



INTERIOR BOARD OF INDIAN APPEALS

Kiowa Tribe of Oklahoma (Komalty KBC), and J.T. Goombi v.
Acting Southern Plains Regional Director, Bureau of Indian Affairs

62 IBIA 166 (02/17/2016)

Related Board case:
62 IBIA 176



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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KIOWA TRIBE OF OKLAHOMA)	Order Vacating Recognition Decision
(Komalty KBC), AND J.T. GOOMBI,)	in Docket No. 14-070 and
Appellants,)	Remanding, and Order Dismissing
v.)	Appeal in Docket No. 14-088
)	
ACTING SOUTHERN PLAINS)	Docket Nos. IBIA 14-070
REGIONAL DIRECTOR, BUREAU)	14-088
OF INDIAN AFFAIRS,)	
Appellee.)	February 17, 2016

These two appeals to the Board of Indian Appeals (Board) involve an internal tribal government dispute within the Kiowa Tribe of Oklahoma (Tribe).

In Docket No. 14-070, a group of individuals claiming to constitute the Kiowa Business Committee (KBC) (“Komalty KBC”)¹ challenges a February 5, 2014, decision (Recognition Decision) by the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director summarily rejected the validity of a tribal election through which the Komalty KBC claims legitimacy, and instead concluded that BIA was “required” to renew several Indian Self-Determination and Education Assistance Act (ISDA) contracts with the Tribe through a KBC chaired by Amber Toppah (“Toppah KBC”), which the Regional Director referred to as the “current/holdover” KBC. We vacate the Regional Director’s Recognition Decision because the exceedingly sparse administrative record that he considered, and which he certified as the complete record upon which he relied, does not support the decision.

In Docket No. 14-088, J.T. Goombi, a Tribal member and intended candidate for the KBC, appeals from a November 7, 2013, decision (Election Decision) of the Regional Director, in which the Regional Director declined to exercise authority granted to BIA

¹ The appeal was filed in the name of the Tribe, but for clarity, the Board refers to Appellant Tribe as the “Komalty KBC,” based on the fact that Appellant Tribe contends that the KBC is chaired by Matthew Komalty. The Board’s references to actions taken by or on behalf of the Tribe, tribal entities, or tribal officials, and the Board’s use of titles claimed by various individuals, shall not be construed as expressing any view on the underlying merits of the dispute.

under the Tribe's Constitution, in a specified circumstance, to call and supervise an election for KBC members. We dismiss Goombi's appeal for lack of ripeness because, subsequent to declining Goombi's request, the Regional Director attempted to issue a decision to call a tribal election. Although the Regional Director's attempted action was jurisdictionally defective, as explained in a related decision the Board is also issuing today,² it is apparent that the Regional Director is prepared to revisit the earlier decision that Goombi appealed, and we conclude that the matter would benefit from further development of an administrative record, including further proceedings on remand in Docket No. IBIA 14-070.

Background

The last undisputed election for members of the KBC apparently was conducted in 2010, when the members now constituting the Toppah KBC were elected. The Tribe's Constitution variously provides that "all terms of office [for the KBC] shall be for two (2) years," Kiowa Const., Art. III, § 5, and that "[t]he term of office for each officer and committeeman [of the KBC] shall be for a period of two (2) years *and until a successor is duly elected and installed in office*," *id.*, Art. III, § 3 (emphasis added).³ The Toppah KBC construes the latter clause as authorizing it to hold over in office indefinitely if no successors are elected and installed, and it contends that the Tribe's Election Board has lacked a quorum since October 2012 for holding an election. Vacancies on the Election Board are filled by the KBC.⁴ Kiowa Const., Art. XIII, § 1.

In 2011, a recall election was held in which all of the individuals claiming to constitute the Toppah KBC purportedly were recalled. The incumbents refused to accept the recall as valid, on various grounds, and have remained in control of the Tribe's government. In December 2012, members of the Election Board purported to conduct an election for the KBC, but the incumbents refused to accept that election as well, contending that the Election Board lacked a quorum and was thus precluded from conducting an election.

The Tribe's Constitution provides that "[s]hould the [KBC] be permanently unable to raise a quorum, the Commissioner of Indian Affairs or his authorized representative may

² See *Toppah v. Southern Plains Regional Director*, 62 IBIA 176 (2016).

³ The terms are supposed to be staggered so that 4 members of the KBC are up for election in even-numbered years and 4 members are up for election in odd-numbered years. See *id.*

⁴ The Toppah KBC contends that it has appointed replacements for the Election Board but the Chair of the Election Board has refused to install them in office.

call and supervise an election to bring the committee up to its full complement and prescribe the rules of procedure.” Kiowa Const., Art. IV, § 3.

In the summer of 2013, Goombi, who is a tribal member and identified himself as an intended candidate for the KBC, sent a letter to the Superintendent, asking BIA to invoke its authority, under the Tribe’s Constitution, to call and supervise a tribal election. *See* Letter from Goombi to Superintendent, Aug. 15, 2013 (Exhibit (Ex.) 4 to Goombi Notice of Appeal, Apr. 10, 2014). According to Goombi, both the KBC and the Election Board are incapable of raising quorums for taking action because the number of lawful members on each entity is below what is required for a quorum.⁵ Because the absence of a quorum on the Election Board would preclude it from holding an election to fill vacancies on the KBC, and the absence of a quorum on the KBC would preclude it from filling vacancies on the Election Board, Goombi argued that the KBC was permanently unable to raise a quorum, thus triggering BIA’s authority to call and supervise an election. *See* Letter from Goombi to Regional Director, Sept. 6, 2013 (Docket No. 14-088 (14-088) Administrative Record (AR) 1).

In October of 2013, Dwayne Davis, Chair of the Election Board,⁶ wrote to the Regional Director and the Superintendent, informing them that the Election Board was planning to conduct a special election for the KBC, to be held on December 14, 2013. *See* Letter from Davis to Regional Director, Oct. 28, 2013 (14-088 AR 3); Letter from Davis to Superintendent, Oct. 28, 2013 (14-088 AR 4).

On November 7, 2013, the Regional Director issued a letter distributed to various members of the Tribe, apparently in response to Goombi’s request and the correspondence from Davis. *See* Letter from Regional Director to Sir or Madam, Nov. 7, 2013 (Docket No. 14-070 (14-070) AR 5). The Regional Director stated that BIA had considered invoking its authority under the Tribe’s Constitution to call a tribal election, explaining that the grounds for such BIA action “would be the Tribe’s inability to conduct its own election and the lack of a recognized quorum of the [KBC].” *Id.* at 1.

⁵ A quorum of the KBC consists of five members, and “[n]o business of any nature shall be transacted unless a quorum is present.” Kiowa Const., Art. XV, § 4. Goombi contends that the Toppah KBC has been reduced to four members; the Toppah KBC contends that it has five members. A quorum of the Election Board consists of three members. Kiowa Election Board Ordinance, § 4(b)(1) (Ex. 2 to Answer Brief of Toppah KBC, Sept. 11, 2014).

⁶ It is not disputed that Davis is Chair of the Election Board.

The Regional Director noted, however, that Davis, “representing the Kiowa Election Board,” had advised BIA that the Tribe would be holding an election on December 14, 2013, and he stated that the “effort of the Tribe to resolve its own leadership dispute” was “commendable.” *Id.* Based on the upcoming election, the Regional Director advised that BIA was withholding any decision on whether to invoke its authority to call a BIA-conducted election, “in order to let the Kiowa tribal members elect their representatives by a tribally conducted election.” *Id.* The Regional Director further advised that any acceptance of the results from the upcoming election would be determined later. *Id.*

The Regional Director also stated that “[u]nder the present circumstance, not having a recognized business committee which can adopt the necessary resolutions, all but one of the Kiowa Tribe’s [ISDA] contracts with [BIA] will expire on December 31, 2013,” after which BIA would administer those programs “until such time as the Tribe has a recognized and functioning” KBC. *Id.* The Regional Director noted that “[a]lthough no new contracts may be approved,” funds already advanced to the Tribe under existing contracts would continue to be used for the programs. *Id.* at 2.

In response to the Regional Director’s letter, the Toppah KBC wrote to the Superintendent, requesting “clarification and modification” of the Regional Director’s letter. Letter from Black to Superintendent, Nov. 15, 2013 (14-070 Supp. AR 1).⁷ The Toppah KBC expressed concern that the Regional Director’s letter had resulted in financial institutions freezing the Tribe’s bank accounts, and asked that the letter be clarified and modified “to allow and authorize current signatories on all bank accounts.” The Toppah KBC also asked that the “current signatories” on the Tribe’s ISDA contracts “be authorized to execute any and all contract documents required for the continuation of all current federal programs.” *Id.* at 2.

In December 2013, the election that had been announced by Davis was conducted. The results of that election, when combined with the results of another Davis-led election in 2012, form the basis for the Komalty KBC’s claim to be the lawful KBC. Following the 2013 election, Davis sent a letter thanking BIA’s Anadarko Agency for allowing the Election Board to use its conference room as a polling site and enclosing a copy of the election results, as certified by the Election Board. Letter from Davis to Acting Superintendent, Dec. 18, 2013 (14-088 AR 7). The record includes a timeline for the election, which indicates that the election was certified by a 4-member Election Board

⁷ Prior to briefing, the Board granted a motion from the Regional Director to supplement the administrative record, as originally submitted. *See* Order, May 13, 2014. The Supplemental Record was received June 26, 2014.

headed by Davis.⁸ Timeline for Dec. 14, 2013, Election (received by BIA on December 27, 2013) (14-088 AR 6). In the 2013 election, Komalty was elected Chair of the KBC.

On December 28, 2013, the Toppah KBC met and approved two resolutions authorizing the renewal of the Tribe's ISDA contracts with BIA. The resolutions identify Toppah as Chair of the KBC and recite that a quorum was present. *See* Tribal Resolutions #CY-2013-259 and #CY-2013-260 (14-070 AR 1). Copies of the resolutions were received by BIA on December 30, 2013. *See id.*

On January 14, 2014, the Superintendent advised Toppah that the signatories on file for the Tribe's ISDA contracts had expired. Letter from Acting Superintendent to Toppah, Jan. 14, 2014 (14-070 Supp. AR 2). In an undated letter, however, the Superintendent also advised the Toppah KBC that BIA's "payment system still accepts those signatures previously authorized by the Tribe," but that the acceptance was "limited to the current available funding" and would "not apply to new funding." Letter from Acting Superintendent to Black, undated (14-070 AR 4). In addition, an internal memorandum signed by the Superintendent, directed to a BIA ISDA official, stated that the Agency was "still acknowledging the previously authorized signatures" for purposes of renewing ISDA contracts, and named members of the Toppah KBC as the "signatories." Memorandum from Acting Superintendent to Pack, undated (14-070 AR 3).

The Komalty KBC obtained a copy of the Superintendent's internal memorandum and objected to the apparent decision by the Superintendent to accept the Toppah KBC as authorized to renew ISDA contracts on behalf of the Tribe. Letter from Newland to Regional Director, Jan. 17, 2014 (14-070 AR 2). The Komalty KBC contended that none of the five signatories from the Toppah KBC were authorized to act on behalf of the Tribe, and the Komalty KBC asked the Regional Director to "stay" any implementation of the Superintendent's memorandum. The Komalty KBC's letter identified Komalty as Chair of the KBC and William Tartsah as Vice-Chair.

On February 4, 2014, the Regional Director responded, stating that "Toppah and her supporters" had presented the two resolutions to BIA, and that "[a] determination was made based on the newly received documents that indicated they are valid and that re-contracting would be in the best interest of the Tribe." Letter from Regional Director to Newland, Feb. 4, 2014, at 1 (14-070 AR 2). The Regional Director asserted that "no new

⁸ The Komalty KBC contends that in addition to Davis, and Karen Purley, the Election Board includes Trecial Macias and Ruth Toehay. It is unclear, and the Komalty KBC does not explain, when or under what circumstances those additional individuals were added to the Election Board.

decision has been made with respect to the leadership” of the Tribe, and that the Agency was still reviewing the results of the December 2013 election. *Id.* at 1-2 (unnumbered). He also stated, however, that BIA was “prohibited by law” from complying with the Komalty KBC’s request to stay action on the ISDA proposals, and announced that BIA was “moving forward with awarding . . . the renewal contracts.” *Id.* at 2 (unnumbered).

A day later, the Regional Director wrote to the Toppah KBC, advising it that the two resolutions submitted by Toppah “appear to be facially valid for purposes of renewing” the Tribe’s ISDA contracts. Letter from Regional Director to Chairman, Feb. 5, 2014 (Recognition Decision) (14-070 AR 1). The Regional Director stated that he had concluded that BIA was “required” to renew the Tribe’s ISDA contracts based on the “facial validity” of the two resolutions submitted by the Toppah KBC, which he described as the “current/holdover” KBC. *Id.* at 1, 3 (unnumbered). The Regional Director briefly addressed what he characterized as the “alleged tribal election” held in December 2013, stating that it had “not been embraced by the Tribe,” and that it had been “alleged” that the Election Board had acted unconstitutionally in holding and certifying the election without a quorum. Recognition Decision at 1.

The Komalty KBC appealed to the Board from the Regional Director’s February 5, 2014, decision to recognize the Toppah KBC for purposes of renewing the Tribe’s ISDA contracts, arguing that the decision was an unexplained about-face from the Regional Director’s November 7, 2013, letter, and that the Regional Director’s dismissive assertions regarding the December 2013 election are unsupported by the record. Goombi appealed to the Board from the Regional Director’s November 7, 2013, letter withholding a BIA decision on whether to call a tribal election.

In addition to briefs filed by the Komalty KBC and Goombi appellants, the Toppah KBC filed answer briefs in opposition to the appeals. The Regional Director also filed answer briefs in opposition to each appeal.

In the Komalty KBC’s appeal (Docket No. IBIA 14-070), the Regional Director’s administrative record, which the Regional Director certified as containing “all information and documents utilized by the deciding official in rendering the decision appealed,” consists of the Recognition Decision, with attached copies of the two Toppah KBC resolutions; the Regional Director’s February 4, 2014, and November 7, 2013, letters; plus the two undated documents signed by the Superintendent, described above. Included with the February 4, 2014, letter is a copy of the incoming correspondence from the Komalty KBC, dated January 17, 2014. A supplemental record submitted by the Regional Director contains copies of ISDA contracts purportedly awarded to the Tribe, through Toppah, in 2014, and additional copies of the Toppah KBC resolutions.

In Goombi’s appeal (Docket No. IBIA 14-088), the Regional Director’s administrative record, again certified as containing “all information and documents utilized by the deciding official in rendering the decision appealed,” includes correspondence from Goombi asking BIA to invoke its authority to call a tribal election, and correspondence from Davis, on behalf of the Election Board, reporting on the results of the December 2013 election.⁹

Standard of Review

The Board recently stated that unless both Federal and tribal law clearly dictate a particular outcome, we will afford BIA latitude to exercise discretion in determining with whom it will deal, during a tribal leadership dispute, in carrying on the government-to-government relationship with a tribe. *Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director*, 62 IBIA 103, 114 (2016). When a BIA decision involves an exercise of discretion, the Board does not substitute its judgment for that of BIA, but we do review it to determine whether it comports with applicable law, is supported by the record, and is adequately explained. *Id.* An appellant bears the burden of demonstrating that a regional director has not properly exercised his discretion. *Id.*

Discussion

I. Komalty KBC Appeal (Docket No. 14-070)

We vacate the Regional Director’s Recognition Decision because the decision itself is conclusory and the evidence in the record relied on by the Regional Director is not sufficient to support the decision. Based on the decision, and the letter sent by the Regional Director in November 2013, it is clear from the record that the Regional Director was aware of, and indeed appears to have encouraged, the tribal election conducted by Davis in December 2013, and had received Davis’s certification of the election results identifying Komalty as the new Chair of the KBC. The Regional Director summarily dismissed recognizing Komalty with the assertions that the election had not been “embraced by the Tribe” and that it had been “alleged” that the Election Board had acted unconstitutionally. Nothing in the record relied upon by the Regional Director supports those assertions.

⁹ The administrative record submitted by the Regional Director also includes post-decisional documents filed in Goombi’s appeal prior to submission of the record, which are part of the appeal record, but not part of the record relied on by the Regional Director in issuing the November 7, 2013, decision.

The Regional Director also asserted that BIA was “required” to renew the Tribe’s ISDA contracts based on the “facial validity” of resolutions presented by Toppah, and that “no new decision has been made with respect to the leadership” of the Tribe. Recognition Decision at 1; Letter from Regional Director to Newland, Feb. 4, 2014, at 1. But no evidence in the record relied on by the Regional Director indicates when or under what circumstances any decision, purportedly still in effect, had been made to recognize the Toppah KBC as the leadership of the Tribe.¹⁰ And relying on the “facial validity” of the resolutions presented by Toppah would seem to necessarily presume that the Toppah KBC was a recognized and functioning KBC—contrary to what the Regional Director stated only a few months earlier. *See* Letter from Regional Director, Nov. 7, 2013 at 1 (referring to the Tribe as “not having a recognized business committee”).

It is apparent that the Regional Director intended the decision to recognize individuals as tribal officials only on an interim basis, pending resolution of the dispute, but the decision falls short, both in its reasoning and in the evidence upon which the Regional Director relied, in supporting a determination to accept the Toppah KBC as authorized to renew ISDA contracts on behalf of the Tribe.

As the Regional Director acknowledged, during a tribal government dispute BIA may be required to recognize individuals as tribal officials on an interim basis, and in some cases it is permissible for BIA to recognize the “last undisputed officials on an interim basis.” Recognition Decision at 2 (unnumbered). But BIA’s decision must still be explained, and must still be supported by the administrative record. In the present case, it was not sufficient for the Regional Director to summarily declare that tribal resolutions approved by a KBC that some contended lacked a quorum, and others contended had been entirely replaced, were “facially valid” and on that basis conclude that ISDA contracts with the Tribe must be renewed through the Toppah KBC. A reasoned explanation, supported by evidence in the record, was required. Therefore, we vacate the Recognition Decision

¹⁰ Documents submitted by the Komalty KBC on appeal indicate that in 2011 the Superintendent made a decision to recognize the Toppah KBC for a 3-month period, but that the Regional Director subsequently dismissed an appeal from that decision as moot because the 3-month period had expired. There is no evidence in the appeal record that the Superintendent’s decision ever became legally effective, *see* 25 C.F.R. § 2.6, before it expired of its own accord, but even if it had, the expiration and subsequent action by the Regional Director dismissing a challenge as moot would leave the issue of tribal leadership unresolved. A subsequent decision to recognize the Toppah KBC would be a new decision by BIA, and the record does not indicate that BIA took such action, until issuance of the Recognition Decision.

and remand for further proceedings. In so doing, we emphasize that we express no opinion on the underlying issue of whether it was permissible, on the evidence in the existing record or otherwise available to the Regional Director, to recognize the Toppah KBC for purposes of renewing the Tribe's ISDA contracts.

II. Goombi Appeal (Docket No. IBIA 14-088)

We dismiss Goombi's appeal for lack of ripeness because, after declining to invoke BIA's authority to hold a tribal election, the Regional Director revisited the issue and attempted to do so. *See Wind River Resources v. Acting Western Regional Director*, 43 IBIA 1, 3 (2006) (Board applies the doctrine of ripeness). On January 26, 2015, the Regional Director issued a decision in which he concluded that the KBC was permanently unable to raise a quorum, and that BIA would call and conduct a tribal election, as authorized by the Tribe's Constitution. In a separate decision being issued today, the Board is vacating the Regional Director's January 26 decision on jurisdictional grounds, but it is now apparent that the Regional Director may be considering granting Goombi the relief that he seeks. In addition, any determination by the Regional Director on whether the circumstances exist for BIA to call a tribal election, and whether BIA should do so, necessarily should consider the proceedings on remand from Docket No. 14-070 regarding the December 2013 election, as well as additional evidence that apparently is available to the Regional Director, but not included in the records for the present appeals.¹¹ Therefore, we conclude that Goombi's appeal should be dismissed for lack of ripeness.¹²

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 vacates the Regional Director's February 5, 2014, decision (Recognition Decision) and the related February 4, 2014,

¹¹ We note that the administrative record submitted by the Regional Director for the appeals from his January 26, 2015, decision is considerably larger than the records submitted for the decisions at issue in the present case, and the tribal parties have submitted additional evidence on appeal.

¹² Had the Regional Director's January 26 decision not been jurisdictionally defective, it would likely have mooted Goombi's present appeal, but because we are vacating that decision, we decide the matter on the basis of ripeness.

decision, and remands for further proceedings consistent with this decision.¹³ The Board dismisses Goombi's appeal.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

¹³ There is no evidence that the underlying actions and decisions of the Superintendent were ever lawfully placed into effect, *see* 25 C.F.R. § 2.6, but to avoid any doubt about the effect of our decision on the Superintendent's letters and memorandum that could be construed as recognizing the Toppah KBC for purposes of renewing the Tribe's ISDA contracts, we vacate the Superintendent's actions and decisions as well.