



INTERIOR BOARD OF INDIAN APPEALS

Colleen Kent v. Acting Northwest Regional Director, Bureau of Indian Affairs

45 IBIA 168 (08/17/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

COLLEEN KENT,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 05-77-A
ACTING NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	August 17, 2007

Appellant Colleen Kent appealed to the Board of Indian Appeals (Board) from an April 21, 2005, decision (Decision) of the Acting Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director upheld a December 28, 2004, decision of the Superintendent of the Yakama Agency, BIA (Superintendent; Agency), declining to retroactively approve the gift conveyances of Yakama Allotment Nos. 234, 672, 1679, and 1680 in fee from Harry E. Kent (Harry) to Appellant, Harry's wife. The Regional Director affirmed the Superintendent's decision not to retroactively approve the gift deeds because he found that (1) the record was not sufficiently clear that the gift deeds executed in 1993 still expressed Harry's intent at the time of his death in 2001, and (2) the Superintendent never made a determination during Harry's lifetime that the gift conveyances were in Harry's best interest.

We vacate the Regional Director's decision because we conclude that (1) Harry's intent was very clear that he wanted to gift deed the properties to Appellant, and (2) BIA's failure to make a determination as to Harry's best interest during his lifetime was not a proper ground for declining to retroactively approve the gift deeds. Because a decision whether to approve a gift deed falls within BIA's discretion, we must remand the matter to the Regional Director to issue a new decision whether to retroactively approve the gift conveyances, in light of this decision.

Background

In 1991 or 1992, Harry apparently notified the Agency that he wished to convey by gift his interests in Allotment Nos. 234, 672, 1679, and 1680 to Appellant, to whom he

had been married for over 30 years.¹ At that time, an Agency realty officer contacted YNCE to determine whether mortgages held by YNCE against the four allotments had been satisfied, and whether the Yakama Nation (Nation) had any objection to the conveyances.

On March 1, 1993, an Agency realty officer sent a memorandum to the Yakama Nation Land Committee (Land Committee), advising the Land Committee of Harry's intent to give his trust property to Appellant, out of trust.² Attached was a proposed "Land Committee Action" for the Land Committee's "consideration and concurrence." The memorandum stated that Appellant, a non-Indian, was not eligible to inherit trust property and that the family home is located on Allotment No. 1680. The realty officer also stated that Harry did not want to devise the property by will because it would become subject to the Yakama Tribal Purchase Option.³

On March 23, 1993, Agency Realty Officer Julia Hill forwarded four applications and four gift deeds for Gift Conveyance Out of Trust to Harry. Hill noted that she was

¹ A letter dated January 15, 1991, from an Agency realty officer to the Yakama Nation Credit Enterprise (YNCE) states that Harry had "made application" to convey by gift the properties to Appellant. The record also contains four "check sheets - land transactions," apparently prepared by the Agency, which identify April 2, 1992, as the "date of application" for applications to convey the four allotments by gift. The record does not include any gift deed applications dated 1991 or 1992 or otherwise provide any information about Harry's apparent request at that time.

² Section 152.2 of 25 C.F.R. provides that, "[a]ction on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant." That section also provides that if action is to be withheld, the applicant "shall be advised that he has the right to appeal the withholding action pursuant to [25 C.F.R.] Part 2."

³ Section 607 of 25 U.S.C., and its implementing regulations at 43 C.F.R. § 4.300-4.308, authorize the Nation to purchase the interests of heirs or devisees who are not enrolled members of the Nation with one-fourth degree or more blood of the Nation. However, if the heir or devisee is a surviving spouse of the decedent, the statute provides that the spouse may request a life estate in one-half of the interest acquired by the Nation. 25 U.S.C. § 607(c).

sending the documents at Harry's request and instructed Harry to complete and sign the applications in the presence of two witnesses. It appears from the record that, at the time Hill mailed the applications and deeds to Harry, most of the responses to the questions on the applications had already been typed in by an Agency employee. One of the questions on the application was "I intend to use the land for the following purposes after receiving a patent in fee which becomes taxable from date of issuance." The typed-in response was "I wish to gift convey this land regardless of value to [Appellant], as she is Non-Indian and ineligible to inherit trust property." The line following "amount of my annual income" was left blank. Hill advised Harry that the deeds must be signed in front of a notary public, and stated that she had not yet heard from the Nation concerning the transactions. Hill did not direct Harry to return either the deeds or the applications to the Agency.

On April 23, 1993, Harry signed four separate Applications for Gift Conveyance Out of Trust of Indian Land for Allotment Nos. 234, 672, 1679, and 1680, in favor of Appellant. Two witnesses signed each application. Harry apparently hand-delivered the applications to the Agency in April 1993, *see* Statement of Reasons filed with the Regional Director at 2, and the Regional Director agrees that Harry "promptly returned" the gift deed applications, *see* Regional Director's Answer Brief at 1.

Also on April 23, 1993, Harry signed four deeds to restricted Indian lands for Allotment Nos. 234, 672, 1679, and 1680 in favor of Appellant in the presence of a notary. The deeds were dated April 4, 1993. The deeds recited "one dollar (\$1.00) and other good and valuable consideration" as consideration for the deeds. Harry did not return the signed deeds to BIA.

On December 9, 1997, an Agency employee, identified as "Marie Therese," wrote a note to the file stating that Harry and Appellant had been to the Agency that day and that they "want to go ahead with the gift conveyance and taking the land out of trust." The employee also noted that there had not been any "land committee action to date," but that she had advised Harry and Appellant that she would send a "new one over and get started on the completion of this file."

Harry executed a will on December 15, 1997. In it, Harry stated that he had a beneficial interest in eight Yakama trust allotments, including Allotment Nos. 234, 672, 1679, and 1680. The will devised Harry's interests in each of those trust allotments to Appellant, should she survive him by 30 days. Harry noted in the will, "I am currently attempting to obtain fee patent[s] for myself in the [eight] trust allotments." Harry also devised "all of the rest, residue and remainder of [his] property, whether real, personal or mixed and wheresoever situate, to [Appellant,]" should she survive him by 30 days. Two

witnesses signed the will, and completed sworn statements attesting that Harry was of sound mind and was not acting under duress or undue influence.

Appellant contends that Harry periodically contacted the Agency to ask about the gift deeds, and that Harry and Appellant were “consistently informed that there was, indeed, action being taken [on the gift conveyances].” *See* Reply Brief at 1. There is no documentation of these alleged communications in the record, nor does Appellant provide any details about them, except to contend that Harry’s final meeting with BIA Realty staff “took place approximately one week prior to the hospitalization during which he passed away.” *See id.* at 3.

Harry died on October 6, 2001. It is undisputed that at the time of his death, BIA had not approved the gift deed applications that he had submitted.

Almost three years later, on or around August 12, 2004, Appellant presented the four original gift deeds completed by Harry to the Nation, and notified the Nation that she was requesting the Superintendent’s approval of the gift deeds.

By memorandum dated August 12, 2004, Ruth Adams, an Acting Realty Officer for the Nation,⁴ asked YNCE to advise her whether Harry paid off mortgages against the properties at issue. She noted that the title status reports showed that mortgage encumbrances existed against Allotment Nos. 234 and 672.

On October 18, 2004, the Land Committee met to consider whether it should exercise its purchase option and purchase Allotment Nos. 234, 672, 1679, and 1680. The Committee voted to purchase the allotments. *See* Land Committee Action 004, 2004-5.⁵

On November 9, 2004, Appellant contacted the Superintendent, and explained that she was submitting the gift deeds for approval.

By memorandum dated November 10, 2004, the Superintendent advised the Regional Director that Appellant wanted BIA to approve the gift deeds. The

⁴ The Nation had contracted realty functions from the Agency pursuant to an Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, contract.

⁵ The Land Committee Action refers to a “Realty Committee Action with decision,” and states that it is attached to the Land Committee Action. However, no such Realty Committee action or decision is included in the record before the Board.

Superintendent wrote that “the [Nation] has acted on 11/10/04 stating their objection to this Deed to fee status; and indicate that they would probably purchase the estate interests after Probate.” Memorandum from Superintendent to Regional Director, Nov. 10, 2004, at 2. No Tribal Committee action dated November 10, 2004, appears in the record.

Appellant contacted the Superintendent again on November 16, 2004, to follow up on her request that the gift deeds be approved. By memorandum dated December 13, 2004, Hill again asked YNCE to provide information about mortgages against Allotment Nos. 234, 672, 1679, and 1680.

On December 28, 2004, the Superintendent issued a decision declining to approve the gift deeds. The Superintendent found that Harry had never submitted a completed application or the original deeds, and therefore he (the Superintendent) “lack[ed] authority to now execute and approve the deeds . . . posthumously.” Superintendent’s Decision at 2. In addition, the Superintendent found that several factors counseled against retroactive approval of the gift deeds: 1) Harry was mailed four applications and gift deeds but never returned them; 2) BIA never interviewed Harry to review his personal and financial conditions, or resolved the issue of the mortgages listed on the title status reports; 3) Harry indicated in his will that he was attempting to obtain a fee patent for himself in the allotments, which showed that he knew the gift deed applications were not approved; and 4) Harry had purchased property from other landowners, knew that the transactions had to go through BIA, and therefore knew that he should submit the applications and the deeds to BIA. The Superintendent concluded that “[f]rom [Harry’s] actions, and inactions regarding a decision on his lands, it appears that he was not sure . . . what he wanted to do.” *Id.* at 1.

Appellant appealed the Superintendent’s decision to the Regional Director. Appellant argued that Harry’s actions since 1993 “show a clear and consistent intent to transfer lands out of trust into fee status,” and that it would be in Harry’s best interests for BIA “to respect his application to transfer the allotted lands in fee to [Appellant].” Statement of Reasons filed with the Regional Director at 1, 3. With respect to the Superintendent’s conclusion that Harry never returned the applications to the Agency, Appellant asserted that the “applications were hand carried to the Yakama Realty Office . . . in April [of 1993].” *Id.* at 2. Appellant stated that “periodically . . . [Harry] would inquire as to the status of the Gift Conveyance applications [and] the responses ranged from ‘they’re in process’ to ‘not very much longer.’” *Id.* Appellant also noted that the mortgages against the four allotments had been satisfied prior to the Superintendent’s decision. Appellant asserted that because BIA had not acted on Harry’s applications, Harry “applied for patent in fee on the lands in 1995, under the impression this would prove a more timely process for his desire to transfer the status of the allotments to fee patent,” and devised the property

to Appellant through his 1997 will. *Id.* The record does not include any applications for fee patents completed by Harry. Appellant asked the Regional Director to retroactively approve the gift deeds.

On April 21, 2005, the Regional Director affirmed the Superintendent's decision and declined to retroactively approve the gift deeds because (1) there was no evidence in the record that the Superintendent had made the required "careful examination" of the applications and there was nothing in the record to demonstrate that the Superintendent made a determination that the gift conveyances would be in Harry's best interest; and (2) the record was not entirely clear that Harry still intended, at the time of his death, to convey the parcels to Appellant by gift deed. In examining Harry's intent, the Regional Director relied in part on Harry's failure to return the deeds to the Agency. The Regional Director noted that Harry had acquired at least some of the parcels through deeds, and therefore Harry should have known that the deeds needed to be returned. The Regional Director also relied in part on Harry's reference in his will to obtaining fee title to the parcels in his name. With respect to whether the conveyances would have been in Harry's best interest, the Regional Director stated that he was "not suggesting that the gift would not have been in [Harry's] interest, only that no such consideration or finding was ever made by the Superintendent." Decision at 4. The Regional Director concluded that, given questions about Harry's intent and whether approval would have been in his best interest, "it was not unreasonable for the Superintendent to decline to approve the deeds over 11 years after they were executed, and over three years after [Harry] died." *Id.*

Appellant appealed to the Board, and included a Statement of Reasons with her notice of appeal. Appellant and the Regional Director filed briefs.⁶

⁶ On June 5, 2006, and March 21, 2007, Administrative Law Judge Steven R. Lynch (ALJ) held hearings to probate Harry's trust estate. The ALJ issued an Order Approving Will and Decree of Distribution on April 27, 2007, in which he ordered the distribution of Decedent's trust or restricted property to Appellant in accordance with Decedent's will. However, the ALJ also found that because Appellant was not an enrolled member of the Nation, that portion of Decedent's estate located on the Yakama Reservation was subject to a tribal purchase option. The ALJ noted that "there is an appeal currently pending before the [Board] . . . which when decided, will determine whether [Allotment Nos. 234, 672, 1679, and 1680], should have been conveyed in fee status to [Appellant]." Order Approving Will and Decree of Distribution at 3. The ALJ further noted that, if the Board were to determine that any of the allotments should have been conveyed to Appellant, the allotments would not be subject to the tribal purchase option.

Discussion

A. Standard of Review and Arguments on Appeal

Conveyances of trust or restricted land require Secretarial approval and BIA has promulgated regulations governing such conveyances, including gift conveyances. *See* 25 C.F.R. §§ 152.17, 152.22(a), 152.23, 152.25(d); *see also Bitonti v. Alaska Regional Director*, 43 IBIA 205, 212-13 (2006); *Estate of Joseph Baumann*, 43 IBIA 127, 136 (2006). BIA has been delegated the authority to approve or deny an application for a proposed conveyance, and that authority involves the exercise of discretion. *Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006). BIA's authority includes the authority to retroactively approve a conveyance after the death of the Indian grantor. *Bitonti*, 43 IBIA at 211; *Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982).

An appellant bears the burden of showing that BIA did not properly exercise its discretion. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). In reviewing such decisions, the Board may not substitute its judgment for that of BIA. *Barber*, 42 IBIA at 136. The Board's role is limited to determining whether BIA's decision is in accordance with the law, is supported by the record, and is adequately explained. *Scrivner v. Eastern Oklahoma Regional Director*, 44 IBIA 147, 150 (2007).

In approving a conveyance of trust land, BIA acts as trustee for the Indian owner. *Estate of Evan Gillette, Sr.*, 22 IBIA 133, 138 (1992). In determining whether or not to approve a gift deed retroactively, BIA should satisfy itself that the grantor's intent and understanding were "reasonably clear." *Willis v. Northwest Regional Director*, 45 IBIA 152, 167 (2007). Where there is reasonable doubt concerning a grantor's intent, the Board will uphold a decision not to retroactively approve a gift deed. *See id.* at 166; *Estate of Sandra Kay Bouttier LaBuff Heavy Gun*, 43 IBIA 143, 149-50 (2006) (finding that the ALJ reasonably concluded that there was sufficient doubt to preclude retroactive approval of a gift deed).

Appellant asserts that the Regional Director abused his discretion in declining to retroactively approve the gift deeds because (1) Harry's actions demonstrated a clear and consistent intent to transfer the properties at issue to her, and his decision to devise the property to her in a will was only to provide an "additional 'fallback' method[] to ensure" that the conveyance would take place, Reply Brief at 3; (2) the reason that the gift deed

transactions were never completed is because BIA “has consistently demonstrated an unwillingness to take action,” Opening Brief at 3, and (3) the Regional Director did not consider the factors set forth in *Wishkeno*.⁷

B. Harry’s Intent

We first address the Regional Director’s finding that the record was not entirely clear as to Harry’s intent because it contained evidence that called into question his intent. We disagree.

The Regional Director found that it was not “absolutely clear whether approval of the deeds executed in 1993 still expressed the intent of [Harry] upon his death,” Decision at 4, because (1) Harry never returned the deeds to the Agency; (2) Harry had acquired some of the parcels at issue by deed and it would not be unreasonable to assume that he knew deeds needed to be returned to the Agency for processing before the transaction could be completed; and (3) he stated in his will that he was trying to obtain a fee patent in his name, which the Regional Director construed as evidence that Harry “changed his mind” about the gift conveyances.

Viewing the facts of this case as a whole, we find that the facts relied on by the Regional Director are not sufficient to raise a reasonable question about Harry’s intent. The record shows Harry’s consistent intent, over several years, to transfer the properties at issue to Appellant, by gift deed if possible. Harry first contacted the Agency about gift conveying the properties at issue to Appellant in 1991 and 1992, as evidenced by the letter from the Agency to YNCE and the land transaction check sheets. In 1993, he completed four gift deed applications and four gift deeds. It is undisputed that he returned the applications to the Agency shortly thereafter and retained the deeds. The record does not indicate that BIA told Harry to return the deeds and Appellant explains that it was their practice to submit the original signed deeds at the time of final approval. *See* Reply Brief

⁷ In *Wishkeno*, 11 IBIA at 32, the Board held that BIA has authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if (1) the Secretary is satisfied that the consideration for conveyance was adequate, (2) the grantor received the full consideration bargained for, and (3) there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance.

at 3.⁸ Whether or not that was the case, any question about Harry's intent raised by his failure to return the deeds at the time he signed them was resolved in 1997 when he informed an Agency employee that he "want[ed] to go ahead with the gift conveyance and taking the land out of trust." Note to file signed "Marie Therese," Dec. 9, 1997.

It is true that, at the same time, Harry executed a will in which he devised all of his trust allotments, including the allotments at issue, to Appellant. In that will, however, he expressly stated that he was "currently attempting to obtain fee patent for [him]self" in the trust allotments. Although a grantor's inclusion of trust property in a will, or actions to obtain fee patents for himself, might well be sufficient in some circumstances to create ambiguity about the grantor's intent regarding previously-executed gift deed applications or deeds, we do not think that Harry's actions, viewed in context, create uncertainty in this case about his intent. His primary intent, as evidenced by the gift deeds and his statement in the will, appears to have been to convey the allotments in fee to Appellant without them being subject to the tribal purchase option.

The signed applications, signed gift deeds, Harry's statement to Marie Therese in 1997, and Harry's will — read in context — are evidence of a clear intent, over a number of years, to transfer the property to his wife of over 30 years, primarily through gift deeds but also possibly through other means as a backup. The fact that Harry included these properties in his will, recognizing that at the time they were in fact still trust property but also expressing his intent to have trust status removed, does not raise questions about whether Harry intended and wanted the gift deeds to Appellant to be approved. Harry's interest in transferring the properties to Appellant by any possible means, and the fact that he may have resorted to alternative means as a backup, does not evince an intent *not* to convey by gift deed or a change of mind about wanting BIA to approve the gift deeds.⁹ We therefore conclude that the Regional Director's finding that there was some reasonable question about Harry's intent, as justification for his decision not to approve the gift deeds, is not supported by the record, viewed as a whole.

⁸ According to Appellant, on several occasions when she and Harry inquired about the status of the gift deeds, they were informed that BIA was still processing them and that the Nation had not yet advised BIA of its position on the proposed conveyances.

⁹ Because Appellant is non-Indian, any conveyance to her of Harry's trust lands would have been in fee. *Cf.* 25 C.F.R. § 152.6. Therefore, Harry's statement in his will about obtaining fee patents is not inconsistent with conveying the interests in fee to Appellant, whether by gift deed or by alternate backup means.

C. Harry's Best Interest

The Regional Director concluded that an additional reason not to approve the gift deeds was because no finding was ever made during Harry's lifetime that the gift conveyances were in Harry's best interest. The Regional Director stated that he was not "suggesting that the gift would not have been in [Harry's] interest, only that no such consideration or finding was ever made by the Superintendent." Decision at 4. The Regional Director also stated that "the record is not absolutely clear . . . whether approval would have been in his best interest," *id.* at 4, but does not articulate any reasons why it would not have been in Harry's best interest to convey the allotments to his wife. The Regional Director also noted that the Superintendent never approved the applications.

From the record before the Board, it appears that the only action BIA ever took on Harry's applications was to request information about mortgages against the property from YNCE and to prepare a proposed action for the Land Committee as a means of soliciting the position of the Nation with respect to the proposed conveyances.

We disagree with the Regional Director that the failure of the Superintendent to conduct a best-interest evaluation during Harry's lifetime constitutes a ground for declining to approve the gift deeds after his death. In *Willis*, 45 IBIA at 162-63, which we are also deciding today, we found that when a grantor dies, BIA's duty to protect the grantor's financial interest during his lifetime becomes moot. In *Willis*, the Regional Director declined to approve a gift deed retroactively, relying at least in part on a finding that the gift conveyance would not have been in the grantor's best interest on the date that the deed was executed. We vacated that decision because the Regional Director had failed to articulate how retrospective consideration of the grantor's financial interest during his lifetime was relevant to posthumous approval of a deed. *Id.* at 152, 162-63.

In the present case, the Regional Director did not even find that approval of the gift deeds would have been against Harry's interest during his lifetime. Indeed, the Regional Director stated that he was not suggesting that approval of Harry's gift deeds would not have been in Harry's best interest. Instead, he relied solely on the fact that BIA had not conducted a best-interest examination during Harry's lifetime. As noted in *Willis*, however, in at least one previous case the Board has upheld BIA's retroactive approval of a deed, although there was no evidence that BIA had made any best-interest finding at all. *See Willis*, 45 IBIA at 162-63 (citing *Leon v. Albuquerque Area Director*, 23 IBIA 248 (1993)).

Therefore, we conclude that the Regional Director erred in relying on BIA's failure to conduct a best-interest examination during Harry's lifetime as a ground to decline to approve the gift deeds retroactively.

D. *Wishkeno* factors

Appellant argues that the Regional Director failed to apply the factors for retroactive approval of conveyances set forth in *Wishkeno*, 11 IBIA at 32. To the extent that she suggests that the factors identified in that case may be the only factors that BIA may consider, or that satisfaction of those factors requires BIA to retroactively approve a gift deed, we disagree.

In *Wishkeno*, the Board remanded a decision by the Deputy Assistant Secretary, which had declined to give retroactive approval to a warranty deed of Indian trust land. *Id.* at 33. Relevant to the present case, the Board in *Wishkeno* held that the Secretary had authority to retroactively approve gift deeds in the absence of fraud, overreaching, or other illegality.¹⁰ The Board did not hold, however, that in the absence of such evidence, the Secretary was required to retroactively approve a gift deed, or that this was an exclusive list of considerations. For example, sufficiency of evidence regarding the grantor's intent is clearly relevant. *See Willis*, 45 IBIA at 166-67; *Estate of Heavy Gun*, 43 IBIA at 149. Thus, to the extent that Appellant is suggesting that the *Wishkeno* factors are the *only* factors that BIA may consider in deciding whether to retroactively approve a gift deed, we disagree.

Conclusion

We vacate the Regional Director's decision affirming the Superintendent's decision not to approve the gift deeds because (1) the record does not support the Regional Director's finding that Harry's intent to convey these parcels by gift deed to Appellant, if possible, was not sufficiently clear, and (2) the failure by BIA to determine whether the gift conveyances were in Harry's best interest during his lifetime was not a proper basis for declining to approve the gift deeds. We remand the matter to the Regional Director to issue a new decision on whether to retroactively approve the gift deeds at issue in light of this decision.

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 Board vacates the Regional Director's

¹⁰ Other factors cited in *Wishkeno* were the adequacy of consideration and receipt by the grantor of the full bargained-for consideration, although the Board noted that at least for certain conveyances by gift, no consideration may be "adequate consideration." 11 IBIA at 33 n.9; *see White v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)*, 15 IBIA 142, 145 (1987). Thus, these factors are not necessarily relevant for gift conveyances to family members.

April 21, 2005, decision, and remands the matter to the Regional Director to issue a new decision on whether to retroactively approve the gift deeds.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge