INTERIOR BOARD OF INDIAN APPEALS

Ronald Johnson, et al. v. Acting Minneapolis Area Director, Bureau of Indian Affairs

28 IBIA 104 (07/11/1995)

United States Department of the Interior

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

RONALD JOHNSON and GERALDINE WALKER, Appellants	:	Order Affirming Decision
v.	:	Docket No. IBIA 95-29-A
ACTING MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	July 11, 1995

Appellants Ronald Johnson and Geraldine Walker seek review of a December 17, 1993, decision issued by the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a December 3, 1993, tribal election held by the Prairie Island Indian Community (Community). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

An election for members of the Community's tribal council was scheduled for December 3, 1993. The election was to be held in accordance with the Community's Constitution and Amended Election Ordinance #3. Appellants were election judges for this election. Lucy Benway and Chris Leith were alternate election judges. There is some indication that Benway withdrew as an alternate election judge before the election and did not participate as a judge in the election.

The election was held as scheduled. Pursuant to an unsigned memorandum sent to the Community's eligible voters by "Election Judges and Clerks," absentee ballots were counted if they were postmarked on or before December 3, 1993, and were received in the Red Wing Post Office by 4 p.m. on December 6, 1993.

On December 10, 1993, appellants, in their capacity as election judges, issued an "order" stating that because of irregularities with the election, they declined to certify the results of the election, declared the election null and void, and requested that the Tribal Council set a date for a new election. As set forth at pages 3-4 of their opening brief, appellants decided not to certify the results of the election because:

1. The ballot box was opened twice prior to its final counting.

2. Poll watchers interjected themselves in the counting process and this icontrary to the role which they are assigned within the Election Ordinance. Additionally, at least one candidate had more than one poll watcher.

3. There was not a final vote count upon the closing of the polls on Election Day as is required by paragraph 7 of the ordinance.

4. There is no provision for absentee voting within the Ordinance and, accordingly, the extension of the time in which the poll was to close to accommodate absentee voters was in error.

5. The ballot box was opened on Friday, December 3, 1993, and a preliminary count released. The preliminary count, however, was not a preliminary certification and did not purport to be such. It was an error to release the preliminary count, as this may have affected others who had not voted and permitted to vote later [sic].

On December 15, 1993, the Area Director wrote to the Community's Chairman, noting her receipt of the December 10 order. The Area Director stated that, "until the election results are certified by the Election Judges," BIA could not recognize any tribal officials.

By letter dated December 16, 1993, Leith, as the alternate election judge, certified the election results. On December 17, 1993, the Area Director recognized the newly elected officials.

On January 17, 1994, appellants sent a notice of appeal to the Area Director. This appeal sought review of the December 17, 1993, recognition of the election results, and ended: "Please forward this appeal for consideration by the proper officials." The Area Director states in his answer brief that an Area Office employee attempted unsuccessfully to contact appellants in order to inform them of the proper appeal process. Apparently, the Area Office took no further action in regard to the notice.

By letter dated September 30, 1994, appellants sought Board review of the Area Director's December 17, 1993, decision. In an October 4, 1994, predocketing notice, the Board noted that the appeal appeared untimely on its face, but stated that nothing in the materials appellants filed showed that they had been given proper appeal information as is required by 25 CFR 2.7. The Board stated: "If any party can show that appellants were given proper appeal information but failed to file a timely appeal in accordance with those instructions, the Board will dismiss this appeal."

Briefs were filed by appellant, the Area Director, and the Community.

Both the Community and the Area Director seek dismissal of this appeal based on the appellants' alleged personal knowledge of the appeal regulations, including the 30-day time limit for filing a notice of appeal. The Community first raised this argument in a pre-briefing motion. The Board denied the motion, but stated that it could be renewed. The Community renewed the motion to dismiss in its answer brief, relying primarily on the doctrine of laches.

The Area Director supports his motion by referring to an October 20, 1994, letter from appellant Walker to the Board in which Walker states that appellants had been advised of the 30-day deadline for filing a notice of appeal by an attorney who was assisting them; and a statement made by the Community's assistant general counsel that both appellants, as members of the election board, had been involved in and informed of the appeal process in connection with another matter. Walker disputes the latter statement.

25 CFR 2.7 provides:

> (a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.
>
> (b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.
>
> (c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day tine limit for filing a notice of appeal.

25 CFR 2.7(c) plainly requires a BIA deciding official to include in "[a]ll written decisions" an identification of the official to whom an appeal may be taken and a statement concerning the 30-day time limitation for filing an appeal (emphasis added). The regulation does not authorize any exceptions to this requirement. The Board declines to create judicially a "personal knowledge" exception from the requirement that BIA deciding officials inform persons affected by their decisions of the appeal procedures. Accordingly, this appeal is considered timely filed.

Citing several Board cases, both the Community and the Area Director argue that appellants are before the wrong forum, and that they should have sought relief from the Community's tribal court. The Community states:

> The Prairie Island Tribal Court is fully operational. The Community's judicial code was passed by the Community Council in December, 1992 and later approved by the [Area Director] in November, 1993. * * * The jurisdiction of the Prairie Island Tribal Court extends to all matters in which the Prairie Island Indian Community is a party. Title 1, chapter II, Section 1(e) Prairie Island Judicial Code.

(Answer Brief at 5-6). The Area Director agrees that a functioning tribal court exists, noting that the court "has been acknowledged by Minnesota state courts as recently as December 19, 1994" (Answer Brief at 7). See Matsch v. Prairie Island Indian Community, Court File No. 25-C6-94-1170 (Goodhue County, MN) .

Although appellants had earlier contended that they were not aware of the existence of a tribal court, they did not repeat this contention in their briefs, or dispute the existence or jurisdiction of the tribal court. Instead, they contend that, in acting on the certification of the election by an alternate election judge, the Area Director intervened in the election by failing to defer to their reasonable interpretation of tribal law, made in their official capacity as election judges.

Based on appellants' failure to dispute the information presented by the Community and the Area Director concerning the tribal court, the Board concludes that the Community has a functioning tribal court with jurisdiction over the subject matter of this case.

The correctness of the Area Director's decision to recognize the results of the December 3, 1993, tribal election is secondary to appellants' primary dispute over whether the election was properly conducted, whether the alternate judge had authority to certify the results of the election, and their new contention that Leith was coerced into certifying the results of the election. These questions raise an intratribal dispute within the jurisdiction of the tribal court.

The Board has consistently upheld the jurisdiction of tribal courts to review intertribal disputes, and has deferred to tribal court jurisdiction when a BIA decision is secondary to an intertribal dispute. See, e.g., Simpson v. Acting Billings Area Director, 27 IBIA 300 (1995) ; Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79, 80 (1993) ("The Federal policy of respect for tribal courts, and of support for tribal self government in general, counsels abstention by a Federal forum in a case in which a tribal forum has primary jurisdiction"). See also Middlemist v. Secretary of the Interior, 824 F. Supp. 940, 946-47 (D. Mont. 1993) ("[T]he authority of the Tribal Council to promulgate and enforce [a tribal ordinance] * * * is determinative of all of Plaintiff's claims, including the correctness of the BIA's approval and subsequent funding of the Ordinance"), aff'd, 19 F.3d. 1318 (9th Cir.), cert. denied, 115 S.Ct. 420 (1994).

The tribal court, not BIA or this Board, is the proper forum to consider appellants' claims. If the tribal court holds for appellants, BIA can be asked to withdraw its recognition of the election results.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Minneapolis Area Director's December 17, 1993, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge