

No. SC-CV-68-14

FILED
SUPREME COURT

IN THE SUPREME COURT OF THE NAVAJO NATION 2014 OCT 20 AM 8:52

NAVAJO NATION

DALE TSOSIE AND HANK WHITETHORNE,
Petitioner/Appellant,

v.

NAVAJO BOARD OF ELECTION SUPERVISORS AND NAVAJO
ELECTION ADMINISTRATION
Respondents,

And Concerning:

CHRISTOPHER DESCHENE,
Real Party in Interest

REPLY TO PETITION FOR MANDAMUS
REGARDING MERITS

NAVAJO NATION
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STATEMENT OF THE CASE

This Petition seeks a Writ of Mandamus against the Navajo Board of Election Supervisors and the Navajo Nation Election Administration (Respondents), non-parties to the actions below, ordering them to comply with 11 N.N.C. § 44 by removing Christopher Deschene (RPI) from the ballot, placing the third place finisher (Russell Begaye) on the ballot, and ordering the RPI to cease conducting further campaign activities. The Petition is grounded on the default judgment issued by the Office of Hearings and Appeals against the Christopher Deschene (RPI) for refusing to participate in pre-trial proceedings. Final Order Disqualifying the Respondent, No. OHA-EC-005-14 issued by the Office of Hearings and Appeals on October 9, 2014.

PROCEEDINGS BELOW

On September 5, 2014, Petitioners filed an action against Christopher Deschene, then Respondent now Real Party in Interest (RPI), with the Office of Hearing and Appeals to disqualify him as a Navajo Nation Presidential candidate. The Office of Hearings and Appeals (OHA) dismissed the petition as untimely on September 10, 2014. Petitioners filed an appeal of OHA's decision to the Navajo Nation Supreme Court on or about September 19, 2014. On September 26, 2014, the Navajo Nation Supreme Court heard oral arguments, issued a remand order to OHA, and issued a fluency standard for Navajo Nation Presidential candidates. Further the Navajo Nation Supreme Court directed OHA to conduct a hearing within five business days or by the close of business on October 3, 2014 and determine whether Mr. Deschene meets the fluency standard issued by the Court.

On September 29, 2014, the parties met with OHA and representatives from the Department of Diné Education to discuss the development of an objective fluency test. During

this meeting RPI's counsel, Calvin Lee, agreed RPI would take the fluency test. RPI's counsel was replaced by Brian Lewis. On October 1, 2014, RPI submitted a Motion to Dismiss the Statement of Grievance and a Memorandum of Law in Support of the Motion. OHA conducted a hearing and denied the motion to dismiss based on the Navajo Nation Supreme Court's remand order. On October 2, 2014, RPI appeared at the testing location however did not take the fluency test. Petitioners moved for a default, however, OHA denied the default motion but allowed for a deposition of RPI. The deposition took place on October 6, 2014. On October 8, 2014, the Navajo Nation Supreme Court issued the order from the September 26 hearing which went into more detail than the September 26 remand order and added that Mr. Deschene shall cooperate with OHA. On October 9, 2014, OHA held their final hearing. During the hearing, OHA issued a default judgment against RPI. In OHA's written order dated October 9, 2014, OHA found that RPI does not meet the fluency standard set forth by the Navajo Nation Supreme Court and as such disqualified RPI from the election. OHA further expected the Navajo Election Administration to comply with 11 N.N.C. § 44. The Petitioners filed this Writ of Mandamus.

STATEMENT OF THE ISSUES

- I. Have Respondents contributed to the "crisis" of the Presidential election, or have they taken any action in contempt of this Court or the Office of Hearings and Appeals?
- II. Are Respondents mandated by Navajo law to follow 11 N.N.C. § 44?
- III. Will Respondents violate Navajo law if RPI is removed from the ballot?

ARGUMENTS

Navajo Nation law mandates the Navajo Board of Election Supervisors and the Navajo Election Administration to administer, implement, and enforce the election rules and timelines set forth in the Navajo Nation Code. The Navajo Board of Election Supervisors has the authority to make and enforce rules and regulations not inconsistent with the Election Code concerning matters within the jurisdiction of the Board. These regulations shall have the force and effect of laws of the Navajo. The Navajo Election Code set forth specific timelines which mandate the procedures for each election. The Navajo Nation established the Navajo Board of Election Supervisors to ensure the mandated procedures were followed. Failure to follow the established procedures and timelines could adversely affect the election process.

I. Have Respondents contributed to the “crisis” of the Presidential election, or have they taken any action in contempt of this Court or the Office of Hearings and Appeals?.

The Respondents have demonstrated no contemptuous action. The Office of Hearings and Appeals’ (OHA) Final Order states, “Respondent is hereby DISQUALIFIED from the election.” *Final Order Disqualifying Respondent* (Final Order), OHA-EC-005-14, OHA-EC-007-14, at 6 (October 9, 2014) (emphasis in original). Next, the Final Order states, “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.” Final Order, at 6, (October 9, 2014) (emphasis added). Finally, the Final Order directs in the last line, “All parties *shall* have ten days to appeal this final order to the Navajo Nation Supreme Court.” Final Order, at 6, (October 9, 2014) (emphasis added). Of the three parts to the Final Order, the expectation in part two is directed to the Respondents; however, the OHA concludes with a mandatory

statement that applies to the parties in the OHA case based on 11 N.N.C. § 341(A)(4) where “a party who wishes to appeal from a decision by the Office of Hearings and Appeals must file a Notice of Appeal with the Supreme Court of the Navajo Nation within 10 days after the decision is made.” By law and by Navajo Rules of Civil Appellate Procedure, Rule 5, the Respondent (here RPI) in the OHA Final Order has until October 20, 2014 to file his Notice of Appeal.

Petitioners allege there is a crisis caused by the contempt of Respondents in not following the OHA Final Order. The contempt allegation is a serious matter and must be addressed.

“Contempt” is defined as “a willful disregard or disobedience of a public authority.” Black’s Law Dictionary, 6th Edition. “Contempt of court” is defined as:

“Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court’s authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given.” Black’s Law Dictionary, 6th Edition.

See also *John v. Herrick*, 5 Nav. R. 129 (Nav. Sup. Ct. 1987), *In Re Contempt of Sells*, 5 Nav. R. 37 (Nav. Ct. App 1985), *In Re Contempt of Mann*, 5 Nav. R. 125 (Nav. Sup. Ct. 1987).

Respondent’s actions following the OHA order are not in willful disregard or disobedience to the OHA; Respondents proceeded with the election process, as they are mandated to do, because the judicial dispute involving the RPI is not complete until his time for appeal passes.

The Navajo Election Administration (NEA) and the Navajo Board of Election Supervisors (NBOES) are mandated to follow the election process in the Navajo Nation Code from start to finish; several sections of the Election Code anticipate timeframes for potential challenges or disputes by third parties. Judicial disputes and other challenges that arise during the course of an election do not cause the NEA to deviate from the election process until the

appropriate time has lapsed. There are several examples of this in the Election Code. For example, 11 N.N.C. § 24(A) provides, “The Navajo Election Administration shall hold the candidate applications of all candidates it has certified as eligible for a period of 10 days during which sworn challenges may be filed with the Office of Hearings and Appeals by other applicants for the same position, whether or not such applicants are certified.” 11 N.N.C. § 24(D) states, “If the Office of Hearings and Appeals determines that the challenge meets the requirements of § 24(B) and (C), it shall hold a hearing not less than three nor more than 10 days after its determination that the challenge is valid on its face.” 11 N.N.C. § 24(G) reads, “The decision of the Office of Hearings and Appeals shall be issued to the party initiating the challenge and the candidate within 10 days of the hearing. Appeal may be made by either party to the Navajo Nation Supreme Court within 10 days of the date of the decision.” Further, 11 N.N.C. § 341(A), with respect to OHA resolving disputes, requires that “[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.”

During the time that these challenges are made and proceed through the appropriate channels, NEA/NBOES continue with the election process as they are required to do. Unless they are made parties to the challenge or dispute, the Respondents are not directly involved or affected by any ongoing litigation. Respondents march forward with the process until the judicial disputes are fully and finally resolved, including any appeal times.

The Respondents are not intending to impede, frustrate or willfully disobey the OHA Final Order; but, in every instance were following the procedures with regard to the election process as set out in the Navajo Election Code. On the other hand, had Respondents not

followed procedure, the RPI would take issue with the action that did not follow procedure. The reasonable, proper and legal manner is to allow the election process to take place to ensure a fair and just application of the Election Code.

What would have happened if Respondents had halted the election, added the third runner-up to the general election ballot, and removed RPI from the ballots as “expected” of them by the OHA, before the proper appeal time had lapsed? In that case, if Mr. Deschene exercises his right to appeal the OHA decision, then Respondents have truly caused chaos. Given the choice between acting on every interim decision made in challenges before the appeal time lapses or moving forward with the election process pending the complete and final resolution of any challenges or litigation, the Respondents choose to move forward as the most logical and consistent response.

II. Are Respondents mandated by Navajo law to follow 11 N.N.C. § 44?

The relevant portions of 11 N.N.C. § 44 state, “In the event of...disqualification of any candidate, who by virtue of the primary election was placed on the general election ballot...the candidate who received the next highest votes in the primary election preceding the general election shall automatically be placed as the new candidate on the official ballot in the general election following said primary election.” The Respondents, under this statute, have the obligation to place the candidate who received the next highest votes in the primary election on the general election ballot once a determination has been made on the disqualification of a candidate who is on the general election ballot. However, as described in the previous section, there is a period for an appeal to the Navajo Supreme Court on the OHA’s decision on disqualification of a candidate. Statutes must be read together and not pinon picked. *In the*

Matter of Frank Seanez, SC-CV-58-10 (corrected), slip op., at 10 (Nav. Sup. Ct. January 25, 2011).

11 N.N.C. § 341(A)(1), which was the focus of the issue at OHA, carries with it other procedural matters including providing a party the opportunity to appeal to the Supreme Court of the Navajo Nation. 11 N.N.C. § 341(A)(4). The Navajo Rules of Civil Appellate Procedure dictate the process for an appeal to the Navajo Nation Supreme Court, Nav. R. Civ. App., Rule 7, as the parties in this case have previously followed in SC-CV-57-14. See also 11 N.N.C. § 24(G) (Appeal may be made by either party to the Navajo Nation Supreme Court within 10 days of the date of decision (of OHA)).

In this case the Petitioners request for a writ of mandamus is premature. The NBOES and the NEA have the general powers and duties to administer, implement and enforce the Navajo Election Code. 11 N.N.C. § 321, 2 N.N.C. §§ 873, 876. In carrying out their duties the NBOES and the NEA have followed the process for conducting the election and have had no involvement in the case before the OHA. Petitioners now allege that Respondents have refused to remove RPI when; however, as cited herein, the election process allows for an appeal of the OHA decision.

As the Supreme Court has decreed in *Bradley v. Benally*, 6 Nav. R. 156, 159 (Nav. Sup. Ct. 1989), “Relief may be sought in the Supreme Court only after the movant has sought relief in the trial court and been denied. In this situation, the proper course of action is to move this Court for a writ of mandamus. A writ of mandamus, however, is an extraordinary remedy and will be granted only where the movant demonstrates that the writ is appropriate in the circumstances and satisfies this Court that he has effectively satisfied the requirements set out above and been refused by the trial judge.” In *Hurley v. To'hajiilee Family Court*, SC-CV-44-05, (Nav. Sup. Ct.,

Slip Op. 2005), the Court stated, “A writ of mandamus is an extraordinary remedy granted only when necessary. This Court will refuse to issue a writ when there is a plain, speedy and adequate remedy at law.” In this case the remedy is governed by an application to the District Court where the Petitioners may address the Sovereign Immunity Act requirements. The Sovereign Immunity Act requirements are addressed in Respondents brief on the Court’s jurisdiction.

Respondents agree that 11 N.N.C. § 44 require the NEA to move the third place candidate to the general election ballot on the disqualification of the RPI, but only once the dispute regarding a candidate’s qualification has been fully and finally resolved. As long as there is time for appeal, the NEA/NBOES cannot deviate from its course. To do so would cause constant and repeated changes to the election, without allowing consistent expectations in the process. In this case, RPI’s appeal time has not lapsed. If Mr. Deschene does not appeal, and the OHA decision becomes final, then Respondents will react. If Mr. Deschene does appeal, Respondents will consider how that appeal affects their mandate to follow through with the election process, and react. But at this time the Petitioner’s writ of mandamus is premature.

III. Will Respondents violate Navajo law if RPI is removed from ballot?

The Respondents are not parties to *Tsosie v. Deschene*, *Whitethorne v. Deschene*, SC-CV-57-14, SC-CV-58-14, nor are they parties to the proceedings in the Office of Hearings and Appeals, *Tsosie and Whitethorne v. Deschene*, OHA-EC-005-14 and OHA-EC-007-14. As non-parties to the case, Respondents, without a timely challenge, are mandated by law to proceed with an election and to permit voters to vote for candidates of their choice. 11. N.N.C. § 3, 11 N.N.C. § 121. The Respondents, NEA and NBOES, are mandated by law to conduct elections, not wait for lawsuits which they are not made a part of to be resolved.

The Navajo Nation Council established the Navajo Board of Election Supervisors and the Election Administration Office “as an independent entity.” Title Two states, “The Navajo Board of Election Supervisors, hereinafter, the Board, and the Election Administration Office, hereinafter, the Office are hereby established. The Board is created by the Navajo Nation Council as an independent entity. The Board shall be responsible to the Navajo Nation Council only and shall be placed under the Intergovernmental Relations Committee who shall have ministerial oversight and whose primary purpose shall be routing documents and record-keeping incidental to the authority delegated to the Board and the Office by the Election Code; and to cause effect to the authority entrusted solely in the Board and Office; and to guard the public interests entrusted to the Board.” 2 N.N.C. 871 (A); *The Navajo Nation v. Redhouse*, 6 N. Rep. 305, 307 (1990). As an independent entity the NBOES and the NEA have certain obligations to the electorate and the election process.

As an “independent entity,” NBOES must be able to implement, enforce and interpret the Election Code to fulfill its’ responsibility to the People. Its’ interpretation of the Code in respect to elections is that it must conduct all elections in a fair and impartial manner to protect the rights of the people. This is the Respondents’ duty. To carry out that duty means that the NEA/NBOES cannot change course at every interim order or upon the initiation of every challenge. In the absence of being named a party to a dispute, Respondents are charged with staying the course and implementing the election until a dispute is fully resolved.

Petitioners have been proceeding with their challenge of RPI’s qualifications and that process has not yet intersected with the electoral process administered by the Respondents. Once the parties’ time to appeal the OHA order has passed, only then will the Respondents be in a position to change course in this election. Without a timely challenge, Respondents are

mandated by law to proceed with an election and the only type of dispute allowed after an election is a dispute based on how an election was conducted. 11 N.N.C. § 341. See *Morris v. Navajo Board of Election Supervisors*, 7 Nav. R. 75, 76-77 (Nav. Sup. Ct. 1993) (10 minute delay in start of election, absence of a police officer at poll, absentee ballot availability); *Secatero et al. v. Navajo Board of Election Supervisors*, 6 Nav. R. 385, 387 (Nav. Sup. Ct. 1991) (irregularities in the conduct of recall elections).

The NEA and NBOES have statutory timelines to meet in order to conduct elections in a fair, orderly and timely manner. If challenges are made, challengers must follow the statutory time requirements. The ten day period in 11 NNC § 24 is there so that all challenges can go through the various processes, including the OHA hearing and appeals to the Navajo Nation Supreme Court, before the primary election date arrives. To allow the 11 NNC § 341 to be interpreted such that a challenger can commence an action very close to or even after the primary election, fails to allow for the NEA and NBOES to fulfill statutory and Title Two requirements to provide for elections to the People. If the elections are not completed according to the timelines, the next Navajo Nation president cannot be sworn in on the second Tuesday after the the first Monday in January following the election. 11 N.N.C. § 6(B).

CONCLUSION


The Navajo Election Code provides the structure for the election process and the Respondents are under lawful authority to carry out that process. The challenge filed at the Office of Hearings and Appeals by the Petitioners does not affect that process until such time the Respondents are brought into the case. As such, the Respondents have not contributed to the

“crisis” of the Presidential election, nor have they taken any action in contempt of this Court or the Office of Hearings and Appeals.

The Petition for Writ of Mandamus is premature. While the Respondents are required to move a third place candidate to the general election ballot if a disqualification is made of a candidate in the primary election, they must also follow the election process that provides an appeal from decision of the Office of Hearings and Appeals. The dispute in the case between Petitioners and the RPI is on-going until the appeal process is exhausted. Once the appeal process is exhausted, and only then, will the Respondents be required to move a third place candidate to the general election ballot.

At this point, Petitioners are attempting to enforce an OHA order in a case in which Respondents were not parties, by seeking extraordinary relief in the form of a writ from the Supreme Court rather than addressing the potential sovereign immunity issues that arise from seeking redress in the proper forum.

RESPECTFULLY SUBMITTED this 20th day of October, 2014.



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CERTIFICATION:

I hereby certify that the forgoing application, at time of filing, was forwarded to the parties by email:

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