



INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Goggles

46 IBIA 258 (02/14/2008)

Denying reconsideration of:

46 IBIA 158

Related Board case:

47 IBIA 174



United States Department of the Interior

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ESTATE OF JOSEPH GOGGLES) Order Denying Reconsideration and
) Declining to Address Motions
)
) Docket No. IBIA 08-33
)
) February 14, 2008

On January 4, 2008, the Board of Indian Appeals (Board) dismissed for lack of jurisdiction this appeal filed by Ruth Big Lake and Edie Big Lake (Appellants), through Sky D. Phifer, Esq. 46 IBIA 158. Appellants had sought review of the October 31, 2007, Decision by Indian Probate Judge (IPJ) James Yellowtail in the estate of Joseph Goggles. On February 4, 2008, the Board received from Appellants a petition for reconsideration that included motions for an extension of time and for production of a more complete hearing transcript. For the reasons set forth below, we deny Appellants' petition for reconsideration. In addition, we conclude that we lack jurisdiction to entertain Appellants' motions for an extension of time to file a petition for rehearing and for a more complete hearing transcript, and therefore we decline to address these motions.

Petition for Reconsideration

Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. 43 C.F.R. § 4.315; *Estate of Doris June Derickson*, 44 IBIA 177 (2007). The Board dismissed Appellants' appeal for lack of jurisdiction because they failed first to seek rehearing before the IPJ. See 43 C.F.R. § 4.320(a); *Estate of Phillip Lorraine Post*, 44 IBIA 108, 109 (2007); *Estate of Frank Andrew Spencer*, 39 IBIA 190 (2003). The Board observed, however, that Appellants had served their notice of appeal on the IPJ. We expressed no opinion on whether the IPJ may construe Appellants' notice of appeal as a timely petition for rehearing.

Appellants make three arguments in support of their petition for reconsideration. First, Appellants argue that it would have been futile for them to seek rehearing because the IPJ denied their request for the preparation of a full transcript of the hearing in this estate. Second, Appellants contend that the regulations themselves are confusing concerning the

need to first seek rehearing before appealing to the Board. Finally, Appellants claim that the Board may exercise jurisdiction over their appeal pursuant to 43 C.F.R. § 4.318. We conclude that none of Appellants' arguments show extraordinary circumstances meriting reconsideration of our determination that we lack jurisdiction over Appellants' appeal and therefore deny reconsideration. Because we summarily dismissed the appeal, we briefly address each contention.

First, with respect to futility, there is no provision in the regulations that permits appellants to avoid petitioning for rehearing on grounds of futility. Even if futility were a recognized exception to the administrative exhaustion requirements, we fail to see how — without more — the denial of a fuller transcript leads to the conclusion that a petition for rehearing is futile.

Second, we reject Appellants' contention that the regulations are confusing. They claim that 43 C.F.R. § 4.241(a), which governs petitions for rehearing, suggests that rehearing is discretionary because aggrieved parties “may” file a petition for rehearing. In addition, Appellants claim that the Board's jurisdictional regulation, 43 C.F.R. § 4.320(a), fails to state that an appeal will lie after a *decision* on a petition for rehearing, thus suggesting that an appeal may lie to the Board simply on a petition for rehearing. Appellants misinterpret the regulations.

With respect to subsection 4.241(a), the decision by aggrieved parties to pursue rehearing after an initial probate decision *is* a discretionary decision but it does not mean that the discretion includes the option of appealing directly to the Board. The alternative, if no petition for rehearing is filed, is that the initial probate decision may become final and the estate may be distributed according to the terms of the decision. *See* 43 C.F.R. §§ 4.240(c), 4.241(h); *cf.* § 4.242(f).¹ Moreover, and especially in light of the clear language of subsection 4.320(a), we do not see how subsection 2.421(a) can be construed to suggest or imply that a direct appeal to the Board is permissible. Subsection 4.320(a) states that a right of appeal to the Board in Indian probate matters will lie in three circumstances: from an “*order . . . on a petition for rehearing or petition for reopening or regarding tribal purchase of interests.*” (Emphasis added.) We fail to see how substitution of the word “decision” for the word “order” in subsection 4.320(a) would make the intent of this provision any clearer than it is. In addition, the IPJ gave clear and accurate instructions for seeking review of his decision: “This decision becomes final . . . unless . . .

¹ Of course, some appellants may be eligible to seek reopening of the estate pursuant to 43 C.F.R. § 4.242.

a written petition for rehearing shall have been filed *with the undersigned Indian Probate Judge* at the above address.” Notice Accompanying Decision, Oct. 31, 2007; *see also* Decision at 6 (“This decision is final for the Department unless a petition for rehearing is properly filed.”). We further note that the Board has clear precedent for the necessity of complying with the exhaustion requirements set forth in subsection 4.320(a). *See, e.g., Estate of Post*, 44 IBIA at 109; *Estate of Spencer*, 39 IBIA 190. Therefore, we reject Appellants’ arguments concerning the construction of 43 C.F.R. §§ 4.241(a), 4.320(a).

Third, Appellant’s contention that the Board may exercise independent jurisdiction over this appeal pursuant to 43 C.F.R. 4.318 is erroneous as a matter of law. Section 4.318 is not itself a grant of jurisdiction but a grant of authority, once jurisdiction has been otherwise established. *See Hoopa Valley Tribe v. Special Trustee for American Indians, Dep’t. of the Interior*, 44 IBIA 247, 251 (2007).

For the foregoing reasons, we conclude that Appellants have failed to show extraordinary circumstances warranting reconsideration of our decision to dismiss their appeal for lack of jurisdiction.

Motions for Extension of Time and for More Complete Transcript

In the alternative, Appellants seek an extension of time to file a petition for rehearing with the IPJ and for a more complete transcript of the hearing in Decedent’s estate. Appellants do not cite any authority for the Board to rule on their motions in the absence of jurisdiction nor do we know of any. Therefore, we decline to address these motions. However, we specifically noted in our order dismissing Appellants’ appeal to the Board that “We express no opinion on whether [Appellants’] Notice of Appeal [which was served on the IPJ] may be treated as timely filed with Judge Yellowtail and whether it should be construed as a petition for rehearing within the meaning of 43 C.F.R. § 4.241.” 46 IBIA at 159 n.1. That determination apparently still remains to be made in the first instance by the IPJ.

Conclusion

We conclude that Appellants have not met their burden of showing extraordinary circumstances in support of their petition for reconsideration. We further conclude that we lack jurisdiction to rule on Appellants’ remaining motions for an extension of time to seek rehearing and for a more complete hearing transcript.

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 Board denies reconsideration of 46 IBIA 158. The Board also declines to address, for lack of jurisdiction, Appellants' motions for an extension of time for filing a petition for rehearing with the ALJ and for a more complete transcript.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge