



INTERIOR BOARD OF INDIAN APPEALS

Janis Schmidt v. Bureau of Indian Affairs

54 IBIA 173 (12/13/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

JANIS SCHMIDT,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	Docket No. IBIA 11-116
)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	December 13, 2011

Janis Schmidt (Appellant) appealed to the Board of Indian Appeals (Board) from a March 23, 2011, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which the Regional Director summarily dismissed an appeal from Appellant regarding BIA's failure to act on Appellant's complaints regarding an allegedly fraudulent notice of trespass sent by BIA to Appellant, dated October 23, 2003.¹ In her Decision, the Regional Director stated that generally a notice of trespass is not appealable, but that, in the alternative, the Regional Director had considered Appellant's merits arguments and was dismissing the appeal on the ground that the relief sought by Appellant had already been adjudicated in related Federal court proceedings involving a Federal tort claim filed by Appellant.

We dismiss this appeal as untimely because Appellant has not demonstrated that she filed her appeal within the 30-day period for filing an appeal to the Board. But even if we were to resolve the timeliness issue in Appellant's favor, we would still dismiss this appeal because the apparent source of her complaint — BIA's October 23, 2003, notice of trespass — expired as a matter of law after one year, rendering moot Appellant's claim that the notice must be rescinded, and because the relief sought by Appellant — damages and criminal complaints against BIA — are not within the jurisdiction of the Board.

¹ Appellant contends that her appeal is against BIA and that it be captioned accordingly. *See* Letter from Appellant to Board, June 1, 2011, at 4. In addition to naming BIA, Appellant names as appellees a Regional Director and the Acting Regional Director who issued the Decision, and also Robert Ecoffey, as the former Regional Director (2004-2006); Larry Bodin, as the former Superintendent (2001-2005); and Frieda Brewer Marshall, as a BIA Pine Ridge Agency Realty Officer.

Discussion

I. The Appeal is Untimely

A notice of appeal from a decision of a BIA regional director must be filed with the Board “within 30 days after receipt by the appellant of the decision from which the appeal is taken.” 43 C.F.R. § 4.332(a). The effective date of filing a notice of appeal with the Board is the date of mailing (if sent by U.S. mail) or the date of personal delivery (if not mailed). *See id.* § 4.310(a). The 30-day deadline for filing an appeal is jurisdictional. *Id.* § 4.332(a). Untimely appeals must be dismissed. *Id.* The burden is on an appellant to show that its notice of appeal was timely filed with the Board. *See Saguario Chevrolet, Inc. v. Western Regional Director*, 43 IBIA 85, 85 (2006).

The Decision was sent to Appellant by certified U.S. mail. It advised Appellant of her appeal rights, stating that any appeal “*must be mailed within 30 days of the date you receive this decision.*” Decision at 2. In her notice of appeal, Appellant stated that she had received the Decision on April 6, 2011. *See* Notice of Appeal at 2. But the U.S. Postal Service’s Track & Confirm service on its website recorded that the Decision, as identified by the certified mail identification number, was delivered on April 5, 2011. The Board obtained from the Regional Director a copy of the certified mail return receipt card, which bears Appellant’s signature and on which the delivery date is recorded as April 5, 2011. Appellant’s appeal to the Board was filed on May 6, 2011, as shown by the postmark on the envelope. *See* 43 C.F.R. § 4.310(a).

Noting that if Appellant received the Decision on April 5, 2011, then her appeal was filed on the 31st day after receipt and is untimely, the Board provided Appellant with an opportunity to provide additional information to support the statement in her notice of appeal that she received the Decision on April 6, 2011, and to demonstrate that she did not receive it on April 5, 2011, as recorded on the return receipt card and in the U.S. Postal Service records. *See* Pre-Docketing Notice, Order for Information from Appellant and Regional Director on Timeliness of Appeal, and Order Concerning Further Proceedings at 2-3.²

Appellant concedes that her signature is on the return receipt for the Decision, but she contends that “someone else wrote April 5, 2011,” on the receipt. Letter from Appellant to Board, June 9, 2011. In the alternative, Appellant argues that her appeal is

² The Board provided Appellant with a copy of the return receipt card submitted by the Regional Director.

timely because she appealed the Decision through an April 14, 2011, letter responding and objecting to the Regional Director's Decision.

We find that the evidence is insufficient to satisfy Appellant's burden to demonstrate that she received the Decision on April 6, and not on April 5. And there is no evidence that Appellant sent her April 14 letter to the Board until she included it as an appendix to her notice of appeal, and thus the April 14 letter cannot serve as a timely appeal from the Decision.

Appellant fails to corroborate her statement that she received the Decision on April 6, 2011, with any supporting evidence, and she cannot simply rely on bare allegations to meet her burden of establishing timeliness. *See Saguario Chevrolet, Inc.*, 43 IBIA at 92 (dismissing appeal because Appellant provided insufficient evidence to establish the appeal was timely); *Siemion v. Rocky Mountain Regional Director*, 48 IBIA 249, 256-58 (2009) (same). The return receipt card signed by Appellant records the date of delivery to Appellant as April 5, 2011. Appellant's unsupported assertion that she did not receive the Decision until April 6 is insufficient for us to conclude that April 6 was the date of receipt.

Appellant has provided no evidence that she filed her April 14 objection with the Board within the 30-day deadline for filing an appeal. The April 14 letter is addressed to the Regional Director, and it notes that Appellant sent copies of the letter to Senator Kent Conrad and the Assistant Secretary - Indian Affairs. The Board is not included in the list of parties copied on the April 14 letter. Sending copies of the April 14 letter to the Regional Director and the Assistant Secretary was not the same as filing a timely appeal with the Board. *See LeCompte v. Acting Great Plains Regional Director*, 46 IBIA 242, 243 (2008) (appellant's assertion that she served BIA and the Assistant Secretary - Indian Affairs "does not satisfy the regulatory requirement that she timely file her notice of appeal with the Board"). Accordingly, Appellant cannot rely on the April 14, 2011, letter as a timely notice of appeal.

Because Appellant filed her appeal on May 6, 2011, which is more than 30 days after April 5, 2011, the Board must dismiss her appeal as untimely.

II. Even if the Appeal is Timely, the Board Would Dismiss it as Moot or for Lack of Jurisdiction

A. Background

The source of Appellant's complaint against BIA, which started this longstanding dispute, is an October 23, 2003, trespass notice that the BIA Superintendent sent to

Appellant. *See* Notice of Appeal, App. Tab 10. The notice of trespass, issued pursuant to 25 C.F.R. § 166.803, stated that Appellant did not have permission to live on or build on the property that she was occupying on the Pine Ridge Reservation.³ Appellant contested the trespass notice and contended, for various reasons, that BIA had illegally or fraudulently issued the trespass notice, and that BIA was obligated to rescind the notice.⁴ According to Appellant, BIA failed to address or follow through with the trespass notice, but Appellant was evicted from the property pursuant to tribal court proceedings. Appellant accuses BIA of committing criminal fraud in issuing, and not rescinding, the trespass notice.

Appellant then commenced a variety of complaints and actions against BIA officials, including a tort claims action, and against tribal and other Federal officials, seeking redress for her eviction, which Appellant attributes to the allegedly illegal trespass notice. *See* Notice of Appeal at 5 (“The trespass letter was the cause of many of my damages”); *see also Schmidt v. Bodin*, Civ. No. 06-5034, 2007 WL 2362583 (D.S.D. 2007) (dismissing complaint), *aff’d*, 273 Fed. Appx. 570 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 906 (2009). Appellant contended that BIA officials unlawfully turned the matter over to the tribal court and that through those tribal court proceedings, Appellant lost her “house, belongings, garden, orchard, way of life, address, and contact.” *Aff. of Appellant*, Feb. 3, 2011, at 2. Among the relief sought by Appellant was that BIA replace Appellant’s house and compensate her for losses and damages caused by BIA officials.⁵

B. Discussion

Even if we were to conclude that this appeal is timely, we would dismiss it. First, the October 23, 2003, trespass notice that was the original source of Appellant’s complaint, and for which she seeks rescission, expired by operation of law one year after it was received by Appellant, i.e., it expired sometime in 2004. *See* 25 C.F.R. § 166.805. Thus, even if Appellant were to demonstrate that the trespass notice was issued in error, the relief

³ The October 20, 2003, notice described the property as follows: the NW/4SW/4 (less 2 acres), SW/4SW/4 Section 23, Township 39 North, Range 42 West.

⁴ Appellant does not contend that she had an approved lease for the property, but asserts that the individuals who complained to BIA about Appellant’s occupancy did not own the property, and that the property was owned in fee by the Catholic Church and thus was not subject to BIA jurisdiction.

⁵ Appellant identifies the amount of damages that she seeks against BIA as \$9,000,000, *see* Notice of Appeal at 27, or \$1,500,000, *see Aff. of Appellant*, Feb. 3, 2011, at 55.

available would be BIA’s withdrawal of the notice, *see* 25 C.F.R. § 166.804(b), but the withdrawal of an expired notice would have no effect.⁶ The Board does not consider appeals that are moot — i.e., where nothing turns on the outcome and no relief is available. *See Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009) (discussing doctrine of mootness).

Second, to the extent that Appellant seeks a judgment from the Board for damages or action by the Board on her complaints of criminal misconduct by BIA officials, *see* Notice of Appeal at 4, the Board lacks jurisdiction over these claims. *See Estate of Cyprian Buisson*, 53 IBIA 176, 177 (2011) (the “Board lacks authority to award monetary relief”); *Pounds v. Burris*, 34 IBIA 47, 47 (1999) (“The Board has not been delegated any criminal jurisdiction.”); *Taylor v. Portland Area Director*, 20 IBIA 101, 104 (1991) (the Board “has not been delegated authority to consider tort claims against the United [S]tates.”).

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.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

⁶ Because we conclude that this claim would be moot even if the appeal were timely, we do not address the Regional Director’s dismissal of Appellant’s appeal on the ground that trespass notices are not subject to appeal. *See* Decision at 1 (citing 25 C.F.R. § 166.803(c)).