INTERIOR BOARD OF INDIAN APPEALS

Kiowa Business Committee of the Kiowa Indian Tribe
v. Anadarko Area Director, Bureau of Indian Affairs

18 IBIA 401 (08/21/1990)

Denying reconsideration of:
18 IBIA 384

United States Department of the Interior

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

KIOWA BUSINESS COMMITTEE OF THE KIOWA INDIAN TRIBE, Appellant	:	Order Denying Reconsideration
v.	:	Docket No. IBIA 90-116-A
ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 21, 1990

On August 15, 1990, the appellant in the above case filed with the Board of Indian Appeals (Board) a motion for reconsideration or, in the alternative, request for waiver or exception. Appellant seeks reinstatement of its appeal, which was dismissed by Board order dated July 23, 1990, for failure to file a timely notice of appeal. 18 IBIA 384 (1990).

Reconsideration of Board decisions is permitted under 43 CFR 4.315, which provides in pertinent part:

> (a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted.

Appellant raises five arguments in support of its motion: (1) 25 CFR 2.20 does not specifically prohibit the filing of appeals directly with the Assistant Secretary - Indian Affairs (Assistant Secretary) and the ambiguity thus created as to whether an appeal should be filed with the Assistant Secretary or with the Board must be resolved in appellant's favor; (2) the Acting Anadarko Area Director (Area Director) was properly notified of the appeal and the Board is an agent of the Secretary of the Interior, and the Board or the Assistant Secretary should exercise discretion to determine that service was acceptable; (3) in an analogous court situation, when an appeal is improperly sent to the appeals court rather than to the district court, service is deemed sufficient although not technically correct, and the misdirected document would be forwarded to the proper court; (4) prior appeals have been filed with the Assistant Secretary pursuant to regulations and dismissing the appeal under the present circumstances would not be in the interest of justice or within the intent of the regulations; and (5) the Assistant Secretary should waive or make exception to the rules and regulations which caused this appeal to be dismissed as untimely filed.

In regard to appellant's first argument, the Board finds that there is no ambiguity in the regulations as to where a notice of appeal must be filed. The regulations in 25 CFR Part 2, to which appellant refers in its motion, state that appeals may be decided by "[t]he Assistant Secretary - Indian Affairs pursuant to the provisions of § 2.20 of this part," (25 CFR 2.4(c)), and by "[t]he Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR Part 4, Subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary - Indian Affairs other than the Deputy to the Assistant Secretary - Indian Affairs/ Director (Indian Education Programs)" (25 CFR 2.4(e)). 25 CFR 2.20 sets out procedures for the Assistant Secretary to assure jurisdiction over an appeal otherwise properly filed with the Board. These regulations clearly provide that a notice of appeal is to be filed with the Board, not with the Assistant Secretary.

Furthermore, even if there were some ambiguity in the regulations, the Area Director's decision notified appellant that any appeal was to be filed with the Board. The decision reads:

> This decision may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Blvd., Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and MUST BE FILED WITHIN 30 DAYS OF THE DATE YOU RECEIVE THIS DECISION. * * * You must send copies of your notice of appeal to (1) the Assistant Secretary - Indian Affairs * * * (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you sent copies to these parties. * * * [Emphasis in original.]

The regulations in 43 CFR 4.332 state:

> (a) <u>A notice of appeal shall be</u> in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and <u>filed with the Board of Indian Appeals</u>, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. <u>A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary - Indian Affairs</u>. As required by § 4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary - Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. * * * [Emphasis added.]

Appellant was clearly informed by both the Area Director and the regulations that its notice of appeal was to be filed with the Board. The fact

that appellant chose to send its appeal to a different office does not excuse its failure to file a timely notice of appeal in the proper office. 1/

Appellant's second argument appears to be that because the Area Director and the Board are both part of the Department of the Interior, service of a copy of the notice of appeal on the Area Director should be deemed proper filing of the appeal with the Board. This proposition is without merit on its face. Mere service on an interested party does not, under any set of circumstances, confer jurisdiction over an appeal on the reviewing forum when no notice of appeal is properly filed.

Appellant next raises an argument by analogy to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. Appellant states that filing of an appeal in the incorrect forum under that rule results in a finding that service was timely, with the forum receiving the filing redirecting it to the proper forum. Appellant further states that it was informed, allegedly by someone in the Office of the Assistant Secretary, that the Assistant Secretary "with a degree of frequency, receive[s] mistakenly directed Notices of Appeals [sic] from decisions of Area Directors, and that it routinely forwards the appeals to the [Board]." Motion at page 2. Appellant states that this routine practice supports its position.

The Department's regulations do not provide any means for finding that the filing of a notice of appeal with the Assistant Secretary is acceptable under the present circumstances. The Department is bound by its own properly promulgated regulations, which have the force and effect of law. See, e.g., Tarabochia v. Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 269, 275, 91 I.D. 243, 246 (1984). Furthermore, assuming arguendo that the office of the Assistant Secretary "routinely" forwards to the Board appeals that are incorrectly filed with it, the present appeal was not forwarded to the Board. Thus, even if appellant could establish a normal business practice that could somehow excuse its incorrect filing, the specific evidence in this case is that any such business practice was not followed.

Appellant's fourth argument is that prior appeals have been filed with the Assistant Secretary under the regulations. Presumably, appellant is referring to the former appeal regulations under which decisions of Bureau of Indian Affairs (BIA) Area Directors were filed with the Commissioner of Indian Affairs. Because the position of Commissioner was vacant, appeals were sometimes filed with the Assistant Secretary because appellants did not know the proper official to whom to send the appeal.

The appeal regulations for BIA and the Board were amended, effective March 13, 1989, by notice properly published in the Federal Register. See 54 FR 6478 and 6483 (Feb. 10, 1989). Contrary to appellant's allegations, a primary purpose of the amendment to the regulations was to change the place

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1/ We note that protective notices of appeal could have been filed with both the Board and the Assistant Secretary, but were not.

for filing notices of appeal from BIA Area Director decisions from the central office of BIA to the Board. Those persons doing business with the Department are presumed to have knowledge of properly published regulations. See, e.g., Hays v. Muskogee Area Director, 18 IBIA 380, 381 (1990), and cases cited therein.

In this case, however, the Board need not resort to this presumption because appellant refers to the new regulations in support of its argument that the ambiguity of those regulations caused it to file its notice of appeal in the incorrect office. Thus, by its own admission, appellant knew of the new regulations. The Board has already discussed the application of those regulations to this appeal. 2/

Appellant's final argument is that the Assistant Secretary should waive or make exception to the rules and regulations which caused the appeal to be dismissed as untimely filed. The only authority the Assistant Secretary has to waive Departmental regulations arises from 25 CFR 1.2, which states in its entirety:

> The regulations in Chapter I of Title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

This authority is limited to the waiver of regulations in 25 CFR Chapter I. The Board is not part of the Office of the Assistant Secretary - Indian Affairs, and is not subject to administrative direction or oversight by that official. Neither are the Board's regulations in 43 CFR subject to waiver by the Assistant Secretary. The Board has previously held that it has no authority to waive or make exceptions to duly promulgated Departmental regulations. See, e.g., Kirkie v. Acting Aberdeen Are Director, 18 IBIA 6 (1989); Redfield v. Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 190, 194 (1984). 3/

2/ If appellant is, instead, saying that it has filed appeals with the Office of the Assistant Secretary since the promulgation of the new regulations and that those appeals have been addressed by that office, the validity of any action taken by the Assistant Secretary is seriously in question. Furthermore, such an allegation would undermine appellant's previous contention that the Office of the Assistant Secretary routinely forwards incorrectly filed appeals to the Board.

3/ Furthermore, appellant has not been singled out for the application of the requirement that notices of appeal must be dismissed when they are filed with the Assistant Secretary rather than with the Board. For other cases in which the Board has dismissed appeals that were untimely and/or filed in the wrong office, see Tonkawa Tribe of Oklahoma v. Acting Anadarko Area Director, 18 IBIA 370 (1990); McLean v. Portland Area Director, 18 IBIA 311 (1990); Locust v. Acting Anadarko Area Director, 18 IBIA 286 (1990); Jones v. Assistant Anadarko Area Director, 17 IBIA 122 (1989).

Accordingly, the Board finds that appellant has not set forth grounds for reconsidering the July 23, 1990, dismissal order. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this motion for reconsideration is denied. 4/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
John H. Kelly
Administrative Judge
Alternate Member

4/ Appellant also states that counsel appearing on its behalf in this appeal is not in violation of 25 U.S.C. § 81 (1982). Because the identity of counsel played no part in the Board's original dismissal order, this statement is not addressed.