

JACK ZUCKERMAN

IBLA 79-134

Decided February 7, 1980

Appeal from decision of Wyoming State Office, Bureau of Land Management, suspending action on oil and gas lease offer W 65303 and a protest against issuance of the lease.

Set aside, protest dismissed, case remanded.

1. Administrative Practice -- Agency -- Oil and Gas Leases:
Applications: Drawings -- Oil and Gas Leases: Applications: Sole
Party in Interest

Where a majority of the Board of Land Appeals has ruled that an agreement between a filing service company and its clientele create no interest in the company and its president which would violate the regulations requiring disclosure of other interests in the lease offers and which preclude multiple filings in simultaneous filing-drawing procedures and that the president's filing an offer in his own name competing with the clientele of the company does not violate the regulations, a case involving similar factual and legal issues will follow the Board's majority position.

2. Administrative Practice -- Administrative Procedure: Generally --
Applications and Entries: Generally -- Oil and Gas Leases:
Applications: Drawings -- Rules of Practice: Appeals: Generally --
Rules of Practice: Hearings -- Rules of Practice: Protests

It is a proper exercise of discretionary authority for a Bureau of Land Management office to suspend action on an oil

and gas lease offer pending resolution of similar cases on appeal to the Board of Land Appeals and a court proceeding. However, where the court case is remanded to the Department of the Interior for further consideration and the Board has resolved cases with substantive issues similar to those in the case under consideration, it will set aside the Bureau's decision, and dismiss the protest and remand the case for action in accord with those rulings. Where there are no disputed factual issues controlling resolution of the case, the protestant's request for a hearing will be denied as well as his request for further suspension of the case.

APPEARANCES: William R. Hamm, Esq., Quarles & Brady, Milwaukee, Wisconsin, for appellant; Don M. Fedric, Esq., Hunker-Fedric, P.A., Roswell, New Mexico, for protestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Jack Zuckerman was the first drawn offeror for parcel W-3800, assigned serial number W-65303, in the August 1978 drawing of noncompetitive oil and gas lease offers held by the Wyoming State Office, Bureau of Land Management (BLM). Zuckerman's signed drawing entry card was completed and submitted for him by Fred Engle, d.b.a. Resource Service Company, Inc. (RSC), an oil and gas leasing service.

On November 8, 1978, Nugent T. Brasher, the second-drawn offeror, filed a protest against issuance of the lease, asserting that Zuckerman is not a qualified offeror. Zuckerman and RSC responded with a request that the protest be dismissed. On December 14, 1978, the Wyoming State Office denied the request, and Zuckerman and RSC have appealed that denial.

The protest submitted that RSC, and offerors using its services, violated 43 CFR 3112.5-2, which prohibits multiple filings, and 43 CFR 3102.7, which requires an offeror either to attest that he is the sole party in interest or to disclose the other parties. Protestant alleged that even if the contract between RSC and appellant complied with the regulations facially, RSC had a scheme or plan which gave it a greater probability of obtaining a lease.

On November 27, 1978, appellant responded to the protest, asserting that the service agreement under which the offer was filed did not give RSC an interest in either the offer or any lease. Attached to

the response was a copy of a letter from the Chief, Branch of Lands and Minerals Operations, BLM, stating that he saw no violation of the regulations in the standard RSC service agreement. Appellant requested BLM to dismiss the protest and issue the lease to him.

The protestant responded to the answer for appellant, reasserting his belief that RSC has an interest within the meaning of the regulations in the offers it files, and stating that the new service agreement did not eliminate the established relationship between client and agent.

On December 4, 1978, BLM informed appellant that the issue raised in the protest was pending in the United States District Court in Wyoming and that the State Office would act on his request in the awarding of the lease when the court resolved the matter. In a letter dated December 4, 1978, BLM decided to deny dismissal of the protest because an identical contract was then under review by this Board, and continue to await administrative and judicial resolution of the problem. ^{1/} Appellant here appeals that denial.

On appeal, appellant charges that withholding action on leases won by RSC clients is arbitrary, unfair and unreasonable, and violates the Administrative Procedure Act, 5 U.S.C. § 555(b) (1976). Appellant urges this Board to decide the merits of the protest, i.e., whether or not he is the first-qualified applicant for parcel W-3800. He argues the Government is estopped to find RSC's service contract creates an impermissible interest in lease offers because of the letter from BLM indicating there was no problem with the new contract. Appellant asserts that RSC had no interest in the lease offer filed on his behalf that would disqualify the offer, and the lease should be issued to him. Finally, appellant denies the existence of any scheme devised to give RSC an unfair opportunity to acquire oil and gas leases.

In his answer, protestant argues that the only issue before the Board at this time is the correctness of the State Office's refusal to dismiss the protest. He argues that the status quo should be maintained until the time for judicial review of related Board decisions has expired. If the Board decides to consider the merits of the protest, he requests a hearing. Protestant reiterates his belief that Engle, through RSC, is operating pursuant to a scheme designed to increase his chances of winning interests in valuable leases, although he concedes that the evidence to support a finding of such a scheme is circumstantial.

^{1/} The State Office was referring to IBLA 79-39, a case involving a contract between RSC and William C. Ridgway, Jr. This Board issued its decision on January 16, 1979. Geosearch, Inc., 39 IBLA 49 (1979).

Protestant complains that Fred Engle and Gertrude Engle, with the same address in Milwaukee, and Mary Engle, with a different Milwaukee address, also filed for parcel W-3800, along with at least 10 other RSC clients. Protestant argues against the applicability of estoppel to the Government, particularly in the public land cases. Finally, he urges the Board to overturn an Assistant Solicitor's decision John V. Steffens, 74 I.D. 46 (1967), which allowed use of a filing service.

[1] In the appeal filed in behalf of appellant Zuckerman and in behalf of Resource Service Company, Inc. (RSC), is a copy of the order of the United States District Court for the District of Wyoming, No. C78-104K (filed Feb. 12, 1979), in Donald W. Coyer, and Fred L. Engle, d.b.a. Resource Service Company v. Cecil D. Andrus, remanding the case to the Department for the development of evidence concerning agreements by Engle, d.b.a. RSC, with his clientele. Since issuance of the BLM decision, this Board has issued four decisions which have decided the substantive issues raised by the appellant and the protestant here. They are: Geosearch, Inc., 40 IBLA 401 (1979); Geosearch, Inc., 40 IBLA 267 (1979); and Geosearch, Inc., 39 IBLA 49 (1979); and the most recent decision, Ervin J. Powers, 45 IBLA 186 (1980). Basically, these cases held that the most recent agreement between RSC (Engle) and his clientele created no "interest" in RSC which appellant was required to disclose under 43 CFR 3102.7 or which might have resulted in a violation of 43 CFR 3112.5-2 prohibiting multiple offers. In Powers, a majority of this Board went further and held that there was no violation of those regulations by the fact that Engle personally filed an offer competing with his clientele where his offer was not the winning offer.

If this were a case of first impression, Judge Thompson would rule in accord with her dissent in Powers, on the issue of violation of the regulations where Engle has filed an offer competing with those of his clientele. This matter, however, was resolved by a majority of the Board (including Judges Fishman and Frishberg) in Powers in ruling that there was no violation and that an offer drawn first by one of Engle's clientele should not be rejected for that reason. Judge Thompson is constrained to follow the Powers determination, although in disagreement with it.

[2] The Geosearch decisions and Powers resolve all of the substantive issues raised by the parties here and are followed. Therefore, no further discussion of the contentions of the parties, which are similar to those raised in those cases, need be addressed here except the protestant's arguments on procedural matters. It is true as protestant asserts that the primary issue raised by this appeal concerns the propriety of BLM's withholding adjudication of the protest and lease issuance because questions concerning RSC were being considered by this Board and the Wyoming Federal court. At the time BLM rendered its decision, the legal issues raised here remained unresolved. It was appropriate for BLM to suspend action on the offer and

protest against the offer as a reasonable exercise of the Secretary's discretion to lease.

However, in view of the court action remanding a case to the Department and in view of the rulings on substantive issues made by this Board in the Geosearch and Powers cases, supra, we see no need to delay adjudication of the protest. Ordinarily we would remand the matter to BLM to adjudicate the protest initially; however, as all of the issues have been resolved by Board decisions this would now be a needless exercise. The decision of the majority of the Board in Powers is based upon assumptions that the facts are as alleged by the protestant in that case. The protestant here has alleged similar facts concerning the filings. There appears no factual controversy for which a hearing would be needed to resolve disputed matters. Therefore, as long as the majority position in Powers controls the disposition of similar legal questions arising from the same factual context there is no basis for ordering a hearing. Protestant's request for a hearing is denied for this reason. By ruling on the merits of the issues at this time, the case is placed in a posture whereby protestant can seek judicial review in the courts, if desired.

Accordingly, 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 set aside, the protest is dismissed, and the case is remanded for further proceedings consistent with this decision and the Geosearch and Powers decisions cited above.

Joan B. Thompson
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Newton Frishberg
Chief Administrative Judge

