



INTERIOR BOARD OF INDIAN APPEALS

Raymond Cross v. Great Plains Regional Director, Bureau of Indian Affairs

65 IBIA 157 (02/28/2018)

Denying petition for reconsideration of:
65 IBIA 89

Judicial review of this case:

Complaint filed, *Cross v. Dep't of the Interior*, No. 4:18-CV-00220-CKJ
(D. Ariz. Apr. 25, 2018)



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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RAYMOND CROSS,)	Order Denying Reconsideration
Appellant,)	
)	
v.)	
)	Docket No. IBIA 18-022-1
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 28, 2018

On January 11, 2018, the Board of Indian Appeals (Board) dismissed for lack of jurisdiction this appeal filed by Raymond Cross (Appellant) from an October 16, 2017, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). *See* 65 IBIA 89 (2018). The Board found that the Decision from which Appellant sought to appeal did not constitute a “final administrative action or decision” by the Regional Director, and therefore the Board lacked jurisdiction to consider Appellant’s appeal.¹ *See* 43 C.F.R. § 4.331. On January 29, 2018, the Board received a petition for reconsideration from Appellant.

The Board’s standard for reviewing petitions for reconsideration is well-established: Reconsideration of a Board decision will be granted only in extraordinary circumstances. 43 C.F.R. § 4.315; *Nowlin v. Acting Eastern Oklahoma Regional Director*, 64 IBIA 131 (2017); *Howard v. Acting Pacific Regional Director*, 55 IBIA 240 (2012). In his petition, Appellant argues that (1) the Board’s dismissal of the appeal for lack of jurisdiction was based on a “clearly erroneous legal interpretation of the federal administrative law principles governing final agency action”; and (2) the Board should reinstate the appeal, order briefing on the merits, and review the Regional Director’s decision so as to prevent a “clear

¹ The Regional Director found that the Fort Berthold Agency Superintendent (Superintendent) did not err in responding to Appellant’s request under 25 C.F.R. § 81.57 for the number of tribal members who must sign a petition to call a Secretarial election to amend the Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe). Appellant contended in his appeal to the Regional Director, and again before the Board, that the Superintendent erred in using allegedly erroneous tribal membership information provided by the Tribe. *See* 65 IBIA at 90.

and manifest injustice,” which, Appellant contends, would otherwise be suffered by him and other members of the Tribe if the Decision were left in place. Petition for Reconsideration, Jan. 27, 2018, at 1. We deny Appellant’s petition because neither of the stated grounds for reconsideration satisfies the “extraordinary circumstances” standard for granting reconsideration.

Before addressing Appellant’s two arguments for reconsideration, it is necessary to correct a mischaracterization of the Board’s decision. Appellant asserts repeatedly that the Board’s decision “upheld” the Regional Director’s decision. *Id.*, *passim*. That is not the case. The Board found that, under the regulations in 25 C.F.R. Part 81 governing the petitioning process, the Superintendent’s determination of the number of signatures required for a valid petition to call a Secretarial election—prior to submission of the petition to BIA and a decision on its validity—was not a final administrative action or decision. 65 IBIA at 92. The Board dismissed Appellant’s appeal because the Board lacks jurisdiction over interim agency actions. *Id.* at 91 (“The Board is authorized to consider appeals from ‘a final administrative action or decision,’ . . . [but] is not authorized to consider an appeal from interim action by a BIA regional director” (internal citations omitted)). In doing so, we took no position on the merits of the Regional Director’s decision.

Considering now Appellant’s arguments for reconsideration, Appellant first contends that the Board erred in determining its jurisdiction in an “overly rigid and formalistic manner.” Petition for Reconsideration at 6. Appellant argues that the Superintendent’s determination of signature requirements is “final” in the sense that it is a “dispositive action on a substantive issue” from which “legal consequences will flow.” *Id.* at 7-8 (citing *Bennet v. Spear*, 520 U.S. 154 (1997); *Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Director*, 48 IBIA 241 (2008)). In the Board’s decision, we discussed *Picayune* and explained that in the context of the Secretarial election petitioning process, the “substantive matter” on which BIA will take final administrative action “is the validation of a *petition* calling for a Secretarial election.” 65 IBIA at 92. Appellant, as the purported spokesperson of a group of tribal members interested in formulating a petition, has yet to submit a petition, with any number of signatures, to BIA for validation. And as we also explained, the regulations governing the petitioning process do not envision BIA making a final decision on a petition’s validity prior to submission of the petition. *Id.*

The determination of the number of signatures required for a valid petition may be sought from the Tribe directly or from BIA. See *id.* at 90 (citing 25 C.F.R. § 81.57(a)(1)). This is an interim step in the process of formulating a petition, a process which culminates in submission of the petition to the Regional Director for a written decision regarding the petition’s validity and the basis for the Regional Director’s determination. *Id.* at 91 (citing 25 C.F.R. § 81.62(b)(2)). That decision is “a final agency action.” *Id.* at 91 & n.3. The decision from which Appellant appeals is an interim action over which the Board lacks

jurisdiction. Nothing in Appellant’s argument identifies “[F]ederal administrative law principles governing final agency action” that the Board failed to consider. And the Board has held that a petition for reconsideration does not show extraordinary circumstances when the issues raised were considered in the Board’s decision. *White v. Acting Great Plains Regional Director*, 63 IBIA 193, 193 (2016); *Jacobs v. Great Plains Regional Director*, 43 IBIA 272, 272-73 (2006) (citing *Lira v. Acting Pacific Regional Director*, 38 IBIA 107 (2002)). Appellant’s disagreement with the Board’s legal conclusions does not constitute extraordinary circumstances under 43 C.F.R. § 4.315. *White*, 63 IBIA at 193.

Next, Appellant argues that the Board should reconsider its decision and allow Appellant’s appeal to proceed so as to avoid “[a] clear and manifest injustice” from occurring that would deprive Appellant and tribal petitioners of their “federal statutory and sovereign rights” to petition for a Secretarial election. Petition for Reconsideration at 1; *see also id.* at 9-10. But the Board dismissed Appellant’s appeal for lack of jurisdiction to consider the appeal. While the Board may, pursuant to 43 C.F.R. § 4.318, exercise the inherent authority of the Secretary of the Interior to correct manifest error or injustice in a decision over which it has jurisdiction, this provision does not provide an independent source of jurisdiction for the Board to consider an appeal over which it lacks jurisdiction. *See* 43 C.F.R. § 4.318 (Scope of review); *Hoopa Valley Tribe v. Special Trustee for American Indians*, 44 IBIA 247, 251 (2007) (denying reconsideration of Board’s determination that it lacked jurisdiction over the appeal). Thus, Appellant’s “manifest injustice” argument does not provide grounds for reconsideration of the Board’s dismissal of Appellant’s appeal.

In sum, neither of the arguments raised in Appellant’s petition convinces us that there are extraordinary circumstances warranting reconsideration of the Board’s determination that it lacks jurisdiction over this appeal.

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 denies Appellant’s petition for reconsideration.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Thomas A. Blaser
Chief Administrative Judge