

UNITED STATES

v.

W. C. SMITH

IBLA 73-129

Decided February 1, 1974

Appeal from a letter decision of the State Director, Wyoming State Office, Bureau of Land Management, declaring contestee's interest in mining claims null and void for failure to file timely answer to contest complaint. (Contest No. W-28124)

Reversed and remanded.

Attorneys--Practice Before the Department: Persons Qualified to Practice

Qualifications to practice before the Department of the Interior are prescribed by regulations. An attorney-in-fact who does not fall into the regulations' categories of persons authorized to practice before the Department is not authorized to practice merely because he has a power of attorney.

Practice Before the Department: Generally--Rules of Practice: Answers

Where an answer to a mining contest complaint is filed in behalf of a contestee by a person not authorized to practice before the Department, the answer may be accepted if it is properly ratified by the contestee.

Rules of Practice: Answers

Where an error in a middle initial occurs within an affidavit executed by a mining claimant to demonstrate ratification of an answer to a mining contest

filed in his behalf by a person not authorized to practice before the Department, summary dismissal of the attempted ratification will be rejected and the contestee will be allowed to submit an affidavit properly identifying the contestee and correcting prior mistakes.

APPEARANCES: Kenneth A. Hicks, Esq., Kienzle, Kienzle and Hicks, Shawnee, Oklahoma, for contestee; Bryan L. Kepford, Esq., Office of the Solicitor, Denver, Colorado, for the United States.

OPINION BY MR. RITVO

W. P. Smith appeals from a letter decision of the State Director, Wyoming State Office, Bureau of Land Management, dated August 24, 1972, declaring null and void his interest in Crawfish Placer mining claims Nos. 1-8 inclusive, 13-40 inclusive, located in Sections 21-28 inclusive, 34 and 35, T. 14 N., R. 95 W., 6th P.M., Sweetwater County, Wyoming.

On October 28, 1971, the Government initiated a contest proceeding challenging the validity of the above-identified mining claims. On November 26, 1971, Merle I. Zweifel filed an answer to the complaint in behalf of himself as co-owner, and as attorney-in-fact for contestee W. C. Smith. By decision dated February 11, 1972, Zweifel was declared unauthorized to practice before the Department in Smith's behalf and Smith was allowed ten days to:

(1) file evidence showing Merle I. Zweifel is qualified to practice before the Department pursuant to the provisions of 43 CFR 1.3, or (2) ratify the answer filed by Merle I. Zweifel as attorney in fact.

The decision further informed Smith that:

To ratify the filing of the answer you must submit a sworn affidavit in which you state, if it is a fact, that you had authorized Merle I. Zweifel to file an answer on your behalf before he filed it.

Contestee requested and was granted additional time through March 10, 1972, to file his affidavit. On February 28, 1972, contestee filed an affidavit which referred to an authorization for

the filing of unspecified mining claims in Nevada, but did not show that Zweifel was authorized to file an answer in behalf of Smith in Wyoming. An amended affidavit was filed on April 3, 1972. This latter affidavit complied with the instructions for ratification given in the February 11, 1972, decision. 1/ The affidavit, however, was executed and acknowledged by one W. P. Smith who, the State Office maintained, was not a party to the contest and had no recorded interest in the claims. In its letter decision of August 24, 1972, the State Office declared that both affidavits filed by the contestee pursuant to the February 11, 1972, decision were legally unacceptable.

Under the Department's rules governing contests against mining claims, a contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and when he fails to file an answer, the allegations of the complaint will be taken as admitted, and the mining interest which is the subject of the contest may properly be declared null and void without a hearing. 2/ James D. Lindsay, 10 IBLA 238 (1973); United States v. Sainberg, 5 IBLA 270 (1972), aff'd sub nom. Sainberg v. Morton, Civil No. 72-217, (D. Ariz., Sept. 10, 1973). In the case on appeal, the Director held that, given the ineffective ratification attempt, appellant had failed to file an answer to the contest complaint within the time allowed. The allegations in the complaint were deemed admitted which resulted in a finding that the claims were invalid. Accordingly, Smith's interest in the claims was declared null and void.

Appellant urges that the Director's decision was in error and states the following reasons in support of his appeal:

1/ The affidavit read in pertinent part as follows:

"That the affiant, anterior to the filing of mineral claims in the State of Wyoming on his behalf by Merle I. Zweifel, authorized the said Merle I. Zweifel to act as his attorney in fact, insofar as the filing of mining claims * * * and to take any actions necessary to defend the validity of said mining claims, and to otherwise protect said mining claims as if the affiant were himself acting."

2/ 43 CFR 4.450-6 states:

"Within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer. * * *"

43 CFR 4.450-7(a) states:

"If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing."

1. That W. C. Smith is one and the same person as W. P. Smith.
2. That through inadvertance [sic] and mistake claims were filed in the name of W. C. Smith instead of W. P. Smith. That through inadvertance [sic] and mistake this fact was not noted by Mr. Smith at the time of filing his Affidavit of Power of Attorney in favor of Merle I. Zweifel. That since the filing of said Affidavit the error has been noted by the Contestee. That the Contestee has offered to file an Affidavit correcting said mistake but that the Contestee has been informed by the Hearing Examiner that said Affidavit would be of no effect.

The major issue raised by this appeal is whether the mistaken middle initial used by appellant on his affidavit nullified the attempted ratification. Before discussing this, however, we first think it proper to consider the general requirements regarding who may practice before the Department and what constitutes adequate ratification of action taken by one not authorized to practice before the Department.

Qualifications to practice before the Department are prescribed by regulations, 43 CFR 1.3. Only by coming within the categories designated by these regulations can one be authorized to practice before the Department. The contestee did not demonstrate that Zweifel was eligible to practice before the Department as either an attorney at law or under any of the other special circumstances listed within the regulations.

Having failed to show authorization for Zweifel to practice before the Department, the contestee was given the opportunity to ratify the answer filed by Zweifel. The State Office erred, however, in its February 11, 1972, decision with respect to the instructions given regarding ratification. The State Office required proof that Zweifel had a power of attorney to act in Smith's behalf. This is neither a proper form of ratification nor is it sufficient to prove authorization to practice before the Department. The Department has held that an attorney-in-fact who does not fall into the categories of persons authorized to practice before the Department cannot be authorized to practice merely because he has a power of attorney. Hattie M. Fults, A-27609 (November 19, 1957).

Ratification does not require that the party who initiated an action be authorized to practice before the Department.

All that is required is that the ratifier adopt as his own the actions taken by the initiating party. Barbara C. Storey, A-29584 (September 26, 1963); E. H. Hamlet, A-29516 (August 19, 1963). In Storey, supra, we held that where a notice of appeal and statement of reasons for appeal is filed in behalf of an appellant by one who is not authorized to practice before the Department, the appeal need not be dismissed if the filing is ratified by the appellant. The same reasoning equally applies with respect to the filing of an answer to a contest complaint. In the instant case, the State Office informed appellant that his ratification would perfect the appeal. We consider those circumstances sufficient to avoid the penalty of dismissal. As the Board has concluded that the contestee will be allowed to submit an amended affidavit (see below), he will have an opportunity to file an adequate ratification making clear that he has accepted, as his own, the answer filed in his behalf by Zweifel.

Next we consider whether the mistaken middle initial used by appellant on his affidavit nullified the attempted ratification. We think not.

While an affiant's signature is ordinarily the primary means of his identification, he may also be identified by a recitation of his name in the body of the instrument. ^{3/} Courts have held that where variances occur between an affiant's name recited in the body and the signature on an affidavit, the jurat may rectify the inconsistency. Raley v. Warrenton, 120 Ga. 365, 47 S.E. 972, 973 (1904); 2A C.J.S. Affidavits § 29(a) (1972). Here it appears sufficiently from the affidavit that the affiant is the contestee. The jurat of the officer who administered the oath is, in effect, a certificate that W. C. Smith appeared before him and subscribed the affidavit, and the affiant W. P. Smith, is thus identified as the same person who is referred to in the body of the affidavit as W. C. Smith. Even assuming insufficiency, amendments are normally allowed as a matter of course in situations where a mistake in the middle initial of the affiant has occurred. Stout v. Folger, 34 Iowa 71, 11 Am.R. 138 (1871); State v. Giles, 103 N.C. 391, 9 S.E. 433, 434 (1889); Redman v. Union Pac. Ry. Co., 3 Wyo. 678, 29 P. 88, 89 (1892).

This Department has rejected the use of summary dismissal where an error regarding a claimant's middle name or initial is

^{3/} Both affidavits read in the body of the instruments as follows:

"W. C. Smith, of lawful age, being first duly sworn, upon oath, states:"; below the signature line: "W. C. Smith." (Emphasis added).

inconsequential or easily curable. Union Oil Co., 72 I.D. 313 (1965); Davidson v. Taylor, 52 I.D. 154, 155 (1927). In Union Oil, the government issued contest complaints and received return receipts bearing signatures containing the same surname and similar or corresponding given names or initials as those of the claimants. The appellants asserted that there was no presumption of identity and argued that the burden rested with the Department to show that the claimants and recipients were one and the same. The Department responded at page 320:

* * * unless it is affirmatively shown to the contrary, the presumption of identity is not overcome by minor discrepancies in the use of given names or initials of the locators and that, all else being regular, effective service of notices of contest was made notwithstanding such minor discrepancies. (Emphasis added.)

We believe that the reasoning in the Union Oil case applies in this situation as well. Therefore, the Board concludes that when an error in a middle initial occurs within an affidavit executed in order to demonstrate ratification of an answer filed by a person not authorized to practice before the Department, summary dismissal of the attempted ratification will be rejected and the contestee will be allowed to submit an affidavit properly identifying the contestee and correcting the prior mistake. See Skillman v. Clardy, 256 Mo. 297, 165 S.W. 1050, 1055 (1914). Appellant made an appropriate request to the Department to allow correction of the error. Such request was improperly ignored.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to the Bureau of Land Management for action not inconsistent with the views expressed herein.

Martin Ritvo, Member

We concur:

Joseph W. Goss, Member

Frederick Fishman, Member

