



INTERIOR BOARD OF INDIAN APPEALS

Otoe-Missouria Tribe v. Deputy Commissioner of Indian Affairs

30 IBIA 232 (03/07/1997)



# United States Department of the Interior

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

OTOE-MISSOURIA TRIBE,	:	Order Dismissing Appeal
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 95-133-A
DEPUTY COMMISSIONER OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	March 7, 1997

Appellant Otoe-Missouria Tribe appealed to the Board from a June 5, 1997, decision of the Deputy Commissioner of Indian Affairs, declining to waive 25 CFR 12.103(j), concerning salaries paid to law enforcement officers under Indian Self-Determination Act (ISDA) contracts. At the time of the Deputy Commissioner's decision, the present regulations in 25 CFR Part 900 had not yet been promulgated. Thus, there was a question as to the proper appeal procedures to be followed.

Appellant contended, in essence, that the issue in the appeal was subject to section 107(e) of ISDA, 25 U.S.C. § 450k(e) (1994), which provides:

The Secretary may, with respect to a contract entered into under this Act, make exceptions in the regulations promulgated to carry out this Act, or waive such regulations, if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this Act, and is not contrary to statutory law. In reviewing each request, the Secretary shall follow the timeline, findings, assistance, hearing, and appeal procedures set forth in section 102.

Because this was a case of first impression, the Board requested briefing from the parties as to whether the regulation in 25 CFR 12.103(j) is a "regulation promulgated to carry out this Act" within the meaning of section 107(e), and thus whether a hearing on the record was required in this case. The Board also requested that the Deputy Commissioner advise it concerning the then-existing procedures for referring ISDA cases for hearing.

The parties agreed that 25 CFR 12.103(j) is a "regulation promulgated to carry out this Act" within the meaning of section 107(e). Accordingly, they also agreed that appellant was entitled to a hearing on the record under ISDA. The Board found the parties' arguments persuasive and therefore concluded that appellant was entitled to a hearing on the record.

In response to the Board's procedural inquiry, the Deputy Commissioner took the position that the hearings and appeals procedures in 25 CFR Part 271 (1995) were not applicable to this appeal and recommended that the Board retain jurisdiction over the appeal under its authority in 43 CFR Part 4 and refer the matter for hearing under 43 CFR 4.337(a).

The Board agreed that the procedure recommended by the Deputy Commissioner was the most efficient means by which appellant could be afforded its statutory right to a hearing. Therefore, by order of September 1, 1995, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for assignment to an Administrative Law Judge under 43 CFR 4.337(a).

The matter was assigned to Administrative Law Judge Richard L. Reeh, who issued a scheduling order on September 21, 1995. The Deputy Commissioner responded to the order, but appellant did not. On February 23, 1996, Judge Reeh issued a "Request for Comments," stating: "The parties should be allowed an opportunity to submit comments as to whether this matter should be returned to the Interior Board of Indian Appeals with an advisory that a hearing was not conducted because Appellant failed to participate in the administrative hearing process."

Having received no comments, Judge Reeh issued a decision on April 23, 1996, stating: "Absent participation of any kind by Appellant, \* \* \* the record suggests no realistic objective for further inquiry. Neither has the Appellant Tribe evidenced a desire to engage in discovery nor has it raised any genuine issue of material fact."

Judge Reeh accordingly determined that the matter should be returned to the Board and advised the parties of their right to file exceptions or comments with the Board. No exceptions or comments were filed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR.4.1, this appeal is dismissed for failure to prosecute.

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//original signed  
Anita Vogt  
Administrative Judge

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge