



INTERIOR BOARD OF INDIAN APPEALS

Thurman L. Welbourne v. Anadarko Area Director, Bureau of Indian Affairs

26 IBIA 69 (06/20/1994)



United States Department of the Interior

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

THURMAN L. WELBOURNE

v.

ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-7-A

Decided June 20, 1994

Appeal from a decision rejecting a contest of a Secretarial election for the Cheyenne-Arapaho Tribes of Oklahoma.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Tribal Government: Elections

The decisions of Bureau of Indian Affairs officials in election contests under 25 CFR 81.22 may be appealed under 25 CFR Part 2.

2. Board of Indian Appeals: Generally--Indians: Tribal Government: Elections

When an election is contested under 25 CFR 81.22, the grounds for the contest must be presented to the Bureau of Indian Affairs within 3 days after the election. The Board of Indian Appeals cannot consider arguments based on grounds presented for the first time in an appeal to the Board.

3. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

25 CFR 81.22 provides a mechanism for challenging the manner in which a Secretarial election is conducted, but does not authorize a challenge to the substance of a tribal constitution or constitutional amendment adopted at the election, or a challenge to the Bureau of Indian Affairs' review of the constitution or amendment.

4. Administrative Procedure: Standing--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

A tribal member lacks standing to challenge the Bureau of Indian Affairs' approval or disapproval of an amendment to a tribe's constitution.

APPEARANCES: Appellant, pro se; Charles R. Babst, Jr., Esq., Office of the Field Solicitor, U. S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Thurman L. Welbourne is a member and the Business Manager of the Cheyenne-Arapaho Tribes of Oklahoma (Tribes). He seeks review of a September 10, 1993, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), rejecting his contest of a July 27, 1993, Secretarial election 1/ at which an amendment to the Tribes' Constitution was adopted. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

The Tribes are organized under the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. §503 (1988). 2/ They ratified their present Constitution on April 19, 1975. Under Article I of the Constitution, the Tribal Council is "the governing body of the organization, composed of all enrolled members at least eighteen (18) years of age, and empowered to act on [certain specified] matters;" and the Business Committee is "an eight (8) member representative body empowered to act on [certain other] matters."

On August 15, 1992, the Tribal Council adopted a resolution proposing an amendment to the Constitution. 3/ The proposed amendment provided:

The current Sections 1 and 2 to Article IV - Council and Committee Authorities, shall be amended to read as follows:

Section 1. h. The members of the tribal council may limit or restrict any of the powers of the business committee at a duly called tribal council meeting.

Section 2. The Cheyenne-Arapaho Business Committee, subject to applicable Federal and State Laws, shall have the power to act

1/ See 25 CFR 81.1(s): "Secretarial election means 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." (Emphasis in original).

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

3/ Article XIII of the Constitution provides:

"Amendments to this constitution and by-laws may be proposed by the majority vote of the tribal council at an annual or special council meeting; and, if approved by the Secretary of the Interior, shall be submitted to a referendum vote of the members of the tribes and shall be effective if approved by a majority vote of those voting."

for the Tribes in all matters not in Section 1 of this Article, in Article XI as prohibited by Tribal Council Resolution and as otherwise restricted by the Constitution and By-laws.

a. The Business Committee may petition to repeal a Tribal Council Resolution, but only by a referendum vote of the Tribes.

b. Tribal Council Resolutions shall become effective upon passage at a Tribal Council meeting and remain in effect until repealed at another Tribal Council meeting or a referendum vote of the Tribes.

The Tribal Council resolution was submitted to the Concho Agency, BIA, on September 17, 1992, apparently with a request that a Secretarial election be conducted under 25 CFR Part 81. The Superintendent forwarded the request to the Area Director who, on November 16, 1992, authorized the election pursuant to 25 CFR 81.5.

In early June 1993, an election board was appointed, and notice of the election was mailed to tribal members. 4/ The notice stated:

Members of the Cheyenne-Arapaho Tribes of Oklahoma are hereby advised that an election will be held on Tuesday, July 27, 1993, for the purpose of voting on a constitution amendment[. The] election is being conducted in accordance with the regulations set out in 25 CFR [Part] 81. The constitution amendment was proposed by the Cheyenne-Arapaho Business Committee.

On June 7, 1993, the Chairman of the Business Committee wrote to the Superintendent, pointing out that, contrary to the statement in the notice, the amendment had not been proposed by the Business Committee. He continued:

4/ 25 CFR 81.5(f) provides:

“Any authorization not acted upon within 90 days * * * from the date of issuance will be considered void. Notification of the election date as provided for in § 81.14 shall constitute the action envisioned in this section. Extension of an authorization may be granted upon a valid and reasonable request from the election board.”

In this case, two requests for extension were made by the Superintendent prior to the appointment of an election board. Both requests were granted by the Area Director. Under 25 CFR 81.8(a), the Superintendent was to become chairman of the election board, which was also to include “at least two representatives of the tribal governing body or an authorized representative committee.”

25 CFR 81.14 provides: “Not less than 30 nor more than 60 days notice shall be given of the date of the election. * * * The election board shall determine whether the notice will be given by television, radio, newspaper, poster, or mail, or by more than one of these methods.”

I am requesting that you re-issue a follow-up letter to all the tribal members that received this initial letter. We would recommend that some historical context, such as the date of the meeting, the location, the vote on the agenda item, who offered the resolution, etc. [be included]. In fairness, the tribal members should be aware of the facts as to the origin of this proposed amendment and future impact. In simple terms, what are the tribal members voting on.

The Superintendent did not send a second letter. However, on July 8, 1993, he published a notice in the Watonga Republican. ^{5/} The notice stated in part:

To Members of the Cheyenne-Arapaho Tribes

On July 27, 1993, registered voters of the tribes will have the chance to amend the Constitution and Bylaws provisions on Council and Committee authorities, Article IV.

This amendment was presented by Mary Lou Prairie Chief at the August 15, 1992, Tribal Council meeting and adopted as Tribal Council Resolution #081592STC004 by a vote of 97 for, 34 opposed, 2 absentions. In Ms. Prairie Chief's words, in part:

“This would be a proposed change to our constitution, that’s all I am asking and if you will vote on it, it will go to a referendum vote . . . to see if this change will go into effect and it will change our constitution, because the Business Committee always says, we don’t have the right to enact resolutions, this would make sure we did, whatever you vote here today if you wanted some way to limit or restrict the powers of the present business committee, you would come here, you could vote on one and it would take effect immediately . . .”

The amendment also would let the Business Committee call a referendum election if it wanted to overrule a Tribal Council resolution restricting its powers.

* * * * *

The Business Committee did not request this election and did not prepare the amendment. It came from the tribal membership as explained above.

^{5/} In his brief in this appeal, the Area Director states that the Watonga Republican is “a newspaper of general circulation in Blaine County, Oklahoma, where most Cheyenne-Arapaho members reside” (Area Director’s Brief at 2).

The election was held on July 27, 1993. On the same day, the election board certified and posted the results, stating: "Out of 307 ballots cast, 231 Yes; 65 No; 11 spoiled votes." All three election board members signed the certification.

On July 30, 1993, appellant filed an election contest under 25 CFR 81.22. 6/ He contended: (1) many tribal members were confused by the error in the original notice concerning the origin of the proposed amendment; (2) the published correction was inadequate because only a small percentage of tribal members read the Watonga Republican; (3) only 307 of 6,000 eligible voters voted in the election; (4) BIA was negligent in failing to review the amendment prior to authorizing the election; and (5) the amendment will cause procedural difficulties within the Tribes.

On August 9, 1993, the Superintendent rejected appellant's challenge, stating:

Your contest was timely filed July 30, 1993, and the Election Board met August 3 and 4, 1993, on the matter. Contesting of the results of Secretarial elections is governed by 25 CFR 81.22.

By a vote of two (2) for and one (1) against, the election board concurred in your contest and recommended that a new election be held. The basis for this was that the number of persons voting was affected by an error in the Notice of Election for the July 27, 1993, election. Substantiating documentation submitted by you consisted of a correction published in the July 8, 1993, edition of the Watonga Republican, a copy of the proposed amendment, a copy of the Voter Registration Form, and a copy of the official election notice.

You state in your letter of contest that "the Procedural Difficulties are the main reason for this official challenge to the Election." The Procedural Difficulties you address are not election procedures; they are the difficulties the Cheyenne and Arapaho Tribes may experience in conducting tribal business under the amended constitution. This is not proper grounds for contest and has no bearing on the proper conduct of the election.

