



INTERIOR BOARD OF INDIAN APPEALS

Ken Mosay and Mary Washington v. Minneapolis Area Director,
Bureau of Indian Affairs

27 IBIA 126 (01/19/1995)



United States Department of the Interior

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

KEN MOSAY AND MARY WASHINGTON

v.

MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-72-A

Decided January 19, 1995

Appeal from a decision recognizing the results of a tribal election.

Affirmed.

1. Board of Indian Appeals: Generally--Indians: Tribal Government: Judicial System--Indians: Tribal Powers: Tribal Sovereignty

In a case where exhaustion of tribal remedies is required, appellants before the Board of Indian Appeals cannot avoid the requirement simply by alleging that the tribal court lacks jurisdiction over the matter at issue. Instead, they must take the matter to the tribal court so that the court may determine its own jurisdiction.

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

In implementing the government-to-government relationship with an Indian tribe, the Bureau of Indian Affairs has the authority and responsibility to decline to recognize the results of a tribal election when the election was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988). The fact that the Bureau bears this responsibility, however, does not mean that tribal members seeking to challenge an election may bypass a tribal forum in order to allege violations of the Act before the Bureau.

3. Board of Indian Appeals: Generally--Indians: Generally

The Board of Indian Appeals is not required to consider evidence presented for the first time on appeal.

APPEARANCES: Mark A. Jarboe, Esq., Minneapolis, Minnesota, for appellants; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director; Howard J. Bichler, Esq., Hertel, Wisconsin, for the St. Croix Chippewa Indians of Wisconsin.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Ken Mosay and Mary Washington seek review of a February 3, 1994, decision of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), recognizing the results of a July 31, 1993, election conducted by the St. Croix Chippewa Indians of Wisconsin (Tribe). For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On June 12, 1993, the Tribe conducted an election for the five positions on the St. Croix Tribal Council. ^{1/} Appellants were among the apparently successful candidates. However, the election was challenged and, after considering the challenges, the Tribe's Election Board ordered that a new election be conducted. The second election was held on July 31, 1993. This time, appellants were not elected.

Appellant Mosay and others filed challenges to the July 31, 1993, election with the Election Board, which rejected them. In response to an inquiry from the Superintendent, Great Lakes Agency, BIA, the Election Board reported:

During the course of the five working day challenge period, ten (10) individual tribal members filed a total of twelve (12) challenges with the Election Board.

* * *

Upon review of the filed challenges, the Election Board identified four (4) issues among all the allegations relating to the election process as being proper for election board disposition. Those were 1) alleged voting by ineligible voters; 2) residency of a council candidate; 3) "vagueness" of the voter eligibility list; and 4) the presence of candidates at the vote tally.

* * * After [an August 10, 1993,] hearing, the Election Board met and made the following findings and decisions:

1) review of all poll lists revealed that no ineligible voters participated in the election;

^{1/} Under Article IV of the Tribe's Constitution, the Tribal Council consists of five members elected biennially. At the time of the June 12, 1993, election, appellants were incumbent members of the Council.

2) residency of the candidate in question had been previously verified by the board by letter from the housing authority and such candidate was certified as eligible to run for office;

3) "vagueness" of voter eligibility list allegation was dismissed for lacking a concise statement as required by the election ordinance; and

4) presence of candidates at the vote tally, while not prohibited under the ordinance, gave rise to a recount of votes for candidates in the Big Round Lake Community. The recount was held on August 11, 1993 and was open to the public. The results of the recount were identical to the original tally and had no bearing on the final election results.

With respect to the allegations of wrongful campaign practices of certain candidates, the Election Board found that such activities, whether provable or not, were beyond the scope of authority within which the board is empowered to act.

Finally, the Election Board found the allegation of election interference by a partner of the [Tribe's] gaming management company to be an issue involving the contracting parties and outside the scope of the board's authority. I have been informed that this issue will be addressed by the contracting parties in the near future.

(Aug. 16, 1993, Letter from Election Board's Legal Affairs Specialist to Superintendent at 1-2).

On August 19, 1993, the superintendent informed the members of the Tribal Council that he was satisfied with the actions of the Election Board concerning the matters within its jurisdiction. He also congratulated the new Tribal Council members upon their election, in essence recognizing the election as valid. He requested, however, that the Tribal Council review the allegation concerning interference in the election by a partner of the Tribe's gaming management company and inform BIA whether it considered the allegation to be true. On August 23, 1993, the Tribal Council responded that it did not consider the allegation true. It stated further that Tribal Council members who were present when the interference was alleged to have taken place had made notarized statements rebutting the allegation.

By letter of August 20, 1993, appellants formally requested that the Superintendent decline to recognize the results of the July 31 election. At about the same time, other tribal members filed complaints with the Superintendent, making various allegations of election irregularities.

The Superintendent responded to the several requests and complaints on September 16, 1993. In his letter of that date to appellants' attorney, he stated that he believed the complaints fell into four categories:

(1) allegations of election irregularities; (2) allegations of violations of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (1988); 2/ (3) allegations of interference by managers of the Tribe's gaming operation; and (4) allegations of improper per capita distribution of gaming proceeds. In response to these allegations, the Superintendent stated that (1) he was satisfied with the action taken by the Election Board concerning alleged election irregularities and therefore had recognized the election results on August 19, 1993; (2) he considered the allegations of ICRA violations to be within the jurisdiction of the tribal court; (3) he considered the allegations of interference by gaming management personnel to be within the jurisdiction of the Wisconsin State Gaming Commission; 3/ and (4) he was still gathering information from the Tribe concerning the per capita distributions.

Appellants appealed the Superintendent's August 19, 1993, recognition of the election results to the Area Director. On February 3, 1994, the Area Director affirmed the Superintendent's decision.

Appellants then appealed the Area Director's decision to the Board. Briefs were filed by appellants, the Area Director, and the Tribe.

Discussion and Conclusions

Appellants contend that the July 31, 1993, election involved, *inter alia*, violations of ICRA; section 11 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(b)(3); and BIA's guidelines concerning gaming management contracts. 4/ Specifically, they argue that (1) violations of ICRA and IGRA occurred when candidates favoring the management company sent unapproved per capita payments to tribal members in envelopes which also contained campaign literature; (2) ICRA violations occurred when casino property was used for a rally and a tribally-owned casino van was used to transport selected voters to the polls; and (3) the events described in argument (2) also violated IGRA and the BIA Guidelines, as did a statement alleged to have been made by a partner in the Tribe's gaming management company. 5/ On appeal to the Board, appellants submit an affidavit from a former employee of the tribal casino,

2/ All further references to the United States Code are to the 1988 edition.

3/ By letter of Sept. 16, 1993, the Superintendent transmitted a number of the complaints he had received to the State Gaming Commission.

4/ "Guidelines to Govern the Review and Approval of Gaming Contracts and Other Gaming Activities" (BIA Guidelines), issued by the Assistant Secretary - Indian Affairs on Mar. 5, 1992.

5/ It is apparent that appellants consider the election dispute linked to perceived problems with the Tribe's gaming management company. Appellants and the Tribe agree that there are controversies within the Tribe over the management company, although they disagree as to the significance of these controversies.

who states that he was paid by the gaming management company for certain election related activities.

The Tribe's principal response is that appellants have failed to exhaust their tribal remedies. The Tribe also contends, *inter alia*, that some of appellants' arguments are irrelevant because they concern the invalidated June 12, 1993, election rather than the July 31, 1993, election. The Tribe objects to the affidavit submitted by appellants, on the grounds that it was not submitted to BIA and that much of it is irrelevant. However, to cover the possibility that the Board might consider appellants' affidavit, the Tribe submits affidavits from several individuals, intended to refute the statements made in appellants' affidavit.

The Area Director agrees with the Tribe that appellants belong in a tribal forum rather than before this Board. Appellants counter that the tribal court lacks jurisdiction over the matter, in particular the alleged violations of ICRA and IGRA. 6/

[1] Appellants have not attempted to challenge the election in the tribal court. Therefore, the tribal court has had no opportunity to rule on the extent of its jurisdiction. In National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985), the Supreme Court cautioned that a Federal forum should stay its hand in order to allow a tribal court "a full opportunity to determine its own jurisdiction." This requirement is a component of the broader rule requiring exhaustion of tribal remedies. The Board follows this rule, declining to consider issues which belong before a tribal forum, e.g., Flores v. Acting Anadarko Area Director, 25 IBIA 6 (1993) (tribal disenrollment), and sometimes abstaining from a

fn. 5 (continued)

Appellants oppose the management company. In 1992, they filed suit in Federal court, seeking to void the management contract. They were unsuccessful. United States ex. rel. Kenneth Mosay v. Buffalo Brothers Management, Inc., No. 92-C-925-S (W.D. Wis. Aug. 17, 1993), aff'd, 20 F.3d 739 (7th Cir. 1994).

6/ With respect to ICRA, appellants acknowledge the Supreme Court's statement to the contrary in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), but contend that, in this case, the tribal court lacks jurisdiction over ICRA violations because ICRA has never been incorporated into tribal law and the court's jurisdiction is limited to "matters arising under the constitution and laws of the [Tribe]" (Appellants' Reply Brief at 5).

In Santa Clara Pueblo, 436 U.S. at 65, the Supreme Court stated:

"Tribal forums are available to vindicate rights created by the ICRA, and [25 U.S.C.] § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property rights of both Indians and non-Indians"

(footnotes omitted).

case entirely where it finds that primary jurisdiction lies with a tribal court. E.g., Zinke & Trumbo, Ltd. v. Phoenix Area Director, 27 IBIA 105 (1995) (Area Director's approval of a tribal ordinance).

