

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re the application of) Appeal No. 05-0008
)
MARY DOE,¹) DECISION
Appellant.)
) October 31, 2006
_____)

STATEMENT OF THE CASE

Ms. Doe filed a timely appeal of an Initial Administrative Determination [IAD], dated August 17, 2005, issued by the North Pacific Groundfish Observer Program [NPGOP].²

The IAD denied Ms. Doe certification as an observer because she did not meet written standards issued at the start of a three-week observer training class and therefore did not meet the requirements for observer certification in 50 C.F.R. § 679.50(j)(1)(iii)(B)(4)(i). The IAD further stated that NPGOP would not allow Ms. Doe to retake the class because NPGOP concluded that Ms. Doe had unresolvable deficiencies in meeting the requirements for observer certification, within the meaning of 50 C.F.R. § 679.50(j)(1)(iv)(A).

Ms. Doe took observer training from July 18 to August 5, 2005. She failed the final examination with a score of 64%. The written standard is that trainees must pass all examinations with a score of 75% or better.³ Ms. Doe stated that she failed the exam because she was sick, not because she had unresolvable deficiencies, and asked NPGOP to reconsider its decision that she could not retake the class.⁴ NPGOP maintained its decision. NPGOP stated that trainees had the right to withdraw from the class; that Ms. Doe knew of her right to withdraw; that Ms. Doe chose to take the final exam rather than withdraw from the class; and that Ms. Doe's illness did not explain her poor performance throughout the class.⁵ Ms. Doe stated that she did not know she could withdraw from the class, and would have done so, had she known.⁶

¹ Mary Doe is a fictitious name to protect the privacy of the Appellant. The NPGOP is represented by Tom Meyer, NOAA Office of General Counsel. Ms. Doe represented herself.

² The NPGOP regulations are at 50 C.F.R. § 679.50. All NPGOP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/default.htm>

³ Ms. Doe's final exam is Document 14 in the NPGOP Administrative Record. The written standards issued at the beginning of Ms. Doe's class are Document 1.

⁴ Letter from Mary Doe to Jennifer Ferdinand (Aug. 31, 2005) [Document 17].

⁵ Letter from Jennifer Ferdinand to Mary Doe (Oct. 4, 2005) [Document 24].

⁶ Letter from Mary Doe to Office of Administrative Appeals (Sept. 7, 2005).

In response to written questions, NPGOP stated that NPGOP policy was that NPGOP gives trainees the option of withdrawing from the training at any time and retaking the class and that the NPGOP notified Ms. Doe's class, and Ms. Doe individually, of that right.⁷ I held a hearing on July 31, 2006, to determine whether NPGOP notified Ms. Doe that she could withdraw from the training class and retake it.⁸

Ms. Doe can appeal the IAD because it directly and adversely affects her interests, as required by 50 C.F.R. § 679.43(b). I conclude that the record has sufficient information for me to reach a decision and that all procedural requirements have been met, as required by 50 C.F.R. §679.43(k). I therefore close the record and issue this decision on Ms. Doe's appeal.

SUMMARY

The IAD is VACATED. I conclude that NPGOP did not prove, by a preponderance of the evidence in the record, that it notified Ms. Doe that she could withdraw from the observer training class and retake the class. I find that Ms. Doe would have withdrawn from observer training before taking the final exam, if she had known that she could withdraw and retake it. Ms. Doe should be treated as having withdrawn in good standing from observer training.

I emphasize that this Decision only removes the IAD as a barrier to Ms. Doe retaking the observer training class. For Ms. Doe to become an observer in the North Pacific Groundfish Observer Program, she still must take and pass the observer training course and meet every other standard specified in federal regulation for observer certification.

I do not decide whether Ms. Doe violated any other written standards since I have concluded that she should be treated as having withdrawn from the class and since NPGOP stated that Ms. Doe could have withdrawn from the class, notwithstanding any other alleged problems. I do decide that NPGOP did not abuse its discretion in declining to consider Ms. Doe's performance as an observer in other observer programs because that is purely a legal issue and is likely to recur.

ISSUES

1. Did NPGOP prove, by a preponderance of evidence in the record, that it notified Ms. Doe that she could withdraw from the observer training class and retake it?
2. In evaluating whether a trainee has unresolvable deficiencies, does the NPGOP abuse its discretion by not considering a trainee's performance in other observer programs?

⁷ NPGOP Certification Official's Responses to January 26, 2006 Order's "First Questions Directed to NPGOP," at 3 - 4 (March 15, 2006) [Document 39].

⁸ Order Requiring Oral Hearing and Addressing Prehearing Matters (June 27, 2006); Order Scheduling Oral Hearing and Addressing Additional Prehearing Matters (July 12, 2006).

ANALYSIS

1. Did NPGOP prove, by a preponderance of evidence in the record, that it notified Ms. Doe that she could withdraw from the observer training class and retake it?

A. NPGOP policy on withdrawal from the training class.

NPGOP states that, when Ms. Doe took the training course, NPGOP policy was that a trainee could withdraw from the class, and retake the class, if the trainee was in good standing when the trainee withdrew.⁹ I have three observations about this policy. First, NPGOP declined to put it in writing, when it adopted new Observer Program regulations in 2002.¹⁰ Second, NPGOP sometimes states the requirement that a trainee be “in good standing” as that the trainee be “in passing status.”¹¹ For this appeal, this is a minor difference which I have resolved by interpreting “in good standing” to mean the same thing as “in passing status.”

Third, when NPGOP has stated its withdrawal policy, it has not consistently added the requirement that the trainee must be “in good standing” when the trainee withdraws.¹² This is a bigger problem because, as this appeal shows, if a trainee becomes ill during the course, it is not apparent how to judge, and when to judge, whether the trainee is in “in good standing” or “in passing status.” With those reservations, I find that, when Ms. Doe took the training course, NPGOP policy was that a trainee could withdraw from the class, and retake the class, if the trainee was in good standing when the trainee withdrew.

⁹ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 350 - 366. All references to Hearing are to the hearing I conducted on this appeal on July 31, 2006.

¹⁰ Final Rule, 67 Fed. Reg. 72,595, 72,603 (Dec. 6, 2002).

¹¹ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 350 - 366; Lesson Plan [Document 1].

¹² Letter from Jennifer Ferdinand to Mary Doe at 5 (Oct. 4, 2005)(“All trainees are given the option of withdrawing from the job training at any time.”) [Document 24]; NPGOP Certification Official’s Responses to January 26, 2006’s Order’s “First Questions Directed to NPGOP” at 4 (March 15, 2006) (Ms. Ferdinand’s letter “accurately states the NPGOP policy on when observers can withdraw and retake the class.”) [Document 39]; NPGOP Response to January 26, 2006, Order Addressing Preliminary Matters at 4 (March 15, 2006)(“It is NPGOP policy to excuse observer trainees from training because of an illness that prevents completion [sic] the class. The observer may reschedule and re-enter another full training course.”) [Document 38]; Final Rule, 67 Fed. Reg. 72,595, 72,602 (Dec. 6, 2002)(“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.”)

When Ms. Doe took the training class in July 2005, NPGOP gave trainees written standards.¹³ The written standards given to Ms. Doe did not refer at all to a trainee withdrawing and retaking the class. Since this appeal began, NPGOP put its withdrawal policy in the written Training Standards that trainees receive, and sign, at the beginning of each training course. The Training Standards now state:

If you determine that you will not be able to meet these standards, you may drop out of the training with no penalty from NMFS. You must be in a passing status to exercise this option. If you choose to leave the training, you must retake the course in its entirety and meet all standards in order to be certified.
[Document 43].

The reference to dropping out of the training “with no penalty from NMFS” requires explanation. NPGOP does not select or hire the persons who take the training class, who are called observer candidates or observer trainees. Observer trainees are supplied to NMFS by an observer provider.¹⁴ The observer provider company hires the trainees and makes sure that a trainee meets specific science-related academic requirements,¹⁵ has particular computer skills,¹⁶ submits a written statement with the trainee’s criminal convictions,¹⁷ and submits a statement from a physician who has examined the trainee and who states that the trainee can safely perform the work of an observer.¹⁸

The written Training Standard now tells trainees that if a trainee withdraws from the class, NMFS *will* allow the trainee to retake the class and *will not penalize* the trainee for withdrawing from the class. It is up to the trainee’s employer – the observer provider company – and the trainee to decide whether the trainee can try again.

NPGOP’s treatment of trainees who withdraw from the class contrasts with trainees who fail the class. According to federal regulation, if a trainee fails the class, NMFS excludes the trainee

¹³ A trainee can be denied certification only if the trainee does not meet standards issued in writing at the start of training. 50 C.F.R. § 679.50(j)(1)(iii)(B)(4)(i); 50 C.F.R. § 679.50(j)(1)(iv)(A).

¹⁴ 50 C.F.R. § 679.50(i)(2)(i); Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 350 - 366. Ms. Ferdinand referred to Ms. Doe as being “sponsored” by an observer provider company. The observer provider company itself must obtain an observer provider permit. 50 C.F.R. § 679.50(i)(1).

¹⁵ 50 C.F.R. § 679.50(i)(2)(i)(A)(1) - (3); 50 C.F.R. § 679.50(i)(2)(x)(A)(1)(iii).

¹⁶ 50 C.F.R. § 679.50(i)(2)(i)(A)(4).

¹⁷ 50 C.F.R. § 679.50(i)(2)(x)(A)(1)(iv).

¹⁸ 50 C.F.R. § 679.50(i)(2)(x)(C). The observer provider submitted a physician’s statement on Ms. Doe’s fitness to be an observer, which included that Ms. Doe had received outpatient treatment for migraines. [Document 19]

from retaking the class if the NPGOP certification official concludes that the trainee has unresolvable deficiencies in meeting the requirements for observer certification.¹⁹ Unlike the trainee who withdraws from the class, NMFS examines the performance of the trainee who fails the class and makes a case-by-case determination whether NMFS will allow the trainee to try again and retake the class.²⁰

B. Does Ms. Doe have a defense to her failure to withdraw from the observer training course if NPGOP did not notify Ms. Doe she could withdraw from the class and retake it? Yes.

Before the hearing, I ruled that, if NPGOP did not notify Ms. Doe that she could withdraw from the class and retake the class, Ms. Doe had a defense to her failure to meet written observer standards.²¹ More precisely, my ruling is that if NPGOP did not notify Ms. Doe that she could withdraw from the class, she has a defense to her failure to withdraw from the class. This ruling comports with NPGOP policy. NPGOP policy is that trainees have the option or the right to withdraw. NPGOP policy is also to notify trainees of that right.²² It would be fundamentally unfair to accord trainees a right but make them rely on chance to find out about it.

This ruling is consistent with NPGOP's position in this appeal. In answer to a written question before the hearing, NPGOP agreed that, if a trainee reasonably did not know that the trainee could withdraw and retake the class, the trainee would have a defense to the trainee's failure to meet written performance standards.²³ When Ms. Doe sought to retake the class, the NPGOP

¹⁹ 50 C.F.R. § 679.50(j)(1)(iv)(A).

²⁰ Final Rule, 67 Fed. Reg. 72,595, 72,602 (Dec. 6, 2002)(NMFS response to public comment).

²¹ Order Requiring Oral Hearing and Addressing Prehearing Matters at 2 (June 27, 2006). I also ruled that the NPGOP has the burden of proving, by a preponderance of evidence in the record, that it notified Ms. Doe of her right to withdraw and retake the class. Order Ruling on Burden of Proof (Aug. 4, 2006).

²² The trainers testified that they covered this subject with the trainees. Testimony of Mike Vechter, Hearing, Tape 1, Side B, Log 540 - 550; Testimony of Joseph Chaszar, Hearing, Tape 1, Side A, Log 500 - 505. The official Lesson Plan for the introductory class addresses the subject of a trainee dropping and retaking the class. [Document 42] See page 8 *infra*.

²³ The question was: "Does Ms. Doe have a defense to her failure to meet performance standards if she reasonably believed that she could not withdraw from the class due to illness and retake it?." NPGOP answered:

Depending on the record, these grounds could constitute a defense. It is the NPGOP policy to excuse observer trainees from training because of an illness that prevents completion the class. The observer may reschedule and re-enter another full training course. Were, for example, a trainer to misstate the "illness excuse" and a trainee

certification official thought it critical that Ms. Doe had the right to withdraw from the class, and retake it, but chose not to do so:

Observing is field work and the industry norm is to commit to 90-180 day contracts. Again, illness must be expected while observing and successful observers are able to cope with the challenge. It is also expected that when an observer recognizes that the quality of their data is suffering due to their physical impairment, that they take time off from sea duty. **All trainees are given the option of withdrawing from the job training at any time.** Your recognition of illness did not prompt you to withdraw, despite your later claim that it was affecting your work. **If illness alone was the actual cause of your failure, it was your responsibility to inform your trainer of your illness and to withdraw from the class.**²⁴

The certification official further stated:

By failing to withdraw from the class, the message you sent to your trainers and to your employer was that you did not feel that the quality of your work was suffering due to your illness and that you could continue to perform a difficult job in a stressful situation.²⁵

I therefore conclude that NPGOP had a duty to notify Ms. Doe of her right to withdraw and retake the class. The duty to notify means a duty to adequately notify. A notice in a foreign language to an English speaking class, for example, would not be adequate legal notice. To be legally sufficient, notice must be of the type reasonably calculated to inform the person of what they have a right to be notified.²⁶ In this instance, the trainee has the right to be notified that he or she can withdraw from the class, if the trainee is in good standing, and retake the class.

reasonably believe [sic] they could not withdraw without jeopardizing their re-entry at a later time, it would appear the program gave a “no second chances” and this would be inconsistent with existing policy.

However, if there is such a defense, the record here does not support it. Our position is that Ms. Doe would have had no reasonable cause to believe that she could not withdraw from the three-week observer training class due to illness or other reason.

NPGOP Response to January 26, 2006 Order Addressing Preliminary Matters (March 15, 2006) at 4 [Document 38] [footnote omitted].

²⁴ Letter from Jennifer Ferdinand to Mary Doe (Oct. 4, 2005) at 5 - 6 (footnote omitted) (emphasis added).

²⁵ Letter from Jennifer Ferdinand to Mary Doe (Oct. 4, 2005) at 6 (emphasis added).

²⁶ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The certification official assumed that Ms. Doe knew she could withdraw and retake the class, possibly because it is NPGOP policy that trainees should be notified that they can do that. But Ms. Doe stated that she did not know that. And the record before the certification official contained no evidence that Ms. Doe had been informed. The written Training Standards given to Ms. Doe's class did not contain any sort of notification.²⁷ The Trainer Notes by Mike Vechter, entered into the NPGOP database immediately after the class, stated that Ms. Doe was sick during the final week of class but did not mention anything about Ms. Doe choosing not to withdraw from the class.²⁸ I therefore held a hearing to determine whether NPGOP notified Ms. Doe of its withdrawal policy.

The NPGOP has the burden of proof on this issue. The standard of proof in this proceeding is proof by a preponderance of evidence in the record, rather than, for example, proof beyond a reasonable doubt. Therefore the question is whether NPGOP has proven, by a preponderance of evidence in the record, that it notified Ms. Doe that she could withdraw from the observer training class and retake it.

At the hearing, the two trainers, Mr. Vechter and Mr. Chaszar, testified by telephone. Jennifer Ferdinand, the NPGOP certification official, testified, in person and Ms. Doe testified by telephone. I carefully reviewed all the documentary evidence in the record, the pleadings and arguments submitted by both parties and the testimony of the witnesses at the hearing.

C. Did NPGOP notify Ms. Doe of its withdrawal policy? No.

The NPGOP acknowledges that it did not notify Ms. Doe in writing of its withdrawal policy. The NPGOP states that it notified Ms. Doe twice orally: [1] during the introductory class given on July 18, 2005 by trainer Mike Vechter and [2] in individual conversation or conversations between trainer Joseph Chaszar and Ms. Doe after Ms. Doe came to class ill on August 3, 2005. I conclude that NPGOP has not shown, by a preponderance of evidence in the record, that it orally notified Ms. Doe that she could withdraw from the training course and retake it.

First, did the NPGOP notify Ms. Doe of her right to withdraw in the introductory lecture by Mr. Vechter on July 18, 2005? Mr. Vechter gave the introductory class. Mr. Vechter testified that he usually closely followed the official lesson plan:

Mr. Meyer [attorney for NPGOP]: Do you follow the lesson plan when you give the introductory remarks to the class?

Mr. Vechter: I do.

Mr. Meyer: And is that what you'd call a practice and procedure for you as a

²⁷ Document 1.

²⁸ Document 4.

teacher?

Mr. Vechter: Yes, I definitely love lesson plans and I tend to hold them in my hand and use them every time I teach.²⁹

The Lesson Plan for the introductory class is seven pages. The time allotted for the class is 30 minutes. With regard to retaking the class, the Lesson Plan states as follows:

E. This is job training, not a college class.

1. The class cannot be re-taken if failed

2. You may be able to re-take the class if you have to leave for some reason, and are in good standing. [Document 42 at page 5]

The Lesson Plan is dated February 18, 2003. Mr. Vechter gave this class on July 18, 2005. Point 1 did not accurately state NPGOP policy or regulation in effect at the time of Ms. Doe's class or in effect now. Point 1 states a blanket rule against retaking the class if the trainee fails the class. Although this had been NPGOP policy, NMFS adopted a regulation in December 2002 that NPGOP would examine on a case-by-case basis whether a trainee who failed the class had unresolvable deficiencies and therefore could not retake the class.³⁰

Point 2 in the Lesson Plan addresses a trainee's ability to leave the class and retake it. Point 2 also does not accurately state NPGOP policy on withdrawal. It tells the trainees that "you *may* be able to re-take the class if you have to leave for some reason, and are in good standing." It does not state that the trainee *will* be able to retake the course if the trainee withdraws for any reason and is in good standing.

When Mr. Vechter was asked what he thought the withdrawal policy was, he testified:

Ms. McKeen: Mr. Vechter, when the outline says the class cannot be retaken if failed, would that be what you have told, would that be what you told the class?

Mr. Vechter: Yeah. At that time that was certainly our understanding.

Ms. McKeen: OK. And then it says you *may* be able to re-take the class.

Mr. Vechter: Hm, hm.

²⁹ Hearing, Tape 1, Side B, Log 541 - 548.

³⁰ 50 C.F.R. § 679.50(j)(1)(iv)(A); Final Rule, 67 Fed. Reg. 72,595, 72,602 (Dec. 6, 2002) (NMFS response to public comment).

Ms. McKeen: Is that what you would have said?

Mr. Vechter: Yeah, cause that would be up at NMFS's discretion.³¹

Ms. Doe testified that as to what she heard Mr. Vechter say:

Ms. McKeen: [W]hen the course started in the introductory lecture, do you remember was that given by, by Mr. Vector?

Ms. Doe: Yeah, it was given by Mr. Vector and I remember what was said too.

Ms. McKeen: And what did you, what did he say?

Ms. Doe: From what I remember, from what he said, we could drop for personal reasons at any time.

Ms. McKeen: OK.

Ms. Doe: And that if we were too sick to come to class we were to call ahead let them know why and that they would deal with it from that point on.³²

At the hearing, Ms. Doe asked Mr. Vechter whether that could have happened:

Ms. Doe: Do you remember if you told us exactly word for word what was in the lesson plan, or if you just kind of paraphrased it and say we can drop out for personal reasons?

Mr. Vechter: Yeah, I cannot remember in detail what I stated, no.³³

Ms. Doe's testimony at the hearing was consistent internally and consistent with her written statements that she thought that, if she dropped the class, she could not come back:

Ms. McKeen: So when they said you could drop for personal reasons at any time, how come when this problem came up you didn't drop?

Ms. Doe: Because my understanding of it was that I could just drop out and go home. Like I, I didn't see that you could drop out and retake the course whenever you want. As far as I understood it was to my employer and to them that I was

³¹ Hearing, Tape 1, Side B, Log 591 - 596.

³² Hearing, Tape 2, Side B, Log 535 - 540.

³³ Hearing, Tape 1, Side B, 583 - 585.

saying see you later I'm going home. I'm done. I, I didn't really think that it was given us the option to retake it.³⁴

And when Ms. Doe was asked whether the presence of someone in her training class, who had failed an earlier class, suggested to her that she could drop out and retake the class, she stated:

Oh no. That's didn't even register with me. I thought like, my whole understanding of dropping the course was that there was no second chances, that once you dropped it you went home. That was it. It was because you didn't want to take it again kind of thing.³⁵

Ms. Doe's testimony that she did not know she could withdraw and retake the class is consistent with her later actions. Ms. Doe did not withdraw from the course, even though she became sick in the final week of the course, she tried to miss part of a class due to illness and she was available to retake the course.³⁶

I conclude that the NPGOP has not proven by a preponderance of the evidence in the record that, during the introductory lecture, the trainer notified the class members that they had the right to withdraw from the class and retake the class, if they were in passing status when they withdrew.

I base this conclusion on the following evidence or lack of evidence. The notification to the class was not in writing. Whatever the trainer said about withdrawing from the class, his comments would have been brief – as he was covering 7 pages of lecture material in a 30-minute class. The trainer testified that he followed the Lesson Plan. The Lesson Plan did not accurately state NPGOP withdrawal policy. It did not state that a student who withdrew from the class in good standing definitely could retake the class. The Lesson Plan is more consistent with the proposition that NPGOP makes a discretionary call about whether a trainee who withdraws from the class can retake the class. Mr. Vechter testified that he believed that whether a trainee could retake the class was up to NMFS's discretion, which makes it less likely he would have notified the trainees that NMFS would definitely allow them to retake the class if they dropped out in good standing. Ms. Doe offered consistent testimony that she did not know she could drop out of the course and retake it. Ms. Doe's testimony was consistent with her actions in not dropping the course even though she was sick the last week of class, she tried to miss part of a class due to her illness and she would have been available to take the next course.

Second, did the NPGOP notify Ms. Doe that she could withdraw from the class and retake it through conversations between Mr. Chaszar and Ms. Doe on August 3 and 4, 2005?

³⁴ Hearing, Tape 2, Side B, Log 540 - 550.

³⁵ Hearing, Tape 2, Side B, Log 562.

³⁶ See pages 11 - 12 & 18 *infra*.

The NPGOP states that it notified Ms. Doe that she could withdraw and retake the class through individual conversations between Mr. Chaszar and Ms. Doe that occurred after Ms. Doe came to class sick on Wednesday, August 3, 2005.³⁷ It is undisputed that Ms. Doe did not withdraw from the class and did take the final exam. The question is whether the preponderance of evidence in the record shows that NPGOP notified Ms. Doe she could have withdrawn from the class and the conditions under which she could have withdrawn.

This question also begins with the introductory lecture. Ms. Doe testified that, in the introductory lecture, Mr. Vechter, told the trainees “that if we were too sick to come to class we were to call ahead let them know why and that they would deal with it from that point on.”³⁸

At the beginning of the third, and final week of class – around Monday, August 1 – Ms. Doe began to have migraine headaches. Ms. Doe testified that by Wednesday morning of the final week of class, which was August 3, her headaches were so severe that she called the Training Center. She testified that she “followed protocol given by instructors to call in sick” and talked to Mr. Chaszar. Ms. Doe testified: “I was told that I had to come to class or they’d need to get me caught up and there really wasn’t much time to do any of it. So I showed up and basically puked all day in class.”³⁹

Although a graphic way to put it, Mr. Vechter’s Trainer Notes confirm Ms. Doe’s testimony in its essentials:

[Ms. Doe] also suffered from migraines during the last week of class. On August 2nd⁴⁰ she was unable to come to class because of her migraine. She called in well before class, and spoke to Joe Chaszar. He asked her to make it to class if it were possible. She did come to class around nine. She was visibly ill. She had to make frequent trips to the bathroom, and was physically shaking.⁴¹

I place great weight on Mr. Vechter’s Trainer Notes because it is the trainer’s job to enter notes in the NPGOP database as a regular part of their duties and because Mr. Vechter made these notes immediately after the course ended. Mr. Chaszar wrote in an e-mail to Ms. Ferdinand that

³⁷ NPGOP Closing Statement 1 - 3 (Aug. 11, 2006).

³⁸ Hearing, Tape 2, Side B, Log 540. NPGOP did not offer any testimony on this point.

³⁹ Hearing, Tape 2, Side B, Log 498 - 502.

⁴⁰ August 2, 2005 was a Tuesday. Ms. Doe testified that she called in sick on a Wednesday, which was August 3. Mr. Chaszar agreed that she might have called in on Wednesday, August 3. Testimony of Joe Chaszar, Hearing, Tape 1, Side A, Log 560.

⁴¹ Trainer Notes by Mike Vechter [Document 4].

that Ms. Doe “was obviously in a lot of pain” that day.⁴²

Based on the preponderance of evidence in the record, I find that: [1] Ms. Doe called the Training Center on Wednesday, August 3, to see if she could miss all or some of class, [2] Mr. Chaszar advised her to come to class if possible, [3] she arrived at 9:00 a.m., one hour after class had started, and [4] she was visibly sick during class on August 3.

The next question is what happened when Ms. Doe arrived at class. NPGOP states that Mr. Chaszar told Ms. Doe that she had the option to withdraw from the class, and retake it, and that Ms. Doe made a conscious choice not to withdraw from the class.

In evaluating the evidence, the strongest evidence in favor of NPGOP’s position is Mr. Chaszar’s written e-mail to Ms. Ferdinand, dated March 8, 2006, which states:

[Mary Doe] was unable to come to class on time on August 2 due to migraines. She came in at 9 am. During a break, I questioned [Mary] about her health. I informed her of the rigors of observer work, and asked if she feels confident that she can do the work. She told me she could and this was a “temporary thing”. She was unable to get the homework assignment completed and was obviously in a lot of pain. I told her that she had the option of dropping the class now and she could retake it at a later date. She assured me she would be fine. I then told her that if she continued and failed, she quite probably would not be able to repeat the class. She said she understood and that she would be fine. [Document 41]

Mr. Chaszar also testified at the hearing. His testimony at the hearing was candid and forthcoming and differed somewhat from his written statement. This is not unusual. The process of giving sworn oral testimony at a hearing allows the witness to expound on a simple written statement. The process of a witness answering questions often yields a more complete and nuanced picture of the facts in a particular situation. I find that the preponderance of evidence in the record does not show that NPGOP informed Ms. Doe that she could withdraw and retake the class through conversations between Mr. Chaszar and Ms. Doe on August 3 and 4, 2005. I rely on seven points to reach that conclusion.

First, at the hearing, Mr. Chaszar testified that he did not remember whether or how Ms. Doe responded to the possibility that she could drop and retake the class:

Mr. Meyer: Did you discuss with her in connection to her not feeling well how that would affect her class performance and whether she could drop out and

⁴² Document 41. The certification official characterized the notes in the database that Ms. Doe had a migraine headache for “one hour.” Hearing, Tape 2, Side A, Log 585. That is not an accurate characterization of Mr. Vechter’s Notes and is not borne out by other documentary evidence or the testimony at the hearing.

retake the class?

Mr. Chaszar: Yeah, I talked with her about, how that would affect her, well there's several things I talked to her about. As far as how that would affect her class, I said if she's not feeling well and if she has a, if she has a, difficulty with class, and she already missed this part, that she could drop the class, and retake it at a later date.

Mr. Meyer: Did she seem to understand that? Can you tell us what her response was?

Mr. Chaszar: You know, I don't recall. I don't recall if she responded to that particular, that particular question that I posed to her, possibly, you know, I don't know why, you know, but she was, but possibly because of how ill she was or, you know, I don't know. I don't recall how she responded, quite frankly.⁴³

Second, Mr. Chaszar did not consistently testify that he told Ms. Doe she definitely could retake the class, as opposed to telling her that she might be able to retake the class. Although some of Mr. Chaszar's testimony suggests that he told Ms. Doe she could definitely retake the class, he also testified that he told her that she could drop the class "and perhaps take it at another, at a later date."⁴⁴ When asked whether he had the authority to tell Ms. Doe that she could definitely retake the class, he said:

Actually, the authority does lie with the certifying, the certifying official, but, however, the protocols set by, by the official, is that they can retake the class if they are in good standing. So, yeah, so, you know, I could have alluded to that it would be up to National Marine Fisheries Services, yes.⁴⁵

Third, it would not have been clear to Mr. Chaszar or Ms. Doe whether Ms. Doe was in good standing. Mr. Chaszar testified that, for him, good standing meant the trainee passed the mid-term exam; turned in, and then corrected, all homework assignments to the trainer's satisfaction; passed the Fish ID exam in the final week of class, if it had been given; and displayed the attitude and ability to do the work to the trainer's satisfaction.⁴⁶

On the morning of Wednesday, August 3, Ms. Doe met some, but not all, of these criteria for

⁴³ Hearing, Tape 1, Side A, Log 410 - 426.

⁴⁴ Hearing, Tape 1, Side A, Log 575.

⁴⁵ Hearing, Tape 1, Side B, log 375 - 379.

⁴⁶ Hearing, Tape 1, Side A, Log 506 - 516. The Fish ID Exam is more formally called the Domestic Species Identification Examination. It has three parts and a trainee must pass each part.

being “in good standing.” She passed her mid-term exam.⁴⁷ She handed in the first five homework assignments on time. She corrected and resubmitted them to the trainer’s satisfaction.⁴⁸ The record suggests that the trainers thought that Ms. Doe had the attitude and ability to be considered “in good standing.”⁴⁹

But Ms. Doe had not handed in her sixth homework assignment, which was due the morning she was sick, Wednesday, August 3.⁵⁰ And she had passed two parts of the Fish ID exam that she had taken on Tuesday, August 2, but she had failed one part.⁵¹ According to Mr. Chaszar’s testimony as to what constitutes “in good standing,” he normally would not have considered a trainee in Ms. Doe’s position in good standing.

Ms. Ferdinand testified that she would have excused Ms. Doe from turning in the sixth assignment, if the reason was illness:

Mr. Meyer: Can you tell us whether or not Ms. Doe would have been allowed back in class, given what you know, had she dropped out for medical reasons on August 2nd or 3rd of 2005, whatever day it was that . . .

Ms. Ferdinand: Um

Mr. Meyer: She was . . .

Ms. Ferdinand: I believe at that point she had, that if, if we had excused her from

⁴⁷ Document 3. Ms. Doe scored 83.75%.

⁴⁸ Documents 5 - 9. Ms. Doe resubmitted her first, third and fifth homework assignment once. She resubmitted her second and four assignments twice. The certification official relied, in part, on Ms. Doe’s homework assignments to conclude that Ms. Doe had unresolvable deficiencies. IAD at 5 - 6 & 8. I do not reach that issue because I conclude that Ms. Doe should be treated as having withdrawn from the class in good standing.

⁴⁹ Mr. Vechter’s Trainer Notes state in part:

Mary was an average student who failed to perform on the final exam. . . . She started the class very strong, but faltered during the last week. Mary had a great attitude throughout the class, and wanted to understand all concepts. Her homework was average, and her fish ID skill were a bit below average.

Joe [Chaszar] noted verbally that Mary still did not understand proportioning even at the end of class. . . . Joe felt that had she not had the migraines, she likely would have passed the class.

⁵⁰ Testimony of Mary Doe, Hearing, Tape 2, Side B, Log 585 - 588.

⁵¹ Document 12. Ms. Doe’s scores on the three parts of the Fish ID exam were 86, 98 and 72.

finishing her sixth homework which, in the instance of the medical situation, I would have had no problem excusing that, we would have considered her in good standing and she could have retaken the class.⁵²

The record does not indicate that Mr. Chaszar knew this. And Ms. Ferdinand did not state she would have excused Ms. Doe from passing the Fish ID Exam. It is unclear to me whether she would have. But Ms. Doe retook, and passed the third part of the Fish ID Exam on Thursday, August 4.⁵³ At that point, I find that NPGOP would have considered Ms. Doe in good standing. The important point here is that the lack of clarity – about how and when NMFS would have determined whether Ms. Doe was in good standing – makes it less likely that Mr. Chaszar told Ms. Doe that she definitely could withdraw and retake the class.

Fourth, what is very clear from the record is that Mr. Chaszar and Mr. Vechter talked to Ms. Doe about whether her illness meant that she couldn't be an observer. Mr. Chaszar testified that he talked with Ms. Doe several times that day – Wednesday August 3 – and the next - Thursday August 4. Mr. Chaszar testified:

Mr. Chaszar: So I questioned her about her health because she, she didn't look good at all. And, at first, I talked to her about the rigors of the job. And, you know, wanted to know if she felt competent to do the work. And she assured me that it was temporary.

Mr. Meyer: In other words, why did you, why did you have this discussion about the rigors of observer work? Was there a concern on your part about a particular health issue and how that might carry out in the field, or what?

Mr. Chaszar: Yes, I'm not familiar, I'm not a doctor, I'm not familiar with migraines so I wanted to find out more information about her health issues because she, she, she didn't look, she looked very ill to me. And so I wanted to get more information from her how she was going to deal with this offshore. So my first concern was of course her safety when she was offshore.⁵⁴

Mr. Vechter also testified to conversations with Ms. Doe on that topic:

Mr. Meyer: OK. Did you have any conversations with Ms. Doe about the effect of her sickness on her performance in the class?

Mr. Vechter: Not that I can remember in real good detail. Like we did have talks

⁵² Hearing, Tape 2, Side A, Log 367 - 372.

⁵³ Document 13. She scored 100%.

⁵⁴ Hearing, Tape 1, Side A, Log 562 - 575.

with her, basically, like Joe mentioned. We were just very worried and concerned about her overall, uh, health and that there was some concern that if it was an extended period on a vessel, she might be putting herself in harm.⁵⁵

Mr. Vechter's Trainer Notes reflect that Mr. Chaszar talked to Ms. Doe about whether her illness would interfere with her ability to be an observer:

[Joe Chaszar] questioned her on several occasions about whether her migraines would interfere with her work at sea. Joe said she was defensive about this, saying she had medication and that she would take a day off if she was suffering from a migraine. She said that the medication knocked her out and that she could sleep off the headache. She also said that she had disclosed this medical ailment to her contractor. **Joe voiced his concern over the potential safety hazard of being heavily medicated on a vessel, but she was dismissive of this issue as well.**⁵⁶

Here, too, I place great weight on Mr. Vechter's Trainer Notes, which are contemporaneous and do not mention Mr. Vechter or Mr. Chaszar talking to Ms. Doe about withdrawing from the class due to her illness and retaking the class.

Ms. Doe testified that she did not remember Mr. Chaszar talking to her about dropping the class and taking another one, but did remember Mr. Chaszar talking to her about whether her illness would affect her ability to be an observer:

Ms. Doe: I don't remember having a conversation with him about dropping the class at all. It's possible that my head was in the clouds and I didn't hear anything that he said to me. But as far as I can remember, I don't recall. I remember him talking to me about my migraines and getting a little bit defensive about it and kind of the conversation ending with that.

Ms. McKeen: So you remember him telling, asking you about whether or not it could affect your ability to be an observer?

Ms. Doe: Yeah. I remember those conversations because they, I got upset about thinking that he was going to tell me to go home.⁵⁷

Ms. Doe testified that she had a conversation with Mr. Chaszar in October 2005, after she filed her appeal, about why the instructors did not tell her about dropping the class and starting over:

⁵⁵ Hearing, Tape 1, Side B, Log 570 - 575.

⁵⁶ Document 4 (emphasis added).

⁵⁷ Hearing, Tape 2, Side B, Log 578 - 585.

Ms. McKeen: And you had mentioned that you had a conversation with Mr. Chaszar outside of class. What was that?

Ms. Doe: He was just asking me how the appeal was going. And at that point I really didn't know because it was only at the beginning of October. And he, I asked him why nobody told me why don't you drop and start over. And his response to it was that that's what we were getting around to asking you all those questions about your health. But you were dismissive and defensive. And I said well, of course, I was. I thought you guys were trying to tell me to go home.⁵⁸

Ms. Doe's testimony that she asked Mr. Chaszar this question at this time is consistent with her written statements and her testimony that she did not know – until after the class ended – that she could have withdrawn from the class and retaken it.

Based on the foregoing evidence, I find that the focus of Mr. Vechter's and Mr. Chaszar's conversations with Ms. Doe on August 3 and August 4 was whether migraines would undermine her ability to be an observer.

Fifth, I find that the trainers also emphasized that, for Ms. Doe to complete the course, she had to complete the course requirements. I rely on Ms. Doe's testimony that, when she tried to call in sick, she was advised to come to class because "they'd need to get me caught up and there really wasn't much time to do any of it."⁵⁹ Mr. Chaszar testified that, when she came to class on Wednesday, "She was also unable to get her homework assignment completed. That was a concern. She was going to have to get that done."⁶⁰

This testimony is quite credible because, in order for Ms. Doe to successfully complete the course, she did have a lot of work to do in the last two days of class, before she took the final examination on Friday, August 5. Ms. Doe had to attend class on Wednesday and Thursday, August 3 and 4. She had to study to retake part of the Domestic Species examination she failed. She had to retake that part of the Domestic Species examination. She had to hand in her sixth homework assignment, correct it and resubmit it.

Ms. Doe did those things. She studied Wednesday evening with other students who had to retake the Fish ID Exam. She did her sixth homework assignment Wednesday evening and handed it in Thursday.⁶¹ She attended class on Thursday. She retook, and passed, the Domestic

⁵⁸ Hearing, Tape 3, Side A, Log 43 - 56. Mr. Chaszar remembered seeing Ms. Doe but did not remember any specifics of their conversation. Hearing, Tape 1, Side B, Log 203 - 205.

⁵⁹ Hearing, Tape 2, Side B, Log 498 - 502.

⁶⁰ Hearing, Tape 1, Side A, Log 580.

⁶¹ Testimony of Mary Doe, Tape 2, Side B, Log 485 - 495; Final Data Exercise [Document 10].

Species examination on Thursday.⁶² She received her sixth homework assignment back for corrections on Thursday and resubmitted it on Friday morning, just before she took the final exam.⁶³ I find that the trainers' priority was helping Ms. Doe meet the tight time schedule she had to meet to finish course requirements.

Sixth, taken together, the evidence in the record is that NPGOP was trying to communicating to Ms. Doe four things while she was actively sick: [1] do not miss any part of a class, even if you are sick, [2] maybe you cannot be an observer if you get sick like this, [3] in the next two days, even though you are sick, you need to pass the Fish ID exam and you need to hand in, and correct, your final homework assignment and [4] if you withdraw from the course because you are sick, NMFS may allow you to retake it. Even if Mr. Chaszar said to Ms. Doe, at one point, that NMFS would allow you to withdraw and retake the class, the presence of three other, potentially conflicting messages, makes it less likely that NPGOP notified Ms. Doe in a way reasonably calculated to inform her of her right to withdraw and retake the training.

Seventh, based on the preponderance of evidence in the record, I find that Ms. Doe did not know she could withdraw from the class and that she would have withdrawn from the class after she got sick, if she had known she could do so. Ms. Doe wrote:

I was not aware that I could withdraw from the class and retake the training at a later date. If I had known that that was an option, I would have requested to do so as soon as I began feeling sick.⁶⁴

I did not try to withdraw from the course when I got sick because I didn't realize it was an option. I thought that withdrawing meant that I quit and I did not want to quit. If I had understood from the beginning that I could withdraw from the course and be eligible to take the next available training, I would definitely have done so.⁶⁵

Ms. Doe's attempt to call in sick supports this statement. Her first reaction to being sick was that she was too sick to go to class. This suggests that she did think that her illness was affecting her performance and supports her claim that she would have withdrawn from the class, if she had known that she had that option.

⁶² Document 13.

⁶³ Letter from Mary Doe to OAA at 6 (Sept. 7, 2005). The trainers did not score Ms. Doe's sixth homework assignment, after she resubmitted it, since she failed the final exam. On appeal, the certification official testified that she scored it and that Ms. Doe's number of errors increased. Testimony of Jennifer Ferdinand, Tape 2, Side A, Log 450 - 458.

⁶⁴ Letter from Mary Doe to OAA at 5 (Sept. 7, 2005).

⁶⁵ Letter from Mary Doe to OAA at 7 (Sept. 7, 2005).

The certification official stated: “It was not until after you failed the final written exam that you attributed your performance problems to your illness.”⁶⁶ This statement has two flaws. First, before Ms. Doe failed the final exam, the trainers had not informed her that she had any performance problems. She had passed the mid-term exam. She had resubmitted her first five homework assignments to the trainer’s satisfaction. Before she failed the final exam, there was no venue in which Ms. Doe had to “attribute” her performance to any cause. Second, Ms. Doe’s attempt to call in sick does suggest that she thought her illness would affect her performance.

Ms. Doe had no reason why she could not have remained in Anchorage and taken the class again. The record contains no indication that Ms. Doe had any reason to think that the observer provider company would not sponsor her to take the class again. And, immediately after Ms. Doe failed the final exam, the observer provider contacted the certification official to enroll Ms. Doe in the next training class.⁶⁷

Overall, I found Ms. Doe’s testimony credible when she said:

The way migraines, I guess, affect me usually I take a day, and I relax, I take some meds and I go to sleep and within a day I’m better. I didn’t really have that chance to do that in the training. I tried to but I needed to be there. I was told that I had to come to class or they’d need to get me caught up and there really wasn’t much time to do any of it so I showed up and basically puked all day in class. The next day, I was no better and for the final I was no better either. I guess the reason why I kind of think that the migraine definitely affected what happened on the final is because even though I was taught a lot of the information before hand, trying to recall I don’t know if either of you ever had a migraine but trying to think straight when you have a headache like that just doesn’t really work well. I guess if somebody told me that I was allowed to drop out and retake the next available class, I definitely, definitely would have jumped at the opportunity because, well, I basically sat around Anchorage waiting until the end of September, hindsight 20/20, but I spent five months wasting time in Anchorage waiting to get out to work with crab.⁶⁸

This testimony was consistent with her written statements, her other testimony, her action in seeking to miss part of class when she become actively ill and her availability to retake the class.

⁶⁶ Letter from Jennifer Ferdinand to Mary Doe (Oct. 4, 2005) at 6.

⁶⁷ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side B, Log 282.

⁶⁸ Testimony of Mary Doe, Hearing, Tape 2, Side B, Log 490 - 510. NPGOP recognizes that, over a 60-to-90 day cruise, an observer might have to take time off from sea duty due to illness. Letter from Jennifer Ferdinand to Mary Doe at 5 (Oct. 4, 2005).

To summarize, from the evidence in the record, I find that, through conversations with Mr. Chaszar, the NPGOP did not notify Ms. Doe that she could withdraw from the class due to illness and retake a future class. I have found that the NPGOP did not notify Ms. Doe, in writing or verbally, *before* she got ill, that she could withdraw from the class if she did get sick. I find that Mr. Chaszar and Mr. Vechter had several conversations with Ms. Doe on August 3 and August 4. I find that these conversations occurred while Ms. Doe was actively ill and after Mr. Chaszar turned down Ms. Doe's request to miss part of the class on August 3 because she was sick. I find that the focus of Mr. Chaszar's conversations with Ms. Doe was whether her illness would interfere with her ability to be an observer. I find that the trainers' priority was Ms. Doe's need to complete the required course work in the rush of the remaining two days of the course. Even if Mr. Chaszar referred to Ms. Doe's retaking the class, NPGOP has not shown, by a preponderance of evidence, that he communicated to Ms. Doe that she could definitely retake the class rather than that was something NMFS *might* allow her to do.

Overall, I conclude that the oral notice claimed by NPGOP was not reasonably calculated to notify Ms. Doe that she had the right to withdraw and retake the course and the conditions under which she could exercise that right. I conclude that NPGOP did not prove, by a preponderance of evidence in the record, that it notified Ms. Doe of her right to withdraw from the observer training class and retake it.

The effect of this Decision, if it becomes the final agency action, is that NPGOP will treat as done that which ought to have been done. Ms. Doe will be treated as if NPGOP had notified her that she could withdraw from the class due to illness and as if she had done that.

I do not decide whether Ms. Doe violated other written standards because I have determined that the NPGOP should treat Ms. Doe as having withdrawn from the class and because the NPGOP states that it would have allowed Ms. Doe to withdraw and retake the class, notwithstanding these other alleged problems. Thus, the resolution of these other issues would not affect the outcome of the appeal. I do resolve one additional issue, since it is purely a legal issue and is likely to recur.

2. In evaluating whether a trainee has unresolvable deficiencies, does the NPGOP abuse its discretion by declining to consider a trainee's performance in other observer programs?
No.

Before the NPGOP issued its IAD, Ms. Doe had not taken, and passed, the State course to become an observer for the State of Alaska on crab vessels. Therefore, it would have been impossible for the NPGOP to consider that fact before it issued the IAD.

Ms. Doe finished the State course in September 2005 and, on appeal, asked NMFS to consider that fact in evaluating whether she had unresolvable deficiencies in meeting the requirements to

become an observer in the NPGOP.⁶⁹ On appeal, Ms. Doe also submitted a reference that she had done excellent work in field surveys and sampling of gaspereau (a fish) and juvenile salmon in Nova Scotia.⁷⁰ At the hearing, the NPGOP stated that it evaluates whether a trainee has unresolvable deficiencies based on the trainee's performance in the NPGOP training class and Does not wish to consider a trainee's performance in other observer programs.⁷¹

I considered this issue in the context of decertifying an already certified observer in *Jane Doe*.⁷² In that appeal, I ruled that the observer had not shown that the duties of a State observer on a crab vessel were comparable to the duties of a federal observer on a groundfish vessel.

The context here is a trainee – a person who is applying for observer certification – who has failed the NPGOP observer training course and wishes to retake the course. I conclude that, in deciding whether to allow a trainee to retake the observer certification class, the NPGOP does not abuse its discretion by declining to consider the trainee's performance in other observer programs or other field work settings. I base that conclusion on three reasons.

First, if a trainee fails the course, the regulation gives the certification official ten business days to decide whether NPGOP will allow the trainee to retake the course and to communicate that decision to the trainee in a written Initial Administrative Determination.⁷³ The IAD must explain why the NPGOP is denying certification, what requirements the trainee was deficient in and the basis for the certification official's conclusion that the trainee has unresolvable deficiencies.⁷⁴

Within those ten days, the NPGOP states that the certification official will, and indeed must, examine the trainee's performance in the NMFS-approved training course. To do that, the certification official will examine the trainee's performance on examinations, assignments and the trainer's comments on the trainee's performance. The certification official will have other job duties, in addition to determining whether trainees who fail the course may take it again. For example, Ms. Ferdinand enrolls trainees in new training programs, sets training policies and oversees the Observer Training Center at the University of Alaska at Anchorage.⁷⁵

⁶⁹ Letter from Mary Doe with Appeal (Sept. 7, 2005).

⁷⁰ Reference Letter from Paul LeBlanc re Mary Doe (Aug. 22, 2005)

⁷¹ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 483 - 590.

⁷² *In the matter of decertification of Jane Doe*, Decision on Reconsideration, Appeal No. 04-00008 at 33 (June 12, 2006).

⁷³ 50 C.F.R. § 679.50(j)(1)(B)(4)(ii).

⁷⁴ See 50 C.F.R. § 679.50(j)(1)(B)(4)(ii); 50 C.F.R. § 679.50(j)(1)(iv)(A).

⁷⁵ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 345 - 350.

The length of time allowed by regulation suggests that [1] the regulation does not envision the certification official gathering evidence from outside sources to assess whether a trainee can retake the course and [2] NMFS is within its discretion to limit the evidence it considers to the trainee's performance in the NMFS-approved training course.

Second, to consider evidence from other observer programs, the certification official would have to examine the workings of other observer programs to determine if the observer programs, and the observer's duties, were comparable to the NPGOP.⁷⁶ With the NPGOP, NMFS is managing "a live fishery."⁷⁷ With the NPGOP, the observers actually estimate a vessel's catch and are carefully trained how to do that. NMFS relies upon data collected by observers to actually close groundfish fisheries when the total allowable catch or TAC for the fishery has been, or is about to be, reached. This is a crucial part of the observer's duties and is different from other observer programs where observers' duties are more focused on law enforcement or scientific sampling.⁷⁸ The differences between the NPGOP and other observer programs support NPGOP's determination to limit the evidence it considers to the trainee's performance in the training course designed specifically for observers who work in the North Pacific groundfish fisheries.

Third, if the certification official determined another observer program was comparable, the certification official would need to obtain a release from the trainee to review the trainee's performance in the other course or on-the-job performance in another observer program. This information is confidential and NMFS could not obtain it without a release. The process of seeking a release would also take time and the trainee might not wish to release that information. Then the NPGOP would have to decide how, and whether, to consider the trainee's unwillingness to release information that the trainee has the right not to release.

For these reasons, in evaluating whether a trainee has unresolvable deficiencies, I conclude that NMFS does not abuse its discretion if it does not consider a trainee's performance in other observer programs.

FINDINGS OF FACT

1. When Ms. Doe took the training course, NPGOP policy was that a trainee could withdraw from the class, and retake the class, if the trainee was in good standing when the trainee withdrew.
2. In the introductory lecture to the class on July 18, 2005, Mr. Vechter did not inform Ms. Doe's class that NMFS allowed trainees to withdraw from the class and retake the class, if a trainees was in good standing,

⁷⁶ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 522 - 549.

⁷⁷ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 515.

⁷⁸ Testimony of Jennifer Ferdinand, Hearing, Tape 2, Side A, Log 520 - 526.

3. Mr. Chaszar did not notify Ms. Doe that she could withdraw from the class due to illness and retake the class, through conversations with Ms. Doe on August 3 and 4, 2005.
4. On August 3, Ms. Doe called the Training Center to determine if she could miss all, or part, of class on that day.
5. During the phone call on August 3, Mr. Chaszar advised Ms. Doe to come to class if possible.
6. Ms. Doe arrived at class at 9:00 a.m. on August 3, one hour after class started.
7. Ms. Doe was visibly sick during class on August 3, 2005.
8. Mr. Chaszar had several conversations with Ms. Doe on August 3 and August 4, 2005, while Ms. Doe was ill.
9. After Ms. Doe got ill, it is not clear how and when NPGOP would have determined whether she was in good standing.
10. On August 4, 2005, after Ms. Doe passed the Fish ID, or Domestic Species Identification, Exam, NPGOP would have considered her in good standing.
11. The focus of Mr. Vechter's and Chaszar's conversations with Ms. Doe on August 3 and 4, 2005, was whether Ms. Doe's illness interfered with her ability to be an observer.
12. On August 3 and 4, 2005, the trainers' priority was helping Ms. Doe meet the tight time schedule she had to meet to finish course requirements
13. Ms. Doe did not know that, if she was in good standing, she could withdraw from the class and retake it.
14. Ms. Doe would have withdrawn from the class on or before August 4, 2005, if she had known that she could withdraw from the class and retake it.

CONCLUSIONS OF LAW

1. If NPGOP did not notify Ms. Doe that she had a right to withdraw from the class and retake it, she has a defense to her failure to withdraw from the class before she took the final exam.
2. NPGOP did not prove, by a preponderance of evidence, that it notified Ms. Doe that she could withdraw from the observer training class and retake it.
3. The oral notice claimed by NPGOP was not reasonably calculated to notify Ms. Doe that she had the right to withdraw and retake the course and the conditions under which she could exercise that right.

4. Ms. Doe should be treated as if she had withdrawn from the observer training class in good standing on August 4, 2005.

5. In evaluating whether a trainee who fails the course has unresolvable deficiencies, NPGOP does not abuse its discretion by not considering a trainee's performance in other observer programs.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED to the extent that it prohibits Ms. Doe from retaking the observer training class. NPGOP is ORDERED to treat Ms. Doe as though she had withdrawn from observer training class in good standing on August 4, 2005. This Decision takes effect November 30, 2006, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

Ms. Doe 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, November 13, 2006.⁷⁹ A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that I overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Administrative Judge

⁷⁹ The tenth day is Friday, November 10, 2006, which is a federal holiday. If a deadline falls on a weekend or holiday, the deadline is the next federal business day.