

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island

RE: DANNY BROWN

AAD No. 04-006/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Applicant Danny Brown's request for hearing. Mr. Brown had applied for a Multipurpose License from the Office of Boat Registration and Licensing ("OBRL") and had the request denied because he had not held such a license or its equivalent since 1991. According to R.I. GEN. LAWS § 20-2.1-12 and section 6.7.10 of the Rules and Regulations Governing the Management of Marine Fisheries ("Fisheries Regulations"), Mr. Brown next requested reconsideration of the denial before the Commercial Fishing License Review Board ("Review Board"). The Review Board issued a decision recommending that the OBRL issue the license to Mr. Brown. As required by statute, OBRL considered the recommendation but ultimately declined to issue the requested license, characterizing it as an upgrade, and instead offered to issue a Principal Effort License with Quahog endorsement (the equivalent of what Mr. Brown most recently held before his period of incarceration from 1994 to 2004). Applicant disagreed with this determination and again asked the Commercial Fishing License Review Board to consider the matter. The Board issued no further decision and when the time for response by the Board expired, OBRL issued its final denial and Applicant filed this appeal at AAD. Applicant proceeded to hearing before the AAD on November 22, 2004. Danny Brown appeared *pro se* and the Office of Boat Registration and Licensing was represented by Deborah George, Esq. The hearing was deemed closed at the conclusion of the proceedings.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 *et seq.*); the Administrative Procedures Act (R.I. GEN. LAWS § 42-35-1 *et seq.*); and the Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters ("AAD Rules").

PREHEARING CONFERENCE

On October 21, 2004 a prehearing conference was conducted. At the prehearing conference, the parties agreed to the following stipulations of fact:

1. Applicant, Danny Brown, did not hold a valid multi-purpose commercial fishing license as of December 31, 2003.
2. Applicant, Danny Brown, was granted a principal effort license with quahog endorsement by the Department on or about May 7, 2004 based on the Department's modification of the recommendation of the Commercial Fishing License Review Board.
3. Applicant has not held a multi-purpose license since December 31, 1991.
4. Applicant renewed his boat registration for a 1977 Angler, Registration #RI 6634L in April 1991, March 1992, March 1993, May 1994, December 1997, July 1999, June 2001, and July 2004.

The OBRL identified the following issues to be considered by the Hearing Officer at the hearing:

1. Whether Applicant, Danny Brown, was eligible to apply for a commercial multi-purpose since he did not possess a valid multi-purpose license since 1991.
2. Whether Applicant, Danny Brown, was eligible to upgrade from the Principal Effort License with quahog endorsement to a Multi-Purpose License since he has not held a valid multi-purpose license since 1991.

Applicant raised the issue of the constitutionality of the statute and Fisheries Regulations. That issue was raised and preserved in the summary judgment proceedings and is similarly preserved on the hearing record. Applicant was advised that the hearing officer will not address the constitutionality claims.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, Applicant testified on his own behalf. The OBRL presented two (2) witnesses, Margaret McGrath, the Programming Services Officer at OBRL and Mark Gibson, Deputy Chief of the Division of Fish and Wildlife of DEM.

Mr. Brown's testimony and argument were brief. He stated that he possessed the equivalent of a multipurpose license in past years and that the last time he held such a license was 1991. He testified that he did not need that license in 1992, 1993 and 1994 as he was working under the lobstering license of another individual while in his employ. In 1994, Mr. Brown held a shellfish license which is the equivalent of a present day Principal Effort License with Quahog Endorsement. Sometime in 1994, Mr. Brown was incarcerated in Rhode Island and remained in prison until early 2004 when his petition for post-conviction relief was granted by a Justice of the Rhode Island Superior Court. His release is under appeal by the Rhode Island Attorney General's Office and Mr. Brown remains free on personal recognizance. Mr. Brown testified that he would have held on to his multipurpose license had he known that the Fisheries Regulations and statute would change. He argues that he was unable to apply for renewal because of his incarceration and a lack of funds and that if he were granted the license it would not cause the fishery to be over-fished. On cross-examination, Mr. Brown acknowledged that in May of 2004, the OBRL issued to him the equivalent license as he possessed at the time of his incarceration. He further acknowledged that his current license allows him to quahog; that he has the gear to do so; and that he currently participates in that fishery. Mr. Brown also conceded that although he was incarcerated, he was able to renew his boat registration while in prison, with the assistance of his nephew.

Margaret McGrath, testifying on behalf of the OBRL, confirmed that in May 2004, OBRL issued to Mr. Brown a Principal Effort License with Quahog Endorsement, the present day equivalent of a shellfish license. She testified that OBRL's decision in this matter was consistent with prior agency decisions specifically referencing three final agency decisions issued in 2003. Moreover, Mrs. McGrath indicated that no new multi-purpose licenses were issued by DEM in 2004 and that the agency was consistent in its application of its Fisheries Regulations denying upgrades and requiring license-holders to remain at their current level.

Mark Gibson, Deputy Chief of the Division of Fish and Wildlife, also testified for the OBRL. Mr. Gibson is

responsible for the review of fisheries stock assessments for DEM; for preparation of fishing sector management plans for DEM; and for the drafting of fisheries licensing regulations for the Department. He is the Department's representative to the Marine Fisheries Council and the Atlantic States Marine Fisheries Council. Mr. Gibson testified that he was familiar with the Fisheries Regulations governing license issuance for the year 2004 which provide that no new lobster licenses or new multipurpose licenses are to be issued for the year. He testified that issuance of a multipurpose license would allow Applicant to participate in the lobster fishery. In order to be consistent with management plans, Mr. Gibson testified that no new access to the lobster fishery could be allowed. Under cross-examination, Mr. Gibson explained that one reason for this restriction is that the Atlantic Coastal Compact and other interstate management plans, to which Rhode Island is a party, prohibit new lobster licenses in Area 2. According to Mr. Gibson, DEM must comply with these restrictions. Mr. Gibson also explained that the prohibition on new licenses is necessary because the resource (lobsters) is at such a low level that it cannot sustain new entrants into the fishery at this time.

Conclusion

The Director's rule-making authority for implementing a commercial fisheries licensing system is set forth in R.I. GEN. LAWS § 20-2.1-9. Under this statute, the rules apply both to commercial fishing licenses and to commercial fishing by license holders. The statute allows regulation of the types of licenses and/or license endorsement and limitations on levels of effort and/or on catch by type of license and/or license endorsement. It also allows the Department to impose "Limitations and/or restrictions on effort, gear, catch, or number of license holders and endorsements." R.I. GEN. LAWS § 20-2.1-9(1)(v).

With this grant of broad rule-making authority, the Department adopted the Fisheries Regulations that *inter alia*, restricted the issuance of new licenses (Rule 6.7-4 *et seq.*) That Regulation reads in pertinent part:

(6.7-4) License Renewals

(a) ...

(b) ...

(c) Applicants who possessed a valid Multi-Purpose License as of the immediately preceding year may obtain a Multi-Purpose License for the immediately following year.

The Department restricted the availability of Multi-Purpose Licenses to those individuals who held the license as of December 31, 2003. This Applicant did not hold such a license, or any license at all, as of December 31, 2003. The last time he held a multi-purpose license, which is the subject of this appeal, was 1991. Moreover, Rule 7 of the Fisheries Regulations states:

RULE 7. AVAILABILITY OF NEW LICENSES AND ENDORSEMENTS FOR 2004

(7.1) Multi-Purpose Licenses

No new Multi-Purpose Licenses shall be available for 2004, except pursuant to sections 6.7-8 and 6.7-9.¹

The OBRL was therefore proceeding in accordance with applicable statutes and regulations when it denied Mr. Brown a Multi-purpose license.

¹ These provisions are inapplicable to the instant appeal.

Having determined the legal issue that the OBRL was acting in accordance with Chapter 2.1 of Title 20, I now proceed to consider the evidence presented at the hearing on whether Applicant should nevertheless be issued a multipurpose license. Both R.I. GEN. LAWS § 20-2.1-12 and Section 6.7-10 of the Fisheries Regulations provide that Applicant bears the burden to prove compliance with the criteria for issuance of the license. Both also set forth factors that the Review Board is required to consider and that AAD may consider on appeal.²

- (i) the impact that issuance of the license will have on the fisheries management program overall;
- (ii) equity with other license holders;
- (iii) consistency with prior agency decisions;
- (iv) consistency with management plans;
- (v) unreasonable hardship to the applicant; and
- (vi) consistency with the provisions and purposes of R.I.G.L. 20-2.1.

Rule 6.7-10(g)(vi) of the Fisheries Regulations adds that the Review Board should consider whether the issuance of the license would be consistent with the provisions and purposes of the Fisheries Regulations.

The first issue therefore, is to consider the impact that issuance of the license will have on the fisheries management program overall. Applicant argues that if the license were issued, he would not over-fish the resource. The factual question is, will one more entrant into the fishery impact the fisheries management program... The agency final decision and order in *Re: Patrick J. Heaney*, AAD No. 03-001/MSA, June 27, 2003; 2003 WL 22970592 addressed this precise issue. In that final decision the Director stated:

... More participants in a fishery means more effort being exerted and more pressure on the stock, even though a quota is in place. While reasonable minds may differ as to how significant the additional impact on the stock is, it cannot be found, as a matter of fact, that there will be no such impact. Moreover, the statute is very clear in its recognition that the fishery to be protected is not just the fish stock but includes the fishermen trying to make a living. More fishermen fishing for the same stock in a quota fishery generally means that less fish can be caught by each participant and, ultimately, that the preservation or restoration of the fishery in this broader sense is in jeopardy.

The facts of the present case support a similar finding, and I conclude that Applicant has not met his burden on this issue.

The second factor for consideration is equity with other license holders. Applicant did not address this issue. Applicant has not met his burden on this issue.

The third issue to be considered is whether issuance of the requested license would be consistent with prior agency decisions. Applicant offered no evidence on this issue. Mrs. McGrath, however, addressed this criterion in her testimony. She testified that OBRL issued no new multipurpose licenses in 2004. She indicated that OBRL's decision to deny Mr. Brown a multipurpose license was consistent with its actions in other such cases and with the agency's final decisions in several cases. She referenced *Re: Heaney, Patrick, J.*, AAD No. 03-001/MSA, June 27, 2003; 2003 WL 22970592; *Re: Brian Thibeault*, AAD No. 03-006/MSA, June 27, 2003; 2003 WL 22970595 and *Re: Mark Oliveira*, AAD No. 03-004/MSA, July 9, 2003; 2003 WL 22970594 as prior agency decisions with which OBRL's determination in the instant

² See *Re: Brian Thibeault*, AAD No. 03-006/MSA, June 27, 2003; 2003 WL 22970595.

matter is consistent. Although the facts of each case differ, the common thread is that each Applicant sought an upgrade of the license they had possessed in the immediately preceding year. In each case, OBRL, applying the statute and Fisheries Regulations, denied the “upgrade” and issued to the Applicant only the license that they held in the immediately preceding year. In each case, that decision was ultimately upheld by the Director. Issuance of the multipurpose license to Mr. Brown would be inconsistent with those prior agency decisions. Applicant has failed to meet his burden on this issue.

Consistency with management plans is the fourth consideration. Mr. Gibson’s uncontradicted testimony established that allowing even one more person into the lobster fishery would be violative of existing management plans and interstate agreements. Since the issuance of a multipurpose license would allow Applicant into the lobster fishery, issuance of the license cannot be considered consistent with management plans. Applicant has not met his burden on this issue.

The fifth factor, unreasonable hardship to Applicant, has also not been established. “Unreasonable hardship” is defined in Rule 5.54 of the Fisheries Regulations to mean:

Severe economic loss resulting from the denial of a license which is unique to an individual and which has not been caused or exacerbated by prior actions of or inaction on the part of that individual.

Applicant testified that he was illegally incarcerated from 1994 to 2004. His petition for post-conviction relief was granted in 2004 and as a result he was released from prison. He now seeks the license he last held in 1991 - three years prior to his incarceration. Even assuming, *arguendo*, that I find that Mr. Brown’s incarceration presents the type of unique circumstances contemplated by the Fisheries Regulations, the remedy would be to restore him to the position he was in at the time of his incarceration. Specifically, the remedy would be to issue to him a Principal Effort License with Quahog Endorsement, which OBRL has already done. I agree with OBRL’s determination that issuance of a multipurpose license would constitute an upgrade from what Applicant last held. With further regard to unreasonable hardship, Mr. Brown testified that he is currently working under his existing license and presented no testimony concerning severe economic loss. Based on these facts, I must conclude that Applicant has not met his burden on this issue.

The final issue to be considered, as set forth in the Fisheries Regulations, is whether the issuance of the license would be consistent with the provisions of R.I. GEN. LAWS Title 20 Chapter 2.1 and with the Fisheries Regulations. As discussed above, Applicant has not met his burden on any of the criteria set forth in the statute and Regulations. Accordingly, issuance of a multipurpose license to this Applicant would not be consistent with the provisions of Chapter 2.1 of Title 20 and would not be consistent with the Fisheries Regulations.

Applicant has therefore not met his burden to prove by a preponderance of the evidence that he satisfies the above criteria for issuance of a multipurpose license.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. By letter to OBRL dated February 9, 2004 Danny Brown requested issuance of a commercial fishing license.
2. The OBRL denied Applicant’s request on or about February 16, 2004.
3. On or about February 19, 2004, Applicant requested that the Review Board reconsider the

denial.

4. By letter dated April 13, 2004 the Review Board recommended that OBRL issue to Danny Brown "the license he seeks."
5. OBRL declined to adopt the recommendation of the Board and by letter dated May 4, 2004 informed Mr. Brown that his request was denied. The letter informed Mr. Brown of the appeal procedure to the Administrative Adjudication Division for Environmental Matters.
6. OBRL modified the recommendation of the Board by issuing to Mr. Brown the equivalent of the license he held when he began his incarceration.
7. Applicant, Danny Brown, was granted a Principal Effort License with Quahog Endorsement by the Department on or about May 7, 2004 based on the Department's modification of the recommendation of the Commercial Fishing License Review Board.
8. By letter dated May 11, 2004 Mr. Brown asked the Review Board to consider an appeal of OBRL's denial.
9. The Review Board took no action and the OBRL issued its final denial to Applicant on or about August 20, 2004 and again advised Applicant of the appeal procedure to AAD.
10. On September 8, 2004 Applicant filed an appeal with AAD.
11. Applicant has not held a multi-purpose license since December 31, 1991.
12. Applicant, Danny Brown, did not hold a valid multi-purpose commercial fishing license as of December 31, 2003.
13. Applicant was incarcerated from 1994 to early 2004.
14. At the time of his incarceration, Applicant held a shellfish license.
15. A Principal Effort License with Quahog endorsement is the present day equivalent of a shellfish license.
16. Issuance of a multipurpose license to this Applicant would constitute an upgrade of the license last held by Applicant and held at the time of his incarceration.
17. Applicant renewed his boat registration for a 1977 Angler, Registration #RI 6634L in April 1991, March 1992, March 1993, May 1994, December 1997, July 1999, June 2001, and July 2004.
18. Fishing is Applicant's sole means of support.
19. Applicant currently works his Principal Effort License with Quahog Endorsement.
20. Applicant seeks the multipurpose license for use in the lobster fishery, as well as for other allowed species.
21. Issuance of a multipurpose license would allow Applicant into the lobster fishery.

22. The lobster fishery is currently managed through the imposition of management plans, interstate compacts and restrictions on new entrants into the lobster fishery.
23. The status of the lobster resource is at low levels and cannot sustain new entrants into the fishery.
24. Current management plans and interstate agreements, to which Rhode Island is a party, allow no new entrants into the lobster fishery for 2004.
25. Issuance of a multipurpose license to this Applicant would be inconsistent with management plans.
26. The Fisheries Regulations prohibit the issuance of new multipurpose licenses in 2004.
27. 27. The OBRL has not issued any new multipurpose licenses for 2004.
28. Denial of a multipurpose license is consistent with prior agency decisions.
29. Issuance of the multipurpose license to this Applicant would be inconsistent with the provisions and purposes of R.I. GEN. LAWS § 20-2.1-1 *et seq.* or with the provisions and purposes of the Fisheries Regulations

CONCLUSIONS OF LAW

After due consideration of the above findings of fact and the legal argument of the parties, I conclude the following as a matter of law:

1. The AAD has jurisdiction over this matter pursuant to R.I. GEN. LAWS § 42-17.7-2; R.I. GEN. LAWS § 20-2.1-12; and Rule 6.7-10(i) of the Fisheries Regulations.
2. The Director's rule-making authority for implementing a commercial fisheries licensing system that allows regulation of the types of licenses/endorsements and limitations and/or restrictions on gear or number of license holders and endorsements is established in R.I. GEN. LAWS § 20-2.1-9.
3. The Fisheries Regulations were adopted pursuant to R.I. GEN. LAWS § 20-2.1-9.
4. Because it is an upgrade, the multipurpose license sought by Applicant constitutes a new license as contemplated by R.I. GEN. LAWS §20-2.1-5 (1)(ii) and the Rules and Regulations Governing the Management of Marine Fisheries.
5. The OBRL acted in accordance with Rule 7 in denying Applicant's request for issuance of a multipurpose license for 2004.
6. In appeals from denials issued by the OBRL, the AAD may consider those factors identified in R.I. GEN. LAWS § 20-2.1-12 and in Section 6.7-10 of the Fisheries Regulations.
7. Pursuant to R.I. GEN. LAWS § 20-2.1-12 and Section 6.7-10 of the Fisheries Regulations, Applicant must prove by a preponderance of the evidence that he has complied with the

criteria for issuance of a license.

8. Applicant failed to prove by a preponderance of the evidence that issuance of a multipurpose license would not have an impact on the fisheries management program.
9. Applicant failed to prove by a preponderance of the evidence that issuance of the multipurpose license would achieve equity with other license holders.
10. Applicant failed to prove by a preponderance of the evidence that issuance of a multipurpose license would be consistent with prior agency decisions.
11. Applicant failed to prove by a preponderance of the evidence that issuance of the multipurpose license, which allows him into the lobster fishery, would be consistent with management plans.
12. Applicant failed to prove by a preponderance of the evidence that OBRL's denial of the multipurpose license would cause an unreasonable hardship as defined in Rule 5.54 of the Fisheries Regulations.
13. Applicant has failed to prove by a preponderance of the evidence that issuance of the multipurpose license would be consistent with the provisions and purposes of R.I. GEN. LAWS § 20-2.1-1 *et seq.* or with the provisions and purposes of the Fisheries Regulations.
14. Applicant has failed to prove by a preponderance of the evidence that he meets the criteria for issuance of a multipurpose license.

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

ORDERED

Applicant's request for a Multipurpose License for 2004 is **DENIED**.

Entered as an Administrative Order this ____ day of December, 2004 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

APPENDIX A

OBRL EXHIBITS

OBRL 1 Copy of Applicant's License History (2 pages)
(Full)

OBRL 2 Copy of letter dated February 9, 2004 from Applicant, Danny Brown to

- (Full) OBRL requesting renewal of multi-purpose license MULT0527 that expired December 31, 1991 (1 page)
- OBRL 3
(Full) Copy of preliminary denial letter dated February 16, 2004 from OBR&L to Applicant (2 pages)
- OBRL 4
(Full) Copy of letter dated February 19, 2004 from Danny Brown to Commercial Fishing License Review Board requesting reconsideration of preliminary denial from OBR&L (4 pages)
- OBRL 5
(Full) Copy of letter dated April 13, 2004 (received by the OBR&L on April 22, 2004) from Commercial Fishing License Review Board to OBR&L issuing recommendation to Dept. (9 pages)
- OBRL 6
(Full) Copy of letter dated May 4, 2004 from OBR&L to Applicant Danny Brown modifying recommendation from Commercial Fishing License Review Board (2 pages)
- OBRL 7
(Full) Copy of application submitted by Applicant Danny Brown to OBR&L on May 7, 2004 applying for PEL license with quahog & non-quahog endorsements. Additionally, screen prints of license & endorsement issued on May 7, 2004 (3 pages)
- OBRL 8
(Full) Copy of letter dated May 11, 2004 from Applicant Danny Brown to Department requesting to go back before Commercial Fishing License Review Board (5 pages)
- OBRL 9
(Full) Copy of letter dated May 25, 2004 from OBR&L to Danny Brown notifying Applicant that request for reconsideration being sent back to Commercial Fishing License Review Board (1 page)
- OBRL 10
(Full) Copy of final denial letter dated August 20, 2004 from OBR&L to Danny Brown (2 pages)
- OBRL 11
(Full) Copy of Boat Registration history (11 pages)