

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of) Appeal No. 94-0005
)
KEITH T. SUGIURA,) DECISION
Appellant)
_____) April 20, 1995

Appellant Keith T. Sugiura has appealed an initial administrative determination of the Restricted Access Management Division [Division], dated August 22, 1994, which denied his application for Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program because it was not filed with the Division by the filing deadline, July 15, 1994. This appeal was timely filed on November 8, 1994. An oral hearing by telephone was held February 6, 1995, before this appellate officer. Mr. Sugiura was the only witness. He waived his right to 30 days' notice of the hearing and of the issues on which testimony was to be taken. The record was closed February 6, 1995. Appellant's appeal adequately demonstrates that the Division's determination has an adverse and direct effect on his interest.

BACKGROUND

The Appellant's Request for Application ["RFA"] form is signed and dated "6-12-94." The envelope in which it was mailed to the Division was postmarked from Cold Bay, Alaska, with a date of July 20, 1994. The envelope and enclosed RFA were received at the Division's office in Juneau on July 22, 1994 -- seven days after the filing deadline. The Division rejected the application as untimely filed without considering whether the Appellant is otherwise eligible for participation in the IFQ program.

ISSUE

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

ADDITIONAL FACTS AND DISCUSSION

NMFS established July 15, 1994, as the application filing deadline for this IFQ Program.¹ By its terms, the agency's notice of the application period required that an application form be received at the Division's office in Juneau by July 15. Subsequently, the Division initiated a preliminary step in the application process by requiring the filing of a Request for Application ["RFA"] form before submitting

¹"Applications must be received during the application period beginning January 17, 1994, and ending at 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)

the application itself. The Division announced that for the purpose of meeting the filing deadline, it would accept a completed RFA in lieu of an application, so long as the RFA was received by the deadline. Ultimately, the Division decided to accept as timely filed any completed RFA that was postmarked on or before July 15, 1994.² The Division 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.³

Appellant contends that although his RFA was postmarked July 20, 1994, he "mailed" it before July 15, 1994, and that therefore it should be considered timely filed. The Appellant testified during his hearing that he left his home in Kirkland, Washington, on May 20, 1994, to engage in commercial fishing for the summer and that he did not return home until September. He stated that he was fishing for salmon in the Bering Sea (Area M gillnet fishery) during the entire month of July 1994, and that he did not come ashore between June 25 and the end of July. During that time, mail service was provided to fishermen on his vessel by a tender operated by Peter Pan Seafoods. Appellant testified that the mail service was "sporadic" and that he received mail only two or three times a month. He testified that outgoing mail was given to the tender, which usually stayed in the fishing area from one to five days before delivering the mail to Port Moller. Appellant stated that there is no post office in Port Moller and that mail would be flown from there to Cold Bay, where it was deposited with the United States Postal Service. Appellant stated that people on the tenders sometimes neglected to deliver the mail to the post office, causing further delays in mailing. He testified that mail usually took from one to three weeks to deliver.

Appellant testified that his wife received a blank RFA form from the Division in mid-June 1994 and that he had never received any RFAs or other correspondence from the Division before that time. This is consistent with the Division's own database, which shows that the first contact the Division had regarding the Appellant was on or about June 14, 1994, and that an RFA was mailed to the Appellant on or about June 15. Appellant testified that his wife mailed the RFA form to him and that he received it on approximately July 10, while he was on a fishing vessel. Appellant signed and dated the RFA "6-12-94." He testified that this date was actually July 12, 1994, and that he had erroneously entered "6" instead of "7" to indicate the month. Appellant stated that he carried stamps with him while aboard the fishing vessel, that he put a stamp on the letter and gave it to someone on the Peter Pan Seafoods tender either on July 12 or 13.

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

³Michael B. White, Appeal No. 94-009, decided January 17, 1995, affirmed January 20, 1995, at page 4.

I find the Appellant's testimony to be credible because it is consistent with the dates in the Division's records and with a statement the Appellant wrote on his RFA at the time he completed it.⁴ I also accept his testimony as credible because it is inherently believable and because it is undisputed. Therefore, I find that the Appellant did deliver his completed RFA to the tender for mailing on or before July 15, 1994. Because delivery to the tender was the only mail service available to the Appellant while aboard the fishing vessel and because delays in getting mail from the vessel to the post office at Cold Bay were beyond the Appellant's control, surrendering control of his mail to the tender was the functional equivalent of personally depositing the mail with the United States Postal Service. I find Appellant's action under these circumstances to be a "decisive action to complete the filing of his application" that was taken by the July 15 filing deadline. Therefore, I find as a matter of law that the Appellant's RFA was 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 May 19, 1995, unless, by that date, the Regional Director orders review of the decision.

Because any QS to which the Appellant may be entitled has been assigned to the quota share reserve under 50 C.F.R. § 676.20(d)(3), the Appellant still has an opportunity to receive QS and the corresponding IFQ 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.

Edward H. Hein
Chief Appeals Officer

⁴At the bottom of his RFA Form C, the Appellant wrote in pen: "I don't have the information that you need at this time because I'm right in the middle of my gillnet season & all my paperwork is at home. I won't be home until September 10th. At that time I'll submit everything that you need. Thank you."

Certification of Service

I certify that a copy of the attached DECISION was sent to the Appellant today:

Keith T. Sugiura
11047 N.E. 116th Street
Kirkland, Washington 98034

Sent by certified mail # _____, return receipt requested.

Dated:

Obren Davis, Program Support Assistant
Restricted Access Management Division