INTERIOR BOARD OF INDIAN APPEALS

Neddeen Naylor, et al. v. Sacramento Area Director, Bureau of Indian Affairs

23 IBIA 76 (11/13/1992)

United States Department of the Interior

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

NEDDEEN NAYLOR, MARY L. WUESTER, IRENE BUTTON,
and NOREEN E. SELLBERG
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-146-A Decided November 13, 1992

Appeal from a decision declining to recognize the results of a tribal election held by the Lone Pine Paiute-Shoshone Tribe.

Affirmed as modified.

1. Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Government: Elections

   In discharging its government-to-government relationship with an Indian tribe, the Bureau of Indian Affairs has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

APPEARANCES: Appellants, pro sese; Julie Fritcher, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Neddeen Naylor, Mary L. Wuester, Irene Button, and Noreen E. Sellberg seek review of a March 12, 1992, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to recognize the results of an August 23, 1991, election held by the Lone Pine Paiute-Shoshone Tribe (Tribe); declaring that the Tribe had no functioning government which BIA could recognize; and suspending the Tribe's Indian Self-Determination Act (P.L. 93-638) contracts and grants. For the reasons discussed below, the Board affirms the Area Director's decision as modified in this opinion.

Background

Appellants were candidates for tribal office in an election held on August 23, 1991. Naylor received the most votes for Chairperson, Wuester received the most votes for Vice-Chairperson, and Button received the most votes for Treasurer. Sellberg, who was a candidate for Secretary, received fewer votes than her opponent, Julie Fritcher. On August 27, 1991, Ruth Buff, who signed herself "Chairperson, Election Committee," wrote to the Central California Agency, BIA, declaring the election invalid. She attached a list of 15 reasons why she considered the election invalid.

On November 4, 1991, the Superintendent wrote to Naylor, stating that he would recognize the results of the election. He explained:

> The issues raised by Ms. Ruth Buff * * * deal primarily with candidates and voter eligibility criteria and these issues were adequately resolved by the Election Committee prior to the election of August 23, 1991.
>
> It should also be noted that this Agency has repeatedly requested additional election documents from all parties involved with this election with no success. Due to the time lag of 70 days between the election and lack of response from the Tribe, we feel this Tribal Election decision needs to be made at this time because the Bureau of Indian Affairs has a legal responsibility and is required to be accountable for Grants and/or Contracts awarded to Tribes using appropriated federal dollars.
>
> As you are aware the Bureau of Indian Affairs with rare exceptions does not interfere in Tribal affairs when an internal dispute occurs. However, the situation at Lone Pine Reservation falls within this exception with the government to government relationship deteriorating rapidly. Therefore, a timely decision needs to be made which will allow the Paiute-Shoshone Indians of the Lone Pine Community Tribal Government the opportunity to become fully operational.

On November 6, 1991, the Superintendent wrote to Ruth Buff, reiterating his determination to recognize the election and discussing the 15 points raised in Buff's letter. On November 19, 1991, he wrote to Sandra Jefferson Yonge, who was Tribal Chairperson prior to the election, again noting that he would recognize the election. He gave both Buff and Yonge the right to appeal his decision.

On December 9, 1991, a notice of appeal to the Area Director was filed by 63 individuals. A statement of reasons was filed by Fritcher, who was one of the 63 who had signed the notice of appeal. An answer was filed by Naylor.

While the appeal was pending before the Area Director, a meeting of the Tribe's General Council was called. At that meeting, held on January 19, 1992, the tribal members in attendance voted, 44-0, to remove Naylor, Wuester, and Button from office. They also appointed a committee, called the Business Committee or Oversight Committee, to manage tribal business. Yonge was apparently requested to serve as Chairperson Pro Tem.

During late January and early February 1992, 51 individuals signed a petition requesting that BIA continue to recognize the validity of the August 23, 1991, election. Another petition, signed by 66 individuals,

called for the removal of Naylor, Wuester, and Button. 1/ By this time, both factions were claiming to be in control of the Tribe--the Naylor faction by virtue of the August 23, 1991, election, and the Yonge/Oversight Committee faction by virtue of the January 19, 1992, General Council meeting.

On March 12, 1992, the Area Director issued the decision on appeal here. He reversed the Superintendent's decision and declared the August 23, 1991, election invalid. He stated:

> The Lone Pine Paiute Shoshone Tribe has, in the past, had a governing document in place under which they conducted elections. However, we have been advised as early as last summer that the community had disregarded that document in favor of operating as a General Council. In addition, we are told there is no election ordinance adopted by the Tribe to provide guidance on elections and corresponding procedures to follow. Our analysis was conducted on the premise that General Council concepts are in effect at this time.
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> * * * * * *
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> After thorough review of all material submitted by the Central California Agency and other parties in interest including yourself, the Superintendent's decision is reversed for the following reasons:
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> 1. In accordance with the General Council concept, proper notice must be given to all persons who might be eligible to participate. It appears due and adequate notice was not given. The only formal notification of the Tribal election was posted at 9:00 p.m. on August 22, 1991, the evening prior to the election.
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> 2. The election of August 23, 1991, was declared invalid by the chairperson of the election committee, Ruth Buff, on August 24, 1991. This declaration, citing 15 causes, was posted in public on that date and this notice was given in writing to the Superintendent, Central California Agency four days later on August 27.
>
> 3. The Report of Tribal Election submitted to the Bureau of Indian Affairs, Central California Agency on August 30, 1991, was not properly certified by all members of the election committee. * * *.
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> For the reasons stated above, the election of August 23, 1991 is declared invalid. Furthermore, there are now no properly

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1/ This petition is undated. It alleges that Naylor, Wuester, and Button "fail[ed] to comply with the Tribe's General Council's decision that the August 23, 1991 tribal election was invalid."

> elected officers of the Tribe since the last elected council has served its term in office and that term has expired. Therefore, the BIA has no governing body of this Tribe with whom to enter into business and governmental matters at this time.
>
> By this correspondence, notification is given that all P. L. 93-638 grants and contracts are hereby suspended until a properly conducted election is held with results certified by the appropriate tribal election committee members. We are offering assistance, at this time to provide a federal mediator to work with the General Council toward resolving any election issues. [2/] Bureau staff stands ready to assist in this matter as well. [Emphasis in original.]

(Area Director's Mar. 12, 1992, Decision at 1-2).

Appellants' appeal from this decision was received by the Board on April 15, 1992. Appellants and Fritcher filed briefs. Expedited consideration has been granted.

Discussion and Conclusions

The Tribe suffers from deep internal divisions which, during the last two years, have seriously affected the Tribe's ability to function. An October 29, 1990, election for the offices of Vice-Chairperson and Secretary was declared invalid by the Superintendent in January 1991. 3/

Although the Tribe has a draft constitution, which it apparently followed until about two years ago, it now operates as a general council without a governing document. 4/ It has no election ordinance, or at least did not have one at the time of the August 23, 1991, election. 5/ Because

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2/ The Board understands that a mediator has since been appointed but that little progress has been made toward resolving the Tribe's internal problems.

3/ It was apparently because the Oct. 29, 1990, election had been held invalid that all four tribal offices were at issue in the Aug. 23, 1991, election.

4/ As far as the Board is aware, at the time of the election, the Tribe's only formal ordinance was an ordinance governing land assignments, which was adopted by tribal referendum on Apr. 4, 1962. This same ordinance also governs land assignments on the Bishop and Big Pine Reservations.

The ordinance contains a definition of "voting member" but does not purport to establish election procedures or regulate any activity other than land assignments.

5/ Fritcher states that an election ordinance was adopted at an Aug. 15, 1992, General Council meeting.

of the lack of tribal governing documents, the Area Director stated that he would review the Tribe's election "on the premise that General Council concepts [were] in effect." 6/

The Board has often stated that both BIA and the Board should refrain from involving themselves in internal tribal disputes unless there is a clear necessity to do so. E.g., Forrest v. Sacramento Area Director, 18 IBIA 372 (1990). However, the Board has also recognized that, in order to carry out the government-to-government relationship, BIA must sometimes make decisions concerning whether or not a tribal governing body is properly constituted. E.g., Greendeer v. Minneapolis Area Director, 22 IBIA 91, 94-95 (1992). In so doing, BIA has authority to interpret tribal law where necessary. E.g., Reese v. Minneapolis Area Director, 17 IBIA 169, 173 (1989), and cases cited therein. Here, in the absence of any tribal law governing elections, and faced with the need to identify the Tribe's legitimate governing body, the Area Director was required to look to more general guidance to determine whether or not the Tribe's election was valid.

[1] Chief among the "more general guidance" available to the Area Director was the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302 (1988). The Board held in United Keetoowah Band v. Muskogee Area Director, 22 IBIA 75 (1992), that an Area Director has the authority and the responsibility to decline to recognize the results of a tribal election when he finds that a violation of ICRA has tainted those results.

Although the Area Director did not find that a violation of ICRA had occurred in this case, he evidently sought to ground his decision on general notions of fairness. 7/ The Board therefore reviews his decision from that perspective.

6/ The record includes a document entitled "General Council Concept." The document appears to be in draft form. Its source is not identified, but the Board assumes that it was prepared by BIA. It is evidently intended to assist new tribes to organize.

The document states at page 2:

"There are six (6) essential principles necessary to establish a government under the General Council concept. They are as follows:

"1. Right of Participation
"2. Due and Adequate Notice
"3. Fair and Equal Opportunity
"4. Duly Recorded Actions
"5. Parliamentary Procedures
"6. Delegation of Powers."

It then discusses each of these principles.

7/ The Area Director refers to the "General Council concept" throughout his decision. It appears likely, therefore, that he relied to some extent on the document of that title discussed in footnote 6. While it was not improper for the Area Director to employ the principles discussed in that

The Area Director provided three bases for his decision. He first found that the only formal notice of the election was posted at 9 p.m. on the evening before the election. Based on that finding, he concluded that proper notice of the election had not been given.

Appellants contend:

> Under our TRADITIONAL METHOD of noticing elections, we have always [done] it by having our General Elections every two years in the month of June and establishing the date at a General Council meeting at least 30 days in advance of the election day, which served as the official notice. This was done at the July 24, 1991 General Council meeting * * *. [8/] [Emphasis in original.]

(Notice of Appeal at 2).

Appellants submit an unofficial transcript of the July 24, 1991, meeting prepared by appellant Sellberg. 9/ The transcript shows that there was discussion of August 23, 1991, as the date for an election. At one point, the Chairperson appears to have announced the date. Evidently, however, no formal vote was taken (Tr. at 10-11). The Board assumes that the Chairperson's announcement was sufficient to establish the election date. Assuming arguendo that the announcement was also sufficient to give notice of the election date to those in attendance at the July 24, 1991, meeting, it was clearly not sufficient to give notice to members who did not attend the meeting. Moreover, to the extent any tribal members relied upon the tradition described by appellants, they would have had no inkling that the election would take place when it did.

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fn. 7 (continued)
paper, it would clearly have been improper to invoke the paper itself as a controlling document. Cf., e.g., Allen v. Navajo Area Director, 10 IBIA 146, 162-65, 89 I.D. 508, 517-18 (1982). There is no indication that the Area Director made improper use of the paper in this case.

8/ For purposes of this decision, the Board accepts appellants' description of the Tribe's election tradition as accurate. It is immediately apparent, however, that the election at issue here deviated from that tradition in two important respects--it was held in August rather than June, and it was held less than one year after the preceding election.

9/ There is no evidence that this transcript was before the Area Director when he issued his decision. The Board has stated on a number of occasions that it is not required to consider arguments or evidence that were not before the BIA deciding official. E.g., Joint Board of Control v. Acting Portland Area Director, 22 IBIA 22 (1992).

In this case, the Board finds that, even if this transcript is considered, appellants cannot prevail here. Accordingly, there would be no point in delaying resolution of this appeal by, for instance, remanding the matter to the Area Director in order to allow him to take the new evidence into account.

Appellants do not contend that notice of the election date was given to members by mail, by posting on the reservation prior to August 22, by publication in newspapers, or in any manner other than announcement at the July 24 meeting. The Board finds that appellants have not shown error in the Area Director's statement that the only formal notice of the election was posted at 9 p.m. on the evening before the election.

The Board agrees with the Area Director that, under these circumstances, the Tribe failed to provide proper notice of the election to all tribal members. Although no finding is made here as to whether or not a violation of ICRA occurred, the Board notes that, under some circumstances, failure to provide proper notice may well constitute a violation of the due process rights of tribal members under ICRA.

The second basis for the Area Director's decision was the fact that the election had been declared invalid by Ruth Buff.

Appellants contend that Buff was never appointed Chairperson of the Election Committee and had no authority to declare the election invalid.

The Election Committee members were chosen at the July 24, 1991, General Council meeting. There is no indication in the transcript of the meeting that the General Council appointed Buff or anyone else as Chairperson of the committee. Nor is there any evidence that the committee itself chose Buff as Chairperson. Finally, there is no evidence that either the Tribe or the Election Committee vested Buff with the unilateral authority to declare the election invalid. Accordingly, the Board finds that it was error for the Area Director to base his decision upon the fact that Buff had declared the election invalid. 10/

The third basis for the Area Director's decision was that the election results had not been properly certified by the Election Committee.

Appellants contend that all four members of the committee certified the election results on the day of the election. They also state, however, that two members of the committee refused to sign the official certification of election results.

The record includes a document entitled "Report of Election Results," which has a certification statement at the bottom. This statement is signed by only two members of the Election Committee, Alice Maddux and Patricia Ross. Appellants contend that all four committee members signed the back of the paper on which the committee first recorded the election results on the evening of August 23, 1991. Appellants submit a copy of an undated piece of paper on which the words "Election Committee," the time

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10/ The Area Director's recognition of Buff's unilateral "invalidation" of the election also appears to be inconsistent with his refusal to recognize the certification of election results on the basis that it was signed by only two of the four Election Committee members. See the discussion immediately following.

"11:17 p.m.," and the four signatures appear. 11/ The paper includes no certification statement nor any other indication of its purpose. This paper is simply too vague to be construed as an election certification, and the Board declines to so construe it.

Because the Tribe had no election ordinance, there was no formal requirement that all, or any given number of, Election Committee members sign the certification of election results. The intent of the General Council in establishing the committee should therefore be ascertained, if possible. It appears that the General Council intended the committee to be comprised of an equal number of representatives from each of the two factions of the Tribe. See Transcript of July 24, 1991, meeting at 12. In light of this intent, it is very unlikely that the General Council intended for the election results to be certified by only two of the four committee members, because that would mean that the representatives of one faction could control the certification.

Under these circumstances, it was appropriate for the Area Director to decline to recognize a certification signed by only two of the four Election Committee members. The Board affirms the Area Director's conclusion that the election results were not properly certified.

The first and third bases for the Area Director's decision are sufficient to support the decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Sacramento Area Director's March 12, 1992, decision is affirmed as modified by deletion of the second basis for the decision.

//original signed
Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

11/ From the copies included in the record, this paper appears to be much smaller than the paper upon which the election results are recorded. Therefore, it appears unlikely that it is actually the back of the paper on which the election results were recorded. Without the original documents, it is not possible to tell for certain.