



INTERIOR BOARD OF INDIAN APPEALS

Mary Ann Topsseh Combs v. Commissioner of Indian Affairs

4 IBIA 27 (04/28/1975)

Also published at 82 Interior Decisions 184

Judicial review of this case:

Affirmed, *Combs v. United States*, CV 75-103-M (D. Mont. Aug. 11, 1976)



United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF

MARY ANN TOPSSEH COMBS

FLATHEAD ALLOTTEE NO. 1648

v.

COMMISSIONER OF INDIAN AFFAIRS

IBIA 75-35-A

Decided April 28, 1975

Appeal from an administrative decision of the Commissioner of Indian Affairs, affirming the decision of the Acting Area Director, Billings Office.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act--
Administrative Procedure: Administrative Review--Administrative
Procedure: Initial Decision--Administrative Procedure: Substantial
Evidence

The ultimate findings and decision of the administrative law judge adopted by the Commissioner of Indian Affairs will not be set aside upon administrative

review where they are supported by substantial evidence.

APPEARANCES: Gary Niles Kimble, Esq., for appellant, Mary Ann Topsseh (Combs); Edward L. Meredith, Esq., for Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This matter comes before the Board on an appeal from the decision of the Commissioner of Indian Affairs adopting the findings and recommendations of Administrative Law Judge Frances C. Elge, after an adversary hearing held on December 12, 1973, at the Flathead Agency, Ronan, Montana, and affirming the decision of the Acting Area Director, Billings Area Office.

The appeal is brought on the grounds the decision of the Commissioner is contrary to the facts and evidence as presented at the administrative hearing. Appellant contends that her moneys were disbursed contrary to her intent constituting a breach of the fiduciary relation which existed between the appellant and the then Superintendent, Harold D. Roberson.

These contentions in essence are similar to those raised at the hearing afforded the appellant and again in a memorandum preliminary to the issuance of the Commissioner's decision.

Having reviewed the record, including 127 pages of transcript of testimony taken at a hearing where all interested parties were represented by learned counsel, and briefs of appellant and appellees, the Board finds that the appellant has shown no reason why the findings of fact, conclusions of law, and recommended decision of Administrative Law Judge Elge adopted by the Commissioner of Indian Affairs should not be affirmed.

[1] We hold that there is substantial evidence in the record to support the findings and recommended decision of the Administrative Law Judge adopted by the Commissioner of Indian Affairs. We adopt Judge Elge's decision attached hereto.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7 and 43 CFR 4.1(2), the appeal is hereby dismissed and the decision of the Commissioner of Indian Affairs is AFFIRMED.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
David J. McKee
Chief Administrative Judge

//original signed
Alexander H. Wilson
Administrative Judge

Attachment



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
ADMINISTRATIVE LAW JUDGE
c/o BUREAU OF INDIAN AFFAIRS
BILLINGS, MONTANA 59101

ADMINISTRATIVE APPEAL (For Refund) OF)
MARY ANN TOPSSEH (COMBS), FLATHEAD) FINDINGS AND
ALLOTTEE 1648, FROM A DECISION OF THE)
BILLINGS AREA DIRECTOR, BUREAU OF) RECOMMENDED DECISION
INDIAN AFFAIRS)

1. By order of August 21, 1973, issued by the then Acting Chief Administrative Law Judge William Fauver, Office of Hearings and Appeals, Arlington, Virginia, the undersigned was designated to conduct a hearing in the appeal in caption, to provide a transcript thereof to become a part of the record together with documentary evidence admitted or tendered at the hearing, and to issue findings of fact and a recommended decision to be transmitted to the Assistant Secretary for Indian Affairs. By modification of July 1, 1974, the undersigned was directed to transmit the record with the findings and recommended decision to the Commissioner of Indian Affairs.

2. A hearing was duly held at the Flathead Indian Agency at Ronan, Montana, on December 12, 1973. Mary Ann Topsseh (Combs), hereinafter referred to as the appellant, was represented by Gary Niles Kimble, Esq., of Missoula, Montana. The Billings Area Office and the Flathead Indian Agency, Bureau of Indian Affairs, were represented by Edward L. Meredith, Esq., of the Billings Field Solicitor's Office.

3. The appellant, a Salish Indian, is a member of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation and, at the time of the transaction involved in this case, was ninety years old. She does not read nor write.

FACTS

4. In November 1972, the appellant received a check from the Bureau of Indian Affairs for \$16,823.85, proceeds from the sale of her own 80-acre allotment 1684 to the Confederated Salish and Kootenai Tribes. On November 28, 1972, the appellant, with the check in her possession, traveled from her home near Arlee, Montana, to the Flathead Indian Agency at Ronan, Montana, with Mrs. Cecelia Vanderberg, a neighbor. With Mrs. Vanderberg present, she discussed with Flathead Agency personnel, including the Superintendent, Mr. Harold D. Roberson, the matter of disposition of the check. At the conclusion of the discussions, the check was deposited to the credit of the appellant's

individual Indian account which is administered by the Bureau of Indian Affairs.

5. After preparation, execution by the appellant, and approval by the Superintendent of appropriate applications therefor, the amount of the check was distributed to ten of the appellant's grandchildren and one great grandchild, an eleventh thereof each. The appellant retained a twelfth of such amount. A check for that share, \$1,401.98, was mailed to the appellant. Each of the recipients owned an undivided fractional interest in Flathead allotment 1647, that of Louie Topsseh (Combs), the late husband of the appellant and progenitor of the recipients. Exhibit 3.

6. On December 22, 1972, the appellant, her son Abel Combs Topsseh, and her attorney Mr. Kimble visited the Superintendent at the Flathead Indian Agency, informing the Superintendent that the appellant had not intended to give the money to the recipients; that she had intended to buy their shares in the Louie Topsseh (Combs) allotment 1647 with such payments. On December 26, 1972, the Superintendent wrote to the appellant's counsel describing the transaction and, among other things, stating: "We are convinced it was Mrs. Combs' intent on November 28 to make an outright gift to the persons indicated."

7. By letter of April 4, 1973, the appellant's counsel filed an appeal with the Area Director, Billings Area Office, Bureau of Indian Affairs. By letter of May 3, 1973, the Area Director affirmed the action of the Flathead Indian Agency Superintendent. This appeal of that decision was taken by letter of May 17, 1973, to the Commissioner of Indian Affairs.

8. The sole issue in this appeal is whether, on November 28, 1972, the appellant intended (1) gifts of money to the recipients or (2) the payment of such money in consideration for the purchase of the recipients' interests in the Louie Topsseh (Combs) allotment.

DISCUSSION OF EVIDENCE

9. On November 28, 1972, the appellant went to the home of Cecelia Vanderberg, her neighbor. She had with her the check for \$16,823.85. She asked Mrs. Vanderberg to write a letter for her to the Superintendent to give the money to "these children that hadn't received anything when their grandfather Louie died." Mrs. Vanderberg stated that the appellant was referring to her grandchildren. Tr. 66, 67. Mrs. Vanderberg then told the appellant that she and her husband were going to the Agency and that, if the appellant desired, she could "come with us and we'll just go in and see about it." Mr. and Mrs. Vanderberg and the appellant then proceeded to the

Flathead Indian Agency in the Vanderberg automobile. Tr. 66. Mrs. Vanderberg further testified that the appellant said nothing about wanting to buy land; that all the appellant said to her was to give this to the children; that when they got to the Agency office they talked to Eileen Decker and Frenchy Burland (both realty specialists at the Flathead Agency); that Frenchy called in Superintendent Roberson and talked to him; that she recalled that the Superintendent advised the appellant that she could handle the matter herself but that the appellant wanted it done through the Agency; that the appellant did not want Bob Matt (surviving husband of appellant's deceased granddaughter Teresa Delphine Matt) to get any of it for the reason that, when Bob Matt's wife Teresa was killed (mother of Ramona Plant, one of the recipients of the money involved), allegedly Bob Matt did not give his daughter Ramona any of the insurance recovery; that said alleged deprivation was appellant's reason for giving Ramona a share. Tr. 68.

10. Mrs. Vanderberg, also a member of the Flathead Tribes, has been a neighbor of the appellant for 36 years. She speaks only the English language. She stated that the appellant lived right across the road, about a quarter of a mile from the Vanderberg home (Tr. 65); that appellant would come to her home when she wanted a letter written; that Mrs. Vanderberg or her daughters would write letters for the appellant; and that through the years she had always understood the appellant; and that the appellant understood her and her family. Tr. 69, 75, 76.

11. Mrs. Vanderberg did not remember the Superintendent's asking the appellant about whether the appellant wanted to buy land.

12. When Mrs. Vanderberg and the appellant came to the Agency office on November 28, 1972, they proceeded to the small office of Francis O. (Frenchy) Burland and Mrs. Eileen Decker. Both Mr. Burland and Mrs. Decker are members of the Flathead Tribes; neither understands or speaks the Indian language.

13. Mr. Burland testified that Mrs. Vanderberg spoke first, stating that the appellant wished to distribute money, represented by the check in the appellant's possession, to her grandchildren; that he advised Mrs. Vanderberg that he thought the appellant was going to buy property; that Mrs. Vanderberg and the appellant talked briefly, Mrs. Vanderberg asking the appellant if she was going to buy "this property" and that the appellant responded, "I'm too old. I don't need the land; I don't need the money." Tr. 80, 85, 87; that Mr. Burland, not knowing whether the money could be distributed by the Agency, requested Mr. Roberson to join the group to listen to what the appellant had to say; that Mr. Roberson asked her "you mean you don't want to buy the land?" and that she responded that she did not, that she wanted to give the money to her grandchildren,

whereupon Mr. Roberson advised her that she could take the check to the bank and that they would do it for her; that the appellant rejected the suggestion stating that she wanted the Superintendent to do it, adding, "That's what you're here for." Mr. Burland felt no need to get an interpreter because the appellant was speaking perfectly clear English and appeared to understand exactly what he was saying to her. Tr. 80, 81.

14. Mr. Roberson's testimony, with respect to his participation in the transaction was corroborative of that given by Mr. Burland. Tr. 43, 44. Additionally, Mr. Roberson recounted that the appellant wanted the Agency to handle the matter for her so that there would be a record of what she had done and that the appellant stated, "I want them to have this for their share and leave me alone." He testified that both Mr. Burland and he specifically asked the appellant if she wished to purchase the interests these heirs held in the Louie Topsseh (Combs) allotment, to which she replied in the negative, stating that she did not need any more land because she was too old; that he asked her more than once, "Are you sure you do not want to buy the land?" and that each time he received a negative reply either from the appellant or from Mrs. Vanderberg. Tr. 44. Mr. Roberson then complimented the appellant on her generosity and, with Mrs. Decker and the appellant, discussed distribution of the money and the identity of the recipients, appellant's grandchildren and one great grandchild. Mr. Roberson recalled that the appellant added Ramona Plant, a great grandchild, to the list of recipients because "her parents never did anything for her." Tr. 53.

15. After the discussion, the appellant was asked to come back after lunch to give Mrs. Decker time to prepare documents necessary for effecting the transaction.

16. Mrs. Decker's testimony was almost identical to that given by Mr. Roberson and Mr. Burland with respect to participants in the discussion of the transaction, questions asked, and replies given by the appellant, as recounted in paragraphs 13 and 14, supra. See Tr. 92, 93. Added was that, after the discussions, Mrs. Decker prepared documents for payments of money to twelve recipients, one great granddaughter and eleven grandchildren, including Margaret Topsseh Pablo, appellant's granddaughter, the daughter of Abel Combs Topsseh. When Mrs. Decker was reviewing the documents with the appellant, Mrs. Decker read the name and amount for each recipient. When she read one for Margaret, the appellant said, "No. Margaret's dad is living. Abel is living." She did not want Margaret included. Rather than having eleven new forms prepared in a larger amount to each, the appellant elected to keep \$1,401.98, one share, for herself. Tr. 46, 94.

17. When the appellant received her check for one-twelfth of the land sale money, she asked her son Abel Combs Topsseh to take her to Missoula, Montana, to "take this check in, to go to the bank." Mr. Topsseh looked at the check and asked the appellant, "Where's the big check?" He testified that the appellant answered that she had bought the land back, that she had given the check to the Superintendent. Mr. Topsseh further stated that the appellant needs help in making deals, such as buying a car. He observed that ". . . sure she needs help but she thinks she can do it, you know." He testified that she can't talk English too good. Tr. 10.

18. Mr. Topsseh related that, after he learned of disposition of the big check, he and the appellant went to the Agency to see Mr. Roberson about the transaction; that the appellant jumped up and told him (Mr. Roberson), "If I want to give that money away like that why I'd send 'em, you know, myself." In response to questioning by Mr. Kimble, concerning the meeting with the Superintendent, his further testimony was:

Q. Did she use part English and part Indian?

A. Yes. She uses, you know, she's

Q. Did you have to interpret?

A. No. I didn't say nothing. Just let her and Roberson fight it out. So that's when that happened, why I said, "Now you keep quiet. We're going to go see a lawyer." I try to tell her how to straighten this up.

19. Concerning purchasing of interests in the Louie Topsseh (Combs) allotment 1647, it is established that, at the time of executing a deed in favor of the Confederated Salish and Kootenai Tribes for her own 80-acre allotment, within a month prior to her receiving her check therefor, the appellant expressed to Mr. Burland that when she received the money "she wanted to, in turn, then purchase interests in the land, in what I [Mr. Burland] assumed the land that she was living on." Tr. 79. It is also established that Mr. Topsseh had advised the Superintendent that he and his mother were going to buy the land back with the proceeds from the sale of her land. Tr. 8, 51. Both Mr. Topsseh and Mr. Roberson testified that, when Mr. Topsseh informed Mr. Roberson of the intention to purchase the land, Mr. Roberson told Mr. Topsseh that it will be her money and that she can do what she wants with it. Tr. 7, 51.

20. In preparation for the purchase of the interests in allotment 1647, Mr. Topsseh, in early October 1972, obtained from Mr.

Burland two applications to sell interests to the appellant, one for Ignace Adams and one for Robert Eugene Adams, so that they or one of them could start the sale. Each owned a 17/630 undivided interest in the Louie Topsseh Combs allotment. See Exhibit 3, continuation sheets 3, 4. No evidence was submitted as to what thereafter transpired with respect to those applications. Mr. Burland was not thereafter contacted about them. Tr. 83, 20.

21. Appellant's testimony, both in English and through an interpreter, except for her remembering that she received her land sale check and that she made the November 28 trip to the Agency, was frequently unresponsive. With respect to the November 28, 1972, transaction at the Agency, she testified that upon arrival at the Agency, "There were three standing there, two ladies and that agent;" that she told him, "I come to see you about my land," that "I come to tell you I want to do for my land and why I got the money. There are two, you know, these two ladies; they look at each other and they seem to understand." She stated that she told the Superintendent, ". . . I wanted to come and for my land, I wanted to give my grandchildren share for their share from Louie;" that "she buys them people their share." Tr. 32. She further stated that Mrs. Vanderberg said nothing during the discussions; that she just stood by the door, when, in fact, Mrs. Vanderberg had sat beside the appellant to assist her, albeit all in the English language. Tr. 33, 92.

22. The testimony of Mr. Abel Topsseh was that the appellant, his mother, lived in a log house on the Louie Topsseh (Combs) allotment 1647; that, with the money received from the land sale, she wanted to buy the grandchildren out so she would have it for herself; that after she received her check for one-twelfth of her land sale money, she told him that she had bought the land with the "big check." Mr. Topsseh was not present during the November 28 transaction. Moreover it is apparent even from his testimony, as well as that of others, that the appellant is an independent person and likes to run her own affairs; and that he opposed deals she made, such as leasing land for considerations he deemed inadequate. Tr. 125, 126.

23. In support of the contention that the appellant should not transact business without the assistance of an interpreter, appellant's counsel took the testimony of Father Edmund G. Robinson, a priest at St. Ignatius Mission. Father Robinson stated his relationship with the appellant to be that of a client to a priest and of a friend to a friend; that he was in contact with the appellant for years ending with the summer of 1964, when he was transferred to another location; and that he was in contact with her again from the summer of 1968 to date. Father Robinson contrasted her ability to understand and speak English in the earlier period with that ability

during the later period of his contacts with her. It was his observation that her hearing in the later years was considerably impaired; that the appellant has a general understanding about the commonalities of life; that her expression in English can be understood by someone who has known her but is fragmented and broken in various ways; that he and the appellant had had misunderstandings about simple things on occasion when he had talked with her; that a reasonable man would have to be extremely prudent in dealing with a matter of such magnitude (the transaction here involved); that he asked her twice to explain the transaction and that she advised him that she could not explain it in English but could if he understood Indian. He doubted her ability to formulate a transaction of that size. Tr. 21, 22. His main conversations with the appellant had been about every day things. His testimony is given little weight in that his relationship was not of a business nature as were the appellant's dealings with Agency personnel.

24. In addition to the participants in the transaction, Donna Rae Fuqua, lease clerk at the Flathead Agency, testified with respect to the appellant's negotiating a lease on 20 acres of hay land in March 1972, and of her and her lessee's being in the Agency during the instant hearing to prepare and execute a modification of the lease, execution of such modification having been prevented by Mr. Abel Combs who thought the consideration inadequate. Tr. 110, 123. Mrs. Fuqua confirmed that the appellant could converse in English and convey her wishes as to what she wanted.

25. The Supervisory Social Services Representative at the Flathead Agency also testified that the appellant understood English, could readily be understood, and had the ability to handle her own affairs.

26. A factor in this matter is that from the time of the death of Louie Topsseh Combs, Allottee 1647, the appellant had lived on his allotment; she and her son Abel had used the land, belonging to them and the other heirs, for farming and raising cattle; they made no payments for such use to the other heirs, except \$17.00 paid to Delphine Matt. The recipients of the money from the appellant's land sale were among those heirs. Tr. 52, 104. It may have been the nonpayment for such use that prompted the appellant's distribution of funds to her favored descendants.

27. After the appellant and her son Abel had employed counsel, after the two with their counsel had called on the Superintendent on December 22, 1972, and after the Superintendent's letter of December 26, 1972, namely on or about February 1, 1973, according to the testimony of Superintendent Roberson, the appellant walked into his office and told him, "I want you to know that I'm not angry with you for what you've done. You did what I wanted." At the same meeting, in English,

she stated that she wanted the Superintendent to know that (distribution of the money) was not a gift to her heirs but that she wanted them to have that as a share of whatever she had had or derived from the land.

28. The Louie Topsseh Combs allotment 1647 is owned by 22 persons in varying, undivided fractional shares. The appellant owns one-third plus her dower right; appellant's son Abel Topsseh owns one-sixth; appellant's daughter Mary Topsseh Felsman, one-sixth. Shares of these three, collectively, account for ownership of two-thirds or 66-2/3% of the allotment. Collectively, the shares of the recipients of the money here involved represent ownership of 1938/7560 or approximately 25-2/3% thereof. The remaining shares, vested in eight owner's constitute 582/7560 or approximately 7-2/3% of the ownership. Exhibit 3, continuation sheets 3, 4. Had appellant's intent been to purchase, it would seem that all extant shareholders would have been included, particularly an owner such as Robert Matt whom the appellant obviously dislikes. Tr. 52, 68, 98.

29. From Abel Topsseh's testimony about the proposed purchase, it appears that his interest was greater than that of an agent for the appellant. First, he quoted the appellant as having told him, on the day she received the land sale check, "I'm going to buy this 80 back from the grandchildren." When referring to his getting forms from Frenchy Burland, and having been asked if he saw anyone else in the office, he stated, "Well there was somebody else besides him, I don't know. Eileen knows that I was talking because he gave me the form and I told him that I was buying this land back . . ." Tr. 6, 7. When asked about talking with Mr. Roberson, Mr. Topsseh stated, ". . . I told him that we was buying this land back, you know." Tr. 8. [Emphasis supplied.] Apparently Mr. Topsseh planned to share in the benefits of the appellant's acquisition of land.

FINDINGS

30. Considering the record as a whole, I find that a preponderance of reliable, probative, and substantial evidence establishes that:

- (1) The appellant was not and is not under disability, legal or otherwise;
- (2) The appellant, to and including the date of the hearing in this matter, has been conducting business affairs at the Flathead Agency, with respect to which most communication has been in the English language; occasionally, the appellant requests the assistance of an interpreter;
- (3) Cecelia Vanderberg, appellant's neighbor, who has communicated with the appellant frequently over the

