



INTERIOR BOARD OF INDIAN APPEALS

Frank D. Simmons and Nancy L. Simmons; and Stanley W. and Wilma Strong
v. Deputy Assistant Secretary - Indian Affairs (Operations)

14 IBIA 243 (09/02/1986)



United States Department of the Interior

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

FRANK D. SIMMONS AND NANCY L. SIMMONS

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

and

STANLEY W. STRONG AND WILMA STRONG

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 86-9-A, 86-10-A

Decided September 2, 1986

Appeals from denials of waivers of the "one-time only" restriction on receipt of category B funds under the Indian Housing Improvement Program.

Dismissed.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion.

3. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Housing: Home Improvement Program Funds--Regulations: Waiver

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

APPEARANCES: Frank D. and Nancy L. Simmons, pro sese; Stanley W. and Wilma Strong, pro sese; Duard R. Barnes, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

On November 1, 1985, the Board of Indian Appeals (Board) received notices of appeal from Frank D. and Nancy L. Simmons and Stanley W. and Wilma Strong (appellants). Appellants sought review of a July 11, 1985, decision of the Acting Deputy Assistant Secretary-- Indian Affairs (Operations) (appellee) declining to waive the "one-time only" restriction on receipt of category B funds under the Indian Housing Improvement Program. 25 CFR 256.4(b), 256.5(b). For the reasons discussed below, the appeals are dismissed.

Background

Appellants are members of the Confederated Tribes of Siletz Indians of Oregon (tribe). In 1978 the Simmons applied to BIA for financial assistance in repairing their home. They state they requested \$6,500 under the Indian Housing Improvement Program (HIP). 1/ They received \$1,675. They state they were informed when they accepted the reduced assistance that they should devote this money to the most used areas of their home and then apply for an additional grant in the future. In 1984 the Simmons applied for additional HIP funds. Their application was denied on the grounds that they had already received a category B HIP grant, 2/ and they were, therefore, not eligible to receive another grant. 3/

The Strongs purchased a new mobile home in 1978 and applied to BIA for financial assistance in setting up water, sewer, and electrical connections to that home. The administrative record does not disclose the amount of assistance sought or the program under which they applied. The Strongs received \$3,000 in two installments: \$546 on November 1, 1978, and \$2,454 on January 1, 1979. The Strongs further state they were informed this money

1/ Regulations governing this program are found in 25 CFR Part 256.

2/ The categories of grants under HIP are set forth in 25 CFR 256.4. These categories, as designated by their respective paragraphs in section 256.4 are: A--Repairs to housing that will remain sub-standard even with those repairs; B--Repairs to housing that will become standard as a result of those repairs; C--Down payments for the purchase of housing that meets BIA standards; and D--Financing of the construction of new housing that meets BIA standards. The definition of standard housing is set forth in 25 CFR 256.2(i), and includes reference to general construction, heating, plumbing, electricity, and family size.

3/ Under 25 CFR 256.5 (b), "[a]fter July 1, 1975, an applicant can only receive assistance one time under categories given in paragraphs (b), (c), and (d) of § 256.4."

came from Indian Health Service (IHS) sanitation funds. In fact, the funding came from category B HIP funds. ^{4/} In 1984 the Strongs applied for HIP funds for repairs to their mobile home. Their application was denied on the grounds that they had already received a category B HIP grant, and they were, therefore, not eligible to receive another grant.

Appellants sought assistance from the tribe. On behalf of an unspecified number of tribal members, the tribe requested BIA to waive the "one-time only" restriction for receipt of funds under category B. ^{5/} On March 16, 1984, the Portland Area Director, BIA, (Area Director), forwarded the request for a waiver to appellee.

On April 13, 1984, appellee informed the Area Director that waiver requests would be considered on a case-by-case basis. Appellee's memorandum states at page 1:

The problem encountered by the Siletz Tribe indicates a lack of understanding by the BIA and the Siletz Tribal HIP Committee in administering the program. As you know, the intent of the HIP is to assist needy Indian families by providing them with standard housing on a one time basis. Moreover, because HIP resources are very limited and the needy families very great, to provide repeated assistance to one needy family is unfair and possibly unwarranted. Therefore, the HIP regulations limit Categories B, C and D to one time grants.

^{4/} The Strongs do not state whether it was a BIA or a tribal employee who told them their grant came from IHS rather than HIP funds although they state they were misinformed by both BIA and tribal housing staff. While it is not entirely clear from the record, it appears that appellants' grant applications were handled through the tribe in accord with 25 CFR 256.3, which provides in pertinent part:

"To the maximum extent possible, the program will be administered through tribes, tribal housing authorities, or other tribal organizations, or by having tribal officials participate in the applicant selection process. Every effort will be made to use Housing Improvement Program funds in conjunction with other programs so the result will be a greater amount of housing improved than would otherwise be possible with the Housing Improvement Program funds alone."

^{5/} Waiver of the provisions of Part 256 is permitted under 25 CFR 256.10, which provides: "A proposal for a waiver of the regulations of this Part 256 must be submitted to the Commissioner and will be considered if substantial justification is presented according to § 1.2 of this chapter." Section 1.2 provides in pertinent part:

"Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians."

Nonetheless, because of the apparent misunderstanding of the HIP regulations by the BIA, waiver requests of recipients affected during 1978 and 1979 will be considered on an individual basis * * *.

The tribe subsequently submitted individual requests for waivers of the "one-time only" restriction on behalf of appellants and two other tribal members. By memorandum dated March 4, 1985, appellee granted a waiver for one individual but declined to waive the restriction for the others, including appellants. Appellee's memorandum states at pages 1-2:

Our review of the documentation submitted by the Siletz Tribe indicates that Mr. B-- B-- indeed was misinformed and ill-advised on HIP regulations and policy. His original HIP application was for \$10,000. In FY 1980 a \$4,000 HIP grant was approved with a written notification from the Superintendent that the remaining \$6,000 would be made available to Mr. B-- from FY 1981 funds. While this is clearly contrary to HIP regulations--and also obviously bad management by the BIA--we feel that the circumstances were beyond Mr. B--'s control, and as such, warrant special consideration. Thus, in accordance with Part 1, Section 1.2 of the 25 CFR we are granting the waiver for Mr. B-- as requested.

The requests for Stanley Strong * * * and Frank Simmons are denied. There is no evidence that these recipients were promised further HIP assistance. Moreover, Mr. Strong has already received two HIP grants. [6/] * * * Mr. Simmons also received a HIP grant of \$1,675 under Category B. He is no longer eligible for further assistance. In view of his family composition and annual income, we find no emergency situation surrounding the Simmons' case. To assist these families, or any other recipients, a second or third time until the cost limitation is reached is unwarranted and against program regulations and thwarts the policy of providing for standard housing.

The tribe requested reconsideration of the waiver denials. On July 11, 1985, appellee denied reconsideration. The denial letter concludes: "This decision is based on the exercise of discretionary authority. Under re delegated authority from the Secretary of the Interior, this decision is final for the Department."

Appellants' appeals from this decision were received by the Board on November 1, 1985. Both appellants and appellee filed briefs on appeal.

6/ It appears likely that appellee's statement that the Strongs had received two HIP grants relates to their receipt of their approved amount in two installments.

Discussion and Conclusions

BIA's appeal regulations provide at 25 CFR 2.19(c):

When the Commissioner [at all times relevant to this appeal, the Deputy Assistant Secretary--Indian Affairs (Operations)] 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 pursuant to 43 CFR 4.310.

Appellee's decision states that it is based on the exercise of discretionary authority and is final for the Department.

[1, 2] The Board has previously 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 and that, therefore, the determination of whether a decision is properly characterized as discretionary is within the Board's review jurisdiction. Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142, 144 (1983). It has also stated that a decision characterized as discretionary but which involves the application of legal principles to a specific fact situation may be reviewed to the extent of the legal conclusion reached. ^{7/} A decision properly characterized as discretionary will, absent extraordinary circumstances, ^{8/} not be reviewed. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 152, 91 I.D. 43, 46-47 (1984). Even where it has acquired jurisdiction over a case involving an exercise of discretion, pursuant to 25 CFR 2.19(b), ^{9/} which

^{7/} Even where the ultimate decision is discretionary, an alleged violation of regulations governing the discretionary decisionmaking might serve as the basis for Board jurisdiction limited to the alleged violation of law. Billings American Indian Council, *supra*, 11 IBIA at 144.

^{8/} The Board found that such extraordinary circumstances were present in a case where the Secretary had personally referred a matter to the Board without limitation on the Board's scope of review. Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 80, 90 I.D. 521 (1983).

^{9/} Section 2.19 provides in pertinent part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

does not distinguish between cases based upon an exercise of discretion and those based upon an interpretation of law, the Board must remand an issue to the BIA when it determines that the issue is one committed to Secretarial discretion. 10/ Quinault Allottee's Association v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (1986). If appellee's decision is properly characterized as based on the exercise of discretionary authority, therefore, the Board lacks jurisdiction over this appeal.

Appellee's decision constituted a determination not to exercise the retained Secretarial power to waive or make exceptions to a regulatory provision which adversely affected appellants. The two requirements specified in 25 CFR 1.2 for the exercise of that power are that the waiver or exception be permitted by law and that the Secretary find the waiver or exception to be in the best interest of the Indians. No question arises here concerning the legal permissibility of the waiver at issue. Nor can appellants claim that they have a legal right to a waiver. 11/

[3] The determination of whether a waiver or exception is in the best interest of the Indians is a determination requiring the exercise of discretion. In this case, that determination requires a balancing of the interest of appellants against the interest of Indians who have never received HIP assistance, for purposes of allocating the limited HIP funds. Because the decision to waive the regulation at 25 CFR 256.5(b) is committed to the Secretary's discretion, the Board lacks jurisdiction over this appeal. 12/

fn. 9 (continued):

"(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 Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

10/ See 43 CFR 4.337(b), which provides:

"Where the Board finds that one or more issues involved in an appeal or a matter referred to it require the exercise of discretionary authority of the Commissioner, the Board shall refer those issues to the Commissioner for resolution."

11/ Appellants state they were misinformed by BIA and tribal staff concerning the HIP regulations. However, individuals dealing with the Government are held responsible for knowledge of duly promulgated Federal regulations, and misinformation given to them by Federal Employees does not create rights not given by law. E.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Marko & Yarrow Lewis, 46 IBLA 257 (1980); Royal Harris, 45 IBIA 87 (1980).

12/ In Antone v. Assistant Secretary--Indian Affairs, 12 IBIA 186 (1984), the Board took jurisdiction over an appeal concerning denial of a waiver of the HIP regulations. In that case, the Assistant Secretary's decision letter had granted the appellant a right of appeal 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, these appeals from the Acting Deputy Assistant Secretary's decision of July 11, 1985, are dismissed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Administrative Judge