



INTERIOR BOARD OF INDIAN APPEALS

Rosebud Indian Land and Grazing Association v.
Acting Great Plains Regional Director, Bureau of Indian Affairs

39 IBIA 247 (03/01/2004)

Vacating on Reconsideration:

39 IBIA 218



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROSEBUD INDIAN LAND AND GRAZING ASSOCIATION, Appellant	:	Order Granting Reconsideration, Vacating Prior Order, and Reinstating Appeal
v.	:	
ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 04-11-A March 1, 2004

Appellant Rosebud Indian Land and Grazing Association, through a petition filed by counsel dated January 15, 2004, seeks reconsideration of the Board of Indian Appeals (Board) January 2, 2004, order dismissing its appeal. 39 IBIA 218. The Board dismissed the appeal for failure to prosecute after Appellant, at the time appearing through its President, Jeffery A. Waln (Waln), failed to comply with this Board's orders to post and publish notice of the filing of its appeal. The petition for reconsideration was timely filed. See 43 C.F.R. § 4.315(a). For the reasons discussed below, the Board grants reconsideration, vacates its prior order of dismissal, and reinstates the appeal.

Appellant sought review of a September 16, 2003, letter issued by the Acting Great Plains Regional Director, Bureau of Indian Affairs, (Regional Director; BIA) concerning an increase in the rental rate for grazing land on the Rosebud Sioux Reservation. Because the appeal affected the interests of a very large number of landowners and grazing permittees, the Board excused Appellant from providing actual individual service of its notice of appeal to each interested party, unless requested. Instead, the Board implemented special constructive notice procedures for the case in an October 31, 2003, pre-docketing notice and order concerning service. The Board ordered Appellant initially to provide constructive notice of its appeal through posting and publication, and also ordered the Regional Director to post and publish copies of the Board's orders. After failing to receive responses from the parties indicating that they had complied with the initial notice requirements in the Board's October 31 order, the Board on December 1, 2003, again ordered the parties to show compliance with its directives for posting and publishing notice concerning the appeal. In its December 1 order, the Board stated that Appellant's failure to respond to the order would result in dismissal of the appeal for

failure to prosecute. On January 2, 2004, having received no response from Appellant, the Board dismissed the appeal. 39 IBIA 218.

In Appellant's petition for reconsideration, Waln contends that he misunderstood the October 31, 2003, order, incorrectly believing that all posting and publication requirements were to be handled by the Regional Director. Appellant also contends that he 1/ did not respond to the Board's December 1, 2003, order because he did not receive a copy of that order, nor did he receive a copy of the Regional Director's December 19, 2003, notification to the Board that the Regional Director had complied with her own notice obligations. Appellant submitted two affidavits, one signed by Waln, and another by its counsel, David R. Moeller, Esq., making factual attestations in support of Appellant's contentions that its noncompliance was due to combination of an initial misunderstanding and the subsequent failure to receive either the December 1 order or the Regional Director's December 19 notification. Appellant apologizes for the misunderstanding, contending that its failure to comply was harmless error, and that if the appeal is reinstated, it will promptly satisfy all notice requirements of the Board.

The Regional Director contends that Appellant has failed to allege extraordinary circumstances warranting reconsideration and reinstatement of the appeal. The Regional Director contends that Appellant must be presumed to have received the December 1, 2003, order, because the Board previously has held that notices sent to a party's last known address, and not returned – as was the case here – are presumed to have been received. While acknowledging that the presumption is rebuttable, the Regional Director asserts that Appellant has not credibly rebutted the presumption that it received the December 1 order. In support of her argument, the Regional Director submitted the original certified mail receipt as evidence that on December 23, 2003, Waln did – contrary to his sworn statement – receive and sign for the Regional Director's December 19, 2003, notification. This, according to the Regional Director, severely undermines Waln's contention that he did not also receive the Board's December 1 order. The Regional Director asserts that Appellant has failed to explain why some correspondence was received, while other correspondence sent to the same address was not.

Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. 43 C.F.R. § 4.315. Here, the Board dismissed the appeal in its preliminary stages based on Appellant's failure to comply with two orders concerning service.

The Board has held that a person is presumed to have received notice when it is sent to the person's last known address, and not returned by the Postal Service. See, e.g., Estate of Ella

1/ Although Appellant is an organization, the facts at issue concerning the petition for reconsideration involve the actions, understandings, and attestations of Waln. Therefore, the Board will refer to Appellant and Waln interchangeably.

Sarah Case Barnes, 17 IBIA 72, 74 (1989); Estate of Everett Cozad, 13 IBIA 185 (1985). The presumption of receipt, however, is rebuttable. Estate of Rose Hyson Hardwick Sparlin, 19 IBIA 153, 155 (1991). For example, when a notice is sent to an address other than an individual's current correct address, and the individual specifically denies receiving notice, the presumption may be rebutted. See id. (citing Cozad). Furthermore, if there is evidence that an individual through other means had actual notice, an alleged defect in the formal notice may constitute harmless error. See, e.g., Estate of Andrew Jackson, 12 IBIA 39, 42 (1983).

Appellant does not dispute that the service list contains his current correct address. In that respect, the facts here are distinguishable from those in Sparlin and Cozad. Waln does specifically deny receipt of the December 1, 2003, order. But he also specifically denies receiving a copy of the Regional Director's December 19, 2003, notification, yet the Regional Director has shown that Waln received and signed for it on December 23, 2003. ^{2/} The Regional Director's December 19 notification clearly refers to the Board's December 1 order, thus giving Appellant actual notice of the existence of that order. That should have put Waln on notice to contact the Board for a copy of the order. ^{3/}

The Board's decision whether to grant reconsideration comes down to two issues. First, does Appellant's professed misunderstanding of the October 31, 2003, order provide a basis for granting reconsideration. Second, is Appellant's assertion that he did not receive the Board's December 1, 2003, order sufficiently credible to warrant granting reconsideration. Under the specific facts and circumstances of this case, the Board concludes that reconsideration and reinstatement of the appeal are warranted.

The Board's October 31, 2003, order concerning service adopted special constructive notice procedures for this case, which are not the usual requirements governing appeals to the Board. While the Board's order specifically identified both Appellant and the Regional Director as having posting and publication obligations, the special procedures evidently created some

^{2/} Waln's affidavit, dated Jan. 14, 2004, also states that he did not receive a copy of the Board's Jan. 2, 2004, decision dismissing the appeal. The certified mail return receipt card received by the Board shows that Waln signed for receipt of that order on Jan. 15, 2004, one day after he executed his affidavit, thus corroborating his statement about receipt of the Jan. 2 decision.

^{3/}

The Board notes that the Regional Director's notification does not refer to the notice obligations that were placed on Appellant. In this regard, while it gave him actual notice of the December 1 order, it did not give him specific notice of its contents. If Waln believed that the Board's Oct. 31, 2003, order placed all constructive notice obligations on the Regional Director, the Regional Director's Dec. 19, 2003, notification by itself would not have corrected that misunderstanding.

confusion among the parties. In this respect, the Board notes that the Regional Director's response to the petition for reconsideration acknowledges her own initial confusion with the Board's new procedures set out in the October 31 order. Waln's affidavit specifically states that he misunderstood the October 31 order, believing that constructive notice would be handled by the Regional Director. While the Regional Director contends that any justifiable confusion was subsequently clarified by the Board's December 1, 2003, order, that of course only raises the question whether Appellant received the December 1 order.

The facts here support the presumption that Appellant received the December 1, 2003, order. It was mailed to his current correct address, and not returned to the Board by the Post Office. Appellant provides no explanation for why he admittedly received some correspondence concerning this case, but did not receive other correspondence mailed to the same address. Appellant does, however, specifically deny receiving the December 1 order, and Appellant's counsel corroborates that denial based on conversations between Appellant and counsel.

As previously noted, however, Appellant also specifically denies receiving the Regional Director's December 19, 2003, notification, Waln Aff. ¶ 10, although the evidence now shows that he received and signed for it on December 23, 2003, about the same time he recalled seeing the BIA's notice about the case in the Todd County Tribune. *Id.* ¶ 6. Therefore, the Board must decide whether Waln's credibility is so undermined that the Board should disregard his attestation that he did not receive the December 1, 2003, order.

The Board concludes that under the specific facts of this case, Waln's incorrect statement in his affidavit does not so undermine his credibility that the Board should disregard his assertion that he did not receive the December 1, 2003, order. In this respect, the Board relies heavily on the affidavit submitted by Appellant's counsel, stating that Waln informed counsel that he had not received the December 1 order. The Board presumes that Appellant's counsel independently inquired and was satisfied as to the truth of Waln's assertions, before counsel submitted his own affidavit. ^{4/}

The Regional Director asks that the Board consider the fact that Appellant's failure to comply with the Board's instruction has not been without consequence for BIA, both in terms of administrative burden and costs associated with posting and publishing the Board's January 2, 2004, order of dismissal, and our subsequent January 22, 2004, order allowing responses to the petition for reconsideration. However, the Regional Director does not contend that she otherwise would be prejudiced by reinstatement of the appeal. We agree that Appellant's failure to comply with the October 31, 2003, order, and failure to inquire about

^{4/} Appellant's counsel's affidavit does not make any assertion regarding Appellant's receipt of the Regional Director's December 19 notification.

the December 1, 2003, order when Waln received the Regional Director's notification, unnecessarily resulted in burdens on the Regional Director, but not of sufficient magnitude to deny the petition for reconsideration. 5/

This case was dismissed during preliminary proceedings for failure to prosecute, based on noncompliance with Board orders. That noncompliance apparently resulted from Appellant's initial confusion concerning case-specific procedures established by the Board, 6/ and was compounded by Appellant apparently not receiving a follow-up order from the Board. Under these circumstances, we are reluctant to let the dismissal stand based solely on the presumption of notice, when the Appellant specifically denies such notice and that denial is corroborated by a sworn affidavit of counsel. We conclude that Appellant has made a sufficient showing to warrant granting reconsideration and reinstatement of the appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board grants reconsideration; vacates the order of dismissal, 39 IBIA 218; and reinstates the appeal.

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Kathleen R. Supernaw
Acting Administrative Judge

5/ By separate order, the Board will set new deadlines for Appellant's compliance with the October 31, 2003, order, and will address other procedural matters, including a request from the Regional Director that the Board modify the requirements for publishing orders in this case. At that time, the Board will consider whether the administrative and financial costs associated with the Regional Director's posting and publication of the Jan. 2, 2004, and Jan. 22, 2004, orders should result in any obligations being shifted to Appellant. Pending further action by the Board, the Regional Director's obligation to publish this order is stayed.

6/ The Board notes that this case does not involve an alleged misunderstanding about requirements in the regulations governing appeals. In other cases, the Board has strictly applied regulatory requirements, whether or not they may have been misunderstood by a party.