



INTERIOR BOARD OF INDIAN APPEALS

Rudy Maldonado v. Northwest Regional Director, Bureau of Indian Affairs

60 IBIA 122 (03/18/2015)



# 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

RUDY MALDONADO,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-138
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	March 18, 2015

Rudy Maldonado (Appellant) appealed to the Board of Indian Appeals (Board) from a June 8, 2012, decision (Decision) by the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director reversed a February 23, 2012, decision by BIA's Yakama Agency Superintendent (Superintendent) purporting to reopen a restriction that the Superintendent had placed on Appellant's Individual Indian Money (IIM) account in 2009 pursuant to the applicable regulations. *See* 25 C.F.R. §§ 115.601(b)(2), 115.606. The Regional Director reversed the Superintendent's decision, reasoning that the regulations did not permit the Superintendent to reopen a restriction on an IIM account that had become final, and that even if the Superintendent had discretion to do so, his decision to reopen the matter and partially lift the restriction was not supported by the record.

Whether or not BIA might, in some circumstance, have the authority to reopen a final decision to restrict an IIM account, the Regional Director correctly reversed the Superintendent's decision, which lacked any foundation to reopen or modify the restriction. Therefore, we affirm the Decision.

## Regulatory Framework

BIA maintains interest-bearing trust accounts—IIM accounts—for funds held for the benefit of individual Indians. *See generally*, 25 C.F.R. Part 115, Subpart F. BIA may place an involuntary restriction on an IIM account under several circumstances. *See id.* § 115.601(b). An "encumbrance" is a restriction placed on an account until the money owed from the account is paid to a specified party. *Id.* § 115.701 (table). As relevant to this case, when BIA receives proper documentation, it may encumber an IIM account in order to satisfy a debt on which the account holder has defaulted that was secured, with

BIA's advance approval, through assignment of IIM account income as collateral. *Id.* § 115.601(b)(2). If the amount owed is greater than the current balance when the encumbrance is placed on the IIM account, payment may need to be made over the course of one or more years. *Id.* § 115.617.

If BIA decides to restrict an IIM account, BIA is required to provide the account holder with individual notice and an opportunity to challenge the decision. *Id.* § 115.600; *see id.* § 115.602 (forms of notice). When notice is delivered by certified mail, the restriction becomes effective 5 days after BIA mails the notice. *Id.* § 115.604(a). The notice must include, among other things, the reason for the restriction and the amount to be encumbered. *Id.* § 115.605(a). The notice must also explain that the account holder has 40 days from the date the notice was sent to request a hearing to challenge BIA's decision to restrict the IIM account, an explanation of how to request a hearing, and a statement that BIA will conduct the hearing, referred to as a "Kennerly" hearing.<sup>1</sup> *Id.* If the account holder does not request a hearing to challenge BIA's decision to restrict the IIM account during the allotted time period, "BIA's decision to restrict [the] IIM account will become final." *Id.* § 115.606.

### Factual Background

On May 22, 2009, the Superintendent sent Appellant a *Kennerly* letter stating that, effective in 5 days, BIA was placing an encumbrance on Appellant's IIM account to satisfy Appellant's delinquent loans to the Yakama Nation Credit Enterprise (YNCE), which were secured by prior BIA-approved assignments. Encumbrance Notice at 1 (AR Tab 6); *see* Assignment of Trust Property and Power to Lease, Sept. 18, 1997 (AR Tab 2); Assignment of Trust Property and Power to Lease, July 5, 2001 (AR Tab 4). The Superintendent advised Appellant that YNCE sought to recover a total of \$33,843.97. Encumbrance Notice at 1. The Superintendent proposed to pay all funds currently in, and all future income accumulating to, Appellant's IIM account until the entire amount of the loan was collected by YNCE. *Id.* The Superintendent advised Appellant that if Appellant decided to request a hearing, his written request must be received by BIA within 40 days from the date the Notice was mailed. *Id.*

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<sup>1</sup> So called after *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983), in which the court held that "BIA had violated Kennerly's due process rights by withdrawing funds from his IIM account to pay debts allegedly owed to his tribe without affording him any opportunity for a hearing at which the validity of the debt could be determined." *Fredericks v. Acting Aberdeen Area Director*, 24 IBIA 115, 119 n.4 (1993).

Appellant did not respond to the notice, and the Superintendent's decision to encumber Appellant's IIM account became final. *See* 25 C.F.R. § 115.606. From August 2009 to June 2011, BIA dispersed all of the income deposited in Appellant's account to YNCE, an amount totaling \$1,049.41. *See* YNCE Statement of Reasons, May 17, 2012, Attachment (Appellant's Account History, 1/1/1997 to 2/1/2012) (AR Tab 25); Appellant's IIM Historical Query, 6/15/2009 to 5/22/2012 (AR Tab 27). Then, on September 27, 2011, Appellant's IIM account received a single payment of \$2,228.84, which BIA, without explanation, did not disperse to YNCE. Appellant's IIM Historical Query at 12 (unnumbered).

Days earlier, however, on September 22, 2011, Appellant had sent a letter to the Superintendent requesting a *Kennerly* hearing "pursuant to" the Part 115 regulations. Letter from Appellant to Superintendent at 2 (unnumbered) (AR Tab 8). Appellant also asked the Superintendent to place a hold on any distributions from Appellant's IIM account until YNCE gave Appellant the opportunity to refinance his loans. *Id.* Appellant conceded that he had failed to timely respond to the Superintendent's notice in 2009, but argued that he had not understood what a *Kennerly* hearing was. *Id.* at 1 (unnumbered). Appellant contended that his circumstances had substantially changed, that his total income did not meet the poverty level, and that he could not meet his financial obligations. *Id.* at 1-2 (unnumbered). Appellant provided no documentation to support his contentions, nor did he contend that BIA had made an error in the decision to encumber his account.

In the following months, without notice to YNCE, the Superintendent made three releases, totaling \$2,420.36, from Appellant's IIM account, to Appellant. *See* Letter from Superintendent to Appellant, Oct. 25, 2011 (AR Tab 9) (\$1,000 disbursement); Letter from Superintendent to Appellant, Nov. 21, 2011 (AR Tab 10) (\$1,000 disbursement); Letter from Superintendent to Appellant, Jan. 17, 2012 (AR Tab 12) (\$420.36 disbursement). Upon each release, the Superintendent stated, "I have considered Mr. Maldonado's request for a partial release of his IIM funds based upon undue financial hardship and have concluded that this distribution is necessary and in his best interests and is done pursuant to my authority as set forth in 25 C.F.R. § 115.601 et seq." *See, e.g.*, AR Tab 9.

In February 2012, after notice to YNCE, the Superintendent conducted a hearing regarding the encumbrance on Appellant's IIM account. *See* Transcript of Kennerly Hearing, Feb. 7, 2012 (Transcript) (AR Tab 17). At the hearing, Appellant presented evidence that his annual income was \$14,507.51 and that his monthly expenses were \$1,982.59. Financial Information (AR Tab 15). YNCE objected to BIA's releases to Appellant, after the encumbrance had become final and without further notice to YNCE, and also questioned under what authority the Superintendent could hold a post-decisional *Kennerly* hearing. Transcript at 4. YNCE stressed that Appellant's loans had been past due

for 9 years and that the disbursements it had received had not satisfied Appellant's debt on his loans. *Id.* at 3.

Following the hearing, which he characterized as a hearing “for reconsideration due to hardship,” the Superintendent changed the encumbrance on Appellant's IIM account to permit Appellant to receive one-half of the income from his IIM account, while leaving in place the restriction on the other half of the income until the two loans from YNCE were repaid in full. Superintendent's Decision, Feb. 23, 2012, at 1 (AR Tab 21). The Superintendent recited the fact that Appellant had assigned his IIM account income to YNCE as security for loans, that he had been delinquent for 9 years, and that he had not demonstrated a clear effort to renegotiate or refinance a new repayment plan with YNCE. *Id.* The Superintendent also found that Appellant's IIM account provided an average of \$35.00 per month, did not appear to be a critical component of income for Appellant, and was the only potential means of repayment for YNCE. *Id.* Nevertheless, after stating—without making any express findings—that he had “considered [Appellant's] low income and the hardship [Appellant] continue[d] to experience” in meeting living expenses, the Superintendent concluded that “the additional funds will help defray [Appellant's] living expenses.” *Id.* The Superintendent did not address the question of his authority to reopen the 2009 encumbrance decision.

YNCE appealed the Superintendent's decision to the Regional Director. Notice of Appeal, Mar. 19, 2012 (AR Tab 22). YNCE argued that the Superintendent abused his discretion by not dispersing all of the funds in Appellant's IIM account to YNCE, by unilaterally releasing funds to Appellant while the restriction was in place, and by reopening the case without any showing of a change in circumstances. Statement of Reasons, May 15, 2012, at 3-4 (AR Tab 25). YNCE also argued that Appellant failed to demonstrate that the restriction on his IIM account caused him undue financial hardship. *Id.* at 5-6.

On June 8, 2012, the Regional Director issued his decision reversing the Superintendent's decision and reinstating the full encumbrance on Appellant's IIM account until the two loans to YNCE were repaid. Decision at 7-8 (AR Tab 28). The Regional Director concluded that because Appellant had not requested a hearing to challenge the Superintendent's 2009 decision to restrict his account, that decision had become final and the Superintendent did not have authority to reopen the encumbrance. *Id.* at 6. The Regional Director reasoned:

The regulations do not allow for an account holder to come forward several years later and request a hearing when he failed to request one when his account was restricted. Indeed, to allow this practice would thwart the process of restricting an IIM account if at any time after a restriction is in

place, an account holder could request a hearing and have the restriction temporarily or permanently lifted.

*Id.* The Regional Director also stated that the Superintendent did not have the authority to release any funds from Appellant's IIM account and instructed the Superintendent not to release any more money to Appellant. *Id.* at 6, 8. The Regional Director also concluded that even if the Superintendent was authorized to hold a *Kennerly* hearing after BIA's decision to restrict an IIM account had become final, the Superintendent's decision to reopen the matter and partially lift the encumbrance was not supported by the record. *Id.* at 7.

Appellant appealed the Regional Director's decision to the Board. He argues that the original encumbrance never became final because BIA failed to provide him with a final written decision on the encumbrance, as described in 25 C.F.R. § 115.616. Notice of Appeal, July 11, 2012, at 2. Appellant presents several other arguments suggesting that the original encumbrance was not justified, or should be revisited. *Id.* at 2-4. He states that he was never given an accounting of his loans, that YNCE should have given him additional opportunities to restructure his loan, and that his circumstances have changed significantly since he originally borrowed the funds from YNCE. *Id.*

### Discussion

Appellant bears the burden of demonstrating error in the Regional Director's decision. *Peters v. Acting Midwest Regional Director*, 55 IBIA 266, 269 (2012). The Board reviews legal questions, including BIA's interpretation of the regulations, *de novo*. *Honanie v. Northwest Regional Director*, 53 IBIA 140, 149 (2011). To the extent the decision of a BIA regional director is an exercise of discretion, we determine "whether the administrative record supports the Regional Director's decision, whether the decision comports with the law and applicable regulations, and whether BIA has provided an explanation for its decision that is neither arbitrary nor capricious." *Id.* at 148-49.

We review first Appellant's contention that BIA's 2009 decision to place an encumbrance on Appellant's IIM account never became final because BIA did not issue a final decision in compliance with 25 C.F.R. § 115.616.<sup>2</sup> As we have observed previously,

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<sup>2</sup> 25 C.F.R. § 115.616 (What information will be included in BIA's final decision?) provides that BIA's final written decision will include:

- (a) BIA's decision to remove or retain the restriction on the IIM account;
- (b) A detailed justification for the supervision or encumbrance of the IIM account, where applicable;

(continued...)

the notice of an encumbrance that BIA provides to an IIM account holder, pursuant to 25 C.F.R. §§ 115.602 and 115.605, does not merely provide notice of a “proposed encumbrance.” *Quaempts v. Acting Northwest Regional Director*, 42 IBIA 272, 283 (2006). Rather, it notifies the account holder of an encumbrance that goes into effect 5 days after the notice is sent. *See* 25 C.F.R. 115.604(a). We have reasoned that 25 C.F.R. § 115.606 “expressly provides that if an account holder does not request a hearing after receiving the section 115.605 notice of decision, ‘BIA’s decision to restrict [the] account will become final.’” *Quaempts*, 42 IBIA at 283 (quoting 25 C.F.R. § 115.606) (alteration in original). In that instance, where the IIM account holder has already received notice of the reason for the restriction and the amount, “it makes little sense to require BIA to issue another ‘final’ decision under section 115.616 providing a ‘detailed justification’ for and determining the amount of the encumbrance.” *Id.* Moreover, in the present case, the Superintendent’s 2009 notice clearly advised Appellant of the terms of the encumbrance and disbursement: “to distribute (pay) any and all funds currently on [sic], and/or future income accumulating to this account to [YNCE] until the entire amount of the loan is collected by [YNCE]” from Appellant’s IIM account or other sources. Encumbrance Notice at 1.

Appellant has failed to demonstrate that any further notice or decision was required under the regulations when he failed to request a hearing. *See Quaempts*, 42 IBIA at 283 (“We do not construe the regulations as requiring BIA to do again that which it has already done and which has gone unchallenged.”). The Regional Director did not err in concluding that the decision to encumber Appellant’s IIM account became final when Appellant did not timely seek a hearing after receiving the May 22, 2009, notice of the encumbrance.

The Regional Director also correctly observed that there are no provisions in 25 C.F.R. Part 115 that permitted Appellant to request, or the Superintendent to grant, reopening of the final encumbrance decision. Whether or not BIA might have authority to reconsider a final encumbrance decision in the absence of express language in the regulations, e.g., to correct an error made by BIA, the record provides ample evidence to

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(...continued)

- (c) The amount(s) to be paid, the name and address of a third party to whom payment will be made, and the time period for repayment established under 617(a) of this part, where applicable;
- (d) Any provision to allow for distributions to the account holder because of an undue financial hardship created by the encumbrance, if applicable; and
- (e) Any other information the hearing officer deems necessary.

When an IIM account holder does not request a hearing, BIA’s regulations provide that BIA will follow the procedures in § 115.616 “as applicable.” *Id.* § 115.606.

support the Regional Director's conclusion that the Superintendent's decision to do so here lacked any reasonable foundation. Once the encumbrance became final, the right to receive disbursements from the IIM account vested in YNCE. If anything, a proceeding to reopen a final encumbrance must focus on determining whether there is a clear justification for divesting the creditor of a right, and not, as is the case in initial encumbrance proceedings, whether the encumbrance should include an allowance for distributions to the IIM account holder to avoid undue financial hardship. *Cf.* 25 C.F.R. § 115.616(d).

Appellant's other arguments should have been raised in a *Kennerly* hearing in response to the Superintendent's 2009 notice of the encumbrance, if Appellant wished to have them considered. Appellant chose not to challenge the encumbrance within the appropriate time period, as established by 25 C.F.R. § 115.605(a)(5), and we find no basis to consider the arguments for the first time in this appeal.

The Regional Director properly concluded that the Superintendent had no basis to reopen BIA's final decision to encumber Appellant's IIM Account.

### Conclusion

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:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge