



INTERIOR BOARD OF INDIAN APPEALS

Clifford McKenzie v.

Senior Awarding Official, Southern Plains Regional Office, Bureau of Indian Affairs

39 IBIA 242 (02/24/2004)

Reconsidering:

39 IBIA 184



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

CLIFFORD McKENZIE,
Appellant

v.

SENIOR AWARDING OFFICIAL,
SOUTHERN PLAINS REGIONAL
OFFICE, BUREAU OF INDIAN
AFFAIRS,
Appellee

: Order Granting Reconsideration,
:
: Vacating Prior Order, and
:
: Dismissing Appeal for
:
: Lack of Jurisdiction
:
:
:
: Docket No. IBIA 03-88-A
:
:
:
: February 24, 2004

Appellant Clifford McKenzie, Chairman, Kiowa Tribe of Oklahoma (Tribe) appealed a March 18, 2003, Notice of Reassumption of certain programs contracted to the Tribe under the Indian Self-Determination and Education Assistance Act (ISDA). ^{1/} The notice was issued by the Senior Awarding Official, Southern Plains Regional Office, Bureau of Indian Affairs (Regional Office; BIA). On October 28, 2003, the Board of Indian Appeals (Board) dismissed the appeal as having been withdrawn by the Tribe. 39 IBIA 184 (2003). On October 31, 2003, the Board received a letter from Appellant contending otherwise, which the Board treated as a request for reconsideration. For the reasons discussed below, the Board grants the request for reconsideration; vacates the October 28, 2003, decision; but dismisses the appeal for lack of jurisdiction.

Early in the appeal, on April 28, 2003, the Board issued a show cause order requiring Appellant to show that he had standing to bring the appeal; that the appeal had been timely filed; and that the Board had jurisdiction to review the decision at issue, given the fact that it

^{1/} After the appeal was filed, the Board found that it had been filed under 25 C.F.R. Part 2 as an administrative appeal, related to but distinct from issues that would fall under the ISDA regulations, 25 C.F.R. Part 900, Subpart L. In response to the Mar. 18, 2003, notice of reassumption, Appellant had submitted three documents to the Regional Office, BIA, all dated Apr. 16, 2003. In an order dated Apr. 28, 2003, the Board discussed all three documents. In one document, Appellant sought an informal conference about the reassumption, pursuant to the ISDA regulations, 25 C.F.R. § 900.154. The Board concluded that nothing related to the request for an informal conference was before it. The Board concluded that the other two documents constituted an appeal pursuant to 25 C.F.R. Part 2.

was signed by a BIA awarding official and not a Regional Director. On September 22, 2003, before the Board had addressed these threshold jurisdictional issues, it received a letter signed by five members of the Kiowa Business Committee. The letter stated that Appellant did not have authority to file the appeal and that it should be withdrawn. On September 23, 2003, the Board requested that the Business Committee submit a formal resolution asking that the appeal be dismissed. On October 2, 2003, the Board received Tribal Resolution No. CY-2003-04, filed by the Secretary of the Kiowa Business Committee. That resolution, dated September 25, 2003, stated that the Tribe was withdrawing the appeal.

On October 28, 2003, after waiting to see if Appellant would object to the resolution filed by the Secretary of the Business Committee, the Board dismissed the appeal. 39 IBIA 184 (2003). On October 31, 2003, Appellant filed Tribal Resolution No. CY-2003-039 with the Board, dated October 28, 2003. Resolution No. CY-2003-039 was directly contrary to the earlier resolution, and appeared to have been approved by a differently-constituted membership of the Business Committee from the individuals who approved the earlier resolution. Resolution No. CY-2003-039 stated that it authorized Appellant to prosecute the appeal on behalf of the Tribe. The Board treated Appellant's October 31 filing as a petition for reconsideration of its dismissal of the appeal.

Information provided by Appellant in his October 31, 2003, filing showed that there was a difference of opinion over who constitutes the membership of the Business Committee. Therefore, on November 3, 2003, the Board asked the Southern Plains Regional Director, BIA, to inform it of the presently recognized membership of the Business Committee. On November 18, 2003, the Board received the Regional Director's response, identifying those individuals the Superintendent, Anadarko Agency, BIA (Superintendent) has recognized as members of the Business Committee, but also indicating that the Superintendent's August 19, 2003, decision was appealed to the Regional Director.

It therefore appears that there is or may be a pending dispute regarding the current composition of the Business Committee. That dispute is not before the Board. The two conflicting resolutions filed with the Board, one of which the Board relied on for its dismissal of the appeal, appear to be implicated in this dispute. Rather than unnecessarily rely on or address the validity or effect of either tribal resolution, and in doing so wade into matters not presently before it, the Board grants reconsideration; vacates the October 28, 2003, order; and returns to the threshold question of jurisdiction.

In its April 28, 2003, order to show cause, the Board noted that it has jurisdiction under 25 C.F.R. § 2.4(e) over decisions issued by Regional Directors, but that the decision being appealed was signed by the Senior Awarding Official, not by the Regional Director. The Board did not reach this jurisdictional issue in its October 28, 2003, decision because it relied upon the apparent withdrawal of the appeal. On reconsideration, the Board concludes that the

appeal must be dismissed for lack of jurisdiction because Appellant had not shown that he is appealing a decision by a Regional Director. ^{2/}

In response to the Board's show cause order, Appellant did not dispute that the language of 25 C.F.R. § 2.4(e) does not give the Board jurisdiction over appeals from decisions of BIA regional officials subordinate to the Regional Director, such as the Senior Awarding Official. Instead, Appellant contended that it was the Senior Awarding Official, and not the Tribe, who in effect brought the appeal before the Board by forwarding Appellant's April 16, 2003, documents to the Board in the apparent belief that they should be directed to the Board. While not seriously contesting the jurisdictional problem raised by 25 C.F.R. § 2.4(e), Appellant nevertheless asked the Board in effect to assume jurisdiction over the appeal and review various matters in order to provide guidance to the parties or adjudicate several threshold issues.

The Board acknowledges that an April 17, 2003, letter sent to Appellant from the Acting Senior Awarding Official may have created some confusion by stating that a decision of "an Area Office official" may be appealed to the Board. In fact, 25 C.F.R. § 2.4(e) does not vest the Board with jurisdiction over appeals from decisions by subordinate regional (formerly "area") office officials. *See, e.g., Dahozy v. Natural Resource Manager*, 38 IBIA 203 (2002) (decision by a BIA subordinate official must first be appealed to a Regional Director). Therefore, the Board lacks jurisdiction over the appeal.

In addition, the Board does not have authority to issue advisory opinions. *See, e.g., Paiute Indian Tribe of Utah v. Western Regional Director*, 38 IBIA 128 (2002); *Jackson v. Muskogee Area Director*, 32 IBIA 45, 47 (1998), and cases cited therein. Therefore, the Board declines Appellant's request that it assert jurisdiction to provide guidance or adjudicate threshold issues.

However, even when the Board lacks jurisdiction over an appeal, it may be appropriate to refer the matter to the appropriate forum for consideration and action, as appropriate. *See, e.g., Estate of Myrna Patricia Owen White*, 39 IBIA 227 (2004) (dismissing appeal as premature and referring petition to the Hearings Division). In this case, the Board refers this matter to the Regional Director.

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 grants the petition for reconsideration;

^{2/} By vacating the October 28, 2003, decision, the Board expresses no views concerning either Tribal Resolution No. CY-2003-04 or Resolution No. CY-2003-39, or concerning Appellant's standing. Nor, of course, does the Board express any views concerning the dispute that is or may be pending before the Regional Director, or possibly within a tribal forum.

vacates the October 28, 2003, decision, 39 IBIA 184 (2003); and dismisses the appeal for lack of jurisdiction.

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Kathleen R. Supernaw
Acting Administrative Judge