

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Frank Pettis
Denial of Berthing Permit
AAD No. 08-003/CRA
2009

DECISION AND ORDER

This is an appeal filed by Frank Pettis (“Applicant” or “Pettis”) to review the denial by the Division of Coastal Resources of the Department of Environmental Management (“Division” or “DEM”) of applicant's request to renew his berthing permit at the Port of Galilee State Piers. The denial was transmitted by letter dated September 26, 2008 and the Applicant requested an appeal on October 22, 2008. The Applicant was represented by attorneys Robert Goldberg, Esq. and Thomas Goldberg, Esq. The division was represented by Gary Powers, Esq. A notice was issued on February 23, 2009 setting the matter down for prehearing and hearing on March 16, 2009 at 1:30 p.m. At the Prehearing Conference the parties submitted Prehearing Memoranda and met with the Hearing Officer to review proposed exhibits and stipulations of fact.

STIPULATED EXHIBITS

The parties agreed at the Prehearing Conference to the entry of the following exhibits:

APPLICANTS' EXHIBITS

Applicants' Exhibit # 1 Full; a copy of bill from DEM to Applicant dated January 8, 2009 for dockage fee for the vessel Dorado II, docking period June 1, 2008- June 30, 2009 in the amount of \$1,380.00 together with a copy of a check dated January 15, 2009 from Pettis Boat Yard to “State of RI DEM” in the amount of \$1,380.00

DIVISION EXHIBITS

Division exhibit # 4 for identification; the resume of Ramon R. Pena.

JOINT EXHIBIT

Joint Exhibit # 1 Full a copy of the letter from DEM dated September 26, 2008 denying the Applicant's berthing permit application.

Joint Exhibit # 2 Full a copy of letter from Robert D. Goldberg, Esq. dated October 22, 2008 requesting an appeal to the Administrative Adjudication Division.

STIPULATED FACTS

The parties agreed on the following stipulated facts:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a Notice from the Division dated September 26, 2008 from the Division notifying the Applicant of the denial of the application for renewal of the berthing privileges of the Applicant's vessel, Dorado II, at the port of Galilee State Piers.

3. A letter was submitted on behalf of the Applicant dated October 22, 2008 requesting a hearing concerning the Division's Notice dated September 26, 2008.

HEARING SUMMARY

An Administrative Hearing was held on March 16, 2009. Frank Pettis was the first witness testifying in support of his appeal. Mr. Pettis stated that he is the owner of the vessel Dorado II and has conducted charters out of Point Judith and Pawtuxet Cove for twenty-two (22) years. He has kept his boat at the Port of Galilee for twenty (20) years. Mr. Pettis testified that he holds a captain's license which authorizes him to pilot a vessel of 100 tons and take charters 100 miles off shore. Mr. Pettis testified that he kept his vessel in Pawtuxet and posted a sign in Galilee with her phone number indicating he was available for charter but at some point the sign was removed. He testified that he was available for charter which he described as offshore canyon trips. He said that he had about a half-dozen inquiries in 2008 but none of them resulted in a charter. He said if he had a charter he would have picked them up in Galilee.

Mr. Pettis acknowledged that he had received a letter dated September 26th which has been marked as Joint Exhibit # 1 Full. He said that he received no other notice or verbal warning that he could not berth his vessel at the state pier. He said that he became aware that he could not use his slip when he went to Galilee in May of 2009 and found another vessel in his place.

Mr. Pettis testified that he had received a bill which was identified as Applicant's Exhibit # 1 Full. He testified that he paid the sum of \$1,380.00 which represented three quarters of the year's charge. He testified that his vessel is still operational and he intends to continue to use it for charter. He requested to be allowed to continue to have his berth at Galilee.

Counsel for the Division advised that he did not intend to cross examine Mr. Pettis at this time but reserved the right to call him as a witness as part of the division's presentation. Mr. Pettis responded to a question from the Hearing Officer to the effect that the sign he put up at the berthing slip had been taken down in June of 08 and he did not replace it. At the conclusion of Mr. Pettis' testimony the Applicant rested.

The Division presented Ramon Pena as its first witness. Mr. Pena testified that he has been employed by DEM for twenty (20) years and has served as the port manager at the Port of Galilee for three and a half years. He said that he initiated the termination of Mr. Pettis's berthing permit due to lack to activity. He said that the log book records and his own observations indicated that Mr. Pettis' vessel Dorado II had not been in the Port of Galilee for the period between July 1, 2007 and June 30, 2008. The log book was identified by witness Pena and admitted as Division's # 3 Full over Applicant's objections.

Mr. Pena was directed to the Division's Regulations entitled "Galilee Port Operations Regulations and Berthing Management System January 9, 2004." (regulations) He was directed to page 5, Part 2, Section 9 which establishes "Berthing Permit Criteria by Boat Class." Mr. Pena was specifically directed to subsection A. (4) which states that "Applicants for permit must demonstrate that they will be engaged in carrying passengers for hire by certifying either: ... The vessel was used for carrying passengers for hire on at least 30 days of the previous year, and/or that the vessel was available with a licensed captain aboard for charter on the average of 2 days each week from Memorial Day through October 15."

Mr. Pena testified that there were charters out of the Port of Galilee during the period of time that Mr. Pettis only had six inquiries. He said that charters were down somewhat but everyone had charters.

Mr. Pena was next directed to section 13 on page 6 of the Regulations which states; "A permittee shall notify the State in advance if his berth will not be used for a period of one week or longer." Mr. Pena testified that although Mr. Pettis did not use his berth for an extended period of time he never notified port management of his intent to leave it open. Mr. Pena advised that there are a lot of people looking for temporary berths who could be accommodated."

The Division moved to have Mr. Pena recognized as an expert in the interpretation and application of the regulations. Mr. Pena was admitted as an expert for the purposes of assisting the Hearing Officer over the Applicant's objection. Mr. Pena testified that he had an opinion as to whether the Applicant was eligible for the re-issuance of a berthing permit at the Port of Galilee. He did not in fact state what his opinion was.

Applicant's counsel conducted a cross-examination of witness Penna. Mr. Pena acknowledged that it is not a requirement that the boat has to be berthed at the slip. He said that he did not see a sign at the slip during the summer. He did not know who removed the sign or when. Upon questioning Mr. Pena said that the log would not show Mr. Pettis' vessel listed.

Counsel for the division conducted a brief redirect examination. Mr. Pena testified that the rate for Port of Galilee is \$40.00 a foot. While other marinas can range from \$100.00 to \$150.00 a foot for a four month period. No charge is made for utilities. On recross examination Mr. Pena said that there are no slips vacant at the State Pier. There is a waiting list of at least 15 boats.

The Division called the applicant, Frank Pettis as a witness. Showing the Applicant Applicant's Exhibit # 1 Mr. Pettis acknowledged that the check was from Pettis Boatyard. Mr. Pettis acknowledged that he owns a marina. The state rested. A schedule was set for the submission of post hearing briefs. The hearing was then adjourned.

ANALYSIS

The Rules and Regulations for the Port of Galilee were promulgated pursuant to R.I. General Laws Chapters 46-5 and 42-17.1 in accordance with the R.I. General Laws Chapter 42-35, the Administrative Procedures Act. The Applicant bears the burden of proof that he has met the requirements of the regulations and that the Division wrongfully denied the renewal of his berthing permit.

The Division has stipulated to the fact that the applicant has met all the requirements of Part II Section 9 of the regulations except subsection (6) thereof. Subsection (6) requires "that the vessel was used for carrying passengers for hire on at least 30 days of the previous year, and /or that the vessel was available with a licensed captain aboard for charter on the average of 2 days each week from Memorial Day through October 15th.

The Applicant acknowledged that he did not carry passengers for hire out of Galilee during the previous year. He testified that he kept his vessel at his marina in Pawtuxet and was not at the Port of Galilee during the year. He said that he was available for charters although he was not physically present at his slip in Galilee. He testified that his availability to take charters was made known to the general public because he had posted a sign with his vessel name and phone number on his dock. He stated that the sign was removed at some point but he could not say when or by whom it was removed. (T. p.12)

Mr. Pettis testified that he received "probably a half a dozen" (T. p 14) inquiries but that none of them resulted in a charter. He said that he was available for charter if requested and would have gone to Galilee to pick them up. Mr. Pettis testified that he felt that the lack of charters was use to the cost of fuel which was required to travel out to the canyon where he normally fished. His testimony implied that the lack of charters were due to the cost of the charter and not his unavailability at the dock.

The Division witness, Ramon Pena, testified that his records indicated that Mr. Pettis' vessel was never in the Port during the year 2007-2008. He testified that although "most of the vessels were down somewhat - a majority of them were busy all year" (T. p.31). He said based on his observations and conversations with the charter captains "Everybody did at least 30 charters last year. Some did 150" (T. p.32). He also testified that there is a waiting list of between 15 to 30 vessels for berthing spots at the Port of Galilee.

The division argues that the Applicant's vessel was not available with a licensed captain on board on the average of 2 days each week from Memorial Day through October 15th. The Applicant

asserts that he was available to take charters although the vessel was not physically present at the Port of Galilee. The applicant points to his use of a sign that was posted at the pier as evidencing his availability. I find as a fact that the Applicant was not available at the Port of Galilee with a captain on board for an average of 2 days each week from Memorial Day through October 15th as required by the regulations. There was no testimony that Mr. Pettis was “on board” the vessel at the Port of Galilee. This is also consistent with the provision of Part II Section 9 (A) (1) which says that “Permits will be issued only for those vessels which are, and will be, actively engaged as charter boats during the year which the permit is issued.”

The Division is charged with the responsibility to properly manage the port facility (Part I, Section 3 of the Regulations). The regulations contain language in each boat class requiring active participation in order to retain a berthing permit. To allow berths to go unused while there is a waiting list would be a dereliction of the division's management duties.

The division raises an issue that the Applicant failed to notify pier management of the fact that he would be absent for one week or longer (Part II, Section 13). I find as a fact that the Applicant did fail to notify port management of his absence. I do not, however, find a provision allowing the refusal of issuance of permit for violation of this section. There is no consequence listed for failure to notify of an absence of more than one week.

The Applicant raises as a defense the fact that the division accepted berth permit fee from the Applicant after notice of non-renewal and therefore, this acted as a waiver. I do not find that the Division waived its right to proceed with its non-renewal position in spite of acceptance of the berth permit fee. The Division in its Post Hearing Memorandum properly referenced the law under RI General Laws 42-35-14(b) which provides the Applicant with a stay of eviction proceedings pending a final determination by the agency. The fact that the Applicant is entitled to his permit during the pendency of his appeal brings with it a requirement that he continue to pay his berthing permit fee. The division is entitled to accept this fee without being found to have waived the right to non-renewal. I find as a fact that the Division did not waive its right to continue with its non-renewal action.

FINDINGS OF FACT

1. The Applicant is the owner of that certain vessel identified as the Dorado, aka Dorado II.
2. The Applicant has held a berthing permit for the Port of Galilee for approximately 20 years.
3. The Applicant held a berthing permit at the Port of Galilee for the term of July 1, 2007 through June 30, 2008.
4. During the period of time from July 1, 2007 through June 30, 2008 the Applicant's vessel, Dorado II, was not present at its berth in the Port of Galilee.
5. The Applicant at some time during the period from July 1, 2007 through June 30, 2008 posted a sign at his slip with the name of the boat, the words “sports fishing charters” and his phone number.
6. During the period from July 1, 2007 through June 30, 2008 the sign was removed or fell off the pier. The Applicant does not know when the sign came down.
7. During the period from July 1, 2007 through June 30, 2008 the Applicant kept his vessel Dorado II at his marina in Pawtuxet, Rhode Island.
8. During the period from July 1, 2007 and June 30, 2008 the Applicant had a half dozen inquiries, none of which resulted in a charter.
9. The Applicant's vessel was not used for carrying passengers for hire on at least 30 days of the previous year.
10. The applicant did not have a captain on board and was not available at the Port of Galilee for at least an average of 2 days per week for the period between Memorial Day and October 15th.
11. By letter dated September 26, 2008 the Department of Environmental Management Division of Coastal Resources notified the Applicant that his berthing permit for the vessel Dorado would not be renewed for the period from July 1, 2008 through June 30, 2009.

12. By letter dated October 22, 2008 from his attorney, Robert D. Goldberg, filed an administrative appeal.

13. The notice of appeal was filed in a timely manner.

14. The Applicant has failed to meet his burden of proof by a preponderance of the evidence that his vessel was used for carrying passengers for hire on at least 30 days of the previous year, and/or that the vessel was available with licensed captain aboard for charter on the average of 2 days each week from Memorial Day through October 15th.

15. The filing of administrative appeal acted as a stay of termination of berthing permit right of the Applicant until final adjudication by the agency.

16. The Division accepted berthing fees from the Applicant in the amount of \$1380.00 during the pendency of the appeal.

17. The acceptance of the Applicant's berthing fee during the administrative appeal did not constitute a waiver of its right to proceed with non-renewal of the Applicant's berthing permit.

CONCLUSION OF LAW

After due consideration of the above findings of fact and the legal argument of the parties, I conclude the following as a matter of law:

1. The Administrative Adjudication Division of the Department of Environmental Management has personal jurisdiction of the Applicant and subject matter jurisdiction of the appeal.

2. The Applicant has failed to meet his burden of proof by a fair preponderance of the evidence that the subject vessel qualifies to remain at the Port of Galilee in the capacity as a charter boat pursuant to the requirements of Part II Section 9 of the "Galilee Port Operations Regulations and Berthing Management System."

3. The Division acted properly and within its authority when it issued a notice of non-renewal to the Applicant by letter dated September 26, 2008.

4. The acceptance of Applicant's berthing fee payment by the Division during the pendency of the administrative appeal did not constitute a waiver of its right to proceed.

5. The Applicant's Appeal should be denied.

Wherefore, based on the Findings of Fact and Conclusions of Law, it is hereby

ORDERED

Applicant's Appeal is DENIED.

Entered as an Administrative Order this ___ day of July 2009 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins

Chief Hearing Officer

Entered as a Final Agency Decision and Order this ___ day of ___, 2009.

W. Michael Sullivan, Ph.D.

Director

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. General Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and 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.