



INTERIOR BOARD OF INDIAN APPEALS

Elias H. Attea, Jr. v. Eastern Area Director, Bureau of Indian Affairs

16 IBIA 138 (06/06/1988)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ELIAS H. ATTEA, JR.

v.

AREA DIRECTOR, EASTERN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-13-A

Decided June 6, 1988

Appeal from a decision of the Eastern Area Director, Bureau of Indian Affairs, revoking an Indian trader's license for the sale of cigarettes and fuel on the St. Regis Mohawk Indian Reservation.

Reversed and remanded.

1. Administrative Procedure: Administrative Procedure Act--  
Administrative Procedure: Licensing--Indians: Traders

Except in cases of willfulness or where public health, interest, or safety requires otherwise, 5 U.S.C. § 558(c) (1982) dictates that, prior to institution of proceedings to revoke an Indian trader's license, the licensee must be given written notice of the facts or conduct that may warrant revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements.

2. Administrative Procedure: Administrative Procedure Act--  
Administrative Procedure: Licensing--Indians: Traders

For purposes of the procedural requirements concerning license revocation in 5 U.S.C. § 558(c) (1982), a finding that a licensed Indian trader acted willfully requires evidence that he acted intentionally or with careless disregard of agency requirements.

APPEARANCES: Hans Walker, Jr., Esq., Washington, D.C., for appellant; John H. Harrington, Esq., Office of the Solicitor, U.S. Department of the Interior, Atlanta, Georgia, for appellee.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Elias H. Attea, Jr., challenges a September 18, 1987, decision of the Area Director, Eastern Area Office, Bureau of Indian Affairs (appellee; BIA), revoking appellant's Indian trader's license. For the reasons discussed below, the Board reverses that decision and remands the case to appellee.

### Background

Persons doing business on Indian reservations and trading with Indians are subject to regulation pursuant to the "Indian trader statutes," 25 U.S.C. §§ 261-264 (1982). <sup>1/</sup> 25 U.S.C. § 261 provides: "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 262 provides:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

The regulations promulgated pursuant to this statutory authority are found at 25 CFR Parts 140 and 141 <sup>2/</sup> and provide for, inter alia, the issuance of licenses to trade with Indians.

On May 1, 1986, appellant was issued an Indian trader's license by the Liaison Officer, New York Liaison Office, BIA. <sup>3/</sup> The license authorized appellant to sell cigarettes and fuel on the St. Regis Mohawk Indian Reservation, New York, from May 1, 1986, to April 30, 1991. The license stated:

In consideration of the granting of this license, and by the acceptance thereof, the licensee expressly warrants that all applicable Federal, State, and Tribal laws and regulations will be fully complied with in all respects and that authorized annual license fees will be paid when due. Upon failure to do so the licensee is subject to forfeiture of this license and such further action as the law and facts may justify.

This license is revocable at any time pursuant to the provisions of Part 251 [now Part 140] of Title 25 of the Code of Federal Regulations.

In an action effective on November 12, 1986, the Tribal Council of the St. Regis Mohawk Tribe (tribe) revoked the tribal licenses of three

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<sup>1/</sup> All further references to the United States Code are to the 1982 edition.

<sup>2/</sup> Part 141 concerns only the Navajo, Hopi, and Zuni Reservations.

<sup>3/</sup> The license shows that it was issued to Elias H. Attea, Jr., JR Attea Wholesale. Appellant's license application, dated Mar. 5, 1985, identifies his residence address and proposed business address as 6175 Strickler Road, Clarence, New York, and states that he was employed by Attea Bros., 1509 Clinton St., Buffalo, New York.

individuals who had been licensed to sell unstamped cigarettes at retail on the reservation. The tribe then wrote to Milhem Attea & Bros., Inc., concerning the revocations. 4/ The letter was addressed to the company at its business address, 1509 Clinton Street, Buffalo, New York 14206. It was dated November 12, 1986, and mailed on November 18, 1986. The letter stated:

RE: ELI TARBELL, BEAR'S DEN  
WILLIAM SEARS  
GABRIEL OAKES

This is to notify you that the St. Regis Mohawk Tribal Council has revoked the authority of the above-named individuals to sell unstamped cigarettes as of this date.

You are to cease delivering any unstamped cigarettes to the above-named businesses immediately.

You are also requested to send us any invoices for deliveries made after July 29, 1986, to the present time. [Emphasis in original.]

On December 3, 1986, the tribe wrote to appellee requesting that he revoke appellant's trader's license. 6/ The tribe's letter stated:

On November 21, 1986, a shipment of cigarettes was confiscated by a group of people from the St. Regis Reservation. In the shipment confiscated were cigarettes which were to be delivered to Bear's Den, William Sears and Gabriel Oakes, among other deliveries. \* \* \*

On Sunday, November 30, 1986, at about noon, another shipment was delivered to William Sears. This shipment was made in a Ryder Company truck and was witnessed by several individuals.

On January 2, 1987, appellee wrote to Milhem Attea & Bros. Inc., concerning the tribe's request. Appellee's letter offered an opportunity to respond to the tribe's allegations and to state why appellant's license should not be revoked.

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4/ This letter was signed by two of the three St. Regis tribal chiefs. The signature line for the third chief was blank. The record shows that the third chief disagreed with the action and questioned the validity of an action taken by only two chiefs. For purposes of this decision, the Board assumes that the two chiefs had the authority to act for the tribe.

5/ In its Dec. 3, 1986, letter discussed infra, the tribe states that the letter dated Nov. 12 was mailed on Nov. 18. The record copy of the letter dated Nov. 12 also bears a handwritten notation to the same effect.

6/ The letter to BIA was signed by the same two St. Regis tribal chiefs as was the letter to appellant. The signature line for the third chief was, again, blank.

On January 12, 1987, appellant, through his attorney, moved to dismiss the tribe's request to revoke his trader's license, on the grounds, inter alia, that neither the tribe's letter dated November 12, 1986, nor appellee's January 2, 1987, letter constituted effective notice to appellant because both were addressed to Milhem Attea & Bros. Inc. rather than appellant, and appellant's business was separate from that of Milhem Attea & Bros. Inc.

In response to appellant's motion, on January 21, 1987, appellee wrote directly to appellant, repeating the offer made in the January 2 letter. Appellee stated that the tribe had requested that appellant's trader's license be revoked because "[he had] failed to comply with tribal laws and regulations as [he was] required to do by the terms of [his] license." Appellant was given 30 days to file a response. The letter also stated that the tribe would have 15 days from its receipt of appellant's response to file a reply.

Appellant responded by letter of February 10, 1987, stating eight separate objections to the proposed revocation of his license. The tribe replied in a letter dated May 19, 1987. <sup>7/</sup>

In a decision dated September 18, 1987, appellee revoked appellant's trader's license. The decision identified the relevant issues as: "(A) whether the St. Regis Mohawk Tribe is recognized as exercising sovereign powers over its own reservation, (B) whether the intent of the Federal Trader Licensing Statutes has application to this matter, [and] (C) whether the 1968 Indian Civil Rights Act, 25 U.S.C. 1301-1303, has application to this matter."

Appellee found that the tribe had the sovereign authority to regulate non-members who enter the St. Regis Mohawk Indian Reservation, even those who enter with the approval of BIA, and that the tribe had attempted to regulate the activities of appellant by directing him to cease delivering unstamped cigarettes to certain individuals.

He further found that the intent of the Indian trader statutes was to protect Indians from non-Indians who would take unfair advantage of them and that because Indian tribes could achieve the intent of the statutes by exercise of their own authority in cases where BIA has not acted, <sup>8/</sup> they should not be precluded from doing so where BIA has acted. He stated that

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<sup>7/</sup> The tribe's response appears to have been untimely. Neither the Jan. 2 letter nor the Jan. 21 letter, in which the time deadlines were set out, shows that a copy of the letter was sent to the tribe, although both indicate that copies were sent to the tribe's attorneys.

<sup>8/</sup> Appellee cites United States ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980), in which it was held that, where BIA failed to issue trader's licenses because of administrative problems, traders were authorized to operate under tribal permits.

the statutes should not be used to force a tribe to accept a person onto its reservation where there is information that he is not wanted.

Finally, he found that the due process clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), required, *inter alia*, notice of tribal governmental action sufficient to allow a person the opportunity to conform his behavior to governmental requirements. He found, as a matter of fact, that appellant had been afforded sufficient notice of the tribe's requirement but had willfully failed to conform.

He concluded that appellant's failure to conform to the tribe's direction was a violation of the provision of his trader's license requiring him to comply with tribal laws and regulations and that appellant's license should therefore be revoked.

Appellant appealed the decision to the Assistant Secretary--Indian Affairs, who, by memorandum of January 6, 1988, referred it to the Board pursuant to 25 CFR 2.19(a)(2). <sup>9/</sup> The appeal was docketed on January 13, 1988, and the parties were informed of their briefing privileges. No additional briefs were filed before the Board.

#### Discussion and Conclusions

Appellant argues that appellee's decision violated the Administrative Procedure Act (APA), 5 U.S.C. § 551, because (1) no hearing was held although the APA requires a hearing under the circumstances of this case, (2) BIA failed to give appellant the written notice required by the APA, (3) appellee failed to meet the burden of proof imposed upon him by the APA, and (4) appellee did not make the express findings required by the APA. Appellant also argues that the decision violated his right to due process of law, that the provisions of appellant's trader's license are unconstitutionally vague, and that the revocation of appellant's trader's license was not authorized by the regulations at 25 CFR Part 140.

The Board finds it unnecessary to address all of appellant's arguments because it holds that appellee's decision must be reversed for failure to comply with the APA, as discussed below.

[1] 5 U.S.C. § 558(c) provides in relevant part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if ,

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<sup>9/</sup> 25 CFR 2.19(a) provides:

"Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

- (1) Render a written decision on the appeal or
- (2) Refer the appeal to the Board of Indian Appeals for decision."

before the institution of agency proceedings therefor, the licensee has been given--

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements. [10/]

For purposes of the APA, "license" is defined to include "the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). Appellant's trader's license comes within this definition. "Agency" is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, [with certain exceptions, not relevant here]." 5 U.S.C. § 551(l). BIA comes within this definition, but the tribe does not.

Thus, unless one of the exceptions in section 558(c) applies in this case, appellant was entitled to written notice by BIA, 11/ and to an opportunity to demonstrate or achieve compliance with lawful requirements, prior to the institution of proceedings to revoke his trader's license. This requirement was explained in the legislative history of the APA and has been addressed by the Attorney General and the Federal courts. The report of the Senate Judiciary Committee on the bill that became the APA states that the provision "is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency." Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 35 (1946). See also Attorney General's Manual on the Administrative Procedure Act 90-91 (1947). 12/

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10/ The Board has previously noted that § 558(c) applies to BIA actions. See, e.g., Metzger v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 314 (1985).

11/ For purposes of the written notice required by 5 U.S.C. § 558(c), the tribe's letter to appellant was insufficient because the tribe is not an agency within the meaning of the APA and was not the entity responsible for issuing and monitoring the trader's license.

12/ Describing the provision, the Attorney General's Manual states:

"This sentence requires an agency to give a licensee an opportunity to change his conduct before his license can be revoked by the agency unless the licensee's conduct is willful or the public health, interest or safety requires otherwise. Thus, if a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply with the requirements of the agency before it can revoke, withdraw, suspend or annul his license."

In Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074 (7th Cir. 1982), the United States Court of Appeals for the Seventh Circuit found that the legislative history of this section demonstrated that it had as a purpose "to provide a licensee threatened with the termination of its license an opportunity to correct its transgressions before actual suspension or revocation of its license resulted." The court further stated that the procedural requirements of section 558(c) "afford a licensee faced with the revocation or suspension of its license an opportunity for a second chance, \* \* \* or an opportunity to put its house in lawful order before more formal agency proceedings are undertaken." (Citations omitted.) Id. Accord Blackwell College of Business v. Attorney General, 454 F.2d 928, 933-34 (D.C. Cir. 1971); Atlantic Richfield Co. v. United States, 774 F.2d 1193, 1200-1201 (D.C. Cir. 1985).

[2] Section 558(c) provides an exception to the notice and "second chance" requirements in cases where the licensee's conduct is willful. 13/ Appellee found that appellant had willfully failed to conform to the tribe's requirement.

The legislative history of the APA indicates that the willfulness exception in section 558(c) applies "only where the demonstrable facts fully and fairly warrant [its] application," and that "[w]illfulness must be manifest." S. Doc. No. 248, supra, at 211. As interpreted by the courts, willfulness, for purposes of this section, is present "if a person (1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961). See also Koden v. U.S. Department of Justice, 564 F.2d 228, 234 (7th Cir. 1977); Holt Hauling & Warehousing System, Inc. v. U.S. Customs Service, 650 F. Supp. 1013, 1017 (Ct. Int'l Trade 1986). 14/ The court in Holt Hauling & Warehousing System, Inc. stated:

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13/ The second exception to the procedural requirements, concerning situations where "the public health, interest, or safety requires otherwise," is not at issue here.

14/ The term "willful" in other Federal statutes has been interpreted in an analogous manner. In McLaughlin v. Richland Shoe Co., 56 U.S.L.W. 4433 (U.S. May 16, 1988), the Supreme Court endorsed a standard of willfulness for purposes of a statute of limitations in the Fair Labor Standards Act, 29 U.S.C. § 255(a), which it had earlier adopted in construing a liquidated damages provision in the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). The Court stated:

"In common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional.' \* \* \* The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in [Trans World Airlines v. Thurston, [469 U.S. 111, 125-30 (1985)]]--that an employer either knew or showed reckless disregard

In the cases applying the willfulness exception in § 558(c), the licensees either received prior warning letters \* \* \* or were subject to a previous court order \* \* \* informing them that their conduct was not satisfying agency regulations. In each instance the licensee again disregarded the warnings or orders by engaging in similar conduct. [Citations omitted.]

650 F. Supp. at 1017. In the case before it, the court found that, although the licensee had not received written warnings it had been warned orally; it had in its possession a manual describing the procedures it was charged with violating; and its violations continued over a 13-month period. The court therefore concluded that there was a reasonable basis for a finding that the licensee had acted willfully. Id. The cases indicate that the evidence required to support a finding that a licensee acted willfully is substantially more than evidence showing simply that the licensee violated an agency requirement. As a threshold matter, the licensee must have had some way of knowing that his conduct would violate an agency requirement. 15/

Appellant's trader's license was revoked because of deliveries made to individuals whose tribal licenses had been revoked. As far as the record shows, the only notice concerning the propriety of such deliveries which appellant could have received, prior to the deliveries, was the tribe's November 12, 1986, letter. That letter made no reference to any tribal law or regulation which deliveries to the named individuals would violate. No evidence of any such tribal law or regulation is included in the administrative record. Thus assuming arguendo that appellant received the tribe's November 12 letter prior to the deliveries made on November 21 and November 30, 1986, and that he was responsible for the deliveries, 16/ the

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fn. 14 (continued)

for the matter of whether its conduct was prohibited by the statute--is surely a fair reading of the plain language of the Act." 56 U.S.L.W. at 4435. In Thurston, the Court noted that this standard had been applied in interpreting the term in numerous other criminal and civil statutes. 469 U.S. at 126-27 and n.20.

15/ The Supreme Court in Thurston and McLaughlin specifically rejected a test by application of which an employer's actions might violate a statute or if he knew the statute was "in the picture." 469 U.S. at 127-28; 56 U.S.L.W. at 4434.

16/ As discussed above, appellant asserts that the tribe's letter was not proper notice to him because, inter alia, it was incorrectly addressed. He also asserts that appellee lacked evidence that the Nov. 21 and Nov. 30 deliveries were made by appellant or that the cigarettes delivered on those dates were unstamped. Appellant specifically contends that he did not make the Nov. 30 delivery.

record does not demonstrate that appellant was on notice that, by making those deliveries, he would be in violation of any tribal law or regulation, much less that he might be in violation of the provision of his trader's license requiring compliance with "applicable tribal laws and regulations." Under these circumstances, appellant's conduct, again assuming that he was responsible for the November 21 and November 30 deliveries, cannot be considered willful.

The Board holds that appellant did not willfully violate the terms of his trader's license.

Because appellant did not willfully violate his license, appellee was required by 5 U.S.C. § 558(c) to give him notice in writing of the facts or conduct that may have warranted the revocation of his license and an opportunity to demonstrate or achieve compliance with all lawful requirements. Appellee's letter to appellant stated only that the tribe had requested revocation of appellant's license on the grounds that he had "failed to comply with tribal laws and regulations as [he was] required to do by the terms of [his] license," but did not identify the tribal law(s) or regulation(s) or specify how appellant had failed to comply. Further, appellant was not given an opportunity to demonstrate or achieve compliance with lawful requirements, 17/ the "second chance" described by the courts, before his license was revoked.

The Board holds that appellee's decision must be reversed because appellee failed to give appellant the notice and opportunity to demonstrate or achieve compliance required by 5 U.S.C. § 558(c).

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17/ As discussed above, there is no evidence in the record of a tribal law or regulation prohibiting deliveries to unlicensed retailers. Assuming the existence of such a law or regulation, the Board expresses no opinion as to whether violation of the tribal enactment would, ipso facto, constitute a violation of appellant's trader's license for which the license could be revoked. One of appellant's unaddressed arguments is that the provision of appellant's trader's license making it subject to forfeiture for failure to comply with "applicable" tribal laws and regulations is unconstitutionally vague because it is unauthorized by the regulations at 25 CFR Part 140 and because it sets no apparent limits on the tribal laws that may be considered applicable. The Board has found it unnecessary to address the issue for purposes of this decision. Further, it would be imprudent for the Board to attempt to address it in the absence of a tribal law or regulation claimed to be applicable. However, in any further proceedings to revoke appellant's trader's license on this ground, the issue should be addressed with reference to the particular tribal law or regulation in question.

Therefore pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellee's September 18, 1987, decision is reversed, and this case is remanded to appellee for further proceedings as appropriate.

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//original signed  
Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge