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SUMMARY OF THE FINAL DECISION AND THE RECOMMENDED DECISION IN *MASHANTUCKET PEQUOT TRIBAL NATION V. INDIAN HEALTH SERVICE*

by

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On May 3, 2006 Board Member Donald Garrett of the Appellate Division, Departmental Appeals Board, U. S. Department of Health and Human Services, upheld partial declinations by the Indian Health Services of seven separate contract proposals of the Mashantucket Pequot Tribal Nation (MPTN) under the Indian Self-Determination Act. In doing so Board Member Garrett reversed the Recommended Decision, dated March 10, 2006, of Judge Andrew Pearlstein of the U. S. Department of the Interior, Office of Hearings and Appeals. Such appeals are initially heard by the DOI Office of Hearings and Appeals but may be reviewed, modified, adopted or reversed by the Secretary of the Department of Health and Human Services within 20 days from the date of any timely written objection by a party to the Recommended Decision. The Secretary has delegated the authority to hear such appeals to the HHS Departmental Appeals Board, Appellate Division. Board Member Garrett's decision is final for the Secretary of Health and Human Services. It is subject to appeal to federal district court under section 110 of the ISDA. A decision on whether to appeal has not yet been made by MPTN. Our firm has represented MPTN in their appeals for the past six years.

All of the appeals involved the circumstances in which under section 813 of the Indian Health Care Improvement Act a tribal health program or facility can provide services to non-Indians under an ISDA contract. While Board Member Garrett agreed with Judge Pearlstein that section 813 does not require a joint decision by IHS and the tribe to serve non-beneficiaries in a tribally operated health program, he concluded that the MPTN had failed to comply with the requirements of section 813 of the Indian Health Care Improvement Act with respect to decisions by tribal programs to serve such non-beneficiaries. On this ground he concluded that the Nation was providing pharmaceutical services outside of its ISDA contract and that these services to non-beneficiaries are not a contractible program. The reasons why he decided that MPTN was not in compliance are summarized below. As we note, Board Member Garrett briefly identified several other grounds for concluding that the program at issue is not contractible. While we continue to agree with MPTN and Judge Pearlstein as to MPTN's compliance with section 813, Board Member Garrett's decision is final for DHSS, binds the Indian Health Service, and should be given careful consideration by any tribe seeking to provide services under an ISDA contract to non-Indians under section 813.

We review both decisions below. A summary of of the way in which each identified issue was decided by Board Member Garrett is in boldface.

Jurisdiction

Judge Pearlstein ruled that he had jurisdiction over these multiple appeals. The Indian Health Service argued that providing pharmaceuticals to persons who were not members of the MPTN or of any other tribe was not a "program for the benefit of Indians" and therefore the ISDA, and its appeal provisions, did not apply to the IHS's declination of language permitting providing pharmaceuticals to such persons. According to Judge Pearlstein, if one of the alleged reasons the program would be unlawful is that it would not be for the benefit of Indians, that allegation is properly addressed through the declination hearing process as provided by the statute and regulations. He described the IHS position as "short circuiting" the appeal process.

IHS did not object to Judge Pearlstein's decision on this point, which was not before Board Member Garrett.

Is the MPTN Program Declined A Program for the Benefit of Indians?

IHS, as noted above, argued that, even if the Board had jurisdiction, the program it declined was not a program for the benefit of Indians, which justified its declination. Judge Pearlstein responded that: "IHS's declinations are at their core based on policy considerations, rather than on legal foundations." The IHS argument, according to Judge Pearlstein, "disregards the express provision in the IHCIA that allows the extension of services to non-Indians. It also does not recognize that such an extension of services to non-Indians does demonstrably operate for the benefit of the Indian members of the MPTN."

Judge Pearlstein analyzed the provisions of section 813 of the IHCIA which clearly permit tribes to provide services to non-Indians under their contracts with IHS. He also relied on the evidence that the services benefit Indians in increasing the service population and devoting the savings which result from utilizing federal schedule pricing for pharmaceuticals (since tribes are entitled to use the federal schedule when carrying out an ISDA contract) makes possible additional services to the Indian service population. He concluded: "...the needs and desires of the MPTN, not those of IHS, should be the paramount concern in reviewing this matter..." IHS argued that the program MPTN wished to contract was a part of its employee health plan for its non-Indian employees. Judge Pearlstein responded: "The program that the Nation seeks to contract is not its EHBP [Employee Health Benefit Plan] but its pharmacy services..." Judge Pearlstein also noted the frequency with which IHS has entered into contracts with other tribes which provide for services to non-Indians. Such contracts "belie the IHS argument that programs that serve non-Indians cannot be lawfully carried out by the IHS or the contractor."

Board Member Garrett looked at this issue differently than Judge Pearlstein did. While he cited several reasons for concluding that services to non-Indian employees are not a program for the benefit of Indians, the primary basis for his conclusion is that the MPTN did not comply with the requirements under section 813 for providing such services. Board Member Garrett states: "the services cover thousands of non-Indians who are ineligible for

IHS services and who do not qualify for such services under the exception in section 813 (b) (1) (B) of the IHCIA." The result on this issue might have been different if the services did qualify under the exception, which they would have in his view if the MPTN had met his standards for complying with that statute (see below). He viewed the "benefit for Indians" which Judge Pearlstein found as being "not the type of benefit that an ISDA contract for the provision of health care services is intended to provide." We think Board Member Garrett ignores the connection between poverty and inadequate health care.

However, Board Member Garrett states that even if the Nation had complied with section 813 as he understands it, he has other reasons why the services to non-Indian employees are not a program for the benefit of Indians. However, they are generally specific to this case and probably not adequate as independent grounds for declination. They include:

- **The Nation does not use IHS funds for these services;**
- **PRXN could be considered as a reasonably available alternative (a reason for his conclusion that MPTN failed to comply with section 813, rather than on independent basis to decline);**
- **the non-Indian employees work for the casino and not in health care; and**
- **Any health care benefit to members is outweighed by the large number of non-Indians served.**

Requirements for Tribal Compliance with Section 813, IHCIA, in Serving Non-Indians

Relying upon the plain language of section 813 Judge Pearlstein held that the statute "provides much greater authority and discretion to contracting tribes operating health facilities than to the IHS, in conjunction with the local tribe, where the IHS directly operates the health facility." Judge Pearlstein carefully analyzed the provisions of the ISDA relating to declination and the provisions of the IHCIA relating to services to non-Indians and concluded that the IHS argument that its approval of such services is required because the contract is a bilateral agreement is a "circular" argument. He noted that, of course, IHS can decline all or part of a contract, but that after it has done so its decision is subject to the appeal process presently proceeding. For a tribe, the requirement is that it "take account" of factors that the IHS in its facilities is required to determine. "While the phrase 'take account of' is somewhat vague, it is clear that it does not require a formal 'determination' as required in the case of an IHS operated facility."

Board Member Garrett, while denying that a joint determination is necessary, essentially read the statute to require a tribal determination that there are no reasonable alternative services and to allow IHS to decline a proposal to provide such services if the tribe's determination is not reasonable. He agrees with Judge Pearlstein that the statute sets two separate standards for IHS and tribal facilities and dismisses the IHS agreement argument that constitutional principles dictate reading the statute in any way other than

the way it reads on its face. Nevertheless, he concludes (1) the tribe's decision is subject to Secretarial review, (2) if the Secretary concludes that the tribe did not "take into account" the factors required by section 813, declination is justified on the ground that services to non-Indians is an activity that cannot lawfully be carried out by the contractor.

Board Member Garrett goes on to decide, contrary to Judge Pearlstein, that section 813 requires the governing body of the tribe decide that no such services are available before taking this consideration into account in determining whether to provide services to non-Indians." He concludes that the requirement as interpreted by Judge Pearlstein would be a "hollow exercise." We do not agree with his interpretation of the statutory language on this point.

Legislative History

Judge Pearlstein concluded that the legislative history of section 813, which stretched over several years covering variations in language, supports the tribal position that section 813 does not give the IHS a veto over the tribal decision to serve non-Indians. He rejected IHS's reliance on a colloquy between two Senators, long after the enactment of the legislation, indicating a committee's intent that drugs acquired on the federal schedule be "for the exclusive use of trial members." Judge Pearlstein noted that the colloquy concerned a pending amendment to a provision of the ISDA (covering general tribal access to federal sources of supply and not the specific provision of section 813 permitting tribes to serve non-Indians under tribal ISDA contracts if certain conditions are met) and did not address the specific exception to the general rule made in section 813.

Board Member Garrett relies to some extent on the colloquy but says very little about the legislative history since he accepts that section 813 does not require a joint determination.

Delegation of Authority, Separation of Powers

The IHS argued that even if section 813 does not require a joint determination when services in a tribal facility are provided to non-Indians, nevertheless the IHS must have a veto over a tribal decision to do so where federal schedule prices are used in providing pharmaceuticals to non-Indians because otherwise the delegation of authority would be "constitutionally suspect under separation of powers principles." Judge Pearlstein ruled that "this formulation departs unnecessarily from the plain language and meaning of the IHCIA and distorts the factual situation... The fact that non-Indians benefit from this practice [use of FSS schedule] is not in substance different from any other extension of services to non-Indians under the IHCIA." He held that there is no basis to deem such delegation constitutionally suspect based on the number of persons served or the amount of money saved by access to federal sources of supply. The Supreme Court has endorsed the broad delegation of Congress's power to regulate commerce with Indian tribes. *United States v. Mazurie*.

Board Member Garrett agreed that section 813 does not require a joint determination and rejected the argument based on constitutional principles, as noted above.

MPTN's Compliance with IHCIA in Deciding to Serve Non-Indians

IHS argued that even if IHS approval of MPTN's decision is not required, MPTN did not comply with the requirements laid out in section 813 with which a tribe must comply when it decides to serve non-Indians in a tribally operated facility. Judge Pearlstein concluded that:

> ... the record is sufficient to show that the Tribe did ultimately follow the required process. .. While there may not have been an explicit epiphany to comply with the IHCIA in full at a particular point in time, the record is sufficient to show that the Tribe took into account the availability of reasonable alternative services for its non-Indian employees. ... no particular form of the authorization to extend services to non-Indians is required.... In this case the MPTN has demonstrated that it took into account the statutory factors as required by the IHCIA to extend pharmacy services to its employees. Neither the IHS nor I may substitute our judgment for that of the Tribe.

Judge Pearlstein concluded that MPTN had considered whether the MPTN commercial pharmacy or local pharmacies were reasonable alternatives and concluded that they were not based on their lack of Drug Utilization Review (DUR), their higher costs, and their inconvenient access.

Having set a higher standard for a tribe than Judge Pearlstein did, Board Member Garrett then concludes: "Even if something less than a formal determination is required, the undisputed facts fail to show that the Nation made a considered decision at any point in time that there was no reasonable alternative services available. Indeed it is unclear whether the Nation even had the statutory consideration in mind when it conducted the studies and activities on which it relies."

We believe, with Judge Pearlstein, that section 813 requires tribes "to take account" of whether there are reasonable alternative services but not to determine that there are "none" and that the statute does not authorize the IHS, or Board Member Garrett, acting for the Secretary to substitute their judgment for the judgment of the Tribe.

Board Member Garrett further establishes a separate standard which MPTN would not have met even if he had concluded that it had made a determination as he considers section 813 requires. The decision must also be one that a reasonable person would accept. He agrees that deference should be accorded to a tribe's conclusion, but not "where no reasonable person could agree with the tribe's conclusion." Since he holds MPTN to a higher standard than Judge Pearlstein does - the Nation must decide that no reasonably available alternative services exist - it follows that he is able to establish a principle which IHS must use to review and either approve or disapprove a tribe's decision. He further concludes that no reasonable person could refuse to consider MPTN's commercial

pharmacy operations, as well as other pharmacies in the vicinity, as alternatives reasonably available.

Annual Consideration of the Factors

IHS argued that the IHCIA requires an annual review of the criteria for serving non-Indians. Judge Pearlstein found no such explicit requirement in the statute or regulations. He further considered that through the annual funding agreement process, under which the IHS can annually decline proposed funding agreements, the Tribe had, in fact, reviewed the IHCIA criteria once a year.

Board Member Garrett concludes that the activities relied on by the MPTN and by Judge Pearlstein, were "too far removed in time to be relevant to the proposed AFAs at issue here.. Since such services must be approved on an annual basis [in annual funding agreements] it follows that a proposal to provide such services to non-Indians must be based on a decision... which is made on a contemporaneous basis with respect to each AFA that is proposed." He held that MPTN could not rely on any decision from the early 1990's with regard to its FY 2000 and subsequent AFAs. He also concluded that merely by approving the annual funding agreements each year MPTN had not met the requirement for a contemporaneous event.

Pharmacy Service Not Provided Under the ISDA

IHS argues that the services in question are not provided by a health facility operated under the Indian Self-Determination Act but by the Tribe's pharmacy outside of the contract. IHS did not raise this issue until the fourth declination. Judge Pearlstein concluded that "... PRxN, at least that portion of it which provides pharmacy services to tribal members and employees, does operate under the Tribe's ISDA contract." IHS argued that PRxN, the Tribe's pharmacy, was a "contract health care provider" and thus a supplier for the Nation, not an arm of the Nation providing services under the Nation's contract. Judge Pearlstein pointed out that PRxN does not meet IHS's own definition of contract health service provider: "services not available directly from IHS or Tribes that are purchased from community hospitals and practitioners." PRxN is not a separate legal entity from the tribe. Judge Pearlstein noted: "The ISDA contract is between the IHS and the Nation – not between the IHS and any of the Nation's internal health facilities."

IHS did not object and Board Member Garrett did not need to address this issue.

Application of Ban on Declination of Proposed Contract Which Is Substantially the Same As Prior Contract (25 CFR § 900.32)

The Nation argued that the declinations were all prohibited by a regulation which provides that a proposed AFA that is substantially the same as its predecessor AFA cannot be declined by IHS. This regulation was intended to give IHS one bite at the apple in deciding whether one of the five declination criteria applies. Judge Pearlstein agreed with MPTN that the proposed Funding Agreements were substantially the same. However, he indicated his view that

the regulation could not bar declination in this case because the particular program was not funded by IHS, but by the Nation or has a declination on the ground that the proposed AFA is unlawful or improper. However, as Judge Pearlstein states: "In view of my conclusions on the substantive issues, which adopt the Nation's positions, it is not necessary for me to determine definitively the application of section 900.32."

Board Member Garrett agreed with Judge Pearlstein that section 900.32 applies only when a declination involves a funding amount and does not apply if there is no reduction in the funding to be made available. He maintains that this position is "clear" by quoting out of context certain language from section 900.32. Both Board Member Garrett and Judge Pearlstein ignore the identification of examples of proposals which could be declined and have no bearing on the funding amount: "a redesign proposal; waiver proposal... or different program service, function or activity" .. This portion of the decision guts the substance of section 900.32 which was certainly intended by the Rulemaking Committee which developed the language to apply where the same amount of funding is proposed to be used for different purposes and in different ways.

Our view on this is supported by the published comments on the regulations: "In the past as a matter of practice, neither IHS nor BIA has reviewed contract renewal proposals for declination issues. Therefore the Departments have agreed that IHS and BIA will not use the declination process on contract renewals where there is no material or significant change in the contract." Not a word limiting "change" to a change in funding amount. **Finally, he disagreed with Judge Pearlstein that the proposals were substantially the same as the prior AFA. His requirement for a "contemporaneous decision" on alternative services means that each AFA must be treated separately.**

Conclusion

Finally, Judge Pearlstein concluded that the MPTN may "lawfully" extend health services to its employees and their families. While section 813 may have been meant to apply primarily in remote areas, as argued by IHS, there "is nothing in the language of the stature itself, or in any implementing regulations, that limits the application of the statute to remote areas, or to prescribed numbers or proportions of otherwise ineligible persons. The MPTN is a small tribe located in the relatively urbanized northeast corridor, that operates some big businesses with many employees. Its employees and their well-being are so important to the continued welfare of the Tribe that they are considered part of the Tribal family. Under the plain language of the IHCIA, the law's provisions are also available to this Tribe, in its unique situation, where it is used to extend a valuable health care benefit to its members and employees, while greatly reducing the high costs of pharmaceuticals the Tribe would otherwise be obliged to pay. The Nation then uses the savings to defray the costs of providing other health services, thus delivering a double benefit to its Indian members."

Board Member Garrett summarizes his decision as follows:

"Contrary to what the ALJ concluded, the proposed services for non-Indian employees are not contractible under the ISDA. First of all, the proposed services are not

properly the subject of a program that the Secretary is authorized to administer for the benefit of Indians. This conclusion is supported by the fact referred to below that the Nation failed to comply with the Indian Health Care Improvement Act (IHCIA). In addition, rather than provide the type of benefit to tribal members that an ISDA contract for the provision of health care services is intended to provide, the provision of these services under the Nation's proposals would essentially function to provide a substantial fringe benefit to thousands of non-Indian employees of the Nation's commercial casino operations. Moreover, since the proposals do not meet the requirements of section 813 (b) (1) (B) of the IHCIA, 25 U.S.C. §1680c (b), for providing services to non-Indians under an ISDA contract, the proposals were unlawful. While that section provides an exception to the requirement that services be provided only to Indians and certain other individuals not otherwise eligible for IHS health services, the Nation did not qualify for the exception. Specifically, in determining whether to provide pharmacy services to its non-Indian employees, the Nation's Tribal Council failed to decide that there were no reasonable alternative pharmacy services available to meet these employees' health care needs. No such decision was made by the Nation's Tribal Council at any point, much less contemporaneously with the proposed AFAs. In any event, no reasonable person could conclude based on the undisputed facts that there were no reasonable alternative services available."