



BURKE RANCHES, INC. v. BUREAU OF LAND MANAGEMENT

173 IBLA 45

Decided November 14, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

BURKE RANCHES, INC.

v.

BUREAU OF LAND MANAGEMENT

IBLA 2007-261

Decided November 14, 2007

Appeal from order of Administrative Law Judge Robert G. Holt dismissing an appeal from a decision of the Upper Snake Field Office, Bureau of Land Management, denying an application for a grazing permit. ID-310-2007-001.

Motion for expedited review granted; order dismissing appeal reversed.

1. Administrative Procedure: Hearings--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Hearings--Rules of Practice: Appeals: Dismissal--Rules of Practice--Hearings

An order by an Administrative Law Judge dismissing a grazing appeal for lack of prosecution because the appellant failed to respond to an Initial Prehearing Conference Order will be reversed when the appellant had no notice that the appeal was subject to dismissal for failing to respond.

APPEARANCES: Karen Budd-Falen, Esq., Cheyenne, Wyoming, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Burke Ranches, Inc., has appealed from a July 11, 2007, order of Administrative Law Judge (ALJ) Robert G. Holt, dismissing its appeal from a March 13, 2007, decision by the Upper Snake Field Manager, Bureau of Land Management (BLM), denying its application for a grazing permit. The basis for dismissal was failure to respond to a prehearing order.

Appellant moved for expedited review of this matter, and after consideration of the surrounding circumstances, that motion is hereby granted. Because appellant was not provided notice that its failure to respond to a prehearing order could result in dismissal of the appeal, we reverse.

On June 7, 2007, Judge Holt issued an Initial Prehearing Conference Order (Order) notifying appellant and BLM of an initial telephonic prehearing conference at 11:00 A.M. on July 10. The Order required the parties to submit in writing, not later than 10 days from the date of the Order, the names and telephone numbers of the persons who would participate in the conference. Although appellant received the Order, it filed no response. At the appointed time, Judge Holt attempted to call Dick Burke, appellant's owner, at the telephone number provided in the notice of appeal, but a recorded message stated that the number had been disconnected. The record does not indicate whether Judge Holt attempted to call again in the event that he had inadvertently reached the wrong number. The next day, Judge Holt dismissed the appeal for "failure to prosecute" because of appellant's failure to comply with the terms of the Order. Judge Holt's dismissal order cites no legal authority for his action.

Appellant explains that its failure to respond to Judge Holt's Order resulted from a misunderstanding between Dick Burke and appellant's counsel about who would represent appellant in the appeal. Statement of Reasons at 2. Appellant asserts that Burke's phone number was never out of service during the relevant time period. *Id.* at 3. Appellant questions whether Judge Holt had authority to dismiss the appeal for failure to respond to his Order, pointing out that the Department's regulations make no provision for dismissal of an appeal under these circumstances. *Id.* at 3-4. Even if Judge Holt had such authority, appellant asserts that he had an obligation to "wield such power in a fair and equitable manner" by providing "notice and an opportunity to cure" before dismissing the appeal. *Id.* Noting that Dick Burke is not a lawyer, appellant contends that dismissal of this appeal for failure to prosecute is not appropriate because there was no pattern of delay, no notice that further delays would result in dismissal, no prejudice to other parties, no effort to balance the concerns of court administration with appellant's right to a hearing, and no effort to assess the efficacy of lesser sanctions. *Id.* at 5-8. Appellant asserts that if Dick Burke had been given notice and an opportunity to explain the circumstances, Judge Holt would not have had a reasonable basis for dismissing the appeal. *Id.* at 7.

Analysis

Section 9 of the Taylor Grazing Act requires the Secretary to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge." 43 U.S.C. § 315h (2000). The Department has long recognized that these hearings are to be conducted in accordance with the

Administrative Procedure Act (APA), 5 U.S.C. §§ 554-559 (2000). *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *Frank Halls*, 62 I.D. 344, 346 (1955).

The APA provides: “A sanction may not be imposed . . . except . . . as authorized by law.” 5 U.S.C. § 558(b) (2000). The APA defines the term “sanction” to include “withholding of relief.” 5 U.S.C. § 551(10)(B) (2000). Thus, dismissal of an appeal for failure to comply with a requirement may be considered a sanction. For example, this Department has issued a regulation providing sanctions for failure to comply with applicable standards of conduct that include “requiring an offending party to show cause why its claim, motion, or interest should not be dismissed.” 43 C.F.R. § 4.27(b)(2).¹

Courts have recognized that dismissal of an appeal is a matter of discretion when this Department’s regulations provide that an appeal may be *subject to* dismissal under specified circumstances. *Tagala v. Gorsuch*, 411 F.2d 589, 590-91 (9th Cir. 1969); *Pressentin v. Seaton*, 284 F.2d 195, 199 (D.C. Cir. 1960). For example, the regulations give an ALJ discretionary authority to summarily dismiss a grazing appeal *after* BLM has made its opening statement at the hearing if the appellant has failed to appear. 43 C.F.R. § 4.476(b).

[1] However, there is no specific regulation providing for dismissal of an appeal for failure to respond to a prehearing order, nor is there a regulation providing that such failure would constitute a waiver of appellant’s statutory right to a hearing under 43 U.S.C. § 315h (2000).² Nevertheless, an ALJ has the power to regulate the course of a hearing under 5 U.S.C. § 556(c) and 43 C.F.R. § 4.474, a power that includes the imposition of sanctions. We have held, however, that even where the power to impose sanctions exists, the violator must first have been provided notice of the range of sanctions before a specific sanction can be imposed. *Board of Regents of the University of Oklahoma*, 165 IBLA 231, 239 (2005), and cases cited.

We conclude that although an ALJ can and indeed must regulate the course of a hearing and appropriately impose necessary sanctions, he may not dismiss an appeal for failure to comply with a prehearing order where no regulation or order

¹ A ruling against a party as a sanction for violation of § 4.27 involving *ex parte* communications has a specific statutory basis. 5 U.S.C. §§ 556(d), 557(d) (2000).

² *Cf.* 43 C.F.R. § 4.1156(a) (if a party in a surface mining civil penalty proceeding fails to comply timely with a prehearing order, the ALJ must issue an order to show cause why (1) that person should not be deemed to have waived his right to a hearing and (2) the proceedings should not be dismissed).

imparted notice to the appellant that its appeal was subject to dismissal for failing to respond, or that the appellant's right to a hearing would be deemed to have been waived. As appellant points out, Judge Holt did not issue a show cause order and await a response before deciding to dismiss the appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the order appealed from is reversed.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge