



## INTERIOR BOARD OF INDIAN APPEALS

Estate of Anthony Munks

37 IBIA 202 (04/10/2002)

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# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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## ESTATE OF ANTHONY MUNKS

IBIA 02-20

Decided April 10, 2002

Appeal from an order denying a motion for rehearing in Indian Probate IP SA 220 N 98.

Reversed and remanded.

1. Indian Probate: Rehearing: Pleading, Timely Filing

The policy expressed in Indian probate regulations published during 2001 by the Bureau of Indian Affairs and the Office of Hearings and Appeals favors a conclusion that 43 C.F.R. § 4.241(a) should now be interpreted to provide that the date of filing a petition for rehearing by mail is the date of mailing.

APPEARANCES: Daniel A. Raas, Esq., Bellingham, Washington, for Appellant Kevin Day.

### OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from an October 10, 2001, Order Denying Motion and Petition for Rehearing issued in the Estate of Anthony Munks by Administrative Law Judge William E. Hammett. The appeal was filed by Kevin Day (Appellant), one of several heirs to this estate, whose motion for rehearing was denied as untimely. <sup>1/</sup> For the reasons discussed below, the Board reverses Judge Hammett's October 10, 2001, order insofar as it denied Appellant's motion for rehearing and remands this matter to the Judge for consideration of Appellant's motion on the merits.

#### Background

Judge Hammett issued an Order Determining Heirs in this estate on June 9, 2000. On July 25, 2001, he issued an Order Granting Petition for Rehearing Instantly and Order

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<sup>1/</sup> In his Oct. 10, 2001, order, Judge Hammett also denied a petition for rehearing filed by other heirs to this estate. That petition was denied on the merits, and no appeal has been filed.

Modifying Order Determining Heirs. The Notice which accompanied the July 25, 2001, order showed July 25, 2001, as the date of mailing and stated: "This decision becomes final sixty (60) days from the date of mailing of this notice unless within such period a written petition for rehearing shall have been filed with the superintendent by an aggrieved party in accordance with the provisions of 43 CFR 4.241." 2/

Appellant filed a motion for rehearing. In his October 10, 2001, order, Judge Hammett stated that his office received Appellant's motion on September 25, 2001. He observed that the motion bore a certification by the legal assistant for Appellant's attorney, certifying that the motion had been placed in the mail on September 24, 2001. He continued: "Based on such certification this forum is compelled to presume that the Superintendent would not have received delivery of the motion until September 25, 2001, at the earliest possible date." Oct. 10, 2001, Order at 1. Judge Hammett then found that the final day of the 60-day period for filing a petition for rehearing was September 24, 2001. Noting that, under longstanding Departmental precedent, "the date of receipt of the petition for rehearing is the date which determines whether the petition has been timely filed," id. at 2, he held that Appellant's motion was untimely because it had not been received by the Superintendent on or before September 24, 2001.

Appellant appealed Judge Hammett's October 10, 2001, order to the Board. On December 13, 2001, the Board ordered briefing on the question of timeliness. Only Appellant filed a brief.

### Discussion and Conclusions

Judge Hammett's October 10, 2001, order correctly described Departmental precedent concerning the date on which petitions for rehearing are considered filed in Indian probate cases. Under that precedent, such petitions have been deemed filed on the date they are received in the office designated to receive them. The issue here is whether the precedent should be reexamined in light of the recent revision of the Department's regulations governing Indian probate proceedings.

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2/ On July 25, 2001, 43 C.F.R. § 4.241 provided:

"(a) Any person aggrieved by the decision of the administrative law judge may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the administrative law judge a written petition for rehearing. \* \* \*."

As further discussed below, Judge Hammett erred in stating that petitions for rehearing should be filed with the Superintendent.

The precedent cited by Judge Hammett originated in cases decided prior to establishment of the Office of Hearings and Appeals (OHA) and the Board of Indian Appeals in 1970. The earliest explicit discussion of the “date of filing” issue appears in Estate of Jack Fighter, IA-1346, 71 I.D. 203 (1964). At the time that decision was issued, the probate of Indian trust estates was governed by Bureau of Indian Affairs (BIA) regulations in 25 C.F.R. Part 15 and appeals from Indian probate decisions were decided in the Office of the Solicitor.

The decision in Fighter states:

Although the precise problem of whether the filing specified in 25 CFR 15.17 [3/] is satisfied by mere mailing was not directly in issue in our earlier decisions on timeliness under that regulation, discussions in them clearly indicate that the filing date was considered to be the date the petition was received. The direction “file with the superintendent” contained in 25 CFR 15.17 in our view means quite simply what it says, and there is nothing in the regulation to even suggest that this filing is accomplished until a petition has been actually delivered to the Superintendent. That mailing a petition does not constitute filing it under 25 CFR 15.17 is further illustrated by the provision for the distribution of estates in 25 CFR 15.16.

Under the latter regulation (25 CFR 15.16) the distribution of an estate may be made by the Superintendent after 60 days have elapsed from the date upon which notice of the decision is mailed to the interested parties, unless within that period a petition for rehearing is filed. Obviously a petition which has been mailed within the required period but which for some reason does not reach the Superintendent within the required period would be ineffective to stay the distribution authorized by the regulation. Therefore, it must follow that filing a petition for rehearing with the Superintendent means its actual delivery to his office rather than the mere mailing of the petition to him. This is in accord with the clear import of the regulation's language itself, our previous opinions on timeliness, and the related regulation concerning distribution of an estate. [Footnote omitted.]

71 I.D. at 204-05.

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3/ 25 C.F.R. § 15.17 (1964) provided:

“(a) Any person aggrieved by the decision of the examiner of inheritance may, within 60 days after the date on which notice of the decision is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case), file with the superintendent a written petition for rehearing. \* \* \*.”

In Estate of James Nicodemus, IA-1356 (1966), the reasoning of Fighter was found applicable to notices of appeal filed under 25 C.F.R. § 15.19 (1966), 4/ and it was accordingly held that the date of filing a notice of appeal was the date of receipt by the Superintendent.

These decisions were followed by the Board after its establishment in 1970. E.g., Estate of Ralyen or Rabyea Voorhees, 1 IBIA 62 (1971) (petition for rehearing); Estate of Lucy Hope Deepwater, 1 IBIA 201 (1971) (petition for rehearing); Estate of Cato T. Kamiakin (Tomeo), 4 IBIA 132 (1975) (notice of appeal).

The Board's initial regulations did not address the "date of filing" question. 5/ However, in 1981, the Board revised its regulations to include, among other things, a specific provision concerning the date of filing a notice of appeal. 46 Fed. Reg. 7335 (Jan. 23, 1981). As added in 1981, 43 C.F.R. § 4.310(a) provided: "Filing. The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery." This language appears in the present 43 C.F.R. § 4.310(a), with the addition of an exception added in 1989, which is not relevant to notices of appeal. 6/

By promulgating this rule in 1981, the Board overrode the cases cited above insofar as those cases pertained to the filing of notices of appeal in Indian probate cases. No corresponding change was made to 43 C.F.R. § 4.241(a) concerning petitions for rehearing. Therefore,

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4/ 25 C.F.R. § 15.19 (1966) provided:

"(a) Any person aggrieved by the action taken by the examiner of inheritance on a petition for rehearing or on a petition for reopening may, within 60 days after the date on which notice of the examiner's action is mailed to the interested parties (or within such additional period as the Secretary, for good cause, may allow in any case), file with the superintendent a written notice of appeal to the Secretary. \* \* \* ."

5/ OHA's general regulations, however, included the following provision, which is still in effect today: "A document is filed in the Office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it." 43 C.F.R. § 4.22(a). This and other provisions in OHA's general regulations in 43 C.F.R. Part 4, Subpart B, apply to "all types of proceedings" in OHA, 43 C.F.R. § 4.20, except that, "[w]herever there is any conflict between one of the general rules in subpart B \* \* \* and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern." 43 C.F.R. § 4.1(b).

6/ The exception reads: "[E]xcept that a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e) shall be effective the date it is received by the Board." 43 C.F.R. § 4.310(a) (2001).

after 1981, the “date of filing” rule for notices of appeal and the “date of filing” rule for petitions for rehearing were no longer consistent with each other.

On January 22, 2001, BIA published regulations establishing new probate procedures. 66 Fed. Reg. 7089. These regulations provide for some probate decisions to be issued by deciding officials within BIA and also provide for appeals from those decisions. 25 C.F.R. § 15.401-15.405.

25 C.F.R. § 15.403 provides:

How long do I have to file an appeal?

(a) You must send or deliver your written appeal within 60 days of the date that appears on the decision mailed to you. If you mail your appeal, it must be postmarked within 60 days of the date of the decision.

On June 18, 2001, OHA published interim probate regulations. 66 Fed. Reg. 32888. On December 31, 2001, it published final probate regulations. 66 Fed. Reg. 67656. 43 C.F.R. § 4.241(a) was revised in the interim regulations to provide that petitions for rehearing were to be filed with the Administrative Law Judge rather than with the Superintendent, as subsection 4.241(a) had previously provided. <sup>7/</sup> The subsection was revised again in the final regulations, this time to change the term “administrative law judge” to “OHA deciding official.” No specific statement was included in that subsection concerning the date of filing a petition for rehearing.

In the preamble to its interim regulations, OHA explained:

OHA is now amending its regulations to make them consistent with BIA’s newly adopted regulations governing these probate cases, and to ensure that BIA and

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<sup>7/</sup> The interim regulations were made effective immediately. Thus, on July 25, 2001, the regulations provided that petitions for rehearing were to be filed with the Administrative Law Judge. The instructions given in Judge Hammett’s July 25, 2001, order were incorrect in that they stated that petitions for rehearing were to be filed with the Superintendent. It appears, however, that Appellant filed copies of his motion for rehearing with both the Superintendent and Judge Hammett and that he mailed both on the same day. Therefore, for purposes of this decision, the Board finds the error in Judge Hammett’s appeal instructions harmless.

OHA are applying the same standards and criteria for determining heirs and paying claims.

\* \* \* \* \*

In this interim rule, OHA is making those changes to its regulations that are necessary to avoid inconsistencies in the processing of Indian probate cases between BIA and OHA deciding officials.

\* \* \* \* \*

The purpose of the changes to 43 CFR part 4, subpart D, is to make the policies and procedures that OHA uses to probate an Indian decedent's trust estate consistent with those recently adopted by BIA to ensure uniformity of treatment within the Department.

66 Fed. Reg. at 32884-85.

Very similar statements were made in the preamble to OHA's final regulations:

These regulatory changes [in the interim rule], which were made immediately effective, were designed to make OHA's regulations consistent with the new 25 CFR part 15 that had been published by [BIA] on January 22, 2001.

\* \* \* \* \*

As explained in the interim rule, OHA is using the current rulemaking process (including the interim and final rules) to adopt those changes to its previous regulations that are necessary to avoid inconsistencies in the processing of Indian probate cases between BIA and OHA deciding officials. However, these changes are not intended to serve as the Department's final word on the Indian probate process. BIA and OHA are both contemplating further revisions to improve the probate process and make the regulations easier to understand, and the two organizations will work together on such changes over the coming months.

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As explained above, the purpose of the changes to 43 CFR part 4, subpart D, is to make the policies and procedures that OHA uses to probate an Indian

decendent's trust estate consistent with those adopted by BIA earlier this year, to ensure uniformity of treatment within the Department.

66 Fed. Reg. at 62652.

As is evident from these passages, OHA placed considerable emphasis upon consistency and uniformity in the BIA and OHA probate regulations. Further, the preambles to the BIA and OHA regulations reflect a concern, on the part of both the regulation drafters and the commenters, that the regulations be clear and easy to understand. See, e.g., the statement quoted above from the preamble to OHA's final probate regulations. See also the preamble to BIA's final regulations, which states at 66 Fed. Reg. 7074: "Numerous respondents requested that we clarify time frames and deadlines that the public and BIA must follow." In response to that comment, BIA stated that it was adding certain deadlines. It does not appear that any of the changes made to proposed 25 C.F.R. § 15.403, concerning the time for filing appeals, resulted from these particular comments. (The "postmark as date of filing" rule already appeared in the proposed version of that section.) Nevertheless, the general concern for clarity, as reflected in this and other parts of the BIA and OHA preambles, is relevant here.

As matters now stand, a person who proceeds through all stages of the probate appeal/rehearing process is subject to a "date of postmark" rule when appealing a BIA deciding official's decision to OHA, a "date of receipt" rule when seeking rehearing of the OHA deciding official's decision, and a "date of mailing" rule when appealing to the Board from the OHA deciding official's decision on rehearing. <sup>8/</sup> Further, while the "date of postmark/ mailing" rule is set out in the regulations governing the first and third steps of this process, the "date of receipt" rule is not set out in the regulation governing the second step, i.e., rehearing. Thus, in order to know that the "date of receipt" rule applies to petitions for rehearing, a person must be familiar with the cases discussed above or must realize that one of OHA's general regulations, 43 C.F.R. § 4.22(a), might apply.

In the Board's experience, it has not been the practice of Administrative Law Judges to include information about the "date of receipt" rule in the notices they send to parties in Indian probate cases. Nor, as far as the Board is aware, has it been their practice to refer parties to 43 C.F.R. § 4.22(a). Rather, the notices issued by Administrative Law Judges typically reference only OHA's Indian probate regulations and/or the Board's regulations. The Board considers it unlikely that the average party to an Indian probate proceeding is familiar either with

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<sup>8/</sup> As the Board has interpreted its "date of mailing" rule in 43 C.F.R. § 4.310(a), it is essentially the same as a "date of postmark" rule. Where the postmark is present and legible, the Board construes the postmark date as the date of mailing. E.g., Estate of Alan Wayne Conners, 23 IBIA 199 (1993); Greyeyes v. Aberdeen Area Director, 22 IBIA 174 (1992).

the cases discussed above, in which the “date of receipt” rule was developed for Indian probate cases, or with 43 C.F.R. § 4.22(a). Indeed, it is now more likely that those parties will come across BIA’s new probate regulations in 25 C.F.R. Part 15, either because those regulations were cited by a BIA deciding official in a decision issued under Part 15, or because the parties were otherwise aware of Title 25 of the Code of Federal Regulations as the title dealing with Indian matters. Thus, a present-day party to an Indian probate proceeding is more likely to be aware of the two regulations concerning probate appeals, which explicitly provide that the filing date is the postmark/ mailing date, than he/she is to find the information necessary to understand that the rehearing regulation has been interpreted differently.

[1] In his brief on timeliness, Appellant argues that either the filing rule in 25 C.F.R. § 15.403(a) or the filing rule in 43 C.F.R. § 4.310(a) should apply to the filing of petitions for rehearing. The Board cannot agree that either of these regulatory provisions can be applied directly to petitions for rehearing. The Board finds, however, that 43 C.F.R. § 4.241(a) should be interpreted in a manner compatible with the OHA and BIA regulations published in 2001. Given the strong emphasis by both offices on consistency between the OHA and BIA regulations, and the more general expression of concern for clarity in the regulations, the Board concludes that the prior interpretation of 43 C.F.R. § 4.241(a) must now be replaced by an interpretation consistent with 25 C.F.R. § 15.403(a) and 43 C.F.R. § 4.310(a). Therefore, the Board holds that, on and after June 18, 2001, the date of filing a petition for rehearing by mail under 43 C.F.R. § 4.241(a) is the date it is mailed.<sup>9/</sup> The Board further holds that 43 C.F.R. § 4.241(a), as so interpreted, conflicts with 43 C.F.R. § 4.22(a), thus making 43 C.F.R. § 4.22(a) inapplicable to petitions for rehearing.

The Board believes that the interpretation of 43 C.F.R. § 4.241(a) stated in this decision is more consistent with present policy and the present regulations than is the prior interpretation. Ideally, however, no interpretation would be needed because the regulation would clearly state when a petition for rehearing is deemed to be filed. Therefore, the Board recommends that OHA consider clarifying 43 C.F.R. § 4.241(a) in this regard. If OHA believes that the prior interpretation is preferable to the one stated in this decision, the prior interpretation can be restored through such a clarification.

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<sup>9/</sup> The concern expressed in Fighter about the Superintendent’s distribution of estates should no longer be a concern because 43 C.F.R. § 4.273(a) now provides that distribution may not take place until 75 days after issuance of a final probate decision. The preamble to OHA’s final regulations states: “[T]he time period has been set at 75 days to reflect the additional 15-day grace period provided in 25 CFR 15.312 [BIA’s regulation concerning distribution of estates].” 66 Fed. Reg. at 67654.

Appellant's motion for rehearing was mailed on September 24, 2001. The Board holds that it was timely filed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Hammett's October 10, 2001, order is reversed insofar as it denied Appellant's motion for rehearing, and this matter is remanded to him for a decision on the merits of Appellant's motion.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge