

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: C. RAFAEL, LLC
LICENSE DENIAL

AAD NO. 12-003/F&WA

Decision and Order

This is an appeal before the Administration Adjudication Division of the Department of Environmental Management ("AAD") taken by C. Rafael, LLC ("Rafael" or "Applicant") from the denial by the Division of Fish and Wildlife ("Division") of its application for transfer of Summer Flounder Exception Certificate # 91. Applicant filed its appeal on November 21, 2012 and an Administrative Hearing was held on February 26, 2013.

Hearing

Mr. Carlos Rafael identified himself as the President of C. Rafael, LLC and advised that he would be acting as spokesperson for the Applicant and that he would like to proceed without an attorney. Mr. Rafael was also the only witness for the Applicant. Mr. Jason Davis of Vessel Documentation Service attended the hearing to assist Mr. Rafael, but did not testify. The Division was represented by Mr. Gary Powers, Esquire who presented Nancy Scarduzio, Principal Marine Biologist for the Division as its only witness.

Stipulated Exhibits

The following exhibits were agreed to as Full or Joint Exhibits prior to the commencement of testimony:

Division's Exhibit #1 Full. Denial Letter dated November 1, 2012 from the Division in response to Applicant's request to transfer Summer Flounder Exemption Certificate #91 which had previously been assigned to the F/V Huntress I (O.N. 608248). 3 pages (Copy).

Joint Exhibit #2 Full. The letter dated November 21, 2012 submitted to the AAD on behalf of the Applicant requesting a hearing concerning the Denial Letter. 2 pages (Copy).

Joint Exhibit #3 Full. Bill of sale dated December 15, 2011 pursuant to which the Applicant acquired the F/V Huntress I (O.N. 608248) from the U. S. Marshals Service at auction. 2 pages (Copy).

Joint Exhibit #4 Full. The letter dated March 23, 2012 from the Division to the Applicant in which the Division advised the Applicant of its obligation to satisfy the qualifications set forth in *Rhode Island Fisheries Statutes and Regulations* Section 7.7.10 in order to be granted the transfer of Summer Flounder landing Exemption Certificate #91. 2 pages (Copy).

Joint Exhibit #5 Full. The Applicant's application dated June 15, 2012 to the Division for the application for the transfer of Summer Flounder Exemption Certificate #91. 18 pages (Copy)

Joint Exhibit #6 Full. Two R.I. Multi-purpose landing licenses for non-residents submitted to supplement the Applicant's June 15, 2012 application. 5 pages (Copy).

Division's Exhibit #7 Full. The e-mail response dated July 31, 2013 from the

Division concerning the Applicant's June 15, 2012 application and the supplement thereto. 2 pages (Copy).

Testimony

Applicant's Direct Case:

Mr. Carlos was allowed to testify in narrative form to present the reasons why he felt the Division was wrong in denying the Applicant its transfer application. He testified, under oath, that he purchased a fishing vessel F/V Huntress I (O.N. 608248) at an auction conducted by the U. S. Marshals Service on December 15, 2011 for the sum of Six Hundred and Fifty Thousand (\$650,000.00) Dollars. He said that at the time of the auction the representative of the U. S. Marshals Service advised that together with the vessel and its equipment the successful bidder would receive all Federal and State Permits.

This representation was verbal. He testified that he had purchased vessels at auction in the past and this was always a provision. He said that he never before has been involved in a transfer in Rhode Island. He said that he relied on the representations of the U. S. Marshals Service and did not feel it necessary to apply for a transfer of permit. The Applicant rested its case.

Division's Rebuttal Case:

The Division presented as its only witness Ms. Nancy Scarduzio, Principal Marine Biologist for the Division of Fish and Wildlife ("Scarduzio"). Ms. Scarduzio testified that

she has been an employee of the Division for eleven (11) years and that one of her duties is to review applications for Summer Flounder Exemption Certificates ("Certificate"). She said that she reviewed approximately thirty (30) applications for the Certificate in the last four (4) years.

She explained that the Certificate authorizes the operator of a vessel who also possesses a valid Rhode Island Commercial Fishing License authorizing the harvesting of summer flounder to land the species in an amount greater than the limit of two hundred (200) pounds per day. She also explained that some commercial fishing licenses only authorized the taking of "non-restricted finfish" and, thus, some licensed fishers are not authorized to take any summer flounder or other "restricted finfish".

Ms. Scarduzio explained the steps she took once she became aware of the fact that the title to the F/V Huntress I (O.N. 608248) had been transferred. She said that she took the initiative to notify Mr. Rafael of the necessity and procedure to transfer the license. In spite of the written explanation provided to the Applicant it never satisfied the Resident non-restricted landing license. DEM continued to try to work with the Applicant to satisfy the license transfer requirement long after the ninety (90) days after title transfer period expired. Rafael, in fact never provided evidence that the proposed operator of the vessel possessed a valid Rhode Island commercial fishing license authorizing the possession of summer flounder.

After a brief cross-examination by Applicant of witness Scarduzio, DEM rested.

Analysis

In this appeal the burden of proof is on the Applicant to show by a preponderance of the evidence that the Division was wrong or committed error when it denied its Application for license transfer. Preponderance of the evidence has been interpreted to mean that it is more likely than not that the Division was wrong or committed error. The Applicant must introduce competent evidence to meet its burden of proof in order to prevail in its appeal.

The Applicant presented no evidence to show that the Division did not follow the law and its own regulations in denying the application. The only evidence presented by the Applicant was in the nature of an equitable argument. The Applicant stated that he relied on the representations of the Federal Marshal at the auction. He acknowledged that he had never been involved with the Rhode Island license transfer procedure. He pleads ignorance of the law.

Ignorance of the law is not an excuse. Everyone is presumed to know the law. Walden v. U. S. 133 S. Ct. 587. In addition, even if the Applicant was not familiar with the license transfer procedures and requirements in Rhode Island, the written correspondence from the Division (Joint Exhibits #4 and #7) expressly spelled out what was required. The Applicant did not and has not complied with the Regulatory requirement of Section 6.1(a) (vii).

CONCLUSION

The Applicant has failed to meet its burden of proof that the Division improperly denied its Application for the transfer of Summer Flounder Exception Certificate # 91. The Applicant's appeal should, therefore, be denied.

FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the administrative Hearing I make the following Findings of Facts:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a Denial Letter dated November 1, 2012 from the Division (Division Exhibit # 1 Full).
3. Pursuant to a letter dated November 21, 2012 on behalf of the Applicant (Joint Exhibit # 2 Full) Applicant requested a hearing before the AAD concerning the Denial Letter dated November 1, 2012.
4. Applicant acquired the F/V Huntress I (O.N. 608248) from the U. S. Marshall Service at an auction through on or about December 15, 2011 (Joint Exhibit # 3 Full).
5. The Division contacted the Applicant via letter dated March 23, 2012 (Joint Exhibit # 4) in which the Division advised the Applicant's obligation to satisfy the qualifications to complete the transfer of the Summer Flounder Exemption Certificate.

6. The Applicant submitted an application for application for the transfer of Summer Flounder Exemption Certificate # 91 to the Division dated June 15, 2012 (Joint Exhibit # 5 Full).
7. Applicant's June 15, 2012 application for transfer failed to include evidence that the operator of the subject vessel possessed a valid Rhode Island commercial fishing license to land summer flounder. Rather, the application was supported by Multi-purpose landing license –MPLAND000205 for a non-resident with which one is not permitted to land restricted finfish and therefore not in compliance with the licensure requirement of the regulation.
8. Applicant through his agent, Jason Davis, was advised of the licensure deficiency to which Jason Davis responded on July 31, 2012 by faxing copies of two RI Multi-purpose landing licenses for non-residents (Joint Exhibit # 6 Full). Both which did not permit landing of restricted finfish, and therefore did not meet the regulation requirement.
9. On July 31, 2012, Ms. Scarduzio responded to Mr. Davis via email (Joint Exhibit # 7) with notice of the inadequacy of the license submittals and the provision of a copy of the governing regulations.

10. On November 1, 2012, over ninety (90) days following the July 31, 2012 correspondence, the Division provided the Applicant with a Denial Letter (Division Exhibit # 1).

CONCLUSIONS OF LAW

Based on the above Findings of Fact I make the following Conclusions of Law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant has filed a timely Appeal from the Division Denial of its Application.
3. The Applicant has not satisfied his burden of proving at hearing that the Division was in error when it denied on November 1, 2012 the Applicant's June 15, 2012 application for the transfer of Summer Flounder Exemption Certificate # 91.
4. The Division's Decision to deny the Applicant's Application should be upheld.
5. The Applicant's Appeal should be Denied.

ORDER

Based on the above Findings of Fact and Conclusions of Law it is hereby

ORDERED:

1. The Applicant's Appeal is hereby **Denied**.

Entered as an Administrative Order this 17th day of April, 2013.



David Kerins
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: C. Rafael, LLC, 84 Front Street, New Bedford, MA 02740 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 17th day of April, 2013.



NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.