



INTERIOR BOARD OF INDIAN APPEALS

Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

11 IBIA 146 (04/04/1983)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

URBAN INDIAN COUNCIL, INC.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-55-A

Decided April 4, 1983

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) denying funding under the Indian Child Welfare Act.

Affirmed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals has jurisdiction to review legal questions arising from the alleged violation of regulatory requirements that are prerequisites to the exercise of discretionary authority vested in the Bureau of Indian Affairs.

2. Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

25 CFR 23.25(c)(3) does not require that an organization providing Indian child welfare or family assistance programs have previously received grant funds under the Indian Child Welfare Act in order to qualify for its exemption.

3. Administrative Procedure: Burden of Proof

The burden is on the applicant to prove entitlement to statutory or regulatory exemptions.

4. Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

Read in context, 25 CFR 23.29(b)(4) is an integral part of section 23.29, which is intended to help ensure that each application for grant funds under the Indian

Child Welfare Act will ultimately be evaluated on its merits, rather than disapproved because of technical shortcomings.

5. Indian Child Welfare Act of 1978: Financial Grant Applications: Disapproval

A violation of the responsibilities undertaken by the Bureau of Indian Affairs in 25 CFR 23.29(b) (4) is not proven merely by a showing that an application for grant funds under the Indian Child Welfare Act was disapproved without prior notification of possible disapproval and an opportunity to correct errors. Rather, the reasons for disapproval must be examined to determine whether they are the kinds of problems addressed by the regulation.

6. Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

The remedy for failure to meet the deadlines established in 25 CFR 23.30, 23.32, and 23.34 for consideration of an application for grant funds under the Indian Child Welfare Act is provided in 25 CFR 23.65 and is the right to request a decision from the next higher official having approval authority.

7. Board of Indian Appeals: Jurisdiction

When a decision in an appeal to the Deputy Assistant Secretary--Indian Affairs (Operations) is not rendered within 30 days from receipt of all pleadings, the Board of Indian Appeals acquires jurisdiction over the case under 25 CFR 2.19.

8. Board of Indian Appeals: Jurisdiction

Because the Board of Indian Appeals has no independent knowledge of the expiration of the 30-day deadline established in 25 CFR 2.19 for the issuance of a decision in an appeal brought to the Deputy Assistant Secretary--Indian Affairs (Operations), the appellant must inform the Board of the expiration of that period through either a notice of appeal or a motion for the Board to assume jurisdiction. Upon receipt of such

information, the Board will docket the appeal and request the transmittal of the administrative record from the Deputy Assistant Secretary.

9. Bureau of Indian Affairs: Administrative Appeals: Generally

The Board of Indian Appeals declines to hold that a decision issued by the Deputy Assistant Secretary--Indian Affairs (Operations) after the expiration of the 30-day period established in 25 CFR 2.19 is void when the appellant acquiesces in the delay.

APPEARANCES: Kurt Engelstad, Esq., Portland, Oregon, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Board of Indian Appeals received a notice of appeal on August 17, 1982, from the Urban Indian Council, Inc. (appellant), on behalf of itself and the Portland Indian Child Welfare Consortium. ^{1/} The notice sought review of an August 3, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) denying the consortium's application for grant funds under the Indian Child Welfare Act of 1978 (Act), 25 U.S.C. §§ 1901-1952 (Supp. II 1978). For the reasons discussed below, the decision is affirmed.

Background

On February 23, 1982, appellant submitted an application on behalf of the Portland Indian Child Welfare Consortium to the Portland Area Office, Bureau of Indian Affairs (BIA), seeking fiscal year 1982 grant funds under the Indian Child Welfare Act. The application was initially reviewed by the area office and was then submitted to the area grant panel for full review and rating. The application received a rating of 81.3. A rating of 85 was required for approval. Appellant was notified of the disapproval of the consortium's application by letter of April 12, 1982, from the Acting Portland Area Director.

Appellant appealed this decision and on August 3, 1982, was informed by the Acting Deputy Assistant Secretary that the disapproval was affirmed. Appellant appealed to the Board on August 17, 1982. Both parties filed briefs on appeal. Appellee also filed a motion to dismiss this case on the grounds that the Board lacked jurisdiction over it.

^{1/} The consortium members include appellant, the Native American Rehabilitation Association, ANPO, and United Indian Women. The Native American Rehabilitation Association withdrew from the consortium during the administrative review process and is no longer associated with the appeal.

Discussion and Conclusions

The first issue before the Board is appellee's motion to dismiss for lack of jurisdiction. Appellee argues that the decision in this case was rendered in the exercise of discretion given to the BIA under 25 CFR 23.25(a), which states that the Commissioner of Indian Affairs, now appellee, shall select those applications for funding that "in his or her judgment" best promote the purposes of the Act. Appellee argues that because he has been given discretion in making this selection, 43 CFR 4.330(b) renders his decision nonreviewable by the Board.

The Board considered this identical claim in Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142 (1983). In that case, the Board held that it does not have jurisdiction to review those decisions that are properly made in the exercise of discretion committed to the BIA unless such cases are specifically referred to it. The Board noted that discretion is exercised in those situations in which there is no law to apply and that the determination of whether a particular decision is based upon the exercise of discretion or an interpretation of law is itself a legal question. When legal guidelines or requirements must be observed before an ultimately discretionary decision can be reached, an allegation that those legal standards were violated could serve as the basis for Board jurisdiction to review the limited issue of whether there was a violation of legal rights. See also Wesley Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982); Aleutian/Pribilof Islands Association v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

In Billings American Indian Council there was no allegation of violation of legal rights. The only issues raised involved the exercise of discretion and those issues were not referred to the Board. Therefore, appellee's motion to dismiss the appeal was granted.

[1] In distinction, appellant here argues that appellee violated regulatory requirements in the consideration of its application. Specifically, appellant alleges that it was improperly faulted for failing to provide letters of support from individuals and families to be served because it was exempt from this requirement under 25 CFR 23.25(c) (3); the area office failed to comply with the notice of potential disapproval requirements of 25 CFR 23.29; and the BIA's decisions are void because it failed to comply with procedural deadlines established in 25 CFR 23.32 and 2.19. Each of these issues represents a legal question over which the Board has jurisdiction.

The first legal issue appellant raises is whether it was required to submit letters of support from individuals and families to be served as part of its application. Appellant alleges that it falls within the exemption from this requirement set forth in 25 CFR 23.25(c) (3). This section states: "The requirements of this subsection [regarding evidence of substantial support from the Indian community or communities to be served by the grant] do not apply in the case of an existing multi-service Indian center or an off-reservation Indian organization of demonstrated ability which has operated and continues to operate an Indian child welfare or family assistance program."

According to appellee, appellant is a member of

a new, unproven consortium which was formed solely for applying for a 1982 ICWA [Indian Child Welfare Act] grant. The consortium has never received or applied for an earlier ICWA grant. Thus, the consortium could not have "demonstrated" its "ability" to Appellee prior to this application. Minimally, the UIW [appellant] needed to submit letters of support since the organization has never before received an ICWA grant.

(Appellee's Brief at 4).

Appellant replied to this statement by submitting a letter dated May 12, 1981, and signed by the Portland Area Director, informing it of the award of a grant under the Act, apparently for fiscal year 1981. It appears that this grant was made to appellant in its individual capacity, rather than to the Portland Indian Child Welfare Consortium, the applicant for fiscal year 1982 funding.

[2] Appellee incorrectly interprets section 23.25(c)(3). The section does not require that an organization providing Indian child welfare or family assistance programs have previously received grant funds under the Indian Child Welfare Act in order to come under its exemption. A prior grant award may be one way to demonstrate ability, although a previous award does not of itself guarantee continued community support. However, because the section does not enumerate the ways in which an organization can demonstrate its ability, BIA erred insofar as it held a prior award to be required to qualify for this exemption. ^{2/} The error in this case, however, was harmless in view of the Board's next holding.

[3] The burden is on the applicant to prove entitlement to statutory or regulatory exemptions. See Daniel Brothers Coal Co., 2 IBSMA 45, 87 I.D. 138 (1980). Appellant has provided evidence that it, in its individual capacity, had previously been awarded grant funds under the Indian Child Welfare Act. It has not shown that the consortium or any of its other members received such funds. Neither has it attempted to show in some other way the consortium's or its members proven ability to provide the contemplated services to the relevant Indian community. The BIA is not required to consider appellant's individual record as proof of the consortium's abilities. Appellant has failed to prove the consortium's entitlement to the exemption provided in 25 CFR 23.25(c)(3).

The second legal issue raised in this appeal is whether the BIA erred in not informing appellant of the potential disapproval of the application and offering technical assistance in correcting the problems as required under 25 CFR 23.29. This regulation states:

^{2/} The Board notes that the phrase "Indian child welfare or family assistance program," found in 25 CFR 23.25(c)(3), could be interpreted to mean such a program conducted under the Indian Child Welfare Act. The phrase is nowhere defined in this manner. The Board sees no reason to narrow a generic description of a type of service to a program operated only under one Act.

(b) Upon receipt of an application for a grant under this part, the Superintendent [or Area Director under 25 CFR 23.31] shall:

* * * * *

(4) Inform the applicant, in writing and before any final recommendation, of any special problems or impediments which may result in a recommendation for disapproval; offer any available technical assistance required to overcome such problems or impediments; and solicit the applicant's written response.

The Board considered 25 CFR 23.29(b)(4) in Aleutian/Pribilof Islands Association, supra. In that case the Board held that the regulation, although not required by the Act, was adopted as a proper exercise of the Secretary's authority to implement the statute, had the force and effect of law, and was binding upon the Secretary. The regulation "create[d] substantive rights to advance notification of possible disapproval of a grant application and to assistance as available in remedying the problems in the application." Id. 9 IBIA at 260, 89 I.D. at 199.

Appellee states that an initial review was made of the consortium's application and that no special problems or impediments to approval were found. The application was, therefore, referred to the area grant selection committee for review and ranking.

[4] Under section 23.29(b)(4), the BIA official conducting the initial review of a grant application has the responsibility to inform the applicant of any special problems or impediments that might result in a recommendation of disapproval. Read in context, the section is an integral part of section 23.29, which is intended to help ensure that each application will ultimately be evaluated on its merits, rather than disapproved because of technical shortcomings. Section 23.29(b) sets forth the requirements for preliminary review of a grant application. Receipt of the application is first acknowledged (23.29(b)(1)) before it is reviewed for completeness. The applicant is given an opportunity to provide any missing information (23.29(b)(2)). When the application package is complete, BIA determines whether the purposes for which the grant is sought coincide with the purposes of the Indian Child Welfare Act and whether the overall plan is feasible (23.29(b)(3)). If after this initial review BIA notes any special problems or impediments that might result in the application's disapproval, the applicant is given an additional opportunity to augment or correct the application (23.29(b)(4)). It is only after the applicant has been given the opportunity, if necessary, to correct these two types of problems, that the application is fully assessed on its merits and approved or disapproved by the appropriate BIA official (23.29(b)(5) and 23.31(a)(1)). The applicant is then informed of the final determination (23.31(a)(3)).

[5] A violation of the responsibility undertaken by BIA in 25 CFR 23.29(b)(4) is not proven merely by a showing that an application was disapproved without prior notice of possible disapproval. The reasons for disapproval must instead be examined to determine whether they are the kinds of

problems addressed by the regulation. In this case, the Acting Deputy Assistant Secretary's decision letter and the rating sheets show that disapproval of the consortium's application was a close decision. The application received a rating only 3.7 points below the level for approval. There was disagreement among the review panel on the application's strengths and weaknesses. The administrative record thus shows that the final decision to disapprove the consortium's application was not made because of any "special problems or impediments," but rather on the basis of a thorough and comprehensive analysis of the application's merits.

Section 23.29(b)(4) does not guarantee approval of all applications by requiring BIA to determine whether an application will be disapproved as submitted and then to give the applicant an opportunity to correct each and every problem found. It merely helps to ensure that each application will ultimately be evaluated on its merits. The consortium's application was so evaluated and the Board finds no violation of 25 CFR 23.29(b)(4).

Appellant's final legal argument is that the BIA's decisions are void because they were rendered after the expiration of deadlines established in 25 CFR 23.32 and 2.19. Section 23.32 gives the Area Director 30 days from receipt of an application in which to review it and determine whether or not it should be approved. The section states that an "[e]xtension of this deadline will require consultation with, and written consent of, the applicant." The BIA acknowledged receipt of the consortium's application on February 23, 1982. The Acting Area Director informed appellant that the application had been disapproved by letter dated April 12, 1982, a total of 48 days after receipt.

[6] As appellee correctly notes, the regulations provide the remedy for failure to meet the established deadlines. Under 25 CFR 23.65,

[w]henver a Superintendent or Area Director fails to take action on a grant application within the time limits established in this part, the applicant may at its option, request action by the next higher Bureau official who has approval authority as prescribed in this part. In such instances, the Superintendent or Area Director who failed to act shall immediately forward the application and all related materials to that next higher Bureau official.

Both the right to a decision within 30 days and the remedy for failure to provide such a decision are created by regulation. Appellant, and the consortium it represents, waived the right to a decision by the Area Director in 30 days when it failed to exercise its regulatory option of requesting action on the application by the next higher BIA official, and thereby chose to allow the Area Director to render a decision.

Under the second regulatory deadline cited by appellant, 25 CFR 2.19(a), the Commissioner of Indian Affairs, now Deputy Assistant Secretary--Indian Affairs (Operations), is given 30 days after all time for filing pleadings has expired to either render a written decision on the appeal or refer the case to the Board of Indian Appeals for decision. Section 2.19(b) further provides that "[i]f no action is taken by the Commissioner within the 30-day

time limit, the Board of Indian Appeals shall review and render the final decision."

Appellant alleges that the time for filing all pleadings in this appeal expired on May 20, 1982, the date its appeal and statement in support of the appeal were filed. A final decision was rendered on August 3, 1982, 75 days later. Appellee does not dispute that more than 30 days elapsed before a decision was issued, but refers only to 25 CFR 23.65 in justifying the delay.

The Board considered 25 CFR 2.19 in Matthew Allen v. Navajo Area Director, 10 IBIA 146, 155-56, 89 I.D. 508, 513 (1982), and held that when a decision is not issued by the Deputy Assistant Secretary within 30 days of the filing of all pleadings, the Board acquires jurisdiction over the case. In Allen a notice of appeal filed with the Board recited that the time for the filing of all pleadings had expired more than 30 days before the filing of the notice with the Board and requested the Board to assume jurisdiction over the appeal. The Board did assume jurisdiction over Allen and 19 similarly situated appeals and subsequently issued decisions for the Department. See also Diane Zarr v. Acting Deputy Director, Office of Indian Education Programs, IBIA 82-51-A (docketed Aug. 5, 1982).

Other cases have been referred to the Board by the Deputy Assistant Secretary under 25 CFR 2.19(a)(2). See, e.g., Walch Logging Co. v. Portland Assistant Area Director (Economic Development), 11 IBIA 85, 90 I.D. 88 (1983); Daniel Conway v. Acting Billings Area Director, 10 IBIA 25, 89 I.D. 382 (1982); Yvonne Weiser v. Portland Area Director, 9 IBIA 76 (1981); Gertrude E. Sherman v. Acting Portland Area Director, 9 IBIA 25, 88 I.D. 619 (1981).

Unlike the situation with 25 CFR 23.32, no regulatory sanction is provided for a violation of 25 CFR 2.19. The Board agrees with appellant that the language of section 2.19 is mandatory and, therefore, finds that there is a remedy for violation of its requirements.

[8] Under 25 CFR 2.11(a) a notice of appeal filed with the Commissioner must also be served on the Board. Service on the Board of subsequent documents is not required. Therefore, the Board does not have independent knowledge that the 30-day limitation established in section 2.19 has expired. When an appellant informs the Board of the expiration of this period through the filing either of a notice of appeal giving evidence of the expiration or of a motion for the Board to assume jurisdiction over the appeal, the Board will act to ensure that the time limitation is properly observed by docketing the case and requesting transmittal of the administrative record from the office of the Deputy Assistant Secretary.

[9] If, however, as here, an appellant acquiesces in the failure of the Deputy Assistant Secretary either to decide the case or to refer it to the Board within the time limitation, the Board declines to hold that any decision eventually issued is void. If a decision of the Deputy Assistant Secretary that is rendered past the time limits imposed by 25 CFR 2.19 is subsequently appealed to the Board, it will be reviewed under the same standards as would apply for review of any other decision.

Therefore, for the reasons discussed above and pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

//original signed
Wm. Philip Horton
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Franklin D. Arness
Administrative Judge