

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re the revocation of the
observer certification of
██████████
Appellant

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Appeal No. 10-0040
ORDER DENYING MOTION FOR
RECONSIDERATION AND
ESTABLISHING A NEW EFFECTIVE
DATE FOR DECISION

On October 12, 2011, I issued a Decision in this appeal.¹ In the Decision, I concluded that the North Pacific Groundfish Observer Program (NPGOP) showed that ██████████ (Appellant) had failed to perform the duties of an observer, as specified in federal regulation 50 C.F.R. § 679.50(j)(2), and that the NPGOP had shown a reasonable basis for its decision to revoke the observer certification of Appellant.

The NPGOP issued an Initial Administrative Determination (IAD) with eight findings.² The Decision concluded that NPGOP had shown that Appellant failed to perform the duties of an observer as specified in IAD Findings 1, 2, 4(B), 7 and 8:

1. Failure to tally the species composition as instructed;
2. Failure to accurately record species composition data;
3. Failure to correctly identify the predominant species;
- 4(B) Failure to meet the weight sample requirements for non-predominant species;
7. Failure to complete Species Description Forms for all species observed;
8. Failure to complete data forms as instructed.³

With respect to IAD Findings 4(A), (5) and (6), I concluded that, based on the existing record, I could not conclude that Appellant failed to perform the duties of an observer:

- 4(A) Failure to meet the weight sample requirements for predominant species;
5. Failure to meet the species identification sample requirements;
6. Failure to meet the length and otolith sample requirements⁴

The Subject Cruise – the cruise that led to the decertification proceedings – occurred from

¹ Decision (Oct. 12, 2011). All citations to Decision are to the original Decision.

² IAD (Apr. 30, 2010).

³ Decision at 6 – 9 (IAD Finding 1); Decision at 9 – 10 (IAD Finding 2); Decision at 12 (IAD Finding 4(B)); Decision at 14 – 15 (IAD Finding 7); Decision at 15 – 18 (IAD Finding 8).

⁴ Decision at 11 – 12 (IAD Finding 4(A)); Decision at 13 (IAD Finding 5); Decision at 13 (IAD Finding 6).

October 11, 2009 – October 25, 2009.⁵

Appellant filed a timely motion for reconsideration.⁶ I stayed the effective date of the Decision pending a ruling on the motion for reconsideration.⁷ Appellant submitted additional written argument.⁸

ANALYSIS

The standard for reconsideration is that the appellant must show that, in the decision, the administrative judge misunderstood or overlooked a material matter of law or fact.⁹ I have carefully read Appellant's submissions and conclude that he has not shown that the Decision contains a material mistake of law or fact.

First, the Decision concluded that Appellant had failed to perform the duties of an observer.¹⁰ On reconsideration, Appellant states that the expectations for observers in the Observer Manual, are unreasonable and impractical, particularly on small boats.¹¹

The observer program regulation states that an observer must perform the assigned duties of an observer as described in the Observer Manual or other written instructions from the Observer Program Office and that failure to do so is cause for decertification.¹² The observer program regulation does not establish a different standard for observers on small boats. I do not have the authority to evaluate whether the standards in the Observer Manual are unreasonable or impractical and, on that basis, to excuse an observer from meeting the standards in the Observer Manual.

Appellant does not show that the Decision overlooked or misunderstood the standard of behavior applicable to Appellant, even though he was an observer on a smaller boat.

Appellant restates that the decertification official mistakenly concluded that he relied on a crew member to tell him the number of individual fish in certain species composition samples.¹³ Appellant restates that, if the Observer Program had given him the opportunity to show the method he did use to arrive at the totals in these samples, he

⁵ Decision at 2.

⁶ Letter from Appellant to Office of Administrative Appeals (Oct. 21, 2011).

⁷ Order Staying Effective Date of Decision (Oct. 21, 2011).

⁸ Letter from Appellant to National Appeals Office (Jan. 3, 2012).

⁹ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.

¹⁰ Decision at 6 – 18.

¹¹ Letter from Appellant to Office of Administrative Appeals at 2 (Oct. 21, 2011); Letter from Appellant to National Appeals Office at 2, 5 (Jan. 3, 2012)

¹² 50 C.F.R. § 679.50(j)(2)(A); 50 C.F.R. § 679.50(j)(3)

¹³ Letter from Appellant to Office of Administrative Appeals at 2 (Oct. 21, 2011).

could have shown that his method of collecting this data was reliable.¹⁴

The Decision did not overlook this argument. The Decision concluded that, even if Appellant had not relied on a crew member for these numbers, Appellant had no tally marks or calculations on the deck form, or anywhere else in the observer logbook, to show how he arrived at the total number of individual fish in twenty-five of eight-seven species composition samples.¹⁵ The Decision concluded: “The lack of specification of his method of tallying would itself violate the Observer Manual, and standard scientific sampling protocol, which requires that an observer show all his calculations.”¹⁶

I have carefully examined Appellant’s other arguments and none of them show that the Decision overlooked or misunderstood a material question of law or fact in concluding that Appellant failed to perform the assigned duties of an observer as alleged in IAD Findings 1, 2, 4(B), 7 and 8.

Second, the Decision concluded that NPGOP had a reasonable basis for determining that the deficiencies in Appellant’s performance warranted decertification.¹⁷ In reviewing the NPGOP action, I do not evaluate the evidence to determine if I would have come to the same conclusion. I review the evidence to determine if NPGOP’s decision was reasonable. The Decision stated the legal standard:

The regulation gives NPGOP discretion whether to seek decertification. The only requirement is that the suspension/decertification review official determines that it is warranted. [50 C.F.R. § 679.50(j)(3)(iii)] The standard of review of the decertification official’s determination is whether NPGOP has shown a reasonable basis for its conclusion that decertification is warranted.

Appellant restates his argument that he had a history of good performance on prior cruises and that, after the initial debriefing, NPGOP staff did not give him an opportunity to continue the debriefing and show, by a video demonstration or by physically going to a boat, how he had collected his samples.

The Decision did not overlook these arguments. With regard to the NPGOP’s failure to give him an additional opportunity to show how he collected the samples, the Decision concluded that “the [observer] regulation does not require NPGOP to do that. Their failure to do so does not violate any legal requirement and does not make their decision unreasonable or arbitrary.”¹⁸

¹⁴ Letter from Appellant to Office of Administrative Appeals at 2 (Oct. 21, 2011)

¹⁵ Decision at 6 – 9.

¹⁶ Decision at 8.

¹⁷ Decision at 18 – 20.

¹⁸ Decision at 8.

With respect to Appellant's history of performance on prior cruises, the Decision did not overlook that argument. The Decision noted that the decertification official acknowledged Appellant's history of service to the NPGOP.¹⁹ In the IAD, the decertification official acknowledged "that as a North Pacific Groundfish observer you have provided NMFS with valuable data used in the management of the North Pacific fisheries," and that through 2007, his evaluations from prior cruises "reflect a history of solid performance."²⁰

But after 2007, the decertification official accurately determined that the problems in IAD Findings 1, 2, 7 and 8 were identified in debriefings after one or more of the three cruises that occurred in 2008 and 2009: namely cruises that occurred from March 31 to April 5, 2008; August 21 to August 27, 2008; April 5 – 11 and April 21 to May 4, 2009.²¹ The Subject Cruise occurred October 11 – 25, 2009.

Appellant states that he was not on notice that NPGOP viewed his problems with data collection from these cruises as serious. He points to the following facts. At the beginning of 2009, he was simply required to take the standard, annual one-day briefing, which all observers must take. He was not required to take a two-day briefing, nor was he required to take a mid-cruise briefing for any cruise, either of which would have signaled to him that NPGOP viewed the problems with his data as serious.²² With respect to the April/May cruise in 2009 – the cruise immediately before the Subject Cruise – the debriefer concluded: "Most of the errors you made on your last deployment were corrected and the data you submitted had very few errors. The logbook was complete and the species Id forms were neatly done."²³ In September 2009, NPGOP gave him a very good evaluation in a letter of reference.²⁴

The decertification official was aware of Appellant's letter of recommendation in September 2009 and stated that it accurately reflected NPGOP's evaluation of his performance to that date.²⁵

It is true that the problems in the three prior cruises were not sufficient to cause NPGOP to seek decertification or require Appellant take additional briefings. But the observer

¹⁹ Decision at 19. Appellant began work as an observer in December 1990 and worked on at least one cruise in every year from 1990 through 2009. Domestic Observer Comment Summary [Document 5].

²⁰ IAD at 18.

²¹ Decision at 19. The Decision omitted the dates of the April/May 2009 cruise: April 5 – 11 and April 21 to May 4, 2009. It occurred in two segments on two different vessels but was considered one cruise. Domestic Observer Comment Summary [Document 5].

²² Letter from Appellant to National Appeals Office at 5 – 6 (Jan. 3, 2012).

²³ Domestic Observer Comment Summary, Comments on Cruise July 2 – July 8, 2009.

²⁴ Recommendation Letter from Director, Fisheries Monitoring and Analysis Division (Sep. 15, 2009).

²⁵ IAD at 18.

