

**IN THE COURT OF APPEALS
SAN JUAN SOUTHERN PAIUTE TRIBAL COURT
IN AND FOR THE SAN JUAN SHOUTHERN PAIUTE TRIBE**

IN RE THE ELECTION HELD ON
DECEMBER 5, 2020:

ROSE ANN WHISKERS; JOHNNY LEHI,
JR.; LEPAYTON CHOE; DEEANNA
SMITH; LOUISE TALLMAN; and MAY
PRESTON,

Petitioners,

vs.

SAN JUAN SOUTHERN PAIUTE TRIBE
ELECTION BOARD,

Respondent.

Ct. App. Case No. 2020-AP-01 through 03

Tribal Court Case Nos. SJSPT-2020-02
through 07

**OPINION RE SPECIAL ELECTION
CHALLENGE**

San Juan Southern Paiute

Tribal Court of Appeals

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Weathers, J. –

Petitioners May Preston and Louise Tallman, as well as Respondent San Juan Southern Paiute Tribe Election Board (“Election Board”), appeal the Opinion and Order entered by the trial court on December 20, 2020 that invalidated the presidential election but upheld the other Tribal Council elections. After reviewing the voluminous paperwork submitted, and without oral argument given the limited time permitted to review this matter, this Court affirms in part and reverses in part.¹

I. BACKGROUND

Pursuant to Order of this Court, the Election Board held a special election on December 5, 2020 to fill the seats of President, Vice-President, member of the Northern Area, and member

¹ This Court denies the motions to dismiss filed by each side.

of the Southern Area on the Tribal Council. Drive-up polls were established outside the Administration Building located in Tuba City, Arizona to receive the votes given the COVID-19 pandemic.

The Tribe elected Michael King as President. His election was challenged on the basis that he did not reside within the territory of the Tribe or within 150 miles of the Territory of the Tribe for at least one year prior to the election as mandated by the Tribe's constitution. See San Juan Paiute Tribe Constitution ("SJSPT Const.") Article VIII, Section 6. He spent some months away in Kansas for college. Nicole Edgewater won the seat for the Northern Area. Her election was also challenged on the ground that she did not reside in the Northern Area for one year prior to the election. She was hospitalized for a time in Phoenix with complications from COVID-19.

The Election Board moved to dismiss these and other challenges. After a telephonic evidentiary hearing – effectively a bench trial – the Tribal Court granted the motion to dismiss except as to King. The trial court invalidated that election and ordered a new election within 60 days of any appeals having been decided. Petitioner Preston, Petitioner Tallman, and the Election Board timely appeal various aspects of the trial court's Opinion and Order.

II. LEGAL DISCUSSION

A. Standard of Review

To succeed on an appeal, an appellant must show how the Tribal Court committed prejudicial error by citing to the Tribal Court's opinion and the record to explain the error. Preston v. San Juan Southern Paiute Election Board, SJSPT App. No. 2019-AP-01, at 6 n. 1 (August 20, 2019). This Court will review the trial court's factual findings for clear error and its legal conclusions de novo. See id. at 4; see also Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788, 802 (9th Cir. 2020). Interpretation of the Tribe's constitution presents a pure question of law this Court will review de novo. See Smith v. Ho-Chunk Nation, 2003 Ho-Chunk

Supreme LEXIS 9, *8 (2003) (appellate courts review questions of statutory and constitutional interpretation de novo).

To challenge a tribal election:

The person challenging the election results shall prove by clear and convincing evidence that the Election Board violated the Constitution, the Election Ordinance, or otherwise conducted an unfair election **and** that the outcome of the election would have been different.

San Juan Southern Paiute Tribe Election Ordinance (“Election Ordinance”) Article VII, Section 1202 (2019) (emphasis added). “In other words, the challenger has the burden of proof by clear and convincing evidence to prove that the answer to each of the following questions is ‘yes’:

Was the election conducted in violation of tribal law or in an unfair manner? If so, was the election violation so substantial that without it the election outcome would have been different?”

Preston, SJSPT App. No. 2019-AP-01, at 5. “Clear and convincing evidence is evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable.” Id.

B. King Election Challenge

The Election Board appeals the decision of the Tribal Court vacating the election of Michael King as Tribal Council President. The Tribal Court found as follows:

The Court finds that the Election Board published an Election Notice that allowed a student exception to the residency requirements. The Court finds the Election Board’s Nomination Form is insufficient, resulting in the Election Board being unaware of King’s status. The Court finds that by clear and convincing evidence the Election Board violated the election laws and held an unfair Presidential Election. The Court finds that the outcome of the election would have been different, if the violation had not occurred.

Opinion and Order dated 12/20/20 at 6. According to the Tribal Court, the “plain language of the Constitution and the Election Ordinance do not provide for an exception to the residency requirement under any circumstances.” Id. at 5-6.

On appeal, the Election Board argues that it did not rely on a student residency exception to the residency rule when the Election Board qualified King as a candidate for the election. It argues instead that given the lack of any guiding tribal law as to whether a candidate must be continuously physically present at a qualifying residence, the Election Board interpreted tribal law to permit a candidate to live elsewhere in addition to a qualifying residence within the Tribe's territory during the prescribed year. In other words, the Election Board contends it did not create an exception to residency but rather interpreted the meaning of residency in the Constitution.²

The Tribe's Constitution requires a candidate for President to have resided within the territory of the Tribe or within 150 miles of the territory of the Tribe for at least one year prior to the date of the election. See SJSPT Const. Art. VIII, § 6 and Art. IV, § 2. By invalidating King's election because he lived away at college for a time being, the Tribal Court essentially interpreted the Constitution to require physical presence for residency. There was no dispute at trial that King was a full-time student and lived in Kansas four of the 12 months prior to the election. There was also no dispute that Kansas is more than 150 miles away from the Tribe's territory. Because King was not physically present living within the Tribe's territory for the

² The Tribal Court noted that the Tribe recently amended its Constitution to remove the residency requirement for voting and could have done the same for running for office. Or, according to the Tribal Court, the Tribe could have added an exception from the residency requirement for students when it recently amended its Constitution. But, by the same token, the Tribe could have added language clarifying that residency for candidacy requires continuous physical presence if that is what the Tribe intends. But the Tribe did not. Furthermore, the Tribal Council amended the Election Ordinance *after* the amendment to the Tribe's Constitution to add a definition of "residence" or "residency" to mean "the main living place of a person." The Tribal Council could have clarified and limited the meaning of residency in the amended Election Ordinance to require physical presence, but it did not.

entire year prior to the election, the Tribal Court ruled that he did not meet the residency requirement. This was legal error.

The real issue here is not an exception to the residency requirement, but rather the meaning of “reside” within the Tribe’s Constitution. Pursuant to Article VIII, Section 6, “Persons nominated to run for Tribal Council seats . . . must meet the residency requirements set forth in Article IV for at least one year prior to the date of the election.” Article IV requires the President, Vice President, and the At-Large Council Member to “reside within the territory of the Tribe or within one hundred fifty (150) miles of the territory of the Tribe” and Area Council members to “reside in their respective areas” the boundaries of which are to be defined by ordinance.

The Tribe’s Constitution does not define “reside” or “residency.” However, the Election Ordinance does define “residence” or “residency” in the context of these constitutional provisions as “the main living place of a person.” See Election Ordinance §401(C)(2). It does not include physical presence as part of the definition, and it does not say “the only living place” or simply “the living place.” By including the word “main” and excluding the words “physical presence,” the Election Ordinance suggests a person may have two or more residences which suggests a person need not be continuously physically present to be a candidate.

According to the definition of “residence” in a leading legal dictionary, “a person may have only one legal domicile at one time, but he may have more than one residence.” See Black’s Law Dictionary 1309 (6th ed. 1990). “It is often said that a person may have several ‘residences’ but only one ‘domicile’.” McIntosh v. Maricopa Cty., 241 P.2d 801, 802 (Ariz. 1952). Under the common understanding of the word “residence,” it is quite possible to have more than one at a time. Hornsby v. Lufthansa German Airlines, 593 F. Supp. 2d 1132, 1137 (C.D. Cal. 2009). It is well-established that a person may have more than one residence. See Rosario v. INS, 962 F.2d 220, 224 (2d Cir. 1992); In re Ashton, 2013 Bankr. LEXIS 321, at *6

(Bankr. D. Idaho Jan. 18, 2013). In fact, the Tribal Court itself previously agreed that a “person can have multiple residences, but only one domicile.” See In the Matter of the July 18, 2015 General Election, Case No. E-2015-001 at 2 (Feb. 9, 2016).

The closest case on point is likely Howlett v. Salish & Kootenai Tribes of Flathead Reservation, 529 F.2d 233 (9th Cir. 1976). There, candidates attacked the tribal constitutional requirement that a candidate for the tribal council had to have “resided in the district of his candidacy for a period of one year next preceding the election.” As with King here, the federal judge there found that the candidates were physically absent from the reservation for a period of six months in the year immediately preceding the election. Id. at 240-41. In discussing the word “resided” within the tribe’s constitution, the federal judge stated:

The word residence has an evasive way about it, with as many colors as Joseph's coat. It reflects the context in which it is found. It may be equated with domicile meaning that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. A domicile is usually not changed by absence due to military service or attendance in college. Given this meaning I find that the plaintiffs did reside on the reservation for a period of one year next preceding the election.

The word reside, however, may signify the place where the candidate has actually lived and maintained a home and where he was personally present. It is this meaning which the tribal council gave the word.

Id. at 241 (internal quotes omitted). The tribal council had defined “reside” to mean actual physical presence so candidates would be sufficiently familiar with the culture of and issues facing the tribe and the tribe would be sufficiently familiar with the candidate. Id. at 243. Ultimately, the federal court deferred to the tribal council’s meaning and determined that “reside” meant actual physical residence without allowance for absence for military service, school attendance, work, or otherwise. Id. at 241.

Here, unlike other tribes, the Tribal Council has not so specifically defined the word “reside” as to mean actual physical presence. Cf. Begay v. Navajo Nation Election Admin., 2002

Navajo Sup. LEXIS 3, *7 (2002) (noting that under Navajo statutory law a candidate must have been continually physically present within the Navajo Nation for at least three years prior to the time of elections). Instead, the Tribal Council here has simply said the word “residency” means the “main living place of a person.” Had the Tribal Council intended to limit “residence” to actual physical presence, it would have defined “residence” to mean “the main living place of a person *at which he or she has been physically present*” or something similar. There is no discussion of actual physical presence in the Tribe’s Constitution or the Election Ordinance.

The uncontroverted evidence at trial confirmed that King’s main living place for 32 years has been “4 miles North of Navajo Mountain Chapter” within the Tribe’s territory. While he conceded he was away for four of the past 12 months at college before the election, he insisted his residence has been and will be his home within the Tribe’s territory. He physically resided in his home within the Tribe’s territory and studied remotely from early May 2020 to the election in early December 2020. The reasons behind having a one-year residency requirement – so a candidate is familiar with the customs of and issues facing a tribe and the tribe is sufficiently familiar with the candidate – are clearly met based on the facts of this case.³ Because a person may have more than one residence, it is fair to say that King resided both within the Tribe’s territory and in Kansas during the year prior to the election. Based on the uncontroverted facts of this case, it is also safe to say that his “main living place” has been and will be within the territory of the Tribe. He therefore met the constitutional requirements to run for office.

³ The Tribal Court noted that the “Constitutional requirement for residency creates an expectation that the elected tribal leaders will currently reside in the community and not simply be enrolled.” Whether current physical presence at the time of election is required is not before this Court. However, this Court will remark that the uncontroverted evidence established that King physically resided at his home within the territory of the Tribe for several months up to the election.

C. Edgewater Election Challenge

Petitioners Preston and Tallman appeal the Tribal Court's finding that Nicole Edgewater met the residency requirements for election. They contend that Edgewater did not physically reside in the Northern Area for one year prior to the date of election, in part, because she was hospitalized in Phoenix with COVID-19 from late-April to mid-August 2020.

The Tribal Court agreed with the Election Board "that a hospital is not a residence and staying in the 'city' from time-to-time to be closer to medical appointments was not a change in residence." Opinion and Order dated 12/20/20 at 8. This Court agrees. There is no evidence in the record to suggest that Edgewater's "main living place" was anywhere other than "2.5 miles North of Navajo Mountain Chapter" in the Northern Area.⁴ Even assuming Petitioner Preston's argument is true that a "hospital becomes residence after a month's stay," as discussed above a person may have more than one residence and still satisfy the constitutional requirements.⁵

As the law currently exists, continuous physical presence is not required to establish residency. If that is not the understanding of the Tribal Council, it should amend the Election Ordinance to make continuous physical presence a clear requirement for residency.

III. CONCLUSION

Based on the foregoing, the Tribal Court's Opinion and Order dated December 20, 2020 is affirmed in part and reversed in part. Its decision that the December 5, 2020 Presidential

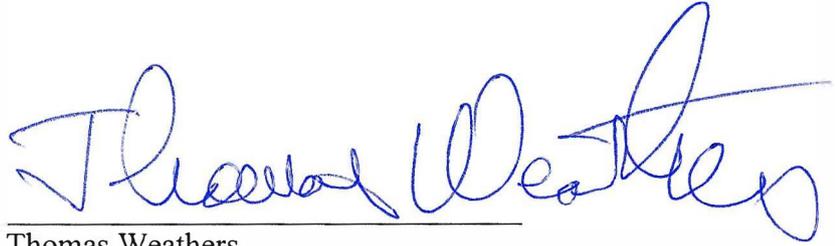
⁴ Petitioner Tallman also complains she had witnesses who could have testified about Edgewater's residency, but the Tribal Court refused to let them speak. In fact, the Tribal Court sustained an objection to their testimony because they were not disclosed as witnesses by the required date. This Court sees no abuse of discretion.

⁵ Petitioner Preston also contends that she did not get enough time before the Tribal Court to argue her case and that the Election Board impermissibly used an older version of the Election Ordinance for the election. This Court sees no abuse of discretion in the amount of time allocated to each side. Also, this Court finds no prejudicial error in using an older version of the Election Ordinance. Petitioner Preston has not articulated how using the older version prejudiced or substantially altered the election results.

Election is invalid is reversed. Michael King is the duly elected President and the order setting a new presidential election within 60 days is vacated. The Tribal Court's order dismissing the challenges to Nicole Edgewater's candidacy is affirmed. Edgewater is the duly elected member from the Northern Area.

IT IS SO ORDERED.

Date: 4/5/2024



Thomas Weathers
Justice of the Court of Appeals