

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 03-0016
)	
JON GRIMSSON)	DECISION
Appellant)	
_____)	August 19, 2004

Jon Grimsson, through R. Shawn Griggs of Mundt McGregor LLP, appealed an Initial Administrative Determination [IAD], dated May 6, 2003, issued by the Restricted Access Management Program [RAM] under the North Pacific Groundfish and Crab License Limitation Program [LLP].¹ Mr. Grimsson can appeal the IAD because it directly and adversely affects his interests.²

Mr. Grimsson applied for an LLP groundfish license based on the fishing history of the F/V PROSPERITY, ADFG # 41864, formerly the F/V CONTINUITY. The IAD determined that Mr. Grimsson was not the eligible applicant for that LLP license because he did not own the F/V PROSPERITY or the fishing history of the F/V PROSPERITY apart from the vessel.

Mr. Grimsson's appeal was filed on July 7, 2003, the last day of the sixty-day appeal period.³ The appeal was a brief letter from Mr. Griggs, Mr. Grimsson's counsel. Mr. Griggs stated that, on the information available to him, he believed that Mr. Grimsson was an eligible applicant for the LLP license based on the F/V PROSPERITY's fishing history. Mr. Griggs requested an extension of sixty days to research the law and the facts to support Mr. Grimsson's appeal. This Office granted the extension and gave Mr. Grimsson until September 5, 2003 to submit additional evidence and argument.⁴

On September 5, 2003, Mr. Griggs notified me that Mr. Grimsson had chosen not to be represented by Mundt MacGregor. Mr. Griggs withdrew as counsel and submitted all the documentary evidence he had obtained from Mr. Grimsson in connection with the appeal. Mr. Griggs asked me to give Mr. Grimsson an additional thirty days to submit evidence and argument. I granted that extension until October 10, 2003.⁵ Mr. Grimsson did not submit any evidence or argument in that thirty-day period or since then, although he had submitted evidence

¹ The LLP is located in 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(license requirements) and 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/reggs/summary.htm>.

² 50 C.F.R. § 679.43(b).

³ Letter from R. Shawn Griggs, Mundt MacGregor LLP (July 7, 2003).

⁴ Order Granting Extension to Supplement Appeal with Pleadings and Evidence (July 16, 2003).

⁵ Order Granting Extension (Sept. 10, 2003).

and argument to RAM.⁶

I conclude that the record has sufficient information to decide Mr. Grimsson's appeal, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue this decision.

SUMMARY OF DECISION

The IAD is AFFIRMED. An LLP license may only be issued to an applicant who meets the definition of eligible applicant in federal regulation 50 C.F.R. § 679.2. Mr. Grimsson does not meet the first definition of eligible applicant, which requires ownership of an LLP qualifying vessel on June 17, 1995, because he did not own the F/V PROSPERITY on June 17, 1995.

The second definition of eligible applicant in 50 C.F.R. § 679.2 requires ownership of an LLP qualifying fishing history according to the express terms of a written contract that clearly and unambiguously transferred or retained the vessel's fishing history to the applicant. Mr. Grimsson owned the F/V PROSPERITY before June 17, 1995 but lost the F/V PROSPERITY involuntarily through bankruptcy proceedings in 1993. Mr. Grimsson produced no contract or court order that reserved the vessel's fishing history to him. Mr. Grimsson does not meet the second definition of eligible applicant and is therefore not the eligible applicant for the LLP license resulting from the fishing history of the F/V PROSPERITY.

Mr. Grimsson raised before RAM a number of challenges to the definition of eligible applicant. An appeals officer must interpret and apply the LLP regulations but does not have authority to rule on challenges to them.

ISSUE

Is Jon Grimsson the eligible applicant for the LLP license based on the fishing history of the F/V PROSPERITY?

ANALYSIS

An LLP license may be issued only to an eligible applicant.⁷ The term, "eligible applicant," is defined in federal regulation 50 C.F.R. § 679.(2). That regulation provides:

Eligible applicant means a qualified person who submitted an application during the application period announced by NMFS and:

(1) Who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and

⁶ Mr. Grimsson presented his arguments in a letter to RAM dated February 29, 2000.

⁷ 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.4(k)(5).

(k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or

(2) To whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; . . .⁸

The F/V PROSPERITY did make the harvests necessary to support an LLP groundfish license with endorsements for Aleutian Islands, Bering Sea, Central Gulf and Western Gulf.⁹ To receive that license, Mr. Grimsson must prove either that he owned the F/V PROSPERITY on June 17, 1995 or that he owns the fishing history according to the terms of the second definition of eligible applicant in 50 C.F.R. § 679.2. The date June 17, 1995 was the date of final action on the LLP by the North Pacific Fishery Management Council.¹⁰

According to the official LLP record, Mr. Grimsson did not own the F/V PROSPERITY on June 17, 1995.¹¹ If an applicant disagrees with the official LLP record, the applicant has the burden of proving the official record is incorrect.¹² Mr. Grimsson has not produced any evidence that the official LLP record is incorrect and that he owned the F/V PROSPERITY on June 17, 1995.¹³

⁸ Federal regulation 50 C.F.R. § 679.2 contains two additional ways a person can be an eligible applicant. One applies to the Norton Sound king crab summer fishery, the other to individuals who demonstrate eligibility pursuant to the Rehabilitation Act of 1973. Mr. Grimsson claims neither.

⁹ The NMFS Alaska Region website lists LLP groundfish licenses and the original qualifying vessel, by ADFG number, for each license. The website lists the ADFG number for the original qualifying vessel for LLG 1802 as ADFG # 41864, which is the ADFG number for the F/V PROSPERITY. <<http://www.fakr.noaa.gov/ram/daily/llp_gf.pdf>> visited August 19, 2004. LLG 1802 is a transferable license which means that RAM determined that another applicant was the eligible applicant for that license. The current license holder for LLG 1802 is Legacy Fishing, Inc. The original recipient of LLG 1802 was ScanSea Investments. Memorandum (e-mail) to Mary Alice McKeen from Tracy Buck, Permit Operations Manager (May 19, 2004)

¹⁰ Final Rule, 63 Fed. Reg. 52,642, 52,651 (1998).

¹¹ ScanSea Investment Company did. Memorandum (e-mail) to Mary Alice McKeen from Tracy Buck, RAM Permit Operations Manager (May 25, 2004). ScanSea apparently purchased the vessel from West One Bank, the creditor that foreclosed on the F/V PROSPERITY in bankruptcy proceedings.

¹² 50 C.F.R. § 679.4(k)(6)(v) (“An applicant who submits claims that are inconsistent with information in the official LP record has the burden of proving that the submitted claims are correct.”)

¹³ Mr. Grimsson’s documents indicate that he lost possession of the vessel in 1993. Complaint to Foreclose Preferred Ship Mortgages In Rem and In Personam, West One Bank, Washington v. F/V CONTINUITY [now F/V PROSPERITY], [USCG] Off. No. 615485, No. 93-1218C (W.D. Washington,

I therefore conclude Mr. Grimsson did not own the F/V PROSPERITY on June 17, 1995 and is not an eligible applicant based on vessel ownership.

Since Mr. Grimmson did not own the F/V PROSPERITY on June 17, 1995, the only way he can receive this LLP license is if he owns the fishing history of the vessel and meets the second definition of eligible applicant in 50 C.F.R. § 679.2. This definition requires that Mr. Grimsson own the fishing history of the F/V PROSPERITY “by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained.”¹⁴ This regulations means that if a contract is silent or unclear or ambiguous with respect to the transfer or retention of the fishing history, NMFS will treat the vessel owner on June 17, 1995 as the owner of the fishing history.¹⁵ Mr. Grimsson has not produced any written contract that he owns the fishing history of the F/V PROSPERITY.

Mr. Grimsson owned the F/V PROSPERITY before June 17, 1995 but lost the vessel through a bankruptcy proceeding in 1993 filed by West One Bank, which held a mortgage on the F/V PROSPERITY. Mr. Grimsson argued that the vessel mortgages and supporting security agreements with West One Bank did *not* specifically encumber the fishing history of the F/V PROSPERITY and therefore when the bankruptcy court awarded the F/V PROSPERITY to West

Sept. 8, 1993); Warrant to Arrest Vessel, same case (Sept. 8, 1993).

¹⁴ 50 C.F.R. § 679.2 (definition of eligible applicant).

¹⁵ The commentary to the Final LLP rule states:

The following presumptions will be used to determine the qualification for a license in the absence of a written contract provision addressing the vessel’s fishing history. First, if a vessel was sold on or before June 17, 1995, it will be presumed that the vessel’s fishing history and license qualification were transferred with the vessel. Second, if a vessel was sold after June 17, 1995, it will be presumed that the vessel’s fishing history and license qualification remained with the seller. Furthermore, only one license will be issued based on the fishing history of any qualified vessel.

Final Rule, 63 Fed. Reg. 52,642, 52,647 (1998). The Fishery Management Plan for Groundfish in the Gulf of Alaska states:

License Recipients. Licenses will be issued to owners (as of June 17, 1995) of qualified vessels. The owners as of this date must be “persons eligible to document a fishing vessel” under Chapter 121, Title 46, U.S.C. In cases where the vessel was sold on or before June 17, 1995, and the disposition of the vessel’s fishing history for license qualification was not mentioned in the contract, the license qualification history would go with the vessel. If the transfer occurred after June 17, 1995, the license qualification history would stay with the seller of the vessel unless the contract specified otherwise.

FMP for Groundfish of the Gulf of Alaska, Section 4.4.1.3.1 (March 1, 2002), available on the Council website <<<http://www.fakr.noaa.gov/npfmc/fmp/goa/goa.htm>>> visited August 19, 2004.

One Bank, it did *not* award the fishing history of the F/V PROSPERITY to West One Bank. The problem with this argument is that the regulation adopts the opposite presumption. If a vessel owner transferred a vessel before June 17, 1995, the vessel owner must have *explicitly* retained the fishing history.

Mr. Grimsson argued to RAM that, since he lost the F/V PROSPERITY in a bankruptcy foreclosure – not a consensual sale of transfer – he could not produce a written contract reserving to him the fishing history of the vessel. This argument does not help Mr. Grimsson. In the context of the definition of eligible applicant, a written contract either can be satisfied by a court order or it cannot. If a written contract can be satisfied by a court order,¹⁶ Mr. Grimsson is not an eligible applicant because he does not have a court order that reserved to him the fishing history of the F/V PROSPERITY. If a written contract cannot be satisfied by a court order, Mr. Grimsson is not an eligible applicant because he does not have a written contract.

Mr. Grimsson argued that West One Bank asked Mr. Grimsson to sign a release for ScanSea and this meant the bank acknowledged that Mr. Grimsson should receive the LLP license based on the catch of the F/V PROSPERITY.¹⁷ The fact that the bank sought a release for catch data does not imply that the bank agreed that Mr. Grimsson retained the fishing history of the F/V PROSPERITY. The bank's letter does not mention anything at all about Mr. Grimsson having the right to the LLP license based on the fishing history of the F/V PROSPERITY.¹⁸ The bank's letter cannot be reasonably read as a written contract between the bank and Mr. Grimsson reserving to Mr. Grimsson the fishing history of the F/V PROSPERITY. And the bank could not enter into any contract now because the bank's successor – ScanSea Investment – applied for and received the LLP license based on the fishing history of the F/V PROSPERITY.¹⁹

Before RAM, Mr. Grimsson challenged the LLP definition of eligible applicant with three arguments: it was wrong to base LLP licenses on vessel ownership as of a certain date because other limited access programs awarded the harvests to the vessel owners at the time of the

¹⁶ This appears to be the better interpretation of a written contract in the context of the definition of eligible applicant because it applies the definition of eligible applicant to vessel owners who lose vessels involuntarily through court orders *and* vessel owners who transfer vessels voluntarily through contracts.

¹⁷ The State of Alaska releases fish ticket information to the State of Alaska permit holder on whose permit the catch was recorded. *See* Alaska Statutes 16.05.815(a)(6). The Federal Government releases weekly processor reports to the owner of the vessel at the time the vessel caught the groundfish.

¹⁸ The letter from West One Bank to Jon Grimsson, dated June 9, 1995, states: “The ScanSea principals have asked us to contact you and request the attached letter to be dated and signed so they may obtain the subject catch data.”

¹⁹ *See* note 9 *supra*. The definition of eligible applicant based on ownership of a vessel's fishing history by a written contract does not state ownership of the fishing history as of a certain date.

harvest; the control date notice in the Federal Register did not notify potential applicants who owned the vessel at the time of harvest that they might have to produce a written contract showing they kept the right to those harvests;²⁰ the government did not provide Mr. Grimsson prior notice of the need for a written contract retaining his rights to the F/V PROSPERITY's fishing history and therefore denied him due process.

These are not arguments to interpret the definition of eligible applicant a certain way. These arguments challenge the validity of the LLP regulations that define eligible applicant and award LLP licenses to eligible applicants. I have the duty to interpret and apply the LLP regulations to appeals before me.²¹ I do not have the authority to rule on challenges to the regulations themselves.

I therefore conclude that Mr. Grimsson is not the eligible applicant for the LLP license based on ownership of the F/V PROSPERITY or on ownership of the fishing history of the F/V PROSPERITY.

FINDINGS OF FACT

1. Mr. Grimsson did not own the F/V PROSPERITY on June 17, 1995.
2. Mr. Grimsson does not own the fishing history of the F/V PROSPERITY through the express terms of a written contract that clearly and unambiguously provides that the LLP qualifying fishing history of the F/V Prosperity has been transferred to him or retained by him.
3. Mr. Grimsson does not own the fishing history of the F/V PROSPERITY through the express terms of a court order that clearly and unambiguously provides that the LLP qualifying fishing history of the F/V Prosperity has been transferred to him or retained by him.

CONCLUSION OF LAW

1. Mr. Grimson is not the eligible applicant for the LLP license resulting from the fishing history of the F/V PROSPERITY.

DISPOSITION

²⁰ Notice, 55 Fed. Reg. 36,302 (Sept. 5, 1990), corrected by Notice, 55 Fed. Reg. 37,729 (Sept. 13, 1990). These notices establish September 15, 1990 as the "control date:" the date on which the North Pacific Fishery Management Council gave notice of its intent to develop a measures to limit access to the groundfish, crab and halibut fisheries off Alaska.

²¹ *George Ramos*, Appeal 94-0008, Regional Director's Decision on Review at 4 (April 21, 1995), <<<http://www.fakr.noaa.gov/appeals/radecisionsbynumber.html>>>, the NMFS Alaska Region website, visited August 19, 2004.

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect September 19, 2004, unless by that date the Regional Administrator orders review of the Decision.

Any party or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, August 30, 2004. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that I have overlooked or misunderstood, and must be supported by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer