



## INTERIOR BOARD OF INDIAN APPEALS

Wilbur Barton; Arletta Bischoff; Irving Clark; Pearlene Dayzie; Francis Harvey;  
June James v. Navajo Area Director, Bureau of Indian Affairs

12 IBIA 110 (12/09/1983)

Also published at 90 Interior Decisions 536

Judicial review of this case:

Compromise settlement, *Begay v. Clark*, No. CIV 84-1285-PCT-PGR  
(D. Ariz. Apr. 21, 1986)

Related Board cases:

10 IBIA 173

10 IBIA 237

10 IBIA 253

10 IBIA 269

10 IBIA 318

10 IBIA 334

11 IBIA 285

Stipulated dismissal, *Allen v. Watt*, No. CIV-83-1921-PCT-WPC  
(D. Ariz. June 4, 1985)



# United States Department of the Interior

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

WILBUR BARTON

v.

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS 1/

IBIA 82-12-A, etc.

Decided December 9, 1983

Consolidated appeals from decisions of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellants.

Plan approved; appeals dismissed.

1. Indians: Welfare--Regulations--Publication

Because the list of specific types of assistance provided by the Bureau of Indian Affairs under the general assistance program is not a rule within the meaning of 5 U.S.C. § 551(4) (1976), the general assistance eligibility criteria published in 25 CFR Part 20 may be used in determining eligibility for custodial care assistance, even though Part 20 does not specifically indicate custodial care as a type of assistance available through the general assistance program.

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1/ The Board hereby consolidates the following cases with Barton: Arletta Bischoff v. Acting Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-17-A; Irving Clark v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-18-A; Pearlene Dayzie v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-19-A; Francis Harvey v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-22-A; and June James v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA 82-23-A.

APPEARANCES: Stephen LeCuyer, Esq., DNA-Peoples' Legal Services, Inc., Shiprock, New Mexico, for appellants; 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 ADMINISTRATIVE JUDGE MUSKRAT

Appellants in the above-named consolidated cases are all Navajo Indians who were receiving care and training funded by the Bureau of Indian Affairs (BIA) at Toyei Industries (Toyei), Toyei, Arizona. This assistance was terminated effective January 12, 1981, on the grounds that appellants were not eligible for custodial care assistance under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A. The decisions found that appellants did not require care from others in daily living due to age, infirmity, physical or mental impairment. Each appellant sought review of this decision by the Navajo Area Director, BIA, and the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary). When the Deputy Assistant Secretary did not render a decision in appellants' cases within the 30-day time period established in 25 CFR 2.19, appellants sought and obtained review by the Board of Indian Appeals (Board).

In decisions dated October 15, 1982, the Board found, inter alia, that appellants' assistance had been improperly terminated by reference to a rule published only in the BIA Manual in violation of 5 U.S.C. § 552 (1976) and Morton v. Ruiz, 415 U.S. 199 (1974). The Board ordered BIA to develop a

plan to implement the holding, and retained jurisdiction over the appeals to review the BIA plan. 2/

Discussion and Conclusions

On remand BIA determined that appellants are not eligible for custodial care assistance because they each received supplemental security income (SSI) after they left Toyey. This determination is based upon BIA's interpretation of 25 CFR 20.21, which states:

Indians meeting the requirements prescribed in § 20.20(a) [concerning basic requirements for receipt of any form of financial assistance from BIA] shall be considered eligible for general assistance under this part: Provided, That:

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(b) They do not receive and are not eligible to receive public assistance or Supplemental Security Income payments and are not included in such payments made to others. However, otherwise eligible Indians may receive general assistance under this part upon application for and pending initial receipt of such payments.

The BIA has previously argued that the general assistance provisions apply to appellants' receipt of custodial care assistance because 66 BIAM 5.2A and 5.10B(1) make custodial care a type of general assistance. See 10 IBIA at 185; 10 IBIA at 248; 10 IBIA at 265; 10 IBIA at 281; 10 IBIA at 329; and 10 IBIA at 345.

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2/ See James v. Navajo Area Director, 10 IBIA 334 (1982); Harvey v. Navajo Area Director, 10 IBIA 318 (1982); Dayzie v. Navajo Area Director, 10 IBIA 269 (1982); Clark v. Navajo Area Director, 10 IBIA 253 (1982); Bischoff v. Navajo Area Director, 10 IBIA 237 (1982); and Barton v. Navajo Area Director, 10 IBIA 173 (1982).

Appellants each acknowledge receipt of SSI payments since they left Toyei. <sup>3/</sup> They furthermore acknowledge that such payments would render them ineligible for receipt of custodial care assistance if such assistance falls under the general assistance provisions of 25 CFR Part 20. <sup>4/</sup>

In the October 15, 1982, decisions in appellants' cases, the Board found that 66 BIAM 5.2A and 5.10B(1) made custodial care a type of general assistance. The Board also found that 25 CFR Part 20 did not specifically indicate that custodial care was part of the general assistance program or that BIA provided funds for custodial care. The Board did not reach the question of whether the sections of the BIA Manual making custodial care a type of general assistance were required by 5 U.S.C. § 552(a)(1)(D) (1976) to be published in the Federal Register in order to be effective. <sup>5/</sup>

[1] The eligibility requirements for BIA assistance programs are found in 25 CFR Part 20. The basic requirements for participating in any program are found in section 20.20. More specific requirements for receipt of general assistance are found in section 20.21, for child welfare assistance in

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<sup>3/</sup> One appellant, Irving Clark, states that he returned to Toyei from Nov. 26, 1981, until Aug. 25, 1982. During that period, he personally stopped receiving SSI payments, which apparently were paid to Toyei for his care. At all other times, he received SSI payments.

<sup>4/</sup> According to appellants, a Mar. 9, 1977, memorandum from the Acting Deputy Commissioner of Indian Affairs permits the Navajo Area Office to waive the prohibition against receipt of BIA general assistance by an individual receiving SSI income. Appellants conclude that this memorandum provides a basis for them to receive BIA and SSI assistance simultaneously. This waiver, however, permits BIA to use general assistance funds only to supplement SSI payments in cases in which SSI benefits alone are not sufficient to cover the full cost of care for individuals placed in institutional or custodial care. This memorandum would apply only if appellants were receiving such care and their SSI payments were insufficient to meet costs.

<sup>5/</sup> See 10 IBIA at 185; 10 IBIA at 248-49; 10 IBIA at 265; 10 IBIA at 281; 10 IBIA at 329-30; and 10 IBIA at 346.

section 20.22, for family and community services assistance in section 20.24, and for miscellaneous services in section 20.23. The specific types of assistance available through each of these programs are not listed in Part 20, but are specified in 66 BIAM 5.2A. The Board finds that the list of types of assistance provided under the general assistance program is not itself a rule within the meaning of 5 U.S.C. 551(4) (1976), but rather is an interpretation of a regulation in accordance with 5 U.S.C. § 552(a)(2)(B) (1976). <sup>6/</sup> Therefore, the list is not required to be published in the Federal Register, but may be recorded in the BIA Manual or other internal operations guides.

Accordingly, BIA correctly determined that each appellant became ineligible for BIA custodial care assistance when he or she began receiving SSI payments. Receipt of SSI payments appears to have coincided closely with each appellant's departure from Toyei. Based upon the representations of BIA and the admissions of appellants, the Board approves BIA's plan to find appellants ineligible for custodial care assistance under 25 CFR Part 20 from the time they left Toyei. <sup>7/</sup>

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are

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<sup>6/</sup> For a discussion of these statutory provisions, see 10 IBIA at 183-84; 10 IBIA at 246-48; 10 IBIA at 263-64; 10 IBIA at 279-80; 10 IBIA at 327-29; 10 IBIA at 343-45.

<sup>7/</sup> A settlement agreement between Toyei and BIA on the amount owed to Toyei for services previously rendered to appellants was approved by the Board on Aug. 23, 1983. Payment has been made under this agreement. This settlement is conclusive of all issues arising from BIA general assistance payments to appellants before they received notification of the termination of their assistance. See Begay v. Navajo Area Director, 12 IBIA 107 (1983).

dismissed on the grounds that appellants are not eligible for the receipt of BIA custodial care assistance under 25 CFR Part 20.

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Jerry Muskrat  
Administrative Judge

We concur:

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Franklin D. Arness  
Administrative Judge

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Bernard V. Parrette  
Chief Administrative Judge