INTERIOR BOARD OF INDIAN APPEALS

Robert Tabor, Bill Blind, Vinita Sankey, and Ed Whiteskunk
v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

39 IBIA 144 (10/02/2003)

On reconsideration:
39 IBIA 186

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROBERT TABOR, BILL BLIND, VINITA SANKEY, and ED WHITESKUNK, Appellants	:	Order Vacating Decision in Part and Dismissing Appeal as Moot
v.	:	Docket No. IBIA 03-111-A
ACTING SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	October 2, 2003

Appellants Robert Tabor, Bill Blind, Vinita Sankey, and Ed Whiteskunk, members and officers of the 33rd Business Committee (Business Committee) of the Cheyenne-Arapaho Tribes of Oklahoma (Tribes), sought review of an April 25, 2003, decision issued by the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning whether certain actions taken by the Business Committee could be recognized in light of the fact that a quorum had not been established at the meeting at which those actions were taken. For the reasons discussed below, the Board of Indian Appeals (Board) vacates the Regional Director's decision in part and dismisses this appeal as moot.

The Business Committee consists of eight members. Constitution and By-Laws, Art. I, sec. 3. A quorum of the Business Committee consists of "at least five (5) of the elected members." Constitution, Art. I, sec. 5.a. The Business Committee members select a Chairman, Vice-Chairman, Secretary, Treasurer, and Sergeant-at-Arms from their members. Constitution, Art. VIII, sec. 4. Article XIV, sec. 1, of the Constitution provides:

> The chairman of the business committee shall preside over all meetings of the committee, shall perform all the duties of a chairman, and exercise any authority delegated to him by the business committee. He shall have the privilege of voting in case of a tie. He shall further preside at all meetings of the tribal council, unless a different presiding officer is selected by the tribal council at the outset or at any time during the course of the meeting.

It appears that there has been an even split among the members of the Business Committee for some time. It further appears that the four Business Committee members who are not appellants here may have declined to attend Business Committee meetings in order to prevent the establishment of a quorum.

On or about August 6, 2002, the Business Committee Chairman, one of the Appellants here, presented to the Regional Director an opinion written by an attorney apparently hired by Appellants or some of them. This opinion of counsel advanced an interpretation of the Tribal Constitution under which the Business Committee Chairman could vote as a representative of his/her district and could vote a second time under Article XIV, sec. 1, in order to break a tie vote. 1/ Under this interpretation of the Tribal Constitution, Appellants would be able to control an evenly divided Business Committee because of the Chairman's second vote.

Upon the request of the Regional Director, the Department's Field Solicitor reviewed the opinion of counsel and, in a two paragraph memorandum dated November 4, 2002, agreed with it. Nothing in the administrative record or in the November 4, 2002, memorandum indicates that the Field Solicitor considered any information other than the opinion of counsel in reaching his conclusion.

In a second document dated January 31, 2003, the same attorney offered his opinion on the question of whether the Business Committee could legally conduct business at a meeting at which a quorum was never established or during which a quorum was lost because a sufficient number of Committee members left the meeting. He opined that "in emergency situations a majority of the Business Committee can continue to conduct the meeting." Jan. 31, 2003, Memorandum at 1. In presenting this advice, the attorney relied extensively on Hall v. Lakeside State Bank of New Town, 26 Indian L. Rep. 6032 (Fort Berthold Tribal Ct. 1998). He stated that his opinion and Hall were further supported by Pedro v. Blind, Case No. CNA-CIV-00-81 (Cheyenne-Arapaho D.Ct. 2000). Although the attorney initially used the term "majority" to describe the group of Business Committee members who were taking action in the absence of a quorum, he did not use this term when he summarized his conclusions.

1/ It appears that this interpretation of the Tribal Constitution may have differed from the Tribes' prior interpretation of, and practice, under their Constitution. See, e.g., Hawk v. Pedro, Case No. CNA-CIV-01-05 (Cheyenne-Arapaho D.Ct. May 16, 2001) (In setting out the reasons why the removal of the Business Committee Treasurer was improper, the Tribal District Court Judge stated, among other things: "The Chairman voted for the removal when there was no tie.")

The Board may take official notice of decisions issued by another judicial forum.

A regular monthly Business Committee meeting was scheduled for February 1, 2003. All four present Appellants attended the meeting, but the other four Committee members did not. Apparently acting on the advice given in their attorney's January 31, 2003, opinion, and on their conclusion that an emergency situation existed, Appellants conducted tribal business despite the fact that there was not a quorum at the meeting.

Appellants submitted the resolutions adopted at the February 1, 2003, meeting to the Superintendent, Concho Agency, BIA (Superintendent). By letter dated February 7, 2003, the Superintendent declined to recognize the validity of the resolutions, on the grounds that they were adopted at a Business Committee meeting at which there was not a quorum. 2/

Appellants appealed to the Regional Director. It appears that they presented their attorney's January 31, 2003, opinion to BIA for the first time with their notice of appeal.

On March 18, 2003, after the issuance of the Superintendent's decision, the Supreme Court of the Cheyenne-Arapaho Tribes issued a decision in the case of Wilson v. 33rd Business Committee, Case No. CNA-SC-02-02. In Wilson, the Tribal Supreme Court discussed the question of the voting rights of the Business Committee Chairman and stated that, under the Tribes' Constitution, the Business Committee Chairman could vote only in the case of a tie among the other Business Committee members. In this discussion, the Court distinguished the Tribes' Constitution from the constitutions of some other tribes, specifically including the constitution at issue in Hall. 3/

2/ The Superintendent's decision states: "We have had the assistance of the Regional Office Branch of Tribal Government Services and the Field Solicitor in this review." Feb. 7, 2003, Decision at 2. The "assistance" is not further identified. However, on Feb. 3, 2003, the Regional Director, noting that Appellants had apparently relied on the Field Solicitor's Nov. 4, 2002, memorandum in taking action at the Feb. 1, 2003, meeting, asked the Field Solicitor to clarify that memorandum as to whether the Chairman could vote if there was no tie vote and whether, if the Chairman could vote twice, he could be counted twice to establish a quorum. The Field Solicitor responded on Feb. 5, 2003, stating:

"As stated in our opinion of November 4, 2002, the Chairman has 'the privilege of voting in case of a tie.' Article XIV, Section 1. This does not permit the Chairman to vote twice in the absence of a tie. Nor does it permit the Chairman to be counted twice to establish a quorum. Article I, Section 5.2. states that 'A quorum (for the Business Committee) shall consist of at least five (5) of the elected members and must be present to transact tribal business...'"

3/ Interestingly, the Hall court also distinguished the constitution before it from the situations of "many tribes where the Tribal Chairman only votes in case the Council vote results in a tie." 26 Indian L. Rep. at 6033.

In their appeal to the Regional Director, Appellants described the circumstances which lead them to conclude that there was an emergency situation in the Business Committee and Tribal affairs. Appellants stated their opinion that the other four Committee members did not attend the February 1, 2003, meeting "because they know they are out-voted, due to the Chairman's authority to cast an additional vote to break the four to four deadlock." Feb. 26, 2003, Notice of Appeal at 3. They further stated that "[p]rinciples of parliamentary law recognize that in [emergency] cases a legislative body can conduct business on an emergency basis, as long as it is pursuant to an act of a majority of the body, even acting without a quorum, and subject to the additional proviso that any such emergency action is ratified at the next meeting at which a quorum is present. * * * In such [emergency] cases, the other remaining four members of the Business Committee (constituting a majority due to the Chairman's presence) must have the ability to act as a Business Committee, and conduct emergency business." Id. at 5.

It appears that the Regional Director read Appellants' argument as being that the Chairman should be counted twice in determining whether or not action was being taken by a "majority" of the Business Committee because of their related, and strongly argued, contention that the Chairman could vote twice in the event of a tie. On April 25, 2003, he affirmed the Superintendent's decision not to recognize the resolutions presented by Appellants, but relied on that part of the Tribal Supreme Court's decision in Wilson which stated that the Chairman could vote only in the case of a tie. The Regional Director stated: "Although Wilson did not address the quorum issue before this office, carrying its logic further, the Chairman, being able to vote only once, can only be counted once to establish a quorum. * * * The Appellants do not have a majority (the Chairman being counted twice) as they argue." Apr. 25, 2003, Decision at 2-3. 4/

Appellants appealed to the Board. Appellants, the four other members of the Business Committee, 5/ and the Regional Director filed briefs on appeal.

4/ The Regional Director stated his understanding "that the Cheyenne-Arapaho Supreme Court has been petitioned to rehear Wilson" on the issue of the Chairman's voting rights. Apr. 25, 2003, Decision at 2. He noted: "If the Supreme Court, on rehearing, makes a different determination, we would then follow that ruling. Until such time, though, we feel bound to accept the court's clear statement on this issue." Id.

The Regional Director's analysis, including the language "the Chairman, being able to vote only once, can only be counted once to establish a quorum," appears to also be based on the Field Solicitor's Feb. 5, 2003, memorandum, quoted in footnote 2.

5/ In his answer brief, the Regional Director commented that he did not receive a copy of the brief filed by the four other members of the Business Committee. He stated that he knew of it only because the Board referred to it in an order. The Board was unaware of this comment until it began consideration of this appeal. Upon closer examination, nothing in that

In their notice of appeal and supporting brief before the Board, Appellants assert that the Regional Director mischaracterized their argument. They contend that they had not argued that the Chairman could be counted twice in order to establish a quorum, but rather had argued that a majority of the Business Committee could take action in an emergency situation when four members of the Committee were boycotting Committee meetings in an attempt to prevent the establishment of a quorum.

The Board finds that the Regional Director's interpretation of Appellants' argument was eminently reasonable under the circumstances of Appellants' references to their position that the Chairman could vote twice and their tying that reference to the term "majority." The dictionary definition of "majority," in the present context, is at least one more than half. One more than half of a body composed of eight members is five members. There is no possible way to say that four members of this Business Committee (which presently has its full complement of eight members) constitute a "majority" of the Committee unless, as they certainly appeared to do in their filings before the Regional Director, Appellants were arguing that the Chairman could be counted more than once because he had more than one vote. 6/

However, the Board need not decide this issue because, in their reply brief, Appellants contend that the quorum issue is moot. They state that, since the filing of their appeal with the Board, the Business Committee has met with a quorum present and has conducted tribal

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(fn. 5, continued)
brief shows that it was served on interested parties, including Appellants. However, Appellants received the same order mentioning the brief and did not notify the Board that they had not received a copy of the brief. Neither did they mention the brief and/or their failure to receive a copy of it in their reply brief. Under these circumstances, the Board finds that Appellants were on notice that a brief opposing their position had been filed and, if they were interested in its contents, should have requested a copy of that brief from either the Board or the other members of the Business Committee.

In any event, the Board finds the failure to serve interested parties to be harmless error under the circumstances of this case because it does not rely on that brief in reaching its decision here.

6/ The only other logical argument that the four Appellants constituted a "majority" of the Business Committee would be that they were a majority of the members attending the meeting. Appellants, however, did not make this argument.

business, including taking action on the issues that were addressed in the resolutions which BIA declined to recognize. 7/

With Appellants' concession that there is not an emergency situation and that Tribal business is being conducted, it would appear that they should be requesting dismissal of this appeal. However, they are not. Instead, they argue that the Board must rule on the question of the Chairman's voting rights. This appears to be the issue Appellants have been most concerned about from the beginning of this matter, based on the fact that their briefs have been devoted almost exclusively to it.

As the Board mentioned in footnote 2, above, on February 5, 2003, the Field Solicitor issued a second opinion addressing the Chairman's voting rights as well as whether the Chairman could be counted twice to establish a quorum. Despite the existence of this opinion, the Superintendent did not engage in any such discussion in her February 7, 2003, decision. Instead, the Superintendent confined her decision to the question of whether or not there was a constitutional quorum present at the February 1, 2003, Business Committee meeting.

The issue on appeal to the Regional Director was therefore whether the Superintendent correctly decided that there was no quorum at the February 1, 2003, meeting. In addressing that question, the Regional Director went further than the Superintendent, and based his decision on the number of votes that the Chairman has. He relied explicitly on the Tribal Supreme Court's decision in Wilson and apparently implicitly on the Field Solicitor's February 5, 2003, memorandum, in holding that the Chairman could not be counted twice to establish a quorum because he could only vote once.

In essence, Appellants urge the Board to ignore the limited issue that was before the Regional Director and issue an advisory opinion holding that at least three Tribal Court decisions, including two Tribal Supreme Court decisions (Hawk; Wilson; and Tabor v. Lujan,

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7/ It appears likely that the full Business Committee met in response to the Tribal Supreme Court's decision in Wilson, which, among other things, held that attendance at Business Committee meetings is mandatory. The Board expects that the Court's discussion of the Chairman's voting rights in Wilson was also influential.

The fact that the Business Committee was able to meet and conduct business following the issuance of a Tribal Court decision illustrates the reason why this Board, BIA, and the Department should not rush to insinuate themselves into intra-tribal disputes, but rather, in promoting tribal sovereignty and self-determination, should allow time for tribal processes to be utilized.

Case No. CNA-SC-03-04 (Cheyenne-Arapaho S.Ct. May 7, 2003) 8/), are unreasonable and will not be followed by the Department because they violate the Tribal Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1302.

The Board declines Appellants' invitation to, in practical effect, reverse the Tribal Supreme Court. It especially declines that invitation when there is no Federal necessity to reach a conclusion on the issue of the Chairman's voting rights.

However, the Board recognizes that the Regional Director's decision can be read as including a Departmental holding on the question of the Chairman's voting rights. 9/ Furthermore, there are two extant Field Solicitor's opinions, one of which clearly accepts the argument that the Chairman can vote twice, and the second of which implies that the Chairman can vote as a regular matter in the absence of a tie. The Board finds that the Department cannot allow this situation to stand and therefore exercises the inherent authority of the Secretary of the Interior to correct a manifest injustice or error, as delegated to it in 43 C.F.R. § 4.318.

Accordingly, the Board vacates any and all parts of the Regional Director's April 25, 2003, decision that constitute or imply a holding as to the Chairman's voting rights. This issue was not properly before the Regional Director on appeal and no decision on the Chairman's voting rights was required to issue a decision on the quorum issue which was properly before the Regional Director.

The Board also vacates the Field Solicitor's November 4, 2002, memorandum in total and vacates that part of his February 5, 2003, memorandum which addresses the issue of the Chairman's voting rights. Because there was no issue before the Department concerning the Chairman's voting rights when the Field Solicitor issued his November 4, 2002, memorandum, and consequently no need for the Department to take a position on that question, issuance of the memorandum constituted an unwarranted intrusion into intra-tribal affairs. In addition,

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8/ Appellants do not mention Hawk. They base their arguments on Wilson, contending that the discussion of the Chairman's voting rights both there and in Tabor is dicta.

9/ The Board also recognizes that reading the Regional Director's decision in this way would result in an ambiguous "holding." Although the Regional Director stated that he was following Wilson, the language he used does not track that part of the Wilson decision which states that the Chairman can vote only in the case of a tie. Instead, the statement that the Chairman can "vote only once," appears to follow that part of the Field Solicitor's Feb. 5, 2003, memorandum which stated that the Chairman "cannot vote twice in the absence of a tie." This language appears to suggest that the Chairman can vote once even in the absence of a tie, a "holding" that is at odds with Wilson.

because the February 5, 2003, memorandum continued in part the unwarranted intrusion that started in the November 4, 2002, memorandum, that part should also not have been issued. Cf. Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, 38 IBIA 244 (2002) (concerning a BIA decision in regard to an enrollment issue rendered without a case or controversy pending before BIA). 10/

However, the Board notes that the Regional Director's decision contains an accurate statement of the law. In the interest of promoting tribal sovereignty, the Department will defer to a Tribe's reasonable interpretation of its own laws. See, e.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996). In light of the carefully researched and reasoned decisions rendered by the Tribal Supreme Court, and of the distinct possibility that those decisions reflect the Tribes' prior interpretation of the Chairman's Constitutional voting rights, 11/ it will take much more for the Board to accept Appellants' contention that this interpretation is unreasonable than was set forth in their arguments in this case. If Appellants continue to believe that the Tribal Supreme Court has issued an erroneous decision(s), they should make that argument to the Tribal Supreme Court, which has full authority to interpret and implement the Tribal Constitution and the Indian Civil Rights Act.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, any part of the Regional Director's April 25, 2003, decision which addressed the question of the voting rights of the Tribes' Business Committee Chairman is vacated on the grounds that that issue was not before the Regional Director. In addition, the Board vacates the Field Solicitor's November 4, 2002, memorandum in total and vacates that part of his February 5, 2003, memorandum which discusses the Chairman's voting

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10/ The Board recognizes that Appellants had presented the Regional Director with a copy of their attorney's opinion that the Chairman could vote twice and that the Regional Director had requested comments on that opinion from the Field Solicitor. However, in the absence of any actual case pending before the Department that required it to take a position on the Chairman's voting rights, both the Regional Director and the Field Solicitor should have declined to engage in what was, at that time, a matter of purely intra-tribal debate.

11/ See, e.g., Hawk, in which the Tribal District Court apparently did not believe it necessary to discuss the issue of the Chairman's voting rights, but instead, stated those rights as a foregone conclusion.

rights. This appeal is dismissed as moot in regard to the quorum issue, which is the only issue that was properly before the Department at any time during this proceeding. 12/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

12/ The Board notes that in Tabor, present Appellants asked the Tribal Supreme Court to act on a "resolution" which was adopted at a Business Committee "meeting" at which there was no quorum. The Court specifically distinguished Hall and Pedro, the cases Appellants cited here, and, although acknowledging the possibility that there might theoretically be circumstances under which less than a quorum of the Business Committee might need to take action, rejected Appellants' argument that any such circumstances existed in regard to the "resolution" then before it.

Had this case gone to a decision on the quorum issue, the Board would have been required to address the question of whether it should defer to this Tribal interpretation of the Tribal Constitution.