

While considering the motion, I discovered that the recording of the September 30, 2010, hearing was missing.⁵ Accordingly, to afford Appellant an opportunity to restate his case with the benefit of counsel, I offered to hold another hearing in his appeal.⁶ The offer was accepted and, after discussion with Appellant's counsel, I scheduled a "re-hearing" for May 24, 2011, at 10:00 a.m.⁷

At the above date and time, I contacted counsel's office to begin the telephonic hearing. Counsel told me, and confirmed in writing, that Appellant had decided to eschew the re-hearing and asked that I rule on the Motion for Reconsideration without a rehearing.⁸

ANALYSIS

An appellant may request reconsideration of a decision on the grounds that the administrative judge misunderstood or overlooked a material matter of law or fact.⁹

In his motion, counsel for Appellant did not allege that I overlooked any fact; rather, he contended that I misunderstood the facts because I concluded that the facts did not support the Appellant's allegation that he specifically intended to operate his own charter halibut fishing business in 2005.¹⁰

Under the relevant CHLAP regulation,¹¹ the unavoidable circumstance provision allows NMFS to treat an applicant as if the applicant had actually participated in the fishery if the applicant proves:

1. That the applicant held a specific intent to operate his own charter halibut fishing business during a specific time period;
2. That the applicant's intent was thwarted by a circumstance that was unavoidable, unique to the applicant, unforeseen and reasonably unforeseeable;
3. That the circumstance actually occurred; and,

⁵ Letter from Phil Smith to [REDACTED] (electronic mail, Mar. 29, 2011).

⁶ Letter from Phil Smith to [REDACTED] (electronic mail, Mar. 29, 2011).

⁷ Letter from Phil Smith to [REDACTED] (electronic mail, May 24, 2011).

⁸ Letter from Phil Smith to [REDACTED] (electronic mail, May 24, 2011); Letter from [REDACTED] to Phil Smith (electronic mail, May 24, 2011).

⁹ The procedure for seeking reconsideration is posted on the NMFS Alaska Region website, Administrative Appeals: <http://www.alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>. Ms. Eileen Jones, Esq., Chief Administrative Judge for NAO, re-stated the procedure on February 17, 2011. The changes to the procedure were not significantly different from the prior procedures, and have no bearing on either Appellant's appeal or his Motion for Reconsideration.

¹⁰ Motion for Reconsideration at 2 (Feb. 15, 2011).

¹¹ 50 C.F.R. § 300.67(g)(2).

4. That the applicant took all reasonable steps to overcome the circumstance.

In the Decision, I concluded that Appellant had not formed a specific intent to operate his own business in the 2005 halibut sport fishing season and that, as a result, he could not prevail in his claim that an unavoidable circumstance thwarted that intent.¹² By concluding that Appellant lacked the requisite specific intent to participate in 2005, I rendered the other elements of the unavoidable circumstance regulation moot, and did not address them.¹³

In his appeal and his motion for reconsideration, Appellant asserted that he intended to operate his own charter halibut fishing business in 2005, that he was next in line to buy a boat with the assistance of owner of [REDACTED] (Charter Company) and that his intent was thwarted by the last minute decision of a captain with more seniority to buy a boat with the assistance of the owner of Charter Company.¹⁴

Appellant stated in his initial appeal letter, "In 2004, I guided for [Charter Company] with the hopes of running my own business/boat in 2005. Unfortunately seniority kept me from realizing my dream that year."¹⁵ The owner of Charter Company wrote that "[Appellant] was ready, willing, and able to buy his own boat in 2005, but another hired captain [Name] in the [Charter Company] fleet had more seniority, and so bought a boat prior to the '05 season. If [the other captain] had been unable or unwilling to buy a boat at that time, [Appellant] was next in line and would have bought a boat in time for the '05 season."¹⁶

The Decision did not overlook evidence that Appellant had any firm reason to believe that the captain with more seniority would not buy a boat for the 2005 season, that Appellant would be able to buy a boat for the 2005 season and that, based on Appellant's expectation of buying a boat, he took any steps to buy a boat for the 2005 season. The record does not support a finding that it was a last minute decision by the captain with more seniority to purchase a boat with the assistance of the owner of Charter Company. Based on the statement by Appellant and the owner of the charter company, it was the other captain's prerogative to purchase the boat, because the other captain had more seniority with the company, and the other captain did that.

Appellant did not buy a boat, and operate his own charter halibut business, for the 2005 charter halibut season or the 2006 charter halibut season. He purchased a boat, with the assistance of the owner of the charter company, in the fall of 2006 and his first charter halibut season with that boat was 2007.¹⁷

¹² Decision at 5 (Dec. 2, 2010).

¹³ Decision at 5 (Dec. 2, 2010).

¹⁴ Letter from Appellant to NMFS (received Mar. 31, 2010); Motion for Reconsideration (Feb. 15, 2011).

¹⁵ Letter from Appellant to NMFS (received Mar. 31, 2010).

¹⁶ Letter from Owner of Charter Company (Feb. 24, 2010).

¹⁷ Letter from Owner of Charter Company (Feb. 24, 2010).

I have carefully reviewed the Decision in this appeal and the arguments in Appellant's Motion for Reconsideration. I conclude that the Decision did not overlook or misunderstand any material matters of fact or law in concluding that Appellant did not hold a specific intent to operate a charter halibut fishing business in 2005 within the meaning of 50 C.F.R. § 300.67(g)(2).

DISPOSITION

For the reasons stated herein, Appellant's Motion for Reconsideration is DENIED.

The Decision entered in this appeal, dated December 2, 2010, will take effect on June 27, 2011, unless by that date the Regional Administrator orders review of the decision.


Philip J. Simur /
Administrative Judge