INTERIOR BOARD OF INDIAN APPEALS

Frederick Tomah, et al. v. Acting Eastern Area Director, Bureau of Indian Affairs

30 IBIA 92 (11/05/1996)

United States Department of the Interior

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

FREDERICK TOMAH, DANYA BOYCE, SALLY LINDSAY, and ANTHONY TOMAH, Appellants	:	Order Affirming Decision
v.	:	Docket No. IBIA 96-17-A
ACTING EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	November 5, 1996

Appellants Frederick Tomah, Danya Boyce, Sally Lindsay, and Anthony Tomah seek review of that part of an October 4, 1995, decision of the Acting Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), in which the Area Director declined to alter the manner in which BIA implements the government-to-goverment relationship with the Houlton Band of Maliseet Indians (Band). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that part of the Area Director's decision.

The Band was recognized by Congress in the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1994). It did not adopt a constitution. The only governing document the Band has which has been cited as relevant to this appeal is an election ordinance initially adopted on March 6, 1987, and subsequently amended.

On May 27, 1995, appellants Boyce, Anthony Tomah, and Lindsay were elected to the Band's tribal council. On September 22, 1995, Clair Sabattis was elected tribal chairman, and Mary Joseph, Gerald Hanning, and appellant Frederick Tomah were elected to the tribal council.

A dispute arose within the tribal government, and escalated into occupation of the tribal administration building by appellants. When a negotiated resolution of the dispute was not successful, Sabattis apparently called a special general membership meeting for October 1, 1995.

The minutes of the October 1, 1995, meeting show that appellants did not attend the meeting, although Sabbatis and council members Joseph and Hanning did. A motion was made and carried to remove appellants from their positions on the tribal council. Immediately following the removal vote, nominations were taken to fill temporarily four vacancies on the tribal council. Four individuals were elected to replace appellants.

On October 2, 1995, Sabattis wrote to the Area Director asking BIA to determine which part of the tribal government had authority to act on behalf of the Band. The Area Director responded on October 4, 1995, with the decision now under review. She noted that BIA had previously required that any document committing the Band be signed by the chairman and supported by a tribal council resolution, and stated that appellants had requested BIA to

discontinue this practice and instead to accept as binding any tribal council resolution adopted by a majority vote of the tribal council. The Area Director continued:

> While this office certainly recognizes the authority of a tribal government to evolve and change its preferred manner of dealing with [BIA], we do not believe that we have sufficient justification in this case to recognize that the primary authority to conduct the affairs of the [Band] has shifted from, the individual who is elected to the position of tribal chairman to a majority of the tribal council.
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> The only document that this office has on file that can reasonably be viewed as an organic governing document is the tribal election ordinance of May 12, 1994. * * *
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> While the [Band's] election ordinance does not directly address the particular powers and/or authorities of the tribal chairman's position vis-a-vis the powers/authorities of tribal council members, the ordinance does indicate in several instances that the position of tribal chairman is viewed as being different or unique from positions occupied by members of the council. For instance, at title 5, sec. 501, page 3, of the election ordinance islanguage as follows: "Any elector is eligible to be a candidate for Chairman or member of the Council except anyone who has been removed from office." Since language of the section specifically mentions the chairman's position apart from positions on the tribal council, the inference is clear that the chairman's position is intended to be treated differently from tribal council positions. Again, at title 5, sec. 501, page 4, of the election ordinance, specific mention is made of the different manner in which nominating petitions for the office of tribal chairman are to be presented as opposed to nominating petitions for candidates for tribal council positions.
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> Based on the only organic governing document that the Houlton Band has thus far produced--the tribal election ordinance--there, is justification for this office's dealings with the tribe in a manner which accords the tribal chairman governmental authority distinct from that of members of the tribal council. The language of the tribal election ordinance singles the position out as being distinguishable from other elected governmental positions.
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> Before this office would be justified in altering its manner of conducting the government-to-government relationship with the Houlton Band to conform with the request of [appellants], we would require the tribe to express clearly its preference in a tribal constitution or--at the very least--in a tribal resolution approved by the full voting membership of the tribe in general council. To date, it has not been proven by [appellants] that such a change is favored by the majority of the tribal membership and this office will not accept a change of such significance without assurance that it is wanted by the Houlton Band's members.

> We are in receipt of information that [appellants] were summarily removed from office at a purported general council meeting on October 1, 1995. This office does not recognize such removal because there is strong indication that the pertinent provisions of the tribe's election ordinance were not followed. Title 2, section 203, page 2, of the election ordinance sets forth the procedures for recall of elected officials. It must be shown that these procedures were utilized before duly elected tribal officials can be recognized as removed from office. Individuals who were selected to replace [appellants] on the tribal council at the October 1 meeting are not recognized, at this writing, as being members of the Houlton Band tribal council by this office.

(Decision at 2-3).

On October 16, 1995, Sabattis wrote the Area Director and submitted additional information about the October 1 meeting and the actions taken at it.

The Area Director's October 4 decision did not provide the parties with information concerning their right to appeal. Therefore, by letter dated October 19, 1995, the Area Director provided that information to both sides in this dispute.

On October 23, 1995, Sabattis asked the Area Director to reconsider that part of her October 4 decision declining to recognize those individuals elected as temporary council members at the October meeting. By letter dated October 30, 1995, the Area Director declined to reconsider her decision.

Appellants appealed from that part of the Area Director's decision in which she declined to alter the manner in which BIA conducts government-to-government relations with the Band.

In her October 4, 1995, decision, the Area Director stated that BIA's established manner of conducting government-to-government relations with the Band was based on an interpretation of the election ordinance as placing special governmental authority with the chairman, distinct from that given to the tribal council. The election ordinance provides little guidance to either the Band or the Department concerning the Band's governmental structure. However, from all indications, this interpretation of the election ordinance has been known for some time, and both the Band and BIA have operated under it. The Board concludes that the Area Director properly declined to alter the established manner in which BIA has been dealing with the Band in the absence of definitive evidence that such a change was desired by the tribal membership--as opposed to being desired by a faction of the tribal council which is attempting to control the Band's governmental affairs during a serious internal crisis. Therefore, it affirms this part of the Area Director's decision.

The Band claims to have appealed from that part of the Area Director's decision in which she declined to recognize those individuals elected on October 1, 1995. The Board interprets this filing, and all others made in

the name of the Band, to be from Sabbatis and those individuals either not removed from, or elected to, the tribal council on October 1, 1995. These individuals will be referred to collectively as "Sabbatis."

In late January 1996, the Area Director forwarded to the Board a copy of a document Sabbatis had filed with her. The Board received this document on January 18, 1996. The document is dated December 8, 1995, and is entitled "Statement of Reasons Re: Notice of Appeal dated November 9, 1995."

By order dated February 22, 1996, the Board requested information from Sabbatis about this possible appeal. The Board received Sabbatis' response on March 4, 1996. The response included copies of a November 9, 1995, notice of appeal and the December 8, 1995, statement of reasons. By order dated March 6, 1996, the Board declined to determine at that time whether the November 9, 1995, filing with the Area Director was a timely notice of appeal, stating that the question could be addressed in this decision.

The Board now reaches that question. The Area Director's October 19, 1995, letter stated:

> Our decision may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.340 (copy enclosed). Your notice of appeal to the Board must be signed, by you or your attorney and <u>must be mailed within 30 days of the date of this letter</u>. It should clearly identify the decision being appealed. * * * You must send copies of your notice of appeal to (1) the Assistant Secretary - Indian Affairs * * *, (2) each interested party known to you, and (3) this office." Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties.
>
> If no appeal is timely filed, our decision of October 4, 1995, will become final for the Department of the Interior 30 days from the date of this letter. No extension of time may be granted for filing a notice of appeal. [Emphasis in original.]

In her October 30, 1995, letter declining to reconsider the October 4, 1995, decision, the Area Director further stated:

> On October 19, 1995, a letter directed to you and to [appellant] Fred Tomah was hand delivered to you by the Area Tribal Relations Specialist. A duplicate of the letter is enclosed. * * * The letter gives a full explanation of how to appeal the October 4 decision to a superior authority within the Department of the Interior in the event that you are dissatisfied with any part of the decision. We advise you to review the October 19 letter and the regulatory material and take advantage of the appeal process that is available to you and any other interested party.

The Board finds that although the Area Director's statements of the right to appeal to the Board were not correct in all particulars, the Area

Director clearly and correctly informed Sabbatis that any notice of appeal was to be filed with the Board, and provided a copy of the Board's appeal regulations. Instead of following these instructions, Sabbatis chose to file his notice of appeal with the Area Director.

The Board has consistently held that a notice of appeal is not timely when the party seeking to appeal has been informed that a notice of appeal must be filed with the Board, but files his/her notice of appeal with an official other than the Board, resulting in receipt of the notice of appeal by the Board outside the time period specified in the regulations. Simon v. Sacramento Area Director, 29 IBIA 59 (1996); After Buffalo v. Acting Billings Area Director, 28 IBIA 131, recon. denied, 28 IBIA 159 (1995); Blanchard v. Sacramento Area Director, 27 IBIA 134 (1995).

The Board concludes that Sabbatis failed to file a timely notice of appeal. Therefore, because there is no appeal before the Board challenging that part of the Area Director's October 4, 1995, decision declining to recognize the results of the October 1, 1995, recall election, the Board does not consider any issue relating to the attempted recall of appellants, or any subsequent election the Band may have held, even though the parties have addressed those matters.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Eastern Area Director's October 4, 1995, decision declining to alter the way in which BIA conducts government-to-government relations with the Houlton Band of Maliseet Indians is affirmed. 1/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judg

1/ This decision does not affect the status of any order entered by the Superior Court for the State of Maine, Aroostook County, in Houlton Band of Maliseet Indians v. Boyce, Docket No. CV-95-236, or by any State appellate court which might be called upon to review any orders of the Superior Court.