

IN THE SUPREME COURT OF THE OSAGE NATION
PAWHUSKA, OKLAHOMA

Supreme Court
of the Osage Nation

FILED MAY 10 2013

By 

RAYMOND RED CORN,)
Speaker of the Osage Nation)
Congress,)
)
Plaintiff,)

vs.)

JOHN D. RED EAGLE,)
Principal Chief of the Osage Nation)
)
Defendant.)

Case No. SPC-2013-01

OPINION
FOR OFFICIAL PUBLICATION

PER CURIAM.¹

In a case of first impression, the Speaker of the Third Osage Nation Congress (“Speaker”) seeks declaratory relief under section 8(a) of ONCA 12-103, *An Act to Establish a Law Governing Declaratory Judgment of the Courts of the Osage Nation; and Granting the Supreme Court Limited Original Jurisdiction* (“Declaratory Judgments Act”), asking this Court to exercise its original jurisdiction to resolve an alleged dispute over the interpretation of Article X, sections 2 and 3 of the Osage Nation Constitution (“Constitution”), which arose when the Principal Chief appointed his brother, Edward Red Eagle, Jr. (“Red Eagle”), to the Osage Nation Energy Services, LLC (“ONES”) Enterprise Board (“Board”) pursuant to Article VII, sections 14 and 15 of the Constitution. As we summarize here and explain further below, we deny the Speaker’s claim for relief.

SUMMARY

The Speaker argues that by appointing his brother to the ONES Board, the Principal Chief violated the Constitution by violating 15 ONC § 6-207, the anti-nepotism provision of the Osage Nation Ethics Law, and created an appearance of impropriety. The Principal Chief stated

¹ Associate Judge Drew Pierce sat by designation pursuant to Administrative Order No. 2013-04.

that the appointment did not violate the Ethics Law and that he did not create the appearance of impropriety. The Principal Chief further argued that this Court lacks jurisdiction because there is no adverse interest between the parties and no dispute over the language or provisions of the Osage Constitution. The parties submitted briefs in support of their respective positions, both of which provided competing interpretations and applications of constitutional language and Osage law. We take jurisdiction to resolve the dispute regarding the interpretations of the language or provisions of the Constitution in accordance with ONCA 12-103(8)(a), but deny the declaratory relief requested by the Speaker as it pertains to the alleged violation of 15 ONC § 6-207.

Based on our review of the applicable constitutional provisions and Osage law, the Court finds that the Speaker pled sufficient facts to establish jurisdiction under section 8(a) of the Declaratory Judgments Act. The Court's role in interpreting disputed constitutional language or provisions is limited, however, when, as in this matter, the Osage Constitution defers to Osage statutory law to address violations of its provisions and such law provides an exclusive remedy.

The Court finds that individuals appointed to Tribal Enterprise Boards under Article VII, section 14 ("section 14") are not in employment positions directly supervised by the Principal Chief. We further hold that, for purposes of Article X, section 3, the most appropriate definition of "appearance of impropriety" is "the appearance of a violation of law or ethics from the perspective of a reasonable person with knowledge of the relevant facts".

Finally, although we find the Declaratory Judgments Act grants us jurisdiction to resolve the dispute over the interpretation of the language or provisions of the Constitution, we also find that we lack jurisdiction to determine whether the Principal Chief violated the Osage Nation Ethics Law's ("Ethics Law") anti-nepotism provisions at 15 ONC § 6-207 because alleged violations of the Ethics Law may only be considered under 15 ONC § 6-303.

Based on the foregoing, the Speaker's request for declaratory relief is denied.

FACTS AND PROCEDURAL HISTORY

In September 2012, the Osage Nation Congress ("Congress") adopted ONCR 12-20 and ONCR 12-26, two resolutions approving the Articles of Incorporation and Articles of Operation of ONES, LLC, which is managed by an Enterprise Board composed of individuals appointed by the Principal Chief and confirmed by Congress pursuant to Article VII, section 14 of the Constitution. From December 2012 through January 2013, the Principal Chief made interim appointments of Board members under the provisions of Article VII, section 15, including a January 24, 2013 interim appointment of Edward Red Eagle, Jr., the Principal Chief's brother. Congress confirmed all but Red Eagle's appointment during its regular session in March 2013. On April 2, 2013, by majority vote, Congress authorized its legislative counsel to prepare and file this action, stating that the Principal Chief's appointment violated our Constitution and laws.

The Speaker's Complaint and Brief in Support were filed on April 4, 2013 and served on the Principal Chief, who timely filed his Answer and Brief in Support on April 19, 2013. In the interim, the Court issued an April 14, 2013 order to set briefing deadlines and to direct the Principle Chief to address a specific question in his Answer. On April 19, 2013, the Speaker filed a motion for leave to file a reply brief in response to the Principal Chief's answer. We granted the motion on April 22, 2013 and the Speaker's Reply was timely filed on April 23, 2013. On April 25, 2013, the Principal Chief submitted a motion for leave to file a surreply brief, which we denied.

STANDARD OF REVIEW

In conducting our review, we first consider *ᎠᎵᎦᎵᎦ*, "to do one's best," a unique Osage value that guides us as we attempt to balance the roles and responsibilities of each branch

of government in a manner that respects the efforts of those who prepared this Constitution as well as the interests of Osage constituency to whom we are all accountable.

The Osage Constitution was adopted to unite our Nation under the values of “Justice, Fairness, Compassion and Respect for the Protection of Child, Elder, All Fellow Beings and Self,” creating three co-equal branches of government, with no single branch holding more power than the other and each branch accountable to the whole. Osage Const. pmbl. & Art. V. Within this framework, we must evaluate constitutional provisions by reviewing the document as a whole, considering each provision as it relates to the others and giving each word its plain meaning when read in context to avoid absurd or inconsistent results.

ANALYSIS

A. The Speaker’s complaint pled sufficient facts to trigger the provisions of ONCA 12-103(8)(a), which authorizes this Court to resolve disputes over the interpretation of the language or provisions of the Osage Nation Constitution.

The Principal Chief requested this Court to dismiss the Speaker’s Complaint, arguing it lacks subject matter jurisdiction for several reasons: first, the claim was not ripe for adjudication; and second, it did not fall within the jurisdictional provisions of section 8(a) the Declaratory Judgments Act because there was no dispute over the interpretation of provisions of the Constitution. For reasons set forth below, we deny the Principal Chief’s request.

In passing the Declaratory Judgments Act, Congress found that “it is in the best interest of the Osage Nation to reserve original jurisdiction to the Supreme Court for actions of declaratory judgment between the Legislative and Executive Branches of the Osage Nation over the interpretation of the language or provisions contained in the Osage constitution.” ONCA 12-103(1). The very purpose of the Declaratory Judgments Act was to grant jurisdiction the Court may not otherwise have, provided there was a dispute over the “interpretation of language or provisions contained in the Constitution.”

In determining whether a dispute over a constitutional provision exists, we must only determine whether the Speaker's Complaint sufficiently alleged facts that triggered the provisions of section 8(a) of the Declaratory Judgments Act. We find it does. In his Complaint, the Speaker alleges that the appointment of Red Eagle to the ONES Board violated Article X, sections 2 and 3; the allegation necessarily requires an interpretation of Article VII, section 14 and Article X, sections 2 and 3. The Speaker created a de facto dispute over the applicable constitutional provisions by initiating this action. If the Principal Chief had agreed that the appointment was in conflict with the Constitution, he would have withdrawn the appointment or not made the appointment at all. There is no need to determine whether this claim is ripe for adjudication; section (8)(a) requirements have been satisfied.

B. When read in context with other provisions of the Constitution, Article VII, section 14 does not define ONES, LLC Enterprise Board positions as employment positions directly supervised by the Principal Chief.

We determine that a dispute exists over constitutional language addressing the status of ONES Board appointees appointed pursuant to Article VII, section 14, which states: "There shall be established, by Osage law, a Tribal Enterprise Board(s) in the Executive Branch, and the Principal Chief shall appoint qualified professionals to oversee operations of Osage Nation business enterprises, by and with the advice and consent of the Osage Nation Congress." The language in section 14 does not indicate whether the positions are employment positions directly supervised by the Principal Chief, but the omission of definitive language does not end our inquiry.

We must consider the language in context with the other provisions of the Constitution, particularly as they address Executive appointees. Article VII, section 15, contains language pertaining to the Executive appointment process, but also references in its first paragraph the appointments of Executive staff and boards and commissions "not provided by [the] constitution

or by law,” stating that “*all appointees* shall serve at the pleasure of the Principal Chief and shall be exempt employees, not subject to the Merit System established at Article VI, Section 22.” (Emphasis added.)

In practice, the phrase “all appointees” has not been applied to Executive appointees whose positions were created by the Constitution. Otherwise, all appointed positions would be construed as employment positions that serve at the Principal Chief’s pleasure, including section 14 appointments, which are treated separately under the Constitution. We determined, however, that such an interpretation is inconsistent with the Constitution’s efforts to evenly distribute governmental power. Despite the plain meaning of the phrase “all appointees”, we find that its provisions are limited to individuals appointed under section 15. Accordingly, section 14 of the Constitution does not define ONES Board positions as employment positions directly supervised by the Principal Chief.

C. Article X, section 8 of the Constitution precludes the Principal Chief’s direct supervision of ONES Board members by prohibiting the Principal Chief from using his office to influence Board activities.

1. The ONES Board oversees operations of ONES, LLC.

The Speaker asks this Court to find a supervisory relationship by invoking the Principal Chief’s position as the “Supreme Executive Power of the Executive Branch” to which all Board members must answer. *Reply*, p. 4. The Constitution does not characterize the relationship between the Principal Chief and Tribal Enterprise Boards as one of supervisor and subordinate. Although section 14 establishes Tribal Enterprise Boards under the Executive Branch, other than the initial appointment and removal of members, it assigns no other role or duty to the Principal Chief with respect to the operation or management of these boards. Again, we must interpret section 14’s provisions as part of the Constitution’s objective to balance power by distributing it throughout the government. In this case, the Constitution created operationally autonomous

entities whose board members may only be appointed and removed by the affirmative acts of two branches.

Under section 14, the ONES Board, not the Principal Chief, oversees the operations of ONES. We decline the opportunity to infer that the Principal Chief directly supervises ONES Board members from the sole act of appointing or removing Board members, both of which require the advice and consent of Congress.

2. Article X, section 8 prohibits officials from improperly influencing board members.

This finding is supported by Article X, section 8, titled “Independent Boards and Commissions,” which states that “Tribal officials and employees shall refrain from using tribal positions to improperly influence the deliberations, administrations, or decisions of established board or commission proceedings.” We interpret this language in the case at hand to prohibit the Principal Chief from using his position to improperly influence the operation of ONES Board; the ONES Board’s authority is exclusive, subject to the provisions of Article VII, section 14.

We determine that this analysis can be reconciled with the provisions of Article VI, section 22, which contain language pertaining to section 14 boards. The first sentence excludes from the merit-based employment system the Principal Chief’s executive staff and “other appointed positions serving at the will of the Office of the Principal Chief as described in Article VII, section 14.” This language can be reconciled within the context of the Executive appointment and removal process, which first requires the Principal Chief to exercise his discretion to appoint or remove an individual, followed by Congressional confirmation. In this context, we find that the “will” or “pleasure” of the Principal Chief is limited to his discretion to appoint individuals or remove appointees when the Constitution (or Osage law) gives him that authority.

Based on our analysis of section 14 and related Constitutional provisions regarding section 14 appointees, we find that ONES Board members are not directly supervised by the Principal Chief.

D. Article X, section 3 violations require the appearance of a violation of Osage law or ethics from the perspective of a reasonable person with knowledge of the relevant facts.

Both parties disagree about the meaning of the Article X, section 3, which requires “[a]ll tribal officials and employees of the Osage Nation [to] avoid even the appearance of impropriety in the performance of their duties.” The Speaker contends that the act of appointing Red Eagle to the ONES Board creates the appearance of impropriety because a reasonable person would find the appointment improper. The Principal Chief responded that the “appearance of impropriety” standard is “elsewhere disregarded as a vague, unenforceable standard,” that is “entirely subjective” when it is undefined. *Answer and Brief in Support*, p. 8. We are not as willing to dismiss an ethical standard regarded as so essential to Osage governance that it was included in the Constitution. We acknowledge the Principal Chief’s point, however: to enforce the “appearance of impropriety” standard, it must be defined.

We first consider the context of the “appearance of impropriety” standard, which is immediately followed by directing “[o]fficials and employees [to] refrain from abusive conduct, personal charges, or verbal affronts upon the character, motives, or intents of other officials or Osage citizens.” The Principal Chief suggests that the two sentences should be considered together. While certainly plausible, the interpretation unduly narrows what was intended to be a broad ethical standard, similar to the other standards set forth in Article X. We construe the “appearance of impropriety” standard as its own distinct standard of conduct.

We next consider the Speaker’s reference to “reasonableness,” which is an appropriate place to begin; it introduces a presumption of neutrality that requires the identification and

consideration of relevant information before drawing conclusions. Because reasonableness requires the identification and consideration of relevant information, the “appearance of impropriety” must be based on knowledge of that relevant information, not speculation about facts unknown or assumptions based on rumors, suspicions or theoretical scenarios. For an act to be improper or appear to be improper, it must be based on actual facts, not mere speculation.

Finally, the alleged impropriety must be more than a disagreeable or offensive act. It must be bound to a legal or ethical standard governing the behavior and acts of the official or employee. If a legal or ethical standard addresses the action in any meaningful way, then it can be properly evaluated and enforced. Therefore, “impropriety” means a violation of law or ethics.

Based on this analysis, we find that under Article X, section 3, the “appearance of impropriety” means the appearance of a violation of law or ethics from the perspective of a reasonable person with knowledge of the relevant facts. With this standard in place, we now turn to the Speaker’s complaint, which accuses the Principal Chief of creating an appearance of impropriety by appointing Red Eagle to the ONES Board.

E. Neither the Osage Nation Ethics Law nor the Declaratory Judgments Act authorize this Court to review alleged ethical violations except those decisions on appeal from the Osage Nation Trial Court pursuant to 15 ONC § 6-309.

Earlier we found that the Declaratory Judgments Act authorized this Court to resolve disputes between the Legislative and Executive branches over the language or provisions of the Constitution. This finding is the jurisdictional basis for our interpretation of the relevant provisions of Articles VI, VII and X of the Constitution. We do not find a similar authorization to consider the merits of whether the Principal Chief violated 15 ONC § 6-207.

The Constitution did more than enumerate powers, set standards and balance authority—it also established remedies. For example, the Principal Chief may remove any appointed position that his office appointed (whose term is not established by the Constitution or Osage

law) pursuant to Article XII. Congress may similarly remove elected and appointed officials under Article VI, section 17. Even Osage citizens may remove elected and appointed officials using the recall process in Article XI. When the Constitution designates a remedy, whether directly, such as the recall process, or indirectly, such as by directing Congress to adopt a law, that remedy cannot be supplanted by another process by inference alone—the law adopted pursuant to that constitutional mandate must include language indicating who is authorized to issue remedies.

In this case, Congress, through its Speaker, requested this Court to find that the Principal Chief violated Article X, sections 2 and 3 of the Constitution. Section 10 of the same Article states: “The Osage Nation Congress shall enact provisions for violations of the above stated code.” The Constitution deferred to Osage law regarding violations of Article X. When the Constitution mandates that Osage law govern violations of its provisions, the remedies set forth in that law are exclusive to all others in the absence of law to the contrary.

To carry out the Constitution’s directive, Congress adopted 15 ONC Chapter 6, the Osage Nation Ethics Law. Section 6-303 of the Ethics Law identifies the Attorney General as both the recipient of alleged ethical violations (for non-Congressional officials) and the initiator of any judicial action to evaluate an alleged violation. The Attorney General is charged with investigating and identifying the necessary facts to evaluate an alleged ethical violation. Under the Ethics Law, the Supreme Court was not granted the authority to adjudicate violations of ethical standards other than to receive appeals from the Trial Court. The investigative and fact-finding tasks, which are necessary components of ethical inquiries, are outside the scope of the activities this Court was authorized to perform by the Ethics Law. Moreover, section 6-303(A) states “*All* complaints of ethical violations against non-Congressional Osage Nation Officials

shall be filed with the Attorney General.” (Emphasis added.) The language is both all-encompassing and compulsory in nature.

The Declaratory Judgments Act, which authorizes actions between the Legislative and Executive branches to be initiated in the Supreme Court, must be interpreted in light of the Ethics Law’s enforcement provisions. We believe the two can be reconciled so that the Declaratory Judgments Act can be used as a tool to resolve disputes between the Legislative and Executive branches without overextending our jurisdictional reach.

The Declaratory Judgments Act did not purport to supplant any other remedy provided by law, allowing it to operate concurrently with other substantive laws and provide appropriate remedies, except when the applicable substantive law provides an exclusive remedy. In the absence of language to the contrary, the Declaratory Judgments Act cannot authorize the type of relief requested when such relief is provided exclusively by another law. The Declaratory Judgments Act can, however, be used as a mechanism to resolve the “dispute over interpretation of the language or provisions contained in the Osage Constitution” without granting the specific relief requested by the complainant.

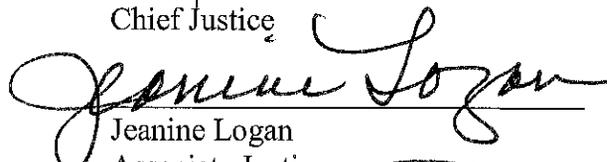
The Ethics Law includes a specific, exclusive remedy in section 6-303(A), which necessarily requires a finding that the relief requested by the Speaker is outside the scope of what the Declaratory Judgments Act authorized. Although we find that we possess the authority to resolve the dispute over the constitutional provisions at issue, our authority to grant the relief requested by the Speaker is bound by 15 ONC § 6-303. We must, therefore, deny the Speaker’s requested relief.

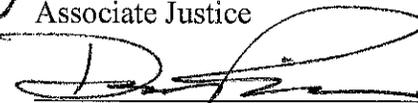
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In these formative stages of the Osage constitutional government, we are sensitive to the challenges that will arise with a new governing document, particularly one that is as broad in scope and depth as our Constitution. We anticipate, from time to time, these challenges will result in disagreements about what the Constitution requires, and that we will be asked to resolve these disagreements to the best of our ability. Despite its complications, the Osage Constitution remains our unique expression of nationhood, and ᄀᄀ.ᄀᄀᄀᄀ should guide our endeavors to implement its provisions and preserve its values.

ORDERED this 3rd day of May, 2013.


Meredith D. Drent
Chief Justice


Jeanine Logan
Associate Justice


Drew Pierce
Associate Judge, sitting by
designation pursuant to AO-2013-04