No. SC-CV-57-14

OHA-EC-005-14

IN THE SUPREME COURT OF THE NAVAJO NATION

DALE TSOSIE,
Petitioner/Appellant,

v.

CHRISTOPHER C. DESCHENE,
Respondent/Appellee

OPENING BRIEF OF THE APPELLANT

The Law Offices of David R. Jordan, P.C.

David R. Jordan
1995 State Road 602
P.O. Box 840
Gallup, NM 87305-0840
(505) 863-2205
Attorneys for Appellant

Table Of Contents

Table Of Citations

Statement of the Case

Petitioner/Appellant Dale Tsosie ("Tsosie") appeals the Office of Hearings and Appeals' dismissal of his election grievance against Christopher Clark Deschene ("Deschene"). OHA erred as a matter of law when it dismissed the grievance. The 10-day cutoff for challenging qualifications should not apply to candidates who have made false statements on their candidate applications. Deschene has acknowledged publicly that he does not meet the qualifications for a candidate, and this Court should enter an immediate order disqualifying him pursuant to 11 N.N.C. § 45.

Proceedings Below

In April 2014, Deschene submitted his "candidate application" to run for the Office of Navajo Nation President, an application that included his false representation that he was fluent in Navajo. On April 25, 2014, Deschene was certified by the Navajo Election Administration ("NEA") as a qualified candidate. *See* Appendix A. It is conceded that no one challenged his qualifications prior to May 5, 2014.

On August 26, 2014, Deschene was the second highest vote getter in the Navajo Nation primary. On September 5, 2014, Tsosie filed his election grievance. *See* Appendix B. On September 9, 2014, the OHA dismissed his appeal, finding that Tsosie had not complied with 11 N.N.C. § 24. *See* Appendix C. This appeal timely followed.

Statement Of Jurisdiction

The Commission has jurisdiction to review the order of the OHA pursuant to 11 N.N.C. § 24(G) and 11 N.N.C. § 341(A)(4).

Standard Of Review

The election statutes cited above provide that the Supreme Court's "review shall be 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) and 11 N.N.C. § 341(A)(4). Though these provisions emphasize the sufficiency of the evidence, clearly a decision based on an erroneous interpretation of the law cannot be sustained by sufficient evidence. The Court therefore has the authority to examine the underlying legal interpretation, and can reverse an OHA decision if the law OHA relies on is not valid. *Sandoval v. NEA*, No. SC-CV-62-12, slip op. at 3 (Nav. Sup. Ct. February 26, 2013).

Statement Of The Facts

1. In April 2014, Deschene submitted his "candidate application" to run for the Office of Navajo Nation President. *See* Appendix A.

2. By law, he was required to swear to the truth of several facts under oath. This included the promise that (a) he was legally qualified to hold the office; (b) that he met the qualifications set forth in 11 N.N.C. § 8; (c) that his candidate application was in the form and manner prescribed by law, and (d) that ***he may be removed as a candidate in the event his or her application contains a false statement.*** (emphasis added). 11 N.N.C. § 21(B)(2).

3. The qualifications for office in 11 N.N.C. § 8 included that requirement that Deschene "Must fluently speak and understand Navajo and read and write English".

4. Deschene has been open about his inability to fluently speak and understand Navajo. He was quoted at a forum in May 2014 as follows: Deschene was

"apologizing that he did not know the language well enough to express his opinions in it and promising to learn it better as his campaign progressed." *See* Appendix D.

5. Deschene told the Associated Press on September 11, 2014, "I've made a commitment to the language, and I've stated a number of times that my personal goal is to be completely fluent by the end of my first term." *See* Appendix E.

6. According to the High Country News in August, "Deschene, in turn, promises to help preserve the language in schools and coming-of-age ceremonies for young people. The younger candidate does not speak Navajo, though it's a requirement of the president according to the Election Administration. Deschene says he'll pick more up on the campaign trail." *See* Appendix F.

Statement Of The Issues

1. Did The OHA err in applying the 10-day limitation contained in 11 N.N.C. § 24 to a complaint about falsification in a candidate application?

2. Did the OHA err in refusing to disqualify Deschene who has admitted publicly that does not fluently speak and understand Navajo?

Argument

I. The OHA Erred In Applying A 10-Day Limit To A Complaint About A Material False Statement In A Candidate Application.

"Leaders don't lie"

Christopher Clark Deschene, August 2014.[1]

This is a case about a candidate that based his candidacy on a false statement about his qualifications. He claimed at the time that he filed his candidate application that

[1] *See* Appendix G.

he was fluent in the Navajo language – a representation he was required to make if he desired to be a Presidential candidate. Having begun his campaign with a falsehood, Deschene must now answer to this Court and to the Navajo people about the *diyin bizaad* – the sacred words that formed the foundation of his candidacy.

OHA dismissed Tsosie's grievance because of the 10-day limitation in 11 N.N.C. § 24. Tsosie contends that this is the wrong statute to apply. He further contends that this Court should disqualify Deschene because of his public admissions that he is not fluent in Navajo, which is a necessary prerequisite for candidacy.

As the Court is aware, the undersigned is a *bilagaana.* However, according to the ruling of the OHA, the undersigned could submit a candidate application, falsify a census number and other qualifying information, and, if no one challenged the false statements in the first ten days, the undersigned would be a legitimate candidate for President of the Navajo Nation, not subject to any legal challenge. That is bad law. Fortunately, it is not Navajo law.

The OHA applied 11 N.N.C. § 24 a statute that allows a candidate to challenge an unqualified candidate ten days after their certification. This statute, however, says nothing about making false statements in a candidate application. Tsosie asserts that he had the right to challenge the ***false statement*** notwithstanding the expiration of ten days from the certification of Deschene by the NEA.

11 N.N.C. § 24 gives a candidate the opportunity to challenge the NEA's facial review of another candidate's qualifications. In 11 N.N.C. § 23(A), the NEA is directed as follows: "Within 30 days of receipt of a candidate application, the Election Administration shall review, verify and determine, ***on the face of the candidate***

application, the qualifications for candidacy." (emphasis added). The NEA does not do investigations or background checks.

It is this "facial" review of the application that is grievable under Section 24. This makes sense. The application is public information, and any candidate can obtain a copy of the application. If, upon the face of the application, the NEA has made the wrong decision, the opposing candidate can challenge the NEA's certification.

The Court should consider how difficult it would be to place the burden on a candidate to discover false statements within that ten-day period. The candidate must certify that he or she has not been convicted of certain crimes within the last five years. There were seventeen candidates for President this year. The best-funded candidate, with the most elaborate campaign staff, would have difficulty conducting background checks of all sixteen opposing candidates within the ten-day period.

The issue of Navajo fluency would be even more difficult to validate. Deschene helped the process this year by admitting that he was not fluent – that he would be "fluent by the end of his first term". The fact of this false statement came to light at the first public forum, on May 29, 2014. Twenty-four days after the cutoff for qualification challenges, Deschene admitted that he did not have sufficient grasp of the *Diné Bizaad* to state his opinions in the Navajo language. Even though he was essentially admitting that he had falsified his candidate application, it was far too late to make a Section 24 challenge at the time.

When he applied to be a candidate for President, Deschene was required to acknowledge that the consequence of a false statement was removal. Tsosie contends that challenging a false statement and seeking removal is not governed by 11 N.N.C. §24.

Tsosie is not challenging the NEA's facial review and certification of Deschene so much as he is challenging the false statement contained in Deschene's candidate application. This is a different issue under Navajo statutes.

Tsosie contends that a challenge to a false statement in the candidate application should be governed by 11 N.N.C. § 341(A)(1). This statute provides: "Within 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." It makes far more sense to apply this longer period for challenges to false statements, which are more difficult to discover.

By their very nature, false statements are designed to conceal the truth. Applying the ten-day rule of Section 24 rewards a candidate who is particularly clever in hiding the truth.

The remaining election statutes only make sense if the Court adopts Tsosie's view. The Court will note that 11 N.N.C. § 44 recognizes that a candidate may be "disqualified" after the primary election. How is this possible given the OHA's view of the statutes? The deadline for candidate applications is 90 days before the primary. 11 N.N.C. § 22. Thus, no later than 80 days before the primary, the deadline for Section 24 qualification challenges has passed. 11 N.N.C. § 22 only makes sense if the Court recognizes that challenges for false statements about qualifications can be filed within ten days after the election.

This Court appeared to go even further in allowing the "false statement" challenge after the general election in *Sandoval v. NEA*. In that case, the Court examined 11 N.N.C.

§ 6(E), and found that it applied to a candidate for a school board even though the pertinent part of the statute was enacted *after* the candidate submitted his candidate application. The Court found that the "issue in this case is not the retroactive application of amended Section 6(E) back to the date of the candidates' filing, but rather, the forward application of this law to an election that has not yet occurred." *Sandoval*, slip op. at 12. In other words, the Court looked not at the primary election, but the general election that occurred after the change in the qualification statute. The Court was concerned that government inaction may allow "an unqualified candidate to be presented to the public for their selection to office." *Sandoval*, slip op. at 12. That same concern is presented in this case.

The Court then proceeded to set forth Navajo law on the subject – law that the OHA should have followed in this case:

> In our Navajo thinking, great responsibilities of public service are placed on a *naat'ánii*, greater than may be commonly understood in other jurisdictions. Those who wish to serve must understand his/her own need to self-assess his/her own qualifications under the laws, his/her own abilities to serve, and the great needs of the public that in numerous cases lack the resources to watch over the actions of the *naat'ániis* they select. 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.*** In short, the withholding of disqualifying conditions by a candidate goes to the self-assessment expected of a *naat'ánii* and his/her fitness to serve. The *naat'ánii* in the circumstances of this case would be expected to voluntarily "step back"—*nát'ą́ą́' hizhdidoogáát*.

Sandoval, slip op. at 13.

Try as he might, Tsosie will never be able to make the case that his grievance should have been heard more eloquently than the Court did in *Sandoval*. OHA erred in dismissing the grievance.

II. Deschene Should Be Disqualified For Making A False Statement In His Candidate Application.

Since election cases must occur on a expedited basis, and since this Court has expressed its preference on numerous occasions for global resolutions that achieve finality, Tsosie is not asking that this be remanded to the OHA. Rather, he is asking that this Court acknowledge Deschene's public admissions of his lack of fluency, and order him disqualified under 11 N.N.C. § 45.

A. The Court Should Disqualify Deschene Because He Has Admitted His Lack of Fluency.

In some future case, there may have to be an evidentiary hearing to determine the "fluency" of a candidate. That is not so in the present action. Deschene has admitted his lack of fluency, promising to be "completely fluent by the end of [his] first administration". *See* factual statement No. 5, *supra.* However, a candidate does not have the right to make the Navajo people wait until the end of his administration to achieve a qualifying skill that was required of him ***at the time he submitted his candidate application.*** The application of 11 N.N.C. § 8 is clear – Deschene is not qualified, and he should be removed from the ballot.

In recent public statements, Deschene has been more careful in his remarks about his language skills – stating, "fluency is a matter of opinion." Facially, the Court may be concerned about whether the question of a candidate's "fluency" is objective enough to measure. Tsosie assures the Court that objective standards do exist for fluency, and it is an important part of the Navajo people's expectations of their highest *naat'ánii.*

Merriam-Webster defines "fluent" as "able to speak a language easily and very well". http://www.merriam-webster.com/dictionary/fluent. The fact of the matter is that most Navajos know immediately whether another speaker is "able to speak a language

easily and very well". It is acknowledged that in some cases, candidates may not take Deschene's path and admit publicly their lack of fluency. In such cases, the challenger will carry the burden of proof.[2] However, it is anticipated that Navajo speakers will have little difficulty sifting those who speak Navajo "easily" from those who do not.[3]

Admittedly, today, we are very inclined to immediately ask "Webster" about the definition of a word or word used in a phrase. However, when we pose the same questions to our *Dine Bibeehaz'aanii*, answers are more specific, structured, organized, and logical reasoning is given to substantiate such structure and specificity. "Fluency", according to the *Dine Bibeehaz'aanii* is defined as an individual's ability to talk about (*baa yajilti'*), analysis speech (*nabik'i yajilti'*), to talk to (*bich'i' yajilti'*), *bich'aah yajilti'* (protection speech) and the ability to comprehend the words, speech, concepts, that are being spoken back to you (*hach'i' yalti'go bik'izhdii'tiih*). *Dine Bibeehaz'aanii* further prescribes that "fluency" means a persons ability to *baa yajilti', nabik'i yajilti', bich'i' yajilti', hachi' yalti'go bik'izhdii'tiih*, the following concepts: K'e, Identity, Prayers, Songs, Ceremonial conduct, belief systems, issues, concerns, ideas, healing, solutions, empathy, protectiveness, defense. All of this has to be done with speech that is heard and understood eloquently, with great vigor, with great tenacity, clearly emphasizing the sounds. (*Dah dilkoohgo, t'aa chanahgo, diits'a'go*)

---

[2] *See Morris v. Nav. Bd. of Elec. Supervisors*, 7 Nav. R. 75, 76 (Nav. Sup. Ct. 1993) (burden of proof on aggrieved party).

[3] If it has to go that far, groups like the Interagency Language Roundtable have established standards for fluency and proficiency. *See* Appendix H. Wikipedia estimates that conversational fluency can involve as few as 3,000 words. http://en.wikipedia.org/wiki/Language_proficiency. The point here is that it measures for fluency can be found and established through respected treatises or expert testimony.

The main cornerstone of fluency according to *Dine Bibeehaz'aanii* is that there is structure and order, thereby, it is imperative that there is belief and faith (*oodla*) in the structure, order, and usage of the language. Moreover, it is most important that the language is carried out in accordance with the way the language is structured in their proper cosmic order. This is embodied in Natural Law. Natural Law prescribes how, where, when, who, and why of the language itself and its proper usage. Thereby, fluency of *Diné Bizaad* cannot be a matter of "opinion" nor can it be scrutinized or manipulated. To do so would be comparable to scrutinizing or attempting to manipulate the sun rising in the east and setting in the west, or attempting to have summer in January, then immediately to go winter with snow and ice in June, then spring and ending the year with fall.

Finally, fluency of *Diné Bizaad*, pursuant to the Natural Law the language is embodied within, *Diné Bizaad* are not just words or phonetic sounds. Anyone can memorize words, phrases, and train to be a "conversational" Navajo speaker. However, without the *Oodla* (faith and belief) and *Bik'eh Na'ada* (To abide by it's laws), the language is not the language of the holy people and it is not fluency pursuant to Natural Law that the language is embodied in.

Some candidates have tried to challenge reasonable qualification standards by reciting the truism that the Navajo people have the right to the candidate of their choice. This Court has routinely held that the Council, and, by extension, the Navajo people, have the right to implement reasonable restrictions on candidacy. *Todacheene v. Shirley*, No. SC-CY-37-10, slip op. (Nav. Sup. Ct. August 2, 2010 *nunc pro tunc* July 9, 2010).

So long as the restriction is reasonable, the Council has the right to impose such a restriction upon candidates. As shall be shown, this restriction is not just reasonable, it is vital for the Navajo people.

B. Removal of Deschene Is Supported By *Diné Bi Beehaz'áanii.*

One of the main requirements of fluency of the *Diné Bizaad*, pursuant to Natural Law, prescribed for a *Naat'ánii* is the ability to use the language to carry out his leadership role and responsibilities (*bee nahat'a al'i*). The foundation requirement to use the language in the role of *naat'ánii* is the ability to use the language of the holy people to communicate with the holy people and to communicate with the holy people's creation through prayer and song. In addition, another requirement of a *naat'ánii* is the ability to communicate with the people you represent; they talk to you about their concerns, and you talk to them about your ideas for solutions to their concerns. A *naat'ánii* must also have the ability communicate with the outside world; to communicate to the *bilagaanaas* the concerns and issues of the people and to bring back the news or message from the *bilagaanaas* on how they will work with the Dine and communicate that back to the people. Thereby, it is a strict requirement that the statute says, "***Must*** fluently speak and understand Navajo and read and write English" 11 N.N.C. § 8 (emphasis added).

Natural law requires that the prayers and the songs to communicate with the holy people and their creations must be done with *Diné Bizaad.* An even stricter requirement is that the prayers and songs cannot be mispronounced or some areas of the prayer or song, omitted. This is a strict requirement. Now, if an individual cannot meet these strict fundamental law requirements, then the individual is unqualified.

This requirement is also present when a person wants to be a *hataalii*, medicineman. A person cannot be given his own *jish* (sacred bundles) and be permitted to perform ceremonies until such time that the individual can demonstrate that he has learned all of the required prayers, songs, sand painting, and other aspects of the ceremony.

Deschene has admitted that he is not fluent in speaking and understanding the Navajo language. He is telling the Navajo people that he will be "fluent" at some time during his administration, if they elect him. In essence, what Deschene is saying is that he wants to amend and manipulate natural law and be allowed to occupy a role of a *naat'ánii*, although he isn't qualified as natural law requires.

If this type of manipulation of natural and traditional law is allowed, then, Navajos might as well allow *hataalii* to get their *jish* even before they learn the prayers or have non-Navajos perform the sacred ceremonies. This Court cannot ethically allow one individual to manipulate Natural Law for the sole purpose of fulfilling his own personal endeavors at the expense of denigrating the sacred natural and traditional law in other areas of Diné existence.

A simple application of natural and traditional law gives plenty of justification to disqualify Christopher Clarke Deschene.

C. Removal of Deschene Is Supported By The Legislative History of 11 N.N.C. § 8.

The relief requested by Tsosie in this case is supported by the legislative history of 11 N.N.C. § 8. Although the Navajos had an "election pamphlet" as early as 1962 (and perhaps earlier), the Council formalized election requirements in the Navajo Nation Election Law of 1966. The qualification statute began its life as 11 N.T.C. § 4, which was

adopted in Council Resolution CMY-60-66. That initial resolution did not include the "fluency" requirement. Rather, candidates for Chairman of the Tribal Council were required to have graduated high school. *See* Appendix I.

The requirement to speak Navajo began with CJY-70-74. That resolution removed the high school graduation requirement, and substituted a requirement to "speak and understand Navajo and read and write English." *See* Appendix I. Given the expedited time frame, Tsosie has been unable to locate any formal written legislative history for CJY-70-74; however, he will continue to seek out such authority and supplement this brief if possible.

It is interesting that the language requirement was a direct substitution for the high school graduation requirement. The substitution seems to indicate a Council decision that complete high school education was not required, so long as English and Navajo language skills were established. The English skills would be necessary when reviewing legislation, signing executive orders, and dealing with the outside world. The Navajo skills would have two particular purposes: dealing with all-Navajo speaking members of the Navajo public, and participating in Council sessions and public forums that were to be conducted in Navajo. The substitution seems to have been rooted in Navajo pragmatism. The job of Chairman would require a strong grasp of Navajo and English.

This requirement seems to have been unchanged up and until 1990.[4] In 1990, of course, the Council passed the Navajo Nation Election Code of 1990, CAP-23-90. See Appendix J. This rather omnibus change was based upon recommendations of the Board

[4] The 1984-1985 update pamphlet showed only one change to candidate qualifications. Council members were required to be at least 25 years old instead of 30. CAP-41-82.

of Election Supervisors after years of review. *See* CAP-23-90, Exhibit B, Appendix J. It was not, as some thought, a reaction to the Navajo governmental crisis of 1989 and 1990, but was instead "an attempt to modernize and streamline Navajo Nation election law". *MacDonald v. Redhouse*, 6 Nav. R. 342, 344 (Nav. Sup. Ct. 1991). The Board of Election Supervisors had proposed the amendments as early as 1988, and the proposal had been tabled in favor of further review. *See* CAP-23-90, Exhibit B, Appendix J.

The BOES helpfully provided formal written recommendations with an explanation of its reasoning for certain amendments. Unfortunately for our present purpose, the BOES was not so helpful as to include a discussion of the fluency requirement. In the 1990 amendment, however, the 11 N.T.C. § 4 became 11 N.N.C. § 8, and the language requirement was amended as follows: "Must ***fluently*** speak and understand Navajo and read and write English." *See* CAP-23-90, Exhibit A, p. 15 Appendix J (emphasis added).

Thus, the most comprehensive reform of Navajo election laws to date made the language requirement ***more*** demanding. This certainly shows that the Council in 1990 was taking the Navajo language requirement very seriously.

Since 1990, 11 N.N.C. § 8 has been amended in four resolutions: CO-64-90, CAP-38-98, CJA-06-01, and CJY-41-03. None of these resolutions changed the fluency requirement. Accordingly, even though the Council has specifically reviewed this particular statute ***four separate times*** since the adoption of the Navajo Nation Election Code of 1990 it has not lessened or eliminated the requirement that the President have fluency in Navajo.

The Court should conclude that the Council has determined that the ability to speak and understand Navajo fluently is a critical for the Navajo Nation president. The reasons therefore are no different than they would have been in 1974. Approximately 169,000 Navajos speak *Diné Bizaad.* ("Navajos Top List of Native Language Speakers in US", http://cnsnews.com/navajos-top-list-native-language-speakers-us-0). This is an extremely significant percentage of the Navajo population, estimated at 300,000. (*Id.*) The Navajo President must represent the Native Speakers as well as the Non-Native speakers, and the Navajo People have the right to expect their *naat'ánii* to speak *Diné Bizaad.*

This Council codified this right of the people at 11 N.N.C. § 204(C). "It is the right and freedom of the people that the sacred Diné language (*nihiin'éí*) be taught ***and preserved.***" (emphasis added). The Council has recognized that the people have the right that the language be preserved. Requiring the highest leader of the Navajos to be fluent in the sacred Diné language is a reasonable step to take toward preserving that language. Tsosie turns to this Court at this crucial juncture to ensure that the language is in fact preserved for present use, and for future generations.

Request for Attorneys Fees

Pursuant to Rule 18(c)(1), N.R.C.A.P., Tsosie request to be able to submit a statement for the amount claimed for attorneys' fees, so that the Supreme Court may award him his reasonable fees incurred in this matter. The Court should take judicial notice that Tsosie was not the third highest vote getter in the Primary Election. This appeal is filed not to further Tsosie's political career, but to protect and defend the people's fundamental right to preservation of *Diné Bizaad.* As the Court observed in

Shirley v. Morgan, special circumstances exist for attorneys' fees where a party expends resources, not for personal gain, but for the aid of this Court and the Navajo people in vindicating important rights. *Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 46-47 (Nav. Sup. Ct. May 28, 2010). Tsosie request an award of his fees.

Conclusion

The Court should overturn the OHA, should disqualify Deschene, should order that he be removed from the ballot and should order that the candidate who received the next highest votes in the primary election preceding the general election be placed as the new candidate on the official ballot in the general election pursuant to 11 N.N.C. § 44.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

The Law Offices of David R. Jordan, P.C.

David R. Jordan, Esq.
1995 State Road 602
P.O. Box 840
Gallup, NM 87305-0840
(505) 863-2205
Attorneys for Appellant

COPY mailed on 9/19/14 to:

Christopher Clark Deschene
Post Office Box 2344
Page, Arizona 86040

The document will also be faxed.