

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of )  
 )  
T. SAMUELSON & T. VASILEFF, )  
Appellants )  
\_\_\_\_\_ )  
Appeal No. 94-0011  
DECISION  
September 18, 1995

STATEMENT OF THE CASE

Appellants appeal an initial administrative determination [IAD] of the Restricted Access Management Division [Division] issued on November 14, 1994, that denied their application for Quota Share [QS] for halibut in Area 3A under the Individual Fishing Quota [IFQ] Program for Pacific halibut and sablefish because their Request for Application [RFA]<sup>1</sup> was filed late. The appeal alleges a direct and adverse effect on Appellants. It was timely filed on December 12, 1994. This Appeals Officer denied Appellants' request for a hearing because the relevant facts are not in dispute.<sup>2</sup>

ISSUE

Whether NMFS should accept Appellants' late RFA as timely filed.

BACKGROUND AND DISCUSSION

Appellants are partners in the F/V KAKWIK. Appellant Samuelson, the managing partner, handles all of the partnership's affairs and skips the F/V KAKWIK during halibut openings. Appellant Vasileff is a silent partner who does not participate in the affairs of the partnership and participates in halibut fishing only when Appellant Samuelson is at the helm.

From September 1, 1993, until August 15, 1994, Appellant Samuelson took a sabbatical from his Anchorage medical practice to travel and work abroad. He hired a bookkeeper to monitor his mail during his absence and instructed her to forward all correspondence concerning the F/V KAKWIK, including letters from the National Marine Fisheries Service [NMFS], to Appellant Vasileff. Otherwise, Vasileff, who also practices medicine in Anchorage, maintained his "silence" with regard to the

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<sup>1</sup> An RFAs is the equivalent of an application for the purpose of meeting the application filing deadline under the IFQ program. *See, Keith A. Buehner*, Appeal No. 94-0001, September 26, 1994, affirmed March 2, 1995.

<sup>2</sup> During a teleconference on March 21, 1995, the appellate officer notified Dr. Samuelson that the absence of contested facts made a hearing unnecessary. 50 CFR 675.25(g)(3)(i) allows a hearing when there is a "genuine and substantial issue of adjudicative fact for resolution."

operation of their partnership. For example, the F/V KAKWIK did not participate in halibut openings during Dr. Samuelson's sabbatical.

In the fall of 1993, Dr. Samuelson's name surfaced as the lead contact for the partnership during the Division's search for potential QS holders.<sup>3</sup> The record shows that in early January 1994, the Division mailed an RFA form to the partners at Dr. Samuelson's address by third-class bulk rate (with return postage guaranteed). The U.S. Postal Service returned the forms to the Division on January 6, 1994, with the notation "TEMPORARILY AWAY." Normally, first-class mail is forwarded or returned to the sender. Third-class bulk-rate mail would be discarded unless, as in this case, return postage was guaranteed. The Division remailed the RFA on April 21, 1994, by first-class mail. Therefore, in the absence of evidence to the contrary, it can be presumed that the Postal Service either delivered the RFA packet to Dr. Samuelson's address or forwarded it pursuant to his request.<sup>4</sup> The record shows no further action on the application by the Appellants or NMFS through the end of the application period on July 15, 1994.

The first indication of the partnership's interest in halibut QS came October 13, 1994. Dr. Samuelson states in the appeal that on that date he heard for the first time a radio news report about the IFQ program. He called the Division the same day to obtain application forms and was told of the July 15 deadline. The Division sent the RFA forms to him on October 25, 1994. Dr. Samuelson completed and signed the forms on October 28, 1994. They arrived at the Division office on November 4, 1994 - 16 weeks after the deadline. Ten days later, the Division issued an IAD denying the application because it was not timely filed.

The IFQ program established an application period beginning January 17, 1994, and ending at close of business on July 15, 1994, and warned that applications "received after the close of business on July 15, 1994, will not be considered."<sup>5</sup> Under a liberal interpretation of the deadline rule, the Division

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<sup>3</sup> The Division retrieved names and addresses of persons potentially eligible to qualify for QS from state and federal records and from the International Pacific Halibut Commission.

<sup>4</sup> Other cases have relied on post office procedures for similar presumptions about the disposition of mail. *See, e.g., Michael B. White*, Appeal No. 94-0009, January 17, 1995, affirmed January 20, 1995 (At page 4: "Envelopes are usually, but not necessarily, postmarked on the date they are put into the mails.") *See also, Roy O. Pederson*, Appeal No. 94-0002, March 22, 1995, affirmed April 21, 1995. (At pages 2-3: ". . . the Postal Service ordinarily postmarks mail on the same day it is collected from a mailbox.") With regard to forwarding services, the Postal Service does not release information such as customer forwarding requests and instructions.

<sup>5</sup> *See*, 59 Fed. Reg. 701-702 (1994).

accepted some RFAs that were delivered after the deadline.<sup>6</sup> Thus, for the purposes of meeting the filing deadline, the Division accepted as timely filed any completed RFA that was postmarked on or before July 15, 1994.<sup>7</sup> The July 15 deadline has also been deemed satisfied if an applicant or someone acting on behalf of an applicant took decisive action by that date to complete the filing.<sup>8</sup>

In this case, the Appellants took no action (let alone *decisive* action) to complete the filing of the partnership's RFA or application by the filing deadline. Nor is there any evidence in this case that the Appellants constructively filed their RFA or application by the deadline. Appellants acknowledge the lateness of their filing, but they argue that the filing deadline should be waived or extended for them because they did not receive actual notice of the IFQ program until after the filing deadline. They state in their appeal that their bookkeeper did not forward the mail as she was directed to do (in written instructions) and, therefore, Dr. Vasileff never received the RFA packet that the Division sent to Dr. Samuelson. They argue that these facts, together with Dr. Samuelson's absence from the United States during the entire application period, constitute "truly unique circumstances" that compel the granting of relief on appeal.

Appellants seek an exception to the filing deadline because they did not receive actual notice.<sup>9</sup> A government agency, however, is not generally required to give actual and personal notice of a legal obligation or opportunity to every affected individual.<sup>10</sup> Instead, in most circumstances, the doctrine of constructive notice serves to satisfy notice requirements under the due process provisions of the United

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<sup>6</sup> See, e.g., Wayne H. Brosman, Appeal No. 94-0007, decided January 10, 1995, affirmed January 13, 1995 (At page 2: "The Division has already demonstrated a policy of liberally interpreting the deadline regulation.")

<sup>7</sup> See, Memorandum of Philip J. Smith for the record, July 26, 1994.

<sup>8</sup> See, Michael B. White, *supra*, in which the presumption that Appellant's RFA was mailed on the postmark date of July 18, 1994, was countered by evidence that the RFA had actually been mailed on or before July 15, 1994; Keith T. Sugiura, Appeal No. 94-0005, April 20, 1995, affirmed April 28, 1995, in which surrendering control of mail for future deposit by fishing company was held to be the functional equivalent of personally depositing the letter in the USPS; and Wayne H. Brosman, *supra*, in which Appellant's late application was found timely because his former partners, in their own applications, had provided to the Division all the information needed for Brosman's application before the deadline.

<sup>9</sup> For purposes of this appeal, I accept Appellants' assertion that neither of the partners received actual notice, notwithstanding the possibility that the bookkeeper may have received notices sent by the Division to Dr. Samuelson.

<sup>10</sup> Some agencies are statutorily required to provide actual notice of the application period for certain federal benefits. See, e.g., 38 U.S.C. § 7722, cited in Smith (Edward F.) v. Derwinski, 2 Vet. App. 429, 432-33 (1992).

States Constitution. This doctrine allows an agency to rely on publication of its actions in the Federal Register to notify the public. Nonetheless, an agency can waive constructive notice in appropriate cases, such as where an applicant was outside the mainstream of information distributed by the Division and the agency had made no attempt to provide the applicant with the notice given to the vast majority of other potential applicants, even though the agency had in its records the applicant's current mailing address.<sup>11</sup>

While I am persuaded that Dr. Samuelson was outside the mainstream of information concerning the IFQ program, Dr. Vasileff was not. During the application period, when the IFQ program was being publicized throughout Alaska, Dr. Vasileff was in Anchorage practicing medicine. As a resident of Anchorage, even though he may have lacked actual knowledge of the considerable local publicity about the IFQ program,<sup>12</sup> it is reasonable to charge him with constructive notice of the program. In particular, although Dr. Vasileff is depicted in the appeal pleading as a "silent" partner who relied completely on Dr. Samuelson to manage the business and engage in actual fishing, partnership law does not absolve Dr. Vasileff of fully shared responsibilities for the legal obligations of the entire partnership.<sup>13</sup> Because the bookkeeper was instructed to forward all mail related to the partnership's vessel to Dr. Vasileff, it is reasonable to presume that he expected to handle any business related to the vessel while Dr. Samuelson was out of the country (and that Dr. Samuelson expected him to do so). Thus, it is reasonable to conclude that Dr. Vasileff received constructive knowledge, if not actual knowledge, of the IFQ program.

Appellants state that "We should not be penalized for the failure of our bookkeeper to perform her duties. It is not fair or equitable to deny our 'Request' based on someone else's failure." The law, however, is otherwise. Even if the Division were required to provide actual notice (which it is not), the partners are themselves to blame for failing to receive such notice. That the bookkeeper may have failed to perform her duty to forward mail properly does not excuse the partners' failure to file their RFA by the deadline. The bookkeeper was their agent and, as such, her negligence is attributable to them. Under the most fundamental principle of agency law, "He who acts through another, himself

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<sup>11</sup>See, e.g., Brosman, *supra* at 4.

<sup>12</sup> The Division engaged in a variety of means to publicize the IFQ program in the Anchorage area. See, Memorandum of Philip J. Smith on "Public Information Regarding the IFQ Program and the July 15, 1994 Deadline for Submission of Requests for Application for Quota Share." The Director's memo details publicity in Anchorage at fisheries and civic meetings, through news accounts and notices in newspapers, and on numerous radio stations and television channels.

<sup>13</sup> See, e.g., Uniform Partnership Act at Section 9; Alaska Statutes 32.05.040: "Every partner is an agent of the partnership for the purpose of its business, . . . the act of each partner . . . binds the partnership . . ."

acts."<sup>14</sup>

The absence of actual notice in this case does not absolve the partners of the responsibility of keeping informed about the regulatory requirements. Fishing is a highly regulated industry. It is a fisherman's responsibility to keep informed of applicable regulations. This responsibility cannot be shifted to the management agency<sup>15</sup> or excused because of an agent's apparent neglect.

#### DISPOSITION

The Division's initial administrative determination denying Appellants' application as untimely filed is **AFFIRMED**. This decision takes effect on October 18, 1995, unless by that date the Regional Director orders review of the decision.

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John G. Gissberg  
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

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Edward H. Hein  
Chief Appeals Officer

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<sup>14</sup> See, e.g., Harold G. Reuschlein, and William A. Gregory, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 1 (1979).

<sup>15</sup> The agency in this case attempted to provide actual notice. Its efforts were frustrated because either the bulk mail was not forwarded or the bookkeeper was negligent, or both. It remains unclear, however, what became of the RFA sent to Dr. Samuelson by first-class mail on April 21, 1994.