

BEFORE THE OREGON FISH AND WILDLIFE COMMISSION

**IN THE MATTER OF DENNIS LEE
STURGELL**

Hammond, Oregon

)
) **PETITION FOR HEARING FOR**
) **DETERMINATION OF**
) **APPLICABILITY OF THE 60-DAY**
) **PERIOD TO REQUEST A HEARING**
) **OF THE DEPARTMENT'S NOTICE**
) **OF INTENT TO REVOKE**
) **COMMERCIAL FISHING LICENSES**

Pursuant to ORS 183.410 and ORS 183.430(2), petitioner Dennis Lee Sturgell respectfully requests that a hearing be provided him to determine the applicability of the 60-day period provided to him from the date of mailing to request a hearing to contest the Department's Notice of Intent to Revoke certain of his commercial fishing licenses under the particular facts of this contested case.

FACTUAL BACKGROUND

Petitioner Dennis Lee Sturgell entered pleas of "guilty" to two violations of the general commercial fishing violations regarding the taking, possessing, buying, selling, or handling of food fish (ORS 509.006) on January 28, 2009 in Clatsop County Circuit Court, Oregon.

Thereafter, on February 6, 2009, the petitioner entered pleas of "guilty" to two violations regarding the unlawful use of a commercial crab pot (OAR 635-005-055(7)) in Tillamook County Circuit Court, Oregon.

Thereafter, on May 15, 2009, the Oregon Fish and Wildlife Commission moved to initiate contested case proceedings to revoke the commercial fishing license and a permit of the petitioner and appoint a License Revocation Board consisting of three commercial crabbers on the Commercial Fishery Permit Board to advise the Commission on this case. On May 18, 2009, the Department of Fish and Wildlife ("Department"/"Agency") mailed a Notice of Intent to Revoke Commercial Fishing Licenses via certified mail, return receipt requested, to the petitioner informing him, in pertinent part:

"To challenge this proposed action, you must submit a written request for hearing to the Department of Fish and Wildlife, 3406 Chery [sic] Avenue NE, Salem, Oregon 97303-4924, which must be received by the Department within 60 days after the date that this Notice was mailed to you Upon receipt of a timely

request for hearing, a case will be referred to the Office of Administrative Hearings which would assign an Administrative Law Judge to hear the case....

“If you fail to file a timely request for hearing or if you fail to appear at a scheduled hearing, this Notice will automatically become an enforceable Final Order against you. The Department’s file would serve as the record upon default.”

Petitioner Dennis Lee Sturgell did not personally receive the Notice until Saturday, May 30, 2009, and delivered it to his primary legal counsel, Harold “Hal” Snow on Monday, June 1, 2009, and Mr. Snow immediately associated the undersigned Thane W. Tienson to assist him in representing the petitioner.

Thereafter, the petitioner, acting by and through his counsel, Thane W. Tienson and Harold “Hal” Snow engaged in several telephone negotiations with counsel for the Commission and Department, Stephen Sanders, in an effort to avoid going through the hearings process. Prior to the expiration of the 60-day period, Mr. Sanders promised that he would speak with Roy Elicker, Director of the Department, and Marla Rae, Chair of the Commission, and promptly report back as to whether there was interest in pursuing settlement negotiations and entering into a settlement agreement. In addition, Mr. Sanders stated that he would contact Fronda Woods or Michael Grossman, counsel for the Washington Department of Fish and Wildlife, and the Washington Fish and Wildlife Commission to determine their interest in being part of any settlement because of concerns about the impact of the Wildlife Violator Compact to which both Oregon and Washington are signatories. Mr. Sanders stated that he believed there was likely to be a positive reception on the part of the Department and Commission to a settlement proposal, in part because the Department had never revoked any commercial fishing licenses before, and, in part, because of the significant economic impact that revocation of the petitioner’s fishing license and permit may have, not just on him but on others in the Oregon commercial fishing industry who depend upon the petitioner’s business for their livelihoods. The petitioner participated in that telephone discussion which was held in the office of Mr. Snow in Astoria, Oregon on a speaker phone.

ORS 183.417(3)(a) expressly provides for informal disposition of contested cases by stipulation, agreed settlement, or Consent Order, and that such informal settlement may be made in license revocation proceedings.

The petitioner and his counsel understood that while there was no guarantee that a settlement could be reached, it was likely that one could be reached, and that the 60-day hearing date would be tolled pending conclusion of such settlement negotiations. However, inexplicably, repeated telephone calls to Mr. Sanders over the next two weeks were not responded to, and, consequently, Mr. Tienson was unable to speak with him until July 29, 2009. At that time, Mr. Sanders informed counsel that the Department was now taking the position that the 60-day request for hearing deadline had passed and that a Final Order would now take effect and settlement negotiations would not continue.

Stunned by this development, the petitioner's counsel immediately filed a Request for Hearing on July 29, 2009, 11 days after the expiration of the 60-day period following the date of mailing but within 60 days of the petitioner's actual receipt of the Notice.

LEGAL ARGUMENT

A. **Petitioner Timely Requested A Hearing Within 60 Days of his Actual Receipt of the Notice of Intent to Revoke.**

In its Notice of Intent to Revoke Commercial Fishing Licenses, the Department identified no statutory or regulatory authority for the 60-day period it established for requesting a hearing or for its decision to commence the 60-day period from the date of mailing, not its actual receipt by the petitioner. ORS 183.435 requires that an agency grant a person requesting a license 60 days from notification of the refusal to request a hearing. Significantly, however, that statutory provision applies, by its very terms, only to refusal to issue a license required to pursue a commercial activity if the refusal is based on grounds other than the results of a test or inspection. Therefore, it does not apply to revocations. Second, even if it were held to apply, the 60-day period is from "notification of the refusal," which the petitioner submits should be calculated only from the date that he personally received such notification and not from the date of mailing by the Department.

Even Petitions for Judicial Review of Agency Orders to which a 60-day appeal period applies, are calculated from the date "following the date the Order upon which the Petition is based is served unless otherwise provided by statute." See ORS 183.482(1). Again, in this case, the Order was not received by the petitioner until May 30, 2009, and therefore, his Request for Hearing was timely.

Additionally, the Commission should be deemed to have received actual notice of the petitioner's intent to request a hearing if no satisfactory settlement could be reached and to have received that actual notice well within the established 60-day period.

B. **A 90-Day Notice Period Should Apply to this License Revocation Proceeding; Petitioner's Request for a Hearing was Timely.**

ORS 183.430(2) obligates the Agency to provide a hearing if a demand for one is made within 90 days in the context of the suspension or refusal to renew a license. Plaintiff submits that the Agency's action in this case more appropriately falls into the category of a refusal to renew a license or suspension of a license rather than a refusal to issue a license. So considered, the petitioner's Request for Hearing is therefore timely and should be honored.

Particularly because of the importance of the issue to the petitioner's economic livelihood and the unprecedented nature of the action by the Agency, petitioner respectfully requests that he be given an opportunity to be heard in opposition in this matter and an opportunity to present his argument and concerns.

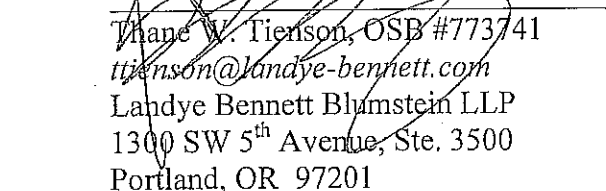
C. In the Alternative, Without Waiving the Above, the Department Should Either Waive the 60-Day Period from the Date of Mailing or Should be Estopped from Contesting Timely Notice of a Request for Hearing.

While the facts upon which the Department's Final Order are not in dispute, the issuance of a Final Order to Revoke Commercial Fishing Licenses without honoring petitioner's Request for Hearing is unlawful. The Commission should be deemed to have either waived the 60-day Notice requirement considering the circumstances of this case or, alternatively, to be estopped from asserting the 60-day period requirement for a hearing request.

CONCLUSION

For all of the above reasons, the petitioner requests that the Department issue a declaratory ruling with respect to the applicability of the particular 60-day period given to the petitioner within which to request a hearing under the particular facts presented here, and that the petitioner's Request for Hearing be found timely, that the petitioner be granted a hearing as requested, and that the sanction of revocation of the petitioner's 2009 commercial license 20228 and his Dungeness crab permit 96314 and the imposition of a bar from reapplying for that license and permit for a period of one year from August 4, 2009 be rescinded.

DATED this 13th day of August, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2009, I served the foregoing **PETITION FOR HEARING FOR DETERMINATION OF APPLICABILITY OF THE 60-DAY PERIOD TO REQUEST A HEARING** on the following individual(s):

Stephen Sanders
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by email, facsimile transmission and first class mail; and

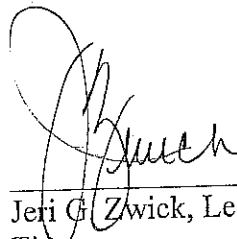
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by facsimile transmission and first class mail.

DATED this 13th day of August, 2009.



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