

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of ) Appeal No. 95-0040  
)  
WILLIAM R. HARTMAN, ) DECISION  
Appellant )  
)  
October 26, 1998  
\_\_\_\_\_)

STATEMENT OF THE CASE

Appellant William R. Hartman filed a timely appeal of an Initial Administrative Determination [IAD] of the Restricted Access Management Program<sup>1</sup> [RAM], dated March 20, 1995. The IAD denied Mr. Hartman's application for halibut quota share [QS] under the Individual Fishing Quota [IFQ] program because he failed to prove that he owned or leased a vessel that made qualifying landings of halibut or sablefish during the QS qualifying period (1988, 1989, or 1990). Because the record contains sufficient information on which to reach a final decision, and because there is no genuine and substantial issue of adjudicative fact for resolution, no hearing was ordered. 50 C.F.R. § 679.43(g).<sup>2</sup>

ISSUE

Whether Mr. Hartman leased the F/V CINDY in 1990.

BACKGROUND

Mr. Hartman claimed on his Request for Application for QS [RFA] that he leased the F/V CINDY from George M. Klinkert, the vessel's owner, between August 29 to September 1, 1990. He submitted a state fish ticket, which showed that he landed 2,416 pounds of halibut from the F/V CINDY on August 31, 1990. He also submitted a copy of his birth certificate and a handwritten statement, dated April 15, 1995, which reads: "William Hartman fished the F/V CINDY for halibut in the year 1990. Handshake agreement." The statement is signed: "George Klinkert."

On January 23, 1996, Appeals Officer, Randall Moen, spoke with Mr. Hartman by telephone. Mr. Hartman told Mr. Moen that (1) he used the F/V CINDY for a one-day halibut opening, as payment

---

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

<sup>2</sup>Formerly 50 C.F.R. § 676.25(g)(3)(iii). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation was unchanged by the renumbering.

for helping Mr. Klinkert move the vessel; (2) skippered and commanded the vessel's operations; (3) hired and paid the one crew member; (4) paid for the bait; and (5) claimed the vessel as a business expense on his federal income tax return. He also stated that the processor paid for the ice, and that Mr. Klinkert paid for the fuel and the gear. Mr. Hartman told Mr. Moen that he would ask Mr. Klinkert for an affidavit of a lease. An affidavit of a lease was never received by this Office.

On June 26, 1996, Mr. Moen called Mr. Hartman to inquire about the affidavit of a lease. Mr. Hartman was not in, and did not return the call.<sup>3</sup>

On September 17, 1996, Mr. Hartman was ordered to produce additional evidence of a vessel lease. As part of the order, Mr. Hartman was requested to produce a notarized affidavit of a vessel lease, a copy of his federal tax return (Schedule C), and crew affidavits. There was no response.

On February 29, 1997, Chief Appeals Officer Edward Hein informed Mr. Hartman in writing that the deadline for additional information was March 31, 1997. Again, there was no response.

## DISCUSSION

To qualify for halibut QS under the regulations of the IFQ program, as implemented by RAM, a person must have owned or leased a commercial fishing vessel, from which a legal landing of halibut or sablefish was made during a QS qualifying year, 1988, 1989, or 1990.<sup>4</sup> A written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years is conclusive evidence of a vessel lease.<sup>5</sup> Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.<sup>6</sup>

Mr. Hartman claims that he leased the F/V CINDY from Mr. George Klinkert in 1990. The record shows that Mr. Klinkert owned the vessel, and received QS for the landings made from the vessel, during that period of time.

In this case we have neither a written lease, nor a notarized affidavit. The handwritten statement of Mr. Klinkert is not notarized, and therefore, cannot be considered conclusive evidence of a vessel lease.

---

<sup>3</sup>Mr. Moen left a message with Mr. Klinkert's mother.

<sup>4</sup>See, 50 C.F.R. §679.40(a)(2), formerly 50 C.F.R. §676.20(a)(1).

<sup>5</sup>See, 50 C.F.R. § 679.40(a)(3)(iii), formerly 50 C.F.R. § 676.20 (a)(1)(iii).

<sup>6</sup>Id.

Other evidence may be used to establish the existence of a vessel lease when there is no written agreement or notarized affidavit of a vessel lease. Establishing the existence of an oral lease is a fact-intensive process involving the weighing of several factors. Through a series of decisions,<sup>7</sup> this Office has identified seven factors that an Appeals Officer should consider in determining the existence of an oral lease. The factors are in keeping with the intent of the North Pacific Fishery Management Council to award QS to persons who supplied the means to harvest the fish, suffered the financial and liability risks to do so, directed the fishing operations, and, in general, acted as entrepreneurs throughout the entire operation.

The factors include, but are not limited to: (1) how the parties characterized their business arrangement; (2) whether the claimed lessee had possession and control of the vessel, including the control of the vessel's navigation; (3) whether the claimed lessee directed the fishing operations of the vessel; (4) whether the claimed lessee had the right to hire, fire, and pay the crew; (5) whether the claimed lessee was responsible for the operating expenses of the vessel; (6) whether the claimed lessee treated the operation of the vessel as a business for federal income tax and other purposes; and (7) whether the claimed lease had a set or guaranteed term. I shall now analyze the factors to determine the existence of an oral lease between the parties.

### **1. How the parties characterized their business arrangement in 1990.**

There are no tax returns, settlement reports, checks, or other documents in the record, showing how the parties characterized their business arrangement at the time of the claimed lease.

Mr. Hartman characterized his business arrangement as a lease on his RFA, on his application for QS, and in his telephone conversation with Mr. Moen. The characterizations were made for purposes of obtaining QS, and not at the time of the arrangement. Consequently, I do not give much weight to the characterizations.

Mr. Klinkert's only characterization of the business arrangement is his purported handwritten statement, which provides that Mr. Hartman "fished" the vessel during the relevant period. The statement is not notarized and does not mention the lease of the vessel. Therefore, I do not give much weight to the handwritten statement.

In light of the above, I find that the evidence does not show how Mr. Hartman and Mr. Klinkert characterized their business arrangement during the relevant time.

---

<sup>7</sup>See, e.g., F/V Determined Partnership v. Big Blue, Inc., Appeal No 95-0049, October 2, 1996, *aff'd* November 5, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, *aff'd* August 20, 1996, Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd*. March 27, 1996.

**2. Whether Mr. Hartman possessed and commanded the vessel, and controlled the vessel's navigation.**

At best, Mr. Hartman's fish ticket shows that he was aboard the F/V CINDY in 1990 during the relevant period. The fish ticket does not indicate who captained the vessel or whether Mr. Klinkert was aboard the vessel. Furthermore, the handwritten statement of Mr. Klinkert, which states that Mr. Hartman "fished the F/V CINDY," establishes only that Mr. Hartman was operating the vessel.<sup>8</sup> Consequently, I find the evidence does not show that Mr. Hartman was in charge of the vessel at the relevant time.

**3. Whether Mr. Hartman directed the fishing operations of the vessel.**

At best, Mr. Hartman's evidence shows only that he fished the F/V CINDY during the relevant time. Neither his fish ticket, nor Mr. Klinkert's handwritten statement, show to what extent, if any, Mr. Hartman was in charge of the fishing operations of the vessel. It is reasonable that Mr. Klinkert also could have been aboard the vessel, directing the vessel's fishing operations. Therefore, the evidence is insufficient to show that Mr. Hartman directed the fishing operations of the vessel.

**4. Whether Mr. Hartman had the right to hire, fire, and pay the crew.**

There are no settlement reports, tax returns, payment receipts, or crew affidavits, showing who had the right to hire, fire, and pay the crew. Therefore, we do not know if Mr. Hartman was in charge of hiring, firing, and paying the crew of the F/V CINDY during the relevant period.

**5. Whether Mr. Hartman was responsible for the operating expenses of the vessel.**

There are no financial records, statements, or receipts of any kind, showing who was responsible for the operating expenses of the vessel. Therefore, we do not know if Mr. Hartman was responsible for operating expenses of the vessel during the relevant period. Given that Mr. Hartman admits that Mr. Klinkert provided the fuel and gear, it is reasonable that Mr. Hartman assumed little financial risk for the one-day trip, even if he did pay for the bait or other trip expenses.

**6. Whether Mr. Hartman treated the F/V CINDY as his business for income tax purposes, and other purposes, during the relevant period.**

There are no federal income tax returns, settlement reports, insurance statements, or records of any

---

<sup>8</sup>Mr. Hartman's allegation that he was on the vessel at the time a U.S. Coast Guard citation was issued, serves also only to prove that he was operating the vessel at the time (a matter about which there is no dispute).

kind, showing whether Mr. Hartman treated the vessel as his business during the relevant period. Therefore, we do not know if Mr. Hartman treated the F/V CINDY as his business during the relevant period.

#### **7. Whether the claimed lease was for a set or guaranteed term.**

RAM's record show that Mr. Hartman made only one landing of halibut from the F/V CINDY during the QS qualifying period. The handwritten statement of Mr. Klinkert fails to mention whether use of the vessel was for a set or guaranteed term. Given that we do not know the arrangement between the parties, it is unclear whether the vessel could have been reclaimed by Mr. Klinkert, or returned by Mr. Hartman, at will. Therefore, we do not know whether the claimed lease was for a set or guaranteed term.

#### Conclusion

The evidence submitted by the Mr. Hartman serves only to establish that he was aboard the F/V CINDY at the time of the harvest and landing of halibut on August 31, 1990. We do not know if Mr. Hartman was in charge of the vessel; if he directed the fishing operations; if he had the right to hire, fire, and pay the crew; if he was responsible for the operating expenses of the vessel; if he ran the F/V CINDY as his business; or if the vessel was his for a set or guaranteed term. In short, we do not know if Mr. Hartman was a partner, hired skipper, employee, or lessee during the relevant period. Consequently, there is insufficient evidence to show that Mr. Hartman leased the F/V CINDY in 1990.

Mr. Hartman was given ample opportunity to produce the required evidence of a lease, but has failed to do so. Under these circumstances I conclude that Mr. Hartman did not lease the F/V CINDY from Mr. George Klinkert in 1990 (or any time during the QS qualifying period).

#### FINDING OF FACT

Mr. Hartman's evidence is insufficient to show that he leased the F/V CINDY from Mr. George Klinkert during the QS qualifying years of 1988, 1989, or 1990.

#### CONCLUSION OF LAW

Mr. Hartman did not lease the F/V CINDY in 1990 (or during the QS qualifying period).

#### DISPOSITION

The IAD which denied Mr. Hartman's application for halibut or sablefish quota share is **AFFIRMED**. This Decision takes effect on November 25, 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 at this Office not later than 4:30 p.m. Alaska Time, on November 5, 1998, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more 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.

---

James Cufley  
Appeals Officer

---

Randall J. Moen  
Appeals Officer