SUSAN TOTENHAGEN
v.
AREA DIRECTOR, MINNEAPOLIS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 87-43-R Decided November 19, 1987

Remand from the United States District Court for the District of Minnesota, concerning the removal of Susan Totenhagen from the office of Chairman of the Shakopee Mdewakanton Sioux Community.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Tribal Government: Officers

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

APPEARANCES: Thomas W. Fredericks, Esq. , and Robert S. Thompson III, Esq., Boulder, Colorado, for appellant; Mariana R. Shulstad, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee; James E. Townsend, Esq., and John E. Jacobson, Esq., Minneapolis, Minnesota, for Leonard Prescott.

OPINION BY ADMINISTRATIVE JUDGE VOGT

On February 12, 1987, the Board issued a decision in Totenhagen v. Minneapolis Area Director, 15 IBIA 105, reconsideration denied, 15 IBIA 121 and 15 IBIA 123, holding that Susan Totenhagen (appellant) was not properly removed from the office of Chairman of the Shakopee Mdewakanton Sioux Community (community) because she was not given the notice concerning her removal hearing to which she was entitled under the community's removal ordinance. 1/

1/ See Totenhagen, 15 IBIA at 105, for a discussion of the background of this matter.

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By order dated July 10, 1987, the United States District Court for the District of Minnesota held that the Board erred in its construction of the community's removal ordinance and remanded the case to the Board. The court stated that, contrary to the Board's finding, service of notice under the ordinance was effective upon mailing and therefore service upon appellant was accomplished within the time requirements of the ordinance. Prescott v. Hodel, Civil No. 4-87-106 (D. Minn. July 10, 1987), slip opinion at 6.

On remand, all parties were given the opportunity to file briefs. Appellant, appellee, and Leonard Prescott, Vice-Chairman of the community, did so.

Discussion and Conclusions

The district court's July 10 order establishes the law of this case, which is binding on the Board. E.g., City of Cleveland, Ohio v. F.P.C., 561 F.2d 344, 346 (D.C. Cir. 1977). Therefore, the Board proceeds from the court's conclusion that service on appellant was in accord with the community's removal ordinance.

In her initial appeal, appellant raised due process arguments which the Board was not required to reach given its disposition of the case. Appellant argued that the community's failure to provide her with 10 days' actual notice violated her right to due process of law under the community's constitution and under the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1982), both because the notice did not conform to the requirements of the community's removal ordinance and because it was inadequate to allow her time to obtain legal assistance and prepare for a hearing. Insofar as appellant's due process argument is based on a violation of the community's removal ordinance, it must fail in light of the law of the case that appellant was given notice in conformity with the ordinance. A conclusion that the notice given appellant violated her right to due process would therefore require a finding that the ordinance itself was defective.

Notice is adequate for due process purposes if it is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The community's removal ordinance provides that attempts at personal service must be made for 3 consecutive days and that, if such attempts are unsuccessful, notice is to be posted at a prominent place in the community and sent by registered mail to the officer whose removal is sought. The removal hearing is to be held at least 10 days after service (Ordinance No. 2, section 2, as amended by Resolution No. 11-29-84-001). Appellee points out that the community is small and that its members live in close proximity to each other and interact on a daily basis (Appellee's Memorandum on Reconsideration at 5-6). The Board cannot say that, under the community's circumstances, either the removal ordinance or the notice

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given appellant pursuant to the ordinance was violative of her due process rights. 2/

[1] The community's removal ordinance provides with regard to removal hearings:

> [Section 2.1] (e) Officers who are charges [sic] may appear personally and have the assistance of legal counsel, or may elect to be represented by counsel without a personal appearance. In the event that an officer or his representative fails to appear before the Council after receiving proper notice as described in this section, the Council may, in its descretion [sic], proceed with the hearing in the absence of the charged officer and render such judgement as it deems appropriate.
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> (f) Officers who are charges [sic] may request a continuance of the hearing date for illness or other good cause. In the event that such request is made the General Council may accept or reject it. If the continuance is granted it shall be for a period not to exceed 30 days from the original hearing date. If the request for continuance is denied the hearing shall proceed forthwith, provided appropriate notice and an opportunity to appear personally or by counsel has been given as prescribed in this Ordinance.
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> Section 3. At the hearing before the General Council, the charges shall be read to the accused and he shall have the opportunity to answer any and all charges against him and present any defenses he may have. The General Council shall vote on the charges and an affirmative vote of the majority of the eligible voters of the Community shall remove the officer from his office.

Relying upon her belief that notice was defective, appellant did not appear at her removal hearing and did not send counsel to represent her. Prescott argues that appellant was required to exhaust her tribal remedies before she was entitled to challenge the tribal action in a Federal forum. The Board agrees with this general proposition. The Federal courts and this Board have recognized that respect for tribal self-government requires that tribal remedies be exhausted before a Federal forum may entertain a challenge to tribal actions or authority. National Farmers Union Insurance

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2/ Even so, the ambiguity of the ordinance with respect to the effective date of service by mail (see 15 IBIA at 109-10) is disturbing when viewed from a due process perspective. Community members ought not to be required to take actions affecting their legal rights without benefit of certainty about what the ordinance requires in this regard. In light of the circumstances discussed, however, this ambiguity does not render the notice provision of the ordinance invalid on due process grounds.

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Cos. v. Crow Tribe, 471 U.S. 845, 853-57 (1985); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144-46 (8th Cir. 1973); Howlett v. Salish & Kootenai Tribes, 529 F.2d 233, 239-40 (9th Cir. 1976); Gillette v. Navajo Area Director, 14 IBIA 71, 75-76 (1986).

Appellant failed to exercise her tribal right to present a defense at her removal hearing. A tribal official who has adequate notice of tribal proceedings affecting him/her but fails to exercise his/her right under tribal law to challenge the proposed tribal action in the tribal forum cannot later challenge the tribal action in a Department of the Interior forum. 3/ Accordingly this appeal must be dismissed because appellant failed to exhaust her tribal remedies.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Acting Chief Administrative Judge

3/ The exhaustion requirement should not, under most circumstances, be invoked against an individual who did not receive adequate notice of a tribal proceeding. See Stratman v. Watt, 656 F.2d 1321, 1325 (9th Cir. 1981).

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