

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)
)
MATTHEW SHADLE,)
Appellant)
_____)
Appeal No. 95-0121
DECISION
August 16, 1996

STATEMENT OF THE CASE

Appellant Matthew Shadle appeals an Initial Administrative Determination [IAD] of the Restricted Access Management Division [Division], dated May 3, 1995. The IAD denied Mr. Shadle's application for additional halibut quota share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because of his failure to provide sufficient evidence of a vessel lease during a QS qualifying year: 1988, 1989, or 1990. Mr. Shadle has adequately shown that his interest is directly and adversely affected by the IAD, and that his appeal was timely filed. Because the record contains sufficient information on which to reach a final decision and there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g).¹

ISSUE

Whether Mr. Shadle leased the F/V TRIDENT.

BACKGROUND

On February 8, 1994, Mr. Shadle submitted a Request for Application [RFA] for halibut QS in which he claimed a lease of the F/V TRIDENT² from December 26, 1988, through October 25, 1989. He did not specify the name of the lessor on his RFA.³ Thereafter, Mr. Shadle was sent a QS Data Summary which indicated that he would not be given QS credit for the lease of the F/V TRIDENT. He was given until January 23, 1995, to contest the Summary. On January 19, 1995, the Division received an affidavit from Norman Little, attesting to Mr. Shadle as the "master" of the F/V TRIDENT between

¹Formerly 50 C.F.R. § 676.25(g)(3)(iii). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulations were unchanged by the renumbering.

²Mr. Shadle also submitted RFA's for two other vessels, the F/V ASSURANCE and the F/V NOOTKA-RISKY BUSINESS, which are not part of this appeal.

³According to the Alaska Commercial Fisheries Entry Commission, Mr. Walt Raber was the vessel's registered owner during the time of Mr. Shadle's alleged lease.

the dates of January 1, 1989, and October 31, 1989. The Division also received a State of Alaska fish ticket, which showed that landings of halibut were made on Mr. Shadle's gear card from the F/V TRIDENT on September 11, 1989. On May 3, 1995, the Division denied Mr. Shadle's request for additional QS because of his failure to prove that he had leased the F/V TRIDENT.⁴

On July 5, 1995, Mr. Shadle appealed the IAD. As part of his appeal, he submitted an affidavit in which he reaffirmed his claim of the lease of the F/V TRIDENT. He also acknowledged having paid a fine of \$10,000 for a fishing violation while operating the F/V TRIDENT in 1989.⁵ On March 18, 1996, he produced an affidavit from John Dersham who claimed that he was a crewmember of the F/V TRIDENT between December 1988 and October 1989, and that during that time Mr. Shadle controlled the vessel, directed the vessel's fishing operations, hired and paid the crew, paid for bait, fuel, groceries, and assumed responsibility for engine repair and vessel fines.

On July 5, 1996, Mr. Shadle was ordered by this office to produce written evidence that would tend to prove the existence of a lease: tax returns, affidavit of a lease agreement from the vessel's owners, expense receipts, 1099 tax statements, crew settlement sheets, crew affidavits, etc. He was also ordered to submit an affidavit describing the nature, origin, and terms of the lease, and the activities performed under the lease. A U.S. Coast Guard abstract of title for the F/V TRIDENT, which listed William and Frances Hannan as the owners of the vessel during the period of Mr. Shadle's claimed lease, was the only evidence produced in response to the order.

DISCUSSION

To qualify for QS under the IFQ regulations, as implemented by the Division, a person must have owned or leased a vessel in which legal landings of halibut or sablefish were made during a QS qualifying year: 1988, 1989, or 1990. 50 C.F.R. § 679.40(a)(2).⁶

Mr. Shadle claims additional QS on the basis that he leased the F/V TRIDENT during the period of December 26, 1988, through October 25, 1989. While the regulations allow for a person to receive

⁴See the IAD.

⁵Mr. Shadle later produced a portion of a transcript of a proceeding before the U.S. Department of Commerce in which the Department acknowledges Mr. Shadle as the operator of the F/V TRIDENT at the time of the fishing violation.

⁶Formally, 50 C.F.R. § 676.20(a)(1).

QS on the basis of an oral lease,⁷ they do not define what constitutes a lease. In O'Rourke v. Riddle⁸ this office found that the North Pacific Fishery Management Council [Council] intended to award QS to those persons who could prove an oral lease and who had supplied the means to harvest the fish, suffered the financial and liability risks to do so, and directed the fishing operations; and who in short, acted like entrepreneurs.⁹ O'Rourke cited five factors that an Appeals Officer should consider in determining the existence of a lease. These factors include, but are not limited to:

- (1) whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel;
- (2) whether the claimed lessee directed the fishing operations of the vessel;
- (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
- (4) whether the claimed lessee was responsible for the operating expenses of the vessel;
and
- (5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal income tax and other purposes.

A sixth factor was adopted in Kristovich v. Dell:¹⁰

- (6) whether the claimed lease had a set or guaranteed term.

A seventh factor was recently added in Smee v. Belle, Inc.:

- (7) how the parties to the lease characterized their business arrangement at the relevant times.

The above factors for determining a lease are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties. Furthermore, the weight given to each factor are subject to the facts present in each case. Not

⁷See 50 C.F.R. § 679.40(a)(3)(iii), formally, 50 C.F.R. § 676.20(a)(1)(iii).

⁸Appeal No. 95-0018, decided May 18, 1995, *aff'd* May 23, 1995.

⁹According to Webster's, an entrepreneur is one who organizes, manages, and assumes the risks of a business enterprise.

¹⁰Appeal No. 95-0010, decided March 20, 1996, *aff'd* March 27, 1996.

all of the factors are necessarily to be given equal weight. One factor may be more compelling than another, depending on the facts. The factors are not elements, but analytical tools or guideposts, that an Appeals Officer may use in the determination of the existence of a lease.¹¹

Analysis of the Factors

The weight of the evidence shows that Mr. Shadle had possession, command, and control of the F/V TRIDENT during the time of his alleged lease. A partial copy of a record of an administrative proceeding against Mr. Shadle shows that he was considered by the U.S. Department of Commerce to be the person responsible for the operations of the vessel at or about the time of his alleged lease; the fish ticket for the landings of halibut made from the vessel on September 11, 1989, is imprinted with Mr. Shadle's gear card number; and Norman Little's affidavit states that Mr. Shadle was the "master" of the vessel from January 1, 1989, through October 31, 1989. John Dersham's affidavit offers further proof of Mr. Shadle's possession, control, and command of the vessel.

While Mr. Shadle may have been in charge of the vessel, there is not enough evidence to support a finding that he leased the vessel. Although ordered to do so, Mr. Shadle never provided an explanation of the nature and circumstances of his arrangement for use of the vessel, nor the terms of the alleged lease. Nor did he provide any written evidence of a lease. If there was a lease, then with whom? Was it the vessel's owners, the Hannan's; the vessel's registered owner, Mr. Raber; or an agent of the Hannan's, perhaps Norman Little. Mr. Shadle does not say, though given numerous opportunities to do so over a lengthy period of time. Mr. Shadle did not provide any documentation of the expenses or financial risks incurred in the operation of the vessel, nor did he provide documents indicating that he used the vessel as a business. He never produced any expense receipts or tax returns. Furthermore, he failed to provide settlement sheets showing how the proceeds from the venture were distributed. The lack of evidence offered by Mr. Shadle makes it impossible to tell if the alleged lease was for a set or guaranteed term, who was responsible for the repair and maintenance of the vessel, who was to provide the gear and insurance, who had the authority to hire and fire the crew, and who decided where to harvest and market the fish. In short, it is impossible to tell who's enterprise it was. Was it Mr. Shadle's to win or lose, or was he acting on behalf of the vessel's owners? Given this glaring lack of evidence, I find that a lease of the vessel, as alleged by Mr. Shadle, did not exist.

FINDINGS OF FACT

I find by a preponderance of the evidence that Mr. Shadle did not hold a lease of the F/V TRIDENT during the QS qualifying period.

¹¹Id.

CONCLUSION OF LAW

Mr. Shadle is not qualified for additional halibut QS as a result of landings made from the F/V TRIDENT during the QS qualifying period.

DISPOSITION

The Division's IAD denying additional halibut QS to Mr. Shadle is AFFIRMED. This decision takes effect on September 16, 1996, unless by that date the Regional Director orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, August 26, 1996.

Randall J. Moen
Appeals Officer