



INTERIOR BOARD OF INDIAN APPEALS

Stockbridge-Munsee Community v. Acting Minneapolis Area Director,  
Bureau of Indian Affairs

30 IBIA 285 (04/15/1997)



# United States Department of the Interior

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

STOCKBRIDGE-MUNSEE COMMUNITY, : Order Vacating Decision  
Appellant : and Remanding Case  
: :  
v. : :  
: Docket No. IBIA 96-29-A  
ACTING MINNEAPOLIS AREA DIRECTOR, :  
BUREAU OF INDIAN AFFAIRS, :  
Appellee : April 15, 1997

The Stockbridge-Munsee Community (Tribe) seeks review of a November 17, 1995, decision issued by the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to reissue a Deputy Special Officer Commission (DSO or DSOC) to James Davids, the Tribal Conservation Officer. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and remands this matter to the Area Director for further consideration.

By letter dated April 5, 1995, the Tribal Chairman wrote to the Area office requesting that Davids' DSOC be renewed. After apparently receiving no response, on July 26, 1995, the Chairman wrote directly to the Area Director, again asking that the DSOC be renewed. Information which was apparently submitted with the Chairman's second request included several citations which Davids issued under 18 U.S.C. § 1165 (1994). <sup>1/</sup>

By letter dated September 29, 1995, the Area Director requested additional information from the Tribal Chairman. The letter stated at page 1:

We are hesitant to reissue a DSO until some matters are clarified.

Deputy Special Officer Commission Cards are issued for the sole purpose of obtaining active assistance in the enforcement of applicable Federal criminal statutes. They are not issued

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<sup>1/</sup> Section 1165 provides:

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

All further citations to the United States Code are to the 1994 edition.

for the purpose of extending jurisdiction over non-Indians who may commit crimes in Indian country. Further, we are extremely careful to issue DSO's without fully understanding their intended use by the holders. As you know, the level of liability risk for the Federal government is tremendous.

We note that the [Indian Self-Determination Act 2/] contract [BIA] has with the [Tribe] does not specifically address Federal law enforcement. In fact, it specifies only the investigation and enforcement of all tribal conservation regulations. While we are fully aware that the DSO's have been issued in the past, automatic reissuance is not our policy.

In order for us to consider reissuance, we request that you provide us with some additional information. How many Federal citations and arrests were affected [sic] through the DSO? Specify if the subjects were Indians or non-Indians. To what Federal court were the subjects referred? Was the US Attorney's office apprised or otherwise consulted? Please provide this information for the past three years.

The Tribal Chairman responded to the concerns raised by letter dated October 20, 1995.

On November 17, 1995, the Area Director declined to reissue Davids' DSOC. After breaking down citations issued by year, the Area Director stated that "[o]ut of the last five years there were only four (4) federal citations issued by Mr. Davids." The Arpa Director continued:

During the last conference call with you and some of the tribal council members and Mr. Davids, we requested any and all training Mr. Davids attended for past years after attending the Indian Police Academy. We have not received any of this information on Mr. Davids on going in-service training to keep his [BIA] certificate current.

We might add that there is no indication that Mr. James Davids is a **full-time law enforcement officer**.

Under 68 BIAM [Bureau of Indian Affairs Manual] Supplement 1, Section 9.1 Policy and Purpose.

It shall be the policy of [BIA] to issue Deputy Special Officer Conrdsions to Federal, State, local, and Tribal full-time certified law enforcement officers who will serve without compensation from the Federal government, for the purpose of obtaining active assistance in the enforcement of applicable Federal criminal statutes, including hunting and fishing regulations in Indian country.

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2/ Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203, as amended, 25 U.S.C. §§ 450-450n (PL 638).

Under 68 BIAM Supplement 1, section 9.5 (B):

The application form shall be fully completed and attested to by the chief law enforcement officer of the enforcement agency for which the **applicant is a full-time officer.**

Under 9.6 Qualifications Standards:

All recipients of Deputy Special Officer Commissions shall meet the minimum standards set forth in 25 CFR 11.304 (Revised as of April 1, 1995 section 12.103).

Under the current P.L. 638 Fish and Wildlife Management and Conservation Enforcement contract Description / Specifications / Statement of Work, Part C-2.C Conservation Law Enforcement States: The Contractor Shall:

[Recitation of contract provisions omitted.]

As you can see from the above, no where does it state that the conservation enforcement officer will enforce Federal law.

There is another concern we have regarding the issuance of a [BIA] DSO card to Mr. Davids. In checking our records we have found there is no documentation the [Tribe] conducted a full back ground investigation of Mr. James Davids.

\* \* \* \* \*

Lastly, as you can see by the above, Mr. Davids is not considered a full-time Law Enforcement Officer, and as stated above no where in the P.L. 638 Fish and Wildlife Management contract does it state that the conservation officer will enforce Federal laws.

Under 68 BIAM Issuance of Deputy Special Officer Commissions, Supplement 1, section 9.13 Caution. states:

The Deputy Special Officer Commission endorses the holder with federal authority and responsibility and concomitantly places a high level of liability risk upon the U.S. Government. In order to reduce liability risks for the Government, great care should be taken to adhere to the policies and procedures set forth.

Also under 9.14 Commissions. states:

Commissions are to be issued only when a legitimate law enforcement need requires issuance. Commissions are not to be issued solely for the furtherance of inter-agency or public relations.

For the above reason, we feel that issuing a [BIA] DSO card to Mr. Davids would not be proper or a benefit to the U.S. Government.

Id. at 2-6.

The Tribe appealed this decision to the Board and filed a brief. The Area Director did not file a brief.

The Area Director raised five general concerns in declining to reissue Davids' DSOC: (1) Davids had issued only four Federal citations in the past five years; (2) BIA had not received information concerning Davids' continuing training to keep his BIA certificate current; (3) Davids is not a full-time law enforcement officer; (4) the PL 638 contract does not provide that Davids would enforce Federal law; and (5) BIA's records did not show that the Tribe had conducted a full background investigation on Davids.

The Tribe states that Davids was hired in 1977 as its Chief Conservation Officer, and received his first DSOC in 1978. It contends that Davids has continuously held a DSOC until his most recent commission expired in March 1995.

In regard to the Area Director's second concern, the Tribe contends that Davids met every requirement set forth in 25 C.F.R. § 12.103 (1996), which established minimum requirements for law enforcement programs receiving funding from BIA. Although the Area Director has not disputed the Tribe's statement, it is not entirely clear whether this information was before her when she issued her decision.

In regard to the Area Director's fifth concern, the Tribe asserts that BIA questioned whether a full background investigation had been conducted on Davids before reissuing his DSOC in 1991. It submits copies of the 1991 correspondence with BIA in support of its contention that BIA accepted as sufficient the information provided at that time. From the wording of the Area Director's decision, it appears possible that BIA failed to retain this correspondence in its files and was unaware that the same question had been asked and answered in 1991.

In regard to the Area Director's first concern, that Davids had issued only four Federal citations in five years, the Tribe argues that the Area Director failed to show a rational connection between this fact and the decision not to reissue Davids' DSOC. While acknowledging that the Board has limited authority to review discretionary BIA decisions, including the issuance of DSOCs, the Tribe cites Wallace v. Aberdeen Area Director, 26 IBIA 150 (1994), and ZCA Gas Gathering Inc. v. Acting Muskogee Area Director, 23 IBIA 228 (1993), in arguing that the Board has required BIA officials to show a reasoned basis for discretionary decisions.

The Area Director's statement concerning the number of citations Davids had issued does not contain any explanation of how the number of citations issued relates to a decision as to whether the DSOC should be reissued. In the absence of such an explanation, the Tribe--and the Board--are forced to

speculate as to why the Area Director believed this fact was significant. <sup>3/</sup> In Quileute Tribe v. Portland Area Director, 23 IBIA 20 (1992), the Board held that "[i]t is a basic precept of the American administrative law system that a person has a due process right to be informed of the reasons for a government agency's decision affecting it." In applying this rule, the Board has cited Bowen v. American Hospital Association, 476 U.S. 610 (1986), in which the Court held that "an agency's explanation of the basis for its decision must include 'a "rational connection between the facts found and the choice made"' (476 U.S. at 626), and that an agency has a responsibility "to explain the rationale and factual basis for its decision, even though we [the Court] show respect for the agency's judgment in both." Id. at 627. See also Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, 28 IBIA 288 (1995); GMG Oil and Gas Corp. v. Muskogee Area Director, 18 IBIA 187 (1990); Bien Mur Indian Market Center v. Deputy Assistant Secretary-- Indian Affairs (Operations), 14 IBIA 231 (1986).

The Board agrees with the Tribe that the Area Director has failed to show a rational connection between the number of citations issued and the decision not to reissue the DSOC.

The Area Director's third and fourth areas of concern are that Davids is not a full-time law enforcement officer and is not required to enforce Federal law under the Tribe's PL 638 contract. The Tribe argues that Davids' employment status has not changed during the 17 years he has had a DSOC, and that Davids is a full-time employee. Although it is not entirely clear from either the administrative record or the Tribe's argument, it appears that the same PL 638 contract has been in place for a substantial period of time. The Tribe argues that because BIA has known both the extent of Davids' employment and the contents of the PL 638 contract, and has previously questioned neither fact in reissuing the DSOC, the Area Director has failed to show a rational connection between those facts and the present decision not to reissue the DSOC.

The Board has held that BIA has not only the authority, but also the responsibility, to correct prior erroneous decisions or interpretations of law or regulation. However, as it stated in Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992), "because persons dealing with a Federal agency are entitled to rely on prior administrative interpretations, any change in the agency's position must be fully and clearly explained in order to show that the change is not arbitrary or capricious." See also cases cited in Hopi. Here, the Area Director's decision gives no hint as to why opposite decisions were reached on the same facts. Without an explanation for the departure from prior practice,

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<sup>3/</sup> For instance, Board could speculate that the low number of citations issued suggests that there is no need for assistance in enforcing Federal law on the Reservation. See discussion below. It is equally possible, however, that few citations were issued because the public was aware that Davids was not only authorized to enforce Federal law on the Reservation, but was also present on the Reservation on a daily basis. Such public awareness could result in the occurrence of fewer citable incidents than there might have been if Davids were not authorized to enforce Federal law.

the Board cannot hold that the Area Director's decision is not arbitrary or capricious.

The Board thus concludes that the Area Director has apparently not had an opportunity to consider information about Davids' continuing training and his background investigation; has failed to show a rational connection between the number of citations Davids issued and the decision not to reissue his DSOC; and has failed to explain the departure from past practice in declining to reissue the DSOC on the grounds of Davids' employment status and the contents of the PL 638 contract. Under these circumstances, the Board holds that the Area Director's decision is not supported by law and substantial evidence. The Board therefore vacates that decision and remands this matter to the Area Director for further consideration.

On remand, the parties should be guided by the BIAM provisions relating to the issuance of DSOCs, 68 BIAM Supp. 1, Chap. 9; any revisions thereof; and the newly revised 25 C.F.R. Part 12, "Indian Country Law Enforcement" (effective May 2, 1997), and in particular new section 12.21. See 62 Fed. Reg. 15610, 15612 (Apr. 2, 1997). As the Board discussed in Cabazon Band of Mission Indians v. Sacramento Area Director, 30 IBIA 279, 283 (1997), it understands the BIAM to provide that "DSOCs are not to be issued unless there is a need for assistance in enforcing Federal law," and to authorize "BIA to consider the extent of the Federal need for assistance." As further discussed in Cabazon, BIA's first task "is to determine whether there is a need for assistance in the enforcement of" Federal law, including but not necessarily limited to 25 U.S.C. § 1165. Id.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Minneapolis Area Director's November 17, 1995, decision is vacated and this matter is remanded for further consideration.

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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//original signed

Anita Vogt  
Administrative Judge