

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re the suspension of certification of)
)
JESSE T. AGEE,) Appeal No. 03-0013
Appellant)
) DECISION
)
) September 26, 2003
)
_____)

STATEMENT OF THE CASE

Jessie T. Agee filed a timely appeal of an Initial Administrative Determination (IAD) issued by NMFS's North Pacific Groundfish Observer Program (NPGOP) on April 21, 2003. The IAD suspended Ms. Agee's certification as an observer under the program on the grounds that she was alleged to have admitted to investigating officers of the NMFS Alaska Enforcement Division that, while serving as an observer from January 18, 2003, to March 24, 2003, she had hosted two parties at her apartment at which marijuana was smoked and that she herself smoked marijuana at one of the parties. The IAD stated that if the allegations were correct, Ms. Agee'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.

Ms. Agee can appeal the IAD because it directly and adversely affects her interests.³ An oral telephonic hearing was held in this matter on August 13, 2003, from Juneau, Alaska. Ms. Agee testified from Helena, Montana, and was represented by her 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 John Moser, a fishery biologist/compliance liaison with the NPGOP.

ISSUE

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

SUMMARY

The IAD is REVERSED. The Appeals Officer concluded that because Ms. Agee was not given

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).

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 Ms. Agee'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.

ANALYSIS

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

Jesse Agee was a certified observer in the NPGOP from August 1999 until her certificate was suspended on April 21, 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, Ms. Agee cannot work as an observer in the NPGOP.

The NPGOP suspension / decertification official notified Ms. Agee through the IAD that her observer certification was immediately suspended. Ms. Agee 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, Ms. Agee 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 Ms. Agee 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 her 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).⁴

The Fifth Amendment provides, in pertinent part, that "No person . . . shall be deprived of life, 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."⁵ A license to pursue one's livelihood, such as an observer certificate, is a "property" interest for due process purposes.⁶ The Supreme Court has stated:

⁴5 U.S.C. §551 et seq.

⁵Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

⁶*See, e.g., Barry v. Barchi*, 443 U.S. 55, 64 (1979); Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1380 (9th Cir. 1989).

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.”⁷

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.⁸

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 lawful requirements.⁹

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.”¹⁰ 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).

⁷Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (internal citations omitted).

⁸Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 6 (D.C. Cir. 1998).

⁹5 U.S.C. §558(c).

¹⁰5 U.S.C. §551(8).

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.¹¹

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,¹² 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 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].¹³

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

¹¹50 C.F.R. §679.50(j)(3)(iii).

¹²Final Rule, 67 Fed. Reg. 72,595 - 72,617 (December 6, 2002).

¹³*Id.* at 72,599.

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”¹⁴

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.

The record in this case contains no evidence that *any* prior notice and opportunity to respond was given to Ms. Agee 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 Ms. Agee 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.

¹⁴50 C.F.R. §679.50(j)(3)(iii).

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 situations¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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 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.”¹⁹

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

The North Pacific Groundfish Observer Program (NPGOP) has carefully considered the documentation submitted by NPGOP staff, John Moser. . . .

¹⁵Air North America v. Department of Transportation, 937 F.2d 1427, 1437 (9th Cir. 1991).

¹⁶Potato 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).

¹⁷Anchustegui v. Department of Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001); Barry v. Barchi, 443 U.S. 55, 64-65 (1979).

¹⁸*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.”)

¹⁹Former 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.

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)²⁰

* * *

Moser's documentation (see enclosures) alleges that, during the cruise, you hosted two parties at your apartment at the ALYESKA SEAFOODS facility where marijuana was smoked. Additionally, you admitted to smoking marijuana at the party on February 14, 2003. At this time you were deployed to ALYESKA SEAFOODS and subject to the drug policy of the North Pacific Groundfish Observer Program (see enclosure).

* * *

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.²¹

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:

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:

²⁰IAD at 1.

²¹The 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.

- (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 Ms. Agee violated the standards of observer conduct.²² 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 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 Ms. Agee to continue working as an observer during the continuation of the investigation would jeopardize

²²“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).

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 Ms. Agee admitted to NMFS enforcement agents that marijuana was present at two parties at her apartment and that she smoked marijuana at one of the parties.²³ It appears from the IAD that the suspension / decertification officer blindly accepted these allegations.

Evaluation of the evidence relied on to support the suspension

Mr. Moser testified at the hearing that in compiling his memorandum, he relied on the March 19, 2003, preliminary investigation report by NMFS Special Agent Mark Kirkland. [Hearing, at tape 2A/235-236] I find credible Mr. Moser's testimony that the "AED Report" listed as a source document in footnote 1 of his memorandum was actually Agent Kirkland's preliminary report. [Hearing, at tape 2A/236-271] Mr. Moser also testified that he relied on personal conversations he had with Agent Kirkland about the investigation, [Hearing, at tape 2A/227] but there is no record of any such conversations in the administrative record, so I cannot consider that evidence. Mr. Moser also testified that he relied on reports of the interviews with Ms. Agee written by Agent Henline, and a copy of the e-mail letter Ms. Agee wrote to Agent Henline. [Hearing, at tape 2A/228-330] These documents are not in the record, they are not referenced in the IAD, and there is no evidence in the record that the suspension / decertification officer read them or relied on them in making her determination to suspend Ms. Agee. Therefore, I cannot consider them.

Ms. Weikart stated in a letter to Ms. Agee's lawyer that she had received the Kirkland report on March 21, 2003 and had considered it when deciding to issue the IAD.²⁴ She stated that she did not have the report in front of her when she wrote the IAD, but she said it was an additional source of information that supported the Moser memorandum. She said that she had the Kirkland report in mind at that time she wrote the IAD, but she did not identify anything specific about Ms. Agee from the report that she remembered or relied on. [Hearing, at tape 1B/975-988]

Agent Kirkland's preliminary report states that it is "based on information received via telephone and fax from the Dutch Harbor Enforcement Office."²⁵ There are no source documents, notes, or other evidence in the administrative record that provide any verification of the statements in the Kirkland report. There is no evidence that Agent Kirkland ever interviewed Ms. Agee or spoke to her before compiling his report.

²³*Id.*, at 1.

²⁴Heather Weikart letter to Suzanne Taylor, July 2, 2003.

²⁵Mark Kirkland report, at 1.

Kirkland's report states that Ms. Agee was interviewed on March 17, 2003, by Agent Ernie Soper and Agent Kenneth Henline. The report asserts that Ms. Agee stated "in substance" that she had smoked marijuana at a party at her apartment on March 1, 2003. It asserts that she identified the person who supplied the marijuana and several of the persons who attended the party. The report states that on March 18, 2003, Ms. Agee changed her statement to say that there was marijuana present at the March 1 party, and that she did not smoke marijuana on that occasion, but did do so at the February 14 party. The report does not state that Ms. Agee said that anyone else used marijuana at her apartment. It does not assert that Ms. Agee arranged to have the marijuana at the parties or whether she knew at the time that there was, or would be, marijuana at her apartment.

The fact that Mr. Moser's memorandum is a reasonably accurate summary of portions of the Kirkland report does not add to the weight or credibility of either document. Neither of these documents constitute first-hand accounts or observations of what Ms. Agee is alleged to have told Agents Soper and Henline. There are no reports by Agents Soper or Henline in the administrative record. Taken together, the evidence relied on by the suspension / decertification officer in support of the suspension amounts to the following: Mr. Moser said that Agent Kirkland said that Agents Soper and Henline said that Ms. Agee said she smoked marijuana and that marijuana was present at her apartment on two occasions. This constitutes third-hand hearsay concerning unsworn admissions alleged to have been made by Ms. Agee. Likewise, descriptions in Agent Kirkland's report of alleged statements by Adin Nelson, Darrel Edson, and Lorna Cameron that marijuana was smoked at Agee's apartment and that Agee was present, are also multiple hearsay.

The record contains no evidence that these alleged statements were recorded on audio or video tape, or that they were reduced to writing and signed by the declarants. Such allegations are too attenuated, in my judgment, to be reliable. Yet these alleged statements comprise the NPGOP's only evidence in support of suspension. It appears from the absence of evidence in the record that no illegal drugs were seized; no drug tests showing positive results were produced; no drug use, distribution, or possession was observed by enforcement agents. The record contains no independent evidence establishing the trustworthiness of the declarants' unsworn, extrajudicial statements.

Standing alone, the alleged statements by Ms. Agee and the others described in Agent Kirkland's report do not constitute the substantial, reliable evidence necessary to support a finding of probable cause that Ms. Agee committed the violations alleged. I conclude that the suspension of Ms. Agee'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.

FINDINGS OF FACT

1. Ms. Agee 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. Ms. Agee 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 Ms. Agee 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 Ms. Agee’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. The “AED Report” listed as a source document in footnote 1 of John Moser’s memorandum was actually Agent Kirkland’s preliminary report.
8. The alleged statements by Ms. Agee and the others in Agent Kirkland’s report do not constitute the substantial, reliable evidence necessary to support a finding of probable cause that Ms. Agee committed the violations 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 Ms. Agee 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 Ms. Agee'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.

DISPOSITION AND ORDER

The IAD that suspended the observer certification of Jesse T. Agee is REVERSED and the suspension is terminated. The North Pacific Groundfish Observer Program is ORDERED to reinstate Jesse T. Agee's certification as an observer under the NPGOP. This Decision takes effect October 27, 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, October 6, 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