

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 98-0002
)
KENNETH M. DUFFUS,) DECISION ON RECONSIDERATION
Appellant)
_____) June 9, 1999

STATEMENT OF THE CASE

This Office issued a Decision in this appeal on May 5, 1999, under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. The Decision affirmed the Initial Administrative Determination [IAD] of the Restricted Access Management [RAM] program that denied IFQ credit to Mr. Duffus for halibut landings made from his vessel, the F/V ENTERPRISE II, in 1986. In the Decision, this Office found that: (1) the F/V ENTERPRISE II had been leased to D&G Enterprises, Inc., during the entire QS qualifying period; (2) D&G Enterprises, Inc., (of which Mr. Duffus owns 50%) is a separate legal entity from Mr. Duffus; and (3) Mr. Duffus made no other halibut landings as an individual during the qualifying period from a vessel that he owned or leased. The Decision also concluded that: (1) although D&G Enterprises, Inc., is a qualified person for QS, Mr. Duffus does not meet the definition of "qualified person" as an individual; and (2) Mr. Duffus cannot receive IFQ credit and QS based on his 1986 halibut landings.

As a preliminary matter, we should state that Mr. Duffus's Motion for Reconsideration was received in this Office on May 21, 1999 — four days after the deadline for filing a motion. Nonetheless, we have accepted the motion because the Decision had not been delivered to Mr. Duffus until May 13, (even though we mailed it to him on May 5) and thus, he had only four days to review the Decision and prepare the motion. In accepting the motion, we also considered that it arrived in an envelope postmarked on May 19, 1999, from Eagle River, Alaska; that no other party would be disadvantaged by the delay involved in considering the motion; and that accepting the motion would more fully afford Mr. Duffus due process.

DISCUSSION

The standard for reconsideration is whether the Appeals Officer overlooked or misunderstood one or more material matters of fact or law in the Decision. In his Motion for Reconsideration, Mr. Duffus challenges each of the findings and conclusions of the Decision, and also asserts that RAM is unlawfully withholding distribution of QS to him. Each of these challenges to the Decision will be addressed in turn.

1. Mr. Duffus alleges that the F/V ENTERPRISE II was leased to D&G Enterprises, Inc., only for part of the QS qualifying period, and he argues that the lease was not a bareboat charter, which he contends is a requirement of the IFQ regulations.

In the Decision, we found that D&G Enterprises, Inc., leased the F/V ENTERPRISE II from Mr. Duffus for the entire QS qualifying period (1988-1990). This finding was a restatement of Duffus v. D&G Enterprises, Inc.,¹ which concluded that the vessel lease agreement was in effect from January 1, 1987, through May 31, 1991. This question has already been finally decided in that case, and is not subject to further review in this appeal.

2. Mr. Duffus alleges that D&G Enterprises, Inc., was not a separate legal entity from Mr. Duffus.

In his motion, Mr. Duffus apparently argues that D&G Enterprises, Inc., was not a separate legal entity from himself. His only support for this argument is his assertion that D&G was actually a partnership until 1994, when he says it was dissolved. He states that "the portion of the business that was a corporation . . . was run strictly as a partnership with [the] exception of the name."

As to the main point — whether Mr. Duffus and D&G are separate entities/persons — the IFQ regulations are clear. They treat individuals, partnerships, and corporations as separate entities or persons for purposes of application, qualification, and initial issuance of QS.² The IFQ regulatory scheme reflects general legal principles, which treat corporations, partnerships, and individuals as distinct legal persons for most purposes. The IFQ regulations do allow an individual to qualify for QS as a former shareholder of a dissolved corporation or a former partner of a dissolved partnership if the corporation or partnership itself would be a qualified person were it still in existence.³

There is no evidence in the record, however, that D&G Enterprises, Inc., was dissolved by the time it applied for QS, or that it is not still in existence. Also, there is no evidence in the record that D&G Enterprises, Inc., was not a corporation during the QS qualifying years (1988-1990). Furthermore, Mr. Duffus's assertion here that the corporation was run like a partnership is unsupported by evidence and, in any event, is irrelevant to the question of whether Mr. Duffus and D&G are separate entities/persons. Consequently, we find that this allegation is without merit.

¹Appeal No. 95-0102, October 15, 1997.

²See, 50 C.F.R. § 679.40(a)(2).

³50 C.F.R. § 679.40(a)(2)(iii).

3. Mr. Duffus alleges that he made other halibut landings, as an individual, during the QS qualifying period.

Under 50 C.F.R. § 679.40(a)(2), Mr. Duffus cannot rely on landings made from the F/V ENTERPRISE II between 1988 and 1990 as the basis for his claim that he is a qualified person for QS because the vessel was under lease to D&G Enterprises, Inc., for that entire period. Mr. Duffus can qualify for QS only if he can show that legal landings were made during the qualifying period from another vessel that he owned or leased. A review of RAM's records by this Office reveals no evidence that Mr. Duffus landed halibut from any vessels other than the F/V ENTERPRISE II during the QS qualifying period, nor has Mr. Duffus submitted any evidence of such landings to this Office. Consequently, we find that this allegation is without merit.

4. Mr. Duffus alleges that the Appeals Officer and RAM have acknowledged that he is a "qualified person" for halibut QS.

Our review of the Decision and the IAD does not show that the Appeals Officer or RAM ever acknowledged that Mr. Duffus as an individual is a "qualified person" for halibut QS. Mr. Duffus has not provided any evidence to the contrary on reconsideration. Consequently, we find that this allegation is without merit.

5. Mr. Duffus argues that he is a "qualified person" for QS as defined in the IFQ regulations and other, unspecified, regulations of the federal government.

The conclusion in the Decision that Mr. Duffus does not meet the definition of "qualified person" as an individual is based on the definition that appears at 50 C.F.R. § 679.40(a)(2), which incorporates the definition of "person" at 50 C.F.R. § 679.2. There is no other definition of "qualified person" for purposes of the IFQ program. As stated previously, Mr. Duffus has presented no evidence that legal landings were made during the qualifying period from a vessel that he owned or leased, apart from the landings of the F/V ENTERPRISE II, which was under lease to D&G Enterprises, Inc., at that time. Consequently, he does not meet the definition of "qualified person" and we find that this argument is without merit.

6. Mr. Duffus alleges that RAM is unlawfully withholding the distribution of QS to him.

Because Mr. Duffus is not qualified for QS as an individual, RAM has no authority to issue QS to him as an individual. Thus, it cannot be the case that RAM is acting unlawfully by refusing to issue QS to Mr. Duffus as an individual. Consequently, we find that this allegation is without merit.

In sum, Mr. Duffus has not supported any of his allegations or arguments with any evidence. Having reviewed the record in this appeal, we find that there are no material matters of fact or law that were overlooked or misunderstood by the Appeals Officer.

We note here, however, that Mr. Duffus is understandably in disagreement with our Decision. The evidence in the record shows that he lawfully landed halibut from his own vessel, the F/V ENTERPRISE II, in 1986, when the vessel was not being leased to anyone else. Although Mr. Duffus continued to fish from the vessel in 1987-1990, he did so on behalf of D&G Enterprises, Inc., which held a lease of the vessel for that entire period. Under IFQ regulations, therefore, D&G Enterprises, Inc., is the only qualified person for QS with respect to the F/V ENTERPRISE II. The unfortunate consequence of Mr. Duffus's business decision to lease his vessel to the corporation for the qualifying period is that neither he nor the corporation can receive any IFQ credit for halibut landings that were made from the F/V ENTERPRISE II before 1987. This result is necessitated by the fact that Mr. Duffus and D&G Enterprises, Inc., are separate legal entities and different applicants for QS.

DISPOSITION

The Decision in this Appeal is AFFIRMED. This Decision on Reconsideration incorporates the Decision by reference, and it takes effect on July 9, 1999, unless by that date the Regional Administrator orders review of the Decision on Reconsideration.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer