



INTERIOR BOARD OF INDIAN APPEALS

Pueblo of Santa Clara v. Southwest Regional Director, Bureau of Indian Affairs

53 IBIA 92 (03/11/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

PUEBLO OF SANTA CLARA,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	
)	Docket No. IBIA 10-126
SOUTHWEST REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	March 11, 2011

This appeal involves a dispute between the Southwest Regional Director (Regional Director) of the Bureau of Indian Affairs (BIA) and the Pueblo of Santa Clara (Pueblo) over whether the Pueblo is required to provide to BIA, or may withhold from it, the applications of individual Indians who apply for Housing Improvement Program (HIP) grants. Through an Indian Self-Determination and Education Assistance Act (ISDA) Self-Governance Compact (Compact) between the Pueblo and BIA, the Pueblo is the HIP “servicing housing office” that administers the program in its service area by, among other things, collecting, processing, and evaluating HIP applications.

A directive from BIA’s Director requires BIA regional offices to review the eligibility and ranking of individual applicants for purposes of developing a regional priority ranked list of eligible applicants.¹ The directive also requires the regional office to ensure that the funds to be distributed for a HIP project will be sufficient to complete the project. To comply with the directive, the Regional Director asserts that he must be able to review the individual HIP applications collected by the Pueblo and that the Pueblo must provide them to BIA. The Pueblo asserts that BIA has no right to demand from it copies of the HIP applications that it has received and processed as the servicing housing office for its service area.

¹ See Memorandum from BIA Director to All Regional Directors, Aug. 17, 2004 (“Director’s Memorandum”), at 3.

In a June 11, 2010, decision (Decision), the Regional Director informed the Pueblo that funds for HIP grants to individuals would not be released until BIA was afforded the opportunity to review the HIP application(s) received by the Pueblo.² The Pueblo appealed the Decision to the Board, arguing that the Pueblo had no obligation under its Compact to provide the HIP application(s) to BIA and that BIA's action violates the Compact.

We need not wade any further into the underlying merits of the dispute because we lack subject matter jurisdiction. The Pueblo's appeal is squarely based on the claim that BIA's demand for copies of HIP applications processed by the Pueblo violates the Pueblo's contract rights under its existing ISDA Compact with BIA. Relevant to this appeal, the jurisdiction of the Board of Indian Appeals (Board) for ISDA appeals is limited to pre-award disputes, e.g., involving *proposed* compacts, and does not extend to the present dispute, which arises under an existing compact.

Background

Indian tribes may administer programs, services, functions and activities otherwise administered by BIA, either by entering into program-specific ISDA contracts with BIA, or through more comprehensive ISDA compacts with BIA, which give tribes more control and flexibility in planning and administering programs. *See* 25 U.S.C. § 458cc(b)(1)-(3); *Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 160 (2006). Self-governance compacts between Department of the Interior agencies and tribes are governed by Title IV of ISDA, *see* 25 U.S.C. § 458aa, *et seq.*, and the implementing regulations governing such ISDA compacts are found at 25 C.F.R. pt. 1000.

Through its Compact and an associated funding agreement with BIA, the Pueblo receives funding to administer a variety of programs. HIP, which provides housing grants to individual Indians,³ is included in the programs listed in the Pueblo's funding agreement

² The Decision refers to "the application," but an April 21, 2010, letter from the Regional Director to the Pueblo refers to HIP "applications" for the Pueblo.

³ HIP grants are based on individual eligibility and priority of need, regardless of tribal affiliation. *See* 25 C.F.R. §§ 256.3(b), 256.5.

for Fiscal Year 2010.⁴ The Pueblo, as the “servicing housing office,” *see* 25 C.F.R. § 256.2, administers HIP at the local level. Among other things, a servicing housing office receives, reviews, and assesses HIP applications from individuals in its service area, and apparently transmits certain information to the appropriate BIA regional office. *See* 25 C.F.R. §§ 256.12-256.14.

Each BIA regional office is required by BIA’s Director to develop a regional priority ranked list of eligible applicants, starting with the highest priority ranked applicant. *See* Director’s Memorandum at 3. If a HIP grant is awarded to an individual, his or her servicing housing office administers the grant. *See* 25 C.F.R. §§ 256.16-256.23. But the Director’s Memorandum states that “[n]o HIP funds will be made available until appropriate review is completed by each regional housing officer who will determine final categories and funding amounts for all funded HIP projects.” Director’s Memorandum at 3. According to the Regional Director, the Director’s Memorandum requires him to ensure that an applicant is eligible and that adequate funds are requested to complete the project.⁵ Decision at 1, citing Director’s Memorandum. To comply with the Director’s Memorandum, the Regional Director apparently either requested or demanded that the Pueblo provide copies of, or allow BIA to review, one or more HIP applications that the Pueblo processed for possible Fiscal Year 2010 funding. The Pueblo objected, arguing that its Compact does not require it to comply with unpublished internal BIA central office guidance, and that requiring it to do so would violate the Compact.

The Regional Director responded by issuing the Decision, which informed the Pueblo that HIP funds would not be released for FY 2010 until BIA was afforded an

⁴ Because we dispose of this appeal on jurisdictional grounds, we have not requested the record. Neither of the parties provided the Board with a copy of the Compact, but both provided a copy of a document titled “Self-Governance 2010 Funding Agreement - Reprogramming Request” (Agreement), which is signed by the parties and dated February 19, 2010. *See* Appellant’s Reply Brief on Jurisdiction, Ex. 1; *see also* Agency’s Brief on Jurisdiction, Ex. 4 (unsigned copy). The Agreement appears to list all of the programs administered by the Pueblo under its Compact, including HIP. Agreement at 1-3. The Agreement lists the amount of funding for HIP as “0,” and an accompanying footnote states that “[HIP] funds will be provided based upon HIP eligible applicant data and used in accordance with HIP regulations unless waived.” *Id.* at 1 & 4 n.6.

⁵ A HIP grant is a one-time award, and thus an applicant who receives a grant is not eligible for future HIP funding.

opportunity to review the individual application(s). The Regional Director advised the Pueblo that if it disagreed with his decision, the Pueblo could appeal to the Board.

Consistent with the Regional Director's appeal instructions, the Pueblo filed this appeal with the Board. In its appeal, however, the Pueblo expressed its belief that its remedy lies elsewhere than with the Board because this is a dispute arising under the Pueblo's existing ISDA Compact. According to the Pueblo, the present dispute is subject to 25 C.F.R. § 1000.428, which governs post-award compact disputes. With exceptions not relevant here, under § 1000.428 post-award administrative decisions may be appealed to the Civilian Board of Contract Appeals (CBCA). *See* 75 Fed. Reg. 31,701 (June 4, 2010), amending 25 C.F.R. §§ 1000.421 and 1000.428.⁶

Upon receipt of the appeal, the Board ordered the parties to brief the issue of the Board's jurisdiction. The Board also strongly encouraged the parties to consider alternative dispute resolution.

Discussion

This appeal presents the unusual situation in which an appellant, in this case the Pueblo, argues that the Board does not have jurisdiction (while seeking to preserve this appeal if it is wrong), and the Regional Director resists dismissal by arguing that the Board does have jurisdiction to review the dispute. The Board's jurisdiction is a question of law and if we do have jurisdiction, the Pueblo is entitled to our review of the dispute. But the Pueblo, as the appellant, is entitled to frame its complaint and cause of action, and in this case, after consideration of the parties' briefs and the Pueblo's clarification of its appeal, we are convinced that the Pueblo is correct that we lack subject matter jurisdiction.

The Board has jurisdiction over pre-award ISDA compact disputes. *See* 25 C.F.R. § 1000.432. The Board also has jurisdiction over appeals by individuals who claim to have been adversely affected by a Regional Director's action taken under HIP. *See* 25 C.F.R. § 256.28. In the present case, we agree with the Pueblo that the Board lacks jurisdiction over the appeal because the dispute is not a pre-award dispute over a proposed compact or a proposed funding agreement, nor is the Pueblo's claim based on an alleged violation by BIA

⁶ In 2007, the Interior Board of Contract Appeals (IBCA) was abolished and its functions were transferred to the newly created CBCA within the General Services Administration. *See id.* at 31,700. The amendments to §§ 1000.421 and 1000.428 changed the references in the regulations from "IBCA" to "CBCA."

of the HIP regulations.⁷ Instead, the source of the legal rights and obligations flowing between BIA and the Pueblo, upon which the Pueblo relies in this appeal, is the Compact, and neither BIA nor the Pueblo suggest that, in the absence of the Compact, the Pueblo would have any obligations related to HIP.

In response to the Board's order for briefing on jurisdiction, the Pueblo asserts that it brings the appeal as a "dispute [that] concerns interpretation and enforcement of the terms of the Pueblo's Self-Governance Compact." Appellant's Brief on Jurisdiction at 1. The Pueblo argues that BIA's "demand [to the Pueblo to produce the individual application(s)] is contrary to the terms of the Compact, and unlawfully intrudes on the Pueblo's right to administer [HIP]." *Id.* at 2. The Pueblo clarifies that its claim "is *not* based on the rights of the [individual HIP] applicants." *Id.* (emphasis added). Instead, argues the Pueblo, "the question [is] whether the Pueblo is bound by unpublished guidance when administering the HIP, contrary to the terms of its Compact." Reply Brief at 3. In sum, the Pueblo contends that its "objection to [BIA's] super-review [of HIP applications] is rooted in the terms of [the Pueblo's] Compact," and that "[t]his dispute concerns the appropriate role of the BIA in the Pueblo's administration of the HIP pursuant to the . . . Compact." *Id.* at 1, 3. Thus, according to the Pueblo, the issue is whether the terms of the Compact require it to comply with BIA's demand for copies of the HIP application, and jurisdiction over the appeal is governed by the regulations applicable to contract disputes, which do not confer jurisdiction on the Board.

The Regional Director, on the other hand, contends that if the Pueblo has standing,⁸ the Board does have jurisdiction because, he argues, the dispute involves an interpretation

⁷ Section 256.28 is titled "What can I do if I disagree with actions taken under the Housing Improvement Program," and the section incorporates the BIA administrative appeals regulations found in 25 C.F.R. pt. 2. The HIP regulations do not include a definition of the word "I," but throughout the regulations the words "I" and "you" are used to refer to individual Indian applicants for HIP grants. We find the Pueblo's clarification of the nature of its claim sufficient to conclude that we lack jurisdiction over this appeal, without having to decide whether there are any circumstances under which a tribal servicing housing office that administers the HIP program in its service area might have a right of appeal under § 256.28.

⁸ The Regional Director argues that the Decision did not constitute a final appealable decision regarding HIP funding and therefore the Pueblo lacks standing. Because we conclude that we lack subject matter jurisdiction over the appeal, we do not address the Regional Director's standing argument.

of the HIP regulations and, more specifically, whether the HIP regulations require the Pueblo to comply with BIA's demand. The Regional Director argues that the HIP regulations authorize BIA to insist on reviewing individual applications in order to create a regional priority list of eligible applicants and to make final decisions to award funding to individual applicants.

The difficulty we have with the Regional Director's argument is that it jumps straight into an interpretation of the HIP regulations on the merits, without acknowledging that the source of the right and legally protected interest upon which the Pueblo relies in challenging the Regional Director's decision is the Compact. The Pueblo does not contend that BIA violated any right granted to the Pueblo by the HIP regulations, or that the appeal arises under those regulations. What the Pueblo argues is that the source of the legal relationship between BIA and the Pueblo for purposes of administering the HIP program is the *Compact*. Thus, in the context of this dispute, the HIP regulations are relevant only to the extent that they may contain requirements incorporated by the Compact, and not because the HIP regulations directly apply to the Pueblo. The Regional Director complains that the Pueblo's brief "ignores the [HIP] regulations." Agency's Brief on Jurisdiction at 3. But the reason for that seems simple: The Pueblo is not claiming that BIA violated its rights under the HIP regulations.⁹ And to further clarify the nature and subject matter of its appeal, the Pueblo expressly disclaims any intent to represent the rights or interests of an individual HIP applicant, or to base its appeal on the rights or interests of such applicants. Thus, any rights that an individual Indian applicant may have under the HIP regulations do

⁹ We note that the Pueblo's request for relief asks the Board to direct the Regional Director "to award 2010 HIP funding *to the Pueblo* for its eligible applicants, without any review of the applications." Notice of Appeal at 2 (emphasis added). But the manner in which the Pueblo framed its request for relief does not persuade us that either the Pueblo or the Board has mischaracterized the nature of the appeal itself as one arising under the Compact. As the Pueblo acknowledges, HIP grants are awarded to individuals, not to tribes. *See* Appellant's Brief on Jurisdiction at 1 n.1; *see also supra* note 4. The fact that the Pueblo, as the servicing housing office, has a derivative right to receive and administer HIP grants that are awarded to individuals in its service area, does not make its claim in this appeal arise under the HIP regulations, or provide a basis for the Board to assert jurisdiction.

not form the basis for the Pueblo's assertion that BIA's decision violated the Pueblo's rights.¹⁰

The Pueblo, while arguing that the Board lacks jurisdiction and that its proper recourse is through breach-of-contract remedies, also contends that the Board "should determine that the dispute between the parties is governed by 25 C.F.R. §§ 1000.420–.438 and 25 C.F.R. § 900.215–.230, not 43 C.F.R. § 4.330." Reply Brief at 1. Our authority in this matter, however, is limited to determining our own jurisdiction, not that of another tribunal. The Board does not have authority to determine whether the dispute might be governed by contract dispute procedures, and thus we decline the Pueblo's request that we interpret the regulatory provisions governing contract disputes.

In addition, the Pueblo "requests that if [the Board] determines that it does not have jurisdiction over this dispute, it nevertheless delay entering an order dismissing this action until after the jurisdiction of the [CBCA] has been determined, so that the Pueblo's right to appeal the decision is not frustrated by a dispute over where that appeal should be pursued." Appellant's Brief on Jurisdiction at 2. We deny the Pueblo's request for delayed entry of an order of dismissal. The Board's jurisdiction, or in this case the Board's lack of jurisdiction, is not affected by whether or not the CBCA has jurisdiction.

Conclusion

To summarize, we agree with the Pueblo that because the appeal is based on the claim that the Regional Director's decision violated the Pueblo's rights under the Compact, the Board lacks jurisdiction.

¹⁰ To further illustrate the nature of the Pueblo's claim, if the Pueblo's right to withhold individual HIP applications from BIA is confirmed in an appropriate forum, the Pueblo would then be permitted to withhold such applications and the Pueblo's contractual rights would be vindicated. Unless BIA were able to obtain, through other means, a copy of the individual's HIP application the result might well be that the individual Indian applicant would not be funded, but that action would affect the right of the individual applicant, not the Pueblo's contractual rights. BIA's rights and obligations, in relation to individual applicants for HIP grants, is a separate issue that is not within the scope of this appeal, as is the case with respect to any right or remedy that an individual applicant may have against either BIA or the Pueblo, if he or she would have received a HIP grant, but for the present dispute.

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 dismisses this appeal for lack of jurisdiction.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge