No. SC-CV-18-17

NAVAJO NATION SUPREME COURT

Kathleen Arviso,
Petitioner/Appellee,

v.

Norma Muskett,
Respondent/Appellant.

OPINION

Before SLOAN, A., Chief Justice, and SHIRLEY, E., Associate Justice.

Appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-NEA-003-17, Chief Hearing Officer Richie Nez, presiding.

Bernadine Martin, Gallup, New Mexico, for Appellant; Justin Jones, Farmington, New Mexico, for Appellee.

Appellant was elected to a fifth term as Chapter Secretary/Treasurer. Upon a post-election challenge, OHA disqualified Appellant and voided her election finding she was not qualified as a candidate at the filing of her application because, as an employee of BIA, she did not submit a written clearance of no conflict from her employer as required by 11 N.N.C. § 8(C)(11). We reverse OHA for the reasons that follow.

I

On November 8, 2016 Appellant Norma Muskett (Muskett) was re-elected as Chapter Secretary/Treasurer for Chichiltah Chapter. Muskett served as Chapter Secretary/Treasurer for the past four (4) terms. On November 9, 2016 her opponent, Appellee Kathleen Arviso (Arviso), filed a Statement of Grievance under 11 N.N.C. § 341 stating she was informed Muskett did not comply with 11 N.N.C. § 8(C)(11), which required a candidate employed by the Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) to obtain a written clearance of no conflict

from their employer in the event that candidate is elected. Arviso did not provide any other information as to who informed her or when she was informed that Musket did not file a written clearance. Arviso, however, identified two individuals, Arlene Tso-Coan and Tommy Nelson, as persons with knowledge of the facts surrounding the grievance. Arviso also stated "*if* Candidate Musket has not filed a grievance, I reserve my right to challenge the issue of conflict[,]" *see* Statement of Grievance, p. 2, R. at 1 (emphasis added), noting her uncertainty of alleged facts.

The Office of Hearings and Appeals (OHA) accepted the grievance and held an evidentiary hearing on January 30, 2017. Both parties appeared with legal counsel. In a written decision later issued on March 7, 2017, OHA disqualified Muskett and voided her election as Chapter Secretary/Treasurer.[1] In support of its decision, OHA found Muskett is employed with BIA as a Home Living Assistant and, as an employee of BIA, Muskett did not submit a written clearance to the Navajo Election Administration (NEA) prior to the filing of her candidacy application. OHA also found that Muskett obtained a written clearance from BIA on November 21, 2016. This appeal followed.

II

The issues are whether this post-election challenge was timely filed under 11 N.N.C. § 341(A)(1) when the complainant was aware of her opposing candidate's employment with BIA before the election and whether OHA erred in disqualifying Muskett and voiding her election.

III

The Court reviews decisions of the Office of Hearings and Appeals under a sufficiency of the evidence standard. *In re Grievance of Wagner*, No. SC-CV-01-07, slip op, at 3 (Nav. Sup. Ct.

[1] OHA delayed setting a hearing and rendering a written decision despite its non-discretionary duty to conduct a hearing within 15 days of the complaint not being dismissed and to issue a written determination within 10 days of the hearing. *See* 11 N.N.C. § 341(A)(1) (2005).

May 14, 2007). A decision lacks sufficient evidence if OHA misinterpreted the law. *Id.* The Supreme Court can reverse OHA's decision if OHA's legal interpretation is incorrect. *Id.*

IV

The Election Codes sets out qualifications for Chapter Officers, which includes among other things, that

> If a candidate is an employee of the Bureau of Indian Affairs or the Indian Health Services, prior to filing, the candidate shall obtain written clearance from the BIA or IHS stating that there is no conflict of interest for the candidate in the event the candidate is elected as Chapter officer. Clearance shall be provided to Election Administration Office.

11 N.N.C. § 8(C)(11) (2005). "Within 30 days of receipt of the application, the Election Administration shall review, verify and determine, on the face of the candidate application, the qualifications for candidacy." 11 N.N.C. § 23(A) (2005). "The Navajo Election Administration shall have the authority to determine ineligible any individual who does not meet the qualifications for the office sought." *Id.* Here, NEA did not determine Muskett to be ineligible. Instead, NEA certified Muskett as a candidate for Chapter Secretary/Treasurer and notified other candidates of Muskett's certification. There was no challenge to Muskett's certification by opposing candidates, including Arviso, prior to the primary or general elections.

On appeal, Muskett relies on NEA's certification of her application. Muskett asserts she is a qualified candidate for Chapter Secretary/Treasurer in this election, like in the four previous elections in which she prevailed. Specifically, Muskett explains she has been employed with BIA for over twenty-one (21) years (as determined by OHA) and has held the position of Chapter Secretary/Treasurer for the past 16 years having complied with the Election Code. Muskett also offers that on November 21, 2016 she obtained two written clearances of no conflict from her employer, substantiating that she continues to be qualified. Muskett also asserts Arviso's post-

election challenge should be barred because her employment with BIA was known to Arviso prior to the primary and general elections, or in July, 2016, requiring Arviso to file a complaint within 10 days of this incident rather than filing until after the general election. Furthermore, Muskett argues that OHA's reliance on *Becenti-Aguilar v. Begay*, No. SC-CV-51-16 (Nav. Sup. Ct. December 16, 2016), in overturning the outcome of her election is a misapplication of the law.

Asserting a timely challenge under the Navajo Election Code is critical. Most recently in *Becenti-Aguilar v. Begay*, No. SC-CV-51-16 (Nav. Sup. Ct. December 16, 2016), we stated "the treatment of an election challenge depends on whether it was filed pre or post-election." *Id.*, slip op. at 6. Looking to *Haskie v. Navajo Board of Elections,* 6 Nav. R. 336 (Nav. Sup. Ct. 1991), we stated "election statutes are mandatory when enforcement is sought *prior* to an election, but they are read to be directory only when challenges are raised *after* an election." *Id.* (citing *Haskie*, 6 Nav. R. at 338 (internal citation omitted)). This rule of statutory construction is built on the premise "that elections which have already been held were conducted regularly and validly." *Haskie*, 6 Nav. R. at 338. We also noted that post-election challenges are viewed with disapproval when the challenge concerns procedures that are known to the challenger before the election, but are raised only after the people have duly voted and the challenger has lost the election. *Becenti-Aguilar*, slip op. at 7.

Generally, candidate qualification challenges are most appropriately raised pre-election under 11 N.N.C. § 24 (2005). Certain post-election challenges have been permitted under 11 N.N.C. § 341(A)(1). *Gishie v. Begay*, 7 Nav. R. 377, 380 (Nav. Sup. Ct. 1999) (post-election challenge of candidate qualification permitted when candidate had almost exclusive knowledge of the facts to which he made declarations); *Tsosie v. Deschene*, Nos. SC-CV-57-14 and SC-CV-

58-14, slip op. at 7 (Nav. Sup. Ct. October 8, 2014) (post-election challenge of candidate qualification permitted when candidate had almost exclusive knowledge of the facts as to his qualifications); and *Becenti-Aguilar v. Begay*, No. SC-CV-51-16, slip op. at 7 (Nav. Sup. Ct. December 16, 2016) (post-election challenge of candidate qualification permitted when an unlawful stipulation allowing an unqualified candidate to run was not known to other candidates to allow a pre-election challenge).

Under 11 N.N.C. § 341(A)(1), the Election Code requires "[w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with." This Court has accepted "this statute to mean that if a candidate knows of an Election Code violation before an election, he or she must take action within ten days of such an incident rather than do so after the election." *Haskie*, 6 Nav. R. at 339. Here, OHA summarily concluded that Arviso filed a complaint one day after the general election and thereby met the requirement of 11 N.N.C. § 341(A)(1) for the matter to be heard. Even with testimony that Arviso knew of Muskett's employment with BIA since July, 2016, OHA did not address that part of 11 N.N.C. § 341(A)(1) requiring the complaining party to assert a challenge within 10 days of the incident complained of. OHA simply omitted this fact from its final order.

"[T]he complainant shall have the burden of proving the allegations contained in the statement of dispute by clear and convincing evidence." 11 N.N.C. § 341(A)(2). Based on the audio, Arviso did not call upon the two people she named as witnesses, nor did she call upon any NEA official to prove that a written clearance was not provided to NEA. Instead, OHA allowed Arviso to call upon Muskett, who then carried the burden of proof that she did not violate the Election Code. The fact is NEA certified Musket as a candidate. Perhaps a previously obtained

written clearance submitted during prior elections was sufficient. Nonetheless, NEA has been authorized some discretion as to the acceptance of the written consent under 11 N.N.C. § 8(C)(11). Absent any findings otherwise, we thus assume NEA acted within the boundaries of its discretion in certifying Muskett.

Relying on *Becenti-Aguilar*, OHA stated that qualifications set forth in the Election Code are mandatory in themselves and the Election Code does not authorize OHA to allow a candidate to run for public office when that individual is determined not qualified for the position sought. *Id.*, slip op. at 6. The *Becenti-Aguilar* case is distinguishable from this case because it concerned an unqualified candidate who was permitted to run for Council Delegate through an undisclosed stipulated agreement that waived a mandatory qualification for that particular candidate, thwarting any possible pre-election challenge. The statutory qualification was therefore read as mandatory. Here, Arviso had an opportunity to take raise her complaint prior to the election requiring 11 N.N.C. § 8(C)(11) to be read as mandatory. Arviso, however, did not initiate a pre-election challenge despite her knowledge of Muskett's employment with BIA since July, 2016. Under the facts of this case, the requirement of 11 N.N.C. § 8(C)(11) must therefore be read as directory. *See Haskie*, 6 Nav. R. at 338 (citing *Johnson*, 4 Nav. R. at 81). Accordingly, the requirement to submit a written clearance will not disqualify a candidate who is otherwise qualified under the statute. Muskett obtained a written clearance of no conflict from BIA on November 21, 2016 that confirmed, or re-confirmed in this case, she had no conflict as a candidate for Chapter Secretary/Treasurer. We thus decline to set aside the presumption of a validly conducted election.

V

We hereby reverse the decision of the OHA.

Dated this 5th day of April, 2017.

Chief Justice

Associate Justice