

JUNE I. DEGNAN (ON RECONSIDERATION)

IBLA 86-1396

Decided May 24, 1990

Petition for reconsideration of June I. Degnan, 108 IBLA 282 (1989), setting aside a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-54599.

Petition for reconsideration granted; June I. Degnan affirmed.

1. Administrative Procedure: Hearings--Alaska: Native Allotments--Evidence: Presumptions--Hearings--Rules of Practice: Hearings--Rules of Practice: Reconsideration

Where an appellant seeks to rebut the presumption of regularity attending the official acts of public officers upon an offer of proof that her Native allotment application was filed, and that procedures operative in the Bureau of Indian Affairs during the mid-to-latter part of 1970 resulted in the absence of her Native allotment application from the file, a fact-finding hearing is warranted.

APPEARANCES: Michael C. Roebuck, Esq., Anchorage, Alaska, for petitioner; Dennis C. Hopewell, Esq., Office of the Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By decision dated November 3, 1989, this Board granted a petition filed by the Alaska State Office, Bureau of Land Management (BLM), to reconsider June I. Degnan, 108 IBLA 282 (1989). Appellant filed no response in opposition to the petition filed June 23, 1989. The November 3 decision reversed Degnan and affirmed the underlying decision of the Alaska State Office rejecting Native allotment application AA-54599. June I. Degnan (On Reconsideration), 111 IBLA 360 (1989). On January 5, 1990, the applicant (Degnan) petitioned for reconsideration of our November 3 decision, arguing that she was entitled to an opportunity to oppose the BLM petition for reconsideration. Counsel indicated that no response was initially filed because it was not clear that the Board would reconsider its decision in Degnan.

By order dated January 31, 1990, the Board set aside June I. Degnan (On Reconsideration), *supra*, and granted the applicant 15 days within which to respond to BLM's initial petition for reconsideration. BLM's initial petition sought review of June I. Degnan, *supra*, wherein this Board ordered a hearing to resolve whether Degnan's Native allotment application AA-54599 had been timely filed. BLM maintained that Degnan's affidavits, which described how her father had mailed her application, were not a sufficient basis for granting a hearing to resolve whether the application had been timely filed.

We granted BLM's initial petition because we found that the presumption of regularity, by which administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing, was entitled to greater weight than the presumption that documents properly mailed are duly delivered. 111 IBLA at 362. Thus, accepting Degnan's affidavits of mailing as true, we held that such evidence of mailing would not overcome the presumption of regularity.

In our order of January 31, 1990, we set aside this decision on reconsideration and granted the applicant leave to respond to BLM's petition, stating:

Such a response must clearly set forth the material issue(s) of fact that Degnan contends remains in dispute. It shall be insufficient to simply state that such issue is "whether or not Ms. Degnan's application was timely filed with the Department of the Interior" (Petition, Jan. 5, 1990, at 9). Such response shall set forth in detail the facts that, if proven at a hearing, show timely receipt by the Department of application AA-54599, or rebut the presumption of regularity attending the official acts of public officers.

Thus, BLM's petition for reconsideration of our decision in Degnan is at issue, and we must decide whether to alter our holding therein. Having considered the merits of the arguments presented, we conclude that our decision in Degnan should be affirmed.

By a pleading filed February 20, 1990, Degnan stated that if granted a hearing, she will submit evidence to rebut the presumption of regularity.

The applicant states that she will rebut this presumption by a two-step process. First, she will show that her Native allotment application was timely mailed to the Bureau of Indian Affairs (BIA) in the mid-to-latter part of 1970. Secondly, she will show that during this relevant timeframe, there existed a lack of procedures and resources at BIA to handle the thousands of applications that were received. These deficiencies caused confusion and loss of numerous applications, some never to be found although later proven to have been timely filed (Answer to BLM's Petition, Feb. 20, 1989, at 12). The applicant states that she will further show that BIA failed to log and date stamp applications and that the agency erroneously returned applications to applicants.

The record is presently silent as to BIA's procedures upon its receipt of a Native allotment application. A different situation applies, however, with respect to when application AA-54599 is said to have been mailed. The applicant states that she will show that it is more probable than not that her application was mailed in the mid-to-latter part of 1970. She chooses this timeframe because:

A cursory examination of BLM records reveals that Ada Degnan's application, F-13193, was signed October 10, 1970, transmitted by the Anchorage Agency of BIA to the Fairbanks Office of BLM on November 3, 1970, and received by BLM Fairbanks on November 5, 1970. The application of Eve Merrifield, June Degnan's sister, F-14219, was signed on October 4, 1970, and was received by BLM on September 1, 1971. The application of Ida M. Harden, another sister of June Degnan, F-13083, was signed on September 3, 1970, and received by the BLM on September 15, 1970. And the application of Frances Degnan, another sister of June Degnan, FF-013058, was signed on July 24, 1970, and received by the BLM on August 5, 1970.

[1] Degnan's offer of proof, summarized above, is sufficient to support the grant of a hearing to inquire whether her Native allotment application was timely filed with the Department, as ordered in Degnan. At such hearing the Administrative Law Judge will receive evidence as to when Degnan's application was filed, and if filed, whether conditions at the receiving or processing agency were such as to dispel the presumption of regularity.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Government's petition for reconsideration is granted, and our decision in June I. Degnan is affirmed.

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

The procedural history of this case highlights a potential problem with our rule governing petitions for reconsideration and suggests that the prudent practitioner should not take one provision of that rule too literally.

43 CFR 4.403, as amended June 5, 1987, provides in part that "[n]o answer to a petition for reconsideration is required unless so ordered by the Board."

This sentence was added to the rule in response to a suggestion that the proposed rule should be revised to "provide for responsive briefing to a petition for reconsideration." 52 FR 21307 (June 5, 1987). That suggestion was rejected with the following explanation:

Because the Board rarely grants petitions for reconsideration, we see no reason why adverse parties should consider it necessary to file a response whenever a petition for reconsideration is filed. The final rule provides that no answer to a petition for reconsideration is required unless so ordered by the Board. Ordinarily, however, the Board does not consider granting a petition unless answers have been solicited and received. [Emphasis added.]

52 FR 21307-08 (June 5, 1987).

We were not required to solicit an answer when we received the Bureau of Land Management's (BLM's) petition for reconsideration of our first decision in this case (108 IBLA 282 (1989)), and we did not; appellant was not required to submit one, and she did not. We found BLM's petition persuasive, so we proceeded to issue our second decision (111 IBLA 360 (1989)) reversing our first decision.

The lesson is quite plain: although no answer to a petition for reconsideration is required, if a party thinks the petition contains anything that might possibly persuade the Board, it should take the initiative to file an answer rather than waiting for the Board to order one. In my view, due process did not require us to set aside our second decision and allow appellant's answer to BLM's petition in this case, and parties should not count on our exercising our discretion in favor of doing so in future cases.

Will A. Irwin
Administrative Judge