

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In Re Application of)
) Appeal No. 10-0004
)
 [REDACTED])
 [REDACTED]) DECISION
)
) November 19, 2010
 Appellant)
 _____)

STATEMENT OF THE CASE

[REDACTED] filed a timely appeal of an Initial Administrative Determination (IAD) prepared by the Restricted Access Management (RAM) Program on May 27, 2010. RAM denied [REDACTED] application for a charter halibut permit (CHP) under the Charter Halibut Limited Access Program (CHLAP).¹ [REDACTED] may appeal the IAD because it directly and adversely affects his interest, as required by 50 C.F.R. § 679.43(b).

[REDACTED] appeal of the IAD was timely filed on June 3, 2010. On July 8, 2010, the Office of Administrative Appeals (OAA) advised him that his appeal had been received and accepted and that the undersigned was the administrative judge to whom the appeal had been assigned.

[REDACTED] augmented the record with copies of emails written by fellow charter operators as well as a statement from a former Chairperson of the North Pacific Fishery Management Council (the body that designed the program and recommended that it be adopted by the Secretary of Commerce).

On July 20, 2010, I held a scheduling conference with [REDACTED] and established a hearing date for July 27, 2010. After a necessary schedule adjustment, the hearing was re-scheduled to 2:00 p.m., Alaska Daylight Time, on Tuesday, August 31, 2010. At the hearing, [REDACTED] chose to represent himself.

Following the hearing, I reviewed the record in its entirety and concluded that it contains sufficient information on which to decide this appeal.² Therefore, I closed the record and issue this decision.

ISSUES

1. Does [REDACTED] qualify for a charter halibut permit based on his claim that an unavoidable circumstance (active duty military service) thwarted his intent to engage in the halibut charter fishery in 2004 and 2005?

¹ The Charter Halibut Limited Access Program is codified at 50 C.F.R. §§ 300.61, 300.66, and 300.67, available on the NMFS Alaska Region website: <http://alaskafisheries.noaa.gov/regs/summary.htm>.

² 50 C.F.R. § 679.43(g)(2).

2. If the answer to the first question is “yes,” should the permit be transferable or non-transferable,³ and for how many anglers should the resulting permit be endorsed.⁴

ANALYSIS

The regulations governing charter halibut permits provide several ways an applicant can qualify for a charter halibut permit. In the case before us, [REDACTED] argues only one means by which he may qualify for a charter halibut permit. Namely, [REDACTED] contends that under the rules for what may be commonly referred to as the unavoidable circumstance military service exception, he qualifies for a charter halibut permit. As indicated below, I agree with [REDACTED]

The regulation providing for unavoidable circumstance claims made under the military service provision [50 C.F.R. 300.67(g)(3)] sets out a series of requirements. The threshold requirement under the unavoidable circumstance claims made under the military service provision is that the “applicant for a charter halibut permit ... meets the participation requirement in the recent *participation period*, but does not meet the participation requirement for the *qualifying period*.” In this case that means that [REDACTED] took five or more halibut logbook fishing trips in 2008, but took less than five bottomfish logbook trips in 2004 or 2005. In addition, the applicant must show that he “was ordered to report for active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period” (2004 or 2005). Further, the applicant must prove he intended to operate a charter halibut fishing business but was unable to because of his obligation to the military.

Does [REDACTED] satisfy the participation requirement for the recent *participation period*, but not the participation requirement for the *qualifying period*? Yes.

The first requirement for [REDACTED] to meet is proof that he had five or more halibut fishing trips in 2008, but fewer than five bottomfish logbook fishing trips in 2004 or 2005. The record shows that [REDACTED] reported sixty-three halibut logbook trips in 2008. Since sixty-three exceeds the requisite amount of five, [REDACTED] has proven this element of his case. The record also shows that [REDACTED] reported no bottomfish logbook trips in either 2004 or 2005. I therefore conclude that [REDACTED] is qualified to have his claims adjudicated under the military service provisions of 50 C.F.R. § 300.67(g)(3).

Was [REDACTED] obliged to report to active duty in the U.S. Military during the qualifying years of 2004 and 2005? Yes.

[REDACTED] submitted documentary evidence of his active duty military service. The document was a military form (DD-214),⁵ showing that he entered active duty status on [REDACTED]

³ 50 C.F.R. § 300.67(d).

⁴ 50 C.F.R. § 300.67(e).

⁵ DD form 214 – Automated [CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY]

I find by a preponderance of the evidence that ██████████ was obligated to report to active duty in the U.S. Military during the years 2004 and 2005.

3. Did ██████████ have a specific intent to operate a charter halibut business during 2004 or 2005? Yes.

Prior to arriving in AK, ██████████ operated a charter business in Texas, and held the required USCG license. From the time he arrived in Alaska in 2001 until the present, ██████████ has consistently and effectively pursued his intention to operate a charter halibut fishing business. He first served as a charter boat captain and he then developed a specific intent to open his business in (probably) 2005. But he hesitated. He knew that his status in the Armed Forces made him vulnerable to a call to active duty. So, to remove that uncertainty, he volunteered for active duty.

In early June of 2005, he further demonstrated his ongoing intent to enter the business by arranging for a vessel to be constructed. This was some months before his formal discharge. The vessel was completed in 2006, and he brought it to Alaska to put it in use in the charter halibut fishing business.

Taken in their totality, these facts support ██████████ claim that he intended to operate a halibut charter business during the qualifying period (2005), and I so find.

Should ██████████ permit be designated as transferable or non-transferable?

Because ██████████ has proven the basic elements of his claim, he qualifies for a permit. However, there are two different types of permits: transferable and non-transferable. Thus, my next inquiry is whether ██████████ should receive a transferable or a non-transferable permit.