[2] Appellants contend that exhaustion of tribal remedies is not necessary here because they have alleged violations of ICRA. They cite Board decisions holding that, in furthering its government-to-government relationship with an Indian tribe, BIA must decline to recognize the results of a tribal election tainted by violations of ICRA. See, e.g., Naylor v. Sacramento Area Director, 23 IBIA 76 (1992); Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992); United Keetoowah Band of Cherokee Indians v. Muskogee Area Director, 22 IBIA 75 (1992). The fact that BIA bears this responsibility, however, does not relieve tribal members of their obligation to exhaust their tribal remedies before seeking relief from BIA.

Because appellants have not exhausted their tribal remedies, the Board declines to address the validity of the July 31, 1993, election. The question of whether the tribal court has jurisdiction over the allegations made by appellants, including their allegations that violations of Federal law affected the outcome of the election, is a matter for the tribal court to decide.

Some of appellants' allegations raise issues that might appropriately be addressed in non-tribal forums, although not in the context of this appeal. For instance, appellants contend that certain per capita payments were made in violation of 25 U.S.C. § 2710(b)(3), because the Tribe's distribution plan had not been approved by the Secretary. ^{7/}

It appears from the record that the Tribe submitted a per capita distribution plan to BIA for approval on October 1, 1992, and subsequently submitted changes on two occasions, i.e., on November 2, 1992, and February 15, 1993. It also appears that the Tribal Council began to make per capita payments on December 1, 1992, without awaiting BIA approval. See Tribal Chairman's October 5, 1993, letter to Superintendent. The Tribe's plan was ultimately approved by BIA, but not until December 17, 1993. See Area Director's Brief at 5. If appellants have a remedy against the Tribe for unauthorized per capita distributions, it is not through this appeal. ^{8/} The status of the per capita distributions under IGRA is not relevant to the validity of the July 31, 1993, election except insofar as some of the payments are alleged to constitute unfair campaign practices--allegations which, as noted above, must be made in the tribal court.

Appellants also contend that IGRA and the BIA Guidelines were violated when the managers of the Tribe's gaming operation interfered in the tribal

^{7/} 25 U.S.C. § 2710(b)(3) provides: "Net revenues from any Class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if-- * * * (B) [the tribe's] plan is approved by the Secretary as adequate."

^{8/} The Area Director notes one instance in which tribal members sought injunctive relief against their tribe in Federal court. Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738 (D.S.D. 1992).

election. Specifically, appellants allege violations of sections F.1 and F.2 of the BIA Guidelines. ^{9/} The BIA Guidelines were superseded by regulations promulgated by the National Indian Gaming Commission (NIGC) on January 22, 1993, 58 FR 5818. The NIGC regulations do not contain the contract requirements set out in sections F.1 and F.2 of the BIA Guidelines. They do, however, contain a provision similar to the provision of IGRA which precludes the approval of a management contract for Class II gaming where “the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity.” 25 U.S.C. § 2711(e)(2); 25 CFR 533.6(b)(2). It is possible that, if the facts are as appellants allege, the NIGC could take action concerning the management contract. It is also possible that at least some of the alleged violations may be subject to the authority of the Wisconsin State Gaming Commission. ^{10/} As discussed above, however, the alleged violations of Federal law are relevant to this appeal only insofar as they are alleged to have affected the results of the July 31, 1993, election, and such allegations must be brought before the tribal court .

[3] In light of its disposition of this appeal, the Board finds it unnecessary to determine whether it would, under other circumstances, consider the affidavits submitted by appellants and the Tribe. Ordinarily, the Board does not consider evidence presented for the first time on appeal. Estate of Evan Gillette, Sr., 22 IBIA 133 (1992). Cf. Joint Board of Control v. Acting Portland Area Director, 22 IBIA 22 (1992) (The Board is not required to consider issues or arguments raised for the first time on appeal). In some cases, discovery of significant new evidence at the appeal stage might warrant remand of a case to the Area Director for consideration of that evidence. In this case, however, the tribal court is the appropriate forum to consider this evidence in the context of the issue in this appeal. NIGC and the State Gaming Commission may also be appropriate forums to consider some of appellants' allegations and evidence, insofar as they raise issues within the jurisdiction of those bodies. ^{11/}

^{9/} Section F.1 provides: “The contract shall provide that the contractor will not unduly interfere with, or attempt to influence the internal affairs or government decisions of the tribe for its gain or advantage.”

Section F.2 provides:

“The contract shall provide that no payment or thing of value may be made to any member of the tribal government official [sic], relative of any tribal official, or tribal government employee for the purpose of obtaining any special privilege, gain, advantage or consideration for the contractor. The contract shall certify that no such payments have been or will be made in the future.”

^{10/} As indicated above, the Superintendent transmitted several complaints to the State Gaming Commission. He did so with the understanding that the State Commission has jurisdiction over certain gaming-related activities pursuant to the Tribe's compact with the State concerning Class III gaming.

Although not entirely clear from the record, it appears that the Tribe may have both Class II and Class III gaming operations.

^{11/} Copies of this decision will be furnished to both bodies.

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 February 3, 1994, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge