



INTERIOR BOARD OF INDIAN APPEALS

Jane Rush v. Acting Navajo Area Director, Bureau of Indian Affairs

25 IBIA 198 (03/04/1994)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JANE RUSH

ACTING NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-96-A

Decided March 4, 1994

Appeal from the denial of the renewal of a peddler's permit.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Discretionary Decisions--Indians: Traders

Decisions concerning whether or not to grant a trader's license or peddler's permit are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Administrative Procedure: Generally--Constitutional Law: Due Process--Indians: Generally--Indians: Traders

When determining whether to grant a trader's license or peddler's permit, it is a denial of due process for the Bureau of Indian Affairs to rely on adverse allegations relating to the character of the applicant without giving the applicant an opportunity to respond to those allegations.

APPEARANCES: Samuel Pete, Esq., Shiprock, New Mexico, for appellant; Thomas O'Hare, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Jane Rush seeks review of an April 19, 1993, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (BIA; Area Director),

denying an application to renew appellant's peddler's permit. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this case to the Area Director for further consideration.

Background

The administrative record indicates that appellant held a peddler's permit authorizing her to sell Indian jewelry and toys on the Navajo Reservation for the period January 5 through April 5, 1993. On March 26, 1993, she filed an application to renew the permit for the period April 5 through July 5, 1993. ^{1/}

In considering appellant's application, the Area Director apparently relied on two documents. The Realty Officer, Shiprock Agency, BIA (Agency), opposed renewal of the permit in an undated memorandum which states in its entirety:

The party in question, has been involved in a series of incidents which have not been conducive the clientele [sic]. Other vendors have given me verbal complaints, for which I requested written submissions to document.

I have personally advised [appellant] of her conduct, and have given her copies of [25] CFR as it pertains to 141.29 political contributions, and involvement in tribal affairs. She subsequently admitted to me that she still was involved even after she was notified of the consequences, and possible denial of her peddler's permit. I also responded to a complaint of pawnbroking which was resolved.

I recommend that [appellant] be denied the privilege of doing business on the reservation for the remainder of the current year to show the seriousness of the misconduct.

She has stated to me in the past, that she would not be hurt if she were denied the permit, and that she would simply do business off reservation.

^{1/} Because the period for which appellant sought renewal of her peddler's permit has already passed, this appeal is arguably moot. Although the Board does not normally address moot appeals, it will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review. See, e.g., Cherokee Nation of Oklahoma v. Muskogee Area Director, 22 IBIA 240, 245 (1992); Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, 18 IBIA 423, 427 (1990). The Board considers the merits of this appeal under this exception to the mootness doctrine.

No written complaints from other vendors appear in the administrative record or in the submissions on appeal.

The second document was a complaint against appellant by the Secretary/Treasurer of the Shiprock Public Market. The complaint charges appellant with making false allegations against Navajo vendors of having had sexual relations with appellant's husband, conspiring with her attorney to obtain records of the Shiprock Public Market under false pretenses, being personally involved in tribal politics, verbally attacking customers and other vendors, and in general having a bad attitude and being ill-mannered and ill-tempered.

By letter dated April 19, 1993, the Area Director denied renewal, stating:

This decision is based on a complaint filed with our office by the secretary and treasurer of the Shiprock Public Market and the recommendation of our Shiprock BIA Agency headquarters. More specifically, the complaint documents both physical and verbal attacks occurring on the reservation during the past year that required police assistance.

Appellant appealed this decision to the Board. Both appellant and the Area Director filed briefs.

Discussion and Conclusions

As early as 1790, Congress enacted legislation regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. The licensing statutes are currently found in 25 U.S.C. §§ 261-264 (1988). ^{2/} Section 261 provides that

[t]he Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

Section 262 further states that

[a]ny person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

^{2/} All further references to the United States Code are to the 1988 edition.

Regulations implementing these statutes are found in 25 CFR Part 141 (regarding activities on the Navajo, Hopi, and Zuni Reservations) and 25 CFR Part 140 (regarding activities on other Indian reservations). Part 141 applies to both “traders” and “peddlers.” “Peddler” is defined in 25 CFR 141.3(i) to mean “a person who offers goods for sale within the exterior boundaries of the Hopi, Navajo or Zuni Reservations, but does not do business from a fixed location or site on any of those reservations.” As relevant to this decision, the Board finds no other meaningful distinction between “traders” and “peddlers” or a “trader’s license” and a “peddler’s permit.”

The statutes and regulations grant broad discretion to BIA in considering an application for a peddler's permit. See, e.g., United States v. Parton, 132 F.2d 886, 887 (4th Cir. 1943) (“Full power and responsibility with respect to granting or refusing a license are vested in [the Commissioner] and not in the courts”); Blair v. McAlhaney, 123 F.2d 142, 143 (4th Cir. 1941) (“There is nothing in the statutes granting to the courts any power to review the action of the Commissioner in granting or refusing a license of this character”). Although the courts would now have authority to review these decisions under the Administrative Procedure Act, that review is limited. See 5 U.S.C. § 706.

[1] The Board has frequently discussed its role in reviewing decisions based on the exercise of discretion granted to BIA by statute. As with other discretionary decisions, it is not the Board's function, in reviewing a decision concerning the granting or denial of a trader's license or peddler's permit, to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Citing primarily Navajo law, appellant contends that the decision to deny renewal of her peddler's permit violated her due process rights because it was based on a complaint to which she was not given an opportunity to respond. This case, which involves the enforcement of Federal statutes and regulations, is governed by Federal, not tribal, law. Cf., e.g., Naegel Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 176-77 (1993) (determination of whether an agreement was a lease within the meaning of Federal law, i.e., 25 U.S.C. § 415, was a question of Federal, not state, law). The Board has, however, frequently discussed the fact that parties in matters before BIA are entitled to due process, specifically including the opportunity to be heard. See, e.g., Lower Peoples Creek Cooperative v. Acting Billings Area Director, 23 IBIA 297 (1993); Roberts v. Acting Portland Area Director, 22 IBIA 167 (1992).

On appeal, appellant denies the allegations made by both the Agency and the complainant, and has submitted an affidavit from the attorney with whom she was accused of conspiring and the signatures of 42 individuals who indicate they have not heard at least some of the statements the complaint

accused appellant of having made. Appellant contends further that the complainant is a violent person, as is evidenced by two civil assault and battery judgments against her in the Navajo Tribal Court.

In his answer brief, the Area Director contends that his decision was based on the regulations and fact. The “facts” upon which the Area Director relied are presumably the statements made in the complaint and the Agency’s memorandum. The Area Director contends that these two documents show that appellant was a person of poor character, and therefore did not meet the requirements of 25 CFR 141.5(b)(4). ^{3/}

It is clear that there is a great deal of personal animosity between appellant and the complainant. That animosity is evident on the face of the complaint. The casual statement in the Area Director’s answer brief that the allegations in the complaint are true has no independent support in the record. The only “fact” or “truth” that can be gleaned from the four corners of the complaint is that the complainant does not like appellant.

The Area Director’s answer brief also dismisses appellant’s arguments that the complainant had civil judgments against her by asserting that such a fact would not negate the truth of her statements. Even a cursory reading of the Tribal Court decisions in those cases demonstrates that the complainant’s credibility was at issue. The Tribal Court decisions are evidence that may be considered in determining the complainant’s credibility.

The Agency’s statements, although not obviously subject to credibility questions, are unsupported. Although no inference can be drawn from the failure of other individuals to provide written confirmation of oral statements, the absence of such confirmation weakens the Agency’s memorandum. Appellant also specifically denies statements made by the Agency.

[2] Appellant states that, prior to her appeal to the Board, she had no knowledge of the existence of the allegations against her. The Area Director, however, assumed that the allegations were true and relied on them in determining that appellant was a person of poor character. By failing to give appellant an opportunity to respond to the allegations against her, the Area Director denied her due process. Accordingly, his decision must be vacated and this matter remanded to him for further consideration.

On remand, the Area Director must give appellant an opportunity to respond to the allegations against her. It appears that appellant believes she should have had a hearing. Nothing in the regulations or the licensing statutes require a hearing for either a new or renewal permit.
Appellant

^{3/} This regulation requires that an application for any form of business license on the Navajo Reservation must provide “[s]atisfactory evidence of the character * * * of the applicant and the employees of the applicant.”

does not cite any other Federal law or regulation granting a right to a hearing, and the Board is not aware of any. ^{4/}

Although appellant does not have a legal right to a hearing under the circumstances of this case, the Area Director is not precluded from using a hearing format or any other means of gathering evidence in allowing appellant an opportunity to respond to the allegations. Because it appears that credibility may be an important issue, the Area Director might find a hearing useful because it would give him an opportunity to observe people and their reactions.

The Board believes it necessary to discuss one additional argument raised in the Area Director's answer brief. That brief contends that any initial denial of due process to appellant was corrected through the right of appeal to the Board. The Board has indeed held on several occasions that certain denials of due process may be cured through the right of appeal. The Board undertakes whenever possible to resolve a controversy as expeditiously as possible. Sometimes, an initial denial of due process can be remedied during the appeal, thereby avoiding the additional delay that would result from returning the case to BIA for correction of the error, with the possibility of another appeal following BIA's new decision. The Board's practice should not, however, be viewed as condoning the initial denial of due process. The right to due process must be safeguarded at each step of the administrative process, not merely added on as an afterthought just before a matter leaves the Department for Federal court.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 19, 1993,

^{4/} The application for, or even the expectation of receiving, a license or permit does not rise to the level of a property interest. Brooks v. Muskogee Area Director, 25 IBIA 31, 34-5 (1993).

In Attea v. Eastern Area Director, 16 IBIA 138 (1988), the Board held that the revocation of a trader's license issued under 25 CFR Part 140 was subject to the requirements of 5 U.S.C. § 558(c), and that the licensee was therefore entitled to written notice of the facts or conduct that allegedly warranted revocation of the license, and an opportunity to demonstrate or achieve compliance with all lawful requirements. The present case does not, however, concern the revocation of a license, but rather the renewal of one.

Section 558(c) has been interpreted as requiring a hearing when an agency proposes to withdraw, suspend, revoke, or annul a license it has granted. The courts have also held, however, that the failure to renew a license is not the withdrawal, suspension, revocation, or annulment of a license within the meaning of section 558(c), and therefore a hearing is not required. Bankers Life & Casualty Co. v. Callaway, 530 F.2d 625, rehearing denied, 536 F.2d 1387 (5th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Commission, 357 F.2d 632 (6th Cir. 1966); Tamura v. Federal Aviation Administration, 675 F. Supp. 1221 (D. Haw. 1987).

decision of the Navajo Area Director is vacated, and this matter is remanded to him for further consideration in accordance with this decision. 5/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

5/ This decision does not require that appellant be given a peddler's permit. After giving appellant an opportunity to respond to the allegations against her, the Area Director retains full discretion to determine whether appellant is a person of good character as required by 25 CFR 141.5(b)(4).