

hearing, having concluded that the record held sufficient information on which to reach final judgment as required by 50 C.F.R. § 679.43(n)(8), I closed the record. This decision follows.

ISSUE

- Did [REDACTED] hold a specific intent to operate a charter halibut fishing business in the charter halibut qualifying period?

CHARTER HALIBUT LIMITED ACCESS PROGRAM

To qualify for a charter halibut permit, an applicant must be a person to whom the Alaska Department of Fish and Game (ADF&G) issued a Business Owner License that authorized logbook fishing trips that met the minimum participation requirements for a permit.³ The charter halibut regulation specifies a minimum participation requirement in two periods: a qualifying period, which is the sport fishing season for halibut in 2004 and 2005,⁴ and a recent participation period, which is the sport fishing season for halibut in 2008.⁵ The regulation specifies two levels of minimum participation: one for a non-transferable permit and one for a transferable permit.

To receive a non-transferable charter halibut permit, the ADF&G license holder must have reported a minimum of five bottomfish logbook fishing trips in one year in the qualifying period (2004 or 2005),⁶ and a minimum of five halibut logbook fishing trips in the recent participation period (2008).⁷

To receive a transferable charter halibut permit, the license holder must have reported a minimum of fifteen logbook fishing trips with the same vessel in the qualifying period (2004, 2005)⁸ and fifteen halibut logbook fishing trips with the same vessel in the recent participation period (2008).⁹

The charter halibut regulation provides an alternate way for an applicant to meet the participation requirements in one, but not both, participation periods.¹⁰ If an applicant meets a minimum participation trip level in the qualifying period (2004, 2005), but not in the recent participation period, the applicant may seek to meet the requirements of the unavoidable circumstance

³ 50 C.F.R. § 300.67(b)(1)(ii).

⁴ 50 C.F.R. § 300.67(c)(6) (“*Qualifying period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2004 and 2005.”).

⁵ 50 C.F.R. § 300.67(c)(7) (“*Recent participation period* means the sport fishing season established by the International Pacific Halibut Commission (February 1 through December 31) in 2008.”).

⁶ 50 C.F.R. § 300.67(b)(1)(ii)(A).

⁷ 50 C.F.R. § 300.67(b)(1)(ii)(A) & (B).

⁸ 50 C.F.R. § 300.67(d)(1)(i).

⁹ 50 C.F.R. § 300.67(d)(1)(ii). All fifteen trips within each period must be with one vessel but the applicant can have used a different vessel in the qualifying period and the recent participation period.

¹⁰ 50 C.F.R. § 300.67(g).

regulation with respect to the applicant's lack of participation in the recent period (2008).¹¹ If the applicant meets the unavoidable circumstance regulation for the recent period, the applicant may be treated as though the applicant participated in the recent period.

Similarly, if the applicant meets the minimum participation trip level in the recent participation period (2008), but not in the qualifying period (2004, 2005), the applicant may seek to meet the requirements of the unavoidable circumstance regulation with respect to the applicant's lack of participation in the qualifying period (2004, 2005). If the applicant meets the unavoidable circumstance regulation for the qualifying period, the applicant may be treated as though the applicant participated in the qualifying period.

FACTUAL BACKGROUND¹²

In early 2003, [REDACTED] was an active duty member of the US Army Reserves (USAR), stationed at Fort Richardson, Alaska. He had served in this capacity (as a member of the USAR, but volunteering for active duty) for several years. In February 2003, the Chief of the Office of Promotions in the Army Personnel Command notified [REDACTED] that he had been promoted from [REDACTED]. As a condition of his promotion, he automatically incurred a "2-year AGR [Active Guard Reserve] obligation prior to voluntary a non-disability separation. . . . Acceptance of this promotion will subject him or her to worldwide reassignment to a position commensurate with grade and MOS [Military Occupational Specialty]."¹³ [REDACTED] accepted the promotion.

In the fall of 2003, having not yet been deployed away from Fort Richardson, [REDACTED] contemplated entering the halibut charter fishing business. "In between February 03 and February 05, during that extension period, my intent was to take people fishing . . .," he testified.

In April 2004, he applied for an ADF&G Sport Fishing Business and Sport Fishing Guide License. At that time, although he owned a vessel ([REDACTED] which he testified was suitable for chartering), he wrote on his ADF&G License application that his Alaska Occupational Business License was "pending." Likewise, he had not developed his internet web site and had done no formal advertising for clients (but states he had some "informal agreements with folks"). Finally, although he planned to personally operate the business, he had not yet acquired his USCG charter boat captain's license,¹⁴

The following exchange addresses the Coast Guard licensing issue:

JUDGE SMITH: You didn't have a license in 2004, is that correct?

¹¹ 50 C.F.R. § 300.67(g)(1).

¹² Unless otherwise indicated, the information in this Background is based on [REDACTED] letters to RAM and OAA (March 29, 2010, and October 6, 2010), from [REDACTED] letter to OAA (July 6, 2010), and from [REDACTED] testimony at the October 8, 2010, hearing.

¹³ Letter from [REDACTED] Chief, Office of Promotions to [REDACTED] (February 10, 2003).

¹⁴ Operator of Uninspected Passenger Vessel (OUPV), or "6-Pack," License.

██████████ No sir, I was studying up for that, and trying to do it on my own and on down the road I realized that the easiest way, the most expeditious way, was to take a course in it; so I was trying to ah, as I told ██████████ I was trying to ‘Abe Lincoln’ it with a big stack of books and charts, and it wasn’t working very well. That’s why I wasn’t able to obtain a license prior to them moving us.

JUDGE SMITH: So when you purchased your, or you applied for, your business and guide license from Fish and Game, you didn’t have a Coast Guard 6-Pack license.

██████████ No sir.

JUDGE SMITH: Were you aware that you needed one?

██████████ Well actually, that was, ah, I was, somewhat, but that was driven home when I did go to the state and started to do that process. What they did tell me I possibly could have done was, ah, you know; hire a captain to do that for me. But, you know, that was just about the same time that the Army Reserves said “Hey, you’re shipping out,” so that kind of thwarted those efforts and I just, you know, put it on the back burner then until we knew we were going to be back in Alaska.

In the spring of 2004, “right in around the time [he] was working with the state for licensing and the Coast Guard, and . . . studying up for the 6-Pack license,” the USAR ordered ██████████ to report to duty at ██████████ He obeyed the order.

On February 28, 2005, the USAR discharged ██████████ from active duty.¹⁵ He quickly returned to Alaska, moved back into his home in ██████████ and went to work as a civilian employee of the ██████████ He did not make any efforts to start his charter halibut fishing business in 2005 because “[he] didn’t have [his] 6-Pack license yet.”

In early 2006, ██████████ enrolled in a course to study for the USCG licensing exam. He subsequently passed the examination, but did not actually receive the license until July 2007. Shortly after the Coast Guard issued the license, he began his charter halibut fishing business.

THE UNAVOIDABLE CIRCUMSTANCE REGULATION

The regulations governing charter halibut permits provide several ways an applicant can qualify for a charter halibut permit. In the case before us, ██████████ argues only one means by which he may qualify for a charter halibut permit. Namely, he contends that under the rules for what is

¹⁵ DD 214 Automated NOV 88 [CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY].

commonly referred to as the unavoidable circumstance military service exception, he qualifies for a charter halibut permit.

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 (see below). The threshold requirement 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 ██████████ must have reported five or more halibut logbook fishing trips in 2008, but reported fewer than five bottomfish logbook trips in 2004 or 2005. ██████████ satisfies this requirement. 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. 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).

At 50 C.F.R. § 300.67(g)(3), the regulation provides:

(3) *Military service.* An applicant for a charter halibut permit that meets the participation requirement in the recent participation period, but does not meet the participation requirement for the qualifying period, may receive one or more permits if the applicant proves the following:

(i) The applicant 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; and

(ii) The applicant had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service.

(iii) The number of transferable and non-transferable charter halibut permit(s) that 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. Angler endorsements on all such charter halibut permits will be pursuant to paragraph (e)(2) of this section.

To satisfy the requirements of the military service regulation, an applicant must meet each requirement in the regulation with respect to the applicant's lack of participation in 2008. An applicant must satisfy each requirement of the military service regulation for NMFS to treat the applicant as though the applicant participated in either qualifying year (2004, 2005).

50 C.F.R. § 300.67(g)(3). Is ██████████ an applicant who meets the participation requirement in the recent participation period, but does not meet the participation requirement for the qualifying period? Yes

The first requirement for ██████ to prove is 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 ██████ reported twenty halibut logbook trips in 2008. Since twenty exceeds the minimum requisite amount of trips (five), ██████ has proven this element of his case. The record also shows that ██████ reported no bottomfish logbook trips in either 2004 or 2005. I therefore conclude that ██████ is qualified to have his claims adjudicated under the military service provisions of 50 C.F.R. § 300.67(g)(3).

50 C.F.R. § 300.67(g)(3)(i). Was ██████ an applicant who 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? Yes.

The record is clear that ██████ was an active duty member of the US Army Reserves when he was promoted by the Army and put on notice that he was subject to worldwide reassignment for a period of two years. ██████ was reassigned to ██████ in the spring of 2004. He was discharged from the Army Reserves ██████

50 C.F.R. § 300.67(g)(3)(ii). Was ██████ an applicant who had a specific intent to operate a charter halibut fishing business that was thwarted by the applicant's order to report for military service? No.

With respect to ██████ intentions in the spring of 2004, the preponderance of the evidence in the record compels me to find that ██████ did not prove that he had a specific intent to operate a charter halibut fishing business in 2004.

The record shows that ██████ (1) owned a vessel (the 1991 fiberglass ██████ ██████ equipped with a marine toilet (head) and a covered deck); and (2) on April 12, 2004, he applied for (and was subsequently issued) the ADF&G Sport Fishing Business and Sport Fishing Guide Licenses.

However, balanced against that limited evidence of specific intent are the following facts:

- ██████ had not operated a charter halibut fishing business at any time prior to 2004;
- At the time he applied for the ADF&G sport fish business and guide licenses, ██████ had not obtained a State of Alaska Occupational Business License, without which he could not have legally operated a sport fishing business (or any other business) within the State of Alaska;
- ██████ had made no documented attempt to attract customers to his business (e.g., establishing an internet site, purchasing advertising space, etc.);
- ██████ had not been issued a USCG "6-Pack" license at the time he allegedly held a specific intent to carry passengers for hire on his vessel;

- After [REDACTED] was discharged from the military and returned to Alaska (in March 2005), he was completely free of his military obligations; however, he did not immediately attempt to enter the charter halibut fishing business because he lacked a “6-Pack” license; and
- [REDACTED] did not take a course to prepare himself for the USCG “6-Pack” licensing exam until the spring of 2006 and, in the event, the license was not issued to him until 2007.

I find by a preponderance of the evidence that [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2004 or 2005.

As a result, [REDACTED] does not satisfy the requirements in the military service regulation, 50 C.F.R. § 300.67(g)(3), with respect to his lack of participation in the charter halibut fishery in 2004, and therefore [REDACTED] has not proven that he meets the minimum qualifications for a charter halibut permit

FINDINGS OF FACT

1. [REDACTED] made no reports of bottomfish logbook fishing trips during the charter halibut qualifying period (2004, 2005).
2. [REDACTED] 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.
3. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2004 or 2005.

CONCLUSIONS OF LAW

1. [REDACTED] did not hold a specific intent to operate a charter halibut fishing business in 2004 or 2005 within the meaning of 50 C.F.R. § 300.67(g)(3)(ii).
2. [REDACTED] does not satisfy the requirements of the military service regulation in 50 C.F.R. § 300.67(g)(3) with respect to his lack of participation in the charter halibut fishery in 2004 or 2005.
3. [REDACTED] does not satisfy the minimum qualifications for a charter halibut permit.

DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED**. This decision takes effect on January 19, 2011, 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 at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, December 30, 2010. 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 of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.


Philip J. Smith
Administrative Judge

Reviewed and approved:


Eileen Jones
Chief Administrative Judge