MILLE LACS BAND OF OJIBWE
v.
ACTING DEPUTY COMMISSIONER OF INDIAN AFFAIRS

IBIA 95-35-A Decided December 21, 1994

Appeal from a decision concerning fiscal year funding under a self-governance compact.

Docketed and dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Contracting of Federal Services--Indians: Indian Self Determination and Education Assistance Act: Generally

Under the circumstances of this case, the Board of Indian Appeals finds no reason why self-governance decisions signed by the Deputy Commissioner of Indian Affairs should be immune from the general right of review by the Board. If these decisions are actually decisions of the Assistant Secretary - Indian Affairs, they should be signed by the Assistant Secretary, not by the Deputy Commissioner or any other subordinate official.

APPEARANCES: Philip Baker-Shenk, Esq., Washington, D.C., for appellant; Sharee Freeman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Assistant Secretary - Indian Affairs.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On October 11, 1994, the Board of Indian Appeals (Board) received a statement of reasons in a case styled as above from appellant Mille Lacs Band of Ojibwe. The statement of reasons, which was the first filing the Board had received concerning this matter, indicated that appellant was appealing an August 4, 1994, decision of the Acting Deputy Commissioner of Indian Affairs (Deputy), and contained a copy of appellant's September 6, 1994, notice of appeal, showing that the notice was addressed to the Deputy and the Minneapolis Area Director, Bureau of Indian Affairs (BIA), with copies to the Assistant Secretary - Indian Affairs (Assistant Secretary), the Acting Director of the Office of Self-Governance, and appellant's Chief

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Executive. There was no indication that the Board was sent a copy of the notice of appeal. Also on October 11, 1994, the Board received a telephone call from appellant requesting the docket number assigned to this case.

On October 13, 1994, in response to a request to the Deputy, the Board received a copy of the August 4 decision. The decision involves FY 1995 funding under appellant's self-governance compact. The only indication in the decision concerning appellant's appeal rights was the statement: "In the event that the Band wishes to appeal to the Policy Council, we would recommend that the Band include a note to that effect in the Agreement."

The Board would ordinarily have review jurisdiction over decisions issued by the Deputy. See, e.g., 25 C.F.R. 2.4(d); 2.6(c); 2.20(c) (Decisions issued by the Assistant Secretary are final for the Department, but decisions issued by subordinate officials may be appealed to the Board). The circumstances of this case also indicated that appellant believed its appeal was before the Board, even though it had neglected to file its notice of appeal with the Board.

Because, inter alia, of the possible conflict between the Board's normal review jurisdiction and the apparent intent to employ a different review procedure for self-governance compacts, in an October 14, 1994, order the Board requested briefing from the Assistant Secretary concerning the procedures being employed for review of self-governance decisions.

On November 9, 1994, the Board received a memorandum from the Assistant Secretary stating her intent to assume jurisdiction over this appeal under 25 C.F.R. 2.20(c). Because the memorandum was not timely under 25 C.F.R. 2.20(c) and 43 C.F.R. 4.332(b), 1/ on November 14, 1994, the Board held that the attempted assumption of jurisdiction had no legal effect. See Shaahook Group of Capitan Grande Band of Diegueno Mission Indians v. Director, Office of Tribal Services, 27 IBIA 43, amended on recon., 27 IBIA 90 (1994). The Board repeated its request for briefing on appeal procedures.

On December 13, 1994, the Board received a motion from the Assistant Secretary seeking dismissal of this appeal. The Assistant Secretary stated that the appeal filed with her had appeared to be in accordance with the August 4, 1994, letter and had not indicated that appellant had, or intended to, file another appeal with the Board. She stated that she had not realized until December 2, 1994, that her memorandum assuming jurisdiction had been transmitted out of time.

1/ 25 C.F.R. 2.20(c) states in pertinent part: "If the Assistant Secretary * * * decides to issue a decision in the appeal * * *, [she] shall notify the Board * * *, the deciding official, the appellant, and interested parties within 15 days of [her] receipt of a copy of the notice of appeal." 43 C.F.R. 4.332(b) provides: "In accordance with 25 C.F.R. 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary * * * may decide to review the appeal."

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Concerning appeal procedures for self-governance compacts, the Assistant Secretary stated:

> The statute and the self-governance compact provide that appeals or disputes related to the compact and annual funding agreement are to be brought under Section 110 of P.L. 93-638 [the Indian Self-Determination Act, 25 U.S.C. § 450m-1 (1988)]. See, Section 306 of the Tribal Self-Governance Demonstration Project Act. Section 110 specifically deals with contractor appeals from decisions of a contracting officer. Since it is the Assistant Secretary * * * who signs self-governance agreements and since contracting authority is vested in her analogous to the contracting officers, it is her decisions relative to annual agreements that can be appealed under Section 110.
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> As an alternative step, the Assistant Secretary * * * has had a long-standing practice throughout the Demonstration Project that issues related to the Project should be referred to the Self-Governance Policy Council. This is a council created to advise the Assistant Secretary on policy matters and other major decisions related to the program. This procedure, in part, was established to provide a forum for both the BIA and the tribes when policy matters arose in the Demonstration Project which were difficult to handle due to the lack of regulations and established policy. A number of appeals have been made to the Policy Council and decided during the course of the Demonstration Project.
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> A self-governance tribe has the initial option of filing an appeal under Section 110, but is encouraged to use the alternative appeal through the policy council to deal with "grey" areas where policy decisions are needed. [Appellants] appeal is such an issue.
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> * * * * * *
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> Since [the Policy] Council is established to provide recommendations to the Assistant Secretary * * *, the appeal is in actuality an opportunity for [appellant] to have the issue reviewed and reconsidered. This process is in harmony with 25 C.F.R. 2.6(c) which states that decisions made by the Assistant Secretary * * * are final for the Department unless otherwise provided.

(Motion at 1-3).

As the Board understands the Assistant Secretary's practice, a tribe that has received an adverse self-governance decision from the Assistant Secretary may seek reconsideration of that decision before proceeding to Federal court under section 110. If reconsideration is sought, the matter is referred to the Policy Council. Presumably, the harmony between

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the Assistant Secretary's practice and 25 C.F.R. 2.6(c) is that her decisions would be final for the Department except for the fact that she has provided a right to seek reconsideration. What is not clear is whether part of the practice also involves the routine signing of decisions for the Assistant Secretary by the Deputy or some other subordinate official.

The Assistant Secretary's statement also suggests that, even though the demonstration portion of the self-governance program has been completed, she intends to continue to follow the practice developed during that time in addressing policy issues and in providing administrative review options.

The Assistant Secretary appears to suggest that the decision under appeal here is actually her decision. The materials before the Board indicate that the Deputy's August 4, 1994, letter was in response to a July 7, 1994, letter from appellant. It is not clear whether appellant's July 7 letter was preceded by correspondence from BIA or the Assistant Secretary relating to specific issues or advising appellant of a decision, or whether it was part of generalized procedures for determining the amount of funding that appellant would receive under its compact for the new fiscal year. However, it is clear that the Deputy stated: "The other items referenced above need to be changed as indicated in order for me to sign off on the Agreement" (Aug. 4, 1994, Letter at 2; emphasis added). This statement suggests that the Deputy is the deciding official, or at least the person who would be signing the funding agreement. Although it is logical that the deciding official would be an official at least at the Assistant Secretary's level, the limited materials before the Board do not support a conclusion that the Assistant Secretary was the deciding official here.

[1] Decisions of the Deputy are normally appealable to the Board. 2/ The Board knows of no reason based on statute or regulation, and the Assistant Secretary has provided none, why self-governance decisions signed by the Deputy should be immune from this review. If these decisions are actually decisions of the Assistant Secretary, they should be signed by her, not by the Deputy or any other subordinate official. The Board holds that the August 4, 1994, decision is within its normal review jurisdiction.

However, the Assistant Secretary also states that

> [t]his particular appeal is related to a discretionary funding decision made by the Assistant Secretary * * *. In the process of the negotiations [for FY 1995 funding], a financial mistake was discovered in the amount of money [appellant] was entitled to receive * * *. This error is directly related to

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2/ There is an exception where the Deputy's decision has been approved in writing by the Secretary or the Assistant Secretary prior to promulgation. 43 C.F.R. 4.331(b). Nothing in the materials before the Board indicates that the Assistant Secretary issued such a written approval in this case.

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> administrative procedures which were established to facilitate the Demonstration Project. * * *
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> These funds were requested by the Band in compact negotiations for fiscal year 1995 in spite of a clear policy memorandum dated August 11, 1993, from the Assistant Secretary * * * which established that non-recurring items are not to be transferred to the tribes' base. * * * The funds at issue had been base transferred in years prior to this policy being firmly established. In addition, these funds are project-driven and tribes must compete annually for them. There is no indication or assertion on the part of Appellant in its briefings on this matter that [it] participated in a competition for these funds or has an approved project that would entitle [it] to receipt of these funds for fiscal year 1995.

(Motion at 2-3).

This statement appears to equate policy determinations with discretionary decisions. The Board agrees that the legislation establishing the self-governance demonstration project gave the Department discretion to make policy determinations relating to the program. It also understands that, during the demonstration portion of the program, the promulgation of regulations setting out the policies to be followed was a low priority: not only were many of the issues not readily apparent and likely to be discovered only after some experience, but the Department was also under pressure to show results quickly, often without having time to address important and fundamental questions. At some point, however, both due process and the Administrative Procedure Act, 5 U.S.C. §§ 552 and 553 (1988), require that "practices" and ad hoc policy determinations be promulgated as regulations. The Board hopes that administrative review procedures will be addressed when regulations are promulgated under section 204 of the Tribal Self-Governance Act of 1994, Title II of the Act of October 25, 1994, P.L. 103-413, 108 Stat. 4250.

Nevertheless, the Board is cognizant of the facts that this matter is also pending before the Assistant Secretary, having been filed there in accordance with instructions provided to appellant, and that the Assistant Secretary is apparently handling it in the manner in which she has handled other, similar requests for reconsideration of self-governance decisions. Although the Board believes this case raises questions beyond the merits--questions which the Assistant Secretary should promptly address--it dismisses this appeal as a matter of comity and in an effort to ensure consistent decisionmaking in this very important area.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, this appeal from the August 4, 1994, decision of the Deputy Commissioner of Indian Affairs is

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docketed and dismissed. This dismissal does not affect the appeal pending before the Assistant Secretary.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

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