp. Serv.*, 2014 WL 4302525, at *6 (AAA Apr. 7, 2014) (no sexual connotation, in and of itself, to manager stating she wanted to travel alone with employee so they could get to know each other, questioning his marital status, and brushing employee’s hair back).

With regard to the meaning of “sexual connotations,” the Agency cites in its Brief to *Cloud*, No. AK1202525 F/V Arcturus, 2017 WL 10845065, at *8 (NOAA Oct. 16, 2017). Br. at 18. There, while at sea, a male crewmember entered a female observer’s unlit stateroom uninvited, closed the door, sat on her bunk, and reclined next to her, draping his legs over hers. Br. at 18. This crewmember’s conduct was found to have sexual connotations and be violative of 50 C.F.R. § 679.7(g)(5) and 16 U.S.C. § 1857(1)(L). Br. at 18 (citing *Cloud*, 2017 WL 10845065, at *8). *Cloud* also held that in assessing the actions the Tribunal must evaluate the alleged victim’s subjective state of mind, whether she felt Respondent’s actions constituted harassment, as well as apply an objective test, whether a “reasonable victim” of the same gender would find the conduct intimidating, hostile, or offensive. *Cloud*, 2017 WL 10845065, at *6 (citing and following *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)).

As proof of the Charge here, the Agency offers a series of factual allegations regarding intimidating, hostile, or offensive statements made, and conduct engaged in, by Respondent towards B.D., having sexual connotations, supported principally by the testimony of B.D. In defense, Respondent relies almost exclusively upon his own testimony vehemently denying

extraneous the regulation’s identification of conduct having “sexual connotations” as a separate category of unlawful conduct.

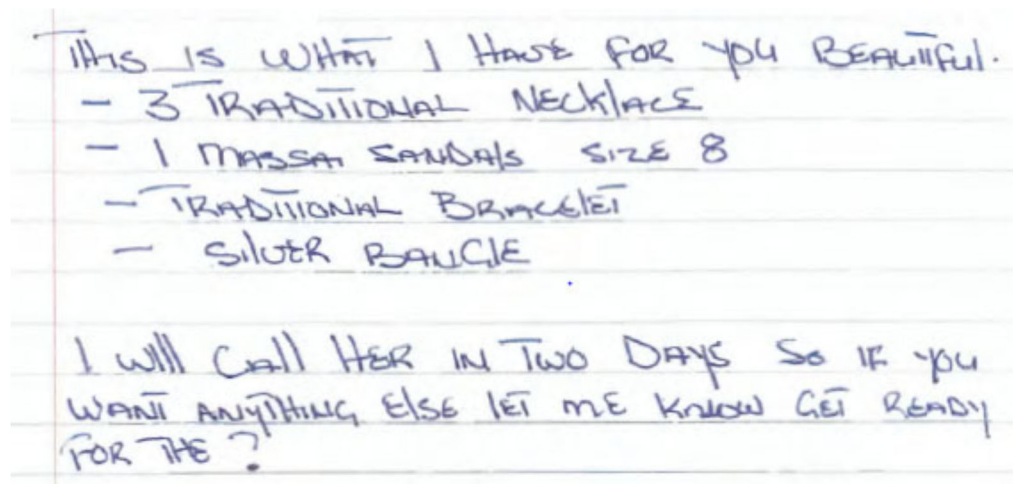
making such statements and/or engaging in such conduct, or explains it as instigated and consented to by B.D. As such, this case comes down to a determination of credibility. As noted by the Agency, the following factors are relevant to such a determination –

the witness’s opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; any internal inconsistency of the witness’s statements; the witness’s bias, or lack thereof; the contradiction of the witness’s version of events by other evidence or its consistency with other evidence; the inherent plausibility of the witness’s version of events; any inaccuracies or falsehoods in the witness’s statements; and the demeanor, candor, or responsiveness of the witness.

Br. at 24 (quoting *Bui*, 2019 WL 7579972, at *10 (citations omitted)).

After consideration of those factors, I find B.D.’s version of events credible. In reaching this conclusion, I am significantly influenced by AX 5, which I see as documentary evidence strongly corroborating one aspect of B.D.’s testimony, and broadly undermining Respondent’s credibility.

AX 5, in full, reads exactly as follows –



THIS IS WHAT I HAVE FOR YOU BEAUTIFUL.

- 3 TRADITIONAL NECKLACE
- 1 MASSAI SANDALS SIZE 8
- TRADITIONAL BRACELET
- SILVER BAUCLE

I WILL CALL HER IN TWO DAYS SO IF YOU WANT ANYTHING ELSE LET ME KNOW GET READY FOR THE ?

At hearing, B.D. testified that during the second trip, she returned to her stateroom to find this note, propped on her bed near her pillow. Tr. Vol. I at 47–48. She said she recognized Respondent’s handwriting on the note from the travel list he had previously shown her in which he had referred to her as “a beauty.” Tr. Vol. I at 48; *see also* Tr. Vol. I at 37. B.D. believed the note referred to gifts Respondent and/or his sister-in-law intended to procure for her, because Respondent had previously talked to her about traditional African necklaces and sandals that his sister-in-law could acquire, and she wears a size 8 shoe. Tr. Vol. I at 45, 48. B.D.’s testimony in this regard is completely consistent with the contemporaneous statement she drafted on March 6, 2018, while still on the vessel. AX 4 at 4.

On the other hand, Respondent's countering explanations as to the circumstances surrounding this note (AX 5) were numerous, inconsistent, illogical, vague, and inherently unbelievable. Early on in his interview with the OLE, Respondent repeatedly swore he never wrote any type of a note to B.D., stating "Why would I write someone a note that I don't like?" AX 12 at 35–36. Then when presented with the note, with the word "beautiful" hidden, Respondent confidently said the note referred to bracelets he was getting for Heath, Dan and Randy, and the sandals were for the "HR manager in Seattle." AX 12 at 37–38. The last sentence of the note, he said, referred to a call he intended to make to his sister-in-law. AX 12 at 38–39. When asked as to the meaning of the phrase "So if you want anything else, let me know. Get ready for the ?" Respondent gave a vague, non-sequitur answer — "I ask Heath to get his wife, and I put a question mark here." "Ask Heath. Heath will tell you. And this is what's for — and to this day, the sandals for Heath's girlfriend, he didn't get." AX 12 at 39.

Next, when asked by OLE, who is the "you" in the note's salutation "this is what I have for you," Respondent said it was for "Heath and . . . the captain." AX 12 at 40. After revealing to Respondent the final word "beautiful" in the note's salutation, OLE inquired again as to whom the note addressed stating — "So, 'This is what I have for you beautiful,' is for Heath and the captain?" Respondent's reply was: "Yes, that was it's beautiful. Because I write this because the word "beautiful," I use that all the time." AX 12 at 40. Upon hearing OLE further express disbelief that the note was addressed to Heath or the captain, Respondent then shifted his explanation and implied that the note was written to his sister-in-law stating: "when I'm talking to my brother's wife, I always call her beautiful." AX 12 at 41–42. Right afterwards, Respondent's explanation quickly shifted again, and he suggested that the note was really for himself, "because sometimes, if and when I go to the store, I write something. I forget." AX 12 at 42.

At hearing, Respondent again circulated through all these vague implausible explanations with regard to the note. In his narrative testimony on direct, he averred that "I wrote the note, yes, I used the word beautiful, and when I talked to my brother-in-law [sic]. But the *note was for* Heath and the Captain because they wanted bracelets." Also, "I wrote for Heath and the Captain because they wanted bracelet and stuff, and so the note *was for* my sister-in-law." Tr. Vol. II at 52–54 (emphasis added). He also claimed "I wrote it down so I could remember. Because when Heath was leaving, he told me that her, he wanted me to get sandals for his girlfriend and leave me the size, and traditional bracelet. And they wanted silver bracelet, like the one I have here. And I gave one to Heath, gave one to Dan, and gave one to Randy." Tr. Vol. II at 136. On cross, Respondent first claimed that "the note was *to* Heath's girlfriend[,] who wore size 8 sandals, with "her" in the note referencing his sister-in-law Annie, whom he alleged he also calls "Beautiful, sometimes[.]" Tr. Vol. II at 159–63 (emphasis added). Then he again implied he wrote the note for himself "to remember" and that he uses the word beautiful "all the time," "when I talk to people, most of the time when I'm, people that I'm really close to." Tr. Vol. II at 173. Next, that "this note was *for* Heath because of his girlfriend. And I even referred to it, as the note was for his girlfriend." Tr. Vol. II at 174 (emphasis added). Finally, Respondent asserted "[t]he note, I wrote down because when Heath was l[eaving], he told me what he wanted for his girlfriend. I wrote it down. And I listed there. I was going to send a fax to my sister-in-law." "It's a note that I wrote that I was going to send to my sister-in-law." Tr. Vol. II at 182–83.

See also, Tr. 184 (Q: Okay. So you're saying Exhibit 5 you were going to send Annie, correct? A: Yes . . .").

In an unsuccessful effort to clarify Respondent's testimony with regard to the note, this Tribunal engaged in its own exchange with him:

TRIBUNAL: . . . My question is who was supposed to look at that note after you?

[RESPONDENT]: Heath.

TRIBUNAL: The first person who was supposed to look at that note after you?

[RESPONDENT]: Heath. Heath. Yes.

* * *

TRIBUNAL: How was Heath going to get the note?

* * *

[RESPONDENT]: No, Heath wasn't going to get the note. I was talking, he came to me and tell me about her girlfriends having heard coming from a girlfriend.

And what, and he was on the line talking to the girl. So I wrote what he told me. And I because he was on the line, I said you could tell her to ask, like, whatever, what else she wanted.

And I wrote that I wrote everything down and I left it on the table.

Because I, the note was, Heath wasn't supposed to take the note. I was, the note I wrote because I wanted my sister in law to get the stuff for Heath's girlfriend.

Tr. Vol. II at 236–38.

Likewise, Respondent's hearing testimony and prior statements to OLE about *where* he left the note are inconsistent. When OLE interviewed Respondent, at first, he twice claimed that he left the note on a table in the stateroom he shared with B.D. AX 12 at 42, 44. Then when OLE offered him a hypothetical involving leaving a notebook on a table, Respondent grabbed on to that assertion and said he left the note (AX 5) "in a notebook" on the table. AX 12 at 44, 49. In fact, he doubled down on this claim, by expressing anger at the fact that to obtain the note so left, B.D. must have gone through his stuff. AX 12 at 44, 49. However, at hearing, Respondent made no mention of the note being in notebook and again twice testified simply that he left the note on a table in their shared stateroom. Tr. Vol. II at 135–36, 238.

While difficult, cobbling together into a cohesive whole from Respondent's various incongruous statements regarding the note made over the course of his testimony, his best account of the events seems to be that he wrote the note with the intent of faxing it to Annie or using it to remind himself what African items he was going to ask Annie to procure for other crewmembers at their request. Tr. Vol. II at 236–39. The three silver bracelets were for Dan, Randy and Heath, and the sandals, size 8, referred to in the note, were intended for Heath's girlfriend but Respondent gave them to the HR Manager. Tr. Vol. II at 136, 159, 163, 167, 183, 187, 238; AX 7 at 15. As to the use of the word "beautiful" in the note, that term of endearment

referenced Annie, his sister-in-law, with whom Respondent has a very close relationship. Tr. Vol. II at 162 (“I am closer to Annie than my own sister.”). Finally, Respondent did not leave the note for B.D. to find on B.D.’s bunk, near her pillow, but left it for himself on a common table in their stateroom. Tr. Vol. II at 135–36, 184.

The problem with even this fairly coherent explanation, is that it is inconsistent in numerous ways with the wording of the note itself. First, the opening sentence of the note states this “This is what *I have for you* beautiful.” AX 5 (italics added). If the note was actually intended as a list of items being memorialized for himself or being requested *from* his sister-in-law, the phrase “what I have *for you*” makes no sense. Second, either his sister-in-law can be the one logically referred to in the note’s salutation in the second person as “beautiful” or the third-person in the last sentence as “her,” but not both. And, since it was his sister-in-law who Respondent admitted he intermittently called while on the ship, it seems most logical that the word “her” references his sister-in-law, whom he was going to call in two days, rather than “beautiful.” Therefore, the term beautiful in the salutation must reference someone else. Third, Respondent’s claim that the note was intended either for himself or for his sister-in-law is completely belied by the closing sentence of the note “If *you* want anything else, let *me* know Get ready for the ?” AX 5 (emphasis added). Even assuming, arguendo, that the first part of that sentence was directed to other crewmembers, to encourage them to add their requests for additional items, what then would the “Get ready for the ?” mean in regard to them? Respondent never provided any explanation for the meaning of this final phrase.

Finally, Respondent claims that he was referencing his sister-in-law when he used the descriptive adjective “beautiful.” While no doubt some men have a very close relationship to their brother’s wives, my common sense and experience suggests that few freely address such women in essentially a shopping list with the endearment “beautiful.” *United States v. Santarsiero*, 566 F. Supp. 536, 539 (S.D.N. Y. 1983)(judge is entitled to consider all the facts presented to him and to draw reasonable inferences from those facts based upon his common sense and experience); *Abad v. Bayer Corp.*, 531 F. Supp. 2d 957, 966–67 (N.D. Ill. 2008) (In weighing the credibility of witnesses, “a court is entitled to consider the inherent plausibility of the testimony. If the testimony runs counter to the judge's common sense, or the judge's own experience, to the extent he or she has any experience that is relevant, this is a factor that can weigh against acceptance of the opinion.”).

In addition, I note that at hearing Respondent acknowledged discussing every item listed in the note with B.D., although he claimed she was going to purchase them for herself. Tr. Vol. II at 142. ([B.D. was] “going to buy her sandals.” “Bracelet that she said she was going to pay for. Necklace that she said she was going to pay for.”). *See also* AX 9 (Respondent messaged B.D. photographs of such items and encouraged her to take a taxi).

On the other hand, the whole note, plainly read exactly as written, makes complete sense under the circumstances if it was intended for B.D., as B.D. and the Agency allege. Tr. Vol. I at 46–49 (“It is a note that was left for me on my bed from Eli.”). It was she to whom Respondent was referring in the salutation by the endearment “beautiful,” and for whom the items they had discussed were intended, including sandals in her particular size. Tr. Vol. I at 45 (Respondent had previously discussed with her African necklaces and Masai sandals and indicated “his sister-

in-law Annie was going to buy them for me.”); Tr. Vol. I at 48 (“We had discussed the necklace and he had described the sandals[;]” B.D. states her shoe size is “[s]ize 8.”). B.D. testified that Respondent had similarly referred to her as “a beauty” in a prior to-do list he created and presented to her. AX 4 at 3; Tr. Vol. I at 37. Further, that both parties knew the note was for her is evidenced by the fact that she retained the note among her papers after finding it, and speaking to Respondent regarding it, precisely because she was concerned that this offer of gifts could be perceived as an attempt at observer bribery. Tr. Vol. I at 45, 52. Had the note been intended for someone else, Respondent would have undoubtedly requested its return or, at least, remarked its absence. He never once suggested that was the case to OLE or at hearing. Finally, it was also B.D. of whom Respondent was inquiring as to whether she wanted anything else before he called “her,” i.e. his sister-in-law, in two days, and whom he was hoping to entice in future plans together through the gifts as evidenced by the phrase “Get ready for the ???” Tr. Vol. I at 49 (B.D. indicating “her” in second paragraph “refers to Annie since she was the one that Eli had talked about to provide the items.).

While the record lacks similar documentary evidence specifically undermining Respondent’s credibility as to his denials and explanations for the other conduct with sexual connotation alleged by B.D., the legal maxim in law *falsus in uno, falsus in omnibus* or “false in one, false in all,” seems apt here. *Arias-Hernandez v. Sessions*, 685 F. App’x 372, 378 (6th Cir. 2017) (maxim evidenced appropriateness of doubting the legitimacy of remaining four affidavits after determination that two affidavits were of questionable authenticity); *United States v. Roulhac*, No. 3:16CR192, 2018 WL 1706361, at *4 (M.D. Pa. Apr. 9, 2018), *aff’d*, 763 F. App’x 168 (3d Cir. 2019) (quoting jury instruction setting forth substance of maxim); *United States v. Baron*, 602 F.2d 1248, 1254 n. 11 (7th Cir. 1979) (same). The maxim provides that “[i]f you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness’ testimony concerning other matters.” *Roulhac*, 2018 WL 1706361, at *4.

Also supporting finding B.D. more credible than Respondent, is the fact that B.D.’s hearing testimony was generally logical and consistent with other statements she had made contemporaneous with the events, and she was calm and professional in her responses even when being cross-examined by Respondent. *See e.g.*, Tr. Vol. I, 124, 145, 146. B.D.’s testimony was also constrained to the facts, even when unfavorable to her, and she never overstated Respondent’s actions, even when invited to do so by him. *See e.g.*, Tr. Vol. I, 145–46 (responding to Bah asking how many times he had asked her for sex, B.D. responded: “You did not ask me for sex.”), 160:20–22 (same).

Additionally, I find Respondent’s claim that B.D.’s allegations arise from anger and are being pursued in retaliation for him spurning her advances, seems belied by B.D.’s general temperament, thoughtful self-reflection, sincerity and restraint as evidenced in both her testimony and writings, particularly in AX 4. AX 4 is a free flowing “raw” ten-page narrative chronical of B.D.’s thoughts on the events, which she drafted for herself at the very beginning of her third voyage. AX 4 at 1. In that statement, B.D. vents her frustration, anger and discomfort at Respondent’s actions which have “gone too far.” AX 4 at 1. However, her feelings regarding Respondent are also balanced and moderated, for example, she acknowledges that he is “a good worker and can be a good guy.” AX 4 at 1. She offers an explanation for his improper conduct “he doesn’t seem to pick up on the social cues that I’m uncomfortable and he needs to back off.”

AX 4 at 1. She thoughtfully queries her own role in the events asking herself “whether I reacted improperly or gave the wrong signals.” AX 4 at 1. *See also* AX 4 at 3 (“I couldn’t find my wording” to shut Respondent down after he suggested he intended she “didn’t go home a single woman.”). She considers and acknowledges her own personality traits. AX 4 at 2 (“I also try to keep the peace, especially when that person is my roommate[.]”). She honestly recognizes the difficult social situation onboard the vessel she is in. AX 4 at 3 (“It’s a hard game to play as a girl on a boat[.]” trying to be friendly but not be “too nice” and clearly set the boundaries). Most significantly, she indicates no intent to pursue legal action or have Respondent fired, but only to share what happened to protect and give credibility to a “future female observer” who finds herself in her situation AX 4 at 1. On the whole AX 4, written shortly after the events, has no underlying indications of an angry spurned woman confabulating a story to seek revenge. Rather, it reflects the thoughtful and honest wide-ranging emotions of a relatively young intelligent woman who has, in fact, been pushing back on weeks of escalating sexual harassment and has finally realized the person she’s dealing with “doesn’t even respect my no’s.” AX 4 at 8.

Further, at this point, three years on from the events, B.D. has no reason to testify falsely. She has nothing to gain financially, or otherwise, from this case. Any civil penalty imposed on Respondent will be paid to NOAA, not B.D. 15 C.F.R. § 904.105. In fact, she forwent \$10,000 in income simply to attend the hearing. Tr. Vol. I at 115. In addition, her personal health circumstances mediate against her wasting time pursuing false allegations for no reward. Tr. Vol. I at 107–08.

On the other hand, Respondent has had clear incentive to falsely deny and minimize his conduct towards B.D. both then and now. At the time he was on the vessel, he faced sudden termination. Now, he faces an imminent finding of liability and imposition of a significant monetary penalty.

Therefore, I find the following allegations made by B.D. true:

- (1) Respondent referred in writing to B.D. as a “beauty” to take on future travel with him. Tr. Vol. I at 37;
- (2) Respondent presented to B.D. a to-do list indicating that he wanted to make sure she did not go home “a single woman.” Tr. Vol. I at 37;
- (3) Respondent made unsolicited comments to B.D. regarding having discussed with his sister-in-law and/or his brother B.D.’s buttocks, kissing B.D., B.D.’s interest in him, having B.D. “in the bag,” and whether Respondent and B.D. had “done anything.” Tr. Vol. I at 40–44;
- (4) Respondent mentioned to B.D. going on a future date at the Eiffel Tower. Tr. Vol. I at 42;
- (5) Respondent referred to B.D. as “beautiful” in the note he left on her bunk and offered her gifts (AX 5). Tr. Vol. I at 46–49;

- (6) In the early morning hours of March 3, 2018, when Respondent and B.D. were alone in their stateroom, Respondent told B.D. that he was wondering if her butt was “jam or jelly,” made a provocative gesture with his hands beckoning B.D., and then hugged her without her consent. Tr. Vol. I at 55, 58–61. Afterward, Respondent stated, “[Now I know it’s jelly.” Tr. Vol. I at 60;
- (7) On March 4, 2018, Respondent waylaid B.D. in a hallway and asked for a hug and, when B.D. capitulated to his request, he squeezed her buttocks, then subsequently held on to her hand, and pinched her cheek, all without her consent. Tr. Vol. I at 67, 69–73; and
- (8) Without her consent, Respondent photographed B.D.’s buttocks and talked about sending the photos, while saying that he and his brother had a bet about how good B.D.’s butt looked in jeans. Tr. Vol. I at 76–77.

Respondent undertook all of the foregoing conduct when he and B.D. were alone. *E.g.*, Tr. Vol. I at 41, 74. While B.D. submitted to Respondent’s coerced second request for a hug, she never consented to Respondent’s first request for a hug or Respondent touching her buttocks. Tr. Vol. I at 74.

Subjectively, B.D. believed Respondent’s conduct and statements to her during the second trip had sexual connotations and B.D. told Respondent directly that they would not be dating. Tr. Vol. I at 44–45. I find that a reasonable female observer similarly situated to B.D. also would have also found Respondent’s statements and conduct had sexual connotations. *See Cloud*, 2017 WL 10845065, at *8.

B. Creation of Intimidating, Hostile, or Offensive Environment

As noted above, the pertinent MSA regulation states that to be a violation the conduct of sexual connotation must have “the purpose or effect of interfering with the observer's work performance, or otherwise creates an intimidating, hostile, or offensive environment.” 50 C.F.R. § 679.7(g)(5).

Neither the Act, nor its regulations define “intimidating,” “hostile,” or “offensive.” As such, the Tribunal in *Cloud* looked to those terms’ common meanings, finding –

The common legal definition of “intimidation” is “[u]nlawful coercion; extortion, duress, putting in fear.” [] The common legal definition of “offensive” is “[c]ausing displeasure, anger, or resentment; esp., repugnant to the prevailing sense of what is decent or moral.” [] [A] hostile work environment sexual harassment may arise from “purely psychological aspects of the workplace environment” that serve to substantially affect the terms and conditions of a victim's employment.

Cloud, 2017 WL 10845065, at *8 (citing Black's Law Dictionary 422 (abridged 5th ed. 1983, Black's Law Dictionary (10th ed. 2014), *Meritor Savings Bank v. Vinson*, All U.S. 57, 64 (1986)). See also *Cusick*, 2012 WL 442005, at *2 (“Intimidate means the use of any words or actions intended or designed to make another person timid or fearful or to make that person refrain from doing something that person would otherwise do, or do something that person would otherwise not do.”).

In *Cloud*, after considering the totality of the circumstances, the Tribunal found that a reasonable person similarly situated to the observer would have felt the crewmembers conduct was intimidating and offensive. *Cloud*, 2017 WL 10845065, at *9. In support, it cited the observer’s testimony of feeling afraid, expressing concerns about being isolated and calls for help going unheard, having difficulty sleeping, feeling uncomfortable and wanting to leave the ship. *Id.* It also noted the observer contacted her fishery observer coordinator at “first opportune moment,” and cried as she reported the incident to the captain and the NMFS agent. *Id.*

In its Brief, the Agency cites as instructive on this point, *Kim*, No. SW010208, 2003 WL 23033174, *1–2 (NOAA Nov. 6, 2003) (Order Granting in Part and Denying in Part Agency's Petition for Reconsideration). Br. at 20. In *Kim*, a male crewmember woke a female observer asleep in her bunk, with her privacy curtain drawn, and asked her for sex. *Kim*, 2003 WL 23033174 at *1–3. In the morning, the observer reported the incident to the captain, documented it in her notebook, and notified NMFS upon returning to shore. *Id.* at *3. The observer completed her assignment on the vessel, but testified that she felt extremely uncomfortable and intimidated, and had difficulty concentrating on her work. *Id.* at *2–3. She discontinued her work with the Observer Program after the incident. *Id.* at *2. The Tribunal found that the crewmember’s action created an intimidating and offensive work environment. *Id.* at *3–4.

Upon considering the totality of the circumstances, a preponderance of the evidence supports a finding that B.D. both in actuality felt, and a reasonable female person similarly situated to B.D. would have felt, that Respondent's conduct created an intimidating, hostile, or offensive environment.

The record reflects that over the course of her second voyage, Respondent’s inappropriate conduct towards her escalated in a few short weeks from flattery to amorous aspirational comments, to requests to touch her buttocks, to actually touching her buttocks without her consent. Tr. Vol. I at 69–71 (Respondent blocked the narrow vessel passageway, hugged her, and squeezed her buttocks).

B.D. testified that Respondent’s conduct made her feel “very uncomfortable” and “very vulnerable.” Tr. Vol. I at 61–62, 75, 78, 82, 90, 92, 124, 132–33, 143. She lost sleep. Tr. Vol. I at 62–63. Respondent’s repeated advances and efforts to assert control, left B.D. feeling uncertain as to “what he was going to do or say next[,], especially because he kept persisting[.]” Tr. Vol. I at 82. She came to realize that “he was not accepting when I would say no [and] even if I didn’t say anything he was translating that as a yes.” Tr. Vol. I at 80. B.D.’s unease remained until she disembarked from the Alaskan lady after the third trip: “knowing that he was still in the room with me and there’s only so far I can get away from him on the boat while assigned there . . . impacted [my] sleep.” Tr. Vol. I at 90, 113. Due to Respondent’s actions and

statements, B.D. experienced “a lot more stress and anxiety onboard” while she continued to perform her stressful and strenuous work. Tr. Vol. I at 112–22; *see also* Tr. Vol. I at 21, 15–20, 22.

In regard to the episode resulting in Respondent’s unwanted physical touching of her buttocks, B.D. described the effect of Respondent’s actions on her as follows:

I was incredibly stressed and uncomfortable especially with no one else in the hallway. There were no witnesses then. There was no one to kind of back me up. Because I was in the hall and blocked in by the walls and the boxes then there wasn’t a way for me to easily get away from him. I couldn’t just step aside. I either had to crawl over the boxes or push him away. So it was just a very vulnerable, uncomfortable feeling.

Tr. Vol. I at 75.

Moreover, the record reflects that B.D. contemporaneously and extensively documented the offensive conduct for herself, and reported the harassment promptly to the in-season manager and the captain, as well as her colleagues. AX 4; Tr. Vol. I at 101; AX 7 at 23 (B.D. reported Respondent’s conduct to Captain Adkins on March 6, 2018); AX 19 at 5 (B.D. reported Respondent’s conduct to her in-season manager on March 7, 2018). Likewise, when given the opportunity, she submitted an Observer Statement, signed under penalty of perjury, at her debriefing with NMFS. AX 6.

As noted above, at hearing, Respondent raised a series of issues challenging the credibility of B.D.’s allegations. I found none of those challenges persuasive.

First, Respondent challenged the Agency’s claim that the note (AX 5) evidenced a list of “gifts” intended for B.D, since B.D. testified that she intended to pay for the items. Tr. Vol. II at 131–32. However, parties can hold mutually exclusive intentions, neither of which invalidates the other. In this case, B.D.’s testimony and AX 5 evidence that Respondent intended the items from his sister-in-law to be gifts, but that B.D. had no intention of accepting them on such terms and initially considered paying for the items, but eventually chose not to accept them under any circumstances. *See* Tr. Vol. I at 45–46, 48–49, 127–28 (B.D. testifying her understanding that Respondent’s sister-in-law was going to buy the items for her); Tr. Vol. I at 45 (B.D. stating her intent to pay for the items).

Second, Respondent suggested that B.D. continued to initiate conversations with him after he ceased speaking with her, and that this evidences that she was not actually afraid of him. Tr. Vol. II at 132–33. The documentary record indicates that Respondent ceased talking to B.D. during the third voyage, after B.D. pointblank told him that she was not interested in a romantic relationship. There is no evidence that B.D. engaged in anything more than perfunctory pleasantries during that trip. *See* AX 4 at 9 (B.D. narrative stating “Fortunately, as of the time of writing this sentence (evening 3/7/18), Eli hasn’t talked to me much at all since we left port. I’m OK with it staying that way.”); AX 4 at 10 (“Despite Eli and I still not talking much, the issue

isn't over as I've been losing sleep here and there the last week to write and edit this statement.”). Such minimal conversations on the last voyage, whereas on the first voyage had been extensive, supports, rather than undermines, B.D.'s claim of being uncomfortable and afraid of Respondent as a result of his behavior during the second voyage.

Third, Respondent queried B.D. at hearing why she allowed him to hug her a second time in the hallway, if, in truth, the first hug had made her so uncomfortable. Tr. Vol. II at 132–34, 137. B.D. gave a response to this query which was cogent and credible –

you were blocking my way in the hallway. It's a very narrow hallway to begin with, and then to have the boxes there made it more narrow. So I was not able to get around you. And at the time it - in hindsight no, that wasn't the best way to deal with it, but at the moment I was just uncomfortable and trying to think of how I could make you move because I could not get anywhere else. And so I thought fine, a quick hug, like you're already like literally right in front of me so there wasn't an option to move anywhere else.

* * *

Because at the time it was a very stressful situation. I wasn't really sure how to react. I was not trying to get anyone in trouble unnecessarily and literally my only thought was I want to get off the boat.

Tr. Vol. I at 132–34.

Fourth, Respondent challenged B.D.'s characterization of him as the unwelcome pursuer, claiming that “she was the one talking about sex in the room. . . . I never talked about sex with her[]” (Tr. Vol. II at 138) and on cross-examination asked her “if I was such a person who was sexual harassing you why would we be in the room together and you talk about sex with animals -- insects and all of this stuff?” Tr. Vol. I at 142. In response, B.D. denied “always” talking about sex in the room, but conceded she may have shared information with Respondent regarding how butterflies reproduce, explaining “I spent a year working on butterfly research and I think it was interesting.” Tr. Vol. I at 142. Further, she asserted that “[i]f that conversation happened it would have happened during the second trip before you gave me the hug, and made the comments, and made me so uncomfortable. It did not happen during the third trip after all of that had taken place.” Tr. Vol. I at 143.

Fifth, Respondent similarly stated that B.D. “gave me her address. Invited me over to Ohio . . . If I was such a sexual predator, why would you invite me to your home?” Tr. Vol. II at 142–43. B.D.'s believable answer to this was that – “When we had discussed initially the traditional necklace then initially I was interested in it and so we had discussed the possibility of it. And you said that she would -- that Annie would need my address in order to send it to me, and so I gave you my address then.” Tr. Vol. I at 143–44.

Sixth, Respondent asserted “we did not have internet on the boat. So, if I took picture of her . . . why didn't she go to the captain? She said, she thought I was going to delete it. So if I was going to take pictures that I would sent around, weeks from now, why would I delete it?” Tr. Vol. II at 139. *See also* Tr. Vol. II at 203 (Respondent querying that if, in fact, he had taken her picture, why did she not promptly report it to the captain, as the “truth was right there if there was,” suggesting B.D. did not report the incident “because she knew she was lying.”). B.D.’s contemporaneously-drafted narrative provides a credible statement of her thought process at the time: “[i] just really want[ed] to get off the boat . . . I knew [my] anger would start to build now that he had disrespected me to grab me when I had said no, but I can be slow to anger and more so at that point I just wanted to leave.” AX 4 at 7.

Finally, Respondent asserted that if he had acted as B.D. claimed, why did she not report his initial offensive actions to the captain or NMFS earlier. I am particularly unpersuaded by this argument. I observe that Respondent’s actions occurred when B.D. was isolated on a relatively small vessel with a crew of twenty, all of whom were unfamiliar men, far off shore in the Bering Sea, for a number of weeks. B.D. could not leave the ship or isolate herself. She had no food other than that which Respondent was preparing for her. She had no reassurance other men would come to her defense. If something were to happen to her, neither assistance from enforcement or medical personnel would be immediately available. Under such circumstances, waiting to report the instance until she was returning to shore, seems imminently understandable.

In sum, the record as a whole suggests that Respondent concocted the erroneous impression of some romantic interest towards him from B.D.’s initial innocuous gestures such as bringing him tea, remarking on his nice smile or pleasing meal, inquiring as to his relationship status, or the attractiveness of his children. *See e.g.*, Tr. Vol. I at 125–27 (“Didn't you come to me and tell me that I had a nice smile” “you asked me if I had a girlfriend.”); Tr. Vol. II at 225 (“when I was a cook she come, [and say] this is a nice meal. Do you cook at home and stuff, like stuff like that but to me, I just think that it was a flirt[.]”). This led him to make comments and engage in a series of unwelcome activity with clear sexual connotations. Respondent may not have considered such actions on his part as “harassment.” Tr. Vol. II at 141 (“[W]here is the harassment that she's talking about? When I asked her, did [I] . . . asked you for sex? She said no.”). However, such acts were harassment and as such a violation of the MSA and its regulation.³⁴

After consideration of the totality of circumstances, a preponderance of the evidence of record proves that Respondent committed the violation as alleged in the Superseding NOVA.

VII. PENALTY

A. Principles of Law Regarding Civil Penalty

³⁴ In its Brief, NOAA also suggests that Respondent also “committed multiple batteries against B.D. in the course of his escalating sexual harassment.” Br. at 21 (citing *United States v. Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007) (“Even a seemingly slight, but intentional, offensive touching can suffice for a battery.”)). That specific legal determination is beyond the issues I am required to determine in this case.

The MSA provides that any person who violates any provision of the Act or implementing regulation may be assessed a civil penalty. 16 U.S.C. § 1858(a). At the time of the violation, the maximum civil penalty which could lawfully be imposed was \$184,767, per day of violation. *See* 16 U.S.C. § 1858(a); The Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410 (as amended by the Debt Collection and Improvement Act of 1996, Pub. L. 104–134); 15 C.F.R. § 6.4(f)(15) (2018). *See also* Civil Monetary Penalty Adjustments for Inflation, 83 Fed. Reg. 707 (Jan. 8, 2018) (Final Rule).

In determining the appropriate amount of the civil penalty, the Act provides that –

the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, Provided, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a). Similarly, the Rules provide that the factors to be taken into account in assessing a civil penalty, depending upon the statute in question, may include “the nature, circumstances, extent, and gravity of the alleged violation; the respondent’s degree of culpability, any history of prior violations, and ability to pay; and such other matters as justice may require.” 15 C.F.R. § 904.108(a).

The Agency proposed in the Superseding NOVA the imposition of a \$24,000 penalty. It does not propose a specific penalty amount in its Brief. In any case, there is no presumption in favor of the penalty proposed by the Agency, and I am not “required to state good reasons for departing from the civil penalty or permit sanction that NOAA originally assessed in its charging document.” *Nguyen*, Docket No. SE0801361FM, 2012 WL 1497024, at *8 (NOAA Jan. 18, 2012); *see also* 15 C.F.R. § 904.204(m). I must independently determine an appropriate penalty “taking into account all of the factors required by applicable law[.]” 15 C.F.R. § 904.204(m); *see also* 15 C.F.R. § 904.108 (enumerating factors to be considered in assessing a penalty).

B. Arguments Regarding Civil Penalty

As to the nature, circumstances, extent, and gravity of the violation, the Agency argues the importance of the work done by fishery observers to its program; that sexual harassment is a serious matter; and that Respondent’s conduct negatively affected B.D. Br. at 31–32 (citing Tr. *passim*). With regard to culpability, it suggests “the need for a high penalty in this case” as Respondent was an experienced crewmember, his conduct was intentional and he has neither taken responsibility for it nor expressed regret. Br. at 32–33 (citing Tr. *passim*). The Respondent has no prior history of violations nor has he submitted financial information regarding his ability to pay a penalty, NOAA states. Br. at 33. As to “[s]uch [o]ther [m]atters as [j]ustice [m]ay [r]equire,” it states “[a]lthough preventing observer sexual harassment is the ‘Agency’s highest priority,’ it remains a real problem[.]” and suggests that a “significant penalty

in this case will send a strong and clear message that such conduct will not be tolerated and will be met with serious consequences.” Br. at 33.

Respondent did not file a post-hearing brief nor did he specifically acknowledge and argue the application of the relevant penalty factors at hearing.

C. Analysis of Civil Penalty and Assessment

1. Nature, Circumstances, Extent, and Gravity of the Alleged Violation, and Respondent’s Culpability

I have found the Agency’s arguments persuasive with regard to my review of these penalty factors.

The nature of the violation is the harassment of a fisheries observer. Ms. Ferdinand testified at hearing that fisheries observers are “referred to as a cornerstone of sustainable fisheries management[,]” because of their importance to the management of federal fisheries.³⁵ Tr. Vol. II at 97. Specifically, observers provide the Agency with “a good understanding of quantity and quality and the biology of the animals” being removed, without which the fisheries could not be sustainably managed “for the long-term.” Tr. Vol. II at 98. She suggested that observers are particularly important in Alaska, which has a “really large number” of “limited access privilege programs[,]” which gives the public right to harvest fish, a federal resource, to a small number of vessels. Tr. Vol. II at 98. It is even of greater significance to NOAA to have observers on catcher-processor vessels, such as the Alaskan Lady, Ms. Ferdinand opined, because while at sea, such vessels process the fish into product and often transfer it to “trampers” which take the frozen product directly overseas. Tr. Vol. II at 98–99. “So we wouldn’t have any picture of what was really happening in the Fishery without observers[,]” she testified. Tr. Vol. II at 99. Ms. Ferdinand averred that the majority of freezer catcher processors sail with just a single observer, “[s]o it does all fall to that one observer to collect that information that we need.” Tr. Vol. II at 101–02.

Due to the importance of observers, the Agency invests significant resources into hiring, training, and retaining them, spending \$4.5–6 million dollars per year on the observer program in Alaska alone. Tr. Vol. II at 106. One of the challenges to the program’s success is incidences of observer sexual assault, including rape, as well as sexual harassment, which Ms. Ferdinand acknowledged happen “all too frequently.” Tr. Vol. II at 107, 115–16. Over her career, she has been made aware of “hundreds of reports[,]” of sexual assault and sexual harassment. Tr. Vol. II at 107. In Alaska alone, she estimated 25–30 such cases are reported each year, and lately she has seen an “uptick in reports,” which she attributed to “observers who recognize that . . . [i]t’s not something they should tolerate. And that reporting it, even if it doesn’t help them, it helps observers coming into the -- into the workforce and who might be getting on that vessel in the

³⁵ Ms. Ferdinand is the Director of the Fisheries Monitoring and Analysis Division of NOAA’s Alaska Fisheries Science Center. Tr. Vol. II at 76–77. She has a Bachelor of Science degree in National Resource Management and a Master’s of Public Administration. Tr. Vol II at 77. Ms. Ferdinand worked as a fisheries observer from 1996 until 1998. Tr. Vol. II at 77–78.

future.” Tr. Vol. II at 113–14. Preventing and protecting fisheries observers from sexual harassment or sexual assault is “our Agency’s highest priority,” Ms. Ferdinand proclaimed, stating the obvious, that “in a perfect world it wouldn’t happen at all[.]” Tr. Vol. II at 103–05, 123. *See also* Tr. Vol. II at 107 (“obviously our goal would be zero”). To this end, NOAA engages in extensive outreach to the fishing community notifying them that “sexual harassment of an observer will not be tolerated.” Tr. Vol. II at 104, 122. It also provides observers with specialized training in sexual harassment avoidance. Tr. Vol. II at 103, 111–12.

The circumstances, extent and gravity of this case are stated in great detail above. In sum, a lone female observer was assigned to engage in hard work, for long hours, on a fishing vessel sailing far offshore, for weeks at a time, with a totally male crew. The observer was dependent on the crew for her safety and well-being, and particularly dependent on Respondent, the cook, in regard to her food. Over the course of several weeks, Respondent escalated his interactions carrying sexual connotations with her, culminating in him intentionally touching her buttocks without her consent. Tr. Vol. I at 70–71. He engaged in these inappropriate interactions when the two were alone and restricted small areas of the vessel, depriving the observer of witnesses, protection, and/or an easy route of escape. Tr. Vol. I at 75. He then proceeded to gaslight her and others in this proceeding, denying the truth of her allegations of unconsented touching and generally suggesting that she initiated or condoned of all the interactions carrying sexual connotations, blaming B.D., the victim, for the harassment she suffered. *See e.g.*, AX 22 at 2.

The evidence documents that B.D. was negatively affected by Respondent’s harassment. Tr. Vol. I at 113. The limited space onboard and Respondent’s continual presence caused her anxiety. Tr. Vol. I at 113. Even though Respondent was the one who harassed her, B.D. second-guessed and reproached herself “over the fact that it had progressed as quickly as it did.” Tr. Vol. I at 113–14. This is not unexpected in our culture where on the one hand, men are presumed to be unable to exercise appropriate self-control in the presence of a woman, and on the other, women are told that their mere attitude, attire, location, or beverage consumption, can give men the imprimatur of consent to sexual activity.³⁶ B.D., who prided herself on being able to deal professionally with difficult situations, testified that Respondent’s actions made her feel

³⁶ B.D.’s thoughtful consideration of what additional actions she could have taken to avoid the harassment, stands in stark contrast to Respondent’s lack of self-reflection and acknowledgement of responsibility for the harassment. B.D. testified that immediately after Respondent touched her buttocks, she backed away from him and told him that it “was not okay[.]” Tr. Vol. I at 71. In response, Respondent said he was sorry, “but did not seem sincere at all. He had a smile on his face[;]” “it seemed like he still had some smug satisfaction that he got what he wanted.” Tr. Vol. I at 72. Respondent continued to use self-assured, aggressive language even after he became aware of B.D.’s claim of harassment. For example, Respondent told OLE during his interview on November 9, 2018, that “if I was interested, I would have got her[.]” and “if I wanted to have, I would have got her.” AX 12 at 29, 34. He stated, “if I get to the point that I’m going to grab her and I knew that she wanted me, why grab her? Why not take her?” AX 12 at 34; *see also, e.g.*, AX 12 at 36 (noting another exchange with B.D., Respondent said: “I told her to shut up. I wasn’t talking to her.”). At the hearing, Respondent also derisively insulted B.D. and expressed hostility. *See e.g.*, Tr. Vol. I at 135 (“Vancouver have [sic] many beauties. Why would I take you there?”); Tr. Vol. II at 147 (“Why would I stay in Seattle for one month . . . [w]aiting for her to come, so I could take [her] to Vancouver? When there are a lot of beautiful women in Seattle.”). When Respondent did not like B.D.’s answers to his cross-examination questions, he contemptuously uttered, “Jesus Christ” in response. Tr. Vol. I at 125–26, 135. Notably, he took a similar aggressive and swearing approach in response to the other female observer who testified at hearing, Ms. Engelhardt. Tr. Vol. II at 68.

as though she “lost control,” which carried “a level of humiliation[.]” Tr. Vol. I at 114. Besides suffering emotionally, B.D. suffered a financial loss as a result of Respondent’s misconduct, in that attendance at the hearing, required she forego an observer contract in Hawaii that amounted to a loss of about \$10,000 in income. Tr. Vol. I at 115.

Respondent was an experienced commercial fisherman, having worked over 100 fishing trips. Tr. Vol. II at 222. He admitted that he was well aware of the prohibition on harassing observers, having been repeatedly advised of them orally and in writing. Tr. Vol. II at 192; *accord* AX 28; AX 30; Tr. Vol. I at 213–14. He was more than capable of understanding the restrictions. Captain Adkins described Respondent as “a very smart guy” and someone who he never had issues communicating with and Respondent claims to have attended university for physics, mathematics, and project management. Tr. Vol. I at 229; Tr. Vol. II at 154, 220–21. He seemed aware that B.D. was someone who was trying to be “professional” and not make any trouble for the captain. He exposed B.D. to a series of unwanted, unsolicited, and offensive statements and acts, leading up to grabbing her buttocks. He expressed no remorse in this proceeding for his actions. To the contrary, he either denied their occurrence or suggested that B.D. initiated and consented to them. As such, I find that Respondent’s actions were intentional.

2. History of Prior Offenses and Inability to Pay

NOAA has represented to this Tribunal that Respondent no prior violations. Further, while Respondent implied at hearing that he had limited financial resources, and serious health issues, (Tr. Vol. II at 240–42), he failed to timely provide the Agency with any records which would support a finding of inability to pay the proposed penalty.³⁷

3. Such Other Matters as Justice May Require

Ms. Ferdinand testified at hearing that “all observers regardless of what vessel they're getting on deserve a safe working environment and that's regardless of who they're working with. And I say the same thing for fishermen. Fishermen and harvesters, they all deserve a safe working environment.” Tr. Vol. II at 123. This Tribunal fully agrees with such sentiment. Unfortunately, Ms. Ferdinand’s testimony to the effect that 25–30 incidents of observer harassment/assault are reported each year in Alaska alone, evidences that observers are not getting what they deserve despite it purportedly being the Agency’s “highest priority.” Tr. Vol. II at 103, 107, 113, 115, 123. That is simply unacceptable. The commercial fishing industry and its crewmembers must be sent a strong and clear message regarding the ramifications of illegally harassing observers. A significant penalty imposed in this case, will send such a message and encourage observers to continue to report harassment whenever it occurs. Tr. Vol. II at 113–14.

³⁷ I note that Respondent had described his financial and family situation very favorably to B.D. during their voyages in 2018. AX 4 at 10. Specifically, he told her of “all these other employment opportunities and connections he has[.]” that his dad gives him about \$50,000 a year because his dad “‘doesn’t need it,’ and that his parents are currently arguing over which one of them gets to buy [him] his house[.]” and that “his mom has \$70 million just in one bank account and she’s a lawyer,” etc. AX 4 at 10. B.D. stated that Respondent made it “abundantly clear” to her that “money is not a concern of his[.]” AX 4 at 10. It is unclear from the record whether these statements were true at the time, or puffery he engaged in in an effort to entice B.D. into a romantic relationship with him.

In *Cloud*, the Tribunal imposed a monetary civil penalty of \$12,500 for a single incident of negligent harassment, i.e., entering the observer's stateroom and sitting on her bed. *Cloud*, 2017 WL 10845065, at *12. It noted that the crewmember immediately apologized for the action and expressed regret thereafter. *Id.* This Tribunal finds a more significant penalty warranted here, in that Respondent engaged in a series of inappropriate acts, for which he has neither apologized nor expressed remorse. Having carefully considered the evidence presented in this case and the factors set forth in the Magnuson–Stevens Act, implementing regulations, I conclude that the appropriate civil penalty to impose in this case is \$20,000.

ORDER

IT IS HEREBY ORDERED that a civil penalty in the total amount of \$20,000, is IMPOSED on Respondent Eliman Bah.

Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

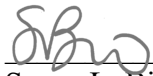
PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and 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. *Id.* 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).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Agency within 30 days from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(b).

SO ORDERED.



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

Dated: March 7, 2022
Washington, D.C.