



INTERIOR BOARD OF INDIAN APPEALS

Nambe Pueblo v. Deputy Assistant Secretary - Indian Affairs (Operations)

13 IBIA 53 (12/07/1984)



# United States Department of the Interior

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

NAMBE PUEBLO

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-39-A

Decided December 7, 1984

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying fiscal year 1984 grant funding under the Indian Child Welfare Act.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Indian Child Welfare Act of 1978: Financial Grant Applications: Generally

Although the ultimate decision on whether to select a particular proposal for grant funding under the Indian Child Welfare Act and its implementing regulations is discretionary, the regulations provide certain legal guidelines and requirements that must be followed in reaching that decision. An alleged violation of these guidelines and requirements could serve as the basis for Board jurisdiction limited to the alleged violations of law.

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

Part 23 of 25 CFR places the burden on the applicant to prove that it is entitled to receive Federal funds under the Indian Child Welfare Act.

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

Receiving technical assistance from the Bureau of Indian Affairs in the preparation of an application for grant funding under the Indian Child Welfare Act does not guarantee that the application will be funded.

APPEARANCES: Allan R. Toledo, Esq., Albuquerque, New Mexico, for appellant; Sharee Freeman, 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 PARRETTE

On July 5, 1984, the Board of Indian Appeals (Board) received a notice of appeal from the Nambe Pueblo (appellant). Appellant sought review of a June 6, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) denying appellant's application for fiscal year 1984 grant funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1952 (1982). Appellant alleged that the denial of its application was arbitrary, capricious, and inconsistent with the intent of the ICWA, and that the welfare of the tribe and its members was being adversely affected by the decision. For the reasons discussed below, the Board finds that this appeal should be dismissed for lack of jurisdiction.

Background

Prior to formal submission of an application for ICWA funding to the Albuquerque Area office, Bureau of Indian Affairs (BIA), appellant sought and obtained technical assistance in preparing the application from BIA pursuant to the provisions of 25 CFR 23.29. The preliminary comments made by BIA on January 13, 1984, indicate that the application would probably have received a competitive score of 79. A score of 85 is necessary before an application is considered for funding.

Appellant formally submitted its application to BIA on January 16, 1984. The application was reviewed by the Albuquerque Area Office Selection Committee and was assigned a review rating of 81. Appellant was notified of the decision to deny its application by letter dated February 27, 1984.

Appellant sought review of this decision by appellee. Appellee referred the appeal to a grant appeal panel, which reviewed the original application. The panel assigned the application a competitive score of 77. Based upon this review, appellee on June 6, 1984, affirmed the decision of the Area Office to deny funding to appellant because the application did not meet the minimum standards for approval as required under Title II of the ICWA. This decision stated that it was based upon the exercise of discretion and was final for the Department.

The Board received appellant's notice of appeal from this decision on July 5, 1984. The notice of appeal appeared to seek review of a discretionary decision over which the Board had no jurisdiction under 25 CFR 2.19 and 43 CFR 4.330. Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142 (1983). Consequently, on July 25, 1984, the Board issued an order allowing appellant an opportunity to show cause why the appeal should not be dismissed for lack of jurisdiction. Appellant's response to this order was received on August 27, 1984.

By order dated September 5, 1984, the Board gave appellee an opportunity to reply to appellant's response, or to concede Board jurisdiction over the case. Appellee forwarded the administrative record in this matter to the Board on October 5, 1984, but noted that it was not conceding the question of jurisdiction. Appellee's brief opposing Board jurisdiction was received on October 10, 1984.

Discussion and Conclusions

[1] The Board discussed its role in reviewing the denial of grant applications under the ICWA in Billings American Indian Council, supra, and Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146 (1983). In those cases, the Board stated that it is ultimately discretionary with BIA whether to fund a particular application under the ICWA and its implementing regulations. Because this decision is committed to BIA's discretion, the Board does not have jurisdiction to review these decisions. The regulations, however, contain certain legal guidelines and requirements that must be followed in deciding whether a particular application should be funded. An alleged violation of those guidelines or requirements can serve as the basis for Board jurisdiction, limited to the alleged violations of law. Cf. Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146 (1984); 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).

Appellant's first argument is that BIA arbitrarily denied its application on the ground that demographic data relating to the individuals to be served by its proposed program were not provided. Demographic data is required of the applicant by 25 CFR 23.24 1/ and 23.25. 2/ Both in its

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1/ In relevant part, 25 CFR 23.24 states that an “[a]pplication for a grant under this part shall include: \* \* \* (d) The unduplicated client service population directly benefiting from the project.”

2/ Section 23.25 states in pertinent part:

“(a) The Commissioner [or] his/her designated representative shall select for grants under this part those proposals which will in his/her judgment best promote the purposes of Title II of the Act. Such selection will be made through a review process in which each application will be scored competitively, taking into consideration the content of the application as required in 23.24, and the following factors:

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“(3) Whether the applicant presents narrative, quantitative data, and demographics of the client population to be served. Examples of such data include:

- “(i) The number of actual or estimated Indian child placements outside the home;
- “(ii) The number of actual or estimated Indian family breakups; and
- “(iii) The need for a directly related preventive program.

“(4) The relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing prevention of Indian family breakup. \* \* \*

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“(5) The proper justification of the extent to which the proposed program would duplicate any existing child and family service program emphasizing prevention of Indian family breakup, taking into consideration all of the factors listed in paragraphs (a) (1), (2), (3) and (4) of this section. Proper justification must be given for any duplication of services.”

response to the Board's July 25, 1984, order and in the brief submitted in its earlier appeal to appellee, appellant argues that it does not have the resources to provide this demographic data, and that the information is not generally available in the form requested.

[2] The regulations in part 23 clearly place the burden on an applicant to prove that it is entitled to receive Federal funds under the ICWA. The BIA is neither required nor permitted to make assumptions about the persons to be aided with ICWA funds, or the programs to be provided. <sup>3/</sup> Appellant's reliance on Seattle Indian Center v. Acting Deputy Assistant Secretary-- Indian Affairs (Operations), 12 IBIA 67, 90 I.D. 515 (1983), is misplaced. In Seattle the Board addressed a situation in which BIA received applications for ICWA funds from several organizations that appeared to be serving the same client population and/or offering the same types of programs. In such cases, BIA must determine whether there is actual duplication before finding an applicant not eligible to receive ICWA funds on the assumption that there is duplication. The Board did not hold that BIA, rather than the applicant, was required to ascertain the preliminary demographic data necessary to sustain an application for funding. Because it is the applicant's responsibility to provide this information so that its application can be evaluated, BIA does not violate the law or abuse its discretion by denying an application that fails to set forth the required information.

[3] Appellant also argues that it sought and received technical assistance from BIA before submitting its formal application. The conclusion appellant apparently urges is that if BIA had given it proper and adequate technical assistance, the application would have been accepted. Such a conclusion is not justified. Receiving technical assistance from BIA in the preparation of a grant application does not guarantee that the application will be accepted. BIA assistance provides an opportunity for the applicant to receive an advance indication of any potential problems with its application and guidance in attempting to correct those problems. It gives no assurance that the problems can be corrected.

Whether or not technical assistance has been provided to an applicant, BIA retains full responsibility to review the application on its merits when it is formally submitted. The fact that BIA has provided technical assistance in regard to a grant application that is subsequently denied, therefore, does not constitute a violation of law or abuse of discretion.

The Board finds that appellant has raised no legal issue relating to BIA's consideration and denial of its application for grant funding under the ICWA. Because no legal issue was raised, the Board lacks jurisdiction over the appeal.

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<sup>3/</sup> See, e.g., Inspector General's Audit Report, "Review of Indian Child Welfare Grants Awarded by the Bureau of Indian Affairs," Dec. 27, 1982, which is quoted in appellee's brief at pages 11-12.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed for lack of jurisdiction.

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Bernard V. Parrette  
Chief Administrative Judge

We concur:

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//original signed  
Jerry Muskrat  
Administrative Judge

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//original signed  
Anne Poindexter Lewis  
Administrative Judge