

or law is one which affects the outcome of the Decision or, even if the outcome is the same, the fact or issue should be addressed to clearly state the basis for the Decision.

Upon reviewing Appellant's motion for reconsideration, I reopened the record to allow him to submit evidence and argument concerning a point he raised in the motion, namely that he purchased gear for charter halibut fishing in 2004. I also allowed him to submit evidence to clarify when he took the United States Coast Guard (USCG) "6-pack" licensing course; i.e., whether it was in the spring of 2006 or the spring of 2007.⁵

Appellant submitted an affidavit, with receipts, showing that he purchased sport fishing halibut gear that was suitable for halibut charter trips, specifically eight high quality reels and poles and eight personal flotation devices (six adult, two child).⁶ He also submitted evidence that he signed up for the USCG course in March 2007 and completed it in April 2007.⁷ He had already testified that he received the license in July 2007.⁸

Appellant also submitted evidence that the Alaska Department of Fish and Game (ADF&G) did not require charter vessel operators to specifically report halibut in 2004 and 2005 and that after 2005, ADF&G did specifically require charter operators to report halibut in the ADF&G logbooks.⁹ Appellant seeks to call ADF&G staff to testify to the change in logbook requirements.

I deny Appellant's request to introduce evidence concerning the change in the logbook reporting requirements for several reasons. First, he did not make this argument during his appeal and therefore I did not overlook it. Second, it is a matter of public record that ADF&G logbooks did not require charter vessel operators to report halibut harvests in 2004 and 2005 and that, in 2006, ADF&G changed the logbooks to require the reporting of halibut harvests.¹⁰ In 2004 and 2005, charter operators were instructed to report the time they spent targeting bottomfish (including halibut) under bottomfish effort.¹¹ Third, this issue is not relevant to Appellant's appeal. He has never stated that he caught, or tried to catch, halibut in 2004 or 2005. He argued that he did not operate a charter halibut business because of his order to report for military service. I examine whether the Decision contained a material error in its analysis of that claim.

⁴ The procedure for seeking reconsideration is posted on the NMFS Alaska Region website, Administrative Appeals: <http://www.alaskafisheries.noaa.gov/appeals/reconsiderationpolicy.htm>.

⁵ Order to Re-Open the Record for Limited Purposes (March 17, 2011).

⁶ Affidavit of [REDACTED] (March 24, 2011); Statement of [REDACTED] (March 23, 2011); Receipt for mate vests (dated February 22, 2004); Receipt for rods and reels (dated February 7, 2004).

⁷ Letter from [REDACTED] to [REDACTED] (March 9, 2007); Certificate of Training (April 21, 2007).

⁸ Testimony of Appellant at 36 min. (October 8, 2010).

⁹ Letter from [REDACTED] Attorney, to [REDACTED] (March 24, 2011).

¹⁰ Proposed Rule, 74 Fed. Reg. 18,178, 18,185 (Apr. 21, 2009).

¹¹ *Id.*

ANALYSIS

Under the relevant CHLAP regulation, a special provision for military members provides that, if the applicant had reported sufficient halibut logbook fishing trips in 2008 (the recent participation period) to qualify for a permit and had held a specific intent to operate a charter halibut fishing business during the qualifying period (2004, 2005), but had not done so because of the applicant's obligation to report for military service, the applicant could be treated by NMFS as if the applicant had actually participated in 2004 or 2005.¹²

The regulation, 50 C.F.R. § 300.67(g)(3), 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.

Before an applicant can demonstrate his eligibility for a permit under this section, an administrative judge must make a finding, under section 300.67(g)(3)(ii), that the appellant held a specific intent to operate a charter halibut fishing business during the year in which he contends that, but for his obligation to serve in the U.S. military, he would have actually operated such a business. In the case at hand, 2004 was the year under scrutiny.

1. The Decision did not contain a material error of law when it considered evidence of Appellant's actions before and after 2004.

Appellant objected to the Decision stating that he had not operated a charter halibut business before 2004.¹³ Appellant also argued that the Decision contained an error of law by considering evidence regarding Appellant's actions after 2004.¹⁴ (specifically, in 2005), in reaching a conclusion regarding Appellant's specific intent in 2004. Neither argument is persuasive.

¹² 50 C.F.R. § 300.67(g)(3).

¹³ Appellant's Statement at 2 (Dec. 29, 2010).

¹⁴ Motion for Reconsideration at 2.

All evidence that is relevant, material, reliable, and probative may be considered in resolving an appeal.¹⁵ Evidence that tends to make less likely, or more likely, a fact in dispute meets these criteria. Appellant's actions before and after 2004 are relevant to determine whether Appellant had a specific intent to operate a charter halibut business in 2004 that was thwarted by his order to report for military service.

With respect to Appellant's actions before 2004, the Decision did not err by considering that Appellant had not operated a charter halibut business before 2004. If an applicant had operated a charter halibut business in 2002 or 2003, and was ordered to report for military service in 2004, the applicant's prior participation would be relevant to whether he had formed a specific intent to participate in 2004, and whether his military service obligation thwarted that intent. If the applicant had operated a charter halibut business before 2004, that could make it more likely that he did not participate in 2004 because of an order to report for military service. The applicant would have shown that he had all the things required to actually operate a business: a vessel, the necessary licenses, a vessel operator, a way to attract clients, and the ability to successfully take them out on trips.

The same is true for what an applicant does after the military service ends. Appellant stated: "What was overlooked [in the Decision] was applying 50 C.F.R. § 300.67(g)(3)(ii) to 2004 independent from the events of 2005 when (Appellant) returned from military service."¹⁶ If an applicant, as soon as the military service ends, operates a charter halibut business, that tends to make it more likely that it was the the order to report for military service that thwarted the applicant's intent to operate a charter halibut business.

Counsel suggests that "thwart" simply means create an obstacle.¹⁷ Webster's defines "thwart" more strongly and as equivalent to prevent: "**a**: to run counter to: OPPOSE, BAGGLE, CONTRAVENE . . . **b** : to oppose successfully: (1) to defeat the hopes, aspirations or plans of . . . (2) to block or check the occurrence, preperformance, or completion of"¹⁸

In the context of the CHLAP, "thwarted" should have the common meaning of prevent, or block the occurrence of; namely the administrative judge must find that the applicant's military service prevented the applicant from operating a charter halibut business. This is the proper meaning of thwarted because the military service exemption allows NMFS to treat a person who did not participate in the qualifying period as though the applicant had participated. To do this, NMFS must determine, through the appeal process, whether Appellant would likely have operated a charter halibut fishing business in 2004 or 2005 but for his order to report for military service.

To determine whether an applicant held a "specific intent" to operate a business, the administrative judge is called upon to make a determination of the Appellant's state of mind during the year in which the Appellant did not operate a charter halibut fishing business. To do

¹⁵ 50 C.F.R. § 679.43(j).

¹⁶ Motion for Reconsideration at 2.

¹⁷ Motion for Reconsideration at 2.

¹⁸ Webster's Third New International Dictionary (1986).

so fairly, the Judge must consider all of the facts in the record, including known events that preceded, and followed, the Appellant's non-performance during the relevant time period.

It is therefore entirely appropriate, and not an error of law, that the Decision considered Appellant's actions after he was free to start his halibut charter fishing business and the claimed barrier to realizing his intent was removed. The Decision properly considered that Appellant returned to Alaska in early 2005, but did not start his business until 2007, following receipt of his captain's license from the U.S. Coast Guard.¹⁹

I note that the Decision stated that Appellant enrolled in a course to study for the USCG license in early 2006.²⁰ That is incorrect. On reconsideration, Appellant clarified that he enrolled in the course in March 2007 and completed it in April 2007.²¹ Appellant received the USCG license on July 12, 2007, and took his first clients out on July 14, 2007.²²

2. The Decision did not contain a material error in its evaluation of evidence of Appellant's actions during 2004.

Appellant listed a series of facts that, he implied, had not been considered by the Administrative Judge. I evaluate each of Appellant's points:

| Appellant's Motion | Decision |
|---|--|
| Appellant bought Business and Guide Licenses from the Department of Fish and Game | Noted in Decision at page 3 |
| Purchased Suitable Vessel | Noted in Decision at page 3. Appellant's testimony indicated vessel had been purchased in around 2001 or 2002, primarily for family use. |
| Purchased eight sets of sport halibut gear and SOLAS ²³ lifesaving equipment | Not noted in Decision because Appellant had not presented this in his written statements or in his testimony at the hearing. On reconsideration, Appellant presented documentation of these purchases in February 2004. This is some evidence that Appellant |

¹⁹ Decision at 7.

²⁰ Decision at 4.

²¹ Letter from [REDACTED] to [REDACTED] (March 9, 2007); Certificate of Training (April 21, 2007).

²² Appellant's Testimony at 36 min. (Oct. 8, 2010).

²³ "Safety of Life at Sea" – an international treaty providing for maritime safety.

intended to operate a charter halibut business in 2004. But it does not outweigh the evidence that Appellant did not show that he had a realistic plan to obtain, for the 2004 season, an essential element needed to operate a charter halibut business, namely an operator licensed to carry passengers.

Expended time and money to qualify for USCG Captain's License

Appellant had logged the sea time necessary for his USCG Captain's "6-pack" license. But, to receive the license, the Decision at pages 3 – 4 noted that Appellant concluded he needed to take and pass the USCG course. The fact that Appellant had sea time does not outweigh the evidence that Appellant did not show that he had a realistic plan to obtain, for the 2004 season, an essential element needed to operate a charter halibut business, namely an operator licensed to carry passengers.

Entering into informal agreements with the "local populace" for charters

Appellant alleged this during the administrative hearing but did not elaborate or provide any corroboration in the form of testimony from tour brokers or other persons that would refer him clients. The Decision did not refer to this testimony but this was not a material omission because [a] the testimony was vague and not sufficient to indicate that Appellant had any definite trips lined up or any definite source of referrals for trips and [b] the Decision relied primarily on the Appellant's lack of a vessel operator, which informal agreements with the populace for referrals does not solve.

Appellant stated that, even though he did not have a USCG Captain's license himself, he could have hired someone who did.²⁴ The Decision did not overlook any evidence that Appellant had an agreement with any person to operate the vessel, any testimony by Appellant of names of persons with the required USCG license that he could have hired, any evidence that Appellant contacted any specific persons to run the boat for him, and any evidence that Appellant investigated the finances of this business model and would have operated that way. And when Appellant did start his business in 2007, he operated the vessel himself and did not hire a captain.

CONCLUSION

I have carefully evaluated the arguments and evidence submitted by Appellant in connection with his motion for reconsideration. The Appellant has not shown by a preponderance of evidence that he would have operated a charter halibut business in 2004 but for the order to report for military service. I conclude that the Decision did not contain a material error of law or fact and that Appellant did not have a specific intent to operate a charter halibut fishing business in 2004.

DISPOSITION

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

The Decision entered in this appeal, dated Decembr 20, 2010, will take effect on May 5, 2011, unless by that date the Regional Administrator orders review of the decision.



Philip J. Smith
Administrative Judge

²⁴ Appellant's Statement at 3 (Dec. 29, 2010).