



Huron Potawatomi Tribal Court

The Nottawaseppi Huron Band of the Potawatomi

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CASE NO: See Below		
ROB LARSON (CASE NO. 13-080-CV/TRO), DEAN TENBRINK (CASE NO. 13-078- CV/TRO), and TERRY TENBRINK (CASE NO. 13-079- CV/TRO)	v.	THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL COUNCIL, and THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI ELECTION BOARD
ROB LARSON Plaintiff In Pro Per 6501 Post Road Montague, Michigan 49437		JAMES MEGGESTO Attorney for Respondents Akin Gump Strauss Hauer & Feld LLP 1333 New Hampshire Avenue, N.W. Washington, D.C. 20036-1564 Phone: 202-887-4000 Fax: 202-887-4288 Email: jmeggesto@akingump.com
DEAN TENBRINK Plaintiff In Pro Per 3309 West Main Street Kalamazoo, Michigan 49006		
TERRY TENBRINK Plaintiff In Pro Per 230 E. Johnson Street Shelby, Michigan 49455		

OPINION AND ORDER

At a session of said Court held in the Courthouse of the Nottawaseppi Huron Band of the Potawatomi Tribal Court on the Pine Creek Reservation on the 15th day of March 2013

Honorable Melissa L. Pope Presiding

INTRODUCTION

This matter comes before the Court on an Appeal of Decision of the Tribal Election Board, Request for Advisory Opinion on Constitutionality of the Tribal Election Code, a Petition for Temporary Restraining Order and Permanent Injunction against the Tribal Council and the Tribal Election Board.

JURISDICTION

The NHBP Tribal Court has jurisdiction over this matter pursuant to Article XI, Section 3(b) of the NHBP Constitution:

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.

Suits against Tribal officials are authorized under Article X of the NHBP Constitution:

Section 2. Authorization of Suits against Officials and Employees of the Band.

- a) Officials and employees of the Band shall be subject to suit if
 1. The suit is brought in the Band's Tribal Court.
 2. The suit is against such officials or employees in their official capacity;
 3. The suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief;
 4. The suit seeks to enforce legal rights and duties established by this Constitution and by the laws of the Band.

In the present case, the Plaintiffs, NHBP Tribal Members and former candidates for Tribal Council in the election scheduled for April 27, 2013, are petitioning for an Appeal of Decision of the Tribal

Election Board, Request for Advisory Opinion on Constitutionality of the Tribal Election Code, a Petition for Temporary Restraining Order and Permanent Injunction against the Tribal Council and the Tribal Election Board with the Plaintiffs' cause of action arising under their assertion that the Respondents violated Article VII(1)(8) of the NHBP Constitution and that the NHBP Tribal Election Code violates Article VII (1)(a) of the NHBP Tribal Constitution, the United States Constitution and the Indian Civil Rights Act.

STATEMENT OF FACTS

The Plaintiffs were candidates for the NHBP Tribal Council in the election to be held on April 27, 2013.

In January 2013, the Election Board issued notice to four (4) candidates, Rob Larson, Dean TenBrink, Terry TenBrink and Roann Beebe-Mohr, of a hearing to show cause why they should not be ruled ineligible to run based on allegations by Tony Day, a current member of the NHBP Tribal Council and a candidate for the NHBP Tribal Council in the April 27, 2013 election. The date of notice is not clear from the pleadings of the Plaintiffs.

A Hearing of the Election Board was held on January 31, 2013. The Decision of Election Board, issued on February 1, 2013, stated that the Election Board "found that violations of the Election Code provisions outlined below had occurred, and found in favor of the plaintiff Tony Day. As a result, each of the defendants will be removed from all ballots for any election of the three expiring Tribal Council Seats." (Decision of Election Board at page 1). It appears from this written decision that the removal of the candidates was announced at the Hearing.

These In Pro Per Plaintiffs individually submitted an Appeal of Decision of the Tribal Election Board, Request for Advisory Opinion on Constitutionality of the Tribal Election Code, a Petition for

Temporary Restraining Order and Permanent Injunction against the Tribal Council and the Tribal Election Board by mail with the Tribal Court receiving these pleadings from Plaintiffs Rob Larson and Dean TenBrink on March 8, 2013 and from Plaintiff Terry TenBrink on March 11, 2013. The filing fees were not included with the pleadings. Contact information for the Plaintiffs was not on the pleadings. The pleadings indicated that the Plaintiffs had mailed these pleadings to the Respondents.

The Tribal Court Administrator obtained the Plaintiffs' phone numbers and attempted to contact the Plaintiffs by phone on Friday, March 8, 2013 and Monday, March 11, 2013. Plaintiff Dean TenBrink acknowledged receipt of the voicemails in an email to the Tribal Court Administrator the evening of March 11, 2013.

On Monday, March 11, 2013, the Chief Judge reviewed the documents and advised the Tribal Court Administrator to schedule a Hearing for Friday, March 15, 2013 for the reasons to be discussed in the "Analysis" section of this Opinion and Order.

The Tribal Court Administrator had several communications with the parties that included: notification of the date and time set for Hearing; the requirement that the filing fee be paid prior to the Hearing; how to become a member of the NHBP Bar; how to access NHBP Court Rules on the NHBP Tribal Court website; that the Plaintiffs needed to request the transcript from the Election Board for the January 31, 2013 Hearing as the Tribal Court was not involved with this Hearing and did not have access to this transcript; and that Plaintiffs carry the burden of proof.

The Hearing was held at 2:00 p.m. on Friday, March 15, 2013. Plaintiffs Dean TenBrink and Terry TenBrink, the Respondents and the Attorneys for the Respondents appeared. Plaintiff Rob Larson did not appear. The parties appearing presented oral arguments before the Court. The Court advised that it would have its Opinion and Order completed no later than Tuesday, March 19, 2013 without objection.

ANALYSIS

There are three Plaintiffs who submitted identical Petitions in this case. The Plaintiffs are not represented by an attorney and the NHBP Court Rules do not permit lay advocates. As such, the Court was required to open three separate cases.

Plaintiff Rob Larson did not appear. The other two Plaintiffs advised the Court at the Hearing that Plaintiff Larson could not get off of work. The Tribal Court Administrator stated that Plaintiff Larson contacted the Court prior to the Hearing to state he could not attend the Hearing. The Tribal Court Administrator referred Plaintiff Larson to the Court Rule governing adjournments. Plaintiff Larson did not submit a written Motion to Adjourn. The Court hereby dismisses Plaintiff Larson's action.

As explained on the record at the Hearing, there was some initial confusion regarding the pleadings filed in this case. Although the title of the Complaint stated that this was, among other things, a Petition for Temporary Restraining Order and Permanent Injunction, the filing did not conform to the requirements for obtaining a Temporary Restraining Order (TRO).

Requests for restraining orders are governed by Chapter 10, Court Rules for Restraining Orders.

Section 4. Emergency Restraining Orders

A. To obtain an Emergency Restraining Order (ERO), the party requesting the ERO must do the following:

1. File a written request for the ERO with the Tribal Court Administrator in person, by FAX or by mail;
2. Set forth in the ERO request the following information:
 - a. The names and addresses, if known, of all the parties concerned with, requesting and subject to the requested ERO;
 - b. The reasons for the emergency necessitating the ERO with (sic.) may include but not be limited to the following:

- i. Unless the ERO is issued right away the party requesting the ERO will suffer immediate and irreparable physical, mental or financial harm;
- ii. Unless the ERO is issued right away the party or minor children of the party will suffer immediate and irreparable physical, mental or financial harm; and/or
- iii. Unless the ERO is issued right away the Tribe will undertake an action that will cause the party petitioning for the ERO irreparable financial harm.

3. Pay the required filing fee.

The pleadings in these cases did not conform to this Court Rule. They should have stated why this was an emergency, what irreparable harm the Plaintiffs would suffer if the TRO was not granted and included the filing fee. However, the pleadings specified that their request for a TRO was with regard to the election scheduled for April 27, 2013.

With regard to the timing of elections, the NHBP Constitution provides as follows:

Article V – Elections

Section 1. Elections

- a) Elections shall be held in the month of April in conjunction with the annual meeting of the General Membership for those Tribal Council seats whose holders' terms are expiring or for seats otherwise vacant.

In taking note that the NHBP Constitution requires that elections take place in April, that the Plaintiffs requested in their pleadings that, “the defendants be ordered to respond within a time sufficient for a final determination of this case by the Tribal Court and the Tribal Supreme Court on or before March 15, 2013,” that the NHBP website stated that absentee ballots were mailed on February 27, 2013, and that allegations of prior restraint on speech are of the utmost importance, the Court determined that this matter was urgent.

Although the Court determined this case involved an urgent matter, the Court did not have sufficient information to determine whether an Emergency Restraining Order should be issued. In addition to the Plaintiffs not addressing the requirements for an Emergency Restraining Order, the Plaintiffs did not discuss the NHBP case law on preliminary injunctions in election cases. Finally, if the Plaintiffs proved their case and the Court ordered that their names be placed back on the ballot, it would require immediate action by the NHBP Tribal Council and Election Board. The Court, therefore, based on the totality of the circumstances, ordered an expedited Hearing for Friday, March 15, 2013. This provided the Plaintiffs with the opportunity to provide arguments and evidence regarding their allegations, as well as time for the Respondents to prepare their response.

For the record, the Court scheduled this Hearing before the filing fee was paid. In addition to the urgency of the matter as discussed above, the Court Rule states that petitions for Emergency Restraining Orders can be submitted via facsimile. As the Court cannot accept payment by credit card and the Court Rule allows for filing by facsimile, the Court determined that this requirement is not clear. The Court had the Tribal Court Administrator inform the parties about the Hearing date and inform the Plaintiffs that the filing fee had to be paid before the date and time set for Hearing. The Plaintiffs paid the filing fees on Thursday, March 14, 2013. The Court will be revising Chapter 10 to address this issue.

The Plaintiffs were provided with the opportunity to make arguments and present evidence. While they made arguments similar to the arguments in their Petitions and Briefs, they did not present any evidence. The Court notes for the record that the Plaintiffs stated the following in their cover letter to the Court: "We would also like to request a transcript for the hearing, in accordance with the Tribal Court's administrative order 10-001-CJ. We will send a check for the transcript within the next three days."

The Tribal Court was not involved with the Hearing held by the NHBP Election Board that resulted in the removal of the Plaintiffs from the ballot. As such, the Tribal Court cannot produce such a

transcript. This request needed to be made to the Election Board. The Tribal Court Administrator advised the Plaintiffs of this fact prior to the Hearing. Important to this Opinion and Order, the Plaintiffs did not provide this transcript to the Court during the Hearing on March 15, 2013 nor did it request that the Court consider this transcript when making its decision. As such, the only information the Court has from the Plaintiffs is the original filing and the arguments made at the Hearing.

In *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, the NHBP Supreme Court affirmed the test for preliminary injunctions adopted by the Trial Court:

We first address the standard that the trial court must use in determining whether to issue an injunction, and the standard the appellate court must use in reviewing the trial court's decision. The trial court applied the four – part test required in federal and state courts: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Spurr v. Nottawaseppi Huron Band of Potawatomi Tribal Council*, No. 11-251TRO, at 8 (NHBP Tribal Court, Dec. 29, 2011) (quoting *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)). This four-part test is standard in other Anishinaabe tribal courts as well. E.g., *Crampton v. Election Board*, 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Court 2009); *DeVerney v. Election Board*, 9 Am. Tribal Law 290, 291 (Little River Band of Ottawa Indians Tribal Court 2009). We agree with the trial court on the proper test to apply in analyzing requests for injunctive relief. (*Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, No. 12-005APP, at 9-10 (NHBP S. Ct. Feb. 21, 2012)).

While a Plaintiff must succeed on all four parts of the test for a preliminary injunction to be granted, of particular importance with this case is that the Plaintiffs are requesting a specific action in relation to an election. As noted by the NHBP Supreme Court in *Spurr*, an “injunction, is all but universally understood in tribal, state, and federal courts as ‘extraordinary.’ E.g., *Bauer v. Mohegan Council of Elders*, 8 Am. Tribal Law 99, 102 (Mohegan Tribal Court 2009)” *Id.* at 9. The Supreme Court went on to list numerous cases of support.

As here, the *Spurr* case addressed a request for an injunction relating to an NHBP Tribal election. The Supreme Court stated:

The government counters with reasoning from the Ninth Circuit that “[i]nterference with impending elections is extraordinary ..., and interference with an election after voting has begun is unprecedented.” Appellees’ Brief at 13 (quoting *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003)); see also *id.* at 13-14 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). We find the government has the better of the argument. The Tribal Council’s authority to call and conduct Article IX elections forces the judiciary to extend great deference to that branch of government. Mr. Spurr has not met his burden of proof. *Id.* at 8-9.

In the present case, the absentee ballots have been mailed, putting the request for a preliminary injunction into the category of “unprecedented”. Even if this was not interpreted as being “an election after voting has begun,” the remedy requested would be extraordinary. The Plaintiffs have the burden of proof when requesting the extraordinary remedy of a preliminary injunction in an election.

In cases such as this when a party is not represented by an attorney and does not appear to have had legal advice, the Court takes extra care in reading the pleadings and reviewing the evidence to determine whether the statements, arguments, legal analysis and evidence support the relief requested. The Court finds support for this approach in the NHBP Tribal Court Mission Statement: “The mission of the Nottawaseppi Huron Band of the Potawatomi Tribal Court is to fully implement the delegation of Constitutional judicial authority from the people of the Tribe consistent with self-determination, the sovereign powers of the Nation, traditional values, fairness and justice.” However, the Court cannot create the arguments, legal analysis and evidence. It must have something to work with or it crosses the line from searching for what is there and not said, to trying the case. To engage in this type of conduct would violate the Canons of Judicial Conduct and threaten the Nation’s expectation of and entitlement to a fair and impartial Tribal Judiciary.

As stated previously, the Court took extra care in the initial review of the pleadings. Based on the totality of the circumstances, the Court ordered an expedited Hearing even though the Plaintiffs’ pleadings did not conform to the Court Rules on Restraining Orders. However, even with the Court’s

careful review, the Plaintiffs have failed to present the legal arguments and evidence required for the extraordinary relief they are requesting.

To begin, the Plaintiffs did not address the four-part test required for a preliminary injunction in *Spurr*: that they are likely to succeed on the merits; that they are likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in their favor; and that an injunction is in the public interest. One could argue that some of these factors can be surmised from the pleadings, such as that the irreparable harm the Plaintiffs would suffer if the preliminary injunction was not granted would be that they would not be able to run for the NHBP Tribal Council in the April 27, 2013 election. However, the four-part test requires that the Plaintiffs “must establish” these factors. To establish these factors, the Plaintiffs must submit evidence. In addition to the issue of the transcript of the January 31, 2013 Election Board Hearing previously discussed, the Plaintiffs did not present any evidence at the March 15, 2013 Hearing before this Court. At the March 15, 2013 Hearing, the Court advised the Plaintiffs that they would be given the opportunity to present witnesses and other evidence. The Plaintiffs responded that they would not be presenting any evidence. In addition, the Plaintiffs did not address how their request to interfere with an election, an extraordinary remedy as noted in *Spurr*, was appropriate. The Court notes that this burden may have been higher as the Plaintiffs waited until after the absentee ballots were mailed to file their Petitions.

Instead of doing what is required by NHBP Tribal Law, the Plaintiffs only made allegations that certain provisions of the Election Code are prior restraints on speech in violation of the NHBP Tribal Constitution, the United States Constitution and the Indian Civil Rights Act. The Plaintiffs also alleged that they were denied equal protection and due process of law. They did not provide support for their allegations from NHBP case law or other tribal law. While the Plaintiffs cited a handful of United States cases, they did not provide the facts of the cases, the significance of the holdings or why the NHBP Tribal

Court should adopt these lines of reasoning. Of equal importance, the Plaintiffs have not submitted any evidence to support their allegations.

With the Plaintiffs failing to make the appropriate arguments, provide the appropriate legal analysis, including analysis around the request for this extraordinary, perhaps unprecedented, relief as required in *Spurr*, and provide evidence to support their arguments and analysis, the Plaintiffs have failed to meet their burden of proof. The Court hereby denies the Plaintiffs request for a preliminary injunction.

CONCLUSION

The Plaintiffs failed to meet their burden of proof in the four-part test for a preliminary injunction: plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest. Within this analysis, the Plaintiffs also failed to address how their request for the extraordinary remedy of interfering with an election was warranted.

ORDER

For the reasons set forth in this Opinion and Order, the Plaintiffs have failed to meet their burden of proof. The Temporary Restraining Order and Permanent Injunction against the Tribal Council and the Tribal Election Board is hereby **DENIED**.

3-19-2013

Date

Melissa L. Pope
Melissa L. Pope, Chief Judge

CERTIFICATE OF MAILING

I certify that on this day I mailed a copy of the *Opinion and Order* by first-class mail to the parties, or their attorneys, at the addresses listed below.

3/19/2013
Date



R Scott Ryder, Tribal Court Administrator