



## INTERIOR BOARD OF INDIAN APPEALS

Aleutian/Pribilof Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary -  
Indian Affairs (Operations)

9 IBIA 254 (04/09/1982)

Also published at 89 Interior Decisions 196

Related Board cases:

9 IBIA 281

10 IBIA 23

Related judicial cases:

*Aleutian-Pribilof Islands Ass'n, Inc. v. Powers*, Case No. A82-163 Civil (D. Alaska)

*Tanana Chiefs Conference v. Lestenkof*, Case No. F82-017 Civil (D. Alaska)



# United States Department of the Interior

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

ALEUTIAN/PRIBILOF ISLANDS ASSOCIATION, INC.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-1-A

Decided April 9, 1982

Appeal from the disapproval of a grant application under the Indian Child Welfare Act of 1978.

Reversed and remanded.

1. Board of Indian Appeals: Jurisdiction

The Board has jurisdiction to determine whether a decision by an official of the BIA is properly characterized as discretionary.

2. Regulations: Birding on the Secretary--Regulations: Force and Effect as Law

Once a regulation is adopted by the Department, and so long as it remains extant, the Secretary and his representatives are bound by it and it has the force and effect of law.

APPEARANCES: Madelon Blum, Esq., and Mark C. Manning, Esq., for appellant Aleutian/Pribilof Islands Association, Inc.; David C. Case, Esq., Office of

the Regional Solicitor, for appellee, Acting Deputy Assistant Secretary--Indian Affairs (Operations). Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Aleutian/Pribilof Islands Association, Inc. (appellant), has appealed the July 9, 1981, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) upholding a March 4, 1981, decision of the Juneau Area Director, Bureau of Indian Affairs (BIA), disapproving appellant's grant application under the Indian Child Welfare Act of 1978, Act of November 8, 1978, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963 (Supp. II 1978) (Act). Appellant alleges that its application was disapproved in violation of regulations published at 25 CFR 23.29. For the reasons discussed below, the decision appealed is reversed and the case is remanded to the Deputy Assistant Secretary for further proceedings.

Background

Subchapter II of the Act provides for Federal grants to Indian tribes and organizations for the development and implementation of programs to carry out the purposes of the Act. Regulations governing this grant program are published in 25 CFR Part 23. Pursuant to these provisions, appellant filed an application for a grant of \$250,000 for fiscal year 1981 with the Superintendent of the Anchorage Agency, BIA, on December 22, 1980.

On March 4, 1981, appellant received a letter from the Juneau Area Director disapproving its application. This was the first communication concerning the application that appellant received from BIA. Appellant appealed

the disapproval on April 2, 1981. The Acting Deputy Assistant Secretary--Indian Affairs (Operations) upheld the denial on July 9, 1981. Appellant filed an appeal with the Board of Indian Appeals (Board) on August 18, 1981.

Issue

Appellant argues to the Board, as it did in its earlier appeals, that BIA's disapproval of its grant application was made in violation of regulations in 25 CFR 23.29(b)(1), (4), and (6).

These regulations state:

Upon receipt of an application for a grant under this part, the Superintendent shall:

(1) Acknowledge receipt of the application in writing within 10 days of its arrival at the Agency Office.

\* \* \* \* \*

(4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediments which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.

\* \* \* \* \*

(6) Promptly notify the applicant in writing as to the final recommendation. If the final recommendation is for disapproval, the Superintendent will include in the written notice to the applicant the specific reasons therefor.

Appellant does not argue that it was entitled to approval of its application and does not request that the Board reverse the Acting Deputy Assistant Secretary's decision on the merits of the application. Instead, it argues only that the regulations create a legal right to an opportunity to revise an application after initial review and that it was denied this right.

Jurisdiction

In his July 9, 1981, letter to appellant, the Acting Deputy Assistant Secretary stated:  
"This decision is based on the exercise of discretionary authority. Under redelegated authority from the Secretary of the Interior, this decision is final for the Department." This statement derives from 25 CFR 2.19(c), which states:

When the Commissioner [1/] renders a written decision on an appeal, he shall include one of the following statements in the written decision:

(1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.

(2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals \* \* \* .

Appellee argues that the characterization of this decision as discretionary by the Acting Deputy Assistant Secretary insulates it from Board review. In support of this proposition, appellee cites Ahtone v. Acting Deputy Assistant Secretary--Indian Affairs, 8 IBIA 278 (1981).

[1] In Ahtone the Board deemed itself obliged to accept the Commissioner's characterization of a tribal election dispute as a "discretionary" matter. The Board did not attempt to independently evaluate whether or not the controversy may in fact have entailed a legal dispute cognizable

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1/ The duties of the Commissioner were assigned to the Deputy Assistant Secretary--Indian Affairs (Operations) by memorandum dated May 15, 1981, and signed by the Assistant Secretary--Indian Affairs.

under the Board's regulations. In this regard, the Board did not even have the administrative record before it which was utilized by the Commissioner in rendering his decision; rather, the Board dismissed the Ahtone appeal for lack of jurisdiction merely on the grounds that the matter had been labeled as discretionary and nonreviewable by the Commissioner.

The Board has recently reevaluated its obligations as a quasi-judicial tribunal charged with furnishing objective, independent review of the Bureau's actions. In St. Pierre v. Commissioner, 9 IBIA 203, 89 I.D. 132 (1982), also a tribal election controversy, the Board denied the Bureau's motion for dismissal in a matter characterized by the Commissioner as discretionary, stating at 9 IBIA 218-20:

It is a fundamental principle of judicial procedure that a court has "jurisdiction to determine its jurisdiction." See Charles Alan Wright, Handbook of the Law of Federal Courts, section 16 (2d ed. 1970). As a quasi-judicial tribunal charged with the responsibility of performing objective independent review of agency action, the Board of Indian Appeals also has inherent authority to determine its own jurisdiction under 43 CFR 4.330(b)(2). Thus, upon appeal to the Board, it is for this tribunal in ascertaining its jurisdiction to determine whether the decision appealed is or is not "discretionary." See Hamel v. Nelson, 226 F. Supp 96, 98 (N.D. Cal. 1963). Because the matter of jurisdiction is both a judicial and a legal question, courts and by analogy the Board, in its quasi-judicial capacity, are not bound by the characterization or descriptive titles placed on agency action by the agency itself. See Ligon Specialized Hauler, Inc. v. I.C.C., 587 F.2d 304, 314 (6th Cir. 1978).

\* \* \* The characterization of a decision as "discretionary" is a legal conclusion and the product of a legal analysis. Accordingly, the Board, as a quasi-judicial tribunal, is specifically qualified, equipped, and authorized to perform such functions. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), the Supreme Court observed that the exception to judicial review of agency action committed to discretion under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976), is "a very narrow exception \* \* \* applicable in those

rare instances where ‘\* \* \* in a given case there is no law to apply.’” Purely discretionary decisions then involve situations in which there is no law to apply. Here there is "law to apply" for in this instance the agency action rested on interpretation of the tribal constitution, section 16 of the I[ndian] R[eorganization] A[ct], and general principles of trust law applicable to the specific situation and surrounding circumstances.

\* \* \* The Board then is not precluded from entertaining an appeal from a BIA action or decision merely because the issue has been labeled "discretionary" by the agency. [Footnotes omitted. 2/]

In this case, the sole issues on appeal are whether Departmental regulations in 25 CFR 23.29 were violated and, if so, what are the consequences of that violation. This is a legal question that does not involve the exercise of discretion. It is, therefore, within the Board’s jurisdiction.

### Discussion and Conclusions

Appellant argues in essence that, because of BIA’s failure to follow 25 CFR 23.29 and to inform it of deficiencies in its application, it was deprived of the opportunity to correct its application so that it could be seriously considered. BIA contends that there was substantial compliance with the regulations, which are themselves not mandatory because they are merely "designed to secure order, system, and dispatch in proceedings." 3/

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2/ Omitted footnote 9 specifically addresses the Board’s action in Ahtone, supra, stating among other things:

"By delimiting its holding in Ahtone, the Board does not imply it may have reached a different conclusion on the merits of the case than that of the Acting Deputy Commissioner. Since it did not have the agency record before it, it is even speculative whether the Board would have characterized the disposition in Ahtone as other than a purely discretionary matter."

3/ Appellee’s answer brief at page 4, quoting French v. Edwards, 80 U.S. (13 Wall.) 506, 511 (1872).

[2] The provisions of 25 CFR 23.29(b)(4) require BIA to take specific actions when its review of an Indian Child Welfare Act grant application indicates that the application may be disapproved. This regulation is not the type of "housekeeping" provision that BIA alleges. It creates substantive rights to advance notification of possible disapproval of a grant application and to assistance as available in remedying the problems in the application. Although the Act did not require the Secretary of the Interior to adopt this particular regulation, the regulation was clearly within his discretionary authority to establish in implementation of the statute. Once this regulation was adopted, and so long as it remains extant, the Secretary and his representatives are bound by it and it has the force and effect of law. United States v. Nixon, 418 U.S. 683, 694-96 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957); David V. Udy, 45 IBLA 389 (1980); Wilfred Plomis, 34 IBLA 22 (1978).

The BIA attempts to distinguish several cases finding due process violations from this case. It is true that the cases are distinguishable on their facts. The legal proposition established by all of the cited cases, however, applies in this case: Regulations adopted by an agency that grant substantive or significant procedural rights are binding on the agency and will be enforced as law unless and until they are deleted or amended. Thus, while BIA may be correct that an agency normally has some freedom in determining how to exercise authority committed to its discretion, the agency can limit itself by promulgating regulations governing its conduct. Service v. Dulles, *supra*.

Neither is it true that BIA substantially complied with the regulation. Although BIA did provide some general orientation to potential applicants, including appellant, on September 2, 1980, this assistance did not amount to specific notice of deficiencies following initial review which is contemplated in 25 CFR 23.29(b)(4). Without such notice, appellant was deprived of the right guaranteed in the regulation to attempt to remedy problems in its application in order that the application might receive initial approval.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 9, 1981, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) is reversed and the case is remanded to the Bureau of Indian Affairs so that it may expeditiously follow the procedures outlined in 25 CFR 23.29(b)(4). This decision does not require BIA to approve appellant's application or to give grant funds to appellant should the application be approved. It requires only that BIA follow its regulations in dealing with appellant's application.

The Board has considered this case ahead of other appeals previously docketed in recognition of the fact that an adjudication over fiscal year 1981 grant funds is subject to mootness. <sup>4/</sup> So as not to require the Bureau to take actions which would be futile for all concerned, the Board will retain limited jurisdiction in this matter to rule on a motion that the Bureau be relieved of remand requirements imposed by this decision on grounds of mootness. Any such motion, however, must be filed within 10 days from

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<sup>4/</sup> Appellant points out, however, that pursuant to 31 U.S.C. § 701 (1976) appropriated funds are available for obligation for 2 years following the expiration of the fiscal year in which they are appropriated.

