



INTERIOR BOARD OF INDIAN APPEALS

Joanne Carr, Betty F. Freiheit and William K. Bouschor, and Mary Locke v.
Midwest Regional Director, Bureau of Indian Affairs

46 IBIA 127 (12/10/2007)



United States Department of the Interior

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

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| JOANNE CARR, BETTY F. FREIHEIT) | Order Affirming Decisions in |
| and WILLIAM K. BOUSCHOR,) | Part and Dismissing in Part |
| AND MARY LOCKE,) | |
| Appellants,) | |
|) | Docket Nos. IBIA 07-118-A |
| v.) | 07-120-A |
|) | 07-121-A |
| MIDWEST REGIONAL DIRECTOR,) | |
| BUREAU OF INDIAN AFFAIRS,) | |
| Appellee.) | December 10, 2007 |

These three appeals to the Board of Indian Appeals (Board) seek review of three separate decisions of the Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), all of which were dated June 11, 2007. Each decision rejected a contest to a May 1, 2007, Secretarial election to amend the Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians (Tribe). Each of the contests raised a procedural challenge to the conduct of the election; none took issue with the substance of the amendment to the Tribe's Constitution.

The Tribe has moved for expedited consideration of these appeals on the grounds that uncertainty over the validity of the May 1 Secretarial election could affect an upcoming tribal election for tribal offices. After reviewing the administrative record and the briefs, the Board concludes that these appeals are suitable for summary disposition on procedural grounds, without extensive explanation.¹ We conclude that the Regional Director correctly dismissed the contests of Appellants William K. Bouschor and Mary Locke on the ground that they lacked standing to contest the Secretarial election because neither had registered to vote in the election. We also conclude that the Regional Director correctly rejected Appellant Betty F. Freiheit's challenge to the election on the ground that she had failed to

¹ The Regional Director's decisions and his consolidated brief on appeal more than adequately support and explain his grounds for rejecting the contests, and provide additional factual and legal background information and explanation relevant to our disposition on appeal, further minimizing the need for more extensive discussion in this decision.

exhaust administrative remedies by first submitting her challenge to the Election Board. Although the Regional Director rejected Appellant Joanne Carr's contest on the merits, we need not reach the merits of her appeal because we conclude that she too lacked standing to bring her contest, either because she did not register to vote in the election or because she failed to exhaust administrative remedies by first submitting her challenge to the Election Board.

Background

The Tribe is organized under the Indian Reorganization Act (IRA), 25 U.S.C. § 476, and is governed by a Constitution that was adopted by the Tribe in 1975 and approved by the Commissioner of Indian Affairs that same year.

On May 1, 2007, pursuant to a petition from the Tribe, the Election Board appointed pursuant to 25 C.F.R. § 81.8 conducted a Secretarial election² to amend Article IV, Section 3 of the Tribe's Constitution.³ It is undisputed that neither Bouschor nor Locke registered to vote in the election. In addition, although not noted by the Regional Director and not raised by any party on appeal, the list of registered voters that is included in the administrative record does not list Carr as a registered voter for the election. Finally, it is undisputed that prior to the election, Appellants Carr, Bouschor, and Freiheit failed to challenge the right to vote of anyone whose name appeared on the official list of registered voters prepared by the Election Board. *See* 25 C.F.R. §§ 81.12 (voting list), 81.13 (eligibility disputes).

A total of 9,299 members of the Tribe registered to vote; 6,206 voters actually voted in the election. The proposed amendment was adopted by a vote of 5,310 in favor and 883 opposed, with 13 ballots found separated or spoiled.

Carr, Freiheit and Bouschor jointly, and Locke, filed separate contests to the election, and the Regional Director rejected each contest in his three separate decisions. Appellants filed appeals with the Board and filed opening briefs. The Regional Director filed a consolidated answer brief. Locke filed a reply brief.

² A Secretarial election is a Federal election conducted pursuant to the IRA and the Department's implementing regulations, 25 C.F.R. Part 81.

³ The amendment requires that persons who are elected or appointed to the Tribe's Board of Directors must resign from any position of tribal employment or surrender any rights under a contract with the Tribe prior to assuming office.

Appeal of Joanne Carr (IBIA 07-118-A)

Carr seeks review of the Regional Director's June 11, 2007, decision in which the Regional Director rejected her argument on the merits that voter eligibility should have been limited to tribal members who are living within the Tribe's seven county service area. The Regional Director found, among other things, that the Tribe's Constitution expressly made all adult members of the Tribe eligible to register to vote, regardless of residence, and that neither the IRA nor the regulations required otherwise for the Secretarial election.

Although the Regional Director addressed the merits of Carr's challenge, the record before the Board shows that Carr is not listed as having registered to vote in the election. The Superintendent, in forwarding Carr's election contest to the Regional Director, stated that Carr was a registered voter, *see* Memorandum from Superintendent to Regional Director, May 8, 2007, at 2, and the Regional Director apparently assumed that was the case. But the list of registered voters included in the administrative record does not include Carr's name.

The regulations expressly provide that only a "qualified voter" may file an election challenge. 25 C.F.R. § 81.22. Registration to vote is the means by which an individual may become a "qualified voter." *See* 25 C.F.R. § 81.1 (definition of "registration"). Because it appears that Carr did not register to vote, she was not a "qualified voter," within the meaning of section 81.22, and therefore she lacked standing under the regulations to file a challenge to the election.

Even assuming, however, that the Superintendent was correct that Carr was a registered voter, we would still dismiss her appeal for lack of standing on separate grounds.

There is no evidence in the record that Carr filed a written challenge with the Election Board, although her challenge to the election is based on an eligibility dispute: she contends that tribal members outside of the Tribe's seven county service area were not eligible to vote. Section 81.13 of 25 C.F.R. expressly vests in the Election Board the authority to consider eligibility disputes, including "any written challenge of the right to vote of anyone whose name is on the [official] list [of registered voters]," and requires that such challenges be brought at least 10 days before the election. Although Carr avers that she telephoned the chairperson of the Election Board and discussed with him her concerns about the eligibility of voters who live outside the seven county service area, the regulations clearly require challenges to be submitted in writing.

Therefore, without deciding the scope of the Election Board's jurisdiction to decide particular eligibility disputes, including Carr's, and without deciding whether an Election

Board decision would be administratively reviewable, *see* 25 C.F.R. § 81.13 (election board decision “shall be final”), we conclude that at a minimum Carr was required to first present her challenge to the eligibility of nonresident members to the Election Board in writing, in order to allow it to consider both its jurisdiction and, as appropriate, the merits of the challenge. Carr’s failure to exhaust her administrative remedies before the Election Board deprives her of standing to bring her appeal to the Board.⁴

We therefore find it unnecessary to review the merits of Carr’s claim, and instead dismiss her appeal for lack of standing because she failed to register to vote and also failed to exhaust her administrative remedy before the Election Board.

Appeal of Freiheit and Bouschor (IBIA 07-120-A)

Freiheit and Bouschor seek review of the Regional Director’s June 11, 2007, decision that (1) dismissed Bouschor’s challenge because Bouschor had not registered to vote in the election and therefore was not a “qualified voter” who was eligible to challenge the election under 25 C.F.R. § 81.22, and (2) denied Freiheit’s challenge because she had not submitted a written challenge to the Election Board concerning the eligibility of voters on the registration list and because she had not presented evidence in support of her challenge. Freiheit and Bouschor claim that the Secretarial election should be declared invalid because a class of persons who admittedly are members of the Tribe should not have been allowed to vote. According to Freiheit and Bouschor, only members from the “original six bands” should have been allowed to vote. They contend that eligible voters must be from one of the original six bands and that members from other bands (e.g., Mackinac Bands of Chippewa and Ottawa Indians) were permitted to vote.⁵

⁴ We note that Carr was a member of the Election Board, but her contest clearly and necessarily was filed in her capacity as an individual tribal member.

⁵ The Tribe’s Constitution identifies the six historical bands as Grand Island, Point Iroquois, Sault Ste. Marie, Garden River, Sugar Island, and Drummond Island. Constitution, Art. III, § 1. An Amended Membership Ordinance adopted in 1978 by the Tribe’s Executive Council states that “the historical bands have been treated under different names at different times. They were inclusive of all Native Americans living in the eastern Upper Peninsula. The phrase ‘six historical bands’ is hereby interpreted to include all indigenous Native Americans of the Eastern Upper Peninsula.” Amended Ordinance § 5(a).

It is undisputed both that Bouschor did not register to vote in the election and that Freiheit did not file a challenge with the Election Board concerning any voter's eligibility to vote.

For the reasons discussed above with respect to Carr's appeal, we affirm the Regional Director's dismissal of Bouschor's challenge on the grounds that his failure to register to vote deprived him of the status of a "qualified voter" entitled to file an election challenge.

And for the additional the reasons discussed above with respect to Carr's appeal, we affirm the Regional Director's decision not to consider Freiheit's challenge. She did not present a claim to the Election Board to challenge the right to vote of anyone whose name was on the official list of registered voters, and therefore failed to exhaust her administrative remedies. Although Freiheit argues that her challenge is to a class of voters rather than to any particular individuals, that does not excuse the requirement that she first must present her challenge to the Election Board. She cannot wait until the Secretarial election is over and then seek to invalidate the results by presenting a claim against an entire class of voters, whose inclusion or exclusion was not considered by the Election Board and, in addition, whose votes may or may not have changed the result. Thus, we affirm the Regional Director's decision not to consider the merits of Freiheit's challenge because she did not exhaust her administrative remedies.

Appeal of Mary Locke (IBIA 07-121-A)

Locke seeks review of the Regional Director's June 11, 2007, decision that dismissed her challenge to the validity of the adoption of the amendment. Locke argued generally that voters were not given sufficient time to register for the Secretarial election, and that an insufficient number of votes were cast to make the election valid. The Regional Director found that because Locke had not registered to vote in the election, she was not a "qualified voter" who was eligible to challenge the election under 25 C.F.R. § 81.22. The Regional Director did not address Locke's argument that voters were not given enough time to register. Although the Regional Director should have addressed that argument in his decision, we affirm his dismissal of Locke's challenge for lack of standing because Locke does not claim that the time period allowed for registration violated the regulations, nor does she even claim that *she* intended to register but did not have sufficient time to do so.

As noted earlier, it is undisputed that Locke did not register to vote, and therefore under the terms of section 81.22, she was not a "qualified voter" who had standing to challenge the election. Her position in this regard is no different the that of Carr and Bouschor. Unlike Carr and Bouschor, however, Locke argues — in general terms — that voters did not have sufficient opportunity to register to vote.

The regulations provide that “[n]ot less than 30 nor more than 60 days notice shall be given of the date of the election,” and that such notice “shall . . . advise that persons must register if they intend to vote.” 25 C.F.R. § 81.14. Locke does not contend that the notice provided for the Secretarial election did not comply with section 81.14. Instead, she apparently contends that the time period provided — although in accordance with the regulations — was insufficient. She does not, however, cite any legal authority to support her argument, and in any event the Board does not have authority to consider what is in substance a challenge to the validity of the regulation. See *Loureiro v. Acting Pacific Regional Director*, 37 IBIA 158, 159 (2002). In addition, we note that Locke does not contend that she intended to register to vote, but was somehow precluded from doing so because of the time period provided. Therefore, we reject her apparent argument that her failure to register should be excused, based on the time allowed for registration.

Because Locke has provided no grounds for consideration of her claim that voters had insufficient time to register to vote, and because she was not a registered voter, the Regional Director correctly concluded that she lacked standing to bring a challenge to the election, and properly dismissed her challenge.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and as discussed above, the Board (1) dismisses Carr’s appeal for lack of standing because she was not registered to vote, or in the alternative because she failed to exhaust administrative remedies, (2) affirms the Regional Director’s dismissal of the challenges from Bouschor and Locke, and (3) affirms the Regional Director’s decision not to consider Freiheit’s challenge on the merits because she did not exhaust administrative remedies.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge