NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF THE REGIONAL ADMINISTRATOR

In re the suspension of certification of	)	Appeal No. ~~95-0012~~ 03-0013 corrected, OMM GCAK
	)	
JESSE T. AGEE,	)	DECISION ON REVIEW
Appellant	)	
	)	AFFIRMED

On April 21, 2003, the North Pacific Groundfish Observer Program (NPGOP), National Marine Fisheries Service (NMFS), issued an *Initial Administrative Decision (IAD)* which suspended appellant's certification as an observer under the program.

Appellant filed a timely appeal of the *IAD* pursuant to the provisions of 50 C.F.R. 679.43. By its *Decision*, dated September 26, 2003, the Office of Administrative Appeals (OAA) reversed the *IAD*, and ordered that appellant's observer certification be re-instated. The OAA's *Decision* in this matter is hereby affirmed for the reasons discussed therein, and made effective immediately.

Procedural Due Process

In the OAA's discussion, the NPGOP was apprised of the requirements of 5 U.S.C. 558(c) which must be met before any sanction affecting a "license", such as an observer's certification, can be made effective prior to final agency action. First, imposition of the sanction must be preceded by notice and opportunity for hearing appropriate to the nature of the case. Second, that sanctions not be given immediate effect "[e]xecpt in cases of willfulness, or those in which public health, interest, or safety requires otherwise..." *Id.* It must be pointed out, however, that the requirements of the Administrative Procedure Act are not the only standard which must be satisfied before a sanction such as suspension or decertification of an observer's certification can be made effective prior to final agency action. The Constitutional requirements of procedural due process, which are more extensive than the requirements of the APA, must also be met.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Licenses to pursue one's livelihood are clearly a "property interest" within the meaning of procedural due process. *Barry v. Barchi,* 443 U.S. 55, 64 (1979); *Foss v. NMFS*, 161 F.3d 584, 588 (9th Cir. 1998); *Chalkboard, Inc. v. Brandt,* 902 F.2d 1375, 1380 (9th. Cir. 1989). The courts are unequivocal about the right to a hearing of some sort prior to adverse government action affecting a "property right" (such as the ability to pursue one's occupation). *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Procedural due process is a flexible concept (*Mathews v. Eldridge*, *supra* at 334; *Goldberg v. Kelly,* 397 U.S. 254, 262-263 (1970)), and has been described as follows:

> An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing **appropriate to the nature of the case**.' [Emphasis added.]

Chalkboard, Inc. v. Brandt, supra at 1380. The issue presented, therefore, is the sort of pre-deprivation hearing that will be deemed appropriate in any given situation. At a minimum, procedural due process requires a pre-deprivation procedure that involves notice of the evidence that forms the basis of the government's proposed action, and an opportunity for the individual observer to respond in a meaningful way to that evidence. In some circumstances, depending on the nature of the case, the right to respond to the evidence in a meaningful way will involve only the right to respond in person or by written submission. *Cleveland Bd. Of Educ. v. Loudermill, supra* at 546. In other circumstances, however, the right to respond in a meaningful way will include a right to refute the government's evidence by oral presentation of the appellant's own arguments and evidence and the right to confront and cross-examine adverse witnesses at a pre-deprivation adversarial hearing. *Goldberg v. Kelly, supra* at 267-268. The latter situation, of course, would preclude imposition of any proposed sanction against an observer prior to the full exhaustion of the observer's administrative remedies - in other words, prior to final agency action.

The Supreme Court has developed a three-part test to determine the nature of the pre-deprivation hearing that will be deemed appropriate in any given situation.

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the possible value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, supra at 334-335. The test provided in 5 U.S.C. 558 (c) goes only to the third prong of the *Mathew v. Eldrige* test - the governmental interest involved. Meeting the requirements of the governmental prong of the test, however, is only the beginning of the process the agency must engage in before putting a sanction into effect prior to final agency action. The governmental interest must be weighed against the other two prongs of the test - the private interest involved, and the risk of erroneous deprivation. Thus, it is possible that even if record shows that the requirements of 5 U.S.C. 558 (c) are met, imposition of the proposed sanction prior to final agency action may be inappropriate because the government's interest in doing so is outweighed by the other two prongs of the test. The present appeal presents a factual situation which raises concern under both of these other prongs.

First, the private interest involved is of particular concern. Most of the case law on this subject has involved applicants for public benefits of some kind (*e.g.*, public assistance, disability payments, etc.) In each of the cases that have allowed something less than a full adversarial pre-deprivation hearing, and thus allowed the imposition of the proposed sanction prior to final agency action, the

agency had the ability to fully compensate any appellant who was ultimately successful - usually through back payments. Thus, the private interest involved was never the risk of a potential loss of benefits altogether, but merely that of going without such benefits during the pendency of the administrative appeal. This is not the case with observer suspensions or decertification. Should the appellant prove successful on appeal, as in this case, she cannot be compensated for lost employment opportunities suffered between the issuance of the IAD and the final resolution of her appeal by the OAA. Thus, the private interest involved in these kinds of cases should be given serious consideration by the agency before attempting to impose the proposed sanction prior to final agency action.

Second, the facts of this case are of particular concern under the risk of erroneous deprivation prong of the *Mathews v. Eldridge* test as well. This risk is to be measured in the context of the nature of the evidence relied upon by the agency. *Mathews v. Eldridge, supra* at 345. It has been analyzed as whether the agency can establish probable cause under the procedures in use. *Barry v. Barchi, supra* at 66. In cases in which the courts have upheld agency procedures that provided something less than a full adversarial pre-deprivation hearing, there has been either no factual dispute at all (*Codd v. Velger*, 429 U.S. 624, 627 (1977); *Atlantic Richfield Co. v. U.S.*, 774 F.2d 1193, 1203 (D.C. Cir. 1985)), or the "factual issue to be determined was susceptible of reasonably precise measurement by external standards" (*Chalkboard, Inc. v. Brandt, supra* at 1381) such as the finding of medical experts. *Barry v. Barchi, supra* at 65; *Cassim v. Bowen,* 824 F.2d 791, 798 n. 3 (9th Cir. 1987). Where factual issues are not susceptible to reasonably precise measurement by external standards, especially where the factual disputes involve "issues of witness credibility and veracity," the risk of erroneous deprivation of constitutionally protected property interests is deemed too high and a fully adversarial pre-deprivation hearing is required. *Chalkboard, Inc. v. Brandt, supra* at 1381. In the present case, the imposition of the proposed suspension of appellant's observer certification seems to have been based upon hearsay statements by other government employees (enforcement agents). This is precisely the kind of evidence which raises concerns under the risk of erroneous deprivation prong of the *Mathews v. Eldridge* test, and thus would weigh heavily against imposition of the proposed sanction prior to final agency action.

In conclusion, in the future should the NPGOP impose a proposed sanction at the time of the issuance of its *IAD*, the record must show that its decision to do so is supported by a weighing of the three factors discussed in *Mathews v. Eldridge, supra.*

Applicability of the Exclusionary Rule

At the same time it issued its *Decision*, the OAA also issued an *Order Regarding Motion To Limit Record For Review and Motion To Suppress.* As concerns that part of the *Order* which deals with appellant's *Motion To Suppress*, I wish to remind the OAA that the exclusionary rule applies only to statements made "in custody." *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966).

Ronald J. Berg
for James Balsiger
Regional Administrator
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10/7/03
Date

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