

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 94-0003
)	
KURT E. DANIELSON,)	DECISION
Appellant)	
)	November 30, 1995
_____)	

STATEMENT OF THE CASE

Appellant Kurt E. Danielson has appealed an initial administrative determination of the Restricted Access Management Division [Division] of the National Marine Fisheries Service [NMFS], dated August 19, 1994. The Division denied Appellant's application for Quota Share [QS] under the Individual Fishing Quota [IFQ] Program for Pacific halibut and sablefish because his Request for Application [RFA] was not filed by the filing deadline, July 15, 1994. This appeal was timely filed on October 11, 1994. An oral hearing by telephone was held on January 28, 1995, before the Chief Appeals Officer, Edward H. Hein. The Appellant and his mother, Mrs. Jean Danielson, were the only witnesses. Appellant waived his right to a 30-day advance notice of the hearing.

ISSUE

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

BACKGROUND

According to Division records, the Division mailed Appellant an RFA on three separate occasions: December 30, 1993, May 27, 1994, and June 15, 1994. A reminder postcard was also sent on April 5, 1994. In spite of Appellant's contrary assertion in his written appeal, the Division's records show that the mailings were sent to the Appellant's correct address in Lynnwood, Washington. Appellant acknowledged during cross-examination that he had not moved and this was his only address during that period. Appellant testified, however, that he never received an RFA before leaving for fishing in Alaska in May 1994; and that before he left, he told his wife to "take care of the issue." (The Division's records show that the RFA that was sent to Appellant on May 27, 1994, was in response to a May 23, 1994, request from an unidentified source, which was undoubtedly the Appellant or his wife).

Appellant testified that he called his wife in June 1994, from Alaska to ask if his RFA had arrived and that she told him it had not arrived. On or about July 5, 1994, the Appellant phoned his mother from Alaska and asked her to help get him an RFA. Mrs. Danielson testified that she phoned the Division a day or so after the call from her son and was told that an RFA would be sent to Appellant's home address. (The Division has no record of receiving the phone call or of a request for an RFA in July

1994, or of sending Appellant an RFA in July 1994). Mrs. Danielson testified that her daughter-in-law told her that she received it before the application filing deadline. She estimates her daughter-in-law would have received it on or about July 12, 1994, a day or two after her phone call to the Division. Mrs. Danielson also testified that she phoned her daughter-in-law that week, reminded her of the filing deadline, and urged her to send in the RFA by overnight mail, if necessary.

Appellant testified that his wife, Roberta Danielson, told him that she did not receive the RFA until the deadline day itself. Appellant's wife signed the RFA for Appellant, as power of attorney, dating it July 11, 1994. Appellant speculated on cross-examination that his wife may have back-dated the document. (In his written appeal, Appellant was more matter-of-fact about it, asserting his wife backdated the document, and that it was done because she did not receive it in time to be mailed by the deadline date). The RFA was postmarked July 16, 1994, one day after the filing deadline, and it arrived at the Division on July 18, 1994. Appellant returned home from fishing in Alaska in September 1994.

On November 11, 1994, and December 12, 1994, Appellant filed letters with the Division in support of his appeal, alleging, in essence, that he should be granted relief because neither he nor his wife received an RFA in time to be filed by the application deadline. Appellant claims his RFAs of December 1993, May 1994, and June 1994, were mailed to the wrong address; and that the Division did not send him an RFA in time to be timely filed, even though his mother had requested one approximately ten days before the deadline. In the alternative, Appellant contends he should receive relief because he wasn't home to receive an RFA, but his wife was, and that it was she, not he, who failed to act.

DISCUSSION

The Division treats an RFA as an application for QS for purposes of meeting the timely filing requirement.¹ The regulations implementing the IFQ program provide that an application received after July 15, 1994, "will not be considered."² However, the Division, as a matter of practice, has accepted as timely filed any RFAs postmarked on or before the July 15, 1994, filing deadline.³ An RFA postmarked after the deadline may also be considered timely filed if it is shown that it was, in fact, mailed on or before that date.⁴ This is because mail is sometimes not postmarked on the same day it is

¹An RFA is the equivalent of an application for the meeting of the application filing deadline under the IFQ program. See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

²59 Fed. Reg. 701, at 702 (1994).

³Policy announced July 26, 1994, by Philip J. Smith, Chief, RAM Division.

⁴See Michael B. White, Appeal No. 94-0009, January 17, 1995, *aff'd* January 20, 1995.

deposited in the mail.⁵ A postmark is merely evidence of the date of mailing and can be challenged by introducing competent evidence to the contrary on appeal. As we stated in White, the Division interprets the application filing deadline as requiring that an applicant either deliver an RFA to the agency by the July 15, 1994, or otherwise take decisive action by that date to complete the filing of the RFA, such as by depositing it in the mail.⁶

While NMFS regulations allow the admission on appeal of any evidence that is "relevant, material, reliable, and probative,"⁷ the Appellant has offered no evidence in this case to show that his RFA was mailed on a date different from its postmark date, or that he, or anyone on his behalf, took decisive action by July 15, 1994, to complete the filing of the RFA. Because the RFA was postmarked July 16, 1994 -- one day after the filing deadline -- the RFA must be considered untimely filed.

Appellant's claim that he never received an RFA until July 15, 1994, is not credible. An RFA was sent to his home on three separate occasions, over a period of six months, and none was returned as undeliverable. A separate reminder was sent, as well, during that same time period. Appellant also knew before his May 1994 departure to Alaska (approximately two months before the RFA deadline) that an RFA had to be filed by July 15, 1994. His wife's failure to act properly on his behalf does not excuse the late filing. The Appellant chose his wife to be his agent and, as such, her negligence is attributable to him. Under the most fundamental principle of agency law, "He who acts through another, himself acts."⁸ Because the Appellant's livelihood is fishing, it is regrettable that I must find that he is not entitled to relief.

FINDINGS OF FACT

1. The Division mailed at least three RFAs to Appellant at his correct address, all of which were presumably received before July 15, 1994.
2. Appellant's RFA was mailed to the Division on the day it was postmarked, July 16, 1994, one day after the application filing deadline.
3. Neither the Appellant, nor anyone on his behalf, took decisive action by July 15, 1994, to complete

⁵See, e.g., Roy O. Pederson, Appeal No. 94-0002, March 22, 1995, at 2, *aff'd* April 21, 1995.

⁶Michael B. White, *supra*, at 4.

⁷50 C.F.R. § 676.25(j)(1994).

⁸See, e.g., Harold G. Reuschlein, and William A. Gregory, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 1 (1979).

the filing of his RFA.

CONCLUSION OF LAW

The Appellant's RFA was not timely filed.

DISPOSITION

The Division's initial administrative determination denying Appellant's application as untimely filed is **AFFIRMED**. This decision takes effect December 29, 1995, unless by that date the Regional Director orders review of the decision.

Randall J. Moen
Appeals Officer