



INTERIOR BOARD OF INDIAN APPEALS

California Indian Legal Services v. Acting Pacific Regional Director,
Bureau of Indian Affairs

47 IBIA 209 (09/03/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CALIFORNIA INDIAN LEGAL)	Order Affirming Decision
SERVICES,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-61-A
ACTING PACIFIC REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	September 3, 2008

California Indian Legal Services (Appellant) appeals from a February 21, 2006, decision (Decision) of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), denying Appellant’s request under section 102(b) of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912(b) (2001),¹ for the payment of fees and expenses incurred in Appellant’s role as appointed counsel for an Indian client in a probate guardianship proceeding in Mendocino County (California) Superior Court (Court). Case No. SC UK CVPG-98-P 22541. The Decision identified three grounds for denial of Appellant’s request: (1) BIA had not previously certified the client as eligible to have his appointed counsel compensated as required by 25 C.F.R. § 23.13(e)(2); (2) insufficient documentation under 25 C.F.R. § 23.13(a) to enable BIA to certify client eligibility; and (3) BIA’s lack of available funding for the particular fiscal year. Appellant challenges the Regional Director’s decision as erroneous, arbitrary, capricious, and an abuse of discretion.

We affirm the Decision for the following reasons. First, BIA had not previously certified Appellant’s client as eligible to have his attorney compensated by BIA under 25 C.F.R. § 23.13(b) and (c). Second, certification of eligibility is a prerequisite to the mandatory authorization of the payment of attorneys fees and expenses under 25 C.F.R. § 23.13(e)(2). Third, this lack of certification derived from the Court’s failure to provide requisite documentation to BIA under 25 C.F.R. § 23.13(a). Although lack of prior certification alone is sufficient to affirm, we also affirm the Regional Director’s denial of certification due to the submission of incomplete documentation. In particular, the Court

¹ All subsequent references to 25 U.S.C. § 1912(b) are to the 2001 volume.

did not provide BIA with the requisite copy of the petition or complaint that commenced the underlying proceedings, and which would have enabled BIA to determine whether, as a threshold matter, the proceeding was one for which fees may be paid under ICWA, nor did Appellant provide a courtesy copy of this petition or complaint. We cannot, however, affirm the Regional Director's denial of certification due to BIA's lack of available funding; nothing in the record supports this determination.

Background

I. Statutory and Regulatory Framework

Enacted in 1978, ICWA regulates proceedings for the adoption, foster care placement, or termination of parental rights involving Indian children. The statute authorizes state courts to appoint counsel for indigent parents or Indian custodians “in any removal, placement, or termination proceeding.” 25 U.S.C. § 1912(b); *cf.* 25 C.F.R. § 23.13(a) (payment may be authorized for involuntary child custody proceedings). If state law does not authorize the appointment of counsel in such proceedings, then the statute obligates the Secretary of the Interior (Secretary) to pay reasonable fees and expenses for attorneys appointed by the state court, on prompt notice by the state court of the appointment. 25 U.S.C. § 1912(b).

BIA's regulations establish the information required to process an application for the payment of attorney fees and expenses under ICWA. When a state court, acting under ICWA, appoints counsel for an indigent in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, 25 C.F.R. § 23.13(a) requires the state court to provide BIA with written notice of the appointment. The regulation provides that the court's notice 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. BIA must then certify the client's eligibility to have his or her counsel compensated by BIA unless, *inter alia*, “[t]he notice to [BIA] of appointment of counsel is incomplete,” *id.* § 23.13(b)(5), or “[f]unds are not available for the particular fiscal year,” *id.* § 23.13(b)(6).

Thus, the regulations presume that upon the court's appointment of counsel under ICWA, the court will notify BIA and provide requisite documentation, whereupon BIA will certify eligibility before the anticipated proceedings.

BIA has 10 days from its receipt of the notice of appointment of counsel to notify the court, the client, and the appointed counsel whether the client has been certified eligible. *Id.* § 23.13(c). If BIA does not render a decision within 10 days of receipt of the notice, the lack of decision may be deemed a denial and appealed to the Board. *Id.* § 23.13(g).² Formal denial of certification, as opposed to BIA's missing the 10-day deadline for making a determination of eligibility for certification, is appealable to the Assistant Secretary-Indian Affairs (Assistant Secretary). 25 C.F.R. § 23.13(c). If an appeal is submitted to the Assistant Secretary and a decision is not rendered within 60 days after all time for pleadings has expired, any party may then ask the Board to assume jurisdiction. *Id.* §§ 2.20(e), 23.13(c).

After proceedings on the merits have concluded, the state court is to “[d]etermine the amount of payment due appointed counsel” and “[s]ubmit [court-]approved vouchers to the [BIA] Area Director *who certified eligibility for BIA payment*” 25 C.F.R. § 23.13(d) (emphasis added).³ BIA must then “authorize the payment of attorney fees and expenses in the amount requested . . . unless, [*inter alia*]: [t]he client has not been certified previously as eligible” *Id.* § 23.13(e)(2). BIA's payment determination is appealable to the Board, *id.* § 23.13(f), as is BIA's failure to render a determination within 15 days after receipt of a voucher, *id.* § 23.13(g).

II. Facts

In June 2004, Michael D. Britton, an enrolled member of the Round Valley Indian Tribes, contacted Appellant seeking assistance in the probate guardianship of his daughter,

² BIA published the final rule for the current wording of 25 C.F.R. Part 23 in 1994. During the comment period, “[o]ne commenter recommended that failure of [BIA] to comply with the established [10-day] timeframe[] specified at §[] 23.13 (c) . . . be grounds for automatic approval of attorney fees and expenses pursuant to § 23.13.” 59 Fed. Reg. 2,248, 2,254 (Jan. 13, 1994). BIA rejected this suggestion, noting that “automatic approval would neither guarantee nor assure that applicants under § 23.13 would be eligible for attorney fees or expenses as delineated in that section.” *Id.* at 2,254 - 255.

³ “Area Directors” are now designated as “Regional Directors.”

who is also a tribal member or eligible for membership. Thereafter, Mr. Britton petitioned the Court to appoint Appellant as his counsel under ICWA. On August 6, 2004, the Court granted his request in an ex parte order (Order Appointing Counsel). On its face, the Order Appointing Counsel included all information required of a written notice of appointment of counsel under 23 C.F.R. § 23.13(a), with the exception of a copy of the original petition or complaint for the underlying probate guardianship proceeding. *See id.* § 23.13(a)(5). Thereafter, however, the Court did not provide BIA with a copy of the Order Appointing Counsel or a copy of the underlying petition or complaint required under 25 C.F.R. § 23.13(a). Notably, Appellant, the court-appointed attorney, did not independently offer this information to BIA.⁴

At the conclusion of the probate guardianship proceedings in September 2005, Appellant submitted a Request for Reimbursement and Attorney Voucher for Attorney Services Under 25 U.S.C. § 1912(b) (Request for Reimbursement) to the Court. On September 27, 2005, the Court approved Appellant's request for fees and costs in the amount of \$18,120 (Order Approving Request) and generated a voucher as addressed in 25 C.F.R. § 23.13(d).

On December 23, 2005, the Court's Deputy Clerk filed a Declaration of Service by Mail (Declaration of Service), declaring that one month earlier, on November 23, 2005, she had served the Regional Director with copies of Appellant's "request for reimbursement and attorney fee voucher . . . , order approving request for reimbursement for attorney services . . . , declaration[s] . . . in support of req[uest] for reimbursement and attorney fee[s,] . . . and [a] supplemental minute order filed Sept. 21, 2005" The Declaration of Service did not make any reference to the Order Appointing Counsel or to the underlying petition or complaint, required to be submitted to BIA under 25 C.F.R. § 23.13(a).⁵ The record contains no indication that BIA ever received a November 2005 mailing from the Court. Moreover, the Declaration of Service did not contain, as an

⁴ Although Appellant attached a copy of the Order Appointing Counsel as Exhibit C to its Statement of Reasons in Support of the Notice of Appeal to the Board, the Administrative Record does not reflect that the Regional Director received a copy of this order from either the Court or Appellant prior to issuing the Decision.

⁵ The Order Approving Request instructed the "Clerk of the Court . . . to submit . . . the [Order Appointing Counsel] to the Bureau of Indian Affairs" Order Approving Request at 2. This instruction was not followed. *See* Declaration of Mail (omitting any mention of the Order Appointing Counsel).

attachment, the referenced information that the Court was required to submit to BIA under 25 C.F.R. § 23.13(d).

In early January 2006, Appellant contacted BIA concerning the status of BIA's authorization of the payment of \$18,120 in attorneys fees and expenses. On January 5, 2006, the Regional Director advised Appellant that he had not received a copy of the Order Approving Request, nor any of the supporting documents required to be submitted by the Court. By letter dated January 26, 2006, Appellant asserted to the Regional Director that it had previously faxed him a copy of the Declaration of Service and was now enclosing copies of the Declaration of Service, the Order Approving Request, the Request for Reimbursement, and two declarations in support of the Request for Reimbursement. Appellant made no reference to the Order Appointing Counsel or to the underlying petition or complaint.

By letter dated February 21, 2006, the Regional Director denied Appellant's request for payment of attorney fees and expenses based on a finding that the client, Mr. Britton, "ha[d] not been certified previously as eligible under 25 [C.F.R.] § 23.13(c), [thereby] providing grounds for denial under 25 [C.F.R.] § 23.13(e)(2)." Decision at 2. The Regional Director also found that he could not retroactively certify Mr. Britton's eligibility under 25 C.F.R. § 23.13 (b) and (c). The Regional Director explained that he had not been provided documentation, required by 25 C.F.R. § 23.13(a), upon which an eligibility determination could be made under 25 C.F.R. § 23.13(b). In particular, the Regional Director found that he did not have a copy of the petition or complaint.⁶ He also found that funds were not available for that particular fiscal year with which to pay Appellant's fees and costs, thereby providing grounds for denial of certification of eligibility under 25 C.F.R. § 23.13(b)(6).

⁶ The Regional Director also mentioned that he had not been provided "the name and address of the client[,]" or documentation "specifically certify[ing] that state law makes no provision for appointment of counsel, . . . or . . . that the Indian client is indigent." These matters are immaterial to our resolution of this appeal, and we address them no further.

The Regional Director also noted that notification of appointment of counsel is to be prompt, presumably to allow certification of eligibility before the proceedings begin. *See* 25 U.S.C. § 1912(b) ("the court shall promptly notify the Secretary upon appointment of counsel"); *but see* 25 C.F.R. § 23.13 (regulation does not expressly address or mention "prompt" presentation to BIA of appointment of counsel by a state court).

III. Procedural History

A. Stay of Proceedings

On March 28, 2006, Appellant appealed the denial of payment to the Board pursuant to 25 C.F.R. § 23.13(f). Because Appellant also appealed the denial of eligibility to the Assistant Secretary pursuant to 25 C.F.R. § 23.13(c), the Board stayed the appeal pending before it. When the Assistant Secretary did not act on Appellant's appeal within 60 days, Appellant requested that the Board lift its stay and assume jurisdiction over Appellant's denial-of-eligibility appeal. The Board then assumed jurisdiction over the appeal, consolidated it with Appellant's denial-of-payment appeal, and lifted the stay. The Board also requested the Administrative Record (AR).

B. Administrative Record

The record received from BIA contains a table of contents identifying only the documents at Tab 1 as having been received by BIA prior to issuance of the Decision. Tab 1 consists of only two pages: (1) Appellant's January 26, 2006, letter, and (2) the Court's December 23, 2005, Declaration of Service. None of the documents identified as enclosed with the Appellant's letter were included at Tab 1, thus suggesting that the Regional Director did not receive the enclosures. Clearly, this is not the case as the Decision, found at Tab 2, states that the Regional Director had received the "Order approving request for attorney's fees, attorney fee voucher and related documents" Decision at 1. The first two of these referenced documents appear in the record as attachments to Appellant's submissions to the Board. The "related documents," referred to in the Decision, are not identified, and the Board is left to guess whether they may have been submitted separately to the Board by Appellant. The remaining tabs in the record contain documents generated in the course of the appeal to the Board. The record does not contain any documentation concerning funding or lack thereof "for the particular fiscal year." Lastly, the table of contents for the AR identifies three documents as "privileged." These documents were not submitted to the Board and, therefore, were not considered by Board.⁷

⁷ The Regional Director is reminded that the AR must contain *all* documents reviewed and considered by him in the course of a decision — even if duplicative of other records — as well as certain categories of documents that must be included regardless of whether they were actually considered or relied upon. *See* 43 C.F.R. § 4.335(a); *Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 227-28 n.15 (2008). If records have been lost or

(continued...)

C. Motion for Default Judgment

Appellant filed a brief in support of its appeal. No other briefs were filed. On January 18, 2007, Appellant requested a default judgment against the Regional Director due to his failure to file an answer brief. The Board denied Appellant's request and explained that its regulations do not require any party to an appeal to file a brief:

The Regional Director does not have the burden of proof in these proceedings, nor does the Regional Director's failure to file an answer constitute a concession of arguments made by Appellant. Rather, the Regional Director's failure to file an answer brief simply means that the Regional Director's opinion is reflected solely in the administrative record.

Order Denying Request for Default Judgment at 2; *see also* Order Setting Briefing Schedule at 3 ("Opposing parties . . . *may* file an answer [brief].") (emphasis added). We turn now to the merits of this appeal.

Discussion

I. Standard of Review

For appeals over which the Board has jurisdiction, the standard of review is straightforward. We review questions of law and the sufficiency of evidence *de novo*. *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 318 (2007). When a BIA decision involves the exercise of discretion, the Board does not substitute its judgment for that of BIA, but reviews the decision to determine whether the appellant has demonstrated that BIA's decision is not in accordance with the law, is not supported by the record, or is not adequately explained. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.* Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Id.*

⁷(...continued)

destroyed, the certification of the record should so state. Ordinarily, the Board must be able to determine what records were submitted to the Regional Director as well as what records were available to him. We cannot do so with the record provided to us. But because the critical facts in this appeal are undisputed, we need not rely on the completeness of the record to decide the issues in this appeal.

II. Denial of Payment

This is a simple matter. As noted above, BIA “shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless: . . . [t]he client has not been certified previously as eligible” 25 C.F.R. § 23.13(e)(2). BIA had not certified Mr. Britton’s eligibility prior to its receipt of Appellant’s Request for Reimbursement and the court-approved voucher under 25 C.F.R. § 23.13(d). Thus, the Regional Director properly denied the payment. Accordingly, the Board affirms the decision to deny payment due to BIA’s lack of prior certification of Mr. Britton’s eligibility under 25 C.F.R. § 23.13(b) and (c).

Appellant argues that the “[F]ederal government has a trust obligation to Indian tribes” that extends to tribal families. Statement of Reasons in Support of the Notice of Appeal to the Board (Appeal to Board) at 6. Appellant argues that BIA’s failure to pay attorneys fees and expenses under ICWA violates this obligation. To the extent that any “trust” obligation exists in this case, it arises by statute, and does not exist apart from compliance with the statute and implementing regulations. Congress has authorized the payment of legal fees in certain Indian child custody proceedings, and the Department of the Interior has promulgated regulations in furtherance of this statutory responsibility, but in this case there has been incomplete compliance with the regulatory requirements.

Appellant further argues that it is “patently illogical and unfair” to deny attorney fees based on the lack of prior certification when Appellant “followed all appropriate procedures.” *Id.* at 5. We recognize the statute’s purpose to ensure the payment of appointed counsel for the indigent. Nonetheless, the regulations make clear what records must be provided to BIA for it to make a determination that a particular client is eligible for the payment of fees, and this record does not contain that information. The Court, which bore the responsibility of providing the records to BIA, did not provide them, and the Appellant did not independently do so.

Appellant argues that it should not be punished for the Court’s mistaken handling of paperwork. BIA, however, has no authority to pay attorney fees and expenses without having first established that the proceeding is one for which payment is appropriate. *See* 25 C.F.R. § 23.13(e)(2).

III. Denial of Certification of Eligibility

A. Denial of Certification of Eligibility Based on an Incomplete Notice of Appointment of Counsel under 25 C.F.R. § 23.13(b)(5)

Appellant asks this Board to determine that the Regional Director should have certified Mr. Britton's eligibility on the basis of the alleged November 2005 submission by the Court referenced in the Court's December 2005 Declaration of Service. But neither the alleged November 2005 submission by the Court nor the Appellant's January 2006 letter included a copy of the underlying petition or complaint required under 25 C.F.R. § 23.13(a)(5) for purposes of determining eligibility under 25 C.F.R. § 23.13(b). Therefore, we cannot find any error in the Regional Director's refusal to certify Mr. Britton's eligibility for payment of legal fees and affirm the Regional Director's denial of certification due to the submission of incomplete documentation.

Appellant cannot overcome the fact that BIA was not supplied a copy of the petition or complaint. Appellant concedes that "[the] Court failed to provide . . . BIA with a copy of the petition or complaint." Statement of Reasons in Support of the Notice of Appeal to the Assistant Secretary (Appeal to Assistant Secretary) at 5. Appellant further concedes that it did not correct the Court's oversight by submitting a certified copy of the petition or complaint itself. Without a copy of the petition or complaint, BIA cannot determine whether the proceeding involving Mr. Britton properly fell within the scope of proceedings for which ICWA authorizes the payment of fees and expenses.

Appellant suggests that the Regional Director would not have accepted the documentation directly from Appellant. Past practice involving the Pacific Regional Director and Appellant, however, shows that he has accepted documentation directly from Appellant. *See Spears v. Sacramento Area Director*, 28 IBIA 161, 163 (1995). Appellant has not shown this practice to have changed. Moreover, the Regional Director did, in fact, accept documentation provided directly by Appellant in January 2006. This documentation, however, did not include a copy of the petition or complaint.

Appellant also argues that the Regional Director is estopped from denying eligibility because he failed to render a decision 10 days after receipt of the notice of appointment of counsel, as required by 25 C.F.R. § 23.13(c). We disagree. The preamble to the publication of 25 C.F.R. Part 23 in the Federal Register expressly rejects the notion that BIA's failure to comply with the 10-day deadline should be grounds for automatic approval of attorney fees and expenses pursuant to 25 C.F.R. § 23.13. *See* 59 Fed. Reg. at 2,254 - 255.

B. Denial of Certification of Eligibility Based on Lack of Available Funding for the Particular Fiscal Year Under 25 C.F.R. § 23.13(b)(6)

In contrast, we cannot affirm the Regional Director's denial of certification based on the lack of funding for the particular fiscal year when the record itself is silent as to the availability or unavailability of funds. We note that the Federal fiscal year begins on October 1 of each year and ends on September 30 of the following year. *See* 31 U.S.C. § 1102. Appellant was appointed counsel in fiscal year 2004, and the proceedings concluded in fiscal year 2005, but BIA did not learn of the appointment until fiscal year 2006. This timing may have had an impact on BIA's ability to fund Appellant's fees and expenses, but the Regional Director fails to explain whether or how this might have been the case, and nothing in the record speaks to the issue either.

Appellant argues that BIA has "general welfare dollars that it may use at its discretion." Appeal to Assistant Secretary at 6. Payment of fees under ICWA requires the appropriation of funds pursuant to the Snyder Act, 25 U.S.C. § 13. *See* 25 U.S.C. § 1912(b).⁸ Once appropriated, these funds must be available for the particular fiscal year. 25 C.F.R. § 23.13(a)(6). Appellant provides no evidence that "general welfare dollars" are available for the "particular fiscal year," much less any evidence showing that such "general welfare dollars" have been "appropriated pursuant to [the Snyder Act]."

IV. Summary

Appellant has not shown that the Regional Director failed to exercise his discretion appropriately in denying payment of attorneys fees and expenses pursuant to 25 C.F.R. § 23.13(e)(2). The Board therefore affirms the denial of payment due to the lack of prior certification of eligibility. Although the lack of prior certification alone is sufficient to affirm the denial of payment, the Board also affirms the Regional Director's decision to deny certification due to the failure to submit a copy of the state court petition or complaint to BIA. The Regional Director's decision to deny certification due to the unavailability of funding for the particular fiscal year, however, is neither supported by the record nor adequately explained. Thus, the Board cannot affirm the Regional Director's denial of certification based on the unavailability of funding.

⁸ The Snyder Act authorizes the appropriations of funds for the "[g]eneral support [of Indians]." 25 U.S.C. § 13.

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 declining to pay Appellant attorneys fees and expenses.

I concur:

_____/ / original signed
Maria Lurie
Acting Administrative Judge

_____/ / original signed
Debora G. Luther
Administrative Judge