



NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

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TRIBAL COURT CASE NO. 21-075-AMA/ELE

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

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NHBP TRIBAL COURT

OPINION AFTER ORAL ARGUMENT

SUMMARY

This *Opinion After Oral Argument* involves the appeal of the Nottawaseppi Huron Band of the Potawatomi (NHBP) Election Board Decision – Election Dispute 2021-1 issued on March 12, 2021 by Dorie Rios, NHBP Tribal Council Member and Candidate for Tribal Council in the April 24, 2021 NHBP Election, and Nancy Smit, NHBP Tribal Council Member and Candidate for Tribal Council in the April 24, 2021 NHBP Election, (Petitioners) finding that they had violated the Election Code and assessing penalties. The Election Board issued two decisions with the first finding that a violation occurred without a hearing and the second issued after a Hearing on the Petitioners Motion for Reconsideration was held.

This Court sets aside the NHBP Election Board Decision – Election Dispute 2021-1, finding by clear and convincing evidence that the failure to hold an initial hearing violated Article XV § 3.1-41 (C) (3), (4), and (5) of the Election Code and remands this case to the NHBP Election Board for further proceedings consistent with this *Opinion After Oral Argument* pursuant to NHBP Election Code Article XV § 3.1-41 (F).

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 2021-1 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 23, 2021, the Election Board received an election dispute filed by Gary Chivis, which alleged that three of the current candidates running for Tribal Council, Robyn Burlingham, Dorie Rios, and Nancy Smit, may be in violation of Section 3.1-9.M. of the Election Code.” (March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 at Page 1; See also February 5, 2021 NHBP Election Board Decision).

“In his dispute, Mr. Chivis requested an investigation into whether the photographs used by Robyn Burlingham, Dorie Rios, and Nancy Smit in the special election edition of the Turtle Press were paid for by the Tribe in violation of Section 3.1-9.M. of the Election Code. Mr. Chivis also claimed that if these candidates used Tribal resources for their campaign photographs, then they should be removed from the ballot, since his son, Jeff Chivis, was removed from the ballot in 2016

for a similar violation.” (March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 at Page 1; See also February 5, 2021 NHBP Election Board Decision).

On February 5, 2021, the Election Board issued the NHBP Election Board Decision after “[t]he Board investigated the allegations” but did not hold a hearing. The NHBP Election Board found that Dorie Rios and Nancy Smit violated the Election Code because, although they paid the digital license fees to Conway Photography, Dorie Rios had not paid NHBP the sitting fee charged to the Tribe for taking the photograph for use by the NHBP Tribal Government in 2015 and Nancy Smit had not paid the Tribe for the sitting fee charged to the Tribe for taking the photograph in 2018.

On March 8, 2021, the Election Board held a hearing on the Petitioners’ Motion for Reconsideration. The complaining witness did not appear.

The Election Board issued the NHBP Election Board Decision – Election Dispute 2021-1 following the Hearing on Petitioners’ Motion for Reconsideration on March 12, 2021, upholding its previous decision which included the following penalties to each Candidate: “\$250.00 fine; (2) replacement of the candidate’s photo with a different photo; and (3) notice of this decision by a call to membership and posted on the members only website”. (March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 at Page 3; February 5, 2021 NHBP Election Board Decision at 2).

The Petitioners filed a timely appeal to this Tribal Court.

On March 31, 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

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

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 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

As noted in the Statement of Facts, the Election Board issued the NHBP Election Board Decision on its investigation only and without a hearing on February 5, 2021. After the February 5, 2021 NHBP Election Board Decision was issued, the Petitioners filed a Motion for Reconsideration. The Election Board held a hearing on the Motion on March 8, 2021, issuing the NHBP Election Board Decision – Election Dispute 2021-1 on March 12, 2021. The Petitioners filed a timely appeal to this Tribal Court pursuant to Article XV § 3.1-41 of the Election Code. This Court issues this *Opinion After Oral Argument* following the filing of Briefs and Oral Argument on March 31, 2021.

The underlying issue involves this Court determining whether the NHBP Election Board properly applied the NHBP Election Code to the complaint filed against the Petitioners. 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.

The arguments presented in this case raise several critical, and in some instances complicated, issues that intertwine with the analysis of the Election Board's actions and reasoning that this Court finds must be addressed to fulfill its duties under both the NHBP Constitution and the NHBP Election Code.

The Court will begin by reviewing purpose of the NHBP Election Code as stated 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 Court begins with the purpose of the Election Code to emphasize that the focus 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 some of the arguments presented that the Court will discuss later in this *Opinion*, the Court finds it important to note these foundational considerations at the start of this analysis.

There are several undisputed facts in the present case. The Petitioners are Members of Tribal Council whose terms are expiring who are Candidates for Tribal Council in the April 2021 NHBP Election. The parties acknowledge that NHBP paid for photographs to be taken of Members of Tribal Council with Petitioner Dorie Rios photographed in 2015 and Petitioner Nancy Smit photographed in 2018, for use by the NHBP Tribal Government. There is no dispute in that the Petitioners contacted the photographer to purchase a photo taken for the NHBP Tribal Government for use in their respective campaigns. Both parties also acknowledge that the Petitioners paid the photographer the fee required to purchase a license to use the photograph, as well as that the photograph provided written authorization to the Petitioners that they had purchased the license required to use the photograph “however they needed to”. (Petitioners’ Exhibit 2). While the Petitioners testified that they did not know prior to this case progressed that the NHBP paid a sitting fee to the photographer contracted by the NHBP Tribal Government to take the photographs, there does not appear that it is disputed that a sitting fee was paid by the Tribe in 2015 and 2018. Finally, the Petitioners were not requested by NHBP to pay nor did they pay NHBP when purchasing the license from the photographer for the cost of the sitting fee charged in 2015 and 2018 when the photographs were taken.

The Election Board found that the Petitioners violated Article VIII § 3.1-9 (M) of the Election Code that states as follows:

Candidates, NHBP employees, and all other persons are prohibited from using any NHBP government or enterprise property, including phones, facsimile machines, the NHBP website, NHBP government e-mail, and office supplies for campaign activities. Except as otherwise provided in this section, no campaign-related material will be accepted for publication in the NHBP Newsletter.

Article VIII § 3.1-9 (M) of the Election Code is important to ensure that current or former Members of Tribal Council do not abuse the authority of the position in their efforts to be re-elected to Tribal Council, including using Tribal Government resources in their campaign. However, in ensuring that such abuse does not occur, the fact that a Candidate is currently serving on or has previously served as a Member of Tribal Council cannot be erased, their contributions ignored, nor the performance of their duties – and benefit to the Tribe – disregarded.

The Petitioners were photographed as part of their duties as Members of Tribal Council. The NHBP Tribal Government contracted for and received a service that was independent of the election currently being held. Here, the Petitioners contacted the owner of the photographs, paid for a license for the purpose of using the photographs, and, in paying the licensing fee, had the legal right to the photographs “however they need to”. They were not obligated to pay the Tribe for a sitting fee that the Tribe properly paid to have photographs of Members of Tribal Council for use by the Tribal Government with the Petitioners fulfilling their duties as Members of Tribal Council by being photographed. This differs significantly from an action that would violate Article VIII § 3.1-9 (M) of the Election Code, such as if a current Member of Tribal Council scheduled a photography session where the Tribe paid a sitting fee for photographs it did not intend to use so that the Candidate only had to pay the licensing fee. Such a scenario would involve a Candidate exploiting Tribal Government resources for the benefit of their campaign. That is not what happened here.

The Election Board then made the argument that the Petitioners were unfairly enriched by not having to pay a sitting fee that other Candidates had to pay as they had not been Members of Tribal Council. While it is true that at least one Candidate who has not previously served on Tribal Council had to pay the \$185.00 sitting fee and the Petitioners did not, it is also true that the taking of the photographs was a part of performing the duties the Petitioners had as Members of Tribal Council that these other Candidates were not required to perform. These Candidates will also not have an attendance record of Tribal Council Meetings, a voting record on issues before Tribal Council, they will not have served as Chairs of NHBP Committees, given welcome addresses and other speeches at NHBP, Tribal, and non-Tribal events, been quoted in press releases and articles, and the list goes on. Attempting to hold Candidates who have been on Tribal Council financially responsible for the costs associated with every duty they fulfilled is a slippery slope without clear guidelines on what is and is not a violation.

In addition, the Court notes that it is not clear what authority the Election Board relied on when determining that the Petitioners owed monies to the Tribe. While there is no question that the Election Board has the authority to investigate allegations that a Candidate has used Tribal Government resources to campaign in violation of the Election Code and to assess fines when it properly finds that the Election Code has been violated, here the Election Board found that the Tribe was owed a debt by the Petitioners. The Court has not identified any provisions in the Election Code that appears to authorize the Election Board to find that a Candidate owes money, generally or a specific amount as in this case, to the Tribe. The Court reads the Election Code as authorizing the Election Board to investigate, prosecute, and determine if allegations that an individual has used Government resources for campaigning in violation of the Code and to assess a fine if the Election Board finds it appropriate. It does not, however, read the Election Code to provide the Election Board with the authority to assume the duties of Tribal Council, potentially in collaboration with the appropriate Departments under the Legislative Branch, to determine that a debt is owed nor the amount of that debt.

The Election Board stressed that, in order to reverse the February 5, 2021 NHBP Election Board Decision and subsequent March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 upholding its findings and penalties after the Motion for Reconsideration, the Court must determine by clear and convincing evidence that the Election Board decision was: arbitrary, capricious, or an abuse of discretion; contrary to a constitutional or statutory right or privilege; without observance of procedure required by law; unsupported by substantial evidence; or lacking in fundamental fairness. The Election Board further noted that the Court cannot reverse and remand merely because it disagrees with the decision of the Election Board. The Court does not view the Court’s analysis of the factors discussed thus far as simply disagreeing with the Election Board’s analysis or reaching a different conclusion as the Election Board. The Election Board’s Decisions must be reversed and the matter remanded to the Election Board because the Court finds there is clear and convincing evidence that the Election Board’s failure to hold an initial hearing resulted in the Decision being reached without observance of procedure required by the Election Code, resulting in the Election Board’s findings not being supported by substantial evidence with the Decision contrary to the rights in the Constitution generally and statutory due process rights in the Election Code specifically that lacked in fundamental fairness and does not ensure that the NHBP election is “[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”.

The issues resulting in the Court reversing the Election Board Decisions in this matter stem from the Election Board not holding a hearing pursuant to Article VIII § 3.1-26 of the Election Code with the Court referring to this hearing both by citation and as an initial hearing since a Hearing on the Petitioners’ Motion for Reconsideration was later held. In this case, the complainant requested that, if the Election Board found the Candidates had violated Article VIII § 3.1-9 (M) of the Election Code, they be removed from the ballot. The Election Board responded that it did not remove the Candidates from the ballot, tailoring the penalties for accountability with removal “excessive”. Although the Petitioners were not removed from the ballot, the penalties assessed were serious, not only through the cost of the highest fine being assessed and the cost of using a new photograph, but public posting of the Election Board Decision to the Tribal Citizens only website. With removal from the ballot requested by the complainant and the Election Board assessing serious penalties, failing to hold an initial hearing denied the Petitioners due process.

The Election Board argued that the right to due process is limited to criminal proceedings in the NHBP Constitution. This is a misinterpretation of the Constitution. For example, both Members of Tribal Council Article IV § 8 and the Judiciary Article XI § 8 are afforded a specific process that includes notice and a public hearing with the accused having the right to address the allegations to be removed from their respective positions. These are due process rights that do not relate to criminal proceedings.

This Court also finds that due process protections are consistent with the traditional values of this Native Nation with the Citizens of NHBP incorporating traditional values into the operation of the Tribal Government through the Guiding Principles in Article II § 2 (b) of the NHBP Constitution, the supreme law of this federally recognized American Indian Tribe:

- (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.

To ensure elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings” and are “[c]onducted in accord with NHBP constitutional requirements” with the Constitutional requirements including that actions be guided by the principles to “[p]romote the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture” and “ensure the perpetual preservation and revitalization of the Band's sovereignty and self-determination”, the process for determining whether a Candidate or other member violated the Election Code to the extent removal from the ballot and/or fines and public censure may be penalties imposed must include due process protections to ensure the fundamental fairness all of these provisions promote. The Election Code provides these due process protections through the hearing that is supposed to be held pursuant to Article VIII § 3.1-26.

The Election Board argued that it is not required to hold an initial hearing to determine if a Candidate or other member violated the Election Code and assess penalties. While the Court acknowledges that the relevant provisions may give the impression that a hearing is not required when read independently, the Court finds that a comprehensive reading of all provisions in Article VIII § 3.1-26, especially when interpreted within the Guiding Principles in the Constitution and the Purpose cited in the Election Code, establishes the right to due process protections through an initial hearing.

The Court is including below the majority of provisions in the Election Code regarding election disputes so that these individual provisions can be properly interpreted within the full context of the Election Code:

Article VIII § 3.1-26 Election dispute hearings.

- A. An election dispute is a dispute, other than an election challenge or a dispute over a final decision of the Election Board, that involves an alleged or proven civil or criminal violation of the Election Code or other violation of NHBP law related to a campaign.
- B. Any eligible voter may register an election dispute with the Election Board within 10 days of the date the alleged Election Code violation took place. The

election dispute may be registered on the form provided by the Election Board, accessible from the NHBP website, and at the NHBP administrative offices located on the Pine Creek Reservation and in Grand Rapids.

- C. The Election Board shall log each election dispute, and investigate any incident it reasonably believes constitutes a material violation of the Election Code, either on its own initiative or after a timely election dispute is registered by an eligible voter. The Election Board shall provide a response to the eligible voter who registered the election dispute within fourteen (14) calendar days of receiving the election dispute complaint.
- D. If the Election Board reasonably believes that a candidate or other member materially violated the Election Code, the Election Board may publicly lodge an election dispute complaint and provide notice of the same to the accused person. No election dispute complaint, however, shall be lodged more than ten (10) days after the election to which the election dispute complaint relates.
- E. After lodging an election dispute complaint, and upon at least fourteen (14) days' notice, the Election Board shall schedule a hearing to determine whether the accused person violated the Election Code or other NHBP law related to a campaign.
- F. The Election Board shall provide every opportunity to allow the accused person to appear at the hearing at a mutually agreeable time. If the accused person is unable or unwilling to appear in a timely manner, the Election Board shall hold the hearing without the participation of the accused person.
- G. All hearings shall be on the record and shall be promptly transcribed by an official reporter.
- H. The accused person is entitled to counsel of his or her choice, who shall be paid for at his or her own expense. The accused person shall be entitled to present evidence and to examine all witnesses under oath.
- I. The Election Board shall designate one or more individuals to act as counsel on behalf of the Election Board to investigate the alleged violation and, if necessary, to prosecute the election dispute complaint at the hearing. The Election Board's designee shall have the power to present evidence and to examine all witnesses under oath.
- J. The hearing shall be conducted by the Election Board and the Board's designee, even in cases that are initiated by an eligible voter registering an election dispute with the Board. In such cases, the eligible voter who filed the election dispute will ordinarily be expected to appear as a witness.

Article VIII § 3.1-26 (A), (B), (C), (D), (E), (F), and (G) articulate the due process rights of the Candidate or other member⁵ accused of violating the Election Code. Provision (A) simply defines an election dispute as “a dispute, other than an election challenge or a dispute over a final

⁵ The Court primarily uses “Candidate” except when quoting the Election Code solely for the sake of simplicity, acknowledging and affirming that “Candidate or other member” is used throughout the Election Code.

decision of the Election Board, that involves an alleged or proven civil or criminal violation of the Election Code or other violation of NHBP law related to a campaign”.

The process for filing an election dispute is detailed in provision (B) with the right of the accused established to not indefinitely face allegations with a complaint required to be filed “within 10 days of the date the alleged Election Code violation took place”.⁶

The responsibilities of the Election Board become more specific in provision (C). The Election Code establishes the process for accountability of complaints by mandating that “[t]he Election Board shall log each election dispute”. This provision also establishes the requirement that the Election Board “investigate any incident it reasonably believes constitutes a material violation of the Election Code”. As such, paragraph (C) establishes the standard for the Election Board to find that it “reasonably believes” the conduct alleged “constitutes a material violation of the Election Code” for further action to be taken. The latter standard allows the Election Board to disregard frivolous complaints or complaints involving conduct that it finds on its face to not have violated the Election Code.

Provision (D) provides that “[i]f the Election Board reasonably believes that a candidate or other member materially violated the Election Code, the Election Board may publicly lodge an election dispute complaint and provide notice of the same to the accused person...”. The Election Board asserts that this provision leaves the choice of whether to hold a hearing within the authority of the Election Board “[i]f the Election Board reasonably believes that a candidate or other member materially violated the Election Code”. This Court disagrees, however, as the next provision, paragraph (E), specifically provides due process protections to the Candidate stating, “[a]fter lodging an election dispute complaint, and upon at least fourteen (14) days' notice, the Election Board shall schedule a hearing to determine whether the accused person violated the Election Code or other NHBP law related to a campaign”. The choice of the Election Board, after determining whether “the Election Board reasonably believes that a candidate or other member materially violated the Election Code”, is whether the Election Board will pursue the matter further with that process involving that the Election Board will “publicly lodge an election dispute complaint and provide notice of the same to the accused person”. Once the Election Board “reasonably believes that a candidate or other member materially violated the Election Code” and the Election Board decides to “publicly lodge an election dispute complaint... upon at least fourteen (14) days' notice, the Election Board shall schedule a hearing to determine whether the accused person violated the Election Code or other NHBP law related to a campaign”. The use of the word “shall” mandates that a hearing be scheduled. These provisions also mandate additional due process protections for the Candidate alleged to have violated the Election Code, including notice.

⁶ The Court notes that there is a discrepancy as to whether the timing requirements in Article VIII § 3.1-26 (B) were met. The violation alleged to have occurred related to the use of photographs published in the special election edition of the Turtle Press. The mailing was sent on January 12, 2021 and the complaint was received on January 23, 2021, 11 days after the special election edition of the Turtle Press was mailed. The Election Board allowed the investigation to proceed, stating that it was adding time day for mailing. Although the Election Code does not authorize the extension of the 10-day timing requirement, the Court recognizes that the COVID-19 Pandemic has had an impact on the U.S. Postal Service. As such, it will not order the Election Board to dismiss the complaint on the grounds that it was not timely filed but doing so in this instance does not set precedent for adjustments by the Election Board absent a crisis, such as a public health pandemic, that must be articulated in the Election Board decision to withstand review, or the Election Code amended to authorize and establish the exceptions permitted or authorize and articulate discretion to the Election Board.

Article VIII § 3.1-26 (F), (G), and (H) further articulate the rights of the Candidate alleged to have violated the Election Code with (F) providing that “[t]he Election Board shall provide every opportunity to allow the accused person to appear at the hearing at a mutually agreeable time...”, (G) requiring that “[a]ll hearings shall be on the record and shall be promptly transcribed by an official reporter, and (H) stating that “[t]he accused person is entitled to counsel of his or her choice, who shall be paid for at his or her own expense” and that “[t]he accused person shall be entitled to present evidence and to examine all witnesses under oath”. Again, these are due process rights.

The Election Board argued that the provisions just reviewed allowed the Election Board to issue decisions on their investigation only. This is not supported by the analysis of Article VIII § 3.1-26 (A), (B), (C), (D), (E), (F), (G), and (H) above. In addition to there being no provisions that specifically authorize the Election Board to issue a decision on the investigation alone without a hearing, the failure to fulfill the requirements when a hearing is conducted, such as requiring a mechanism for the arguments made and evidence be presented “shall be on the record” and “shall be promptly transcribed by an official reporter”, that “[t]he accused person is entitled to counsel of his or her choice, who shall be paid for at his or her own expense” and that “[t]he accused person shall be entitled to present evidence and to examine all witnesses under oath” cannot be fulfilled absent a hearing. There is no doubt that, if a hearing is scheduled, the accused has rights that individually and collectively constitute due process rights.

Further support for the foundational concept that Candidates or others accused of violating the Election Code have due process protections can be found by returning to the purpose of the Election Code as articulated in Article I § 3.1-2 to ensure that NHBP elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings; and [c]onducted in accord with NHBP constitutional requirements”. The denial of due process rights is not in accordance with ensuring that elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings”. For the Election Board to have the authority to avoid triggering the due process protections for a hearing by issuing a decision that finds that a Candidate or other member violated the Election Code and assesses them penalties for the violation without evidence presented “on the record” that “shall be promptly transcribed by an official reporter”, without “[t]he accused person... entitled to present evidence and to examine all witnesses under oath”, and without “[t]he accused person... entitled to counsel of his or her choice, who shall be paid for at his or her own expense” would not only render these due process rights meaningless, but fail to follow the purpose of the Election Code to ensure that elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings”, as well as fail to ensure that elections are “[c]onducted in accord with NHBP constitutional requirements” as it does not follow the Guiding Principles of the Constitution.

The Election Board further argued that the Petitioners did have a hearing as the Election Board scheduled a hearing on the Petitioners’ Motion for Reconsideration pursuant to Article VIII § 3.1-27 (E) with that provision stating that “[t]he accused person may request reconsideration of the Election Board’s decision on the grounds of procedural error”. A hearing on a motion for reconsideration, however, does not involve the same process as a hearing scheduled pursuant to Article VIII § 3.1-26 (D). Article VIII § 3.1-26 (I) states that “[t]he Election Board shall designate one or more individuals to act as counsel on behalf of the Election Board to investigate the alleged violation and, if necessary, to prosecute the election dispute complaint at the hearing...” with (J)

providing that “[t]he hearing shall be conducted by the Election Board and the Board's designee...”. Unlike an initial hearing that “shall be conducted by the Election Board” where the Election Board is mandated that it “shall designate one or more individuals to act as counsel on behalf of the Election Board... if necessary, to prosecute the election dispute complaint at the hearing” the burden of proof shifts from the requirement that evidence be presented to prove that the accused violated the Election Code to the accused having to prove that they did not violate the Election Code and that the Election Board erred in finding that they had violated the Election Code. Even trying to meet the burden of a motion for reconsideration is problematic when an initial hearing is not held as the accused does not have the evidence or a record of the presenting of evidence to review to challenge the evidence presented. As such, a hearing on a motion for reconsideration does not fulfill the requirements in Article VIII § 3.1-26 (A), (B), (C), (D), (E), (F), and (G) nor does it cure the failure to hold the initial hearing.

Another issue in this case is that the Petitioners consulted current Chairman Jamie Stuck regarding the requirements for use of a photograph in their campaign that was taken in the performance of his duties as a Member of Tribal Council. The Petitioners consulted him, in part, because a complaint had been filed against him for use in his campaign of a photograph taken while serving as a Member of Tribal Council and he was found to not have violated the Election Code. The petitioners presented this April 26, 2016 Election Board Decision as evidence that they did not violate the Election Code. For reasons not known to this Court, the Election Board asked how the Petitioners obtained the April 26, 2016 Election Board Decision with it appearing that the Election Board may not have been aware of the Decision. The Petitioners indicated that they relied on this previous April 26, 2016 Election Board Decision in their approach to the issue. The Election Board responded that, unlike a court, it is not bound by precedent.

The approach that previous decisions of the Election Board do not constitute precedent is of significant concern to this Court. The Court again returns to the purpose of the Election Code for guidance with the purpose being to ensure that elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings; and [c]onducted in accord with NHBP constitutional requirements”. Looking to previous Election Board decisions is a specific and necessary avenue to ensure that elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings”.

