

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Fiske, Eric
Lobster Trap Allocation
AAD No. 07-017/F&WA
MPURP 001257
June, 2007

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters (“AAD”) on the appeal of Eric Fiske (“Mr. Fiske” or “Applicant”) of his Initial 2007 Area 2 Lobster Trap Allocation (“Allocation”) as determined by the Department of Environmental Management, Division of Fish and Wildlife (“Division”). By letter dated January 16, 2007, the Applicant was notified that his Allocation for 2007 is eighteen (18) traps. By letter dated February 5, 2007, Applicant requested a hearing with the AAD contesting the Allocation. The governing regulations are the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, dated November 22, 2006¹ (“Regulations”). A status conference was held on February 28, 2007 and the parties indicated to the hearing officer that they wished to pursue settlement discussions. A control date of March 22, 2007 came and passed without resolution and the matter was set down for administrative hearing. After a brief continuance at the request of the Division, the prehearing conference was held on June 4, 2007 followed immediately thereafter by the administrative hearing. The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq. At the prehearing conference, the following documents were submitted and marked as indicated:

For Applicant:

- App. 1 (Full)** Notice of 2007 Lobster Trap Allotment dated January 16, 2007
- App. 2 (Full)** Hearing Request of Eric Fiske, dated February 5, 2007
- App. 3 (ID)** Correspondence from Mr. Fiske to Mr. Powers dated 2/28/07
- App. 4 (ID)** Correspondence from Mr. Fiske to Hearing Officer Baffoni dated 3/23/07
- App. 5 (ID)** Correspondence from Mr. Fiske to Mr. Powers dated May 15, 2007
- App. 6 (ID)** Correspondence from Mr. Fiske to Mr. Powers dated 6/1/07, 3 pages; includes physician's statements.

For the Division of Fish and Wildlife:

- Div. 1 (Withdrawn)
- Div. 2 (Withdrawn)
- Div. 3 (Full)** Landing and Trap Deployment Data for Applicant 1999-2004
- Div. 4 (Full)** Curriculum Vitae of Thomas E. Angell, 2pp.

The following stipulations of fact were agreed upon by the parties:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be Eighteen (18) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.

3. The lobster trap allocation dated January 16, 2007 was calculated on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
4. The Division's history of the Applicant's participation in lobster fishery reveals that the Applicant had lobster landings in the year 2004.
5. The Division's history of the Applicant's participation in lobster fishery in 1999 and 2000 reveals that the Applicant would have obtained an Initial Area 2 Lobster Trap Allocation in the amount of Seventy Five (75) traps.

The Applicant bears the burden of proof in this proceeding. Applicant identified the following issues:

1. Whether Applicant meets the medical hardship exception set forth in the Regulations.
2. Whether Applicant's inability to obtain his license (and participate in the fishery) until December of 2003 should require an increase in his allocation.

The Division identified the issue as follows:

Whether the Applicant was able to satisfy the Hearing Officer that he suffered a medical hardship during the target years of 2001 - 2003 as set out in Part 15.14-2-5(d).

Thomas E. Angell was qualified, by agreement of the parties, as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations.

Testimony

Mr. Fiske testified on his own behalf and his testimony was brief. He stated that he submitted medical evidence from Dr. Sandoval and Dr. Leddy indicating that they would not have advised him to fish during the years 2001 and 2002. He testified that he was under a great deal of stress during that period and was physically unable to fish. With regard to the 2003 year, Mr. Fiske testified that he was initially denied his license by the Office of Boat Registration and Licensing of DEM, appealed the denial to AAD and finally obtained the license under a consent agreement in December of 2003. By that time, he had been unable to fish for almost all of 2003. There was no cross examination of this witness. In response to a question by the hearing officer regarding his medical condition in 2001 and 2002 and the requirements of the Regulations, Mr. Fiske testified that he was not in the hospital; a nursing home; hospice nor was any outpatient care required. He stated simply that he was physically unable to fish in the years 2001 and 2002. I found Mr. Fiske to be a very credible and forthright witness substantially affected by the adoption of these Regulations.

The Division called Thomas E. Angell as its only witness. Mr. Angell is employed by the Department in the Division of Fish and Wildlife. Mr. Angell's duties include serving as the project leader for Rhode Island's Lobster Research and Management Project. Mr. Angell was responsible for the drafting and implementation of the Regulations. Briefly stated, the Regulations were promulgated by DEM to comply with the lobster management plan adopted by the Atlantic States Marine Fisheries Council ("ASMFC"), of which Rhode Island is a member state. Rhode Island is required to comply with the management plan or adopt an alternative that meets the goals of the ASMFC plan. Mr. Angell was responsible for extracting the necessary elements of the ASMFC management plan and drafting state regulations that comply with the ASMFC management plan. Mr. Angell testified that he drafted the initial regulations which were then forwarded to the Rhode Island Marine Fisheries Council (RIMFC) Lobster Panel for review. Thereafter, the proposed regulations were reviewed by the entire RIMFC and were ultimately forwarded to the Director of DEM for review, approval and adoption.

Mr. Angell next explained his involvement in the implementation of the Regulations. He reviewed applications for Initial 2007 Area 2 Lobster Trap Allocations, reviewed and computed the data provided by Applicants and participated in providing the notices to Applicants regarding their 2007 allocation.

Mr. Angell testified that he was present for all of Applicant's testimony. With regard to Applicant's inability to fish in 2003 because his license was not issued until December of that year, Mr. Angell testified that the Regulations contain no provision for individuals who, for reasons other than medical hardship or military service, did not fish in 2003.

Mr. Angell testified that he reviewed the medical evidence supplied by Mr. Fiske and listened to his testimony. In conclusion, it was Mr. Angell's expert opinion that the evidence presented by Applicant was insufficient to satisfy the language of the Regulations concerning the medical hardship exception.

Upon cross-examination, Mr. Angell acknowledged that the Regulations have had a financially detrimental impact on some licensees. Mr. Fiske questioned this witness regarding other alternatives to manage the fishery such as the moratorium on commercial fishing licenses. Mr. Angell explained that the lobster management effort set forth in the Regulations reduces the number of lobster traps and is designed to ultimately *reduce* the catch. He compared that to the commercial fishing license moratorium which prevents an increase in the catch by limiting the number of licensees.

The parties were afforded the option of making closing arguments or filing a brief or written statement after the conclusion of the hearing. Mr. Fiske and Mr. Powers elected to make a closing statement.

Applicant's Position:

Applicant first argues that he cannot agree that the Regulations provide the only exceptions for the required 2001-2003 qualifying years. Mr. Fiske asserts that the Regulations must be applied reasonably and must take into account other circumstances. He argued that the commercial fishing licensing process, under which he eventually obtained renewal of his license in 2003, recognized financial hardship as a consideration on appeal. He argued that Mr. Angell's testimony acknowledged that the Regulations cause financial hardship and that similar consideration should apply under the current Regulations.

Applicant further argued that the information provided at hearing establishes that he should be granted an exception for medical hardship. He argued that he was unable to fish during 2001 and 2002 and also submitted the statements of two doctors attesting to the fact that he was under stress during that time and would not have been advised to fish.

Finally, Applicant maintains that as a result of the denial of his license in 2003 by the Office of Boat Registration and Licensing, he was prohibited from fishing in 2003 until December of that year when his appeal resulted in issuance of the license. He argues that the DEM's actions in 2003 should require reconsideration of his allocation using data for years 1999 and 2000.

Applicant also voiced his frustration with the Lobster Trap Allocation process including the appeal process and the manner in which settlement discussions were handled.

Division of Fish and Wildlife's Position:

With regard to Applicant's inability to fish in 2003 as a result of an initial license denial, the Division argues that the Regulations provide only two exceptions - medical hardship and military service. Applicant has not proven that either exception applies to the year 2003. The Division argues that the AAD may interpret and apply Regulations, but that AAD is constrained from writing into the Regulations exceptions that simply do not exist.

The Division concluded by asserting that Applicant's appeal should also be denied because he has failed to introduce adequate proof, under the medical hardship exception to the Regulations, to entitle him to an additional allocation of traps. Counsel argues that the information provided is too general and vague to meet the very specific medical hardship standards contained in the Regulations.

Analysis

Only the portions of the Regulations applicable to the instant proceeding are addressed in this analysis. The Department of Environmental Management has the authority under Title 20 of the General Laws to enact regulations governing the commercial fishing industry in our state. As part of that broad authority, the Department is responsible for regulation of the lobster industry and associated licensing. The Regulations provide that DEM's Division of Fish and Wildlife shall be the lobster trap allocation authority for both state licensed and federally permitted Rhode Island residents. The Division is required to process Area 2 lobster trap allocation applications submitted by Rhode Island residents. Valid license or permit holders² seeking a 2007 Area 2 Lobster Trap Allocation were required by Regulation 15.14.2-2(b) to make written application to the Division from November 12 - December 31, 2006. To be eligible for any Area 2 lobster trap allocation, Regulation 15.14.2-2(c) requires an applicant present documentation that he/she lawfully harvested lobsters employing lobster traps in Area 2 during the years 2001-2003.

The Applicant in this matter submitted the required forms to the Division and included documentation that he lawfully harvested lobsters in Area 2 using lobster traps. Because Applicant did not fish traps in 2001 and because he was not able to renew his license until December of 2003, 2002 was the only year for which he could document the lawful harvesting of lobsters. As a result, and through no fault of the Applicant, no documentation could be provided for the years 2001 and 2003. The Division accepted the information provided by Applicant and applied the standard regression formula adopted in the Regulations to determine the Applicant's Initial 2007 Area 2 Lobster Trap Allocation. The result of that standard calculation was that Applicant's allotment was reduced to eighteen (18) traps.

Medical Hardship:

The Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Only two exceptions are enumerated in the Regulations³ which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness. Applicant alleges medical hardship.

Parts 15.14.2-5 (d) and (e) govern the issue of medical hardship and read as follows:

(d) Medical/Military Service Hardships - Any applicant who holds a current commercial lobster license and who held such authorization during the period 2001-2003 but had no documented, or had reduced, fishing performance during 2001-2003 due to the applicant's military service or the documented disabling physical or medical illness, injury, impairment, or condition that constitutes a material incapacitation involving inpatient care in a hospital, a nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider of the applicant or the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law may appeal in order to request that his/her Initial Lobster Trap Allocation be based on his/her 1999-2000 fishing performance (lobster landings and maximum number of traps reported fished) for the years 1999-2000 be employed to calculate the applicant's initial Area 2 lobster trap allocation.

(e) The decision maker shall employ the following considerations when determining the initial allocation of traps to be assigned to an applicant:

1. In order to permit the employment of the medical hardship exception set out in part 15.14.2-5(d), an applicant must present to the RIDEM, written documentation that a governmental agency(ies) has rendered a final agency decision documenting the existence of a disabling physical or medical illness, injury, impairment, or condition that involves inpatient care in a hospital, nursing home, or a hospice, or outpatient care requiring continuing treatment or

supervision by a health care provider of the applicant or the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law, constituting a material incapacitation during the period 2001-2003. Such documentation shall include the date of the year and the material incapacitation, which must be notarized as original at the time that the appeal is presented.

Applicant, who bears the burden of proof on this issue, presented very limited evidence. Mr. Fiske testified he was undergoing a very stressful period in 2001 and 2002 and was physically unable to fish. He did not provide any more specific information than those general assertions. The physician's statements provided at hearing were marked for identification. They were copies of letters provided by Dr. Sandoval and Dr. Leddy, neither of which reflect that the Applicant was under their continuing treatment or supervision during these years. The letters were not notarized. While I am persuaded that Applicant was under a great deal of stress during 2001 and 2002 which negatively impacted his ability to fish, the Regulations require that an Applicant meet the medical hardship standard enumerated in Part 15.14.2-5(e). Based on the documentary and testimonial evidence adduced at hearing, Applicant has failed to meet that Regulatory standard.

Inability to Fish in 2003 as a Result of a License Denial

As a result of the denial of his license in 2003 by the Office of Boat Registration and Licensing, Mr. Fiske was unable to fish until December of that year when his appeal resulted in a consent agreement and issuance of the license. He argues that the DEM's actions in 2003 mandate reconsideration of his allocation using data for years 1999 and 2000.

Mr. Angell testified that he drafted the Regulations to be in conformance with the management plan adopted by the ASMFC. He testified that only two exceptions were included in the regulatory scheme - medical hardship and military service. It is a well established tenet of statutory construction that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Union Village Development Associates v. Town of North Smithfield Zoning Board of Review, 738 A.2d 1084, 1086 (R.I.1999) (quoting Providence & Worcester Railroad Co. v. Pine, 729 A.2d 202, 208 (R.I.1999)). If a statute is unambiguous and its words can be plainly interpreted, then the "work of judicial interpretation is at an end." ' Kelly v. Marcantonio, 678 A.2d 873, 877 (R.I.1996) (quoting DeAngelis v. Rhode Island Ethics Commission, 656 A.2d 967, 969 (R.I.1995))." In the instant matter, the same rules of statutory construction are applicable to the Regulations. The Regulations concerning the qualifying years for computation of the 2007 Area 2 Lobster Trap Allocation are clear. The qualifying years are 2001 - 2003. A deviation from those qualifying years may only be had by way of the two specifically enumerated exceptions provided within the Regulations. In Simeone v. Charron, the Rhode Island Supreme Court held that a court is not "entitled to write into the statute certain provisions of policy which the legislature might have provided but has seen fit to omit * * *. * * * If a change in that respect is desirable, it is for the legislature and not for the court." Simeone v. Charron, 762 A.2d 442, 448 (R.I. 2000), citing Elder v. Elder, 84 R.I. 13, 22, 120 A.2d 815, 820 (1956). The present matter is analogous. It is not the province of the Adjudication Division to write an exception into the Regulations which the Department might have included, but chose to omit. Any additional exceptions to these regulatory provisions must be added in conformance with the process for adoption set forth in the Administrative Procedures Act, R.I. Gen. Laws §42-35-1 et. seq.

Findings of Fact

After consideration of the documentary and testimonial evidence presented I make the following findings of fact:

1. The Applicant is the holder of a commercial fishing license (MPURP 001257).

2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. The Applicant received notice of his 2007 Initial Area 2 Lobster Trap Allotment determination by letter dated January 16, 2007
4. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined to be Eighteen (18) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
5. The lobster trap allocation dated January 16, 2007 was calculated on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
6. Applicant filed a request for hearing with the Administrative Adjudication Division dated February 5, 2007.
7. The Applicant was denied renewal of his commercial fishing license in 2003 and appealed the denial to the AAD.
8. Applicant's appeal concluded with the signing of a Consent Agreement and issuance of the license in December 2003.
9. Applicant was unable to fish in 2003 because his license was not issued until December of that year.
10. Applicant's only qualifying year for the computation of the allocation is the year 2002.
11. The Applicant was under stress during the years 2001 and 2002 and was physically unable to fish.
12. The Applicant presented no written documentation that a governmental agency(ies) has rendered a final agency decision documenting the existence of a disabling physical or medical illness, injury, impairment, or condition that involves inpatient care in a hospital, nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider of the applicant or the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law, constituting a material incapacitation during the period 2001-2003.
13. The physician's statements presented for consideration were not notarized.
14. Applicant presented no evidence of military service.
15. The Division's history of the Applicant's participation in lobster fishery reveals that the Applicant had lobster landings in the year 2004.
16. The Division's history of the Applicant's participation in lobster fishery in 1999 and 2000 reveals that the Applicant would have obtained an Initial Area 2 Lobster Trap Allocation in the amount of Seventy Five (75) traps.
17. Lobster stock assessments commencing in 1996 establish that Area 2 is overfished for lobsters.
18. The Regulations were adopted to conform to a management plan for lobsters in Area 2 adopted by the Atlantic States Marine Fisheries Council with the intent of reducing the number of traps fished.
19. The Regulations contain only two exceptions to the 2001-2003 qualifying years.

Conclusions of Law

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Applicant failed to prove that he meets the medical hardship exception set forth in Part 15.14.2 (d) and (e) of the Regulations.

3. AAD must follow the plain language of the Regulations and may not write exceptions into the Regulations which the Department chose to omit.

4. Applicant's 2007 Initial Area 2 Lobster Trap Allotment was calculated in accordance with the Regulations.

Based on the foregoing, it is hereby

ORDERED

Applicant's appeal of his 2007 Initial Area 2 Lobster Trap Allocation is **DENIED**.

Entered as a Recommended Decision and Order this _____ day of June, 2007 and herewith forwarded to the Director for issuance as a Final Agency Order.

Entered as a Final Agency Order this _____ day of _____, 2007

Mary F. McMahon

Hearing Officer

W. Michael Sullivan, PhD.

Director

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.

Footnotes

1. The Regulations applicable to the instant proceeding were filed with the Secretary of State on November 22, 2006. Subsequent to the determination of Applicant's allotment and subsequent to the filing of this appeal, the Regulations were superseded by an April 6, 2007 filing with the Secretary of State.

2. Recreational (non-commercial) lobster trap license holders are exempt from this process.

3. See, Regulations 15.14.2-2 (c); 15.14.2-5(d).