

In response to Appellant's application, on July 27, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).⁷ The Notice provided Appellant thirty days to provide additional information in support of his application.

On August 20, 2010, Appellant submitted a letter in response to RAM's Notice.⁸ Subsequently, on November 12, 2010, RAM issued the IAD and denied Appellant's application for a CHP. In the IAD, RAM explained that it understood Appellant was claiming he should receive a CHP because he qualified under the "unavoidable circumstances" provisions of the CHLAP; however such a claim could only be handled on appeal.

On January 14, 2011, OAA received Appellant's timely appeal of the IAD.⁹ In the appeal, Appellant stated he was forced to purchase another boat in 2004 due to an accident and was subsequently unable to participate in the 2008 season due to health reasons.¹⁰

On May 3, 2011, NAO sent Appellant a hearing notice by regular and electronic mail. The hearing notice acknowledged receipt of Appellant's appeal and also scheduled an oral hearing for June 8, 2011 at 10 a.m. Alaska Time, 2 p.m. Eastern Time.¹¹ The notice also provided Appellant with the telephone number he needed to call on the hearing date and informed Appellant that he could contact NAO in the event he had any questions or concerns. NAO did not receive any correspondence from Appellant in response to the hearing notice.

On June 8, 2011, Appellant did not contact NAO and did not participate in the hearing. On June 10, 2010, NAO sent Appellant an order, by certified and electronic mail, notifying him he could show good cause for failing to participate in the scheduled hearing. NAO set a deadline of June 17, 2011 for Appellant to submit a statement explaining his absence from the hearing. In addition, the last paragraph of the order informed Appellant of the following:

If Appellant does not provide a statement of good cause or does not wish to participate in an oral hearing, I will review the record and issue a decision based on the record. Appellant may submit additional information he would like NAO to review in considering his appeal. NAO must be in receipt of any additional information by 5:00 p.m. AKT on Friday, June 24, 2011.

⁷Original File Tab, RAM's Notice of Opportunity to Submit Evidence dated July 27, 2010.

⁸Original File Tab, Appellant's letter dated August 20, 2010.

⁹Pleadings File Tab, Appellant's appeal letter received on January 14, 2011.

¹⁰Pleadings File Tab, Appellant's appeal letter received on January 14, 2011.

¹¹Appeals Correspondence Tab, Notice to Schedule Hearing dated May 3, 2011.

NAO received no such statement or additional information from the Appellant. As a result, I will review the case with the information already contained in the record. Accordingly, I close the record and issue this decision.¹²

ISSUES

At issue in this appeal is whether Appellant is eligible to receive a CHP. To resolve this issue, I must evaluate the following:

1. Did Appellant establish by a preponderance of the evidence that he was issued a business owner license by ADF&G and reported at least five logbook fishing trips in 2008?
2. If the answer to Question 1 is “no”, I must consider whether Appellant can prevail based on the unavoidable circumstances provisions of the CHLAP regulations if he did not experience an unavoidable circumstance.

If the answer Question 2 is “no,” I must uphold the IAD and conclude that Appellant does not qualify for a CHP.

FINDINGS of FACT

1. In 2004, Appellant had an ADF&G business license to operate his charter fishing business.¹³
2. In June of 2004, Vessel I caught on fire and was taken out of commission.¹⁴
3. Later in 2004, Appellant purchased Vessel II.¹⁵
4. Appellant reported to ADF&G a total of fourteen bottomfish logbook fishing trips for Vessel I and II for the year 2004.¹⁶
5. In 2008, Appellant was not issued a license to operate his charter fishing business in the State of Alaska.¹⁷
6. In 2008, Appellant was not issued a logbook.¹⁸
7. In 2008, Appellant did not report any halibut logbook fishing trips to ADF&G.¹⁹

¹² See 50 C.F.R. § 679.43(g) and (k).

¹³ Original File Tab, State of Alaska Business License attached to Appellant's Application.

¹⁴ Original File Tab, Letter from Appellant attached to his application dated March 28, 2010.

¹⁵ Pleadings Tab, Appellant's appeal letter received on January 14, 2011.

¹⁶ Original File Tab, Application, page 3.

¹⁷ Original File Tab, IAD, page 2; Appellant's letter dated March 28, 2010.

¹⁸ There is no affirmative proof in the record that Appellant reported logbook trips in 2008.

8. On March 31, 2010 Appellant filed an application with RAM for a CHP to operate charter halibut trips in area 2C.²⁰
9. On November 12, 2010, RAM issued the IAD by which RAM denied Appellant's application for a CHP.²¹
10. On January 14, 2011, OAA received Appellant's timely appeal of the IAD.²²
11. On May 3, 2011, NAO acknowledged receipt of the Appellant's appeal and also scheduled an oral hearing to take place on June 8, 2011 at 10 a.m. Alaska Time, 2 p.m. Eastern Time.²³
12. NAO provided notice to Appellant of the June 8, 2011 hearing by electronic mail and regular mail, both of which were sent on May 3, 2011.²⁴
13. On June 8, 2011, Appellant did not appear for the hearing. Appellant did not advise NAO prior to or at the scheduled time that he was unable to attend the hearing.²⁵
14. On June 10, 2010, NAO sent Appellant by certified and electronic mail an order to show cause for failure to appear at hearing. NAO did not receive a response from Appellant.

PRINCIPLES OF LAW

The regulations governing the CHLAP provide that NMFS will issue a CHP if the applicant meets certain requirements. One such requirement is that the applicant is an individual, or entity, to which ADF&G issued an ADF&G Business Owner License that authorized logbook fishing trips.

Logbook fishing trips are used to meet minimum participation requirements needed to be eligible for a CHP.²⁶ Minimum participation requirements to qualify for a CHP are as follows: an applicant must have reported five or more bottomfish "logbook fishing trips" during one year of the qualifying period, namely 2004 or 2005, and must have reported five or more halibut "logbook fishing trips" during the recent participation period, namely 2008.²⁷

¹⁹ There is no affirmative proof in the record that Appellant reported logbook trips in 2008.

²⁰ Original File Tab, Application.

²¹ Original File Tab, IAD.

²² Pleadings File Tab, Appellant's appeal letter received on January 14, 2011.

²³ Appeals Correspondence Tab, Notice to Schedule Hearing dated May 3, 2011.

²⁴ NAO email dated June 8, 2011.

²⁵ Hearing recording for June 8, 2011.

²⁶ See 50 C.F.R. § 300.67(b) (1) (ii).

²⁷ See 50 C.F.R. § 300.67(b) (1) (ii) (A) and (B); 50 C.F.R. § 300.67(f) (6) and (7); and 50 C.F.R. § 300.67(d)(1).

A “logbook fishing trip” means a bottomfish logbook fishing trip or a halibut logbook fishing trip that was reported as a trip to the State of Alaska in a Saltwater Charter Logbook within the time limits for reporting the trip in effect at the time of the trip.²⁸

The Official Record is the information NMFS prepared regarding participation in charter halibut fishing. NMFS used the Official Record in implementing the CHLAP, including evaluating applications for Charter Halibut Permits.²⁹

If an applicant does not qualify for a CHP based on the criteria outlined above, he may still be eligible for a permit if he meets the criteria for what is known as an unavoidable circumstances claim. The threshold criterion for an unavoidable circumstance claim, as it applies to this appeal, is that the applicant meets the participation requirement for the qualifying period (2004 or 2005) but does not meet the participation requirement for the recent participation period (2008). If that threshold criterion is met, the applicant must also prove by a preponderance of the evidence the following: the applicant had a specific intent to operate a charter halibut fishing business in the recent participation period (2008); the applicant's specific intent was thwarted by an actual circumstance that was unavoidable, unique to the applicant, and unforeseen and reasonably unforeseeable by the applicant, and; the applicant took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in the recent participation period (2008).³⁰

ANALYSIS

Did Appellant establish by a preponderance of the evidence that he was issued a business owner license by ADF&G and reported at least five logbook fishing trips in 2004 or 2005 and 2008?

The regulations governing the CHLAP provide that NMFS will issue a CHP if an applicant meets certain requirements. A central requirement is that the applicant is an individual, or entity, to which ADF&G issued an ADF&G Business Owner Licenses that, authorized logbook fishing trips and has recorded a minimum of five logbook fishing trips in applicant’s logbook for 2004 or 2005, and 2008.³¹

Appellant in this case was issued a license by the ADF&G in 2004 and subsequently recorded over the minimum of five bottomfish logbook fishing trips for that same year as well. Therefore, Appellant does meet the requirement for the qualifying period.

However, Appellant concedes he does not have the logbook trips for 2008. Rather he argues that because he is missing the requisite trips for 2008 but does have the

²⁸50 C.F.R. § 300.67(f)(4).

²⁹See 50 C.F.R. § 300.67(f) (5); 75 Fed.Reg. 554, 556 (2010).

³⁰50 C.F.R. § 300.67(g)(1)(i)-(iv).

³¹50 C.F.R. § 300.67(b)(1)(ii)(A) and (B); 50 C.F.R. § 300.67(f)(6) and (7); 50 C.F.R. § 300.67(d)(1).

requisite trips for 2004, he should be eligible for a permit under the unavoidable circumstances provision in the CHLAP regulations.

Can Appellant prevail based on the unavoidable circumstances provisions of the CHLAP regulations if he did not experience an unavoidable circumstance?

In order to become eligible under the unavoidable circumstances, Appellant must establish that:

- a. he held a specific intent to operate a charter halibut fishing business in the recent participation period (2008);
- b. his specific intent was thwarted by an actual circumstance that was unavoidable, unique to him, and unforeseen and reasonably unforeseeable by the him;
- c. he took all reasonable steps to overcome the circumstance that prevented him from operating a charter halibut fishing business in the recent participation period (2008).³²

In an attempt to meet his burden of proving these elements, Appellant argues he suffered from hypertension in 2008 which caused him to not qualify for his United States Coast Guard captain's license.³³ Other than his written statements, there is nothing in the record to support a finding concerning Appellant's state of health or medical needs in 2008. Further, other than his written statements there is nothing in the record to show that he did not have a captain's license because of a medical condition. There is also no evidence as to the steps, if any, he took to treat the alleged health issue.

Assuming for the sake of argument that Appellant did have a health concern in 2008, that per se does not establish an unavoidable circumstance occurred. In other words, not every health issue constitutes an unavoidable circumstance. Given the limited evidence Appellant has presented in support of his appeal and particularly in support of his claim that he suffered an unavoidable circumstance, I conclude that Appellant has not met his burden of proving that he suffered an unavoidable circumstance in 2008 that prevented him from participating in his charter fishing business. For the same reasons, I conclude that Appellant has not shown he held the specific intent to participate in his charter fishing business in 2008. Without showing that an unavoidable circumstance occurred and that Appellant held a specific intent, Appellant cannot prevail in this appeal.

³² See 50 C.F.R. § 300.67(g)(1)(i)-(iv).

³³ Pleadings File Tab, Appellant's appeal letter received on January 14, 2011; Original File Tab, Appellant's letter dated March 28, 2010.

CONCLUSIONS OF LAW

Appellant has not established by a preponderance of the evidence that he meets the minimum participation requirements to qualify for a CHP, because he was not issued a Business Owner License from ADF&G and did not report at least five logbook fishing trips in 2008.

Appellant has not shown by a preponderance of the evidence that he experienced an unavoidable circumstance in 2008.

Appellant has not shown by a preponderance of the evidence that he held the specific intent to participate in his charter fishing business in 2008.

The IAD is consistent with CHLAP regulations and Appellant is not eligible for a permit under the CHLAP rules.

ORDER

The IAD dated November 12, 2010 is upheld. This decision takes effect thirty days from the date issued, August 22, 2011,³⁴ and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator elects to review this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

Appellant or 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 the tenth day after the date of this Decision, August 1, 2011. 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 administrative judge, and must be accompanied by a written statement in support of the motion.



Eileen G. Jones
Chief Administrative Judge

Date Issued: July 22, 2011

³⁴50 C.F.R. § 679.43(k) and (o).