NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of	)	Appeal No. 95-0002
	)	
KENNETH F. TISON,	)	DECISION
Appellant	)	
	)	January 30, 1995
_____	)	

Appellant Kenneth F. Tison has appealed an initial administrative determination of the Restricted Access Management Division ["Division"] of the National Marine Fisheries Service ["NMFS"]. On September 12, 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 and adequately shows that the Appellant's interests are harmed by the initial decision. No hearing was held concerning the appeal, as the relevant facts are not in dispute.

The key fact involved in this appeal is that the Appellant's application was received in the Division's offices on July 15, 1994 -- the last day for filing applications -- by facsimile ["fax"] transmission. The agency denied the application on grounds that it had not been timely filed. This denial was based on the Division's policy that in order to meet the deadline, an application must not only have been received by July 15, but the application received by that date must have carried the applicant's *original signature* -- *not a facsimile*. No provision was made for "curing" that deficiency in an application that was otherwise timely filed. This policy had the effect of barring the use of facsimile transmission as a means of meeting the July 15 filing deadline.

By the time it decided to reject this Appellant's application as untimely, the agency had devised an important exception to its rule that applications had to be received by July 15. As an interpretation of the basic intent of the July 15 deadline, the agency ruled that an application would be considered timely filed if it had been placed into the U.S. mails (as shown by a postmark) by July 15, 1994. That "postmark" interpretation of the IFQ Program filing deadline, in my opinion, is very relevant to how "faxed" applications must be treated.

ISSUE

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

BACKGROUND

To examine the soundness of the Division's "original signature" requirement for timely filed applications,

it is important to outline how the Division treated applications for purposes of the deadline rule, and in particular how and why it developed its "postmark" interpretation.

The regulations implementing the IFQ Program provide that an application received after the close of business on July 15, 1994, "will not be considered."[1] This filing deadline is a basic element of the IFQ Program.

The Division originally designed the IFQ Program to have a two-step application process. Applicants were first to file a Request for Application for Quota Share [an "RFA"], and later an Application for Quota Share [an "application"] based on additional information supplied by the Division from its database showing vessel ownership and fish landings. Based on experience in initial implementation of the Program, the Division decided to treat an RFA as an application for purposes of the July 15 filing deadline. Somewhat later in the course of implementing the Program, the Division decided to accept as timely filed an RFA sent in an envelope postmarked on or before the July 15 deadline.[2]

This "postmark" interpretation of the July 15 deadline addressed the problems fishermen (often away at sea) were experiencing in making sure that their applications arrived at the Division by the deadline. Not having been part of the original Program regulations, the postmark interpretation had not been publicized in the Division's mailings to potential applicants or included in printed instructions on how to fill out and file applications or RFAs.[3] The postmark policy was basically an "in-house" rule that was not announced until after the deadline had passed.

It is important to compare the Division's treatment of mailed applications with its treatment of applications sent by fax. During the last days or weeks of the application period, the Division received a number of phone calls from people concerned about missing the deadline. There was apparently no written agency policy directly addressing the sending of RFAs to the Division by facsimile for purposes of meeting the deadline, and there is no evidence that the Division discouraged people from transmitting RFAs to the agency by fax. However, as a matter of policy, the Division did not accept RFAs faxed to the office by July 15 as meeting the deadline. It followed the principle that for purposes of meeting the deadline, an applicant's RFA bearing his or her *original signature* (not a facsimile) must either have

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[1]59 Fed. Reg. 701 at 702 (1994)

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

[3]No criticism of the policy of considering an RFA to be an "application" under the rules, or of the postmark interpretation, is intended here. Both were apt exercises of agency discretion, and were properly implemented summarily to remedy practical problems. Also, both involved the removal of restrictions or procedural steps that the agency found were proving needlessly harsh or restrictive for applicants.

been received in the Division by July 15 or (under the "postmark" interpretation) have been placed in the mail by that date.

This insistence on an original signature for purposes of meeting the July 15 deadline was not based on a regulation. Nor was there any regulatory requirement that applications bear an original signature, although the instructions for filling out applications or RFAs that were provided to applicants did contain such a requirement.[4]

Mr. Tison's statement on appeal primarily discussed why he should be granted relief for his lack of landings of halibut or sablefish during the qualifying years for the IFQ Program. He apparently assumed that this problem was the main reason why the Division's denied his application[5]. As to the late filing issue, the Appellant merely said that he delayed sending in his application because he had trouble obtaining advice about how to prove that circumstances beyond his control kept him from making landings of halibut or sablefish during the qualifying years. He said: "I faxed the application on the last day because I had not been able to get all of the [records and other documents] necessary."

DISCUSSION

This Appellant, in my view, is entitled to have his application considered timely filed as a matter of law. I believe it would be arbitrary and capricious, as well as contrary to the IFQ Program appeals

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[4]The "Application Information" booklet provided to applicants contained such instructions as: "You must sign all forms in ink," and, "Make sure that signatures on affidavits are notarized." Such instructions suggest that original documents, rather than electronic copies, were contemplated as being required by the agency. But those phrases do not make clear whether the original documents had to be provided by the deadline, or whether they might be supplied at some later stage in the administrative process, or even just have to be maintained by the applicant in case questions should arise. Coupled with the repeated reminder: "Your application must be *received* by NMFS/RAM before close of business on *Friday, July 15, 1994*," [emphasis in original] these instructions could be regarded as meaning that original documents, containing original signatures, must be physically delivered to the Division by the close of business on July 15. The Division , as evidenced by its denial of this Appellant's and other applicants' faxed applications as being untimely, obviously thought these instructions were clear enough to be binding on applicants. But in deciding to rely on such communications for purposes of the deadline, the Division may not have considered the possible ambiguity in its application instructions as to *when or how* the agency might require original documentation to be provided.

[5]In fact, the *only* grounds for the Division's denial of the Appellant's application was that it had been untimely filed. However, the Appellant's assumption that the Division would likely reject his application because he hadn't made legal landings of the covered species during the qualifying period was apparently correct, and he has provided his explanation (by way of appeal of that expected denial) already.

regulations, for the agency to relax the deadline for mailed materials under its "postmark" rule while rejecting *as untimely* applications sent via fax machine that were actually received in the Division by the deadline. The Division's desire to have an original signature to validate an application is a proper agency concern, but it is not a time-critical consideration. An even more important factor influencing my decision is that the agency's insistence upon original signatures was not announced in the agency's regulations. The regulations do not provide that applications sent to the agency via facsimile machine by the deadline will be rejected as untimely.

Having decided to accept some applications (sent by mail) that actually arrived at the agency's offices substantially beyond the deadline, it would be capricious for the agency to refuse to accept applications that actually arrived in the office by the deadline -- especially when the only reason for this refusal is that the signature on the document is an electronic copy of an original signature.

An agency decision to treat faxed applications differently from mailed applications for deadline purposes due to the lack of an original signature is particularly problematic where the agency has waived a regulatory requirement in one case, but refuses to waive an informal agency policy in the other. Moreover, the "physical receipt by the deadline" policy is both explicitly and logically associated with the deadline rule, whereas the original signature requirement is not. As a minimum, it would seem incumbent on the agency before rejecting faxed applications received by the deadline to notify the applicants that their submissions were insufficient due to lack of an original signature and allow them additional time to cure that deficiency.

The Division's preference for original signatures, although arguably reasonable in itself[6], cannot reasonably be allowed to dominate the interpretation of the filing deadline requirement.

To illustrate the problem posed by rejecting faxed applications for deadline purposes, imagine Appellant Tison's situation on the day of the deadline, when he was faced with having to decide whether to mail his RFA, knowing that it would not be received until after the deadline, or to send it by fax.[7] The Appellant acted rationally in selecting the fax alternative because deadlines are usually set in

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[6] Courts and agencies have historically demanded strict formalities for the validation of documents, but they are moving toward a more liberal acceptance of a party's endorsement (express or implied) as validation. Rule 901 of the FEDERAL RULES OF EVIDENCE, for example, consists of a "General Provision" followed by illustrative examples. The General Provision is: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

[7] It could be argued that the Appellant should not have waited until the day of the deadline before acting to file his RFA. However, such considerations are relevant only in connection with cases in which relief is being considered as a matter of discretion. Applicants have the right to file at any time up to the deadline.

light of time-sensitive considerations, such as the need for data to process an application, as opposed to factors like the need for an original signature on an application, which might be furnished later, or which might not need to be furnished unless a question should arise about the authenticity of the application.

With that thought in mind, the Appellant could logically reason that NMFS was primarily concerned about *timing* in setting a deadline and would prefer the faster means of transmission. He would not expect the Division to reject a faxed application in favor of one sent through the mails. Moreover, we can assume that the Appellant knew that the regulations require applications to be actually received by the Division by the deadline. This requirement had not been publicly rescinded. In contrast, the "original signature" requirement was not a matter of regulation. In this situation, Mr. Tison would logically have thought that faxing his RFA to the agency was his only hope of qualifying under the Program.

As shown by his actions, and the arguments in his appeal, this Appellant never completely realized or believed that the Division had rejected his application because it had been sent by fax. Rejection for that reason was not an obvious likelihood.

Finally, there is a "technical" reason why this Appellant is entitled to relief, although I consider it to be based on an important procedural rule and thus not a "technicality" in the pejorative sense. The Division's "postmark" rule, as discussed in the White case,[8] is not a substantive rule, but a rule of evidence. That is, the Division decided to accept a particular type of proof that the deadline was met. NMFS' regulations, however, allow parties to appeal any ruling, and to support their appeals with any evidence that is "relevant, material, reliable and probative."[9] Mr. Tison's statement of reasons why the Division's initial determination should be reversed is an original document bearing an original signature. The signature was put forward as being that of the Applicant and appears to be the same as the signature on the facsimile of the Applicant's RFA. I find it probative. As a separate grounds for relief, I therefore conclude that the Appellant has cured the "original signature" deficiency in his earlier application and that his RFA should now be considered to have been 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 April 4, 1995, unless, by that date, the Regional Director orders review of the decision.

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[8] Michael B. White, Appeal No. 94-009, decided January 17, 1995; affirmed by the Regional Director January 20, 1995.

[9] 50 CFR § 676.25(j)

As explained above,[10] the Appellant has requested that the Division move forward quickly to issue its official denial of his application on the substantive grounds of lack of landings of the covered species during the qualifying years -- assuming that will be the Division's initial determination on that issue. The Appellant considers this to be in his best interests, as it would permit prompt consideration of his appeal of that decision, which he has already "filed" as part of his appeal of the denial of his application as untimely. The Division is reviewing the Appellant's application and the Division's database concerning his vessel ownership and landings, if any, and is expected to issue its initial decision pursuant to Mr. Tison's request shortly.

Expedited review of this decision by the Regional Director would facilitate the further consideration of this Appellant's application. It could also make it possible for the Division to issue QS to this Applicant -- or to others whose applications may have been denied on the same grounds -- in time for inclusion in the Quota Share pool for the 1995 fishing season. Therefore, 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.

Kenneth R. Clark
Appeals Officer

[10] *See* note 5.