IN THE SUPREME COURT OF THE NAVAJO NATION

FILED
SUPREME COURT
2014 OCT 14 AM 11:19
NAVAJO NATION

DALE TSOSIE AND HANK WHITETHORNE,

Petitioners,

vs.

NAVAJO BOARD OF ELECTION SUPERVISORS AND NAVAJO ELECTION ADMINISTRATION,

Respondents; and

CHRISTOPHER DESCHENE,

Real Party in Interest.

No. SC-CV-68-14

Regarding OHA Case Nos. OHA-EC-05-14 and OHA-EC-07-14 and this Court's Prior Opinion in SC-CV-57-14 and SC-CV-58-14

PETITION FOR A WRIT OF MANDAMUS

David R. Jordan
The Law Offices of David R. Jordan, P.C.
1995 State Road 602
P.O. Box 840
Gallup, NM 87305-0840
(505) 863-2205
Counsel for Petitioner Tsosie

Justin Jones
The Law Offices of Justin Jones, P.C.
PO Box 2240
Farmington, NM 87499
(505) 947-2848
Counsel for Petitioner Whitethorne

1. This petition for mandamus is being brought pursuant to the Court's original jurisdiction to issue "any writ" that is "[n]ecessary and proper to the complete exercise of its jurisdiction." 7 N.N.C. § 303(a). In this respect, Petitioners are also relying upon *Bennett v. Board of Election Supervisors*, 7 Nav. R. 201 (Nav. Sup. Ct. 1990). *Bennett* ruled that this Court could not enter a writ against the Navajo Board of Election Supervisors ("NBOES") under Section 303(b) or (c), because the NBOES is not a Court. The case suggested that original writ jurisdiction over the NBOES was present under Section 303(a), however Bennett had never argued 303(a), so his case had to be dismissed.

2. This case finds the Navajo Nation in a state of crisis. This crisis is directly caused by the contempt that the Respondents and the Real Party in Interest (RPI) have for this Court and the Office of Hearings and Appeals (OHA). At this juncture, there is a very real risk that this Court could lose its jurisdiction over this dispute if affirmative action is not taken. Affirmative steps are necessary to preserve the jurisdiction of this Court over this dispute.

3. Pursuant to the Order of this Court in *Tsosie v. Deschene*, Nos. SC-CV-57-14 and SC-CV-58-14, slip op. (Nav. Sup. Ct. October 8, 2014 *nunc pro tunc* September 26, 2014), RPI had to demonstrate his fluency in the Navajo language in a hearing before the OHA. This Court directly ordered RPI to "cooperate with the OHA as it carries out its duty". Slip opinion at 12.

4. In direct defiance of both the OHA and this Court, RPI did not cooperate with the OHA as it carried out its duty. Instead, he refused to take a fluency test ordered by the OHA *to which his counsel had previously agreed.* At the final hearing, he refused to answer questions about his fluency, despite the OHA giving him several opportunities to provide such answers. Ultimately, the OHA ruled against RPI because of his refusal to obey the orders of this Court and

the OHA. *See* Final Order of the OHA, attached. Because of his refusal to respect the Orders of this Court and the OHA, the OHA ordered him disqualified.

5. Once the disqualification order was entered, Respondents were mandated by Navajo law to move the third place candidate onto the ballot for the general election and to remove RPI. 11 N.N.C. § 44 required Respondents to "automatically" place the candidate who received the next highest votes in the primary election preceding the general election as the new candidate on the official ballot in the general election. Respondents have no discretion to keep a disqualified candidate on the ballot. In addition, OHA's disqualification order declared that the RPI was "unqualified" to be a candidate for the Office of Navajo Nation President; he is no longer a candidate for the Office of the Navajo Nation President.

6. In violation of Navajo law, Respondents have refused to remove RPI from the ballot and to place the third place finisher from the primary on the ballot. Because this is a non-discretionary duty, mandamus relief is appropriate. Also in violation of Navajo law, the RPI continues to campaign, as a candidate for election to the Office of Navajo Nation President, although he was declared and ordered by OHA that he is not qualified to be a candidate for the Office of Navajo Nation President.

7. This Court must enter a writ of mandamus to completely exercise its jurisdiction. If Petitioners have to go to District Court, they will likely be precluded from obtaining relief because of the operation of 1 N.N.C. § 555. By the time that Petitioners comply with the notice provisions of the Sovereign Immunity Act, the election will be over.

8. Failing to issue the writ will reward the Respondents and the RPI, who have openly defied this Court, Navajo law and the authority of the OHA.

9. Moreover, this election dispute needs to be brought to a speedy end. The Navajo people deserve to know, once and for all, who will be the candidates for president in this upcoming election. The conduct of Respondents and the RPI, in defying this Court, Navajo law and the OHA, has created much disharmony on the Nation. This Court, as the final arbiter of law on the Navajo Nation, needs to step in to give finality to the this dispute and to inform the Navajo people who the proper candidates are going to be.

10. Respondents have no legal right to take the actions they are taking. Further, RPI has been openly defying this Court and the OHA by continuing to make public appearances and making public speeches as if he was still a qualified candidate. As this Court is aware, neither Petitioner will be directly benefitted by this writ, because they were not the third-place finishers. Accordingly, they again request an award of their attorneys' fees. They are bringing this action to vindicate the fundamental right of the people to preserve the language, to stop Respondents and RPI from further unlawful behavior, and to give the Navajo people finality as to this dispute.

Statement Of The Relief Sought

Petitioners request a permanent writ of mandamus against Respondents ordering them to comply with 11 N.N.C. § 44 by removing RPI from the ballot, placing the third place finisher on the ballot, and to order the RPI from conducting further campaign activities. This "automatic" obligation is non-discretionary. Petitioners also request an award of their attorneys' fees.

RESPECTFULLY SUBMITTED this 14th day of October, 2014.

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

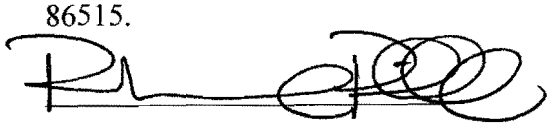
David R. Jordan
Counsel for Petitioner Tsosie

The Law Offices of Justin Jones, P.C.

Justin Jones
Counsel for Petitioner Whitethorne

CERTIFICATE OF SERVICE

We hereby certify that COPIES were mailed this 14th day of October, 2014, to Levon Henry, Chief Legislative Counsel, at PO Box 3390, Window Rock, AZ 86515; Brian Lewis, Counsel for RPI, 2418 Hwy 66, Box 215, Gallup, NM 87301, Navajo Election Administration, PO Box 3449, Window Rock, AZ 86515, Navajo Board of Election Supervisors, PO Box 3449, Window Rock, AZ 86515, Office of Hearings and Appeals, PO Box 1300, Window Rock, AZ 86515.



OFFICE OF HEARINGS AND APPEALS
WINDOW ROCK, NAVAJO NATION, ARIZONA

DALE E. TSOSIE,	
Petitioner,	**No. OHA-EC-005-14** **Re: SC-CV-57-14**
and	
HANK WHITETHORNE,	
Petitioner,	**No. OHA-EC-007-14** **Re: SC-CV-58-14**
v.	**FINAL ORDER DISQUALIFYING**
CHRISTOPHER C. DESCHENE,	**RESPONDENT**
Respondent.	

This matter came before the Office of Hearings and Appeals (OHA) for a Final Hearing on October 9, 2014 pursuant to the Order of Remand of the Navajo Supreme Court dated September 26, 2014. Petitioner Dale E. Tsosie was represented by David Jordan; Petitioner Hank Whitethorne was represented by Justin Jones; and, Respondent Christopher C. Deschene was represented by Brian L. Lewis. The OHA, being fully advised in the premises, and having received Petitioners' Motion for Default, and good cause appearing, hereby enters the following Findings of Fact, Conclusions of Law and Final Order:

I. Findings of Fact

1. On September 26, 2014, the Supreme Court ordered the OHA to hold a hearing to determine the fluency of the Respondent and if upon such findings, to order the Respondent qualified or disqualified from being a candidate for the Office of Navajo Nation President. The Court applied a standard for a fluency determination by this tribunal. The OHA was ordered to hold a final hearing by October 3, 2014.

2. The parties met with the OHA on September 29, 2014. At that meeting, Calvin Lee, Jr. represented the Respondent, David R. Jordan represented Dale E. Tsosie and Justin Jones represented Hank Whitethorne. The OHA sought to have Mr. Deschene on the telephone, but Mr. Lee assured the OHA that he spoke for Mr. Deschene at the meeting. Representatives from the Department of Diné Education, Office of Standards, Curriculum & Assessment Development also attended the meeting, and they assured the parties that that they could develop an objective fluency test appropriate for a candidate for President of the Navajo Nation.

3. All parties, including Mr. Deschene's counsel, agreed to the fluency test prior to the Final Hearing in this matter. The OHA memorialized this agreement in an order dated September 29, 2014. Subsequently Respondent's counsel was replaced by Brian L. Lewis and Mr. Lee was terminated as legal counsel.

4. On October 1, 2014, Respondent submitted his *Motion To Dismiss the Statement of Grievance* - and - *Memorandum of Law in Support of the Motion to Dismiss the Statements of Grievance.* After a hearing on the motion, OHA dismissed the motion on grounds that the *Order of Remand* instructed the OHA to hold a hearing "to determine whether or not to disqualify Appellee as a candidate for the office of the Navajo Nation President by applying the standard we have adopted above." *Order of Remand* at 3.

5. On October 1, 2014, Respondent likewise submitted his *Motion to Dismiss the Statements of Grievance.* After oral arguments, OHA dismissed this motion on the grounds immediately cited above.

6. Respondent showed up on October 2, 2014 but refused to take the test.

7. On October 2, 2014, Petitioners moved for a default against Respondent for his refusal to take the test. This motion was argued before the OHA. Petitioners argued that Respondent was bound by the agreements of his counsel. *In the Matter of Estate of Nat Benally*, No. SC-CV-49-08, slip op. (Nav. Sup. Ct. June 25, 2009). They further argued that default was the appropriate remedy for refusal to participate in pre-trial procedures under *Loley v. Dept. of Employment & Training*, 7 Nav. R. 406 (Nav. Sup. Ct. 1999). The Respondent submitted his *Response in Opposition to Motino (sp) for Default on in the Alternative to Suppress Evidence from Navajo Language and Culture Experts* on October 3, 2014.

8. The OHA denied the default motion, but gave Petitioners additional time to take the deposition of Respondent. The parties agreed that the deposition would take place at The Law Offices of David R. Jordan, P.C. on Monday, October 6, 2014.

9. On October 2, 2014, Respondent submitted his *Response to the Statement of Grievance*. A joint response was received from the Petitioners and OHA did not rule on the Motion.

10. Respondent then filed his *Motion in Limine to for (sp) a Ruling to Include Expert Witness* on October 3, 2014. The Petitioners did not respond to the motion and the OHA did not rule on the motion.

11. The deposition of Respondent was taken on October 6, 2014; prior to the deposition, the parties were under an affirmative order of confidentiality and protective order, gag order and directive to sit for deposition entered by OHA on October 6, 2014. The OHA scheduled this matter for a final hearing on October 9, 2014.

12. The Respondent submitted his final motion on October 6, 2014 entitled, *Motion to Disqualify Current Counsel for Petitioners Tsosie and Whitethorne*. OHA denied the motion on grounds that the motion did not specify grounds sufficient for disqualification.

13. At the final hearing, the deposition was played for the OHA. Respondent was observed refusing to answer numerous questions in Navajo. He would answer questions with statements such as "*Diné nishlé*" or "You don't have the right to test me, Justin" or "Diné bindahoo'aa, let the people decide" or "You are not an expert, this is your test."

14. After the deposition was played, Petitioners called Respondent to the stand. Counsel for Petitioner Whitethorne asked the questions. His first question, in Navajo, was "Where are you from?" The Respondent declined to answer the question saying he has protested to this form of questioning many times. This is a standard devised by you and Mr. Whitethorne. I am being administered a test. "You are testing me. This is not right."

15. The next question, asked in Navajo was, "What clan are you?" Again, the Respondent repeated the same answer to Whitethorne's counsel.

16. Mr. Whitethorne's counsel then asked, in English, "Can you describe, in Navajo, how a resolution becomes law?" The Respondent repeated his answer in similar fashion as to questions one and two. The question called for a yes or no answer, and again Respondent declined to answer. Counsel for Whitethorne reiterated to Respondent, "We're not asking

for you to answer in Navajo, but answering in yes or no if you could answer the question in Navajo."

17. The OHA posed the same question to Respondent twice. Again, Respondent declined to answer. Respondent was given various opportunities to answer the question. Respondent clearly knew the answer, but refused to provide any answer to the OHA on this question.
18. The OHA acknowledged on record that the Respondent, by not answering the question, was pushing him into a corner to rule on a default. The Hearing Officer informed him that OHA had offered the parties an objective test developed by the Department of Diné Education, Office of Standards, Curriculum & Assessment Development; that his prior counsel had stipulated to the test and his subsequent counsel advised against it.
19. Finally, given that scenario, the OHA held Petitioner in default for failing to follow the reasonable orders of the OHA and the Navajo Nation Supreme Court, including answering questions posed by Petitioners and by the OHA that were designed to determine whether Respondent met the Supreme Court's fluency standard.

II. Conclusions of Law

1. The OHA has the inherent right to enter default when a party, in bad faith, refuses to participate in pre-trial proceedings ordered by a tribunal. *Loley v. Department of Employment and Training*, 7 Nav. R. 406 (Nav. Sup. Ct. 1999).
2. On October 8, 2014, the Navajo Supreme Court entered its opinion in this matter. In that opinion, it stated: "Deschene *shall* cooperate with the OHA as it carries out its duty." (emphasis added).

3. From the moment that the OHA received this case back on remand, Respondent refused to cooperate with the OHA. He refused to take the test that would have provided an objective measure of his fluency, even though his own prior counsel had agreed to the test. He refused to answer questions at the deposition ordered by the OHA. He refused to answer questions posed by Petitioners at the final hearing. Despite being given several opportunities, he refused to answer a direct "yes" or "no" question posed to him by the OHA.
4. The open defiance by Respondent cannot be tolerated. It defies the authority of the Supreme Court and of this tribunal. Petitioners have the burden of proof, but Respondent does not have the right to refuse to answer simple questions posed by the Petitioners.
5. Because of Respondent's repeated refusal to answer questions and to comply with the authority of the Supreme Court and the OHA, the OHA finds clear and convincing evidence that Respondent cannot meet the standard of fluency announced by the Supreme Court on September 26, 2014.

III. Final Order

Respondent is hereby DISQUALIFIED from the election. The OHA expects the Navajo Elections Administration to follow 11 N.N.C. § 44 by automatically placing the candidate who received the next highest votes in the primary election preceding the general election as the new candidate on the official ballot in the general election. All parties shall have ten days to appeal this final order to the Navajo Nation Supreme Court.

DATED this 9th day of October, 2014.

Richie Nez, Chief Hearing Officer
Office of Hearings and Appeals

CERTIFICATION
I hereby certify that this is a true and correct copy of the foregoing Order filed in the Office of Hearings and Appeals.

Secretary of Hearings/Appeals

10/9/2014
Date

Certificate of Service

I hereby certify that the above ***Final Order Disqualifying Respondent*** will be served upon all parties by electronic mail, and by USPS First Class Mail, postage prepaid, this 9th day of October, 2014 to:

The Law Offices of David R. Jordan, PC
Counsel for Petitioner Dale E. Tsosie
1995 State Road 602
Gallup, New Mexico 87305
David@jordanlegal.com

The Law Offices of Justin Jones, PC
Counsel for Petitioner Hank Whitethorne
Post Office Box 2240
Farmington, New Mexico 87499
justinjoneslaw@gmail.com

B. Lewis Legal & Econ. Consulting, LLC
Counsel for Respondent Christopher C. Deschene
2418 HWY 66, Box 215
Gallup, New Mexico 87301
blewislegal@gmail.com

Courtesy copy routed by electronic mail and interoffice mail to:

Navajo Election Administration
The Navajo Nation
Window Rock, Arizona

Department of Justice
The Navajo Nation
Window Rock, Arizona

Office of Legislative Service
The Navajo Nation
Window Rock, Arizona

The Office of the President/Vice President
The Navajo Nation
Window Rock, Arizona

Meredith Benally, Legal Secretary
Office of Hearings and Appeals