



INTERIOR BOARD OF INDIAN APPEALS

Ronald Peltier v. Great Plains Regional Director, Bureau of Indian Affairs

46 IBIA 16 (10/15/2007)

Related Board case:
41 IBIA 279



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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RONALD PELTIER,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	
)	Docket No. IBIA 05-87-A
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee)	October 15, 2007

Appellant Ronald Peltier appealed to the Board of Indian Appeals (Board) from a June 21, 2005, decision (Decision) of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director approved an amendment to Article V, Section 4(a) (Amendment) of the Constitution of the Turtle Mountain Band of Chippewa (Tribe).¹ The Amendment disqualifies individuals from running for elected tribal office who have been convicted of misdemeanor fraud, embezzlement, forgery, or thefts of monies entrusted to the tribal government. Appellant challenges the adoption of the Amendment on two grounds: (1) the requisite number of voters did not participate in the election as required under the Tribe's Constitution; and (2) a prohibition on individuals who had been convicted of certain misdemeanor crimes from running for tribal office violates the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302. We dismiss Appellant's appeal on the grounds that Appellant failed to exhaust tribal remedies with respect to his procedural challenge to the election and because he lacks standing to mount a substantive challenge to the Amendment.

¹ In the same June 21, 2005, decision, the Regional Director disapproved amendments to Article II of the Tribe's Constitution that addressed the territory and jurisdiction of the Tribe. The Tribe appealed that portion of the Decision that disapproved the Article II amendments to the Board. The Board dismissed the Tribe's appeal for failure to prosecute. *Turtle Mountain Band of Chippewa Indians v. Great Plains Regional Director*, 41 IBIA 279 (2005).

Background

Approximately 20 years ago, Appellant served on the Tribe's Tribal Council. While in office, Appellant "pled guilty to a misdemeanor offense involving misuse of tribal funds." Letter from Appellant to Regional Director, Dec. 16, 2004, at 1. Appellant explained that he gave "tribal members less than \$100.00 to pay for housing during the wintertime [and] obtained no personal benefit." *Id.* at 1, n.1. The record does not reflect whether he served on the Tribal Council or in any other elected tribal office following his conviction.

Sometime prior to July 22, 2004, Appellant became a candidate for Tribal Chairman for which the primary was set for October 19, 2004. On July 22, 2004, after Appellant's candidacy became known, the Tribal Council adopted Resolution No. TMBC2737-07-04, which called for an election to amend the Tribe's Constitution to disqualify individuals who had been convicted of misdemeanor fraud, embezzlement, forgery, or theft of monies entrusted to the tribal government from running for elected tribal office.

Elections to amend the Tribe's Constitution are governed by Section 1 of Article XIII of the Tribe's Constitution, which provides:

This Constitution and Bylaws may be amended by a majority of the qualified voters of the [Tribe] at an election called for that purpose; provided that at least twenty (20%) of the resident voters of the Tribe entitled to vote shall vote in such election, but no amendment shall become effective until it shall have been approved by the Secretary of the Interior or his delegated representative.^[2]

Pursuant to this provision, an election to amend Article V, Section 4, of the Tribe's Constitution was held on October 19, 2004. Section 4(a), with the proposed change italicized, provides as follows:

To become a candidate for an elected position, a person must (1) be an enrolled member of the [Tribe], (2) be twenty-five years of age or over, (3) have not been convicted of a felony, (4) *have not been convicted of misdemeanor fraud, embezzlement, forgery or theft of monies entrusted to the*

² Apparently additional regulations governing elections to amend the Tribe's Constitution are found in the Tribe's election code. Only one page from the Tribe's election code has been submitted to the Board in the administrative record, and Appellant contends that it was subsequently revised.

Tribal Government, and (5) must reside within Rolette County. In addition, candidates for District Representative must reside in the district they seek to represent.

A total of 3,643 tribal members voted in the election and 2,110 of those voters voted in favor of the Amendment. The Tribe then submitted the Amendment to BIA for approval pursuant to Article XIII of the Constitution.³ During the same election, Appellant received the highest number of votes for the position of Tribal Chairman, which entitled him to run in the general election.

Shortly following the election, a dispute apparently arose as to whether the Tribe's adoption of the Amendment disqualified Appellant from running in the general election. An action apparently was filed in tribal court to remove Appellant's name from the ballot or otherwise prohibit or disqualify his candidacy. According to Appellant, a tribal court judge ruled that Appellant was entitled to run in the general election, but held that the Amendment would bar him from running in any future elections.⁴

The general election was held in November 2004 with Appellant's name on the ballot. Appellant was not elected.

On December 16, 2004, Appellant, through counsel, wrote to the Regional Director to request that BIA disapprove the Amendment. Appellant challenged the Amendment on both procedural and substantive grounds. Appellant first argued that the requisite number

³ A resolution or letter requesting the Regional Director to approve the Amendment has not been included in the record.

In addition, we note that the Tribe is not organized under the Indian Reorganization Act (IRA), 48 Stat. 984 (June 18, 1934). Thus, the election to amend the Tribe's Constitution was not required to be a "Secretarial election" within the meaning of 25 C.F.R. § 81.1(s) (defining "Secretarial election" as an "election held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from *tribal* elections which are conducted under tribal authority)"). See 25 U.S.C. § 476(d)(1).

⁴ Appellant briefly summarizes the tribal court dispute in a December 16, 2004, letter to the Regional Director, but no other information concerning the dispute has been included in the record before the Board. It is unclear whether, in addition to the dispute over whether the Amendment barred Appellant from running for office in the general election, the tribal court judge also considered the arguments raised in this appeal by Appellant.

of tribal members had not voted in the election. Appellant asserted that, under the Tribe's Constitution, 20 percent of all eligible voters were required to vote in the primary for there to be a valid adoption of the Amendment. He asserted that there were 24,090 eligible voters; that 4,818 votes (20 percent of 24,090) were required to be cast for the election to be valid; and that the 3,643 votes cast in the October 19 election did not satisfy the 20 percent requirement. Appellant also argued that the Amendment violated the equal protection and due process clauses of ICRA, that the Amendment was impermissibly vague, and that the Amendment was "put before the [Tribe] . . . with the express purpose of keeping [Appellant] from holding elected office." Letter from Appellant to Regional Director, Dec. 16, 2004, at 3.

By letter to the Tribe dated June 21, 2005, the Regional Director approved the Amendment. He did not refer to Appellant's December 16, 2004, letter nor did he respond to the arguments raised by Appellant or provide any explanation for his approval. However, a January 27, 2005, letter from the Field Solicitor to the Regional Director included in the record before the Board explains that the Turtle Mountain Agency (Agency) viewed the Amendment as "a commendable effort to have a 'clean' tribal government." Letter from the Field Solicitor to Regional Director, Jan. 27, 2005, at 3.⁵

Appellant appealed the Regional Director's decision to the Board. As his opening brief, Appellant submitted his December 16, 2004, letter to the Regional Director. The Regional Director filed an answer brief, and Appellant filed a reply brief.

Discussion

A. Appellant's Procedural Challenge

Appellant claims that the Tribe disregarded its Constitution in approving the passage of the Constitutional amendment because less than 20 percent of the Tribe's eligible voters cast ballots in the election. We conclude that Appellant was required to present this claim in the first instance to the Tribe's election board, tribal court, or other appropriate forum and exhaust his tribal remedies. Because Appellant has not demonstrated or even alleged

⁵ The Field Solicitor's letter cites a referral memo from the Agency, but the record provided to the Board does not include the referral memo.

that he has done so, we dismiss his claim insofar as it concerns election procedures to amend the Tribe's Constitution.⁶

The claim, as framed by Appellant, turns only on tribal law: For purposes of amending the Tribe's Constitution, whether voter turnout — as determined by the Tribe's Constitution — was sufficient on October 19, 2004. Appellant maintains that voter turnout was insufficient, notwithstanding that a majority of the votes cast favored the adoption of the Amendment. Appellant acknowledges that Article XIII of the Tribe's Constitution requires “a majority vote of the qualified voters of the [Tribe] . . . provided that at least twenty per cent (20%) of the *resident* voters entitled to vote shall vote in such election” to amend the Tribe's Constitution. Constitution, Art. XIII, Section 1 (emphasis added). Appellant acknowledges that the Tribe consistently has calculated “20% of the *resident* voters entitled to vote” as 20 percent of the voters who voted in the last general election. Reply Brief at 7 n.2 (emphasis added).⁷ However, Appellant argues that when the Tribe amended Article V of its Constitution in 2000 to eliminate the residency requirement, the amendment also effected the elimination of the residency requirement in Article XIII even though no amendment to Article XIII was on the ballot in 2000. He

⁶ We note that the parties agree that Appellant has standing to appeal the alleged improprieties in the election. Ordinarily and as a matter of administrative economy, the Board applies Federal constitutional principles of standing, as outlined in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), as well the Federal prudential principles of standing found in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990). *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 188 n.12 (2007). However, where the challenge is to a tribal election held pursuant to tribal law *and* is raised in an appeal from a decision of a Regional Director whose review occurs as a matter of tribal law, rather than Federal law, it would be appropriate to apply tribal law on standing. *See, e.g., Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Since we dismiss this claim on alternate jurisdictional grounds, we need not determine whether Appellant has standing pursuant to tribal law to challenge the sufficiency of votes cast in the October 19, 2004, election to amend the Tribe's Constitution.

⁷ Apparently, Article V of the Tribe's Constitution required that the voter reside in Rolette County for 30 days prior to the election in order to be eligible to vote. Because it was difficult to determine the residency of all enrolled members of the Tribe during the thirty days prior to an election to amend the Constitution, the Tribe passed a resolution sometime prior to 1993 that interpreted the 20 percent requirement to mean 20 percent of “the number of voters that took part in the latest previous General Election.” Letter from the Field Solicitor to Area Director, Jan. 14, 1993, at 3.

argues that the Tribal Council effected a change to section 13.0201(7) of the Tribe's Elections & Recall Code "to define 'resident voter' as 'all voters entitled to vote in the Tribal Elections.'" Letter from Appellant to Regional Director, Dec. 16, 2004, at 2. Thus, according to Appellant, because there were 24,090 eligible voters for the October 19 election, a minimum of 20 percent of the 24,090 voters (4,818 voters) were required to cast ballots that day and a majority of those (a minimum of 2,410) must vote in favor of the Amendment to successfully amend Article V, Section 4. Instead, a total of only 3,643 voters cast ballots, of which 2,110 voted to approve the Amendment.

The Regional Director responds that Appellant failed to raise this argument in a challenge before the Tribe's election board and therefore is barred from raising it now. Appellant does not respond to this argument in his Reply Brief and there is no evidence in the record that Appellant has brought his procedural challenge before the election board or other appropriate tribal forum.⁸

We agree with the Regional Director. Matters that raise issues governed by tribal law must be determined in the first, if not the only, instance by the Tribe itself absent a compelling Federal reason to do otherwise. See *Yeahquo v. Southern Plains Regional Director*, 36 IBIA 11, 12 (2001) ("Where a BIA decision concerns an intra-tribal matter, the BIA decision is secondary to a decision by a tribal forum in that matter [and t]herefore, the Board customarily requires that tribal remedies be exhausted before a tribal member may seek relief from the Board"). This tenet particularly holds true for tribal elections that are not Secretarial elections. See *Displaced Elem Lineage Emancipated Members Alliance v. Sacramento Area Director*, 34 IBIA 74, 77 (1999). To inject BIA's analysis of a purely tribal issue into a tribal dispute before the Tribe itself has addressed the issue unnecessarily intrudes into the Tribe's sovereign rights to govern itself. See *Stops v. Billings Area Director*, 23 IBIA 282, 283 (1993). Therefore, we conclude that Appellant is required to exhaust his tribal remedies prior to seeking review of the Regional Director's decision. Doing so is consistent with "the Federal policy of respect for tribal self-government and the principle that intra-tribal disputes should be resolved in tribal forums." *Displaced Elem Lineage Emancipated Members Alliance*, 34 IBIA at 77. Therefore, we dismiss this claim for failure to exhaust tribal remedies.

⁸ Although Appellant apparently challenged the Amendment in tribal court, none of the pleadings or decision from that proceeding were submitted by the parties. Moreover, nothing in the record informs us whether the tribal court would be the appropriate tribal forum in which to raise this issue in the first instance.

B. Appellant's Substantive Challenge

Appellant also argues that the Amendment violates ICRA. The Regional Director argues that Appellant lacks standing to object to the Department's approval of the Amendment on substantive grounds. We agree with the Regional Director. We conclude that Appellant has failed to show any actual or imminent, concrete or particularized injury from the Regional Director's decision.

The Board follows the three elements of standing described in *Lujan*, 504 U.S. at 560-61. *Washoe Tribe of Nevada and California v. Western Regional Director*, 45 IBIA 180, 183 (2007).⁹ Under *Lujan*, an appellant must show that (1) it has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally-protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. 504 U.S. at 560-61.

The first prong of standing requires Appellant to show that he has suffered an actual or imminent, concrete or particularized injury to a legally-protected interest. Although there is no fundamental right to run for public office, *see Clements v. Fashing*, 457 U.S. 957, 963 (1981), it cannot reasonably be disputed that there is a legally-protected interest in running for election, *cf. id.* at 962-63. However, the injury to that legally-protected interest must have some "imminence" in its effect on the appellant. *Lujan*, 504 U.S. at 564. "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is 'certainly impending.'" *Id.* at 564 n.2; *compare Gralike v. Cook*, 996 F. Supp. 889, 896 (W.D. Mo. 1998) (plaintiff established standing where he stated that he planned to run for Congress in a particular district in the next election, outlined his plans to take the formal steps required under state law to declare candidacy, and stated that he intended to file for candidacy as soon as state law allowed him to do so) and *Clements*, 457 U.S. at 961-62 (standing was established where plaintiffs, who currently held office, would automatically forfeit their positions under the challenged provision if they ran for judicial office; plaintiffs asserted that, but for the challenged provision, they would run for judicial office) *with Lujan*, 504 U.S. at 564 (plaintiffs' profession of an intent to return to places they had visited before, but without any description of concrete plans, or any specification of when the some day will be, did not support finding of actual or imminent injury).

⁹ We apply the Board's principles of standing to Appellant's substantive claim, rather than tribal principles, because Appellant's substantive challenge to the Amendment — that it violates ICRA — is brought under Federal law.

The Regional Director relies on the Board's decisions in *Welbourne v. Anadarko Area Director*, 26 IBIA 69 (1994) and *McKay v. Acting Rocky Mountain Regional Director*, 36 IBIA 61 (2001), which held that a tribal member lacks standing to object to the Department's action in approving or disapproving a constitutional amendment adopted in a Secretarial election held under 25 C.F.R. Part 81. See *McKay*, 36 IBIA at 62; *Welbourne*, 26 IBIA at 78.

Appellant responds that he has standing to challenge the substance of the Amendment. He contends that the cases relied on by the Regional Director to show that he lacks standing are inapposite.¹⁰ Appellant argues that enforcement of the Amendment at issue will "directly harm" him. Reply Brief at 6. Appellant maintains that the Amendment, if upheld, disqualifies him from running for office. He asserts that, "if the [A]mendment is enforced against him, as it will be, his civil rights will be violated." *Id.* at 5. Appellant asserts that he is a "politically active member of the [Tribe]." Letter from Appellant to Regional Director, Dec. 16, 2004, at 1.

Appellant does not assert that he actually has been barred from running for tribal office or that he has any intention of running again for tribal office, much less any specific plans to do so. As such, there is no injury to him at the present time. It is not enough to claim that "if the [A]mendment is enforced against him . . . his civil rights *will* be violated" because the alleged injury is too speculative. Reply Brief at 5 (emphasis added). Put another way, he has not articulated an imminent injury. If we were to render an opinion on the validity of the Amendment where there is no particularized or imminent injury to Appellant, it would be an unwarranted intrusion into tribal matters. We conclude that Appellant has not met the threshold requirement of standing to bring this appeal.

Because Appellant has not shown that the Amendment has been applied to him or that he intends to run in a specific future election where the Amendment would be applied against him, we conclude that he has not established a sufficiently imminent threat of injury at this time. Therefore, Appellant lacks standing to challenge the Amendment as a violation of ICRA.

¹⁰ Appellant points out that *McKay* and *Welbourne* concerned Secretarial elections held pursuant to 25 C.F.R. Part 81 and that the plain language of Part 81 allows challenges to the conduct of the election but not to the substance of a constitutional amendment. Appellant notes that the election in this appeal was held pursuant to tribal law, and that the Board's reasoning in *McKay* and *Welbourne* does not apply. Because of our conclusion that Appellant has not shown an injury from the Regional Director's decision, we need not address the parties' arguments concerning these cases.

Conclusion

We find that Appellant is barred from raising his procedural challenge to the Amendment because he did not exhaust his tribal remedies. As to Appellant's substantive challenge, we conclude that Appellant lacks standing to challenge the substance of the Amendment.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge