

JOHN R. MIMICK, ET AL.

IBLA 76-288

Decided June 7, 1976

Appeal from decision of Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease offer W-51677.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases:
Applications: Drawings

Simultaneous oil and gas drawing entry cards must be fully executed by the applicant and when the applicant omits the date of execution on the card, the lease offer is properly rejected.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases:
Applications: Drawings

Where an applicant fails to date a simultaneous oil and gas drawing entry card, he has not complied with 43 CFR 3112.2-1(a) which requires that the card be "fully executed" and his offer is properly rejected whether the defect is discovered before or after the drawing. The fact that BLM entered the card in the drawing does not waive the defect.

APPEARANCES: John R. Mimick, James W. Belmont, Thomas J. Lauvetz, Arthur J. Denney, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

In a drawing of simultaneously filed oil and gas lease offers filed in June 1975 in the Wyoming State Office, Bureau of Land Management, the offer of John R. Mimick, James W. Belmont, Thomas J. Lauvetz, and Arthur J. Denney was first drawn for parcel 1290. On

July 29, 1975, the State Office notified appellants by letter that their offer had been rejected because the drawing entry card had not been fully executed as required by 43 CFR 3112.2-1(a) which provides:

Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director, "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. * * * (Emphasis added.)

The State Office specified that the date had been omitted.

In their statement of reasons, appellants contend that:

- 1) language and intent of the Regulation is vague and unclear
- 2) our intent was clear and beyond misinterpretation
- 3) the date on the card itself has little or no significance because the controlling factor is the period during which the card is received
- 4) The financial instrument accompanying the offer was properly dated, and
- 5) Lastly, that the BLM validated our offer by entering it into the actual drawing, or at least judged the defect as "curable."

[1] We do not agree that the intent of 43 CFR 3112.2-1 is vague and unclear. Appellants assert that the regulation does not explicitly require that the card be dated. The regulation does, however, state that the card must be "fully executed." Also, a notice published in the Federal Register, specifying that BLM Form 3112-1 (May 1974) was the correct form of lease offer stated, "Failure to complete any part of the card will disqualify the applicant from participation in the drawing * * *." 39 F.R. 24523 (1974). The regulation and the notice make it clear that no mistakes will be permitted. Albert E. Mitchell, III, 20 IBLA 302 (1975). As the card provides a space for the date, the date must be provided in order for the card to be "fully executed" as required by the regulation.

It is irrelevant that appellants provided the other information required, or mailed the card within the proper time. The offer is defective because the date was not provided thereon. The fact that the date appeared on their check will not suffice. The date is important because it shows that as of a particular date, the offerors, by their signatures, certify all the statements made on the card. See Ray Flamm, 24 IBLA 10 (1976).

Appellants further contend that the language, "Failure to complete any part of the card will disqualify the applicant for participation in the drawing * * *" is interpreted to mean rejection from participation in the drawing--not to awarding the lease. They contend that the BLM validated their offer by entering it into the drawing, or at least, cured the defect.

[2] Under section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1970), when the Secretary of the Interior determines that an oil and gas lease is to be issued for a particular tract, it must be issued to the first qualified applicant. McKay v. Wahlenmaier, 226 F.2d 35, 47 (D.C. Cir. 1955). Appellants are not qualified because of their failure to comply with 43 CFR 3112.2-1. The offer of an unqualified applicant must be rejected whether the defect in the drawing card was discovered before or after the drawing. McKay v. Wahlenmaier, supra. Furthermore, in a widely publicized Instruction Memorandum No. 75-194, the Associate Director, Bureau of Land Management, lists certain changes in the processing of simultaneous oil and gas lease offers. The memorandum specifically states that the entry card of a successful drawee will be rejected, subject to the right of appeal, if the drawee failed to complete the entry drawing card by omitting the date. A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected. Manhattan Resources, Inc., 22 IBLA 24 (1975). The act of entering the card in the drawing does not cure nor waive the defect. See Manhattan Resources, Inc., supra; Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974).

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.

Douglas E. Henriques

Administrative Judge

We concur:

* Martin Ritvo
Administrative Judge

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

* See my separate concurrence in Ray Granat, IBLA 76-9, issued today.

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

Although I recognize that Departmental decisions have required uniformly full compliance with oil and gas leasing regulations to preserve an applicant's priority of consideration, the case at bar involves, in my judgment, a reductio ad absurdum.

Appellants' egregious error was to omit from their drawing card the dates they executed it. The drawing card was filed within the period prescribed by 43 CFR 3112.1-2. The date was completely irrelevant to the merits of appellants' offer.

Assume, arguendo, that the four individuals involved had executed the drawing card on four different days - what dates 1/ should the last two individuals have employed on the drawing card and where would they be expected to place such dates?

The omission of the dates of signatures on the drawing card is but a minor, insignificant deviation from the requirement that the card be fully executed.

Albert E. Mitchell, 20 IBLA 302 (1975), rejected a drawing entry card because the card omitted the state in which the lands are located. Ray Flamm, 24 IBLA 10 (1976), similarly rejected the drawing card because it was postdated and that such postdating voided his statement as to his "sole party in interest" status. My view is that Mitchell, Flamm, and the majority opinion herein reflect a mechanistic, if not pavlovian, treatment of 43 CFR 3112.2-1. Concededly, that approach has been the hallmark of oil and gas adjudication for at least some 3 decades. But I suggest that at least a minimal degree of rationality ought to be permitted to permeate the adjudicatory process.

The Department has in a few special instances departed from the rigid requirement of compliance with regulatory requirements, e.g., United States v. Humboldt Placer Mining Co., 71 I.D. 434 (1964); Arthur E. Meinhart, 5 IBLA 345, 349 (1972).

Moreover, in North American Coal Corp., 74 I.D. 209 (1967), the Department held that the failure of a high bidder at a sealed bid auction to submit with his bid a statement of his citizenship and interests in other holdings, required by regulation and the invitation to bid, may be waived where the default has given him no

1/ The card has only two boxes for dates.

advantage over the other bidder. See 45 Comp. Gen. 221, 223 (1965). It is difficult in the case at bar to conjure prejudice to other offerors from appellants' failure to show the dates of their signatures. I recognize that North American attempts to draw a line of demarcation between competitive and noncompetitive mineral leasing in that the Government derives the same revenue no matter who the successful noncompetitive applicant may be. This is a distinction not grounded upon any legal principle, but rather upon obeisance to the concept of maximizing revenue to the Federal Government.

The case most often cited as requiring the Secretary to follow his regulations is McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). But that case involved a patent attempt to circumvent the fairness of the drawing. Culbertson, an officer of a corporation holding 23.7 percent of its capital stock, and Irwin, also an officer holding 19.3 percent of such stock, both filed offers for the same tract as did the corporation itself. Culbertson and Irwin did not reveal on their filings the fact of their stock ownership. The court held that "[a] lease which was obtained through the applicant's creation and concealment of an inherently unfair drawing cannot be said to have created a legal relation of lessor and lessee which is impervious to cancellation." Id. at 43. In contradistinction, there is no public policy consideration in the case at bar precluding the waiver of the minor defect.

The courts have recognized that failure to comply with regulations is not necessarily fatal. In McCallin v. United States, 180 Ct. Cl. 220 (1967), it was held that a permanent reassignment of an employee can be validly made orally despite a departmental regulation requiring that such notice be in writing.

In Greenway v. United States, 163 Ct. Cl. 72, 80 (1963), the Court stated:

It is not every deviation from specified procedure, no matter how technical or regardless of its basic nature, that automatically serves to invalidate a discharge. Taylor v. United States, [131 Ct. Cl. 387 (1955)]; Debusk v. United States, 132 Ct. Cl. 790 (1955), cert. denied, 350 U.S. 988; Queen v. United States, 126 Ct. Cl. 532 (1953). The kind of deviation herein involved more nearly resembles the situation in Taylor, where, as in the instant case, the employee received all his basic rights of sufficient advance notice, an opportunity to reply, and a notice of final decision, but was wrongfully deprived of 30 days' pay (by being involuntarily placed on annual leave during the notice period) than it does in the case of Stringer v. United States, 117 Ct. Cl. 30, 90 F. Supp. 375 (1950), upon which

plaintiff relies, where the advance notice was of insufficient duration (albeit by only one day) and was otherwise defective, the employee was not given any proper notice of final decision, and there were other irregularities, such as the failure to afford the employee, a veteran, with the right to answer personally. In Taylor, the court made the employee whole by granting him a judgment for the 30 days' pay of which he was deprived, but the discharge itself was nevertheless sustained.

In DeBusk v. United States, 132 Ct. Cl. 790, 796 (1955), cert. denied, 350 U.S. 988 (1956), the Court of Claims upheld the termination of services of a federal employee, despite the fact that the charges filed against the employee were not countersigned by the appropriate personnel official. The court found that "the omission of the personnel officer's signature amounts in this case to be more than a technical violation of the regulation."

In Ciaffone v. United States, 121 Ct. Cl. 532, 538-39 (1953), the failure to give the employee a notice of his right to appeal a RIF to the Civil Service Commission was not deemed to adversely affect the separation since "[h]e admittedly was not prejudiced by the failure of the notice to contain in specific words this information, and * * * he did appeal to the Civil Service Commission * * *."

In Queen v. United States, 137 Ct. Cl. 167, 172 (1967), the notice given to the terminated employee was defective on several counts including the fact that "it did not state clearly the nature of the action (i.e., whether reduction-in-force, discharge for cause, or other), erroneously informed plaintiff that he had 30 days to appeal to the Commission instead of the 10 days provided by the regulation and failed to advise him that he had 90 days in which to apply for placement elsewhere in the Federal service. These defects were not substantial and should not have misled plaintiff into delinquency."

Finally, although we have ruled to the contrary in recent decisions, we are not obliged to put the gloss of approval upon our errors. An administrative agency is not bound by the rule of stare decisis. A new interpretation can stand unless irrational. Ace Lines, Inc. v. United States, 239 F. Supp. 804, 17 Ad. L.2d 216 (S.D. Iowa 1965). See N.L.R.B. v. West Side Carpet Cleaning Co., 329 F.2d 759, 15 Ad. L.2d 183 (6th Cir. 1964).

The majority opinion relies on Instruction Memorandum No. 75-194, dated April 25, 1975, as mandating the rejection of appellants' offer and sustaining that action on appeal. But it is clear that such instructions are not regulations and do not have the force and effect of law. Clark County School District, 18 IBLA 289, 306, 82 I.D. 1, 9 (1975); John Paul Hinds, 18 IBLA 385, 388 (1975), citing Barbara Rubinstein, A-28508 (December 28, 1960).

I would sustain appellants' claim to relief and direct the issuance of the oil and gas lease to them. The next case of this genus may involve use of an incorrect zip code, showing the zip code on a separate piece of paper, or omission of a middle initial from a signature. I believe the majority opinion unwarrantedly compels a harsh result, which will impel the same conclusion for even more minute variances.

Frederick Fishman

Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

