



INTERIOR BOARD OF INDIAN APPEALS

Quileute Indian Tribe v. Portland Area Director, Bureau of Indian Affairs

23 IBIA 20 (10/29/1992)



# United States Department of the Interior

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

QUILEUTE TRIBE

v.

PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-175-A

Decided October 29, 1992

Appeal from the denial of an application for a grant under the fiscal year 1992 Planning Grant Program.

Vacated; referred to the Assistant Secretary - Indian Affairs.

1. Administrative Procedure: Generally--Bureau of Indian Affairs:  
Administrative Appeals: Generally--Indians: Generally--Indians:  
Financial Matters: Financial Assistance

A Federal agency has a responsibility to explain the rationale and factual basis for decisions affecting persons dealing with the agency. Failure to provide such information is a violation of due process.

APPEARANCES: Tribal Vice-Chairman Chris Morganroth III, for appellant.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Quileute Tribe seeks review of an April 3, 1992, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's application for a grant under the FY 1992 Planning Grant Program. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision, and refers this case to the Assistant Secretary - Indian Affairs for further consideration.

### Background

Pursuant to an announcement published at 57 FR 160 (Jan. 2, 1992), appellant filed an application for a continuing grant under the FY 1992 Planning Grant Program. Appellant sought the grant to:

- 1) Enhance communication with government and nongovernment organizations which can assist in environmental assessment and planning efforts. Activities are described as they relate to Water Resources, Waste/Hazardous Materials, Natural Resources or Land use/Zoning.

- 2) Integrate environmental concerns into Tribal programs and facilitate thoughtful economic and infrastructure development.
- 3) Create an Environmental Education Program.
- 4) Integrate culturally significant data into environmental protection.
- 5) Develop financial and staffing plan to maintain environmental program.

(Application at 2).

The application was reviewed by the Portland Area Office. On April 3, 1992, the Area Director denied the application, stating:

Four members of an Area Review Committee independently ranked twenty-nine grant applications in accordance with published program guidelines. These individual scores were totaled, resulting in each applicant's final score and relative ranking.

Total scores on the applications reviewed ranged from 360 to 215. It was determined that your application, overall, ranked below the level that could be approved within Portland Area's total funding of \$206,250. The lowest ranked application among those funded was ranked sixth. If additional funding becomes available, it will be applied to lower rank applications.

The Area Director indicated that appellant's application received a total score of 323 points, and that it ranked fourteenth.

The Board received appellant's notice of appeal from this decision on May 28, 1992. On May 29, 1992, the Board issued a predocketing notice and order to furnish appellant with a copy of the administrative record and statement of the basis for decision. The Board stated on page 2 of that order:

In its notice of appeal, appellant indicates that it discussed its ranking with officials within the Portland Area Office, apparently not including the Area Director. Appellant thus received some information relating to its standing among the grant applicants. The appeal shows, however, that appellant has not been fully informed about the reasons why its application was denied.

Appellant has a due process right to be informed of the reasons why its application was denied. See Bowen v. American Hospital Association, 476 U.S. 610, 626-27 (1986). This is true even though the Area Director's decision was ultimately based upon an exercise of discretion. See, e.g., Stone Trucking v. Portland Area Director, 22 IBIA 52, 56-7 (1992) (BIA must demonstrate the basis for a decision involving the exercise of discretion).

Because no reasons were provided in the denial letter, the Board could vacate the Area Director's decision and remand this matter to him for issuance of a new decision. The Board has determined, however, that this procedure would not be the most effective, and would substantially delay final resolution of this appeal.

The Area Director is ordered to provide appellant with a complete, readable, duplicate copy of the administrative record identical to the record furnished to the Board. The Area Director shall enclose with each copy of the administrative record, including the copy transmitted to the Board, a statement of the specific reasons for the denial of appellant's application. [Emphasis in original.]

Although informed of their right to do so, neither appellant nor the Area Director filed a brief on appeal. Statements in support of appellant's appeal were received from the State of Washington, Department of Ecology; the United States Coast Guard, Port Angeles Group; and the United States Environmental Protection Agency, Region 10.

#### Discussion and Conclusions

The Area Director's decision did not inform appellant of the reasons for the denial of its application. The only statement in the administrative record arguably constituting such a statement is found on page 2 of the Area Director's memorandum transmitting the record to the Board: "The Portland Area Office reviewed all the applications fairly. It is unfortunate that [appellant's] application was not funded due to insufficient funds." The Board did not receive a copy of any other letter sent to appellant in response to the Board's May 29, 1992, order. The Board contacted the Area Office to determine if a letter had been sent to appellant setting forth the specific reasons for the denial, and was informed that no such letter had been sent. <sup>1/</sup>

[1] It is a basic precept of the American administrative law system that a person has a due process right to be informed of the reasons for a government agency's decision affecting it. Bowen, supra at 627 (a Federal agency has a responsibility to "explain the rationale and factual basis for its decision"). The Board has applied this rule in Indian matters. See, e.g., K.D. McPhail, d.b.a. Macro Oil Co. v. Acting Muskogee Area Director,

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<sup>1/</sup> The Area Director's denial in this case was not the only instance during consideration of FY 1992 grant applications in which an Area Director denied an application without giving specific reasons. In each such case appealed to the Board, the Area Director was ordered to provide the appellant with a statement of those reasons. See Algaacig Tribal Government v. Juneau Area Director, 23 IBIA 1 (1992); Three Affiliated Tribes of the Fort Berthold Reservation v. Aberdeen Area Director, Docket No. IBIA 92-174-A; and Native Village of Venetie Tribal Government v. Juneau Area Director, Docket No. IBIA 92-185-A. This is the only case, however, in which an Area Director failed to comply with the Board's order.

18 IBIA 353 (1990); GMG Oil & Gas Corp. v. Muskogee Area Director, 18 IBIA 187 (1990); and Estate of San Pierre Kilkakhan (Sam E. Hill), 1 IBIA 299, 79 I.D. 583 (1972).

Here, the Area Director's decision provided no reasons for the denial of appellant's application. The administrative record includes the rating sheets of the four reviewers. The scores given were 100, 88, 75, and 60, each out of a possible 100. The large disparity in the scores was not resolved or explained in the comments made by the reviewers. There is no evidence that the range of scores was examined, or even noted. In fact, it appears from the record that the four scores were simply added together to give a total score of 323 for appellant's application. Under the circumstances of this case, it is impossible for the Board or appellant to know the reasons why the Area Director denied this grant application. Accordingly, the Board vacates the Area Director's decision.

The more difficult part of this decision is the remedy. The Area Director was informed of the failure of his decision to comply with due process requirements, and declined to correct the problem. The Board assumes that if this case were vacated and remanded to the Area Director, he would merely provide the reasons the Board ordered him to give in May, or state that there are no funds remaining for the FY 1992 program. <sup>2/</sup> In either case, the problem raised by this case would remain unaddressed.

The approval or disapproval of applications under this funding program is a discretionary function over which the Board has limited review authority. See, e.g., Metlakatla Indian Community of the Annette Islands Reserve v. Deputy Commissioner of Indian Affairs, 22 IBIA 49, 50 (1992). The Board does not have authority to order BIA to fund appellant's application either at the requested amount or a reduced amount, or to fashion any other meaningful remedy.

This case is, however, reminiscent of a previous case involving grant funding under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1988) (ICWA). In Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs, 9 IBIA 254, 89 I.D. 196 (1982), the Board reversed a decision disapproving a FY 1981 ICWA grant application after finding that BIA had failed to follow requirements set forth in 25 CFR 23.29(b)(4) (1982). The case was remanded with instructions to follow the regulations. Although there had been a clear violation of

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<sup>2/</sup> An Apr. 27, 1992, letter from the Area Contract Specialist to appellant indicates that "[f]unds were not set-aside for overturned appeals. If an appeal was upheld, [BIA] Central Office [in Washington, D.C.,] would locate the funding." This failure to set aside funds for cases that might be reversed or ordered to be reconsidered on appeal is a problem that the Board suspected might exist. See, e.g., Las Vegas Paiute Tribe v. Acting Phoenix Area Director, 22 IBIA 302, 304 (1992) ("If he concludes that appellant's application would have been approved, the Area Director shall further determine an appropriate remedy, if, as the Board assumes, funds for the FY 1992 \* \* \* program have all been distributed").

the appellant's legal rights, at 10 IBIA 23, 24 (1982), the Board relieved BIA of the remand requirements after finding that there were "no unobligated fiscal year 1981 funds that could be applied to appellant's grant application even if that application were approved."

The Aleutian/Pribilof Islands Association (A/PIA) also applied for a FY 1982 ICWA grant. In order to avoid repetition of the previous FY's scenario, A/PIA sought to enjoin the disbursement of funds under the FY 1982 program, pending resolution of its administrative appeal. A limited preliminary injunction was granted by the United States District Court for the District of Alaska. Aleutian/Pribilof Islands Association, Inc. v. Powers, No. A82-163 Civ (D. Alaska May 11, 1982). A similar preliminary injunction, sought for the same reason, was granted in Tanana Chiefs Conference, Inc. v. Lestenkof, No. F82-017 Civ (D. Alaska May 17, 1982). <sup>3/</sup>

It is the Board's understanding that, either in connection with or subsequent to these cases, the Department determined to set aside a certain percentage of the ICWA grant appropriation in order to provide funds for applications that might be approved after an appeal. Because the Board does not presently consider ICWA grant appeals, <sup>4/</sup> it is not aware of the precise procedures in place governing these cases.

This case demonstrates the same potential problem as was experienced in the ICWA cases. Although the Board's decision does not require that appellant's application be funded, but rather requires reconsideration of the application on its merits, if reconsideration shows that appellant's application should have been funded, it is highly unlikely that FY 1992 funds would be available. Although the Board has raised this potential problem in several previous cases, one of which was cited in footnote 2, supra, this extended discussion is given for the first time because the facts of this case suggest that there may be a real possibility that the denial of appellant's application might be reversed after further consideration.

This appeal thus raises questions related to both the denial of due process to appellant in consideration of its FY 1992 grant application, and to the general problem involving the availability of fiscal year funds should a denial be reversed as the result of an appeal. <sup>5/</sup> These questions cannot adequately be addressed by an Area Director. Accordingly, the Board has determined that it should use its authority in 43 CFR 4.337(b) to refer

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<sup>3/</sup> Both of these cases were apparently ultimately resolved to the plaintiffs' satisfaction, without Board involvement.

<sup>4/</sup> In recent years, these cases have been considered by the Assistant Secretary - Indian Affairs under authority of 25 CFR 2.20(c) and 43 CFR 4.332(b).

<sup>5/</sup> The concern about the availability of funds relates not only to the Planning Grant program, but also to the Small Tribes program, the Training and Technical Assistance Grant program, and any other similarly administered grant program

this matter to the Assistant Secretary - Indian Affairs for further consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.337(b), the Portland Area Director's decision is vacated, and this matter is referred to the Assistant Secretary - Indian Affairs for further consideration in accordance with the discretion granted to him and the legal conclusions of this opinion.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge