

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0027
)
GERALD I. BRAGER,) DECISION
Appellant)
_____) January 31, 1996

STATEMENT OF THE CASE

Appellant, Gerald I. Brager, appeals an Initial Administrative Determination [IAD] of the Restricted Access Management Division [Division], dated March 31, 1995, which denied his application for quota share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] Program because it was not timely filed with the Division by the filing deadline, July 15, 1994. The appeal was timely filed on April 19, 1995. An oral hearing was held on January 30, 1996, before this Appeals Officer. The Appellant was the only person who testified at the hearing. Appellant waived his right to a 30 days' advance notice of the hearing and of the issues on which his testimony was to be taken. The record was closed on January 31, 1996. Appellant's appeal adequately demonstrates that the Division's determination has an adverse and direct effect on his interest.

ISSUE

Whether the National Marine Fisheries Service [NMFS] should accept Appellant's application as timely filed.

BACKGROUND

On December 28, 1993, the Division sent Appellant a Request for Application [RFA] for QS. Appellant never completed it, filed it away, and mistakenly forgot about it. On June 16, 1994,¹ the Division sent Appellant another RFA. According to Appellant, the RFA arrived at his Sitka, Alaska, business on June 27, 1994, and was thereafter forwarded to his Yakutat business office on June 28, 1994, where he was located at the time. Appellant claims that the RFA arrived on June 30, 1994.² Appellant testified that upon its arrival he "immediately" completed it, sealed it in its envelope, and set it on his file cabinet shelf to the left side of his office desk (as was his customary practice) for pickup to the Sitka Sound Seafoods-Yakutat plant, and subsequent delivery (as was also the customary

¹This is based on the RFA's control date.

²The aforementioned dates of June 27, 1994, June 28, 1994, and June 30, 1994, are based on Appellant's computer log entries, which were chronologically pieced together by Appellant for his appeal. The entries are basically a reconstruction of information in his files.

procedure) to the U.S. post office in Yakutat. Appellant testified that when he is working in Yakutat he normally does not leave his office; he works sixteen to eighteen hours per day, seven days a week; and he relies on the pick-up of his mail for delivery to the Yakutat post office via employees from the Sitka Sound Seafoods plant. Appellant testified that he believes that June 30, 1994, was the day that he completed and sent in his RFA, and that he recalled it as that day because it was the day of his meeting with a Japanese business representative. A few hours after the hearing, however, Appellant faxed to this office, upon specific request of the Appeals Officer, a photocopy of a duplicate copy of the RFA that he said he had mailed to the Division.³ The RFA contained Appellant's signature and was dated July 1, 1994.

Appellant testified that he telephoned the Division on January 11, 1995, to inquire about the status of his RFA on January 11, 1995, and that he recalled speaking to Mr. Tom Pehowski. When asked during his appeals hearing why he had waited until January 11, 1995, to inquire about the status of his application, Appellant testified that once the RFA was stamped and sealed in the envelope, he "didn't have any reason to believe that it [the RFA] wouldn't get done [that is, mailed to the Division]." Mr. Tom Pehowski told Appellant that his RFA had not been received, and that he would send him another RFA. Appellant telephoned Mr. Pehowski again on January 23, 1995, to tell him he had not received the RFA that he had requested on January 11, 1995.⁴ Appellant received an RFA on January 28, 1995. The Division received the completed RFA back from the Appellant via certified mail on February 8, 1995. Appellant testified that while he was aware of the RFA's deadline date he did not believe he would be excluded from the IFQ program (due to an untimely filing) because he had already received an IFQ number.

DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for the IFQ program.⁵ By its terms, the agency's notice of the application period required that an application form be received at the agency's office in Juneau by July 15. Subsequently, the Division initiated a preliminary step in the application process by requiring the filing of an 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

³Appellant had previously sent to this Appeals Officer a fax transmittal of a June 27, 1994, computer log entry, in which he stated that he had made and filed duplicate copies of his RFA.

⁴Mr. Pehowski's notes confirm Appellant's phone calls.

⁵"Applications must be received during the application period beginning January 17, 1994, and ending at the 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).

Division decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.⁶ The Division has interpreted the July 15 deadline as essentially requiring that an applicant either deliver an RFA to the Division by that date or otherwise take decisive action by that date to complete the application filing, as by depositing an RFA in the mail.⁷

The Appellant in my judgment, has established by the greater weight of the evidence that he did mail his RFA to the Division before the RFA's deadline. 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 Appellant's RFA was mailed on or before the filing deadline. I base my conclusion on the following reasons.

First, Appellant was credible and sincere. He was able to give a very accurate and detailed account of what occurred in the final days of the mailing of his RFA; and in the review of his account, I was unable to find any glaring inconsistencies. Second, Appellant was aware on June 28, 1994, of the RFA's deadline date, and of its importance. (He had made a note of it on that day on his office calendar). The fact that he believed it important at a time near the day that he claims to have mailed his RFA, suggests that he very well may have followed through with the mailing of his RFA. Third, Appellant made duplicate copies of his RFA, which he very likely would not have done if he had not already mailed his RFA. Fourth, it is highly unlikely that Appellant would have called the Division to inquiry about the status of his RFA if he already knew that he had not sent it in. Fifth, it is reasonable to assume that Appellant would not have asked the Division for another RFA (on two separate occasions after the application deadline) if he already had an RFA. Appellant only had a duplicate copy, not the original. Sixth, the fact that Appellant did not contact the Division until several months after the deadline is another indicator that he mailed his RFA before the deadline. Appellant said he believed he had mailed his RFA approximately fifteen days before it was due. Given that he mailed it in a manner that he felt comfortable with, he would have had no reason to doubt its arrival. Finally, it is understandable and plausible that his RFA may have been lost in the mail, given the means by which it was mailed. Several exchanges occurred even before the RFA would have reached the post office in Yakutat. In my judgment, the facts taken as a whole are sufficient to find that it is more likely than not that Appellant took decisive action in the mailing of his RFA before the application deadline.

FINDINGS OF FACT

I find, by a preponderance of the evidence, that:

⁶The policy was announced on July 26, 1994, by Memorandum of Philip J. Smith, Chief of the Division.

⁷See Michael B. White, Appeal No. 94-0009, January 17, 1995, affirmed January 20, 1995, at 4.

1. Appellant mailed his RFA by first-class mail from Yakutat on or about July 1, 1994, before the application deadline.
2. The RFA was never received by the Division.

CONCLUSION OF LAW

Appellant took decisive action to complete the filing of his RFA before the application deadline and, therefore, I conclude as a matter of law that Application's RFA 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 Appellant's IFQ application as if it had been timely filed. This decision takes effect on February 29, 1996, unless, by that date, the Regional Director orders the review of the decision.

In order to ensure that QS and Individual Fishing Quota [IFQ] is issued to the Appellant for the 1996 season, 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.

Randall J. Moen
Appeals Officer