



INTERIOR BOARD OF INDIAN APPEALS

Charles K. Hudson v. Great Plains Regional Director, Bureau of Indian Affairs

61 IBIA 253 (09/15/2015)

Judicial review of this case:

Complaint filed, *Hudson v. U.S. Dep't. of the Interior*, No. 1:15-cv-01988-TSC
(D.D.C. Nov. 12, 2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CHARLES K. HUDSON,)	Order Affirming Decision
Appellant,)	
)	
v.)	Docket No. IBIA 14-025
)	
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 15, 2015

Charles K. Hudson (Appellant), appealed to the Board of Indian Appeals (Board) from a September 13, 2013, decision of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), denying Appellant’s challenge to the July 30, 2013, Secretarial election¹ in which two amendments to the Constitution and Bylaws of the Three Affiliated Tribes of the Fort Berthold Reservation (Constitution) were adopted. The Regional Director concluded that the challenge was untimely, and that even if it were timely, Appellant failed to provide any substantiating evidence supporting the challenge, as required by 25 C.F.R. § 81.22.² On appeal, the Regional Director reconsidered his

¹ A Secretarial election is a Federal election held within a tribe pursuant to regulations prescribed by the Secretary of the Interior, as authorized by Federal statute. *See* 25 U.S.C. § 476; 25 C.F.R. § 81.1(s). The regulations governing Secretarial elections are currently found in 25 C.F.R. Part 81. Secretarial elections are distinguished from tribal elections, which are conducted pursuant to tribal authorities and without Federal oversight. *See Visintin v. Midwest Regional Director*, 60 IBIA 337, 337 (2015).

² On April 14, 2014, the Board received a request from 10 individuals, identifying themselves as “qualified voters on the Fort Berthold reservation” (Qualified Voters), to expedite a decision in this appeal. The Board construed the letter as a motion by Qualified Voters to intervene for the limited purpose of seeking expedited review, *see* 43 C.F.R. § 4.313, and allowed interested parties to respond, *see* Order Granting Request for Limited Intervention and Denying Motion to Expedite, May 27, 2014. In his response brief opposing intervention, Appellant identified the contact person for Qualified Voters as a member of the Election Board responsible for supervising the Secretarial Election that is the subject of Appellant’s appeal. Response to Motion to Intervene, May 12, 2014, at 1. The (continued...)

calculation of the appeal period and acknowledged that Appellant's challenge was timely. He maintains, however, that his decision dismissing the appeal remains unchanged because Appellant failed to provide evidence substantiating the claims raised in his challenge of the Secretarial election. We conclude that Appellant's principal claim in his election challenge, that the voter participation threshold required by the Three Affiliated Tribes' Constitution was not met, was legally unsound, and that Appellant's remaining claims were not supported by substantiating evidence. We therefore affirm the Regional Director's decision.

Background

On April 16, 2013, the Regional Director authorized the Superintendent of the BIA's Fort Berthold Agency to call and conduct a Secretarial election to vote on two proposed amendments to the Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribes). *See* Answer Brief (Br.), Feb. 13, 2014, at 2. Notice of the Secretarial election along with a Secretarial election packet,³ was mailed to all tribal members with known addresses. *See id.*, Exhibit (Ex.) 3, Memorandum from Acting Superintendent to Regional Director, Aug. 23, 2013, at 2, 3. The election was held on July 30, 2013, and 510 of the 1,249 tribal members who registered to vote in the Secretarial election cast ballots. *Id.* Appellant was among those tribal members who registered to vote. *See id.*, Ex. 1, Voter Registration Form (signed and submitted by Appellant). Appellant also requested an absentee ballot, checking the third of the three bases for requesting an absentee ballot: "I am a non-resident voter. I do not live on the Fort Berthold Reservation." *Id.* Ex. 1, Absentee Ballot Request Form (completed and submitted by Appellant).

The members of the election board established for the Secretarial election pursuant to Federal regulation, *see* 25 C.F.R. § 81.8, certified the election results on July 31, 2013, as required by 25 C.F.R. § 81.23. *See* Certification of Results of Secretarial Election (AR Tab 4). Both proposed amendments were adopted by a majority of voters "in an election in

(...continued)

Board denied the motion to expedite, finding that the movant failed to provide convincing reasons why the appeal should be given priority over other pending appeals and noted that neither the Tribe nor the Regional Director responded to Qualified Voters' motion. Order Granting Request for Limited Intervention and Denying Motion to Expedite at 1-2.

³ The election packet included a cover letter with the heading "Notice of Secretarial Election and Need to Register," a copy of each of the proposed amendments, a Secretarial election brochure, a voter registration form, and an absentee ballot request form. Secretarial Election Packet (Administrative Record (AR) Tab 2).

which at least 30 percent of the 1249 members entitled to vote, cast their ballot” *See id.* The Regional Director approved both amendments based on their adoption by the majority of tribal voters, noting that “30% of those who registered to vote did cast ballots in the election, in accordance with 25 C.F.R. § 81.7.” Letter from Regional Director to Chairman, Three Affiliated Tribes, Sept. 13, 2013, at 1, 3.

Appellant submitted a challenge of the Secretarial election by email on August 5, 2013, in which he identified seven enumerated “legal deficiencies, inconsistencies and concerns” as grounds for the challenge. Email from Appellant to Chairman, Secretarial Election Board, Mon. Aug 5, 2013, 2:55 p.m., Attachment (Challenge) (AR Tab 3). Among the deficiencies listed by Appellant was the charge that the number of voters who cast ballots in the election failed to meet the voter participation requirement in the Tribes’ Constitution, and the claim that BIA provided “[c]ontradictory information” regarding the eligibility to vote of tribal members living off-reservation that may have dissuaded some off-reservation members from requesting absentee ballots. Challenge at 1-2 (unnumbered). Appellant also alleged that he had “heard” that the list of registered voters was not timely posted, that the origin and future effect of the proposed amendments were not made known to voters, that the Tribes’ website contained misleading information concerning the amendments, and that neither the Tribes nor BIA had made copies of the Constitution readily available to members prior to the election. *Id.*

The Regional Director responded to the challenge on September 13, 2013, explaining that a Secretarial election “is a federal election, not a tribal election” and that BIA therefore “follow[s] the regulations for Secretarial Elections found in [25 C.F.R. Part 81]” Letter from Regional Director to Appellant at 1 (Decision) (AR Tab 1). The Decision quoted the regulation governing appeals of Secretarial election results, 25 C.F.R. § 81.22,⁴ which authorizes any qualified voter to challenge election results within 3 days following posting of the results, by filing the grounds for the challenge, along with substantiating evidence, with the officer in charge. Decision at 1. The Regional Director determined that Appellant had registered to vote in the Secretarial election and was therefore a “qualified voter” as defined by the regulations at 25 C.F.R. § 81.1(o). *Id.* He

⁴ Section 81.22 provides:

Any qualified voter, within three days following the posting of the results of an election, may challenge the election results by filing with the Secretary through the officer in charge the grounds for the challenge, *together with substantiating evidence*. If in the opinion of the Secretary, the objections are valid and warrant a recount or new election, the Secretary shall order a recount or new election. The results of the recount or new election shall be final.

25 C.F.R. § 81.22 (Contesting of election results.) (emphasis in original).

determined, however, that Appellant's challenge was filed 2 days after the 3-day deadline to file a challenge, which the Regional Director calculated as expiring at 4:00 pm, August 3, 2013, and was therefore untimely. The Regional Director also explained that, even if the challenge had been timely filed, Appellant failed to provide any substantiating evidence, which was required pursuant to 25 C.F.R. § 81.22. *Id.* at 2. On these grounds, the Regional Director denied Appellant's challenge.

Appellant appealed from the September 13, 2013, Decision and filed an opening brief, to which the Regional Director responded. Appellant filed a reply brief in response to the Regional Director's answer brief.

Discussion

In his notice of appeal to the Board and, subsequently, in his opening brief, Appellant references the seven enumerated points raised in his election challenge before the Regional Director, while focusing on four specific issues: (1) the timeliness of his challenge, (2) confusing and contradictory voter eligibility information concerning members residing off-reservation, (3) failure to meet the 30% voter participation threshold required by the Tribes' Constitution for amendments, and (4) failure to provide tribal members with an analysis of the effect of the proposed amendments. *See* Notice of Appeal, Sept. 30, 2013, at 1-2 (unnumbered); Opening Br., Jan. 22, 2014, at 1-3.⁵

The Regional Director, in his answer brief, reconsidered the timeliness of filing of Appellant's challenge and, applying guidance for computation of time provided in 25 C.F.R. § 2.15, concluded that the 3-day limit for challenges to Secretarial elections which he earlier determined had expired on Saturday, August 3, would, pursuant to § 2.15, have been extended until Monday, August 5, 2013. Answer Br., at 2-3. The Regional Director therefore concluded that Appellant's challenge was timely, but that denial of the challenge was justified because the grounds for the challenge "were not supported by 'substantiating evidence' which would 'warrant a recount or a new election.'" *Id.* at 3 (quoting from 25 C.F.R. § 81.22). In his reply brief, Appellant urged the Board to accept the Regional Director's reconsideration of the timeliness of his election challenge and also conceded that the fourth issue identified in his opening brief, BIA's failure to provide an analysis of the effect of the proposed amendments, "should be dismissed based on the existing case law." Reply Br., Apr. 2, 2014, at 1. We accept both the withdrawal of the

⁵ While Appellant makes passing reference to the grounds raised in his challenge, the only issues raised by Appellant in his appeal to the Board are the four identified here. We therefore address only those issues. Were we to address the remaining grounds of the challenge, the result would be the same.

Regional Director's initial timeliness determination and Appellant's acknowledgement that the fourth point raised in his appeal should be dismissed, and turn now to the two remaining issues before the Board in this appeal.

I. Appellant Failed to Substantiate His Claim that Off-Reservation Members were Prevented from Voting by Confusing Voter Eligibility Information

In addition to timely filing, the legal requirements for contesting the results of a Secretarial election include that the challenge be brought by a "qualified voter"⁶ and that it identify "the grounds for the challenge, *together with substantiating evidence.*" 25 C.F.R. § 81.22 (emphasis in the original). If, after considering the grounds and the substantiating evidence presented in the challenge, the Secretary determines that "the objections are valid and warrant a recount or new election," the Secretary shall so order. *Id.* The Board has previously concluded that "in order to present 'substantiating evidence,' a challenger must present evidence that supports both (1) the particular claim being made, i.e., that an alleged procedural error occurred in the conduct of the election, and (2) the conclusion that the procedural error likely affected or tainted the election results in such a way as to cast doubt on the fairness of the election and the integrity of the ultimate results." *Wadena v. Midwest Regional Director*, 47 IBIA 21, 29 (2008). We agree with the Regional Director that Appellant failed to provide any substantiating evidence that eligible voters residing off-reservation failed to request an absentee ballot to vote in the Secretarial election due to confusing voter information. *See* Decision at 2; Answer Br. at 4. In light of the speculative nature of Appellant's claim, we must also conclude that he has failed to provide evidence of any kind that the election results were tainted to the extent that the fairness of the election was in doubt.

Appellant argues that voting information concerning the right of tribal members not living on the reservation to vote in the election was confusing and contradictory, and that, as a result, "[i]t is not only possible, but highly likely, that some non-resident tribal members believed themselves ineligible to vote."⁷ Opening Br. at 2. Appellant did not

⁶ The Regional Director observed that Appellant was a "qualified voter" because his name was on the Registered Voters List. Decision at 1 (citing 25 C.F.R. § 81.1(o)).

⁷ Appellant specifically identifies language from the section labeled "Absentee Voting" in the Secretarial election brochure that fails to include off-reservation residence as a basis for requesting an absentee ballot, as a possible source of confusion for eligible voters living off-reservation. Opening Br. at 2 (quoting Section 8 of the Notice and Rules of Election (AR Tab 2)). That section of the brochure also informs eligible voters that "[a]n Absentee Ballot Request Form is attached." Notice and Rules of Election, sec. 8 (AR Tab 2). One of the three bases for requesting an absentee ballot listed on the face of the Absentee Ballot (continued...)

provide any evidence to support this claim, such as affidavits from eligible off-reservation voters who were dissuaded from registering or from requesting an absentee ballot by the allegedly confusing voter information.⁸ Instead, Appellant merely speculates that it is “highly likely” that some off-reservation tribal members failed to vote, *see id.*, but does not explain how, even assuming this were the case, it casts doubt on the fairness of the election and the integrity of the election results such that a new election would be warranted, *see Wadena*, 47 IBIA at 28-29 & n.16.⁹

Appellant clearly failed to meet his burden of production by providing any substantiating evidence in support of his claim, as required by 25 C.F.R. § 81.22.

II. Federal Regulation and the Tribe’s Constitution both Set Voter Participation Threshold at 30% of Registered Voters

Appellant alleges that the July 30, 2013, Secretarial election should be nullified because the level of voter participation did not meet the threshold of 30% of eligible voters established in Article X of the Tribes’ Constitution. Challenge at 1 (unnumbered). As pertinent to this appeal, Article X provides:

(...continued)

Request Form sent to all eligible voters, and the one checked on the form submitted by Appellant, was the statement: “I am a non-resident voter. I do not live on the Fort Berthold Reservation.” *See* Answer Br., Ex. 1, Appellant’s completed Absentee Ballot Request form; *see also* Secretarial Election Packet, Absentee Ballot Request Form (AR Tab 2). While this may not have been sufficient to resolve fully any confusion created by the reference in the brochure, an off-reservation voter reading the form would have been advised at least of their right to seek an absentee ballot to vote in the Secretarial election. *See* Answer Br. at 4.

⁸ We also note that of the five challenges filed with the Election Board, only Appellant’s challenge alleged that voter information may have confused tribal members living off-reservation. *See* Opening Br., Ex. 3 at 2-3.

⁹ In response to the Regional Director’s argument that Appellant lacks standing to assert the claims of other tribal members in this regard, *see* Answer Br. at 3-4, Appellant asserts that his “right as a member of the Tribe to participate in a fair election [was] harmed by the contradictory and confusing directions” included in voting instructions provided to non-resident members, Reply Br. at 1-2. Even assuming that the regulations provide standing for a qualified voter to challenge the fairness of an election based on an alleged procedural error, Appellant’s claim still fails, as it is based purely on speculation and unsubstantiated injury.

This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the tribes voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election

Constitution, Art. X – Amendments (Answer Br., Ex. 4). Appellant does not dispute the number of voters reported to have cast ballots in the Secretarial election. Challenge at 1 (unnumbered)(referencing the Certification of Results of Secretarial Election issued by the Election board on July 31, 2013 (AR Tab 4)). Rather, he argues that the number of voters participating in the election represented “a mere 5.5%” of eligible voters, based on census data which reportedly showed there were 9,270 tribal members over 18 years of age. *Id.*

In his decision dismissing the challenge as untimely, the Regional Director failed to address Appellant’s challenge concerning the voter participation threshold, although Appellant produced “substantiating evidence” in the form of the undisputed count of ballots cast, a link to the website where he obtained the census data on which he based his calculation of voter participation, and a reference to the specific provision in the Constitution that provides the authority he cites as the basis for this aspect of his challenge. On appeal, the Regional Director explains that 25 C.F.R. § 81.7, the Federal regulation that establishes the voter participation requirement for the adoption, ratification or revocation of tribal constitutions and amendments through a Secretarial election, sets the minimum participation threshold at 30% of *qualified* voters. Answer Br. at 4 (emphasis added). In pertinent part, this regulation provides:

[A] constitution and bylaws, amendments thereto, or charter and charter amendments shall be considered adopted, ratified, or revoked if a majority of those actually voting are in favor of adoption, ratification, or revocation. The total vote case, however, must be at least 30 percent of those *entitled* to vote, unless, with regard to amendments, the constitution provides otherwise.

25 C.F.R. § 81.7 (emphasis added). He also concludes that “only those eligible voters who register are considered qualified or entitled to vote in the Secretarial election,” Answer Br. at 4, and notes that the regulations also define “registration” to mean “the act whereby persons, who are *eligible* to vote, become *entitled* or *qualified* to cast ballots by having their names placed on the list of persons who will be permitted to vote,” *id.* (quoting 25 C.F.R. § 81.1(o) (emphases added)). Finally, the Regional Director reviews Article X of the Tribes’ Constitution, quoted *supra*, and determines that “the tribal constitution’s amendment section also requires a majority vote of ‘qualified’ voters[,] provided that at least 30 percent of those entitled to vote participate in the election.” Answer Br. at 5.

Because 510¹⁰ of the 1,249 voters who were “qualified” to participate in the Secretarial election actually cast ballots, the Regional Director concludes that the 30% voter participation requirement was easily met. *Id.* at 4-5 (finding that 30% of 1,249 is 375 registered voters, whereas the certified number of ballots cast was 510).

This Board previously addressed the legal requirements under Federal regulations for voter participation in a Secretarial election and found that, in the context of 25 C.F.R. § 81.7, “‘entitled to vote’ means those who are eligible *and* who register to vote.” *Wadena*, 47 IBIA at 32. We therefore agree with the Regional Director’s conclusion that, because 510 of the 1,249 eligible voters who had registered to vote cast ballots in the election, the voter participation level exceeded the requirement of 30% of entitled voters set in § 81.7.

Although we agree with Appellant that Article X of the Tribes’ Constitution establishes the voting requirements for constitutional amendments, we disagree with Appellant’s interpretation of that provision. *See* Challenge at 1 (unnumbered); Reply Br. at 2. Specifically, Appellant fails to distinguish between “eligible voters” and “voters entitled to vote” as the latter term is used in the Tribes’ Constitution, and concludes that at least 30% of tribal members 18 years of age at the time of the election, regardless of their registration status, must vote to meet the Article X voter participation threshold requirement. *See* Reply Br. at 2-3. Appellant does not provide any support for this proposition, which supposes that the Tribes’ Constitution adopted the formulation used in § 81.7, the parallel Federal regulation governing voter participation in amending tribal constitutions, but assigned a different meaning to the specific term used to calculate whether the voter participation threshold had been met. This seems particularly unlikely where, as here, the election at issue is “an election called . . . by the Secretary of the Interior” for the purpose of amending the Tribes’ Constitution. *See* Constitution, art. X. In the absence of any evidence or legal argument in support of this proposition, we are unwilling to infer in the Tribes’ Constitution a different legal meaning of the term “entitled to vote” than that established by Federal regulation. We therefore agree with the Regional Director that the voter participation threshold is the same in both the Federal regulation and Article X of the Tribes’ Constitution.

¹⁰ The Election Board recorded that two ballots cast in voting for proposed amendment no. 1 were spoiled. *See* Certification of Results of Secretarial Election (AR Tab 4). In such elections, all duly cast ballots are counted, including spoiled or mutilated ballots, for the purpose of determining whether the required number of voters cast their ballots in the election. 25 C.F.R. § 81.21.

Conclusion

We conclude that Appellant failed to provide substantiating evidence for his claim that the voting information provided by the Election Board was confusing and contradictory and dissuaded eligible voters residing off the reservation from registering to vote and requesting absentee ballots, such that the election results were tainted and the fairness of the election was called into question. We also conclude that the 30% voter participation threshold required by Federal regulation and the Tribes' Constitution was met because more than 30% of those members registered to vote in the election cast ballots.

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 affirms the Regional Director's September 13, 2013, decision.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge