

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 01-0023
)	
KAREN N. BOYCE)	DECISION
Appellant)	
)	August 6, 2003
_____)	

STATEMENT OF THE CASE

Richard Boyce, on behalf of his minor daughter Karen N. Boyce, filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program [RAM], which denied Karen's Application for a Transfer Eligibility Certificate [TEC] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. Mr. Boyce can appeal the IAD because it directly and adversely affects his daughter's interests.¹ An oral telephonic hearing was held in this matter on August 12, 2002, from Juneau, Alaska. Richard Boyce, Karen Boyce, and Karen's sister, Lucinda Boyce, testified from Haines, Alaska.

ISSUES

1. Does Karen Boyce meet the definition of "IFQ Crew member" under 50 C.F.R. §679.2?
2. Must a TEC applicant prove that he or she was licensed as a crew member during the claimed 150 days of crew member experience?

SUMMARY

The IAD is vacated. On appeal, Karen Boyce has submitted evidence that supports her claim that she has worked for more than 150 days as a member of the harvesting crew of the F/V ELEANOR S, owned and operated by her father, Richard Boyce. Because she meets the definition of an IFQ crew member, she is entitled to a Transfer Eligibility Certificate [TEC]. An applicant for a TEC is not required to prove that claimed crew member experience was performed while licensed as a crew member.

ANALYSIS

- 1. Does Karen Boyce meet the definition of "IFQ Crew member" under 50 C.F.R. §679.2?**

¹50 C.F.R. § 679.43(b).

Karen Boyce must obtain a TEC before she can purchase quota shares, or have them transferred to her, because she was not initially issued quota shares. To be eligible for a TEC, she must show that she meets the definition of “IFQ crew member.”² That is, she must have served at least 150 days as a member of a harvesting crew in any U.S. commercial fishery.³ RAM rejected Karen’s application for a TEC on the grounds that she did not submit evidence showing that she is an IFQ crew member, and, that even if she did crew for 150 days, she was not properly licensed while crewing.

When Karen Boyce applied for a TEC, she was 14 years old. She has two older sisters, Eleanor, age 20, and Lucinda, age 18. Both Eleanor and Lucinda applied for, and received, TECs. Karen, like her sisters, applied for a TEC based on her experience commercially fishing for salmon and halibut with her father, Richard Boyce, aboard his boat, the F/V ELEANOR S. To be eligible for a TEC, Karen must meet the definition of IFQ crew member by showing that she spent 150 days aboard the F/V ELEANOR S performing work “directly related to the catching and retaining of fish.”⁴

IFQ regulations do not suggest how Karen might prove how many days she has been a crew member. The captain and crew of vessels participating in the Southeast Alaska gillnet and halibut fisheries are not required to record the number of days they spend working in those fisheries. Therefore, it would be unreasonable to require that Karen or her father document each day she actually spent working aboard the F/V ELEANOR S. It is reasonable, however, to expect her to present testimony and some form of documentation showing that she worked as a crew member when she claims she did. Karen has met this expectation.

Richard Boyce has harvested salmon and halibut with his daughters since 1990, when his oldest daughter, Eleanor, was 8 years old.⁵ The second daughter, Lucinda, joined the crew of the F/V ELEANOR S in 1993, when she was 9 years old.⁶ Karen claims she began fishing in 1993, when she was 6 years old, and has submitted entries from her father’s logbook showing that she was aboard the F/V ELEANOR S every year between 1993 and 2000. The logbook entries do not indicate how many days she spent aboard the vessel during those years, but Karen claims she fished a total of 210 days, for an average of 26.25 days per year.

Despite some discrepancies with the experience claimed in her application form, I find that Karen’s fishing history is credible for two reasons. First, it is very much in line with the 33 and 37 fishing days per year claimed by her sisters Eleanor and Lucinda, respectively, in their TEC

²50 C.F.R. § 679.41(d)(6)(i).

³50 C.F.R. § 679.2, definition of IFQ crew member.

⁴Id.

⁵Eleanor Boyce’s Application for IFQ Crew Member TEC, 10-11-95.

⁶Lucinda Boyce’s Application for IFQ Crew Member TEC, 10-31-96.

applications. Second, Commercial Fisheries Entry Commission [CFEC] fish ticket records for the F/V ELEANOR S and Richard Boyce's testimony support Karen's stated fishing history. CFEC records show that the F/V ELEANOR S made 127 salmon landings between 1993 and 1996, and 53 halibut landings between 1997 and 2000. Richard Boyce testified that Karen was aboard the F/V ELEANOR S between one-half and one-third of those trips. Conservative estimates of 2.5 days fishing per salmon landing and 2 days fishing per halibut landing, and Karen aboard the vessel for 40 percent of its landings, lead to a conclusion that Karen fished for salmon and halibut approximately 127 days and 42 days, respectively, for a total of 169 days of commercial fishing. While this is lower than her estimate of 210 fishing days, it is still higher than the number needed to qualify her for a TEC.

Karen must also show that her work aboard the F/V ELEANOR S was "directly related to the catching and retaining of fish."⁷ The IAD questions how a "child of 6 could effectively participate as an active and contributing crew member in the SE Alaska salmon gillnet or halibut longline fisheries."⁸ Karen asserts that her gillnetting duties included cleaning and steering the boat, moving and picking fish, and off-loading the fish after each trip. While halibut fishing, Karen claims she baited hooks, washed and bled the fish, steered the boat, and helped out on deck. Lucinda's oral testimony corroborates Karen's description of her job:

Q.: When you started fishing, what sorts of things did you do for your dad on the boat?

A.: The biggest thing was throwing the fish in the hold, since that was the easiest. You just had to distinguish between dog and sockeye and the occasional king. When we got a little older, maybe 8, 9, or 10, it was driving the boat, since driving the boat is a little bit more important. Just helping, you know, when we needed to lift the brail bags out, unpack brail bags, lifting those out, washing down the deck, making dad's lunch, getting him towels when he got jellyfish in his eye, marking the buoys, just, you know, little things like that. Not necessarily pulling in the fish, but keeping the deck clear so they weren't sliding around.

Q.: Were there other people on the boat?

A.: Occasionally. For halibut, I know there would be other people who would come out and fish their quota off our boat, but mainly for gillnetting it was the three of us girls with maybe an occasional other person coming out, but it wasn't anything consistent. It was the three of us crewing.

Q.: Were you crewing a lot more than Karen did at the same ages?

⁷50 C.F.R. § 679.2, definition of IFQ crew member.

⁸IAD at 3.

A.: She has a similar amount of time, and, as much as I hate to say it, she probably did more.

Q.: You said earlier, Lucinda, that each of the girls, as they got to be 8, 9, or 10 years old, would do some of the driving of the boat. Do you mean on the way to the fishing grounds, or after you were there, making sets, or what?

A.: Both. When we got down to the fishing grounds, we'd be at the helm.

Richard Boyce's affidavit is consistent with Lucinda's and Karen's accounts of the jobs they performed aboard the F/V ELEANOR S:

Karen's first jobs on the boat included counting and moving salmon, and measuring dunginess crab with a crab gauge, well within the ability of an enthusiastic 6-year-old. She progressed to driving the boat, sorting salmon into brailers by species, handling net, helping pick, standing watch on the net while I took a nap, baiting hooks, measuring and recording halibut lengths, general cleanup before, during and after trips, cooking, and more.

Richard Boyce's oral testimony explains further the role of a young person aboard a commercial fishing vessel:

I would say whatever credence you would give to any other occupation for someone that's just learning it, where they're actually doing the job while they're learning it. Kids on fishing boats, and it's not just me, are helpful in learning the job from an age that usually is a lot younger than they could do on something that's not a supervised-by-the-family type job. There's ample jobs to do on any kind of fish boat, and the lower end of the scale is well within the capabilities of kids. It's more their desire to do them than anything else, and usually you find the desire of kids when they're younger surpasses their ability to do the jobs. They want to be out there doing it, and you shouldn't try and stop that.

While cooking, cleaning the boat, and off-loading fish at the dock are not jobs that fit the IFQ crew member definition, picking, moving, washing, and bleeding fish are tasks directly related to the catching and retaining of fish. Steering the boat also satisfies the IFQ crew member definition if, as in Karen's case, it involves positioning the boat and gillnet or longline while harvesting. The Boyce family's credible testimony demonstrates that young children can participate as crew members in the harvest of salmon and halibut in Southeast Alaska. I find that Karen Boyce has been a member of the harvesting crew of the F/V ELEANOR S for more than 150 days. I conclude that she is therefore an IFQ crew member and is entitled to a TEC.

2. Must a TEC applicant prove that he or she was licensed as a crew member during the claimed 150 days of crew member experience?

According to the IAD, ADFG records show that Karen Boyce was not licensed in some years or portions of years for which she claims crew member experience. Unlike the definition of “legal landing”⁹ in the IFQ program, or the definition of “documented harvest” in the License Limitation Program, which requires a “lawful harvest,”¹⁰ the definition of IFQ crew member is based only on experience, not legal or lawful or licensed activity. Where the regulation specifies only that a TEC applicant must have certain experience, I read that as directing NMFS to determine whether the applicant had the minimum experience, not whether the applicant complied with all applicable regulations.

This view is supported by the fact that, because the required experience could be in any commercial fishery in the United States, and the licensing requirements can vary from state to state, it would be impractical to require NMFS to determine whether each applicant was in compliance in each jurisdiction and fishery. Neither the regulatory history of the IFQ program nor the language of the regulations suggest that the North Pacific Fishery Management Council or the Secretary of Commerce intended NMFS to verify such compliance.

In RAM’s view,¹¹ the purpose of the 150 days’ experience requirement is to “separate real fishermen from casual, part-time, participants” and to make sure that individuals holding QS can safely operate vessels and gear in the professional longline fisheries. RAM’s explanation shows that the purpose of the experience requirement was not to make sure that applicants had complied with various licensing requirements. I am satisfied that Karen Boyce has sufficient experience to meet the goals identified by RAM.

The regulation does not specify that applicants must prove they were licensed at the time they gained the crew member experience. The TEC application form does not require or request that applicants submit proof of licensure, or even assert that they were properly licensed. The limited evidence in the record would indicate that RAM rarely inquires whether an applicant was licensed or not, and does so only if an applicant claimed crew experience at a very young age. This office is aware of only two instances in which RAM inquired about crew member licenses for TEC applicants – Karen Boyce and Dylan Swanberg. These cases involve applicants who claimed crew member experience beginning at age 6 and 5, respectively. RAM did not inquire about licenses for Karen Boyce’s two sisters, who both claimed crew member experience beginning at age 9 and who, like Karen Boyce, were not licensed in every year for which they claimed experience. Both sisters’ TEC applications were approved. Likewise, RAM approved

⁹“Legal landing means a landing in compliance with Federal and state commercial fishing regulations in effect at the time of landing.” 50 C.F.R. §679.2.

¹⁰“Documented harvest means a lawful harvest that was recorded in compliance with Federal and state commercial fishing regulations in effect at the time of the harvesting.” 50 C.F.R. §679.2.

¹¹See, IAD at 3, n. 1.

the TEC applications of two teenage brothers, Benjamin and Lars Peters, without inquiring into their licenses. They both claimed crew member experience beginning at age 11 and 12, respectively.

In the IAD, RAM questioned how a child of 6 could “effectively participate as an active and contributing crew member.” RAM made a rebuttable presumption that a child must be at least 10 years old to do so. Perhaps RAM inquired into Karen Boyce’s crew member license history primarily because RAM thought it might show whether she was serious about participating as a crew member. Possession of a crew license may tend to support a claim of crew experience, but it is not *per se* evidence that the licensee actually worked as a crew member. Conversely, the lack of a license does not prove that the person did not crew, especially in this case where Richard Boyce testified that he believed at the time that Karen was not required to have a license. I view Karen Boyce’s license history only as evidence to be weighed along with other evidence of whether her claims of crew member experience were credible.

I conclude that the failure to be properly licensed as a crew member does not prohibit an applicant from obtaining a TEC if the applicant has proved the minimum 150 days experience as part of a harvesting crew in any fishery in the U.S. Karen Boyce has made that showing. Therefore, she need not establish that she was a licensed crew member.

FINDING OF FACT

1. Karen Boyce has 150 days’ experience working as part of the harvesting crew aboard the F/V ELEANOR S.
2. The regulation defining an IFQ crew member directs NMFS to determine whether the applicant had the minimum requisite experience, not whether the applicant complied with all applicable regulations.

CONCLUSIONS OF LAW

1. Karen Boyce is an IFQ crew member and is entitled to a Transfer Eligibility Certificate.
2. The failure to be licensed as a crew member does not prohibit an applicant from obtaining a TEC if the applicant has proved the minimum 150 days experience as part of a harvesting crew in any fishery in the United States.

DISPOSITION AND ORDER

The IAD that is the subject of this appeal is VACATED. RAM is ordered to issue Karen N. Boyce a Transfer Eligibility Certificate. This Decision takes effect September 5, 2003, unless by that date the Regional Administrator orders review of this Decision.

The Appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, August 18, 2003. A Motion for Reconsideration must be in writing, must specify one or more 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.

Edward H. Hein

Chief Appeals Officer