

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Thomas L. Brower
AAD. NO. 01-004/F&WA
FLUKE EXEMPTION PERMIT NO. 127
2004

ORDER DENYING APPLICANT'S MOTION for SUMMARY JUDGMENT AND GRANTING DIVISION'S CROSS-MOTION FOR SUMMARY JUDGMENT

This matter is before me on the Motion for Summary Judgment ("Motion") filed by Thomas L. Brower ("Applicant") and the Cross-Motion for Summary Judgment ("Cross-Motion") filed by the Division of Fish and Wildlife ("Division").

The parties agree that there are no facts in dispute. In addition, Applicant concedes in his Motion that the Division correctly applied the provisions of the Rhode Island Marine Fisheries Council ("RIMFC") Rules to the transfer request submitted by the Applicant, ultimately resulting in a denial of the transfer. Applicant has appealed that denial to the Administrative Adjudication Division for Environmental Matters ("AAD").

The following facts are undisputed.

1. Applicant was the President of Brower and Brower, Inc. owner of the fishing vessel ("F/V") Jaime Elizabeth.
2. On or about April 25, 2001, Brower and Brower, Inc. sold the F/V Jaime Elizabeth and Applicant agreed to transfer with the sale all federal fishing history and fishing permits issued to the F/V Jaime Elizabeth.
3. State fishing permits and histories were excluded from the sale of the F/V Jaime Elizabeth.
4. Subsequent to this completed transaction, applicant applied to the Division to transfer Summer flounder Exemption Permit No. 127 from the F/V Jaime Elizabeth to the F/V Kristen, another vessel owned by Applicant.
5. On or about August 17, 2001, the Division denied Applicant's request because the proposed transfer did not comply with RIMFC Regulations, specifically Rules 2.9 and 7.7.8-6.
6. Applicant agrees that the Division correctly applied the provisions of the Regulations to the transfer request.

Applicant maintains, however, that RIMFC Regulations, Rule 2.9 and 7.7.8-6 are unconstitutional alleging that they violate both the commerce clause and the supremacy clause of the United States Constitution. Applicant moves for summary judgment asking that I find the Regulations to be invalid as a result of constitutional infirmities. Counsel for the Division argues that AAD is without jurisdiction to determine the constitutionality of the Regulations, specifically whether the Regulations in issue violate the commerce clause and supremacy clause of the United States Constitution as suggested by Applicant. The Division has filed a cross motion for summary judgment stating that there are no genuine

issues of material fact; the parties agree that the Regulations were correctly applied; and that the Division is entitled to judgment as a matter of law.

The Constitutional Challenge

Since its creation by the Legislature in 1989, the AAD has been invited to determine the constitutionality of a variety of statutes and regulations which it has the obligation and authority to enforce. AAD has relied upon and followed the holding of the United States District Court in the case of Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) and consistently declined to entertain constitutional challenges to the regulations. *Re: Betty Combs*, AAD No. 04-003/ISA, Final Agency Order dated October 7, 2004; *Re: Johnston Corporation*, AAD No. 02-012/ISA, Final Agency Order dated April 29, 2004; *Re: Tallman & Mack (F/V Maria Mendonsa)*, AAD No. 00-001/F&WA, Administrative Order issued May 18, 2000; *Re: F/V Sister Alice*, AAD No. 98-002/F&WA, Final Agency Order dated April 8, 1999; *Louis G. and Joan R. Roy*, AAD no. 95-002/ISA, Final Agency Order dated June 7, 1995; *Richard and Anita Ally*, AAD No. N/A, Administrative Order issued November 5, 1991; *Bruce T. Cunard/ROW Acquisition, Inc. d/b/a Reliable Shellfish*, AAD No. N/A, Final Agency Order dated June 17, 1991. Applicant's Motion likewise asks AAD to determine whether Regulations, which enjoy the presumption of validity, violate various provisions of the United States Constitution. I decline to reach those issues and concur with agency precedent and conclude that AAD is without jurisdiction to determine the constitutionality of the Regulations. As the District Court has held, the "... expertise of state administrative agencies does not extend to issues of constitutional law." Bowen v. Hackett, 361 F. Supp. at 860.

The Division's Cross-Motion for Summary Judgment

Having dispensed with Applicant's constitutional challenges on jurisdictional grounds, I turn next to the cross motion for summary judgment filed by the Division. It is well settled that "[s]ummary judgment is an extreme remedy and should be applied cautiously." Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I.1996) (citing Hydro-Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I.1994)). Super.R.Civ.P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law."

The material facts of this appeal are undisputed. Counsel for the Division reiterates that the parties agree the Regulations were properly applied to the transfer request and resulted in a denial of the request. The parties agree that the denial was appropriate under the Regulations as applied. Accordingly, counsel for the Division asserts that there is no dispute as to any genuine issue of material fact and that the Division is entitled to judgment as a matter of law.

I have reviewed all evidence of record as well as the memoranda of counsel in the light most favorable to the non-moving party. I conclude that there is no dispute as to any genuine issue of material fact and the Division is entitled to judgment as a matter of law.

Based on the forgoing it is hereby

ORDERED

1. Applicant's Motion for Summary Judgment is **DENIED**.

2. The Division's Cross-Motion for Summary Judgment is **GRANTED**.

Entered as an Administrative Order this _____ day of February, 2005 and herewith recommended to the Director for issuance as a Final Agency Order.

Kathleen M. Lanphear

Chief Hearing Officer

Entered as a Final Agency Order this _____ day of _____, 2004.

Frederick J. Vincent

Acting Director