

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 95-0016
)	
SCOTT M. GILBERT,)	DECISION
Appellant)	
_____)	June 26, 1998

STATEMENT OF THE CASE

Appellant Scott Gilbert filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management program¹ [RAM] of the National Marine Fisheries Service on March 6, 1995. The IAD denied Mr. Gilbert's application for halibut quota share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program because his Request for Application [RFA] of QS was not filed by the July 15, 1994 deadline. Mr. Gilbert's interests are directly and adversely affected by the IAD. A hearing was held on June 30, 1995. Mr. Gilbert, and Ms. Tracy Buck, a permit specialist with RAM, testified at the hearing. The record was closed on July 6, 1995.

ISSUE

Whether Mr. Gilbert's application for QS (RFA) was timely filed.

BACKGROUND

Mr. Gilbert claims that he filed an RFA by mail from Portland, Oregon, on January 12, 1994, but that the RFA was returned to him by mail in March or April 1994, with a handwritten post-it note from RAM stating that the RFA would not be processed without a vessel registration number. RAM has no record of receiving or returning an RFA from Mr. Gilbert prior to the deadline of July 15, 1994, nor of sending him a post-it note. Mr. Gilbert does not recall any other specifics regarding the mailing of his RFA. RAM's records show that RAM did not receive an RFA from Mr. Gilbert until February 17, 1995, seven months after the deadline. The RFA received by RAM is date-stamped, February 17, 1995, and signed January 6, 1994, by Mr. Gilbert.

Ms. Buck, who has been a permit specialist with RAM since March 1994, testified that it was not the practice of RAM to return an RFA to an applicant, even without a vessel registration number. Ms. Buck testified that every piece of mail received by RAM is routinely opened, date stamped, and copied

¹The Restricted Access Management Division was renamed Restricted Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

upon receipt, with both the original and a copy of the original filed; and that written correspondence with an applicant is done via letter, not a handwritten post-it note, with a copy of the letter retained in the applicant's file.

Ms. Buck testified the procedures at RAM were set up by Mr. Shawn Carey, beginning December 1993, and formalized by Ms. Jessica Gharrett, RAM's operations manager, in a written memorandum on April 7, 1994. The memorandum instructed all staff to log in, copy, and file all RFAs received by RAM. Ms. Buck also testified that based on her own knowledge, and what Ms. Gharrett has told her, the procedures have never changed.

Mr. Gilbert testified that he went into the RAM office in Juneau on or about March 27, 1994, to inquire about his RFA, and was told there was no record of him having sent in an RFA; and that he received a second RFA from RAM, and a vessel registration number for his new vessel, in June 1994. Mr. Gilbert could not explain why did not return his RFA before the deadline after obtaining a new vessel registration number, when he knew that RAM had no record of him filing an RFA.

DISCUSSION

Under the regulations of the IFQ program, applications for QS must have been filed with RAM before the close of business on July 15, 1994.² Applications for QS received after that date are not considered for QS.³ To be considered timely filed, applications for QS must have been mailed or postmarked before July 15, 1994.⁴ An RFA is the equivalent of an application for QS for purposes of meeting the deadline.⁵

Mr. Gilbert claims that he mailed his RFA on January 12, 1994, before the application for QS deadline, but that it was subsequently returned to him by RAM, with a handwritten post-it note instructing him to provide a vessel registration number.

Mr. Gilbert is adamant about the date of the mailing, but cannot explain why he knows it was mailed on that date. He also has no recall of any other specifics of the mailing. While he claims the RFA was returned to him, he cannot explain why he did not act on it before the deadline, even though he had a vessel registration number in June 1994, and knew that RAM did not have an RFA from him, as early as March 1994.

RAM's records show that Mr. Gilbert's RFA was filed February 17, 1995, seven months after the

²See, 59 Fed. Reg. 701, 702 (1994).

³Id.

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

⁵See, Keith A. Buehner, Appeal No. 94-0001, September 26, 1994, *aff'd* March 2, 1995.

application deadline. The RFA is date-stamped February 17, 1995, according to RAM procedures. There is no other date-stamp on the RFA. There is also no copy of an earlier RFA filed by Mr. Gilbert in RAM's files, even though it was the practice of RAM to copy and file incoming RFAs. Mr. Gilbert claims that his RFA was returned to him with a handwritten post-it note. However, it was not RAM's practice to return RFAs or to send post-it notes, but to correspond with applicants via letter. Mr. Gilbert also claims his RFA was returned because it did not have a vessel registration number. RAM's practice, however, was to process incomplete RFAs, and to ignore vessel registration information.

Mr. Gilbert has no evidence to support his claim, other than his bald assertion. While the procedures for handling RFAs were not formalized until April 1994, the practice of date stamping, copying, filing, and letter writing is common in public agencies. Therefore, in light of Ms. Buck's testimony and Ms. Gharrett's memorandum, and the absence of other proof to the contrary, I find it more likely than not that RAM's customary practices were followed in this instance. Consequently, I find the preponderance of the evidence shows that Mr. Gilbert did not file an RFA before the application deadline, and that his application for QS (RFA) was not timely filed. Mr. Gilbert presented no evidence that the doctrine of equitable tolling⁶ should apply in this case.

FINDING OF FACT

Mr. Gilbert did not file an RFA before the July 15, 1994, application deadline.

CONCLUSION OF LAW

Mr. Gilbert's application for QS (RFA) was not timely filed.

DISPOSITION

The IAD, denying Mr. Gilbert's application for QS, is **AFFIRMED**. This decision takes effect on July 27, 1998, unless by that date the Regional Administrator orders review of the decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Time, on the tenth day after the date of this decision, July 6, 1998. 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.

⁶The equitable tolling doctrine requires a showing of extraordinary circumstances beyond the applicant's control. *See, e.g., John T. Coyne*, Appeal No. 94-0012, May 24, 1996, *effective* June 24, 1996; and *Estate of Kinberg*, Appeal No. 95-0035, August 1, 1997, *aff'd* August 13, 1997.

Randall J. Moen
Appeals Officer