

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

In re Application of

[REDACTED]

Appellant

)  
)  
)  
)  
)  
)  
)

Appeal No. 10-0027

DECISION on REMAND

---

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.<sup>1</sup>

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 April 5, 2010, Appellant applied for a CHP pursuant to the Charter Halibut Limited Access Program (CHLAP).<sup>2</sup> 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 3, 2010, RAM sent Appellant a Notice of Opportunity to Submit Evidence (Notice).<sup>3</sup> In the Notice, RAM advised Appellant an Active Duty Military Service hardship claim requires proof 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 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. RAM advised Applicant he had until June 2, 2010, to submit any additional evidence in support of

---

<sup>1</sup> 50 C.F.R. § 679.43.

<sup>2</sup> Original File Tab, Application for Charter Halibut Permit(s) for IPHC Regulatory Areas 2C and 3A, received April 5, 2010, signed March 31, 2010.

<sup>3</sup> Original File Tab, Notice of Opportunity to Submit Evidence.

his claim. On June 1, 2010, Appellant responded to the Notice.<sup>4</sup> Appellant stated that intended to start his charter business in summer 2004, but that in December 2002 he was given orders from the Coast Guard to report for service and that he did not return to Alaska until August 2006.<sup>5</sup> Appellant submitted with his response to the Notice a copy of a Standard Travel Order issued by the Department of Homeland Security, U.S. Coast Guard, indicating that he was to report to ██████████ ██████████ OR from July 15, 2003 to July 1, 2007.<sup>6</sup>

On June 17, 2010, RAM sent Appellant the IAD which is the subject of this appeal.<sup>7</sup> 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 military service 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 August 7, 2010, Appellant timely filed his appeal of the IAD with OAA.<sup>8</sup> On September 24, 2010, NAO sent Appellant an Order Scheduling a Hearing.<sup>9</sup> On October 4, 2010, Appellant testified during his scheduled hearing that in November 2002, he received orders from the U.S. Coast Guard to report for active duty in ██████████ OR, beginning on December 22, 2002.<sup>10</sup> Appellant further testified that during his military service he received orders to leave military service a year early with a leave date of April 4, 2006.<sup>11</sup> Appellant also testified that in late 2003, he purchased a vessel for his planned charter operations in Alaska. Appellant presented three witnesses at his hearing all of whom stated Appellant wanted to go into the charter fishing business before and during the qualifying period.<sup>12</sup>

On October 17, 2011, NAO issued the initial Decision in this appeal. On November 10, 2011, the Regional Administrator (RA) for the National Marine Fisheries Service (NMFS), Alaska Regional Office, issued a stay of the Decision until December 22, 2011. On December 21, 2011, the RA issued a Decision on Review remanding NAO's October 17, 2011 Decision to further develop the existing record.

---

<sup>4</sup> Original File Tab, type-written letter received June 1, 2010.

<sup>5</sup> Original File Tab, type-written letter received June 1, 2010.

<sup>6</sup> Original File Tab, copy of Standard Travel Order received June 1, 2010.

<sup>7</sup> Original File Tab, IAD.

<sup>8</sup> Pleadings Tab, letter dated August 7, 2011, and received August 10, 2010.

<sup>9</sup> Pleadings Tab, Order Scheduling Hearing.

<sup>10</sup> Audio recording of October 4, 2010, scheduled hearing.

<sup>11</sup> Audio recording of October 4, 2010, scheduled hearing.

<sup>12</sup> Audio recording of October 4, 2010, scheduled hearing.

Specifically, the RA has asked NAO to make findings on:

- (1) Whether the Appellant purchased a vessel in 2003;
- (2) Whether, and on what date, the Appellant obtained his business owners license following his return to Kodiak; and;
- (3) Whether the Appellant operated his charter halibut fishing business in 2007.

The RA stated documentary evidence addressing the above findings should enable NAO to draw reasonable conclusions as to whether Appellant held a specific intent to operate a charter halibut fishing business during the qualifying period that was thwarted by his obligations to the U.S. Coast Guard.

Subsequent to the RA's Remand, NAO issued a Request for Information to Appellant requesting evidence necessary for NAO to comply with the RA's remand. On January 3, 2012, in response to this request, Appellant submitted the following documents:

- (1) A Certificate for a Title of a Boat issued by the State of Oregon on ██████████ 2003. This document indicated that Appellant was one of the lien holders / legal owners of this vessel.
- (2) A United States Coast Guard Merchant Marine Officer License issued ██████████ 2004.
- (3) A 2007 Alaska Department of Fish and Game (ADF&G) Sport Fish Business Owner/Guide License issued on ██████████ 2006, indicating Appellant as the Business Owner or Guide.
- (4) A Condition and Valuation Survey for Appellant's vessel dated December 13, 2006.
- (5) A document issued by the Alaska Department of Commerce, Community, and Economic Development Business, stating Appellant is licensed by that department to conduct business from April 30, 2007 through December 31, 2007.
- (6) A document from the Alaska Division of Corporations, Business, and Professional Licensing, indicating Appellant had an active business license from April 30, 2007 to December 31, 2009.
- (7) A document from The Maritime Consortium, Inc. dated July 3, 2007, indicating that Appellant's test results were negative for pre-employment purposes for his company.

(8) Appellant's 2007 ADF&G Saltwater Charter Logbooks, indicating he was fishing for halibut in July and August 2007.

(9) A document dated June 13, 2007, indicating insurance liability coverage for Appellant's vessel.

(10) Photographs of Appellant's vessel.

I have determined that the information in the record is sufficient to render a decision.<sup>13</sup> I therefore close the record and render this decision. In reaching my decision, I have carefully reviewed the entire record, including the audio recording of the hearing.

## ISSUES

1. Was Appellant ordered to report to active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period?

2. If the answer to Question 1 is "yes", then I will decide whether Appellant had a specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service;

If the answer to Question 2 is "no," I must conclude Appellant is not eligible for a CHP under the military unavoidable circumstance provisions and, therefore, uphold the IAD.

## PRINCIPLES OF LAW

To qualify for a permit, an applicant must hold an ADF&G Business Owner 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).<sup>14</sup>

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.<sup>15</sup>

---

<sup>13</sup> 50 C.F.R. § 679.43(g) (2).

<sup>14</sup> 50 C.F.R. § 300.67(b)(1) and (3), and (f)(4).

<sup>15</sup> 50 C.F.R. § 300.67(f)(5); 75 Fed.Reg. 554, 556 (2010).

Among the threshold criteria for obtaining a permit to operate a charter halibut fishing business, is participation in the industry in two time periods, the *qualifying period*, 2004 or 2005, and the *recent participation period*, 2008. Further, the participation must have occurred in the International Pacific Halibut Commission (IPHC) regulatory area (either 2C or 3A) for which the applicant seeks the permit. This threshold criteria may be referred to as the participation requirements.<sup>16</sup>

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:

1. 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
2. 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.<sup>17</sup>

#### FINDINGS OF FACT

1. On ██████████ 2002, Appellant received an Alaska Nautical Training School Certificate of Training.<sup>18</sup>
2. On December 22, 2002, Appellant was ordered to report for military service.<sup>19</sup>
3. Appellant purchased a vessel in 2003.<sup>20</sup>
4. On ██████████ 2004, Appellant was issued a Merchant Marine Officer License.
5. On July 3, 2006, Appellant was issued an ADF&G Business Owner License.<sup>22</sup>

---

<sup>16</sup> 50 C.F.R. § 300.67(a) and (b), and Notes to Final Rule, 75 Fed.Reg. 554, 554-555 (2010).

<sup>17</sup> 50 C.F.R. § 300.67(g)(3).

<sup>18</sup> Pleadings Tab, copy of certificate.

<sup>19</sup> Audio recording of October 4, 2010, scheduled hearing.

<sup>20</sup> Evidence Tab, Certificate for a Title of a Boat issued by the State of Oregon on October 31, 2003, received January 3, 2012.

<sup>21</sup> Evidence Tab, Merchant Marine Officer License, received February 10, 2012.

<sup>22</sup> Evidence Tab, 2007 Alaska Department of Fish and Game (ADF&G) Sport Fish Business Owner/Guide License issued in July 3, 2006, received January 3, 2012.

6. Appellant operated his charter halibut fishing business in July and August 2007.<sup>23</sup>
7. Appellant received orders to leave military service a year early with a leave date of April 4, 2006.<sup>24</sup>
8. Appellant presented no evidence that, prior to his order to report for military service on December 22, 2002, he had an ADF&G Business Owner License, a State of Alaska Occupational Business License, a vessel suitable for charter vessel trips, a USCG “6-Pack” license, liability insurance for a charter vessel business, that he had advertised or booked trips for charter halibut clients, or that he had previously operated a charter halibut fishing business.

### ANALYSIS

In analyzing this case, I considered the entire record, including statements made during the scheduled hearing and the documents submitted by Appellant in support of his appeal. 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 2004 or 2005. I will first address whether Appellant was ordered to report to active duty military service as a member of a branch of the U.S. military, National Guard, or military reserve during the qualifying period. I will next address whether Appellant held the specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service.

Appellant testified he was ordered to report for active duty with the U.S. Coast Guard from December 22, 2002 to April 4, 2006. The U.S. Coast Guard is one of the five armed forces of the United States. Given the above, it is reasonable to conclude Appellant was ordered to report for active duty military service as a member of a branch of the U.S. military, during the qualifying period.

The next criterion I consider is whether Appellant held the specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service.

Appellant presented evidence indicating he had a specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service. On ██████████ 2002, Appellant received a Nautical Training School Certificate in order to prepare himself to obtain a Coast Guard License necessary for him to operate such a business. Further, Appellant presented three witnesses at his

---

<sup>23</sup> Evidence Tab, 2007 ADF&G Saltwater Charter Logbooks, received January 3, 2012.

<sup>24</sup> Audio recording of October 4, 2010, scheduled hearing.

hearing who stated that prior to Appellant receiving orders to report for military service he wanted to go into the charter fishing business.

Appellant also presented evidence indicating he had a specific intent to operate a charter halibut fishing business after he was ordered to report for military service on December 22, 2002. Such evidence includes, but is not limited to, Appellant's purchase of a vessel in 2003, his receipt of a Merchant Marine Officer License on ██████████ 2004 and an ADF&G Business Owner License on ██████████ 2006, and his operation of a charter halibut fishing business in 2007.

The evidence Appellant submitted demonstrating his intent to operate a charter halibut fishing business after his receipt of orders to report for military service is noted; however this evidence must be viewed in the context of the Charter Halibut Limited Access Program (CHLAP) regulations. The CHLAP regulations state:

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: ... (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.<sup>25</sup>

In evaluating the facts of Appellant's appeal under the plain language of the above section of the CHLAP regulations, it does not follow that any weight should be afforded to Appellant's evidence of his specific intent to operate a charter halibut fishing business after his receipt of orders to report for military service on December 22, 2002. It is not logical or possible that Appellant developed a specific intent to operate a charter halibut fishing business before or during the qualifying period, *after* he was ordered to report for military service. This point is made all the more striking through Appellant's testimony during his scheduled hearing that he received orders to leave military service *a year early* with a leave date of April 4, 2006. Appellant could not possibly have believed or formed a specific intent that he would be able to operate a charter halibut fishing business before or during 2004 or 2005, after he was ordered to report for military service on December 22, 2002, and knowing he would not be released from his military service until April 4, 2006.

The CHLAP regulations require an applicant's intent be thwarted by his or her order to report for military service. The plain language of this regulation indicates this intent must be formed before it can be thwarted. Therefore, the only evidence that may be analyzed in evaluating Appellant's specific intent to operate a charter halibut fishing business is that which occurred prior to his order to report for military service, namely his receipt of a Nautical Training School Certificate late 2002, and

---

<sup>25</sup> 50 C.F.R. § 300.67(g)(3).

the testimony of his three witnesses. This evidence must be weighed against facts indicating Appellant did not hold a specific intent to operate a charter halibut fishing business prior to his order to report for military service. Appellant did not present any evidence that prior to this order he possessed an ADF&G Business Owner License, a State of Alaska Occupational Business License, a vessel suitable for charter vessel trips, a USCG "6-Pack" license, liability insurance for a charter vessel business, that he had advertised or booked trips for charter halibut clients, or that he had previously operated a charter halibut fishing business.

Given the totality of the evidence and facts, I conclude Appellant did not have a specific intent to operate a charter halibut business that was thwarted by his order to report for military service. Appellant failed to prove by a preponderance of the evidence that he held a specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service.

#### 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.

Appellant did not have a specific intent to operate a charter halibut fishing business that was thwarted by his order to report for military service.

The IAD is consistent with CHLAP regulations.

#### ORDER

The NAO initial Decision issued October 17, 2011, is vacated. The IAD dated June 17, 2010 is upheld. This decision is effective thirty (30) days from the date issued<sup>26</sup> on March 26, 2012, 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 reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43(k) and (o).

---

<sup>26</sup> 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, March 5, 2012. 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.



---

Steven Goodman  
Administrative Judge

Date Issued: February 24, 2012