Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Daniel R. Barlow
APPLICATION DENIAL FOR SUMMER AGGREGATE PROGRAM
AAD No. 10-003/F&WA
September 2010

DECISION AND ORDER

This matter is before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to a request for hearing filed by Daniel Barlow (Applicant) regarding the denial of his application to participate in the 2010 Summer Flounder Sector Allocation Pilot Program ("Program"). A Prehearing Conference and Hearing was conducted on September 8, 2010.
The Division of Fish and Wildlife ("Division") was represented by Gary Powers, Esq. The Applicant was represented by Merlyn P. O'Keefe, Esq.
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, Administrative Adjudication Division for Environmental Matters (AAD Rules).

PREHEARING CONFERENCE

Both parties submitted Prehearing Memoranda as required by the AAD rules.
At the Prehearing Conference the parties agreed to the following stipulated facts:
1. The Applicant applied for authorization to participate in the sector management program as an individual participant in a proposed sector.
At the Prehearing Conference the parties agreed to the admission of the following as Full Exhibits:

Joint Exhibit #1Full	The Division's letter to the Applicant dated June 15, 2010 denying Applicant's Application. 1 Page (Copy).
Joint Exhibit #2Full	The Consent Agreement entered into by the Applicant at the Administrative Adjudication Division in a matter entitled In Re: BARLOW, DANIEL R., AAD No. 07-010/ENE on December 9, 2008. 4 Pages (Copy)
Joint Exhibit #3Full	The Applicant's Notice of Appeal dated July 21, 2010 filed with the Administrative Adjudication Division requesting a hearing concerning the denial of the Applicant's authorization to participate in the sector management program. 1 Page (Copy).

HEARING SUMMARY

The Applicant, Daniel Barlow, testified on his own behalf. He stated that he has had a state fishing license for as long as required and has never had any violations than the one which resulted in the Consent Agreement of December 9, 2008 (Joint Exhibit # 2 Full). He fishes for flounder with one other deckhand and his boat is rigged only to fish for flounder. If allowed to participate in the program, he would earn $30,000 to $40,000 for the remainder of the year. While fishing in the program he could catch from five hundred (500) to fifteen hundred (1500) pounds

per day. Conversely, if not permitted to participate in the program, his limit would be fifty (50) pounds per day. He stated that there is a time factor in his appeal request because the flounder are moving out to sea as the season progresses.
The Applicant went on to testify about the Consent Agreement (Joint Exhibit # 2 Full). He agreed to the terms of the Consent Agreement during the last week of November, during a time in which he was going through some personal difficulties. After one and a half years of litigation he thought that it would be good to get it settled and close the case. He turned in his license and did not fish for ten (10) days. He felt that he held up his part of the agreement, and when he turned in his license the case was over.
The Applicant's counsel had the Applicant read into the record the express language of paragraphs 4 and 7 of the Consent Agreement. The Applicant testified that since the entry of the Consent Agreement he has not been charged with any other violations and has complied with all applicable laws and regulations.
On cross-examination the Applicant acknowledged that the Division had originally sought a thirty (30) day suspension and that a ten (10) day was a compromise. He also said that he is familiar with the tiered system of administrative penalties. He admitted that the original offense involved the taking of flounder in excess of the legal limit.
On redirect examination the Applicant said that the original offense involved the taking of thirty seven (37) pounds of flounder in excess of the legal limit of one hundred (100) pounds This represented approximately five (5) to eight (8) fish.
Upon questions presented by the Hearing Officer the Applicant acknowledged that he was represented by legal counsel at the time he entered into the Consent Agreement. Applicant's counsel and counsel for the Division advised that they were the attorneys involved in the preparation of the Consent Agreement. The attorneys stipulated that the agreement was the product of negotiation and was typed by the Division. The Applicant rested upon the conclusion of Mr. Barlow's testimony.
The Division presented Jason McNamee as its only witness. He testified that he is an employee of the Department of Environmental Management in the Division of Fish and Wildlife. He has been with the Division since 2002 and holds the position of Principal Marine Biologist. He participated as a member of a team that drafted the regulations for the program. He played a role in reviewing the Application of the Applicant to participate in the program. He consulted with DEM Law Enforcement who advised him that the Applicant had been the subject of a violation within the last three (3) years. He in turn advised his supervisor that Mr. Barlow was not eligible to participate in the program under the terms of Section 7.7.11-1 of the Rules and Regulations Governing the Management of Marine Fisheries. Mr. McNamee's curriculum vitae was admitted as Division Exhibit # 1 Full.
Counsel for the Division submitted a Post-Hearing Memorandum on September 13, 2010 and annexed thereto a full copy of the Rhode Island Marine Fisheries Statutes and Regulations Part VII Minimum Sizes of Fish/Shellfish May 6, 2010 (“Regulations”).

ANALYSIS

The authority of DEM and AAD in matters relating to commercial fishing licensing is derived from R.I.G.L. § 20-2.1-1 et seq. Section 7.7.11-1 (c) of the Rhode Island Marine Fisheries Regulations provides:
“A participant must not have been assessed a criminal or administrative penalty in the past three years for violation of any state or federal law or regulation relating to marine fisheries.”
The Division in its letter of denial (Joint Exhibit # 1 Full) advised that the Applicant is “ineligible to participate in the program” since he “had been assessed an administrative penalty in the last three years”. The Division's allegation is based on facts arising out of the Consent Agreement (Joint Exhibit # 2 Full).

The Applicant argues that the terms and conditions of the Consent Agreement do not constitute an "administrative penalty" so as to trigger the disqualification provisions of Section 7.7.11-1 (c). He further argues that the penalty is excessive and that the program from which he is being excluded did not exist at the time of the execution of the Consent Agreement and therefore it amounts to punishment after the fact.

I am not convinced that there is a legal basis to reverse the Division's denial based on the last two arguments. The decision will stand or fall based on the interpretation of the Consent Agreement to the program regulations as it applies.

The pertinent clauses in the Consent Agreement are found in paragraphs 4 and 7. Paragraph 4 provides s follows:

"This Agreement shall operate to absolve the Respondent from any liability arising for all violations alleged by the Division relative to the inspection of Respondent's vessel, F/V Cracker Jac which was conducted on May 22, 2007 at the State Pier at Point Judith by officers of the Division of Law Enforcement of the Department of Environmental Management."

The pertinent section of paragraph 7 reads as follows:

"Pursuant to the terms of this Agreement, the Division agrees that should the Respondent be determined, following the date of the execution of this Agreement, to have violated a Rhode Island statute or regulation governing the taking of seafood products and the Department elects to proceed administratively relative to said violation, the Department shall not impose a second tier penalty suspending thereby said license(s) for a period of up to ninety (90) days. Rather, the Division shall once again seek to impose a first tier penalty suspending Respondent's license(s) for a period of thirty (30) days as a result of said violation.

A Consent Agreement is in the nature of a contract between the Applicant and DEM. It represents a negotiated disposition of the Applicant's Appeal and the underlying violation. In the AAD a Consent Agreement is not approved by the Hearing Officer or entered as an Order of the AAD. The interpretation of a Consent Agreement is, therefore, subject to the rules of contractual construction.

The parties with the assistance and advice of their respective counsel agreed on the language contained in the Consent Agreement. The language chosen by the parties in the contract is controlling regarding their rights and responsibilities. The parties chose to use the words in paragraph 4 as follows: "This Agreement shall operate to absolve the Respondent from any liability arising for all alleged violations etc ..." (emphasis added). I must therefore interpret the meaning of the work "absolve" as it applies to the present case.

In Amica Mutual Ins. Co. v Stricker 583 A 2d 550 (R.I. 1990) the Supreme Court said at page 552 that "the language employed be given its 'plain, ordinary and usual meaning'." Black's Law Dictionary, seventh edition, gives the following definition for the word "absolve": "1. To release from any obligation, debt or responsibility. 2. To free from the penalties for misconduct". When the Respondent entered into the Consent Agreement, he was freed from the penalties of his misconduct. In exchange for OC&I agreeing to "absolve" him from any liability, the Respondent agreed to voluntarily surrender his commercial fishing license for ten (10) days. The license was not suspended by act of law and therefore does not constitute an "administrative penalty" as referenced in Section 7.7.11-1 (c).

The Respondent in the Consent Agreement did not admit the alleged violation. It could be argued that absent an admission or adjudication, the import of the Consent Agreement does not rise to the level of an "administrative penalty" for which the Respondent could be declared ineligible for participation in the program. Counsel for OC&I suggests in its Post Hearing Memorandum that this type of disqualification is far from unique. The examples given, however, do not fit the present case. The examples suggested involved pleas of "nolo contendere" and "guilty". In both instances the defendant admitted his or her culpability. But, where a party is "absolved" from all liability regarding one incident, he cannot then be subject to future consequences in another incident to which he and the Division have not otherwise expressly agreed.

The intent of the parties is further supported by the terms of paragraph 7 of the Consent Agreement. Paragraph 7, in summary, states that if the Respondent is determined to have violated a Rhode Island statute or regulation governing the taking of seafood products in the future, it will be considered a first offense. The alleged violation disposed of by the Consent Agreement would not be used as a prior violation for the purpose of an enhanced penalty.
The conclusion that I have reached in this matter is not intended to adversely reflect on DEM employee Jason McNamee. It appears that when McNamee consulted with DEM Law Enforcement he was advised of something that led him or them to believe that the Applicant had been the subject of an Administrative Penalty. This may have resulted from the fact that he voluntarily surrendered his fishing license to the Division for a ten (10) day suspension. Mr. McNamee did not have nor had he been advised of the language contained in the Consent Agreement that the Respondent was "absolved" of any liability arising under the alleged violation.

CONCLUSION

In conclusion I find that the Division improperly denied the Applicant participation in the Summer Flounder Sector Allocation Pilot Program based on the erroneous assumption that he had been the subject of an "administrative penalty" within the past three years. The Applicant, in fact, neither admitted nor was found responsible for any previous violation. The Consent Agreement between the Applicant and DEM expressly absolved the Applicant from all liability arising from the prior incident. The term "absolved" is stronger than the criminal standard of "not guilty". It is unlawful and unfair to deny him from the right to participate in a program as a result of an alleged violation from which he has been absolved.

FINDINGS OF FACT

1. The Respondent is the holder of a Multi-Purpose License MPURP # 000926.
2. The Respondent has held a commercial fishing license for as long as commercial fishing licenses have been required.
3. The Respondent owns and operates a commercial fishing vessel named the "F/V Cracker Jac".
4. The Respondent primarily fishes for flounder and his vessel is outfitted for that purpose.
5. On May 22, 2007 the Respondent was cited by the Division for a violation of the R.I. Marine Fisheries Regulations for landing one hundred and thirty seven (137) pounds of summer flounder when the limit was one hundred (100) pounds.
6. Respondent filed a timely Appeal to the AAD for review of the violation.
7. On December 9, 2008 the Respondent entered into a Consent Agreement (Joint Exhibit # 2 Full) which disposed of the appeal and the underlying alleged violation.
8. The Consent Agreement operated to absolve the Respondent from any liability arising for all violations alleged by the Division relative to the inspection of Respondent's vessel, F/V Cracker Jac which was conducted on May 22, 2007 at the State Pier at Point Judith by officers of the Division of Law Enforcement of the Department of Environmental Management.
9. The Respondent did not admit liability for the alleged May 22, 2007 violation.
10. The Respondent has not been adjudicated to be liable for the violation alleged on May 22, 2007.
11. The language of the Consent Agreement served to free him from the penalties for misconduct involved in the May 22, 2007 incident.
12. Other than the alleged violation on May 22, 2007, Respondent has committed no other violations.
13. The Respondent voluntarily surrendered his commercial fishing license as a condition of the Consent Agreement.

14. The Applicant timely filed an application to be included as a participant in the 2010 Summer Flounder Sector Allocation Pilot Program ("Program").
15. On June 15, 2010 the Division denied the Respondent's application to participate in the program (Joint Exhibit # 1 Full).
16. The Division advised in its denial that the Applicant was ineligible to participate in the program because he had been assessed an administrative penalty in the past three years for a violation of a state regulation relating to marine fisheries and thus failed to meet the eligibility criteria set forth in sub-section 7.7.11-1 of the regulations.
17. The Applicant filed a timely appeal with the AAD on July 21, 2010 (Joint Exhibit # 3 Full).
18. The terms and conditions of the December 9, 2008 Consent Agreement do not constitute an administrative penalty.
19. The Division improperly denied the Applicant participation in the 2010 Summer Flounder Sector Allocation Pilot Program.
20. The Applicant should be allowed to participate in the program if otherwise qualified.

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 mater of law:
1. The Administrative Adjudication Division for Environmental Matters ("AAD") has jurisdiction over this 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 the Rules and Regulations Governing Management of Marine Fisheries Part VII.
2. The Applicant is subject to the jurisdiction of the AAD.
3. Section 7.7.11-1 (c) of the Regulations provides for the ineligibility of an Applicant who has been assessed an administrative penalty in the past three years for a violation of a state regulation relating to marine fisheries.
4. A Consent Agreement in which an Applicant is "absolved from any liability arising for all violations" does not constitute being assessed an administrative penalty.
5. The Applicant has proven by a preponderance of the evidence that he has not been assessed an administrative penalty in the past three years for a violation of a state regulation relating to marine fisheries.
6. The Applicant has proven by a preponderance of the evidence that he is not ineligible to participate in the 2010 Summer Flounder Sector Allocation Pilot Program under Section 7.711-1(c) of the Regulations.
7. The Division improperly denied the Applicant the right to participate in the 2010 Summer Flounder Sector Allocation Pilot Program.
8. The Applicant is entitled to participate in the 2010 Summer Flounder Sector Allocation Pilot Program.
Wherefore, based upon the above Findings of Fact and Conclusions of Law it is hereby

ORDERED

1. The Applicant's appeal is GRANTED.
2. The Denial of the Division rejecting Applicant's application to participate in the 2010 Summer Flounder Sector Allocation Pilot Program is hereby REVERSED.
3. The Division is directed to issue all necessary documents to allow the Applicant to participate in the 2010 Summer Flounder Sector Allocation Pilot Program forthwith.
Entered as an Administrative Order this ___ day of September, 2010.
David Kerins
Chief Hearing Officer