



INTERIOR BOARD OF INDIAN APPEALS

Larry Martin v. Billings Area Director, Bureau of Indian Affairs

19 IBIA 279 (04/04/1991)

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United States Department of the Interior

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

LARRY MARTIN

v.

BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-133-A

Decided April 4, 1991

Appeal from a decision declining to consider an appeal by a subcontractor under an Indian Self-Determination Act contract.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Contracts: Indian Self-Determination and Education Assistance
Act: Generally--Indians: Indian Self-Determination and Education
Assistance Act: Generally

The Indian Self-Determination Act does not give a subcontractor an explicit or implicit right to appeal under 25 CFR Part 2 from an action taken by an Indian tribe pursuant to a contract under the Act.

2. Board of Indian Appeals: Jurisdiction--Contracts: Disputes and
Remedies: Jurisdiction--Contracts: Indian Self-Determination and
Education Assistance Act: Generally

The Board of Indian Appeals does not have jurisdiction over contract disputes arising under an Indian Self-Determination Act contract.

3. Bureau of Indian Affairs: Administrative Appeals: Generally--
Contracts: Indian Self-Determination and Education Assistance
Act: Generally

In connection with its authority to rescind an Indian Self-Determination Act contract under 25 U.S.C. § 450m (1988), the Bureau of Indian Affairs has authority to investigate an Indian tribe's performance under the contract.

4. Contracts: Indian Self-Determination and Education Assistance
Act: Generally--Indians: Indian Self-Determination and Education
Assistance Act: Generally--Indians: Tribal Government: Judicial
System

The Bureau of Indian Affairs must implement the Federal commitment to tribal self-determination, which includes a policy of respect for tribal courts, in fulfilling its oversight responsibilities under the Indian Self-Determination Act.

APPEARANCES: Rene A. Martell, Esq., Wolf Point, Montana, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for appellee; Reid Peyton Chambers, Esq., and Tassie Hanna, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Larry Martin seeks review of a July 10, 1990, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take action on appellant's allegations against tribal officials acting under an Indian Self-Determination Act (P.L. 93-638) ^{1/}

^{1/} 25 U.S.C. §§ 450-450n (1988 and Supps). All further references to the United States Code are to the 1988 edition and its supplements.

contract. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

During FY 1989, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (Tribes) operated a Housing Improvement Program (HIP) under P.L. 93-638 contract No. CTC50583489. On May 12, 1989, the Tribes' HIP contracted with appellant, an enrolled member of the Tribes, to renovate the residence of another tribal member. The contract amount was \$5,598. Work was to begin on May 15, 1989, and be completed by June 15, 1989. Appellant began work on May 15, 1989. Almost immediately, HIP officials became dissatisfied with the quality of his work; later, they also became concerned that he was not complying with his contractual obligations. Ultimately, in July 1989, HIP terminated appellant's contract and hired others to complete the work.

By letter of September 19, 1989, appellant requested the Billings Area Contracting Officer to

have an entity outside the Billings area do a formal review and audit of the Fort Peck HIP program; * * * insure that [appellant] is reinstated in good standing as an eligible contractor for HIP bids; * * * rectify with the Fort Peck Housing Authority, the damage done to [appellant's] credibility and reputation due to the inappropriate actions of their grantee, the Fort Peck Tribes; [and award appellant] damages of [a total of \$5700] for lost profits * * *.

Appellant attached an affidavit alleging, inter alia, that actions of the tribal HIP Director had precluded him from being awarded a contract in April 1989 in the amount of his original bid of \$15,100, prevented him from completing work on time, and deprived him of the opportunity to be awarded other contracts in June and July 1989.

On September 26, 1989, the Contracting Officer advised appellant that he would have to resolve the matter with the Tribes, but stated that Area housing personnel would meet with appellant and the HIP Director on their next trip to Fort Peck "to work out any problems with the contract."

On January 22, 1990, appellant again wrote to the Contracting Officer, stating that no meeting had occurred. The Contracting Officer responded on February 13, 1990, indicating that travel restrictions precluded the housing personnel from traveling to Fort Peck and suggesting that appellant contact the HIP Director and request that he set up a meeting with the Tribal Executive Board to resolve the matter.

By letter of April 9, 1990, appellant submitted an appeal, as well as a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, to the Superintendent, Fort Peck Agency, BIA. Appellant's tort claim was referred to the Billings Field Solicitor, who denied it on May 31, 1990. His appeal was referred to the Area Director who, by decision dated July 10, 1990, affirmed the Contracting Officer's conclusion that appellant would have to resolve his problem directly with the Tribes.

Appellant's notice of appeal from the Area Director's decision was received by the Board on August 2, 1990. Appellant, the Area Director, and the Tribes filed briefs.

Discussion and Conclusions

Appellant argues that the Area Director's decision denies him a right of appeal which would be available to him if he contracted directly with BIA; he contends that this denial raises due process and equal protection questions and that he should therefore be entitled to appeal the Tribes' action either under 25 CFR Part 2 or through the disputes clause of the Tribes' P.L. 93-638 contract. Further, appellant argues, the Area Director should have conducted an investigation of the Tribes' HIP program pursuant to appellant's complaint.

[1] 25 CFR Part 2 does not provide an explicit avenue of relief for appellant. This part is applicable to "appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions." 25 CFR 2.3(a). It contains no specific authorization for BIA officials to decide appeals from tribal actions. ^{2/} If such authority exists, it must be found elsewhere.

^{2/} It does, however, provide a right of appeal from decisions of BIA officials who deny the relief requested by a party, even if the reason for denial is the official's lack of authority to grant relief or the necessity for the party to seek relief from a tribe. Cf. Oglala Sioux Tribe v. Aberdeen Area Director, 16 IBIA 201 (1988). Clearly, such decisions have an adverse effect on the party who is denied relief. The Board rejects the Area Director's argument that the Board lacks jurisdiction over this appeal (Area Director's Brief at 7).

Appellant does not identify any source of that authority. The Area Director and the Tribes argue that there is none. The Board is not aware of any statute or regulation which specifically authorizes BIA to hear appeals from tribal actions under P.L. 93-638 contracts; it considers, therefore, whether there is an implied right to appeal such actions to BIA.

Any implied right of appeal must be gleaned from P.L. 93-638 itself or, at a minimum, must be consistent with the intent of Congress in that statute. ^{3/} Congressional intent is explicitly declared in section 3 of the Act, 25 U.S.C. § 450a, which provides:

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

^{3/} In certain limited circumstances, the Board has recognized the authority of BIA and the Board, despite the lack of any explicit statutory or regulatory provision, to review tribal actions where necessary to carry out the United States' trust responsibility or its government-to-government relation with Indian tribes. E.g., *Prairie Band of Potawatomi Indians v. Acting Anadarko Area Director*, 17 IBIA 97 (1989); *Rogers v. Acting Deputy Assistant Secretary-- Indian Affairs (Operations)*, 15 IBIA 13 (1986); *Crooks v. Minneapolis Area Director*, 14 IBIA 181 (1986). In such cases, the Board has required those who seek relief from the Department to exhaust tribal remedies. E.g., *Totenhagen v. Minneapolis Area Director*, 16 IBIA 9 (1987). Further, the Board has recognized as binding on Departmental officials the resolution of internal disputes by valid tribal forums. E.g., *Smalley v. Eastern Area Director*, 18 IBIA 459 (1990).

Congress has made explicit provision for relief against tribal misfeasance under P.L. 93-638 contracts. 25 U.S.C. § 450m authorizes the Secretary to rescind a contract for, inter alia, a tribe's "violation of the rights or endangerment of the health, safety, or welfare of any persons." ^{4/} 25 U.S.C. § 450f(c) requires the Secretary to obtain liability insurance for tribes performing under contract. In addition, Congress has extended FTCA coverage to tribes and their employees. ^{5/} Given these

^{4/} 25 U.S.C. § 450m provides:

“Each contract or grant agreement entered into pursuant to sections 450f, 450g, and 450h of this title shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and hearing on the record to such tribal organization rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: Provided, That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety and, in such cases, he shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970, as amended [29 U.S.C. § 651 et seq.].”

^{5/} Act of Oct. 23, 1989, § 315, 103 Stat. 701, 744; Act of Nov. 5, 1990, § 314, 104 Stat. 1915, 1959. The 1989 statute provided:

“[W]ith respect to claims resulting from the performance of functions, during fiscal year 1990 only, or claims asserted after the effective date of this Act, but resulting from the performance of functions prior to fiscal year 1990, under a contract, grant agreement, or cooperative agreement authorized by [P.L. 93-638], an Indian tribe, tribal organization or Indian contractor is deemed to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract

explicit remedial provisions, it is questionable whether Congress intended yet another remedy to be read into the statute.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court considered whether Congress intended in the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341, to create a Federal cause of action for its enforcement, beyond the habeas corpus remedy specified in the Act. The Court found that “[t]wo distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government.’” 436 U.S. at 62. The Court continued:

Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other.
Creation of a federal cause of

fn. 5 (continued)

or agreement: Provided * * *, That upon the effective date of this legislation, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor, or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act: Provided further, That beginning with [fiscal year 1991], and thereafter, the appropriate Secretary shall request through annual appropriations funds sufficient to reimburse the Treasury for any claims paid in the prior fiscal year pursuant to the foregoing provisions: Provided further, That nothing in this section shall in any way affect the provisions of [25 U.S.C. § 450f(d) (concerning FTCA coverage of certain health-related functions)].”

The 1990 statute extended FTCA coverage, in virtually identical language, to “functions performed during fiscal year 1991 and thereafter.”

While the term “claims” in the first part of this provision may, at first glance, appear to be capable of interpretation to include administrative appeals under 25 CFR Part 2, it is apparent from the section read as a whole that only tort claims are intended.

action for the enforcement of rights created in Title I, however useful it might be in securing compliance with [25 U.S.C.] § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums * * * but it would also impose serious financial burdens on already "financially disadvantaged" tribes. * * *

Moreover, * * * implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA * * *. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. [Citations and footnotes omitted.]

436 U.S. at 64-65. The Court accordingly held that only the remedy of habeas corpus, specified in the ICRA, was available to enforce the Act.

The Supreme Court's analysis in Santa Clara Pueblo is, if anything, even more fittingly applied to P.L. 93-638, in which no "dual objectives" are apparent but, rather, a single unified purpose, *i.e.*, the promotion of tribal self-determination, including the "development of strong and stable tribal governments." An implied right of appeal under 25 CFR Part 2 would undermine the authority of tribal forums and therefore impede, rather than promote, the development of strong and stable tribal governments. It would disserve the purpose of P.L. 93-638 in the same way an implied Federal cause of action would disserve the ICRA purpose to protect tribal government. The Board holds that P.L. 93-638 does not include an implied right to appeal a tribal action under 25 CFR Part 2.

[2] Appellant next argues that he has a right to appeal through the disputes clause of the Tribes' P.L. 93-638 contract. This clause,

however, concerns disputes arising between the parties to that contract, not disputes between the Tribes and third parties with whom it subcontracts. Section 329 of the contract provides in part: "Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer * * *. The decision of the contracting officer shall be final and conclusive unless within thirty (30) days from the date of receipt of such copy, the contractor mails or otherwise furnishes to the contracting officer a written appeal addressed to the Secretary." (Emphasis added.) 6/

Appellant did not follow the procedures for appealing a BIA contracting officer's decision under a disputes clause. Under the Department's regulations, those appeals are heard by the Interior Board of Contract Appeals. 43 CFR 4.1(b)(1); 4.100-4.128. Had appellant followed the disputes procedures, however, it is unlikely that the Board of Contract Appeals would have entertained his appeal. Even assuming appellant's complaint could somehow be construed as a dispute arising under the Tribes' contract, the Board of Contract Appeals recognizes a subcontractor as possessing a right to appeal in only very limited circumstances. That Board has held that, unless the prime contractor has authorized or ratified the appeal, a "subcontractor is without any standing to invoke the provisions of [a disputes clause], from which the Board's jurisdiction

6/ P.L. 93-638 contracts are now subject to the Contract Disputes Act, 41 U.S.C. §§ 601-613, which controls in matters concerning appeal rights. See 25 U.S.C. § 450m-1(d).

is derived, as a means of securing an adjudication by the Board of the rights and obligations of the contesting parties." Divide Constructors, Inc., 84 I.D. 119, 122 (1977). In support of its conclusion in that case, the Board quoted from Beacon Construction Co. of Mass., Inc. v. Prepakt Concrete Co., 375 F.2d 977, 981 (1st Cir. 1967):

[T]he requirement of privity is not merely technical, but reflects the purpose of the disputes clause. The Contracting Officer does not agree to act as general arbiter for the project; rather, his decision on disputes is made authoritative for the benefit of the government, to provide for efficient settlement of matters affecting the government's liability under the general contract. And, at least under the usual form of general contract, that liability is only to the general contractor, not to the subcontractors.

84 I.D. at 122 n.9. See also Ohbayashi-Gumi, Ltd., 91 I.D. 311 (1984).

In any event, because appeals arising under the disputes clause of a P.L. 93-638 contract are within the jurisdiction of the Board of Contract Appeals, the Board of Indian Appeals has no jurisdiction over them.

[3] Appellant's last contention is that BIA should have investigated the Fort Peck HIP program pursuant to his complaint. The Tribes respond to this contention as follows:

Appellant has no grounds under [P.L. 93-638] to demand that the BIA review the program, for the federal statute and regulations provide no such rights to subcontractors or third parties. The BIA may certainly receive complaints from third parties and may, where the complaints are serious and pervasive, even choose to investigate. This does not, however, grant Appellant a statutory right to demand an investigation of the Fort Peck HIP program. The Area Office was well within the parameters of its

discretion in declining to investigate the HIP program or act on Appellant's other requests. [Emphasis in original.]

(Tribes' Brief at 4).

As noted above, the Secretary has authority under 25 U.S.C. § 450m to rescind a contract and reassume control of a contracted program where he determines that a tribe's performance under the contract "involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of [contract] funds" and where he also determines that the tribe "has not taken corrective action as prescribed by him." BIA clearly has authority to investigate a tribe's contract performance as necessary to enforce this provision. However, the purpose for conducting such an investigation would be to determine whether a tribe's contract should be rescinded, not to provide personal relief to an individual complainant.

In light of this purpose, the Board considers whether appellant's complaint compelled a BIA investigation of the HIP program under section 450m. While the Tribes suggest that the decision to investigate a tribe's contract performance is entirely within BIA's discretion, it is possible that, under some circumstances, BIA would have a duty to act. The Board is not required to decide what circumstances might give rise to such a duty, however, because it finds that, under the circumstances of this case, BIA had no obligation to initiate an investigation.

[4] Appellant did not allege in his complaint to BIA that any grounds for rescinding the Tribes' contract were present. He did not, for instance, allege that his rights had been violated by the Tribes. ^{7/} Nor did he allege, as he does before the Board, that "[n]o tribal appeals process exists for Appellant" (Appellant's Opening Brief at 3). If appellant had made and substantiated this allegation before BIA, it is conceivable that he would have provided BIA with grounds to initiate an inquiry under authority of 25 U.S.C. § 450m. ^{8/} However, not only did appellant fail to raise this issue with BIA, but nothing in any of his filings with the Board indicates that he ever attempted to obtain relief from the Tribes.

The Tribes have a court with "jurisdiction over Indians in all substantive legal areas, including criminal, civil, traffic, and hunting and fishing matters." ^{9/} Respect for tribal courts is a well-recognized aspect of the Federal Government's commitment to tribal self-determination. See, e.g., Santa Clara Pueblo, 436 U.S. at 65 ("Tribal courts have repeatedly

^{7/} Appellant's allegation before the Board that he has been denied due process and equal protection is apparently directed against BIA's refusal to hear his appeal, rather than against any actions taken by tribal officials. It appears to be based on the premise that, because BIA would not hear his appeal, appellant was denied any right to appeal, an allegation he fails to support. See discussion infra.

^{8/} A tribe which provides no procedures at all through which to seek relief from acts of tribal officials or employees, in their performance under P.L. 93-638 contracts, is arguably in danger of violating the rights of those who are aggrieved by the tribal actions. A tribe does not violate an individual's rights, however, simply by declining to grant the relief he seeks.

^{9/} National American Indian Court Judges Association and Branch of Judicial Services, Bureau of Indian Affairs, Native American Tribal Court Profiles, 1984 at 4.

been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians”); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 14-15 (1987) (“We have repeatedly recognized the Federal Government’s longstanding policy of encouraging tribal self-government. * * * Tribal courts play a vital role in tribal self-government * * * and the Federal Government has consistently encouraged their development”). BIA is obligated to implement the Federal self-determination policy in fulfilling its P.L. 93-638 contract oversight responsibilities. It would clearly have been inappropriate for BIA to initiate an investigation under 25 U.S.C. § 450m in the circumstances of this case, where appellant failed even to allege before BIA, much less demonstrate, that no tribal review was available to him.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Billings Area Director's July 10, 1990, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge