NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0102
	)	
KENNETH M. DUFFUS,	)	
Appellant	)	
	)	DECISION (Revised)[1]
and	)	
	)	
D&G ENTERPRISES, Inc.,	)	
Respondent	)	October 15, 1997
_____	)	

STATEMENT OF THE CASE

Appellant Kenneth M. Duffus appealed an Initial Administrative Determination [IAD] issued on May 10, 1995 by the Restricted Access Management Program [RAM].[2] The IAD addressed conflicting claims of Mr. Duffus and Respondent D&G Enterprises, Inc., [D&G] to halibut Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program. D&G is an Alaska close corporation whose shares are held by Mr. Duffus (50%) and Mr. Bruce J. Gabrys (50%). Both men also serve as the corporation's only directors and officers: Mr. Gabrys is president and treasurer; Mr. Duffus is vice-president and secretary.

Mr. Duffus, as sole owner of the 42-foot fishing vessel F/V ENTERPRISE II, claimed IFQ credit for halibut landings made from the vessel from 1986 through 1990. Mr. Gabrys, on behalf of D&G, also claimed credit for halibut landings from the vessel for the years 1987 through 1990 on the grounds that the corporation had held a lease of the vessel during that time. RAM accepted D&G's claim and denied Mr. Duffus' claim under the rule that a vessel owner cannot receive IFQ credit for landings made from the vessel while it was leased to another and the landings are to be credited to the vessel lessee. 50 C.F.R. § 679.40(a)(2)(i)(B).[3] The IAD allocated the qualifying pounds of halibut landed from the vessel during the lease to D&G, but suspended issuance of QS pending the exhaustion of Mr.

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[1]An earlier draft of this Decision was inadvertently sent to the parties as the Decision. This revision does not change the outcome of the Decision.

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

[3]Formerly, 50 C.F.R. § 676.20(a)(1). All IFQ regulations were renumbered, effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

Duffus' administrative appeal rights.

Mr. Duffus filed a timely appeal of the IAD on July 7, 1995. He has adequately shown that his interest is directly and adversely affected by the IAD. On July 12, 1995, this Office issued an order joining D&G to this appeal. Mr. Duffus requested an oral hearing, but Appeals Officer Louis E. Agi denied the request in an order dated September 25, 1995. [AO Procedural Order No. 1, at 29]

ISSUES

1. Whether a vessel lease existed between the parties.

2. If so, when was the vessel lease in effect?

3. Whether RAM had the authority to process D&G's Application for QS without the approval of D&G's board of directors.

4. Whether RAM improperly redirected D&G's mail to Mr. Gabrys and unlawfully issued QS to Mr. Gabrys.

BACKGROUND

Mr. Duffus filed a Request for Application for Quota Share [RFA] for halibut QS, based on his ownership of the F/V ENTERPRISE II. [15 Mar 94] He acknowledged on his RFA that he had leased the F/V ENTERPRISE II to D&G from January 1, 1987 until May 1991. Mr. Duffus stated that during this period he was the vessel's sole operator and owner, and paid many of the vessel's expenses. [Duffus letter to NMFS, 15 Mar 94, attached to RFA]

Two months later, Mr. Gabrys, as president of D&G, filed an RFA for halibut QS on behalf of the corporation. He asserted that D&G had leased the F/V ENTERPRISE II from January 1987 until June 1991. This was virtually the same lease period acknowledged by Mr. Duffus in his RFA. Attached to D&G's RFA was a document was entitled "Bareboat Charter." It was prepared in two parts, totalling 16 pages. This is the key document at issue in this appeal.

The document lists Mr. Duffus and his wife, Juliann N. Duffus, as "Owner," and D&G Enterprises, Inc., as "Charterer." It was signed on January 2, 1987, before a notary by the Duffuses (for themselves) and by Mr. Gabrys (on behalf of D&G).

The charter hire (lease fee) was set at 30% of gross receipts for halibut, 25% for salmon, and 20% for all other species. [Charter, Part II, at 1] The charter also provided, among other things, that D&G was to:

- provide all hull and marine and indemnity insurance for the vessel, in the name of the owner [Mr. Duffus];

- maintain and return the vessel, appliances, appurtenances, gear and equipment in good repair and condition, less reasonable wear and tear;

- indemnify the owner for any claims arising out of charter's operation;

- pay for the vessel's yearly dry-docking, cleaning and painting expenses;

- pay for the vessel's operating expenses; and

- at its own expense, navigate and operate the vessel.

The charter specified that it was a "full and complete demise of the vessel to the Charterer" and provided that D&G would have exclusive control over the vessel during the term of the charter. [Charter, § 5(n), at 7-8] No one other than D&G could maintain, manage, or operate the vessel without the owner's written consent. [Charter, § 5(f), at 5-6]

After the RFA's were received and processed by RAM, the parties each submitted Applications for QS. Mr. Duffus filed an individual Application for himself, in which he claimed IFQ credit for all the halibut landings made from the F/V ENTERPRISE II for 1986 through 1990. In a one-page letter attached to the Application, Mr. Duffus again acknowledged that he had entered into a bareboat charter agreement with D&G, but asserted that, in practice, it was not a bareboat charter because he operated the vessel in his capacity as owner and individually paid for most of the expenses of the vessel:

> Enclosed is my application for quota shares under the NMFS program. As mentioned in my March letter to you the vessel was initially purchased by me and placed into service in 1986. I entered into a lease with D&G Enterprises, Inc. a corporation in which I am 50% owner. Although the lease agreement was set up as a bareboat charter, it was never operated in accordance with the lease, and as such, the agreement was mutually terminated. Evidence enclosed demonstrates that there was no bareboat charter, as I was not only the skipper of the vessel 100% of the time between 1986 and 1990 but also shouldered all or the majority of the expenses for the vessel. ... [Duffus letter to NMFS, 27 Jun 94]

Mr. Duffus then filed [5 Jul 94] a second Application for QS on behalf of D&G, as the corporation's

registered agent.[4] In the corporate Application Mr. Duffus crossed out references to the F/V ENTERPRISE II, thereby asserting that D&G had no qualifying interest in the the vessel or its landings history. He also crossed out D&G's business mailing address that had been printed on the Application and substituted in its place his personal residence address.[5]

Mr. Gabrys also filed an Application for QS on behalf of D&G, as the corporation's president. [8 Jul 94] As in the RFA, Mr. Gabrys claimed IFQ credit for the halibut landings made from the F/V ENTERPRISE II during the period in which he claimed that D&G had leased the vessel from Mr. Duffus.

RAM informed the parties by letter [3 Jan 95] that their Applications for QS were in conflict and gave them 90 days to submit additional evidence in support of their claims. In so doing, RAM recognized the Application submitted by Mr. Gabrys's as D&G's legitimate Application. On May 10, 1995, RAM issued an IAD in which it determined that the written bareboat charter constituted conclusive evidence of the existence of a vessel lease between the parties under 50 C.F.R. § 679.40(a)(3)(iii).[6] RAM denied Mr. Duffus' individual claim for QS and allocated to D&G the qualifying pounds of halibut from the F/V ENTERPRISE II for the period January 2, 1987 through May 31, 1991.[7] Issuance of QS was suspended pending completion of all administrative processes. [IAD, at 5]

On appeal, Mr Duffus again acknowledges that a vessel lease existed between the parties, but he argues that it was not a bareboat charter. He contends that only the existence of a bareboat charter would authorize RAM to issue QS to a vessel lessee in place of the vessel owner. Therefore, Mr. Duffus reasons, he should receive the credit for all of the vessel's landings. Mr. Duffus further argues that RAM had no authority to take any action on the D&G Application submitted by Mr. Gabrys because Mr. Gabrys did not obtain the consent of the corporation's Board of Directors to file the Application. Finally, Mr. Duffus asserts that RAM improperly sent correspondence for D&G to Mr. Gabrys's address and unlawfully issued QS to Mr. Gabrys. [Appeal, at 2-3]

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[4]The role of Registered Agent has been passed back and forth between Mr. Duffus and Mr. Gabrys over the years. Mr. Duffus was Registered Agent for 1987-1989 and 1993-1996; Mr. Gabrys was Registered Agent for 1990-1992 and 1997. [D&G Articles of Incorporation, Art. 4, at 2; State of Alaska Biennial Reports, 1988-1997]

[5]Mr. Duffus identified this on the form as "(resident agent address)." He also supplied different telephone numbers and crossed out Mr. Gabrys's name.

[6]Formerly, 50 C.F.R. § 676.20(a)(1)(iii).

[7]No pounds were credited for 1991. Under the IFQ program, only halibut landings for the years 1984-1990 can generate qualifying pounds. *See,* 50 C.F.R. § 679.40(a)(4)(i).

In response, D&G made various assertions concerning Mr. Duffus's statements and conduct. D&G's only relevant assertions are that Mr. Duffus operated the vessel on behalf of the corporation, not as vessel owner, and that decisions about selecting crew and fishing operations were made jointly by Mr. Duffus and Mr. Gabrys as officers of D&G. [Statement in Opposition to Appellant's Appeal, at 1-2, 10 Aug 95]

DISCUSSION

Under the IFQ program, as implemented by RAM, an applicant for QS may receive credit only for legal landings of Pacific halibut and sablefish that were made from a vessel owned or leased at the time of the landings. 50 C.F.R. § 679.40(a)(2).[8] A written vessel lease is conclusive evidence of the existence of a vessel lease between the parties. 50 C.F.R. § 679.40(a)(3)(iii).[9] To be conclusive evidence, a written lease must identify the leased vessel, the name of the lease holder, and the period of time during which the lease was in effect. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether that document on its face actually constitutes a vessel lease for purposes of the IFQ program.

The inquiry begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, due to fraud, duress, coercion, mistake, or incapacity, is always relevant and should be considered.[10]

If the Appeals Officer determines that a valid vessel lease existed, then the next question is to determine if and when the lease was in effect. In examining that question, the Appeals Officer will presume that the lease was in effect for the term stated in the lease, unless contrary evidence is presented. The owner of the vessel has the burden of rebutting the presumption that the vessel lease was in effect for the term stated in the lease. To rebut the presumption, the owner must prove by a preponderance of the evidence that the parties mutually agreed to set aside or terminate the lease early.

1. Whether a vessel lease existed between the parties.

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[8]Formerly 50 C.F.R. § 676.20(a)(1).

[9]Formerly 50 C.F.R. § 676.20(a)(1)(iii).

[10]If the Appeals Officer finds that a written document does not constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties actual conduct and intent.

Mr. Duffus admits that the document in question was a vessel lease. He does not argue that the lease was invalid due to fraud, duress, coercion, mistake, incapacity, or the like. Rather, Mr. Duffus argues that only a bareboat charter can serve as the basis for issuing QS to D&G as a lessee. He bases his argument on § 5.2.2 "Eligibility" of the Supplemental Environmental Impact Statement for the IFQ program, which states (in part): "To be eligible for a quota allocation, . . . a person must also be the owner of the vessel from which the landing was made, or **be the operator of a bare-boat charter**." [SEIS, at 5-3, 15 Sep 92] Mr. Duffus then defines a *bareboat charter* as "a qualified lease giving the charter holder complete control of the leased vessel."[11] Although the document in question is titled "Bareboat Charter" and provides that the charterer will have exclusive control over the vessel during the term of the charter, Mr. Duffus argues that it was nonetheless not a bareboat charter because he, as owner, served as skipper of the vessel during the entire charter period.

Mr. Duffus's argument relies on the wrong legal authority. The Supplemental Environmental Impact Statement does not have the force of law. It represents only an analysis of the anticipated impacts of the IFQ management plan and was written when the plan was still in preliminary form, in this instance as of September 15, 1992. The Council had previously proposed allowing lessees to qualify for QS on the basis of "a lease of a fishing vessel (written or oral) or other 'bare-boat charter' arrangement." [*Newsletter*, NPFMC, No. 6-91, 19 Dec 91, at 15] By December 3, 1992, however, the proposed rule for the IFQ program required a "written vessel charter demise" and made no mention of a bareboat charter. [Proposed 50 C.F.R.
§ 676.20(a)(1)(iii), at 57 Fed. Reg. 57,147 (1992)] The final rule, published November 9, 1993, required a "written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement." [58 Fed. Reg. 59,406 (1993)] Ultimately, the regulatory language was changed again to provide that a written vessel lease or notarized statement would constitute conclusive evidence of a vessel lease. [59 Fed. Reg. 43,503 (1994)]

In O'Rourke v. Riddle,[12] this Office stated that a business arrangement between the parties need not rise to the level of a bareboat charter in order to qualify as a vessel lease under the IFQ program. Nor does a written agreement need to be a bareboat charter in order to constitute conclusive evidence of a vessel lease. Thus, whether or not the document is a bareboat charter is irrelevant. If the document is a valid vessel lease it can be conclusive evidence that a vessel lease existed between the parties, as long as it identifies the leased vessel, indicates the name of the lease holder, and states the period of time

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[11]The definition is from an informational newsletter entitled, "True North: Your Guide to Fisheries Management in the North Pacific." It was published for the North Pacific Fishery Management Council in October 1992. Although the quoted definition may be correct, in a general sense, it has no legal authority in this appeal.

[12]*See,* Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

during which the lease was in effect. 50 C.F.R. § 679.40(a)(3)(iii).

Although Mr. Duffus has, essentially, conceded that the document in question is a type of vessel lease, he does not concede that it is legally sufficient to authorize RAM to give D&G credit for all of the vessel's landings and to issue QS to D&G as a vessel lessee instead of to him as the vessel's owner. So, rather than relying on Mr. Duffus's admission, this Office will determine for itself whether the document in question constitutes a valid vessel lease under the IFQ program.

Looking at the document as a whole, I find that the document's provisions contain terminology and characteristics consistent with the existence of a lease. The lease agreement is entitled "Bareboat Charter," and uses terms such as "owner," "charterer," and "charter hire." D&G, as charterer, is required to pay for the hire of the vessel (30% of the vessel's halibut gross proceeds), the vessel's operating expenses, insurance, claims arising out of the vessel's operations, yearly dry-docking fees, and certain maintenance expenses. The charter specifies that it is a "full and complete demise of the vessel to the Charterer." D&G is given exclusive control of the vessel, including the vessel's navigation and operation. The document is signed by the vessel's owner, and is for a definite term. The document provides that the charterer cannot provide for anyone else to operate the vessel without the owners' written consent. Accordingly, I find that the document is on its face a valid vessel lease within the meaning of the IFQ program. Because the document identifies the leased vessel, the name of the lease holder, and the period of time during which the agreement was in effect, I conclude that the document constitutes conclusive evidence of the existence of a vessel lease agreement.

2. When was the vessel lease was in effect?

Having determined that there was a valid vessel lease between the parties, the next question is when was it in effect. This office has ruled that a valid written vessel lease is presumed to have been in effect for the term stated in the document, unless contrary evidence persuades otherwise.[13] Evidence of subsequent conduct can be introduced to show that a valid vessel lease was terminated before the end of its stated term.

In this case, the term of the charter is not set out separately. The "Chartering Clause" [Charter, § 2(a)] provides that the term of the charter would be set forth in Part II of the document, but Part II does not contain a specific term provision. The term may be deduced, however, from the payment schedule as January 1, 1987, to December 31, 1991. [Charter, Part II, at 1] Both parties agree,

[13] *See* Dittrick v. Weikal, Appeal No. 95-0109, February 27, 1996, *aff'd* March 4, 1996.

however, that their relationship for the use of the vessel was mutually terminated in May 1991.[14]

Mr. Duffus cannot rebut the presumption that the vessel lease was in effect for the stated term by showing that the vessel was not in fact used as a bareboat charter. Nor is it sufficient for him to show merely that the parties' conduct during the stated term of the lease differed from the provisions of the document. Rather, he must demonstrate by a preponderance of the evidence that the parties agreed to set aside their lease or terminate it prematurely. In the absence of a subsequent written rescission, or an oral rescission plus other consistent conduct, the Appellant must produce evidence of actual subsequent conduct by the parties that (1) clearly establishes that the nature of the parties' business relationship was fundamentally changed; and (2) strongly supports an inference that the parties mutually intended to so change their relationship.[15]

The evidence in this case shows that neither party expressly terminated the vessel lease orally or in writing. Mr. Duffus contends, instead, that it can be reasonably inferred from the parties' actual conduct that the lease was mutually terminated at the outset of fishing operations because he operated the vessel for the entire stated lease term on behalf of himself, as the vessel's owner, and not on behalf of D&G.

My examination of the record shows that the parties' conduct was not fundamentally different than that called for under the terms of the lease. The lease did not specify who would serve as captain of the vessel, but it did provide that D&G would have exclusive control over the vessel and that no one else would operate the vessel without the owner's written consent. Although Mr. Duffus possessed, skippered, and fished the vessel throughout the period of the lease until May 1991, he has not established that he did so on his own behalf rather than as an agent of D&G.

If Mr. Duffus was operating the vessel on his own and not under the vessel lease, I would expect to find that D&G was no longer involved in the operation of the vessel in any way. The evidence, however, is to the contrary. D&G paid for the lease of the vessel and the vessel's operating expenses.[16] D&G contracted with crew members to work aboard the vessel. Mr. Duffus acknowledges income from *lease* payments on his tax returns during the entire period of the lease, and D&G acknowledges in its

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[14]Mr. Gabrys asserts that the lease ended May 31, 1991 [Gabrys affidavit, 25 Feb 95, at 1; Gabrys supplemental filing, 4 Dec 95, at 2] Mr. Duffus states that the corporation was no longer involved with the vessel after May 2, 1991. [Duffus supplemental filing, 6 Nov 95, at 3]

[15]*See* Wisner v. Schauf, Appeal No. 95-0128, October 25, 1996, at 4-5.

[16]Such expenses included food supplies, moorage and storage, fishing equipment, small tools and equipment, fish/boat licenses, and repairs. Vessel lease payments were made from the D&G checking account; the checks were signed by Mr. Gabrys and, in some cases, also by Mr. Duffus.

financial statement of having made such payments. The evidence in the record shows conduct that confirms the parties' continued reliance on the lease rather than its termination.

The evidence in the record does not clearly establish that the nature of the parties' business relationship was fundamentally different than that called for under the terms of the written lease. The evidence shows a continued reliance on the vessel lease, rather than an intent to change their relationship. I cannot reasonably infer from the evidence of the parties' actual conduct that they clearly agreed to set aside or terminate the written lease prior to May, 1991. Accordingly, I find that the parties operated under the written vessel lease from Jaunary 1, 1987 through May 1991. This modified lease period covers all halibut landings relevant to this appeal, which extends to catches only through 1990.

3. Whether RAM had the authority to process D&G's Application for QS without the approval of D&G's board of directors.

Mr. Duffus claims that RAM should not have processed D&G's Application for QS without the approval of D&G's board of directors. True or not, Mr. Duffus' complaint is not within the purview of this office, nor a matter within the IFQ program. Rather, it is a matter between him and D&G. RAM's responsibility under the IFQ program is to process applications for purposes of determining whether applicants qualify for QS. RAM has inherent authority to accept and process applications which reasonably appear on their face to be legitimate. In this instance, Mr. Gabrys submitted sufficient documentation to support his application on behalf of D&G. I note that D&G's articles of incorporation do not bar an officer from conducting business in the name of the corporation, and that on the face of it, Mr. Gabrys did act responsibly, as president and a director of D&G, when he filed for QS on behalf of D&G. An untimely application would have forever barred D&G from whatever rightful claim that it may have had for QS.[17] Given that Mr. Duffus's submission disavowed the corporation's interests in the F/V ENTERPRIS II and the related QS, and instead claim these for himself, I find that it was reasonable for RAM to accept Mr. Gabrys' submission as D&G's legitimate claim.

If Mr. Duffus believes that Mr. Gabrys was not authorized by D&G to apply for QS, he can take his complaint to a court of law, which in this case is the appropriate forum for addressing such grievances. If Mr. Duffus had contended that Mr. Gabrys' actions had misrepresented D&G's qualifications for QS, that would have been another matter. The allegation that he was not authorized to apply for QS on behalf of D&G, however, is of no concern to this office, and not a matter of review on appeal.

4. Whether RAM improperly redirected D&G's mail to Mr. Gabrys and unlawfully issued QS to Mr. Gabrys.

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[17]"Applications must be received during the application process beginning January 17, 1994, and ending at the 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).

Mr. Duffus' complaint is contrary to the facts in the record. The record shows that Mr. Gabrys filed on behalf of D&G, and that 69,875 qualifying pounds of halibut landed from the F/V ENTERPRISE II were allocated to D&G. The resulting QS was not issued to either party, pending the outcome of this appeal. There is nothing in the record indicating that the mail was improperly diverted from D&G to Mr. Gabrys. In fact, since RAM allocated the qualifying pounds to D&G, it may be reasonably assumed that D&G received the necessary paperwork or mail from RAM. Mr. Duffus's contentions here are without merit.

FINDINGS OF FACT

1. The parties executed a valid written agreement entitled "BAREBOAT CHARTER" on January 2, 1987.

2. The agreement was in effect for the period January 1, 1987 through May 31, 1991.

3. RAM did not improperly divert mail or issue QS to Mr. Gabrys.

CONCLUSIONS OF LAW

1. The written agreement constitutes a valid vessel lease for purposes of the Pacific halibut and sablefish IFQ program.

2. The written agreement is conclusive evidence of the existence of a vessel lease between the parties.

3. D&G qualifies as the party to which qualifying pounds resulting from legal landings of halibut made from the F/V ENTERPRISE II during the period January 1, 1987 to May 31, 1991 should be allocated, based on its lease of the vessel from Mr. Duffus during that period.

DISPOSITION

RAM's IAD dated May 10, 1995, allocating qualifying pounds of halibut landed from the F/V ENTERPRISE II to D&G Enterprises, Inc., is AFFIRMED. This decision takes effect on November 14, 1997, unless by that date the Regional Administrator orders review of the decision. Any party, including the 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 27, 1997. 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. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Louis E. Agi
Appeals Officer

We concur in the factual findings, legal analysis, and conclusions of law of this Decision. We have reviewed this Decision and the accompanying administrative record to verify the substantive accuracy of the Decision and to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other Appeals Decisions of this Office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1997 fishing season, we recommend that the Regional Administrator 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.

Randall J. Moen
Appeals Officer

Edward H. Hein
Chief Appeals Officer