



INTERIOR BOARD OF INDIAN APPEALS

Karen Bucktooth v. Acting Eastern Area Director, Bureau of Indian Affairs

29 IBIA 144 (04/04/1996)



United States Department of the Interior

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

KAREN BUCKTOOTH, Appellant	: Order Affirming Decision as : Modified : :
v.	:
ACTING EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	: Docket No. IBIA 95-110-A : : : April 4, 1996

This is an appeal from a March 31, 1995, decision of the Acting Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), recognizing Dennis J. Bowen, Sr., as the president of the Seneca Nation (Nation) and establishing conditions under which BIA will conduct government-to-government relations with the Nation. For the reasons discussed below, the Board affirms the Area Director's decision as modified in this order.

Bowen was elected president of the Nation on November 1, 1994, and sworn into office on November 8, 1994. At his swearing-in, Bowen announced the removal of two members of the Council (the Nation's legislative body), Ross John and Art John. Three days later, Bowen filed suit against Ross John in the Nation's Peacemakers Court. 1/ The complaint was amended on

1/ The Peacemakers Court is a component of the Nation's judicial system, as established by Sec. IV of the Nation's Constitution. Sec. IV provides in part:

"The judicial power shall be vested in a Court of Appeals, a Peacemakers Court and a Surrogates Court. There shall be one Court of Appeals. There shall be two Peacemakers Courts and two Surrogates Courts * * *.

"The Court of Appeals shall be comprised of six judges, any three of whom shall hear each appeal. * * * The Peacemakers Court shall be comprised of three judges each, any two of whom shall have the power to hold Court and discharge all the duties of the Peacemakers Court. The Surrogates Court shall be comprised of one judge each.

"All determinations and decisions of the Peacemakers and Surrogates Courts shall be subject to appeal to the Court of Appeals. * * *

"All determinations of the Court of Appeals shall be subject to appeal to the Council upon the granting of a writ of permission by a vote of not less than seven Councillors. Such appeal, if granted, shall be heard by at least a quorum of the Council. In the event that no appeal is made to the Council, the decision of the Court of Appeals is final, and no other court or subsequently elected Council shall have the right to re-open, re-hear,

November 29, 1994, to include Art John and other tribal officials and/or employees as defendants.

The ensuing proceedings in various tribal forums are, as relevant to this appeal, succinctly summarized in the Area Director's answer brief:

Bowen filed suit against Ross John and Art John in Civil Action No. 1111-94 to enjoin their sitting or acting as members of the Council of the Seneca Nation. The Peacemakers Court issued a temporary restraining order against Ross John on November 11, 1994 and against Art John on November 29, 1994 * * *. Interlocutory appeals from these orders were taken to the Court of Appeals.

While the cases of Ross John and Art John were pending in the Court of Appeals, on January 14, 1995, the Council by a vote of 10-4 invoked Civil Procedure Rule 22-105 which provides:

The Nation's Council shall have authority to issue a stay of any order issued by any court under this article until the Council shall have an opportunity to hear and determine the issues raised in the proceeding.

The Council thereupon stayed the injunctions that the Peacemakers Court had issued against Ross John and Art John * * *.

The Council on January 14 also resolved to draw impeachment charges against Bowen. An impeachment committee was formed which issued its report on January 25. Articles of impeachment were drawn and Bowen was notified of the impeachment proceedings on January 25, as well. Bowen was summoned to appear on January 28 to answer the articles of impeachment * * *.

On January 27, upon the petition of the two Surrogate judges of the Seneca Nation, [2/] in the case of Scanlan v. Printup, Civil Action No. 0127-95 (Peacemakers Ct.) the Peacemakers Court enjoined the Council from taking further action to impeach Bowen * * *. However, the order was signed by only one judge * * *.

fn. 1 (continued)

reverse or affirm the decision of the Court of Appeals.

"On such matters of appeal from the Court of Appeals, the decision of the Council shall be final, and no subsequent elected Council shall have the right to reopen, rehear, reverse or affirm the decision of a previous Council. "

2/ Under Sec. II of the Seneca Constitution, the surrogate judges have a role in the impeachment of a president. Sec. II provides:

"The Council shall have the power of impeachment, by vote of the majority of all the members elected.

"The court for the trial of an impeachment shall be composed of the president and the Council or a majority of them in all cases except in that of the trial of the president; in that case, the court for the trial of impeachment shall be composed of at least a majority of the Council and of the surrogates of the Nation."

The trial of impeachment was held on the scheduled date * * *. The impeachment court consisted of ten councillors, including Ross John and Art John, but the two Surrogate Judges were not in attendance. The [impeachment] Court rendered its decision on January 28, finding Bowen guilty of the offenses with which he had been charged, and removing him from office. On February 3 the Council affirmed the decision of the impeachment court by a unanimous vote of the same ten Councillors who had served as the impeachment court, including Ross John and Art John * * *.

On February 6, 1995 the Peacemakers Court conducted a hearing in the Scanlan v. Printup case and permanently enjoined the Council from conducting impeachment proceedings without the presence of the Surrogate judges. The impeachment and removal of Bowen that had already occurred were deemed unconstitutional and null and void. Two judges signed the order of February 6 * * *.

On February 11, 1995 on a vote of 9-0 with one abstention, Bucktooth was selected by the Council to serve as president of the Seneca Nation. Ross John and Art John participated in this Council action * * *.

Finally, in their appeal that had been pending before the Court of Appeals, Ross John and Art John invoked Civil Procedure Rule 22-105 which states further that "temporary or prejudgment relief against a body or officer shall not be available."

The Court of Appeals in considering the effect of this rule, cited a precedent established in a previous case that required the constitutionality of CPR 22-105 to be determined by the Peacemakers Court. [Based upon that precedent, the Court of Appeals held that CPR 22-105 could not be invoked in the instant case.]

The Court [of Appeals] thereupon affirmed the temporary restraining orders which prohibited Ross John and Art John from acting and sitting as Councillors, and the case was remanded to the Peacemakers Court. [The Court of Appeals issued its decision on March 17, 1995.]

(Area Director's Answer Brief at 3-6).

While these matters were proceeding through the Nation's courts and Council, the same substantive issues were being litigated in State court, in a suit filed on November 18, 1994, by Ross John and others. John v. Bowen, Index No. 1994/12582 (N.Y. Sup. Ct.). The State court found that it had jurisdiction over the dispute and issued a number of orders against Bowen, including a December 30, 1994, order directing him to show why he should not be held in contempt for failing to comply with the court's previous orders.

On January 20, 1995, Bowen filed suit in Federal district court, seeking an injunction against the State court proceedings. The district court issued a temporary restraining order on January 27, 1995. On February 27,

1995, the district court issued a preliminary injunction restraining the State court from exercising any further jurisdiction in the matter. Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995).

While the Federal court proceeding was still pending, by letter of February 14, 1995, ten members of the Council requested the Assistant Secretary - Indian Affairs to recognize Bucktooth as president of the Nation. On February 22, 1995, Bowen also wrote to the Assistant Secretary. He disputed Bucktooth's claim to the presidency and requested that he be recognized as president.

The Assistant Secretary referred the matter to the Area Director. By letters of March 8, 1995, to Bucktooth and Bowen, the Area Director indicated that, in light of an apparent stalemate within the Nation, he would undertake to determine which individuals BIA would recognize as the leaders of the Nation for purposes of government-to-government relations between BIA and the Nation. He invited both parties to submit additional materials. He also scheduled a meeting for March 22, 1995, at which both sides were given an opportunity to present their positions.

On March 31, 1995, the Area Director issued his decision. ^{3/} He first discussed the status of Ross John and Art John as members of the Council but declined to make a determination on that issue, stating:

It is not a matter within the authority of the Bureau to determine whether Ross John and Art John were properly appointed or whether the Peacemakers Court decisions enjoining them from serving as councillors was correct. The ultimate fate of Councillors Ross John and Art John must be decided through the judicial process established in the Seneca Constitution. Hence, the council in the end will speak the final word on their cases.

(Area Director's Decision at 3).

Next, the Area Director addressed the question of the presidency. He stated:

The impeachment process was rife with error. * * * The crucial fact * * * and the one upon which the Bureau bases its opinion, is the participation of Ross John and Art John in the trial of impeachment and subsequent vote of impeachment by the Council. At the time of these occurrences, both Ross John and Art John were under an injunction issued by the Peacemakers Court that prohibited them from serving as councillors. The participation of Ross John and Art John tainted the impeachment proceedings and rendered those proceedings unconstitutionally void and of no effect. Therefore, Dennis Bowen was not properly removed from his position of president * * *. * * *

^{3/} By this time, the dispute within the Nation had erupted into violence. One person had been shot prior to March 8. On the day after the March 22 meeting, three people were shot and killed. Area Director's Brief at 2-3.

Accordingly, the appointment of Karen Bucktooth is a nullity * * *.

(Id. at 4-5).

Finally, the Area Director listed the conditions under which BIA would conduct government-to-government relations with the Nation:

Karen Bucktooth must step down from the presidency.

All councillors must submit a written expression of their intention either to remain on the Council or to resign from their position on the Council.

All judicial proceedings concerning Ross John and Art John must be completed, with the proviso that any action of the Council on these cases must proceed without the participation of Ross John and Art John.

All judicial proceedings against officials of the Seneca Nation who were removed from their positions must be completed.

The Council must recognize Dennis Bowen as the rightful President of the Seneca Nation.

All vacancies on the Council must be filled.

Upon presentation of a valid council resolution requesting that it do so, the Bureau will assist the Nation in obtaining the services of a qualified neutral judge or attorney to preside in the tribal court proceedings mentioned above.

(Id. at 5-6).

On appeal to the Board, Bucktooth contends: (1) the Area Director's decision constituted an unwarranted intrusion into tribal sovereignty; (2) it was not necessary for the Area Director to issue a decision concerning the presidency because the Nation's governing body is the Council; (3) the decision was internally inconsistent; and (4) the decision was wrong in concluding that the impeachment process was "rife with error." Bucktooth also challenges all seven conditions listed in the last part of the Area Director's decision.

The Area Director contends that his decision was reasonable and that it demonstrated that BIA favors resolution of internal tribal disputes in tribal forums. Further, he contends, he acted swiftly and decisively in order to defuse the violent governmental crisis within the Nation.

Bowen contends, inter alia, that the Area Director's decision was consistent with tribal law--in particular, with the Peacemakers Court decision in Scanlan v. Printup, in which that court held that the impeachment of Bowen was null and void.

Both the Area Director and Bowen contend that Bucktooth cannot now argue that the Area Director overstepped his authority in issuing a decision on the presidency when she sought a Departmental decision on this very point.

It is a well-established principle of Federal law that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body. *E.g.*, Bowen v. Doyle, 880 F. Supp. at 123; Howe v. Acting Billings Area Director, 28 IBIA 142, 143-44 (1995); Johnson v. Acting Minneapolis Area Director, 28 IBIA 104, 107 (1995). Where an intra-tribal dispute of this nature has been resolved in a valid tribal forum, the results are binding on BIA and the Board. Wheeler v. U.S. Department of the Interior, 811 F.2d 549 (10th Cir. 1987); Smalley v. Eastern Area Director, 18 IBIA 459 (1990).

