



INTERIOR BOARD OF INDIAN APPEALS

Billings American Indian Council v. Deputy Assistant Secretary -
Indian Affairs (Operations)

11 IBIA 142 (04/01/1983)



United States Department of the Interior

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

BILLINGS AMERICAN INDIAN COUNCIL

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-49-A

Decided April 1, 1983

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying funding under the Indian Child Welfare Act.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

The area of discretionary authority vested in the Bureau of Indian Affairs and over which the Board of Indian Appeals has no jurisdiction, unless the case is specially referred to it, involves those situations in which there is no law to apply.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction

The characterization of a decision as discretionary rather than based upon an interpretation of law is a legal conclusion reached through legal analysis. The determination of whether a decision is properly characterized as discretionary is within the Board's review jurisdiction.

3. Board of Indian Appeals: Jurisdiction--Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

Although the ultimate decision on whether to select a particular proposal for grant funding under the Indian Child Welfare Act

and its implementing regulations is discretionary, the regulations provide certain legal guidelines and requirements that must be followed in reaching that decision. An alleged violation of these guidelines and requirements could serve as the basis for Board jurisdiction limited to the alleged violations of law.

APPEARANCES: Arlyn Headdress, Coordinator, Indian Child Welfare Program, Billings American Indian Council, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On July 12, 1982, the Board of Indian Appeals received a notice of appeal from the Billings American Indian Council (appellant). The notice sought review of a June 16, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) upholding the denial of fiscal year 1982 grant funds to appellant under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1952 (Supp. II 1978). For the reasons discussed below, the appeal is dismissed.

Background

Appellant submitted an application for fiscal year 1982 grant funds under the Indian Child Welfare Act to the Bureau of Indian Affairs on February 22, 1982. The application was reviewed by the Billings Area Selection Committee under the regulations in 25 CFR Part 23. The proposal received a review rating of 84.2. A rating of 85 was required for approval of the application. Appellant was notified of the disapproval of its application by letter dated March 19, 1982, and signed by the Acting Billings Area Director.

Appellant appealed this disapproval by letter dated April 7, 1982. On April 15, 1982, appellant provided additional information relevant to its appeal. The Deputy Assistant Secretary upheld the disapproval on June 16, 1982. That decision letter states:

It has been determined that this proposal does not best promote the purposes of Title II of the Act as defined in 25 CFR 23.22. * * * The Bureau has found that this proposal does not meet minimum standards for approval * * *. This decision is based on the exercise of discretionary authority [and] * * * is final for the Department.

Appellant appealed this decision to the Board on July 12, 1982. Although advised of its right to do so, appellant did not file a brief. Appellee filed a motion to dismiss the appeal for lack of jurisdiction on November 1, 1982. Again, appellant failed to respond to a Board order granting it time to address this motion.

Discussion and Conclusions

This case is before the Board on appellee's motion to dismiss for lack of jurisdiction. That motion is based on 25 CFR 23.25(a) and 43 CFR 4.330(b). Under 25 CFR 23.25(a) appellee argues that the Commissioner of Indian Affairs, now appellee, is expressly given discretion to "select for grants under this part those proposals which will in his or her judgment best promote the purposes of title II of the Act taking into consideration insofar as practicable the following factors * * *." Since appellee has discretion in making these decisions, he argues that 43 CFR 4.330(b) makes the exercise of that discretion nonreviewable by the Board.

[1] The Board's regulations recognize that those decisions properly issued under the exercise of discretionary authority vested in the Bureau of Indian Affairs may be made final for the Department without Board review. See 43 CFR 4.330(b)(2) and 4.337(b). ^{1/} However, as the Board has previously discussed, the area of discretion involves those situations in which "there is no law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). Wesley Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982); Aleutian/Pribilof Islands Association v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

[2] The Board has also held that the characterization of a decision as discretionary rather than based upon an interpretation of law is a legal conclusion reached through legal analysis. Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 219, 89 I.D. 132, 139 (1982), disapproved, in part, on other grounds in Robert Burnette v. Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 464, 89 I.D. 609 (1982). Thus, the determination of whether a decision is properly characterized as discretionary is within the Board's review jurisdiction.

[3] The Board has examined the Deputy Assistant Secretary's decision in this case, the regulations cited, and appellant's submissions. The Board agrees with appellee that the ultimate decision on whether to select a particular proposal for grant funding under the Indian Child Welfare Act and its implementing regulations is discretionary. However, the regulations do provide certain legal guidelines and requirements that must be followed in reaching that decision. An alleged violation of these guidelines and requirements could serve as the basis for Board jurisdiction limited to the alleged violations of law. See Wesley Wishkeno, supra; Aleutian/Pribilof Islands Association, supra.

In this case, appellant has not alleged that any of its legal rights were violated. Instead it disputes only the Deputy Assistant Secretary's ultimate discretionary conclusion. The Board does not have jurisdiction to review this decision.

^{1/} Paragraph (b) of 43 CFR 4.330 permits cases decided through the exercise of discretionary authority to be specially referred to the Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellee's motion to dismiss this appeal is granted.

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

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Franklin D. Arness
Administrative Judge