

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 05-0001
	)	
MICHEL DUTEAU,	)	DECISION
Appellant	)	
	)	February 2, 2005
_____	)	

STATEMENT OF THE CASE

Michel Duteau appeals an Initial Administrative Determination [IAD] issued by NMFS's North Pacific Groundfish Observer Program [NPGOP] on January 19, 2005.<sup>1</sup> Michel Duteau took the three-week observer training certification course in Anchorage, Alaska from December 27, 2004 to January 14, 2005. Mr. Duteau appeals the determination in the IAD that he can never retake the observer training course because he did not pass either of two domestic finfish identification tests he took in the third week of the course.

Mr. Duteau can appeal the IAD because it directly and adversely affects his interests.<sup>2</sup> The record has sufficient information for me to decide this appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and decide Mr. Duteau's appeal.

SUMMARY

The IAD is vacated. If the NPGOP determines that a candidate for observer certification cannot retake observer training, the certification official must make a determination that the candidate has unresolvable deficiencies in meeting the requirements for observer certification and must provide the basis for that determination. The IAD did not contain such a determination.

ISSUES

Was the IAD properly issued and was Mr. Duteau properly denied the opportunity to retake the observer certification training course?

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<sup>1</sup> The IAD is in the form of a letter to Mr. Duteau from Jennifer Ferdinand, Certification Official, NPGOP. The NPGOP regulations are at 50 C.F.R. § 679.50, which are available on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>.

<sup>2</sup> 50 C.F.R. § 679.43(b)

## ANALYSIS

I will initially state the facts, which are undisputed. Michel Duteau took a three week observer certification training course in Anchorage from December 27, 2004 to January 14, 2005. A passing score on any test administered in the course is 75. On January 11, 2005, Mr. Duteau received a score of 71 on a domestic finfish identification exam. He identified 4 out of 14 species incorrectly. Because he did not pass that test, Mr. Duteau was given a second finfish identification test on January 14, 2005. He received a score of 70, misidentifying 3 out of 10 species.

The IAD states that, at the beginning of the course, Mr. Duteau was notified that, to meet the training standards for certification as an observer, he had to score 75% or above on all exams. Mr. Duteau does not dispute that he received such a notice and that he did not, in fact, pass either finfish identification test.<sup>3</sup> But Mr. Duteau wishes to take the observer certification training course again and the IAD stated that he cannot do so. According to the certification official who issued the IAD, NPGOP has another observer certification course scheduled to start February 7, 2005 and one tentatively scheduled for June 2005.<sup>4</sup> The certification official stated that, based on an internal policy, it was NPGOP's position that Mr. Duteau could never retake the course.<sup>5</sup>

It appears that Mr. Duteau completed all other aspects of the course satisfactorily and passed all other tests he took in the course.<sup>6</sup> These include an exam for math proficiency, crab identification, use of keys and field guides and two observer manual exams.<sup>7</sup> It also appears that, apart from the course, Mr. Duteau completed all other requirements for observer certification.<sup>8</sup> These include a resume, academic transcript, educational requirements, physical examination and a sworn statement regarding criminal convictions.<sup>9</sup>

I conclude that the IAD does not meet the standards in the NPGOP regulations and therefore

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<sup>3</sup> Notice at 1 [Exhibit 1]. Mr. Duteau received and signed this notice on December 28, 2004. The Notice also states that the course "cannot be retaken if the trainee fails to demonstrate to the trainer their understanding of the concepts, behavior, and skills required to be a NMFS groundfish observer."

<sup>4</sup> Memorandum to File (Feb. 2, 2005).

<sup>5</sup> *Id.*

<sup>6</sup> Statement by Michel Duteau (Jan. 22, 2005). The IAD did not identify any other problem with Mr. Duteau's performance.

<sup>7</sup> Notice at 2 [Exhibit 1].

<sup>8</sup> Statement by Michel Duteau (Jan. 22, 2005). The IAD did not identify any other problem with Mr. Duteau's performance.

<sup>9</sup> 50 C.F.R. § 679.50(j)(B)(2).

must be vacated. The NPGOP regulations provide at 50 C.F.R. § 679.50(j)(1)(B)(4)(ii):

If a candidate fails training, he or she will be verbally notified of the unsatisfactory status of his or her training on or before the last day of training. Within 10- business days of the verbal notification, the observer candidate will be notified in writing. **The written notification will indicate why the candidate failed the training; whether the candidate can retake the training. If a determination is made that the candidate may not pursue further training, notification will be in the form of an IAD denying certification, as specified under paragraph (j)(1)(iv)(A) of this section.** [emphasis added]

That regulation – 50 C.F.R. § 679.50(j)(1)(iv)(A) – provides:

(A) Denial of a certification. The NMFS observer certification official will issue a written IAD denying observer certification **when the observer-certification official determines that a candidate has unresolvable deficiencies in meeting the requirements for certification as specified in paragraph (j)(1)(iii) of this section.** The IAD will identify the reasons certification was denied and what requirements were deficient. [emphasis added]<sup>10</sup>

When NMFS published the NPGOP regulations for notice and comment, a member of the public asked NMFS to clarify the criteria for when a candidate could retake the class if the candidate failed training. NMFS responded as follows:

Comment 14: Under the proposed regulation change an observer candidate will be notified whether he or she will be allowed to retake the training class should he or she fail training. We request that NMFS clarify the criteria for applicants retaking the NMFS training class.

Response: Historically, NMFS has not allowed candidates to retake training if they failed the NMFS certification training. NMFS has allowed candidates to retake training if they withdrew from training to address personal issues that developed during the course of the training or to address deficiencies noted prior to the end of training. NMFS will continue to allow candidates who meet the two conditions noted above to retake training. **Outside of those conditions, candidates may fail for a host of reasons ranging from behavior problems to lack of technical skills. For this reason, each observer candidate must be evaluated on a case-by-case basis taking into account the reasons behind their failure.** Regardless of whether NMFS decides an observer can or cannot retake the certification training, NMFS' decision can be appealed under the

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<sup>10</sup> Although the regulation refers to deficiencies, I do not conclude the regulation is drawing a distinction between a deficiency or deficiencies. An IAD may identify a single deficiency as the basis for denying a candidate the opportunity to retake the course.

new regulations.[emphasis added]<sup>11</sup>

On appeal, Mr. Duteau offered a detailed explanation why he failed the tests – which he failed by identification of one fish each time – and why he believed that he could pass the identification test if he could try again.<sup>12</sup> He also described what actions he had taken, apart from seeking to retake the course and the test, to remedy his deficiencies in species identification.<sup>13</sup> The IAD did not address whether Mr. Duteau deficiencies are unresolvable and, if so, the basis for that determination.

I conclude that when an IAD states that an applicant can not retake the observer training certification course, the certification official must determine whether the candidate has unresolvable deficiencies and provide the basis for the determination. I therefore conclude that the IAD was not properly issued and that Mr. Duteau was not properly denied the opportunity to retake the observer certification training course.

#### FINDING OF FACT

The certification official did not include in the IAD a determination that Mr. Duteau's deficiency or deficiencies are unresolvable.

#### CONCLUSIONS OF LAW

1. An IAD that denies a candidate for observer certification the opportunity to retake the observer training certification course must include a determination by the certification official that the candidate's deficiencies are unresolvable and provide the basis for the determination.
2. The IAD was not properly issued and Mr. Duteau was not properly denied the opportunity to retake the observer certification training course.

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<sup>11</sup> Supplementary Information, Final Rule, 67 Fed. Reg. 72,595, 72,601 (Dec. 6, 2002). Ms. Ferdinand provided me with a Memorandum from William Karp, Program Leader, NPGOP, June 24, 1999, to Observer Program Contractors that a candidate who fails a species I.D. exam twice could not retake the training course. This memo predates the current regulation, which was adopted in 2002 and changed the procedure for observer certification.

<sup>12</sup> Statement of Michel Duteau (Jan. 22, 2005). Mr. Duteau is a Canadian citizen and, except for one semester in 2004 in Denmark, has conducted his academic studies in French. He states that he was familiar with the French names for these fish but not the English names. I am providing NPGOP a copy of Mr. Duteau's statement with this Decision.

<sup>13</sup> *Id.* Among other things, Mr. Duteau states that he has translated every species name in the Observer Sampling Manual and has looked up every fish species in the manual and in the Peterson Field Guide to Pacific Coast Fishes to cross check specific characteristics of species and create a clear image of each species in his mind.

## DISPOSITION

The IAD is VACATED and the IAD may not be an impediment to Mr. Duteau retaking the observer training certification course. This Decision takes effect March 4, 2005, unless the Regional Administrator orders a different effective date pursuant to 50 C.F.R. § 679.43(o).

The Appellant or 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, February 13, 2005. 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 in support of the motion.

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Mary Alice McKeen  
Appeals Officer