

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

RE: GERARDI, PAUL, JR.
NOTICE OF VIOLATION

AAD NO. 10-002/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division ("AAD") pursuant to the request for hearing filed by Paul Girardi, Jr. regarding the denial of his Application for the issuance of new soft-shell clam and quahog license endorsements. A Prehearing Conference was conducted on July 21, 2010 and the hearing commenced immediately thereafter.

The Office of Management Services of the Department of Environmental Management (the "Division") was represented by Gary Powers, Esq. and Mr. Girardi represented himself.

The proceedings were conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I.G.L. § 42-17.7-1 et seq.); the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.); R.I.G.L. § 20-2.1-5 et seq.; the Rules and Regulations Governing the Management of Marine Fisheries (Fisheries Regulations) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management.

HEARING SUMMARY

Paul Girardi, Jr. (the "Applicant") testified on his own behalf in a narrative form. He said that he had a license in the 90's and left the fishing business to seek other employment. He refers to his letter dated April 26, 2010 as his Notice of Appeal (Division Exhibit #5 Full). In that statement he addressed the problems involving his personal financial conditions. He did not supplement his Application with an affidavit regarding his fishing history. He said that he was told by someone in the licensing office that the affidavit was not necessary.

On cross-examination he identified his application which was marked as Division's Exhibit #1 Full. He also acknowledged receipt of the Letter of Denial dated April 14, 2010 which was marked as Division's Exhibit #3 Full. He did not recognize a document entitled "New License/Endorsement Opportunities Available for 2010" which was later qualified by Division's witness and marked as Division's Exhibit #4 Full. He testified that he did not recall how long he had a license but the last time was in 1992. Upon the completion of his testimony the Applicant rested.

The Division presented Margaret McGrath as its only witness. She said that she has been employed by DEM since 1980 and currently holds the title of Director of Programming Services. Her duties include review of applications for the 2010 applications which included the one filed by Mr. Girardi. Mrs. McGrath testified regarding the results of the 2010 application process. She said that two hundred and twenty six (226) applications were filed for sixteen (16) quahog and seventeen (17) soft shell clam endorsements available. The endorsements were issued on a priority basis as established in the regulations. She reviewed the specific criteria for priority as reflected in the Notice of Denial (Division Exhibit #3 Full).

Mrs. McGrath identified a document as the Applicant's information in the Commercial License System which was entered as Division Exhibit #2 Full. She testified that based on Division's Exhibit #2 Full the Applicant did not qualify for any of the priorities established by the regulations. Mr. McGrath also identified a document entitled "New License/Endorsement Opportunities Available in 2010" which was entered as Division's Exhibit #4 Full. She pointed out that Division's Exhibit #4 Full describes the application process including the priorities. It also contains a form of affidavit which could be used by Applicants. She testified that the Applicant did not file an affidavit and no one in her office discouraged him from doing so.

The Applicant conducted a brief cross-examination in which Mr. McGrath testified that an affidavit may have made a difference depending upon its contents. Upon the completion of Mrs. McGrath's testimony the Division rested.

ANALYSIS

The authority of the Department of Environmental Management ("DEM") and the AAD in matters relating to commercial fishing licensing is derived from R.I.G.L. §20-2.1-1 et seq. The Rules and Regulations Governing the Management of Marine Fisheries (Regulations") were adopted on December 8, 2009.

The Applicant has applied for two of the 2010 new license opportunities; a quahog endorsement and a soft shell clam endorsement. The regulations established that a total of sixteen (16) new quahog endorsements and seventeen (17) new soft shell clam endorsements on Commercial Fishing Licenses would be issued. The department received two hundred and twenty six (226) applications for these new endorsements. The regulations establish a method for determining which applicants should receive these endorsements by a certain priority basis.

Section 6.7-6 (a) of the regulations holds that first priority in the issuance of new commercial fishing licenses ("CFLs") with applicable endorsement(s) shall be given equally to the following three categories:

1. Licensed resident fishers holding a CFL, endorsed in the same fishery sector for which a new license/endorsement is being sought, who have been actively fishing that endorsement.

2. Licensed resident fishers holding a principal effort license (PEL) who have been actively fishing their license.
3. Resident crew members who have been actively participating in the same fishery sector for which a new license/endorsement is being sought.

Section 6.7 (b) of the regulations holds that second priority in the issuance of new CFLs with applicable endorsement(s) shall be given equally to the following two categories:

1. Licensed resident fishers holding a CFL, endorsed in any fishery sector, who have been actively fishing their license.
2. Resident crew members who have been actively participating in any fishery sector.

The Division advised the Applicant that he did not meet any of the criteria upon which a priority is received pursuant to Rule 6.7-6 of the Regulations. The Applicant filed a timely appeal. In his Notice of Appeal (Division Exhibit #5) listed several reasons which included personal circumstances why he needed the endorsements. He did not allege that he was entitled to a priority under the Rule.

The Applicant, in his testimony at the Administrative Hearing, repeated his request for a license endorsement based on his personal difficulties and his hope that he could improve his economic situation. The Applicant did not argue that the Division erroneously overlooked his entitlement to a priority. He did not present any evidence that the department improperly interpreted his application. The Applicant alleged that he was advised by an employee of the Division not to file an affidavit but did not indicate what additional information would have been provided in the document that would have entitled him to a priority.

In his direct case the Applicant did not sustain his burden of proof by a preponderance of the evidence. The Division's case presented the documents upon which its determination was based. Mrs. McGrath also addressed the issue of the affidavit and testified that to her knowledge no one in her office advised the Applicant not to file an affidavit. She further pointed out that an affidavit form was provided to the Applicant as part of the application package (Division's Exhibit 4 Full). I am not persuaded by the Applicant that any employee of the Division discouraged him from filing an affidavit or that an affidavit if filed would have made a difference.

CONCLUSION

The Applicant has not met his burden of proof by a preponderance of the evidence that his application was improperly denied. While the Hearing Officer can sympathize with the Applicant for his need to improve his ability to earn a living there is no discretion provided in the Regulations to go beyond its express provisions. The Applicant's appeal, therefore, must be denied.

FINDINGS OF FACT

1. The Administrative Adjudication Division has jurisdiction over this action and personal jurisdiction over this action and personal jurisdiction over the Applicant.
2. On January 6, 2010 Applicant filed an application for a quahog and soft shell clam endorsement to his CFL.
3. On April 24, 2010 the Office of Management Services issued a letter to Applicant advising him that his application had been denied.
4. On April 29, 2010 Applicant filed his Notice of Appeal.
5. The 2010 Regulations provided for the issuance of a limited number of endorsements: sixteen (16) quahog and seventeen (17) soft shell clams.

6. Applicant was one of two hundred and twenty six (226) applicants for the limited endorsements.
7. The Regulations provided for a priority basis for the issuance of their endorsements.
8. The Applicant did not meet the requirements of any of the priorities.
9. The Applicant was not entitled to the issuance of the endorsements sought.
10. The Division did not commit error in the denial of the Applicant's application.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division for Environmental Matters ("AAD") has jurisdiction over the matter pursuant to R.I.G.L. § 42-17.7-2; Rule 3 of the Administrative Rules of Practice and Procedure for the AAD; R.I.G.L. §20-2.1-12 (c); and Rule 6.7-10 (g) (vii) of the Rules and Regulations Governing Management of Marine Fisheries ("Regulations").
2. Section 6-7-6 of the Regulations provide a priority basis for the awarding of endorsements to CLF's for quahog and soft shell crab licenses.
3. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a priority under Section 6-7-6 of the Regulations.
4. The Applicant is not eligible for a priority under Section 6-7-6 of the Regulations.
5. The Division acted in compliance with the Regulations when it denied Applicant's application.

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

ORDERED

The Applicant's appeal is DENIED.

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Entered as an Administrative Order this 26th day of October, 2010.



David Kerins
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade St., Room 310
Providence, RI 02908
(401) 222-1357

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail, postage prepaid to: Paul Girardi, Jr., 89 Sagamore Street, Warwick, RI 02886; and via interoffice mail to Gary Powers, Esq., DEM Office of Legal Services, 235 Promenade Street, 4th Floor, Providence, RI 02908 on this 26th day of October, 2010.



Bruce L. Stewart