



INTERIOR BOARD OF INDIAN APPEALS

Ron F. Vega v. Acting Navajo Regional Director, Bureau of Indian Affairs

57 IBIA 138 (06/18/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RON F. VEGA,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 11-127
ACTING NAVAJO REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	June 18, 2013

Appellant Ron F. Vega appealed to the Board of Indian Appeals (Board) from a May 11, 2011, decision of the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The decision denied Appellant’s application for a livestock purchase permit. The reason given for the denial was that the Navajo Nation (Nation) had denied the application. We vacate the decision because the Regional Director erred in abdicating to the Nation her discretionary authority to approve or deny Appellant’s application. In accordance with the regulations governing livestock purchase permits, the Regional Director should have assessed Appellant’s fitness to purchase livestock, instead of simply deferring to the Nation’s recommendation. Moreover, while the administrative record does contain information pertinent to Appellant’s fitness to trade, it was in the form of unsupported allegations to which Appellant was not given an opportunity to respond. If the Regional Director relied on those statements in denying the application, that would be a violation of Appellant’s due process rights. We therefore vacate the decision and remand the matter for further consideration.

Background

On September 10, 2010, Appellant submitted an application for a livestock purchase permit to BIA’s Navajo Regional Office. Administrative Record (AR) Tab 7. The Regional Director forwarded the application to the Nation’s Department of Resource Enforcement (DRE) for “review and consent.” Letter from Regional Director to Navajo Nation President, Mar. 18, 2011 (AR Tab 6). Approximately 6 months later, having received no reply, the Regional Director again requested “the Navajo Nation’s decision whether to consent [to] or deny” the permit. *Id.* The DRE responded by memorandum

dated April 6, 2011, in which it recommended denying the application because it had pending investigations against Appellant.¹ April 6 Memorandum at 1 (AR Tab 5). It also stated that Appellant had previously purchased and sold livestock on the Navajo reservation (Reservation) without the required DRE-issued permits, in violation of the Navajo Nation Code, title 3, § 1269. *Id.* at 1-2. In the May 11, 2011, decision, the Regional Director stated that she denied the application because the application form “requires” the Nation’s consent, and the Nation “denied [the] application.” Decision at 1.²

Appellant timely appealed the decision and filed a statement of reasons. Despite two extensions of time, Appellant did not file an opening brief. The Regional Director filed an answer brief.

Discussion

We vacate and remand the Regional Director’s decision because she failed to exercise any independent discretion in denying the application. She appears to have understood the Nation’s consent to be a necessary prerequisite to approval, and she deferred entirely to the Nation’s recommendation. The Regional Director thus failed to properly consider the legal prerequisites to her exercise of discretionary authority: determining whether Appellant was fit to purchase livestock and whether he had posted a bond. And even if the Regional Director did consider Appellant’s fitness to trade before making her decision, Appellant was never given an opportunity to respond to the factual allegations made in the April 6 memorandum, which presumably formed the basis for any fitness determination. If the denial relied on allegations to which Appellant had not been given a chance to respond, that would violate Appellant’s due process rights and would provide an independent ground to vacate the decision.

The Commissioner of Indian Affairs is authorized to establish rules and regulations governing those who wish to trade with Indians. 25 U.S.C. §§ 261, 262; *see also Rush v. Acting Navajo Regional Director*, 25 IBIA 198, 200-01 (1994). Pursuant to that authority, BIA promulgated regulations governing business practices on the Navajo, Hopi, and Zuni reservations. *See* 25 C.F.R. Part 141. Section 141.14(a) specifies that people who are not enrolled members of the Nation may not purchase livestock from enrollees on the

¹ The memorandum stated that DRE would not discuss details of the investigations until they were complete.

² The application form includes a space to indicate whether tribal consent had been given and, if consent was withheld, the reason why. Application at 3. That portion of Appellant’s application indicates that consent was not given and it refers to the April 6 memorandum for the explanation. *Id.*

Reservation without a BIA-issued permit. To receive a permit, an applicant must show that he is “is a fit person to engage in the purchase of livestock” and he must post a \$10,000 bond. *Id.* § 141.14(b); *see also* 25 U.S.C. § 262.

BIA has “broad discretion” in deciding whether to grant permits under Part 141. *See, e.g., Rush*, 25 IBIA at 201. Although not required by the regulations, the Regional Director “routinely seeks” the Nation’s consent when deciding whether to grant livestock purchase permits. Answer Brief at 7. In reviewing Part 141 permit decisions, the Board does not substitute its own discretion for the Regional Director’s, but instead ensures that the Regional Director gave proper consideration to all legal prerequisites to the exercise of her discretion. *See Rush*, 25 IBIA at 201.

The decision states that the application was denied “because the [Nation] has denied [the] application.” Decision at 1; *see also id.* (DRE “informed” BIA that the application “was denied”). But the Regional Director, not the Nation, has statutory and regulatory authority to grant or deny livestock purchase permits. Of course, the Regional Director may consider the Nation’s views and solicit its consent,³ but she was required to make independent determinations of whether Appellant had established that he was “a fit person to engage in the purchase of livestock” and whether he had posted a \$10,000 bond. 25 C.F.R. § 141.14(b). She instead deferred entirely to the Nation. The Regional Director thus failed to consider a legal prerequisite to the exercise of her discretion and, accordingly, we vacate the decision and remand the matter. *See Rush*, 25 IBIA at 201.

Even if the Regional Director did consider Appellant’s fitness to purchase livestock—and the record does not evince such consideration—she failed to afford Appellant an opportunity to respond to the allegations in the April 6 memorandum, which comprise the only evidence in the record relevant to Appellant’s fitness to trade. The DRE alleges in the memorandum that Appellant traded livestock on the Reservation in violation of the Navajo Nation Code and was being investigated for additional infractions. The record does not indicate that Appellant had access to the April 6 memorandum before BIA submitted the administrative record for this appeal. *See also* Notice of Appeal (“I did not receive a copy of the ‘memorandum’ and no one would answer my wife’s inquiry about the ‘memorandum.’”). Appellant claims that he “followed all the [permit] guidelines” and had

³ This appeal does not require us to decide what legal effect, if any, an Indian tribe’s refusal of consent has on a livestock purchase permit that BIA in its discretion nonetheless decides to issue, and therefore we do not address it. The Board does not issue advisory opinions. *Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009), and cases cited therein.

“made sure [to] have all the proper bonds, paperwork and information” when trading livestock on the Reservation. *Id.*; *see also* Statement of Reasons.

In *Rush*, a BIA area director denied a Part 141 permit based on allegations and recommendations made by a BIA agency employee and an employee of the Nation. 25 IBIA at 199-200, 202. The appellant in that case argued that the allegations were untrue and that she never had an opportunity to respond to them. *Id.* at 201. We vacated that permit denial decision because the area director violated the appellant’s due process rights by basing the denial on unsupported factual allegations to which the appellant was not given an opportunity to respond. *Id.* at 202.

The only document in the record pertinent to Appellant’s fitness to trade was the April 6 memorandum. As in *Rush*, Appellant was never afforded a chance to respond to those unsupported assertions⁴—he did not even have access to the memorandum until after the decision was issued. Therefore, even if the Regional Director based the decision on an assessment of Appellant’s fitness, it did not comport with due process because Appellant was not given a chance to respond to the allegations made in the memorandum. That would be an additional reason to vacate the decision.

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 vacates the Regional Director’s May 11, 2011, decision and remands the matter for further consideration.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁴ There is no independent support for the allegations in the April 6 memorandum. The Regional Director attached Tribal court documents to the answer brief, Exs. A & B, but those documents postdate the decision and thus could not have been relied upon in rendering it.