



INTERIOR BOARD OF INDIAN APPEALS

Ponca Tribe of Oklahoma; Pawnee Tribe of Oklahoma; and Otoe-Missouria Tribe  
v. Acting Anadarko Area Director, Bureau of Indian Affairs

22 IBIA 199 (08/07/1992)

Related Board cases:

24 IBIA 21

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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

PONCA TRIBE OF OKLAHOMA, PAWNEE TRIBE OF OKLAHOMA,  
and  
OTOE-MISSOURIA TRIBE

v.

ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-114-A, 92-116-A, 92-117-A

Decided August 7, 1992

Appeals from a decision concerning the distribution of Pawnee Agency funds for purposes of contracting under the Indian Self-Determination Act.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

A decision distributing funds among several tribes, for purposes of contracting under the Indian Self-Determination Act, is a decision based on the exercise of discretion. In reviewing such decisions, the Board of Indian Appeals does not substitute its judgment for that of the Bureau but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Leonard Biggoose, Chairman, for the Ponca Tribe of Oklahoma; Robert L. Chapman, President, for the Pawnee Tribe of Oklahoma; and Della C. Warrior, Chairman, for the Otoe-Missouria Tribe.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Ponca Tribe of Oklahoma, Pawnee Tribe of Oklahoma, and Otoe-Missouria Tribe seek review of a December 16, 1991, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), establishing a formula for the distribution of funds among Pawnee Agency tribes for purposes of contracting under the Indian Self-Determination Act (P.L. 93-638) <sup>1/</sup> for Fiscal Year (FY) 1993. For the reasons discussed below, the Board affirms the Area Director's decision.

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<sup>1/</sup> 25 U.S.C. §§ 450-450n (1988 and Supps).

### Background

The Pawnee Agency, BIA, serves five tribes. These are the three appellant tribes and the Kaw and Tonkawa Tribes. Apparently sometime during 1991, or perhaps earlier, the five tribes decided that they wanted to contract all or most of the Agency functions beginning in FY 1993. They were advised that they should arrive at an agreement as to division of the Agency funds among them in sufficient time to allow each tribe to prepare contract proposals for FY 1993, based on the amount of funds that it could expect to receive.

By June 1991, four of the tribes (all but the Tonkawa Tribe) had met twice and had apparently reached preliminary agreement. On June 7, 1991, all five tribes met with the Pawnee Agency Superintendent concerning the FY 1993 budget. Three of the tribes (Ponca, Kaw, and Otoe-Missouria) presented resolutions concerning their intent to contract Agency programs in FY 1993. The Pawnee Tribe was unable to produce a resolution because of an intra-tribal dispute. The Tonkawa Tribe expressed disagreement with the proposal offered by the other four tribes. The Superintendent again advised the tribes that they must agree among themselves on division of the funds.

The tribes met among themselves and then met again with the Superintendent on July 14, 1991. On July 2, 1991, three of the tribes (Kaw, Otoe-Missouria, and Ponca) met with the Area Director and informed him that the Tonkawa Tribe still did not accept the proposal agreed to by the other four tribes. The Area Director stated that, unless the tribes could reach agreement, BIA would make the fund distribution decision which, if unsatisfactory to the tribes, could be revised through negotiation or could be appealed.

The tribes attending the July 2 meeting agreed to have the Area Office prepare options for division of the funds, to be considered by the tribes in their attempts to reach a consensus. Four options, labelled options A through D, were prepared and sent to the tribes in August 1991. 2/ On

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2/ Under option A, the division of funds for all programs would be based 50 percent on population and 50 percent on land acreage. Under option B, division of funds for all programs would be based 50 percent on population and 25 percent on land acreage; the remaining 25 percent would be divided equally among the five tribes. Under option C, funds for all programs would be divided equally. Under option D, 96 percent of the funds for certain programs (scholarships, adult education, aid to tribal government, and social services) would be divided according to population; 96 percent of the funds for tribal courts, law enforcement, and credit would be divided equally; and 96 percent of the funds for agriculture, real estate appraisals, and other real estate services would be divided according to land acreage. The remaining 4 percent of all funds would be designated specifically for the Tonkawa Tribe.

The administrative record indicates that the Area Office staff considered option D to be the formula agreed upon by four of the five tribes. However, an undated, but apparently earlier, analysis of the tribes'

August 29, 1991, the tribes met to consider the options but were unable to reach agreement. The Ponca, Pawnee, and Otoe-Missouria Tribes voted for option A, and the Kaw and Tonkawa Tribes voted for option B.

The tribes met further to attempt to come to an agreement but were unsuccessful. They so informed the Area Director and requested him to make a decision concerning distribution of the funds among them.

On December 16, 1991, the Area Director rendered the decision at issue here. He adopted a formula, called option E in the attachments to the decision, which classified the programs to be contracted into four categories and provided that the funding distribution would be:

CATEGORY I

Tribal Courts, Social Services, Real Property Management, and Real Estate Appraisals.

50% based upon workload data  
50% divided equally

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CATEGORY II

Scholarships, Adult Education and Other Aid to Tribal Government.

50% based upon tribal membership  
50% divided equally

\* \* \* \* \*

CATEGORY III

Agriculture.

50% based upon land acres  
50% divided equally

\* \* \* \* \*

CATEGORY IV

Law Enforcement and Credit/Financing.

100% divided equally.

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fn. 2 (continued)

proposal does not include the 4-percent specific designation for the Tonkawa Tribe.

The Board received the Ponca Tribe's appeal from this decision on January 16, 1992, and the Pawnee and Otoe-Missouria Tribes' appeals on January 22, 1992. The Ponca and Pawnee Tribes filed briefs, and the Otoe-Missouria Tribe filed a statement. 3/ The Kaw Tribe filed a brief in support of the Area Director's decision. 4/

Because the decision at issue here concerns funding for FY 1993, which begins October 1, 1992, there is a clear need to resolve this matter expeditiously. The Board therefore expedites this appeal on its own motion.

#### Discussion and Conclusions

The Ponca Tribe states that it agrees with the Area Director's distribution formula except with respect to the equal division of law enforcement funds. The Tribe contends that it should receive a larger share of these funds because it is the largest tribe and has the greatest number of law enforcement problems. 5/

The Pawnee Tribe argues generally that the division of funds must be based upon need, population, land acreage, and historical funding patterns. In its only specific example of disagreement with the Area Director's decision, however, the Tribe demonstrates that it may have partially misunderstood the Area Director's formula. The Tribe contends that, under the formula, "a Tribe with a population of 2,457 will receive the same allocation for scholarships as a Tribe with a population of 288" (Pawnee Tribe's Brief at 1). This is not the case. Under the Area Director's formula, the Pawnee Tribe, with a population of 2,457, would receive \$104,429 for scholarships; the Tonkawa Tribe, with a population of 286, would receive \$49,885.

The Otoe-Missouria Tribe states that it has the following objections to the Area Director's formula:

(1) A greater weight factor should be provided to the Tribes' actual jurisdiction boundaries.

(2) The number of Tribal members presently residing within the jurisdictional boundaries whom the Tribes exercise jurisdiction over.

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3/ The appellant tribes requested and were granted two extensions of time in which to file their opening briefs. Upon granting the second extension, the Board informed appellants that no further extensions would be granted. The Otoe-Missouria Tribe then requested a third extension, which was denied.

4/ The Kaw Tribe's brief was not signed.

5/ Contrary to its present position on this point, the Ponca Tribe earlier supported the tribal proposal which provided for equal division of law enforcement funds.

(3) A comparison of land bases will reveal that the land base of the Otoe-Missouria Tribe is greater than the other four Tribes.

(4) The majority of the Tribes (4) voted for Option A and Option B as the second. [6/]

(Otoe-Missouria Tribe's Statement at 1-2).

The Kaw Tribe supports the Area Director's decision. It states that it believes the present differences among the tribes could have been avoided if the tribes had presented their concerns during the negotiation period.

[1] While all of the appellants have expressed disagreement with the Area Director's allocation of funds, none has alleged any legal or procedural error. Decisions allocating funds among tribes are based on the exercise of discretion. The Board has limited jurisdiction over discretionary decisions of BIA officials. In reviewing such decisions, the Board does not substitute its judgment for that of BIA but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. See, e.g., Washoe Tribe v. Acting Phoenix Area Director, 19 IBIA 190 (1991); McDonald v. Portland Area Director, 18 IBIA 399 (1990).

The Board has also held that a discretionary decision by a BIA official should be reasonable. E.g., Absentee Shawnee Tribe v. Anadarko Area Director, 18 IBIA 156 (1990). Although appellants allege, in essence, that the Area Director's formula is unreasonable, they do not support their arguments. The Pawnee and Otoe-Missouria Tribes make no attempt to do so. The Ponca Tribe makes such an attempt with respect to law enforcement funding. Its argument, however, is rendered unpersuasive by its failure to explain why it earlier supported the same division of law enforcement funds which it now argues is unreasonable.

Appellants bore the burden of showing error in the Area Director's decision. E.g., Sauk-Suiattle Indian Tribe v. Portland Area Director, 20 IBIA 238 (1991); Kays v. Muskogee Area Director, 18 IBIA 380 (1990). By failing to allege any legal or procedural error, and by failing to show that the Area Director's decision is unreasonable, appellants have failed to carry their burden of proof.

Although, in light of appellants' failure, the Board affirms the Area Director's decision, it notes that the administrative record here does not include background data supporting the distribution formula chosen by the Area Director. Nor does it show that the formula was presented to the

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6/ According to the summary of the Aug. 29, 1991, meeting and the tribal letters included in the record, this statement is incorrect. The documents in the record show that three tribes voted for option A and two voted for option B.

tribes for discussion. In Shoshone-Paiute Tribes v. Phoenix Area Director, 18 IBIA 423 (1990), the Board stated that a formula for distribution of funds for P.L. 93-638 purposes should be made available to the affected tribes for comment and discussion, together with supporting data, prior to the time for negotiation of the contracts for the fiscal year to which the formula applies.

There are significant differences between this case and Shoshone-Paiute Tribes, where the distribution formula was not presented to the tribes until after the fiscal year had begun and the tribes' contracts had already been negotiated. Here, efforts to reach an agreement among the tribes were initiated well in advance of FY 1993. These efforts included extended discussions among the tribes concerning the relative merits of various formulas, although it is not clear whether the tribes had the opportunity to discuss the Area Director's formula. Perhaps most significantly, the tribes in this case explicitly requested the Area Director to issue a decision in light of their continued failure to reach agreement. Implicit in this request is the acknowledgment that further discussions would be futile.

For these reasons, the Board concludes that Shoshone-Paiute Tribes does not require that the Area Director's decision be vacated in this case. Nevertheless, in future years, if it again becomes necessary for the Area Director to decide upon fund distribution for these tribes, he should seek to present a draft distribution formula, with supporting data, for discussion and comment by the tribes prior to issuing his decision. 7/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 16, 1991, decision of the Acting Anadarko Area Director is affirmed.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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7/ The Board recognizes, however, that the need for the Area Director to render a decision of this nature may not become apparent until a critical stage has been reached, especially if tribal negotiations fail unexpectedly at the last minute.