

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

RE: **BIG G SEAFOOD, INC / HAGGERTY, HEATHER**
LICENSE DMURP000159

AAD NO. 13-006/ENE

DECISION AND ORDER

This matter was heard by Hearing Officer David M. Spinella on August 26, 2014. The Rhode Island Department of Environmental Management ("RIDEM"), Division of Law Enforcement, was represented by Gary Powers, Esquire. The Respondent, Big G. Seafood, Inc. had Ms. Heather Haggerty, its President, as its spokesperson pursuant to Rule 4.00 of the *Administrative Rules of Practice and Procedures for the Administrative Adjudication Division for Environmental Matters*.

Jurisdiction

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. General Laws §43-17.7-1 et. seq.); the *Administrative Procedures Act* (R.I. General Laws §42-35-1 et. seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* (AAD Rules); and R.I. General Laws §4-19-1 et. seq.

Burden of Proof

The Department of Environmental Management, Office of Compliance and Inspection ("OC&I") bears the burden of proof in this matter and must prove the allegations in the NOV by a preponderance of the evidence, which requires that the facts be shown to more likely than not support the proponent's conclusion **Perry v. Alessi**, 890 A.2d 463, 469 (R.I. 2006).

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Facts and Travel

The Respondent owns and operates a Wholesale Seafood dealership at 48 Antonio Costa Avenue, New Bedford, Massachusetts. It possesses Rhode Island Dealer Multi-Purpose License #DMPURP000159 from the RIDEM.

On March 25, 2013, the RIDEM Office of Boat Registration and Licensing forwarded applications for the issuance of commercial fishing licenses to the RIDEM Division of Law Enforcement for review. One of those licenses was held by Mr. Seamus Sullivan. According to his SAFIS (Standard Atlantic Fisheries Information Systems) report, Mr. Sullivan sold whelk to Respondent a total of forty-four (44) times in the year 2012. On those forty-four occasions, Mr. Sullivan did not possess the proper endorsement for whelk to his Principal Effort License according to the RIDEM. Conversely, it was determined that the Respondent allegedly violated R.I. General Laws §20-4-1.1 and Rhode Island Marine Fisheries Regulations (RIMFR) Commercial Fishing License Regulations Rule 6.11-2, which provides that dealers shall purchase only from those persons who are commercially licensed to take and possess marine species.

Respondent denied the allegations in the Notice of Violation ("NOV") dated May 21, 2013 and appealed the RIDEM's decision on June 5, 2013 to this Tribunal.

Witnesses

The Division of Law Enforcement presented Ms. Margaret McGrath as its first witness. Ms. McGrath is the Programming Services Officer at the Office of Boat Registration and Titles. She has worked for the RIDEM since 1988. She testified that Mr. Seamus Sullivan held a Multi-Purpose License in the year 2012, but did not have the proper whelk endorsement. She indicated that Mr. Sullivan was cited for selling whelk during 2012 and he reached a legal agreement with

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the RIDEM on August 30, 2013 regarding his license which included a retroactive provision reinstating his whelk endorsement back to 2012. She was not sure about the details of the retroactive application of Mr. Sullivan's whelk endorsement as she was not privy to the negotiations between the RIDEM and Mr. Sullivan. No other evidence was presented by the RIDEM concerning this issue.

Ms. McGrath also stated that the RIDEM forwarded a letter dated October 24, 2011 to all commercial license holders and licensed dealers. (Division Exhibit 11 – FULL). The letter explained that the RIDEM “may” also be breaking out two existing endorsements: “whelk may be a new endorsement for 2012, removing it from the shellfish other endorsement and horseshoe crab may be removed from the non-lobster crustacean endorsement. Both endorsements may potentially be available to residents only that possess a CFL or PEL license”.

Ms. McGrath noted that it was incumbent upon all license holders to follow the progress of these potential changes after the Rhode Island Marine Fisheries Council met in November 2012 to decide, with the RIDEM, the fate of these endorsements and select the proper endorsement(s) when they renewed their license. The changes, as noted, were in fact made by RIDEM and Mr. Sullivan did not specifically request the new whelk endorsement on his license renewal application for 2012, which was filed by him on February 3, 2012. (Division Exhibit 12 – FULL).

After a Notice of Violation was forwarded to him, Mr. Sullivan negotiated some type of legal agreement with RIDEM on August 30, 2013, which gave him the new whelk endorsement retroactively back to 2012 according to Ms. McGrath. No details were provided at the Hearing concerning this agreement, nor were any details provided on his license on file with the RIDEM (Division Exhibit 7 – FULL) and available for the public and dealers to view on a computer.

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The next witness presented by the Division of Law Enforcement was Ms. Anna Webb. Ms. Webb works for the Atlantic Coastal Cooperative Statistics Program (ACCSP). She is responsible for tracking data and information for Rhode Island with SAFIS. Mr. Sullivan's sales information is kept in this data base. Dealers are also responsible to report their purchases from licensed fishermen in the SAFIS system. Dealers must report twice a week. Both Mr. Sullivan and Big G Seafood reported the sale/ purchase of whelk forty-four (44) times from April – December 2012. (Division Exhibit 6 – Full). Ms. Webb stated that Respondent has faithfully reported all its purchases to SAFIS based on her review of the relevant SAFIS data.

The last witness presented by the Division of Law Enforcement was Detective Sheila Paquette, who is a Senior Environmental Criminal Investigator for the RIDEM Division of Law Enforcement. She investigated and prepared the narrative report regarding Mr. Sullivan (Division Exhibit 9 – FULL) and his lack of a whelk endorsement in 2012 along with the sales of whelk to Respondent. Detective Paquette also investigated the purchase of whelk by Respondent from Mr. Sullivan and prepared the narrative report as well (Division Exhibit 4 – Full).

Detective Paquette did not determine the penalty for Mr. Sullivan or the recommended penalty for the Respondent other than to note that this was a first offense for both Mr. Sullivan and the Respondent. Other members of the Law Enforcement Division determined the penalty to be imposed. No details were provided about how the penalty was determined in this case.

Under cross examination, Detective Paquette noted that this was not a criminal investigation of the Respondent despite the fact the protocol is to use a criminal styled complaint. She also indicated that she did not visit the Respondent's facility as indicated in the report but rather conducted the process over the phone with the Respondent.

Detective Paquette said Ms. Haggerty told her she had first taken over the business when

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the purchases of whelk began from Mr. Sullivan and that she was bringing herself up to speed regarding all of the regulations concerning endorsements.

Ms. Haggerty indicated during her testimony that she thought Mr. Sullivan had the proper endorsement to sell whelk in 2012 when viewing his license on SAFIS. She noted the letter of October 24, 2012 from the RIDEM said the whelk endorsement "may" be a new endorsement for 2012, removing it from the "shellfish other endorsement". Additionally, Detective Paquette said she was not aware of whether letters were sent to Dealers by the RIDEM advising the Dealers that the whelk endorsement was moved to a different category in 2012.

The Division of Law Enforcement then rested. Ms. Haggerty then asked more questions of Ms. McGrath and then indicated, once again, that she was with Big G Seafood for about six months when this matter was investigated. She reiterated that she had to educate herself about the SAFIS system and checked it regarding Mr. Sullivan. She said SAFIS indicated Mr. Sullivan had a valid license and whelk endorsement for 2012 and the October 24, 2011 letter indicated the whelk endorsement "may" be changed for 2012. She apologized for the mistake.

Discussion

The Division of Law Enforcement investigated the license holder/ fisherman (Mr. Seamus Sullivan) for selling whelk during 2012 without the proper endorsement. After citing Mr. Sullivan, the testimony presented was that he made some sort of legal arrangement with the RIDEM, whereby on August 30, 2013 his license was suspended for twenty (20) days and his whelk endorsement was retroactively in effect back to 2012. No evidence was presented concerning the retroactive applicability or implication of this retroactive provision. The Division of Law Enforcement argued that the Respondent should receive the same penalty, a twenty (20)

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day suspension of its dealer license because the violation stemmed from the same offense, namely, purchasing whelk from Mr. Sullivan, who did not have the proper endorsement in 2012 to sell whelk. Mr. Sullivan had the affirmative responsibility to fill out a form to renew his license and make sure he selected the proper endorsements to his license before selling to Dealers. On the other hand, the Respondent only had to view Mr. Sullivan's license on the SAFIS System, to make sure it was purchasing from a properly licensed fisherman and stay informed about changes in the law and/ or regulations that affect its licenses and those fishermen they buy from. In this case, the RIDEM's letter of October 24, 2011 (Division's Exhibit 11 – FULL) to all license holders was tentative about whether the whelk endorsement would remain in the same category for the 2012 licensing year. There was no testimony about a second letter or final notification to all license holders that the endorsement was placed into a new category in 2012. Based on the foregoing, I do not agree that the penalty needs to be the same for the Fisherman and the Dealer in this matter.

I do believe the Division has proved, by a preponderance of the evidence, that the Respondent purchased whelk from Mr. Sullivan forty-four (44) times without him being properly licensed. In fact, the Respondent admitted to the violation, but Ms. Haggerty argues that she was learning about the business when this incident occurred and apologized for the mistake. I found her testimony to be sincere and credible. All of the Division's witnesses testimony was similarly sincere and credible and it is obvious they did their jobs in a professional manner. In fact, Ms. Haggerty mentioned that the staff at the RIDEM have been helpful navigating her through her learning curve after taking over the business. Thus, the following facts need to be considered before determining a penalty:

- a) The RIDEM was possibly going to change the category for a whelk endorsement for

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2012;

- b) Mr. Sullivan did not ultimately have the proper wheel endorsement in 2012 (by mistake according to the evidence presented);
- c) There was no testimony about the effect of the retroactive application of his wheel endorsement into 2012 when he reached a Legal Agreement in 2013 with RIDEM;
- d) Respondent erroneously believed Mr. Sullivan had the appropriate wheel endorsement for 2012 after reviewing the information in the SAFIS System;
- e) Ms. Haggerty apologized for the error;
- f) Ms. Webb stated that the Respondent has faithfully reported to the SAFIS System and
- g) Detective Paquette stated that this was the first violation Respondent has received from the RIDEM.

Taking all these facts into account, I believe the Penalty should be mitigated in this case.

Detective Paquette noted that the penalty sought by the Law Enforcement Division was a suspension of the Respondent's Rhode Island Dealers License for twenty (20) days. This is less than the thirty (30) days as provided by the "Rules and Regulations governing the Suspension/Revocation of Commercial Marine Fisheries, Shellfish Buyer, Lobster Dealer, Finfish Dealer and Multipurpose Dealer, Licenses Issued pursuant to TITLE 20 of R.I.G.L. Fish and Wildlife", additionally, the Respondent was cited under R.I.G.L. §20-2.1-4(1), which provides "the license of any person who has violated the provisions of this chapter, or the rules adopted pursuant to the provisions of this chapter or rules and regulations that pertain to commercial fishing and reporting issued pursuant to this title, may be suspended or revoked by the director as the director shall determine by regulation."

I believe a suspension of the Respondent's Rhode Island Dealer Multipurpose License for

a period of seven (7) days is appropriate under the circumstances.

Findings of Fact

1. Mr. Seamus Sullivan did not possess the proper whelk endorsement to his Principal Effort License in 2012.
2. Mr. Seamus Sullivan reached a legal agreement with the RIDEM on August 30, 2013 regarding his license which included a retroactive provision reinstating his whelk endorsement relating back into 2012.
3. On October 24, 2011, the RIDEM forwarded a letter to all commercial license holders and licensed dealers which indicated that the RIDEM "may" also be breaking out two existing endorsements: "whelk may be a new endorsement for 2012, removing it from the shellfish other endorsement".
4. Mr. Sullivan and Respondent reported the sale/ purchase of whelk forty-four (44) times by Mr. Sullivan to the Respondent during 2012 while Mr. Sullivan did not have the proper whelk endorsement.
5. Respondent received a Notice of Violation from the RIDEM, Division of Law Enforcement dated May 21, 2011 notifying Respondent that Dealer Multipurpose License # DMPURP000159 along with any and all commercial fishing licenses and permits which may have been issued by the RIDEM to her and/or any corporation in which she owned a majority interest were to be suspended for a period of twenty (20) days due to the Respondents violation of R.I.G.L. §20-4-1.1 and Rhode Island Marine Fisheries Regulations Commercial Fishing Licensing Regulations Part 6.11-2 which provides that dealers shall purchase marine species only from persons who are commercially licensed

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to take and possess such marine species.

6. It was the responsibility of Mr. Sullivan, as a Principal Effort License holder, to properly renew his license in 2012, and select the appropriate endorsement to his license.
7. Ms. Haggerty testified that she thought Mr. Sullivan had the proper whelk endorsement(s) for 2012 based on her review of his license in the SAFIS System.
8. Ms. Haggerty did not realize the whelk endorsement ultimately did get placed in a separate category by the RIDEM in 2012 and that Mr. Sullivan did not select that new endorsement for whelk.
9. Ms. Haggerty apologized for the mistake she made as she had just taken over the Respondent business at the time this case/ investigation commenced.
10. There was no clear evidence presented whether a letter was sent to licensed Dealers by the RIDEM advising them that the whelk endorsement category was changed in 2012.
11. Ms. Haggerty made an honest mistake when she believed Mr. Sullivan had the proper whelk endorsement.
12. Respondent does have an obligation to stay informed of changes in Regulations and Laws pertaining to the Fishing Industry.

Conclusions of Law

1. The Division of Law Enforcement proved, by a preponderance of the evidence, that Respondent Big G Seafood, Inc. violated the provisions of R.I.G.L. §20-4-1.1 and Rhode Island Marine Fisheries Regulations Commercial Fishing License Regulations Rule 6.11-2, which provides that dealers shall purchase only from those persons who are commercially licensed to take and possess marine species, when Big G Seafood, Inc.

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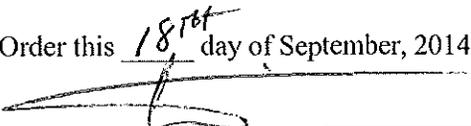
purchased whelk from Mr. Seamus Sullivan on forty-four (44) occasions during 2012, as outlined in the Notice of Violation dated May 21, 2013 to Respondent.

2. The Penalty imposed against the Respondent should be mitigated based on the facts presented.

Wherefore it is hereby **Ordered** that:

1. The Respondent's Appeal is **DENIED** in part and **GRANTED** in part.
2. Respondent's Appeal is hereby **DENIED** and **DISMISSED** concerning the allegations in the Notice of Violation regarding Respondent's violation of R.I.G.L. §20-4-1.1 and the Rhode Island Marine Fisheries Regulations Commercial Fishing Licensing Regulations Part 6.11-2. I find that the Division of Law Enforcement proved, by a preponderance of the evidence, that Respondent did violate these provisions.
3. Respondent's Appeal is hereby **GRANTED** with respect to the penalty provisions in the Notice of Violation as I find the penalty of a twenty (20) day suspension of Respondent's Dealer License to be excessive. The penalty is hereby reduced to seven (7) days.
4. The Respondent's Dealer Multipurpose License # DMPURP000159, along with any and all commercial fishing licenses and permits which may have been issued by the Rhode Island Department of Environmental Management to Respondent or any corporation in which Ms. Haggerty owns a majority interest are hereby reduced to a seven (7) day suspension of its Dealer License based on the facts and circumstances presented.

Entered as an Administrative Order this 18th day of September, 2014.


David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

RE: BIG G SEAFOOD, INC / HAGGERTY, HEATHER
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CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid to Heather Haggerty, Big G Seafood, Inc., 48 Antonio L. Costa Avenue, New Bedford, MA 02740; and via interoffice mail to Gary Powers., Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 18th day of September, 2014.

Elizabeth K. Larnie

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.