



INTERIOR BOARD OF INDIAN APPEALS

Eastern Cherokee Tribal Community Services Committee v.
Acting Eastern Area Director, Bureau of Indian Affairs

30 IBIA 1 (09/11/1996)



United States Department of the Interior

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

EASTERN CHEROKEE TRIBAL
COMMUNITY SERVICES COMMITTEE,
Appellant
v.
ACTING EASTERN AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

: Order Affirming Decision
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: Docket No. IBIA 95-142-A
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: September 11, 1996

This is an appeal from a February 14, 1995, decision of the Acting Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to renew a Deputy Special Officer Commission (DSOC) for Samuel Quinton Frankiewicz. The appeal was filed by the Eastern Cherokee Tribal Community Services Committee (appellant).

Frankiewicz, a police officer with the Eastern Cherokee Police Department, was issued a DSOC on November 5, 1991. The DSOC expired on November 5, 1994. On November 2, 1994, Frankiewicz was alleged to have been involved in an incident in which he, while intoxicated, went to a residence located off the Eastern Cherokee Reservation and there assaulted a minor Indian female and broke one of her crutches. On the same day, Frankiewicz was suspended from duty as a tribal police officer pending an investigation of the incident. During the tribal investigation, Frankiewicz admitted being intoxicated and admitted being at the scene of the incident but denied breaking the crutch.

Frankiewicz appealed his suspension from the tribal police force. Appellant was the entity which heard his appeal. On November 10, 1994, appellant reinstated Frankiewicz after hearing testimony from the tribal police officers who had investigated the incident. Although appellant appears to have reinstated Frankiewicz based in part upon its understanding that no criminal charges had been filed against him, 1/ in fact a criminal complaint had been filed against him in Jackson County North Carolina, and a criminal summons, charging misdemeanor assault, had been issued on November 7, 1994.

Following its reinstatement of Frankiewicz as a tribal police officer, appellant asked BIA to renew Frankiewicz's expired DSOC. BIA declined to take any action on the matter while the criminal charges were pending. 2/

1/ See Nov. 14, 1994, Letter from Appellant's Chairman to the Superintendent, Eastern Cherokee Agency, BIA.

2/ See Area Director's Nov. 16, 1994, and Dec. 9, 1994, memoranda to the Superintendent.

In January 1995, the criminal charges against Frankiewicz were dismissed because the complaining witness failed to appear at the hearing. Appellant then reinstated its request that Frankiewicz's DSOC be renewed.

On February 14, 1995, the Area Director denied appellant's request, stating in part:

[T]he lack of conviction in criminal court does not automatically negate irresponsible behavior and support cause for the BIA to issue a DSOC. Issuing Officer Frankiewicz a DSOC forces the BIA to compromise the minimum standards required in the 68 BIAM [Bureau of Indian Affairs Manual] and set forth in 25 CFR 12.103. In addition, the 68 BIAM authorizes the BIA to suspend or revoke a DSOC at any time for reasons solely within its discretion. The 68 BIAM furthermore issues this caution, "The DSOC endorses the holder with federal authority and responsibility and concomitantly places a high level of liability risk upon the U.S. Government

Therefore, based on longstanding BIA policy and practice regarding DSOCs, character, requirements and determinations, this request is * * * denied.

Appellant appealed this decision to the Board. 3/ In its statement of reasons, appellant contended:

[A]s a citizen of the United States a person is protected under the Constitution. The Constitution states that a person is innocent until proven guilty. Mr. Frankiewicz has not been convicted of any criminal charges. The charges that were previously made were dismissed. There are no charges pending.

Also there was a complaint hearing before [appellant]. [Appellant] found that there was no justification for the complaint.

Mr. Frankiewicz has performed well in his duties as an officer with the Cherokee Police Department. He has previously received an "Officer of the Month" award based on the performance of his duties.

We feel that Mr. Frankiewicz is being treated unfairly and ask that you reconsider your previous decision to deny the reissuance of his DSO Commission.

The Board docketed this appeal on August 2, 1995, following receipt of the administrative record. The notice of docketing informed appellant that it bore the burden of proving error in the Area Director's decision.

2/ Appellant actually filed its notice of appeal, as well as a statement of reasons, with the Area Director. The appeal was later forwarded to the Board, which received it on July 12, 1995. The Board accepted the appeal as timely because appellant had been given incorrect appeal information.

Appellant requested and was granted an extension of time in which to file a brief. Ultimately, however, appellant elected not to file a brief. Accordingly, its entire argument is contained in its statement of reasons.

Appellant appears to be contending that Frankiewicz has a constitutional right to be issued a DSOC as long as he has not been convicted of a crime and has no charges presently pending against him. This is not the case. No tribal police officer has a right to be issued a DSOC. DSOC's are issued for the benefit of the Federal government, not the benefit of the officer. This is made clear in 68 BIAM Supp. 1, sec. 9.1, which states that DSOCs are issued "for the purpose of obtaining active assistance in the enforcement of applicable Federal criminal statutes, including Federal hunting and fishing regulations in Indian country." ^{4/} See also sec. 9.14, which provides: "Commissions are to be issued only when a legitimate law enforcement need requires issuance. Commissions are not to [be] issued solely for the furtherance of interagency or public relations."

BIA is clearly concerned that the officers to whom it issues DSOC's are of the highest character. See, e.g., sec. 9.13, which provides:

Caution. The Deputy Special Officer Commission endorses the holder with federal authority and responsibility and concomitantly places a high level of liability risk upon the U.S. Government. In order to reduce liability risks for the Government, great care should be taken to adhere to the policies and procedures set forth.

Sec. 9.6F provides that, in order to be issued a DSOC, a tribal officer must meet the minimum standards set forth in 25 CFR 11.304 (now 25 CFR 12.103). 25 CFR 12.103(i), in turn, incorporates Civil Service Commission (now Office of Personnel Management (OPM)) minimum standards for police officers. The OPM standards authorize character investigations for the purpose of assessing loyalty to the United States Government, honesty, integrity, and general character. Clearly, these standards, as incorporated into the BIA criteria, contemplate that BIA may make judgments as to whether a candidate for a DSOC possesses the required qualities to a degree warranting the issuance of a DSOC.

There is no evidence that the Area Director based his decision upon the dismissed criminal charges against Frankiewicz. Rather, his decision indicates that it was Frankiewicz's admitted behavior which caused him to deny Frankiewicz a DSOC. In his brief in this appeal, the Area Director contends:

The admissions of Frankiewicz during the tribal investigation do not reveal him to be a person of unredeemable bad character. His admissions do, however, reveal him to be a person who, at least at this point, is lacking in the type of integrity, judgment, and discretion that is demanded of a person carrying a DSOC.

(Area Director's Brief at 4).

^{4/} 68 BIAM, Supp. 1, Chap. 9, is titled "Issuance of Deputy Special Officer Commissions." The record copy of this chapter is dated Nov. 22, 1993.

The Area Director further argues that his decision was reasonable and "is supported by written standards that Frankiewicz failed to meet according to his own admissions" (Id. at 5).

The Board has held that, in reviewing BIA decisions based upon the exercise of expertise and judgment, its role is to determine whether BIA's decision is reasonable--that is, whether it is supported by law and substantial evidence. If BIA's decision is reasonable, the Board will not substitute its judgment for BIA's. Further, the burden is on an appellant to show that BIA's decision is unreasonable. E.g., Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 184-185, 94 I.D. 172, 175 (1987), and cases cited therein.

A decision to grant or deny a DSOC is a decision which involves both expertise and judgment. Therefore, the Board applies its established standard of review here. It finds that the Area Director's decision is reasonable because it is based upon law and substantial evidence. It further finds that appellant has failed to show that the Area Director's decision is unreasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 14, 1995, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge