

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

RE: FIELD, RUSSELL S.
LICENSE DENIAL

AAD NO.08-003/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division for Environmental Matters (AAD) pursuant to the request for hearing filed by Russell Field (Applicant) regarding the denial for renewal of his Principal Effort Commercial Fishing License with quahog endorsement, i.e., PEL #1037 by the Office of Boat Registration and Licensing (Division or OBRL). A prehearing conference was conducted on September 3, 2008 and the hearing commenced immediately thereafter.

The OBRL was represented by Gary Powers, Esq. Mr. Field represented himself.

The proceedings were conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I.G.L. § 42-17.7-1 et seq.); the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.); R.I.G.L. § 20-2.1-5 et seq.; the Rules and Regulations Governing the Management of Marine Fisheries (Fisheries Regulations) and the Administrative Rules of Practice and Procedure for the Department of Environmental 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. Pursuant to an application dated April 14, 2008, the Applicant applied to the Division for the renewal of Principal Effort License with quahog endorsement, i.e., PEL #1037.
3. The last Principal Effort License with quahog endorsement that Applicant was issued expired on December 31, 2004.
4. The Division's Preliminary Denial letter dated April 14, 2008 advised Applicant of his opportunity to request within ten (10) days of receipt of the Preliminary Denial a reconsideration of the Preliminary Denial by the Commercial Fishing License Review Board.
5. Pursuant to the Division's April 14, 2008 Preliminary Denial, the Applicant forwarded a letter dated April 18, 2008 to the Commercial Fishing License Review Board requesting reconsideration by the Commercial Fishing License Review Board of the Preliminary Denial.
6. The Commercial Fishing License Review Board declined to make a recommendation to the Department within thirty (30) days and Applicant's request for Reconsideration concerning the Preliminary Denial and the Division advised Applicant via letter dated May 23, 2008 that the Division's Decision denying Applicant's Application For Renewal of PEL #1037 had now become final. The May 23, 2008 letter further advised Applicant of his opportunity to request a hearing before the Administrative Adjudication Division within thirty (30) days of receipt of the May 23, 2008 Denial of the Applicant's Application For Renewal of PEL #1037.
7. The Applicant submitted a letter dated June 11, 2008 to the Administrative Adjudication Division requesting a hearing concerning the Division's May 23, 2008 Denial of the Applicant's Application For Renewal of PEL #1037.

EXHIBITS

At the Prehearing Conference the parties agreed to the admission of the following as full exhibits:

- OBRL Exhibit#1 Full The Applicant's Application For Renewal of PEL #1037 dated April 14, 2008. 3 Pages (Copy).
- OBRL Exhibit#2 Full The Division's computer summary of Applicant's commercial fishing license history revealing that the Applicant last possessed a valid Commercial Fishing License on December 31, 2004. 3 Pages (Copy).
- OBRL Exhibit#3 Full The Division's Preliminary Denial letter to the Applicant dated April 14, 2008 denying Applicant's Application For Renewal of PEL #1037 dated April 14, 2008. 1 Page (Copy).
- OBRL Exhibit#4 Full The Applicant's April 18, 2008 letter to the Commercial Fishing License Review Board requesting reconsideration by the Commercial Fishing License Review Board of the Division's April 14, 2008 Preliminary Denial. 1 Page (Copy).
- OBRL Exhibit#5 Full The Division's May 23, 2008 letter notifying the Applicant the Division denying Applicant's Application For Renewal of PEL #1037 dated April 14, 2008 had become a final decision due to the failure of the Commercial Fishing License Review Board to act within thirty (30) days of Applicant's April 18, 2008 request for reconsideration. 2 Pages (Copy).
- OBRL Exhibit#6 Full The Applicant's letter to the Administrative Adjudication Division dated June 11, 2008 requesting a hearing concerning the Division's May 23, 2008 denial of the Applicant's Application For Renewal of PEL #1037 dated April 14, 2008. 1 Page (Copy).

HEARING SUMMARY

The Applicant testified on his own behalf. He testified that he had suffered from an injury to his neck and shoulder in November 2004 when he fell from the roof of his house. He did not renew his Principal Effort License (PEL 1037) in 2005 because he was unable to fish.

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He testified that he could not raise his arm over his shoulder. He also stated that he could not do other occupations such as carpentry.

Applicant Field testified that he underwent treatment through 2005 with a chiropractor. In January 2006 a MRI was performed which indicated that Applicant Field had suffered a 9 mm tear of his supraspinatous muscle. Mr. Field presented a "Final Narrative Report" from Dr. A. J. Donatelli of Rhode Island Medical Rehabilitation, Inc. dated March 7, 2007. Applicant Field requested that the report be admitted as an exhibit. Attorney for OBRL objected on the basis that the report was unsigned. The exhibit was marked Applicant's #1 for ID and it was ruled that the Applicant had fifteen (15) days to obtain and submit a signed copy of the medical report. On September 8, 2008 the Applicant filed a signed copy of the medical report which I have admitted into evidence as Applicant's Exhibit #1 Full. (a copy of which is annexed hereto and made a part hereof)

The Applicant testified that he continues to suffer from the effects of his injury to the present. He testified and it was confirmed by Applicant's Exhibit #1 Full that a surgery was required to give the Applicant relief. Applicant testified that he has not gotten an operation because he cannot afford it. The Applicant rested.

OBRL presented Margaret McGrath as its only witness. Witness McGrath is the person within OBRL responsible for reviewing of applications for Principal Effort Licenses. Witness McGrath identified Mr. Field's application which is OBRL Exhibit #1 Full. Ms. McGrath testified that Mr. Field's application was rejected because he did not have a license in 2007. Ms. McGrath was directed to OBRL Exhibit #2 Full which she identified as a printout of Mr. Field's license history. She testified that the printout showed that Mr. Field had no fishing license for 2005, 2006 or 2007.

Witness McGrath described OBRL Exhibit #3 Full as OBRL's preliminary denial of Mr. Field's Application. OBRL Exhibit #4 Full was identified as Mr. Field's request dated April 18, 2008 to have his application reconsidered by the Review Board.

In his request for review, Applicant Field described for the first time his medical condition. Witness McGrath explained that the Review Board declined to hear the matter. OBRL Exhibit #5 Full was identified by witness McGrath as a Final Denial. OBRL Exhibit #6 Full was described as Applicant Field's request for an Administrative Hearing which was filed in a timely manner. OBRL rested.

Applicant Field argued that he should be allowed to have a license in spite of the fact that he has not had a license since 2004. He requested that his appeal be granted on the basis of an ongoing medical hardship which has existed since November 2004.

Counsel for OBRL argued that the Applicant was able to work in 2006 and waited until 2008 to apply for his license could not be excused on the basis of medical hardship. Counsel also argued that the evidence of medical hardship cannot be supported by the medical report of a chiropractor who is not qualified to offer an opinion. Counsel argued that the opinion of a chiropractor did not rise to the level of competency as a medical doctor.

ANALYSIS

The authority of the RIDEM and the AAD in matters relating to commercial fishing licensing is derived from R.I.G.L. 20-2.1-1 et seq. The authority of OBRL regarding "Principal Effort" licenses is found in R.I.G.L. 20-2.1-5 (1) (ii) which states that "Duly licensed persons in a fishery as of December 31 of the immediately preceding year shall be eligible to obtain a Principal Effort License for the fishery sector for which they were licensed on December 31 of the immediately preceding year."

RIDEM adopted regulations on December 7, 2007 entitled "Rules and Regulations Governing the Management of Marine Fisheries". In Rule 6.7.4 entitled "License Renewals, Transitions and Upgrades" at subsection (a) it states "Applicants who possess a valid Commercial Fishing License with Lobster (Resident only), Quahog (Resident only), and/or Restricted Finfish endorsements as of the immediately preceding year may obtain a Commercial Fishing License with the same endorsement(s) for the immediately following year". The statutory and regulatory language is clear and unambiguous. An Applicant for a Commercial Fishing License with quahog endorsement must have a license with that endorsement for the previous year.

The undisputed facts are that the Applicant did not renew his license in 2005, 2006 or 2007. I find the Applicant to be a credible witness. I accept as fact that he suffered an injury in November of 2004 which rendered him incapable of fishing in 2005, 2006 and 2007. He testified that he continues to suffer from the effects of his injury but wants to go back to commercial fishing. Applicant has argued that as a result of the injury he should be relieved from the strict application of the Statute and Regulations.

It appears that the Applicant is requesting an exception based on "Medical Hardship". R.I.G.L. 20-2.1-3 (13) defines "Medical Hardship" as a "significant medical condition that prevents a license applicant from meeting the application requirements".

R.I.G.L. 20-2.1-5 (5) is entitled "Transfer for Hardship". It states in part "a license may be transferred to a family member upon the incapacity or death of the license holder who has actively participated in commercial fishing".

The Rules and Regulations Governing the Management of Marine Fisheries incorporate the identical definition of "Medical Hardship" in Rule 5.45. Rule 6.7-9 is entitled "Issuance of New Licenses and Operators Permits under Hardship Conditions". Subsection (a) states "A

hardship shall be deemed to exist if a license holder who is actively fishing does or becomes permanently or temporarily incapacitated by illness or injury so as not to be able to fish for any period in excess of fourteen (14) days”.

The regulations provide in subsection (e) of Rule 6.7-9 states “In the case of temporary incapacity, exceeding a period of fourteen (14) days, the Department will issue, upon application, an operator permit or equivalent license of the same category to a Rhode Island resident designated by the incapacitated license holder”.

It appears that this method of preserving a commercial license upon disability of the original operator will only be available for two years. The regulations state “the operator permit or equivalent license will be eligible for renewal once, at a cost equivalent to the cost of the original license upon approval by the Director”.

Section (e) of Rule 6.7-9 finally provides for the return of a license to the disabled license holder. The regulations state “upon the return to wellness of the incapacitated license holder, the original license will, upon application, be reinstated and the operator permit or equivalent license will be suspended”.

The Statutes and Regulations provide a method for incapacitated holders of commercial fishing license to retain control of their license for a limited time. Neither the Statute nor the Regulations provide for an exception to the licensing requirement.

It is a well established rule of statutory construction that the statute must be interpreted literally and the words of the statute given their plain and ordinary meanings in determining the Legislature’s intent. Local 400, International Federation of Technical and Professional Engineers v. Rhode Island State Labor Relations Board, 747 A.2d 1002 (R.I. 2000) citing Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996).

The language of R.I.G.L. § 20-2.1-5 (1) (ii) is clear and unambiguous, and clearly demonstrates that the Applicant is not eligible to apply for a commercial fishing license in 2008 since he did not possess a valid multi-purpose license as of December 31, 2007. In fact he did not hold a license for 2005, 2006 or 2007.

Applicant has therefore failed to meet his burden of proving by a preponderance of the evidence that he is eligible for the issuance of a commercial multi-purpose license in 2008. This conclusion is dispositive of this matter, and renders it unnecessary to consider the criteria established by R.I.G.L. § 20-2.1-12 (b) and Fisheries Regulation 6.7-10 (g).

Assuming arguendo that the above is not dispositive of this matter, a review of the evidence presented clearly demonstrates that the Applicant failed to meet his burden of proving that he meets the criteria established in R.I.G.L. § 20-2.1-12 and Rule 6.7-10 of the Fisheries Regulations that the issuance of the license (1) will have no impact on the fisheries management program overall; (2) would place Applicant at equity with other license holders; (3) would be consistent with prior agency decisions; and (4) would be consistent with management plans.

It is difficult to understand how the Applicant, who is commercial fisherman, would not be aware of the license requirement, especially considering the numerous laws and regulations that commercial fisherman are required to address on a daily basis. In any event, any such unawareness is insufficient to support any claimed eligibility. It is indeed unfortunate that the Applicant did not apply for his license during the period of time that he was eligible (2005-2007); however, contrary to Applicant's belief, there is no provision under the existing statutes or the rules and regulations that would permit the granting of a license after a three (3) year lapse. Consequently, the decision of OBRL to deny the Applicant commercial fishing license for 2008 was consistent with the statute and the Fisheries Regulations and should be affirmed.

FINDINGS OF FACT

1. On December 31, 2004 the Applicant was the holder of a Principal Effort License with Quahog Endorsement, PEL 1037.
2. In November 2004 the Applicant suffered an injury to his neck and shoulder as the result of a fall.
3. The Applicant did not apply for a license in 2005.
4. The Applicant underwent treatment by a chiropractor in 2005.
5. The Applicant applied for a license in 2006 after the deadline.
6. The Applicant applied for a license in 2007 which was denied. He did not file an appeal.
7. The Applicant applied for a license in 2008 which was denied by notice dated May 23, 2008.
8. The Applicant filed an appeal in a timely manner.
9. The Applicant suffered from a medical hardship beginning in November of 2004 and proceeding through 2005.
10. The Applicant did not transfer his license to a designee.
11. The Applicant did not possess a Principal Effort License with Quahog Endorsement for the years 2005, 2006 and 2007.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division for Environmental Matters ("AAD") has jurisdiction over this matter pursuant to R.I.G.L. § 42-17.7-2; Rule 3 of the Administrative Rules of Practice and Procedure for the AAD; R.I.G.L. § 20-2.1-12 (c); and Rule 6.7-10 (i) of the Rules and Regulations Governing Management of Marine Fisheries.

2. The Rhode Island General Laws and the Fisheries Regulations prohibit the issuance of Principal Effort License unless the applicant possessed a license for the year immediately preceding.
3. Applicant is not eligible to apply for a Principal Effort License since he did not have a valid Principal Effort License as of December 31, 2007 pursuant to R.I.G.L. § 20-2.1-5 (1) (ii).

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

ORDERED

1. The request of Applicant, Russell Field, for a multi-purpose license for 2008 is DENIED.

Entered as an Administrative Order this 19th day of November, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.



David Kerins
Acting Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

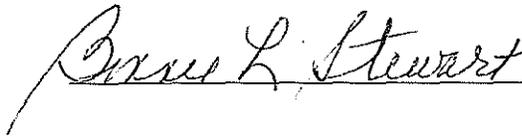
Entered as a Final Agency Order this 19th day of November, 2008.



W. Michael Sullivan, Ph.D.
Director
Department of Environmental Management
235 Promenade Street, Fourth Floor
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded by first-class mail, postage prepaid to: Russell S. Field, 38 Freedom Road, Providence, RI02909; and via interoffice mail to Gary Powers, Esq., DEM Office of Legal Services, 235 Promenade Street, 4th Floor, Providence, RI 02908 on this 20th day of November, 2008.



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.