



## INTERIOR BOARD OF INDIAN APPEALS

Kern County Public Defender's Office v. Pacific Regional Director, Bureau of Indian Affairs

56 IBIA 121 (01/25/2013)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

KERN COUNTY PUBLIC	)	Order Affirming Decisions
DEFENDER’S OFFICE,	)	
Appellant,	)	
	)	
v.	)	Docket Nos. IBIA 11-059
	)	11-060
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	January 25, 2013

The Kern County Public Defender’s Office (Appellant) appealed to the Board of Indian Appeals (Board) from two separate decisions issued by the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), on January 14, 2011. In both decisions, the Regional Director denied Appellant’s request under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912(b), for payment of legal fees incurred as court-appointed counsel for the mothers/objectors, in two California state court guardianship proceedings involving Indian children.<sup>1</sup> The Regional Director denied these payment requests because, prior to the requests, the Regional Director had not certified the clients as eligible to have their appointed counsel compensated. Certification of eligibility is a mandatory prerequisite to the Regional Director’s authorization of payment of attorney’s fees and expenses under 25 C.F.R. § 23.13(e)(2).

On appeal, Appellant asserts that: George and Scholl were entitled to counsel under ICWA but were unrepresented until the court appointed Appellant; the North Fork Rancheria of Mono Indians asked the court to appoint an attorney for George; Appellant’s clients were satisfied with the results of the guardianship proceedings; affording legal counsel to indigent parents and Indian custodians to effectuate the purposes of ICWA is important to BIA’s mission; and on March 11, 2011—while the appeals were pending before the Board—the court issued notices of appointment to BIA. Amid these arguments,

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<sup>1</sup> Docket No. IBIA 11-059 relates to Appellant’s request for fees incurred in a guardianship proceeding involving five Indian children whose biological mother is Carmen L. George (George). Docket No. IBIA 11-060 relates to Appellant’s request for fees incurred in a guardianship proceeding involving an Indian child whose biological mother is Natalie R. Scholl (Scholl).

Appellant does not identify any errors in or lack of evidentiary support for the Regional Director's decisions.

In both cases, the court did not timely send notice of Appellant's appointments and the Regional Director consequently had no opportunity to make the requisite certifications of client eligibility. Therefore, the requested fees cannot be paid and we affirm the Regional Director's decisions.

## Background

### I. Statutory and Regulatory Framework

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

BIA's regulations establish procedures for paying attorney's fees and expenses pursuant to ICWA out of BIA's appropriated funds. Specifically, 25 C.F.R. § 23.13(a) requires, as a threshold matter, that the court send written notice to the BIA Area Director (now Regional Director) that the court has appointed counsel for an indigent Indian party in an involuntary child custody proceeding for which state law does not provide for the appointment of counsel. The notice of appointment "shall" 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.*

After receiving a notice of appointment from the court, the Regional Director determines whether the client is eligible to have his or her appointed counsel compensated by BIA. *Id.* § 23.13(c); *see id.* § 23.13(b) (BIA "shall" certify the client's eligibility unless one or more of six grounds for denial are present). If the Regional Director denies certification, the applicant may appeal the decision to the Assistant Secretary - Indian Affairs. *Id.* § 23.13(c).

The court also must make a determination of reasonable attorney's fees and expenses, using the same procedures and criteria it uses in determining the fees and expenses to be paid to appointed counsel in state juvenile delinquency proceedings. *Id.* § 23.13(d)(1). The court must submit a voucher to the Regional Director who previously "certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed." *Id.* § 23.13(d)(2).

After receiving the court-approved voucher, the Regional Director determines whether to authorize payment of the fees and expenses contained in the voucher. *Id.* § 23.13(f). The Regional Director "shall" authorize the payment of fees and expenses in the amount requested in the voucher approved by the court unless, *inter alia*, the client has not been previously certified as eligible. *Id.* § 23.13(e)(2). If the Regional Director denies payment, or authorizes payment in an amount less than the amount approved by the court, the applicant may appeal the decision to the Board. *Id.* § 23.13(f).

## II. Factual Background

Appellant was appointed by the Kern County, California, Superior Court (Court) to represent George in an ICWA guardianship proceeding affecting her five minor children who are members of or eligible for membership in the North Fork Rancheria of Mono Indians (Tribe). George Petition, Dec. 20, 2010 (Administrative Record (AR) for Docket No. IBIA 11-059 Tab 1). Prior to the appointment, the Tribe intervened and through its tribal ICWA representative argued that the lack of counsel was grounds for invalidating prior guardianship proceedings. Memorandum of Points and Authorities at 5 (Opening Brief, Ex. C). Appellant represented George from approximately March 15, 2010, through December 15, 2010. George Petition, Ex. A.

Appellant was appointed by the Court to represent Scholl in an ICWA guardianship proceeding affecting her daughter who is a member of or eligible for membership in the San Manuel Band of Mission Indians. Scholl Petition, Dec. 10, 2010 (AR for Docket No. IBIA 11-060 Tab 1). Appellant represented Scholl from approximately September 17, 2010, through December 6, 2010. *Id.*, Ex. A.

On December 29, 2010, and January 10, 2011, Appellant filed with the Court and mailed to the Sacramento Area Director<sup>2</sup> and the Secretary of the Interior (Secretary) separate Petitions for Attorney Fees in the Scholl and George proceedings, respectively. Appellant's Petition for Attorney Fees in the George proceeding requested an order for the

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<sup>2</sup> The Sacramento Area Director is now the Pacific Regional Director.

guardianship estate, the North Fork Rancheria of Mono Indians, the Sacramento Area Director, or the Secretary to pay the “total sum of \$13,050 as and for attorney’s fees for services rendered” between March 15 and December 15, 2010. George Petition at 2-3. Appellant’s Petition for Attorney Fees in the Scholl proceeding requested an order for the guardianship estate, the San Manuel Band of Mission Indians, the Sacramento Area Director, or the Secretary to pay the “total sum of \$2,211.25 as and for attorney’s fees for services rendered” between September 17 and December 6, 2010. Scholl Petition at 2-3. Prior to Appellant’s fee petitions for services rendered, the Court did not provide notice of the appointments to BIA.<sup>3</sup>

In separate decisions dated January 14, 2011, identical except for the captions, the Regional Director denied Appellant’s fee petitions.<sup>4</sup> The Regional Director found that BIA had not received a notice of appointment of counsel or prior request for certification, and Appellant’s clients had not been certified as eligible when the fee petitions were presented to BIA for payment for services rendered. The Regional Director concluded that the requests for payment “must” therefore be denied pursuant to 25 C.F.R. § 23.13 and the Board’s decision in *California Indian Legal Services v. Acting Pacific Regional Director*, 47 IBIA 209 (2008). George Decision at 1; Scholl Decision at 1.<sup>5</sup>

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<sup>3</sup> Appellant’s fee petitions do not include the following information that BIA’s regulations require as part of the initial court notice of appointment: address of the client; copy of the petition or complaint; certification from the court that state law makes no provision for appointment of counsel in such proceedings; and certification by the court that the Indian client is indigent. Nor do the fee petitions contain a court-approved voucher. The fee petitions each attach a Reimbursement of Fees Report prepared by Appellant containing a list of dates, time, and activities, totaling 90 hours in the George case and 15.25 hours in the Scholl case. George Petition, Ex. A; Scholl Petition, Ex. A.

<sup>4</sup> The Regional Director’s decision in the George matter contains the following incorrect dates: date of filing of Appellant’s Petition for Attorney Fees with the Court (December 29, 2010); date on which Appellant presented its fee petition to BIA (January 3, 2011); and date on which Appellant began to render services to its client (September 2010). We identify the correct dates as applicable to the George matter in the text above.

<sup>5</sup> On February 28, BIA the Board received a copy of the Tribe’s Response to [Appellant’s] Petition for Attorney Fees, dated February 23, 2011. The Tribe argued that a state court lacks jurisdiction to order the Tribe, the Sacramento Area Director, or the Secretary to pay the fees. The Tribe also noted, “[w]hile unfortunate, it appears that the proper notice was not submitted to [BIA] by the Court in order to trigger payment for appointed counsel in an involuntary Indian child custody proceeding in state court.” Tribe’s Response at 3.

This appeal followed. Appellant filed an opening brief. The Regional Director did not file an answer brief.

## Discussion

### I. Standard of Review

The Board reviews questions of law and the sufficiency of evidence *de novo*. *Tuttle v. Acting Western Regional Director*, 56 IBIA 53, 59 (2012); *Brinkoetter v. Midwest Regional Director*, 52 IBIA 59, 61 (2010); *California Indian Legal Services*, 47 IBIA at 215. An appellant bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Tuttle*, 56 IBIA at 59; *Brinkoetter*, 52 IBIA at 61.

### II. Merits

On appeal, Appellant does not identify any error in or lack of evidentiary support for the Regional Director's decisions. The key fact in each case—which is unaffected by how well Appellant represented George and Scholl, or the degree to which that representation furthered the purposes of ICWA and thereby benefited BIA and tribal interests—is that the Court did not furnish timely notices of appointment of Appellant as counsel for George and Scholl, and thus the Regional Director was unable to make a timely determination on Appellant's clients' eligibility. Appellant has failed to meet its burden.

Appellant submitted two separate Notices of Appointment of Counsel in the George and Scholl guardianship proceedings, both dated March 11, 2011. Opening Br., Exs. A & B. The Notices of Appointment each contain a Certificate of Mailing to, *inter alia*, the Sacramento Area Director, the Assistant Secretary - Indian Affairs, and the Associate Solicitor - Indian Affairs, dated March 10, 2011. Prior to this, neither the Court nor Appellant provided BIA with a notice of appointment.<sup>6</sup>

Regardless of the completeness of the Court's and Appellant's submissions to date, they are all too late because they were provided to BIA as part of, or subsequent to, Appellant's fee petitions. Pursuant to 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

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<sup>6</sup> In the case of Scholl, the notice the Board received appears complete. *See* Opening Br., Ex. B. In the case of George, the notice the Board received is missing the third page, which would appear to be the Court's certification that the Indian client is indigent. *See id.*, Ex. A. Neither Appellant nor the Court has provided court-approved vouchers for Appellant's costs relating to Scholl and George.

approved by the court unless: . . . (2) The client has not been certified previously as eligible under paragraph (c) of this section.” The Regional Director had not certified George or Scholl previously as eligible for Appellant to receive compensation for services. As the Court did not timely send notifications of appointment to BIA, and the Regional Director consequently did not make the requisite certifications, the requested fees cannot be paid. See *Brinkoetter*, 52 IBIA at 62; *California Indian Legal Services*, 47 IBIA at 216.<sup>7</sup>

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 decisions declining to pay Appellant attorney’s fees and expenses.

I concur:

          // original signed            
Thomas A. Blaser  
Administrative Judge

          //original signed            
Steven K. Linscheid  
Chief Administrative Judge

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<sup>7</sup> The Regional Director’s decisions “also note[d]” that pursuant to “25 C.F.R. § 23.13(d)(1) . . . expenses shall be determined using the rates for state juvenile delinquency appointed counsel proceedings. [Appellant’s] expenses were not broken out on the list of attorney hours that was attached to [Appellant’s] request for reimbursement; rather, lump sum compensation was requested in the petition.” George Decision at 1; Scholl Decision at 1. This comment highlights the fact that neither the Court nor Appellant provided court-approved vouchers as required by 25 C.F.R. § 23.13(d) and (e). However, we do not need to consider the sufficiency of Appellant’s Reimbursement of Fees Reports because Appellant is prohibited from receiving compensation on the other grounds identified by the Regional Director, which we affirm.