

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 94-0006
)
MELVIN C. SODER,) DECISION
Appellant)
_____)
March 14, 1997

STATEMENT OF THE CASE

Appellant Melvin C. Soder filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on October 17, 1994. The IAD denied Mr. Soder's application for halibut Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because his Request for Application [RFA] was untimely filed. Mr. Soder's interests are directly and adversely affected by the IAD. A telephonic hearing from Juneau was held on April 10, 1995, before Appeals Officer John G. Gissberg.

ISSUE

Whether Mr. Soder's application for quota share was timely filed.

BACKGROUND

Mr. Soder lives in Hawaii during the winter and commercially fishes in the Cordova, Alaska area during the summer. Mr. Soder maintains a year-round Cordova post office box. During the off-season, Mr. Soder has his mail forwarded by the Postal Service to his Hawaii residence.

The Division sent an RFA packet to Mr. Soder at his Cordova address in December 1993. A second RFA was sent to the same Cordova address on or about June 15, 1994. The Division received Mr. Soder's completed RFA by mail on September 29, 1994. The envelope containing the RFA was addressed to the National Marine Fisheries Service in Juneau, Alaska. The envelope displayed a Honolulu, Hawaii, postmark dated September 24, 1994, and Mr. Soder's Cordova, Alaska, post office box as the return address. The RFA was signed by Mr. Soder and dated June 20, 1994.

In an IAD issued October 12, 1994, the Division determined that Mr. Soder was ineligible for QS because his RFA was filed after the July 15, 1994, application deadline. On appeal, Mr. Soder asserts that he, in fact, mailed his RFA from Cordova on July 14, 1997, and that, therefore, his application should be accepted as timely filed.

DISCUSSION

Under the IFQ program, an application for QS will not be considered if it is received after the close of business on July 15, 1994.¹ The Division treated an RFA as the equivalent of an application for the purpose of meeting the IFQ filing deadline.² In spite of the July 15, 1994 deadline, the Division accepted, as timely filed, an RFA postmarked on or before July 15, 1994.³ An RFA is considered timely filed if it can be shown that it was mailed on or before July 15, 1994, notwithstanding a contrary postmark date.⁴

I note that the U.S. Postal Service ordinarily postmarks mail on the same day it is collected from a mailbox, that the city on the postmark is ordinarily in the same geographical area where the mailbox is located, and that the postmark at least shows the same state in which the mailbox is located. Thus, the postmark on the envelope that contained Mr. Soder's RFA is evidence that the RFA was mailed on September 24, 1994, from a mailbox in or near Honolulu and, at the very least, from Hawaii, not Alaska.

At the hearing, Mr. Soder testified that he mailed the RFA at the Cordova post office on July 14, 1994. He stated that in 1994 he was in Cordova from about May 15 until the end of August. He could not explain how his RFA received a Honolulu, Hawaii, postmark dated September 24, 1994.

Mr. Soder's cousin, Gordon A. McElhaney, testified that he picked up Mr. Soder at the dock in Cordova one day during the first part of July 1994, and drove him to the post office to mail some letters. He recalled a sealed envelope with the words, "NMFS," seeing some RFA forms, and discussing the IFQ deadline with him. He could not recall the specific date that he had picked him up, only that it was near the first part of July 1994. He did not actually see Mr. Soder mail the RFA, nor did he say that Mr. Soder told him that he did. Mr. McElhaney stated that the July 15, 1994, deadline was common knowledge at that time, and that everyone in Cordova was constantly reminding one another to get their applications [RFAs] in by that date. Mr. McElhaney also recalled reminding Mr. Soder of the RFA deadline when Mr. Soder flew in to Cordova from Hawaii in either April or May

¹See, 59 Fed. Reg. 701-702 (January 6, 1994).

²See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

³See, Memorandum of Philip J. Smith, July 26, 1994.

⁴For example, see Michael B. White, Appeal No. 94-0009, January 17, 1995, affirmed, January 20, 1995, where the presumption of a late mailing 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; and Keith T. Sugiura, Appeal No. 94-0005, April 20, 1995, affirmed April 28, 1995, where the surrendering control of mail for future deposit was the functional equivalent of personally depositing a letter.

1994.

I find that Mr. Soder has failed to establish by a preponderance of the evidence that the postmark on the envelope in which his RFA was mailed was incorrect. I base this conclusion on several factors: (1) The envelope in which the RFA was received was clearly addressed to the National Marine Fisheries Service in Juneau. (2) There are no marks, notations, rubber stamps, stickers, or other indications on the envelope that it was diverted or delayed enroute to Juneau. (3) Mr. Soder presented no documentary evidence that the envelope was mailed anywhere other than Honolulu, Hawaii, on September 24, 1994. (4) Mr. Soder was unable to describe the circumstances surrounding the mailing, and did not mention the name of his own witness, Mr. McElheney, who claims to have been with him on the day of mailing. (5) Mr. McElheney did not witness the mailing, nor did Mr. Soder tell him when and where he had mailed the RFA. At best, it appears from Mr. McElhaney's testimony that he only assumed that it had been done as Mr. Soder claims. In sum, Mr. Soder has provided no credible explanation for the discrepancy between his assertions and the postmark evidence. I, therefore, find by a preponderance of the evidence that Mr. Soder mailed the RFA from Hawaii on September 24, 1994.

FINDING OF FACT

Mr. Soder did not mail his RFA from Cordova, Alaska on July 14, 1994, but from Honolulu, Hawaii on September 24, 1994, according to the postmark on the RFA's envelope.

CONCLUSION OF LAW

Mr. Soder's application for quota share was not timely filed.

DISPOSITION

The Division's IAD denying Mr. Soder's application as untimely is **AFFIRMED**. This Decision takes effect on April 14, 1997, unless by that date the Regional Administrator orders review of the Decision.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Decision, March 24, 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.

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, and agency policies, and consistency with other appeals decisions of this office.

Randall J. Moen
Appeals Officer