NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of	)	Appeal No. 94-0008
	)	
GEORGE M. RAMOS,	)	DECISION
Appellant	)	
_____	)	March 21, 1995

George M. Ramos has appealed an initial administrative determination of the Restricted Access Management Division ["Division"] of the National Marine Fisheries Service ["NMFS"], dated September 12, 1994. The Division denied his application for Quota Share ["QS"] under the Individual Fishing Quota ["IFQ"] Program for Pacific halibut and sablefish because it was not received[1] by the filing deadline of Friday, July 15, 1994. This appeal was timely filed and adequately claimed that the Appellant's interests are harmed by the initial determination. Some actions were taken in this case that do not need to be outlined here.[2]

BACKGROUND AND STATEMENT OF FACTS

This Appellant's application[3] was received in the Division's office via its facsimile ("fax") machine while the office was closed over the weekend immediately following the Friday deadline -- specifically, on Sunday, July 17, 1994. It is the Division's policy that an application received after July 15, 1994 "shall not be considered."[4]

Some changes have been made concerning the July 15 filing deadline since the inception of the IFQ Program. At one point, NMFS envisioned a two-step application process. Applicants were first to file a Request for Application for Quota Share [an "RFA"], and later an Application for Quota Share [an

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[1]When it denied this application, the Division was rejecting as untimely not only all applications filed late, but also any that had been provided by the deadline date only in facsimile form. Faxed applications were rejected because they lack an original signature. However, this policy was changed based on a recent appeal. (Kenneth F. Tison, Appeal No. 95-0002, January 30, 1995, aff'd. by the Regional Director January 30, 1995.) We therefore need to address only whether the Appellant's application was properly ruled untimely because of the date and time the fax was sent.

[2]An oral hearing was held by telephone, and other incidental actions and evidence were taken, to clarify a misunderstanding by this appeals officer of certain material in the case file. The record was closed on January 11, 1994.

[3]In the form of a Request for Application, or "RFA;" *see* following discussion.

[4]59 Fed. Reg. 701 at 702 (1994)

"application"] based on additional information supplied by the Division from its database showing vessel ownership and fish landings. In its implementation of the Program, the Division decided to treat an RFA as an application for purposes of meeting the July 15 filing deadline. It also decided to accept as timely an RFA sent in an envelope *postmarked* on or before the July 15 deadline.[5] This "postmark" interpretation of the deadline was implemented when a large number of applications with postmarks of July 15 or earlier were received shortly after the deadline. The Division recognized that fishermen (often at sea at that time of year) had understandable difficulties in making sure that their applications would be delivered to the Division by the deadline. This "in-house" rule was never publicly announced, and was not formalized until after the deadline had passed.[6]

The facts about the filing of Mr. Ramos' application are not in dispute. On the morning of July 15, 1994, Ms. Clydina Bailey of the Division's staff received a phone call from a woman who identified herself as Mr. Ramos' daughter. The woman inquired about what was needed for her father to qualify under the IFQ Program. When Ms. Bailey informed her that the application was due in the office by 5 p.m. that day (the "postmark interpretation" was not yet agency policy), the caller closed the conversation. She had not given her full name or her phone number, so Ms. Bailey had no means of re-contacting her.

When that conversation ended, Ms. Bailey tried to locate Mr. Ramos by telephone to help him file his application right away. She made several calls, and finally reached the office of Sitka Sound Seafood in Yakutat, where Mr. Ramos sells his fish. A woman answering the phone agreed that if Ms. Bailey would fax an RFA to her she would have Mr. Ramos fill it out and return it to the Division. Ms. Bailey faxed the RFA within about two hours of that conversation.

Nothing had been received from Mr. Ramos by the time the Division office closed that day for the weekend (at about 5:00 p.m.). On Sunday afternoon, July 17, while the office was officially closed for business for the weekend, the Appellant's completed RFA arrived at the fax machine in the Division. The fax cover sheet was addressed to Ms. Bailey "from Nancy Remme for George,"[7] and included the note: "George was fishing on the 15th so just received your fax."

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

[6]No criticism of the policy of considering an RFA to be an "application," or of the postmark interpretation, is intended here. Both were properly implemented summarily to remedy practical problems. Also, both merely lifted needless or unduly harsh restrictions or procedural steps. My point in mentioning that there was no public announcement of the "postmark interpretation" is to illustrate that granting after-the-fact relief in this case would be consistent with the Division's practice in implementing the deadline rule.

[7]Nancy Remme is an employee of Sitka Sound Seafood.

The only reason the Appellant offers in support of his appeal is that he filed late because he did not receive the "Form A application" until two days after the filing deadline.[8]

ISSUE

The issue for decision in this appeal is whether NMFS should accept Appellant's application as timely filed.

It must be stated here, however, that the equities in this particular case have highlighted an additional concern involving all of the "late filing" cases. Namely, they call into question the rationale behind the Division's current interpretation regarding the effect of the filing deadline (embodied in the policy that late applications "shall not be considered"). The Division's interpretation of that policy is that a late filing of an application permanently bars the applicant from receiving an initial issuance of Quota Share from NMFS.[9] This matter is separately raised for consideration by the Regional Director and will be discussed in more detail in connection with whether discretionary relief should be granted in this case.

The special connection between this case and the "permanent bar" policy is this:

> (1) *Concerning the present case*: This case suggests that there may not be an identifiable (or at least not a compelling) reason to reject this Appellant's application as late insofar as it was received at NMFS over the July 16-17 weekend. Even though, in a technical sense, the application arrived late at the Division, delivery during the period between the close of business on Friday and the opening of business on Monday could not have caused the agency any delay in processing this application, whereas the rejection of his application significantly disadvantages this Appellant.
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> (2) *Concerning the permanent bar of late applicants from receiving initial QS under the IFQ Program*: Even though applications filed after July 15 can reasonably be rejected as being too late to result in an allocation of IFQ *for the 1995 fishing season,* it is not clear what important purpose is served by rejecting such applications for purposes of participating in *all future seasons as well as the 1995 season* merely because it was received too late for use in connection with the first season under the Program.[10]

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[8]Minor editing supplied; "Form A" refers to the RFA form for individuals.

[9]There is no provision in the IFQ program for processing any application filed after July 15, 1994, unless such an application is found on appeal to have been timely filed.

[10]The permanent disqualification associated with the late filing of applications has been an equitable consideration in all untimely filing appeals. The severity of the consequences of finding an

DISCUSSION

I. WHETHER THE APPELLANT IS ENTITLED TO RELIEF. The July 15 deadline was at first announced as requiring **actual agency receipt** of an application by July 15. But by liberalizing the rule through its "postmark" interpretation, NMFS implied that it was willing to regard the deadline as requiring, in essence, only:

> ... that an applicant either deliver an RFA to the agency *by that date* or otherwise take decisive action *by that date* to complete his or her filing, as by depositing an RFA into the mail. (Michael B. White, Appeal No. 94-0009, January 17, 1995; aff'd. by the Regional Director January 20, 1995; emphasis added.)

Note that while the "postmark" interpretation permitted some applications to be considered even though they arrived in the Division's offices after July 15, that date was still used to define the outer limit of the filing period. The Appellant in this case failed to meet the deadline under either the "actual receipt by July 15" rule or the liberalized "decisive action by July 15" policy.

The Appellant does not dispute the lateness of his application. His only claim in support of his appeal is that he filed his application late because he did not receive an RFA form from the Division until two days after the deadline. This alone is not a basis for relief, even as a matter of agency discretion. NMFS duly published its regulations in the FEDERAL REGISTER. That publication gave "constructive notice" to the public of the requirements of the Program. An agency is entitled to consider publication of its regulations in the FEDERAL REGISTER as giving effective notice to the public, even if some people may not receive "actual" notice of the regulatory requirements. In other words, when regulatory requirements are properly published, the law shifts to the affected public the burden of finding out about those requirements.[11]

The Division also carried out an extensive campaign to publicize the IFQ Program. This effort included news releases, public service announcements, paid advertisements, media interviews, public information workshops, and presentations at public meetings. The campaign was carried out throughout Alaska

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application not timely filed has caused the appellate officers not only to examine individual situations with reasonable care to see that qualified applicants are not barred from the program by mistake, but also to examine them closely and to resolve most credibility questions in favor of the applicant. (For various reasons, one must reject any contention that a fisherman denied initial QS is not barred from the fishery because he can buy QS from others. It is enough to say that this is a *restricted access* program and we must presume that it achieves that purpose.)

[11]For a more complete discussion of this rule, *see* Wayne H. Brosman, Appeal No. 94-007, decided January 10, 1995, affirmed January 13, 1995.

and specifically in Yakutat, which is the Appellant's address of record. In addition, the Division took steps to reach every person it was aware of who might be a likely applicant. For example, in December 1993 and January 1994, the Division mailed between 5,500 and 6,000 RFA forms to persons listed in the Division's database. The Division was unaware of this Appellant's potential interest in applying for inclusion in the Program because his name did not (and still does not) appear in the Division's database of persons who owned or leased vessels that made legal landings of halibut or sablefish during the qualifying years of 1988, 1889, or 1990.[12]

Although I conclude that this Appellant's application was not timely filed in a technical sense, I find it proper to note and consider that his application actually arrived in the Division's office over the weekend following the Friday, July 15 deadline, while the office was closed.[13] From the standpoint of being in the agency's hands for the purpose of processing, his RFA was received exactly at the deadline. As a practical matter, there is no difference between an application that was personally delivered to the office right at the close of business Friday afternoon and one that arrived by fax on Sunday; neither would have been processed until at least Monday morning. In fact, the Appellant's application was received by the Division before *any* of those that were postmarked on July 15.

In this situation, it is difficult to identify a significant purpose that is served by refusing to accept and process this Appellant's application, thereby denying him the opportunity to show his qualification for the Program.

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[12]This appeals officer has informed the Applicant, both orally and in writing, of this apparent substantive problem with his application and has advised him of the need to provide the Division with evidence that he made legal landings of the covered species during the qualifying years.

[13]The question of when it is proper for an agency's judicial officer to raise theories that the parties have not themselves raised is relevant to both of the matters discussed in this decision, i.e., whether Mr. Ramos' application should be deemed timely filed and the extent of the consequences of a person's failure to apply in time to obtain 1995 IFQ. Although the judicial officer should refrain from becoming an advocate, the officer should not avoid examining obvious and important considerations bearing on the correctness of the agency's treatment of an appellant, especially where the appellant is unrepresented by counsel.

The IFQ regulations provide that an appellate officer will limit review to issues stated in the appeal [50 C.F.R. § 676.25(f)]. However, this provision should not be interpreted to exclude issues apparent to the appellate officer from the most basic facts of the case, such as when a purportedly late application actually arrived in the Division. Such issues may reasonably be viewed as implicitly "stated" in the appeal, particularly where an appellant is unrepresented by counsel. A contrary interpretation would be particularly unfortunate where the merits of the issue are affected by considerations that are likely to be outside the appellant's knowledge, such as unpublished interpretations of the relevant rule that gave some relief to other applicants.

A court might consider it an abuse of discretion for the agency to refuse relief under these circumstances, but I refrain from making such a ruling and I defer to the Regional Director. Under the unique facts of this case, I think it appropriate for him to decide whether the Division's treatment of this Appellant was reasonable when compared to its treatment of the beneficiaries of the "postmark" interpretation.[14]

II. WHETHER THE APPELLANT SHOULD BE GRANTED RELIEF AS A MATTER OF AGENCY DISCRETION. As discussed above, the initial administrative determination in this case gave this Appellant less accommodating treatment -- in terms of overlooking actual lateness in receiving applications -- than it gave to the people who benefited from the agency's "postmark" interpretation. This alone may be sufficient reason for the Regional Director to grant discretionary relief by directing that this Appellant's application be accepted for processing. But discretionary relief may be warranted for additional reasons as well. These are discussed below.

On balance, I would recommend that NMFS grant discretionary relief to this Appellant.[15] Although an appeals officer may order relief to correct an abuse of discretion, an appeals officer cannot exercise the agency's discretion. An appeals officer may find facts, interpret rules, and suggest how the agency should exercise its discretion in a particular situation.[16]

To justify discretionary relief, a party must show not only that relief should be granted as a matter of fairness," but also that such relief *is consistent with*, and will not undermine, *the purpose of the*

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[14]First, it would arguably not be an abuse of discretion for the agency ultimately to deny relief in this case. To grant relief would at least on the surface seem to abandon July 15 as the defining date for the end of the application period, which seems to go beyond the "postmark" interpretation or any other agency ruling to date. Also, it seems preferable in this instance for the agency, rather than an appellate officer, to consider ordering relief because such action might be perceived as *amending* a rule rather than *interpreting* it. It is clearly not within the authority of an appellate officer to engage in rulemaking.

[15] The policy would necessarily apply to others in this Appellant's situation, but no other applicants faxed their applications into the Division's office over the weekend following the deadline.

[16]Some decisions "order" a discretionary agency action, but this is a device to allow the agency to take the action, if it chooses to, by simply affirming the appeals officer's decision or allowing it to become the final agency action automatically at the end of the period specified for review by the Regional Director. Also, the appeals officers have used this device only when the relief can be fairly considered to involve merely interpreting an existing rule rather than implementing an entirely new policy.

particular rule in question."[17] In this case, relief would clearly be consistent with the purpose of the July 15 deadline if the sole purpose of the deadline was to allow the agency *thereafter* to proceed with the processing of applications for the issuance of QS in time for the 1995 fishing season. This is the only apparent reason for the deadline, but to say that no other considerations were involved in selecting that date would imply that agencies generally avoid setting filing deadlines to fall on a Friday, which is not true. Agencies and courts, however, often have a rule that when a filing period measured by a fixed number of days would end *on a weekend or holiday*, the period is extended until the end of the next business day. But that rule grants no special accommodation when the period would end on a Friday. This traditional automatic extension of a filing date thus seems to be intended primarily to resolve an ambiguity rather than to give people the benefit of additional time when a technical delay would not matter. But since the advent of the fax machine, this type of rule may incidentally serve that latter purpose also, as this technology has made the receipt of documents by an agency while it is closed not only a possibility, but a commonplace event.

Given these opposing considerations, one cannot say that it was unreasonable for NMFS to set the filing deadline for the IFQ Program to fall on a Friday. However, in considering whether relief in this case would be consistent with the purpose of the deadline rule one should also place on the balance scale the consideration that the agency has given significant accommodation to those who filed their applications by mail.

Accepting an application faxed into the Division's offices over the July 16 - 17 weekend would also not appear to "undermine" the rule by setting a precedent for accepting even later filings. That weekend is unique in being the only period in which a "late" filing could not have delayed the agency in moving forward to the next stage of the IFQ Program.

The factor that in my view tips the scale toward recommending that the agency grant relief to a person who filed his application by fax over the July 16 - 17 weekend is the relative significance of the stakes involved for the agency and the applicant -- particularly where a finding that an application was "late" permanently bars the applicant from receiving a grant of fishing rights under the IFQ Program. While one might rationalize that losing fishing rights for a single season is a heavy but justifiable price to pay for "sleeping on one's rights," I cannot explain to this Appellant[18] why his application should not be processed now, and if he is eligible for QS and IFQ, why he should not be allowed to receive it and fish with it in future years.

The following analogy may shed light on both this Appellant's unique situation and the apparent

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[17]Michael B. White, Appeal No. 94-009, decided January 17, 1995, affirmed January 20, 1995, at page 5; emphasis added.

[18]Nor (as the logic of this case suggests) to any other late-filer.

harshness of the absolute rule that late applications "shall not be considered."

Compare the IFQ Program to a bus that transports fishermen to the dockside for work. The public interest is presumably best served if all the fishermen who are qualified can catch the bus, but the scheduled departure time must be closely observed to ensure that the bus reaches the docks in time for the beginning of the fishing day. Assume the bus is scheduled to leave the stop at exactly 7:15. If a traffic light at the intersection of the bus stop should happen to turn red at exactly that time, and remain red until 7:18, would there be any reason why the driver should not open the door for a passenger who arrives at 7:17 while the bus is still waiting for the light?

This is similar to this Appellant's situation. What reasons can the driver give for refusing to let this fisherman onto the bus to show his ticket (demonstrate qualification) while the bus is delayed at the intersection? There is no actual delay. Unfairness to others who were on time? To the extent the bus is more crowded than it would have been (dilution of the value of QS granted to each of the other applicants), what right have the other passengers to complain? The bus was designed to carry all the fishermen who have tickets (who can meet the qualifications). The problem is compounded when one considers that when the bus arrives at the same time the next day, and the "late" passenger is still waiting at the bus stop, he will still not be allowed to board.

The agency may have valid reasons to enforce its deadline strictly. For example, NMFS provided ample public notice and opportunity for this Appellant and others to comply with the July 15, 1994 deadline. In this situation, the agency may consider the expenditure of further time and resources to process late applications unjustified. However, the reasonableness of this policy may depend on whether the disqualification for late filing is permanent.

RECOMMENDATIONS

For the reasons discussed in this decision, it is recommended that the Regional Director exercise his discretion to require the Division to process this Appellant's application as if it had been timely filed.

It is separately recommended[19] that NMFS consider whether any change should be made in the current policy and rule that the late filing of an application permanently bars the applicant from receiving initial Quota Share under the IFQ Program.

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[19]This Appellant's case is the only one in which an applicant filed beyond the deadline but clearly without the possibility that this lateness could cause the agency actual delay in processing. Thus the Regional Director could grant relief to this Appellant without at the same time deciding whether the "permanent bar" aspect of the deadline rule is justified as a general rule.

DISPOSITION AND ORDER

The Division followed the regulations in denying this Appellant's application as untimely, and its action is therefore AFFIRMED. This decision takes effect on April 19, 1995, unless by that date the Regional Director orders review of the decision.

Kenneth R. Clark
Appeals Officer

Concur:

Edward H. Hein
Chief Appeals Officer