

# Sisseton - Wahpeton Tribal Court

## LAKE TRAVERSE RESERVATION

C. PO BOX 568 • AGENCY VILLAGE, SOUTH DAKOTA 57262-0568

PHONE: (605) 698-7629

### FACSIMILE TRANSMITTAL SHEET

DATE: 8-26-10 TIME: \_\_\_\_\_

NUMBER OF PAGES BEING TRANSMITTED, INCLUDING COVER SHEET: 7

DESTINATION FAX NUMBER: 1-952-378-2864

ATTENTION: Michael Roberts

TELEPHONE NUMBER: \_\_\_\_\_

FROM: Liz Koh FAX NUMBER: 605-698-4135

Chiep Clark

MESSAGE: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PLEASE CALL (605) 698-7629 IF ALL THE PAGES HAVE NOT BEEN RECEIVED.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE

Sisseton, South Dakota

FILED

SISSETON-WAHPETON OYATE RESERVATION LAKE TRAVERSE INDIAN RESERVATION STATE OF SOUTH DAKOTA  
SISSETON-WAHPETON-SIOUX TRIBAL COURT IN TRIBAL COURT

8/25/10  
Date  
by: *Lisa Roberts* 81-54  
10-079-052  
Clerk of Courts

MICHAEL ROBERTS,  
Plaintiff,

vs.

ORDER

SISSETON-WAHPETON  
OYATE RESERVATION ELECTION  
BOARD,  
Defendants.

The Plaintiff has petitioned this Court to review the decision of the Reservation Election Board finding him ineligible to run for the office of Tribal Chairman. The REB concluded that the Plaintiff failed to meet the "duration of physical presence" requirement of Chapter 3-05-01 of the Oyate's Election Code. That section requires a candidate for office to have been "living within" the original boundaries of the reservation or the adjoining towns of Browns Valley, Minnesota and Waubay, South Dakota for twelve consecutive months immediately preceding the deadline for filing to run for office. The "living within" requirement is further amplified by Chapter 03-02-06 as requiring a "continuous physical presence" within the reservation or the two towns for twelve consecutive months.<sup>1</sup>

The Court heard the arguments of each side and also reviewed the administrative record of the proceedings below with the REB at hearing on August 24, 2010. The Plaintiff appeared to represent himself and the REB appeared through its Chairwoman, its members, and Tribal Attorney Debra Flute. Both sides engaged in vigorous oral argument and the Court appreciates the perspectives of those involved.

The Plaintiff made several arguments in support of his position that the REB erred in disqualifying him. First, he contends that the REB's determination that he is a non-resident is error because although he was physically off the reservation for the preceding twelve months prior to the deadline to announce his candidacy, he was so involuntarily because he has had intentions to return to the reservation but cannot find appropriate housing and economic opportunities there. He argues that his physical presence off reservation is similar to the Norman Johnson case and therefore he should be permitted to run. Second, he argues that the legal rationale for restricting off-reservation members

<sup>1</sup> This language was apparently added to the Election Code as the result of a decision by this Court in Norman Johnson v. REB which concluded that a tribal member physically located outside the reservation could nonetheless run for office if his absence from the reservation was involuntary as the result of educational or military pursuits. The Court in this opinion does not express any opinion whether this restriction on the Johnson decision comports with the SWO Constitution as this case does not raise that issue.

from running for office- that they do not have a thorough knowledge of Tribal affairs, and an understanding of the issues confronting Tribal members in the conduct of their daily affairs- is inapplicable to him because he grew up on the reservation and has been passionate about maintaining ties to his community and the Oyate. He points to his recent stint as CEO of the Tribe's gaming enterprises and his maintenance of a website allowing Oyate members to comment on current affairs as proof that he is abreast of the contemporary issues facing the Oyate.

Third, the Plaintiff alleges that the Election Code, by requiring Oyate members to reside on the reservation for twelve months prior to their candidacy in order to run for elective office, violates the Sisseton-Wahpeton Oyate Constitution, Article IX, Section 1, assuring all Oyate members "equal political rights." He argues that this constitutional provision does not allow the Tribal government to impose a residency requirement on Oyate members in order to run for office. He also asserts that by extending the right to run for office to members residing outside the reservation in Waubay and Browns Valley the Oyate is violating the equal protection rights of Oyate members residing outside the reservation but not in those towns. Specifically he points out that he established a residency in Watertown, South Dakota sufficiently to obtain contract health services through the Indian Health Service and that Watertown, South Dakota is qualitatively the same as Waubay and Browns Valley.<sup>2</sup>

The REB counters the Plaintiff's arguments by first pointing out that the Election Code prohibits this Court from second-guessing any finding of fact made by it at Chapter 03-05-10 when it states that "findings of fact" shall be unreviewable. Whether the Plaintiff is a "resident" of the reservation, according to the REB, is a question of fact unreviewable by this Court. Second, the REB contends that even though Mr. Roberts may not be the typical tribal member residing off the reservation, the tribal government is allowed to draw distinctions based upon legislative findings and that a candidate for office should not be allowed to question those legislative findings. Lastly the REB points out that other provisions of the Tribal Constitution grant to the Tribal Council the authority to determine the qualifications of those entitled to run for office and permitting only those Oyate members who have had a continuous presence on the reservation for twelve months prior to announcing one's candidacy is rationally related to a legitimate objective of government.

---

<sup>2</sup> At hearing the Plaintiff also raised an additional issue- gerrymandering- to his list of reasons why he feels the REB is denying his rights. Gerrymandering is the term utilized to describe the process by which the legislature draws an election district to assure that a certain political party is favored. The Court would note that the Sisseton-Wahpeton Tribal Council has not drawn the reservation boundary line. That line is drawn in the treaty between the United States and the Oyate. Insofar as the Plaintiff is alleging that permitting off-reservation candidates in Waubay and Browns Valley to run for office but not permitting him to run is an example of gerrymandering the Court does not find that such is an attempt to assure that a candidate of a certain political persuasion is favored.

First, the Court disagrees with the REB's argument that its finding that the Plaintiff is not a resident of the Lake Traverse reservation is unreviewable by the Court. This Court is barred from considering new evidence in a case such as this and is also barred from questioning the REB's findings of fact under the new election code. See Chapter 03-05-10.. The determination of residency is both a factual determination and a legal one however and although the Court cannot question the REB's underlying factual findings leading to its conclusion, its conclusion on residency is ultimately a legal question. This was the Court's ruling in Norman Johnson v. REB in which this Court found that an Oyate member who was attending school off the reservation to obtain a PhD was nonetheless a resident of the reservation for purposes of the election code. This Court did so because it recognized in certain situations Oyate members who have the intent to remain reservation residents involuntarily live off the reservation in order to obtain an appropriate education, for example, or to serve in the military service. In apparent response to this decision, the Oyate added a "physical presence" requirement to the residency requirement requiring that the candidate have physically been present on the reservation for one year immediately preceding his filing.

If the Johnson decision is no longer good law, then obviously the decision of the REB is legally correct here. The Plaintiff makes no attempt to deny that he physically lives in Savage, Minnesota but he claims that he does so involuntarily because he has attempted to find adequate housing and business opportunities for his wife and himself on the Lake Traverse reservation, but has been unsuccessful. Under the new Election Code the physical presence requirement was not met by the Plaintiff. Even if the Johnson decision remains viable<sup>3</sup>, the Court does not find that the REB committed legal error by finding that the Plaintiff was not a resident. The Johnson rule was a narrow exception to the general rule of residency- that a person is a resident of where he is physically located- carved out by this Court to recognize the inequities heaped upon a tribal member who is attempting to better himself and his tribe by obtaining a professional degree, unobtainable on or near the reservation, or serving his country in the military service where it is clear that the member intends to return to the reservation after his education or service commitment is fulfilled. That description does not apply to the Plaintiff who lives in Savage, Minnesota with his family not because of educational or military pursuits, but because of business pursuits and other interests. The Court certainly does not doubt the sincerity or legitimacy of those interests, but they do not constitute an involuntary presence off the reservation of the type recognized in Johnson.

The Plaintiff also argued at hearing and before the REB that the legal rationale offered by the Tribal Council for imposing the residency requirement in the Election Code does not apply to him because he has a "thorough knowledge of Tribal Affairs, an understanding of the issues confronting Tribal members in the conduct of their daily affairs, and a first-hand knowledge of Reservation life." See Chapter 03-05-01(A). Ergo,

---

<sup>3</sup> This Court need not decide whether the physical presence requirement may violate the constitutional or civil rights of an Oyate member serving in the military or pursuing some educational goals that cannot be pursued on the reservation because that issue is not presented in this case.

he contends, it makes no sense to disqualify him from running when he maintains as much, if not more, experience with reservation affairs than the typical reservation Oyate member. Assuming, for the sake of argument, that the Plaintiff's argument is correct, it still does not entitle him to the relief he seeks. When a government enacts laws it is entitled to assume certain facts and legislate accordingly. There will always be persons who are exceptions to the assumptions of the law, but that does not justify overturning the law. For example, what if the law required pilots to retire at a certain age and a person like Sully Sullenberger, who landed a jumbo jet in the Hudson river to save the lives of hundreds of passengers, reached that age and argued that the law was unreasonable because it required a person like him, still possessed of excellent pilot skills, to retire. Assume further that a Court overturned the law in order to accommodate pilot Sully and eliminated the retirement requirement. The next time one boards a plane he may have as a pilot not Sully Sullenberger, but that same person who drives 40 miles per hour in the passing lane of the interstate with his right blinker light on. An exception cannot swallow the rule. It is a rational assumption for the Tribal government to make that the majority of off-reservation members know less about reservation affairs and hardships than the typical on-reservation member. If the law itself is legal, than the mere fact that someone does not meet the archetype of the person contemplated by the law does not render the law inapplicable.

