No. SC-CV-80-14

NAVAJO NATION SUPREME COURT

Myron McLaughlin,
Petitioner-Appellant,

v.

Russell Begaye,
Respondent-Appellee.

MEMORANDUM DECISION

Before YAZZIE, H., Chief Justice, SHIRLEY, E., Associate Justice, LIVINGSTON, L, Associate Justice by Designation.

An appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-EC-002-15, Chief Hearing Office Richie Nez, presiding.

Brian L. Lewis, Gallup, New Mexico, for Appellant; David R. Jordan, Gallup, New Mexico, for Appellee; Attorney General Harrison Tsosie, Deputy Attorney General Dana Bobroff, Assistant Attorney Generals, Navajo Department of Justice, Window Rock, Navajo Nation, for The Navajo Nation; Chief Hearing Officer Richie Nez pro se for the Office of Hearings and Appeals.

This is an appeal from an election challenge. Myron McLaughlin (McLaughlin) appeals from a final judgment dismissing his challenge against fellow presidential candidate Russell Begaye (Begaye) after Begaye became the new candidate to be placed on the general election ballot following the disqualification of another presidential candidate. We affirm the dismissal but on different grounds.

I

The relevant facts are as follows. After the disqualification of Christopher Deschene by the Office of Hearings and Appeals (OHA) on October 9, 2014, by operation of law Russell Begaye became the new candidate to be placed on the official ballot for the 2014 presidential election. This Court followed up the disqualification with a Permanent Writ of Mandamus, *see*

Tsosie and Whitethorne v. Navajo Board of Election Supervisors and the Navajo Election Administration, SC-CV-68-14 (Nav. Sup. Ct. nunc pro tunc October 23, 2014), and a subsequent order of contempt to enforce the OHA's decision, *see Tsosie and Whitethorne v. Navajo Board of Election Supervisors and the Navajo Election Administration*, SC-CV-68-14 (Nav. Sup. Ct. nunc pro tunc October 31, 2014). Thereafter, on October 31, 2014, McLaughlin filed a grievance pursuant to 11 N.N.C. § 341, claiming Begaye should be disqualified as the new presidential candidate because he did not demonstrate "unswerving loyalty to the Navajo Nation" in violation of 11 N.N.C. § 8(A)(8) when he and other shareholders authorized the filing of a lawsuit in federal district court, naming board members of the Navajo Nation Oil and Gas Company as defendants, to thwart this Court's decision of May 1, 2014 and June 20, 2014. The federal action was filed on June 27, 2014 after this Court rendered a decision on June 20, 2014 in *Navajo Nation Oil and Gas v. Window Rock District Court*, SC-CV-25-14 (Nav. Sup. Ct. June 20, 2014). We need not recite the facts giving rise to the federal lawsuit, since they are set forth in that decision. On November 24, 2014 the OHA dismissed McLaughlin's grievance finding "as a matter of law, that [the federal court] action is not 'disloyal' (sic) such that it would disqualify a candidate from running for president." Findings of Fact and Conclusions of Law and Final Judgment (Final Judgment), at 13, ¶4 (November 24, 2014). This appeal followed.

II

In the November 24, 2014 dismissal of McLaughlin's grievance, the OHA stated "the parties stipulated to the timeliness of the Grievance [and] jurisdiction of OHA," *see* Final Judgment at 3, and proceeded with a hearing under 11 N.N.C. § 341. No findings of facts supporting personal and subject matter jurisdiction were found in the record on appeal. In our appellate review, we are limited to the "evidence on the record." 11 N.N.C. § 341(A)(4).

Furthermore, though the parties did not raise jurisdiction as an issue on appeal, this Court is obligated to determine jurisdiction on its own even if the parties do not raise the issue and, by extension of that duty, we review the jurisdiction of the lower tribunal over the underlying action. Jurisdiction over a respondent requires both personal and subject matter jurisdiction. *Navajo Transport Services, Inc. v. Schroeder*, No. SC-CV-44-06, slip op. at 3 (Nav. Sup. Ct. April 30, 2007) (citing *Nelson v. Pfizer*, 8 Nav. R. 369 (Nav. Sup. Ct. 2003)). Whether the OHA has subject matter jurisdiction is a question of law. This Court reviews matters of jurisdiction *de novo* with no deference to the lower tribunal. *Id.*

Generally, challenges to candidate applications are filed within 10 days of a candidate's certification in the pre-election phase of an election under 11 N.N.C. § 24(G). As to post-election challenges, grievances that a candidate filed a false sworn statement are permissible under 11 N.N.C. § 341(A)(1). *Gishey v. Begay*, 7 Nav. R. 377 (Nav. Sup. Ct. 1999). In *Gishey*, the complainant knew of facts that could have disqualified a candidate yet he did not file a challenge within 10 days of such knowledge as required by 11 N.N.C. § 341 (then 11 N.N.C. § 321(B)). The Court in *Gishey* hesitated to affirm a ruling that strictly requires challenges within 10 days when it is difficult to obtain the facts, especially where a candidate has almost exclusive knowledge of the facts as to their qualification. *See id.* Most recently in *Tsosie and Whitethorne v. Deschene*, SC-CV-57-14 and SC-CV-58-14 (Nav. Sup. Ct. nunc pro tunc October 8, 2014), we affirmed *Gishey* and allowed a grievance filed within 10 days "of the election" because the "incident complained of" concerned a false statement as to a qualification that was known only to the candidate.

Here, McLaughlin launched his challenge under 11 N.N.C. § 341. Pursuant to §341(A)(1), "[w]ithin 10 days of the incident complained of or the election, the complaining person must file with the [OHA] a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with." In this post-election challenge, we are

beyond 10 days "of the election" so that cannot be the basis for the OHA's subject matter jurisdiction under § 341(A)(1). Because this is not a situation where Begaye had almost exclusive knowledge of the facts pertaining to publically filed federal documents, McLaughlin's grievance must be filed within 10 days of "the incident complained of" for the OHA to properly find jurisdiction. From the record, there is no discussion as to "the incident complained of" and when the 10-day period for the filing of the grievance actually began.

The OHA had a duty to determine its jurisdiction before deciding the merits of the case and McLaughlin had the burden of demonstrating that the tribunal had jurisdiction to proceed. Unlike personal jurisdiction, subject matter jurisdiction cannot be conferred on a tribunal by stipulation of the parties.

From the record, we are faced with a post-election challenge under § 341(A)(1). Given the crux of McLaughlin's own grievance, the identifiable point or "incident complained of" which was said to disqualify Begaye and thus should have prompted a challenge was the filing of the lawsuit in federal district court. The filing of the lawsuit occurred on June 27, 2014. McLaughlin was therefore required to file his grievance within 10 days of June 27, 2014, or by July 7, 2014. The filing of McLaughlin's grievance on October 31, 2014, five months after the filing, was thus untimely. Dismissal was therefore proper but on grounds that the OHA lacked subject matter jurisdiction.

Because this Court lacks jurisdiction, we are precluded from ruling on whether the filing of the lawsuit in federal district court was disloyalty requiring the disqualification of Begaye. Our decision to affirm the dismissal in no way condones Begaye's filing of a lawsuit to avoid the final judgment of this Court in federal court.

III

Even though we have dismissed this appeal for lack of jurisdiction, the approach by the Navajo Department of Justice (NDOJ), through the Attorney General and Assistant Attorneys

General, raises questions about the practice of law in this case. The manner in which the NDOJ decided to file a pleading on the substantive issue on appeal is troubling to this Court. The NDOJ is either unaware of the protocol in approaching this Court or is completely unaware of the Navajo Rules of Civil Appellate Procedure for without so much as a request to file a pleading, it submitted substantive arguments as to the merits of the appeal. It is true that this Court ordered the NDOJ to represent the OHA in the filing of a response, but the NDOJ without explanation refused to do so, forcing the OHA administrative judge to approach the Court *pro se.* [1] The NDOJ cannot use this Court's order that it file a response for the OHA as authorization that it may file a response for the Navajo Nation. Normally, the government, if it wishes to submit a pleading on an ongoing litigation, would ask for authorization through a motion to intervene or a motion to appear as an amicus curiae. The Court cannot permit such disrespect of our appellate procedures from the Nation's own lawyers.

Furthermore, of particular concern to this Court is that the government, through the NDOJ, would attack the continuing validity of basic qualifications. The NDOJ asks that we invalidate the "unswerving loyalty" requirement because "neither the candidate nor the People know what it means" and that we should defer to the People "to decide the meaning of the requirement through the exercise of their right to vote, or not, for any candidate, based on their assessment of the candidate's words and actions." *Response of Navajo Nation Department of Justice* at 7 (December 12, 2014). This Court has a duty to "[read] provisions of a statute comprehensively to further the purposes of the law, making sense of all statutory requirements and avoiding, whenever possible, the invalidation of any provisions." *Kesoli v. Anderson Security Agency*, 8 Nav. R. 724, 731 (Nav. Sup. Ct. 2005). The recommendation to simply defer to the ever-changing political will of the People to define our laws

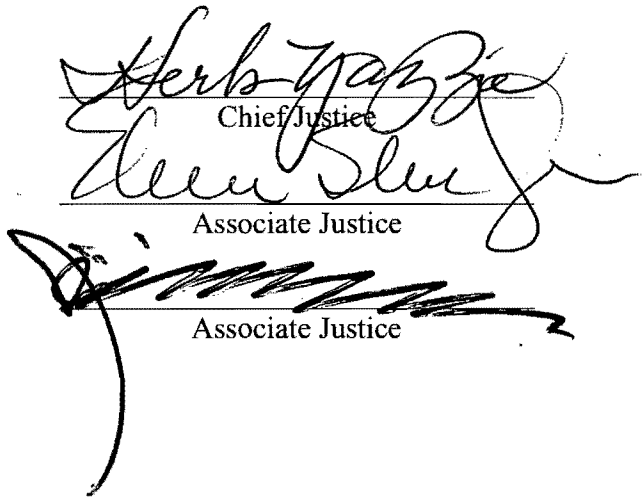
[1] The Court ordered the OHA, through the Department of Justice, to address allegations in the Notice of Appeal as to the qualification of the Hearing Officer. Though the OHA is not a party, appellant sought a retrial in the OHA. Our decision that Hearing Officer Richie Nez had authority as a de facto Hearing Officer addressed only past decisions of the OHA leaving prospective decisions in uncertainty as we considered the appeal and the prayer for relief. The pro se filing of the Chief Hearing Officer hits the hammer on the nail as to our concern. Rather than ignore its duty of representation to the OHA, the NDOJ should have comprehensively considered the issues raised by McLaughlin.

at any given moment in time is not only dangerous to our sovereignty, it is not Diné in thought. Our laws should not sway with the times. The Diné have always been guided and protected by the immutable laws provided by the Holy People; these laws have not only provided sanctuary for the Diné Life Way but has guided, sustained and protected the Diné as they journeyed upon and off the sacred lands upon which we were placed since time immemorial. Navajo Nation Council Resolution No. CN-69-02 (November 1, 2002). It is the duty of the Navajo leadership - and the government attorneys with a fiduciary duty of trust to the People they serve - to preserve, protect and enhance the Diné Life Way and sovereignty of the people and their government. *Id.*, at Whereas ¶3. The knowledge of these fundamental laws may be fading; especially among the young people, *see id.*, at ¶4, but the duty to fundamental law remains and must be protected and assured, *see id.*, at ¶5. All elements of the government must learn, practice and *educate* the Diné on the values and principles of these laws. *Id.*, at ¶8 (emphasis added). In the case, the qualifications of elected officials were enacted decades ago in recognition of our identity as Diné and our immutable laws that have long guided our ancestors and leaders before us. Even with the recommendation by the government attorneys of the NDOJ, this Court will not go around invalidating laws for the political aspirations of a few individuals at the expense of the stability of our government. The will of the People will continue to change with time but our unvarying principles and values at the foundation of our laws have and should remain resolute to protect and enhance our sovereignty.

IV

The Court affirms the dismissal of McLaughlin's grievance on the separate grounds that the OHA lacked subject matter jurisdiction. Russell Begaye shall remain on the official ballot for the 2014 presidential election.

Dated this 16th day of December, 2014.



Chief Justice

Associate Justice

Associate Justice