INTERIOR BOARD OF INDIAN APPEALS

Vincent Vitale v. Juneau Area Director, Bureau of Indian Affairs

36 IBIA 177 (06/11/2001)

Related Board cases:

33 IBIA 63
45 IBIA 10
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54 IBIA 86, *recons. denied*, 54 IBIA 229
57 IBIA 80

# United States Department of the Interior

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

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| VINCENT VITALE, Appellant | : | Order Affirming Decision |
| v. | : | Docket No. IBIA 99-49-A |
| JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee | : | June 11, 2001 |

Appellant Vincent Vitale seeks review of a February 18, 1999, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), denying Appellant's claim for payment of an attorney lien from funds held in the Individual Indian Money (IIM) account of Bertha Mae Tabbytite (Tabbytite). For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision. 1/

Between 1976 and 1980, Appellant performed legal services for Tabbytite in connection with litigation concerning a road which had been constructed across her Indian allotment in the Chugach Mountains near Anchorage. The road was constructed by a private individual, who later transferred it to the City of Glen Alps. The City of Glen Alps was subsequently annexed by the Municipality of Anchorage (Municipality). Litigation over the road commenced in 1969 and concluded in 1992, with Tabbytite ultimately receiving a sizeable award for condemnation of the portion of her allotment that the road crossed and for precondemnation use of the road. A more extensive history of this litigation can be found in Law Offices of Vincent Vitale v. Tabbytite, 942 P.2d 1141 (Alaska 1997), and in the cases cited in that decision.

As relevant to this appeal, Tabbytite dismissed Appellant as her attorney in 1980. Around the time he was dismissed, Appellant filed an attorney lien against Tabbytite under Alaska State law. When Tabbytite was awarded funds from the Municipality in the condemnation litigation, Appellant brought his lien to the attention of the Municipality. The check which the Municipality subsequently issued to Tabbytite also included Appellant as a payee. Tabbytite refused to accept the check and demanded another made out solely to herself. The Municipality then filed an interpleader action in Alaska State court, contending that it was subject to double liability to Tabbytite and Appellant. The interpleader proceeding was concluded in 1997, after reaching the Alaska Supreme Court as Law Offices, supra. Following remand by that court, the

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1/ This case was stayed while Appellant pursued an appeal within the Department of the Interior under the Freedom of Information Act.

Alaska Superior Court entered Final Judgment on September 25, 1997, finding that Tabbytite was liable to Appellant for attorney fees, costs, and interest.

The Alaska Supreme Court also held, however, that 25 U.S.C. § 410 barred Appellant from receiving that judgment from the funds generated by the condemnation litigation. Section 410 provides:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

The Court held:

> An award of compensation for land which is forcibly conveyed in a condemnation action can readily be categorized as money accruing from a sale of the land in question. As Judge Cardozo put it, "'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined." *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758, 758 (N.Y. 1914); *see also*, *United States v. 27,223.21 Acres of Land*, 589 F.Supp. 1121, 1124 (D. Colo. 1984); *Herskovitz v. Vespico*, 238 Pa.Super. 529, 362 A.2d 394, 397 (1976).
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> * * * Just as Tabbytite can be said to have involuntarily sold a portion of said land and received proceeds for the sale in the condemnation action, it is reasonable to conclude that the use of the same land prior to the formal condemnation action was an involuntary leasing and the damages for that use were lease accruals.
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> We conclude, for the above reasons, that all of the proceeds from the condemnation action reasonably can be considered to have accrued from the lease or sale of allotment lands. The proceeds thus fall within the protection of section 410.

942 P.2d at 1147-48.

This appeal stems from Appellant's attempts to force BIA to pay his judgment from funds generated by the condemnation litigation, despite the holding of the Alaska Supreme

Court in Law Offices, supra. 2/ Appellant first sought to have the Area Director retroactively approve his attorney contract with Tabbytite. In a decision dated June 30, 1998, the Area Director declined to do so. Appellant appealed to the Board. While that appeal was pending, Appellant requested that the Area Director pay his judgment from funds deposited into Tabbytite's IIM account. In order to allow consideration of Appellant's requests in the way least burdensome to all concerned, the Board vacated the June 30, 1998, decision and remanded the matter to the Area Director for appropriate consideration. Vitale v. Juneau Area Director, 33 IBIA 63 (1998).

The Area Director issued the decision on appeal here in response to the Board's remand. In issuing his decision, the Area Director complied with Appellant's request that he address a wide range of issues, many of which were not relevant to the actual decision.

On appeal, Appellant again raises numerous issues and subissues. The Board finds that it need not address all of Appellant's arguments in order to reach a decision in this matter. The Board has a consistent practice of not addressing issues raised in an appeal that are not relevant to its decision. It adheres to that practice here.

The substantive issue before the Board is whether the Area Director properly declined to pay Appellant's State court attorney fees award from funds in Tabbytite's IIM account. Arguably, the first aspect of this issue is whether the funds generated by the condemnation litigation were properly deposited into Tabbytite's IIM account. Appellant suggests that the funds were deposited into the account as a "voluntary deposit," i.e., a deposit that was not required to be placed into the account, but rather was placed there at Tabbytite's request. 25 C.F.R. § 115.6 (1999) established the general rule that IIM accounts were not to be used for voluntary deposits. 3/

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2/ In arguing that the Alaska Supreme Court's holding is not dispositive, Appellant relies on footnote 6 in Law Offices, 942 P.2d at 1148-49. That footnote states in pertinent part: "Moreover, we cannot assume that the Secretary of the Interior will unreasonably disapprove of reasonable fees under section 410." Appellant argues that this statement leaves room for the Secretary to consider his claim under section 410.

3/ Section 115.6 (1999) provided:

"As a general rule, voluntary deposits shall not be accepted. Indians who require banking service shall be encouraged to utilize commercial facilities. If in any case it is determined that an exception to this prohibition should be made to avoid a substantial hardship, the facts in the case shall be considered by the Secretary or his authorized representative and an exception will be allowed or denied."

New regulations governing IIM accounts have been promulgated. See 66 Fed. Reg. 7094 (Jan. 22, 2001) and 66 Fed. Reg. 8768 (Feb. 2, 2001). Cf. new 25 C.F.R. § 115.702, which lists the sources of funds that may be deposited into an IIM account.

The record shows that funds generated by the condemnation litigation were placed into Tabbytite's account on two occasions. 4/ The first deposit was made on or about November 27, 1997. The deposit was from a check from the Municipality which was made out to "US DEPT OF INT BIA, TRUST FOR BERTHA MAE TABBYTITE." The record indicates that Tabbytite did not have an IIM account at that time, so the funds were deposited into a suspense account until an IIM account could be established for her. Once her IIM account was established, the funds were transferred into that account.

Appellant argues that BIA erred by depositing these funds into an IIM account after he had informed the Secretary of the Interior of his attorney fee judgment against Tabbytite. The Area Director contends that, as a matter of fact, he was not aware that Appellant was seeking satisfaction of his attorney fee judgment from Tabbytite's trust funds prior to BIA's deposit of the funds into Tabbytite's IIM account. He further argues that, as a matter of law, the deposit was not improper.

The administrative record contains copies of four letters from Appellant to the Secretary. An August 4, 1997, letter asks the Secretary to approve Appellant's attorney contract with Tabbytite under 25 U.S.C. § 410. 5/ Nothing in the letter requests that funds not be deposited into an IIM account for Tabbytite, or even alerts the Secretary to the fact that funds might be in the process of being deposited into such an account. Followup letters dated October 4, November 5, and November 21, 1997, also did not contain anything that might have caused the Secretary to believe that Appellant was raising any issue other than retroactive approval of his attorney contract.

The Board concludes that, even if the Secretary had immediately forwarded each of these letters to the Area Director, the Area Director would have had no reason based on them to believe that Appellant was attempting to assert a claim against the funds paid to Tabbytite before they were deposited into an IIM account.

After this initial deposit of funds, BIA learned that funds the Municipality had previously paid into the registry of the United States District Court for the District of Alaska were still

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fn. 3 (continued)

25 C.F.R. Part 115, as it appeared in the 1999 edition of the Code of Federal Regulations, was in effect during all times relevant to this appeal.

4/ The Board notes that both of these deposits were made after the decision in Law Offices, supra, in which the Alaska Supreme Court held that the funds generated by the condemnation litigation were derived from a "sale" and a "lease" of trust real property within the meaning of 25 U.S.C. § 410. See excerpt from that decision quoted above.

5/ This letter was written after the July 5, 1997, initial decision in Law Offices, supra, but before the Sept. 5, 1997, denial of rehearing.

being held by the court. These additional funds were released by the registry in three separate checks, each made payable to "BIA - TABBYTITE." This designation of payee was in direct conformance with the district court order requiring disbursement. That order stated: "The sum of * * * shall be disbursed by means of check written to the order of 'BIA - Tabbytite.' The check shall be released to the U.S. Attorney's office. The U.S. Attorney's office shall forward the check to the BIA trust acccountant and it shall be deposited in the trust account for the benefit of Bertha Mae Tabbytite." Order in Anchorage, Alaska v. 1.573 Acres of Land, No. A80-372 Civ. (D. Alaska May 13, 1998).

Although Appellant contends that it was improper to deposit these funds into Tabbytite's IIM account, the Board declines to fault BIA for following the order of the Federal district court.

All of the funds deposited into Tabbytite's IIM account were directly derived from her trust land. The Board concludes that Appellant has not shown either that any of the deposits were "voluntary deposits," or that BIA improperly deposited the funds into Tabbytite's IIM account. 6/

Once the funds generated by the condemnation litigation were placed in an IIM account, they became subject to the regulations in 25 C.F.R. Part 115 (1999). 25 C.F.R. § 115.9 (1999) set out those circumstances under which the Secretary determined that funds in an IIM account could be applied to debts owed by the account owner without the owner's consent. Section 115.9 (1999) provided in pertinent part:

> Funds of individuals may be applied by the Secretary or his authorized representative against delinquent claims of indebtedness to the United States or any of its agencies or to the tribe of which the individual is a member, unless such payments are prohibited by acts of Congress, and against money judgments rendered by courts of Indian offenses or under any tribal law and order code. Funds derived from the sale of capital assets which by agreement approved prior to such sale by the Secretary or his authorized representative are to be expended for specific purposes, and funds obligated under contractual arrangements approved in advance by the Secretary or his authorized representative or subject to

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6/ New 25 C.F.R. § 115.702 provides that two types of payments that may be deposited into an IIM account are "[m]oney directly derived from the title conveyance (e.g. sale, probate, condemnation) or use of trust lands * * *" and funds derived from "[a] final order from a court of competent jurisdiction for a cause of action directly related to trust assets requiring funds to be deposited in trust accounts."

> deductions specifically authorized or directed by acts of Congress, shall be disbursed only in accordance with the agreements (including any subsequently approved modifications thereof) or acts of Congress. [7/]

In promulgating former section 115.9 and present section 115.104, the Secretary has in part exercised the discretion granted to him under 25 U.S.C. § 410 by setting out several categories of claims which BIA may pay from an IIM account without the consent of the account owner. See Miller v. Anadarko Area Director, 26 IBIA 97 (1994). Clearly, Appellant's State court claim does not fall within any of those categories of claims.

Appellant has not attempted to show that the Secretary lacked the authority to exercise discretion in this manner. Even if Appellant had attempted such a showing, the Board could not address the argument because it lacks authority to declare invalid a duly promulgated Departmental regulation. See, e.g., Cheyenne River Sioux Tribe v. Great Plains Regional Director, 35 IBIA 281 (2000); Shoshone-Bannock Tribes v. Portland Area Director, 35 IBIA 242, 247 (2000), and cases cited there.

Appellant raises two arguments contending that he should not be prevented from recovering his fee award by 25 C.F.R. § 115.9. The first argument is that, if his attorney contract with Tabbytite had been retroactively approved, then his claim would have fallen under that part of section 115.9 which authorizes payment of "funds obligated under contractual arrangements approved in advance by the Secretary or his authorized representative." He argues that the Secretary was required to approve the attorney contract:

> The Secretary must apply a reasonable business judgment test. Generally, the Secretary applies this test prior to the signing of the lease or sale contract. In this instance, no such prior approval was possible because the claims arose from trespass and condemnation. Instead, the reasonableness of Vitale's contract was established by judgment after the fact. [Footnotes omitted.]

Opening Brief at 32.

In this argument, Appellant has confused his attorney fee claim with his former client's condemnation claim. The question here is whether the Area Director improperly exercised his discretion by not retroactively approving Appellant's attorney contract with Tabbytite. Appellant's argument fails to make such a showing. It also fails to show that, even if Appellant's attorney contract were to be retroactively approved, it would qualify as a "contractual agreement approved in advance" under former section 115.9. Indeed, the regulatory term clearly appears to exclude contracts approved retroactively.

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7/ This provision is now found in 25 C.F.R. § 115.104.

Appellant's second argument concerning former 25 C.F.R. § 115.9 is that the regulation should not apply at all to his situation. This argument is based on the decision in Arenas v. Preston, 181 F.2d 62 (9th Cir. 1950). Appellant contends that Arenas requires that his attorney lien judgment be paid from the funds generated by the condemnation litigation. He argues that the payment should be made under 25 U.S.C. § 410, without reference to former 25 C.F.R. § 115.9.

In Arenas, the Ninth Circuit affirmed a district court's placement of a lien for attorney fees on a trust allotment obtained through an attorney's successful representation of an Indian client. 8/ The Board agrees with the Area Director that the Arenas decision was based on an exercise of the court's equitable powers.

As the Board has repeatedly stated, it is not a court of general jurisdiction, but rather has only that authority which has been delegated to it by the Secretary. Walker v. Unidentified Appellee, 36 IBIA 27 (2001); James v. Acting Rocky Mountain Regional Director, 35 IBIA 136 (2000); Pounds v. Burris, 34 IBIA 47 (1999); Secrest v. Crow Tribe of Montana, 28 IBIA 98 (1995). It has not been delegated "equitable" authority which would allow it to ignore controlling, but--from a party's perspective--inconvenient, regulations. Transok, LLC v. Assistant Field Manager, Tulsa Field Office, Bureau of Land Management, 36 IBIA 51 (2001) (The Board is not at liberty to ignore duly promulgated Departmental regulations); Ballard v. Acting Eastern Oklahoma Regional Director, 35 IBIA 216, 217 (2000), and Van Mechelen v. Portland Area Director, 35 IBIA 122, 125 (2000) (Duly promulgated Departmental regulations are binding on the Board). If Appellant believes that Arenas should control the outcome in this case, he must make that argument in a forum with authority to consider it.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's February 18, 1999, decision is affirmed. 9/

| //original signed | //original signed |
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| Kathryn A. Lynn | Anita Vogt |
| Chief Administrative Judge | Administrative Judge |

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8/ Appellant presents the record of the proceedings before the court in Arenas as proof that the court considered the application of 25 U.S.C. § 410. This presentation was necessitated by the fact that the court did not mention section 410 in its decision.

9/ All motions not previously addressed are denied. Arguments not specifically discussed were considered and rejected or determined to be not relevant to this decision.