

Management, Administrative Adjudication Division for Environmental Matters
(AAD Rules).

PREHEARING CONFERENCE

At the prehearing conference, the parties agreed to the following stipulations of fact:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January 17, 2007 advising the Applicant that his initial 2007 allocation was determined to be Zero (0) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. The lobster trap allocation calculation was prepared on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
4. The Applicant had no lobster landings in the year 2004.
5. The Applicant had no history of participation in the lobster fishery during the years 1999 or 2000.

At the prehearing conference, the parties submitted the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether the Applicant's initial lobster trap allocation was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*
2. Whether the Applicant was able to satisfy the Hearing Officer that Applicant suffered a medical hardship during the target years of 2001-2003 as that term is set out in part 15.14.2-5(d).

The Division submitted the following as additional issues to be considered at the hearing:

3. If the finding to the issue set out above in Issue 2 is in the affirmative, whether the Applicant landed any lobsters during the year 2004 as required by Part 15.14.2-5(e) (3).
4. If the findings to the issues set out above in Issues 2 and 3 are both in the affirmative, whether the Applicant participated in lobster fishery in 1999 or 2000 as required by Part 15.14.2-5(e) (3) to a degree that would permit pursuant to Part 15.14.2-3 a modification in the Initial Lobster Trap Allocation which is the subject of this appeal.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

The Applicant, Russell J. Kraczkowski, testified on his own behalf. It was Mr. Kraczkowski's testimonial and documentary evidence that the Rhode Island Employees' Retirement System approved Applicant's application for an accidental disability pension in 1994; that he has been disabled to the present date, and he is still disabled. The Applicant introduced Applicant's exhibits (as identified in Appendix A attached hereto), and rested his case.

Thomas E. Angell, a Principal Marine Biologist with the Division, was called as a witness for Division. Mr. Angell testified as a lay witness and also as an expert witness concerning the lobster fishery and as an expert witness concerning the interpretation and application of the Department's lobster regulations.

It was the testimony of Mr. Angell that records of the Division established that the Applicant had not landed any lobsters during the year 2004 as required by Part 15.14.2-5(e) (3) in order to permit his lobster trap deployment during the target years of 2001-2003 to be substituted for the better of his deployment in 1999 or 2000 if the Applicant were found to have had a medical condition that impacted his ability to engage in the lobster fishery during the target years of 2001-2003.

Mr. Angell further testified that the Applicant had deployed no lobster traps during the period 1999 through 2000. In further support of his testimony, Mr. Angell relied upon a computer printout of the Applicant's history of participation in the lobster fishery during the years 1999, 2000, and 2004 demonstrating the Applicant's absence of participation in the lobster fishery during the referenced years. (Division's Exhibit #3 FULL).

Mr. Angell testified that in his opinion the Applicant's initial 2007 allocation was determined to be Zero (0) traps consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control based upon the data provided by the Applicant relative to his participation, or lack thereof, in the lobster fishery during the target years of 2001-2003.

Mr. Angell further testified as to his research and his review of the results of the surveys and research of other scientists working in conjunction with the Technical Committee of the Atlantic States Marine Fisheries Commission (ASMFC), which had concluded that the American Lobster was over fished.

Mr. Angell further testified that he assisted both the ASMFC Technical Committee of the Atlantic States Marine Fisheries Commission and the Lobster Advisory Panel of the Rhode Island Marine Fisheries Council in addressing this over fishing problem which had been determined in three peer-reviewed lobster survey reports completed by the ASMFC Technical Committee in 1996, 2000, and 2005.

The ASMFC then adopted Addendum VII in an effort to address the problem of over fishing faced by American Lobsters in Lobster Management Area 2. Mr. Angell described how the ASMFC attempted to address over fishing by increasing the minimum size of lobster which may be harvested, enlarging the size of the escape vents on lobster traps, limiting the number of lobsters which may be landed by non-trap fishers, e.g., otter trawlers, and finally through the adoption of Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. Addendum VII (which was the subject of public notice/comment hearing in the Rhode Island) was described by Mr. Angell as a means of limiting the number of lobster traps that may be deployed with a goal of capping effort at the number of traps deployed during the year 2003.

Mr. Angell then testified as to his role as staff coordinator for the Lobster Advisory Panel of the Rhode Marine Fisheries Council. In that capacity, he stated that he had assisted in the drafting and promulgation of R.I.M.F.R. Part 15.14.2 by which the State adopted regulations to implement Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster

by the State of Rhode Island. Mr. Angell explained that Lobster Management Area 2 is an area composed of the state and federal waters bordering Rhode Island and the Commonwealth of Massachusetts south of Cape Cod extending to the Rhode Island/Connecticut border, although a limited number of lobster fishers from Connecticut and New York also fish in the Area.

Mr. Angell also testified that R.I.M.F.R. Parts 15.14.2 *et seq.* – Area 2 Lobster Trap Effort Control were adopted by the State of Rhode Island in order for the State to come into compliance with ASMFC's Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for American Lobster. He stated that Massachusetts had adopted regulations that were similar to Rhode Island's regulations prior to Rhode Island's promulgation of the subject regulations. Mr. Angell explained that if a member state, like Rhode Island, failed to adopt and implement regulations in compliance with an ASMFC management plan like Addendum VII, a finding of non-compliance could be made by ASMFC and forwarded to the Secretary of Commerce who would impose a sanction of a moratorium on the taking or landing within the noncompliant state of the species which is involved in the subject management plan. In the matter at hand, a finding of non-compliance would result in closure of the State's entire lobster industry. Mr. Angell testified that the Secretary of Commerce had threatened to impose such a moratorium due to a finding by the ASMFC that the State of Rhode Island had failed to comply with the ASMFC's earlier adopted plan requiring the promulgation of regulations limiting the non-trap harvesting of

lobster to one hundred pounds (100 lbs.) per day or five hundred pounds (500 lbs.) per trips at sea of five (5) days or longer. He testified, however, that due to the adoption of the required regulations, the moratorium had been avoided.

CONCLUSION

It is argued by Applicant that pursuant to the American Disabilities Act (ADA) no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under any program or activity. . . ". Applicant contends that the provisions of section 15.14.2-5(d) of the Marine Fisheries Regulations (requiring that a medically disabled applicant may request that the Allocation be based on his/her 1999-2000 fishing performance) does not adhere to the expectations set forth by the ADA. Wherefore Applicant requests that his allocation of traps be the maximum amount.

It is Division's contention that the Applicant failed to offer any testimony whereby the medical determination which permitted Applicant to medically retire from his position as a correctional officer, could be sufficient to establish an inability by the Applicant to participate in the lobster fishery during the target years of 2001-2003 due to a medical hardship pursuant to Part 15.14.2-5(d).

Division asserts that even if the Applicant had established the requisite connection between the condition that qualified Applicant for medical retirement and an inability to participate in the lobster fishery, the Applicant was unable to substitute the better record of participation in either 1999 or 2000 because the

Applicant failed to land any lobsters during the year 2004 as required by Part 15.14.2-5(e)(3).

It is also argued by Division that even if Applicant had presented evidence sufficient to establish both (1) that Applicant's medical condition established an inability for Applicant to participate in the lobster fishery during the target years of 2001-2003 due to medical hardship pursuant to Part 15.14.2-5(d) and (2) that Applicant in fact landed lobsters during the year 2004 as required by Part 15.14.2-5(e)(3), no modification could be afforded Applicant because the relief that is specifically sanctioned by the subject regulations upon demonstrating a medical hardship during the target years of 2001-2003 is the substitution of the party's better performance in either 1999 or 2000--years in which the Applicant did not participate in the lobster fishery.

It is further argued by Division that the Applicant's attempts to challenge the governing regulations as violative of the American Disabilities Act is not properly before the Administrative Adjudication Division. Wherefore, Division requests that the Applicant's appeal be denied and his Initial Lobster Management Area 2 Lobster Trap Allocation of Zero (0) traps not be modified.

It was stipulated by the parties that Applicant's 2007 Initial Area 2 Lobster Trap Allocation was determined by the Division based on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant

himself and also that the Applicant had no lobster landings in the year 2004 and no history of participation in the lobster fishery during the years 1999 or 2000.

The Applicant acknowledges that the data presented by Applicant and relied upon by the Division in making the Zero (0) trap determination were accurate. Applicant failed to offer any testimony or evidence that his medical condition that qualified him for medical retirement in 1994 establishes an inability by Applicant to participate in the lobster fishery during the target years of 2001-2003 due to medical hardship pursuant to Part 15.14.2-5(d). Even if Applicant had established the requisite connection between his medical retirement and an inability to participate in the lobster fishery, the Applicant failed to demonstrate that he would be entitled to the relief requested.

The Rhode Island Marine Fisheries Statutes and Regulations provide in pertinent part as follows:

Section 15.14.2-2 (c)

To be eligible for an Area 2 lobster trap allocation, Area 2 trap allocation applicants must present documentation to the trap allocation authority, establishing to the authority's satisfaction that said applicant lawfully harvested lobsters via lobster traps in Area 2 during the years 2001-2003. Any Area 2 trap allocation applicant who held a license endorsed for Area 2 during the years 2001-2003, but did not renew their license or possess a valid commercial lobster license at any point during 2001-2003 or thereafter, shall not be eligible for an Area 2 trap allocation. Holders of a Federal Lobster Permit endorsed for Area 2 may add or drop the Area 2 designation from their Federal Lobster Permit annually, at the time of permit renewal.

Exception: Any Area 2 trap allocation applicant who holds a current commercial lobster license or landing permit and who held such authorization during the period 2001-2003 but had no documented,

or had reduced fishing performance during 2001-2003 due to documented medically-based impairment or military service may request that his/her Initial Lobster Trap Allocation be based on his/her 1999-2000 fishing performance in Area 2, in accordance with the provisions in section 15.14.2-5.

Section 15.14.2-5 (d) Medical/Military Service Hardships

Any applicant who holds a current commercial lobster license and who held such authorization during the period 2001-2003 but had no documented, or had reduced, fishing performance during 2001-2003 due to the applicant's military service or the documented disabling physical or medical illness, injury, impairment, or condition that constitutes a material incapacitation involving inpatient care in a hospital, a nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider of the applicant or the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law may appeal in order to request that his/her Initial Lobster Trap Allocation be based on his/her 1999-2000 fishing performance in Area 2, and that his/her fishing performance (lobster landings and maximum number of traps reported fished) for the years 1999-2000 be employed to calculate the applicant's initial Area 2 lobster trap allocation.

Section 15.14.2-5 (e) 3.

If an applicant is found to have presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the applicant may use landings from any year or years (highest or the average) during the years 1999 and 2000 as the basis for their allocation, provided that the individual must also have landed lobsters with traps during 2004, and must have possessed a state or federal commercial fishing vessel registration and/or a state commercial fishing license or federal lobster permit to land lobster continuously during the period 1999-2004.

The issue for consideration herein is whether the Applicant has proven by a preponderance of the evidence that he is entitled to a modification of the Initial

Trap Allocation pursuant to Section 15.14.2-5 of the Marine Fisheries Regulations.

Assuming arguendo that Applicant had established that he had a material incapacitation during the years 2001-2003, §15.14.2-5 (d) of the Regulations specifically provide that ". . . the years 1999-2000 be employed to calculate the applicant's initial area 2 lobster trap allocation." It is further provided in §15.14.2-5 (e)3 that even if Applicant presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the Applicant may use landings from any year or years during the years 1999 and 2000 as the basis for their allocation, provided that the individual also landed lobsters with traps during 2004. The Applicant failed to cite any statutory or regulatory authority that would create a new formula or consider Applicant's other fishing history in determining a new Lobster Trap Allocation. Since Applicant had no lobster history in the 1999-2000 substituted period, pursuant to Section 15.14.2 of the Marine Fisheries Regulations, Applicant is not entitled to be awarded any traps as his Initial 2007 RI/Area 2 Lobster Trap Allocation.

The Applicant argues that the Marine Fisheries Regulations should be amended to comply with the ADA. However, the Administrative Adjudication Division is a statutory tribunal, and as such the jurisdiction of AAD is circumscribed by its enabling legislation and other statutes. The AAD was established by Chapter 17.7 of Title 42 of the R.I. GEN. LAWS. The AAD is

charged per § 42-17.7-2 with the authority to hear licensing proceedings pursuant to the regulations promulgated by the Director of the Department of Environmental Management.

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

FINDINGS OF FACT

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant, Russell J. Kraczkowski.
2. The Applicant received a Notice of Initial Area 2 Lobster Trap Allocation (Allocation) from the Division of Fish and Wildlife (Division) dated January 17, 2007 advising the Applicant that his initial 2007 Allocation was determined to be Zero (0) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
3. On February 7, 2007 the Applicant filed a request for an adjudicatory hearing at the Administrative Adjudication Division.
4. The Applicant's Initial 2007 Lobster Management Area 2 Lobster Trap Allocation was prepared on the basis of data concerning Applicant's history of participation in the lobster fishery during the years 2001 through 2003 as presented to the Department by the Applicant himself.
5. The Applicant had no lobster landings in the year 2004.
6. The Applicant had no history of participation in the lobster fishery during the years 1999 or 2000.
7. The Applicant's Allocation determination was accomplished consistent with the requirements of Part 15.14.2 – Area 2 Lobster Trap Control that was duly promulgated pursuant to R.I. GEN. LAWS §42-35-1 et seq.

8. The Applicant's allocation was based on Applicant's fishing performance in Area 2, and his fishing performance (lobster landings and maximum number of traps reported fished) for the years 2001 through 2003 were employed by Division to calculate Applicant's Allocation.
9. The Marine Fisheries Regulations specifically provide that, "the years 2001 through 2003 be employed to calculate Applicant's Allocation".

CONCLUSIONS 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 for Environmental Matters (AAD) has jurisdiction over this matter pursuant to R.I. GEN. LAWS §42-17.7-2; and §15.14.2-5(a) of the Marine Fisheries Regulations.
2. The Applicant failed to prove by a preponderance of the evidence that he meets the medical hardship exception set forth in Section 15.14.2-5 (d) of the Marine Fisheries Regulations.
3. The Division's Allocation of Zero (0) traps to the Applicant was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control of the Marine Fisheries Regulations.
4. The Applicant failed to prove by a preponderance of the evidence that he is entitled to his requested increase of his Initial Lobster Management Area 2 Lobster Trap Allocation of Zero (0) traps pursuant to the provisions and purposes of the Marine Fisheries Regulations.
5. The Applicant's Initial Lobster Management Area 2 Lobster Trap Allocation of Zero (0) traps is the proper Allocation pursuant to the pertinent statutes and regulations.

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

ORDERED

1. Applicant's appeal of his Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.
2. Applicant's Initial 2007 RI/Area 2 Lobster Trap Allocation shall remain at Zero (0) traps.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 13th day of July, 2007.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade St., Room 310
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 16th day of July, 2007.



W. Michael Sullivan, Ph. D.
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

RE: KRACZKOWSKI, RUSSELL J.

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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: Russell Kraczkowski, 201 Chopmist Hill Road, Chepachet, RI 02814; via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 19TH day of July, 2007.

A handwritten signature in cursive script, reading "Bruce L. Stewart", is written over a horizontal line.

APPENDIX A

APPLICANT'S EXHIBITS:

APPLICANT 1 Rhode Island Marine Fisheries Statutes and Regulations,
FULL Part XV Lobsters, Other Crustaceans, and Horseshoe
 Crabs. Section 15.14.2-5(e).1. Pages 28 and 29.

APPLICANT 2 Employee's Retirement System of Rhode Island
FULL Verification letter of accidental disability pension
 Effective December 16, 1994
 2a) Original letter dated December 15, 1994
 2B) Requested documentation verifying continuing
 disability dated April 9, 1007

APPLICANT 3 Rhode Island Commercial License System
FULL Query Summary of Proof of Multi-purpose License.
 Data from 1993 to 2007 Pages 1-3

APPLICANT 4 Statement from Daughter Michelle Kraczkowski
FULL

APPLICANT 5 American with Disabilities Act – Rehabilitation Act – Section
FULL 504

APPLICANT 6 American with Disabilities Act – Title II Highlights – Section 2
FULL - Overview of Requirements. Pages 2 and 3.

APPLICANT 7 United States Coast Guard License for 100 Gross Tons
FULL Master issued to Russell James Kraczkowski.

DIVISION'S EXHIBITS:

DIVISION 1 The Notice of Initial Area 2 Lobster Trap Allocation from
FULL the Division dated January 17, 2007 advising the Applicant
 that his initial 2007 allocation was determined by the
 Division to be Zero (0) traps. 3 Pages (Copy).

DIVISION 2 The Applicant's letter dated January 30, 2007 requesting a
FULL hearing concerning the Division's Allocation Letter. 1 Page
 (Copy).

RE: KRACZKOWSKI, RUSSELL J.

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DIVISION 3
FULL

The Applicant's history of lobster landings and lobster traps deployed during the years 1999, 2000, and 2004. 2 Pages (Copy).

DIVISION 4
FULL

Curriculum vita of Mark Gibson. 5 Pages (Copy).

DIVISION 5
FULL

Curriculum vita of Thomas E. Angell. 2 Pages (Copy).

DIVISION 6
FULL

Curriculum vita of John M. Lake. 3 Pages (Copy).

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.