



United States Department of the Interior

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OFFICE OF HEARINGS AND APPEALS

Interior Board of Contract Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

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APPEALS OF CHEROKEE NATION OF OKLAHOMA

IBCA 3877-3879-98

Decided: March 21, 2001

Compact No. 60G 930002-01-18 : On Reconsideration
: Appellant's Motion for
Department of Health and : Summary Judgment
Human Services: : Granted; Government's
Indian Health Service : Motion to Dismiss
: Denied

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

Background

On June 30, 1999, based on our decisions in Alamo Navajo School Board, Inc. and Miccosukee Corporation, IBCA 3463-66 and 3560-62, 98-2 BCA ¶ 29,831, aff'd on recon., 98-2 BCA 29,832, the Board granted a motion by Cherokee Nation of Oklahoma (Cherokee or Appellant) for summary judgment as to the Indian Health Service's (IHS or Government) liability for the full amount of Contract Support Costs (CSCs) to which Appellant was entitled for fiscal years (FYs) 1994, '95, and '96, under the Indian Self-Determination Act (ISDA), despite shortfalls in Congressional appropriations in those years with respect to IHS' overall programs. Cherokee Nation of Oklahoma, IBCA 3877-79, 99-2 BCA ¶ 30,462.

Alamo and Miccosukee had previously been consolidated by the Board on its own motion because of an apparent similarity of issues with respect to the authorizing statutes. But on appeal before the Court of

Appeals for the Federal Circuit (CAFC), the cases were severed since different funding law issues were involved. Alamo was then voluntarily dismissed by the parties, 185 F. 3d 880 (Fed. Cir. 1998), and remains good law, but Miccosukee was reversed, 217 F. 3d 857 (table) (Fed. Cir. 1999), in light of a similar and contemporaneous appropriations law case, Oglala Sioux Tribal Public Safety Department, IBCA 3680, 98-2 BCA ¶ 29,833, rev'd 194 F. 3d 1374 (1999).

In Oglala, the CAFC held that because the relevant Appropriations Act expressly provided that CSC funds were subject to a specific statutory ceiling (a not-to-exceed "earmark"), as well as to specific language in the authorizing Act making CSC funds subject to the "availability of appropriations," IHS had no obligation to provide full funding of CSCs, despite its contractual obligation otherwise to do so. IHS therefore moved for the Board's reconsideration of the present appeal, arguing that it, too, was governed by the CAFC's decision in Oglala. Appellant opposed the motion on the ground that the question at issue was more similar to Alamo than to Oglala or Miccosukee because no statutory cap or restriction existed; but reconsideration of Cherokee was nevertheless granted in a decision by this Board on October 31, 2000, 34 IBCA 40, 01-1 BCA ¶ 31,158, Judge Parrette concurring in the result only.

Applicable Law (Indian Self Determination Act)

25 U.S.C. § 450j-1. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided * * *

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs of activities which must be carried on by a tribal organization as contractor to ensure compliance with the terms of the contract * * *

(b) Reductions and increases in amount of funds provided
The amount of funds required by subsection (a) of this section* * *

(2) shall not be reduced by the Secretary in subsequent years except pursuant to--

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
* * *

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter. (Emphasis added.)

Discussion

It was primarily because IHS was "asserting errors of law due to the Federal Circuit's reversal of Miccosukee and Oglala," 34 IBCA 46, 01-1 BCA ¶ 31,158 at 153,906, that we granted the reconsideration. The principal error of law asserted by IHS was that for FYs 1990-94, contrary to the Board's understanding, the Tribally Controlled Schools Act (TCSA), 25 U.S.C. § 2008, did not condition the issuance of grants upon the availability of appropriations, and that the Congress did not add such a proviso until after the end of FY 1994. Therefore, IHS asserted, Cherokee differed from Alamo (on which the Board had relied) because in this case there was such a limitation. In fact, however, the Board was correct in stating that the TCSA has had a provision virtually identical to that of the ISDA since 1988. Thus, the primary issue on reconsideration is simply whether the Board's decision in Cherokee was implicitly overturned by Oglala.

IHS's position before Cherokee was decided was that it was prohibited from paying the full amount of Appellant's CSCs by Section 314 of the Omnibus Appropriations Act for FY 1999 (See Cherokee, supra, 99-2 BCA ¶ 30,462 at 150,489). However, IHS' present position largely ignores that earlier contention and bases its arguments primarily on the second proviso contained in the last sentence of subparagraph (b) of 25 U.S.C. § 450j-1, dealing with the potential reduction of funds to other tribes and other programs. Many of these programs, however, are clearly discretionary; and, as in Shoshone-Bannock, 988 F. Supp. 1306, 1332 (D. Or. 1997) and 999 F. Supp. 1395, 1397 (D. Or. 1998), IHS has provided neither

adequate nor convincing proof in this case that any actual reduction of funds for other tribes would be required to fully fund Appellant's CSCs, given IHS' increased appropriations for the years in question.

IHS does not deny that its funds were substantially increased by the Congress during the years in question and does not attempt to rationalize the differences between an unrestricted lump sum appropriation and an appropriation with a statutory earmark, which is the essence of this matter. In effect, IHS is claiming discretionary authority where there is no discretion-- i.e., in its obligation to fully fund CSCs to the extent funds are available. See Ramah Navajo School Board v. Babbitt, 87 F. 3d 1338 at 1341) ("In a year in which Congress appropriates sufficient money to cover the Secretary's [CSC] obligations, each tribe is entitled to receive the full amount of its [CSC] funding.") and ("The statute itself reveals that not only did Congress not intend to commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the Secretary with as little discretion as feasible in the allocation of [CSCs]." Ibid. at 1344.) (Emphasis in original.)

In its effort to justify its allocation decisions by subparagraph 450j-1(b), dealing with the funding of other programs, IHS is attempting to assert the existence of additional mandatory requirements, even though the authorizing Act clearly permits the exercise of discretion to fund or not fund many of these other activities. Such a discretionary use of funds cannot excuse the Secretary's failure to comply fully with the mandatory requirements of § 450j-1(a)(2).

As discussed in our prior decision in this case, the payment of CSCs is clearly mandatory, subject only to an unrestricted (i.e., lump sum) availability of appropriations. The last-sentence proviso of subsection (b) makes clear that the Secretary is not required to reduce his discretionary funding of one tribe for the sake of another one--all of which has nothing to do with his duty to fully fund the mandatory CSC contracts first. Given a lump sum appropriation, as existed here, the Secretary has a clear duty to pay CSCs in full as the authorizing Act directs. There is no discretion under the authorizing Act to withhold or reduce mandatory funds to meet other, discretionary, needs. Ramah, supra.

As to the legal availability of unrestricted or uncapped appropriations, "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency" (citing cases; emphasis added). Lincoln v. Vigil, 113 S. Ct. 2024 at 2031 (1993). The Court also notes that: "Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress."

IHS therefore cannot place its reliance on informal limitations in Committee report language. What is controlling is whether the appropriations as enacted were or were not subject to statutory restrictions, and in this case they were not. They were unearmarked, uncapped, lump sum, increased-amount appropriations. Therefore, adequate funds were readily available for CSC distribution, and the Cherokee Nation is entitled to its full contractual share. Alamo, supra; Ramah, supra.


Decision

Accordingly, we see no need for further briefs or for a further evidentiary hearing in this appeal. We believe that our opinion in Cherokee was correct as originally issued and, upon reconsideration, we decline to modify that decision.



Bernard V. Parrette
Administrative Judge

I concur:



Candida S. Steel
Administrative Judge