



INTERIOR BOARD OF INDIAN APPEALS

Esthervon (Kee) Spencer v. Navajo Area Director, Bureau of Indian Affairs

17 IBIA 226 (08/17/1989)



United States Department of the Interior

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

ESTHERVON (KEE) SPENCER

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS 1/

IBIA 89-29-A

Decided August 17, 1989

Appeal from a decision of the Navajo Area Director, Bureau of Indian Affairs, denying a request for an award of money damages against the Bureau.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Regulations: Interpretation

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against officials of the Bureau of Indian Affairs for their incorrect interpretation of regulations.

APPEARANCES: M. Kathryn Hoover, Esq., Chinle, Arizona, for appellant; Thomas O'Hare, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Esthervon (Kee) Spencer seeks review of a February 22, 1989, decision of the Navajo Area Director, Bureau of Indian Affairs (BIA; appellee), concerning a denial of money damages requested for an improper initial denial of adult vocational training. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal.

Background

On December 7, 1987, appellant inquired into the possibility of obtaining adult vocational training through BIA's Chinle, Arizona, Agency.

1/ This case was originally docketed under the name of Esthervon Kee. Appellant was married and used the name Kee when the incidents leading to the present appeal began. In the interim, she was divorced and restored to her maiden name of Esthervon Spencer. See Kee v. Kee, No. CH-CV-160-88, (District Court of the Navajo Nation, Judicial District of Chinle, Arizona Nov. 14, 1988).

Appellant sought to enroll in a data processing program, and apparently indicated she wished to relocate with her daughter to the Phoenix area. At the time of her inquiry, appellant was separated from her husband and the couple's daughter was living with appellant. By letter dated March 11, 1988, the Chinle Vocational Development Specialist denied appellant's request for assistance under the adult vocational training program, stating:

The decision is based on your failure to submit legal documents pertaining to your divorce or separation signed by the judge. You were instructed to submit a copy of these pertinent documents on several different occasions, but to this date, we have not received either copy. If your divorce is still pending you were given the option to have your spouse write out a spouse agreement giving you consent to enter a vocational training [program] and to take the child. It is the policy of this program to have all legal documents pertaining to separation or divorce on file before the spouse is permitted to leave for training.

Until you submit the above documents, your application will not be re-considered for approval.

(Letter at 1).

By letter dated July 27, 1988, appellant appealed this decision to appellee, arguing:

The denial of Ms. Kee's benefits, and the BIA's policy pursuant to which the denial was made, are illegal. The decision and policy discriminate against Ms. Kee because of her gender and her marital status, and violates her constitutional rights, and statutory rights to receive BIA benefits without discrimination.

We request that Ms. Kee be granted the right to Adult Vocational Training, monetary damages suffered as a result of the discrimination, and that the BIA's discriminatory policy be abandoned.

(Letter at 1).

Although not revealed in the administrative record, it appears likely that appellee contacted the Chinle Superintendent (Superintendent) about this decision. By letter dated October 12, 1988, the Superintendent informed appellant that her application had been approved for a 12-month data processing course at Mountain States Technical Institute in Phoenix, Arizona.

By memorandum dated October 13, 1988, appellee formally notified the Superintendent that the Chinle Agency was in violation of Federal regulations in 25 CFR Parts 26 and 27 and Navajo Area policy in considering marital status, sex, or marital problems in determining eligibility of applicants for adult vocational training. He indicated that the Superintendent was to take immediate action to correct this error. On

the same day a copy of the memorandum and its supporting documents was sent to appellant.

By letter dated November 9, 1988, appellant indicated that appellee's action did not resolve her appeal because he had not dealt with the issue of monetary damages for the improper initial denial of assistance.

By letter dated February 22, 1989, appellee denied appellant's request for monetary damages, stating:

Funds for monetary damages would have to come from the Vocational Training Budget for Chinle Agency which would eliminate training opportunities for other Navajo individuals.

Corrective action has been initiated with all five Navajo Agency Vocational Training programs, to insure that eligibility requirements for vocational training [are] in accordance with existing policy and regulations.

Your client is now being provided training that she made application for. She is presently enrolled in a twelve-month Data Processing Course with Mountain States Technical Institute of Phoenix, Az. This training is to be completed in November of 1989.

The action taken that denied your client a training opportunity was a result of a discretionary action of an individual, and not based on the Bureau's policy and regulations. I have initiated corrective action to insure consistency in the application of Vocational Training program policy and regulations. Your client is presently benefitting from training made available by the Chinle Agency Vocational Training Program.

(Letter at 1).

Appellant's appeal of this denial was received by the Board on April 7, 1989. Pursuant to the Board's notice of docketing, both appellant and appellee filed briefs on appeal. Appellant clarified in her reply brief that she is seeking an award of \$10,000 for the loss of 10-month's wages as a data processor and \$5,000 for mental suffering.

Discussion and Conclusions

There is no dispute that the initial denial of appellant's application for adult vocational training was improper. The only question before

2/ See, e.g., 25 CFR 26.5(c): "Selection of applicants [for BIA's employment assistance programs] shall be made without regard to sex or marital

the Board is whether appellant can be awarded money damages for the delay in her admission to the program.

In its notice of docketing in this case, the Board referred appellant to its decisions in Gillette v. Aberdeen Area Director, 14 IBIA 187 (1986), and Lord v. Commissioner of Indian Affairs, 11 IBIA 51 (1983). In these cases, the Board held that it was not a court of general jurisdiction, but had only those powers delegated to it by the Secretary of the Interior. In particular, the Board held that it had not been delegated authority to award money damages against BIA.

Appellant argues that these cases do not prevent the Board from awarding money damages to her because: (1) the Board's authority under 43 CER 4.1 is coextensive with that of the Secretary of the Interior; 3/ (2) the Secretary has authority to compensate a Navajo Indian wronged by BIA under the Navajo Treaty of June 1, 1868, 15 Stat. 667; 4/ and (3) the wrong she suffered is compensable in money damages.

Appellee contends generally that the Board's decisions in Gillette and Lord were correct and prevent the Board from granting the award sought by appellant. Alternatively, appellee argues that the Navajo treaty does not authorize the payment of money damages under the circumstances of this case.

fn. 2 (continued)

status”; and 25 CFR 27.5(d): “Selection of applicants [for BIA's vocational training program] shall be made without regard to sex or marital status * * *.”

3/ As amended at 54 FR 6485 (Feb. 10, 1989), 43 CFR 4.1 provides in pertinent part:

“The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary. Principal components of the Office include:

* * * * *

“(2) Board of Indian Appeals. The Board decides finally for the Department appeals to the head of the Department pertaining to:

“(i) Administrative actions of officials of the Bureau of Indian Affairs, issued under 25 CFR Chapter I, except as limited in 25 CFR Chapter I or § 4.330 of this part, * * *.”

4/ Article I of this treaty provides in pertinent part:

“If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.”

[1] Appellant asks the Board to interpret its delegated authority to decide appeals arising from decisions of BIA officials as including the authority to award money damages for improper decisions. The Board has carefully reviewed its delegation of authority and concludes that although it has the full authority of the Secretary to correct or uphold decisions of BIA officials that are based upon an interpretation of law, it has not been granted whatever authority the Secretary may have to award money damages for a BIA official's incorrect interpretation of the regulations. Accordingly, the Board reaffirms its holdings in Gillette and Lord that it does not have authority to award money damages against BIA. 5/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Navajo Area Director's February 22, 1989, decision is dismissed.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

5/ Because of this finding, the Board does not reach appellant's remaining arguments.