

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

RE: MITCHELL, MICHAEL
LICENSE DENIAL

AAD NO. 12-001/MSA

DECISION AND ORDER

This matter came on for Hearing on September 11, 2012 before Hearing Officer David M. Spinella. The Applicant was represented by Richard E. Fleury, Esquire and the Department of Environmental Management, Office of Boat Registration and Licensing ("OBRL") was represented by Gary Powers, Esquire.

I. Stipulated Facts

The parties stipulated to the following facts:

1. Applicant Michael Mitchell is a Rhode Island resident.
2. Applicant Michael Mitchell worked seventy-five (75) days in the years 2010 and 2011 on a vessel that was not declared in accordance with Rule 6.8-8 "*Vessel Declaration*" (b) of the *Department of Environmental Management Rules and Regulations Governing Commercial Fishing Licensing ("Regulations")*.
3. Applicant Michael Mitchell worked for a licensed captain, David McDonald, who was licensed to fish quahogs.
4. The Administrative Adjudication Division has subject matter jurisdiction over the Applicant, personally, and the Hearing.
5. Per the application of January 10, 2012, the Applicant, Michael Mitchell, applied for the issuance of a license to harvest quahogs and to be considered as a resident crew member.
6. The Applicant submitted a supporting Affidavit executed by David McDonald on January 9, 2012 in support of the Applicant's January 10, 2012 application in an effort to receive resident crew member priority consideration.

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7. The supporting Affidavit executed by David McDonald on January 9, 2012 alleged that the Applicant had fished as a crew member on the Applicant's commercially declared vessel in 2010 and 2011. The Affidavit was provided by the Department of Environmental Management to the Applicant and the Affiant.

II. Joint Stipulated Exhibits

1. Joint Exhibit 1 - Resident Marine License Application 2012 New License Opportunities received by the Rhode Island Department of Environmental Management Office of Boat Registration on January 10, 2012.
2. Joint Exhibit 2 - Affidavit dated January 9, 2012 entitled "Affidavit in Support of a Commercial Fishing License Application to the Rhode Island Department of Environmental Management".
3. Joint Exhibit 3 - Letter of April 4, 2012 from the Office of Boat Registration and Licensing to Mr. Michael Mitchell signed by Margaret McGrath.
4. Joint Exhibit 4 - Letter from Mr. Michael Mitchell to the Clerk of the Administrative Adjudication Division and Mr. Gary Powers dated April 11, 2012 requesting a hearing and meeting.

III. Burden of Proof

The parties agreed that the Burden of Proof in this matter rests with the Applicant to demonstrate by a preponderance of the evidence that his license was denied improperly by the Office of Boat Registration and Licensing.

IV. Argument

The Applicant's counsel indicated that the issue in this matter is whether Mr. Mitchell satisfied the definition of a "crew" member as set forth in Rule 5.18 of the *Commercial Fishing*

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Licensing Regulations promulgated by the Department of Environmental Management on November 10, 2011. Counsel for the Office of Boat Registration and Licensing argues that the Applicant's "intent" is not an issue to be determined, but rather, the wording in the specific language that is employed in these regulations. (TR. pg. 15 Lines 6-9)

V. Facts

This action is before the Administrative Adjudication Division (the "AAD") pursuant to a letter that was filed with the AAD on April 12, 2012 on behalf of the Applicant Michael Mitchell (the "Applicant"), requesting a hearing before the AAD concerning the determination of the Division dated April 4, 2012 denying the Applicant's application for the issuance a license to harvest quahogs. The application was submitted to the Division on January 10, 2012. The Applicant submitted the subject application accompanied by an affidavit in support of the Applicant's claim that the application was entitled to be considered as a resident crew member priority application pursuant to requirements of Rule 6.7-6 *Issuance of New Licenses and Endorsements, Prioritization* (b)(ii) of the *Department of Environmental Management Rules and Regulations Governing Commercial Fishing Licensing*. Such a priority requires a showing that the Applicant actively participated in the fishery sector as a crew member on a commercially declared vessel for at least seventy-five (75) days during the prior two years; i.e., 2010 and 2011, while working with a captain who held a Rhode Island commercial fishing license or landing permit during those years. A review of the subject application by OBRL revealed that the Applicant did not qualify for such a priority rating. Specifically, it was determined that the supporting affidavit he filed was invalid. It was determined to be contrary to the regulatory

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requirements and the allegations set forth in the affidavit signed by David McDonald on January 9, 2012 that was submitted with the subject application. Specifically, records of the Department of Environmental Management revealed that the affiant, David McDonald, had no commercially declared vessel in either 2010 or 2011. (TR. pg. 41 Lines 20-24 and pg. 42 Lines 1-10)

The *Department of Environmental Management Rules and Regulations Governing Commercial Fishing Licensing Rule 6.7-11 Demonstration and Verification of Actively Fishing and Actively Participating Standards* (f) provides, in pertinent part, as follows:

(f) Any applicant seeking status in accordance with this section who submits inadequate or improper documentation, such as insufficient number or type of transaction records, bogus transaction records, or affidavits that have not been notarized, will not be considered.

The Division's position was that the Applicant submitted an invalid supporting affidavit in support of his application. Thus, in accordance with *Department of Environmental Management Rules and Regulations Governing Commercial Fishing Licensing Rule 6.7-11* (f), the Division withdrew the Applicant's application from consideration for the issuance of a license to harvest quahogs.

At the hearing, Mr. Mitchell provided credible testimony that he intended to act as a crew member on a commercial fishing vessel. Mr. Mitchell indicated that he saw a white commercial fishing vessel decal applied to the vessel. Mr. Mitchell indicated that he believed the vessel to be a properly declared or registered vessel in accordance with the provisions of Rule 6.8-8. (TR. pg. 20)

Mr. Mitchell indicated that all of the work he rendered while on the vessel was done to satisfy the work requirement of "actively participating" as set forth in Rule 6.7-11.

The Department, through the testimony of Ms. Margaret McGrath, who also presented

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credible testimony, indicated that the sole reason for denying Mr. Mitchell priority status was that the vessel had not been declared as a commercial fishing vessel pursuant to the terms and provisions of Rule 6.8-8. The Department introduced no evidence to indicate or rebut Mr. Mitchell's contention that he intended or was employed by David McDonald, a duly licensed Quahog Captain, for the purposes of assisting as a crew member for commercial shellfishing.

VI. Analysis

The issue in this matter is whether the provisions of Rule 6.7-11 (f) allows the Department to take into consideration the intent of an applicant and whether or not the intent of the applicant allows the Applicant to overcome a deficiency in the application. I find that the intent of an applicant is not an element the Department must consider in determining whether or not a resident individual fulfilled all of the requirements necessary to receive priority consideration under Rule 6.7-6 (b)(ii).

Mr. Mitchell's testimony concerning his work experience demonstrated that he met all of the criteria according to Ms. McGrath (TR. pg. 48 Line 22). The problem is that the vessel he worked on was not properly declared pursuant to Rule 5-16 "*Commercial Fishing Vessel*". (TR. pg. 49 Lines 5-22) Lastly, the line entitled "Name of Vessel and Vessel Declaration Number" in the Supporting Affidavit (Joint Exhibit 2) filed by Mr. Mitchell and signed by Mr. McDonald was left blank.

I find that Rule 6-7.11 (f) does not allow or require the Office of Boat Registration and Licensing to determine or consider an applicant's "intent" when deciding to deny or approve a license application. *[Any applicant seeking status in accordance with this Section who submits*

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inadequate or improper documentation... will not be considered. Rule 6.7-11 (f).] The Rule is clear and unambiguous, therefore it must be given its plain and ordinary meaning. Accent Store Design v. Marathon House, 674 A. 2d 1233, 1226 (R.I. 1996).

VII. Findings of Fact

1. Applicant Michael Mitchell is a Rhode Island resident.
2. Applicant Michael Mitchell worked seventy-five (75) days in the years 2010 and 2011 on a vessel that was not declared in accordance with Rule 6.8-8 "*Vessel Declaration*" (b) of the *Department of Environmental Management Rules and Regulations Governing Commercial Fishing Licensing ("Regulations")*.
3. Applicant Michael Mitchell worked for a licensed captain, David McDonald, who was licensed to fish quahogs.
4. The Administrative Adjudication Division has subject matter jurisdiction over the Applicant, personally, and the Hearing.
5. Per the application of January 10, 2012, the Applicant, Michael Mitchell, applied for the issuance of a license to harvest quahogs and to be considered as a resident crew member.
6. The Applicant submitted a supporting Affidavit executed by David McDonald on January 9, 2012 in support of the Applicant's January 10, 2012 application in an effort to receive resident crew member priority consideration.
7. The supporting Affidavit executed by David McDonald on January 9, 2012 alleged that the Applicant had fished as a crew member on the Applicant's commercially declared vessel in 2010 and 2011. The Affidavit was provided by the Department of Environmental Management to the Applicant and the Affiant.
8. The affidavit was left blank on the line entitled "Name of Vessel and Declaration Number".

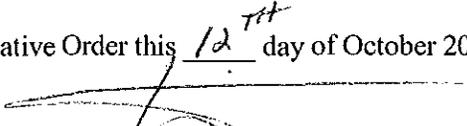
VIII Conclusions of Law

1. The Administrative Adjudication Division has subject matter jurisdiction over this matter and Mr. Mitchell personally.
2. The Commercial Fishing Licensing Regulations promulgated by the Department of Environmental Management on November 10, 2011 are applicable and govern this matter.
3. The Supporting Affidavit submitted by Mr. Mitchell and signed by Mr. McDonald on January 9, 2012 was invalid as the vessel was not commercially declared in either 2010 or 2011.
4. As a result of the invalid Supporting Affidavit being filed, the Applicants Application submitted on January 10, 2012 was properly withdrawn from consideration for the issuance of a license to harvest quahogs and properly denied by the Office of Boat Registration and Licensing by letter on April 4, 2012.
5. Rule 6-7.11 (F) does not allow or require the Office of Boat Registration and Licensing to determine or consider an Applicant's "intent" when deciding to approve or deny a license application.

Wherefore it is hereby **ORDERED**

1. The appeal of Michael Mitchell is hereby **Denied** and **Dismissed**.
2. The Denial of Mr. Mitchells license to harvest quahogs issued by Office of Boat Registration dated April 4, 2012 is hereby **Affirmed**.

Entered as an Administrative Order this 10th day of October 2012.



David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

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CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: Richard E. Fleury, Esquire, 33 College Hill Road, Bldg. 20, Warwick, RI 02886 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 12th day of October, 2012.

Elizabeth K. Larmie

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NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.