6/ 25 CFR 81.22 provides:

"Any qualified voter, within three days following the posting of the results of an election, may challenge the election results by filing with the Secretary through the officer in charge the grounds for the challenge, together with substantiating evidence. If in the opinion of the Secretary, the objections are valid and warrant a recount or a new election, the Secretary shall order a recount or a new election. The results of the recount or new election shall be final." (Emphasis in original).

Finally, you do not actually document your claim that the error in the Election Notice adversely impacted the voter turn-out. You only state that it did affect the number of persons voting. This is not sufficiently persuasive to support calling a new election.

(Superintendent's Aug. 9, 1993, Decision at 1).

By letter of August 30, 1993, appellant appealed to the Area Director, contending (1) the Superintendent lacked the authority to overrule the Election Board; (2) the original election notice was erroneous, and the published correction was inadequate to remedy the error; (3) only 307 of 800 eligible voters voted in the election; Z/ and (4) BIA failed to keep the Tribes advised of election matters and has acted inconsistently with respect to Tribal Council resolutions in the past.

On September 10, 1993, the Area Director affirmed the Superintendent's decision. 8/ His decision concluded:

First, the Acting Superintendent was correct in overruling your contest to the Secretarial Election. The Election Board had no authority to decide the contest and call for a new election. The role of the Election Board in contests is to prepare a report concerning the conduct of the election which will be used in making the Bureau's determination on the contest. * * *

Second, * * * the content or purpose of an amendment is not critical to whether or not a Secretarial election would be conducted; the applicable federal law requires that elections be conducted on amendments that conflict with federal law even though the authorizing officer will have to disapprove it later. Once

Z/ Appellant does not explain the discrepancy between the figure he gives here for the number of eligible voters and the figure he gave in his July 30, 1993, letter. The Area Director's brief in this appeal may shed some light, however. He states that BIA figures show there are approximately 6,000 adult members of the Tribes and approximately 800 registered voters (Area Director's Brief at 3 n.1 and 4 n.2).

8/ Although no party has raised the issue, the Board observes that the Area Director issued his decision before appellant's time for filing a statement of reasons had expired, let alone the time allowed for the filing of answers by interested parties. See 25 CFR 2.10, 2.11. The Board has previously discussed the problems that can arise when an Area Director issues a premature decision in an appeal pending before him. See, e.g., Scott v. Acting Aberdeen Area Director, 25 IBIA 115, 118 (1994), and cases cited therein. In this case, the Board finds that the Area Director's error has been cured in these proceedings in which appellant and other interested parties have had an opportunity to present their views.

submitted, an amendment must be presented to the voters unless the tribe or petitioners withdraw it. 9/

Third, the appeal did not provide the required documentation under 25 CFR § 81.22 to support the challenge. Nothing in the record supports the contention that the error in the election notice resulted in an unrepresentative voter turn out. Mere assertions or opinions are not substantiating evidence. Therefore, the Acting Superintendent's decision to deny the contest stands and the decision is final for the Department.

(Area Director's Sept. 10, 1993, Decision at 2-3). On the same day he issued this decision, the Area Director approved the constitutional amendment.

Appellant's notice of appeal from this decision was received by the Board on September 27, 1993. Briefs were filed by appellant and the Area Director. 10/

Jurisdiction

Appellant's notice of appeal sought "advice and direction" from the Board concerning appeal procedures in light of the Area Director's statement that "the decision is final for the Department." In the pre-docketing notice for this appeal, the Board noted that, if the Area Director's statement was correct, the Board lacked jurisdiction over this appeal. The Board docketed the appeal but invited the parties to address the jurisdiction issue in their briefs.

9/ This paragraph appears to reflect the view that the Tribes are subject to the 1988 amendments to the Indian Reorganization Act (IRA), Act of Nov. 1, 1988, P.L. 100-581, 25 U.S.C. § 476 (1988 amendments), even though the Tribes are organized under the OIWA rather than the IRA. This view is also reflected in the Area Director's Sept. 10, 1993, approval of the Tribes' constitutional amendment, which cites the 1988 amendments as authority for the approval.

However, if the 1988 amendments are applicable to the Tribes, BIA was subject to much more stringent time deadlines for the calling of an election than it observed in this case. See 25 U.S.C. § 476(c)(1)(B).

The Board notes that, when the 1988 amendments were pending before Congress, the then Assistant Secretary - Indian Affairs expressed the view that they would not apply to OIWA tribes. See Sept. 7, 1988, letter of Assistant Secretary, in S. Rep. No. 577, 100th Cong., 2nd Sess. 35 (1988).

Because the issue has not been raised in this appeal, the Board reaches no conclusion as to whether or not the 1988 amendments are applicable to OIWA tribes.

10/ The Tribes have been served with pleadings and briefs in this appeal but have not participated.

No party has accepted the Board's invitation. The Area Director's brief, which discusses the merits of the appeal but does not address the jurisdiction issue, impliedly concedes that the Board has jurisdiction over the appeal.

[1] The Board finds no indication in 25 CFR Part 81 that Area Directors' decisions concerning election contests are intended to be final for the Department of the Interior. ^{11/} Nor is the Board aware of any other statutory or regulatory provision making an Area Director's decision in an election contest final for the Department. The appeal procedures in 25 CFR Part 2 apply to decisions of BIA Area Directors unless another procedure is provided by statute or regulation. 25 CFR 2.3. Accordingly, the Board finds that the Area Director's September 10, 1993, decision was appealable under 25 CFR Part 2 and therefore the Board has jurisdiction over this appeal.

Discussion and Conclusions

In his appeal to the Board, appellant argues that the July 27, 1993, election was void because (1) the authorization for the election was not acted upon within 90 days as required by 25 CFR 81.5(f), and no request for extension was submitted by the election board; and (2) the certification of election results was not prepared on the form required by 25 CFR 81.23(b).

[2] Appellant did not make either of these arguments in his original election contest or in his appeal to the Area Director. The Board normally does not consider arguments raised for the first time on appeal to the Board. E.g., All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 212 (1992), and cases cited therein. In this case, it would be particularly inappropriate for the Board to consider appellant's new arguments, given the requirement in 25 CFR 81.22 that the grounds for an election contest be presented to BIA within 3 days of the election. For the Board to consider appellant's new arguments at this time would be to allow appellant to put forth new grounds for his contest, in violation of the time limit in the regulation. The Board therefore cannot consider appellant's new arguments.

Appellant appears to have abandoned the arguments he made in his original contest and his appeal to the Area Director. It is possible, however, that he believed his earlier arguments would be considered by the Board

^{11/} Cf. 25 CFR 88.1(c), discussed in Welch v. Minneapolis Area Director, 17 IBIA 56 (1989) (Area Director's approval, disapproval, or conditional approval of tribal attorney contract is final for the Department).

The Board has considered at least one other appeal from an Area Director's decision in an election contest under 25 CFR 81.22. Frazier v. Acting Portland Area Director, 21 IBIA 11 (1991). In that case, no question arose concerning the Board's jurisdiction.

because his previous filings were included in the record for this appeal. In the absence of a regulatory impediment, such as that discussed in the preceding paragraph, the Board gives appellant the benefit of the doubt and considers his earlier arguments.

Appellant's principal argument before BIA was that tribal members were misled by the original election notice, with respect to the source of the amendment proposal, and therefore did not vote in the election. In support of this argument, appellant contended that voter turnout was unusually low.

As a part of the record for this appeal, the Area Director submits certifications of election results from earlier Secretarial elections for the Tribes. 12/ By comparison to those earlier elections, turnout for this election appears low. However, a lower-than-normal turnout is not, in itself, proof that it was caused by the error in the election notice.

25 CFR 81.22 requires that an election contest include substantiating evidence in support of the grounds for the contest. Appellant failed to support his allegation with any evidence that the error in the election notice adversely affected the voter turnout or tainted the election results in any way. Accordingly, the Board finds that appellant's challenge to the election was properly rejected, insofar as it was based on the error in the election notice.

Appellant's other arguments were also properly rejected. The fact that only 307 of 800 registered voters participated in the election is not, in itself, a grounds for contest. The Tribes' Constitution does not require that any particular percentage of eligible voters participate in an election concerning a constitutional amendment. See Article XIII, quoted in footnote 3, supra.

Appellant contended that BIA was negligent in failing to review the substance of the proposed amendment before the election. In a related argument, he challenged the substance of the amendment, arguing that it would cause substantial difficulties within the Tribes. 13/ Appellant states that

12/ These are certifications for: (1) a May 28, 1976, election in which a proposed constitution was rejected by a vote of 233 for, 378 against; (2) the Apr. 19, 1975, election in which the Tribes' present constitution was ratified by a vote of 480 for, 226 against; (3) an Apr. [?], 1965, election in which a constitutional amendment was rejected by a vote of 221 for, 255 against; (4) a Nov. 7, 1961, election in which two bylaw amendments were ratified by votes of 542 for, 78 against and 445 for, 198 against; (5) a Nov. 3, 1959, election in which a constitutional amendment was ratified by a vote of 505 for, 126 against; and (6) a Feb. 4, 1942, election in which a constitutional amendment was ratified by a vote of 193 for, 161 against.

13/ He contended:

“The process of limiting or restricting authorities generally is not sound practice. To limit or restrict by resolution is frivolous, for the reason that these resolutions, as approved monthly perhaps, pretend to

BIA employees advised him to wait until after the election to challenge the amendment.

[3, 4] On its face, 25 CFR 81.22 authorizes election contests for only the purposes of challenging the conduct of the election itself, not the substance of the constitution or amendment being voted on, or BIA's review of that document. It appears possible, however, that statements made by BIA employees may have led appellant to believe that he could raise these issues in an election contest. Therefore, the Board considers the broader question of whether an individual tribal member may challenge the substance of a constitutional amendment, or BIA's action is reviewing the amendment, in a Departmental administrative appeal.

The Board normally declines to recognize the standing of tribal members to challenge BIA's approval or disapproval of a tribal enactment. E.g., *Feezor v. Acting Minneapolis Area Director*, 25 IBIA 296 (1994), and cases cited therein. The guiding principle of the Board's decisions in this area is the Federal policy of respect for tribal self-government, which counsels that the Department refrain from interfering in intra-tribal matters. This policy is controlling even where, as here, Departmental approval of tribal constitutional amendments is required by Federal statute. In such cases, the Board has stated, the statutorily mandated review should be undertaken in such a way as to avoid unnecessary interference with tribal self-government. E.g., *Cheyenne River Sioux Tribe v. Aberdeen Area Director*, 24 IBIA 55 (1993).

Under the circumstances here, where the relevant regulation, 25 CFR 81.22, contemplates that election contests will be limited to challenges to the conduct of the election, the Board finds it would be particularly inappropriate for the Board to recognize the standing of a tribal member to make a collateral attack upon the amendment through the contest procedure. The Board finds that appellant lacks standing to challenge the substance of the amendment and/or BIA's action in reviewing the amendment. 14/

fn. 13 (continued)

supersede the tribal Constitution. Resolutions cannot supersede the Constitution, especially blind resolutions. The resolutions are to be effective on passage, which allows no time to judge merit, impact, constitutionality, clarity, intent, or worthiness.” (Appellant's July 30, 1993, Election Contest at 2 (emphasis in original)).

14/ Appellant's position as Business Manager of the Tribes gives him no greater standing here. His standing to contest an election under 25 CFR 81.22 is the same as that of any qualified voter.

Further, even assuming the amendment would have particular impact upon his duties as a Business Manager, he still would lack standing to challenge the amendment itself, or BIA's approval of the amendment, in Departmental proceedings. Cf. *Little Six, Inc. v. Minneapolis Area Director*, 24 IBIA 50 (1993) (A tribal corporation lacks standing to challenge BIA's approval of a tribal ordinance, even where the ordinance directly affects the corporation).

Before the Area Director, appellant contended that the Superintendent lacked authority to overrule the election board concerning his contest. Under 25 CFR 81.8, election boards are given responsibility for conducting elections and performing certain specified functions in connection therewith. They are not, however, given authority to rule on election contests. Rather, under section 81.22, that authority is vested in the Secretary. Therefore, BIA has the authority to disregard the election board's recommendation if it finds that recommendation inconsistent with the requirements of the regulations. The Board rejects appellant's contention that the Superintendent was required to follow the election board's recommendation.

Appellant's final arguments before the Area Director were that BIA failed to keep the Tribes advised of election matters and that it has acted inconsistently with respect to Tribal Council resolutions in the past. Neither of these allegations, even if true, are proper subjects for an election contest because neither relates to the conduct of the election itself. Therefore, the Board rejects these arguments.

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 September 10, 1993, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge