



INTERIOR BOARD OF INDIAN APPEALS

Rick D. Poe v. Pacific Regional Director, Bureau of Indian Affairs

43 IBIA 105 (06/09/2006)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

RICK D. POE,	:	Order Dismissing Appeal
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 05-107-A
PACIFIC REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	June 9, 2006

Rick D. Poe (Appellant) seeks review of a September 2, 2005 decision of the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA) concerning an April 9, 2005 meeting of the Community Council (Council) of the Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria (Tribe) in California. ^{1/} The Regional Director upheld a decision of the BIA Central California Agency Superintendent (Superintendent) to recognize action by the Council removing Appellant from the office of Chairman of the Tribe and electing Nelson Pinola as interim Chairman until a regularly-scheduled November 2005 tribal election. For the reasons discussed below, the Board dismisses this appeal.

Background

The Council is the governing body of the Tribe, and consists of all qualified voters of the Tribe. Tribal Constitution Art. III, sec. 1. The Constitution requires the Council to meet twice yearly, in April and November. Id. sec. 4, as amended. In addition to the Council's regular semi-annual meetings, special meetings may be called, by written notice, by the Chairman or by 25% of the qualified voters. Id. sec. 6. The Council elects from its members a Chairman, Vice-Chairman, Secretary, and Treasurer. Id. sec. 3. Regularly-

^{1/} The Regional Director's decision was mailed undated and was received by Appellant on September 6, 2005. The copy of the decision in the administrative record is dated September 2, 2005.

scheduled elections for tribal officers are held at the Council meeting in November.
Id. sec. 5, as amended. 2/

Article 3 of the Bylaws describes the role of the Chairman, stating that it is “the duty of the chairman to preside over all meetings of the [Council] and [to] carry out all orders of the [C]ouncil,” assisted by the Council members and subordinate officers “in all proper ways” to carry out those Council orders.

Article VI, section 3 of the Constitution provides that “[t]he Community Council may, by a majority vote, expel any officer of the Council for neglect of duty or gross misconduct; Provided, that the accused shall be given an opportunity to answer any and all charges at a designated Council meeting. The decision of the Council shall be final.”

The Tribe does not have a court system.

On November 15, 2003, Appellant was elected Chairman. Other tribal officers elected at the time were Rick Laiwa, Vice-Chairman; Derek Laiwa McKay, Secretary; and Deanna Farley, Treasurer. All of the terms were for two years. Although the 2003 election was preceded by a tribal leadership dispute, the results of the 2003 election were uncontested. See Pinola v. Pacific Regional Director, 40 IBIA 54 (2004) (dismissing as moot an appeal regarding an April 13, 2002 recall election because of the uncontested November 2003 election).

On April 9, 2005, at a semi-annual meeting, the Council purportedly voted to remove Appellant as Chairman, and to elect Pinola as interim Chairman until the next regular tribal election in November 2005, when Appellant’s term was due to expire. In a letter addressed to Appellant dated April 14, 2005, the Superintendent recognized Pinola as the new Chairman, and Appellant appealed to the Regional Director, alleging a variety of infirmities regarding the Council’s April 9 meeting.

On September 2, 2005, the Regional Director upheld the Superintendent’s decision, finding that a quorum existed at the April 9 Council meeting, that the Council’s actions

2/ The Tribe has a Business Committee, which consists of the Chairman, Secretary, and Treasurer of the Council. Id. sec. 7. The Constitution provides that the Business Committee “shall perform such duties as may be authorized by” the Council, id., and the Bylaws of the Tribe provide that “[t]he subordinate officers of the [Council] shall perform such duties as the [Council] may from time to time provide by resolution.” Tribal Bylaws Art. 6.

were valid and had complied with tribal law, and that there was no evidence that the Council's action was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302. The Regional Director also stated that "it would be appropriate to place into immediate effect" the recognition of Pinola as Chairman on public exigency grounds. Regional Director's Decision at 7. 3/

Appellant appealed the Regional Director's decision to the Board, and in his notice of appeal requested clarification concerning the status of the Regional Director's decision during his appeal to the Board. On September 12, 2005, the Board, citing 25 C.F.R. § 2.6(a), clarified that the Regional Director's decision was not in effect because Appellant had appealed to the Board. The Board stated that the question of whether the Regional Director's decision should be made effective immediately was one that could be raised to the Board by motion, should the Regional Director or other interested parties wish to do so. On September 28, 2005, the Board reaffirmed and further clarified that no part of the Regional Director's decision to recognize Pinola as Chairman was in effect, and that "the status quo for the purpose of maintaining the government-to-government relationship between the Department and the Tribe — which is the limited context in which this case arises — is as it existed prior to the Superintendent's decision." Sept. 28, 2005 Order at 2. In that order, the Board reiterated its invitation for the Regional Director or other interested parties, should they wish to do so, to submit a motion for the Board to place the Regional Director's decision into immediate effect.

On November 10, 2005, after the Board had scheduled briefing on the merits, Appellant requested a 60-day extension of time to file his opening brief. In that request, Appellant stated that his request was "based on the fact that the constitutionally mandated tribal election for [the Tribe] is scheduled for this Saturday, November 12, 2005 and the election, if held and certified by the California Superintendent, will render the appeal moot." Nov. 10, 2005 Letter from Appellant to Board. 4/

3/ Pinola had separately requested that the Superintendent's decision be placed into immediate effect, and the Regional Director combined the request with his consideration of Appellant's appeal.

4/ In a motion accompanying his request, Appellant asserted that "[t]he Superintendent * * * has ten (10) days from the date of the election to certify the election results." Nov. 10, 2005 Motion for Extension at 1. Appellant cited no authority for the proposition that BIA was required to certify the election results in order for the election to be valid.

On November 12, 2005, the Council held its semi-annual meeting and regular biennial election of officers. Pinola presided over the meeting as Chairman. Minutes of the meeting taken by the Secretary and also signed by the Treasurer state that a quorum was established and that 200 Council members signed in. The minutes give no indication that Appellant sought to challenge Pinola as chair of the meeting, or sought a Council vote on whether Pinola or Appellant should be allowed to preside. The minutes do indicate that a motion was made to approve minutes from previous meetings, including the April 2005 meeting, and that the motion passed. The minutes report that following the Council's approval of minutes from previous meetings and following several committee reports, supporters of Appellant demanded that the Council call for the election of officers. Pinola was then nominated for Chairman, and the nominations were closed before Appellant could be nominated. Appellant's supporters protested, and the minutes indicate that after some discussion, Appellant was eventually permitted to run as a write-in candidate for Chairman. ^{5/}

The Council then elected Pinola as Chairman and Eloisa Oropeza as Secretary, and re-elected Rick Laiwa as Vice-Chairman and Deanna Farley as Treasurer. The Tribal Election Committee certified the results of the election, and the Tribe reported the results and certification to the Superintendent. The Election Committee's Report states that the number required for a quorum at the November 2005 meeting was 167 and that 182 members voted in the election. Interested Parties Motion to Dismiss, Ex. 2. The Election Committee's report states that Pinola received 136 votes. Id.

By letter dated December 12, 2005, Appellant, through counsel, sent a "Notice of Appeal" to the Superintendent, "appealing [the Superintendent's] certification pursuant to 25 C.F.R. 2.7, or lack thereof pursuant to 25 C.F.R. Section 2.8, of the election results for

^{5/} The minutes of the November 12, 2005 meeting were submitted to the Board supported by a declaration from the Tribal Secretary, whose obligation it is to "keep a full report of all proceedings" of Council meetings. Tribal Bylaws Art. 4. Appellant has offered no evidence to counter the Tribal Secretary's recitation of events as stated in the minutes.

The uncertainty about whether to allow Appellant to run for office at the November meeting apparently was based on language in a resolution purportedly adopted at the April 2005 meeting, which stated that Appellant "shall never hold office in the Tribe from this day forward." Res. No. 04-09-05-001 (April 9, 2005). According to the Tribal Secretary's minutes, a motion was made at the November meeting to overturn Res. No. 04-09-05-001, but it was voted down. Nevertheless, the minutes also state that the Election Committee "opined that they could not prevent voters from writing [Appellant] in as a write-in candidate." Nov. 12, 2005 Meeting Minutes at 2.

the illegal tribal election held on November 12, 2005 by * * * Pinola, who * * * held himself out * * * as * * * Chairman.” Dec. 12, 2005 Letter from Appellant to Superintendent. The letter asserts that the Board, in the present appeal, has issued orders stating that Appellant “was the sole and the legal chairman” of the Tribe. The letter also states that Appellant had not received any notice of any BIA decision concerning the election, and requests that the Superintendent send Appellant “documentation of any actions you have taken” concerning the November 2005 election. 6/

On January 17, 2006, Interested Parties Pinola, Oropreza, Laiwa, and Farley (Interested Parties) moved to dismiss this appeal, contending that the November 2005 tribal election had rendered moot the controversy over the April 2005 recall election. Because it appeared that Appellant did not concede the validity of the November election, the Board allowed briefing to proceed, both on the merits of the Regional Director’s September 2, 2005 decision and on the motion to dismiss. In their reply regarding the motion to dismiss, Interested Parties requested expedited consideration of this appeal.

On May 16, 2006, Interested Parties filed a Request for Relief Based on Exigent Circumstances requesting that the Board rule on their motion to dismiss and on Appellant’s appeal, or in the alternative place the Regional Director’s decision into immediate effect. The Board ordered expedited briefing on Interested Parties’ request, with responses from Appellant and the Regional Director due May 19, 2006, and Interested Parties’ reply due May 22, 2006. See May 16, 2006 Order.

On May 17, 2006, the Board received from Appellant a motion for “declaratory relief,” requesting that the Board “issue an Order declaring that Appellant * * *, the last duly elected Chairman of the [Tribe], is now and has been since his election in November 2003, the legal tribal chairman, for government-to-government purposes, of the [Tribe], pending a final decision by the [Board in this appeal].” The motion does not purport to seek new relief, but rather seeks reaffirmation of what Appellant contends has been said in prior Board orders.

6/ Appellant’s “Notice of Appeal” also asserts that Appellant “intend[s] to file a motion with the [Board] to have this appeal consolidated with the appeal of the illegal recall election of April 9, 2005.” Dec. 12, 2005 Letter from Appellant to Superintendent. The Board has not received any such motion, nor would the Board have authority to directly review action or inaction by the Superintendent. See Hardy v. Acting Midwest Regional Director, 42 IBIA 255, 256 (2006).

Appellant and Interested Parties have briefed the merits of this appeal, the motion to dismiss, and the most recent request for relief based on exigent circumstances.

The Regional Director has filed no pleadings in this appeal, and apparently neither the Superintendent nor the Regional Director have taken any action regarding the November 2005 election or the December 12, 2005 notice of appeal filed by Appellant.

Discussion

In light of the fact that both Appellant and Interested Parties apparently expect — mistakenly — that the Board should serve as the initial forum for deciding the validity of the November 2005 election, and because it appears that BIA may be withholding further action based on an assumption that it must await the outcome of this appeal, the Board expedites its consideration of this appeal. ^{7/}

Interested Parties contend that this appeal must be dismissed as moot because Appellant's 2-year term as Chairman expired in November 2005, at which time the Tribe held a regular election and validly elected Pinola to a new term as Chairman. Appellant disputes the validity of the November 2005 meeting itself. Appellant contends that the Tribal constitution requires that the Chairman preside over all Council meetings and that as the "last duly elected Chairman" of the Tribe, he had to preside in order for the meeting, and the election, to be valid. Appellant argues that Board precedent and Board orders in this appeal are clear that the Tribe was required to treat him as the "legal Chairman" for the November 2005 meeting, and its failure to do so rendered the meeting unconstitutional. According to Appellant, he is therefore entitled to still be recognized as Chairman because "[if the Tribal Chairman] is removed in a contested election * * * [Board] case law and

^{7/} This appeal, of course, divested BIA of jurisdiction over the decision to recognize the April 9, 2005 recall election. It did not necessarily preclude BIA from issuing a new decision for the November 2005 election. However, given the nature of Appellant's arguments in this appeal, BIA may understandably have been concerned that the Board's resolution of this appeal was necessary before it could issue a decision on the November 2005 election, or BIA may have believed that the Board would address the validity of the November election directly.

precedent protects the last duly elected and unchallenged [Tribal] Chairman.” Appellant’s Response to Request for Relief Based on Exigent Circumstances at 4. 8/

Although the Board, as an executive branch forum, is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board does not consider appeals that have become moot. See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308, 310 (2005), and cases cited therein. Mootness may occur when nothing turns on the outcome of an appeal. Id. (citing Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274 (2005)). When mootness has been raised as an issue in a tribal government dispute pending before the Board, the burden is on the party opposing dismissal to demonstrate that the appeal is not moot. See Hamilton v. Acting Sacramento Area Director, 29 IBIA 122, 123 (1996). A valid tribal election will moot questions concerning prior tribal leadership, id., but a subsequent valid election is not the exclusive means by which such a dispute may be rendered moot. See McKay v. Pacific Regional Director, 40 IBIA 26, 31 (2004).

We agree that this appeal must be dismissed, but on more limited grounds than those argued by Interested Parties, and without reaching the issue of whether the results of the November 2005 election should be recognized.

We begin by emphasizing the limited scope of this appeal, as determined by the scope of the Regional Director’s September 2, 2005 decision. The Regional Director only decided whom to recognize as Chairman of the Tribe for the period between April and November 2005, at which time Appellant’s 2-year term was due to expire. Therefore, assuming that the Regional Director erred in recognizing the recall election, Appellant’s term as Chairman expired in November 2005. Conversely, assuming the Regional Director was correct in recognizing Pinola as interim Chairman, Pinola’s term also expired in November 2005. Reversing the Regional Director’s decision would have no effect on the

8/ In his opening brief, filed January 9, 2006, Appellant contended in a footnote that he had “[n]aively * * * anticipated a fair election that he would oversee as the legal [Tribal] Chairman,” but that when Appellant showed up, Pinola was acting as Chairman, Appellant was prohibited from putting his name on the ballot, Council members “apparently” were intimidated and some removed, and Pinola was then elected as the new Chairman. Opening Brief at 5 n.4.

expiration of Appellant's term, nor would an affirmance change the expiration of Pinola's term as interim Chairman. 9/

However, prior to the expiration of the 2003-2005 term for Chairman, it was still the duty of the Chairman to preside over the November 2005 Council meeting. Therefore, if Pinola's status as chair of the meeting was dependent on the Regional Director's decision recognizing Pinola as interim Chairman, and if the validity of the November 2005 meeting itself was dependent on having that individual preside as Chairman, then a reversal by the Board might affect whether the Department should recognize the results of the 2005 election.

Appellant contends that because he was not allowed to preside over the November 2005 Council meeting, the meeting and election were necessarily invalid. According to Appellant, he must therefore still be recognized as Chairman of the Tribe for government-to-government purposes, based on the Federal policy of interim recognition of the last undisputed tribal officials, pending final resolution of a leadership dispute by the Tribe.

We disagree.

It is "well-established that the ultimate determination of tribal governance must be left to tribal procedures." Wasson v. Western Regional Director, 42 IBIA 141, 158 (2006). Appellant relies on the Federal policy that when an intra-tribal dispute has not been resolved and the Department must deal with the tribe for government-to-government purposes, the Department may need to recognize certain individuals as tribal officials on an interim basis, pending final resolution by the tribe. See LaRocque v. Aberdeen Area Director, 29 IBIA 201, 203 (1996). Normally, that policy is applied by recognizing the last undisputed officials on an interim basis. See, e.g., Rosales v. Sacramento Area Director, 32 IBIA 158, 167 (1998). 10/

9/ Neither Appellant nor Interested Parties have cited any provision in tribal law that allows a Chairman to hold over in office after his or her term expires.

10/ This practice is not invariably required. See United Keetoowah Band of Cherokee Indians v. Muskogee Area Director, 22 IBIA 75, 87 (1992) (affirming Area Director's recitation of other possible courses for conducting relations with the tribe). Moreover, BIA is not required to make any recognition decision during a tribal leadership dispute, if interim recognition is not needed for government-to-government purposes. See Wasson, 42 IBIA at 158.

It is true that BIA may be required, as an interim measure while tribal processes are underway, to temporarily recognize tribal officials with whom it will deal for purposes of the government-to-government relationship. *Id.* But BIA's decision is interim and secondary to a final decision of the tribal forum. Wanatee v. Acting Minneapolis Area Director, 31 IBIA 93, 95 (1997). Thus, regardless of whom BIA recognized following the April 2005 Council meeting, that recognition remained subject to the Tribe's own mechanisms for resolving any continuing internal dispute concerning the recall election.

Appellant relies heavily on the fact that when this appeal was filed, the Board clarified that because the Regional Director's decision was not in effect, the status quo with respect to the Department's recognition of tribal leadership remained as it existed prior to the Superintendent's decision — i.e., recognition of him as Chairman. But the Board also made clear that preservation of that status quo was “for the purpose of maintaining the government-to-government relationship between the Department and the Tribe — which is the limited context in which this case arises.” Sept. 28, 2005 Order at 2 (emphasis added).

The status quo, as reflected in the Department's continued recognition of Appellant as Chairman for government-to-government purposes during the pendency of his appeal did not mean, as Appellant suggests, that the Tribe itself was necessarily required to treat him as the “legal Chairman” for purposes of resolving the dispute internally. The purpose of interim Federal recognition of tribal leadership is to serve the interests of the Federal and tribal government in carrying out the government-to-government relationship. The purpose is not, as Appellant suggests, to “protect” an individual interest of a tribal official whose term otherwise would have expired. In the present case, whether continued Departmental recognition of Appellant as Chairman is characterized as preserving the “status quo” or as “interim” recognition while his appeal was pending, it did not prevent the Tribe from using its own mechanisms for resolving the dispute over the recall election. It could not, therefore, be used to require the Council to accept Appellant as chair of the November meeting, because that was the very dispute that the Council had to settle. To hold otherwise in this case would be contrary to the principle that the ultimate determination of tribal governance must be left to tribal procedures. See Wasson, 42 IBIA at 158.

In addressing the merits of his appeal, Appellant challenges BIA's decision to recognize the April recall election by asserting that BIA has no “‘expertise’ to stand in place of the general tribal council” in deciding whether the April meeting was valid. Appellant's Reply Brief at 4. The same principle, however, holds true for the choice of Chairman for the November meeting. The Federal policy regarding interim recognition could not “stand in place of the general tribal council” in reaching tribal resolution of whether Appellant or Pinola should be allowed to preside as Chairman at the November 2005 meeting, thereby resolving within the Tribe any remaining issues regarding the April recall election.

Inconsistently, Appellant also contends that the Council was not a proper forum for resolving the recall election dispute because the dispute involved the Council's own actions. The Board expressly rejected such an argument in Patrick Stands Over Bull v. Billings Area Director, 6 IBIA 98, 104 (1977) ("we do not think it is permissible for the Bureau to regard the governing body of the Crow Tribe as an inadequate forum for the resolution of disputes '[w]hen the actions of the General Council itself are questioned.'). See also Ordinance 59 Ass'n v. U.S. Department of the Interior, 163 F.3d 1150, 1157 (10th Cir. 1998) ("As the Tribe's supreme governmental body, the General Council may be suited to resolve the apparent conflict [within the Tribe].").

Moreover, the evidence in the record before the Board does not indicate that Appellant even sought to exhaust tribal remedies or was precluded from challenging Pinola's chairmanship at the outset of the November 2005 meeting. Nor does the record indicate that Appellant raised any objection to the minutes of the April 2005 meeting. Appellant alleges, in his brief, that "apparently" his supporters were intimidated, Opening Brief at 5 n.4, that individuals challenging Pinola's chairmanship were removed, id. at 8, and that the chances of challenging the April 2005 meeting minutes were "nonexistent and there is no evidence that the opportunity so presented itself," id. It was Appellant's burden, however, to submit evidence to support any such allegations. Appellant has submitted no such evidence, and bare allegations, without evidence, are insufficient to sustain an appellant's burden of proof.

Because the Council was free to independently resolve the chairmanship dispute at the outset of its November 2005 meeting, Appellant has failed to demonstrate that the Regional Director's decision regarding the April 2005 recall election has any continuing effect, or that a reversal by the Board would negate the Council's actions at its November 2005 meeting. 11/ Therefore, we conclude that Appellant has failed to satisfy his burden of proof to show why this appeal should not be dismissed as moot. In addition, with respect to the issue of whether Appellant or Pinola should have been allowed to chair the November 2005 meeting, Appellant has failed to show that he exhausted tribal remedies.

We express no opinion on the November 2005 election itself. The initial decision within the Department regarding that election is properly left to BIA, when such a decision is necessary or appropriate for purposes of government-to-government relations. Apart from the issue of whether the November 2005 meeting was automatically rendered invalid because Appellant was not allowed to preside, any issues regarding the validity of the

11/ Interested Parties do not concede that under tribal law the Chairman must preside over a Council meeting in order for it to be valid, and submit evidence that Appellant's own election in 2003 as Chairman was presided over by the Vice-Chairman of the Tribe.

election that was held during the meeting, including Appellant's ICRA claims, are premature for Board review. 12/ In the event BIA were to decline to recognize the results of that election for Chairman, BIA must then decide in the first instance how to deal with the Tribe on a government-to-government basis. 13/

Conclusion

In summary, we conclude that Appellant's challenge to the Regional Director's decision regarding the April 2005 recall election should be dismissed as moot, or in the alternative for failure to exhaust tribal remedies. The validity of the November 2005 election for Chairman is not ripe for Board review because BIA has made no decision regarding that election. Interested Parties motion to dismiss is granted for the reasons stated in this order, and Appellant's motion for declaratory relief is denied.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Amy B. Sosin
Acting Administrative Judge

12/ In seeking expedited review, Interested Parties have suggested that a variety of Federal and state dealings with the Tribe have been delayed or suspended during this appeal. The Regional Director, however, has not given any such indication during these proceedings, and only recently did Interested Parties seek to have the Regional Director's decision placed into immediate effect, as an alternative to a dispositive ruling from the Board. We express no opinion on what matters may warrant a BIA recognition decision, for government-to-government purposes, following the November 2005 election, or how soon such a decision would be appropriate.

13/ Although Appellant seeks to question the legitimacy of the other Business Committee members, there is no evidence that any unsuccessful candidates for Vice-Chairman, Secretary, or Treasurer have sought to challenge the results of the November 2005 election with respect to those positions. Appellant has suggested no basis on which he would have standing to challenge the outcome of the election for those offices.