The real gist of the Plaintiff's argument is that the residency or duration of physical presence requirement violates the SWO Constitution, Article IX, Section 1, assuring all Oyate members "equal political rights." The Court certainly believes that running for office is the exercise of a political right. The Plaintiff contends that this provision permits of no qualification or exception by the Tribal Council and that the Council cannot deny to off-reservation members the right to run for elective office. The REB counters this argument by pointing out that there is a more specific provision of the Oyate's Constitution, Article V, governing the qualifications of candidates for office and Article V, Section 3 even grants to the Council, or the REB if designated by the Council, the right to determine "qualifications for office."

When there are two conflicting articles in a Constitution there are some rules to determine how to reconcile them. One rule is that provisions of specific applicability take precedence over rules of general applicability. In this case if Article IX, Section 1 were to be read to grant to all tribal members, wherever located, the right to participate in all aspects of political life that right would extend to both adult and child members and to members incarcerated in institutions or in situations in life where it would almost impossible for the member to govern. That is because Article IX, Section 1 makes no attempt to differentiate amongst tribal members. Article V is more specific as it applies to the election process and limits the right to run for office to those Oyate members who are "qualified registered members twenty one years of age or older." Of course there is no residency requirement in this language either so it does not of its own weight foreclose the Plaintiff's arguments. However, the people of the Oyate use the term "qualified registered" in this article whereas it is not used in Article IX, Section 1A. This implies that the member trying to run for office must be both "qualified" and "registered". The latter term must refer to enrollment and the former to some criteria to be utilized to run

for office. Who sets those criteria? This question is answered by Article V, Section 3 where the Constitution vests in the Council, or the REB if delegated to it, the right to set qualifications for office.

This is not to say, however, that the Tribal Council has carte blanche authority to deny certain persons the right to run for office. The Indian Civil Rights Act and the Oyate's Constitution place restrictions on the Tribal Council's ability to restrict the rights of Oyate members. For example, the Council certainly could not dictate that only men could run for elective office or that persons of a certain religious persuasion could not run for office. Those types of classifications are "suspect classifications" because they discriminate against people based upon their sex or religious persuasion. If the Council draws a distinction between tribal members based upon such distinctions they must have a compelling reason to do so. If the Council draws distinctions based upon classifications that are not suspect, however, it must show that the classification is rationally related to a legitimate objective of government. In the Anglo law there has been recognized the right to travel meaning that a person cannot be discriminated against in a manner that may impair his desire to move or travel. That Anglo concept is the product of the "privileges and immunities" clause in the US Constitution, which prevents the individual states from discriminating against non-residents in certain regards. There is no privileges or immunities clause in the Indian Civil Rights Act, probably because tribal rights cannot be exercised by non-members. Even if there were the privileges and immunities clause would not prevent a local government from requiring a residency in order to exercise certain rights such as the right to vote or the right to run for office. The Plaintiff contended at hearing that in federal or state elections a non-member has the right to run for office even if the person is not a resident of that State as long as the person agrees to move to the jurisdiction when elected. That actually is not the state of the law. A unit of government can require a person to be a resident of the jurisdiction where he wishes to run for office. Therefore, differentiating between tribal citizens based upon residency is not a suspect classification under the law.

A federal court has upheld the right of Indian tribes to impose a residency requirement on the right to run for elective office in *Howlett v. Salish and Kootenai Tribes of Flathead Reservation*, 529 F.2d 233, 243 (9<sup>th</sup> Cir. 1976), **even under a compelling governmental interest test**. The Court there held that the residency requirement was necessary to ensure that tribal members running for office have an intimate knowledge of the day-to-day events of reservation life. This Court finds that the Howlett decision is well reasoned and adopts its rationale, although it does not agree that the classification of on and off-reservation citizens is a suspect class.

The line drawn by the Oyate's government is blurred somewhat, however, because the Election Code does allow certain Oyate members living outside the reservation boundaries to run for office. Those members are those who reside in the towns of Waubay and Browns Valley. In order to challenge this exemption the Plaintiff would have to show that he is similarly situated as those Oyate members and that the distinction drawn by the Council is irrational. The Plaintiff resides in Savage, Minnesota outside a large metropolis and some 150 miles from the Lake Traverse reservation. The

( )

( )

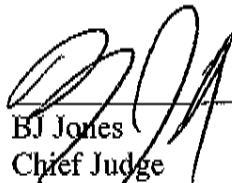
Court finds that Savage, Minnesota is not similarly situated as Waubay and Browns Valley and thus finds that the Plaintiff has failed to show that by allowing those Oyate members in those towns to run for office decision by the REB has violated his right to equal protection of the law.<sup>4</sup>

Because the Court concludes that the REB did not commit legal error when it concluded that the Plaintiff was not entitled to run for Oyate office the decision of the REB must stand.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiff's appeal from the REB decision denying him the right to run for elective office is DENIED.

So ordered this 25<sup>th</sup> day of August 2010.

BY ORDER OF THE COURT:

  
\_\_\_\_\_  
BJ Jones  
Chief Judge

ATTEST:   
\_\_\_\_\_  
Clerk of Courts

<sup>4</sup>The Court today decides another election appeal involving candidate Roth that does involve an analysis of this issue.