The military service provision offers clear guidance on this question. Federal regulation 50 C.F.R. § 300.67(g)(3)(iii) provides that once the applicant proves he or she was ordered to report for military service, and held a specific intent to operate a charter halibut business, the applicant would receive the number of transferable and non-transferable halibut permits as follows:

(iii) The number of transferable and non-transferable halibut permit(s) an applicant may receive under paragraph (g)(3) of this section will be based on the criteria in paragraph (g)(2)(v)(B) of this section.

Paragraph (g)(2)(v)(B) provides:

(B) The number of transferable and non-transferable permits, and the angler endorsement on those permits, that result from the logbook fishing trips that the applicant proves likely would have been taken but for the circumstance that thwarted the applicant's specific intent to operate a charter halibut fishing business in one

year of the qualifying period and the applicant did not participate during the other year of the qualifying period.

The military service applicant will receive a non-transferable permit unless the applicant can demonstrate that it likely would have met the participation requirement for a transferable permit in the qualifying period,⁶ which is fifteen trips with the same vessel in either the 2004 or 2005.⁷

██████████ testified that, but for his military service, he would have started his lodge and charter fishing business in 2005. Even while in the military, he arranged for a charter vessel to be constructed. Upon his early discharge from active duty in late 2005, he diligently pursued his business plan, and commenced his charter business in 2007. In that year he reported fifty-one halibut logbook fishing trips to ADF&G.⁸ In 2008, the second year of his operations, he reported sixty-eight halibut logbook fishing trips.

I find that, were it not for his active military service in 2004 and 2005, ██████████ would have operated his charter halibut business in 2005 in a way similar to how he actually did operate when he was able to start it, which would have been at a level of at least fifteen halibut logbook fishing trips.

Therefore I find by a preponderance of the evidence that, but for his active duty military service in 2004 and 2005, ██████████ would have reported at least fifteen bottomfish logbook fishing trips in 2005.

For how many anglers should ██████████ permit be endorsed?

In ██████████ letter to RAM, received on February 10, 2010, ██████████ stated: “. . . I am requesting a transferable permit for the maximum number of clients that I had on board during 2007 which was my first year after military service. . . . The highest number of clients in 2007 was on Aug 8, 2007, 11 clients, page 44 of log book ██████████.”⁹

In his letter of appeal, ██████████ stated: “. . . If NMFS on behalf of NOAA still believes my voluntary military service to the USA is grounds for denial of a transferable permit for 11 people into the CHLAP, I will be forced to take legal action. . . .”¹⁰

I am not persuaded by ██████████ arguments regarding the number of anglers. As one who qualifies for a permit under the military service provision of the unavoidable circumstance clause, ██████████ is bound by the requirements of the regulations that relate to such applicants. Specifically, 50 C.F.R. § 300.67(g)(3)(iii) provides: “Angler endorsements on all such charter halibut permits will be pursuant to paragraph (e)(2) of this section.” Paragraph (e)(2) provides: “The angler endorsement number will be six (6) on a charter halibut permit issued pursuant to military service under paragraph (g)(3).”

⁶ Final Rule, 75 Fed. Reg. 554, 557 (Jan. 5, 2010).

⁷ 50 C.F.R. § 300.66(d)(1)(i).

⁸ E-mail, NMFS Information Services Division (M. Khalsa) to Judge Smith (November 15, 2010).

⁹ ██████████ Letter to RAM, received February 9, 2010

¹⁰ ██████████ letter to the Office of Administrative Appeals, June 3, 2010.

██████████ request that he be issued a permit with a maximum number of clients he had on board during 2007 is not supported by the regulation that governs the angler endorsement on permits issued pursuant to military service provisions of § 300.67(g)(3). Accordingly, ██████████ request for a permit endorsed for eleven anglers is denied.

For the reasons set out above, I conclude that ██████████ qualifies for a transferable charter halibut permit for use in halibut management Area 3A, endorsed for six charter anglers.

FINDINGS OF FACT

1. ██████████ is qualified to have his claims adjudicated under the military services provision of the regulations because he satisfied the participation requirements for the recent participation period, but not the qualifying period.
2. ██████████ was ordered to report to active duty military service in March of 2004 and was not relieved of that duty until September 2005.
3. ██████████ held a specific intent to participate in the charter halibut fishery in 2005.
4. It is more likely than not that, but for his military service, ██████████ would have operated a halibut charter fishing business during 2005, and would have reported at least 15 bottomfish logbook fishing trips during that year.

CONCLUSIONS OF LAW

1. ██████████ has satisfied the requirements of the military service provisions of the unavoidable circumstances regulation, 50 C.F.R. § 300.67(g)(e).
2. ██████████ qualifies for a transferable charter halibut permit, endorsed for six charter anglers, for use in Area 3A.
3. ██████████ request that he be issued a permit endorsed for 11 anglers is not authorized by the regulations and this office may not grant it. Therefore his request is denied.

DISPOSITION AND ORDER

The denial of ██████████ application for a charter halibut permit, as set out on the May 27, 2010, IAD that is the subject of this appeal, is VACATED. RAM is ordered to issue a transferable charter halibut permit, endorsed for six charter anglers, for use in Area 3A to ██████████. This Decision is effective on December 20, 2010 unless by that date the Regional Administrator orders review of the Decision.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Standard Time, on November 29, 2010, the tenth day after 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 administrative judge, and must be accompanied by a written statement in support of the motion.



Philip J. Smith
Philip J. Smith
Administrative Judge

Reviewed and approved:



for Eileen Jones
Chief Administrative Judge