

Department of Environmental Management  
Administrative Adjudication Division  
State of Rhode Island  
Re: Michael J. Dunphy  
AAD No. 07-022/F&WA  
Lobster Trap Allocation MP 000270  
2008

**DECISION AND ORDER**

This matter came on to be heard before Hearing Officer David Kerins on the appeal of Michael J. Dunphy (“Dunphy” or “Applicant”) of the determination by the Department of Environmental Management, Division of Fish and Wildlife (“Division”) of his initial 2007 Area 2 Lobster Trap Allocation (“Allocation”). By letter dated January 17, 2007 the Applicant was notified that he was authorized an allocation of Twenty Two (0) traps based on the Applicant's activity in the lobster trap fishery during the target years of 2001 through 2003 consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I.G.L. § 42-35-1 et seq. Applicant requested a hearing by letter filed on February 7, 2007. Division reviewed Applicant's fishing history and by letter dated March 15, 2007 advised Applicant that his original allotment was modified to Twenty Two (22) traps. Applicant indicated that he chose to proceed with his appeal notwithstanding the modification.

A Status Conference was held on March 2, 2007 and continued for control date. The Administration Adjudication Division (AAD) contacted the Applicant by Order dated April 1, 2008 requesting advice as to Applicant's intention. Applicant by note filed on April 18, 2008 requested the matter be assigned for hearing. On April 18, 2008 an Order and Notice of Administrative Hearing and Prehearing was issued setting the matter down for hearing on May 29, 2008 at 1:30 p.m. On May 29, 2008 a Prehearing Conference was held immediately prior to the Administrative Hearing. The Applicant, Michael J. Dunphy, appeared and advised that he was proceeding pro se. The Division was represented by Gary Powers, Esq., who was accompanied by Thomas E. Angell. The Division presented a Memorandum as required identifying witnesses, exhibits and suggested stipulations of fact. The Applicant presented an exhibit, a hand written note from a medical provider. After brief discussion the parties agreed on stipulated facts and admission of exhibits.

**EXHIBITS**

The following exhibits were reviewed and agreed to be admitted as listed below.

**Applicant's Exhibits**

Applicant's #1      Trap tag order reflecting the purchase of 110 trap tags.

Full

Applicant's #2      Hand written note from Dr. Steve Roth, M.D. of Thundermist dated March 2, 2007.

Full

**Division's Exhibits**

Division's Exhibit #1 The modified Notice of Initial Area 2 Lobster Trap Allocation from the Division dated March 15, 2007 advising the Applicant that his initial 2007 allocation was calculated by the Division to be Twenty Two (22) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003. 3 Pages (Copy)

Full

Division's Exhibit #2 A letter filed by the Applicant dated February 7, 2007 requesting hearing before the AAD concerning the 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 by the Division to be Twenty Two (0) traps. 1 Page (Copy)

Full

Division's Exhibit #3 The summary dated May 20, 2008 prepared by Thomas E. Angell of Full the Division's record of Applicant's Lobster Landings and Trap Deployment Data during the period 1999-2004. 1 Page (Copy)

Full

Division's Exhibit #4 Curriculum vita of Thomas E. Angell. 2 Pages (Copy)

## **STIPULATED FACTS**

The parties agreed on the following stipulated facts:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a letter dated March 15, 2007 from the Division notifying Applicant that his application for an Initial Lobster Management Area 2 Lobster Trap Allocation determination had been modified following his informal conference with the Division his allocation being increased from a Twenty Two (0) trap to Twenty Two (22) trap allocation.
3. The modified lobster trap allocation dated March 15, 2007 was calculated on the basis 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 Applicant landed lobsters harvested by trap during the year 2004.
5. The Applicant did not land any lobsters harvested by trap during the years 1999 or 2000.

## **WITNESSES**

### **For Applicant**

Applicant, Michael J. Dunphy, testified regarding his fishing history and medical issues.

### **For Division**

The Division presented Thomas E. Angell, Principal Marine Biologist, Division of Fish and Wildlife (offered as a lay witness and as an expert witness concerning the lobster fishery as well as an expert witness concerning the interpretation and application of the Department's lobster regulations)

## **ISSUES**

Applicant identified his issue as, "He planned on fishing but his health wasn't up to par."

Division identified its issues as:

1. The Applicant's initial lobster trap allocation was calculated consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I.G.L. § 42-35-1 et seq.
2. Applicant did not present sufficient and admissible evidence to constitute a "Material Incapacity" throughout Target years 2001-2003 as required in Part 15.14.2-8.

## **HEARING SUMMARY**

The Applicant testified on his own behalf. He testified that he had been a lobster fisherman for twelve (12) years during the late 70's and early 80's. He left the lobster fishing business and returned when he received an allotment of one hundred (100) traps in 2003. He stated that his fishing effort was impacted by illness, including acid reflux and arthritis. He testified that he was sick "a little" in March and then "pretty bad" in July and August. He stated that he planned on making a living in fishing but he can only do that with one hundred (100) traps. The Applicant submitted a handwritten note from Steve Roth, M.D. (Applicant's #2 Full), which was not notarized.

The Division presented as its only witness Thomas E. Angell, a principal Marine Biologist with the Division. Mr. Angell testified as a lay witness and also as an expert witness in lobster fishery and as an expert witness in the interpretation and application of the Department's lobster regulations. Mr. Angell testified that he is responsible for reviewing data on file regarding individual fishing history for the purposes of determining the 2007 lobster trap allocation. Mr. Angell reviewed in his testimony the data contained in several exhibits.

Mr. Angell described Division #1 Full as a letter from the Division of Fish and Wildlife to Applicant dated March 15, 2007. This letter was further described as Applicant's Notice of Lobster Trap Allocation.

Division's Exhibit #3 was described as lobster landings and trap deployment data for Applicant CFL 000270 for 1999 through 2004. Mr. Angell testified as to the method of collection of the data and the interpretation of the information contained therein. In his testimony Mr. Angell stated that the fishing history reflected in CFL 000270 for Applicant was 0 for the years 99, 01 and 02. Fishing history was 22 effective traps for 2003.

Mr. Angell testified that based on Applicant's fishing history the allocation to Applicant of 22 traps was appropriate. Mr. Angell also testified that based on his familiarity with the Regulations the Applicant's claim of "material incapacity" was insufficient. If a case of "material incapacity" were established, Mr. Angell testified that the Applicant had no fishing history for 1999 and 2000 to substitute for the impacted area.

## **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 holders 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. The information provided to the Division from the Applicant's logbook indicates that he participated in the lobster fishery only during 2003 of the qualifying years. 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 Twenty Two (22) traps.

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 Regulations which, if applicable, allow a departure from the 2001 - 2003 qualifying period. Those exceptions involve military service and disabling physical or medical illness, neither of which is alleged by Applicant.

The Applicant presented testimony to the effect that his health prevented him from fishing as much as he had intended. The Applicant also submitted as Applicant's Exhibit #2 a hand written note from a medical provider. This note was not notarized as required by regulation but even if it had been it does not establish a "Material Incapacity" pursuant to section 15.14.2-8 (b). The controlling decision interpreting the Regulations on "Material Incapacity" is Re: Charles Borden AAD No. 07-028/FWA.

Borden states the essential definition within section 15.14.2 of the Amended Regulations reads as follows:

"Material Incapacitation - means a verifiable event beyond the control of the license/permit holder, such as medical condition, that adversely affected his/her fishing performance during the three-year period 2001 - 2001, inclusive. Military service performed during the three year period 2001 - 2003 also constitutes material incapacitation. Other than a decision to serve in the military, material incapacitation can not involve a choice by the license/permit holder to pursue other interest; or to a short-term illness or injury that would not have incapacitated a person for the three qualifying years."

The Borden case established the precedent that when the issue of material incapacity is raised the Applicant must show that he was impacted for the full period of time. In this case we find that the Applicant was only impacted by medical conditions for part of the year.

In arguing that his health was "not up to par" for a portion of the 2003 season Applicant is asking for an interpretation of the regulations which does not appear consistent with the plain language. The issue before the AAD in this matter is not one of regulatory interpretation. The Regulations are clear and unequivocal. 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).

The Applicant has failed to prove by a fair preponderance of the evidence why his initial 2007 Area 2 Lobster Trap Allocation should not be upheld. He has not proven that it was arrived at by miscalculation or that he is entitled to an exception under Section 15.14.2. The Allotment therefore must be upheld.

## **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 commercial fishing license CFL 000270.

2. Applicant filed an application with Division for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. The lobster trap allocation dated January 17, 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 Division by the Applicant.
4. Applicant's allotment as of the January 17, 2007 Notice was Zero (0) traps.
5. Applicant filed a request for appeal on February 7, 2007.
6. On March 15, 2007 Division advised Applicant that his original allotment was modified to Twenty Two (22) traps.
7. Applicant had medical issues which affected his ability to fish for lobster for a portion of 2003.
8. Applicant landed lobster harvested by trap during the years 2003 and 2004.
9. Applicant did not land lobster harvested by trap for the years 1999, 2000, 2001 and 2002.
10. Applicant's allocation of traps was properly calculated by Division.
11. Applicant has not demonstrated facts to support a finding of "Material Incapacity" as defined by Section 15.14.2.

### **CONCLUSION 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 Administrative Adjudication for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I.G.L. § 42-17.7-2; and § 15.14.2-5 (a) of the Marine Fisheries Regulations.
2. The Division's Allocation of Twenty Two (22) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations due to his lack of any documented fishing history.
3. The Applicant failed to prove by a preponderance of the evidence that his requested increase of his Initial Lobster Management Area 2 Lobster Trap Allocation of Twenty Two (22) traps would be consistent with the provisions and purposes of the Marine Fisheries Regulations.
4. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of Twenty Two (22) traps is the proper Allocation pursuant to the pertinent statutes and regulations.

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

### **ORDERED**

1. Applicant's appeal is DENIED.
2. Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation shall remain at Twenty Two (22) traps.

Entered as an Administrative Order this \_\_\_\_\_ day of \_\_\_\_\_, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Acting Chief Hearing Officer

Entered as a Final Agency Order this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

W. Michael Sullivan, Ph.D.,

Director

### **NOTICE OF APPELLATE RIGHTS**

This Final 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.