

No. SC-CV-68-14

SUPREME COURT OF THE NAVAJO NATION

Dale Tsosie and Hank Whitethorne,
Petitioners,

v.

Navajo Board of Election Supervisors and
The Navajo Election Administration,
Respondents.

ORDER

Before, YAZZIE, H., Chief Justice, SHIRLEY, E., Associate Justice, and PLATERO, W.J., Associate Justice by Designation.

An original action for a writ of mandamus against the Navajo Board of Election Supervisors and the Navajo Election Administration concerning Cause Nos. OHA-EC-005-14 and OHA-EC-007-14, Chief Hearing Officer Richie Nez, presiding.

David R. Jordan, Gallup, New Mexico, for Petitioner Dale Tsosie; Justin Jones, Farmington, New Mexico, for Petitioner Hank Whitethorne; Michael P. Upshaw, Scottsdale, Arizona, for Respondent Navajo Election Administration; Kellie A. Peterson and James Griffith, Flagstaff, Arizona, for Respondent Navajo Board of Election Supervisors; Steven C. Boos, Durango, Colorado, and Marianna Kahn, Window Rock, Navajo Nation, for the Navajo Nation Council; James Zion, Albuquerque, New Mexico, for Candidate Joe Shirley, Jr., Candidate Russell Begaye, Window Rock, Navajo Nation, pro se; Amicus Frankie Davis, Provo, Utah, pro se.

This matter comes before the Court on Petitioners Dale Tsosie and Hank Whitethorne's *Motion for Enforcement of this Court's Election Order* filed on March 18, 2015. In a three-page motion, Petitioners ask that this Court swiftly address the non-funding of the April 21, 2015 general election by enforcing our February 20, 2015 judgment and imposing sanctions against the Navajo Nation Council. On March 20, 2015 Candidate Joe Shirley Jr. filed a motion for leave to appear as an amicus curiae and a brief in support of the Motion for Enforcement of Election Order. Candidate Joe Shirley Jr.'s motion for leave to appear as amicus curiae is granted and his brief is hereby accepted by the Court. Petitioners' motion to enforce this Court's order is granted

in part and denied in part. We make this decision without oral argument pursuant to N.R.C.A.P. Rule 16(e) because after this long litigation, we are only now dealing with the final judgment that needs enforcement.

This is the third time Petitioners have had to ask this Court to enforce the Navajo statutory election laws. On October 23, 2014 this Court held that 11 N.N.C. § 44 requires a general election between the first-place and third-place candidates when the second-place candidate was disqualified. See Opinion, No. SC-CV-68-14 (October 23, 2014). On October 23, 2014 the decision became a final judgment of the Navajo Supreme Court and no party requested for its reconsideration pursuant to N.R.C.A.P. Rule 19. Under our system of separation of powers, such a judgment of the Supreme Court is now Navajo Law and subject to enforcement.

On October 31, 2014 this Court removed the Navajo Board of Election Supervisors for its failure to comply with the Court's order and again ordered an election between Joe Shirley Jr. and Russell Begaye pursuant to established election laws.

Then again on February 20, 2015 this Court issued an order invalidating two legislative actions (Resolutions CD-80-14 and CD-81-14) purporting to nullify the 2014 primary election and pardon the removed members of the Election Board. In its February 20, 2015 order, the Court explained that,

The election laws are organic and they are to be protected with a higher standard once they are enacted. If these laws are to be changed, it should be and must be done in consultation with the People. They cannot be unilaterally, single-handedly changed because to do so would change the basic rights of our people to choose their leaders.

As a result, we ordered the following:

The Director of the Navajo Election Administration shall commence with the general election as soon as possible and without further delay. The Director shall immediately set the date

for the general election between Joe Shirley, Jr. and Russell Begay, order the ballots, commence absentee voting at the earliest possible date, and tentatively schedule the inauguration of the new leadership. The Director of the Navajo Election Administration shall now request the Council to appropriate the necessary funds needed to conduct this election. This Court, on behalf of the Navajo People, request the Speaker of the Council to convene a Special Session and the Council to quickly consider the funding request.

Slip Opinion, No. SC-CV-68-14 (Nav. Sup. Ct. February 20, 2015).

Most recently, the Council convened a special session on March 13, 2015 and voted not to fund the court-ordered special election set for April 21, 2015, opting instead to fund a referendum election as to the fluency requirement required by 11 N.N.C. § 8(a)(4). We must enforce the Navajo public's right to have an expeditious presidential election. The Court's decision herein makes no reference to the referendum election called by Res. CMA-06-15 and our decision makes no judgment to this resolution nor the actual referendum.¹

While the language of the February 20, 2015 decision as to the Council's need to exercise to legislative authority was respectfully less than mandatory, it was not to lessen the importance of the People's right to have an election pursuant to the time schedules. Despite the political maneuvering by Council to continue to change the election laws and to delay the 2014 Presidential election, the Navajo Nation has a governmental duty to conduct a presidential election every four years in accordance with existing Navajo Election laws. The Navajo People are entitled, as a matter of basic right/freedom of the Navajo People, to an election at the expense of their government and with the use of their public funds. The public treasury belongs to the

¹ Not only does statutory law call for an election every four years, but there is a need in our present situation to not have a pro tem president for any prolonged period or uncertain length of time; the longer a pro tem president is in office, the more questions as to his authority will be raised. See Amicus Shirley Jr. brief on Motion for Enforcement of Election Order at 6 (March 20, 2015). Furthermore, no comment can be made because the referendum language to be submitted to the people has not been developed.

Navajo People and the Navajo People have a right to have their money used to fund the election without further delay. We repeat with emphasis that the Council cannot impede or otherwise obstruct this obligation so they can unilaterally change the election laws in the midst of an ongoing election. Slip Opinion, No. SC-CV-68-14 at 8 (Nav. Sup. Ct. February 20, 2015). This Court, one component of the government, has the obligation to enforce governmental duties of governmental officials to compel compliance with Navajo law. We find it necessary to take more direct action.

We therefore ORDER the Navajo Election Administration to use its available operating funds to implement the special general election as scheduled. We further ORDER the Acting Controller of the Navajo Nation to immediately identify and transfer \$317,000 to the Navajo Election Administration to supplement and/or replenish its operating line items for the purpose of ensuring the Navajo Nation governmental duty is carried out.

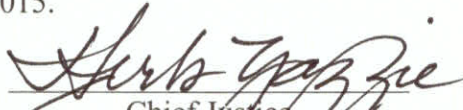
Petitioner's request to shield the Director of the NEA against retaliatory action is granted. Mr. Edison Wauneka is not to be forcibly removed from his current position for having complied with existing statutory laws and orders of this Court. Mr. Wauneka is to carry out his duties under the Navajo Election laws without political influence, as ordered by this Court. Mr. Wauneka is to enter into all necessary contractual obligations, including the hiring of election personnel, to conduct the special, general presidential election and give the election priority over all other matters, including the referendum election. By this order, the Acting Controller of the Navajo Nation is likewise shielded from retaliatory action for complying with the Court's order.

Finally, the Petitioners ask for the second time in this litigation that disciplinary and injunctive actions be taken against the Council, a non-party in this action, to compel funding of the election without affording it notice of having been named and an opportunity to respond

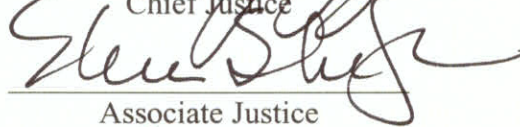
through a brief and oral argument. We decline to do so out of respect and for obvious due process reasons.

Petitioners' motion is granted in part and denied in part as stated above.


Dated this 20th day of March, 2015.



Chief Justice



Associate Justice



Associate Justice