

IN THE SUPREME COURT
OF THE PAWNEE NATION OF OKLAHOMA

In the Matter of:)
Recall Election of April 11, 2020)
Pawnee Election Commission,)
Appellant/Respondent.)
v.)
James Whiteshirt, President,)
Appellee/Petitioner.)

Case No.: PNSC-2020-02

PAWNEE NATION
SUPREME COURT OF OKLA.
FILED
IN THE SUPREME COURT
AUG 06 2020

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Before SMITH, ECHO HAWK, HARSHA, and HASKINS, Justices of the Supreme Court

OPINION AND ORDER

Pending before the Court is Appellant Pawnee Election Commission's (Commission) appeal of the Pawnee District Court's June 14, 2020 Order (District Court Order). For the reasons stated below the Court REVERSES the District Court Order.

I. PROCEDURAL BACKGROUND

Three motions related to the appeal are pending before the Court. The motions raise preliminary matters, which the Court resolves as follows:

Whiteshirt Motion to Strike

On July 23, 2020, James Whiteshirt (Whiteshirt) filed a Motion to Strike the Pawnee Election Commission's (Commission) Reply Brief in support of the appeal, arguing that the Reply Brief was untimely under Federal Rules of Civil Procedure

12(a)(1)(c) and Rules of the Supreme Court of the United States, Rule 25.3, and that the Reply Brief raised new arguments.

Federal Rule of Civil Procedure 12 and Rule 25.3 of the Rules of the United States Supreme Court do not govern the filing of appellate briefs before this Court; the law of Pawnee Nation governs. Specifically, Section 426 of the Pawnee Nation Appellate Procedure governs the time for filing appellate briefs in this Court.

Section 426 provides that a reply brief must be filed at least 3 days before argument. The Commission's reply brief was filed on July 20, 2020. Oral argument in this case took place on July 24, 2020. The reply brief was, therefore, timely.

Notably, this Court's Administrative Order dated July 9, 2020 did not limit the filing of appellate briefs otherwise contemplated by Rule 417 of the Court's Appellate Procedure rules. In addition, the Court finds no merit to Whiteshirt's argument that new points were raised in the Reply Brief, especially since Whiteshirt failed to identify any such new points.

Accordingly, Whiteshirt's Motion to Strike is DENIED.

Whiteshirt Motion for Emergency Stay and Temporary Restraining Order

On July 7, 2020, Whiteshirt filed a Motion for Emergency Stay and Temporary Restraining Order. First, Whiteshirt's motion sought to stay the Commission's declaration of results. However, the Commission issued the Certification of Election on June 29, 2020, seven days before Whiteshirt filed the instant motion. Whiteshirt's Motion on this point is, therefore, untimely and moot.

Whiteshirt also asked this Court to temporarily restrain the installation of the individuals elected to the positions of President and Council Seat #1. The individuals elected were sworn-in on July 6, 2020. The following day, on July 7, 2020, Whiteshirt

filed his motion asking this Court to enjoin an act that had already occurred. Whiteshirt's motion on this point is likewise untimely and moot.

Accordingly, Whiteshirt's Motion for Emergency Stay and Temporary Restraining Order is DENIED.

Whiteshirt's Objection to Commission's Motion for Emergency Stay

On June 15, 2020, the Commission filed a Motion for Expedited Hearing and Motion for Emergency Stay of District Court's Order. This Court's Order dated June 18, 2020 granted the Commission's motion. Notwithstanding the Court's Order, Whiteshirt filed an Objection to the Motion over two weeks later. The Objection was not timely filed and is, therefore, OVERRULED.

Having disposed of related pending motions and objection, the Court now turns to the appeal at hand.

Commission's Appeal

On June 14, 2020, the Pawnee Nation District Court issued an Order granting Whiteshirt's request for a declaratory judgment, holding that the recall election of April 11, 2020 unseating him was unconstitutional. The District Court Order held that Whiteshirt should be reinstated and that another recall petition and election would be required to remove him from office.

On June 30, 2020, the Commission appealed the District Court Order.

II. ANALYSIS

A. Standard of Review

Whiteshirt argues that this Court should review the District Court Order to determine whether there was an abuse of discretion. The Commission argues to the contrary, that *de novo* review is proper.

Although they disagree about the applicable standard of review, both Whiteshirt and the Commission agree that the main issue before this Court is the interpretation of Article VII, Section 2 of the Constitution of the Pawnee Nation of Oklahoma (Constitution). Appellee's Response Br., 3 ("the crux of this matter, as this Court knows, are the words found in Article VII, Section 2"); Appellant's Opening Br., 2. Indeed, the parties devote the majority of their briefing and argument to the meaning of the word "conduct" in Article VII, Section 2 of the Constitution.

Interpretation of the words in Article VII, Section 2 of Constitution is a question of law. Likewise, discerning the legal requirements imposed by Article VII, Section 2 with regard to the timing of a recall vote is a question of law.

At oral argument, Whiteshirt was not able to identify any questions of fact pertaining to the interpretation of the operative words of Article VII, Section 2. In addition, he conceded in his Motion to Strike that the applicable standard of review is *de novo*. Motion to Strike, 2 ("...the standard on appeal as *de novo* and the legal question at issue.").

Questions of law are reviewed *de novo* by this Court. *In Re Jestes*, Appeal No. 09-001, at pp. 1, 11 Okla. Trib. 922 (Pawnee 2009); *see also In Re L.C.M.*, Appeal No. 03-001, at pp. 9, 9 Okla. Trib. 6, 14 (Pawnee 2005). When it comes to determining the meaning of the words in the Pawnee Nation Constitution this Court applies a *de novo* standard of review.

Accordingly, since the core question before this Court is a question of law, the Court applies a *de novo* standard of review, and does not defer to the District Court Order to interpret the meaning of the Constitution.

B. Interpretation of Constitution, Article VII, Section 2

When a valid recall petition is submitted to the Commission, the Constitution says that, “it shall be the duty of the election commission to call and conduct within thirty (30) days an election on such recall.” Constitution, Art. VII, Section 2. What does the word “conduct” mean in Article VII, Section 2? Does it mean that the vote on the recall petition has to be completed by day 30? Or, does the word “conduct” mean that the Commission has to undertake recall election activities within 30 days and diligently direct and manage recall election activities thereafter until completed? This is the issue the Court is called upon to decide.

For multiple reasons set forth below, the Court concludes that the word “conduct” refers to the Commission’s obligation to undertake the duties associated with carrying out an election within 30 days and diligently manage such duties expeditiously until completed.

1. **Plain meaning of the words “conduct” and “election” in Constitutional context**

The starting point in construing the Constitution is the Constitution itself. The Court first looks to the plain meaning of the operative words in Article VII, Section 2 of the Constitution. In this case, the operative word of Section 2 is “conduct”. *See generally, Davison v. Mohegan Tribe Election Comm.*, Appeal No. CV-08-0133, 8 Am. Tribal Law 121 (Mohegan Tribe of Conn. App. 2009), at pp. 131, *citing with approval District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) and *U.S. v. Sprague*, 282 U.S. 716, 731 (1931).

The Constitution first refers to elections in Article IV, Section 4. Section 4 establishes the general duty of the Commission “to conduct all elections.” The Constitution uses the word “conduct” to generally refer to the Commission’s duty to

direct and manage elections. Notably, the following clause of Section 4 uses the word “held” (instead of “conduct”) to refer to votes held on mandatory days: “regular elections are held on the first Saturday of May of each odd numbered year.” Constitution, Article IV, Section 4(i). Article IV, Section 4 establishes that the Commission is responsible to manage, or “conduct” elections.

The word “conduct” in Article VII, Section 2 is not a term of art and is not defined by the Constitution so it is to be given its ordinary meaning. As pointed out by the District Court Order, “conduct” is defined as “to direct or take part in the operation or management of”. District Court Order, 5; <https://www.merriam-webster.com/dictionary/conduct>. The ordinary meaning comports with the Court’s understanding of the word “conduct” in Article IV, Section 4.

Consistent with the use of the word “conduct” in Article IV, Section 4, the Election Act uses the word “conduct” to refer to the Commission’s obligation to manage various election duties. According to the Election Act, “conducting” an election involves:

- Publishing an election notice (Sec. 4(B));
- Assembling election supplies (Sec. 4(C));
- Rulings on eligibility of candidates (Sec. 4(D));
- Publishing a candidate forum (Sec. 4(E));
- Preparing for absentee voters (Sec. 5(B));
- Ordering ballots (Sec. 6(B));
- Delivery and receipt of ballots (Sec. 6(C));
- Preparing ballot box(es) (Sec. 6(D));
- Providing voting list (Sec. 7);
- Providing for absentee voting (Sec. 8);
- Managing polling places (Sec. 9);
- Providing for the canvas of election results (Sec. 11);
- Notifying the President of the Business Council of results (Sec. 11);
- Counting absentee ballots (Sec. 11(D));
- Certifying election results (Sec. 11(F));
- Conducting counts (Sec. 12(A)); and,
- Hearing challenges of election results (Sec. 12(B));

Managing polling places on election day is only one of the many duties the Commission is obligated to undertake as part of its responsibility to conduct elections. If the Commission were required to complete all of these duties within 30 days, then Pawnee voters would be disenfranchised. The Election Act imposes mandatory time frames with regard to various initial election duties:

Number of Days	Actions
5	Days upon receipt to validate recall petition
3	Days for protests of the election results (Sec. 12(A)(B))
7	Days to decide protests (Sec.12(B))
<u>21</u>	Days for voters to request absentee ballots in writing (Sec. 4 (B))
36	Total minimum days to complete essential election activities

Essential preliminary election activities take more than 30 days to complete so the word “conduct” cannot mean holding a vote within 30 days. To say otherwise infringes on voters’ interests and the Commission’s statutory obligations.

The Constitution and the Election Act should be read together to accomplish the purposes of timely recall elections while affording Pawnee voters meaningful access to the ballot and polls. Significantly, Whiteshirt has not challenged the constitutionality of the entire Election Act.

Undermining his own position, Whiteshirt conceded that the issuance of a Certification of Results by the Commission is part of “conducting” an election. Yet, Whiteshirt did not insist during argument that the Certification of Results has to occur within the 30-day time period. This fact shows his position is untenable, and demonstrates that the word “conduct” in Article IV, Section 2 contemplates a broader concept than holding a vote on a certain date.

“Conducting” an election and “holding” an election are not synonymous. The Constitution assigns distinct meanings to the words “conduct” and “held”. In Article IV,

Section 4(i) the Constitution broadly obligates the Commission “to conduct all elections.” Using the word “conduct” in this way, the Constitution assigns the ordinary meaning of directing or managing duties with regard to the election. In Article IV, Section 4 the Constitution also uses the word “held” with regard to regular elections that occur on mandatory days. Constitution, Article IV, Section 4(i) (“regular elections are held on the first Saturday of May of each odd numbered year.”). In contrast with the word “held”, Article VII, Section 2 uses the word “conduct” to refer to the Commission’s general obligation to manage elections. The Election Act makes a similar distinction between the terms “conduct” and “hold”. Therefore, in the Court’s view, the broader term “conduct” references the Commission’s obligation to manage election events; it does not include the obligation to complete all election related duties or hold a vote within the 30 days.

Even though the actual recall vote in question occurred on day 37, this Court finds that the Commission fulfilled its constitutional duty. The Commission was obligated by Article VII, Section 2 to undertake the duties associated with carrying out an election within 30 days and diligently manage such duties expeditiously until completed. The Court finds that it did so.

2. **Factual circumstances**

Evidence matters. Whiteshirt presented no evidence of deliberate, politically-motivated, or flagrant delay by the Commission. In fact, during argument Whiteshirt conceded that no such facts exist. Further, Whiteshirt presented no credible facts demonstrating that the result of the election was impacted in any way by the seven-day delay. There are no facts in the record showing that the recall election was fundamentally unfair to Whiteshirt. Moreover, there is no evidence in the record favoring the interpretation of Article VII, Section 2 suggested by Whiteshirt.

3. Policy considerations

Whiteshirt suggests that the 30-day time frame in Article VII, Section 2 is meant to protect a sitting council member. The Court disagrees. Although it may indeed take a sitting council member's interest into account, the Preamble to the Constitution makes clear that the Constitution also protects the voters and the Commission. The express purpose of the Constitution is "to secure for the Pawnee Nation of Oklahoma and its members" certain rights, powers and privileges. Constitution, Article II, Section 1.

Finally, the voice of Pawnee Nation voters matters. Approximately three hundred eighty-five (385) members voted in the recall election. If Whiteshirt's suggested interpretation of the Constitution were followed, the Commission would have less time to manage and perform all recall election activities. There would be less time for the Commission to publish election notice, assemble election supplies, prepare absentee ballots, order ballots, prepare a voter list, conduct absentee voting, etc. Voters and candidates would have less time to prepare for and participate in the recall election. The Constitution should not be interpreted in a way that does injustice to the voice of Pawnee Nation voters. *Hornbuckle v. Cherokee Bd. of Elections*, 6 Cher. Rpt 4, 2007 WL 7080147 (E. Band Cher. 2007)

Additionally, about five hundred sixteen (516) members voted in the replacement election. If Whiteshirt's suggested interpretation were followed those members' votes would be invalidated, and the voters would likely be called upon again to vote in a recall election amidst the pandemic and resulting turmoil in Tribal governance. The Court believes voters would be disenfranchised by Whiteshirt's interpretation of the Constitution.

III. CONCLUSION

Article IX, Section 6 of the Constitution authorizes this Court to determine whether an action of the government of the Pawnee Nation is constitutional, and take action "as justice may require." In this case, justice requires the Court to find that the Commission fulfilled its duty under the Constitution. The Pawnee Nation Election Commission managed, in commendable fashion, to conduct an efficient and lawful recall election in the midst of a pandemic and political strife. The Commission called and conducted the recall election in a manner that satisfied the requirements of Article VII, Section 2 of the Constitution. Therefore, the recall election held on April 11, 2020 was valid.

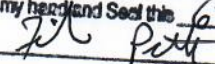
Based on the foregoing points and authorities, the Court REVERSES the District Court Order dated June 14, 2020. The recall election results stand.

Entered this 6th day of August, 2020.


Chad Harsha
Justice

Chief Justice Smith, and Justices Echo Hawk and Haskins concurring. Justice Young took no part in the consideration or decision in this case.

PAWNEE NATION DISTRICT COURT OF OKLAHOMA I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT AND COMPLETE COPY OF THE INSTRUMENT HERewith SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE. Witness my hand and Seal this 6th day of August 2020


COURT CLERK

BY _____
(SEAL) DEPUTY