

ROSEBUD SUPREME COURT
ROSEBUD SIOUX RESERVATION
ROSEBUD, SOUTH DAKOTA

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Case NO. CIV 11-372:)
)
ROSEBUD SIOUX TRIBE ELECTION)
BOARD, Patricia Romero, Rhonda McKenzie,)
Cecelia Fast Horse, Angie Fast Horse,)
Shannon Brill, Rosebud Sioux Tribe Attorney)
General Mato Standing High,)
)
Defendants/Appellants,)
)
-vs-)
)
Ruben McCloskey,)
Plaintiff/Appellee.)

CA No. 11-07

And

MEMORANDUM OPINION
AND ORDER

Case No. CIV 11-376:)
)
Rosebud Sioux Tribe Election Board; Vernon)
"Ike" Schmidt, Cecilia Fast Horse, Thomas)
Valandra, Marcella Prue, and,)
Rosebud Sioux Tribe; Rodney M. Bordeaux,)
President, Rosebud Sioux Tribe; and)
Rosebud Sioux Tribal Council Members, John)
Swift, Delano Clairmont, Richard "Smokey")
Whipple, Kathleen a. High Pipe, Patricia)
"Patti" Douville, Lenard "Shadow" Wright,)
Dennis "Charlie" Spotted Tail, D'Arcy "Doe")
Menard, Sr., Gabriel A. Medicine Eagle,)
Byron "Barnie" Andrews, Sr., Clayton Wright)
Sr., Lynda Douville, Arlene R. Black Bear,)
Webster A. Two Hawk, Sr., Royal Yellow)
Hawk, Claudette C. Arcoren, Dominic)
Harmon, Todd Bear Shield, Russell Eagle)
Bear,)
Defendants/Appellants,)
)
-vs-)
)
Oliver J. Semans, Sr.)
Plaintiff/Appellee.)

Per Curiam Chief Justice Cheryl Three Stars-Valandra
and Associate Justices Deborah DuBray.
Associate Justice Patrick Donovan, dissents.

INTRODUCTION

McCloskey v. RST Election Board, et al. (Civ. 11-372) and Semans v. Rodney Bordeaux, President, Rosebud Sioux Tribe, et al. (Civ. 11-376) were combined into a single hearing before the Supreme Court of the Rosebud Sioux Tribe as each case represents identical issues.

Mr. Ruben McCloskey and Mr. Oliver J. Semans, Sr., plaintiffs/appellees, are enrolled members of the Rosebud Sioux Tribe. Mr. McCloskey and Mr. Semans, Sr. originally filed their respective actions in the Rosebud Sioux Tribal trial court against the defendants/appellants (RST Election Board) seeking injunctive relief.

Plaintiffs/appellees (McCloskey/Seamans) sought to prevent the RST Election Board from certifying certain candidates as eligible for the 2011 election ballot.

McCloskey/Seamans contend that the candidates in question served two consecutive terms in office prior to 2007 and are now prevented from participating as candidates in the 2011 election due to the term limit provisions enacted in Amendment F to the Rosebud Constitution.

Special Judge, B. J. Jones, held hearings on July 29, 2011 and August 9, 2011 and granted a preliminary injunction on August 17, 2011 enjoining the RST Election Board from certifying any candidate for the 2011 election who had served two consecutive terms of office immediately prior to 2011 if that candidate assumed office for the first time after September 20, 2007, and was sworn into office in October 2007.

The trial court's decision was based on an interpretation of Whiting v. Rosebud Sioux Tribe Election Board, et. al., RST Sup. Ct. No. 2009-12, June 1, 2011 (*Whiting*), which held that the term limits provision of the RST Constitution Amendment F applied to any term after September 20, 2007. *Whiting* did not specifically state what election cycle would constitute "term one" under Amendment F.

Judge Jones granted the RST Election Board an expedited RST Supreme Court review due to the timing of the 2011 election and for a further clarification of the ruling in *Whiting*.

STANDARD OF REVIEW

Similar to *Whiting*, there are no issues of fact. The standard of review by this Court is a de novo review as the questions before the Court pertain only to a constitutional analysis and appellate court case interpretation.

ISSUE

The matter before the RST Supreme Court calls for a clarification and application of the holding in Whiting v. Rosebud Sioux Tribe Election Board, et. al. (citation omitted), which held that Amendment F term limits did not apply to a person in office when Amendment F was passed on September 20, 2007, and that term limits for elected officials began after September 20, 2007.

DISCUSSION

Amendment F (found at Article III, Section 2) of the Rosebud Sioux Tribe Constitution provides that the offices of the President, Vice President, Council

Representatives, Secretary and Treasurer shall be subject to limits of two consecutive terms.¹

In issuing its preliminary injunction, the trial court held that term limits for elected officials under Amendment F commenced the moment the 2007 elected officials took the oath of office in October 2007.² The trial court then counted the 2007 election cycle as “term one”; the 2009 election cycle as “term two” and enjoined any person from seeking office in the 2011 election if that person served office consecutively from 2007.³

In *Whiting*, the Court held Amendment F cannot be applied retroactively to candidates in office when Amendment F became effective on September 20, 2007. To do so would be ex post facto legislation and without express legislative intent to the contrary, there is a legal presumption against retroactivity. Since no evidence or case was found to support an express legislative intent for a retroactive application of Amendment F, the President serving in 2007 did not violate the term limit imposed by the amendment. The *Whiting* opinion defined “term” but did not clarify in what year/election cycle “term one” would be imposed by Amendment F.⁴

The trial court in the instant case applied the *Whiting* analysis and reasoned that a “term” begins when a successful candidate is sworn into office. The successful candidates in 2007 took their oath of office after September 20, 2007, sometime in October of 2007. The trial court then counted 2007 as “term one” under Amendment F term limit provisions and issued it preliminary injunction.

¹ *Whiting v. RST Election Board, et al.*, Note 1, Page 1; RST Constitution, Article III, Part 2, as amended, September 20, 2007.

² *McCloskey v. RST Election Board*, CIV 22-372, Pgs 4, 5.

³ *Id.* Pg 6.

⁴ *Whiting v. RST Election Board, et al.*, Note 10, Page 7.

The majority of this Court disagrees with the trial court in its interpretation that the oath of office taken in October 2007, after the passage of Amendment F in September 2007, is to be counted as the first term under the amendment. To hold forth would still constitute ex post facto legislation and contrary to this Court's ruling in *Whiting*.

Taking an oath of office in October 2007 was not an act that occurred in isolation but rather a culmination of the entire elective process that began prior to the effective of amendment F. While the successful candidates of the 2007 General Election began service after September 20, 2007, their oath of office and the beginning of their service is a result of an entire election process that began in June of 2007 when all candidates were certified under various eligibility rules contained in the Ordinance effective on that date of certification.

The successful candidates, as with all candidates in 2007, had to meet certain criteria prior to certification and advancement to the primary election and then onto the general election followed by taking the oath to serve. The ordinance governing the 2007 election was the legal authority guiding the election process up to and including the taking of the oath of office. The swearing in of the successful candidates cannot be taken in isolation. To do so would be to apply the provisions of Amendment F retroactively to those candidates that were guided by Ordinance 86-10 in effect prior to the passage of the amendment which happened midway in the election process.

The majority Court clarifies *Whiting* and holds that Amendment F, incorporated as Article III, Section 12, began with the 2009 election cycle and the successful candidates sworn into office in 2009 served "term one" under Amendment F provisions. All terms of office, prior to the 2009 election cycle, were serving under the law in effect

prior to September 20, 2007. An election cycle begins with candidate certification and concludes with the oath of office. To hold otherwise and to uphold the trial court's preliminary injunction would be ex post facto legislation without express legislative intent and a retroactive application of Amendment F contrary to the Court's ruling in *Whiting*.

CONCLUSION

Based upon the foregoing reasons set forth above, the trial court's order is reversed and its Preliminary Injunction is dissolved.

IT IS SO ORDERED.

Dated this 19th day of October, 2011.

FOR THE COURT:

/s/ D. DuBray

Deborah DuBray, Associate Justice

Concurrence by Chief Justice, Cheryl Three Stars-Valandra
Dissent by Associate Justice, Patrick Donovan

Justice Donovan dissents from the majority opinion of this Court.

I respectfully dissent from the majority opinion.

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As a preliminary matter I would like to discuss when a term of office commences. The Appellants argue and the majority finds that the 2007 candidates' term of office commenced prior to August of 2007 when they met the tribal constitutional and statutory requirements to run in the primary election. The majority then ruled that the taking of the oath of office in October 2007 was not an act that occurred in isolation but was a culmination of the entire elective process that began prior to the passage of Amendment F and that the candidates had to meet certain criteria prior to certification and advancement to the primary election. The lower court ruled a term of office commences when an official is sworn into that office, not when he or she qualifies to run for that office. I disagree with the part of the lower court opinion that states a term of office commences when an official is sworn into office. Article III, Section 12 clearly mandates that a term of office begins the first business day of the first week following certification by the Tribal Election Board, which may occur before an elected official is sworn into office. However, I do agree with the lower court when it ruled that a term of office does not commence when he or she qualifies to run for that office. The term of office begins when the first business day of the first week following certification of the election by the Tribal Election Board. See Article III, Section 12 of the Rosebud Sioux Tribal Constitution.

Appellants argue and the majority opinion finds that Amendment F changed the requirements to run for office and by taking effect after the 2007 primary election but before the 2007 general election. The majority finds that to impose the term limits to the 2007 general election would retroactively enforce the term limit requirement of Amendment F to the 2007 general election. Some of the new requirements call for staggered terms of office and for three

year terms of office rather than two that was previously the standard term of office. They claim that it is unfair to implement the term limit requirements of Amendment F in midstream (between the primary election and the general election) before the staggered three year terms were imposed.

The appellants and the majority opinion rely on *Whiting v. Rosebud Sioux Tribe Election Board*, RST Sup. Ct. No. 2009-12 for its position that the term limit requirement of Amendment F cannot be retroactively applied to the 2007 elections. The appellants' and majority opinion reliance on *Whiting* is misplaced. The facts in *Whiting* are distinguishable from the facts of the present case.

In *Whiting*, the incumbent, who was the current President of the tribe, was in the middle of his term of office when Amendment F took effect on September 20, 2007. The incumbent was elected as President in 2005 for the 2005-2007 term of office and again in 2007 for the 2007-2009 term of office. The plaintiff alleged that Amendment F term limited the incumbent from running in the 2009 election for the 2009-2011 term of office because he had already served two consecutive terms of office and thereby his candidacy in 2009 violated Amendment F. Amendment F took effect on September 20, 2007 before the incumbents term of office from 2005-2007 had expired. The *Whiting* court ruled that Amendment F could not be retroactively applied to the 2005 election after Amendment F took effect on September 20, 2007.

In this case, the candidate was not in the middle of their term when Amendment F took effect. In fact, both candidates had garnered enough votes to pass from the primary election to the general election. Amendment F took effect on September 20, 2007 between the date of the primary election held on August 23, 2007 and the general election held on the fourth Thursday of October, 2007. The overriding factor is the fact that when Amendment F took effect, neither

candidate had started their current term of office. Both candidates were elected in the general election held a month after Amendment F had taken effect. Therefore, each candidate's term limit, specified in Amendment F, began with the 2007 election and their 2007-2009 term of office.

The majority opinion misapplies the retroactive rule announced in *Whiting*. *Whiting* stands for the proposition that a constitutionally mandated term limit requirement cannot be retroactively applied to an incumbent's term of office that started before the constitutional mandate took effect. The majority of this court interprets the retroactive rule to now include an incumbent who wins a primary election but before the general election. The lower court was correct when it ruled that a term of office begins when the first business day of the first week following certification of the election by the Tribal Election Board. See Article III, Section 12 of the Rosebud Sioux Tribal Constitution.

Amendment F is a Constitutional mandate that term limits be imposed. Amendment F does not require that term limits start with staggered terms of office or three year terms of office or a two year term. Amendment F does not specify that term limits start with a three year staggered term of office as required by Amendment F or a two year non-staggered term of office as required by tribal law before Amendment F took effect. Therefore, the term limits took effect on September 20, 2007 and should be applied to the 2007 general election. The term limits took effect on September 20, 2007 well before the general election and should be applied to the 2007 general election. It does not matter the primary election and certification process had already begun or that appellants were not capable of making the staggered term of office or that the three year terms of office applicable in the 2007 elections or that it would somehow be unfair to impose term limits at that stage of the election cycle. The dissent finds that it is unfair to the

people of the Rosebud Sioux Tribe, who duly enacted Amendment F by a majority vote of those who voted, not to impose the term limits when the amendment took effect. A constitutional amendment is a mandate and that mandate should take effect upon the Tribe on the date it takes effect.

Appellants further argue that a term of office as used in Amendment F means a three year term and that because Appellants did not start staggering the terms of office until 2009, that the new term of office that the term limit restriction applies did not start until 2009 and should apply to three year terms of office and not to terms served prior to the new three year terms. The Appellants had the authority under RST Ordinance No. 86-10 Section 102 E. to accomplish the requirement for staggered and three year terms of office before the 2007 general election. This Ordinance allows for a “re-Election to be held as a result of a contest based on violations of this Ordinance or irregularities occurring during a specific election and held with the same candidates and procedures as the contested election during hours set by the Board (emphasis added). Any contest of election resulting in a re-election of a Council representative office shall be held district wide.” Once the Tribe and the Election Board were notified that the Amendment F would take effect on September 20, 2007 they had ample time call for a Re-election under RST Ordinance No. 86-10 Section 102 E.

It does not matter that appellants were not capable of making the staggered term limits applicable in the 2007 elections as they had the authority under RST Ordinance No. 86-10 Section 102 E. to correct this. They failed to do so.

Even if Ordinance No. 86-10 Section 12 E. was not available the term limits should still have taken effect on September 20, 2007. Amendment F is a Constitutional mandate that term limits be imposed. Amendment F does not specify term limits start with a three year staggered

term of office as required by Amendment F or a two year non-staggered term of office as required by tribal law before Amendment F took effect. Amendment F does not specify term limits start before a primary election is held or when the candidates are certified to run for office. Therefore the term limits took effect on September 20, 2007 and should be applied to the 2007 general election.

For future reference, when the tribal Election Board is confronted with an issue of interpretation of tribal law or tribal constitution, they should seek a well reasoned written legal opinion. This would help avoid any confusion for the Election Board and for the people of the tribe who question the procedures and time lines involved in such law and constitutional provisions.