



INTERIOR BOARD OF INDIAN APPEALS

Sylvestor and Shirley LaRocque v. Aberdeen Area Director, Bureau of Indian Affairs

18 IBIA 80 (12/19/1989)



United States Department of the Interior

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

SYLVESTOR AND SHIRLEY LaROCQUE

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-82-A

Decided December 19, 1989

Appeal from a finding that appellants had not timely pursued their appeal rights in a case concerning foster care payments.

Reversed and remanded.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Domestic Relations: Generally--Indians: Financial Matters: Financial Assistance--Indians: Social Services

Regulations in 25 CFR 20.13 provide that, following an initial denial of a request for covered financial assistance, an applicant may either request a hearing within 20 days or file an appeal within 30 days. If an unfavorable decision is rendered after a hearing, an appeal may still be filed.

APPEARANCES: Maureen White Eagle, Esq., Devils Lake, North Dakota, for appellants; L.W. Collier, Jr., Assistant Area Director, Indian Programs, Bureau of Indian Affairs, Aberdeen Area Office, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Sylvestor and Shirley LaRocque seek review of a July 12, 1989, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; appellee), concerning foster care payments for Shylow DeCoteau (Shylow), a minor whom appellants have since adopted. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision and remands the case for further consideration.

Background

Shylow was born September 8, 1986, to Deborah Christine DeCoteau Hobbs (Hobbs). Hobbs, who was an enrolled member of the Turtle Mountain Chippewa Tribe (tribe), died on June 24, 1987, in Dubuque, Iowa. It appears that prior to her mother's death, Shylow was in a foster care home, under the

jurisdiction of the Juvenile Court of Iowa, in and for Dubuque County. 1/ Upon discovering Hobbs' death, Dubuque County authorities apparently contacted BIA police in Belcourt, North Dakota, in an effort to locate Shylow's next of kin.

The tribe filed a petition with the state juvenile court, asking that the matter be transferred to the Turtle Mountain Tribal Court (tribal court) under the Indian Child Welfare Act, 25 U.S.C. § 1911 (1982). 2/ The petition was granted. It further appears that Julianne Wilkie, a Foster Care Coordinator employed by the tribe, 3/ arranged to take custody of Shylow and bring her to the reservation.

On September 15, 1987, the tribal court issued an order of temporary custody, which stated in its entirety:

THERE HAVING BEEN filed with the Turtle Mountain Tribal Court a petition for court custody with foster care placement for the above named minor child [Shylow] by the Dept. of Social Services;

AND THE COURT having reviewed all circumstances surrounding said case;

THEREFORE IT IS THE ORDER OF THIS COURT that the Turtle Mountain Tribal Court shall retain custody and placement in the Sylvester and Shirley LaRocque, foster home under the auspices of Dept. of Social Services, Belcourt, North Dakota.

Shylow was accordingly placed in foster care in appellants' home. By decree of the tribal court dated October 14, 1988, Shylow was adopted by appellants.

At some point appellants attempted to obtain foster care payments for the period in which they acted as foster parents for Shylow. By letter of March 3, 1989, 4/ the Acting Turtle Mountain Agency Superintendent (Superintendent) denied appellants' request for payment, stating:

1/ Many of the facts of this case are not clear in the administrative record. In order for a decision to be sustained on appeal, relevant facts as well as the deciding official's reasoning, must appear in the administrative record. See Plain Feather v. Acting Billings Area Director, 18 IBIA 26 (1989); Quisno v. Billings Area Director, 17 IBIA 278 (1989).

2/ Section 1911(b) provides: "In any State court proceeding for the foster care placement of * * * an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe * * * upon the petition of * * * the Indian child's tribe * * *."

3/ The record suggests that the tribe has contracted certain social services functions and that BIA provides all remaining non-contracted services.

4/ This letter was erroneously dated Dec. 8, 1988. The date of the letter was clarified by a second letter dated Mar. 7, 1989.

This office cannot make retroactive foster care payments because we did not make the placement. Also, the tribal court order is a "restrictive court order" and our regulations prohibit us from making financial payment on restrictive court orders.

Therefore, the administrative action is still upheld, based on the above-mentioned explanation. If [you] need to appeal this decision, we refer [you] to 25 CFR § 2 - Appeals from Administrative Actions. A copy of which is attached for your information.

By letter dated March 27, 1989, appellants appealed this decision. Their letter stated: "Pursuant to your March 3, 1989, administrative action, we are hereby requesting under 25 CFR Section 2, Appeals For Administrative Action, a formal appeal on this issue. * * * Please advise me as to the hearing date on this appeal." By letter dated April 4, 1989, the Acting Superintendent responded, stating: "This is in response to your March 27th letter requesting a date for an appeal hearing pursuant to March 3, 1989 administrative decision. Please be advised that a hearing date is scheduled to be on April 20, 1989."

A bearing was held before Myrna F. Greene, Administrative Officer, Turtle Mountain Agency (agency). However, by decision dated May 1, 1989, Greene concluded that the hearing should not have been held because it had not been timely requested under 25 CFR 20.30(a), which establishes a 20-day time period for requesting a hearing. Greene made no decision on the merits of the case, but informed appellants that they might wish to pursue a tort action.

Appellants appealed this decision to appellee who, on July 12, 1989, affirmed the holding that a hearing must be requested within 20 days. Appellee informed appellants of their right to appeal his decision to the Board.

The Board received appellants' appeal on July 28, 1989. Following receipt of the administrative record, a notice of docketing was issued on August 21, 1989. Appellants filed an opening brief. Appellee objected to one statement made by appellants. 5/

5/ Appellants stated that the Tribal Foster Care Program was "an agency within the Bureau of Indian Affairs' social service structure" (Statement of Reasons at 2). Appellee objected to this statement, contending that "the Tribal Social Service Program in regard to Indian Child Welfare Act (ICWA) is a P.L. 95-608 grant to the Tribe and is not an agency within the Bureau of Indian Affairs' social service structure. They are two separate entities. The Bureau is not responsible for commitments made by the ICWA program" (Statement at 1).

It does not appear that appellee's objection was served on appellants. However, the Board finds this failure constitutes harmless error because the contents of appellee's objection were not considered in deciding this appeal.

Discussion and Conclusions

Regulations relating to BIA financial assistance are found in 25 CFR Part 20. Under 25 CFR 20.30(a),

[a]ny applicant or recipient of financial assistance under this part who is dissatisfied with any decision or action concerning eligibility for or receipt of financial assistance may request a hearing before the Superintendent or his designated representative within 20 days after the date of mailing or delivery of the written notice of the proposed decision as provided in § 20.13. The Superintendent may extend the 20 day period for good cause shown and documented in the record.

The Superintendent did not mention this right to request a hearing in his March 3, 1989, decision letter, but instead informed appellants that his decision could be appealed under 25 CFR Part 2. At that time, 25 CFR 2.10(a) (1988) provided in pertinent part:

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 * * *. [6/]

Appellants raise four issues on appeal: (1) BIA violated its own rules and regulations and failed to give adequate notice of their appeal rights; (2) BIA's failure to comply with its own rules and regulations resulted in denial of their claim without due process of law; (3) BIA is estopped from asserting they had 20 days to appeal because they detrimentally relied upon its representation that they had 30 days in which to appeal; and (4) BIA's decision to adhere strictly to the time requirements of 25 CFR 20.30(a), after providing them with written notice that their appeal was governed by

6/ Appeal regulations for BIA and the Board were revised, effective Mar. 13, 1989. See 54 FR 6478 and 6483 (Feb. 10, 1989). Under the new regulations, "[a]n appellant must file a written notice of appeal in the office of the official whose decision is being appealed * * * within 30 days of receipt by the appellant of the notice of administrative action described in § 2.7." 25 CFR 2.9(a). Section 2.7 requires, among other things, that decisions be in writing and that

"[a]ll written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

Under 25 CFR 2.9(b), the time for filing a notice of appeal does not begin to run until persons adversely affected by the decision are properly informed of their appeal rights.

25 CFR Part 2, is a gross irregularity which causes inequity and injustice, in violation of 25 CFR 20.13(e). 7/

[1] Under 25 CFR 20.13 appellants had two options following the initial denial of their request for foster care payments: (1) they could request a hearing within 20 days, or (2) they could file an appeal within 30 days. If they requested a hearing and the decision was not favorable to them, they still had the option of filing an appeal. Appellants were not, however, clearly informed of these alternative methods of seeking review of the initial decision. Instead, they were referred only to the appeal provisions of 25 CFR Part 2.

Section 20.30(a) provides that extensions of time for requesting a hearing may be granted under appropriate circumstances. BIA thus has to determine whether the circumstances justify an extension of time. This discretion must, however, be exercised with reference to the requirements of section 20.13 that a decision must "clearly and completely" inform persons adversely affected by it of their legal rights to contest the decision.

BIA should have taken at least three factors into consideration before deciding whether or not an extension of time for filing a request for a hearing should have been granted in this case. First, there was apparently considerable confusion resulting from the incorrect date given on the letter decision being appealed. Second, the administrative record does not reveal when the decision was delivered to appellants. Third, appellants were not "clearly and completely" informed of all of their legal rights to contest the decision. If BIA had considered all of these factors, it might well have decided that an extension of time for requesting a hearing should have been granted.

However, in this case appellants were entitled to a decision on the merits of their case regardless of whether or not they timely requested a hearing. By its express terms, appellants' March 27, 1989, letter is a notice of appeal under 25 CFR Part 2, not a request for hearing under

7/ Section 20.13 provides in pertinent part:

"Written notice of all proposed decisions shall be mailed or hand delivered to the applicant or recipient which clearly and completely advise of their legal rights to contest any adverse proposed decision as set forth in § 20.30 or under Part 2 of this chapter and shall further consist of the following:

* * * * *

"(c) Shall advise the applicant or recipient of his right to request a hearing if dissatisfied with the proposed decision.

* * * * *

"(e) Shall advise the applicant or recipient that failure to request a hearing within the 20 day period following the date of notice of proposed decision will cause the proposed decision to become final subject to appeal under Part 2 of this chapter, and that the decision will not be disturbed except for fraud or gross irregularity or where found by higher authority that failure to appeal on the part of the applicant or recipient would result in inequity or injustice to the parties."

25 CFR 20.30(a). Perhaps because of use of the word "hearing" in their letter, the notice of appeal was treated as a request for hearing, a procedure with which agency personnel were familiar, although appellants had still not been informed of the procedure and appeared to be ignorant of it.

A notice of appeal from the Superintendent's March 3, 1989, decision, received in the Superintendent's office on March 28, 1989, is clearly timely under both 25 CFR 2.10(a) (1988) and 25 CFR 2.9(a). Because appellants filed a timely notice of appeal from the initial denial of their request for foster care payments, they were entitled to a decision from BIA addressing the merits of their case. If the agency, for any reason, including mistake, treated a timely notice of appeal as a request for hearing, it did not have authority to deny consideration of the merits of the case on the grounds that a request for hearing was not timely filed. There is no requirement in either 25 CFR Part 2 or Part 20 that a hearing must be requested in a case such as this before an appeal can be filed. Once the agency treated appellants' notice of appeal as a request for hearing, it was required to conduct the hearing, issue a decision on the merits of the case, and inform appellants of their further appeal rights.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 12, 1989, decision of the Aberdeen Area Director is reversed and the case is remanded to BIA for further consideration consistent with this opinion.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Charles B. Cates
Director, Ex Officio Member