

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of)
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) Appeal No. 10-0038
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) DECISION
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 Appellant)
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STATEMENT OF THE CASE

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.¹

The appeal under review was filed by [REDACTED] doing business as [REDACTED] (Appellant). Appellant is appealing an Initial Administrative Determination (IAD) issued by NMFS's Restricted Access Management Program (RAM). In the IAD, RAM denied Appellant's application for a Charter Halibut Permit (permit or CHP).

On March 3, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).² The application was filed with RAM, who is responsible for reviewing and determining whether an applicant will receive a permit or permits.

In response to Appellant's application, on May 5, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).³ In the Notice, RAM advised Appellant that the Official Record showed he met the CHLAP requirements for 2008 by reporting sixteen charter halibut logbook trips to the Alaska Department of Fish and Game (ADF&G). However, RAM also stated in the Notice that Appellant did not meet the CHLAP requirements for 2004 or 2005. RAM set a June 4, 2010, deadline for Appellant to submit evidence to show he met participation requirements in 2004 or 2005. On

¹ 50 C.F.R. § 679.43.

² Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

³ Original File Tab.

June 11, 2010, Appellant responded to the Notice. Appellant stated that he did not meet the minimum logbook fishing trips in 2004 or 2005 because his boat was unsafe and needed to be repaired during that time period.⁴

On June 17, 2010, RAM sent Appellant the IAD which is the subject of this appeal.⁵ In the IAD, RAM denied Appellant a CHP. RAM explained Appellant was not the individual or non-individual entity to which the State of Alaska Department of Fish and Game (ADF&G) issued the Business Owner License that authorized taking logbook fishing trips. RAM also indicated that although Appellant did meet the minimum participation requirements in 2008, he did not meet the basic participation requirements for one of two periods of participation, namely five or more qualifying charter trips in 2004 or 2005. RAM noted Appellant had the right to appeal the IAD to OAA. RAM acknowledged Appellant's unavoidable circumstance claim, but it explained that the claim needed to be determined by OAA, provided Appellant filed an appeal with OAA to pursue his claim.

On June 24, 2011, Judge McKeen informed Appellant of her involvement in the early stages of drafting the regulations to implement CHLAP and offered Appellant the opportunity to request assignment of another administrative judge to Appellant's case. On June 28, 2011, Appellant contacted NAO and requested a reassignment of his appeal to another administrative judge.⁶ Appellant's appeal was reassigned to NOA administrative judge Steven Goodman.

On August 19, 2010, Appellant timely filed his appeal of the IAD with OAA.⁷ In his appeal, Appellant argues that due to unavoidable circumstances he was unable to fully engage in charter fishing operations in 2005. Appellant explained in his appeal that he purchased a boat and all rights to a fishing business from a different fishing business in 2005.⁸ Appellant states in his appeal that the boat he purchased in 2005 was in need of repair and that this delayed his ability to fish during this time period.⁹

On September 22, 2010, Appellant stated during a scheduling conference that in 2005, he was not aware that he needed to operate a charter halibut business in 2005 in order to be eligible to apply for a CHP, and that if he had known of this requirement he would have operated his vessel and such a business at that time.¹⁰

Upon review of Appellant's appeal and case record, I have determined that the record contains sufficient information on which to reach a final judgment. There is no disputed

⁴ Original File Tab, hand-written letter dated June 8, 2010.

⁵ Original File Tab, IAD.

⁶ Appeals Correspondence Tab, e-mail detailing voice message from Appellant requesting reassignment.

⁷ Pleadings Tab, letter dated August 19, 2011 with attachments.

⁸ Although Appellant's letter indicates he purchased this business on September 6, 2006, his attached Bill of Sale indicates the purchase occurred on September 6, 2005.

⁹ Pleadings Tab, letter dated August 19, 2011 with attachments.

¹⁰ Audio recording of September 22, 2010, scheduling conference.

material issue of fact, and no need for a hearing for testimony on disputed factual issues. I therefore am exercising my discretion to not hold a hearing and issue a decision based on the case record. Accordingly, I close the record and issue this decision.¹¹

ISSUES

There is no factual or legal dispute in this appeal but the unavoidable circumstance claim. In this case, the first basic question in an unavoidable circumstance claim is the following:

1. Did Appellant prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005?
2. If the answer to Question 1 is “no,” I must conclude Appellant did not have an unavoidable circumstance and therefore uphold the IAD.

FINDINGS OF FACT (FOF)

1. In 2005, Appellant bought a vessel suitable for charter fishing.¹²
2. This vessel needed to be repaired.¹³
3. Appellant would have operated his fishing vessel in 2005 had he been aware of the CHP eligibility requirements.¹⁴
4. Because Appellant was unaware of the CHP eligibility requirements, he chose to make repairs to his vessel in 2005, which were not completed until 2006.¹⁵
5. Appellant presented no evidence of a business license, advertising, or reservations for charter vessel trips for 2005.
6. On March 3, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).¹⁶ RAM denied Appellant’s application on June 17, 2010, and the instant appeal followed.

¹¹ 50 C.F.R. § 679.43 (g) and (k).

¹² Pleadings Tab, Bill of Sale.

¹³ Pleadings Tab, letter dated August 19, 2011 with attachments.

¹⁴ Audio recording of September 22, 2010, scheduling conference.

¹⁵ Audio recording of September 22, 2010, scheduling conference.

¹⁶ Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A.

PRINCIPLES OF LAW

To qualify for a permit, an applicant must hold an ADF&G Business License (i.e., business registration, sport fishing business owner license, sport fish business license, or ADF&G business license) that was also the license that authorized qualifying fishing trips (i.e., logbook fishing trips that could be used to meet the minimum participation requirements to qualify for a CHP).¹⁷

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.¹⁸

“Applicant-selected year means the year in the qualifying period, 2004 or 2005, selected by the applicant for NMFS to use in determining the applicant’s number of transferable and nontransferable permits.”¹⁹

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 publication period, namely 2008.²⁰

If an applicant for a CHP cannot meet the participation requirements in one period, as in this case for the qualifying period of 2005, but does meet the participation requirements for the other period, 2008, then the applicant may still be eligible for a CHP under the exception to the participation requirements known as the “unavoidable circumstances” rule.²¹

Under the unavoidable circumstances rule as it applies to this case, an applicant for a CHP may be eligible for a permit if:

- (1) he met the participation requirements for 2008, but not for 2005;
- (2) he specifically intended to operate a charter halibut fishing business in 2005;
- (3) his intent was thwarted by an unavoidable, unique, unforeseen, and reasonably unforeseeable circumstance that actually occurred, and;

¹⁷ 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

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

¹⁹ 50 C.F.R. § 300.67(f)(1).

²⁰ 50 C.F.R. § 300.67(b)(1)(ii)(A)-(B), (f)(6)-(7).

²¹ 50 C.F.R. § 300.67(g)(2).

(4) he took all reasonable steps to overcome the unavoidable circumstance.²²

ANALYSIS

In analyzing this case, I considered the entire record, including statements made during the scheduling conference and the documents submitted by Appellant in support of his appeal. Since Appellant does not dispute the substantive basis for the denial of his Application articulated in the IAD, i.e., that he did not have sufficient logbook trips in 2005, I will address the only issue raised in this appeal, namely Appellant's unavoidable circumstance claim. The first criterion I consider is whether Appellant held the specific intent to operate a charter halibut business during 2005.

Appellant purchased a fishing vessel in 2005 that required repair, but was not repaired until 2006. Appellant did not repair his fishing vessel sooner and did not operate his vessel in a charter halibut fishing business in 2005 because he was unaware of the eligibility requirements of the CHP. Appellant did not present any evidence he possessed a business owner's license in 2005. The record also does not indicate other evidence of intent to operate a charter halibut business in 2005, such as advertising or reservations for charter vessel trips.

Given the totality of the evidence and facts it is reasonable to conclude that Appellant did not hold a specific intent to operate a charter halibut business in 2005. Appellant failed to prove by a preponderance of the evidence that he held the specific intent to operate a charter halibut fishing business during 2005.

CONCLUSIONS OF LAW

RAM correctly denied Appellant's application for a CHP. Appellant did not meet the minimum participation requirements to qualify for a CHP pursuant to 50 C.F.R. § 300.67(b)(1)(ii)(A) and (B) since Appellant did not meet the minimum participation requirement for the qualifying period of 2004 or 2005.

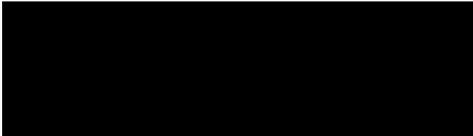
The unavoidable circumstance provisions of the CHLAP regulations do not qualify Appellant to receive a CHP. Appellant has not proven all of the necessary elements to prevail in an unavoidable circumstance claim pursuant to 50 C.F.R. § 300.67(g)(2)(i)-(iv).

²² 50 C.F.R. § 300.67(g)(2).

ORDER

The IAD dated June 17, 2010 is upheld. This decision is effective thirty (30) days from the date issued²³, November 2, 2011, 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 Standard Time, on the tenth day after the date of this Decision, October 13, 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.



Steven Goodman
Administrative Judge

Date Issued: October 3, 2011

²³ 50 C.F.R. § 679.43(k) and (o).