

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Gary Bryson
AAD No. 07-051/F&WA
Lobster Trap Allocation MPURP 000256
2008

DECISION AND ORDER

This matter came on to be heard before Hearing Officer David Kerins on Motion For Summary Judgment filed by the Division of Fish and Wildlife of the Department of Environmental Management (The "Division") and the Objection thereto filed by Applicant Gary Bryson (the "Applicant").

This is an action commenced in the Administrative Adjudication Division of the Department of Environmental Management (the "AAD") by the letter of appeal filed by the Applicant on February 21, 2007. The Appeal requesting review of the determination of the Division of Applicant's 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 (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.

On March 22, 2007 a Status Conference was held with the Applicant and Attorney for the Division at which time a joint request was made to establish a 30 day Control Date. A control date of April 25, 2007 was established and Applicant filed a waiver of his right to a hearing within 90 days.

On April 27, 2007 Applicant filed a written request for an extension of the control date and on April 30, 2007 an Order was entered extending the Control Date to May 25, 2007. On May 22, 2007 Applicant requested an extension of Control Date and on May 24, 2007 an Order was entered extending the Control Date to June 22, 2007. On June 21, 2007 Attorney Deborah Johnson Collins filed her Entry of Appearance on behalf of the Applicant and a request for additional time to prepare. An Order was entered on June 22, 2007 establishing a Control Date on July 27, 2007.

On July 25, 2007 Attorney for Applicant filed a letter requesting Continuance of Control Date due to the fact that her client was undergoing surgery. An Order was entered on July 25, 2007 establishing a September 14, 2007 Control Date. On September 13, 2007 attorney for Applicant filed a letter requesting continuance of Control Date and on September 14, 2007 an Order was entered establishing an October 19, 2007 Control Date.

On October 18, 2007 attorney for Applicant filed a letter requesting a continuance of control date and an Order was entered on October 23, 2007 establishing a November 20, 2007 Control Date. On the November 20, 2007 attorney for Applicant advised that Applicant was prepared to proceed to hearing and an Order and Notice of Administrative Hearing was issued establishing December 19, 2007 as the prehearing and hearing date.

On December 18, 2007 attorney for Applicant filed a Motion to Continue Administrative Hearing until after January 10, 2008 but to proceed with Prehearing Conference on December 19, 2007.

On December 19, 2007 a Prehearing Conference was held attended by the Applicant, his attorney and the attorney for the Division. Attorney for the Division filed a Prehearing Memorandum listing his proposed issues, suggested uncontested facts, intended witnesses, and exhibits.

Attorney for Applicant orally represented Applicant's intended witnesses and exhibits but presented no exhibit at the time of the Prehearing Conference. The parties discussed Division's suggested uncontested facts and four (4) facts were agreed to. The parties further agreed to the

admission of four (4) Division Exhibits as being admitted in full. The stipulated facts and exhibits are listed later in this Decision.

On December 24, 2007 Division filed a Motion for Summary Judgment with Supporting Memorandum. On January 11, 2008 attorney for Applicant filed an Objection to Motion for Summary Judgment and advised that the memorandum in support thereof would be filed separately. On January 24, 2008 an Order was entered scheduling Oral Arguments relative to the Motion for Summary Judgment for February 8, 2008 at 2:00 p.m. and allowing attorney for Applicant until January 31, 2008 for filing of memorandum in support of her objection to Motion for Summary Judgment. On January 31, 2008 Applicant filed a Motion to Continue Oral Argument representing that her client was undergoing surgery on February 7, 2008. An Order was entered on February 6, 2008 scheduling the oral argument for February 19, 2008 at 2:00 p.m. On February 19, 2008 oral arguments were presented by the parties in support of the Motion for Summary Judgment and Objection. On February 21, 2008 Applicant filed a Supplemental Memorandum.

STIPULATED FACTS

The following are the facts to which the parties have stipulated as accepted without additional proof:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The lobster trap allocation calculation was prepared on the basis of data concerning Applicant's history of participation in lobster trap fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
3. The Applicant had no history of landing any lobsters harvested by trap the year 2004.
4. The Applicant had no history of participation in the lobster trap fishery during the years 1999 or 2000.
5. The Applicant did not land lobster by trap between 1996 and 2005.

EXHIBITS

The following are the exhibits to which the parties agreed may be considered as "full" exhibits without additional proof:

DIV Exhibit#1. The Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 17, 2007 advising the Applicant that his initial 2007 allocation was determined by the Division to be Zero (0) traps based upon his reported activity in the lobster trap fishery during the target period of the years 2001 through 2003. 3 Pages (Copy).

DIV Exhibit#2. The Applicant's letter dated February 16, 2007 requesting hearing concerning the Division's Area 2 Lobster Trap Application Letter. 1 Page (Copy)

DIV Exhibit#3 The Applicant's Lobster Landings and Trap Deployment Data during the Years 1999, 2000, 2001, 2002, 2003, and 2004. 1 Page (Copy).

DIV Exhibit#4 Curriculum vita of Thomas E. Angell. 2 Pages (Copy).

ISSUES

The parties presented the following issues for determination by the Hearing Officer:

Applicant

1. The Amended R.I.M.F.R. Part XV of April 11, 2007 is the Regulation Applicable to Bryson's Appeal.

2. The Amended R.I.M.F.R. Part XV of April 11, 2007 and the Director's Statement Pertaining to the Necessity of Reforming the Rigidity of the Regulations Allow for a broader interpretation than the Division puts forth.
3. The Applicant's evidence of incapacitation through medical hardship is factually based and constitutes a genuine issue as to material fact, precluding the possibility of judgment as a matter of law at this stage.
4. That where there is a material incapacity shown but no fishing history for the period of 1999 - 2004, the Division should go to other years to determine allocation.

Division

1. Whether 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. Gen. Laws § 42-35-1 et seq.
2. If the Applicant intends to pursue a claim that he may be entitled to a modification on the basis of a medical hardship exception, then the first supplemental issue to be addressed should be whether the Applicant suffered a medical hardship during the target years of 2001-2003 as that term is set out in Part 15.14.2-5(d).
3. If the issue set out above in Issue 2 is found in the affirmative, the next issue that must be addressed is whether the Applicant landed any lobsters harvested by trap during 2004 as required by Part 15.14.2-5(e) (3).
4. If the issues set out above in Issues 2 and 3 are both found in the affirmative, the next issue that must be addressed is whether the Applicant participated in the lobster trap fishery in 1999 or 2000 as required by Part 15.14.2-5(e) (3) to a degree that would permit a modification in the Notice of Initial Management Area 2 Lobster Trap Allocation which is the subject of this appeal.

ANALYSIS

The Applicant argues that the case is governed by the Regulations adopted on April 11, 2007. The Division does not argue to the contrary. Based on the lack of argument to the contrary and the Decision issued by the Director in Re: Charles Borden, AAD No. 07-028/F&WA, dated January 2, 2008, it is clear that the April Regulations should be the basis for review.

The Applicant next argues that the Regulations should not be strictly applied in this instance. Applicant states in page 6 of his Memorandum in Support of Objection to Motion for Summary Judgment that “the regulations are meant to provide guidance, but it is the spirit rather than the letter that is mandatory”. The Applicant relies on language contained in a memorandum from Director Sullivan to Mark Gibson which, in part, addresses a change in the requirements of Part 15.14.2 - Area 2 Lobster Trap Effort Control. In that memorandum the Director suggests that the Regulations should be amended to allow proof of “material incapacity” to be less limited. The Director suggested that the Regulations have more flexibility and not require proof of medical hardship by a “written documentation that a governmental agency (ies) has rendered a final decision documenting the existence of a disability physical or mental illness, injury, impairment or condition”.

The Division's position is that the Regulations are clear and unambiguous and therefore leave no room for flexibility or different interpretation. Notwithstanding the amendment of the April Regulations they do not provide for the use of a fishing history other than 1999 - 2004. The Division takes the position that even if the Applicant could show a “Material Incapacity” as defined by the Regulations, he did not have a fishing history for the years 1999 and 2000. In summary the Division in its Motion for Summary Judgment and supporting memorandum argue that there is no material fact in dispute because even if we accept the applicant's assertion that he suffered from a “Material Incapacity” during the target years of 2001 - 2003, he cannot

satisfy the requirement of fishing history for the years 1999 - 2000. Division argues that the absence of this fact of proof entitles it to a judgment as a matter of law.

Applicant argues that he is entitled to prove the exception for "Material Incapacity" and thereupon the Division should use years of fishing history other than those specified in the Regulations in order to determine his allocation.

15.14.2-6 - Qualification for Initial Area 2 Lobster Trap Allocation's subsection (a) states:

"To be eligible for an initial Area 2 Lobster Trap Allocation an Applicant

(i) Must have held a Department-issued commercial fishing license, authorizing the individual to fish commercially for lobster, or a federal lobster permit endorsement for Area 2, at some point during the period 2001 - 2003; and/or

(ii) Must have documented fishing performance during the period 2001 - 2003, i.e., must have landed lobsters with traps from Area 2 at some point during that period; or if unable to do so due to material incapacitation, pursuant to the provisions set forth in section 15.14.2-8, must have documented fishing performance during the period 1999 - 2000 and during the year 2004, i.e., must have landed lobsters with traps from Area 2, with a valid license/permit, at some point during those periods; and

(iii) Must have renewed his/her license/permit annually since 2003."

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. 1966) (*quoting DeAngelis v. Rhode Island Ethics Commission*, 656 A.2d 967, 969 (R.I. 1995).

"Area 2 Lobster Trap Effort Control" reflects a policy decision made on the part of the Department after notice and public hearing to implement the management methods reflected in those 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). In the present matter, it is not the province of the Adjudication Division to rewrite Regulations to include alternatives which the Department might have included, but chose to omit. Changes to these regulatory provisions must follow the notice and adoption requirements of the Administrative Procedures Act.

Next we move to the question of whether this matter is appropriate for the entry of a Summary Judgment. The standard of review for an AAD Hearing Officer reviewing a Motion for Summary Judgment is the same standard as that applied in Superior Court for the State of Rhode Island. *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters* ("AAD Rules of Procedure"), Rule 8.00(a)(1). That standard is found in Rule 56 of the Rhode Island Rules of Civil Procedure, and states that "[t]he judgment sought shall be rendered forthwith if the pleadings... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *R.I.R.C.P. Rule 56 (c)*. The case law establishes that a judge or hearing officer shall enter a judgment only when, after reviewing the admissible evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact remains to be decided, and that the moving party is entitled to judgment as a matter of law. *Heflin*, 774 A.2d 25 at 29; *Woodland Manor III Associates*, 713 A.2d 806, at 810.

It is the opinion of this hearing officer, reviewing the evidence in the light most favorable to the nonmoving party, he cannot prevail. The Regulations as amended in April 2007 do not allow him

to take into consideration any fishing history other than that of 2001 - 2003 except in the case of two exceptions. Those exceptions are related to Military Service on "Material Incapacity" as stated in 15.14.2-8 "Material Incapacity" as follows:

(a) An individual who meets the qualifying criteria set forth in sections 15.14.2-6(a)(i) and (iii); but had no documented, or had reduced, fishing performance during the three-year period 2001-2003, inclusive, due to material incapacitation, as specified in section 15.14.2-2 herein, and as further described below, may request that his/her initial Area 2 LTA be based on his/her fishing performance in Area 2 during the period 1999-2000.

This section allows an applicant to request that his or her allocation be based on his or her fishing performance in Area 2 during the period 1999 - 2000. It does not provide for the use of any other years of fishing performance.

The lack of a fishing history between 1999 and 2003 constitutes a material fact which the Applicant must prove in order to prevail. Even if we accept that the Applicant had a "Material Incapacity", for the purposes of this Motion, the allocation of the Division cannot be overturned without the fishing history as expressly provided for by the Regulation.

FINDINGS OF FACT

After consideration of the documentary and stipulated factual evidence I make the following findings of fact:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The lobster trap allocation calculation was prepared on the basis of data concerning Applicant's history of participation in lobster trap fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
3. The Applicant had no history of landing any lobsters harvested by trap the year 2004.
4. The Applicant had no history of participation in the lobster trap fishery during the years 1999 or 2000.
5. The Applicant had no history of lobster landed by trap between 1996 and 2005.
6. The absence of fishing history for 1996 through 2005 is a material fact which is not in dispute.

CONCLUSIONS OF LAW

After due consideration of the above findings of fact and legal arguments 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. Gen. Laws § 42-17.7-2; and § 15.14.2-5 (a) of the Marine Fisheries Regulations.
2. The appropriate Regulations to look to for the requirements for allocation of lobster traps in this matter is the Area 2 Lobster Trap Control Effort as amended on April 11, 2007.
3. The Area 2 Lobster Trap Control Effort as amended do not provide for the calculation of lobster trap allocation by use of years other than 1999 - 2003.
4. The Division's allocation of (0) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2 - Area 2 Lobster Trap Control Effort of the Marine Fisheries Regulations due to this lack of any documented fishing history during the applicable years.
5. There is no dispute as to the material fact stated in 4 above and therefore the Division is entitled to judgment as a matter of law.

From the reasons state above it is hereby

ORDERED

1. The Division's Motion for Summary Judgment is GRANTED.
2. Judgment is entered against the Applicant and his Appeal is DENIED.
3. The Applicant's Initial Area 2 Lobster Trap Allocation shall remain at (0).

Entered as a Recommended Decision and Order this _____ day of March, 2008 and herewith forwarded to the Director for issuance as a Final Agency Order.

David Kerins

Hearing Officer

Entered as a Final Agency Order this _____ day of _____, 2008

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