

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

RE: HOCHMAN, DAVID

AAD No. 03-007/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to the appeal by David Hochman ("Applicant") of the denial of Applicant's request for renewal of his principal effort license with restricted finfish and non-restricted finfish endorsements.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I. GEN. LAWS §§ 42-17.7-1 et seq.); the Administrative Procedures Act (R.I. GEN. LAWS §§ 42-35-1 et seq.); the Rules and Regulations Governing the Management of Marine Fisheries ("Fisheries Regulations"); and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"). The Applicant appeared pro se and Deborah A. George, Esquire represented the Office of Boat Registration and Licensing ("OBR&L"), of the Office of Management Services of the Department of Environmental Management.

The Prehearing Conference was held on May 22, 2003 (immediately prior to the adjudicatory hearing), at which the following stipulations of fact were agreed upon by the parties:

1. David Hochman is a Connecticut resident.
2. David Hochman held a non-resident Rhode Island commercial fishing license, rod and reel, as of December 31, 2002.

The OBR&L's proposed statement of issue is:

Whether David Hochman is eligible to apply for a non-resident principal effort license with restricted and non-restricted finfish endorsements since he did not apply by the February 28, 2003 deadline.

The Applicant's proposed statement of issue is:

I have applied for my non-resident principal effort license with restricted and non-restricted finfish endorsements. The DEM reports that they have not received the application nor have I received it in return mail. My check number 1491 has not been cashed as of present date.

The list of exhibits (all of which were marked and admitted as full exhibits by agreement of the parties), is attached to this Decision as Appendix A.

Mr. Hochman appealed directly to the AAD since the Commercial Fishing License Review Board was not yet appointed and confirmed. At the hearing, Applicant testified on his own behalf. The OBR&L presented one (1) witness, Margaret McGrath, Programming Service Officer at OBR&L.

Mr. Hochman testified that he mailed his application to renew his rod and reel license¹ to the Department on February 28, 2003, and that he enclosed his personal check number 1491 from his personal checking account in the amount of \$500.00 made out to the State of Rhode Island. He testified that he did not keep a copy of his application or mail the application certified mail or certified mail with a return receipt. At some point in March 2003, he wondered where his license was because his father received his license from the Department. Applicant contacted the Department, and was informed they never received his license application. He testified that he did not receive his application or check back as returned mail. He then filed a form with the Post Office known as a tracer (Form 1015) approximately the first week of April 2003, but has

¹ Pursuant to RIGL § 20-2.1-6(1)(ii) an application for a rod and reel license is considered a principal effort license with a restricted finfish endorsement under the new restructured commercial fishing license laws in RIGL § 20-2.1-1.

received no response from this request.

Mr. Hochman offered impressive testimony of his own "personal history". He is a duly licensed chiropractic physician and an active member of numerous professional associations. He is a nationally ranked spear fisherman, and will represent the United States in an international spearfishing competition in 2004 in Tahiti. Applicant utilizes his license fully and fishes commercially to supplement his income.

The Applicant introduced three statements from individuals (none of whom appeared to testify) in which they alleged that Mr. Hochman mailed his license application and check to the Department on February 28, 2003. He also submitted copies of his bank statements, his check register, and returned checks written around February 28, 2003 in an attempt to show that the check was written during the correct time.

Margaret McGrath testified that she is employed as Program Service Officer of OBR&L. This is a supervisory position, and as such, she handles the day to day operation of the OBR&L, and has occasion to deal with fishing licenses. She testified that Mr. Hochman called her a few days after February 28, 2003, and spoke to her and a few others about his fishing license. It was this witness's testimony that after learning of Mr. Hochman's allegation that he sent his application and check to the Department, she and all of her staff in the OBR&L conducted a double check, and nothing or no one else's appeared. This extensive search left no doubt that the Department did not receive Mr. Hochman's application or cash his check. She gave a rather detailed description of the procedure her office follows in receiving, opening, stamping, sorting and recording of mail and checks. She testified that OBR&L received an enormous amount of mail in February 2003, and no other Applicant has alleged that they mailed their application to the Department and that the Department did not receive it.

It is Mr. Hochman's contention that he has presented adequate evidence to

satisfy his burden of proving his eligibility to obtain his non-resident principal effort license with restricted and non-restricted finfish endorsements. Applicant maintains that he has presented adequate credible evidence to establish that he mailed his license application and check in the amount of \$500.00 to the appropriate address of OBR&L by the deadline date of February 28, 2003.

It is OBR&L's position that Mr. Hochman is not eligible to apply for a non-resident principal effort license with restricted and non-restricted finfish endorsements since he did not apply by the February 28, 2003 deadline. OBR&L maintains that Mr. Hochman has not met his burden of proof in this matter since, even if one were to assume that Mr. Hochman did mail his application by the February 28, 2003 deadline, the Department is precluded by statute from issuing any new or renewal license after February 28 of each year, unless an applicant has submitted an application by the February 28 deadline as required by Section 20-2.1-4(g) of the R.I. GEN. LAWS.

The pertinent statutes and regulations governing the mailing deadline are R.I. GEN. LAWS §§ 20-2.1-4(g) and 20-2.1-6(1)(ii)(B), and Fisheries Regulation 6.7-3(d). Section 20-2.1-4(g) provides:

(g) Resident and non-resident licenses. For commercial marine fishing licenses provided for in §§ 20-2.1-5 and 20-2.1-6, the following provisions shall apply: (1) unless otherwise specified in this chapter, an individual qualified to obtain a license must submit an application to the department of environmental management no later than February 28 of each year; license application shall be deemed valid if submitted to the department prior to the close of regular office hours on February 28, or if postmarked by February 28; (2) unless otherwise specified in this title, *no new or renewed licenses shall be issued after February 28 of each year, unless an applicant has submitted an application by the February 28 deadline required by this section*; and (3) the department shall notify all license holder in writing, regarding the December 31 expiration and the February 28 renewal deadline no later than November 1 of each year.

Section 20-2.1-6(1)(ii)(B) also provides that non-residents seeking a non-resident principal effort license must "apply for the non-resident principal effort license no later

than February 28, 2003”.

Fisheries Regulations 6.7-3(d) likewise contains the same February 28, 2003 deadline and specifies that applications must be posted with a postmark no later than said deadline date.

Mr. Hochman presented significant evidence and documentation in an effort to establish that he deposited his application and check in the mail on February 28, 2003. However, there was no evidence whatsoever that a postmarked application for a 2003 license was submitted to the Department by Mr. Hochman.

The testimony of Margaret McGrath was uncontradicted, and clearly establishes that the Department did not receive Mr. Hochman's application by the deadline established by statute and regulation. The evidence also demonstrates that the Department complied with its statutory mandate to notify license holders by November 1, 2002 of the legislative change. It is indeed unfortunate that an individual with such impressive credentials cannot obtain the license renewal that he seeks; however, this cannot alter the outcome of this matter.

A review of the pertinent statutes and regulations clearly demonstrates that the Department is precluded by law from issuing a renewal license to Mr. Hochman for 2003. Assuming arguendo that Mr. Hochman did in fact deposit his application and check in the mail on February 28, 2003, this does not satisfy the legislative mandate in R.I. GEN. LAWS Section 20-2.1-4(g) that license applications shall be deemed valid if submitted to the Department prior to the close of regular office hours on February 28, or if postmarked by February 28.

It is a well-settled rule of statutory construction to give plain meaning to statutes when called on to interpret legislative intent. The Rhode Island Supreme Court held that if the statutory language is clear and unambiguous, “this Court must interpret the statute

literally and must give the words of the statute their plain and ordinary meanings” in determining the Legislature’s intent. Local 400, International Federation of Technical and Professional Engineers v. Rhode Island State Labor Relations Bd. 747 A.2d 1002, 1004 (R.I. 2000) *citing* Accent Store Design, Inc. v. Marathon House, Inc. 674 A.2d 1223, 1226 (R.I. 1996).

The language of R.I. GEN. LAWS §§ 20-2.1-4(g), 20-2.1-6(1)(ii)(B), as amended and the accompanying Fisheries Regulations Rule 6.7-3(d) is unambiguous and expresses a clear and sensible meaning. These provisions were intended to restrict the application period for residential and non-residential commercial fishing licenses. It was the legislature’s clear intent to change the license period from a year long open licensing period to a two month licensing period. The legislature undoubtedly understood the risk involved in restricting the application period as it did, and made it abundantly clear that February 28 was a firm deadline and that the Department cannot issue any renewals after that deadline. While this may seem harsh under the circumstances overall, and particular to Mr. Hochman, this was the legislature’s intent, and the Department must uphold and comply with the law.

The facts in this case are clearly distinguishable from the Raymond F. Chapman case² cited by Mr. Hochman in his Post-Hearing Memorandum. The evidence in Chapman was deemed sufficient to prove that Mr. Hochman held a valid R.I. commercial fishing license prior to July 1, 2000. Unlike Chapman, the credibility of and sincerity of Mr. Hochman is not at issue in the instant matter. Mr. Hochman went to great lengths to establish that he deposited his application and check in the mail. However, this evidence even if accepted in its entirety, clearly fails to satisfy the mandates of the statutes and

² RE: Raymond F. Chapman AAD No. 01-040/MSA

regulations that the Application must be submitted to the Department by February 28, 2003, or in the alternative postmarked by February 28, 2003 in order for a license application to be deemed valid. Assuming arguendo that Mr. Hochman did deposit his application in the mail on February 28, 2003, the Department did not receive it and processing of same would violate the law.

Mr. Hochman acknowledged that he sought to file his application by depositing it in the mail. The necessary requirement is a postmark date and not the depositing in the mail. Only a timely postmark sustains the validity of an appeal. Any risk of nondelivery must be borne by the party who seeks an appeal. Mauricio v Zoning Board of Review 590 Ad 879 (R.I. 1991). Consequently, the decision of OBR&L to deny Mr. Hochman his non-resident principal effort license with restricted and non-restricted finfish endorsements for 2003 was consistent with the statute and the Fisheries Regulations and should be affirmed.

FINDINGS OF FACT

After considering the testimonial and documentary evidence of record, I find as a fact the following:

1. David Hochman is a Connecticut resident.
2. David Hochman held a non-resident Rhode Island fishing license, rod and reel, as of December 31, 2002.
3. The Department notified all license holders in writing regarding the December 31, 2002 expiration and the February 28, 2003 renewal deadline prior to November 1, 2002.
4. David Hochman did not submit an application for a commercial marine fishing license to the Department of Environmental Management prior to the close of regular office hours on February 28, 2003, nor was an application received by the Department that was postmarked by February 28, 2003.
5. David Hochman is not eligible to apply for a Rhode Island non-resident principal

effort license with restricted and non-restricted finfish endorsements since he did not apply by the February 28, 2003 deadline.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein. I conclude the following as a matter of law:

1. David Hochman failed to submit a valid application for a non-resident Rhode Island commercial marine fishing license in that he did not submit his application to the Department of Environmental Management prior to the close of regular office hours on February 28, 2003 nor was his application postmarked by February 28, 2003.
2. David Hochman is not eligible to apply for the renewal of his non-resident principal effort license with restricted and non-restricted finfish endorsements since he did not submit an application prior to the February 28, 2003 deadline established by R.I. GEN. LAWS §§ 20-2.1-4(g)(1) and 20-2.1-6(1)(ii)(B) and Fisheries Regulation Rule 6.7-3(d).
3. The Department is prohibited from issuing a renewal license to David Hochman since Mr. Hochman did not submit an application by the February 28, 2003 deadline pursuant to R.I. GEN. LAWS § 20-2.1-4(g)(2)

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. The request of David Hochman for a renewal of his principal effort license with restricted finfish and non-restricted finfish endorsements is DENIED.

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Entered as an Administrative Order and herewith recommended to the Director
for issuance as a Final Agency Decision and Order this 8th day of August, 2003.

Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this _____ day of
_____, 2003.

Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to David Hochman, 42 Grant Street, Milford, CT 06460; and via interoffice mail to: Deborah George, Esquire, DEM Office of Legal Services, 235 Promenade St., 4th Fl., Providence, RI 02908; on this _____ day of August, 2003.

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If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. GEN. LAWS §42-35-15.

APPENDIX A
LIST OF EXHIBITS

APPLICANT'S EXHIBITS

APPLICANT'S 1 Full	Copy of letter from Noel Hochman
APPLICANT'S 2 Full	Copy of letter from Peggy Fry
APPLICANT'S 3 Full	Copy of letter from Lynn Ries
APPLICANT'S 4 Full	Copy of check book statement page numbers 2 of 5 and 3 of 5
APPLICANT'S 5 Full	Copy of check book statement page numbers 4 of 5 and 1 of 5
APPLICANT'S 6 Full	Copy of check book statement page numbers 1 of 5 and 2 of 5
APPLICANT'S 7 Full	Copy of check book statement page numbers 3 of 5 and 4 of 5
APPLICANT'S 8 Full	Copy of check book statement page number 5 of 5
APPLICANT'S 9 Full	Copy of check register
APPLICANT'S 10 Full	Copy of checks (hand-written)
APPLICANT'S 11 Full	Copy of picture from spearfishing guide

OBR&L'S EXHIBITS

OBR&L 1 Full	Copy of September 18, 2002 letter forwarded to all qualified participants (subsequent to July 1, 2000) including commercial and non-commercial license holders.
OBR&L 2 Full	Copy of David Hochman's license history.
OBR&L 3 Full	Copy of April 2, 2003 letter from David Hochman to Director, Jan Reitsma.
OBR&L 4 Full	Copy of April 7, 2003 denial letter from Margaret McGrath to David Hochman.
OBR&L 5 Full	Copy of April 10, 2003 appeal to the Administrative Adjudication Division.

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- OBR&L 6 Full Copy of Howard Hochman's (David Hochman's father) license history.
- OBR&L 7 Full Rhode Island General Laws Sections 20-2.1-4 and 20-2.1-6.
- OBR&L 8 Full Rhode Island Department of Environmental Management Division of Fish and Wildlife's Rules and Regulations Governing the Management of Marine Fisheries.
- OBR&L 9 Full Blank Non-Resident Principal Effort License Application.