

SUPREME COURT
OF THE
ROSEBUD SIOUX TRIBE

2010 JUN -1 PM 3:30

WILLIAM WHITING,
Plaintiff/Appellant

CASE NO. CA 2009-12

vs.
ROSEBUD SIOUX TRIBE ELECTION
BOARD; ROSEBUD SIOUX TRIBE
PRESIDENT, RODNEY BORDEAUX, in
his official and individual capacity,
Defendants/Appellees.

BY: _____
MEMORANDUM OPINION
AND ORDER

(Per Curiam, Chief Justice Frank Pommersheim and Associate Justices Charles Abourezk
and Leroy Greaves.)

I. Introduction

Mr. William Whiting, plaintiff/appellant, is an enrolled member of the Rosebud Sioux Tribe, and originally filed this action in the Rosebud Sioux Tribal trial court against the defendants/appellees seeking injunctive relief to prevent President-elect Rodney Bordeaux from taking office after his election in the Rosebud Sioux Tribal general election of 2009.

The gist of Mr. Whiting's complaint is quite straight forward. In 2007, members of the Rosebud Sioux Tribe voted to amend the Tribal Constitution in a number of ways, including imposing term limits for the Office of President of the Rosebud Sioux Tribe.¹ This amendment

¹ Amendment F (now found at Art. III, Sec. 2) to the Rosebud Sioux Tribe's Constitution reads in its entirety:

The President and Vice President of the Rosebud Sioux Tribe shall be elected at large for a term of three years. The Secretary and Treasurer of the Rosebud Sioux Tribe shall be elected at large for a term of two years and shall have no vote in matters before the Rosebud Sioux Tribe. The Community Representative of the Rosebud Sioux Tribe shall be elected for terms of three years. *The offices of the President, Vice President, Council Representative, Secretary and Treasurer shall be subject to limits of two consecutive terms.* The terms of Community Representatives shall be staggered terms commencing with the election in 2005. Elections for ten Community Representatives will be for the first three year term, the remaining ten Community Representative elections will be for an initial term of two years, and then it will revert to a three year term at the next general election in 2007. The decision of which ten communities will hold the first three year and two year terms will be made by the Rosebud Sioux Tribal Election Board. Each community of the reservation, as follows, shall be entitled to representation on the Rosebud Sioux Tribal Council as hereinafter provided:

became effective on September 20, 2007. Since Mr. Bordeaux had been elected twice previously to the office of President and served those terms consecutively in 2005-2007 and 2007-2009, his 2009 election, according to plaintiff/appellant, violated the strictures of Amendment F, and therefore Mr. Bordeaux was ineligible to assume the Tribal Office of President. The defendants/appellees moved to dismiss the complaint on various grounds including sovereign immunity and an assertion that decisions of the Tribal Election Board were final and not subject to judicial review.

While there is a Tribal administrative process that exists to make a wide range of challenges to the eligibility of candidates to run for Tribal office, the Tribal Election Board refused to entertain Mr. Whiting's administrative challenge to the seating of Mr. Bordeaux as Tribal President. The Tribal Election Board decided that Mr. Whiting's challenge, which came after Mr. Bordeaux's election was not timely and improperly sought to apply Amendment F retroactively.²

Special Judge B.J. Jones held a telephonic hearing on October 16, 2009³ and issued his written decision on October 27, 2009. In his written decision, he expressly denied the defendants/appellees' motion to dismiss on any of the asserted grounds in that Article XI, Sec. 3⁴

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- | | |
|-------------------|--------------------|
| 1. Antelope | 11. Okreek |
| 2. Black Pipe | 12. Parmelee |
| 3. Bull Creek | 13. Ring Thunder |
| 4. Butte Creek | 14. Rosebud |
| 5. Corn Creek | 15. St. Francis |
| 6. Grass Mountain | 16. Soldier Creek |
| 7. He Dog | 17. Spring Creek |
| 8. Horse Creek | 18. Swift Bear |
| 9. Ideal | 19. Two Strike |
| 10. Milks Camp | 20. Upper Cut Meat |

(Amendment F effective September 20, 2007 – vote 459 for; 339 against; 8 ballots spoiled or mutilated.)
(emphasis added).

² Slip Opinion at 2.

³ At this hearing, Mr. Whiting appeared *pro se* and the defendants/appellees were represented by Mato Standing High, Attorney General of the Rosebud Sioux Tribe.

⁴ Art. XI, Sec. 3 of the Rosebud Sioux Tribe Constitution provides:

of the Rosebud Sioux Tribe's Constitution "clearly provides that this Court has the authority to overturn any Election Board action that violates the Rosebud Sioux Tribal Constitution or ICRA (Indian Civil Rights Act of 1968)."⁵

Judge Jones then proceeded to the merits of the plaintiff/appellant's claim. He found that plaintiff/appellant's claim to have Amendment F applied retroactively was fatally flawed in that there was no evidence "to believe that the people of the Tribe intended it to have retroactive effect."⁶ In addition, Judge Jones noted there exists a reasonable presumption *against* retroactivity as a matter of general jurisprudence as reflected in the caselaw that exists in this area of law.⁷ Judge Jones therefore dismissed the complaint with prejudice.

This appeal followed. The defendants/appellees filed a motion to dismiss the appeal as untimely and otherwise deficient. The plaintiff/appellant opposed the motion. The parties also filed briefs on the merits of plaintiff/appellant's appeal.

This Court heard oral argument on May 4, 2010 on both the motion to dismiss the appeal and the substantive merits of the appeal itself.

II. Issues

A. The appellees' motion to dismiss raises two issues, namely that:

The notice of appeal was not filed within 30 days as required by the Tribal Rules of Appellate Procedure and was otherwise subject to summary dismissal because of plaintiff/appellant's failure to indicate what the appropriate standard of review is.

The authority of the tribal court shall include but is not limited to the power to review and overturn tribal legislative and executive actions for violations of this Constitution or of the Federal Indian Civil Rights Act of 1968 as well as to perform all other judicial and court functions.

⁵ Slip Opinion at 3.

⁶ Slip Opinion at 6.

⁷ Slip Opinion at 4.

B. The substantive appeal of plaintiff/appellant asserted that legal error was committed by Judge Jones in his failure to apply Amendment F retroactively. In addition, plaintiff/appellant asserted that Mr. Mato Standing High, the Tribe's Attorney General, did not meet the job requirements for his position and should not be permitted to argue this appeal.

Each issue will be discussed in turn.

III. Discussion

A. Motion to Dismiss

1. Notice of Appeal (Timeliness)

The appellees argue that notice of appeal filed by the appellant in this matter was not timely as required by Rule 2 of the Rules of Procedure of the Rosebud Sioux Supreme Court.

Rule 2 states in pertinent part that:

A timely filing of a Notice of Appeal commences the appellate process. The Notice of Appeal shall be filed within thirty days of notice of entry of judgment in all civil cases, . . . No extensions of these deadlines will be granted.

Appellees apply the following mathematical calculation. Special Judge Jones decision was issued on October 27, 2009 and appellant's notice of appeal was filed on November 30, 2009, which is more than thirty days and thus it does not meet the thirty day requirement. However, the thirty day period does not begin to run until the "notice of entry of judgment" and therefore the starting date is not the date the judgment was issued. Instead, it begins to run one day from the *mailing* of the notice of entry of judgment. The notice of entry of judgment is dated October 27, 2009 and allowing one day for service by mail, the thirty day period began to run on October 28, 2009.

Calculating thirty days from October 28, 2009, brings one to November 27, 2009. November 27, 2009 was the Friday after Thanksgiving. The Court takes judicial notice of

President Bordeaux's November 13, 2009 memo to all tribal programs declaring that the "Friday after Thanksgiving is a legal holiday in accordance with federal law." Whenever a procedural time requirement falls on a holiday (or weekend), it is automatically extended to the next working day. In this case, that would become Monday, November 30, 2009 and thus the appellant's Notice of Appeal dated November 30, 2009 was timely filed.

2. Summary Disposition

Appellees also moved for summary disposition based on appellant's failure to identify any standard of review. Appellees' sole citation for such a sweeping rule is the Court's decision in the case of *Farmer's State Bank of Mission v. Boyd and Boyd* (CA 89-03) (1990).

That case, however, is not nearly as broad as appellees assert. Its standard of review analysis is much more narrow and merely notes that an appellant who is challenging any of the trial court's findings of fact cannot merely declare them to be wrong, but must demonstrate and convince the court that they are "clearly erroneous" in order to prevail. The Court's opinion merely indicated the failure of appellant's to discharge this burden, but never even mentioned – much less granted – summary disposition.

In the case at bar, there are no issues of fact, but rather a solitary issue of Tribal constitutional law. The standard of review is clearly *de novo* and the appropriate analysis is simply a question of what is the proper constitutional analysis. Failure to mention to the *de novo* standard of review is wholly inadequate to justify summary disposition in favor of appellees.

B. Substantive Appeal

1. Representation of the Parties

In a preliminary matter, appellant challenges the right and authority of Mr. Mato Standing High to appear in this case as the Attorney General for the Rosebud Sioux Tribe.

Appellant asserts that Mr. Standing High does not satisfy one of the necessary conditions to hold the position of Tribal Attorney General, namely that he be admitted and licensed to practice law in South Dakota.⁸

Regardless of the merits of this assertion, the issue of Mr. Standing High's qualifications for the position of Tribal Attorney General are not properly before the Court. The Court takes judicial notice of the fact that Mr. Standing High is a duly admitted member of the Sicangu Oyate Bar Association. Mr. Standing High's membership in good standing with the Tribal Bar Association is the sole requirement for his representation of a client before this Court. His alleged failure to meet the (formal) requirements of the Tribal Attorney General position is a political and contractual matter that must be directly pursued through other administrative and legal channels before seeking any (potential) judicial relief.⁹

In a related matter, and without written notice to this Court, appellant, proceeding *pro se*, requested that he be represented at oral argument before this Court by Mr. Larry Wright. Mr. Wright is a non-law trained member of the Rosebud Sioux Tribe, but he is *not* a member of the Sicangu Oyate Bar Association. This request was *not* opposed by Mr. Standing High and the Court exercised its discretion and granted the request in order to advance fairness and the opportunity to be heard.

⁸ Sec. 4(c) of Rosebud Sioux Tribal Ordinance 88-01 provides in relevant part:

Section 4. Qualifications.

To be eligible for the Office of Attorney General of the Rosebud Sioux Tribe, a person shall meet the following standards:

c) A member in good standing of the South Dakota State Bar and the Sicangu Oyate Bar Association.

⁹ Sec. 9 of Mr. Standing High's employment contract with the Rosebud Sioux Tribe expressly provides that "This contract may only be terminated according to Rosebud Sioux Tribal Ordinance No. 88-01." Sec. 7 of Ordinance 88-01 provides:

Section 7. Removal from Office.

Removal from office shall be pursuant to Tribal Ordinance 87-05, the Recall and Removal Ordinance.

2. Retroactivity of Amendment F

The core of the substantive appeal in this case is whether Amendment F to the Rosebud Sioux Constitution, which created a Tribal Constitutional time limit of “two consecutive terms” for a number of Tribal offices, including President, should be applied retroactively.

In Judge Jones’ decision, he acknowledged that since this Court had not rendered any decision on the matter of retroactivity, he would look elsewhere for guidance. Judges Jones found such guidance principally in two cases, namely *Child v. Lomax*, 188 P.3d 1103 (Nev. 2008) decided by the Supreme Court of Nevada and *Clark v. Arakaki*, 191 P.3d 176 (Hawaii 2008) decided by the Supreme Court of Hawaii. In both of these cases, the respective state supreme courts held that when the term of office commences before the term-limit amendment’s effective date, then that term of office could not be included in determining whether a term limit violation had taken place.

In the case of President Bordeaux, he was already well into *servicing* his first term of office¹⁰ before Amendment F became effective on September 20, 2007. In fact, he was almost finished with that term. Therefore under the reasoning of the *Lomax* and *Arakaki* cases, such term of office could not be used in calculating whether a term limit violation had occurred.

Appellant, not surprisingly, disagrees and suggests in his brief that Judge Jones’ decision relies too much on *state* law rather than pertinent decisions of other tribal courts. To be clear, this case does *not* involve a choice of law question to be resolved in accordance with Sec. 4-2-8 of

¹⁰ Art. III, Sec. 11 of the Rosebud Sioux Constitution which was in effect when Mr. Bordeaux was first elected Tribal President in 2005 provided:

Newly elected tribal officers and community representatives shall begin their official duties on the first business day of the first week following their certification by the Tribal Election Board. This language is preserved verbatim in the subsequently 2007 amended Rosebud Sioux Tribal Constitution, but now appears in Art. III, Sec. 12.

the Tribal Law and Order Code.¹¹ The applicable and dispositive law is the Tribal Constitution. The essential issue in this matter does not involve choice of law determinations, but rather *interpretation*, as a case of first impression, of what the pertinent Tribal Constitutional section means. In this regard, and this regard only, it is appropriate to look at similar cases decided by other courts for their potential analytical guidance and persuasiveness, but not as binding precedent.

Appellant in his brief suggests that there is a more persuasive line of tribal court cases decided by other tribal courts of appeal. Yet none of the cases cited by appellant are term limit cases and perhaps more importantly, two of the cited cases, namely the 1996 *Babby v. Babby* case for the Fort Peck Court of Appeals and 2003 *Ballini v. Confederated Tribes of Grande Ronde* make specific reference to guidance provided by federal caselaw.

Federal caselaw on this matter of statutory or constitutional retroactivity is quite instructive. The leading United States Supreme Court decision in this area of law is *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In this case which involved a question of whether an amendment to Title VII of the Civil Rights Act of 1964 which was passed by Congress while an appeal was pending should have retroactive effect, the Supreme Court articulated a number of values and policies that are in play and need to be considered in the context of determining retroactivity. The Court stated:

¹¹ Sec. 4-2-8 provides:

Law applicable to Actions in Tribal Court – The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered by applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to customs and usages of the Tribe, the Court may request the advise [sic] of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by way of the above, the Tribal Court may look to the law of any tribe or state in which is consistent with the policies underlying tribal law, custom and usages.

The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly, settled expectations should not be lightly disrupted.

Landsgraf, 511 U.S. at 265.

The Court further noted that such basic fairness concerns can be identified in a number of places in the United States Constitution such as the due process clause and the prohibition against *ex post facto* legislation. *Id.* at 266. Similar provisions appear in both the Rosebud Sioux Tribe Constitution¹² and the Indian Civil Rights Act of 1968.¹³ Therefore such concerns, including traditional Lakota notions of respect and fair play, are particularly persuasive in the case at bar.

To be clear, such a presumption *against* retroactivity can be overcome in limited circumstances where there is express legislative intent to that effect and such action does not otherwise violate Constitutional guarantees and norms. However, as noted by Special Judge B.J. Jones, there was absolutely no evidence provided that Amendment F was intended to have such an (unusual) effect. This reasoning and analysis is particularly persuasive in light of the fact that neither the parties nor this Court could identify a single case – tribal, state,¹⁴ or federal – that decided that the imposition of term limits was intended to be retroactive.

¹² See the Rosebud Sioux Tribe Constitution at Art. X, Sec. 1 which provides:

Section 1. Bill of Rights

The government of the Tribe including the community shall not:

- (f) . . . deprive any person of liberty or property without due process of law;
- (h) Pass any bill or attainder or a law, which punishes conduct after the fact;

¹³ 25 U.S. C. § 1302 (8) and (9) which provide:

No Indian tribe in exercising powers of self-government shall -

- (8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law;

¹⁴ In fact, the Ohio State Supreme Court struck down an express attempt by the City of Cincinnati to pass (local) term limit legislation with retroactive effect as violating the Ohio State Constitution. *State ex rel. Mirlisena v. Hamilton City Bd. of Elections*, 622 N.E.2d 329 (Ohio 1993).

IV. Conclusion

For all the above-stated reasons, the decision of the trial court is affirmed.

IT IS SO ORDERED.

Dated this 1st day of June, 2010.

FOR THE COURT:

A handwritten signature in cursive script that reads "Frank Pommersheim". The signature is written in black ink and is positioned above a horizontal line.

Frank Pommersheim
Chief Justice