



NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

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**IN RE NHBP ELECTION BOARD DECISION –
DISPUTE 2021-2**

TRIBAL COURT CASE No. 21-074-AMA/ELE

PLAINTIFF/PETITIONER

**JAMIE STUCK, NHBP CHAIRMAN, AND
JOHN SWIMMER, NHBP CHIEF LEGAL OFFICER,**

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NHBP TRIBAL COURT

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**NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
ELECTION BOARD**

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OPINION AFTER ORAL ARGUMENT

SUMMARY

This *Opinion After Oral Argument* involves the appeal by NHBP Chairman Jamie Stuck and NHBP Chief Legal Officer (CLO) John Swimmer (Petitioners) of Nottawaseppi Huron Band of the Potawatomi (NHBP) Election Board Decision – Election Dispute 2021-2 issued on March 5, 2021. The Petitioners objected to being found to have been campaigning with recommendations made for changes in the future with no action taken because the Petitioners were also found to

have qualified immunity as they were acting within the scope of their respective official capacities when the conduct in question occurred.

JURISDICTION

The NHBP Constitution defines the jurisdiction of the NHBP Tribal Court in Article XI § 3:

Section 3. Jurisdiction.

- a) The judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system. The judicial power shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes, statutes, ordinances, regulations, all resolutions, agreements, and contracts to which the Band or any of its entities is a party, and the judicial decisions of the Tribal Court system.
- b) The judicial power of the Tribal Court system may be exercised to the fullest extent consistent with self-determination and the sovereign powers of the Band, and, as exercised, shall govern all persons and entities subject to the jurisdiction of the Band under Article II of this Constitution.
- c) 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.
- d) Finality of Appellate Review. Rulings of the Tribal Supreme Court are final and binding and cannot be appealed to the Tribal Council, General Membership or any other jurisdiction.

The present case involves analysis of the NHBP Election Board Decision – Election Dispute 2021-2 with Article XV § 3.1-41, Expedited Review by NHBP Court, of the NHBP Election Code providing that “[a]ny aggrieved candidate or eligible voter may seek expedited judicial review of any final decision of the Election Board by filing a petition for review in NHBP Court”.

This Court, therefore, has jurisdiction over this matter pursuant to Article XI § 3 (a) of the NHBP Constitution with this provision stating that “[t]he judicial power of the Nottawaseppi Huron Band of the Potawatomi shall be in the Tribal Court system” and that it “...shall extend to all civil and criminal cases arising under this Constitution, all legislative enactments of the Band, including codes...” with the NHBP Election Code a legislative enactment that specifically provides for Tribal Court review of NHBP Election Board decisions in Article XV § 3.1-41.

FACTS OF THE CASE

On January 26, 2021, Dr. Chivis, a current Member of Tribal Council and Candidate for Tribal Council in the April 24, 2021 NHBP Election, filed a complaint with the Election Board alleging that there were several violations of the Election Code at the January 21, 2021, an NHBP Tribal Council Business Meeting.

On February 19, 2021, a Hearing on the complaint was held where evidence was submitted, including sworn testimony, and arguments made to the Election Board.

On March 5, 2021, the Election Board issued NHBP Election Board Decision – Election Dispute 2021-2 finding, pertinent to this appeal, that Petitioners Stuck and Swimmer had qualified immunity while also making recommendations to address conduct that was of concern to the Election Board.

Petitioners Stuck and Swimmer filed a timely appeal to this Tribal Court.

On March 24, 2021, Oral Argument was held before the Tribal Court via Zoom videoconferencing where all parties appeared and made arguments to the Court.

THE COVID-19 PANDEMIC

Individuals outside of the United States began presenting with symptoms of what is now known as the coronavirus or COVID-19 in December 2019.¹ The U.S. had its first confirmed case of COVID-19 on January 21, 2020.² The World Health Organization (WHO) Director-General issued the Statement of the International Health Regulations (IHR) Emergency Committee that declared a public health emergency of international concern on January 30, 2020.³

On March 10, 2020, Michigan Governor Gretchen Whitmer declared a state of emergency in Executive Order No. 2020-4 with the announcement that Michigan had its first confirmed cases of COVID-19, a woman from Oakland County who had traveled internationally and a man from Wayne County who had traveled domestically⁴.

The Tribal Government of the Nottawaseppi Huron Band of the Potawatomi (NHBP), a federally recognized American Indian Tribe, first began to respond to the threat of the COVID-19 Pandemic on March 13, 2020, with the NHBP Tribal Council beginning to operate the majority of Tribal Government Departments remotely to protect Tribal Government personnel with the increased risk of the COVID-19 Pandemic. The Tribal Government has consistently worked to continue access to critical services to Tribal Citizens, including testing and now the two-dose vaccine. The Tribal Government has also worked in cooperation with Tribal, State, and Federal Partners throughout the Pandemic, including NHBP Chairman Jamie Stuck being appointed by Michigan Governor Gretchen Whitmer to the Michigan Coronavirus Task Force on Racial Disparities.

The State of Michigan simultaneously developed statewide policies and procedures to slow the spread of COVID-19 with Governor Whitmer issuing the first of many Executive Orders on March 23, 2020, referred to generally as the “Stay Home, Stay Safe” Order, to protect Michigan residents as the number of COVID-19 cases – and COVID-19 deaths – increased throughout the State of Michigan. Once the time-frame for emergency powers expired, the Michigan Legislature and Governor have been responsible for collectively managing the Pandemic, along with the heads of

¹ See: <https://www.who.int/news/item/29-06-2020-covidtimeline> & <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

² <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165>

³ [https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/director-general/speeches/detail/who-director-general-s-statement-on-ihf-emergency-committee-on-novel-coronavirus-(2019-ncov))

⁴ https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1F3yB-Sm5-6t_K2yvZ06uBPjurEfH1uQzxb3zwpv_tIA&font=Default&lang=en&initial_zoom=2&height=650

various Michigan Departments, to implement statewide safety protocols, administer the two-dose vaccine, provide economic relief, develop strategies for access to critical services, and develop other strategies for managing the Pandemic.

The NHBP Tribal Court has worked in consultation with the NHBP Tribal Council, NHBP Partners, Tribal Partners and non-Tribal Partners throughout the Pandemic to remain fully operational in fulfilling its duties pursuant to the NHBP Constitution, Tribal laws, and Tribal Court Rules, protecting and exercising the sovereignty of this Native Nation, protecting the rights guaranteed by the NHBP Constitution, and ensuring access to the essential services the Court provides, including the services provided through the Victim Services Department and Probation Department, while maintaining the health and safety of Court Staff and all those accessing the NHBP Tribal Court. The Chief Judge issued the first *Administrative Order* on management of the Court during the Pandemic on March 19, 2020, along with documents designed to assist individuals with accessing the Court. These documents articulate the safety protocols being employed, such as rotating one Court Staff person daily to keep the Court Offices open to the public, receive mail, and receive packages, prioritizing Court proceedings by video conferencing, phone, and other technological avenues, and implementing strategies for individuals who do not have access to technology to participate in Court proceedings and access Court services.

The Court recognizes and thanks NHBP Tribal Government Personnel for their ongoing commitment to caring for Tribal Citizens, the community, and Michigan residents, as well as recognizes and honors the many sacrifices and contributions of NHBP Tribal Citizens to caring for others throughout this Pandemic. Like the Tribal Government as a whole, the Court has worked diligently throughout the Pandemic to build and enhance partnerships for the benefit of both Tribal Citizens and Michigan residents. This Court both recognizes and appreciates that the relationships built through the Michigan Tribal State Federal Judicial Forum, with those relationships founded on mutual respect and the collective desire to support the wellbeing of all those living within Michigan, have provided critical resources to assist this Court with continuing to provide meaningful access to this Tribal Court and the essential services it provides. The Court specifically thanks the Hon. Bridget McCormack, Chief Justice of the Michigan Supreme Court, for offering a Zoom license to the Tribal Courts of all federally recognized Native Nations that are located within the borders of what is now called the State of Michigan at the start of the Pandemic with that gift also given in 2021.

This Court recognizes that the COVID-19 Pandemic has had a dramatic impact on every person living within areas where members of the community have been diagnosed with COVID-19. This Court honors all those who have walked on and offers prayers for those who have endured the loss of a loved one and the immeasurable hardships with trying to honor the lives of their loved ones, perform the ceremonies according to their traditions, and comfort each other within their beliefs when the best avenue for the safety of those family members is to avoid what brings comfort, such as an embrace from a close friend.

The Court also recognizes and offers prayers for all those suffering from the conditions that the COVID-19 Pandemic has created including, but not limited to, temporary and permanent unemployment, food insecurity, loss of housing, loss of utilities, the increase in violent crime, the increase in domestic violence and the severity of the violence victims are enduring, loss of businesses, decreased access to childcare, increased demands for educating children at home, and limited access to critical services, along with many other circumstances creating barriers to meeting even the most basic of human needs.

The Court shall continue to amend *Administrative Orders*, documents, processes, and safety protocols based on advancements in the scientific understanding of COVID-19 and its variants, new or refined prevention protocols, improved personal protection equipment, increased access to personal protection equipment, advancements in technology, improvements to the quality of and access to vaccines, improvements to the quality and availability of testing, and the development and refinement of policies and procedures, to name but a few of the critical considerations during the COVID-19 Pandemic. The Court shall continue its fundamental commitment to ensuring that no person is denied access to justice because they cannot afford the technology being used or live in an area where technology is limited. The Court will also consistently evaluate processes and safety protocols pursuant to the specific circumstances being experienced. Unfortunately, at the time this *Opinion After Oral Argument* was issued, the COVID-19 Pandemic continues with the number of individuals testing positive for COVID-19 in Michigan on the rise, confirmation of at least five of the variants now present in Michigan, and many governments, agencies, service providers, and businesses primarily operating remotely.

With the conditions of the Pandemic changing daily, COVID-19 Pandemic sections in Court documents may be identical, with or without quoting other Court documents, slightly different, or dramatically different depending on the circumstances of the Pandemic when the document is written. The Court will include information whenever possible to maintain historical documentation on the COVID-19 Pandemic while highlighting the impact of the Pandemic on day-to-day life, this Tribal Court, and this Native Nation. The Court offers prayers of strength and healing to all.

ANALYSIS

The Court begins this analysis with noting that Chairman Jamie Stuck and Chief Legal Officer John Swimmer filed this appeal of the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2 under the title of “In the Matter of” instead of as Petitioners/Plaintiffs with the Election Board listed as the Respondent/Defendant. Although the Court questions this titling, including at Oral Argument, the Court has kept the title the same. To be able to identify the individuals and government entities involved, however, the Court shall refer to Chairman Stuck and Chief Legal Officer (CLO) Swimmer as the Petitioners, Petitioner Stuck, Petitioner Swimmer, or by their titles if pertinent to the analysis, the Election Board as either the Election Board or Respondent Election Board, and Dr. Jeff Chivis, a current Member of Tribal Council, a Candidate for Tribal Council in the April 24, 2021 NHBP Election, and the individual who filed the complaint to the Election Board as Respondent Chivis, Councilman Chivis, or Dr. Chivis depending on the content of the analysis.

This case involves the request to set aside, in part, the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2. The Election Code provides the standard of review for appeals of Election Board decisions to this Tribal Court in Article XV § 3.1-41:

- A. Any aggrieved candidate or eligible voter may seek expedited judicial review of any final decision of the Election Board by filing a petition for review in NHBP Court.
- B. The petition for review shall be filed within ten (10) calendar days of the final decision of the Election Board.

- C. The NHBP Court shall hold unlawful and set aside any Election Board final decision that the Court finds, based on clear and convincing evidence, to be:
- 1) Arbitrary, capricious, or an abuse of discretion;
 - 2) Contrary to a constitutional or statutory right or privilege;
 - 3) Without observance of procedure required by law;
 - 4) Unsupported by substantial evidence; or
 - 5) Lacking in fundamental fairness.
- D. The petitioner shall bear the burden of showing that the final decision must be set aside.
- E. The NHBP Court shall ordinarily schedule a hearing no later than seven (7) business days after the petition is filed, and render a decision within ten (10) business days of the hearing. The NHBP Court shall take all reasonable efforts to ensure that the hearing and decision be issued before the election, if any, to which the final decision relates. Further, any Election Board decision and/or scheduled election or reelection shall be stayed pending the outcome of an appeal of an Election Board decision that is filed with the NHBP Court.
- F. Upon setting aside an Election Board final decision, the NHBP Court shall remand the matter to the Election Board for further proceedings.
- G. A NHBP Court decision on a petition for review is subject to review in the Supreme Court.

As noted in “The COVID-19 Pandemic” section of this *Opinion After Oral Argument*, the Pandemic has dramatically affected every aspect of day-to-life. This section also gives a brief highlight of the ways that the NHBP and the State of Michigan Governments have responded to the Pandemic. The Court makes this distinction as a reminder that, as a federally recognized Tribe, NHBP is a sovereign Native Nation responsible for developing its own policies, procedures, and protocols for operation of and access to the Tribal Government during the COVID-19 Pandemic. Although the initial approach throughout Indian Country, the United States, and individual states was 14-day to 21-day quarantines and closures, the significant number of cases in Michigan resulted in NHBP developing technological options for long-term remote operation of the Government with physical distance being the primary tool to reduce the risk for the spread of COVID-19.

With being a year into the Pandemic, we have seen numerous changes at NHBP with the use of technology a significant aspect of the day-to-day operation of this Tribal Government. NHBP Tribal Council Business Meetings have been for a significant period of time and continue to be held remotely over Zoom via video, by phone, or both. Like when they are held in person, NHBP Tribal Council Business Meetings are open to enrolled NHBP Tribal Citizens. To allow greater access, it is this Court’s understanding that Tribal Council Business Meetings are live-streamed on the Citizens-only website.

A final component of Tribal Council Business Meetings before the Chair adjourns the Meeting is the “Member Comment” period. Before the Pandemic, comments were primarily made by Tribal Citizens who were in attendance at the Meeting. To facilitate this important practice of providing

a forum for Tribal Citizens to be heard, the information presented to the Court indicates that Tribal Council created a “Member Comment” form that can be completed, submitted, and read during the “Member Comment” period of a Tribal Council Business Meeting.

This case involves the reading of a statement during the “Member Comment” period at the January 21, 2021 NHBP Tribal Council Business Meeting. Whether submitted for the “Member Comment” portion of this Tribal Council Business Meeting has been at issue as it was not originally submitted on a “Member Comment” form, but rather, as an email under the subject line of “Conflict of Interest” to Robyn Burlingham, who is employed as the Tribal Council/FDA Coordinator and also a Candidate for Tribal Council in the April 24, 2021 NHBP Election.

There is no disagreement that the position of Chair is responsible for facilitating Tribal Council Business Meetings. With this being a public opinion, the Court will restrict disclosure to the “Member Comment” portion of the Tribal Council Business Meeting and relevant comments. For the purposes of this *Opinion*, this will be the comments of the Petitioners and Respondent Chivis.

At the January 21, 2021 NHBP Tribal Council Business Meeting, Petitioner Stuck stated at the opening of the “Member Comment” period that, “[a] majority of these comments may be read, but council is not in the position to respond to a majority of these comments due to them being related to the election”. (Transcript of January Tribal Council Business Meeting at Page 2). Petitioner Swimmer then began reading the comments.

The last statement read was the statement submitted via email with the subject line of “conflict of interest”. The individual who submitted the statement, an NHBP Tribal Elder and Relative of Petitioner Stuck, testified at the Election Board Hearing that the statement was intended to question the truthfulness of the information Dr. Chivis submitted for the special election edition of the Turtle Press and, although the Election Board did not find it defamatory due to the higher standard for comments on officials, it did characterize the statement as “negative criticism”. (Transcript of Election Board Hearing at Page 3). The statement was read by Petitioner Swimmer.

After the statement was read by Petitioner Swimmer, Dr. Chivis asked for the opportunity to respond to the statement. Petitioner Stuck advised Respondent Chivis against responding to the Elder’s Statement on the grounds it could violate the Election Code. As the Chief Legal Officer, Petitioner Swimmer echoed Petitioner Stuck’s advice, adding that NHBP policy prohibited Members of Tribal Council from responding to election related matters while performing Tribal Council duties. Respondent Chivis requested going into closed session. Petitioner Stuck advised that this was not available. Petitioner Stuck then ended the Tribal Council Meeting after confirming there were no more comments and updating on the date of the next Tribal Council Business Meeting and Annual Membership Meeting.

Dr. Chivis filed a complaint with the Election Board about the reading of the statement at the January 21, 2021 NHBP Tribal Council Business Meeting on several grounds, including that the Petitioners, along with the Elder who submitted the statement, were campaigning against him at the Tribal Council Meeting and that the Petitioners suppressed his freedom of speech.

The Election Board held a Hearing on February 19, 2021. Evidence was presented, including sworn testimony. After the February 19, 2021 Election Board Hearing, the Election Board issued the NHBP Election Board Decision – Election Dispute 2021-2 on March 5, 2012.

The Petitioners in this case are asking this Court to reverse the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2, in part, arguing that the finding that they had qualified

immunity should have been done first and that, with the finding of qualified immunity, the Election Board should have not made any “adverse findings” about the Petitioners’ conduct, commented on their conduct, or made recommendations based on their conduct. In addition, the Petitioners raised the issue of whether the Election Board has jurisdiction over NHBP Tribal Government Employees, as well as specific issues relating to Petitioner Swimmer having been performing his duties as the Chief Legal Officer.

The Election Board has argued they acted within their authority, in part looking to the purpose of the Election Code and duties of the Election Board, in making recommendations while affording the Petitioners qualified immunity by not assessing penalties to the Petitioners.

In responding to the Petitioners’ Brief, Respondent Chivis requested that the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2 be set aside as to the finding of qualified immunity and that penalties be assessed for violating the Election Code, among other requests.

The Court will begin with the Petitioners’ argument that the NHBP Election Board does not have jurisdiction over the Chief Legal Officer as this involves an analysis that must be done before the analysis of qualified immunity. In addition, the CLO is a position with specific and unique responsibilities.

The Court agrees with the Election Board that it has jurisdiction for application of the Election Code to NHBP Tribal Government Employees. Whether Tribal Citizens of any Native Nation or otherwise American Indian, NHBP Tribal Government Employees submit to the civil jurisdiction of this Tribe when they become NHBP Tribal Government Employees. A critical example of this civil jurisdiction is the requirement for NHBP Tribal Government Employees to serve on juries in domestic violence cases prosecuted in the NHBP Tribal Court. If the NHBP Tribal Government Employee fails to respond or participate as ordered, the Court has jurisdiction to utilize civil processes to hold the individual Employee accountable to the Court. This does not include the authority to terminate or otherwise discipline that Employee; whether discipline is appropriate is for the Employee’s supervisor to address. However, there is no question that this Court has civil jurisdiction over NHBP Tribal Government Employees, including to enforce Tribal Court orders.

The Election Board states that it has “jurisdiction” over any person because “a person” and “any person” are referenced throughout the Election Code, in particular in Article VII – Prohibited Conduct. The Court declines to analyze this terminology outside of NHBP Tribal Government Employees as that is the question before the Court. The Court notes, however, that NHBP regularly exercises civil jurisdiction over any person who is alleged to commit a civil infraction on NHBP lands. In reviewing the language of the Election Code and the specific submission to NHBP civil jurisdiction via employment with the Tribe, the Court finds that NHBP Tribal Government Employees are subject to the jurisdiction of the Election Code, although the Election Board cannot discipline an Employee within the context of their employment.

The Court sees no reason that the Chief Legal Officer or other NHBP Staff Attorney would be subject to the Election Code, in part because there is no exception in the Election Code for the attorneys who serve in the NHBP Legal Department. As stated previously, however, attorneys within the NHBP Legal Department are unique in that they involve an attorney-client relationship that is guided by ethical standards of the NHBP Tribal Court, as well as the ethical standards of the profession. The attorney-client relationship is also unique as it relates to legal counsel given by the attorney to the client, as well as the confidentiality required within that relationship.

While the Petitioners are correct in their assertion that the Election Board does not have the authority to interfere with the attorney-client relationship, the Court has struggled with the impact of the conduct at the January 21, 2021 NHBP Tribal Council Business Meeting on the attorney-client relationship. To begin, there is a question of whether there was any type of waiver on confidentiality as it pertains to the issue of CLO Swimmer's legal advice to Tribal Council. Chairman Stuck, as a client, asked CLO Swimmer for legal advice outside of the sanctity of a confidential setting, such as a closed session. CLO Swimmer responded – to “another” Client – outside of a confidential setting. Further, the legal advice was not only given outside of a confidential setting; it was given in a public forum. While the Petitioners are correct that the Election Board cannot interfere with the attorney-client relationship, whether an NHBP attorney providing legal advice to their clients outside of a confidential setting and in a public forum raises the question of whether the conduct is subject to review under the Election Code.

This brings the Court to the fundamental issue in this case: qualified immunity. The Petitioners argue for application of qualified immunity pursuant to other jurisdictions. They first take issue with there not being a process to file a motion to dismiss on the grounds of qualified immunity in advance of a hearing. They argue that the point of qualified immunity is to avoid litigation with officials secure in fulfilling their responsibilities without the constant threat of litigation.

It also appears to this Court that the Petitioners are arguing that the finding of qualified immunity means that the description of the conduct involved should be limited to the extent required to establish qualified immunity and end there. From the Court's interpretation, the Petitioners argue that the conduct covered under qualified immunity are insulated from further discussion or evaluation. The Court finds this approach problematic.

To fully explore the issue of qualified immunity, a detailed discussion of the conduct is required to determine if qualified immunity applies. The discussion and analysis of conduct required by this Court to determine whether to set aside the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2 in this *Opinion* highlights this requirement. The Court finds that a detailed discussion and analysis of the conduct is required to determine if qualified immunity applies including but not limited to: where the conduct occurred; the standard approach to Tribal Council Business Meetings being held remotely because of the COVID-19 Pandemic when the conduct identified occurred at a Tribal Council Meeting; the standard remote practice to enter closed sessions; who submitted the comment at issue, the manner in which it was submitted, and whether the process employed reflected the standard approach; who read the comment; what each Petitioner stated in relation to responding to the comment and directly to Respondent Chivis; and other relevant factors. Even if filed as a pre-trial motion, this analysis would have occurred to determine if qualified immunity applied.

The Court further notes that it finds the argument about minimizing the documenting and discussion of conduct difficult to understand within the context of this case as the conduct occurred at an NHBP Tribal Council Business Meeting. NHBP Tribal Council Meetings are open to all NHBP Tribal Citizens. Prior to the Pandemic, participation required being physically present at the Meeting. Since the Pandemic began, however, access to NHBP Tribal Council Meetings is arguably greater since these Meetings are now conducted remotely. As such, it appears to this Court that the conduct is arguably well known by Tribal Citizens.

In their Briefs, the Petitioners do not ask this Court to reverse the finding of qualified immunity, but do allege that Tribal Officials should enjoy absolute immunity to ensure that officials have the

ability to perform their duties without fear of litigation. While this Court understands that a motion to dismiss on grounds of some type of immunity often comes first, the body of law on immunity in other jurisdictions was built on litigation. With affirmation of federal recognition less than 30 years ago and this Tribal Court established in 2006, precedent is limited for this Native Nation. As such, litigation can be expected for a long time, even if a matter is eventually dismissed for some legal reason, such as immunity. Even with jurisdictions that have developed caselaw over a longer period, the idea of avoiding litigation at the onset because an individual has some type of immunity does not fully reflect the process. The Court notes that, although immunity is not a fully developed legal theory in the NHBP Tribal or Supreme Court as of yet, this Court would be extremely cautious with an approach of absolute immunity without accountability for Officials.

The Court has also been confused by the Petitioners arguments in relation to immunity, especially if arguing that it should be absolute immunity, as it directly relates to the Petitioners' conduct at the January 21, 2021 NHBP Tribal Council Business Meeting. The Petitioners claim immunity for advising Councilman Chivis to avoid responding to a statement that put his truthfulness into question at an NHBP Tribal Council Business Meeting because it could be a violation of the Election Code. It is confusing to this Court that the Petitioners argue they had immunity while acting in their official capacity of advising Respondent Chivis, a Member of Tribal Council, that responding to a public comment at a Tribal Council Business Meeting, could result in a violation of the Election Code as, logically, Respondent Chivis would have that same immunity.

Which brings us to the primary focus of this appeal. The Petitioners argue that the Election Board should not have made any "adverse" findings after it found that they had qualified immunity. The Petitioners argue that the Election Board did not have jurisdiction to issue any "adverse" findings after it found that the Petitioners have qualified immunity. This Court disagrees.

The NHBP Election Code states the purpose of the Code in Article I § 3.1-2:

- A. The purpose of this code is to ensure that NHBP elections are:
 - 1) Consistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings; and
 - 2) Conducted in accord with NHBP constitutional requirements.
- B. Unless otherwise specified, all NHBP elections are subject to the same rules as Tribal Council elections.
- C. In carrying out its constitutional authority to govern NHBP elections, the Election Board shall be guided by the Seven Grandfather Teachings:
 - 1) Wisdom.
 - 2) Love.
 - 3) Respect.
 - 4) Bravery.
 - 5) Honesty.
 - 6) Humility.
 - 7) Truth.

The stated purpose of the Election Code is to hold “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings” in addition to ensuring that elections are “[c]onducted in accord with NHBP constitutional requirements”. With regard to the latter, the Court turns to the Guiding Principles in Article II § 2 (b) of the NHBP Constitution, the supreme law of this federally recognized American Indian Tribe, as it has done many times before:

- (b) Guiding Principles. In exercising the jurisdiction and sovereign powers of the Band, the Tribal Council and other institutions of the Band's government shall be guided by the following principles:
1. Promote the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture;
 2. Promote sustainable development strategies and practices to ensure the health and balance of the next seven generations of Tribal Members;
 3. Promote the health, educational and economic interests of all Tribal Members, especially our elders and children;
 4. Promote efforts that ensure the perpetual preservation and revitalization of the Band's sovereignty and self-determination; and
 5. Promote open and transparent governance by providing Tribal Members, and where appropriate, other persons subject to Tribal jurisdiction, with notice and opportunity to comment on financial, policy or legislative business under consideration.

The importance of this Native Nation’s traditional values – especially the Seven Grandfathers Teachings – cannot be understated. The purpose as stated in the Election Code and the Guiding Principles in the Constitution not only complement each other but highlight that this Nation strives to go beyond the specifics of written laws to aspire to these ideals in all it does and the way in which it does it. This Court has and continues to struggle with achieving accountability according to the law and within these ideals.

In the present case, the Court finds that the Election Board achieved accountability to both the law and the ideals of this Nation in its March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2. The Election Board analyzed the facts of the case to determine that Petitioner Chairman Stuck and Petitioner CLO Swimmer had qualified immunity. The Election Board fulfilled the requirements of qualified immunity within the context of the Election Code by not assessing any penalties.

The Election Board also discussed the issues they found to be of concern in relation to fulfilling the purpose of the Election Code in the context of the conduct of the complaint. In this Court discussing the facts of this case, it noted that a statement intended to challenge the truthfulness of Councilman Chivis was read at an NHBP Tribal Council Business Meeting with the public aspect of these Meetings arguably greater due to the COVID-19 Pandemic necessitating remote access. Whether the legal advice given was correct or not – with the Election Board not having jurisdiction to interfere with the attorney-client relationship, discipline the NHBP Tribal Government Employee within the context of his employment, or assess penalties pursuant to the Election Code

because he had qualified immunity – Councilman Chivis was advised by the Chief Legal Officer that he should not respond to the statement that was directed to him. This legal advice was given in the public forum of an NHBP Tribal Council Business Meeting. Councilman Chivis requested to go into closed session and was told that a closed session was not available. The Meeting was then adjourned after confirming there were no more comments and announcing dates for pending Meetings.

Councilman Chivis was denied the opportunity to respond to a statement that questioned his truthfulness that was read in a forum open to all NHBP Tribal Citizens. With the COVID-19 Pandemic, Councilman Chivis is not likely to have a similar public forum to address the statement in his campaign for re-election. The Election Board could not provide the relief requested by Councilman Chivis for the reasons stated in its March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2. However, these circumstances impact the integrity of NHBP Elections, including the April 24, 2021 NHBP Election and are, therefore, within the purpose of the Election Code and the duty of the Election Board to facilitate elections that are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings” that are also “[c]onducted in accord with NHBP constitutional requirements”. The analysis of the conduct in question was appropriate for the finding of qualified immunity with nothing in the Election Code or the application of qualified immunity within the Guiding Principles of the NHBP Constitution prohibiting “adverse” findings for the purpose of highlighting challenges to or making recommendations to facilitate elections that are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings” that are also “[c]onducted in accord with NHBP constitutional requirements”.

For the reasons set forth in this *Opinion After Oral Argument*, this Tribal Court shall not set aside the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2.

CONCLUSION

This Tribal Court shall not set aside the March 5, 2021 NHBP Election Board Decision – Election Dispute 2021-2. The Court finds that the Election Code includes jurisdiction over NHBP Tribal Government Employees. This jurisdiction involves the ability to review the conduct of NHBP Tribal Government Employees as it relates to the Election Code, including assessing penalties as provided in the Election Code, if an Employee violates the Election Code. The jurisdiction of the Election Board to apply the Election Code to NHBP Tribal Government Employees does not include authority to discipline an Employee as it relates to their employment. Although the Court recognizes that the Election Code does not authorize the Election Board to interfere with the attorney-client relationship, it does not find that attorneys serving in the NHBP Legal Department are exempt from the Election Code.

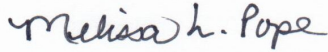
The Court finds that the Election Board properly found that Petitioner Chairman Stuck and Petitioner CLO Swimmer had qualified immunity from being assessed penalties under the Election Code for conduct at the January 21, 2021 NHBP Tribal Council Business Meeting. The Court also finds that nothing in the Election Code or the application of qualified immunity within the Guiding Principles of the NHBP Constitution prohibit “adverse” findings regarding conduct protected under qualified immunity, identifying concerns of conduct protected under qualified immunity, or

making recommendations to address or prevent conduct protected under qualified immunity in the future, pursuant to the responsibilities of the Election Board under the Election Code to facilitate elections that are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewe, and guided by the Seven Grandfather Teachings” that are also “[c]onducted in accord with NHBP constitutional requirements”, including the Guiding Principles of the NHBP Constitution.

IT IS HEREBY ORDERED THAT:

April 7, 2021

Date



Hon. Melissa L. Pope, Chief Judge

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