

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0007
)
GENE E. WATSON,) DECISION
Appellant)
_____) July 10, 1995

STATEMENT OF THE CASE

Gene E. Watson appeals an initial administrative determination of the Restricted Access Management Division ["Division"], dated December 12, 1994, which denied his application for Quota Share ["QS"] under the Pacific halibut and sablefish Individual Fishing Quota ["IFQ"] program because it was not filed with the Division by the filing deadline, July 15, 1994. This appeal was timely filed on February 6, 1995. An oral hearing by telephone was held May 15, 1995, before this appellate officer. The Appellant and his bookkeeper/secretary, Anita Brooks, testified from the office of Brooks-McMillan Accounting Services in Chehalis, Washington. The Appellant waived his right to 30 days' notice of the hearing and of the issues on which testimony was to be taken. The record was closed May 15, 1995. Appellant's appeal adequately demonstrates that the Division's determination has an adverse and direct effect on his interest.

ISSUE

Whether NMFS should accept Appellant's application as timely filed.

BACKGROUND AND DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for this IFQ Program.¹ By its terms, the agency's notice of the application period required that an application form be received at the Division's office in Juneau by July 15. Subsequently, the Division initiated a preliminary step in the application process by requiring the filing of a Request for Application ["RFA"] form before submitting the application itself. The Division announced that for the purpose of meeting the filing deadline, it would accept a completed RFA in lieu of an application, so long as the RFA was received by the deadline. Ultimately, the Division decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.² The Division has interpreted the July 15 deadline as

¹"Applications must be received during the application period beginning January 17, 1994, and ending at close of business on July 15, 1994. . . . Applications for initial allocation of QS received after the close of business on July 15, 1994, will not be considered." 59 Fed. Reg. 701, 702 (1994)

²Policy announced July 26, 1994, by Memorandum of Philip J. Smith, Chief, RAM Division.

essentially requiring that an applicant either deliver an RFA to the agency by that date or otherwise take decisive action by that date to complete the application filing, as by depositing an RFA in the mail.³

The original signed RFA is not in the file and there is no record that it was ever received by the Division. The Division's file on the Appellant contains a photocopy of his RFA, which is signed with a date of May 25, 1994. It was received at the Division's offices in Juneau on October 7, 1994. The record also shows that the Division sent an RFA to the Appellant in December 1993, but this was returned undeliverable in February 1994. A second RFA was mailed to the Appellant on or about April 18, 1994. The Appellant states in his appeal that he received an RFA from the Division on May 2, 1994. He testified that he was in Ms. Brooks' office on May 25, 1994, and that the two of them reviewed several of his business affairs at her desk. The Appellant testified that Ms. Brooks handles all his business correspondence and bookkeeping, as well as other matters as his secretary.

Ms. Brooks testified that she has been working for Mr. Watson since the fall of 1991 and that she has power of attorney to sign documents for him. She verified his testimony by stating that they reviewed several documents together in her office on May 25, 1994. Ms. Brooks testified that at the Appellant's request she signed the RFA for him and placed it in the office's outgoing mail basket. She stated that outgoing mail is taken to the Chehalis post office every day and that she is confident that the RFA was mailed on May 25, 1994, via regular mail.

Four months later, on September 26, 1994, a woman named Karen Grant from Ms. Brooks' office (no longer employed there) called the Division to inquire about the status of Mr. Watson's application. Karen Grant spoke to Peggy Hunnings, a processing clerk with the Division, who informed Ms. Grant that there was no record of the Division having received Appellant's RFA. The Appellant states that Ms. Hunnings advised him (through Karen) to submit a photocopy of the RFA and a letter referencing the phone conversation. Appellant also states that Ms. Hunnings advised him to send an affidavit stating when he had mailed the RFA and proof that he owned the vessel F/V TANA C. Appellant submitted as evidence of the phone conversation the notes written by Karen Grant. [Exhibit 1] The record also contains the letter, affidavit, vessel ownership documents, and the photocopy of the RFA, all of which were received by the Division on October 7, 1994.

On November 21, 1994, Ms. Brooks called the Division to inquire about the status of the appeal and spoke with processing clerk Clydina Baily. Ms. Baily informed her that an IAD denying Mr. Watson's application had been mailed to him. Ms. Brooks testified that she called the Division again on December 15, 1994, to inquire about the status of the application. The Appellant submitted as evidence notes of both telephone conversations prepared by Ms. Brooks. [Exhibits 2 and 3] The Appellant states in his appeal that he received the IAD later the same day, December 15, 1994. The

³Michael B. White, Appeal No. 94-009, January 17, 1995, affirmed January 20, 1995, at page 4.

record (including notes by processing clerk Ellery Lumbab) shows that an IAD regarding the Appellant's application was issued on November 14, 1994; that it was sent to Appellant's former address in Curtis, Washington; that it was returned to the Division marked "undeliverable"; and that a duplicate IAD was issued on December 12, 1994, and sent to Appellant's current address in Manson, Washington. Mr. Lumbab's notes verify the substance of the December 15, 1994, phone call from Ms. Brooks.

Ms. Brooks testified that until the November 21, 1994 telephone call, she and the Appellant had no reason to believe that the RFA would not be accepted by the Division. She testified that she was "quite shocked" when she learned that the Appellant's application had been denied. Ms. Brooks stated that the Division told her it had never received the RFA. She also stated that the RFA was not returned to her office or to the Appellant. She testified that she inquired about the whereabouts of the RFA with the Chehalis post office; that the postal officials told her it was not in their dead letter office and that there was no way to trace the RFA because it had been sent by regular mail.

This case illustrates the prudence of sending important, time-sensitive documents by a method that produces evidence of the date and fact of sending or delivery. Although it was not required, the Appellant, in retrospect, would have been well advised to send his RFA by certified mail, Express Mail, or private delivery service. Alternatively, the Appellant could have avoided the problem of untimely delivery by contacting the Division before the July 15, 1994 filing deadline to verify that his RFA had been received. Nonetheless, these precautions were not required and many applicants sent their RFAs by regular mail without a problem. Under such circumstances, it cannot be said that the Appellant acted unreasonably by relying on regular U.S. mail service. An appellant is entitled to try to prove that he or she took "decisive action" to complete the filing of an RFA or application by the filing deadline even where, as here, the Division has no record of ever receiving it.

FINDINGS OF FACT

The Appellant, in my judgment, has established by a preponderance of the evidence that he did mail his RFA to the Division on May 25, 1994. I reach this conclusion for several reasons. In light of the absence of conclusive evidence of the date of mailing, one must look to the totality of the circumstances to determine whether it is more likely than not that the Appellant's RFA was mailed on or before the filing deadline. First, it is quite plausible that an RFA could have been sent by mail and never received. With some 7,600 IFQ applications filed, it should not surprise anyone that some may have been lost in the mail. In this case, neither the Appellant nor the Division has an explanation for what became of the Appellant's original RFA. Second, I give great weight to the testimony of the Appellant and Ms. Brooks. Their version of the facts is consistent in at least three important ways: (1) It is internally consistent. (2) It is consistent with the record in all details relating to telephone conversations and the receipt of documents from the Division (that is, in all respects *except* the delivery of the RFA). (3) It is consistent with what one would expect to find if the facts were as the Appellant claims. It is, for

example, understandable that the Appellant would have inquired about the status of his application when he had not heard anything from the Division by late September 1994. Finally, the testimony of the Appellant and Ms. Brooks was sincere and credible.

CONCLUSIONS OF LAW

Based on my finding that the Appellant mailed his RFA on May 25, 1994, I conclude that he took decisive action to complete the filing of his application by the July 15, 1994, filing deadline and, therefore, I conclude as a matter of law that the Appellant's application was timely filed.

DISPOSITION AND ORDER

The Division's initial administrative determination denying Appellant's application as untimely filed is VACATED. The Division is ORDERED to process the Appellant's IFQ application as if it had been filed in a timely fashion. This decision takes effect on August 9, 1995, unless, by that date, the Regional Director orders review of the decision.

Because it appears from the record that the processing of the Appellant's application ordered by this decision could place him in conflict with another applicant to whom QS and 1995 IFQ has been issued, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer