

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

RE: HEANEY, PATRICK J.

AAD No. 03-001/MSA

DECISION AND ORDER

This matter came before the Administrative Adjudication Division (“AAD”) pursuant to an appeal by the applicant of the denial of his request for an upgrade of his multipurpose commercial fishing license (MULA #0227) with a gillnet endorsement. The hearing was conducted before Administrative Hearing Officer, Joseph Baffoni, and a recommended decision was presented to this Office on May 9, 2003.

Based upon my review of the applicable statutory and regulatory provisions and of the record as set forth in the Hearing Officer’s recommendation, and by the authority vested in the Office of the Director under Title 42, Chapters 17.1, 17.7 and 35, I decline to adopt the recommended decision of the Hearing Officer and hereby determine that the denial of the request must be upheld, for the following reasons:

1. The recommended decision fails to recognize the statutory mandate and authority given this Office to limit issuance of commercial fishing licenses and endorsements if necessary to protect the fishery; overstates the authority provided by statute to grant relief upon appeal from a license denial by the Department; applies the “unreasonable hardship” test inappropriately; and could result in a significant adverse impact on the fishery in question, both through the individual grant of a license and the precedent-setting effect that grant, and the justification for it, would have.
2. The applicable statute makes holders of commercial, multi-purpose fishing license eligible to apply for gillnet and other gear endorsements,

but does not entitle them to, or guarantee them the granting of, such endorsements.

3. The statute expressly authorizes this Office to promulgate regulations that restrict issuance of commercial fishing licenses and endorsements in accordance with fisheries management plans, so as to protect and allow recovery of fish stocks.
4. It is a matter of public record that the Rhode Island Marine Fisheries Council adopted a management plan for the fishery in question that does not provide for new gillnet endorsements. The record does not include any evidence that the adoption of the management plan failed to follow applicable, statutory and/or regulatory, provisions.
5. It is a matter of public record that the Department promulgated regulations consistent with the management plan in question that do not allow for new gillnet endorsements to be issued. The record does not include any evidence that the promulgation of these regulations failed to follow the applicable provisions of the commercial fishing statute or the Administrative Procedures Act.
6. While the statutory provision for appeal must be given meaning, i.e. some measure of relief must be available under certain circumstances, such circumstances must be truly exceptional and such relief must not involve substitution of the hearing officer's opinion for duly adopted statutory or regulatory provisions.
7. The "threshold issue" is not whether the statute or the regulations prohibit the issuance of a new license or endorsement, but rather whether the Department's denial was consistent with the law and its own regulations. If so, the inquiry may proceed to the unreasonable hardship

and other criteria provided in the statute; if not, there is no reason to reach the unreasonable hardship issue.

8. With regard to “unreasonable hardship,” it is true that the hardship must be found to be “unique” to the applicant, rather than, for example, an impact imposed by regulation on all members of the group the applicant belongs to, whether the commercial fishing industry in general or the user group affected by a particular regulation. That principle cannot be converted, however, so as to entitle each applicant for a license to the benefits enjoyed by other license holders. This would, in effect, render meaningless the entire statutory and regulatory scheme by which the Department may, if necessary, restrict access to certain benefits, including new licenses and endorsements, if such restrictions are necessary to protect the resource. New applicants for a license are not entitled to that license just because others already hold licenses. Similarly, license holders without an endorsement for gill net fishing are not automatically entitled to such an endorsement just because other license holders received that endorsement in the past. To the extent the hearing officer accepted these arguments, he misapplied both the law and the unreasonable hardship test.
9. The hearing officer incorrectly found that granting of the endorsement will not adversely affect the preservation and/or restoration of the fish stock, since the applicant already possesses a license and the endorsement does not allow him to exceed applicable quotas. The mistake is both factual and legal. 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.

10. The facts and questions in this case are similar to those addressed in a more recent recommended decision in the Matter of Brian Thibeault, dated June 12, 2003, which upholds the denial of a gill net endorsement and which I have adopted in its entirety.

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

ORDERED

That the appeal to the Administrative Adjudication Division for Environmental Matters by the Applicant, Patrick J. Heaney, is DENIED and a decision is hereby rendered upholding the denial issued by the Office Of Boat Registration & Licensing.

Entered as a Final Agency Decision and Order this 27th day of June 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 Decision and Order to be delivered via regular mail, postage prepaid to: Patrick J. Heaney, 22 County Street, Newport, RI 02840; 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 May, 2003.

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.