

Department of Environmental Management

Administrative Adjudication Division

State of Rhode Island

IN RE: F/V SISTER ALICE

AAD No. 98-002/F&WA

April 8, 1999

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Applicant's request for hearing on the determination of the Division of Fish and Wildlife ("Division") that the application for a certificate of exemption from the moratorium on the landing of summer flounder was unacceptable due to its submission after the deadline for filing had passed. The hearing was conducted on October 7, 1998. It had previously been determined that the first issue to be considered at the hearing was the matter of the timeliness of the filing of the application. If Applicant prevailed on the question of timeliness, then the application would be remanded to the Division for its review on the merits. (**Prehearing Conference Record and Order**, "Other Matters", p. 3).

Following the hearing, both the Applicant and the Division filed post-hearing memoranda.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN LAWS Section 42-17.7-1 et seq.), the Administrative Procedures Act (R.I. GEN LAWS Section 42-35-1 et seq.) and the Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD Rules").

PREHEARING CONFERENCE

A prehearing conference was conducted on September 10, 1998 at which the parties agreed to the following stipulations of fact:

1. That the Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Lack of timely submission is the sole basis for refusal by RIDEM to process the application.

The exhibits, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

SUMMARY OF WITNESS TESTIMONY

At the hearing, Applicant called two (2) witnesses: **Peter L. Beckman**, President of Beckman Fisheries Inc., the previous owner of the F/V Sister Alice, and **Clarke A. Reposa, Sr.**, the present

owner of the F/V Sister Alice, as Applicant. The Division called two (2) witnesses: **Richard Sisson**, the deputy chief of marine fisheries, and **April Valliere**, a principal marine biologist in the Division of Fish and Wildlife.

The pertinent provisions of the Rhode Island Fisheries Regulations, effective January 1, 1997, are as follows:

7.7.6 Moratorium on the Landing of Summer Flounder -- No person shall possess, land, sell, or offer for sale in excess of two hundred (200) pounds of summer flounder *Paralichthys dentatus*, in any calendar day, in the State of Rhode Island or the jurisdictional waters of the state without a summer flounder exemption certificate Issued by Fish and Wildlife and a valid Rhode Island commercial fishing license. **Application for a summer flounder exemption permit must be received by Fish and Wildlife prior to January 1, 1997.** (emphasis added)

7.7.7 Exemption Certificates -- Fish and Wildlife will issue an exemption certificate for a vessel if the owner of the vessel or his/her representative **applies to Fish and Wildlife prior to January 1, 1997**, for the issuance of such a certificate... (emphasis added)

According to the denial letter, Applicant had failed to comply with regulation 7.7.7 that established the filing deadline of January 1, 1997. (Div 1 Full). The application was therefore deemed unacceptable and was not considered for issuance or denial of the certificate of exemption. The Division offered no determination of whether the vessel would have qualified if the application had been timely submitted.

Applicant's first witness, Peter L. Beckman, testified that Beckman Fisheries Inc. had owned the F/V Sister Alice until September 1998 when Clarke Reposa, Sr. ("Applicant") purchased the vessel. Mr. Beckman stated that in late 1995 he had received notice that the fishery regulations would be amended. He spoke to April Valliere regarding whether he should apply for a certificate of exemption from the moratorium on landing summer flounder (also called "fluke"). According to Beckman, Ms. Valliere stated that the fluke were not then running and that he could apply for the certificate when he needed it. He complained that Ms. Valliere did not tell him of any deadline for applying for the certificate.

Mr. Beckman also testified that when he received his 1996 licenses, there was no accompanying information regarding the fluke exemption. At or about this time Mr. Beckman was not using the vessel, or was using it infrequently, and had had the vessel under a pending contract for sale. The sale fell through and Beckman entered into a boat charter agreement with Mr. Reposa in April or May 1996.

According to Beckman, Mr. Reposa fished the boat through the remainder of 1996. On or about February 10, 1997, Mr. Reposa telephoned Beckman regarding the status of the exemption certificate. Beckman considered that it was his responsibility as owner to obtain the necessary licenses; he therefore completed the overdue application and, on or about February 12, 1997, attempted to submit it to the Division. The Division refused to accept the application. The witness complained that he had received no correspondence or other notice from the Department of Environmental Management ("DEM") regarding the moratorium deadline and he had had no knowledge that such a deadline existed until February 1997.

In both direct testimony and in cross examination, Mr. Beckman testified that he was aware that the limits on landing summer flounder varied with the quota imposed on the state. The witness

stated that he had been involved in the fishing industry since 1979-1980. When he was actively fishing (until 1995), he would read various fishing magazines. He did not read The Providence Journal and only occasionally read the Narragansett Times.

Clarke A. Reposa, Sr. testified next. He stated that he had considered it Beckman's responsibility to obtain the exemption certificate; that he did not have the authority to apply for vessel licenses. In January or February 1997 he became aware that he needed an exemption certificate. For some time, he had been bringing in fluke and had notified the Division of his catch as was required, yet nothing had been said about needing the exemption certificate until after the deadline had passed. In December 1997, Mr. Reposa asked Beckman for authority for him (Reposa) to file the application for the exemption certificate because he did not believe Mr. Beckman was pursuing the matter enough. A **Designation of Agent** form, designating Mr. Reposa as authorized agent, was executed by Mr. Beckman on December 31, 1997. (Appl 3 Full, at 2).

Under cross-examination, Mr. Reposa stated that he has been a commercial fisherman for some thirty (30) years. He does not read any of the fishing magazines. Although he knew in May 1996 of the federal permits issued to the vessel, he had made no inquiry to the DEM prior to the lease nor did he check on the status of any permits after the lease had commenced. He stated that he had been unaware that he needed the exemption certificate in order to continue to land summer flounder.

Mr. Reposa had obtained exemption certificates for two other vessels he owned. He explained that his accountant had handled the permits for those vessels.

Richard Sisson testified on behalf of the Division. Mr. Sisson explained the background for the imposition of the moratorium on landing summer flounder; the experience the Division (and other states) had with applications during the period of the emergency regulations and with the later deadline for applying for the exemption. He stated that the Division received telephone calls from other states prior to the imposition of the deadline and concluded that Rhode Island's application deadline was fairly well known. He also testified that the regulations regarding possession limits changed throughout a given year (for example, there were 17 changes to stay within the quota in the first year of the moratorium). It would therefore be "wise", according to Mr. Sisson, for fishermen to keep abreast of the changes in the limits; if a fisherman were in excess of the limit, then he or she could be cited by a conservation officer for the violation.

This witness testified about the legal notice advertisement¹ for the adoption of the January 1, 1997 regulatory deadline for filing the application for the exemption certificate and also spoke of the newspapers and a magazine that ran stories on the new regulation. Legal notice had been provided in The Providence Journal and news stories had appeared in The Westerly Sun, The Narragansett Times and in Commercial Fishery News.

April Valliere also testified on behalf of the Division. She stated that in November 1995 she was contacted by Mr. Beckman after information had been mailed to fishermen (the Division had sent a mass mailing of the exemption package in November 1995). He had inquired whether he should apply for the certificate then or wait for the sale of the vessel, which he told her was imminent. She stated that she had numerous conversations in November/December 1995 with Mr. Beckman and the prospective purchaser. There was no application deadline at that time, nor was one imminent, according to the witness.

Ms. Valliere also testified that in the summer of 1996 she received a telephone call from Clarke

Reposa. He told her that he intended to lease or purchase the F/V Sister Alice. He asked if the vessel had an exemption certificate and was told that he could apply for one. No application was received, however. There was no deadline at the time of this conversation, according to the witness.

Under cross-examination, Ms. Valliere stated that she had no contacts with Beckman since November/December 1995 or early 1996 until February 1997 (when he called her at home seeking a certificate). In redirect testimony, the witness also stated that there were no conversations with Reposa regarding the Sister Alice from September through December 1996.

