No. SC-CV-64-17

NAVAJO NATION SUPREME COURT

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Terlyn Sherlock,
Petitioner-Appellee,

v.

The Navajo Election Administration,
Respondent-Appellant.

OPINION

Before HOLGATE, T.J., Chief Justice, SHIRLEY, E., Associate Justice, and WOODY, G., Associate Justice by Designation.

Appeal from the Office of Hearings and Appeals concerning Cause No. OHA-NEA-017-17, Chief Hearing Officer Richie Nez, presiding.

Levon Henry and Ron Haven, Window Rock, Navajo Nation, for Appellant; Bernadine Martin, Gallup, New Mexico, for Appellee.

The Navajo Election Administration sought to remove an elected school board member who had two misdemeanor convictions in the state of Arizona. The Office of Hearings and Appeals reversed the removal having concluded that upon the set aside of Appellee's convictions while in office, there were no convictions that would have otherwise disqualified her from elective office. We reverse.

I

Terlyn Sherlock (Appellee) filed her candidate application with the Navajo Election Administration (Appellant) on May 27, 2016. Appellee indicated "N/A" when asked to list any convictions for felonies or misdemeanors. Appellee also filed a notarized statement that "I meet all the qualifications required by Navajo Nation law for the position I am seeking. I have read and received a copy of all qualifications applicable to the position." *Oath*, R. 18. Appellee also swore

that she understood that "I may be removed as a candidate in the event my application contains a false statement" and "if I am no longer otherwise qualified for office if elected." *Id.* Based on Appellee's application, NEA certified Appellee as eligible to run for the position of school board member.

On November 8, 2016, Appellee was elected to her second term as a member of Chilchinbeto Community School Board. The Navajo Board of Election Supervisors certified the results of the election on November 29, 2016, and Appellee took her oath of office on January 12, 2017. On April 13, 2017, the Navajo Department of Diné Education informed NEA that Appellee had two misdemeanor convictions in the state of Arizona, stemming from criminal charges for shoplifting in 1991 and for underage drinking in 1993. *See State of Arizona v. Sherlock*, No. M-0341-109977 (Shoplifting); *State of Arizona v. Sherlock*, No. M-0341-CR-113616 (Liquor-To Minor by Licensee/Underage Consumption). Consequently, on May 19, 2017, NEA provided notice to Appellee of her removal pursuant to 11 N.N.C. § 240(D). On May 31, 2017, Appellee filed a statement of grievance with OHA challenging her removal. Thereafter, at Appellee's request, on June 28, 2017, the Arizona Municipal Court of Flagstaff issued an order granting Appellee's motion to set aside her convictions under A.R.S. § 13-907. *State of Arizona v. Sherlock*, Nos. CR113616, CR109977, June 28, 2017.

The OHA ruled that Appellee's "prior convictions having been set aside, annulled or vacated has the effect of dismissing any convictions covered by 11 N.N.C. § 8(4)(h)." *Final Order* at 3, November 3, 2017. In reaching this conclusion, OHA marginalized the non-reporting of prior convictions stating such convictions were of public record; OHA declined to distinguish *Martine-Alonzo v. Jose*, No. SC-CV-37-16 (Nav. Sup. Ct. November 3, 2016) stating the dismissal of convictions qualifies a candidate; OHA concluded that Appellee's qualifications remain

unimpeached upon the set aside of her state conviction; and OHA further concluded that there is no evidence that Appellee's convictions impeded a fair election. *Final Order* at 3, November 3, 2017. This appeal ensued.

II

The issues are: 1) whether the set aside of Appellee's prior convictions by the state of Arizona, while in office, absolved Appellee of having to disclose any convictions that would have otherwise disqualified her from elective office; and 2) whether Appellee's negative response to the inquiry about felony and misdemeanor convictions was a false statement under the Election Code so as to remove her from elective office.

III

The Court's standard of review is "limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record." 11 N.N.C. § 24(G) (2005). A decision lacks sufficient evidence and may be reversed if the decision of OHA is based on an erroneous interpretation of the law. *In re Appeal of Lee*, 9 Nav. R. 61, 62 (Nav. Sup. Ct. 2006); *In re Grievance of Wagner*, 9 Nav. R. 114, 115 (Nav. Sup. Ct. 2007). When reviewing the legal interpretations of administrative tribunals, the Court applies a *de novo* standard of review. *Begay v. Navajo Nation Election Administration*, 8 Nav. R. 241, 250 (Nav. Sup. Ct. 2002).

IV

Appellant contends that this appeal concerns the removal of an elected school board member under section 240(D) of the Election Code. Appellant, thus, asserts there is no merit to Appellee's argument that because there were no pre-election nor post-election challenges within the timeframe permitted under 11 N.N.C. §§ 24 or 341, this is an untimely challenge of her

qualifications. Considering Appellee raises a jurisdictional argument, we address this argument at the forefront.

In 2003, the Navajo Nation Council (Council) required school board members to maintain required qualifications throughout their term of office, *see* 11 N.N.C. § 8(D)(4)(j) (2005), or be subject to removal through proceedings initiated by the Navajo Election Administration, *see* 11 N.N.C. § 240(D) (2005). Furthermore, in *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12 (Nav. Sup. Ct. February 26, 2013), this Court stated, "Section 8(D)(4)(j), as amended in 2003, uniquely allows school board members to be challenged on their qualifications under the Election Code after an election." *Id.*, slip op. at 14. In 2014, Council extended the requirement to maintain qualifications to other elected officials. *See* Resolution No. CJA-02-14 (February 11, 2014). As to school board members, Council clarified that all removal proceedings shall start with NEA, with any necessary hearings conducted by OHA. *See* 11 N.N.C. § 240(D) (as amended by Resolution No. CJA-02-14, February 11, 2014). Removal actions by NEA can be commenced at any time during an elected official's term of office. We therefore hold that this appeal concerning the removal of an elected official is properly before this Court.

With that said, we address the issues on appeal. Appellant asserts that OHA erred when it determined that the set-aside of Appellee's prior convictions pursuant to Arizona law has the effect of dismissing any convictions against Appellee that would have otherwise disqualified her from holding office under Navajo law. Appellant asserts Appellee did not disclose her convictions to NEA upon direct inquiry and, because of this non-disclosure, she must be removed as a school board member for having filed a false statement. Appellee, on the other hand, asserts that because her convictions were eventually set aside under Arizona law, legally there were no convictions to report. Therefore, her response was not a false statement. We disagree.

The Navajo Nation Election Code provides that the candidate application shall contain "[a]ny convictions for felonies and misdemeanors affecting qualifications for office." 11 N.N.C. § 21(B)(3) (as amended by Resolution No. CJA-02-14, February 11, 2014). Convictions affecting the office for school board members are specified in 11 N.N.C. §§ 8(D)(4)(g) and (h). Candidates for school board, among other things, must not have been convicted of any misdemeanor crimes involving the welfare of children, child abuse, or child neglect, *see* 11 N.N.C. § 8(D)(4)(h)(2), and any crimes involving the use of intoxicating alcohol or illegal substance, *see* 11 N.N.C. § 8(D)(4)(h)(4). The Election Code, therefore, requires a school board candidate to disclose any conviction affecting qualifications for office, as requested in a candidate application. Here, Appellee answered "N/A" on May 27, 2016 despite the existence of two prior convictions on her record. Appellee would have us hold that the set aside of Appellee's prior convictions by the state of Arizona, while in office, absolved Appellee of having to disclose any convictions that would have otherwise disqualified her from elective office. We decline to do so. Because there was no set aside of her convictions at the time that she filed her application, Appellee was required to disclose her prior convictions under Navajo law. Therefore, Appellee's response of "N/A" was a false statement.

Under these facts, OHA erred in refusing to distinguish the case at bar from this Court's holding in *Martine-Alonzo v. Jose*, No. SC-CV-37-17 (Nav. Sup. Ct. November 3, 2016). In *Martine-Alonzo*, the state criminal charges at issue were dismissed upon Ms. Jose's successful completion of a deferred sentencing program *prior* to the filing of her application as a candidate for school board. These facts are wholly distinguished from this case wherein Appellee was granted an order setting aside her criminal charges thirteen (13) months *after* filing her candidate application and six (6) months *after* taking office when NEA sought her removal. Based on OHA's

failure to distinguish these cases, OHA erred in using the holding in *Martine-Alonzo* to justify its order qualifying Appellee to remain in office. OHA provides insufficient evidence to support its finding that the Arizona court's set aside of criminal charges served as a 'dismissal' of the charges similar to *Martine-Alonzo* so as to "qualify" Appellee to remain in her position as school board member. Thus, OHA's determination that Appellee remains qualified to retain her office is not supported by sufficient evidence. The fact is Appellee was not qualified at the declaration of her candidacy and at the time NEA took action to remove her from office.

Appellee would also have us consider that there was a five-year limitation for felonies and misdemeanors when she first ran for office four years ago and, since then, the candidate application did not reflect the change in law so as to require the disclosure of her prior convictions. We find no merit in this argument. The removal of the five-year limitation occurred over thirteen (13) years ago in 2003 when Council instituted a lifetime ban on certain felonies and misdemeanors. Based on our review of the record, the candidate application reflects the changes in the law.

Appellee also asserts that even if she did not report her convictions, a lifetime ban as to felony and misdemeanor convictions cannot stand. There is no merit in this argument. This Court has upheld the lifetime ban concluding that the heightened qualifications of school board members are reasonable and advance an important governmental interest. *See Sandoval*, slip op. at 8-11. Appellee also asserts that the qualification requirements as to misdemeanor convictions at 11 N.N.C. § 8(D)(4)(h) must be read to be directory rather than mandatory pursuant to *Haskie v. Navajo Board of Elections*, 6 Nav. R. 336 (Nav. Sup. Ct. 1991). Again, there is no merit in this argument. We have said the requirement to maintain qualifications at 11 N.N.C. § 8(D)(4)(j) uniquely allows school board members to be challenged on their qualifications after an election.

*Sandoval*, slip op. at 14 (now applicable to other elected officials per CJA-02-14). Thus, "Section 8(D)(4)(j) supplants the *Haskie* rule . . . .." *Sandoval, slip op.* at 14.

The voting public must be able to rely on the statutory protections of our laws, as well as the truth of candidates' statements as to their qualifications. "In our Navajo thinking, great responsibilities of public service are placed on a *naat'ánii*, greater than may be commonly understood in other jurisdictions." *Sandoval*, slip op. at 13. "A candidate may not circumvent express conditions established by the Council by keeping silent until an election is over. Disqualifying conditions that are known to a candidate are not waived simply because an election has taken place." *Id.*

Similarly, we add the practical application of Navajo reasoning. People enter a *hooghan* through the east door making their presence known to all. Much like entering a *hooghan*, in an election, a *naat'ánii* seeking public office must enter an election with complete transparency. Although a *naat'ánii* enters a *hooghan* like the people he or she serves, the standard of conduct of a *naat'ánii* is higher and stricter. *See Sandoval*, slip op. at 13. "The *naat'aanii* indeed [is] expected to be honest, faithful and truthful in dealing with his [or her] people." *In re Certified Questions II*, 6 Nav. R. 105, 117 (Nav. Sup. Ct. 1989). Thus, a *naat'ánii* betrays the trust of the people when he or she chooses to sneak around the *hooghan* in search of a non-existent side door in an effort to be less than open and honest. Here, Appellee did not enter the election with full disclosure of her personal history, which is expected by the people she serves. Instead, she was silent about her prior convictions and, upon the revelation of her disqualifying convictions, she ran to the state court for an order setting aside her convictions so as to evade removal. We will not condone such behavior. We hereby hold that Appellee's negative response to the inquiry about felony and misdemeanor convictions was a false statement under the Election Code so as to remove her from elected office.

A *naat'ánii* is greatly respected by the people, however, a *naat'ánii* can be relieved of authority if he or she betrays the public trust placed in him or her. *See Navajo Nation v. MacDonald*, 6 Nav. R. 432, 445 (Nav. Sup. Ct. 1991). Section 240 of the Election Code substantiates this position. The Diné people will keep an official to his or her words. *Sandoval*, slip op at 4 (citing *Kesoli v. Anderson Security Agency*, 8 Nav. R. 724 (Nav. Sup. Ct. 2005)). In the case at hand, Appellee will be held to her sworn statement that she can be removed, if her application contains a false statement or if she is "no longer otherwise qualified for office if elected." *Oath*, R. 18.

The Election Code requires NEA to "review, verify and determine, on the face of the candidate application, the qualifications for candidacy." *See* 11 N.N.C. § 23(A) (2005). As to NEA's certification process for initiative petitions, we said NEA must use its regulatory due diligence in its duty to "examine, verify and certify." *In re NEA's Determination of Insufficiency Regarding Two Initiative Petitions*, 9 Nav. R. 271, 277 (Nav. Sup. Ct. 2009). Likewise, the process for certifying candidates should be more than "a ministerial process" as justified by NEA. The Diné people rightly expect to choose from qualified candidates when they cast their votes. In this case, a ministerial act with sole reliance on a candidate's word, false declarations in this case, has caused an unqualified candidate to be presented to the public. We are mindful that this is not an isolated event. *E.g.*, *Sandoval*, *supra*. Time, staffing and public funds are needlessly spent having to litigate matters concerning qualification challenges. Presently, there are no sanctions or penalties in the Election Code that explicitly address the filing of a false statement by a candidate running for office. We, therefore, urge Council to consider adopting strict sanctions to deter such unsavory filings.

Based on the above, OHA's decision is not supported by sufficient evidence. We need not consider the application of A.R.S. § 13-907 because Appellee's conduct predates the set aside. Even if we were to consider, which we do not, based on our cursory review of Arizona law, a set aside of a criminal conviction under A.R.S. § 13-907 does not eliminate the fact of the conviction, and therefore does not relieve an offender from having to report the conviction if asked. *See Russell v. Royal Maccabees Life Ins. Co.*, 974 P.2d 443, 449 (Ariz. Ct. App. 1998).

V

Based on the above, we hereby reverse OHA's Final Order of November 3, 2017. The NEA may proceed in its removal of Appellee Terlyn Sherlock under 11 N.N.C. § 240(D). Appellee's request for costs and fees is DENIED.

Dated this 20th day of December, 2017.

Chief Justice

Associate Justice

Associate Justice