NAVAJO NATION
v.
SECRETARY OF HEALTH AND HUMAN SERVICES

IBIA 98-34-A Decided January 27, 1998

Appeal from a decision holding that the Temporary Assistance for Needy Families program is not contractible under the Indian Self-Determination Act.

Dismissed.

1. Indian Self-Determination and Education Assistance Act: Generally

Under 25 U.S.C. § 450f(e)(2) (1994), a final agency decision following an administrative appeal under the Indian Self-Determination Act, 25 U.S.C. § 450-450n (1994), must be made (1) by an official who holds a position at a higher organizational level than the level of the departmental agency in which the decision that is the subject of the appeal was made, or (2) by an administrative judge.

APPEARANCES: Thomas W. Christie, Esq., Window Rock, Arizona, for the Navajo Nation; Camille Loya, Esq., Office of the General Counsel, Department of Health and Human Services, Washington, D.C., for the Secretary of Health and Human Services.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Navajo Nation (Nation) seeks review of a November 13, 1997, decision issued by the Secretary of Health and Human Services (Secretary; HHS, DHHS), which held that a program the Nation sought to contract under the Indian Self-Determination Act (ISDA), 1/ is "beyond the scope of programs, functions, services, or activities authorized under [ISDA]." Secretary's Decision at 2. The program concerned is the Temporary Assistance for Needy Families (TANF) program, a Social Security Act program which the Nation proposed to operate on the Navajo Reservation.

For the reasons discussed below, the Board dismisses this appeal.

1/ 25 U.S.C. § 450-450n (1994). All further references to the United States Code are to the 1994 edition.

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Background

The Board received the Nation's notice of appeal on December 15, 1997. On December 17, 1997, the Board received a motion from the Secretary seeking dismissal of the appeal on the grounds that the Nation's notice of appeal failed to comply with 25 C.F.R. § 900.158(c)(1) and (2). 2/ In an order issued on December 19, 1997, the Board found that the Nation had complied with these regulatory requirements and therefore denied the Secretary's motion.

The Board's December 19, 1997, order continued:

> The Board makes a preliminary determination that this appeal falls under 25 C.F.R. § 900.150(a). Normally, at this point, the Board would refer this appeal to the Hearings Division of the Office of Hearings and Appeals for assignment to an Administrative Law Judge [(ALJ)].
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> In this case, however, it is not clear that the normal procedures can result in any meaningful review. Under 25 C.F.R. § 900.165, where an appeal involves the Department of HHS, an [ALJ's] recommended decision is appealable to the Secretary, HHS.
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> The decision in this case was signed by the Secretary, HHS, and states that it is final for the Department of HHS. Thus, it appears that the normal procedure would be an exercise in futility, as well as a waste of judicial resources, in that any appeal would simply return to the official who issued the initial decision.

The Board ordered the parties to submit statements on the question of how a meaningful appeal procedure could be provided in this case. The Board placed the burden on the Secretary but encouraged the parties to discuss the matter and submit a joint statement. The Board suggested that the parties might agree that the recommended decision of the ALJ under 25 C.F.R. § 900.165 would be final and binding on both parties (absent appeal to Federal court). 3/ Alternatively, the Board suggested that the Secretary consider withdrawing her statement that her decision was final for the Department of HHS and, instead, authorize the HHS Appeals Board to fully review her decision in connection with any appeal from the ALJ's recommended decision.

2/ Subsection 900.158(c) provides: "The Notice of Appeal shall: (1) Briefly state why the Indian tribe or tribal organization thinks the initial decision is wrong; (2) Briefly identify the issues involved in the appeal."

3/ Although termed a "recommended" decision in the regulations, the ALJ's decision would become final for the Department of HHS if it were not appealed administratively. 25 C.F.R. § 900.166.

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Discussion and Conclusions

[1] The parties have not been able to reach agreement and have filed separate responses. The Nation cites 25 U.S.C. § 450f(e)(2), which provides:

> Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either))
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> (A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or
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> (B) by an administrative judge.

The Nation argues that, because there is no higher official in the Department of HHS than the Secretary, who made the decision now on appeal, only an ALJ may render a final decision under this provision. Thus, the Nation reasons, there is no need for the parties to agree that the ALJ's decision will be final.

Although the statute contemplates that a final agency decision may be rendered by an administrative judge, the joint Interior-HHS regulations provide that, as to appeals arising in the Department of HHS, appeals from recommended decisions of ALJs are to be made to the Secretary, HHS, who renders the final decision for the Department of HHS. 25 C.F.R. §§ 900.165-900.167. Thus, by regulation, HHS has chosen to follow 25 U.S.C. § 450f(e)(2)(A), rather than 25 U.S.C. § 450f(e)(2)(B). 4/ This Board is bound by HHS's choice, as embodied in the regulations. Thus it cannot make an ALJ's decision final in this case. The parties might have accomplished this result, however, had they been able to agree not to appeal from an ALJ's recommended decision.

The Secretary's response to the Board's December 19, 1997, order states in part:

> The IBIA has no authority in law or regulation to impose any other appeals procedure besides that which is described in 25 C.F.R. Part 900 and DHHS will not stipulate to alternate procedures. It

4/ This choice, however, did not divest the Secretary of the authority to designate an independent forum as the final decision maker for the Department of HHS. See discussion below.

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> is our position that the procedures specified in Subpart L of the regulations are meaningful procedures which also recognize that the Secretary is the final arbiter of the meaning of the Social Security Act.
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> * * * * * *
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> * * * [T]he appeal in this case would ultimately return to the official who issued the decision being appealed. We disagree that this administrative procedure is futile. The ALJ is free to proffer a recommended decision which the Secretary may review. At such time the Secretary may, according to 25 C.F.R. 900.167(c), adopt, modify or reverse the recommended decision.

Secretary's Response at 2.

Despite her contention that the normal appeal procedure would not be futile in this case, the Secretary requests the Board to circumvent that procedure by summarily affirming her decision. She states repeatedly that she considers her position on the merits of this matter to be binding on this Board: "It is DHHS's position that the IBIA is bound by the Secretary's interpretation of the TANF statute" (Secretary's Response at 3); "The IBIA is not a court. Rather, the IBIA is part of a co-equal Executive Branch [Department] and as such, it must not merely defer to the Secretary's interpretation of the TANF statute, but it is bound by it" (Id. at 4); "[T]he IBIA must do more than merely defer to the Secretary's interpretation of the TANF statute, the IBIA is bound by it" (Id.); "The Secretary's threshold determination * * * is an interpretation permitted under the TANF statute. As such, it is binding on the IBIA" (Id.); "The Secretary's determination that TANF is beyond the scope of programs contractible under [ISDA] is binding on the IBIA." Id. at 5. It is on the basis of this contention that the Secretary seeks a summary affirmance from the Board.

The Secretary's request demonstrates that she misunderstands the Board's role in appeals from ISDA decisions issued by HHS officials. Under 25 C.F.R. Part 900, Subpart L, the Board serves only a procedural function with respect to appeals from HHS decisions. Such appeals are filed with the Board, which makes certain preliminary determinations and then, in virtually all cases, refers the appeal to the Hearings Division of this Department's Office of Hearings and Appeals, which assigns it to an ALJ. 5/ 25 C.F.R. §§ 900.158, 900.160, 900.161. At that point, the Board's involvement in appeals from decisions of HHS officials ceases. The regulations give the Board no authority to address the merits of an ISDA decision issued by an

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5/ In its capacity as procedural "gatekeeper," the Board may dismiss an untimely appeal from an HHS decision. Citizen Potawatomi Nation v. Acting Area Director, Oklahoma City Area, Indian Health Service, 30 IBIA 182 (1997).

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HHS official. 6/ Rather, as discussed above, the regulations make the ALJ's recommended decision on the merits appealable to the Secretary, HHS. 25 C.F.R. §§ 900.165-167.

Accordingly, the Secretary's motion for summary affirmance is denied.

Although the Secretary does not specifically argue that Interior Department ALJs are bound by her decision, the premise of her argument concerning the Board))i.e., that the Board is so bound because it is located in another Executive Branch Department and/or because the final authority to interpret the Social Security Act rests with the Secretary, HHS))would seem to apply to Interior ALJs as well as to this Board. Yet, the Secretary contends that "[t]he ALJ is free to proffer a recommended decision which the Secretary may review." It is not clear from this brief statement how far the Secretary believes the ALJ's "freedom" extends or whether, were this case to be referred to an ALJ, the Secretary would argue to the ALJ that he/she was also bound by the Secretary's decision.

However, the Board need not speculate on such questions. There is a larger question here, and that question concerns the impact of 25 U.S.C. § 450f(e)(2) on this case. Subsection 450f(e)(2) was added to ISDA in 1994. Concerning this provision, Rep. Richardson stated on the floor of the House:

> The amendment * * * removes the potential for a very real conflict of interest in resolving appeals, by requiring that appeals be decided at a level higher than the agency making the original decision or by an administrative law judge. For instance, appeals of IHS [Indian Health Service] declinations would have to be finally resolved at a level no lower than the Assistant Secretary of Health or by an administrative law judge.

140 Cong. Rec. H11143 (daily ed. Oct. 6, 1994) (statement of Rep. Richardson, explaining the provisions of the 1994 amendments to ISDA).

On August 16, 1996, the Secretary designated the Appellate Division of the HHS Appeals Board as the entity to make final agency decisions in ISDA appeals arising from IHS decisions. 7/ The Director, IHS, recommended the

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6/ There is a possible exception to this general rule, with respect to appeals from HHS decisions which fall under 25 C.F.R. § 900.151(i) and as to which there is no genuine issue of material fact. See 25 C.F.R. §§ 900.160(a)(1), (b). Such a case has not yet arisen, and the question of the proper appeal route for such appeals has therefore not been addressed by the Board.
7/ When it issued its Dec. 19, 1997, order in this case, the Board believed that the Secretary's designation covered decisions issued by all HHS offices. The Board has since obtained a copy of the designation, which encompasses only IHS decisions.

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designation in a July 18, 1996, memorandum which, after discussing subsection 450f(e)(2) and its legislative history, explained why the Director believed the HHS Appeals Board should be so designated. He noted that, under subsection 450f(e)(2), any one of several officials in the Office of the Secretary might be designated to make the final agency decisions. He continued: "It is important, however, that the designated official be capable of considering the appeal in an objective manner, and be perceived by all involved parties to be neutral." Director's Memorandum at 2. Describing an earlier case in which tribes had contended that the Director himself was not a neutral decision maker, in part because the same staff members and attorneys who had been involved in the case at a lower level also assisted him in the preparation of his decision, the Director stated:

> Any deciding official in the [Office of the Secretary], such as the [Assistant Secretary for Health], may be faced with a similar problem. The official would need staff assistance in order to understand the substantive issues in the appeal. Thus, the official may turn to IHS staff or the [Office of General Counsel, Public Health Division] in making the decision. The Appellate Division * * * of the [HHS Appeals Board] is likely to be perceived as more neutral, however, because it has staff independent of the IHS. [8/]

Id. The Secretary noted her approval at the end of the Director's memorandum. Thus, it seems clear that, in August 1996, the Secretary was aware, not only of the statutory requirement that a final agency decision be rendered by an official other than the initial decision maker, but also of the context in which that requirement was imposed. Thus, the Secretary's posture in this case is particularly puzzling.

Whether deliberately or through inadvertence, the Secretary created a serious problem here by failing to take the requirements of 25 U.S.C. § 450f(e)(2) into account when she issued her initial decision. 9/ In an attempt to restore some semblance of an independent review procedure, the Board offered suggestions for agreement by the parties and/or corrective action by the Secretary. The Secretary has explicitly declined to consider those suggestions and has offered no tenable recommendation herself.

The Board reluctantly concludes that the problem is not one which it can solve. It cannot force the parties to agree not to appeal an ALJ's recommended decision, in order to remove the Secretary from the appeal

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8/ Concerning the participation of previously involved staff members and attorneys in an appellate decision, see also 5 U.S.C. § 554(d); Greene v. Babbitt, 943 F. Supp. 1278, 1286 (W.D.Wash. 1996).

9/ Ironically, the Secretary could easily have ensured that she was the final decision maker for HHS by observing the requirements of this statutory provision and delegating authority to make the initial decision to a lower level official.

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procedure. Nor can it force the Secretary to remove herself from the procedure by authorizing the HHS Appeals Board to fully review her November 13, 1997, decision. Finally, the Board cannot, as the Nation would like, hold that the ALJ's decision will be final, given the contrary provisions of 25 C.F.R. Part 900.

If the Board were to refer this appeal to an ALJ under the present circumstances, it would not only be wasting the judicial resources of the Department of the Interior, it would also be condoning))indeed, participating in))the clear violation of 25 U.S.C. § 450f(e)(2) which would occur were this case to be returned to the Secretary.

While recognizing that the Nation has been deprived of the independent administrative review to which it is entitled, the Board concludes that it has no choice but to dismiss this appeal. Under the circumstances of this case, the only independent review available to the Nation is review in a Federal court.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of Health and Human Services, 25 C.F.R. Part 900, this appeal is dismissed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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