

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

RE: STANTON, WALTER

AAD NO. 05-001/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Applicant Walter Stanton's request for hearing that was filed on July 6, 2005.

Mr. Stanton had applied for a Restricted Finfish endorsement¹ on his Commercial Fishing License and attempted to participate in the lottery of thirteen (13) new Restricted Finfish endorsements that had become available. The initial denial letter from the Office of Boat Registration and Licensing ("OBRL") stated that his application did not meet the criteria for the issuance of a new endorsement. In accordance with 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. Stanton requested reconsideration of the denial before the Commercial Fishing License Review Board ("Review Board"). Pursuant to Fisheries Regulation 6.7-10(c), Applicant had the burden of proof to demonstrate that he met the criteria for issuance of the endorsement.

The Review Board, following a hearing, issued its recommendation to the OBRL that the endorsement be denied. The OBRL then issued its final denial

¹ Although Mr. Stanton testified that he was seeking an Unrestricted Finfish endorsement, it became clear in the testimony of the Department's witnesses that the Applicant, who wanted to fish "restricted" species, was actually seeking the Restricted Finfish endorsement.

and Applicant filed his appeal at the AAD. Applicant proceeded to hearing before the AAD on August 16, 2005.

Applicant appeared on his own behalf with the assistance of Kathryn Leonard; the OBRL was represented by Gerald F. McAvoy, Esq..

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

Immediately preceding the hearing, a prehearing conference was conducted. At the prehearing conference, the parties agreed to the following stipulation of fact:

1. The Applicant, Walter Stanton, possessed an active and current CFL² with a non-restricted finfish endorsement, which he first obtained in 2004, and renewed in a timely fashion for 2005.

Applicant identified the following as issues to be considered by the Hearing Officer at the hearing:

1. That Walter Stanton had two (2) opportunities to transfer a license but missed them because of misinformation disbursed by the Department.
2. That expense was incurred by Applicant due to misinformation from the Department.

² Commercial Fishing License

3. That the application process allows out-of-state residents may be given priority over state residents for new licenses.
4. That unclear information was given to the Applicant by members of the Review Board.

The OBRL identified the following as an issue to be considered by the Hearing Officer at the hearing:

1. Whether the Applicant has met the burden of proof in qualifying for the issuance of a restricted finfish endorsement for a Commercial Fishing License.

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

FISHERIES REGULATIONS

In order to provide a canvas for the evidence presented at the hearing, it is important to establish some regulatory framework. My discussion of the pertinent regulations follows.

Rule 6.1-1 of the Fisheries Regulations identifies the fishery endorsement categories at issue in this matter. A Restricted Finfish endorsement allows the holder to fish scup, summer flounder, winter flounder, tautog, striped bass and black sea bass. A Non-Restricted Finfish endorsement allows the holder to fish all species of finfish and squid available for commercial harvest except those specified in the Restricted Finfish endorsement category. In an effort to impose fisheries management controls, the Fisheries Regulations has set limits on the availability of the Restricted Finfish endorsements. Pursuant to Rule 6.7-4(a), holders of a Commercial Fishing License with a

Restricted Finfish endorsement may renew the License with the same endorsement for the following year. Licensees without the Restricted Finfish endorsement may seek other fishery endorsements, including Non-Lobster Crustacean (resident only), Non-Quahaug Shellfish (resident only) and Non-Restricted Finfish.

The Fisheries Management Plan, although limiting the number of Restricted Finfish endorsements to those individuals who held them in the prior year, recognizes that some individuals will leave the commercial fishing industry or otherwise choose not to renew their licenses. Rule 6.1-10(a) provides a formula for issuance of a limited number of new Restricted Finfish endorsements when others are retired. It specifies that for every five licenses that are retired, one new Restricted Finfish license/endorsement will be issued. Pursuant to Rule 6.7-5(c), when a limited number of licenses become available, as did in this case, then the Department is required to issue them in accordance with the four priority categories that are set forth in Rule 6.7-6.

The first priority category applies to three types of applicants: licensed resident fishers already holding Commercial Fishing Licenses who have been actively fishing³ their licenses; licensed resident fishers holding Principal Effort Licenses who have been actively fishing their licenses; and resident crew

³ Pursuant to Rule 5.1, a license holder will be considered to have been actively fishing if he or she demonstrates by dated transaction records that they have fished at least seventy-five (75) days in the preceding two years, with at least fifty (50) days in one of the two years.

members who have been actively participating⁴ in the same fishery sector for which the new license is being sought. The second priority category concerns resident crew members who have been actively participating in any commercial fishery. Third priority is given to any resident of Rhode Island. The fourth priority in the issuance of new Commercial Fishing Licenses with the Restricted Finfish endorsement is for non-residents.

Rule 6.7-5(c) provides that all eligible applicants in each priority category will be issued the endorsements before the endorsements are to be issued to applicants in the next lower priority category. If in any priority category there are more eligible applicants than there are endorsements available, then those endorsements will be issued according to a lottery. The evidence presented at the hearing indicates that the new Restricted Finfish endorsements were exhausted in the first priority category.

HEARING SUMMARY

At the hearing, Applicant called two (2) witnesses: **Walter Stanton**, who testified on his own behalf; and **Kathryn Leonard**. The OBRL presented two (2) witnesses: **Margaret McGrath**, the Programming Services Officer at OBRL, who by agreement was qualified as an expert in the areas of fisheries licensing and license renewal; and **Jason McNamee**, a Principal Marine Biologist at the

⁴ Pursuant to Rule 5.2, a crew member will be considered to have been actively participating in the fishery if he or she demonstrates via one or more affidavits that he or she has fished with one or more licensed captains at least seventy-five (75) days in the preceding two years, with at least fifty (50) days in one of the two years.

Department. Mr. McNamee was offered as an expert in the Fisheries Management Plan for the Finfish Fishery Sector. Following some initial questioning by the OBRL, the Applicant agreed that he was qualified as an expert.

At the commencement of the hearing, Applicant testified that he has relied on Kathryn Leonard's assistance for years, particularly because of his severe dyslexia. He stated that she handles all of his paperwork. As a result, Ms. Leonard participated in the hearing not only as a witness, but also as an advocate for her friend Walter Stanton.

Walter Stanton was the first witness. He stated that he has had a Commercial Fishing License for two years. The boat he usually fishes on, the Persistence II is jointly owned by Mr. Moniz and Kathryn Leonard. He is not paid by Mr. Moniz and when he works on other boats, it is also without pay. He has caught yellowfin tuna and bluefish under his current license, but not enough yellowfin to sell and no market for the bluefish. Mr. Stanton's goal is to fish and sell striped bass, a restricted species, but neither his license nor Mr. Moniz' license allows him to sell striped bass.

In his pursuit of the Restricted Finfish endorsement, Mr. Stanton attempted to obtain the license held by Thomas Larson. He purchased the fishing gear but not Larson's boat since it was worthless. He had assumed that by purchasing the gear, the license would be transferred to him. That transfer was denied by the Department, however, and he was told that for the license to be transferred, he needed to buy the vessel. Mr. Stanton said that he was

again told to buy the boat, even a junk boat, by the Review Board. He has not done so because he already has a documented boat.

Mr. Stanton stated that the Department had told him that with his current license and endorsement, he could participate in the lottery of new Restricted Finfish endorsements that had recently become available. No one had informed him that he would need slips in order to qualify for an upgrade of his license. He testified that although he had fished for other vessels, he could not obtain any slips. He had renewed his Commercial Fishing License in order to participate in the lottery.

Applicant also spoke of his physical limitations that prevented him from seeking other endorsements, particularly the Quahaug endorsement that had also become available. In 1991 he had had major back surgery that included fusing two discs and the use of screws. The injured back had failed to heal and he was unable to do any heavy work. The witness stated that even when he fishes, someone else has to pull in the net. In addition to the back injury, Mr. Stanton also suffers from Hepatitis C. The medical treatment for the condition is similar to chemotherapy and it exhausts him. He stated that he has been on Social Security for more than ten (10) years.

Under cross examination, Mr. Stanton stated that prior to obtaining his Commercial Fishing License he had fished for his own enjoyment. For eight years he had also held a federal license for fishing tuna. He testified that he had tried to obtain the needed fishing slips but was unsuccessful. He could not recall any of the names of people he had approached to use the slips.

Kathryn Leonard testified next for Applicant. They had bought the gear from Mr. Larson, even though they did not need it, in order to obtain his license. She had not allowed the purchase of the unsafe vessel and questioned whether the Regulations really intended that unsafe vessels be purchased in order to obtain someone's license. She contended that, due to misinformation from within the Department, two individuals had relinquished their licenses in order to benefit Walter Stanton, but that the transfer was not allowed. She identified "Harry" and Bob Ballou as the sources of the misinformation.

She stated that her friend's health issues had made it difficult or impossible for him to obtain the slips necessary for the upgrade via the lottery. He had become disabled after the back surgery and was on Social Security for the disability. She added that there was "pretty little" he could do. As for his financial situation, she testified that Mr. Stanton can provide financially for himself, but is unable to provide financially for the boat. She supported his quest for the endorsement because if he could sell striped bass, he could at least pay for the gas.

Ms. Leonard was aware of the Department's concern about setting a precedent by granting the endorsement but contended that the particular facts in this matter would distinguish it from other applicants. In an effort to persuade that he should be given the endorsement, she said that they would stipulate that the license would not be transferable.

The OBRL presented its first witness, Margaret McGrath. As the OBRL Programming Services Officer, she has managed the day-to-day operations of

the office and the fisheries licensing system, since 1992. She testified that, in accordance with the fisheries management plan, thirteen (13) Restricted Finfish and a number of Quahaug endorsements became available on January 1, 2005. The 262 applications for the endorsements were sorted into the categories set forth in the Fisheries Regulations. Ms. McGrath stated that there were more applicants in the first category than there were endorsements available, so, in accordance with the November 2004 Fisheries Regulations that were then in effect, the applicants who fell into the lower categories could not participate in the lottery.

The witness explained that the first priority category was comprised of three subsections. None of the applicants fell in the first subsection, that of the resident holder of a Commercial Fishing License who could demonstrate that he or she had actively fished by submitting 75 slips for the two year period with more than 50 in one of the years. Eight (8) applicants met the requirements for the second subsection, that of residents with Principal Effort Licenses who could demonstrate that they had actively fished. Twenty-seven (27) individuals were in the third subsection, resident crew members who could demonstrate that they had actively participated in the same fishery sector as the new endorsements. Lotteries were conducted in each of the subsections: six (6) were selected from the group of eight applicants in the second subsection and seven (7) were chosen from the group of twenty-seven applicants in the third subsection. Thirteen (13) Restricted Finfish endorsements were thus awarded.

Ms. McGrath stated that the distribution of the new endorsements was made in accordance with the Fisheries Regulations and that Mr. Stanton had not met the requirements to be placed in the first category where the lottery had been conducted.

In cross examination, the witness was asked about non-residents who had received the new endorsements. She responded that all thirteen (13) had been issued to Rhode Island residents. Ms. McGrath was also queried about accommodations for individuals with disabilities. She stated that although there was a provision in the Fisheries Regulations regarding medical hardship⁵, it was not applicable to the licensing endorsement system. There were no accommodations in the priority categories for individuals with disabilities.

The next OBRL witness was Jason McNamee, a Principal Marine Biologist at the Department, who, after some initial questioning, was agreed to be an expert on the Fisheries Management Plan for the Finfish Fishery Sector. Mr. McNamee monitors the quota-managed species, which are the economically valued species that are part of the Fisheries Management Plan. The plan's goals are to prevent overfishing and to comply with federal requirements.

In 2003 the Fisheries Management Plan for finfish included a new licensing plan. According to the witness, finfish licenses were either

⁵ When the definition of "Medical Hardship" set forth in Rule 5.41 is read in conjunction with Rule 6.7-10 (a), the existence of a medical hardship allows the applicant the right to request reconsideration by the Review Board notwithstanding that the applicant had failed to apply for

Nonrestricted or Restricted, based upon the species. Those species where there was not as much effort to fish were Nonrestricted; the highly sought after species, like striped bass, were subject to the Restricted license. The Restricted species are managed by a quota system that is set by federal law. He stated that there has been a very intensive fishing effort on striped bass and that it is now in a rebuilding phase which is why the lottery for new endorsements was established.

Conclusion

Applicant has presented many arguments: that nonresidents were given the much sought after Restricted Finfish endorsements; that misinformation from the Department caused the Applicant to make an unnecessary purchase of gear; that the Regulations were unreasonable in requiring the purchase of an unsafe vessel in order to have a license transferred to the new owner; that Mr. Stanton had not been told he needed to submit slips; and that the Americans with Disabilities Act may require some accommodation so he could be on equal ground with healthy applicants to obtain a license.

While the above are side issues as to whether this Applicant has met the burden of proof established by statute and regulations, they raise some equitable and other legal concerns that should be addressed. First, Ms. McGrath testified that, contrary to the Applicant's allegation, all of the new endorsements went to Rhode Island residents. She also testified that all of the

the license by the February 28th yearly deadline and that other late applicants are specifically denied the right to request reconsideration.

endorsements went to individuals in the first priority category, for which one of the requirements was that the person be a Rhode Island resident. I therefore conclude that Applicant's argument in this regard was based on speculation or rumor and not on the facts.

Applicant also argued that he relied on misinformation from Department employees. He did not call those individuals as witnesses, however, so the only evidence presented was from Applicant's witnesses repeating what they say they heard. Such hearsay may be unreliable. In addition, it appeared from the testimony that even when Mr. Stanton and Ms. Leonard were told to buy the vessel *and* gear, they resisted because it did not make sense to them to buy a useless boat. The likely explanation for the requirement that there be a purchase of the vessel as well as the gear in order to warrant the transfer of a license is that there is only the single vessel and there could be multiple purchases of different items of a fisherman's gear.

The Applicant had also complained that he had not been informed of the requirement for submission of slips. Notwithstanding this representation, the Applicant submitted as part of one of his exhibits the first page of OBRL's *Guidance for Applicants Seeking New Quahog or Restricted Finfish Endorsements* that discusses the fishing records. Appl 5 at 4. In order to determine priority status, the document asks several questions:

Q: Are you a Rhode Island resident?

If no, go to section VIII below.

If yes, proceed to next question.

Q: Have you held a Commercial Fishing License (CFL) over the past two years – i.e., in 2003 and 2004?

If no, go to section II below.

If yes, proceed to the next question.

Q: Have you been actively fishing your CFL – i.e., can you demonstrate by dated transaction records that you have fished at least 75 days during 2003 and/or 2004, with at least 50 days in either of those two years?

If no, go to section II below.

If yes, you qualify for priority status under this tier... **Along with this application, you must submit the dated transaction records necessary to qualify for priority status...** (emphasis added)

Applicant also supplied a two page document entitled *New License/Endorsement Opportunities Available for 2005*. Appl 5 at 5-6. On page two of that document, the Department informs the reader that first priority will be given to three classes of applicants, and that one of the classes was for residents who had held, "and actively fished" a Commercial Fishing License with any other endorsement over the past two years. The document contains the following language:

Note: to meet the standard of "actively fished", **an applicant must be able to demonstrate by dated transaction records** that they have fished at least 75 days in the preceding two years, with at least 50 of those days in any one of the two years. (emphasis added) Appl 5 at 6.

It seems clear that the OBRL attempted to be forthcoming and specific about its requirements. If the Applicant was unaware of the requirement for submission of fishing slips in order to obtain priority status, then it was not because the OBRL failed to provide the information.

As for the argument about the Americans with Disabilities Act, Applicant did not provide a copy of the federal or state law for me to consider whether it could be properly applied in this type of matter. I will note, however, that R.I. GEN. LAWS §42-87-2, which is part of the Rhode Island Civil Rights of People with Disabilities Act, states that “[n]o otherwise qualified person with a disability shall, solely by reason of his or her disability, be subject to discrimination...” Mr. Stanton wants his physical limitations to operate as a waiver of the regulatory requirement that he demonstrate that he actively fished in the prior two years. Yet the need for a waiver would be an acknowledgement that Mr. Stanton was not an “otherwise qualified person”. Assuming *arguendo* that the issue can even be considered at this tribunal, it would seem that application of the Americans with Disabilities Act, or Rhode Island's similar statute, would not give this Applicant the relief he seeks.

Applicant has conceded that he did not have any fishing slips to submit with his request for the Restricted Finfish endorsement. Although Mr. Stanton had testified about fishing on Mr. Moniz' vessel and on some other boats, there was no evidence, even testimonial, that Mr. Stanton had fished at least 75 days in the preceding two years. He therefore did not substantiate that he had “actively fished” for a two year period. Applicant also did not present evidence to warrant him being considered a crew member “actively participating” in the fishery sector. He did not meet the requirements of Rule 6.7-6(a) of the Fisheries Regulations to be placed in any of the subsections of the first priority category for the lottery.

According to the testimony of Margaret McGrath, there were thirty-five (35) applicants who qualified for placement in the first priority category and only thirteen (13) Restricted Finfish endorsements available. Since all the endorsements were taken by individuals in the first priority category, there was no need to consider whether this Applicant would be properly placed in a lower priority category. I therefore conclude that the OBRL was proceeding in accordance with the Fisheries Regulations when it initially determined that Mr. Stanton did not meet the criteria for the issuance of a new endorsement.

The Applicant had then requested reconsideration by the Review Board. Both R.I. GEN. LAWS §20-2.1-12 and section 6.7-10 of the Fisheries Regulations provide that the Applicant bears the burden to prove compliance with the criteria for issuance of the license. Both sections also set forth the factors that the Review Board is required to consider:

- 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. GEN. LAWS §20-2.1.

Section 6.7-10(g) 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.

In its recommendation to the OBRL, the Review Board considered Applicant's argument that as a Rhode Island resident and taxpayer who had

invested in fishing equipment and is considered handicapped by Social Security, the denial of the endorsement presented a financial hardship. The Board concluded that the facts presented did not meet the standard of "unreasonable hardship" as defined in the Fisheries Regulations. The Board decided there was insufficient cause to recommend reversal of OBRL's initial decision. Appl 7 (except notations).

The fact that the legislature has required the Review Board to consider factors aside from those initially considered by the OBRL in making its denial, means that these same factors should also be considered when the matter comes before the AAD in Applicant's pursuit of the appeal process. Re: Thibeault, Brian, AAD No. 03-006/MSA, Decision and Order entered as a Final Agency Order on June 27, 2003. As the Director wrote in Re: Hochman, David, AAD No. 03-007/MSA, Decision and Order entered as a Final Agency Decision on August 15, 2003, "the General Assembly envisioned a balancing of interests and consideration of various circumstances, rather than a bright line test focusing on one particular criterion." at 2.

I have considered the factors set forth in R.I. GEN. LAWS §20-2.1-12 and section 6.7-10 of the Fisheries Regulations. For the first issue, since it is only one license, its issuance would be unlikely to have much impact on the fisheries management program overall. Applicant has met his burden on this issue.

The second issue presents a much higher hurdle for the Applicant: equity with other license holders. Applicant seeks the Restricted Finfish endorsement

despite the fact that he could not demonstrate that he had actively fished in the prior two years and thus could not participate in the lottery. No other applicants met the requirements to be placed in the first subsection of the first priority category, but Mr. Stanton wants the requirements to be waived so he can obtain the Restricted Finfish endorsement. Applicant has not met his burden to show that granting him the endorsement would be equitable with respect to other seekers of the endorsement.

On the third issue, consistency with prior decisions, although this is the first matter before the AAD that concerns the lottery process, other AAD decisions have considered the criteria set forth in the statute and in the Fisheries Regulations. Of particular note is the Hochman Decision and Order, wherein the Director considered that the Applicant did not derive his income solely from commercial fishing and thus may have incurred less economic hardship compared to others who had been denied a license. While the Director did not discount the loss of the income, he found that the Applicant had not met his burden to establish unreasonable hardship that outweighed the need to tighten up the licensing and management system. Re: Hochman, David, supra, at 2-3. Applicant in the matter at bar has not established that a decision in his favor would be consistent with prior agency decisions.

"Consistency with management plans" is the fourth consideration. Since the striped bass fishery is this Applicant's intended target, it cannot be considered consistent with management plans to allow this individual, who would receive the endorsement outside of the lottery process, to participate in a

fishery sector that is quota-managed. Applicant has not met his burden on this issue.

The fifth factor, unreasonable hardship to Applicant, has also not been established. Although OBRL's attorney had questioned whether the Applicant was as disabled as he represented, the evidence was abundantly clear that Mr. Stanton's back injury was so debilitating that it affected his everyday activities and warranted disability status under Social Security. While I am sympathetic to Mr. Stanton's medical condition and physical limitations, the Fisheries Regulations have imposed a stringent standard. "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 has not demonstrated that the unneeded purchase of the gear or the anticipated expense of gasoline to fuel the boat rises to the level of "severe economic loss." The Applicant is financially self-sufficient. He just enjoys fishing and would like to earn enough income to pay for the gasoline for the boat. While it is an understandable goal, it is not the "unreasonable hardship" contemplated in the Fisheries Regulations. 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 met his burden on only one of the five criteria. Issuance of a Restricted Finfish endorsement to this Applicant would not be consistent with the provisions of Chapter 2.1 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 Restricted Finfish endorsement.

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

FINDINGS OF FACT

1. Applicant is a Rhode Island resident.
2. Applicant obtained a Commercial Fishing License with a Nonrestricted Finfish endorsement in 2004 and renewed it for 2005.
3. Thirteen (13) new Restricted Finfish endorsements became available on January 1, 2005.
4. There were 262 applications for the new endorsements that had become available.
5. Applicant applied for a Restricted Finfish endorsement in 2005.
6. Applicant did not submit any dated transaction records with his application.
7. The OBRL sorted the applications into categories.

8. There were thirty-five (35) applicants who fell into the first priority category.
9. Applicant was not placed in the first priority category.
10. The OBRL conducted a lottery among those individuals who were in the first priority category and awarded the Thirteen (13) Restricted Finfish endorsements.
11. The OBRL denied Applicant's request for the Restricted Finfish endorsement.
12. Applicant requested that the Review Board reconsider the denial.
13. The Review Board found that the facts presented to it did not meet the standard of "unreasonable hardship" as defined in the Fisheries Regulations and decided there was insufficient cause to recommend reversal of OBRL's initial decision.
14. The OBRL issued its final denial to Applicant on or about June 28, 2005.
15. Applicant seeks to fish striped bass.
16. The striped bass fishery is currently managed through the imposition of quotas.
17. In an earlier effort to obtain the transfer of a Restricted Finfish endorsement, Applicant purchased unneeded gear from Thomas Larson.
18. Applicant has a debilitating back injury; has been diagnosed with Hepatitis C and undergone treatment similar to chemotherapy; and is on Social Security due to his disability.
19. Applicant is financially self-sufficient.

CONCLUSIONS OF LAW

After due consideration of the above Findings of Fact and the legal

arguments of the parties, I conclude the following as a matter of law:

1. In accordance with Rule 6.1-10(a) of the Fisheries Regulations, thirteen (13) new Restricted Finfish endorsements became available on January 1, 2005.
2. Pursuant to Rule 6.7-5(c) and Rule 6.7-6 of the Fisheries Regulations, when a limited number of new endorsements are to be issued, the OBRL shall give priority to the applicants according to a priority system that has four priority categories.
3. Pursuant to Rule 6.7-6 of the Fisheries Regulations, the first priority category contains three (3) subsections: one for holders of Commercial Fishing Licenses among other requirements; one for holders of Principal Effort Licenses among other requirements; and one for resident crew members among other requirements.
4. Rule 6.7-6(a) of the Fisheries Regulations provides that an applicant who is a licensed resident fisher holding a Commercial Fishing License who has been actively fishing the license will qualify in the first subsection of the first priority category.
5. Pursuant to Rule 5.1 of the Fisheries Regulations, a license holder will be considered to have been actively fishing the license if he or she demonstrates by dated transaction records that they have fished at least seventy-five (75) days in the preceding two years, with at least fifty (50) days in any one of the two years.
6. Applicant failed to qualify for placement in the first priority category established pursuant to Rule 6.7-6(a) of the Fisheries Regulations.
7. In accordance with Rule 6.7-5(c) and Rule 6.7-6 of the Fisheries Regulations, the OBRL gave priority to the applicants and thirty-five (35) qualified for the second and third subsections of the first priority category.
8. Pursuant to Rule 6.7-5(c) of the Fisheries Regulations, if in any priority category there are more eligible applicants than there are endorsements available, then those endorsements will be issued according to a lottery.

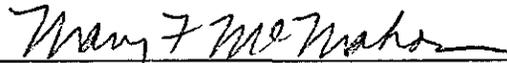
9. In accordance with Rule 6.7-5(c) of the Fisheries Regulations the OBRL conducted a lottery for the new Restricted Finfish endorsements and all were awarded to individuals in the first priority category.
10. In accordance with Rule 6.7-5 and Rule 6.7-6 of the Fisheries Regulations, the OBRL properly denied Applicant's request for the Restricted Finfish endorsement.
11. Pursuant to R.I. GEN. LAWS §20-2.1-12 and Rule 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.
12. Applicant proved by a preponderance of the evidence that issuance of the Restricted Finfish endorsement would have little impact on the fisheries management program overall.
13. Applicant failed to prove by a preponderance of the evidence that issuance of the Restricted Finfish endorsement would be equitable with respect to other license holders.
14. Applicant failed to prove by a preponderance of the evidence that issuance of the Restricted Finfish endorsement would be consistent with prior agency decisions.
15. Applicant failed to prove by a preponderance of the evidence that issuance of the Restricted Finfish endorsement for use in the striped bass fishery would be consistent with management plans.
16. Applicant failed to prove by a preponderance of the evidence that OBRL's denial of the Restricted Finfish endorsement would cause an unreasonable hardship as defined in Rule 5.54 of the Fisheries Regulations.
17. Applicant has failed to prove by a preponderance of the evidence that issuance of the Restricted Finfish endorsement 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.
18. Applicant has failed to prove by a preponderance of the evidence that he has complied with the criteria for issuance of the Restricted Finfish endorsement.

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

ORDERED

Applicant's request for a Restricted Finfish endorsement is DENIED.

Entered as an Administrative Order this 4th day of October, 2005 and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
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 Order this _____ day of October, 2005.

W. Michael Sullivan, Ph.D., 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 forwarded by first-class mail, postage prepaid, to Walter Stanton, 37 Castle Hill Avenue, Newport, RI 02840 and via interoffice mail to: Gerald McAvoy, Esquire, DEM Office of Legal Services, 235 Promenade Street, 4th Floor, Providence, RI 02908 on this _____ day of October, 2005.

NOTICE OF APPELLATE RIGHTS

This Final Agency Order constitutes a final order of the Department of Environmental Management pursuant to R.I. GEN. 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.

APPENDIX A

Applicant's Exhibits

Many of Applicant's exhibits contain several documents, to which the OBRL has agreed to in part. Many of Applicant's exhibits also contain handwritten notations provided by the Applicant. The notations have not been accepted as part of any Full exhibit.

Appl 1 for Id	Copy of documentation for the vessel <i>Persistence II</i> (4 pages)
Appl 2 Full	Copy of Walter Stanton's Commercial Fishing License (1 page)
Appl 3 for Id	Copy of correspondence dated February 18, 2004 from Kathryn Leonard to Fred Vincent, Acting Director; Copy of Bill of Sale dated February 3, 2004 (2 pages)
Appl 4 Full	Copy of check from Walter Stanton, payable to the DEM, dated January 3, 2005; Copies of lottery application and Taxpayer Certification (2 pages)
Appl 4A Full	Copy of correspondence dated March 31, 2005 from Margaret McGrath to Applicant (1 page)
Appl 5 Full in part	Copy of cover page of <i>Rules and Regulations Governing the Management of Marine Fisheries</i> , dated June 21, 2005 (for Id only); Copy of Resident Marine License Application of Walter Stanton, dated January 4, 2005; Fax Cover Sheet; Copy of 1 st page of <i>Guidance for Applicants Seeking New Quahog or Restricted Finfish Endorsements</i> ; Copy of <i>New License/Endorsement Opportunities Available for 2005</i> ; Copy of correspondence from Walter Stanton to Ms. McGrath, dated April 25, 2005 (8 pages)

- Appl 6 Full in part Copy of correspondence from Dennis Nixon to Walter Stanton, dated May 10, 2005; Copy of correspondence from Margaret McGrath to Walter Stanton, dated June 28, 2005; Copy of correspondence from Kate Leonard to the Rhode Island Commercial Fishing License Review Board members, dated June 2, 2005 (for Id only) (4 pages)
- Appl 7 Full Copy of correspondence from Dennis Nixon to Margaret McGrath, dated May 17, 2005 (1 page)
- Appl 8 for Id Copy of documentation for fishing dated 8/6 [sic] (1 page)
- Appl 9 for Id Copy of correspondence from Ajay Mehta to Beacon Owner, dated April 5, 2002 (1 page)
- Appl 10 Full Copy of correspondence from Walter Stanton to Mr. McAvoy, dated July 4, 2005 (2 pages)

OBRL's Exhibits

- OBRL 1 Full License History for Walter Stanton (2 pages)
- OBRL 2 Full *Guidance for Applicants Seeking New Quahog or Restricted Finfish Endorsements* (6 pages)
- OBRL 3 Full Resident Marine License Application of Walter Stanton, dated January 4, 2005 (3 pages)
- OBRL 4 for Id 2005 Management Plan for the Finfish Fishery Sector, dated December 13, 2004 (11 pages)