

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: John A. Stolgitis
AAD NO.07-029/F&WA
Lobster Trap Allocation #MPURP001044
June, 2007

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 Initial 2007 RI/Area 2 Lobster Trap Allocation as determined by the Department of Environmental Management, Division of Fish and Wildlife (Division). Applicant John A. Stolgitis appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division. The hearing was conducted on March 26, 2007. At the conclusion of the hearing Mr. Stolgitis was granted the opportunity to supplement the record by submitting medical documents on or before April 27, 2007. The Division was allowed until May 11, 2007 to make any objection. Both parties were advised that they may file a motion to reopen the hearing if necessary. Mr. Stolgitis filed medical documents at the AAD on April 26, 2007. The Division did not object; the documents are therefore admitted as full exhibits. Neither party has moved to reopen the hearing.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 et seq.); the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 et seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; and the *Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans, and Horseshoe Crabs (Marine Fisheries Regulations)*.

PREHEARING CONFERENCE

A prehearing conference was conducted on March 26, 2007. 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, 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 Applicant did not land any lobsters during 2004.

Applicant identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Longevity in holding the multipurpose license;
2. Rights under the license for gear;
3. License does not require you to fish;
4. Whether another agency --ASMFC-- can impose regulations when other states in the same management area have not adopted the regulations.

The Division identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether Applicant's medical condition meets the standards of Part 15.14.2-5 (e)(1) of the *Marine Fisheries Regulations*.
 2. If Applicant presents evidence that he meets the medical standards, whether Applicant can present evidence that he landed lobster in 2004 as required by Part 15.14.2-5 (e)(3) of the *Marine Fisheries Regulations*.
 3. If Applicant can satisfy the above two requirements, whether Applicant can show participation in the lobster fishery in 1999 and/or 2000.
- A list of the exhibits that were presented by the parties is attached to this Decision as Appendix A.

HEARING SUMMARY

The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued by the Division assigns a zero (0) trap allocation to John A. Stolgitis. Mr. Stolgitis filed an appeal at the AAD on February 8, 2007, citing medical hardship during 2001 to 2003. The hearing was conducted immediately following the prehearing conference on March 26, 2007. Applicant bears the burden of proving by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 of the *Marine Fisheries Regulations*.

The Applicant's only witness was himself. The Division called two (2) witnesses: **Thomas Angell**, a Principal Marine Biologist in the Division of Fish and Wildlife who, by agreement, was qualified as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations; and **Mark Gibson**, Deputy Chief of the Division of Fish and Wildlife who, by agreement, was qualified as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations.

The Applicant testified that in 1996 and 1997 he had surgeries on his feet. In the documentation provided after the conclusion of the hearing, Dr. Gilchrist writes that Mr. Stolgitis had "bilateral neuroma surgeries in 1996 and 1997, and following the surgeries he developed gait impairment, scar tissue formation, and bilateral spurs, both plantar and Achilles" Appl 4 at 1. Although he acknowledged that Mr. Stolgitis had not been his patient during those years, he opined:

[I]t is clear to me that Mr. Stolgitis was unable to participate in the Lobster Fishery during the period 2001-2003 as a result of this medial [sic] situation. The imbalance associated with his condition and the lack of response to quick change in equilibrium while fishing in a small boat precluded the physical safety requirements needed to lobster fish. *id.*

Mr. Stolgitis argued that the regulatory requirement that there be 100% disability in order to claim a medical hardship was not relevant to Applicant's ability to fish.

In addition to Applicant's assertion of medical hardship, Applicant contended that the Division's action in denying the trap allocations was biased and "arbitrary and capricious". He also claimed that the regulations constituted an "ex post facto" action and that other states in the compact had not adopted the regulations.

During the Division's cross examination the witness stated that he did not seek a determination from a government agency for his medical incapacity during the period 1999 to 2004. When needed, he used sick leave for his absences from work. The parties stipulated that Mr. Stolgitis was intermittently out of work.

Mr. Stolgitis did not land lobster in 2004. Mr. Stolgitis did not land lobster in 1999 and 2000. The Division's first witness was Thomas Angell. Mr. Angell stated that among his responsibilities as a Principal Marine Biologist, are monitoring the lobster fishery; obtaining biological samples; compiling data; determining the status of the lobster fishery; and participating on panels and committees. He serves on the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission and as staff coordinator for the Rhode Island Marine Fisheries Council Lobster Advisory Panel.

The witness explained that based upon various studies of the American Lobster, it was determined that Area 2, which includes all of Rhode Island, part of Massachusetts and smaller portions of the waters of Connecticut and New York, had been overfished. In order to protect the lobster fishery, the Atlantic States Marine Fisheries Commission (ASMFC) had adopted *Addendum VII to Amendment 3 to the Interstate Fishery Management Plan for the American Lobster (Addendum VII)*. Mr. Angell stated that each state in Area 2 is required to adopt regulations implementing the *Addendum VII* management plan or a conservation plan that will achieve the same result. If a state does not comply, then the United States Secretary of Commerce and the Secretary of the Interior could begin the process of shutting down the lobster fishery in the offending state through implementation of a moratorium on the fishery.

According to the witness, Massachusetts has adopted regulations; he was unsure about Connecticut. Mr. Angell was responsible for taking the language from the *Addendum VII* management plan and drafting regulations for Rhode Island.

Under cross examination Mr. Angell conceded that Connecticut and New York may not have adopted an Area 2 management plan.

The Division called Mark Gibson as its final witness. Mr. Gibson stated that as Deputy Chief of the Division of Fish and Wildlife he administers the marine fisheries program. He chairs the Rhode Island Marine Fisheries Council (RIMFC) and represents the State of Rhode Island at the ASMFC where he also serves on the Lobster Management Board. He explained the different measures that have been taken in recent years to address the overfishing of lobsters and his active role in drafting *Addendum VII* when the earlier plan was found to be insufficient. He stated that the goal of *Addendum VII*'s effort control plan was to cap the number of lobster pots deployed at or near the 2003 level. The overall goal of the management plan is to rebuild the lobster resource to levels before the decline.

In Mr. Stolgitis' closing argument he stated that he had 800 pots for 2003 and requested a 2007 "token" allocation of "a couple hundred" pots. He contended that the requirements for establishing a medical hardship under the *Marine Fisheries Regulations* are extremely stringent -- and "bizarre" -- in demanding a final decision of a government agency as to the Applicant's medical condition. He asserted that the fact that he did not harvest lobster in the target years, instead practicing "conservation", should not be held against him.

Division's counsel stated in his closing argument that the standard in determining the lobster trap allocation is the Applicant's participation in the fishery, not what the Applicant might have done. He argued that the medical hardship standard was not met; that Applicant had not landed lobster in 2004; and that the Applicant had not participated in the lobster fishery in the years 1999-2000.

Conclusion

Section 15.14.2-3 of the *Marine Fisheries Regulations* provides in pertinent part:

(a) Initial Area 2 lobster trap allocations shall be based on reported lobster landings and reported traps fished in the RIDEM lobster catch/effort logbooks (logbooks) and/or the federal Vessel Trip Reports (VTR) during the qualifying years 2001 -- 2003...

Mr. Stolgitis has not argued that the Initial 2007 RI/Area 2 Lobster Trap Allocation of zero (0) was incorrectly calculated; rather, Applicant claims a medical hardship during the years 2001 -- 2003. Section 15.14.2-5 of the *Marine Fisheries Regulations* provides for an alternative calculation if a medical hardship or military service hardship existed during the target years:

(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. (emphasis added) Although subsection (e) proceeds to delineate further what shall be considered in determining whether the medical hardship exception may be employed, it is unnecessary to reach that issue since the alternative calculation provided in section 15.14.2-5 (d) would not serve to increase Mr. Stolgitis' allotment of lobster traps. He had testified that he did not land lobster in the years 1999 and 2000. He had no lobster fishing history to substitute for the lack of lobster landings in the target years 2001 through 2003.

In addition, even if this Applicant has provided sufficient evidence to qualify for the medical hardship exception, he cannot demonstrate compliance with Section 15.14.2-5 (e) of the *Marine Fisheries Regulations*, which includes the following requirement:

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. (emphasis added)

Mr. Stolgitis did not land lobster in 2004. He is therefore not entitled to a re-calculation of his lobster trap allotment.

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 Applicant received a Notice of Initial Area 2 Lobster Trap Allocation from the Division dated January, 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.
2. Applicant filed a request for hearing at the Administrative Adjudication Division on February 8, 2007.
3. Applicant presented evidence of his medical condition during the years 2001 -- 2003.
4. Applicant did not land any lobsters in 1999 and 2000.
5. Applicant did not land any lobsters during 2004.

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 by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 (d) of the *Marine Fisheries Regulations*.
3. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation pursuant to section 15.14.2-5 (e)3 of the *Marine Fisheries Regulations*.

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

ORDERED

1. Applicant's request for a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.

2. The Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # MPURP001044 shall remain at zero (0) traps.

Entered as an Administrative Order this _____ day of June, 2007 and herewith recommended to the Director for issuance as a Final Agency Order.

Entered as a Final Agency Decision and Order this _____ day of June, 2007.

Mary F. McMahon

Hearing Officer

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. 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.

APPENDIX A

LIST OF EXHIBITS

APPLICANT'S EXHIBITS

APPL 1 Applicant's Medical Exemption Request and Information
For Id

APPL 2 Medical Records, Surgeries 1996
Full

APPL 3 Medical Records, Surgeries 1997
Full

APPL 4 Summation of medical history from principal neurologist,
Full Dr. James Gilchrist

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

DIV 1 The Notice of Initial Area 2 Lobster Trap Allocation from the

Division dated January 16, 2007 advising the Applicant that his initial 2007 allocation was determined by the Division 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 Pages (Copy).

DIV The Applicant's letter requesting a hearing concerning the

2

Full Division's Revocation Letter [sic]. 1 Page (Copy).

DIV

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

Full

DIV

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

Full

DIV

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

Full