

1. Did Mr. Doe fail to meet a written performance standard for observer certification?
2. Did NPGOP reasonably conclude that Mr. Doe had unresolvable deficiencies in meeting the requirements for observer certification?

ANALYSIS

To prevent an observer candidate from retaking observer training, NPGOP must show [1] that the observer candidate failed to meet a written performance standard for observer certification³ and [2] that NPGOP reasonably concluded that the trainee has unresolvable deficiencies in meeting the requirements for certification.⁴

On appeal, the standard of review for these two determinations are different.⁵ In reviewing the first determination – whether the observer candidate or trainee did not meet a written performance standard – I determine whether the NPGOP determination was correct. It is a question of historical fact and I review the NPGOP determination to see whether I agree with it.

The second determination – whether the trainee has unresolvable deficiencies and should not be allowed to take the training again – is not a simple question of historical fact. It calls upon NPGOP to evaluate a trainee's performance in the training course: qualitatively and quantitatively. The regulation commits the determination whether a trainee can retake the course to the discretion of the NPGOP certification official, who has expertise with observers, testing observers and their duties at sea.

On appeal, I do not determine whether I agree with the NPGOP determination that a trainee can retake the course but whether NPGOP made a reasonable decision. I would overturn the NPGOP determination on this point only if I concluded that the certification official acted unreasonably or arbitrarily.⁶

1. Did Mr. Doe fail to meet a written performance standard? Yes.

³ 50 C.F.R. § 679.50(j)(1)(iii)(B)(4)(i).

⁴ See 50 C.F.R. § 679.50(j)(1)(iv)(A).

⁵ For a good discussion of standards of review, see C Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE §10.2 - §10.6 (2d ed. 1997).

⁶ I use the formulation in section 706(2)(A) of the Administrative Procedure Act that a court should “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”

To be certified as an observer, an observer candidate must meet all the certification requirements in federal regulation.⁷ These requirements include successfully completing a NMFS-approved observer training course.⁸ To successfully complete a course, an observer candidate must meet “all performance standards issued in writing at the start of the course for assignments, tests and other evaluation tools.”⁹

Mr. Doe took an observer training course from August 6 to August 24, 2007. At the beginning of the course, Mr. Doe received, and signed, written standards for attendance and participation, physical tasks, conduct in the course and performance standards for course work.¹⁰ For exams administered in the course, the performance standard was: “You must pass all exams with a score of 80% or better.” I therefore find that a passing grade of 80% on all exams is a performance standard that NPGOP issued Mr. Doe in writing at the start of the training course.

Mr. Doe took the final exam for the course on August 23, 2007, and received a 74.6%.¹¹ This score is below 80%. I therefore conclude that Mr. Doe did not meet a performance standard issued in writing at the start of the course.

Mr. Doe also took a finfish identification exam on August 21, 2007 and scored 60%, which is below an 80% passing grade. The finfish ID exam is one part of an exam called a “Domestic Species Identification Exam” that consists of three exams. [Document 22] Exam 1 is a traditional pencil-and-paper exam. Exam 2 is a crab identification exam, where the trainee identifies actual crab specimens. Exam 3 is a finfish identification exam, where the trainee is given 15 finfish specimens to identify. Mr. Doe passed Exam 1 with 92% and Exam 2 with 81% but failed Exam 3, the finfish ID exam, with a 60% score. The NPGOP usually allows a trainee to retake the finfish ID exam. The NPGOP was going to give Mr. Doe the finfish ID exam again on August 24, 2007, but since he failed the final exam on August 23rd, NPGOP “instead dismissed [him] from the class in a failing status.”¹²

Mr. Doe did not meet the performance standard of 80% on the finfish ID exam. But since Mr. Doe was not able to retake the finfish ID exam, and possibly raise his grade to passing, *because*

⁷ 50 C.F.R. § 679.50(j)(1)(iii).

⁸ 50 C.F.R. § 679.50(j)(1)(iii)(b)(4).

⁹ 50 C.F.R. § 679.50(j)(1)(iii)(b)(4)(i).

¹⁰ North Pacific Groundfish Observer three Week Training Standards (signed by John Doe, August 6, 2007)[Document 10]. Each document in the appeal record has a number.

¹¹ Mr. Doe’s NMFS Groundfish Observer Final Exam [Document 20]. Greg Morgan was one of the trainers for the August course. He scored this exam and gave Mr. Doe a grade of 74.6%. Jennifer Ferdinand, the certification official, graded it at 72.6%. The score on the grading sheet for Mr. Doe and the other trainees has Mr. Doe’s score on the final exam at 76% [Document 24]. All three scores – 74.6%, 72.6% and 76% – are below 80%. Mr. Doe does not dispute that he scored below 80%.

¹² IAD at 5.

he failed the final exam, I rely on Mr. Doe's failing the final exam to conclude that he did not meet a written performance standard for observer certification.

2. Did NPGOP reasonably conclude that Mr. Doe had unresolvable deficiencies in meeting the requirements for observer certification? Yes.

If an observer candidate fails the course, NPGOP must decide whether that person can retake it:

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. [50 C.F.R. § 679.50(j)(1)(iii)(B)(4)(ii)]

The regulation specifies that NPGOP can deny an observer candidate the right to retake the training if

the observer certification official determines that a candidate has unresolvable deficiencies in meetings 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. [50 C.F.R. § 679.50(j)(1)(iv)(A)]

When NMFS adopted this regulation, it explained the process in response to a public comment:

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 new regulations.

[Final Rule, 67 Fed. Reg. 72,595, 72,601 (Dec. 6, 2002)]

After Mr. Doe failed the final exam, NPGOP issued an IAD that Mr. Doe could not retake the

course because the certification official determined that he had unresolvable deficiencies. I review whether the certification official acted reasonably.

A. Candidate's prior training course in July 2007.

In reviewing NPGOP's determination after the August 2007 course, it is relevant that the August course was not the first time Mr. Doe took the training course. Mr. Doe began an observer training class on July 16, 2007. He failed the mid-class exam on July 25, 2007, with a score of 74% and NPGOP dismissed him from the July class in failing status.¹³

The acting certification official in July was Lisa Thompson and she concluded that Mr. Doe's performance on the mid-class examination was not consistent with his performance on the homework assignments and that his deficiencies were most likely resolvable.¹⁴ Ms. Thompson allowed Mr. Doe to retake the class but urged him to

seriously consider the challenge of observing as a profession. Observers are constantly exposed to the unusual dichotomy of being physically and mentally exhausted while being expected to be independent, self-motivated and attentive to detail. While the three-week course is rigorous and much is expected of the trainee, it is not representative of all the physical and mental demands observers are under while at sea.

Mr. Doe responded that he "earnestly appreciate[d] the considerations involved" and "will work hard not to disappoint" and registered for the class that began on August 6, 2007.¹⁵

B. Certification official's conclusion after the training class in August 2007.

When Mr. Doe failed the final exam for the August class, the certification official reviewed Mr. Doe's performance in the July and August classes and issued an initial administration determination that Mr. Doe would not be allowed to retake the class.¹⁶ The certification official determined that Mr. Doe had unresolvable deficiencies in two areas: proficiency in species identification through the use of dichotomous keys and proper sampling methodologies.

I first evaluate whether, if Mr. Doe made no arguments, the NPGOP certification official had sufficient evidence to reasonably conclude that Mr. Doe had unresolvable deficiencies in

¹³ Document 3; Document 4. Mr. Doe passed the mid-class exam in the August class with 88%.

¹⁴ Letter from Lisa Thompson to John Doe (Aug. 2, 2007) [Document 9].

¹⁵ Letter from John Doe to Lisa Thompson (Aug. 2, 2007) [Document 9].

¹⁶ The certification official at that time was Jennifer Ferdinand, the person who regularly performs that function.

meeting the standards for observer certification. If the NPGOP establishes that, the trainee has the burden to prove that the NPGOP decision was unreasonable or arbitrary because the trainee failed to meet the standard for reasons that are unrelated to his ability to master the material or to perform the duties of an observer.

The certification official relied on the following evidence concerning Mr. Doe's species identification skills through the use of dichotomous keys. Dichotomous keys are a method where an observer identifies a fish, not by memory or familiarity with individual species, but by a systematic observation of key features that differentiate one class of fish from another until all but the correct fish is ruled out.

In the July class, Mr. Doe received 11 hours of instruction in finfish identification and structured laboratory time to study fish specimens.¹⁷ In the August class, Mr. Doe received 16 additional hours of finfish identification instruction. The certification official noted: "Because you attended both the July and August classes, you were provided with the Fish Families, Flatfish Identification, and Rockfish identification lectures and labs twice."¹⁸

The certification official looked at Mr. Doe's performance on the fish quiz and the finfish identification exam. The fish quiz is an exercise given trainees in the second week of the class where the trainee gets 10 finfish and 6 crab specimens to identify. The trainee does not have to pass this quiz with 80% to successfully complete the course. The NPGOP gives trainees this exam before the Domestic Species Examination to help the trainees assess whether they need more work on identification skills. So failing the fish quiz does not mean Mr. Doe did not meet a written performance standard. But if a trainee does not meet a written standard, the certification official can look at the fish quiz in evaluating whether the trainee's deficiencies are unresolvable.

Even though the trainee had heard most of the fish identification material twice, he misidentified 5 of 10 finfish specimens on the fish quiz. [Document 21] His grade was the lowest in the class. Many of the misses were, in the opinion of the trainer, "what we think of as 'bad' misses – fish that were far from the answer and did not resemble the pictures in their materials (for example, Starry Flounder vs yellowfin sole and shortraker rockfish vs. shortspine thorny head [sic])."¹⁹

After the fish quiz, Mr. Doe failed the finfish identification exam with a score of 60%. He correctly identified 9 out of 15 finfish. [Document 22] A passing grade of 80% would be 12 out of 15 finfish species correctly identified. Of the thirteen people who started the course, eleven

¹⁷ IAD at 4. This is the required time. Trainees can arrange additional individual time in the lab.

¹⁸ IAD at 5.

¹⁹ Trainer's comments after August class [Document 25].

took this exam.²⁰ Mr. Doe's score was the lowest in the class. Only one other trainee failed it.

With respect to Mr. Doe's failure to pass the written examination, the certification official relied on the following evidence to conclude he had an unresolvable deficiency in mastering the material. Mr. Doe failed the final exam even though he had taken the first part of the course twice. Of the 13 members in the class, 11 took the final exam and Mr. Doe was the only person who failed it. [Document 24] Mr. Doe failed the final examination, "even with the most lenient grading."²¹ He had points subtracted on 9 questions and 6 questions were on sampling. [Document 20] According to the NPGOP, "In the more than 20 year history of the NPGOP, he is the only observer candidate to have ever failed more than one attempt at the certification course."²²

The certification official relied on the trainer's comments about Mr. Doe's performance on homework assignments in the July and August classes. The trainer's comments were mixed. After the July class, the trainer noted that Mr. Doe's "homework and in-class exercise performance was average to below average, but he had a normal progresion [sic] of lerning form [sic] mistakes." [Document 4] After the August class, the trainer noted: "[John's homework and in-class work was adequate. Homework was below average, but he worked hard to correct in a timely manner and rarely repeated mistakes." [Document 25]

Mr. Doe's performance in the August class was not uniformly deficient: he passed two parts of the Domestic Species Exam, he passed the mid-class exam, there were some positive aspects of his homework performance. But the certification official, in reviewing Mr. Doe's performance in the July and August classes, qualitatively and quantitatively, had sufficient evidence to conclude that Mr. Doe had unresolvable deficiencies in meeting the standards for observer certification. Mr. Doe now has the burden to prove that his poor performance was due to factors unrelated to his ability to master the material or perform the duties of an observer.

C. Mr. Doe's arguments on appeal

On appeal, Mr. Doe states that he failed the final exam because he was under stress due to the unexpected, and very difficult, death of a close friend in June 2007 and because he experienced test anxiety in the final exam.²³ Mr. Doe submitted a statement from a social worker who knew him from undergraduate school that he "has in the past had issues with test anxiety" and that "his

²⁰ One class member dropped out before taking the fish quiz. The other class member took the fish quiz but no other exams. [Document 24]

²¹ Trainer's comments after August class [Document 25].

²² NPGOP Submission (Feb. 14, 2008).

²³ Letter from John Doe to Office of Administrative Appeals (Oct. 30, 2007); Letter from John Doe to Office of Administrative appeals (Dec. 18, 2007).

current stressors exacerbated that issue.”²⁴

Since the NPGOP did not have these arguments when it issued the IAD, I allowed NPGOP to respond to them.²⁵ The NPGOP submitted further argument.²⁶ After considering Mr. Doe’s arguments, the NPGOP still determined that Mr. Doe had unresolvable deficiencies that should prevent him from taking the course again.

I conclude that NPGOP’s determination was reasonable. NPGOP questioned whether stress was the cause of Mr. Doe’s failing these two courses. Mr. Doe’s friend’s death occurred in June 2007, two months before he took the final exam for the August class. NPGOP noted that Mr. Doe had taken a considerable number of actions despite the stress of his friend’s death. He enrolled in the course twice and arranged alternate child care for his teenage daughters – the friend was going to take care of them while Mr. Doe attended graduate school.

But if stress and anxiety were why Mr. Doe failed the July and August classes, NPGOP was concerned that Mr. Doe’s inability to deal with stress and anxiety would undermine his ability to perform the duties of an observer. An observer is under constant stress. The job is “physically and mentally demanding.”²⁷

At sea, the observer is working independently for up to ninety days. The observer must deal with the captain, the crew, sometimes other observers, and make sure that he or she collects large amounts of data in a fast-paced environment. An observer must deal with chronic lack of sleep and with the lack of a regular schedule, as many vessels fish round-the-clock. An observer must be able to recognize when his or her own physical and mental condition might interfere with his ability to keep himself safe and to accurately sample catches, identify species, report potential violations and conduct other assigned duties. An observer must take steps to protect himself and others, if stress or anxiety interferes with his ability to perform the duties of an observer.²⁸

Mr. Doe states that he did not realize how much stress he was under and how it affected his performance, until after he failed the second class:

Anyway, first I watched [my friend] die then made hasty adjustments to

²⁴ Statement of Jim Narragon (Oct. 16, 2007).

²⁵ Order After Status Conference (Feb. 8, 2008).

²⁶ NPGOP Submission (Feb. 14, 2008). Mr. Doe had until March 5, 2008 to respond. He did not submit any response to the NPGOP Submission.

²⁷ NPGOP Submission (Feb. 14, 2008).

²⁸ See “What is an Observer?”, a pamphlet that trainees receive, prepared by the NPGOP, available at the NPGOP website, www.afsc.noaa.gov/refm/observers/default.htm.

accommodate, and I was not functioning at my normal level yet in some regards. Under such circumstances people commonly become accident prone, and in that context, this was a pileup. My capacities were not optimal, and I did not know that. I was the last to know that. I was just trying to deal.²⁹

But after failing the first class, Mr. Doe had reason to know that stress was affecting his ability to perform complex tasks up to his abilities. And Mr. Doe was on notice from his undergraduate studies that he had trouble taking tests. The NPGOP was concerned that Mr. Doe did not take adequate steps to deal with what should have been known problems. The NPGOP stated that, after the July class,

Mr. Doe had eleven days total to reflect on his performance in the course, evaluate what he thought caused his failure, and determine his next step. During this reflection, had Mr. Doe concluded that stress was a factor, he chose not to disclose this to NMFS, nor did he take steps to ensure that stress would not affect his performance again. Rather, he chose to move forward with his proffered second chance. [NPGOP Submission, Feb. 8, 2008]

It may be that, as Mr. Doe states, “[a]t a different juncture in my life, almost any juncture, the result of that training for me would have been different.”³⁰ But the NPGOP certification official acted reasonably when she concluded, based on Mr. Doe’s performance in the July and August classes, that he might react to this very stressful job in a way that would undermine his ability to perform the duties of an observer.

Given the pattern of Mr. Doe’s performance in the July and August class – his failure of the mid-term exam in the July class, his performance on the fish quiz in the August class, his performance on the finfish identification exam in the August class, his performance on the final exam in the August class, his mixed performance on the homework assignments – I conclude that the certification official reasonably concluded that he had unresolvable deficiencies in meeting the standards for observer certification. Given the stressful nature of observing, I conclude that NPGOP reasonably concluded that Mr. Doe’s difficulty dealing with stress and anxiety might undermine his ability to perform the duties of an observer. I therefore uphold the certification official’s determination that Mr. Doe cannot retake the observer certification course.

FINDINGS OF FACT

1. On August 6, 2007, at the beginning of the training course, NPGOP issued Mr. Doe a written performance standard of a score of 80% or better on all exams.
2. Mr. Doe did not score 80% or better on the finfish identification exam that he took on August

²⁹ Letter from John Doe to Office of Administrative Appeals (Dec. 12, 2007).

³⁰ *Id.*

21, 2007, as part of the observer training course from August 6 - 24, 2007.

3. Mr. Doe did not score 80% or better on the final examination that he took on August 23, 2007, as part of the observer training course from August 6 - 24, 2007.

CONCLUSIONS OF LAW

1. Mr. Doe failed to meet a written performance standard that NPGOP issued Mr. Doe at the beginning of the observer training course, namely, he failed the final examination because he did not score 80% or better.

2. The regulation commits the decision whether an observer can retake the training class to the discretion of the NPGOP certification official.

3. The determination by the NPGOP certification official that a trainee cannot retake the class should be vacated only if the NPGOP certification official acted unreasonably or arbitrarily.

4. Given the pattern of Mr. Doe's performance in the July and August classes, the NPGOP reasonably concluded that he had unresolvable deficiencies in meeting the standards for observer certification.

5. Given the stressful nature of the job of an observer, the NPGOP reasonably concluded that, if Mr. Doe's poor performance in the August class was due to stress or test anxiety, he might have difficulty performing the duties of an observer.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect May 5, 2008, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

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, April 14, 2008. 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