

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

RE: ASH, DAVID
LICENSE DENIAL PEL000316

AAD NO. 14-002/MSA

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division (“AAD”) pursuant to the request for hearing filed by David C. Ash regarding the denial of his Application for the Renewal of his Principal Effort License with quahog and non-quahog endorsements. An Administrative Hearing was conducted on April 22, 2014.

The Office of Management Services of the Department of Environmental Management (the “Division”) was represented by Gary Powers, Esq. and Mr. Ash 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.

HEARING SUMMARY

David C. Ash (the “Applicant”) testified on his own behalf in a narrative form. He said that he had a license in 2008 but didn’t renew it due to poor health. In that statement he addressed the problems involving his personal financial conditions. He said that he couldn’t breathe. He said that over the last several years he was treated for physical and mental health issues. He treated with Dr. Herbert, Gateway Healthcare and Thundermist Health Center. He

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described how he is the primary caregiver for his daughter and that they had stayed at Welcome House of South County due to financial difficulties. His health has improved and he wants to go back to his fishing livelihood. The Division waived cross-examination.

The Division presented Margaret McGrath as its only witness. She said that she has been employed by DEM since 1980 and currently holds the title of Director of Programming Services. Her duties include review of applications for the 2014 applications which included the one filed by Mr. Ash. Mrs. McGrath testified regarding the results of the 2014 application process. She identified a letter of application from Mr. Ash dated 6 January 2014 which was marked Division Exhibit #1 Full. The endorsements were issued on a priority basis as established in the regulations. She reviewed the specific criteria for priority as reflected in the Notice of Denial dated January 14, 2014 (Division Exhibit #3 Full).

Mrs. McGrath identified a document as the Applicant's information in the Commercial License System which was entered as Division Exhibit #2 Full. She testified that based on Division's Exhibit #2 Full the Applicant did not qualify for any of the priorities established by the regulations. Mrs. McGrath pointed out that the Records reflect that Mr. Ash has not had a license since December 2007. She testified that the *RI Marine Fisheries Regulations* at Section 6.7-4 entitled License Renewals provides in subsection (b) that an applicant who possesses a license for the prior year may receive a renewal. Those applicants who did not possess the license for the prior year must participate in a "lottery" for the remaining available licenses. Mr. Ash's name was entered in the "lottery" but was not chosen. Mrs. McGrath testified that the Mr. Ash's application was not accompanied by any documents relating to his medical issues and those questions therefore were not part of her deliberations.

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The Applicant conducted a brief cross-examination in which Mrs. McGrath testified that an affidavit may have made a difference depending upon its contents. Upon the completion of Mrs. McGrath's testimony the Division rested.

ANALYSIS

The authority of the Department of Environmental Management ("DEM") and the AAD in matters relating to commercial fishing licensing is derived from R.I.G.L. §20-2.1-1 et seq. The Rules and Regulations Governing the Management of Marine Fisheries (Regulations") were adopted on December 13, 2013.

The Applicant has applied for a Renewal of his Principal Effort License with quahog and non quahog endorsement. The regulations establish a method for determining which applicants should receive these licenses by a certain priority basis. Section 6.7-6 (b) of the regulations holds that first priority in the issuance of new commercial fishing licenses with applicable endorsement(s) shall be given equally to the following three categories:

(b) Applicants who possessed a valid Principal Effort License with Lobster (resident only), Quahaug (resident only, Soft-Shell Clam (resident only), Restricted Finfish, and/or Whelk (resident only) endorsements as of the immediately preceding year may obtain a Principal Effort License with the same endorsement(s) for the immediately following year. (Emphasis added). Other fishery endorsements on Principal Effort Licenses – including Non-Lobster Crustacean (resident only), Shellfish Other (resident only), and Non-Restricted Finfish – may be renewed without restriction. Non-resident applicants must demonstrate that their state of residence complies with the reciprocity requirements set forth under Section 6.9.

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The Division advised the Applicant that he did not meet any of the criteria upon which a priority is received pursuant to Rule 6.7-4 of the Regulations. The Applicant filed a timely appeal. The Applicant, in his testimony at the Administrative Hearing, repeated his request for an exception based on his personal difficulties and his hope that he could improve his economic situation. The Applicant did not argue that the Division erroneously overlooked his entitlement to a priority. He did not present any evidence that the department improperly interpreted his application. The Applicant testified about medical and personal issues which were not brought to the Division's attention in anyway at the time he filed his application.

In his direct case the Applicant did not sustain his burden of proof by a preponderance of the evidence that the Division had committed error in denying his application. The Division's case presented the documents upon which its determination was based. Mrs. McGrath testified that the Applicant did not meet the renewal criteria because he didn't hold a license on December 31, 2013 and in fact had not possessed the requested license since December 31, 2007.

CONCLUSION

The Applicant has not met his burden of proof by a preponderance of the evidence that his application was improperly denied. While the Hearing Officer can sympathize with the Applicant for his need to improve his ability to earn a living there is no discretion provided in the Regulations to go beyond its express provisions. The Applicant's appeal, therefore, must be denied.

FINDINGS OF FACT

1. The Administrative Adjudication Division has jurisdiction over this action and personal jurisdiction over this action and personal jurisdiction over the Applicant.
2. On January 6, 2010 Applicant filed an application for a Renewal of his Principal Effort license (PEL000316) with quahog and no quahog endorsement.
3. On January 14, 2014 the Office of Management Services issued a letter to Applicant advising him that his application had been denied.
4. On February 7, 2014 Applicant filed his Notice of Appeal.
5. The Regulations provided for a priority basis for the issuance of licenses with endorsements.
6. The Regulations provide for a right to renew a license if held on December 31 of the prior year.
7. Applicant has not had a license since December 31, 2007.
8. The Applicant did not meet the requirements of any of the priorities.
9. The Applicant was not entitled to the issuance of the license sought.
10. The Division did not commit error in the denial of the Applicant's application.

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 the 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 (g) (vii) of the Rules and Regulations Governing Management of Marine Fisheries ("Regulations").
2. Section 6-7-4 of the Regulations provide a priority basis for the awarding of Principal Effort Licenses with quahog and non quahog endorsement.

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3. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a license under Section 6-7-4 of the Regulations.
4. The Applicant is not eligible for a license under Section 6-7-4 of the Regulations.
5. The Division acted in compliance with the Regulations when it denied Applicant's application.

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

ORDERED

1. The Applicant's Appeal is **DENIED**.

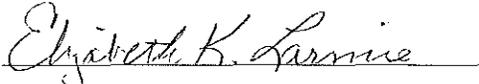
Entered as an Administrative Order this 6th day of May, 2014.



David Kerins
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

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: David Ash, 1104 Mooresfield Road, Wakefield, RI 02879-2041 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 6th day of May, 2014.



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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.