

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

RE: AMATO, JOSEPH
LOBSTER TRAP ALLOCATION
MPURP 000044

AAD NO. 07-081/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of Joseph A. Amato ("Mr. Amato" or "Applicant") of the determination by the Department of Environmental Management, Division of Fish and Wildlife ("Division") that his Initial 2007 Area 2 Lobster Trap Allocation ("Allocation") was untimely. By letter dated March 29, 2007, the Applicant was notified that his application for his Initial 2007 Area 2 Lobster Trap Allocation was rejected because his application was submitted after December 31, 2006. On April 18, 2007, Applicant filed a request for hearing with the AAD contesting the rejection of his Application. 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 May 24, 2007 and an Order and Notice of Administrative Hearing and Prehearing Conference was issued to the parties at the status conference scheduling the Prehearing Conference and Hearing for July 24, 2007. The prehearing conference commenced on July 24, 2007. The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq. Upon Applicant's request, the Prehearing conference was recessed to allow the Applicant to engage counsel. A continuance was granted and the prehearing reconvened on September 18, 2007 followed immediately thereafter by the administrative hearing. Again, Applicant appeared *pro se* and the Division was represented by Gary Powers,

¹ The Regulations applicable to the instant proceeding were filed with the Secretary of State on November 22, 2006. The Regulations were superseded by amended regulations dated April 11, 2007 and August 1, 2007.

Esq. At the prehearing conference, the following documents were submitted and marked as indicated below:

For Applicant:

App. 1 (ID) Statement of Joseph A. Amato dated 09/18/07

For the Division of Fish and Wildlife:

Div. 1 (Full) The Division's Notice dated March 29, 2007 that the Applicant's application for a determination as to his Initial Area 2 Lobster Trap Allocation was untimely and could not be acted upon. 3pp. (Copy)

Div. 2 (Full) Applicant's letter requesting a hearing concerning the Division's March 29, 2007 Notification Letter. 1 page (Copy).

Div. 3 (Full) Curriculum Vita of Thomas E. Angell, 2pp.(Copy)

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 Division mailed the Applicant on October 31, 2006 notification of his ability to submit on or before December 31, 2006 a timely application for a determination as to his Initial Area 2 Lobster Trap Allocation based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The Applicant submitted an application for a determination as to his application Initial Area 2 Lobster trap Allocation on March 29, 2007.
4. Should the hearing officer determine that Applicant's Initial Area 2 Lobster Trap Application be deemed timely, the lobster trap allocation for Applicant would be One Hundred Forty (140) traps.

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.

The Division identified the issue as "Whether the Division acted upon the applicant's initial lobster trap allocation request 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.*”.

The Applicant bears the burden of proof in this proceeding to demonstrate good cause why his Application was submitted out of time. As noted in the stipulations, the parties agree that if this issue is resolved in Applicant’s favor, his Allocation, calculated consistent with the Regulations, would be One Hundred Forty (140) traps.

Testimony

Mr. Amato testified briefly on his own behalf. He agreed that his Application was filed after the December 31, 2006 deadline but his reason was that he never received the notice and application information that was contained in Division’s Exhibit 1 (“Notice”). No one at his residence ever signed for the mailing nor did he ever receive it. He assumed that he did not receive an application because he did not qualify. After speaking with others engaged in the lobster fishery and contacting the Division by telephone, he submitted his Application – admittedly late. Mr. Amato was not cross-examined.

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. Mr. Angell’s testimony relevant to the narrow issue in this matter was that a Notice was mailed to each licensed fisherman asking if they wished to apply for an Allocation. He indicated that pursuant to the Regulations, the deadline for filing an Application was December 31, 2006. He further testified that Applicant’s Notice was sent certified mail; delivery was attempted, but not effectuated, on three separate dates by the U.S. Postal Service; and that the Notice was ultimately returned to the Division as unclaimed. Mr. Angell stated that he was familiar with the certified mail delivery process employed by the U.S. Postal Service and that as a matter of course, each time delivery is

attempted but not completed, a notice is left for the addressee indicating that a piece of mail awaits pick up at the Post Office. Mr. Angell concluded his testimony by testifying that he was present for Applicant's testimony and that based upon the Regulations, Mr. Amato's reasons for late filing were not adequate to modify the Division's determination.

Upon cross-examination Mr. Angell conceded that other Applications filed after the regulatory deadline of December 31, 2006 were accepted by the Division and Allocations determined consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control. On redirect, Mr. Angell indicated that those applicants had better justification for late filings. Those reasons included incorrect mailing address; individuals were out of the country or medical issues.

At the conclusion of Mr. Angell's testimony, the hearing officer inquired very briefly of Mr. Amato. In response, Mr. Amato testified that he received no notices from the U.S. Postal Service indicating delivery was attempted or that mail awaited pick-up at the Post Office. He reiterated that he never received notice and that the first time he became aware of the attempted deliveries was at the prehearing conference when documents were exchanged.

The parties were afforded the option of making closing arguments or filing a brief or written statement after the conclusion of the hearing. Mr. Amato filed a written statement on October 2, 2007 and the Division filed a post-hearing memorandum on October 3, 2007.

Analysis

This matter is one of first impression before the AAD concerning a late filing of an application for a determination of an Initial Area 2 Lobster Trap Allocation. In this case, the Applicant does not contest the Regulations, or the number of traps allocated to him under the Regulations, nor does he contest the fact that his Application was filed late. This matter presents the much narrower and preliminary issue of whether the Applicant can demonstrate good cause for filing the application after the close of the application period.

It is undisputed that on October 31, 2006 the Division mailed the Notice to the Applicant advising him of his ability to submit, on or before December 31, 2006, a timely application for a determination as to his Initial Area 2 Lobster Trap Allocation based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003. This was the first time an application was required of properly licensed individuals for allocation of lobster traps. Testimony establishes that the Notice was sent by certified mail and delivery was attempted by the U.S. Postal Service on three occasions. The Notice was ultimately returned to the Division by the U.S. Postal Service and marked, not as "Refused", but as "Unclaimed". Mr. Amato testified that he never received the Notice nor did he receive any notice from the U.S. Postal Service advising him that mail was being held for pick-up. After conversations with other fishermen and placing telephone calls to the Division, Mr. Amato obtained an Application and filed it on March 29, 2007.

The Division argues that Mr. Amato should be deemed to be in receipt of the Notice because it is undisputed that it was mailed by the Division and receipt is presumed. The Applicant in this matter, however, has rebutted any presumption of receipt by his brief but persuasive testimony that he never received the Notice or any notification that an item of mail was to be retrieved at the Post Office.

While the Regulations set a filing deadline of December 31, 2006, there is no regulatory language indicating that the filing deadline is mandatory or jurisdictional. Moreover, the actions of the Division/Review Panel are illuminating. The Division/Review Panel considered late Applications and weighed the documentation, arguments and other information provided by an Applicant to determine if good cause was shown for a late filing. In some instances, the Applications were accepted and Allocations were awarded consistent with the formula and process established in the Regulations. The practice of the Division/Review Panel in entertaining late filings is a clear indication that the Division has not interpreted the filing deadline as a

mandatory or jurisdictional bar to consideration of a late Application. The evidence of record demonstrates that in some instances Applications filed after the December 31, 2006 deadline were accepted if the Division/Review Panel determined that the reasons presented were adequate or otherwise justified a filing out of time. Absent prejudice to the Division, any doubts regarding demonstration of good cause should be resolved in favor of Mr. Amato. I find no prejudice to the Division in accepting the Application out of time. The outcome is that the Application is evaluated on the merits, applying the standards set forth in the Regulations. The resulting Allocation of One Hundred Forty (140) traps, as stipulated by the parties, is consistent with the lobster effort control plan established by the Regulations.

Findings of Fact

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

1. The Division mailed the Applicant on October 31, 2006 notification of his ability to submit on or before December 31, 2006 a timely application for a determination as to his Initial Area 2 Lobster Trap Allocation based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
2. The Notice was returned to the Division as unclaimed by the U.S. Postal Service.
3. The Applicant did not receive the Notice mailed by the Division on October 31, 2006.
4. The Applicant submitted an application for a determination as to his Initial Area 2 Lobster trap Allocation on March 29, 2007.
5. There is no prejudice to the Division in allowing the Application to be evaluated on the merits.
6. Should the hearing officer determine that Applicant's Initial Area 2 Lobster Trap Application be deemed timely, the lobster trap allocation for Applicant would be One Hundred Forty (140) traps.

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 has demonstrated good cause why his Application was filed late.
3. Good cause having been shown, Applicant's 2007 Initial Area 2 Lobster Trap Allocation of One Hundred Forty (140) traps was calculated in accordance with the Regulations.

Based on the foregoing, it is hereby

ORDERED

1. Applicant's appeal of his 2007 Initial Area 2 Lobster Trap Allocation is **SUSTAINED.**
2. Applicant's 2007 Initial Area 2 Lobster Trap Allocation is One Hundred Forty (140) traps.

Entered as a Recommended Decision and Order this 24th day of October, 2007 and herewith forwarded to the Director for issuance as a Final Agency Order.


Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

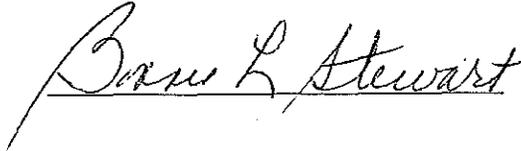
Entered as a Final Agency Order this 23rd day of October, 2007



W. Michael Sullivan, PhD.
Director
Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908
(401) 222-2771

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Joseph A. Amato, 51 Harrop Avenue, Warwick, RI 02886; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 25th day of October, 2007.



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.