



INTERIOR BOARD OF INDIAN APPEALS

Sylvester R. Baker v. Great Plains Regional Director, Bureau of Indian Affairs

52 IBIA 264 (11/30/2010)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SYLVESTER R. BAKER,) Order Affirming Decision
Appellant,)
)
v.)
) Docket No. IBIA 09-15-A
GREAT PLAINS REGIONAL)
DIRECTOR, BUREAU OF)
INDIAN AFFAIRS,)
Appellee.) November 30, 2010

Sylvester R. Baker (Appellant) appealed to the Board of Indian Appeals (Board) from a September 25, 2008, decision of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director affirmed the June 5, 2008, decision of BIA's Turtle Mountain Agency Superintendent (Superintendent) to deny benefits to Appellant under the Adult Vocational Training Program (AVTP) and the Employment Assistance Program (EAP). The Regional Director's decision was based on Appellant's failure to provide verification of his tribal membership and his failure to meet residency requirements. We affirm the Regional Director's decision on the sole ground that Appellant did not satisfy the residency requirements for either AVTP or EAP.

Factual Background

On or about May 23, 2008, BIA's Turtle Mountain Agency received a job placement and training assistance application from Appellant for the purpose of obtaining training as a heavy equipment operator from American Construction Training, a.k.a. Allied Career Training (ACT), in Dothan, Alabama. On the application, Appellant provided his address in Fingal, North Dakota. Appellant also submitted an "Individual Development Plan," which asked inter alia, "Have you been a resident of Rolette County [North Dakota] in the last six months?" Appellant left the answer space for this question blank. Finally, Appellant submitted a form entitled, "Financial Aid Budget," on which he listed his name and identified his tribe as the "Turtle Mountain Band." On June 5, 2008, the Superintendent denied Appellant's application on the grounds that the Agency's priority was to provide financial assistance to residents of Rolette County, where unemployment apparently had reached 66%.

Appellant appealed the Superintendent's decision to the Regional Director, and asserted that he should be entitled to financial assistance regardless of whether he lived in Rolette County. He stated that he felt discriminated against "because [he] own[s his] own home and choose[s] not to live on the reservation." Appeal to Regional Director, Administrative Record (AR), Tab 2. Appellant followed up his appeal with a statement of reasons to the Regional Director in which he asserts that he is a member of the Turtle Mountain Band of Chippewa Indians, that he has never previously received funding from BIA Social Services, that he does not live on the reservation due to the lack of jobs for which he is qualified, and that his reason for seeking further education is to avoid returning to the reservation and increasing the unemployment rate. He enclosed documents from both ACT and from North Dakota State College of Science for purposes of comparing the available training, costs of training, and length of training. Appellant also submitted to the Regional Director verification of his tribal enrollment, signed by the Acting Superintendent on June 19, 2008, and proof that he had not previously received financial assistance from BIA.

The Superintendent submitted an "Answer" to the Regional Director in which he asserted that, given the rising costs of education and a limited budget, his office is unable to provide services to everyone who needs financial aid. He also noted that Appellant had not complied with 25 C.F.R. § 27.1(i) by submitting to the Superintendent verification of his tribal enrollment.¹

On September 25, 2008, the Regional Director issued his decision (Decision). He construed Appellant's application under both AVTP and EAP. As he explained, AVTP "is designed to allow Indians to *acquire* job skills for employment and [EAP] is designed to assist those with an *existing* job skill to obtain employment." Decision at 1. Both programs, he further explained, share a common eligibility requirement: That the applicant reside on an Indian reservation or off reservation in a community designated in the Federal Register as "near reservation" for purposes of receiving AVTP or EAP benefits. Because Appellant did not reside on the Turtle Mountain Reservation or in a community designated as "near reservation" for the Turtle Mountain Band of Chippewa Indians, the Regional Director affirmed the Superintendent's decision. In addition, the Regional Director concluded that denial of Appellant's application was also appropriate based on Appellant's failure to provide the Superintendent with verification of his tribal membership status.

Appellant appealed the Decision to the Board, which included his statement of reasons and several exhibits. The Regional Director submitted an answer brief. Appellant did not file a reply brief.

¹ Section 27.1(i) defines "Indian" for purposes of AVTP.

Discussion

Because Appellant provided proof of his tribal membership to the Regional Director, and the Regional Director agreed that this deficiency in the application to the Superintendent was easily remedied, we decline to affirm the Regional Director's decision on the grounds that Appellant had not provided this proof to the Agency. But we do affirm the Regional Director's decision on the basis of Appellant's residency. Appellant does not assert that he lives, nor does the record suggest that he does live, "on or near an Indian reservation," as defined by the EAP and AVTP programs, which is a criterion for eligibility for these financial assistance programs.

1. Standard of Review

We review the Regional Director's decision to determine whether it is arbitrary or capricious, in accordance with the law, and supported by substantial evidence. *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007). It is Appellant's burden to establish error in the Regional Director's decision. *Id.*

2. Legal Framework

In 1956, Congress enacted legislation for the purpose of assisting adult Indians "who reside on or near Indian reservations" in obtaining vocational training so that they might then find "reasonable and satisfactory employment." 25 U.S.C. § 309. Congress limited the availability of assistance "primarily to Indians . . . *who reside on or near an Indian reservation.*" *Id.* (emphasis added). The EAP, on the other hand, is derived from the Snyder Act, 25 U.S.C. § 13, which authorizes the expenditure of appropriations for a variety of programs benefitting Federally-recognized tribes and their members. The Snyder Act does not prescribe eligibility criteria for any specific program.

The eligibility requirements set out by Congress in § 309 are mirrored in BIA's regulations for both AVTP and EAP. To be eligible for assistance, applicants must be *inter alia* "adult Indians residing on or near Indian reservations." 25 C.F.R. §§ 26.5(a), 27.5(a) (2008).² "Near reservation" is defined as "those areas or communities adjacent or

² In 2009, the Department of the Interior collapsed the two sets of regulations for EAP and AVTP into a single set of regulations, 25 C.F.R. Part 26 (2010). *See* 74 Fed. Reg. 41,331 (Aug. 17, 2009). Because the Regional Director's decision that is before us issued in 2008, we apply the regulations in effect at the time of his decision unless otherwise noted.

(continued...)

contiguous to reservations which are designated by the Assistant Secretary.” *Id.* §§ 26.1(i), 27.1(k). “Near reservation” communities are selected in consultation with the tribal governing body of the reservation and are based upon criteria including the “[n]umber of Indian people native to the reservation residing in the [near reservation] area.” *Id.* §§ 26.1(i)(1); 27.1(k)(1). These two subsections further require that all “near reservation” communities be published in the Federal Register. Indians interested in applying for financial assistance for vocational training are encouraged to submit their application to “the servicing office nearest to his/her residence at the time of application.” *Id.* §§ 26.4(a), 27.4(a).

3. Merits

As we previously noted, the Regional Director upheld the denial of financial assistance to Appellant on two grounds: Appellant had not provided proof of tribal membership and Appellant did not reside on his tribe’s reservation or in a designated “near reservation” community for his tribe. We affirm the Regional Director’s decision on the basis of Appellant’s residence, which undisputedly was neither on the Turtle Mountain Indian Reservation or in the “near reservation” community comprising Rolette County, North Dakota, nor does Appellant contend that he resides on another Indian reservation or in a designated “near reservation” community as a basis for eligibility. We reject the Regional Director’s reliance on the alleged lack of verification of tribal enrollment as a basis for denying assistance to Appellant.

At the time of his application for assistance and apparently continuing to the present, Appellant resided in Fingal, North Dakota. It is undisputed that Fingal is not located in Rolette County.³ Appellant also does not dispute that Rolette County is the only area located in North Dakota that is designated as a “near reservation” community for the Turtle Mountain Band. *See* 48 Fed. Reg. 40,442 (Sept. 7, 1983). Although Appellant argues generally that where he resides should not matter for purposes of eligibility to receive

²(...continued)

However, there has been little or no change in the regulations with respect to the residency requirement: To be eligible, applicants must reside on or near an Indian reservation or in a contract service area. 25 C.F.R. § 26.5(b) (2010).

³ The administrative record provided by BIA does not contain any support, e.g., a map, for its determination that Fingal is not located in Rolette County. Notwithstanding this absence, we take official notice that Fingal is located in Barnes County, North Dakota, not Rolette County. *See* <http://www.northdakotacountymaps.com/barnes.shtml>.

assistance, he does not contend — nor does the record indicate — that he resides in a designated “near reservation” community for another reservation.⁴ Therefore, Appellant has not met his burden on appeal, and we affirm the Regional Director’s decision.

We decline to affirm the Regional Director’s second ground for denying assistance to Appellant, which was based on Appellant’s failure to verify his tribal membership, because Appellant ultimately satisfied this criteria. Significantly, Appellant submitted a certificate of enrollment from BIA’s Turtle Mountain Agency. AR, Tab 7. We are unable to determine, and the Regional Director does not explain in his brief, what document(s) the Superintendent relied on when the enrollment verification form was signed. For his part, Appellant contends that he faxed verification of his tribal enrollment to BIA’s Turtle Mountain Agency during the pendency of his application in May 2008. Moreover, he submitted the necessary documentation to the Regional Director while his appeal was pending and the Regional Director acknowledged the prior oversight “was easily addressed.” Decision at 3. Given these facts, we are unable to support the Regional Director’s decision on this ground.

Finally, we note that Appellant raises two new arguments on appeal to the Board. He contends that BIA is discriminating impermissibly by extending financial assistance only to Indians residing on Indian reservations or in communities designated as “near reservation.” In addition, Appellant contends that BIA’s residency policy violates the McCumber Agreement.⁵ With the exception of instances of manifest error or injustice, which we do not find to be presented by Appellant’s new arguments, the Board’s scope of review ordinarily is limited to consideration of those arguments made before the Regional

⁴ We note that Fingal is not located on an Indian reservation and is approximately 100 miles from the reservations of the Sisseton-Wahpeton Sioux Tribe, the White Earth Band of Chippewa Indians, and Spirit Lake Sioux Tribe. Appellant does not argue, nor can we find, that Fingal is a designated “near reservation” community for any of these three tribes. Therefore, we do not find it necessary to address the Board’s decision in *Kirkie v. Acting Aberdeen Area Director*, 17 IBIA 275, 276 n.2, *recons. denied*, 18 IBIA 6 (1989), on which the Regional Director relied to argue that residential eligibility for services is determined by whether an applicant resides on his own tribal reservation or in a “near reservation” community designated for his tribe’s reservation. *But see* 47 Fed. Reg. 38,355, 38,355 (Aug. 31, 1982); 42 Fed. Reg. 55,229,55,230 (Oct. 14, 1977).

⁵ The McCumber Agreement was negotiated in 1892 between the United States and the Turtle Mountain Band of Chippewa Indians, and dealt with the cession and relinquishment to the United States of the Tribe’s interests in lands within State of North Dakota.

Director. 43 C.F.R. § 4.318; *Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 124 (2009). We see no reason to depart from this rule, and therefore decline to consider these issues.

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 affirms the Regional Director's September 25, 2008, decision.

I concur:

// original signed
Debra G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge