

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 00-0006
)	
CHRIS R. OPHEIM, Sr.,)	DECISION ON RECONSIDERATION
Appellant)	
_____)	January 24, 2003

STATEMENT OF THE CASE

On January 2, 2003, Mr. Opheim filed a timely motion for reconsideration of the Decision in this case. On January 4, 2003, we stayed the effective date of the Decision and ordered that a new effective date be given with the issuance of a decision on reconsideration. The standard for reconsideration is whether the Appeals Officer overlooked or misunderstood a material fact or principle of law in the Decision.

In the Decision, we found that the Restricted Access Management (RAM) program sent Mr. Opheim an LLP application to the last known address that RAM had for him during the LLP application period, and that Mr. Opheim was physically, mentally, emotionally, and legally able to apply for an LLP groundfish license during the LLP application period. As a result, we concluded that RAM complied with its statutory duty to send an LLP application to Mr. Opheim's last known address; and that Mr. Opheim's filing of an untimely LLP application could not be legally excused by the doctrine of equitable tolling.

In his motion for reconsideration, Mr. Opheim claims that his LLP application should have been considered timely filed as a matter of law under the doctrine of equitable tolling because:

- (1) the United States Postal Service (USPS) in Kodiak, Alaska, failed to deliver to Mr. Opheim the LLP mailings that RAM had sent him;
- (2) Mr. Opheim is considered a "minority" as an Alaska native;
- (3) Mr. Opheim was "ignorant" of the requirements for an LLP application;
- (4) the "great depression" that Mr. Opheim experienced for 14 months after he lost his vessel due to a fire, was partly caused by his fear of being arrested for arson by the Alaska State Troopers;
- (5) Mr. Opheim relied on his wife to file a timely LLP application; and
- (6) Mr. Opheim and his wife did not inform NMFS of their change of address, before or during the LLP application period, because of their depression.

Mr. Opheim also claims on reconsideration that the Decision has a "grave [economic] negative

impact" on him and his family, and others. I grant Mr. Opheim's motion and issue this Decision on Reconsideration because I agree that, in the Decision, I did not address some of Mr. Opheim's equitable tolling arguments.

ANALYSIS

Equitable Tolling

Under the doctrine of equitable tolling, an application will be considered timely filed as a matter of law if an "extraordinary circumstance" beyond the applicant's control prevented the applicant from meeting the application deadline.

(1) USPS responsibilities

The USPS is not required to give LLP applicants individual notice of the LLP. The NMFS is required to do that, based on the "last known address" of an eligible applicant. RAM sent Mr. Opheim's LLP application (and reminder postcard) to the last known address that RAM had for him, but the USPS returned the mailings to RAM because (as stated in the Decision) it is the policy and practice of the USPS to not forward mail more than 18 months after a change of address is filed by the postal customer.

The USPS was not required to forward the mail that RAM sent to Mr. Opheim because it had been more than 18 months since Mr. Opheim changed his mailing address to Soldotna, Alaska. The return of Mr. Opheim's mail to RAM was in keeping with a common practice of the USPS, and therefore, it cannot be considered an "extraordinary circumstance," for purposes of tolling the LLP application deadline in this case.

(2) Mr. Opheim's "minority" status as an Alaska native

The circumstance of "minority" under the doctrine of equitable tolling refers to the age, and not to the particular race or ethnic origin, of an applicant. The provision exists to protect those applicants that may have been too young to submit a timely application. Mr. Opheim was not a minor, but an adult, during the LLP application period. Therefore, Mr. Opheim's "minority" status as an Alaska native is not relevant to this case, for purposes of tolling the LLP application deadline.

(3) Mr. Opheim's ignorance of the requirements of the LLP

In T. Samuelson & T. Vasileff,¹ we stated that commercial fishing is a highly regulated industry and that it is a commercial fisherman's responsibility to keep abreast of the commercial fishing

¹Appeal No. 94-0011, September 18, 1995.

regulations that govern the commercial fisheries off Alaska.

If Mr. Opheim had kept abreast of the LLP commercial fishing regulations, he would have found out that he was required to file an LLP application before the application deadline (December 17, 1999) to qualify for an LLP license.

Mr. Opheim could have reasonably found out about the LLP application deadline. Mr. Opheim was physically, mentally, emotionally, and legally able to find out about the deadline, which was published in the Federal Register,² and advertised in various newspapers, trade journals, and radio broadcasts throughout the Soldotna area.³

Mr. Opheim's "ignorance" of the requirements of the LLP was not beyond his control, and therefore, his ignorance cannot be considered a legal excuse (under the doctrine of equitable tolling) for tolling the LLP application deadline in this case.

(4) Mr. Opheim's fear of arrest for arson

Mr. Opheim testified that his "great depression" ended 1½ years after the loss of his fishing vessel, which had been caused by a fire in 1995.⁴ Therefore, even if Mr. Opheim's fear of arrest for arson contributed to his "great depression," it would not have interfered with his ability to find out about the LLP in 1999 during the LLP application period (September 13, 1999 to December 17, 1999), and to submit an LLP application before the application deadline. I conclude that Mr. Opheim's fear of arrest for arson cannot be considered an "extraordinary circumstance that prevented him from meeting the LLP application deadline.

(5) Mr. Opheim's reliance upon his "severely depressed" wife

In several decisions,⁵ we have stated that it is the responsibility of the *applicant* to meet the filing

²64 Fed. Reg. 49,104 (Sept. 10, 1999).

³See the Initial Administrative Determination, July 24, 2000, at pages 3 and 4.

⁴Mr. Opheim testified at a telephonic hearing held by Appeals Officer, Randall Moen, on December 10, 2001.

⁵In T. Samuelson & T. Vasileff, Appeal No. 94-0011, September 18, 1995, we ruled that the failure of Appellant's bookkeeper's to forward NMFS mail to the Appellant did not excuse Appellant from meeting the application deadline for Individual Fishing Quota (IFQ). In Lonny C. Sandelin, Appeal No. 95-0098, January 26, 1999, we ruled that the failure of Appellant's mother's failure to send an IFQ application to RAM did not excuse Appellant from meeting the application deadline. In Kurt E. Danielson, Appeal No. 94-0003, November 30, 1995, we ruled that the failure of Appellant's wife to send an IFQ application to RAM did not excuse Appellant from doing so by the application deadline. Also, in John B. Lee, III, Appeal No. 00-0003, December 5, 2002, we ruled that the failure of Appellant's wife to

deadlines administered by NMFS, and that an application deadline cannot be equitably tolled on the basis that the applicant delegated the responsibility to another person. If Mr. Opheim relied on his "severely depressed" wife to find out about the requirements of the LLP and to submit a timely LLP application, it would not excuse him from meeting the application deadline under the doctrine of equitable tolling. Meeting the LLP application deadline was ultimately Mr. Opheim's responsibility, not his wife's. I conclude that Mr. Opheim's reliance upon his severely depressed wife cannot be considered an "extraordinary circumstance" that prevented him from filing a timely LLP application.

(6) Mr. Opheim's, and his wife's, depression

Mr. Opheim claims that he was unable to tell RAM about his change of address because he and his wife suffered from depression. As stated previously, Mr. Opheim's depression had ended by the time that he and his family moved to Soldotna, Alaska, in 1997; and even if Mr. Opheim's wife was depressed, Mr. Opheim himself was still physically, mentally, emotionally, and legally able to tell RAM about his change of address. Mr. Opheim never claimed or produced evidence on appeal that his wife's depression prevented him from submitting a change of address to RAM. Based on a preponderance of the evidence in the record, I find that it was not beyond Mr. Opheim's control to notify RAM of his change of address, either before or during the LLP application period. I conclude that neither Mr. Opheim's, nor his wife's, depression constitutes an "extraordinary circumstance" that prevented them from telling RAM of his change of address.

Financial Hardship

In the Decision, we stated that under the LLP regulations, and our prior decisions, there are only two situations that excuse a late LLP application when the applicant took no action on or before the deadline to submit the application. Neither one of those situations includes financial hardship. Therefore, Mr. Opheim's late application cannot be legally excused in this case, based on financial hardship to Mr. Opheim and his family.

FINDINGS OF FACT

1. The return of Mr. Opheim's mail to RAM was in keeping with a common practice of the USPS.
2. Mr. Opheim was not a minor, but an adult, during the LLP application period.
3. Mr. Opheim could have reasonably found out about the LLP application deadline.

understand the filing requirements of the License Limitation Program (LLP) did not excuse Appellant from meeting the LLP application deadline.

4. Even if Mr. Opheim's fear of arrest for arson contributed to his "great depression," it would not have interfered with his ability to find out about the LLP in 1999 during the LLP application period (which was between September 13, 1999, and December 17, 1999), and to submit an LLP application before the application deadline.
5. Mr. Opheim never claimed or produced evidence on appeal that his wife's depression prevented him from submitting a change of address to RAM.
6. It was not beyond Mr. Opheim's control to tell RAM about his change of address either before or during the LLP application period.

CONCLUSIONS OF LAW

1. The return of Mr. Opheim's mail to RAM cannot be considered an "extraordinary circumstance," for purposes of tolling the LLP application deadline in this case.
2. Mr. Opheim's "minority" status as an Alaska native is not relevant to this case, for purposes of tolling the LLP application deadline.
3. Mr. Opheim's "ignorance" of the requirements of the LLP is not a legal excuse (under the doctrine of equitable tolling) for tolling the LLP application deadline.
4. If Mr. Opheim relied on his "severely depressed" wife to find out about the requirements of the LLP and to submit a timely LLP application, it does not legally excuse him from meeting the application deadline under the doctrine of equitable tolling.
5. Neither Mr. Opheim's, nor his wife's, depression constitutes an "extraordinary circumstance" that prevented them from telling RAM of his change of address.
6. Mr. Opheim's late application cannot be legally excused in this case, based on financial hardship.

DISPOSITION

Mr. Opheim's motion for reconsideration is DENIED. The DECISION in this case takes effect on February 24, 2003, unless by that date the Regional Administrator orders review of the Decision.

Randall J. Moen
Appeals Officer