



INTERIOR BOARD OF INDIAN APPEALS

James P. Brinkoetter, Jr. v. Midwest Regional Director, Bureau of Indian Affairs

52 IBIA 59 (08/25/2010)



United States Department of the Interior

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

JAMES P. BRINKOETTER, JR.,)	Order Affirming Decision
Appellant,)	
)	
v.)	Docket No. IBIA 09-3-A
)	
MIDWEST REGIONAL DIRECTOR.)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	August 25, 2010

James P. Brinkoetter, Jr., Esq. (Appellant), has appealed the August 25, 2008, decision of the Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), denying Appellant's request under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912(b), for the payment of legal fees incurred as court-appointed counsel for an Indian child's biological mother in state court Indian child custody proceedings. The Regional Director denied the request because the state court had failed to send written notice of Appellant's appointment to the Regional Director as required by 25 C.F.R. § 23.13(a).

On appeal, Appellant asserts that the court's error in not providing the requisite notification compounds the other deficiencies the court made in the custody proceedings; Appellant does not, however, identify any flaws in the Regional Director's conclusion. Nor do we find any such flaws. The applicable regulations require the Regional Director's certification of an indigent Indian parent's eligibility to have his or her counsel compensated by BIA as a mandatory prerequisite to the payment of the attorney's fees and expenses, and the Regional Director's obligation to render that determination is triggered by BIA's receipt of notification by the state court of the appointment of counsel for an indigent Indian parent in an Indian child custody proceeding. *See* 25 C.F.R. § 23.13(a), (b), (c), and (e)(2). In this case, the state court did not send the requisite notification and the Regional Director consequently did not make the requisite certification. The requested legal fees, therefore, cannot be paid, and we affirm the Regional Director's decision.

Statutory and Regulatory Framework

The ICWA, enacted in 1978, addresses proceedings for adoption, foster care placement, and parental rights termination involving Indian children. The statute, *inter alia*, grants indigent Indian parents the right to court-appointed counsel in “any removal, placement, or termination proceeding,” and provides that, if state law does not authorize the appointment of such counsel, “the court shall promptly notify the Secretary upon the appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses” 25 U.S.C. § 1912(b).

BIA’s regulations implement and provide procedures for giving effect to that statutory provision. Specifically, 25 C.F.R. § 23.13(a) directs a state court to send written notice to BIA that the court has appointed counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which state law does not provide for the appointment of counsel. That notice is required to include: (1) The name, address, and telephone number of the appointed counsel; (2) the name and address of the client for whom counsel is appointed; (3) the relationship of the client to the child; (4) the name of the child’s tribe; (5) a copy of the petition or complaint; (6) certification from the court that state law makes no provision for appointment of counsel in such proceedings; and (7) certification by the court that the Indian client is indigent. *Id.* Upon receiving the notification from the state court, the Regional Director has 10 days in which to determine whether the client is eligible to have his or her appointed counsel compensated by BIA and to notify the court, client, and attorney of that determination. 25 C.F.R. § 23.13(b) and (c). Section 23.13(e)(2) requires the payment of legal fees approved by the court, unless, *inter alia*, the client has not been previously certified as eligible.

Background

Appellant was appointed by the Macon County, Illinois, Circuit Court to represent Laurie Sams, a Cherokee Indian, in an ICWA adoption and parental rights termination proceeding affecting her biological daughter. The state court did not notify BIA of the appointment.¹ On February 16, 2007, after the conclusion of the ICWA proceeding, the court, citing 23 U.S.C. § 1912(b), certified that it had appointed Appellant to represent

¹ Although it is unclear exactly when the appointment occurred, Appellant represented Sams from at least January 2002 through May 2005. *See* Administrative Record (AR), Tab 3, Appellant’s Statement for Services Rendered.

Sams after her retainer had been exhausted;² that neither the State of Illinois nor Macon County provided reimbursement for appointed counsel in ICWA cases; and that the services itemized in Appellant's Statement for Services Rendered were reasonable. *See* AR, Tab 3. On June 12, 2008, over a year after the court's certification, Appellant submitted a request to BIA for payment for his services as Sams' appointed counsel in the ICWA proceeding. In his request, he summarized the work he had done for his Indian client and averred that he had previously sought guidance as to how he could be compensated but had received no assistance from the Cherokee Nation on how to proceed. He included a copy of the court's certification with his request.

By decision dated August 25, 2008, the Regional Director denied Appellant's request for payment. The Regional Director concluded that, although Appellant apparently had been appointed by the state court to represent an Indian parent pursuant to the ICWA, the court had failed to send written notice of Appellant's appointment to the Regional Director as required by 25 C.F.R. § 23.13 and that, therefore, BIA was unable to pay for Appellant's services. AR, Tab 1.

This appeal followed.

Discussion

The Board exercises de novo review over questions of law and the sufficiency of evidence. *A C Building & Supply Company v. Western Regional Director*, 51 IBIA 59, 72 (2010); *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 104 (2009); *California Indian Legal Services v. Acting Pacific Regional Director*, 47 IBIA 209, 215 (2008). An appellant bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *A C Building & Supply Company*, 51 IBIA at 72; *Smartlowit*, 50 IBIA at 104. Appellant has failed to meet that burden here.

On appeal, Appellant avers that the state court's failure to provide the requisite notification to BIA compounds the other errors the court made throughout the proceeding.³ He does not, however, provide any argument or evidence demonstrating error

² Sams apparently paid a \$3,000 retainer. *See* AR, Tab 3.

³ Appellant's sole submission on appeal is his notice of appeal. Although the Board's docketing notice advised Appellant that he could file an opening brief and specifically asked Appellant to address the Board's decision in *California Indian Legal Services*, a copy of which the Board enclosed with the notice, Appellant chose not to file an opening brief.

in the Regional Director's decision. Nor do we find any error in the Regional Director's decision.

As directed by 25 C.F.R. § 23.13(e), the Regional Director "shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless: . . . (2) The client has not been certified previously as eligible under paragraph (c) of this section." The Regional Director did not certify Sams as eligible prior to his receipt of Appellant's request for payment and the court's certified approval of the fees and expenses claimed by Appellant as required by 25 C.F.R. § 23.13(d). Thus, the Regional Director properly denied the payment due to the lack of prior certification of Sams' eligibility under 25 C.F.R. § 23.13(b) and (c). *See California Indian Legal Services*, 47 IBIA at 216. To the extent Appellant may be asserting that he should not be penalized for the court's failure to submit the required notification, his argument cannot overcome the regulatory restrictions on BIA's authority to approve attorney fees and expenses delineated in 25 C.F.R. § 23.13(e). *California Indian Legal Services*, 47 IBIA at 216. Since Appellant has not shown, nor have we found, any error in the Regional Director's denial of Appellant's request for payment, we affirm the Regional Director's 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 affirms the Regional Director's decision.

I concur:

 // original signed
Sara B. Greenberg
Administrative Judge*

 // original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.