

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Michael Ventura
AAD No. 08-001/MSA
License Application
2008

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters of the Department of Environmental Management, (AAD) on an appeal filed by Applicant Michael Ventura (Ventura or Applicant) dated May 5, 2008. Applicant is appealing the denial of his Application entitled "Resident Marine License Application, 2008 New License Opportunity" filed on January 14, 2008. The Applicant was seeking a "quahog endorsement" for his Commercial Fishing license (CFL). Notice of denial was forwarded to Applicant by letter dated April 21, 2008 from the Office of Boat Registration and Licensing.

On May 16, 2008 a Status Conference was held attended by Applicant, representing himself, pro se, and Gary Powers, attorney for the Office of Boating Regulations and Licensing Division (OBRL or Division). On May 16, 2008 OBRL filed a Motion for Summary Judgment alleging that a judgment should be entered in favor of the OBRL pursuant to Rule 56 (c) of the Superior Court Rules of Civil Procedure. Oral arguments for consideration of the Motion for Summary Judgment were held on for June 12, 2008.

HEARING SUMMARY

At the hearing the Applicant, Michael Ventura, testified on his own behalf in support of his case. No written objection or memorandum to the Motion for Summary Judgment was filed by the Applicant. The Division presented one witness, Margaret McGrath, Programming Services Officer with the Office of Boating Registration and Licensing (OBRL). The OBRL also filed a memorandum in support of its Motion for Summary Judgment together with four (4) exhibits. Witness, Margaret McGrath, testified that she is employed as the Programming Services Officer with the Department of Environmental Management and serves as the supervisor of the Department's Office of Boat Registration and Licensing (OBRL). She testified that she is familiar with the document entitled "Residential Marine Licensing Application, 2008 New License Opportunity" submitted by the Applicant, Michael Ventura. The entirety of the application submitted to OBRL was presented as Division's Exhibit #1 and qualified as a full exhibit by witness McGrath.

Witness McGrath reviewed the application and directed the hearing officer's attention to the language contained in the application; "Please read all guidance document material prior to submission of this application." Witness McGrath reviewed a document entitled "New License/Endorsement Opportunities Available for 2008" which was qualified and admitted as Division's Exhibit #3 full. McGrath explained that this was guidance material provided to Applicant explaining the requirements for several Commercial Fishing License (CFL) endorsements including the quahog endorsement. McGrath testified that Exhibit #3 under quahog endorsement contain the requirement that applicants must file proof of the fact that he/she "actively fished." Exhibit #3 contains language as follows:

"Note: to meet the standard of 'actively fished' as applicant must be able to demonstrate by dated transaction records that they have fished in the shellfish fishery as least 75 days over the past two years."

Witness McGrath testified that the application of Ventura (Exhibit #2) was submitted as on the application without evidence required to demonstrate “active fishing” as required. Applicant Ventura testified in support of his objection to Motion for Summary Judgment. He stated that he had fished with a quahog license in the early 90's. He testified that he tried to obtain a quahog endorsement in 2007 but was denied due to lack of fishing history. Applicant Ventura obtained an endorsement for “other shellfish, non quahog” in 2007 and actively fished in that fishery. He testified that he had proof of fishing of at least seventy five (75) days but admits he did not include this documentation with his application. He testified that he did not include the fishing history with his application because he did not receive the guidance materials and was expressly advise by Margaret McGrath that he was not required to do so. Witness McGrath denied making any such representation to the Applicant.

ANALYSIS

Summary Judgment is appropriate if Pleadings, Affidavits, Answers to Interrogatories and Admissions filed together to 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. SUPER. R. Civ. P. 56. The party opposing a Motion for Summary Judgment has an affirmative burden to prove the existence of a genuine issue of material fact by presenting specific facts by Affidavit or other evidence to the Court. Harritos v. Cambio 683 A2d 359, 360 (R.I. 1996). The objecting party can not meet the affirmative burden to establish a genuine issue of material fact by resting upon allegations or mere conclusions in the pleadings or otherwise, but must provide the Court competent evidence demonstrating a genuine issue of material fact. Harritos, 683A2d at 360. Additionally, mere recitation of facts sympathetic to an opponent's position will not defeat a proponents Motion for Summary Judgment unless the facts are pertinent to the claim or defense which is actually being asserted. Saltzman v. Atlantic Realty Company 434 A2d 1343, 1345 (R.I. 1981). The primary issue is, therefore, whether or not there exists a material issue of fact.

Applicant argues that he should be issued a quahog endorsement in spite of the fact that he did not provide evidence that he “actively fished” within the last two years. He acknowledges the fact that he did not submit documents establishing his fishing history but raises two excuses: 1. He did not receive the guidance sheet with the filing requirements; and 2. He was advised by Margaret McGrath that he did not need to submit his fishing history. Applicant argues that he has evidence of “actively fishing” which would have satisfied the requirement and would have submitted them if he knew they were required.

The “Rules and Regulations Governing the Management of Marine Fisheries” dated December 7, 2007 were adopted pursuant to Chapter 42-17.1, Section 20-1-4, Section 20-2.1 and Public Laws Chapter 02-047, in accordance with Chapter 42-35 of the Rhode Island General Laws of 1956 as amended. Section 6.7-6 of the Rules and Regulations entitled “Issuance of New Commercial Fishing Licenses with Quahog, Restricted Finfish and/or Lobster Endorsements” at section (a) (ii) states that endorsements will be issued to “licensed resident fishers holding Principal Effort Licenses who have been actively fishing their licenses.” (emphasis added)

In order to demonstrate “actively fishing” we must look to the definition provided in Section 5.1 of the Rules and Regulations as follows:

”Actively fishing” - A license holder will be considered to have been actively fishing that license/endorsement if he or she demonstrates by dated transaction records that they have fished at least seventy-five (75) days in the preceding two years.“

OBRL has taken the position that the Applicant's application was denied because he failed to file the necessary documentation as required by the Regulations. OBRL argues that the requirement is clearly stated in the Regulations and that the Applicant is on notice of this requirement. OBRL argues further that no oral representatives were made by Margaret McGrath or any other employee as alleged. The Department received 202 applications for new commercial fishing

licenses/endorsements. Pursuant to the Regulations adopted in December 2007, 16 quahog endorsements were made available for 2008. The Applicant was not considered for an endorsement because his application was not supported by evidence that he had been “actively fishing” his license. OBRL could not issue a quahog endorsement without a complete application. The Rules and Regulations are clear and unambiguous. No oral representations of Department employees, if I accept this fact for the purposes of argument, may alter this requirement or relieve the Applicant from compliance. OBRL has made its case that there is no issue of material fact in dispute and that judgment should be entered in its behalf as a matter of law.

FINDINGS OF FACT

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. On January 14, 2008 the Applicant Michael Ventura, submitted to the Office of Boat Registration and Licensing a “Residual Marine License Application, 2008 New License Opportunity”.
3. The Applicant was the holder of a 2007 CFL License #000825 Shellfish without quahog endorsement.
4. The Application filed by Applicant sought what is considered an upgrade for issuance of new commercial fishing license with quahog endorsement.
5. The Rules and Regulations Governing the Management of Marine Fisheries requires an applicant for New Commercial Fishing license to submit documentary evidence of “actively fishing”.
6. Sixteen (16) new quahog endorsements were issued in 2008.
7. Applicant did not file any documentary evidence as required to demonstrate “actively fishing”.
8. The OBRL properly sorted the applications and properly interpreted the Rules and Regulations.
9. The OBRL properly denied Applicant's application for New Commercial Fishery license with quahog endorsement.
10. Applicant has not met his burden of proof that OBRL wrongfully denied his application for New Commercial Fishing License with quahog endorsement.
11. Oral representative of employees of OBRL, if made, does not constitute an issue of material fact.
12. There is no issue of material fact we dispute and OBRL is entitled to entry of judgment in its behalf.

CONCLUSIONS 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. § 42-17.7.7-2; R.I.G.L. § 20-2.1-12; and Rule 6.7-10(a) of the Marine Fisheries Regulations.
2. Section 6.7-6 of the Rules and Regulations Governing the Management of Marine Fisheries in section (a) (ii) provides a requirement that applicants for New Commercial Fishing Licenses with Quahog, Restricted Finfish and/or Lobster Endorsements require the showing that the applicant has been “actively fishing” their license.
3. Section 5.1 of the Rules and Regulations provides the following definition of “actively fishing”:
”A license holder will be considered to have been actively fishing that license/endorsement if he or she demonstrates by dated transaction records that they have fished at least seventy-five (75) days in the preceding two years.“

4. Inclusion of documentation of “actively fishing” is a condition precedent to the issuance of new license and/or endorsement under the Rules and Regulations.
5. Failure to provide documentation of “actively fishing” with an application for new license and/or endorsement constitutes an incomplete application.
6. Oral representatives of employees of OBLR, if made, are not grounds for excuse for the failure to provide documentation of “actively fishing”.
7. Rules 56(c) of the Superior Court Rules of Civil Procedure require the entry of judgment in the absence of any issue of material fact or law.

ORDERED

1. OBRL Motion for Summary Judgment is GRANTED.
2. Judgment is hereby entered in favor of OBRL.
3. Applicant's Appeal is DISMISED.

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