INTERIOR BOARD OF INDIAN APPEALS

Gloria J. Visintin v. Midwest Regional Director, Bureau of Indian Affairs

60 IBIA 337 (05/22/2015)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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GLORIA J. VISINTIN,	)	Order Dismissing Appeal
Appellant,	)	
	)	
v.	)	Docket No. IBIA 13-036
	)	
MIDWEST REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	May 22, 2015

Gloria J. Visintin (Appellant) appealed to the Board of Indian Appeals (Board) from an October 29, 2012, decision (Decision) by the Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision rejected a challenge by Appellant to the August 14, 2012, Secretarial election[1] for the Ho-Chunk Nation (Nation), in which several amendments to the Nation's constitution were adopted. We dismiss this appeal for lack of standing because Appellant has failed to establish that she has a legally protected interest that was adversely affected by the decision being appealed, as required by the Board's regulations.

Background

In her challenge to the Secretarial election filed with BIA, Appellant, an enrolled tribal member, contended that the Secretarial election was flawed because the Nation did not follow tribal law and procedures for review of technical comments provided by BIA on the proposed constitutional amendments before they were placed on the ballot in the Secretarial election, and before advising BIA to proceed with authorizing the election. *See* Challenge to Secretarial Election, Aug. 17, 2012, at 1-2. The Regional Director denied the challenge, noting that Secretarial elections are governed by Federal regulations and, specifically, that Appellant's letter challenging the election "does not cite or reference any provisions in 25 C.F.R. Part 81 that were not followed in this election." Decision at 1.

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[1] Unlike *tribal* elections, which are conducted according to tribal authorities, a Secretarial election is a Federal election held within a tribe pursuant to regulations prescribed by the Secretary of the Interior, as authorized by Federal statute. *See* 25 U.S.C. § 476; 25 C.F.R. § 81.1(s). The regulations governing Secretarial elections are currently found in 25 C.F.R. Part 81.

The Regional Director also explained that the election was requested by the Nation pursuant to General Council Resolution 10-01-2011-1, *id.* at 2, and that Federal regulations require BIA to authorize an election to amend a constitution upon receipt of a request conforming to the amending article of the tribal constitution, *id.* (citing 25 C.F.R. § 81.5(d)). The Regional Director stated that "[BIA] authorized the election as required by § 81.5(d) and Article XIII of the [Nation's] Constitution."[2] *Id.*

On appeal to the Board, Appellant again raises objections regarding the alleged failure of the constitutional amendment review process carried out by the Nation.[3] Notice of Appeal, Nov. 30, 2012, at 1-2. Although Appellant alleges that BIA was "arbitrary and capricious" in its handling of the election, *id.* ¶ 1, the basis for this assessment appears to be Appellant's belief that the Nation's President and the General Council Agency (GCA) did not follow certain internal procedures for reviewing revisions to the proposed constitutional amendments following receipt of BIA's technical comments, and before GCA advised BIA to proceed with the election, *id.* ¶¶ 1, 5.

Upon further review of the appeal and consideration of a communication from the Nation's Attorney General concerning the impact of the appeal on tribal elections scheduled for June 2013, the Board ordered briefing on the issues of whether to place the decision into immediate effect and whether Appellant had standing. Order for Briefing, Feb. 4, 2013. Appellant, the Regional Director, and the Nation, as an interested party under the Board's regulations, filed briefs. After reviewing the parties' arguments, the Board placed the Decision into immediate effect to avoid uncertainty and disruption as the Nation prepared for constitutionally-mandated tribal elections. Order Making Decision Effective Immediately, Mar. 14, 2013.

In her brief to the Board, Appellant argues that her tribal constitutional rights were violated because the Nation's institutions, including the GCA, did not follow certain procedures prescribed by the General Council. Appellant's Brief (Br.), Feb. 22, 2013, at 1 (unnumbered). Appellant also states that she is "alarmed and fearful" that there will be further violations of tribal law given the past actions and character of some members of the GCA. *Id.* Appellant concludes by appealing to the Board to "take full measures to assure me that the laws of [the Ho-Chunk] Nation will be upheld . . . ." *Id.* at 2 (unnumbered).

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[2] Article XIII provides in pertinent part that "It shall be the duty of the Secretary of the Interior to call and hold an election on any proposed amendment to this Constitution . . . at the request of the General Council . . . ." Constitution of the Ho-Chunk Nation, art. XIII, § 2.

[3] Appellant does not appear to challenge any of the official election results, including the vote tallies, nor does she call for a recount or a new election.

The Regional Director argues that Appellant fails to meet her burden of establishing standing because she has not established a "particularized injury that she suffered to a legally protected interest held by her as a result of the Regional Director's decision." Regional Director's Response Br., Mar. 7, 2013, at 1-3. The Nation states that Appellant has a difficult burden of establishing standing because, generally, individual tribal members lack standing to bring an appeal seeking to assert an interest that belongs to the tribe as a whole, especially where, as here, the Nation itself did not appeal the Secretarial election. *See* Nation's Response Br., Feb. 20, 2013, at 3-4.

Discussion

An appellant bears the burden of establishing that he or she has standing to bring an appeal before the Board. *Friends of Our Pyramid Lake Reservation v. Western Regional Director (Friends)*, 55 IBIA 272, 273 (2012); *see also* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested party"); 43 C.F.R. § 4.331 (Who may appeal).

The Board has construed its regulations as incorporating the judicial elements of standing as articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 292 (2014). To establish standing, (1) the appellant must show that he or she has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury must be fairly traceable to the challenged action; and (3) the injury must be subject to redress by a favorable decision of the Board. *See Lujan*, 504 U.S. at 560-61; *Kennedy v. Pacific Regional Director*, 60 IBIA 94, 96-97 (2015); *Wadena v. Midwest Regional Director*, 47 IBIA 21, 27 (2008). In doing so, an appellant must assert his or her own legal rights and interests rather than the rights and interests of others. *See Kennedy*, 60 IBIA at 96; *Wadena*, 47 IBIA at 27. We will dismiss an appeal if the appellant fails to demonstrate injury to a legally protected interest. *Friends*, 55 IBIA at 272.

The Board generally declines to recognize tribal members, individually or as organizations composed of tribal members, as having standing to bring an action on behalf of the tribe. *See Wadena*, 47 IBIA at 27 ("[I]t is well established that individual tribal members lack standing to pursue action on behalf of the [t]ribe."); *Welbourne v. Anadarko Area Director*, 26 IBIA 69, 78 (1994) ("The Board normally declines to recognize the standing of tribal members to challenge BIA's approval or disapproval of a tribal enactment."). We have explained that tribal members may not bring an action on behalf of a tribe because they "do not have standing to bring an action based on a personal assessment of what is or what is not in the best interests of the tribe." *Kennedy*, 60 IBIA at 96 (quoting *Bullcreek v. Western Regional Director*, 40 IBIA 191, 194 (2005)). In *McKay v. Acting Rocky Mountain Regional Director*, 36 IBIA 61 (2001), we 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. *Id.* at 62 (citing *Welbourne*, 26 IBIA at 78).

Appellant, despite the expressed sincerity of her concern for the respect of tribal law and procedure, has failed to identify a particularized injury to a legally protected interest of her own resulting from the Regional Director's decision denying appellant's challenge of the August 14, 2012, Secretarial election. Specifically, while Appellant, as a member of the Nation, may have been affected by the results of the August 14, 2012, election, she has failed to identify any personal or individual right or interest that is "*distinct from the general rights and interests of all tribal members*" that was adversely affected. *Friends*, 55 IBIA at 274. Rather, the Board understands that Appellant is a concerned elder who seeks, through this appeal, to enforce tribal law and to serve what she considers the best interest of the Nation.[4] Because Appellant has failed to demonstrate that she meets the first element of standing, we must dismiss her claim.

Conclusion

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 for lack of standing.

I concur:

// original signed	//original signed
Robert E. Hall	Thomas A. Blaser
Administrative Judge	Administrative Judge

[4] We note that the legal rights and interests Appellant asserts are derived solely from tribal law and procedure and that Appellant has not alleged that BIA failed to follow Federal law in the conduct of the election or the approval of election results. Where, as here, Departmental approval of tribal constitutional amendments is required by Federal statute, the mandated review should be undertaken in a manner that avoids unnecessary interference with tribal self-governance. *See Welbourne*, 26 IBIA at 78.