



INTERIOR BOARD OF INDIAN APPEALS

Matthew Allen and Leo Willie v. Navajo Area Director, Bureau of Indian Affairs

12 IBIA 116 (12/09/1983)

Judicial review of this case:

Compromise settlement, *Begay v. Clark*, No. CIV 84-1285-PCT-PGR
(D. Ariz. Apr. 21, 1986)

Related Board cases:

10 IBIA 146

10 IBIA 432

11 IBIA 285

Stipulated dismissal, *Allen v. Watt*, No. CIV-83-1921-PCT-WPC
(D. Ariz. June 4, 1985)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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MATTHEW ALLEN

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS ^{1/}

IBIA 82-11-A, etc.

Decided December 9, 1983

Consolidated appeals from decisions of the Navajo Area Director, Bureau of Indian Affairs, terminating financial assistance to appellants.

Plan approved; appeals dismissed.

1. Indians: Welfare--Regulations: Publication

Because the list of specific types of assistance provided by the Bureau of Indian Affairs under the general assistance program is not a rule within the meaning of 5 U.S.C. § 551(4) (1976), the general assistance eligibility criteria published in 25 CFR Part 20 may be used in determining eligibility for custodial care assistance, even though Part 20 does not specifically indicate custodial care as a type of assistance available through the general assistance program.

APPEARANCES: Stephen LeCuyer, Esq., DNA-Peoples' Legal Services, Inc., Shiprock, New Mexico, for appellants; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

Matthew Allen and Leo Willie (appellants) are Navajo Indians who were receiving care and training funded by the Bureau of Indian Affairs (BIA) at Toyei Industries (Toyei), Toyei, Arizona. This assistance was terminated effective February 17, 1981, for appellant Allen and January 12, 1981, for appellant Willie, on the grounds that appellants were not eligible for custodial care under the provisions of 66 BIAM (Bureau of Indian Affairs Manual) 5.10A. The BIA found that appellants did not require care from others in daily living due to age, infirmity, physical or mental impairment. Appellants sought review of these decisions by the Navajo Area Director, BIA, and the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant

^{1/} The Board hereby consolidates Leo Willie v. Area Director, Navajo Area Office, Bureau of Indian Affairs, Docket No. IBIA-82-29-A, with Allen.

Secretary). When the Deputy Assistant Secretary did not render decisions in appellants' cases within the 30-day time period established in 25 CFR 2.19, appellants sought and obtained review by the Board of Indian Appeals (Board).

In decisions dated October 15, 1982, the Board found, *inter alia*, that appellants' assistance had been improperly terminated by reference to a rule published only in the BIA Manual in violation of 5 U.S.C. § 552 (1976) and Morton v. Ruiz, 415 U.S. 199 (1974). The Board ordered BIA to develop a plan to implement the holdings, and retained jurisdiction over the appeals to review the BIA plan. See Allen v. Navajo Area Director, 10 IBIA 146, 89 I.D. 508 (1982); Willie v. Navajo Area Director, 10 IBIA 432 (1982).

Discussion and Conclusions

In response to the Board's October 15, 1982, orders, BIA contacted appellants. The report of the interview with appellant Allen recites that Allen was not interested in returning to Toyey, his needs were being met by part-time employment and his family, he had never received supplemental security income (SSI) payments, and he would apply for general assistance if a need should arise in the future. Similarly, the report of the interview with appellant Willie stated that Willie was living independently, but close to friends who provided assistance to him; he received \$170 per month in social security disability insurance (SSDI); he did not want to return to Toyey or any other institution; and he believed that he was able to get by on his income. On the basis of these interviews, BIA proposed to find appellants ineligible for general assistance.

The factual basis for BIA's determination thus appears to be that appellants' needs are being met by other resources, *i.e.*, part-time employment and family assistance for appellant Allen and SSDI income for appellant Willie. Under 25 CFR 20.21, which sets forth eligibility criteria for receipt of BIA general assistance, "Indians meeting the requirements prescribed in § 20.20(a) [concerning basic requirements for receipt of any form of financial assistance from BIA], shall be considered eligible for general assistance under this part: Provided, That: (a) Their resources do not meet their need." The BIA has previously argued that the general assistance provisions applied to appellants' receipt of custodial care assistance because 66 BIAM 5.2A and 5.10B(1) make custodial care a type of general assistance. See 10 IBIA at 166; 10 IBIA at 443.

In the October 15, 1982, decisions in appellants' cases, the Board found that 66 BIAM 5.2A and 5.10B(1) made custodial care a form of general assistance. The Board also found that 25 CFR Part 20 did not specifically indicate that custodial care was part of the general assistance program, or that BIA provided funds for custodial care. The Board did not reach the question of whether the sections of the BIA Manual making custodial care a type of general assistance were required by 5 U.S.C. § 552(a)(1)(D) (1976) to be published in the Federal Register in order to be effective. See 10 IBIA at 166-67; 10 IBIA at 443-44.

[1] In Barton v. Navajo Area Director, 12 IBIA 110 (1983), the Board considered whether 25 CFR 20.21(b) could be used to exclude individuals receiving SSI payments from participating in BIA's custodial care assistance program. The Board held that because the list of types of assistance provided under BIA's general assistance program was not itself a "rule" within the meaning of 5 U.S.C. § 551(4) (1976), BIA was not required to publish that list in the Federal Register or in 25 CFR Part 20. Rather, the types of assistance could be listed in the BIA Manual or other internal operations guides. The Board determined that BIA could apply the general assistance provisions of Part 20 in determining eligibility for custodial care.

The same analysis must apply to an eligibility determination made under 25 CFR 20.21(a). Accordingly, based upon the undisputed representations of BIA and the admissions of appellant Willie, BIA correctly determined that appellants are not eligible for BIA custodial care assistance because their needs are met by other resources. The Board approves BIA's plan to find appellants ineligible for custodial care assistance under 25 CFR Part 20 from the time they left Toyei. 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are dismissed on the grounds that appellants are not eligible for the receipt of BIA custodial care assistance under 25 CFR Part 20.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Franklin D. Arness
Administrative Judge

//original signed
Bernard V. Parrette
Chief Administrative Judge

2/ A settlement agreement between Toyei and BIA on the amount owed to Toyei for services previously rendered to appellants, was approved by the Board on Aug. 23, 1983. Payment has been made under this agreement. This settlement is conclusive of all issues arising from BIA general assistance payments to appellants before they received notification of the termination of their assistance. See Begay v. Navajo Area Director, 12 IBIA 107 (1983).