NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of	)	Appeal No. 94-0007
	)	
WAYNE H. BROSMAN,	)	DECISION
Appellant	)	
	)	January 10, 1995
_____	)	

Appellant Wayne H. Brosman appeals an initial administrative determination of the Restricted Access Management Division ["Division"], dated October 17, 1994, which denied his application for Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish because it was not filed with the Division by the filing deadline, July 15, 1994. This appeal was timely filed on November 28, 1994. A telephonic oral hearing was held December 27, 1994, before Chief Appeals Officer Edward H. Hein. Appellant was the only witness. Appellant waived his right to a 30-day notice of the hearing and 30-day notice of the issues. The record was closed on December 29, 1994.

Appellant states in his appeal that the Division's determination has a direct and adverse effect on him because it denies him the opportunity to participate in the halibut fishery in Area 3A. He asks that the determination be reversed.

ISSUE

Whether the Division should accept Appellant's application as timely filed.

DISCUSSION AND FINDINGS

At first glance, there would appear to be no reason to grant Appellant the relief he has requested. His first contact with the Division was on or about September 19, 1994, when he requested a Request for Application [RFA] form. He mailed the completed RFA on September 30, 1994, and it was received at the Division on October 3, 1994 -- 11 weeks after the July 15, 1994, application filing deadline.

Appellant states in his appeal that the reason his RFA was not filed by the close of the application period is that neither of his former partners notified him about the IFQ program until after the filing deadline. This is not a ground upon which relief can be granted to Appellant. Even if Appellant's reliance on his partners had been completely reasonable, their failure to notify him about the requirements of the IFQ program cannot relieve Appellant of his duty to comply with the filing deadline. The IFQ regulations could have been written to permit late filing under any number of circumstances, but they were not. Moreover, provisions for hardship applications were intentionally omitted.

Nonetheless, in light of other circumstances, the Appellant should be granted the relief he seeks.

Foremost among these circumstances, and the determining factor in this decision, is that Appellant's former partners had notified the Division of Appellant's potential eligibility for the IFQ program well in advance of the application filing deadline. The Division had in its files and database Appellant's name, address, Social Security number, and IFQ identification number, as well as other information about his interest in a dissolved partnership whose other members have since qualified for QS.

The Division was thereby in a position to have notified Appellant in time for him to submit an RFA before the filing deadline. Through an oversight, however, the Division did not attempt to contact him or notify him of the application period before that period had expired. Although the Division was not required to provide individualized actual notice of the program to any potentially eligible applicants, the Division voluntarily provided such notice to the majority of those who ultimately applied.

The Division's policy was to try 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. And beginning in May or June of 1994, the Division sent unsolicited RFAs to some apparently eligible people who had recently come to the Division's attention, but who had made no previous contact with the Division. Thus, granting relief to Appellant is consistent with the Division's overall approach to implementing the program.

Any relief granted must be based upon an interpretation of the existing regulations. An Appeals Officer may not create new provisions that neither the North Pacific Fishery Management Council nor the Secretary of Commerce intended as part of the regulations they actually promulgated. Relief can be granted only where it can reasonably be found, as a matter of fact or of law, that the requirements of a particular rule have been met. In this case, I find as a matter of law that the Appellant can be deemed to have complied with the July 15 filing requirement because the Division had been notified of Appellant's potential eligibility before the filing deadline and because the Division would have personally notified the Appellant of the requirements of the program if the Division had been operating optimally.

An administrative agency has inherent authority to interpret its own regulations. In this case, a liberal interpretation in favor of the Appellant would appear to be consistent with the basic intent of the regulation. A regulation establishing a filing deadline is designed to enable an agency to receive and process applications without having to wait an indeterminate period before proceeding with implementation of the program. Unfortunately, a filing deadline can have harsh effects because it results in applications being rejected without any consideration of an applicant's substantive rights under the program. The Division has already demonstrated a policy of liberally interpreting the deadline regulation. Despite the clear language of the regulation, the Division has accepted RFAs in lieu of applications, and has recognized a July 15 postmark as the functional equivalent of timely delivery and filing.

In this case, Appellant's former partners submitted to the agency in a timely fashion the same

information about the Appellant that he was required to furnish in his own RFA. Appellant had been a partner in a partnership named F/V Lady Ruth Ventures from November 1, 1982, until the partnership was dissolved on January 1, 1992. The other partners were Kendal L. Pedersen, IFQ #40500RNLJ, and T. Kent Barker [Terry K. Barker], IFQ #50585FZKS. Each partner had a one-third interest in the partnership and in the vessel owned by the partnership, the F/V Lady Ruth. On June 13, 1994 -- more than a month before the application deadline -- the Division received a completed RFA form from Kendal Pedersen (Exhibit A). This form listed the name, address, and Social Security number of each of the three former partners. Two weeks later, on June 27, 1994, the Division received the same information in a completed RFA form submitted by T. Kent Barker (Exhibit B).

The Appellant testified that he has lived in Missoula, Montana, since February 1991; that the address his former partners provided to the Division for him was his mother's address in Pennsylvania; that he has received mail at that address for many years; that his mother dutifully sends him or informs him of all mail she receives for him. Appellant testified that in mid-September 1994, Kendal Pedersen wrote to him at that address and that Appellant's mother immediately forwarded the letter to him in Montana. Appellant further testified that if the Division had sent an RFA to him at that address, he is certain it would have promptly reached him.

While an administrative agency cannot and should not be held to an unreasonably high standard of actual performance, there is nothing to preclude an agency, in appropriate cases, from giving applicants the benefit of a presumption of optimal or even perfect agency performance. In other words, the Appellant can be treated as if the Division *had* acted optimally -- *had* taken note of the information about him in its files and *had* sent him an RFA before the deadline -- and can consider the filing deadline to have been met. I recommend that the Regional Director adopt this policy in this Appellant's case.

The ruling in this decision should be limited to the particular facts and circumstances of this case. First, Appellant had no actual notice of the IFQ program and its requirements until after the filing deadline had passed. Appellant was not sent an RFA until September 1994, even though the Appellant's name, address, fishing license history, and IFQ identification number had been in the Division's database since late 1993. In addition, Appellant was not exposed to the Division's extensive campaign to publicize the IFQ program during the first half of 1994.

The publicity efforts included, among other things, numerous news releases, public service announcements, paid advertisements, media interviews, public information workshops, and presentations at public meetings. [See Philip J. Smith memorandum of August 11, 1994 (Exhibit C).] This campaign, however, was conducted entirely in the state of Alaska and in the Seattle, Washington, area, where most of the potential IFQ applicants reside. Although the program received additional publicity in other news markets, the publicity did not reach Appellant, a resident of Montana. The Appellant has so testified, and I find his testimony credible.

Second, Appellant reasonably had no constructive notice of the IFQ program. Under the doctrine of constructive notice, an agency is entitled to consider publication of its regulations in the Federal Register as giving effective notice to the public. This doctrine embodies the adage that "everyone is presumed to know the law" even if, in fact, a particular member of the public did not receive actual notice of the regulations. In other words, the law allows an agency to shift to the affected public the burden of finding out about regulatory requirements.

Although the law permits agencies to rely on this constructive notice doctrine, an agency can waive this doctrine in appropriate cases. It would not be arbitrary for the National Marine Fisheries Service to waive that doctrine in this case because the Appellant here was outside of the mainstream of information distributed by the Division -- directly or indirectly -- to the vast majority of applicants. By contrast, if during the application period the Appellant had been residing in Alaska or the Seattle area, where the IFQ program was widely publicized, it would be reasonable to maintain the presumption that he had received constructive notice.

Third, the Division had in its possession sufficient information about the Appellant to have given him actual notice of the IFQ program prior to the filing deadline. The Division knew, or had reason to know, that the Appellant would be interested in applying for QS. Under normal circumstances the Division would have afforded him the kind of timely notice and assistance that it provided to other potentially eligible persons of whom it was aware.

Fourth, taking a liberal interpretation of the July 15 deadline regulation and considering the Appellant as having timely filed does not vitiate the regulation. It also appears that granting relief at this time will not impose an unreasonable administrative burden on the Division and is not likely to impede implementation of the IFQ program.

Fifth, the particular combination of facts and circumstances in Appellant's case is unusual enough that few, if any, other applicants are likely to file similar appeals. Therefore, granting relief to the Appellant in this case is not likely to have a detrimental impact on the administration of the IFQ program.

Another circumstance that contributed to the Appellant's failure to apply before the filing deadline is that, as Appellant stated in his appeal, his former partners did not inform him about the application period until after the filing deadline had passed. As mentioned earlier, this fact does not excuse his failure to meet the deadline, but it did exacerbate Appellant's problems and it helps to explain Appellant's actions.

Appellant testified that, based on his previous dealings with his former partners, he believed that one of them would have let him know about the program, and that he relied on them to do so. Appellant testified that he received no correspondence or communications from Pedersen or Barker during the IFQ application period. Appellant testified that he received two letters from Pedersen in mid-

September 1994 (Exhibits D and E), advising Appellant, among other things, that he might be eligible for QS as a former partner. Pedersen also provided Appellant with the address and toll-free telephone number of the Division.

Appellant testified that once he received notice of the IFQ program from Pedersen in mid-September, he quickly contacted the Division and requested an RFA form. This is consistent with the Division's database records. It tends to show that Appellant took seriously his potential eligibility for QS and that, once he was provided with the necessary information, he did not delay in applying for the program. Although the Appellant's reliance on his partners was misplaced, I find that it was good faith reliance and that it contributed to Appellant's failure to apply for the program by the filing deadline. While this decision is not based on the Appellant's claim that he did not receive timely notice from his former partners, I find that the Appellant's testimony on this point is credible and, in light of all the circumstances, that it lends credibility to Appellant's explanation for his untimely application filing.

A few words are in order here about the Division's role in this matter, which should be understood in the context of its overall approach to implementing the IFQ program. This approach can best be characterized as a commitment to provide as much information and assistance to the public, in a timely fashion, as is possible with a limited staff and a heavy workload. Illustrative of the Division's generally helpful attitude and approach are the extensive publicity campaign, the mailing of thousands of unsolicited RFA forms, the establishment of a toll-free 800 telephone number, and thousands of staff hours spent assisting applicants over the telephone and in person. Despite the Division's best efforts, however, it was inevitable that in the implementation of a new and complex program some people, who would likely be eligible for participation in the program, would "fall through the cracks." That is what happened to the Appellant. This result does not indicate any negligence or malfeasance on the part of the Division.

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 March 16, 1995, unless, by that date, the Regional Director orders review of the decision.

There is still sufficient time for the Division to process the Appellant's application and to include any QS to which he may be entitled in the quota share pool on January 31, 1995, for purposes of calculating Individual Fishing Quotas 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