

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF REINSTATEMENT)
OF PERMIT NO. 37-8388 IN THE NAME OF)
SDRTR, LLC.)
)
LISA VIERLING)
)
Petitioner)
)
_____)

ORDER GRANTING HEARING
REQUEST AND DENYING REQUEST
FOR INDEPENDENT HEARING OFFICER

NOTICE OF PRE-HEARING CONFERENCE

On July 14, 2008, the Department of Water Resources (Department or IDWR) issued an order reinstating lapsed permit 37-8388.

On July 25, 2008, Lisa Vierling (Vierling), through her attorneys, filed a petition requesting among other things that a hearing be provided pursuant to Idaho Code § 42-1701A(3) and that an independent hearing officer be assigned pursuant to Idaho Code § 42-1701A(4).

ANALYSIS

Idaho Code § 42-1701A provides:

(1) All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(2) The director, in his discretion, may direct that a hearing be conducted by a hearing officer appointed by the director. In such event, the hearing officer shall have the duty to make a complete record of the evidence presented and duly received at the hearing and to prepare a recommended or preliminary order in accordance with chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

(3) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

(4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

IDAPA 37.01.01.410 through 37.01.01.412 provide:

410.APPOINTMENT OF HEARING OFFICERS (RULE 410).

A hearing officer is a person other than the agency head appointed to hear contested cases

on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying.

411. HEARING OFFICERS CONTRASTED WITH AGENCY HEAD (RULE 411).

Agency heads are not hearing officers, even if they are presiding at contested cases. The term "hearing officer" as used in these rules refers only to officers subordinate to the agency head.

412. DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES (RULE 412).

Pursuant to Section 67-5252, Idaho Code hearing officers are subject to disqualification for bias, prejudice, interest, substantial prior involvement in the case other than as a presiding officer, status as an employee of the agency, lack of professional knowledge in the subject matter of the contested case, or any other reason provided by law or for any cause for which a judge is or may be disqualified. Any party may promptly petition for the disqualification of a hearing officer after receiving notice that the officer will preside at a contested case or upon discovering facts establishing grounds for disqualification, whichever is later. Any party may assert a blanket disqualification for cause of all employees of the agency hearing the contested case, other than the agency head, without awaiting the designation by a presiding officer. A hearing officer whose disqualification is requested shall determine in writing whether to grant the petition for disqualification, stating facts and reasons for the hearing officer's determination. Disqualification of agency heads, if allowed, will be pursuant to Sections 59-704 and 67-5252(4), Idaho Code.

Vierling filed a timely petition and is entitled to a hearing in the matter of reinstatement of lapsed permit No. 37-8388.

The Department has not yet identified a hearing officer in this matter. Vierling has requested an independent hearing officer. A blanket disqualification for cause of all employees of the agency has not been asserted pursuant to Rule 412. The approval of the request for an independent hearing officer is at the discretion of the Department. The Department is currently operating under severe budget restrictions and is not in a position to hire independent hearing officers to hear typical contested case matters. The request for an independent hearing officer should be denied in this instance.

ORDER

IT IS HEREBY ORDERED that the Department schedule a hearing in the matter of reinstatement of Permit No. 37-8388.

IT IS FURTHER ORDERED that the request of independent hearing officer is **Denied** and that the Department shall identify an employee of the Department as hearing officer prior to or when the hearing is scheduled.

NOTICE OF PRE-HEARING CONFERENCE

This office will be hosting a teleconference set for **10:00 am on October 26th, 2009**, regarding the above referenced matter. All participating parties should be prepared to discuss available dates for a formal hearing.

For a teleconference connection, all parties are urged to call AT&T at **(805)240-9472** from their phone at the appropriate time on October 26th, 2009, as listed above and supply the assigned **Participation Code Number 675676**.

If you prefer to participate in person, be at the IDWR Southern Regional Office, 1341 Fillmore Street, Suite 200; Twin Falls at the appointed time and date.

The conference will be conducted in accordance with the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within ten (10) days prior to the conference. Inquiries for special accommodations should be directed to our Southern Region Office at the contact information listed above or call (208) 736-3033.

Dated this 2nd day of October, 2009.


Allen D. Merritt, P.E.
Regional Manager

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of October, 2009 a true and correct copy of the above and foregoing Notice of Pre-Hearing Conference and Order Regarding Permit No. 37-8388 was forwarded with all required charges prepared, by Regular U.S. Mail to the parties listed:

TRAVIS THOMPSON
BARKER RSHOLT SIMPSON
PO BOX 485
TWIN FALLS ID 83303-485

JAMES SPECK
PO BOX 987
KETCHUM ID 83340

LISA VIERLING
PO BOX 869
SUN VALLEY ID 83353

SDRTR LLC
PO BOX 1368
BOISE ID 83701

JAY PACE
10331 E CHARTER OAK DR
SCOTTSDALE AZ 85260

ATTN Debbie Gibson
ID DEPT OF WATER RESOURCES
PO BOX 83720
BOISE ID 83720-0098

A handwritten signature in cursive script, reading "Mary A. Baldwin", is written over a horizontal line.

Mary A. Baldwin
Administrative Assistant I