

ALEXANDRA ATCHAK

IBLA 75-520(B)

Decided December 12, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting in part Native allotment application F-16235.

Affirmed.

1. Alaska: Native Allotments--Appeals--Evidence: Generally--Rules of Practice: Appeals: Generally--Rules of Practice: Evidence

The Board of Land Appeals will not give favorable consideration to new or additional evidence submitted with an appeal from a rejection of a Native allotment application in the absence of a satisfactory showing why the evidence was not submitted to Bureau of Land Management within the period afforded the applicant for the submission of such evidence.

2. Alaska: Native Allotments--Hearings--Rules of Practice: Hearings

An applicant for a Native allotment has no right to a hearing, and none is required where there is no offer of proof which indicates that the findings of the State Office were incorrect, or where an offer of evidence is unaccompanied by a satisfactory explanation why it was not submitted to the State Office within the time provided.

3. Alaska: Native Allotments

A request by a Native allotment applicant for a new field examination will be denied where the applicant was given the opportunity to submit evidence in support of her claim and failed to do so.

4. Alaska: Native Allotments--Appeals--Evidence: Generally

Where the preponderance of credible evidence indicates that the land applied for was not substantially used and occupied by the applicant, to the potential exclusion of others, for at least 5 years, the application is properly rejected.

APPEARANCES: John Scott Evans, Esq., Alaska Legal Services Corporation, Nome, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Alexandra Atchak appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 28, 1975, rejecting her application for Parcel B of Native allotment F-16235 for failure to show 5 years' substantially continuous use and occupancy of the parcel as required by the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by § 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973).

On January 14, 1971, appellant signed a Native allotment application for two separate parcels of land. She claims seasonal use of the land since 1928 for fishing and berry picking. However, a field examination in June 1973 found no evidence of use and occupancy of Parcel B and only a fire pit on Parcel A. Appellant received a notice informing her of the results of the field examination on April 23, 1974, and was given 30 days to furnish further evidence of her use and occupancy of the land for which she applied. On August 23, 1974, she received a notice of an extension of another 60 days to provide such information. Two witness statements supporting the appellant's application for Parcel A were received on October 21, 1974. On October 25, 1974, the appellant submitted her own affidavit. No additional information was submitted to support the appellant's claim of use and occupancy of Parcel B. The State Office granted the appellant's application for Parcel A, but found that the appellant had not established that she

met the requirements for a Native allotment with respect to Parcel B. We find that conclusion to be proper.

[1] We must initially determine what consideration is to be given to the witness statement sent to the State Office after its decision but prior to appeal and the witness statements in support of her application for Parcel B submitted with the appellant's statement of reasons on September 8, 1975. The statements were not submitted to the State Office before it rendered its decision. By letter dated September 24, 1975, this Board notified Alaska Legal Services Corporation of our policy on this matter. That letter stated, in pertinent part:

4. The Board will not give favorable consideration to new or additional evidence submitted with an appeal in the absence of a showing satisfactory to it why the evidence was not submitted to BLM within the 60-day period afforded the applicant to submit a further showing in support of his application.

It is the general practice of the Board not to consider new evidence submitted on appeal in resolving a matter on its merits, but to remand the case to BLM for further consideration where such new evidence, if true, might change the outcome. It was precisely to enable applicants to submit such new evidence at the proper level that BLM provided an additional 60 days and longer before making its decision in each case. To remand cases to BLM upon the basis of new evidence submitted to the Board for the first time, after the extensive opportunities granted below, would negate the purpose for providing those opportunities and result in endless, undue delays.

5. Where new evidence has been submitted with the statements of reasons already filed, the Board hereby grants until November 3, 1975, or 60 days from the filing of the notice of appeal, whichever is longer, in which to explain why the evidence was not submitted to BLM prior to its decision. Any future offers of evidence must be accompanied by such a showing. In the absence of such showing, newly offered evidence will not be favorably considered by the Board.

The appellant's notice of appeal was filed on April 30, 1975, and we have received no satisfactory explanation for the failure to provide additional evidence before the State Office rendered its decision. The statement of reasons asserts that the appellant

never was provided with a copy of the report of the field examination nor did she receive a copy of guidelines for witness statements and was not informed of the evidence deemed necessary to prove her claim. An examination of the case file, however, indicates that the appellant was not hindered in the preparation of her case by the omission of this information, if such omission did, in fact, occur.

The appellant received a notice of the need for additional evidence on April 23, 1974. An attorney for Alaska Legal Services Corporation began representing the appellant on May 17, 1974, more than 10 months prior to the issuance of the State Office's decision. The case file containing the report of the field examination was reviewed by a person from Alaska Legal Services Corporation on August 2, 1974. 1/ In the absence of a timely satisfactory explanation why the witness statements were not submitted to the State Office prior to its decision, we will not give such statements favorable consideration on appeal.

We find no merit in appellant's argument that she was not advised of the evidence deemed necessary to prove her claim and was thus deprived of an opportunity to be heard. 2/ The nature of satisfactory evidence varies from one situation to another, especially in view of the varying patterns of native use that appear across the State of Alaska. The adequacy of a particular item of evidence depends on its persuasive impact in the context of an individual case. The evidence of use and occupancy of a particular parcel of land is within the peculiar knowledge of the applicant, especially where there is no physical evidence of use and occupancy, and the Department does not want to discourage an applicant from submitting any evidence that might be probative by suggesting examples of acceptable evidence which cannot exhaust all possibilities. Thus, the appellant was invited to submit any additional information and was given repeated extensions of time in which to do so.

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1/ This is more than 2 weeks before the appellant received the letter which, according to the State Office, included the report of the field examination.

2/ Appellant's reference to John Nanalook, 17 IBLA 353 (1974), is not pertinent here. The cases included in that decision involved persuasive evidence of the applicants' use and occupancy, but were remanded in order to clarify certain ambiguities in the record. In that situation, the State Office was asked to notify the applicants of the evidence necessary to clarify the ambiguities.

[2] The appellant has requested a hearing to prove that she had used and occupied Parcel B for the required 5 years. However, applicants for Native allotments do not have a right to a formal hearing. Pence v. Morton, Civil No. A74-138 (D. Alas., April 8, 1975), appeal docketed, Civil No. 2144 (9th Cir., May 23, 1975). This Board has ruled that a hearing is not appropriate where there is no offer of proof, which, if established, would impel a different legal conclusion. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). As indicated above, we will not give favorable consideration to evidence submitted on appeal where the appellant fails to adequately explain why such evidence was not submitted to the State Office during the extensions of time provided for the submission of such information. Accordingly, the appellant's request for a hearing is denied.

[3] The appellant has also requested a new field examination of Parcel B. Again, we stress the repeated extensions of time granted the appellant to produce evidence in support of her claim and her failure to do so. Nothing in the file indicates that there were any difficulties in submitting such evidence, particularly in view of her success in proving her entitlement to Parcel A. We can find no basis upon which to order a new field examination. Heldina Eluska, 21 IBLA 292 (1975).

[4] In this case it has not been demonstrated to our satisfaction that Parcel B of the land applied for was substantially used and occupied by the applicant, to the potential exclusion of others, for at least 5 years. The burden to present clear and credible evidence to establish compliance with the law and regulations is upon the applicant. Jack Gosuk, 22 IBLA 392 (1975).

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 affirmed.

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Frederick Fishman  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Martin Ritvo  
Administrative Judge