The Court uses the terminology of “looking to previous Election Board decisions” and not the term “precedent” purposefully as it agrees with the Election Board to the extent that the Election Board is not a formal court system. It also agrees that changes in the law and NHBP caselaw could impact the previous Election Board decisions serving as binding precedent. There are other possible factors, such as the development of technology that can impact an outcome, with the COVID-19 Pandemic illustrating how dramatic technology can change in one year. It should also be noted that, even when there have been no changes in the law, caselaw or other outside factors, the specific facts of seemingly similar circumstances may differ to the extent that different outcomes are required.

One efficient avenue for addressing the concern of a different analysis or outcome is to reference the previous Election Board decision and explain the reasons the newest decision differs from the previous decision(s). The Election Board demonstrated this approach by addressing in its February 5, 2021 NHBP Election Board Decision and its March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 how the facts of the situation that involved the complainant’s

son differed in the reasons the photograph was found to be problematic from the facts of the current case. The Election Board's reasoning was not as clear, however, for why the current case resulted in a finding that the Petitioners violated the Election Code when the Election Board previously found similar circumstances to not have violated the Election Code.

Whatever the Election Board develops or Tribal Council mandates if it amends the Election Code, it is important for the Election Board to be aware of previous decisions it has issued. In establishing the purpose of the Election Code in Article I § 3.1-2, consistency is the first concept named to ensure that NHBP elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzewen, and guided by the Seven Grandfather Teachings; and [c]onducted in accord with NHBP constitutional requirements”

It should be noted that there are issues raised by both the Petitioners and the Respondent that this Court is not fully addressing in this *Opinion*. The Court is declining to fully analyze these issues, such as the allegation that the complaint was not filed within the time-frame required in the Election Code, because the Court finds that the burden was met to reverse and remand the February 5, 2021 NHBP Election Board Decision and March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 based on the Petitioners not being afforded the due process protections in the Election Code, as well as the other issues discussed in this *Opinion*. The Court is also not addressing the impact, if any, on the proceedings if the complaining witness does not appear since an initial hearing was not held, thus there was no proceeding – and no record for the Court to review – where the burden was properly on the designee of the Election Board to present evidence to prove the allegations of the complaint, meet the evidentiary requirements, including whether the complainant was a necessary witness, fulfill due process requirements, and the other requirements in the Election Code. Further, the Court considers this a serious matter that would require more detailed briefs on this topic from the parties.

CONCLUSION

Petitioner Rios and Petitioner Smit met the burden for this Court to set aside the February 5, 2021 NHBP Election Board Decision and March 12, 2021 NHBP Election Board Decision – Election Dispute 2021-1 based on the Petitioners not being afforded the due process protections in the Election Code. Article VIII § 3.1-26 (A), (B), (C), (D), (E), (F), and (G) articulate the due process rights of the Candidate when read together, including the right to a hearing, for a person to be found by the Election Board as having violated the Election Code. The right to due process is also articulated through the incorporation of the traditional values of this Native Nation through the purpose of the Election Code in Article I § 3.1-2 and the Guiding Principles in Article II § 2 (b) of the NHBP Constitution, the supreme law of this federally recognized American Indian Tribe.

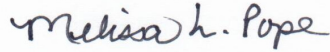
In addition, the Petitioners did not violate Article VIII § 3.1-9 (M) of the Election Code as they paid the licensing fee to have the legal right to use the photographs taken in previous years without paying a fee to the NHBP Tribal Council as it was not requested and the Petitioners were photographed as part of their duties as Members of Tribal Council with the NHBP Tribal Government contracting for and receiving a service that was independent of the election currently being held.

Although the Election Board is not a formal court, looking to previous Election Board decisions is a specific and necessary avenue to ensure that elections are “[c]onsistent, fair, efficient, conducted in harmony with MnoBmadzwen, and guided by the Seven Grandfather Teachings” pursuant to the purpose of the Election in Article I § 3.1-2 and the Guiding Principles in Article II § 2 (b) of the NHBP Constitution

IT IS HEREBY ORDERED:

April 7, 2021

Date



Hon. Melissa L. Pope, Chief Judge

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