In this instance, the Area Director clearly believed that, given the extremely volatile situation within the Nation, an early BIA decision was critical. Understandably, then, he undertook to issue his decision without awaiting final decisions in the cases pending in tribal court. The Area Director suggests in this appeal that the Board ought not to second-guess his determination to issue a decision under the circumstances that were facing him at the time. The Board agrees. Clearly, the Area Director was required to exercise judgment concerning the steps to be taken to defuse the crisis within the Nation. The Board does not substitute its judgment for the Area Director's in this regard. It does, however, have authority to review the substance of the Area Director's decision.

Although it is more apparent from his brief than from his decision, the Area Director recognizes that his decision is, in essence, an interim decision. Where an intra-tribal dispute such as this one has not been resolved in a tribal forum, and BIA must know which individuals it will deal with in its government-to-government relations with the tribe, BIA may have no choice but to issue an interim decision. *See, e.g.*, Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). In that case, the Eighth Circuit Court of Appeals held that BIA must recognize, conditionally, one of two competing tribal governments and that "[t]hat recognition should continue only so long as the dispute remains unresolved by a tribal court" 708 F.2d at 339. The court further stated that it would be appropriate to "determine that the newly elected council, whose successful election received certification from the tribal election board, should govern in the interim period until the dispute reaches initial resolution by a tribal court" *Id.* *See also* Gonzales v. Acting Albuquerque Area Director, 28 IBIA 229 (1995).

In this case, it is arguable that, at the time of the Area Director's decision, an initial resolution of the impeachment question had been reached in the Peacemakers Court. In its February 6, 1995, order in Scanlan v. Printup, that court held that "[a]ny impeachment proceedings against the current President that have already taken place without the presence and authority of the Surrogate Judges of the Seneca Nation is null and void as unconstitutional." This order clearly applied to the impeachment of Bowen, which had already taken place. The Area Director did not cite the February 6 order. It is not entirely clear why he did not, although it

may have been because the order had been appealed and/or because the status of the order was uncertain. ^{4/}

Given his apparent uncertainty about the status of Scanlan v. Printup, ^{5/} it was not unreasonable for the Area Director to look to the Peacemakers Court injunctions in Bowen v. John, which, at the time of the Area Director's decision, had been affirmed by the Court of Appeals. ^{6/} Because Ross John and Art John had participated in the impeachment proceedings despite the injunctions against them, it was not unreasonable for the Area Director to conclude that, under tribal law, the impeachment proceedings were tainted, even though, as of the date of his decision, no tribal court had yet been presented with this precise issue. ^{7/} Nor was it unreasonable for the Area Director to anticipate that, if and when the question were presented to it, the Peacemakers Court would hold that the impeachment proceedings were void because of the participation of Ross John and Art John.

Under the circumstances, the Area Director reasonably applied as much tribal law as he found available. Further, his decision, although based on a different analysis, was consistent with the February 6, 1995, order in Scanlan v. Printup, in which it was explicitly held that the impeachment proceedings were null and void.

^{4/} On Feb. 24, 1995, a motion to vacate the Feb. 6, 1995, order was filed in the Peacemakers Court. On Mar. 8, 1995, a notice of appeal was filed in the Court of Appeals. This notice of appeal was still pending on Mar. 31, 1995, the date on which the Area Director issued his decision. On May 8, 1995, the Court of Appeals dismissed the notice of appeal because the Feb. 24, 1995, motion to vacate the Feb. 6, 1995, order was still pending before the Peacemakers Court.

The status of the Feb. 6, 1995, order on Mar. 31, 1995, is unclear to the Board and may well have been unclear to the Area Director. In this appeal, Bucktooth and Bowen each discuss section 304(b) of the Seneca Nation Rules of Appellate Procedure, which governs the status of a lower court decision after the filing of an application for a writ of permission in the Council. Bucktooth Reply Brief at 8; Bowen Answer Brief at 5 n.4. Neither party discusses any rule governing the status of a lower court decision after the filing of a notice of appeal in the Court of Appeals. However, a Mar. 8, 1995, letter written by the Nation's Attorney General suggests that Peacemakers Court decisions are effective while on appeal to the Court of Appeals unless a stay has been granted. See Bowen Ex. 8 at 10. As far as the Board is aware, no stay was issued in Scanlan v. Printup.

^{5/} It is also possible that the Area Director was simply not aware of the Feb. 6, 1995, order. His decision mentions only the Jan. 27, 1995, order, which he considered invalid because it was signed by only one judge.

^{6/} Later, on Apr. 8, 1995, the defendants in Bowen v. John filed an application for writ of permission to appeal the Court of Appeals' Mar. 17, 1995, decision.

^{7/} As indicated above, in Scanlan v. Printup, the Peacemakers Court found the impeachment proceedings invalid because of the absence of the surrogate judges. It did not address any issues concerning Ross John and Art John.

Accordingly, the Board affirms the Area Director's recognition of Bowen as president of the Nation, pending final resolution of the dispute in a tribal forum.

The Area Director's decision also included seven conditions under which BIA would agree to conduct government-to-government relations with the Nation. As noted above, Bucktooth challenges all seven.

The first and fifth conditions are, in essence, restatements of the Area Director's decision to recognize Bowen as president of the Nation. The Board finds these conditions reasonable.

The second condition requires that each member of the Council submit a statement concerning his/her intent to remain on the Council or to resign. In his brief before the Board, the Area Director states that this condition came about because the present controversy stemmed in part from the resignation of a former councillor. Hoping to avoid a similar controversy in the future and to dispel doubt on the part of BIA over the future membership of the Council, the Area Director imposed the condition because it was "the easiest way to ascertain the membership of the Council" (Area Director's Brief at 14).

It appears from the record that Council membership has recently been rather fluid. Thus, it is understandable that BIA might want to have an accurate list of councillors. In conducting its government-to-government relations with the Nation, BIA has a need to know that certain Council enactments are valid and, for that purpose, may need to know the composition of the Council at the time those enactments are voted upon. BIA has the right to require proof of the validity of Council enactments relevant to the government-to-government relationship whenever there is a question as to the validity of those enactments. But the written statements required by the Area Director's second condition go beyond the needs of BIA in this regard and are thus an infringement upon the Nation's right to self-government. The Board therefore vacates the Area Director's second condition.

The sixth condition also concerns the composition of the Council and requires that all Council vacancies be filled. The Area Director states that the failure to fill vacancies has contributed to the Nation's problems and has led to practices which, *inter alia*, call into question the validity of Council actions. For the same reasons just discussed, the Board finds that BIA may reasonably require the Nation to prove the validity of particular Council actions. It further finds, however, that the general requirement imposed by this condition is an infringement upon the Nation's right to self-government. It therefore vacates the Area Director's sixth condition.

The third and fourth conditions require the completion of certain litigation in the tribal courts. The litigation to which these conditions refer is presumably Bowen v. John. At the time of the Area Director's decision, completion of this litigation appeared imminent. However, the case later became procedurally complicated and, by the time briefs were filed in this appeal, resolution of that litigation--according to both Bucktooth and Bowen--appeared remote. As far as the Board is aware, Bowen v. John is still pending in the Nation's judicial system, as is Scanlan v. Printup.

The Area Director's decision suggests that BIA would delay recognizing any government for the Nation until the proceedings in Bowen v. John are completed. Under the circumstances, this approach appears unworkable. As discussed above, BIA must sometimes recognize a tribal government on an interim basis, while awaiting final disposition of tribal court proceedings. The Board finds that BIA should not await a final disposition of Bowen v. John, but should recognize Bowen immediately. The Board therefore vacates the third and fourth conditions.

The seventh condition is not actually a condition but an offer of assistance to the Nation, which the Nation may accept or reject. The Board sees no problem with this offer of assistance.

Therefore, 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 March 31, 1995, decision is affirmed as modified by deletion of the second, third, fourth, and sixth conditions. 8/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

8/ Arguments made by the parties but not discussed in this order have been considered and rejected.