



## **Huron Potawatomi Tribal Court**

**The Nottawaseppi Huron Band of the Potawatomi**

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<b>Case No.</b> <b>13-078-CV/TRO</b> <b>13-079-CV/TRO</b>	<b>ORDER AND DECISION AFTER SUPREME COURT HEARING</b>	
<b>PLAINTIFFS:</b>  <b>DEAN TENBRICK</b>  <b>TERRY TENBRICK</b>	<b>v.</b>	<b>DEFENDANTS:</b>  <b>NOTTAWASEPPI HURON BAND OF THE POTAWATOMI AND NOTAWASEPPI HURON BAND OF THE POTAWATOMI ELECTION BOARD</b>

### **OPINION OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF POTAWATOMI**

Opinion by Wabaunsee, CJ

#### **I.**

#### **PROCEDURAL HISTORY**

These cases reach us on appeal from the Trial Court's Opinion and Order of April 23, 2013. Dean TenBrink and Terry TenBrink (the "TenBrinks"), members of the Nottawaseppi Huron Band of Potawatomi (NHBP), filed an action to appeal the decision of the NHBP Election Board to disqualify them and two other candidates who were seeking election to the NHBP Tribal Council scheduled for April 27, 2013. The complaint was filed on March 8, 2013 and asked for a temporary restraining order

reinstating them as candidates. The TenBrinks also claimed that portions of the NHBP Election Code were contrary to the NHBP constitution and the Indian Civil Rights Act.<sup>1</sup>

The Trial Court scheduled a hearing on the petition for temporary restraining order for March 15, 2013. At the hearing neither party presented evidence, instead choosing to make oral arguments. Both parties relied on documents attached to various pleadings and filings, but none were introduced into evidence. However there appears to be little dispute as to the basic facts of this case. On March 19, 2013, the Honorable Melissa Pope, trial court judge, denied the request for injunctive relief on the grounds the plaintiffs failed to meet their burden of proof. On April 8, 2013, plaintiffs filed a motion for a new trial, and to alter or amend the judgment. The NHBP Election Board opposed the motion and requested dismissal of the action. After further briefing on April 23, 2013, Judge Pope affirmed her March 19, 2013 decision, denied the motion for new trial, denied the plaintiffs' request for a permanent injunction and advisory opinion and dismissed the TenBrink's case with prejudice.<sup>2</sup> The TenBrinks filed a timely notice of appeal on April 26, 2013. After briefing, the Supreme Court heard oral arguments of the parties on June 5, 2013.

## **II. STATEMENT OF**

### **FACTS**

The Nottawaseppi Huron Band of the Potawatomi (NHBP) Tribal Council amended its Election Code in September 2012.<sup>3</sup> Title III, Election Code, Section 2.5-Candidates and Campaigning, provides:

#### **Section 2.5 - Candidates and Campaigning:**

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<sup>1</sup> Rob Larson also filed a complaint. As discussed below, his case was dismissed. The fourth disqualified candidate, RoAnn Bebee-Mohr did not participate in the litigation.

<sup>2</sup> Rob Larson's case had been dismissed for failure to appear at the March 19, 2013 hearing. He is not a party to this appeal.

<sup>3</sup> The NHBP publishes its codes and Constitution on the Nation's website.



1. The Election Board and the NHBPI Newsletter will only be responsible for publishing a list of candidates and contact information (i.e. address; telephone numbers; e-mail address; webpage), biographical information candidates wish to make available to voters. All other campaigning will be the sole responsibility of the candidates.
2. Candidates, supporters of candidates, or other person(s) acting on another's behalf, shall not, directly or indirectly, knowingly make, publish, circulate or place in the public, either orally or in writing, an assertion, representation, or statement of fact concerning a candidate for elected office, that is false, deceptive, or malicious.
3. Eligible candidates and/or supporters of candidates who wish to distribute campaign materials to the eligible voters must submit their materials to the Election Board no later than fourteen (14) working days prior to the Election.
4. The Election Board prior to distribution must approve all campaign materials.
5. Campaign materials are considered to be: mailers of all sorts, yard signs, clothing, stickers, buttons, websites, social media sites, emails. The Board reserves the right to expand the list with proper notification.
6. Candidates and/or their supporters are barred from mailing campaign materials to eligible voters independent of the Election Board and are in violation of this Code and may be subject to civil and/or criminal penalties.
7. Candidates are required to pay all costs associated with the mailing of campaign materials, which shall include, but not be limited to, copies, envelopes, labels and postage.
8. The Tribal Enrollment office shall supply address labels with the current mailing address of all eligible voting Tribal Members to the Election Board when requested to do so by the Election Board.
9. Restrictions on Campaign Activities at Tribal Government Buildings and Enterprises.
10. Campaign materials (i.e. posters; flyers) may not be posted in any Tribal Government Buildings, Tribal Enterprise Buildings, or in the parking lots (i.e. signs on/in parked vehicles) or other common areas (i.e. entrance; sidewalks, yard) of such Buildings.

After the adoption of the new Election Code the Election Board scheduled an election for three persons to the five-person NHBP Tribal Council. This election notice was issued 150 days before the election scheduled for April 27, 2013. Seven persons

declared their candidacy for election to one of the three contested seats.<sup>4</sup> Tony Day, one of the seven candidates, filed a complaint with the Election Board claiming that four candidates engaged in an unauthorized primary election which was in violation of Section 2.5 of the Election Code. The parties agree that informal meetings were held outside the NHBP Reservation boundaries to narrow the field of candidates and “engaged in regular electioneering communication, get out the vote efforts and eventually formal vote gathering.” Respondents Brief (May 9, 2013) at p.5. After a hearing on January 31, 2013 the Election Board disqualified four candidates including the two appellants in this court without specifying the exact nature of the campaign violations except to restate various sections of the Election Code.

According to Section 4.4 of the Election Code, the absentee ballots are to be mailed sixty days before the election. In this case the absentee ballots were to have been mailed by February 25, 2013, since the election was scheduled for April 27, 2013 (the last Saturday in April). This case was not filed until March 8, 2013 after the absentee ballots were mailed.

In their complaint the plaintiffs ask the Trial Court to reinstate them as candidates and to declare that the Election Code violates the NHBP Constitution and the Indian Civil Rights Act. At the hearing on the temporary restraining order held on March 15, 2013, the Trial Court expressed concerns that the absentee ballots had been mailed. On March 19, 2013, The Honorable Melissa Pope denied the plaintiffs request for a restraining order. She held that that the plaintiffs failed to meet their burden of proof for an injunction as set forth by this Court in *Spurr v Nottawaseppi Huron Band of Potawatomi* No.12-005 App., slip op. at 9 (NHBP S.Ct.Feb. 21, 2012). In *Spurr* this court held that a plaintiff seeking a preliminary injunction must establish:

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<sup>4</sup> The record is not clear on all of the facts in this matter. The decision of the Election Board of February 1, 2013 does not make any findings of fact upon which the Board based its decision. The Election Board found that the four disqualified candidates violated Sections 2.3, 2.4, 2.5 and portions of 2.6 of the Election Code. This recitation of facts is based on what appears to be facts the parties did not contest in filings and oral argument. In the future when the Election Board conducts a hearing on a contested matter, the Board should make specific findings of fact as well as a transcript of the hearing so that a reviewing court will have an understanding of the reasons for a decision.



- 1) a likelihood of prevailing on the merits of the action;
- 2) Irreparable harm in the absence of preliminary relief;
- 3) the balance of equities is in the favor of the moving party; and
- 4) the injunction is in the public interest.

Utilizing the test set forth in Spurr Judge Pope held that the plaintiffs could not demonstrate that they would prevail on the merits of the case.

On April 23, 2013, after further briefing and without oral argument, Judge Pope refused to reconsider her decision of March 19, 2013. Judge Pope did allow the joinder of the cases involving Dean and Terry TenBrink and dismissed the case involving Rob Larson for his failure to appear. She denied the plaintiffs' requests for a new trial, amendment of judgment, permanent injunction and advisory opinion. Judge Pope dismissed the TenBrink's case with prejudice. The TenBrinks filed a timely appeal from the Trial Court's decision.

### III.

#### JURISDICTION

Article XI § 3(c) of the Constitution of the Nottawaseppi Huron Band of Potawatomi provides:

Appellate Jurisdiction. The Tribal Supreme Court shall have jurisdiction to review a final judgment, order or decree of the Tribal Court as provided in appellate rules adopted by the Tribal Judiciary or as prescribed by applicable Tribal law.

The trial court issued a final order on Appellants Terry and Dean's Tenbrick's Request for Advisory Opinion and Petition for Temporary and Permanent Injunction. In accordance with Article XI § 3(c), NHBP Constitution the plaintiffs have filed a timely Notice of Appeal. Therefore, this court has jurisdiction over this appeal of the trial court's decision.

## IV.

**CONSTITUTIONALITY OF SECTION 2.5 OF THE ELECTION CODE**

Any reading of Section 2.5 subsection 2, 3, 4, 6 of the NHBP Election Code leads one to the conclusion these subsections interfere with NHBP member's rights guaranteed by NHBP Constitution. Article VII, Section 1 a), Individual Rights, subsection 1 of the NHBP Constitution provides:

The Band, in exercising the powers of self-government, shall not make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or of the press, or the right of the people to peacefully assemble and to petition for redress of grievances.

This section of the NHBP Constitution is patterned after Article I of the United States Constitution. Both the NHBP and U.S. Constitutions declare that the government cannot enact laws that "abridge the freedom of speech". The common definition of abridge as set forth in the Ninth Edition of Black's Law Dictionary is "to reduce or diminish."

Section 2.5, Subsections 3, 4 and 5 of the Election Codes require that eligible candidates and/or their supporters must submit campaign materials to the Election Board. Before distribution the Election Board must approve all campaign materials. Campaign materials include mailers, yard signs stickers, buttons, websites and emails. Candidates cannot mail campaign materials independent of the Election Board. Candidates are warned that violation of the Election Code could result in civil or criminal penalties. In fact, four candidates were disqualified for violating provisions of this election code for having meetings, using emails and other electronic media and informally agreeing on who would run for election."<sup>5</sup> Requiring a candidate to obtain approval of campaign materials abridges or limits a tribal members' freedom of

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<sup>5</sup> Attached to the Decision of the Election Board dated February 1, 2013 were copies of Facebook postings and emails purportedly sent by the four disqualified candidates or their supporters.



expression. Even if the Election Board does not censor campaign materials, the requirement of submission has a chilling effect.

This court has not issued any opinions of the meaning of the Freedom of Expression section of the NHBP Constitution. This Court has previously held that elections held under Article IX of the NHBP Constitution must provide for the free expression of community will and fundamental fairness. *Spurr v NHBP Tribal Council*, Feb 21, 2012 at 4-5 and 8. While not binding on this Court, the NHBP courts may look to decisions of the United States Supreme Court or other tribal courts for guidance in interpreting similar constitutional language. In the light of requirement that NHBP elections must provide for the free expression of community will, fundamental fairness and the interpretation of similar language by other tribal courts, this court determines that Section 2.5 of the NHBP Election Code acts as an abridgment of NHBP members right to free expression of speech and peacefully assemble, and is, therefore, void. On its face Section 2.5 limits tribal members' right to free speech in the context of an election. Candidates must obtain preclearance for any campaign material. They cannot contact other tribal members except by mail supervised by the Election Board. Based on the petition of Tony Day, the Election Board held that candidate meetings held in November 2012 disqualified the plaintiffs. While the reasoning of the Election Board is not clear, Day complained that the November meeting constituted an unapproved "primary election" and the meeting or the election materials were not preapproved by the Election Board.

Other tribal courts apply strict scrutiny to government action burdening individual speech rights. As the Cherokee Nation's highest court wrote: "The right to run for political office ... is granted and guaranteed by the Constitution, and any action by the Government that infringes on this right must be subjected to the strict scrutiny of this Court, both as to procedural and substantive issues." *Lay v. Cherokee Nation Election Commission*, 6 Okla. Trib. 62, 67, 2 Am. Tribal Law 16 (Cherokee Nation Judicial Appeals Tribunal 1999). *Cf. Jacobson v. Eastern Band of Cherokee Indians*, 4 Cher. Rep. 38, 2005 WL 6437829, at \* 4 (Cherokee Court of the Eastern Band of Cherokee Indians, Nov. 18, 2005) ("[A]lleged violations of the fundamental right to vote are reviewed by the Court on a 'strict scrutiny' basis.") (citation omitted).

Once the court determines an action by the tribal government is inconsistent with the NHBP constitution, the tribal government must establish it has a compelling interest in restricting speech and that the limitation is narrowly tailored to meet the tribal government's interest. The Election Board expanded the scope of the limitations in the Election Code to disqualify candidates for holding a meeting of tribal members in December 2013 to discuss candidates for election. There is nothing wrong with groups of people meeting to discuss who may run for office. Nothing that occurred in the meeting limited possible candidates. Tribal members were always free to forward their own candidacy and the "informal primary" did not limit them. The Election Board appended lengthy e-mails to its decision, which apparently the Board believed were improper election materials. While it is not clear how the December meeting violates the Election Code, it appears to the Election Board that the December meeting was also contrary to the Election Code.<sup>6</sup>

The Election Board in filings with this court says that the restrictive nature of the Code is necessary to regulate campaigning to insure a fair and orderly process. In their brief to this Court the Election Board also says that they have never denied a candidate the ability to distribute material. Nothing in the briefs or in oral argument by counsel provides a basis to justify the significant restrictions on NHBP members' right to free speech and peaceable assembly.

## V.

### REMEDY

The unconstitutionality of the Election Code does not mean the disqualified candidates are to be reinstated, nor does it invalidate the results of the April 27, 2013

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<sup>6</sup> Based on representations at oral arguments before this Court and filings in the trial court, a videotape was made of the Election Board hearing. Upon the completion of hearing during the pendency of the litigation the Election Board should have made a copy of the hearing available to the parties, and made a part of the record in this court. The Election Board has not provided any copy or transcript nor can it offer an adequate explanation for its failure to do so. This Court can only speculate as to what happened at the hearing. At a hearing of such importance to the NHBP people the Election Board must have a way of making a record including a transcript so that all members know what took place, and to provide due process.



election. The TenBrinks, in their March 3, 2013 complaint, ask for the reinstatement of the four disqualified candidates and a declaration the Election Code violates the NHBP Constitution and the Indian Civil Rights Act. This Court agrees with the plaintiffs on the constitutionality of the Election Code, but affirms the Trial Court's decision not to reinstate the disqualified candidates.

The TenBrinks did not file their action until after the absentee ballots were mailed. The TenBrinks could have filed their action before the ballots were mailed. Once the ballots were mailed their only possible remedy was to ask to stop the entire election process and start over, which they did not. The TenBrinks did not ask to stop the election until they filed their reply brief on April 17, 2013, ten days before the election and six days before Judge Pope made her final ruling.<sup>7</sup> To invalidate the election at this late date would throw the NHBP into chaos. The previous tribal council members terms have expired. Section 2, Article IV-Governing Council provides that council members serve until their successors are sworn into office. If the three winning candidates were disqualified, the Tribal Council would not be able to transact any business since the Council requires a quorum of three. Section 4, Article IV NHBP Constitution. If the election were voided there would be a question as to whether only the TenBrinks would be reinstated candidates. One candidate did not participate in the litigation. Another candidate's case was dismissed and he did not appeal.

The disqualified candidates or any tribal member could have challenged the election results in accordance with Section 10 of the Election Code. Under this section challenges to the election must be filed within 5 business days of the election. Based on lack of any reference to a challenge in the appellate proceeding, it appears no challenge was filed. This Court is aware that the TenBrinks started this action without counsel. Judge Pope granted the TenBrinks considerable latitude when they were acting without counsel.<sup>8</sup> The Plaintiffs' late filing and limited request for relief does not

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<sup>7</sup> Judge Pope granted the Election Board's request to strike the Reply Brief as untimely.

<sup>8</sup> After their injunction was denied on March 15, 2013 the TenBrinks had counsel.

allow this Court to fashion a remedy of its own devising. The NHBP Courts can only do what the parties request. The judiciary cannot create solutions or remedies on its own initiative.

**IT IS ORDERED:**

This Court, having heard the arguments of the parties and having reviewed the Trial Court Record and Briefs, hereby reverses that portion of the Order of the Trial Court of April 23, 2013 upholding the constitutionality of Section 2.5 of the NHBP Election Code and declares that it is contrary to the NHBP constitution and has no force and effect. This Court affirms the portions of the order denying the Plaintiffs request to be instated candidates for the April 27, 2013 election. All other portions of Judge Pope's order of April 23, 2013 are affirmed and this matter is remanded to the trial court for actions consistent with this decision.

*John Wabaunsee*

Dated: July 15, 2013

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Hon. John Wabaunsee, Chief Judge

Dated:

**M h.**

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Hon. Matthew L.M. Fletcher, Assoc. Justice

Dated: July 15, 2013

*Holly K. Thompson*

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Hon. Holly K. Thompson, Assoc. Justice

**CERTIFICATE OF MAILING**

I certify that on this date I mailed a copy of this Order to the Plaintiffs' and Defendant's attorneys by ordinary first-class mail.

Dated:

7/23/13

*R. Scott Ryder*  
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R. Scott Ryder,

Tribal Court Administrator