

NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
ALASKA REGIONAL OFFICE

In re Application of)
[REDACTED])
Appellant.)
_____)

Appeal No. 10-0115

REGIONAL ADMINISTRATOR'S DECISION REMANDING CASE TO NATIONAL
APPEALS OFFICE FOR FURTHER CONSIDERATION

On October 19, 2011, the National Appeals Office (NAO) issued its decision in this matter. On October 26, 2011, Appellant [REDACTED] (hereafter [REDACTED]) filed a motion for reconsideration offering clarification of his medical condition and requesting additional time to provide documentation of the same. On November 1, 2011, the NAO denied [REDACTED] motion. As a result, this matter came before the Alaska Regional Administrator for a final decision.

I remand this matter to develop further the existing record. Specifically, I request NAO to make findings on:

- (1) Whether [REDACTED] had the specific intent to operate a halibut charter fishing business in 2005;
- (2) The nature of [REDACTED] medical condition(s) and whether such medical condition(s) thwarted his specific intent because they were (a) unavoidable, (b) unique to [REDACTED], and (c) unforeseen and reasonably unforeseeable; and
- (3) What steps [REDACTED] took to overcome his unavoidable circumstance.

I have reviewed the record and conclude that there remains significant ambiguity concerning [REDACTED] alleged entitlement to a Halibut Charter limited access program permit based on the exception for an unavoidable circumstance. The NAO correctly notes that [REDACTED] bears the burden to demonstrate, by a preponderance of the evidence, that he satisfies the exception. NAO Decision of 10/19/2011 at 5. Although the facts of this case indicate that he has yet not met that burden, I am concerned that he has not had an adequate opportunity to do so. The NAO denied his request for hearing, concluding that "the record contains sufficient information on which to reach a final judgment." *Id.* at 2. Further, in light of that decision, the NAO correctly assumed "all the evidence provided by [REDACTED] as accurate and true" *Id.* Given that posture, I disagree that the record contains sufficient information on which to reach a final determination since [REDACTED] made several allegations concerning his diminished physical capacity in 2005

that purportedly precluded him from qualifying for a permit under NMFS's regulatory scheme.

For example, in his original application (filed April 5, 2010), he submitted a half-page statement in which he states that he "was medically retired from the U. S. Military in [REDACTED]" Further, he indicates he began to pursue his captain's license but was unable to obtain it in a timely manner due to "physical limitations." Similarly, in response to NMFS's Notice of Opportunity to Submit Evidence, [REDACTED] submitted a one-page document (filed July 16, 2010) in which he states that his "personal health was improving enough that I was able to complete" the physical and get his captain's license from the U.S. Coast Guard. He repeats similar statements in his appeal and then offers slightly more details in his motion for reconsideration along with a request for more time to provide the requisite documentation.

Accepting all of these statements as true, I find the record unclear and believe [REDACTED] ought to be afforded the opportunity to offer evidence to prove his claim of unavoidable circumstance, especially since NMFS's regulations provide that such a claim must be presented in the context of one's appeal (as opposed to the application for the permit). See 50 C.F.R. § 300.67(g). I am not suggesting that NAO must hold a hearing for every unavoidable circumstance claim, or even that it should do so here. Rather, there are numerous fact-finding devices available and I leave it the NAO's discretion to employ the appropriate one for each case.

My decision here is a limited one. I do not find that [REDACTED] has proven his unavoidable circumstance claim. Indeed, as NAO has noted, the record contains several facts that suggest he will have difficulty proving his claim. Specifically, he managed to operate what [REDACTED] refers to as a non-profit charter business in 2005 and take several fishing trips.¹ Yet, [REDACTED] claims that his medical limitations prevented him from fulfilling the requirements for a charter halibut limited access program permit. The record does not indicate how he was able to conduct his business but not fulfill the program's requirements. It contains only [REDACTED] allegation that he was "able to make a few non-profit trips when I was feeling well and had assistance." Appt's Mot. for Reconsideration, 10/26/11, at 1. He will need to explain the precise nature of his medical condition and prove that it thwarted him from making at least five bottomfish logbook fishing trips in 2005.²

¹ The NAO appears to have found those facts as conclusively foreclosing [REDACTED] unavoidable circumstance claim. See NAO Decision of 10/19/2011 at 6 ("since Appellant was able to provide charter fishing trips in 2004 and 2005, I cannot find that he suffered from an unavoidable circumstance that 'thwarted' (prevented) operating a charter business"). While I agree that those facts are evidence that tend to undermine [REDACTED] claim that his medical condition thwarted his specific intent to operate a charter halibut fishing business, I do not believe that they per se preclude that possibility.

² The record is a little confusing regarding the years [REDACTED] actually operated his "non-profit" charter business. The NAO concluded that [REDACTED] captained his boat in 2004, apparently based on a letter from [REDACTED] Alaska Mission Team Director, in support of [REDACTED] application. [REDACTED] personal logs, however, contain entries only for 2005 and 2006.

There may be other factual questions that ██████ and the NAO will want to explore, such as: when did he pass the physical for his captain's license; whether he had tried to do so before 2005; why did he not obtain his Alaska Department of Fish & Game Business Owner License before 2006;³ when did he purchase his boat and what options did he explore to operate a qualifying charter business despite his physical limitations, such as through the hiring of a captain;⁴ what medical records or expert testimony exists to corroborate ██████ unavoidable circumstance claim? These are merely examples, and I again leave to the NAO's discretion to conduct the appropriate factual inquiry. Looking at the record and the questions ██████ has raised in his submissions, ██████ needs to focus his attention to the specific elements of his unavoidable circumstance claim.

Finally, I find that there are two errors in the NAO's decision denying ██████ motion for reconsideration. First, the NAO concluded that "[s]ince Appellant did not indicate in his original appeal dated December 18, 2010 that he was precluded from obtaining a license in 2004 and 2005 due to his inability to pass the Coast Guard's physical exam, he waived that issue for consideration." NAO Order Denying Mot. for Reconsideration of 11/01/11 at 1. As a factual matter, I disagree since his initial application references his medical retirement from the military and indicates that he was unable to pursue his captain's license due to his physical limitations. As a legal matter, I also disagree and believe the NAO raised the bar too high for one's statement on appeal. The regulations provide the "appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived." 50 C.F.R. § 679.43(f). This simply means that if ██████ had not claimed unavoidable circumstance in his appeal, he could not raise it in his motion for reconsideration. It does not mean the NAO cannot accept, at its discretion, additional evidence to highlight previously-asserted facts that support the specific issue contained in his appeal, namely, whether his unavoidable circumstance thwarted his intent to run a halibut charter fishing business.

Second, in his motion for reconsideration, ██████ requested more time to accumulate the documents to support his unavoidable circumstance claim. Under the NAO's policy, requests for more time "shall be considered on a case-by-case basis." <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>. In this instance, however, the NAO did not address that part of ██████ motion.

³ There also is some ambiguity on this point in the record. While the NAO found that he held such a license in 2004 and 2005, the record also indicates that that was not the case. RAM's Initial Administrative Decision (at p. 2) states that he did not have such a license and, in his appeal (dated December 18, 2010), ██████ divides his fishing efforts between his personal log book (2005-2006) and his Alaska log book (2006-2010), which somewhat suggests he may have obtained his business license in 2006 or 2007.

⁴ It is not sufficient that ██████ may have had some long-held desire to run a qualifying halibut charter business. There must be some objective evidence that that the applicant would have run such a business but for the unavoidable circumstance. The regulations expressly require an applicant to demonstrate that he "took all reasonable steps to overcome the circumstance that prevented the applicant from operating a charter halibut fishing business in at least one year of the qualifying period." 50 C.F.R. § 300.67(g)(2)(iv).

For the foregoing reasons, the appeal is hereby remanded to the NAO for further proceedings consistent with this decision.



James W. Balsiger, Ph.D.
Regional Administrator

11.17.11
Date