



INTERIOR BOARD OF INDIAN APPEALS

Grand Traverse Band of Ottawa & Chippewa Indians v.  
Acting Deputy Assistant Secretary - Indian Affairs (Tribal Services)

18 IBIA 450 (09/24/1990)



# United States Department of the Interior

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

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

v.

ACTING DEPUTY TO THE ASSISTANT SECRETARY -  
INDIAN AFFAIRS (TRIBAL SERVICES)

IBIA 90-69-A

Decided September 24, 1990

Appeal from a finding that an Indian Child Welfare Act renewal grant application was not timely filed.

Affirmed.

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

A Federal Register notice of the availability of funds under Title II of the Indian Child Welfare Act which states that post marks will not be considered in determining whether an application for funding is timely submitted, places the applicant on notice that it bears the burden of ensuring timely submission of its application.

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

Continued funding under a multi-year Indian Child Welfare Act grant is dependent upon the grantee's progress in achieving the project objectives as set forth in the approved work plan.

3. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to issue advisory opinions.

APPEARANCES: John Petoskey, Esq., Suttons Bay, Michigan, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Grand Traverse Band of Ottawa and Chippewa Indians seeks review of a March 20, 1990, decision of the Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) (appellee) finding that its application for a renewal grant under Title II of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (1982), was not timely filed. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The availability of funds for the fiscal year (FY) 1990 ICWA program was announced by publication in the Federal Register. 54 FR 50310 (Dec. 5, 1989). Part III.B, "Closing Date for Receipt of Applications," stated:

The closing date for receipt of all applications under this Program Announcement is February 16, 1990. Applications for Indian Child Welfare Act Grants must be received in the appropriate Bureau of Indian Affairs' Social Services Area/Agency Office, as specified in 25 CFR 23.28, on/or before 4:15 p.m. or the applicable close of business for that office on the closing date of the application period. Post marks will not be considered as meeting the timeframe for applications received after the application deadline. \* \* \* Applications which do not meet this criteria are considered late applications and will not be considered in the current competition.

(54 FR at 50311).

Appellant states that it delivered its application for the renewal of a 3-year ICWA grant received in FY 1988 to the United States Postal Service (USPS) at 4 p.m. on February 15, 1990. It requested Express Mail Next-Day Service to the Michigan Agency (agency), Bureau of Indian Affairs (BIA). Although USPS attempted delivery on Saturday, February 17, 1990, appellant's application was not delivered to the agency until 10:55 a.m. on February 20, 1990. Appellee does not dispute appellant's statement of facts.

By letter dated February 26, 1990, the agency Superintendent acknowledged receipt of appellant's application. By memorandum of the same date, the Superintendent sent the application package to the Minneapolis Area Director, noting that it was received after the deadline.

On March 7, 1990, the Area Director notified appellant that its application would "not be considered for the second year process" because it "was received after the deadline of February 16, 1990." The Area Director informed appellant of its right to appeal this decision to the Assistant Secretary - Indian Affairs. 1/

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1/ Part III.J of the Federal Register publication states:

"In accordance with 25 CFR 2.20(c), 23.63, and 23.64, the Assistant Secretary - Indian Affairs has made a determination to assume administrative jurisdiction over all Fiscal Year 1990 Indian Child Welfare Act Grant Application appeals.

\* \* \* \* \*

"\* \* \* The Assistant Secretary - Indian Affairs shall take action and render a decision in accordance with the provisions required in 25 CFR 2.20."

(54 FR at 50313).

Appellant filed a timely notice of appeal with the Assistant Secretary. The Assistant Secretary referred the appeal to appellee, who, on March 20, 1990, affirmed the Area Director's decision, stating at page 1:

The Minneapolis Area Director made a correct decision based on the regulations. Due to the competitive nature of the Title II grant program, it would be unfair to the other applicants if we were to grant an extension to you for submission of your renewal application. While you were awarded a multi-year grant program last year, it is not considered a quasi-entitlement because certain conditions must be met each year to be considered for continued funding.

The extenuating circumstances described are unfortunate. We believe, however, that the guidelines are clear and that the regulations allow for fair and uniform treatment of all applicants. We further believe that the ultimate responsibility rests with the applicant for timely submission of applications.

Appellee informed appellant of its right to appeal his decision to the Board. <sup>2/</sup> Although appellant incorrectly filed its appeal with the Area Director rather than with the Board, the Area Director forwarded the appeal to the Board. Appellant filed an opening brief in support of its appeal.

#### Discussion and Conclusions

Appellant raises three arguments on appeal: (1) it complied with the deadline requirements set forth in the Federal Register notice by delivering its application to the USPS in time for timely delivery under that agency's next-day delivery program; (2) it has an entitlement right to the renewal application because it operated the first year of its multi-year grant in an appropriate manner and the only reason for denial of its second year funding was the untimely delivery; and (3) it should not be disqualified from receiving funding under the third year of its multi-year grant because of the late submission of the second year application.

[1] In support of its first argument, appellant raises general legal precedent to the effect that mail properly addressed and delivered to the USPS is presumed to have been delivered, and suggests that principles of estoppel should prevent BIA from refusing to consider its application.

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<sup>2/</sup> 25 CFR 2.20(c) provides that when the Assistant Secretary assumes jurisdiction over an appeal, he may decide the appeal personally, or may assign the appeal to a Deputy to the Assistant Secretary. The section further states that a decision signed by the Assistant Secretary is final for the Department of the Interior, but a decision signed by a Deputy "may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR Part 4, Subpart D."

These general principles do not apply in the present case because of the clear statement in the Federal Register publication that "[p]ostmarks will not be considered as meeting the timeframe for applications received after the application deadline" (54 FR at 50311). This statement placed appellant on notice that it bore the burden of ensuring actual receipt of the application on or before February 16, 1990, regardless of how the application was delivered to BIA.

[2] Appellant's second argument is that it has an entitlement to funding for the second year of a multi-year ICWA grant. Appellant contends that if its application had been timely submitted, "the grant would have been made as a matter o[f] routine" (Opening brief at 5). This statement is not correct. 25 CFR 23.37(f) provides that continued funding under a multi-year ICWA grant is "dependent upon the grantee's progress in achieving project objectives according to the approved work plan submitted in the first year of application." Section 23.37 clearly shows that, although there is an expectation that multi-year grants will continue to be funded for the entire period, BIA is required to make a determination each year that the grantee has successfully performed during the preceding year.

[3] Finally, appellant asks the Board to hold that it is not disqualified from receiving funding for the third year of its multi-year grant merely because it did not receive funding for the second year of the grant. Appellant is requesting an advisory opinion; *i.e.*, a determination of its legal rights in the absence of a controversy concerning those rights. The Board has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to issue advisory opinions.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 20, 1990, decision of the Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge