



INTERIOR BOARD OF INDIAN APPEALS

Vance Gillette v. Aberdeen Area Director, Bureau of Indian Affairs

14 IBIA 187 (07/25/1986)



United States Department of the Interior

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

VANCE GILLETTE

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 86-2-A

Decided July 25, 1986

Appeal from a decision of the Aberdeen Area Director regarding appellant's alleged wrongful discharge from the position of Chief Judge of the Standing Rock Sioux Tribal Court.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA or against an Indian tribe.

2. Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

An appellant who appeals from an alleged failure of a BIA official to act must appeal within a reasonable time after the appellant should have realized that the BIA official is not going to act. Otherwise his appeal will be considered untimely.

APPEARANCES: Vance Gillette, Esq., Browning, Montana, pro se; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee; William R. Perry, Esq., and Kevin A. Griffin, Esq., Washington, D.C., for the Standing Rock Sioux Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

On October 15, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Vance Gillette (appellant). Appellant requested the Board to assume jurisdiction over an appeal he had filed with the Deputy Assistant Secretary--Indian Affairs (Operations). Appellant stated he had

not received a decision within the timeframe established in 25 CFR 2.19. ^{1/} By order dated October 21, 1985, the Board made a preliminary determination that the appeal was properly before it. For the reasons discussed below, the Board affirms the decision of the Aberdeen Area Director.

Background

The Standing Rock Sioux Tribe (tribe) entered into contracts with the Bureau of Indian Affairs (BIA) under the Indian Self-Determination and Education Assistance Act, January 4, 1975, 88 Stat. 2203, P.L. 93-638, 25 U.S.C. §§ 450 through 450n (1982), for a tribal criminal justice program. Contracts Nos. A00C14200805 and A00C14201580 provided funds for the operation of the Standing Rock Sioux Tribal Court for fiscal years 1983 and 1984. Under the contracts, the tribe was responsible for providing court personnel, including judges. BIA was responsible for monitoring the tribe's performance of the contract.

Appellant was appointed Chief Judge of the tribal court by the Standing Rock Sioux Tribal Council in January 1983. On October 5, 1983, the tribal council voted to charge appellant with misconduct under the Standing Rock Sioux Code of Justice and to suspend him immediately from his position until a hearing could be scheduled for a final decision by the tribal council. By letter of October 5, 1983, the tribal chairman notified appellant of the tribal council's action. By memorandum of the same date, addressed jointly to the tribal chairman and the tribal chairman-elect, appellant stated that he resigned as Chief Judge effective October 28, 1983. On October 6, 1983, appellant appeared before the tribal council at his own request and asked that he be retained as Chief Judge until he could finish two cases he was working on. He also stated that if the tribal council would not grant him permission to complete the cases, his resignation would be effective that day (October 6) although his written resignation specified October 28 as the effective date of his resignation. The tribal council did not respond to appellant's request, and appellant left the meeting.

By letter of October 13, 1983, to the Superintendent, Standing Rock Agency, Margaret Wilson, acting as attorney for appellant, requested that the Superintendent intervene

at the Tribal Council level, via a contract compliance check, a disapproval of committee and council action of October 4 and 5, 1983, a freezing of funds, as [sic] other effective methods to

^{1/} Section 2.19 states in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [at all times relevant to this appeal the Deputy Assistant Secretary--Indian Affairs (Operations)] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the [Deputy Assistant Secretary] within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

compel compliance with basic due process rights accorded by law and under the criminal justice 638 funding contract.

The letter also refers to an "attempted suspension" of appellant, which is evidently the tribal council action Ms. Wilson sought to have the Superintendent disapprove. The Superintendent responded by letter of October 17, 1983, stating that a compliance check and a review of tribal council actions would be initiated and that he expected to accomplish those tasks and respond to Ms. Wilson by the end of the week.

By memorandum of October 18, 1983, addressed to both the Superintendent and the tribal chairman, appellant stated that he was withdrawing his resignation. The memorandum continued, "Also, while a compliance audit is requested, the main thrust goes to due process violations in the attempted termination of my 4-year appointment as Chief Judge." No further communication between the Superintendent and either appellant or appellant's attorney appears in the record.

Also on October 18, 1983, appellant applied for a temporary restraining order (TRO), in the Standing Rock Sioux Supreme Court (Supreme Court), against the tribal chairman, vice chairman, and other council members. Appellant sought an injunction against his removal as Chief Judge and other relief, including monetary relief. Curtis W. Hanks acting as Chief Justice of the Supreme Court issued a TRO. The tribe moved to dissolve the TRO and to dismiss the case, arguing, *inter alia*, that Hanks was neither Chief Justice nor a tribal judge at all, and that the Supreme Court lacked jurisdiction over the matter. Appellant then evidently filed a motion to disqualify the tribe's attorneys, to which the tribe responded on October 25. No further activity in the Supreme Court or any lower tribal court is evident in the record. The TRO, if valid, has expired by operation of law pursuant to Standing Rock Sioux Code of Justice, section 2-301(d).

On February 4, 1985, appellant filed a notice of appeal and brief with the Aberdeen Area Director. Appellant stated that he sought to clear his work record but that he did not seek reinstatement. He also stated that he sought damages in the amount of \$37,332 for wrongful termination. On May 10, 1985, the Area Director dismissed the appeal on the ground that it failed to meet the time requirement of 25 CFR 2.10. 2/ The Area Director's decision also stated:

Your October 18, 1983, memorandum to the Agency Superintendent cannot be considered an appeal as it makes no specific

2/ Section 2.10 states in pertinent part:

"(a) A notice of appeal shall be in writing and filed in the office of the official who made the decision that the appellant wishes to appeal * * *. The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant, together with all supporting documents * * *.

"(b) No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed."

request of the Superintendent. It merely establishes your complaint about the manner in which your resignation was handled by the Tribal Council.

Ultimately, the facts of the matter do not support your claim of wrongful termination and the Superintendent was proper in not acting to reinstate you. It would appear that the action brought by you in tribal court remains pending.

Appellant filed an appeal from this decision with the Deputy Assistant Secretary--Indian Affairs (Operations). Appellant's final brief in that appeal is dated August 30, 1985. Appellant's appeal to the Board was received on October 15, 1985. By order of October 21, 1985, the Board made a preliminary determination that it had jurisdiction over the appeal under 25 CFR 2.19. This preliminary determination has not been challenged.

On November 1, 1985, the Board received a motion from appellant to supplement the record. Appellee's opposition to the motion was received on November 25, 1985. Following the Board's receipt of the administrative record on November 25, 1985, the Board, by order of November 29, 1985, took appellant's motion under advisement.

Briefs were received from appellant, appellee, and the Standing Rock Sioux Tribe.

Discussion and Conclusions

[1] Appellant states in his brief before the Board that he seeks compensatory damages in the amount of \$150,000, punitive damages in the amount of \$200,000, and a declaration that his discharge was unlawful. In his reply brief, appellant states that he seeks damages from the tribe rather than from appellee.

The first question is whether the Board has jurisdiction over this appeal. The Board is not a court of general jurisdiction. It may exercise only that review authority which has been delegated to it by the Secretary. 43 CFR 4.1, 4.330. The Board has not been delegated authority to award money damages against BIA. Lord, a.k.a. George v. Commissioner of Indian Affairs, 11 IBIA 51 (1983). Neither has the Board been delegated authority to award money damages against an Indian tribe.

Appellant also seeks a declaration that his discharge was unlawful. On its face this request appears to be a request for relief against the tribe, relief which the Board has no authority to grant. Gillette v. Area Director, Navajo Area Office, 14 IBIA 71 (1986). However, because appellant alleges that the decisions of BIA officials were erroneous, the Board will construe appellant's appeal as an appeal "pertaining to administrative action of officials of the Bureau of Indian Affairs" within the meaning of 43 CFR 4.1. The Board has jurisdiction to consider the subject matter of this appeal and to grant relief within the limits of its authority although it lacks authority to grant the specific relief appellant seeks.

[2] The Area Director dismissed appellant's appeal on the ground that it failed to meet the time requirement of 25 CFR 2.10. Appellant argues that he appealed to the Area Director from inaction by the Superintendent.

Appellant's attorney wrote to the Superintendent on October 13, 1983, and appellant's memorandum to the Superintendent and the tribal chairman was dated October 18, 1983. The Superintendent responded to appellant's attorney's letter on October 17, 1983, indicating that he intended to initiate a contract compliance check, review the tribal council actions, and respond further to her by the end of the week. No further communications between the Superintendent and the appellant or appellant's attorney appear in the record, and appellant does not allege that he attempted any further communication until February 1985 when he filed an appeal with the Area Director.

It is to be expected that an appellant claiming to appeal from the failure of a BIA official to act, rather than from an identifiable act of a BIA official, could not be held strictly to the 30-day limit in 25 CFR 2.10, simply because of the difficulty of pinpointing the date from which the 30-day period would begin to run. Yet an appellant should be expected to take some action within a reasonable time after it should have become obvious to him that the BIA official was not going to act. Here, appellant was on notice that the Superintendent expected to respond to appellant's attorney by the end of the week of October 17, 1983. Yet when the response failed to materialize, neither appellant nor appellant's attorney took any action, either by inquiry to the Superintendent or by appeal to the Area Director, for a period of 16 months. Under such circumstances, appellant's appeal to the Area Director cannot be considered timely.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's May 10, 1985, decision, dismissing appellant's appeal on grounds of untimeliness, is affirmed. 3/ Appellant's motion to supplement the record is denied.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Jerry Muskrat
Administrative Judge

3/ Because of this disposition, other issues raised by the appeal are not reached.