

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of)
)
ROY O. PEDERSON,)
Appellant)
_____)
Appeal No. 94-0002
DECISION
March 22, 1995

Roy O. Pederson has appealed an initial administrative determination of the Restricted Access Management Division ["Division"] of the National Marine Fisheries Service ["NMFS"], dated August 22, 1994. The Division denied his application for Quota Share ["QS"] under the Individual Fishing Quota ["IFQ"] Program for Pacific halibut and sablefish because it was not filed with the Division by the filing deadline, July 15, 1994. This appeal was timely filed on September 23, 1994. A written hearing was ordered by this appellate officer on December 8, 1994. Appellant submitted written responses on January 24, 1995. The appeal and responses adequately demonstrate that Appellant was directly and adversely affected by the Division's initial administrative determination.

BACKGROUND

The Appellant's Request for Application ["RFA"] form is signed and dated July 15, 1994. The envelope in which it was mailed to the Division was postmarked from Anchorage, Alaska, with a date of July 18, 1994. The envelope and enclosed RFA were received at the Division's office in Juneau on July 20, 1994 -- five days after the filing deadline. The Division rejected the application as untimely filed without considering whether the Appellant is otherwise eligible for participation in the IFQ program.

ISSUE

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

ADDITIONAL FACTS 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

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)

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

Appellant contends that although his RFA was postmarked July 18, 1994, he actually mailed it on July 15. He states in his appeal that he deposited the RFA in a mailbox outside the Lake Otis (Anchorage) Post Office in Anchorage late in the afternoon on Friday, July 15, 1994. He posits that the Postal Service made an error by postmarking his envelope July 18. In support of this contention, the Appellant states that the same Lake Otis Post Office erroneously postmarked his Alaska Permanent Fund Dividend application in 1984, which caused the application to be denied because it was filed late. He states that he appealed the denial and that the Alaska Department of Revenue ultimately agreed with him and issued his dividend. As evidence, the Appellant submitted a photocopy of two Permanent Fund Dividend receipts from 1986 [Exhibit 1].

Even if true, an error by postal employees more than 10 years ago does not tend to prove that employees at the same post office made a similar error in this instance. In fact, in my judgment, this evidence tends to weaken the Appellant's case. His claim is that the same post office was twice at fault in applying an erroneous postmark that caused him to miss a deadline for a government benefit program. This seems unlikely, at best.

As further evidence of the likelihood that the postmark was erroneous, the Appellant submitted a letter, dated January 25, 1995, from Ms. Roxanne L. Hooten, manager of the Consumer Affairs and Claims section in the Anchorage District of the United States Postal Service [Exhibit 2]. Ms. Hooten writes that

there is always a remote possibility that an item might not receive proper postmarking. Sometimes a mail sack is placed in a remote area in the workroom floor and is not 'dumped' and 'processed' as expeditiously as it should be. This could have caused a delay in postmarking. This happens very rarely, but it is a possibility.

Ms. Hooten does not acknowledge that there was an error in postmarking the Appellant's envelope; she merely admits that such an error is possible and she qualifies that by stating that the possibility is "remote" and "very rare." This is nothing more than an admission that the Postal Service is not perfect, a proposition that I should think most people would accept as a truism.

On the other hand, other portions of Ms. Hooten's letter support the likelihood that the Appellant's

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

RFA was actually mailed *after* July 15, 1994. She states that at the mailbox in question the last scheduled pick-up on Friday, July 15 was at 6:30 p.m. She also states that there was a mail pick-up at that location on Saturday, July 16 at 3:15 p.m., but no collection on Sunday, July 17. I note that the Postal Service ordinarily postmarks mail on the same day it is collected from a mailbox. In light of this practice, the evidence of the pick-up schedule in Ms. Hooten's letter suggests a few possible explanations for the postmark of Monday, July 18. In decreasing order of likelihood, the most probable explanations appear to be that:

(1) the envelope was deposited in the mail box after the Saturday afternoon collection, and was properly picked-up and postmarked on Monday;

(2) the envelope was deposited after the Friday evening collection but before the Saturday afternoon collection, and was picked-up on Saturday or Monday but not postmarked until Monday;

(3) the envelope was deposited Friday afternoon, but was not picked-up until Saturday or Monday, and was not postmarked until Monday;

(4) the envelope was deposited Friday afternoon and picked-up Friday evening, but was not postmarked until Monday;

(5) the envelope was deposited Friday afternoon, was picked-up and postmarked on either Friday or Saturday, but the wrong date was used on the postmark.

For the Appellant's contention to be true, explanation (3), (4) or (5) above must be true. Both (3) and (4) involve at least two errors by the Postal Service. Number (3) would require both a failure in collection and a failure in postmarking; number (4) would require a failure to postmark the mail two days in a row. Number (5) would require that the postmark stamp be incorrectly set two or three days ahead. Explanation number (2), like numbers (3) and (4), would also require at least two errors by the Postal Service. Explanation number (1), which would involve no error by the Postal Service, is the most likely scenario that accounts for the Monday, July 18 postmark on the Appellant's RFA envelope.

FINDINGS OF FACT

I acknowledge that there is, in Ms. Hooten's words, a "remote possibility" that the July 18 postmark was erroneous, but on balance I find it more likely than not that the Appellant mailed his RFA after July 15, 1995. Although I recognize the difficulty for the Appellant to establish the date of mailing without a witness or a certificate of mailing, I find that the evidence he has submitted is insufficient to overcome the likelihood that his envelope was postmarked on the date it was picked up from the mailbox.

RECOMMENDATIONS

I note that the denial of relief in this appeal has the effect of permanently denying the Appellant from establishing his eligibility for an initial issuance of Quota Share. For reasons explained in George M. Ramos, Appeal No. 94-0008, March 2, 1995, I recommend that NMFS consider whether any change

should be made in the current policy and rule that the late filing of an application permanently bars the applicant from receiving initial Quota Share under the IFQ Program.

DISPOSITION

The Division's initial administrative determination denying Appellant's application as untimely filed is **AFFIRMED**. This decision takes effect on April 21, 1995, unless by that date the Regional Director orders review of the decision.

Edward H. Hein
Chief Appeals Officer