

GATEWAY COAL CO.
v.
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT

IBLA 84-514

Decided January 25, 1985

Certification of interlocutory ruling of Administrative Law Judge Joseph E. McGuire holding in part that the Office of Surface Mining Reclamation and Enforcement was precluded from vacating notice of violation CH 2-50-R.

Vacated and remanded.

1. Rules of Practice: Appeals: Effect of -- Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

APPEARANCES: George S. Brooks II, Esq., Lexington, Kentucky, for appellant; Joseph M. Wymard, Esq., and Robert J. Fall, Esq., Pittsburgh, Pennsylvania, for intervenor June Stout; Blair M. Gardner, Esq., and Lynne N. Crenney, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

By order dated May 22, 1984, the Board accepted certification of an interlocutory ruling of Administrative Law Judge Joseph E. McGuire, dated April 20, 1984, holding in part that the Office of Surface Mining Reclamation and Enforcement (OSM) was precluded from vacating a notice of violation (NOV), No. 82-1-31-9, issued with respect to the Gateway Coal Company's (Gateway) underground coal mining operations at the Ruff Creek Shaft mine in Greene County, Pennsylvania.

On April 2, 1982, OSM issued an NOV on the basis that Gateway was violating section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e) (1982), because disturbed areas were located within 300 feet of an occupied dwelling (the residence of June Stout (Stout)) and within 100 feet of a public road (State Route 221). ^{1/} Gateway was required to reclaim the violating areas or seek a waiver from Stout, with respect to the occupied dwelling, and file a request for a variance with the State regulatory authority (the Department of Environmental Resources (DER)), with respect to the public road, "no later than May 24, 1982." On April 26, 1982, Gateway filed an application for review of the NOV pursuant to section 525(a) of SMCRA, 30 U.S.C. § 1275(a) (1982), contending that it had not violated the statute because it fell within the valid existing rights exception under the statute. Gateway requested a hearing. On May 10, 1982, Gateway filed an application for temporary relief from the requirements in the NOV, pursuant to section 525(c) of SMCRA, 30 U.S.C. § 1275(c) (1982). On May 17, 1982, OSM filed a consent to the temporary relief sought by Gateway and an answer in which it also made a request for a hearing.

On December 16, 1982, Stout filed a petition to intervene pursuant to 43 CFR 4.1110. By order dated August 15, 1983, Judge McGuire granted the petition to intervene. On December 22, 1983, Judge McGuire notified the parties that a hearing would be held on January 26, 1984, in Pittsburgh, Pennsylvania.

On January 16, 1984, OSM vacated the NOV with respect to both violations based on a January 16, 1984, request from the Office of the Field Solicitor. The bases for the Field Solicitor's request were that the State regulatory authority was the "appropriate forum" to determine whether appellant was violating section 522(e) of SMCRA, *supra*; Gateway and Stout were both involved in a pending request with the State agency for a permanent program permit; and the same issues had been raised in the State proceeding. The Field Solicitor noted that if the State concluded that Gateway was violating the statute and then did not enforce its determination, OSM could proceed against Gateway on the basis of a new NOV. On January 23, 1984, OSM filed a motion to cancel the January 1984 hearing.

On February 13, 1984, Stout filed an application for review of the January 1984 OSM order vacating the April 1982 NOV, pursuant to section 525(a) of SMCRA and 43 CFR 4.1160 (1984). Stout contended that OSM should not be permitted to vacate the NOV because the Department is responsible for enforcing the provisions of SMCRA with respect to violations which occurred prior to State primacy and that it would be unconscionable to permit OSM to "abandon" the case after retaining jurisdiction for 2 years. Stout also requested a hearing.

On February 21, 1984, Gateway objected to consideration of Stout's application for review in the context of the present proceeding on the basis that Stout's cause of action (the January 1984 order vacating the NOV) is

^{1/} The NOV was issued pursuant to section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1982).

distinguished from Gateway's cause of action (the NOV). In addition, Gateway argued that, if a hearing is granted, the hearing should be limited to the issue of whether OSM properly vacated the NOV and not address the issue of the propriety of the NOV. On February 27, 1984, OSM filed an answer to Stout's application for review, requesting dismissal of the application.

In his April 1984 decision, Judge McGuire noted that OSM had authority under section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982), to vacate an NOV, but that it would not be permitted to vacate the April 1982 NOV where to do so would adversely affect the intervenor. Judge McGuire based his holding on his determination that Stout's interest could not be adequately protected by the State regulatory authority and the fact that OSM had primary responsibility for enforcing the statute with respect to an NOV issued prior to the State's July 31, 1982, assumption of primary enforcement responsibility. Judge McGuire also noted that intervenor had expended significant time and money in preparing for a hearing, which effort would be negated by allowing OSM to vacate the NOV. Judge McGuire stated that the hearing on Gateway's application for review would be reset for May 8, 1984, and the parties duly notified. In addition, Judge McGuire stated that Stout's application for review would not be regarded as a separate request for relief but would be "accepted." By notice dated April 23, 1984, Judge McGuire notified the parties, including intervenor, of the May 8, 1984, hearing.

On May 3, 1984, Gateway filed a motion requesting that Judge McGuire reconsider his April 1984 decision or, in the alternative, certify the decision as an interlocutory ruling for disposition by the Board pursuant to 43 CFR 4.1124. Gateway also requested a stay of the hearing set for May 8, 1984. On May 4, 1984, Judge McGuire certified the April 1984 decision to the Board, noting that the scheduled hearing had been canceled and the parties so notified. By order dated May 22, 1984, the Board accepted certification of the "question of the correctness of the ruling in Judge McGuire's April 20, 1984, order that the Stout's objections preclude OSM from vacating Notice of Violation No. 82-1-31-9." The Board afforded the parties an opportunity to submit briefs in support of their positions.

In its brief, Gateway contends that OSM had discretion under SMCRA to vacate the April 1982 NOV where it deemed prosecution of the NOV to be inappropriate, despite the objections of intervenor. Gateway argues that OSM properly deferred the question of Gateway's violation of the statute to the State regulatory agency (mindful of OSM's oversight role) because the State had assumed primary enforcement responsibility and was in a better position to judge the matter of valid existing rights under State law. See 30 U.S.C. § 1201(f) (1982). Gateway further argues that intervenor is not prejudiced by this deferral to the State as the question of the company's violation of the statute was presented in connection with the permitting process. In the alternative, Gateway contends that even if OSM did not have discretion to vacate the April 1982 NOV, the act of vacating the NOV rendered Gateway's application for review moot and deprived Judge McGuire of jurisdiction to consider the merits of the NOV, citing 43 CFR 4.1121(c)(1). Gateway argues that the intervention was ancillary to the principal cause of action and was not, by itself, sufficient to sustain such action. Finally, Gateway contends that Judge McGuire summarily dismissed OSM's January 1984 order vacating the

NOV without a hearing, in violation of section 525(a)(1) of SMCRA, 30 U.S.C. § 1275(a)(1) (1982), on the grounds the intervenor had filed an application for review of that order. Gateway requests that the Board overrule Judge McGuire's interlocutory ruling and either reaffirm OSM's January 1984 order vacating the NOV, or remand for a hearing solely on the question of whether OSM properly vacated the NOV.

In its brief, OSM states that, at the time of issuance of the NOV, Gateway had asserted its claim of valid existing rights and requested a determination by DER; that 30 CFR 761.12 designates DER as the proper forum to make such a determination; and that OSM may defer to DER for an "initial determination," citing Ronald W. Johnson, 3 IBSMA 118, 88 I.D. 495 (1981). OSM further states that rather than requesting a delay in Departmental proceedings with respect to Gateway's application for review pending a ruling by DER, it chose to vacate the NOV under its authority in SMCRA. OSM counters that intervenor is not prejudiced by OSM's deferral of the question of whether Gateway is violating the statute to DER, because it retains enforcement authority to ensure compliance with the statute. OSM also contends that DER is an adequate forum to litigate the question. OSM argues that Judge McGuire should have held a hearing on Stout's application for review and that he could not consider the NOV itself until after he determined that OSM erred in vacating the April 1982 NOV. OSM requests the Board to either affirm its January 1984 order vacating the NOV or remand for a hearing on Stout's application for review.

In her brief, Stout contends that she is accorded full party status in connection with Gateway's application for review and is entitled to litigate the merits of the case. Stout argues that OSM cannot unilaterally terminate the proceeding to the detriment of an intervenor, after the passage of 2 years, especially where the Department has the "ultimate" enforcement responsibility under SMCRA.

[1] This case arises initially under Gateway's application for review of the April 1982 NOV. At the time the NOV was issued, OSM was the agency primarily responsible for enforcing the provisions of SMCRA with respect to Gateway's surface coal mining operations. The State did not assume primary enforcement responsibility under the statute until approval of the State regulatory program on July 31, 1982. See 30 CFR 938.10. On July 31, 1982, the application for review had already been filed and assigned to an Administrative Law Judge. The OSM order vacating the April 1982 NOV was not issued until January 16, 1984.

We do not question the general authority of OSM to vacate an NOV. Indeed, section 521(a)(5) of SMCRA, 30 U.S.C. § 1271(a)(5) (1982), provides that "[a]ny notice or order pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative." Until such time as an administrative appeal is timely filed, OSM is the Secretary's authorized representative and has the authority to vacate an NOV. However, when an application for review is timely filed jurisdiction over the subject matter is lodged in the reviewing official or tribunal (either an Administrative Law Judge or this Board), and that official or tribunal becomes the Secretary's authorized representative. For a considerable period of time it

has been the declared policy of the Department that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction of the matter until that jurisdiction is restored by disposition of the appeal by the appellate body. Utah Power & Light Co., 14 IBLA 372 (1974); Audrey I. Cutting, 66 I.D. 348 (1959). This policy was extended to cases involving appeals from decisions issued by OSM in one of the earliest cases decided by the Interior Board of Surface Mining Appeals. 2/ Apache Mining Co., 1 IBSMA 14 (1978). In the present case, an application for review of the 1982 NOV was timely made, jurisdiction over the subject matter was transferred to the Administrative Law Judge, and Stout had intervened. Therefore, the OSM order vacating the NOV has no force or effect and can, at the most, be treated as a motion that the Administrative Law Judge vacate the NOV.

Section 525(a)(1) of SMCRA, 30 U.S.C. § 1275(a)(1) (1982), provides that

any person having an interest which is or may be adversely affected by such notice or order [issued pursuant to 30 U.S.C. § 1271(a)(2) and (3) (1982)] or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. [Emphasis added.]

The applicable regulation, 43 CFR 4.1170(d), authorizes the Administrative Law Judge to consolidate applications for review of related notices, orders, or motions, including a motion to vacate the NOV. In the present case, Judge McGuire could have treated the "order" issued by OSM as a motion by OSM that he vacate the NOV, and ruled on the motion. The merits of the motion to vacate the NOV must be considered prior to considering the question of the propriety of the underlying NOV.

Gateway argues that vacation of the NOV deprived the Administrative Law Judge of jurisdiction to consider the NOV, citing 43 CFR 4.1121(c)(1) in support of its position. Inasmuch as OSM's attempted vacation of the NOV was a nullity, this argument must be rejected. 3/

We note that the applicable statute provides that "at the request of the applicant or the person having an interest which is or may be adversely

2/ Secretarial Order No. 3092 of Apr. 26, 1983, 48 FR 22370 (May 18, 1983), transferred to the Board of Land Appeals "[a]ll of the functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals with respect to appeals arising under the Surface Mining Control and Reclamation Act of 1977."

3/ An appropriate avenue for OSM to defer to the State proceedings would have been to request that Judge McGuire delay consideration of Gateway's application for review until DER had determined whether Gateway's operations, which gave rise to the issuance of the NOV, had been authorized by a State permit in existence on the date of passage of SMCRA. This presumably would have resolved the question of whether Gateway has valid existing rights which permit it to operate in violation of section 522(e) of SMCRA.

affected," the Secretary shall provide an opportunity for a public hearing. 30 U.S.C. § 1275(a)(1) (1982). Stout requested a hearing in connection with her application for review of the vacation order. While the order is a nullity we believe that Stout's filing is properly treated as a request for a hearing on the "motion to vacate."

Therefore, prior to ruling on the motion to vacate the NOV couched in the form of a vacation order, Judge McGuire should afford the parties the opportunity for a hearing. ^{4/} Harry Smith Construction Co., 78 IBLA 27, 34-35 (1983). Accordingly, we must vacate the April 1984 interlocutory ruling and remand the case in order to afford such a hearing based on intervenor's request for a hearing contained in her application for review.

On remand, Judge McGuire will first address the motion to vacate the NOV. If Judge McGuire decides that vacation of the NOV would be proper, he can vacate the NOV and dismiss the case. The question of the propriety of the NOV would be moot. Any aggrieved party may appeal to the Board. 43 CFR 4.1271(a).

If, however, he decides that the motion to vacate the NOV should be denied, Judge McGuire may proceed to consider the correctness of the NOV. On the question of the propriety of the NOV, either OSM or intervenor will have the burden of going forward to establish a prima facie case in accordance with 43 CFR 4.1171(a). We conclude that intervenor, in connection with Gateway's application for review of the NOV, is a "full party" in the proceeding under 43 CFR 4.1110(e), and, as such, is entitled to prove that there has been a violation of the statute.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1984), the interlocutory ruling is vacated and the case is remanded to Administrative Law Judge McGuire for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

^{4/} As an alternative to a hearing, OSM may submit a written statement in support of its motion to vacate the April 1982 NOV and, assuming intervenor withdraws her request for a hearing and agrees to a determination based on written arguments filed by the respective parties, Judge McGuire can consider the question of the propriety of vacating the NOV without a hearing.

