INTERIOR BOARD OF INDIAN APPEALS

Vance Gillette, et al. v. Navajo Area Director, Bureau of Indian Affairs

14 IBIA 71 (02/26/1986)

Related Board case:
13 IBIA 229

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

VANCE GILLETTE, MARGARET S. WILSON, AND FRANK TALKER
v.
AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 85-25-A Decided February 26, 1986

Appeal from a decision of the Navajo Area Director regarding the appellants' discharge from positions as tribal prosecutors for the Navajo Nation.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Tribal Powers: Generally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

APPEARANCES: Vance Gillette, Esq., Browning, Montana, pro se; Margaret S. Wilson, Esq., Gallup, New Mexico, pro se and for appellant Frank Talker; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellee; Lorene Ferguson, Esq., Window Rock, Arizona, for the Navajo Nation. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On March 11, 1985, the Board of Indian Appeals (Board) received a notice of appeal from Vance Gillette, Margaret S. Wilson, and Frank Talker (appellants). 1/ Appellants requested the Board to assume jurisdiction over an appeal they had filed with the Deputy Assistant Secretary--Indian Affairs (Operations) in February 1984. Appellants stated they had not received a decision within the timeframe established in 25 CFR 2.19. 2/ By order dated March 15, 1985, the Board made a preliminary determination that the appeal was properly before it. After a thorough review of the record and for the reasons discussed, the Board affirms the decision below.

1/ Larry Yazzie was originally a party to this appeal. He was dismissed from the appeal, at his request, by Board order dated Aug. 20, 1985. 13 IBIA 229 (1985).

2/ Section 2.19 states in pertinent part:
"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [now, Deputy

Background

The Navajo Nation (Nation) and the Bureau of Indian Affairs (BIA) entered into a contract under the Indian Self-Determination and Education Assistance Act, January 4, 1975, 88 Stat. 2203, P.L. 93-638 (P.L. 638), 25 U.S.C. §§ 450-450n (1982). 3/ Inter alia, P.L. 638 allows for the issuance of contracts to Indian tribes for the improvement of tribal governmental activities. See 25 U.S.C. 450h. The specific contract at issue here, No. N00 C 1420 9507, was effective October 1, 1982, and provided funds for the operation of the Navajo Prosecutor's Office for fiscal year 1983.

Appellants were hired by the prosecutor's office with P.L. 638 funds and subsequently assigned to a potential conflict of interest case involving a Navajo Juvenile Court Referee. 4/ Appellant Gillette was hired on December 2, 1983. The record does not disclose when appellants Wilson and Talker were hired. On December 7, 1983, appellants Gillette and Wilson were granted temporary associate status as members of the Navajo Nation Bar. This status allowed them to practice in the tribal courts until they passed the Navajo Nation Bar examination.

Appellants immediately filed suit in tribal court alleging the conflict of interest of the juvenile referee. The case, which appeared to be accepted for filing, was rejected the next day on the ground that appellants had not complied with the waiting requirement stipulated in the Navajo Nation Sovereign Immunity Act (Immunity Act). Appellants and the Navajo court then became engaged in a verbal and written controversy which resulted in appellants being reprimanded and ultimately discharged from their positions in the prosecutor's office.

On December 22, 1983, and January 6, 1984, appellants filed a complaint with the Navajo Area Director, BIA (appellee), charging violations of the P.L. 638 contract, a violation of their fundamental due process rights guaranteed by the contract, arbitrary and capricious denial of access to tribal courts by tribal officials, and wrongful employment practices.

On January 23, 1984, appellee responded to the complaint, stating at page 1 of his decision:

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fn. 2 (continued)
Assistant Secretary--Indian Affairs (Operations)] shall: (1) Render a written decision on the appeal, or (2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the [Deputy Assistant Secretary] within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

3/ All citations to U.S.C. are to the 1982 edition.

4/ Allegedly the juvenile referee was hearing cases on which she had previously worked as a prosecutor.

> In summary, the issues raised were whether or not: a Juvenile Referee was properly hired; certain petitions were properly denied; certain provisions of the Tribal Sovereign Immunity Act are unconstitutional; certain disciplinary actions by the Chief Justice and Attorney General were proper; and your office followed Tribal procedures in attempting to file certain cases.
>
> We find that these issues involve questions of Tribal procedure and law, which in the first instance, must be interpreted within Tribal administrative or judicial processes. According to Section 101 of the Prosecutor's office contract, personnel are subject to existing Tribal personnel policies and procedures. We also note that the Chief Justice invited you on November 30, 1983 to submit these issues in writing to his office for administrative action. Instead of resolving the issues internally, the disputes were presented to outside forums.
>
> Therefore, it is my determination that Navajo Tribal remedies have not been exhausted and urge you to resolve these issues within available Tribal forums.

Appellants appealed this decision to the Deputy Assistant Secretary by letter dated February 21, 1984. When a decision in the appeal was not rendered by the Deputy Assistant Secretary within 30 days after all briefs were filed, appellants sought review by the Board. Their notice of appeal was received on March 11, 1985. By order dated March 15, 1985, the Board made a preliminary determination that it had jurisdiction over the appeal under 25 CFR 2.19. This preliminary determination has not been challenged, although appellee has challenged the Board's jurisdiction over certain issues raised in the appeal. 5/ Briefs were received from appellants, appellee, and the Navajo Nation.

Discussion and Conclusions

On appeal appellants raise the same arguments as were brought before appellee. They argue the P.L. 638 contract was violated and BIA should have taken action to correct the violation; their fundamental due process rights, guaranteed by the contract, were violated; they were arbitrarily and capriciously denied access to tribal court by tribal officials; and they were wrongfully discharged from their positions. Appellant Gillette also seeks $3,700 in back pay and attorney fees expended in pursuing this appeal.

[1] The Board has jurisdiction to review legal determinations made by BIA under Chapter I of 25 CFR; it does not have jurisdiction over decisions rendered by tribal officials in matters committed to the tribe. See, e.g.,

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5/ Appellee contends the Board lacks jurisdiction over appellants' claim filed under the Indian Civil Rights Act, Apr. 11, 1968, P.L. 90-284, 82 Stat. 77, 25 U.S.C. §§ 1301-1341, and over all claims arising under the P.L. 638 contract. In addition, appellee argues that appellants lack standing to raise the contract claims. Appellants contend that their civil rights claim are raised under the Federal constitution, not under the Indian Civil Rights Act.

25 CFR 2.19(c)(2); 43 CFR 4.1; 43 CFR 4.330; Hawley Lake Homeowner's Association v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 276, reconsideration denied, 13 IBIA 335 (1985), and cases cited therein. Thus, the Board must initially ascertain the extent of appellee's January 23, 1984, decision, and then determine whether or not his decision is legally correct.

Appellee denied appellants' appeal stating, in essence, that appellants were required to seek resolution of their problems through tribal procedures. Because, appellee contended, the matter brought to him was an intra-tribal problem, it was inappropriate for BIA to interject itself into the matter. Appellee also suggested the tribal proceedings through which the problems might have been resolved. The Board's review, therefore, is limited to a determination of whether or not appellee properly concluded that BIA had no role in the dispute at this time.

Reduced to its basics, the appeal before the Board resulted from appellants' alleged failure to follow Navajo tribal law. On May 6, 1980, the Navajo Tribal Council passed Resolution CMY-42-80, approving the Immunity Act, which provides, inter alia:

> 4.A. Any person desiring to institute suit against the Navajo Nation as authorized by this Act shall, as a jurisdictional condition precedent to institution of such suit, provide notice to the Chairman, Navajo Tribal Council, and the General Counsel of the Navajo Nation.
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> * * * * * *
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> 3. No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff provides proof of compliance with this subsection "A." by delivery of the notice required by this subsection at least thirty (30) days prior to the date on which the complaint is proposed to be filed.

This resolution is apparently codified at Title 7, NTC § 855(a)(3).

It is undisputed that appellants failed to comply with this waiting period. However, appellants argue they were acting on behalf of the tribe, which was, therefore, suing, rather than being sued. Thus, they contend the Immunity Act did not apply. The Immunity Act's applicability to this situation is a question for resolution within the Navajo court system. The action taken by the Navajo Chief Justice in instructing the court clerk not to accept the filing of appellants' case demonstrates his initial determination that

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fn. 5 (continued)
Appellants further argue they have standing as third-party beneficiaries under the P.L. 638 contract. Because of the Board's analysis and disposition of this case, appellee's motions to dismiss on lack of jurisdiction are not reached. See discussion, infra. Appellant's standing is discussed in note 10, infra.

the Immunity Act did apply and the preliminary notice of intent to sue was "a jurisdictional condition precedent to institution of such suit." 6/

The problems subsequently encountered by appellants, and ultimately their discharges, resulted from their attempts to force the filing of this case without complying with the Immunity Act's waiting period. Once reminded of this requirement, appellants could have remedied the jurisdictional shortcomings of their case by filing a notice of intent to sue. If appellants had followed this course of action, it is possible that the events about which they are complaining would not have occurred.

The correctness of the chief justice's determination that appellants were required to comply with the Immunity Act's waiting period 7/ and the propriety of the actions he took in disciplining appellants are questions for resolution between appellants and the court. 8/ Rather than pursuing tribal remedies to an ultimate conclusion, appellants characterized the situation as a P.L. 638 contract dispute and attempted to bring the matter before BIA. In their arguments to BIA and the Board, appellants failed to show that the court's actions were anything more than an attempt to maintain order and decorum in judicial proceedings. Appellants' attempt to characterize their problem so as to remove it and themselves from the jurisdiction of the Navajo courts is not persuasive. 9/

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6/ 7 NM § 855(a). Section 1.I. of the Immunity Act clearly defines the Navajo Nation to include "The Judicial Branch of the Navajo Nation Government." Section 3.D. states that "[a]ny officer, employee or agent of the Navajo Nation may be sued in the Courts of the Navajo Nation to compel him/her to perform his/her responsibility under the laws of the United States against a member of and the Navajo Nation." Appellants' attempted suit was against a member of the judicial branch of the Navajo Nation Government, and sought to compel her to perform her responsibilities in a manner deemed proper by appellants. Regardless of the capacity in which appellants believed they were acting, it appears their suit was against the Navajo Nation. Even assuming appellants were acting on behalf of the sovereign, the Immunity Act provides no exception from the waiting period for suits filed by the sovereign against itself.

7/ The question whether the Immunity Act is unconstitutional because it fails to provide for the filing of emergency cases before the expiration of the 30-day waiting period is also a question for resolution in the tribal courts under tribal law as modified, if applicable, by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

8/ Appellee's comments concerning the possible means for resolving those issues were intended merely as suggestions and do not constitute legal determinations of what course the tribe could or should follow. Such determinations would be within the jurisdiction of the Navajo Nation, not BIA.

9/ If the Board had found the P.L. 638 contract was at issue in this proceeding, and appellants had shown that a violation of the contract of the type alleged here would have required BIA to take immediate action to remedy the violation, appellants would still have had to prove that they had standing to raise these arguments. Appellants would thus have been required to show that they were third-party beneficiaries of the contract. Black's Law Dictionary (Rev. 4th Ed. 1968), defines "third party beneficiary" at pages 1650-51:

The Board agrees with appellee that the issues raised in this case were appropriate for resolution within the Navajo Nation. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 23, 1984, decision of the Navajo Area Director is affirmed. 10/

//original signed
Jerry Muskrat
Administrative Judge

I concur:

//original signed
Bernard V. Parrette
Alternate Member

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fn. 9 (continued)

"In order for one not privy to a contract to maintain an action thereon as a 'third party beneficiary,' it must appear that the contract was made and intended for his benefit. * * * And the benefit must be one that is not merely incidental, but must be immediate in such a sense and degree as to indicate the assumption of a duty to make reparation if the benefit is lost."

There is no indication in the Congressional statements of findings and declaration of policy accompanying P.L. 638 and codified at 25 U.S.C. §§ 450 and 450a, that the Act was intended to benefit persons employed under P.L. 638 contracts, or that by entering into a P.L. 638 contract, the Federal Government had assumed a duty to make reparation if persons employed under the contract were discharged.

10/ This decision in no way modifies or restricts BIA's duty to monitor the Nation's performance under its P.L. 638 contract. The Board notes that under 25 CFR 271.52(a), the general term of a P.L. 638 contract is 1 year, with contract terms of up to 3 years permitted under special circumstances. Section 271.20 provides for recontracting of the same function or program. Section 271.15(b)(1) states that BIA may decline to enter into a contract if: "The services to be provided to the intended Indian beneficiaries of the particular program or function to be contracted will not be satisfactory." Furthermore, section 271.75 provides procedures for canceling P.L. 638 contracts for cause. Past performance under a P.L. 638 contract, if found unsatisfactory, would obviously be a reason for declining to recontract, absent proof that a tribe would and could make any necessary changes to remedy the prior problems. Cf., Estate of Frances Ingeborg Conger (Ford), 13 IBIA 296, 301 n.2, 92 I.D. 512, 514 n.2; on reconsideration by Director, 13 IBIA 361, 364, 92 I.D. 634, 636 (1985).