INTERIOR BOARD OF INDIAN APPEALS

Pascua Yaqui Tribe of Arizona v. Acting Director, Tucson Area Office,
Indian Health Service

32 IBIA 98 (03/12/1998)

Related Board case:
33 IBIA 88

Related Indian Self-Determination Act cases:
Administrative Law Judge decision, 11/23/1998
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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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PASCUA YAQUI TRIBE OF ARIZONA, Appellant	: Order Docketing Appeal and Finding Notice of Appeal Timely
v.	:
ACTING DIRECTOR, TUCSON AREA OFFICE, INDIAN HEALTH SERVICE, Appellee	: Docket No. IBIA 98-61-A : March 12, 1998

On February 23, 1998, the Board of Indian Appeals (Board) received a Notice of Appeal from the Pascua Yaqui Tribe of Arizona (Tribe), through counsel, Philip Baker-Shenk, Esq., Washington, D.C. The Tribe seeks review of an October 20, 1997, decision of the Acting Director, Tucson Area Office, Indian Health Service (Director; IHS), declining a proposed Indian Self-Determination Act (ISDA) contract.

The Tribe's Notice of Appeal was postmarked February 20, 1998, and appeared untimely. The Tribe stated, however, that it initially sought an informal conference on the declination, and that it was engaged in correspondence with IHS concerning that request. Because this correspondence was not included with the Notice of Appeal, on February 24, 1998, the Board requested these documents under 25 C.F.R. § 900.160(a)(2). Both the Tribe and the Director filed responses.

The Director declined the Tribe's proposal on October 20, 1997. The declination decision properly informed the Tribe that, within 30 days of its receipt of the decision, it could request an informal conference under 25 C.F.R. § 900.154, file an appeal with the Board of Indian Appeals under 25 C.F.R. § 900.158, or proceed to Federal court under section 110(a) of ISDA, 25 U.S.C. § 450m-1(a) (1994).

By letter dated November 12, 1997, the Tribe requested an informal conference. The Tribe further stated: "In making this decision we are asking that the third party overseeing the hearing be from outside [IHS]."

On December 4, 1997, the Director responded:

> The Tucson Area, with guidance from [IHS's] Headquarters Leadership Team, subcommittee on appeals, has reviewed the [Tribe's] request for an outside hearing officer and has determined the the [Tribe's] request * * * cannot be accommodated. Pursuant to [25 C.F.R. §] 900.155 * * *, the hearing officer shall be a designated representative of the Secretary and shall have the authority to make a recommended decision which will bind the [IHS] unless appealed by the tribe.

The Director provided the Tribe with a list of individuals who had been designated as hearing officers, requested that the Tribe select three of

those individuals, and stated that IHS would then choose a hearing officer from among the three selected by the Tribe.

By letter of December 9, 1997, the Tribe objected to the denial of its request for a non-IHS hearing officer, and agreed to an extension of the time for holding the informal conference until this issue was resolved.

The Director responded on December 18, 1997, stating that the denial of the request for a non-IHS hearing officer was based on the regulations in 25 C.F.R. Part 900. He noted: "You have the option of pursuing this issue with an independent administrative law judge via the Interior Board of [Indian] Appeals, or we could still utilize the informal hearing process if you want to reconsider and use an IHS Hearing Officer."

On January 6, 1998, the Tribe again wrote to the Director, stating: "Please note that we are still awaiting a response on when you will be prepared to sit down with us to negotiate the [ISDA] proposal we submitted in August. We believe we have given you more than enough time to prepare for negotiations." Neither the Tribe nor the Director has submitted any IHS response to the Tribe's January 6, 1998, letter. At page 2 of its Notice of Appeal, the Tribe states: "Despite the renewed requests of the Tribe, the IHS has neither scheduled nor held any informal conference with the Tribe to negotiate the proposal declination."

The Tribe's Notice of Appeal to the Board was postmarked February 20, 1998, 123 days after the Director's October 20, 1997, declination decision and 45 days after the Tribe's January 6, 1998, letter to the Director. The Tribe acknowledges this passage of time, but argues:

> No Agency should be permitted to preclude an administrative appeal being lodged with the Board by dragging out negotiations over an informal conference hearing proceeding for more than 60 days after the Tribe has received the initial declination decision. To treat the Tribe's Notice of Appeal as untimely under these circumstances would breach fundamental principles of due process and render hollow the procedures for informal conference hearings.

Notice of Appeal at 4-5.

There is no dispute that the Tribe filed a timely request for an informal conference under 25 C.F.R. § 900.154. However, problems arose concerning the informal conference when the Tribe requested a non-IHS hearing officer. Because of the Tribe's insistence on a non-IHS hearing officer, and IHS' insistence that it could not honor that request, no informal conference has been scheduled or held. Therefore, no informal conference recommended decision was issued.

Under 25 C.F.R. § 900.158(a), a notice of appeal must be filed with the Board "within 30 days of [the tribe's receipt of] either the initial decision or the recommended decision [after an informal conference]." Section 900.159 allows a 30-day extension of time for filing a notice of appeal if a request for an extension is filed within the original 30-day

period. Citizen Potawatomi Nation v. Acting Area Director, Oklahoma City Area, Indian Health Service, 30 IBIA 182 (1997).

The regulations do not anticipate a situation in which an informal conference is not held once it has been requested, and therefore do not provide a timeframe for appealing from the failure of a Federal agency to hold an informal conference. After reading the Director's December 18, 1997, second denial of the Tribe's request for a non-IHS hearing officer, the Board can understand that the Director may have believed that he had issued his final statement on that issue, even though the letter does not explicitly state this. However, in keeping with ISDA's general goals and allocations of burdens, the Board believes that, when the Tribe indicated in its January 6, 1998, letter that it believed there was still an open question concerning the informal conference, IHS had the responsibility to make its decision not to provide a non-IHS hearing officer explicit and final. By failing to respond to the Tribe's January 6, 1998, request, IHS left the matter hanging.

Furthermore, the Tribe mailed a Notice of Appeal to the Board 45 days after the date of its January 6, 1998, letter to the Director. Based on the evidence presented above as to how long it might take for the Tribe to receive a mailed response from the Director, the Board finds that the Tribe mailed its Notice of Appeal within roughly a 30-day period from the time it had any reason to believe that the Director was not going to respond to its January 6, 1998, letter. The Board concludes that under the, hopefully unique, circumstances of this case, the Tribe acted reasonably and promptly in filing its Notice of Appeal. Therefore, the Board holds that the Tribe's Notice of Appeal was timely filed. 1/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of Health and Human Services, 25 C.F.R. Part 900, this Notice of Appeal from the Acting Tucson Area Director's October 20, 1997, declination decision is docketed and found timely. Therefore, the appeal will be referred to an Administrative Law Judge.

//original signed	//original signed
Kathryn A. Lynn	Anita Vogt
Chief Administrative Judge	Administrative Judge

1/ Despite this holding, the Board notes that there were several points at which the Tribe might have been well-advised to file a protective notice of appeal and to request a stay while negotiations over an informal conference continued. One such time was when the Tribe received the Director's Dec. 4, 1997, letter declining to provide a non-IHS hearing officer. Another time was when the Tribe received the Director's Dec. 18, 1997, letter noting the availability of independent review by an administrative law judge. If the Tribe had filed a protective notice of appeal, it is less likely that there would have been questions concerning whether its notice of appeal was timely.