



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910

THE DIRECTOR

APR 21 2004

Ms. Kimberly S. Dietrich
Association for Professional Observers
P.O. Box 30167
Seattle, Washington 98103

Dear Ms. Dietrich:

Thank you for your letter regarding the compensation of fisheries observers for work performed under the Service Contract Act (SCA) and Fair Labor Standards Act (FLSA).

You refer to my November 13, 2003, memorandum requesting a legal opinion from the U.S. Department of Commerce General Counsel regarding applicability of overtime pay for fisheries observers. Your letter indicates that observers are concerned that their work experience may no longer be applicable when applying for professional level biologist positions if we classify observers as technicians. The determination as to whether a fisheries observer qualifies for a GS-7 Biologist or Fishery Biologist professional position is based on a number of factors, including work experience with the observer program, academic qualifications, superior academic achievement, and/or other work experience at the technical or professional level. The Human Resources office of the National Oceanic and Atmospheric Administration, National Marine Fisheries Service considers an observer's experience as that of a biological technician at the GS-5 level when applying for a professional level position. Observers that were employed in the past by the government in the Eastern Tropical Pacific tuna-dolphin observer program and in the Hawaii longline observer program were hired as GS-5 biological technicians.

Even though fisheries observers are now hired by observer service providers rather than the government, our past hiring practices, coupled with few changes in observers' job duties, warrant the continued reference to observers as biological technicians. This is consistent with the SCA. The procedures used by our Human Resources office in assessing prior work experience have not changed as a result of our request for a legal opinion from the Department of Commerce.

Your letter requests clarification on how the wage rate determinations and FLSA provisions will be applied to observer salaries, application of "waiting" or stand-by time and "working" time, and expectations regarding the observers' filling out detailed time sheets. As you may be aware, NOAA Fisheries is currently involved in litigation concerning this issue and therefore we cannot provide a direct response to these issues at this time. The Department of Labor's Wage and Hour Division is responsible for administering the FLSA. You may wish to contact them directly regarding application of the SCA wage rate determinations and provisions of the FLSA with respect to fisheries observers.

I appreciate your investigation of these issues, and will take into consideration your suggestions and observations as we continue to review federal requirements regarding the compensation of fisheries observers.

Sincerely,

William T. Hogarth, Ph.D.

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES

