



INTERIOR BOARD OF INDIAN APPEALS

33rd Business Committee of the Cheyenne & Arapaho Tribes of Oklahoma
v. Superintendent and Awarding Official, Concho Agency, Bureau of Indian Affairs

39 IBIA 253 (03/19/2004)



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

33rd BUSINESS COMMITTEE OF THE	:	Order Adopting Recommended Decision
CHEYENNE & ARAPAHO TRIBES	:	
OF OKLAHOMA,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 04-71-A
	:	
SUPERINTENDENT and AWARDDING	:	
OFFICIAL, CONCHO AGENCY,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 19, 2004

Appellant 33rd Business Committee of the Cheyenne & Arapaho Tribes of Oklahoma (Tribes) seeks review of a Recommended Decision issued on February 12, 2004, by Administrative Law Judge Richard L. Reeh in a matter arising under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450- 450n. Judge Reeh recommended that the November 10, 2003, decision of the Awarding Official and Superintendent, Concho Agency, Bureau of Indian Affairs (Superintendent; BIA), to reassume the Tribes' Law Enforcement Program on an emergency basis pursuant to 25 C.F.R. § 900.252(a), be affirmed. For the reasons discussed below, the Board of Indian Appeals (Board) adopts the Recommended Decision.

BIA and the Tribes entered into Contract No. CTB05T80170 on March 7, 2003, to administer a Law Enforcement Program under ISDA through 2005. On May 16, 2003, the Superintendent issued a notice of non-emergency reassumption of this contract based on numerous program deficiencies, which included (1) failure to accomplish adequate background investigations for uniformed officers; (2) failure to adequately train the officers; (3) failure to account for property used in connection with law enforcement services; (4) failure to abide by the Tribes' Law and Order Code; and (5) failure to provide a stable law enforcement program to Indian people residing within the boundaries of the Tribes' eight-county service area.

At the Tribes' request, BIA and the Tribes agreed to a Technical Assistance Plan (TAP) effective July 10, 2003, for a period not to exceed 120 days, unless extended by mutual agreement. During this period of time, a BIA police officer was assigned as the Acting Police Chief

of the Tribal Law Enforcement Program to assist in the correction of the deficiencies as well as provide police services to the Tribal communities. It appears that some of the deficiencies were corrected or improved, but at the end of the 120 days, the Tribal police force consisted of a single uniformed officer. The Tribes had vacancies for approximately six positions for police-related officers, including a Chief of Police, and two administrative staff.

On October 8, 2003, the Awarding Official sent the Tribes a letter expressing BIA's concern of the lack of qualified police staff to protect the health, safety and welfare of Indian people residing within the service area. On November 10, 2003, the TAP expired. On the same date, the Superintendent and Awarding Official issued a notice to the Tribes that BIA was vacating its May 16, 2003, notification of non-emergency reassumption and that all associated proceedings were moot. Then BIA issued a notice of emergency reassumption because the Tribes had failed to hire qualified and trained key personnel to fill the vacant law enforcement positions and provide adequate law enforcement services. BIA also immediately rescinded the law enforcement contract pursuant to 25 C.F.R. Part 900, Subpart P. The Tribes had not requested an extension of the TAP.

The Chairman of the Tribes filed an appeal of the November 10, 2003, decision on behalf of the Tribes. The matter was assigned to Administrative Law Judge Richard L. Reeh, Oklahoma City Field Office, Office of Hearings and Appeals. Judge Reeh held hearings on November 21, 2003, and December 18, 2003, ^{1/} and allowed subsequent briefing. He issued a recommended decision on February 12, 2004. As provided in 25 C.F.R. § 900.172, the parties had 15 days from their receipt of Judge Reeh's recommended decision in which to file objections, exceptions or other comments with the Board. On March 3, 2004, the Business Committee, through counsel, filed objections, which the Board received on March 5, 2004.

^{1/} The Chairman and several members of the Tribes' Business Committee attended the Nov. 21, 2003, hearing without counsel. The Chairman testified on behalf of the Tribes. At the Dec. 18, 2003, hearing, counsel made an appearance on behalf of the Business Committee. BIA objected that the attorney did not have required approval from the Tribal Council to appear. Judge Reeh allowed the attorney to participate in the proceedings and determined that her appearance facilitated the receipt of relevant evidence. He also concluded, however, that he was unable to determine whether the Business Committee had standing, separate from the Tribes, which admittedly were a party to the appeal before Judge Reeh. On appeal to the Board, Appellant contends it was error for Judge Reeh not to determine whether the Business Committee separately has standing, although it does not explain how it was adversely affected, considering the fact that Judge Reeh allowed its counsel to participate in the proceedings, and decided the appeal on the merits. The Board rejects Appellant's argument that Judge Reeh was required to decide whether the Business Committee had standing. Cf. Burrell v. Acting Albuquerque Area Director, 35 IBIA 56 (2000) (Board need not decide whether a joint appellant had standing because other appellant clearly did).

Two individuals, as members of the 33rd Business Committee, and one individual as Business Manager for the Tribes, filed responses to the appeal filed by counsel on behalf of the Business Committee. These individuals assert that the Business Committee has not authorized an appeal to the Board from Judge Reeh's recommended decision, and that counsel appearing before the Board on behalf of the Business Committee does not have authority to represent the Tribes in this matter. 2/

In his February 12, 2004, Recommended Decision, Judge Reeh found that

Internal conflicts, personnel difficulties and leadership problems do not excuse tribes from their contractual responsibilities. The emergency re-assumption decision in this case was appropriate. The Agency's over-riding concern for public safety was well founded. It would have been unreasonable for the Bureau to fail to re-assume the law enforcement services operation when an increased risk of physical harm would have resulted from failure to do so. The Bureau's conclusion that one uniformed police officer would not have been able to deliver adequate law enforcement services to Indians within the Tribes' multi-county service area is justified by facts of this case. Common sense suggests that one officer would not have been able to deliver adequate law enforcement services to [N]ative Americans in even one of these counties. Interests of public safety mandated the Agency's decision to effect an emergency re-assumption on November 10, 2003.

Feb. 12, 2004, Recommended Decision at 10.

Appellant's exceptions to the Recommended Decision are that (1) BIA failed to clearly demonstrate that there was an immediate threat of imminent harm to the safety of any person as of November 10, 2003; (2) even if an imminent harm to any person existed as of November 10, 2003, the BIA has not established that such threat arose from the failure of the Tribes,

2/ This appeal appears to have been filed solely on behalf of the 33rd Business Committee. Standing normally would be a threshold jurisdictional issue. In this case, however, because of the abbreviated timetable for deciding an appeal from an emergency re-assumption, and the fact that the underlying issues relevant to standing implicate internal tribal matters, the Board will assume, without deciding, that the appeal from Judge Reeh's recommended decision is properly before it, and will consider the arguments raised by counsel for Appellant. The alternative – issuing no decision or dismissing this appeal to the Board – would lead to the same result on the merits, because Judge Reeh's recommended decision would automatically become final pursuant to 25 C.F.R. § 900.174(a).

as a contracting party, to fulfill the obligations of the law enforcement contract; ^{3/} and (3) BIA has the obligation and trust responsibility to allow the Tribes additional time and assistance to correct the deficiency of staffing.

The Federal regulations in pertinent part provide for an emergency reassumption of an ISDA contract “if an Indian tribe or tribal organization fails to fulfill the requirements of the contract and this failure poses: (1) [a]n immediate threat of imminent harm to the safety of any person; * * * .” 25 C.F.R. § 900.247(a).

Appellant argues that there was no immediate threat of harm because all of the deficiencies listed in the November 10, 2003, reassumption letter had been corrected with the exception of staffing.

The Judge acknowledged that many of the other problems had been addressed by November 10, 2003, but found that the Tribes failed to fulfill the requirements of the contract by not adequately staffing their law enforcement program. He found that “staffing * * * continued to be a critical problem, and – in spite of cautionary advice – the Tribes did not respond.” Feb. 12, 2004, Recommended Decision at 8. Appellant on appeal does not dispute that this contract requirement was not met.

The Board now addresses whether the Tribes’ law enforcement staffing situation posed “an immediate threat of imminent harm to the safety of any person.” Appellant contends that having only one police officer just simply does not create an immediate threat of imminent harm to the safety of any person because the TAP could have been extended, an officer who was a source of problems in October 2003 has been discharged, and BIA could continue loaning its police officers to the Tribal program.

Judge Reeh found that BIA’s concern for public safety was justified by the facts of this case in that one police officer could not adequately deliver law enforcement services within the Tribe’s multi-county service area. The Board agrees. The Tribes’ law enforcement service area covers eight counties in Western Oklahoma. In an October 2003, report, Lt. Addington, the BIA officer assigned to assist the Tribes under the TAP, reported that the Tribal police had

^{3/} The Board notes Appellant’s objection to a sentence in Judge Reeh’s recommended decision that “[t]he former Chairman and [the Business Committee’s counsel] both assert ‘immediate’ or ‘imminent’ threat of harm was posed by the Tribes’ [Nov.] 10, 2003, law enforcement situation.” Feb. 12, 2004, Recommended Decision at 6. Elsewhere in the recommended decision, however, it is clear that Judge Reeh recognized that both the former Chairman and the Business Committee’s counsel were arguing that there was in fact no such threat, but were also making another argument in the alternative that the threat of imminent harm must arise from the failure of the contracting party to fulfill the requirements of the contract.

received numerous cases that required a trained criminal investigator, and that the law enforcement program had responded to 40 calls for services during the month, including multiple assault calls. This amounted to an average of more than one per day. Lt. Addington concluded that the incidents posed a serious threat to the safety and welfare of the persons involved, response time was inadequate due to lack of personnel, and under the circumstances the tribal police program could not provide satisfactory services to the Cheyenne and Arapaho people. In summary, Lt. Addington concluded that the failure to provide proper services posed an immediate danger for possible loss of property or loss of life in emergency situations in the Tribes' service area. The evidence of an immediate threat of imminent harm to safety was sufficient to justify the emergency reassumption. Particularly in the law enforcement context, the Board is not convinced that the regulations require a greater level of immediacy or imminent harm to sustain emergency reassumption of a contract.

Appellant contends that BIA had an obligation to consider extending the TAP. The Board disagrees. Judge Reeh found that the Tribes did not request such an extension, and that finding is supported by the record. Under the circumstances, BIA had no obligation to consider extending the TAP.

Appellant next contends that the evidence clearly shows that the Tribes had no control of the circumstances which resulted in only one police officer remaining on the force on November 10, 2003, because two officers quit and one unsatisfactory officer was terminated by the Tribes. It asserts that the applicant pool for police officers was insufficient. In addition, Appellant argues that the Chairman was not available to review the applications.

Appellant's arguments are not convincing. BIA was not required to abstain from reassuming law enforcement services simply because the Tribes had difficulty filling critical vacant positions, particularly where, as here, Appellant concedes that some problems were attributable to the Tribes' Chairman. It was the responsibility of the Tribes, not BIA, to recruit qualified police officers for its program. Apparently, the Tribes had no contingency plans for staffing turnover or retention. Appellant has not demonstrated that external circumstances excused the Tribes' obligation under the contract or precluded BIA from reassuming the program on an emergency basis.

Appellant's last argument is that BIA had an obligation and trust responsibility to allow the Tribes additional time and assistance to correct the deficiency of staffing, before reassuming the contract. The Board disagrees.

The Federal regulations provide for a transfer of program responsibilities along with the funding when a tribe contracts under ISDA.

When an Indian tribe contracts, there is a responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities funded under the contract.

25 C.F.R. § 900.3(b)(4).

BIA assisted the Tribes for 120 days under the TAP to bring their program up to Federal standards. Judge Reeh found that BIA demonstrated both forbearance and responsibility in assisting the Tribes, and that finding is supported by the record. ISDA is not designed to transfer funds and responsibilities to tribes and yet create an open-ended obligation on the part of BIA to save the contract when a tribe fails to perform. Appellant has failed to show that Judge Reeh erred in concluding that BIA's emergency reassumption was justified.

Federal regulations protect the Tribes from any adverse effect from the reassumption in their operation of other contracted program and any new applications. See 25 C.F.R. § 900.256. The reassumption does not prevent the Tribes from taking the steps necessary to better prepare to perform a law enforcement program contract in the future.

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 February 12, 2004, Recommended Decision of Administrative Law Judge Richard L. Reeh is adopted, and the November 10, 2003, decision of the Awarding Official and Superintendent is affirmed. This decision is final for the Department.

// original signed
Kathleen R. Supernaw
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge