NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
RESTRICTED ACCESS MANAGEMENT DIVISION

In re Application of	)	Appeal No. 94-0009
	)	
MICHAEL B. WHITE,	)	DECISION
Appellant	)	
	)	January 17, 1995
______________________________	)	

Appellant Michael B. (Brent) White has appealed an initial administrative determination of the Restricted Access Management Division ["Division"] of the National Marine Fisheries Service ["NMFS"] dated August 22, 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 filed with the Division by the filing deadline, July 15, 1994. This appeal was timely filed on December 8, 1994. An oral hearing by telephone was held January 10, 1994, before this appellate officer. Mr. White was the only witness. He waived his right to 30-days' notice of the hearing and of the issues on which testimony was to be taken. The record was closed on January 10, 1994.

Appellant stated 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 Areas 3A, 3B, and 4A. He asked that the Division's determination be reversed.

ISSUE

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

BACKGROUND

The Division treats a Request for Application for Quota Share (an "RFA") as an application for Quota Share. The regulations implementing the IFQ Program provide that an application received after July 15, 1994 "will not be considered." [59 Fed. Reg. 701 at 702 (1994)] However, the Division, as a matter of practice, has accepted as timely filed either an application or an RFA sent in an envelope postmarked on or before the July 15 deadline.

The Appellant's RFA was not received in the Division until July 21, 1994. The envelope was postmarked on July 18, 1994, in Sacramento, California. The envelope (retained by the Division as part of the record) shows that at some time before the postmark date, it had been returned to the

sender's home address in Loomis, California, for lack of 29 cents' postage.

In his appeal, Mr. White stated that on June 30, 1994, he "mailed" the RFA "via hand delivery" to Mark Majdic, the Captain and owner of the M/V Barb M II, a tender for UniSea, Incorporated. The Appellant stated that this exchange took place in the Bering Sea, in or around the Egegik river. Appellant White also stated that upon handing the letter to Mr. Majdic, he explained its importance and mentioned the July 15 deadline for applications under the IFQ Program. Mr. White could not explain the postage due notice, but speculated that "due to the moisture from the sea as well as the rainy weather," the stamp must have fallen off the envelope.

The envelope was returned to the Appellant's home in Loomis, California; postage was added; and the envelope was re-mailed. This mailing resulted in the July 18 postmark.

Mr. White also said in his appeal that he is aware that applications were first sent out in January, and that "more than adequate time" had elapsed between January and June 30th for him to have sent in his application sooner. However, he said he failed to receive that first application because he had moved, and the second application reached him via his wife after some delay, "in part because of the nature of the fishing business, the distances involved and lack of telephones and the time to use them."

Mr. White supported his appeal with written statements by Mr. Majdic and Mr. Robert D. Barcott, the manager of UniSea's operations in Bristol Bay. Mr. Majdic's statement was:

> On 6/30/94 I received a letter from Brent White to be forwarded to NMFS. I specifically remember having a conversation with Brent about the importance of getting this letter sent as soon as possible. I forwarded the letter to the main office in Naknek via helicopter within 12 hours.

Mr. Barcott's statement, on UniSea letterhead, indicated that the records of UniSea confirm that Brent White was fishing in the Egegik district of Bristol Bay at the end of June, 1994, and that the company's helicopter logs show that at least two trips daily were made during that period between its office in Naknek and the Barb M II. Mr. Barcott explained that UniSea routinely delivers marine parts and mail to the Barb M II and other boats, and also picks up outgoing mail from the boats and returns it to the company's Naknek office, and from there delivers it daily to either the Naknek or King Salmon post office.

Mr. Majdic's and Mr. Barcott's statements were not notarized. However, during the hearing on January 10, 1995, the Appellant confirmed their authenticity to my satisfaction. The Appellant also testified that a stamp was on the envelope containing his RFA when he delivered it to Mr. Majdic. He also provided details concerning the rainy weather on June 30, 1994, and of his giving the envelope to the skipper of the UniSea vessel. For example, he mentioned removing his waterproof gloves before

climbing a ladder to transfer the envelope from his boat to the larger vessel.

FINDINGS OF FACT

This appeal centers around Mr. White's purported "mailing" of his application on June 30, 1994. Having considered the Appellant's "Statement in Support of Appeal" and the documents he has produced, and having heard his sworn testimony, I find that the Appellant has established that:

1. On June 30, 1994, the Appellant hand-delivered to Mark Majdic an envelope carrying adequate postage and containing his Request for Application for Quota Share.

2. This action was taken with the intent and reasonable expectation that the envelope promptly would be placed into the U.S. postal system and receive a postmark, or be actually delivered to the Division, by the July 15 deadline.

3. The envelope was promptly placed into the U.S. mails, but at some time before it was to be cancelled at the post office, the stamp became detached from the envelope.

4. Nobody saw the stamp become detached from the envelope, because if either the people helping the Applicant or any postal personnel had seen it happen, they would likely have remedied the problem.

5. The postage became detached from the envelope while in the custody of the U.S. Postal Service rather than while in the hands of Mark Majdic or another of Appellant's agents. I find this to be the much more likely scenario because: (a) the detachment could more easily have taken place unobserved while the envelope was in the custody of the Postal Service; and (b) the Appellant's agents, unlike the Postal Service, would likely have added postage if at any time while they had the envelope they had noticed the absence of a stamp.

6. The envelope was originally placed into the mails before July 15, 1994. I reach this conclusion about the date of mailing because the postmark shows that the envelope was processed for the *second* time on July 18 at Sacramento, California. Since the envelope was put into the mail for the first time at a rural post office in Alaska, it would have taken several days for the postal service to return it to the Appellant's home in Loomis, California; and yet more time must have passed before it was finally postmarked in Sacramento. All of this could not have taken place between the deadline of the close of business on Friday, July 15, and the following Monday, July 18.

DISCUSSION

I. WHETHER THE APPELLANT IS ENTITLED TO RELIEF AS A MATTER OF RIGHT. The Appellant in this case has shown that he actually met the deadline. He is therefore entitled to have his RFA considered to have been timely filed, and does not need to rely on extenuating circumstances or other factors relevant to discretionary relief.

The Division did not fix upon a July 15 postmark in order to distinguish between people who put their envelopes in the mail on or before that date and happened to have them postmarked "July 15" and other people who mailed their RFA's at the same time but were not so lucky. The postmark was chosen simply as a piece of evidence that conclusively shows that an envelope was deposited on or before a particular date. Envelopes are usually, but not necessarily, postmarked on the date they are put into the mails. As shown by this particular case, an envelope can be properly deposited in the mails a substantial time before it receives a postmark. The "postmark" rule (interpreting the July 15 deadline set by the Fishery Management Council and approved by the Secretary of Commerce) is thus not a substantive rule, but a rule of evidence. By this interpretation of the July 15 deadline, the Division decided to accept a particular type of proof that the deadline was met. That decision did not imply that other evidence cannot be considered in the appeals process.

By allowing postmark evidence, however, the Division did imply something about how it interprets the deadline rule substantively. Specifically, the Division showed that it interprets the July 15 deadline as essentially requiring 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 in the mail.

NMFS has no need in this case to rely exclusively on the postmark on the face of the envelope as proving when the Appellant's RFA was properly mailed, because the agency provided him the chance to prove this by other means during the appeals process. Appellant White took advantage of that opportunity and demonstrated that his RFA was mailed on time and with proper postage.

Now that this Appellant has presented his case, NMFS cannot refuse to look deeper than the postmark on the envelope to decide when he properly mailed his RFA. When NMFS instituted the IFQ Program it probably could have decided to accept only physical delivery of applications by July 15, 1994, and to allow no appeals about that rule. Or, under a "July 15 postmark" evidentiary standard it probably could have made clear that only postmarks would be accepted as proof of mailing. Either policy might be justified on the theory that case-by-case review of the facts for an individual applicant would be impracticable. But NMFS' regulations specifically allow parties to appeal any ruling, and to support their appeals with any evidence that is "relevant, material, reliable and probative." [50 CFR § 676.25(j)] Having shown by such evidence that his RFA was mailed before the deadline, this Appellant, I find, is entitled to relief.

II. WHETHER THE APPELLANT SHOULD BE GRANTED RELIEF AS A MATTER OF AGENCY DISCRETION.
Assuming the Regional Director should reject my conclusion that the Appellant is entitled to relief as a matter of right, the question arises whether relief should be granted as a matter of agency discretion.

The regulations require appellants to submit a "full written statement of the reasons why the initial administrative determination has a direct and adverse effect on the applicant and should be reversed or modified." [50 CFR § 676.25(f); emphasis added] By giving appellants a right to show why they *should be granted* relief, rather than why they are *entitled* to it, the appeals regulations suggest the availablity of discretionary relief. By granting applicants a broad right to state their own reasons why any determination should be reversed -- even one that applies a relatively clear-cut rule like the July 15 deadline -- NMFS even more strongly implied that it contemplates sometimes granting relief where an applicant cannot be found to have actually, or substantially, complied with a particular rule.

The possible grounds for discretionary relief under the IFQ Program, however, are not unlimited. The fact that a ruling will result in hardship to an applicant, for example, is in itself not a basis for granting relief. The IFQ Program was based on a recognition that any comprehensive new regulatory plan would cause some unavoidable hardships. The Fishery Management Council decided, after considering this issue, that the regulations should not include a hardship provision. Therefore discretionary relief (relief granted when a rule has not been met) cannot be justified solely by reference to the applicant. In an appeal, 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 particular rule in question.

The Appellant in this case has put forward evidence that I believe shows that the Division's initial determination "should be reversed or modified" as provided by 50 CFR § 676.25(f). The evidence shows that with the help of Mark Majdic and others, the Appellant mailed his RFA in ample time for it to have reached the Division, or at least to have been postmarked, on or before July 15, 1994. It also shows that proper postage was on the envelope. In short, the record shows that the Appellant did everything he could reasonably have been expected to do to meet the terms of the filing deadline, even though he failed to meet the Division's relaxed, but still specific, requirement that he provide the Division with an RFA in an envelope bearing a postmark of not later than July 15.

In addition to taking all the steps one could reasonably require of him concerning the deadline, the Applicant actually achieved the sending of an RFA with a postmark of Monday, July 18, which is consistent with the actual depositing of the envelope -- *even the second time* -- into the U.S. mail system on the day of the deadline -- Friday, July 15. (Assume, for example, that there was no pickup over the weekend from mail depositories outside, or even inside, the post office.) This could be considered substantial, even if not actual, compliance with the rule. Substantial compliance with a rule

is a recognized grounds for granting relief, either as of right or as a matter of discretion. In any event, the fact that the Appellant may have gotten his RFA (carrying the stamp that actually received the postmark) into the mails by the deadline clearly shows that the purpose of the deadline rule would not be undermined by granting relief in this case.

As mentioned above, the record also contains evidence that the Appellant failed to receive the first application the Division sent to him, and that there were understandable reasons why he finally mailed his RFA near the end of the overall application period. I find this evidence credible. It further tends to show that granting the Appellant the relief he seeks would be fair. Subject to review by the Regional Director, that is my conclusion and recommendation.

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 22, 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.

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Kenneth R. Clark
Appellate Officer