

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 97-0011
)	
PAUL L. MARTIN,)	DECISION
Appellant)	
_____)	September 29, 1999

STATEMENT OF THE CASE

Mr. Paul Martin filed a timely appeal of an Initial Administrative Determination [IAD] issued on July 17, 1996, by the Restricted Access Management [RAM] program.¹ The IAD denied Mr. Martin's application for quota share [QS] under the Individual Fishing Quota [IFQ] program because he filed his Request for Application [RFA] for QS after the July 15, 1994, deadline. Mr. Martin's interests are directly and adversely affected by the IAD. An oral hearing was not ordered because Mr. Martin did not present or specifically identify any evidence that would help resolve any issues of adjudicative fact raised by the appeal. 50 C.F.R. § 679.43(g)(3).

ISSUE

Should NMFS accept Mr. Martin's RFA for QS as timely filed?

BACKGROUND

In his appeal,² Mr. Martin claims that he mailed two RFAs to RAM before the application deadline. Mr. Martin sent RAM a second RFA after RAM told him that it had not received the first RFA. He claims he inquired about the status of his second RFA and IFQ in July 1996, but that RAM told him that it had never received an RFA from him. Mr. Martin admits that the RFAs were not sent via registered or certified mail.

Mr. Martin claims that his wife's illness prevented him from making sure that RAM received his RFA before the deadline. According to Mr. Martin, his wife's care was a "full time job, and "all ... [of his] concerns were with her and really not about .. [his] I.F.Q.'s." Mr. Martin further alleges that he was also trying to fish, run a restaurant business, do work for Alaska Marine Lines, and deal with a trailer fire that resulted in the loss of his personal belongings and business records.

¹The Restricted Access Management Division was renamed Restricted Access Management program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

²See, the letters dated July 28, 1996, and March 31, 1997.

On July 10, 1996, Mr. Martin filed a third RFA, which was denied by RAM on grounds that the RFA was filed after the application deadline.

Although ordered to do so by this Office,³ Mr. Martin has never specified the date or described the circumstances of the mailing of his first two RFAs; nor did he provide proof of his wife's illness and its effect on the filing of his RFA. RAM's records show that Mr. Martin would have been eligible to receive halibut QS if he had applied by the July 15, 1994 deadline.⁴

Mr. Martin's appeal involves two questions: (1) did Mr. Martin mail an RFA before the application deadline; and, if not, (2) can his third RFA (which was filed after the application deadline) be accepted as timely filed under the doctrine of equitable tolling.

DISCUSSION

Pursuant to the regulations of the IFQ program, NMFS announced in the Federal Register that an application for QS must be filed with RAM before the close of business on July 15, 1994, and that an application for QS received after that date would not be considered.⁵ For the purpose of meeting the filing deadline, RAM announced that it would accept a completed RFA in lieu of an application, so long as the RFA was received by the deadline.⁶ Ultimately, RAM decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.⁷ RAM has interpreted the July 15 deadline as essentially requiring that an applicant either deliver an RFA to the agency by that date or otherwise take decisive action by that date to complete the application filing, as by depositing an RFA in the mail.⁸

Other than Mr. Martin's own assertions, there is no proof in the record that Mr. Martin ever mailed, or that RAM ever received, two or even one RFA from Mr. Martin before the filing deadline. Mr. Martin was ordered to explain the circumstances surrounding the alleged mailing of his RFAs, but he failed to do so. He also waited nearly two years after the filing deadline to inquire about the status of his second

³See, the "Order to Produce Evidence," dated May 19, 1999.

⁴See, the May 11, 1999, memo from Tracy Buck (RAM) to Randall Moen, Office of Administrative Appeals.

⁵See, 59 Fed. Reg. 701, 702 (1994).

⁶See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994.

⁷The policy was announced by RAM (Philip J. Smith) on July 26, 1994.

⁸See, Michael B. White, Appeal No. 94-0009, January 17, 1995, at 4.

RFA and his IFQ. From the weight of this evidence, I find that Mr. Martin did not mail, or take decisive action to file, an RFA on or before July 15, 1994.

Before concluding whether Mr. Martin timely filed an RFA, I must consider whether the doctrine of equitable tolling applies in this case. This Office has found the doctrine applicable in only three cases.⁹ The doctrine of equitable tolling permits an administrative agency, under limited circumstances, to toll the running of a federal application period while an applicant is suffering from a disability or incompetency that prevents the person from complying with the application deadline requirements. In our decision in John T. Coyne,¹⁰ we concluded that the doctrine of equitable tolling can be applied to the IFQ application period. We stated that to obtain relief under this doctrine, an applicant must show three things: (1) extraordinary circumstances beyond the applicant's control prevented the applicant from filing in a timely manner; (2) the applicant was diligent in submitting an application after learning of the filing deadline [and after the disability or incompetency to filing was removed]; and (3) implementation of the IFQ program would not have been harmed or frustrated if the application had been processed by RAM when it was submitted.

Mr. Martin claims that the circumstances of his wife's illness prevented him from meeting the RFA filing requirements. But again, there is no proof in the record that Mr. Martin's wife was seriously ill during the application period. Nor is there proof that his wife's illness caused him to miss or pay attention to the RFA filing deadline. Mr. Martin was ordered to provide proof of his wife's illness, but he failed to do so. Mr. Martin also failed to explain how the alleged fire in his trailer, or how his having to fish, run a restaurant, or do contract work for Alaska Marine Lines, prevented him from filing a timely RFA.

I find that there is insufficient evidence in the record to prove that Mr. Martin suffered from a disability or incompetency beyond his control that prevented him from complying with the RFA filing requirements. As a result, I conclude that the doctrine of equitable tolling does not apply to Mr. Martin in this instance, and that his RFA cannot be accepted as timely filed. Because Mr. Martin's RFA was untimely filed, I conclude that he is ineligible for QS.

FINDINGS OF FACT

1. Mr. Martin did not mail, or take decisive action to file, an RFA on or before July 15, 1994.
2. There is insufficient evidence in the record to find that Mr. Martin's wife was seriously ill during the application period, or that her illness caused Mr. Martin to miss the RFA filing deadline.

⁹John T. Coyne, Appeal No. 94-0012 (Decision on Reconsideration), May 24, 1996; Estate of Marvin C. Kinberg, Appeal No. 95-0035, August 1, 1997, *aff'd*, August 13, 1997; and Christopher O. Moore, Appeal No. 95-0044, September 5, 1997, *aff'd*, September 9, 1997.

¹⁰Appeal No. 94-0012 (Decision on Reconsideration), May 24, 1996, at 13.

3. There is insufficient evidence in the record to find that Mr. Martin's fishing, restaurant business, and employment with Alaska Marine Lines, or the alleged burning of his trailer, prevented him from filing a timely RFA.

CONCLUSIONS OF LAW

1. Mr. Martin did not file a timely RFA for QS.
2. Mr. Martin did not suffer from a disability or incompetency beyond his control that prevented him from complying with the requirements of the application deadline.
3. The doctrine of equitable tolling does not apply in this case.
4. Mr. Martin is ineligible for QS.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This Decision takes effect on October 29, 1999, unless by that date the Regional Administrator orders review of the decision. Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on the tenth day after the date of this Decision, October 12, 1999. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Randall J. Moen
Appeals Officer