

Editor's Note: Reconsideration denied by Order dated February 24, 1997.

BUREAU OF LAND MANAGEMENT

v.

JOE B. FALLINI, JR.

IBLA 96-420

Decided October 23, 1996

Appeal from a decision by Administrative Law Judge James H. Heffernan reversing the Bureau of Land Management's decision to deny an application by Joe B. Fallini, Jr. and Susan L. Fallini to construct a pipeline (N6-95-15).

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Notice of Appeal—Rules of Practice: Appeals: Timely Filing

Timely filing a notice of appeal in the office of an Administrative Law Judge within the 30 days allowed by 43 CFR 4.411(a) is necessary to give the Board jurisdiction over a decision by the judge. Delivery of a notice of appeal to a secretary with instructions that it be sent to the office of the Administrative Law Judge is not sufficient.

APPEARANCES: Bruce Hill, Esq., Office of the Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; W. Alan Schroeder, Esq., Boise, Idaho, and William F. Schroeder, Esq., Vale, Oregon, for Joe B. Fallini, Jr. and Susan L. Fallini.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On June 17, 1996, this Board received a notice of appeal and a petition for a stay of a May 31, 1996, decision by Administrative Law Judge James H. Heffernan, submitted on behalf of the Bureau of Land Management (BLM). ^{1/} Judge Heffernan's decision had reversed a BLM decision denying

^{1/} BLM's stay petition presented the issue of whether Judge Heffernan's decision was automatically stayed or effective pending appeal to this Board. By order of July 10, 1996, the Board suspended the decision until Sept. 1, 1996, and granted Fallini an extension of time to respond.

an application for a permit to construct a pipeline on the Reveille Allotment (N6-95-15) which had been filed by Joe B. Fallini, Jr. and Susan L. Fallini (Fallini). ^{2/} On July 15, 1996, Fallini filed a motion to dismiss the appeal (Motion to Dismiss).

We deem it appropriate to set out certain of the facts relating to this appeal at the outset to set the stage for the arguments addressed in this opinion and identify the determinative issue.

The applicable part of the regulation at 43 CFR 4.411(a) provides:

A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. A person served with a decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within thirty days after the date of service. [Emphasis added.]

Judge Heffernan's office is in the Salt Lake City office, Office of Hearings and Appeals (Salt Lake OHA office). Counsel for BLM states that he received a copy of Judge Heffernan's decision on May 31, 1996. See Affidavit in Support of BLM's Response to the Motion to Dismiss (Hill Affidavit). Using this date, ^{3/} the 30-day period for filing a timely notice of appeal with the Salt Lake OHA office would have ended June 30, 1996. That date was a Sunday and the filing deadline was extended to Monday, July 1, 1996. See 43 CFR 4.22(e). On July 8, 1996, the Salt Lake OHA office advised counsel for BLM that it had not received pleadings related to BLM's appeal of Judge Heffernan's decision. The only copy of BLM's notice of appeal in the case file forwarded by Judge Heffernan contains a notation that it had been hand delivered to the Salt Lake OHA office on July 8, 1996.

Counsel for BLM states that he is unable to explain why the Salt Lake OHA office had not received a copy of the notice of appeal. He notes that

^{2/} Judge Heffernan also upheld BLM decisions to deny another permit application filed by Fallini (N6-94-06) and a permit application filed by Colvin & Son (Colvin) (N6-95-10). His decisions regarding those applications also have been appealed and are docketed as IBLA 96-463.

^{3/} We accept counsel's statement for purposes of review, but note that the copy of Judge Heffernan's decision accompanying BLM's notice of appeal filed with the Board was date stamped as having been received on the following Monday, June 3, 1996. Similarly, Judge Heffernan's cover letter transmitting the record to the Board states: "On July 8, 1996, the BLM filed a notice of appeal from my decision of May 31, 1996, the decision having been received by certified mail by the appellants and respondent on June 3, 1996." The difference has no material effect on the issue raised by the motion to dismiss the appeal.

the Solicitor's office in Salt Lake City generally hand delivers pleadings to the Salt Lake OHA office. Counsel for BLM states that he gave the pleadings to his secretary, a temporary Job Corps employee (the third one since the beginning of the year), who transmitted this appeal for him. Counsel notes that she has since left the office and moved out of state (Hill Affidavit). He also notes that he has been unable to discuss this matter with her to find out what steps were taken to serve the Salt Lake OHA office. The notice of appeal with the notation of having been received on July 8, 1996, is apparently the copy of the notice of appeal BLM's counsel submitted to the Salt Lake OHA office after learning that the Salt Lake OHA office had not received a notice of appeal.

On July 15, 1996, Fallini filed a motion to dismiss the appeal. Fallini notes that, pursuant to 43 CFR 4.11(a), a notice of appeal must be filed "within 30 days after the date of service," that 43 CFR 4.411(c) provides "[n]o extension of time will be granted for filing the notice of appeal," and that the Board has held compliance with the regulation to be jurisdictional (Motion at 1-2). Fallini contends that "BLM was immediately served" with the decision but did not file a notice of appeal with Judge Heffernan until July 8, 1996. *Id.* at 2. Fallini also argues that the notice of appeal sent to the Board (received on June 17, 1996) did not satisfy the 43 CFR 4.411(a) requirement that the notice of appeal must be filed "in the office of the officer who made the decision (not the Board) * * *." *Id.* at 2-3. Additionally, Fallini argues that the 10-day grace period allowed by 43 CFR 4.401(a) does not apply to documents not transmitted before the deadline for filing a notice of appeal. *Id.* at 3.

In response to the motion, counsel for BLM states that BLM's Notice of Appeal and Request for a Stay was filed with the Board "[o]n June 13, 1996, (thirteen days after the issuance of the decision)," but that "[o]n July 8, 1996, it came to the attention of the undersigned that ALJ Heffernan's office had failed to receive the Notice of Appeal and Request [for] a Stay. Those documents were immediately delivered by hand to that office" (Response at 1).

Addressing the portion of 43 CFR 4.401(a) requiring that a document be "transmitted or probably transmitted * * * before the end of the period in which it was required to be filed," BLM argues that its notice of appeal qualifies because: "Thirteen days after the decision was rendered, appeal documents were filed. [4/] Unfortunately, the deciding officer did not receive the appeal within the 30 days, but did receive it within the

4/ In his supplemental affidavit Hill notes that on June 25, 1996, he received a notice of IBLA docketing, which he believed to be the docketing of the BLM appeal. Before 43 CFR 4.21 was amended in 1993, it had been the practice of the Board to docket cases and send notice of the docket number to the parties when it received the case file. The 1993 amendment of section 4.21 introduced time limitations for filing a request for a stay seeking to avoid having a decision placed in full force and effect. As a result, the Board's internal procedure for docketing an appeal was changed.

ten-day grace period." *Id.* at 3. Similarly BLM contends that, unlike many similar cases decided by the Board, its appeal "was transmitted or probably transmitted to the proper office within the 30 days." *Id.* at 4. BLM argues that 43 CFR 4.401(a) "is an equitable, flexible, permissive regulation" and should be applied to deem its appeal to have been timely filed. *Id.* at 4-5.

In reply, Fallini argues that there is no factual support for BLM's assertions that its appeal was transmitted to Judge Heffeman's office within the 30 days allowed for filing a notice of appeal (Reply at 1-2). Fallini also contends that the 10-day grace period provided by 43 CFR 4.401(a) applies "only if it is demonstrated that transmittal to the proper office occurred within the prescribed filing period." *Id.* at 3.

From the outset of this Board's deliberations, the timely filing of a notice of appeal within the 30 days allowed by 43 CFR 4.411(a) has been regarded as essential to the exercise of the Board's jurisdiction over the decision appealed. *Estate of Knudsen*, 10 IBLA 329 (1973); *Gerald D. Heden*, 6 IBLA 291 (1972). Timely filing has also been described as necessary for the orderly administration of Departmental business. See *Thelma M. Eckert*, 120 IBLA 367, 370-71 (1991), quoting *San Juan Coal Co.*, 83 IBLA 379, 380-81 (1984). The regulation has been specifically applied to require filing a notice of appeal with the office of the Administrative Law Judge who issued the decision appealed. *United States v. Camerlino*, 17 IBLA 303 (1974).

Further, there is no evidence that BLM's notice of appeal was transmitted to Judge Heffeman's office on or before Monday, July 1, 1996. The Board fully accepts counsel's explanation that he prepared the notice of appeal and gave it to his secretary with instructions that it be sent to Judge Heffeman's office. This does not constitute transmittal of the notice of appeal. The Board has expressly held that giving a secretary documents with instructions that they should be delivered does not constitute "transmittal." *United States Forest Service, Alaska Region*, 124 IBLA 336, 337 (1992); see also *Thelma M. Eckert*, *supra* at 369; *Donna J. Waidtlow*, 82 IBLA 247, 251 (1984). There is nothing in the record to support a finding that BLM's notice of appeal was filed in a timely manner, as required by 43 CFR 4.411. Compare *Elk Run Coal Co. v. Bruce Babbitt*, 930 F. Supp. 239 (S.D. W.Va. 1996).

fn. 4 (continued)

Since amendment of section 4.21, the Board has been assigning a docket number and sending a notice of the docket number to the parties when the Board receives a request for a stay, rather than when the case file is received. This alleviates some (but not all) of the difficulties that arise when a deciding official does not promptly send the case file to the Board. However, this change in the Board's internal procedure has not obviated the regulatory requirement set out in 43 CFR 4.411(a) that "[a] person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal." (Emphasis added.)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss BLM's appeal docketed as IBLA 96-420 is granted and the appeal is dismissed.

R. W. Mullen
Administrative Judge

I concur.

James L. Burski
Administrative Judge