ANALYSIS

In his Post-Hearing Memorandum (“**Applicant’s Memorandum**”) Applicant has presented two (2) issues to be resolved through this Decision:

1. Whether Applicant’s failure to timely apply for the Certificate of Exemption was the result of mistake, inadvertence, misinformation, surprise or excusable neglect; and
2. Whether the Department is estopped from denying the requested Certificate of Exemption having accepted on multiple occasions during calendar year 1996 landing reports of significant quantities of summer flounder in excess of 200 pounds per trip, without issuance of any notice of violation or Applicant being advised of future necessity for a Certificate of Exemption. at 4.

On the first issue, Applicant seeks relief under Rule 60 (b) of the Superior Court Rules of Civil Procedure. Rule 60 (b) provides the following:

Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect...

Applicant contends that Mr. Beckman’s failure to timely file constitutes excusable neglect under the Rule. Applicant argues that “diligent and reasonable inquiries were made... and at no time were they given any actual or personal notice of the establishment of any application submission deadline...” **Applicant’s Memorandum**, at 6. Applicant further states that

he enquired (sic) and justifiably relied on the DEM (Ms. Valliere) response to his enquiry of qualification and eligibility for issuance of the Moratorium certificate and thereafter in his capacity as owner, licensee and charterer of the FV Sister Alice, never received any actual or personal notice of the application deadline imposed, nor saw any de-minimus legal advertising which might have alerted him to the pendency of any application deadline. at 7.

Applicant concludes that this “excusable neglect” is sufficient to warrant relief due to “extenuating circumstances of sufficient significance...” (citing The Astors’ Beechwood v. Peoples Coal Co., Inc., 659 A.2d 1109, 1115 (R.I. 1995)), **Applicant’s Memorandum**, at 7.

The issue of excusable neglect was considered in another matter involving the late filing of an application for a certificate of exemption from the moratorium on landing summer flounder. In the matter of F/V Alliance, AAD No. 97-003/F&WA, Final Agency Order dated February 20, 1998, the Hearing Officer discussed the standard to determine if the neglect was indeed excusable and

warranted relief. Citing Graham Architectural Products Corp. v. M & J Constr. Co., 492 A.2d 150 (R.I. 1985), the Hearing Officer stated that the existence of excusable neglect was a question of fact that must be established by evidence. The party seeking relief must show “extenuating circumstances of sufficient significance to render” his neglect excusable. Ludwig v. Kowal, 419 A.2d 297 (R.I. 1980). F/V Alliance at 16.

In F/V Alliance, the Hearing Officer found that the evidence demonstrated that the application was filed within a short time after Applicant learned of and had the opportunity to address the untimeliness; and that the elapsed time was of very short duration. at 19. Applicant had presented a “detailed and substantial factual basis” to explain his failure to timely file the application. He had extensive repairs that required the vessel to be docked for long periods of time, protracted financial problems resulting in the foreclosure and auction of the boat, the loss of his mother-in-law and the severe injury of his co-captain. As a result, Applicant had not conducted his customary fishing endeavors during most of the time the summer flounder exemption certificate regulations were promulgated and noticed. The Hearing Officer found that Applicant had sufficiently explained the neglect and had demonstrated that the neglect was occasioned by such extenuating circumstances of sufficient significance to warrant a finding of excusable neglect. at 20.

The instant case presents a weak comparison to the Applicant in F/V Alliance. In that matter Applicant acted quickly to pursue whatever rights he had. Here, while Beckman attempted to submit the application for an exemption certificate within a couple of days of learning the need for one, when the Division refused to accept it, he did nothing for ten (10) months until Mr. Reposa obtained the Designation of Agent from him. Appl 3, at 2. As for Mr. Reposa, ten months had elapsed before he took that step so he might pursue whatever rights Beckman had allowed to languish.

Additionally, the Applicant in F/V Alliance provided a detailed explanation of why he had been unaware of the deadline for filing, each of his reasons alone being of a catastrophic nature. Here, Beckman had inquired about the certificate when there was no deadline nor was one apparently contemplated; paid little or no attention to changes in the regulations despite being aware that the limits on landing summer flounder changed frequently; and had no reason for being unaware of the deadline other than he did not receive actual notice of it. As for Mr. Reposa, he testified that while he knew which federal permits had been issued to the vessel, he made no inquiry of DEM prior to the lease of the boat, nor did he check on the status of any permits after he entered the lease.

The parties in their post-hearing memoranda discuss the elements of what the Rhode Island Supreme Court has determined constitutes “excusable neglect” under Rule 60 (b). The parties agree, and I concur (and as is also discussed in F/V Alliance, at 16-17), that “excusable neglect that would qualify for relief from judgment is generally that course of conduct that a reasonably prudent person would take under similar circumstances.” Citing Pari v. Pari, 558 A.2d 632, 635 (R.I. 1989), **Applicant’s Memorandum**, at 5; **Division’s Posthearing Memorandum** at 4. In an industry as highly regulated as the fishing industry, it is certainly imprudent to not be aware of changing licensure requirements and to fail to determine which permits accompany the transfer of a vessel. It is imprudent to expect that a department’s or agency’s statement that an individual or vessel presently qualifies for a permit means that that entity will always qualify and that the rules will never change. It is also imprudent to expect actual notice of the adoption of regulations when there is no statutory requirement for the same. See R.I. GEN LAWS § 42-35-3.

Based upon the facts as elicited at the hearing, I find that neither Mr. Beckman's conduct nor Mr. Reposa's delayed action constitute excusable neglect under Rule 60 (b).

Applicant has also argued that the Department should be estopped from denying the exemption certificate due to the Department's failure to cite Applicant for violations of the regulations (taking summer flounder without the certificate) when the Division had been informed of landings by Applicant. **Applicant's Memorandum**, at 4; **Applicant's Reply Memorandum**, at 3-4. In the **Reply Memorandum**, Applicant even goes so far as to state that the failure to provide actual notice of a violation would mean that ordinary rules of constructive notice for changes in the regulations cannot be applied to Applicant, only actual notice would suffice. **Id.** Applicant provides no case citation for this conclusion.

The Rhode Island Supreme Court has long recognized that the doctrine of estoppel may in appropriate circumstances be invoked against a public body to prevent injustice where the agency or officers thereof, acting within their authority, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his or her detriment. Murphy v. Duffy, 46 R.I. 210, 124 A. 103 (1924); Santos v. City Council, 99 R.I. 439, 208 A.2d 387 (1965); Ferrelli v. Department of Employment Security, 106 R.I. 588, 261 A.2d 906 (1970). When the doctrine of estoppel is asserted against a governmental agency, the problems encountered by the petitioner as well as the public interest involved must be considered. Lerner v. Gill, 463 A.2d 1352, 1363 (R.I. 1983). This relief is extraordinary and will not be applied unless the equities clearly must be balanced in favor of the party seeking relief under this doctrine. Greenwich Bay Yacht Basin Assoc. v. Brown, 537 A.2d 988, 991 (R.I. 1988). See also, Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865, 868-869 (R.I. 1998).

The Division argues that Applicant's contention (that failure to cite him for a violation would justify imposition of estoppel against the DEM) can be compared to the situation where a motorist may not have been charged with speeding (although he/she frequently exceeded the posted limit) and that that circumstance cannot rise to estop the enforcement of the law or regulation. **Division's Posthearing Memorandum** at 3.

In applying the rulings from the Lerner and Greenwich Bay Yacht Basin decisions, I find that the public interest would weigh heavily against preventing the enforcement of one regulation because another (reporting) regulation had been duly complied with by the Applicant. The public's interest clearly and persuasively mitigates against estoppel.

Estoppel against the Department is therefore denied.

Applicant also raises several constitutional issues in both his **Post-Hearing Memorandum** (at 10-11) and in the **Reply Memorandum** (at 4). In reviewing those issues I have considered the ruling of the U. S. District Court for the District of Rhode Island in Bowen v. Hackett, 361 F.Supp. 854 (D.R.I. 1973). In that matter the Court determined that it would be inappropriate to require exhaustion of administrative remedies where the issue is the constitutionality of a statute the agency must enforce because "the expertise of state administrative agencies does not extend to issues of constitutional law." at 860. In accordance with this view, the Administrative Adjudication Division has repeatedly held that constitutional issues are not properly before this tribunal. See Louis G. and Joan R. Rov, AAD No. 95-002/ISA, Final Agency Order dated 6/7/95; Richard and Anita Ally, AAD No. N/A, Administrative Order dated 11/5/91; Bruce T. Cunard, AAD No. N/A, Final Agency Order dated 6/17/91. I therefore decline to address the constitutional issues raised

by Applicant in his post-hearing briefs.

I have considered the testimonial and documentary evidence presented by the parties and conclude that Clarke Reposa, Sr., as Applicant, has not met his burden to prove that the application for an exemption certificate was submitted to the Division in compliance with the regulations due to excusable neglect under Rule 60 (b), nor has he proved that the Department should be estopped from enforcing the deadline.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. On or about February 12, 1997 Beckman Fisheries, Inc. was the owner of the F/V Sister Alice.
2. On or about February 12, 1997, Peter Beckman, President of Beckman Fisheries, Inc. attempted to submit to the Division an application for a summer flounder exemption certificate.
3. On or about February 12, 1997 the Division refused to accept Mr. Beckman's application.
4. On December 31, 1997 Mr. Beckman, on behalf of Beckman Fisheries, Inc., executed a Designation of Agent form appointing Carke A. Reposa, Sr. as agent, for certain specified purposes, of the F/V Sister Alice.
5. On December 31, 1997 Clarke A. Reposa, Sr. submitted an application for a certificate of exemption to the Division.
6. By letter dated July 7, 1998, the Division informed Applicant's counsel that the application was untimely and unacceptable and was not considered for issuance or denial of the exemption certificate.
7. Mr. Beckman's conduct does not constitute excusable neglect.
8. Mr. Reposa's conduct does not constitute excusable neglect.
9. Enforcement of the regulations is in the public interest.
10. Clarke A. Reposa, Sr. is the present owner of the F/V Sister Alice and has owned the vessel since September 1998.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. Applicant has failed to prove that the failure to timely submit the application for an exemption constitutes excusable neglect under Rule 60 (b) of the Superior Court Rules of Civil Procedure.
3. Applicant has failed to prove that the equities warrant imposition of the doctrine of estoppel

against a governmental agency.

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

ORDERED

Applicant's request for a Certificate of Exemption from the Moratorium on the Landing of Summer Flounder is **DENIED**.

Entered as an Administrative Order this 15th day of March, 1999 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer

Entered as a Final Agency Order this 8th day of April 1999.

George Welly
Interim Director

APPENDIX A

The below - listed documents are marked as they were admitted into evidence:

Applicant's Exhibits:

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Appl. 1 Full

Copy of initial Application package for Certificate of Exemption of F/V Sister Alice dated 2/11/97;

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Appl. 2 Full

Copy of affidavit of Peter L. Beckman dated December 31, 1997;

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Appl. 3 Full

Copy of Application resubmission of Clarke A. Reposa, Sr., with attached Designation of Agent, as receipted for by RI Div. Of Fish and Wildlife on 12/31/97;

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Appl. 4 for Id

Copy of status inquiry to John Stolgitis, Chief, Division of Fish and Wildlife (Certified Mail No. P 273 700 365) dated March 10, 1998;

Appl. 5. Full

Copy of Application denial letter, dated July 7, 1998 with attachment.

Division's Exhibits:

Div. 1

Copy of the July 7, 1998 denial by the Division of an application for the issuance to the F/V Sister Alice (the "Appellant") of a Summer Flounder Landing Exemption Certificate. 1 pg.

Div. 2 Full

Copy of a request on behalf of the Appellant for a formal hearing dated July 17, 1998. 1 pg.

Div. 3 Full

Certificate of Exemption issued to Peter Reposa dated December 5, 1995 for Vessel Katrina Lee.

Div. 4 Full

Certificate of Exemption issued to Clarke Reposa dated December 1, 1995 for Vessel Dona Maria.

Footnotes

- 1 Applicant's counsel had agreed at the beginning of the hearing that he was not questioning whether the regulation had been properly noticed under the Administrative Procedures Act.