



INTERIOR BOARD OF INDIAN APPEALS

Chitina Traditional Village Council v. Juneau Area Director, Bureau of Indian Affairs

31 IBIA 100 (08/01/1997)

Related Indian Self-Determination Act case:

Administrative Law Judge decision, 06/06/1997



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CHITINA TRADITIONAL VILLAGE COUNCIL, Appellant	:	Order Affirming Recommended Decision in Part and Reversing It in Part and Remanding Matter to the Area Director with Instructions
v.	:	
JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 97-49-A August 1, 1997

Appellant Chitina Traditional Village Council seeks review of a Recommended Decision issued on June 6, 1997, by Administrative Law Judge Harvey Sweitzer. The Recommended Decision concerned an October 21, 1996, decision issued by the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), declining in part to contract with Appellant under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994) (ISDA). Although the Judge upheld the Area Director's reasons for declining to contract with Appellant for four specific programs, he recommended that the October 21, 1996, decision be vacated and the matter be remanded to the Area Director for further action.

The Board has reviewed Appellant's objections to the Recommended Decision in light of the record in this matter, including the Area Director's declination decision, the record developed during the hearing before Judge Sweitzer, and the Judge's Recommended Decision. The Board finds no reason to disturb the substance of Judge Sweitzer's decision. It therefore affirms the substantive findings and conclusions of the Recommended Decision.

However, the Board does find reason to modify the Judge's procedural disposition of this case. It takes this action under 43 C.F.R. § 4.318 through exercise of the Secretary's inherent authority to correct a manifest error, because it finds that Judge Sweitzer erroneously relied on a prior Board decision in vacating the Area Director's declination decision.

Although Judge Sweitzer rejected each of Appellant's asserted grounds for reversing the declination decision, and specifically upheld the Area Director's declination decision as to each of the four program areas for which the Area Director declined to contract, he nevertheless vacated the decision. He stated at page 14 of the Recommended Decision:

One of [Appellant's] allegations is that it has never been informed of its precise tribal shares or the precise tribal share formulas, calculations, and supporting data. This allegation was proven true at the hearing.

In the case of Shoshone-Paiute Tribes [of the Duck Valley Reservation] v. Phoenix Area Director, 18 [IBIA] 423 (1990), the Board held that a formula for distribution of funds for self-determination contractual 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. * * * Because the BIA failed to do so in that case, the Board vacated the decision of an Area Director concerning distribution of self-determination contract funds. * * *

In the present case, it may be argued that the BIA met its duty to make available the tribal share formulas during the early 1996 meeting to which [Appellant] was invited but apparently did not attend. Also, it did provide some estimates of allotment acreage figures, but there is no indication that these particular figures were intended for use or were used in the calculations. The evidence shows that the BIA failed to make available for comment and discussion, at a minimum, the supporting data upon which it relied to calculate [Appellant's] tribal shares.

Further, the Area Director has conceded at page 3 of Appellee's Opening Post-Hearing Brief that [Appellant's] tribal shares have not been precisely and conclusively determined. Consequently, the Area Director's decision (declination letter) should be vacated and the matter should be remanded so that the precise tribal share figures, formulas, calculations, and supporting data may be made available to [Appellant] for comment and discussion.

To put the Area Director's concession in context, the Board quotes from pages 2-4 of his Post-Hearing Opening Brief:

Because the BIA has successfully carried that burden [of proof], through evidence presented at the hearing and as explained more fully below, the declination decisions should be substantially upheld. The record is clear that the cited grounds of declination were properly invoked, and that awarding the contracts at the proposed funding levels would not be legally justified or supportable. However, it was brought out at the hearing that the precise amount of money that [Appellant] may be entitled to have included in its Fiscal Year (FY) 1997 ISDA contract for each of the proposed programs, while certainly dramatically less than the amounts sought, has not been precisely and conclusively determined, so that it would be appropriate to remand that aspect of the dispute to the BIA for additional consideration.

Accordingly, * * * a recommended decision should be issued, which upholds the BIA's October 21, 1996 decision, and declines to direct inclusion in [Appellant's] FY 1997 contract of funding at the levels proposed for any of the four programs at issue.

But in addition, such recommended decision should also call for a prompt specific determination by the BIA, in consultation with [Appellant], as to the size of [Appellant's] service area, and the amount of allotment acreage included therein, as well as the volume of commercial timber, and the service population with which [Appellant] should be credited, and any other basic data necessary for the proper application of the formulae under which [Appellant's] tribal share of available program funding should be calculated. At [Appellant's] option, funding at the levels so determined should then be included in [Appellant's] existing ISDA contract with the BIA.

The Area Director considered Appellant's FY 1997 contract proposals under what have been called the "tribal shares formulas," which are discussed at pages 11-13 of his Post-Hearing Opening Brief:

In the process of negotiating the [Self-Governance] demonstration project compacts and funding agreements, residual funding levels and allocation formulas were established for each type of program, function or activity carried on by the BIA. Although those formulas were originally developed in connection with the Self-Governance demonstration project, the same program-by-program dollar allocation criteria (or "formulas") are now being used to determine tribal shares for ISDA contracting purposes as well.

* * * * *

This significant expansion of the scope of Self-Governance [under the 1994 amendments to ISDA] led the BIA to more formally undertake the task of devising a consistent methodology of dividing up available funds between tribes, whether those funds were to be included in contracts to provide federal programs under the ISDA, or were to be transferred to new Self-Governance compacts. * * * This entire process was referred to as the "tribal shares" process, aimed at identifying for each tribe, on a program-by-program basis, the amount of funds it would be entitled to receive in its ISDA contract or Self-Governance agreement if it chose to take over any particular federal program or function.

It was shown at the hearing that although the tribal shares formulas were initially developed on the Area level, their further development was coordinated on a national level. It was also shown that even though the refinement of these formulas is on-going, prior to the Area Director's declination decision here, a version of the formulas was in place and use of those formulas in determining the amount of funding to which any particular tribe was entitled in FY 1997 was mandated by the BIA Central Office. Appellant has not contended that it was unaware that the tribal shares formulas would be applied in reaching a decision on its contract proposal. It was revealed at the hearing that Appellant has argued in other contexts that the formulas are "unfair." This fact indicates that Appellant had some idea of the nature of the formulas and the level of funding it could expect to receive through their application.

In deciding the amount of funding to which Appellant was entitled in each program area for which it sought an ISDA contract, the Area Director used the program-specific tribal shares formulas. The BIA witnesses at the hearing were not conversant with the particulars of each program-specific distribution formula. The Area Director admitted that Appellant had not been given either the formulas or the calculations of the specific amount of funding to which Appellant was entitled under them. He also admitted that because of a continuing dispute over the extent of Appellant's service area/population, the precise amount of funding could not be determined.

Judge Sweitzer found that the Area Director properly employed the tribal shares formulas in determining the amount of funding to which Appellant was entitled in each of the four program areas which were declined and that, even giving Appellant the benefit of the doubt by using the highest possible service area/population, the Area Director also properly declined those contract proposals because the funding which Appellant sought for each program greatly exceeded the applicable funding level as determined using the formulas. The Judge further found that the Area Director's failure to set out the tribal shares formulas, calculations, and supporting data in the declination decision did not violate Appellant's right to due process.

These findings indicate that, in the context of this declination decision, it was not critical that BIA had not precisely and conclusively determined Appellant's tribal shares or made them available for comment prior to issuance of the declination decision because, under any calculation of Appellant's shares, Appellant's proposals as to the four program areas at issue would have been declined.

Under these circumstances, the Board concludes that Judge Sweitzer erred in relying upon Shoshone-Paiute Tribes to support vacation of the Area Director's decision in this case. No declination was involved in Shoshone-Paiute Tribes. Rather, that case concerned a dispute among five tribes--which were the only tribes served by one BIA agency--as to how the budget of that agency was to be divided among them for ISDA purposes. Further, the decision in that case pre-dated the extensive amendments made to ISDA in 1994. ^{1/}

If there was enough information in the record to conclude that the declination decision was proper, the Judge should have affirmed that decision. The Area Director's failure to determine Appellant's service area/ population and to provide the specific tribal shares formulas, calculations, and supporting data should have been addressed through a remand instructing the Area Director to determine Appellant's service area/population either

^{1/} In general, the Board urges caution in applying the holdings of older Board decisions to declination cases arising under the post-1994 version of ISDA and the new regulations in 25 C.F.R. Part 900. One reason for caution is that none of the Board's cases arising prior to Aug. 23, 1996 (the effective date of Part 900), involved declination decisions. Another is that significant changes have been made to ISDA and its implementing regulations.

through negotiation or through the issuance of an appealable decision, and to provide the specific tribal shares formulas, calculations, and supporting data as part of the technical assistance which 25 C.F.R. § 900.30 requires BIA to provide after a declination decision. 2/ Once the Area Director has provided this information, it is up to Appellant to decide whether or not it wishes to avail itself of the technical assistance and/or to accept the amount of funding to which it is entitled under the tribal shares formulas.

For these reasons, the Board reverses that part of Judge Sweitzer's Recommended Decision which vacated the Area Director's decision, and affirms the October 21, 1996, declination decision.

This matter is, however, remanded to the Area Director with instructions either to negotiate a resolution of Appellant's service area/population dispute or to issue an appealable decision on that issue. The Area Director shall ensure that any other tribe or tribes that might be affected by a determination of Appellant's service area/population are included in any negotiations and/or decision. 3/

At the same time, the Area Director shall also provide Appellant with the program-specific tribal shares formulas for the four program areas at issue here. Unless the dispute over Appellant's service area/population is resolved quickly, the Area Director shall calculate the precise amount of funding to which Appellant would be entitled for the four program areas using both the smaller and larger applicable service area/population. The information provided to Appellant shall also include any additional supporting data on which the Area Director relies to make these calculations. The

2/ Section 900.30 provides: "The Secretary shall provide additional technical assistance to overcome the stated objections [to a contract proposal], in accordance with section 102(b) of the Act [25 U.S.C. § 450f(b) (1994)], and shall provide any necessary technical assistance to develop any modifications to overcome the Secretary's stated objections."

3/ The Board notes that, under the circumstances of the recommended vacation and remand in this case, the Area Director could be required to issue a service area/population determination in the context of a declination decision. These two issues are treated differently--both substantively and procedurally--under both ISDA and the regulations. It is regrettable that the Area Director was unable to make a service area/population determination prior to the declination decision. However, the Board understands that when a tribe presents an ISDA contract proposal, it may not always be possible to resolve all preliminary issues prior to the expiration of the time period for issuing a declination decision.

Furthermore, if a service area/population determination is made in the context of review of an ISDA contract proposal, it is possible that other tribes that might be affected by the service area/population determination might be inadvertently overlooked as being interested parties and therefore might be excluded from a decisionmaking process which would significantly affect them.

same information shall be provided to any other tribe or tribes that might be affected by a determination of Appellant's service area/population. By requiring BIA to provide Appellant with information concerning the level of funding to which Appellant would be entitled if its service area/population is ultimately determined to be the larger area/population, the Board does not hold that this amount must be given to Appellant prior to a final determination of Appellant's service area/population.

The Area Director shall commence this process as soon as possible but no later than 10 calendar days after receipt of this Order.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's June 6, 1997, Recommended Decision is affirmed in part and reversed in part. The Area Director's October 21, 1996, declination decision is affirmed, and this matter is remanded to the Area Director for further action as set forth in this Order. This decision is final for the Department of the Interior.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge