

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re the suspension of certification of)
)
ERIC N. DOBBS,) Appeal No. 03-0007
Appellant)
) DECISION
)
) October 24, 2003
)
_____)

STATEMENT OF THE CASE

Eric N. Dobbs filed a timely appeal of an Initial Administrative Determination (IAD) issued by NMFS's North Pacific Groundfish Observer Program (NPGOP) on March 27, 2003. The IAD suspended Mr. Dobbs's certification as an observer under the program on the grounds that he was alleged to have smoked marijuana at a party at another observer's apartment at the Alyeska Seafoods facility in Unalaska, Alaska, on March 1, 2003. The IAD asserted that Mr. Dobbs was serving as an observer aboard the F/V MORNING STAR from January 18 to March 20, 2003.

The allegation was made by John Moser, a fishery biologist / compliance liaison with the NPGOP, in a memorandum recommending Mr. Dobbs's suspension and decertification, dated March 26, 2003. In the memorandum, Mr. Moser asserted that Mr. Dobbs had admitted to smoking the marijuana during an interview with investigating officers of the NMFS Alaska Enforcement Division. The IAD stated that if Mr. Moser's allegations were correct, Mr. Dobbs's conduct would be in violation of observer standards of behavior.¹ Such violations are cause for suspension or decertification.² The suspension was "for a temporary period pending the completion of an investigation and such decertification proceeding as may ensue," and it took effect immediately.

Mr. Dobbs can appeal the IAD because it directly and adversely affects his interests.³ An oral telephonic hearing was held in this matter on August 12, 2003, from Juneau, Alaska. Mr. Dobbs testified from Helena, Montana, and was represented by his attorney, Suzanne Taylor, of the law firm Doney, Crowley, Bloomquist & Uda, P.C., of Helena. Also testifying at the hearing from Seattle, Washington, were Ms. Heather Weikart, the suspension / decertification officer with the NPGOP, and Mr. Moser.

¹50 C.F.R. §679.50(j)(2)(ii).

²50 C.F.R. §679.50(j)(3)(ii).

³50 C.F.R. §679.43(b).

ISSUE

Was the IAD properly issued and was the suspension properly imposed?

SUMMARY

The IAD is REVERSED. The Appeals Officer concluded that because Mr. Dobbs was not given prior notice and opportunity to respond to the suspension / decertification officer before the issuance of the IAD, as specified in the NPGOP final rule, the IAD was not properly issued and, therefore, the suspension was not properly imposed and must be terminated. In addition, the Appeals Officer concluded that the suspension of Mr. Dobbs's observer certificate was not warranted by the evidence relied upon by the suspension / decertification officer. Therefore, the suspension was invalid and must be terminated. Finally, the Appeals Officer concluded that the process provided to Mr. Dobbs by the NPGOP did not meet the requirements of due process and, therefore, the suspension was invalid and must be terminated.

ANALYSIS

Was the IAD properly issued and was the suspension properly imposed?

Eric Dobbs was a certified observer in the NPGOP from December 2000⁴ until his certificate was suspended on March 27, 2003. Although observers are not NMFS employees, they must have a currently valid certificate from NMFS to work as an observer. Consequently, while the suspension is in effect, Mr. Dobbs cannot work as an observer in the NPGOP.

The NPGOP suspension / decertification official notified Mr. Dobbs through the IAD that his observer certification was immediately suspended. Mr. Dobbs was not given prior notice of the suspension and an opportunity to challenge the suspension, or the evidence on which it was based, before the IAD was issued or before the suspension took effect. As a result, Mr. Dobbs has been unemployed as an observer during the 60-day appeal filing period following issuance of the IAD and, so far, through the pendency of the appeal.

A. Notice and opportunity to respond under the NPGOP final rule

Whether Mr. Dobbs was afforded the proper notice and opportunity to respond is an important question, not only because of the notion of fundamental fairness, but also because it implicates his procedural due process rights under the Fifth Amendment to the United States Constitution and the procedural protections provided by the federal Administrative Procedure Act (APA).⁵

The Fifth Amendment provides, in pertinent part, that "No person . . . shall be deprived of life,

⁴Eric Dobbs testimony, Hearing, at tape 1A/179.

⁵5 U.S.C. §551 et seq.

liberty, or property, without due process of law” As the United States Supreme Court has made clear, “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.”⁶ A license to pursue one’s livelihood, such as an observer certificate, is a “property” interest for due process purposes.⁷ The Supreme Court has stated:

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.” We have described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”⁸

As another federal court has stated:

An agency may not impose even a temporary suspension without providing the “core requirements” of due process: adequate notice and a meaningful hearing.⁹

Procedural due process is a flexible concept, and the type of hearing or opportunity to respond that must be provided before the deprivation of a protected property interest varies depending on the type of case and interest involved. Hence, the Supreme Court’s reference above to a “hearing appropriate to the nature of the case.”

The APA codifies basic due process principles in the administrative context. With certain limited exceptions, the APA requires notice and an opportunity to respond before a license may be suspended or revoked. The APA provides, in pertinent part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all

⁶Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

⁷*See, e.g.,* Barry v. Barchi, 443 U.S. 55, 64 (1979); Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1380 (9th Cir. 1989).

⁸Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (internal citations omitted).

⁹Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 6 (D.C. Cir. 1998).

lawful requirements.¹⁰

The APA further provides that a “‘license’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”¹¹ Therefore, an observer certificate is a license under the APA, and its suspension or decertification constitutes a suspension or revocation of a license that is governed by section 558(c).

The NPGOP regulations provide:

Suspension or decertification can be made effective upon issuance of the IAD in cases of willfulness or those cases in which public health, interest, or safety require such actions. In such cases, the suspension / decertification official will state in the IAD that suspension or decertification is effective at [the] time of issuance and the reason for the action.¹²

This language authorizes the immediate imposition of suspension or decertification upon the issuance of an IAD in certain types of cases, but is silent with regard to whether an observer is entitled to any notice or opportunity to challenge the suspension or decertification *before* the IAD is issued and *before* the suspension or decertification takes effect. The language in the NPGOP regulation was obviously drawn from section 558(c) of the APA, quoted above. Unlike section 558(c), however, the NPGOP provision is not worded as an exception to the prior notice and opportunity to respond requirement. Instead, the NPGOP provision specifies only the types of cases in which suspension or decertification can take effect when the IAD is issued.

The “background” section (preamble) of the NPGOP final rule,¹³ however, provides that if NMFS *intends* to proceed with a suspension or decertification action, the suspension / decertification officer will issue a written notice to the observer.

If the action is pursued, this notice will detail the reasons for and the terms of the action. The notice will also indicate to the observer his or her right to appeal the decision and the procedure for filing such an appeal. The observer would have an opportunity to present documentation that would show mitigating circumstances or refute the evidence before the official. Under this procedure, the observer suspension/decertification officer will create a written record. If the observer does not contest the proposal to decertify or suspend the certificate, the observer

¹⁰5 U.S.C. §558(c).

¹¹5 U.S.C. §551(8).

¹²50 C.F.R. §679.50(j)(3)(iii).

¹³Final Rule, 67 Fed. Reg. 72,595 - 72,617 (December 6, 2002).

suspension/decertification officer's initial decision will become final.

If the observer wants to appeal an adverse initial determination by the observer suspension/ decertification officer(s), the decision will be referred to the OAA [Office of Administrative Appeals].¹⁴

This language in the preamble to the final rule is internally inconsistent and confusing. It appears to contemplate, however, that an observer will be notified in writing of any *proposed* suspension or decertification and will be given an opportunity to respond *before* an IAD is issued. The language suggests that, *before* determining whether suspension or decertification is warranted, the suspension / decertification officer will consider any evidence of mitigating circumstances presented by the observer, as well as all evidence presented that tends to refute the evidence that formed the basis for the *proposed* suspension or decertification. The text of the regulation itself then provides that “upon determination that suspension or decertification is warranted . . . , the suspension / decertification official will issue a written IAD”¹⁵

I do not read that previously quoted portion of the regulation, which allows a suspension or decertification to be made effective upon the issuance of an IAD, as eliminating the need to provide notice and opportunity to respond *prior* to the issuance of the IAD. I read it only as allowing a suspension or decertification to take effect before an appeal can be filed and a hearing conducted by this office. Reading the text of the regulation in conjunction with, and in harmony with, the preamble to the final rule, I conclude that the suspension / decertification officer must give an observer notice and opportunity to respond to a *proposed* suspension or decertification before determining whether the suspension or decertification is warranted, before issuing an IAD, and before giving effect to the suspension or decertification.

The preamble to the final rule does not appear to contemplate that the suspension / decertification officer will provide a full evidentiary hearing to the observer, but does indicate that the observer must be allowed to submit documents or written statements that show mitigating circumstances or that tend to refute the evidence on which the proposed suspension or decertification is based. This reading comports with the fact that the NPGOP staff are not trained or prepared to provide full evidentiary hearings.

It could be argued that the prior notice and opportunity to respond specified in the preamble to the final rule does not have the force of law because it is not contained in the actual text of the regulation, and is therefore not mandatory. I would reject such an argument, however, because the preamble expresses the official intent of NMFS and the Secretary of Commerce; because requiring notice and an opportunity to respond prior to the issuance of an IAD does not appear to conflict with any provisions in the regulatory text; and because the requirement is imposed on the agency itself for the benefit of the observers.

¹⁴*Id.* at 72,599.

¹⁵50 C.F.R. §679.50(j)(3)(iii).

The record in this case contains no evidence that *any* prior notice and opportunity to respond was given to Mr. Dobbs before the IAD was issued. The issuance of the IAD is not a substitute for a written notice of proposed suspension. The opportunity to appeal to this office is not a substitute for the opportunity to present to the suspension / decertification official any documentation of mitigating circumstances or evidence refuting the basis for the proposed suspension. Answering questions posed by enforcement agents during the investigation is also not a substitute for the opportunity to submit written documentation to the suspension / decertification official. Because I find that Mr. Dobbs was not given prior notice and opportunity to respond before the issuance of the IAD, as specified in the NPGOP final rule, I conclude that the IAD was not properly issued and, therefore, the suspension was not properly imposed and must be terminated.

B. Notice and opportunity to respond under APA section 558(c) and NPGOP regulations

The next question is whether the suspension in this case was properly imposed in accordance with APA section 558(c) and NPGOP regulations. Giving immediate effect to a suspension or decertification, or delaying the notice and opportunity to respond, are extraordinary measures that are not to be taken routinely or automatically. The use of such measures is limited to unusual, emergency situations¹⁶ that necessitate quickly removing a person from working as an observer. Under the NPGOP regulations and section 558(c) of the APA, such measures are lawful only in cases of willfulness or when required to protect the public health, public interest, or public safety. “Willfulness” means that the observer intentionally did a prohibited act, “irrespective of evil motive or reliance on erroneous advice,” or acted with careless disregard of statutory or regulatory requirements.¹⁷

To invoke these exceptions to the usual rule of prior notice and opportunity to respond, the suspension / decertification officer must articulate the need for immediate action; identify the type of case(s) involved; and make a finding of probable cause, based on substantial evidence, that the observer committed the violations alleged.¹⁸ The suspension / decertification officer must make an independent judgment when deciding whether to suspend or decertify, and whether to give immediate effect to the suspension or decertification.¹⁹ It is not sufficient for the suspension / decertification officer to simply accept the conclusions of the person recommending the action without independently evaluating the quality and sufficiency of the evidence. In

¹⁶Air North America v. Department of Transportation, 937 F.2d 1427, 1437 (9th Cir. 1991).

¹⁷Potato Sales Co., Inc. v. Department of Agriculture, 92 F.3d 800, 805 (9th Cir. 1996); Lawrence v. Commodity Futures Trading Comm’n., 759 F.2d 767, 773 (9th Cir. 1985).

¹⁸Anchustegui v. Department of Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001); Barry v. Barchi, 443 U.S. 55, 64-65 (1979).

¹⁹*See, e.g.*, Horne Brothers, Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972); Sloan v. Department of Housing & Urban Development, 231 F.3d 10, 16 (D.C. Cir. 2000). (“A question of judgment is involved in any agency decision to issue a suspension.”)

evaluating the evidence, the suspension / decertification officer “should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.”²⁰

In this case, the suspension / decertification officer stated in the IAD that

According to the documentation Mr. Moser submitted there is adequate evidence indicating a possible violation of the standards of observer conduct at 50 CFR §679.50(j)(2)(ii)(D)²¹

* * *

Moser’s documentation (see enclosures) alleges that, during the cruise, you attended a party at Jesse Agee’s apartment at the ALYESKA SEAFOODS facility where you smoked marijuana. At this time you were deployed to the F/V MORNING STAR and subject to the drug policy of the North Pacific Groundfish Observer Program (see enclosures).

* * *

If Mr. Moser’s allegations are correct, your conduct clearly violated the specific provisions of 50 CFR §679.50(j)(2)(ii) (“Standards of Behavior”).

There is no evidence of mitigating factors that would excuse or justify your actions. Accordingly, I am obligated to suspend your certification pending an investigation of this matter.

Based on the record before us, you have failed to abide by the standards of observer conduct. Therefore, the determination herein is that:

- Your certification as a North Pacific groundfish observer is **SUSPENDED**, effective as of the date of this notice.
- Your certification shall remain suspended until an investigation is conducted and further action is taken.²²

Under 50 C.F.R. §679.50(j)(3)(ii)(A)(2), the failure to abide by the standards of observer conduct is cause for suspension or decertification. The standards of observer conduct include standards of behavior, which provide, in pertinent part:

²⁰Former 50 C.F.R. §679.50(j)(5)(B). Although this provision was repealed on December 31, 2002, it remains sound advice and guidance for the suspension/decertification officer.

²¹IAD at 1.

²²The suspension has no time limit. Former 50 C.F.R. §679.50(j)(5)(iii)(E)(2) provided that a suspension must be terminated if legal proceedings or decertification proceedings are not initiated within 12 months after the date of the suspension notice. That provision was repealed on December 31, 2002, and the current NPGOP regulations contain no comparable provision.

Observers must avoid any behavior that could adversely affect the confidence of the public in the integrity of the Observer Program or of the government, including but not limited to the following:

* * *

(D) Observers must refrain from engaging in any illegal actions or any other activities that would reflect negatively on their image as professional scientists, on other observers, or on the Observer Program as a whole. This includes, but is not limited to:

- (1) Violating the drug and alcohol policy established by and available from the Observer Program;
- (2) Engaging in the use, possession, or distribution of illegal drugs;

The “Drug Policy of the North Pacific Groundfish Observer Program,” dated January 9, 2003, provides, in pertinent part:

Certified observers and observer trainees are covered under this policy from the first day of training or briefing until the last day of debriefing. This policy was developed to convey the expectations of the NPGOP regarding the use of illegal drugs. The primary purpose of this policy is to ensure the safety and well-being of observers, observer trainees, and those they work with. This policy is also intended to protect the integrity of the NPGOP and the observer workforce as a group of professional scientists providing the highest quality data possible to manage the North Pacific groundfish fisheries.

The use, possession, or distribution of illegal drugs is a crime. For this reason, the NPGOP has a zero tolerance policy. Observers found to be engaging in the use, possession, or distribution of illegal drugs will be recommended for suspension and/or decertification. . . . In addition, the NPGOP will inform an observer’s employer who, as a condition of their employment, may require the observer [to] submit to a drug test. These individuals may also be referred to the appropriate enforcement agency for prosecution.

Reasonably read, the statement in the IAD that “there is adequate evidence indicating a possible violation of the standards of observer conduct” can be construed as a finding of probable cause that Mr. Dobbs violated the standards of observer conduct.²³ There are, however, several serious shortcomings with this finding, with the evidence supporting it, and with the suspension / decertification officer’s consideration of the evidence.

First, in making the finding of probable cause, the IAD does not identify whether this is a case of

²³“The ‘adequate evidence’ showing . . . may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing.” Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972), *quoted in* Sloan v. Department of Housing & Urban Development, 231 F.3d 10, 16 (D.C. Cir. 2000).

willfulness, public health, public interest, or public safety. When invoking the willfulness exception, for example, the IAD should describe how the evidence shows that the alleged violation of the standards of conduct was intentional or was committed with careless disregard of the standards.

Second, the IAD does not articulate why the alleged violation necessitated an immediate imposition of the suspension. The IAD does not explain, for example, how allowing Mr. Dobbs to continue working as an observer during the continuation of the investigation would jeopardize public health, public safety, or the public interest.

Third, there is no indication in the IAD that the suspension / decertification officer evaluated the quality and sufficiency of the evidence, and made an independent judgment that suspension was warranted and that immediate imposition of the suspension was justified. The IAD cites Moser's "documentation" as the only evidence supporting the suspension. Mr. Moser's memorandum asserts that Mr. Dobbs admitted to NMFS enforcement agents that he smoked marijuana.²⁴ It appears from the IAD that the suspension / decertification officer blindly accepted this allegation.

Evaluation of the evidence relied on to support the suspension

Ms. Weikart testified that she based the IAD and her decision to suspend Mr. Dobbs's certificate solely on John Moser's March 26, 2003, memorandum.²⁵ Mr. Moser, in turn, testified that, in compiling his memorandum, he relied entirely on a conversation he had with NMFS Special Agent Mark Kirkland and on a rough draft of a report of NFMS Special Agent Kenneth Henline's March 19, 2003, interview with Mr. Dobbs, which he said Agent Kirkland supplied to him.²⁶ Neither the rough draft nor a record of the conversation with Agent Kirkland are in the administrative record. Therefore, I cannot consider that evidence.

Even if the rough draft of Agent Henline's interview had been placed in the record, Mr. Moser testified that he did not share this rough draft with Ms. Weikart, and does not recall discussing it with her.²⁷ Ms. Weikart testified that she did not see any written report about Agent Henline's interview of Mr. Dobbs before she issued the IAD.²⁸ In addition, neither the rough draft of the Henline interview nor the conversation between Agent Kirkland and Mr. Moser are mentioned in Mr. Moser's memorandum or in the IAD. Therefore, it is clear that Ms. Weikart did not rely on

²⁴Moser memorandum, March 26, 2003, at 1.

²⁵Hearing, at tape 1A/578-584.

²⁶Hearing, at tape 1B/75-95.

²⁷Hearing, at tape 1B/130-134.

²⁸Hearing, at tape 1B/33-38.

this evidence, or even consider it, when she issued the IAD.

Mr. Moser stated that Ms. Weikart never asked him how he knew about Mr. Dobbs's alleged admission of marijuana smoking. Rather, Mr. Moser testified that he only discussed the matter briefly with Ms. Weikart before she issued the IAD; that he told her the admission was his finding and was the reason for requesting suspension; and that she did not ask him for any more details about the admission.²⁹

Mr. Moser's memorandum cites an "AED Report" as the source of his information about Mr. Dobbs's alleged admission.³⁰ Mr. Moser testified, however, that the AED Report had not yet been written at the time he wrote the memorandum.³¹ He testified that "AED Report" actually referred to NMFS Agent Mark Kirkland's preliminary investigation report of March 19, 2003.³² Nonetheless, that was not, in fact, the basis for Mr. Moser's recommendation. Ms. Weikart stated in a letter to Mr. Dobbs's lawyer that she had received the Kirkland report on March 21, 2003 and had considered it when deciding to issue the IAD.³³ As previously mentioned, however, Ms. Weikart testified that she relied entirely on Mr. Moser's memorandum. Thus, I find that Agent Kirkland's preliminary report was not a basis for Mr. Moser's recommendation or for the IAD, and I give it no weight in my consideration of this appeal.

I find by a preponderance of the evidence in the record that Mr. Moser's memorandum itself was the only evidence that Ms. Weikart relied on as a basis for issuing the IAD and suspending Mr. Dobbs's certificate. Mr. Moser's memorandum is not a first-hand account or observation of what Mr. Dobbs is alleged to have told Agent Henline. Mr. Moser testified that he did not speak with Agent Henline about Mr. Dobbs or the interview before issuing his recommendation to suspend.³⁴ The record contains no evidence that these alleged statements by Mr. Dobbs were recorded on audio or video tape, or that they were reduced to writing and signed by him. In addition, it appears from the absence of evidence in the record that no illegal drugs were seized in this case; no drug tests showing positive results were produced; no drug use, distribution, or possession was observed by enforcement agents.

Standing alone, the alleged statements by Mr. Dobbs mentioned in Mr. Moser's memorandum do not constitute the substantial, reliable evidence necessary to support a finding of probable cause that Mr. Dobbs committed the violation alleged. I conclude that the suspension of Mr. Dobbs's

²⁹Hearing, at tape 1B/137-143.

³⁰Moser memorandum, March 26, 2003, at 1, n. 1.

³¹Hearing, at tape 1B/84-85

³²Hearing, at tape 1B/252-253.

³³Heather Weikart letter to Suzanne Taylor, July 2, 2003.

³⁴Hearing, at tape 1B/240-245.

observer certificate was not warranted by the evidence relied upon by the suspension / decertification officer. Therefore, the suspension was invalid and must be terminated.

C. Notice and opportunity to respond under the Due Process Clause

As discussed recently in the Regional Administrator's Decision on Review in the Jesse Agee appeal,³⁵ the Constitutional requirements of procedural due process must also be met before suspension or decertification of an observer certificate can be made effective prior to final agency action. The United States Supreme Court has established 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.³⁶

In this case, as in Jesse T. Agee, the private interest involved is clearly substantial. Suspension of Mr. Dobbs's observer certificate prevents him from working as an observer in the NPGOP. The Regional Administrator has stated that, even if successful on appeal, an observer cannot be compensated for lost employment opportunities suffered between the issuance of the IAD and the final resolution of the appeal by this office.³⁷

The risk of erroneous deprivation is of particular concern in this case. The decision to suspend Mr. Dobbs's certificate was based solely on allegations in Mr. Moser's memorandum, which were not supported by any hard evidence. Rather, they were based on hearsay statements that are not in the record and were not reviewed by the suspension / decertification officer.

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 . . . is deemed too high and a fully adversarial pre-deprivation hearing is required.³⁸

³⁵In re the suspension of certification of Jesse T. Agee, Decision on Review, Appeal No. 03-0013, October 7, 2003. [The Decision on Review was erroneously labeled Appeal No. 95-0012.]

³⁶Mathews v. Eldridge, 424 U.S. at 334-335.

³⁷Jesse T. Agee, Decision on Review, *supra*, at 3.

³⁸*Ibid.*

Although the alleged drug use was susceptible to reasonably precise measurement by external standards, no drug tests supporting the allegation were produced or relied on by the NPGOP. In contrast, Mr. Dobbs submitted with his appeal a report of a privately administered drug test that shows negative results for marijuana and other drug use as of April 22, 2003, approximately seven weeks after the alleged drug use. This evidence, although not conclusive, highlights the lack of objective evidence supporting the allegation. Under these circumstances, the risk of error by imposing suspension without first allowing Mr. Dobbs to respond to the allegation was considerable.

Finally, as previously discussed, the NPGOP's interest in imposing an immediate suspension was not identified or articulated in the IAD. Balancing the government's interest against the private interest and the risk of erroneous deprivation in this case, I conclude that the process provided to Mr. Dobbs by the NPGOP did not meet the requirements of due process. Therefore, I conclude that the suspension was invalid and must be terminated.

FINDINGS OF FACT

1. Mr. Dobbs was not given prior notice of the suspension and an opportunity to challenge the suspension, or the evidence on which it was based, before the IAD was issued or before the suspension took effect.
2. Mr. Dobbs has been unemployed as an observer during the 60-day appeal filing period following issuance of the IAD and through the pendency of the appeal.
3. The statement in the IAD that "there is adequate evidence indicating a possible violation of the standards of observer conduct" is a finding of probable cause that Mr. Dobbs violated the standards of observer conduct.
4. In making the finding of probable cause, the IAD does not identify whether this is a case of willfulness, public health, public interest, or public safety.
5. The IAD does not articulate why the alleged violation necessitated an immediate imposition of the suspension of Mr. Dobbs's observer certificate.
6. The suspension / decertification officer did not adequately evaluate the quality and sufficiency of the evidence, and did not make an independent judgment that suspension was warranted and that immediate imposition of the suspension was justified.
7. Agent Kirkland's preliminary report was not a basis for Mr. Moser's recommendation or for the IAD.
8. Mr. Moser's memorandum itself was the only evidence that Ms. Weikart relied on as a basis for issuing the IAD and suspending Mr. Dobbs's certificate.

9. The alleged statements by Mr. Dobbs mentioned in Mr. Moser's memorandum do not constitute the substantial, reliable evidence necessary to support a finding of probable cause that Mr. Dobbs committed the violation alleged.

CONCLUSIONS OF LAW

1. An observer certificate is a "property" interest for due process purposes.
2. An agency may not impose even a temporary suspension without providing the "core requirements" of due process: adequate notice and a meaningful hearing.
3. Procedural due process is a flexible concept, and the type of hearing or opportunity to respond that must be provided before the deprivation of a protected property interest varies depending on the type of case and interest involved.
4. An observer certificate is a license under the APA, and its suspension or decertification constitutes a suspension or revocation of a license that is governed by section 558(c).
5. The suspension / decertification officer must give an observer notice and opportunity to respond to a *proposed* suspension or decertification before determining whether the suspension or decertification is warranted, before issuing an IAD, and before giving effect to the suspension or decertification.
6. The suspension / decertification officer need not provide a full evidentiary hearing to the observer, but must allow the observer to submit documents or written statements that show mitigating circumstances or that tend to refute the evidence on which the proposed suspension or decertification is based.
7. Because Mr. Dobbs was not given prior notice and opportunity to respond before the issuance of the IAD, as specified in the NPGOP final rule, the IAD was not properly issued and, therefore, the suspension was not properly imposed and must be terminated.
8. Giving immediate effect to a suspension or decertification, or delaying the notice and opportunity to respond, are extraordinary measures that are not to be taken routinely or automatically. The use of such measures is limited to unusual, emergency situations that necessitate quickly removing a person from working as an observer.
9. To invoke the APA exceptions to the usual rule of prior notice and opportunity to respond, the suspension / decertification officer must articulate the need for immediate action; identify the type of case(s) involved; and make a finding of probable cause, based on substantial evidence, that the observer committed the violations alleged.
10. The suspension / decertification officer must make an independent judgment when deciding whether to suspend or decertify, and whether to give immediate effect to the suspension or

decertification.

11. The suspension of Mr. Dobbs's observer certificate was not warranted by the evidence relied upon by the suspension / decertification officer. Therefore, the suspension was invalid and must be terminated.

12. The Constitutional requirements of procedural due process must be met before suspension or decertification of an observer certificate can be made effective prior to final agency action.

13. The process provided to Mr. Dobbs by the NPGOP did not meet the requirements of due process. Therefore, I conclude that the suspension was invalid and must be terminated.

DISPOSITION AND ORDER

The IAD that suspended the observer certification of Eric N. Dobbs is REVERSED and the suspension is terminated. The North Pacific Groundfish Observer Program is ORDERED to reinstate Eric N. Dobbs's certification as an observer under the NPGOP. This Decision takes effect November 24, 2003, unless by that date the Regional Administrator orders review of this Decision.

The Appellant or the NPGOP may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, November 3, 2003. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Edward H. Hein
Chief Appeals Officer