



INTERIOR BOARD OF INDIAN APPEALS

Donald Benally v. Navajo Area Director, Bureau of Indian Affairs

9 IBIA 284 (05/26/1982)

Also published at 89 Interior Decisions 252

Reconsideration denied:
10 IBIA 70



United States Department of the Interior

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

DONALD BENALLY

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS,
AND NAVAJO TRIBE

IBIA 81-24-A

Decided May 26, 1982

Appeal from decision by Navajo Area Director finding the Department lacked jurisdiction to entertain appeal from tribal disposition of tribal election dispute.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indian Tribes: Elections

Following repeal of tribal law permitting appeal to the Department, appellant election candidate at Navajo tribal election held not entitled to appeal to the Secretary from adverse determination by tribal council.

APPEARANCES: Eric D. Eberhard, Esq., for appellant; Gary Verburg, Esq., for appellee Navajo Tribe; Scott Keep, Esq., Office of the Solicitor, for appellee Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Procedural and Factual Background

On April 24, 1981, the Acting Deputy Commissioner of Indian Affairs referred this appeal to the Board of Indian Appeals pursuant to 25 CFR 2.19. Appellant Donald Benally seeks reversal of a decision rendered on about December 12, 1980, by the Navajo Area Director, Bureau of Indian Affairs (Area Director, Bureau). The Area Director's decision found that the Department lacked jurisdiction to review a Navajo tribal election controversy. The record indicates that appellant had been disqualified as a candidate at a tribal election held on the Navajo Reservation in 1978.

On July 10, 1978, appellant was nominated to be a candidate for election to the Navajo Tribal Council. On August 9, 1978, he received the highest number of votes cast at the primary election. On September 5, 1978, the tribal board of election entered a finding that appellant was disqualified to be a candidate by reason of his age. He appealed the election board's decision to the Navajo Court of Appeals, which reversed the board. The election board appealed to the Navajo Supreme Judicial Council, which affirmed the board's initial order disqualifying appellant, reversing the Navajo Court of Appeals. Pursuant to the Navajo Supreme Judicial Council's order, appellant was removed as a candidate from the general election ballot. On February 9, 1979, appellant sought review of the tribal actions by the Navajo Area Director, basing his appeal to the Department on the provisions of Navajo Resolution CJY 85-66, which provides:

All questions of interpretation of the Navajo Election Law of 1966 and any amendments thereto shall be subject to the decision of the Navajo Tribal Council, or any committee or board of the Navajo Tribal Government duly designated by said Navajo Tribal Council, subject to the right to appeal to the Secretary of the Interior.

11 NTC (Navajo Tribal Code) § 1 note. Since the Navajo Tribe has not organized under or accepted the provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479 (1976), or adopted a formal written constitution, there is no tribal constitutional provision for the settlement of election disputes.

On April 13, 1979, the Area Director referred the matter back to the tribe to permit exhaustion of tribal remedies, and on February 15, 1980, the Navajo Tribal Council affirmed the prior decision of the Navajo Supreme Judicial Council in Resolution CF-23-80, which provides, in pertinent part:

[The Area Director] has requested the Navajo Tribal Council to make a final determination on the Donald Benally election dispute; and

5. Almost fifteen (15) months have passed since the 1978 Navajo Nation General Council Election, and it is time to declare the Benally matter closed; and

6. This right of self-determination has been recognized by the U.S. Congress in such acts as the Indian Self-Determination Act, P.L. 93-638 and U.S. Supreme Court in the case of Martinez - Santa Clara Pueblo 436 U.S. 49 (1978).

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Tribal Council hereby affirms the decision of the Board of Election Supervisors on the Donald Benally election dispute.

2. The Election Law of 1966 as set forth in N.T.C. Resolution CJY-85-66 is hereby amended by deleting paragraph 3 of the "Resolved" Section of that Resolution and substituting therefor:

All questions of interpretation of the Navajo Election Law of 1966 and any amendments thereto shall be determined by the Navajo Election Commission.

On February 21, 1980, appellant again sought review by the Area Director; on about December 12, 1980, the Area Director declined to review the election dispute. His decision was based upon a finding that Resolution CF-23-80 deprived the Department of whatever review authority it had earlier possessed. The Area Director, in reaching his decision to defer to provisions of tribal law opined, in pertinent part:

Clearly, prior to February 15, 1980, the sole authority for the Secretary of the Interior to review a dispute involving the interpretation of the Navajo Election Law was found in CJY-85-66.

Because no federal statute authorizes Secretarial action in cases such as this, the Navajo people, acting through their Tribal Council, are free to withdraw the authority they have conferred on the Secretary to hear an appeal on the interpretation of Tribal law and when they have done so, neither the Secretary nor his representative, the Area Director, can continue to exercise appeal jurisdiction.

(Area Director's Decision at 5).

On February 23, 1982, the Assistant Secretary--Indian Affairs, following appeal from the Area Director's decision, issued a directive addressed to the Chairman of the Navajo Tribal Council. Referring to Resolution CF-23-80, the directive recites:

I hereby approve the February 15, 1980, action to remove the right of Secretarial appeal with the understanding that it only be prospectively applied. In that the substance of Mr. Benally's appeal relates to an event that took place in the 1978 election, we believe he is entitled to pursue the matter with this Department under the election law in effect at that time.

(Decision of Assistant Secretary--Indian Affairs dated Feb. 23, 1982, at 2).

Contentions of the Parties

Appellant contends that the Department should review his disqualification by the tribal authorities on the merits urged, citing numerous errors allegedly committed by the tribal reviewing bodies. He argues that jurisdiction to review this matter attached in the Department when he first appealed to the Area Director under the tribal ordinance then in effect, and that the subsequent repeal by the tribal council of the provision of Navajo law permitting such review was an impermissible retroactive application of tribal authority. He endorses the February 23, 1982, directive by the Assistant Secretary.

The Bureau argues that the tribe lacked authority, without prior approval, to terminate the provision of tribal law permitting appeal to the Secretary. It also contends that, until action by the Assistant Secretary--Indian Affairs was taken on February 23, 1982, there had been no Secretarial approval of Resolution CF-23-80 and that without such approval, the resolution was ineffective.

The Navajo Tribe argues that the extinguishment of the provision allowing Departmental review of tribal action on election disputes was not retroactive as a matter of law. The tribe further argues that the tribal ordinance did not require Bureau approval before becoming effective and, therefore, the conditional approval of the amended ordinance issued by the Bureau on February 23, 1982, was without effect.

Discussion and Decision

The Department has long recognized the Secretary's authority in Indian affairs to be limited to the execution of the laws. It is accepted by the Department that Secretarial discretion in Indian affairs is not a general power but exists only where specifically stated in Federal statutes. Acting Solicitor Cohen (referring to 25 U.S.C. § 2) stated the rule thus in Solicitor's Opinion, 58 I.D. 103, 106 (1942):

This was the statute which established the office of the Commissioner of Indian Affairs. It was designed not to add to the business or the authority of the Federal Government in Indian matters, nor to diminish the scope of self-government then exercised by the Indian tribes and nations, but merely to locate a particular mass of Government business in a statutory office. The reference to "management of all Indian affairs" did not confer a power to manage the affairs of Indians or of Indian tribes or nations any more than a reference to "foreign affairs" in defining the duties of the State Department could be construed to confer upon that Department a power to manage the affairs of foreigners or of foreign nations. Just as our "foreign affairs" are affairs of our Government relating to foreign matters, so our "Indian affairs" are affairs of our Government relating to Indian matters.

Continuing, at 58 I.D. 109, he observed:

It is true that statements may be found in a number of court opinions which refer to general supervisory powers exercised by the Department of the Interior over Indian affairs; but it will be found that in each case where such language appears there is some specific statutory authorization for departmental action and the general statutes discussed above are invoked only for the purpose of filling in gaps of detail on which those statutes are silent. On the other hand, actions which this Department purported to justify on the basis of "general supervisory powers" have been repeatedly condemned by the Federal courts as unauthorized and unlawful. [Footnote omitted.]

Unlike the situation presented to this Board in Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982), there is here no tribal constitution establishing a "government-to-government relationship," and, because the Navajo Tribe is not organized under section 16 of the Indian Reorganization Act, supra, there is no statutory basis for exercise of the Secretarial trust responsibility. ^{1/} The question now before the Board is whether in this case a right to Secretarial review conferred by Navajo Resolution CJY 85-66 vested prior to repeal of that law by Resolution CF-23-80, or whether the Secretary's review jurisdiction under Resolution

^{1/} Assuming, without deciding, that there exists broad power in the Secretary to protect tribal governments under a general trust responsibility, whether or not such governments are formed under provisions of the Indian Reorganization Act (see Roger St. Pierre, above at 234 n.22) it is the Board's opinion that the violation alleged by appellant in this case does not constitute an "imminent and substantial threat to the tribal government (i.e., the trust res) sufficient to justify independent action by the United States." Roger St. Pierre, above at 238. The briefs filed in Benally do not address this theory of justifying review by the Bureau of Indian Affairs in the Navajo election dispute. Further, to the extent appellant's dispute with the tribe may be cognizable under the Indian Civil Rights Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301-1341 (1976), the Supreme Court's holding in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), requires that appellant seek relief in a tribal forum.

CJY 85-66 was legally removed by resolution CF-23-80. For the following reasons, the Board holds that resolution CF-23-80 effectively removed the Secretary from his review jurisdiction over Navajo tribal election disputes.

Relying principally upon U.S. Fidelity and Guaranty Co. v. United States, 209 U.S. 306 (1908), appellant contends that the Area Director erred by making a retroactive application of the 1980 Navajo law which limited review of tribal elections to tribal forum. This reliance is misplaced: U.S. Fidelity is distinguished in Hallowell v. Commons, 239 U.S. 506, 508 (1916), for reasons which are relevant here. In Hallowell the Court held that restoration by Congress to the Secretary of the Interior of Indian probate review powers, which had previously been taken from him and vested in the Federal courts, had operated to transfer the review of all pending Indian probate cases to the Secretary:

It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. The appellee contends for a different construction on the strength of Rev. Stats., § 13, that the repeal of any statute shall not extinguish any liability incurred under it, Hertz v. Woodman, 218 U.S. 205, 216, and refers to the decisions upon the statutes concerning suits upon certain bonds given to the United States. United States Fidelity & Guaranty Co. v. United States, 209 U.S. 306. But apart from a question that we have passed, whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs. The consideration

applies with the same force to all cases and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

(239 U.S. at 508).

[1] The same rule applies here: The limitation by the tribe of the review authority over tribal elections to tribal agencies eliminated review of such matters by the Department, including pending cases. The general rule of law, restated by the court in Bruner v. United States, 343 U.S. 112 (1952) (citing Insurance Co. v. Ritchie, 5 Wall. 541 (1867)) (72 U.S. 541), has consistently been that:

[W]hen the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.

* * * * *

In another case arising under the same jurisdictional statutes, the Court, in following Ritchie, stated the applicable rule as follows:

"Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress." The Assessors v. Osbornes, 9 Wall. 567, 575 (1870).

(343 U.S. at 116).

The Area Director correctly applied the tribal law to the facts of this appeal when he determined that, following repeal of the tribal ordinance permitting Secretarial review the Department lacked jurisdiction to review tribal election disputes. As a result, the Bureau lacked authority to make the attempted reconsideration of the case on February 23, 1982, while the matter was pending before this Board, and the attempted modification of the Area Director's ruling is therefore void. 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 decision appealed from is affirmed. Appellant's complaint is not reviewable by the Department.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Jerry F. Muskrat
Administrative Judge