IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF WINDOW ROCK, NAVAJO NATION

OFFICE OF THE NAVAJO NATION PRESIDENT AND VICE PRESIDENT and JOE SHIRLEY, JR. in his capacity as President of the Navajo Nation, and as an individual,
Petitioners

v.

THE NAVAJO NATION COUNCIL and LAWRENCE T. MORGAN, in his capacity as Speaker of the Navajo Nation Council, and as an individual,
Respondents.

No. WR-CV-512-09

FINAL ORDER

This order is issued following a hearing on December 14, 2009 to determine whether the respondents' acts which form the basis for the complaint and petition for injunction are within their scopes of authority. Michelle Dotson, Benjamin Runkle and Kirsten Murphy appeared with the petitioner. Frank Seanez and Tamsen Holm appeared for the respondents. Having considered the record and discussion at the hearing, the court found that the respondents acted outside the scope of their authority in approving resolution CO-41-09 and were not entitled to the Sovereign Immunity Act's defenses or protections.. At the conclusion of the evidentiary hearing, the court was prepared to move to a hearing on petitioners' request for a TRO. However, the petitioners made a motion for a directed verdict, which the court granted. This order reduces the discussions from the hearing to writing, and includes further explanation for its conclusions.

PRELIMINARY MATTERS

Appearance of Legislative Counsel. Two attorneys from the Office of Legislative Counsel appeared at the hearing, and filed a Limited Entry of Appearance on behalf of the respondents. Petitioners objected to the limited appearance because the Office of Legislative Counsel had filed notice of conflict on December 9, 2009. In that letter, Frank Seanez stated that "the Office of Legislative Counsel finds that, independent of the authority of the Office of the Attorney General, it has an extreme difficulty in providing legal representation to the Navajo Nation Council and the Speaker of the Navajo Nation Council in this matter under Rule 3.7 of the Model

Rules of Professional Conduct as adopted by the Navajo Nation Supreme Court, No. A-CV-41-92." In defense of its limited appearance, the Office of Legislative Counsel argued that the limited appearance was solely for the purpose of seeking a continuance of the December 14th hearing, and for assisting the respondents in obtaining outside counsel. Further, Frank Seanez requested that another attorney from his office provide interim representation, since he anticipated being called as a witness in this case. The court granted the motion for limited appearance, and proceeded to consider the motion for continuance.

Respondents' Motion for Continuance. Respondents request that the December 14th hearing be continued, and recited the procedural background of this case to show that they lacked sufficient notice to proceed. The court finds that the respondents have received adequate notice and have had sufficient time to prepare for the December 14th hearing. On December 4, 2009 the petitioners gave notice to the respondents that they intended to file a complaint, request for preliminary injunction and TRO on December 7th. It is true that the petitioners did not include copies of the anticipated court pleadings, and Nav. R. Civ. P. 65.1 does not require that. Rule 65.1 authorizes a TRO can be sought, even without any notice. If notice is given to the opposing party, the rule requires that "notice shall be given to the adverse party or the party's counsel stating that the movant will request the court to grant a temporary restraining order." Nav. R. Civ. P. 65.1(b). That part of the rule was complied with, and notice was sent to the Office of the Speaker and to the Office of Legislative Counsel. The Office of Legislative Counsel hand-delivered a copy of that notice to the Office of the Attorney General on December 4th.

Rather than consider the TRO ex parte, the court scheduled a hearing for December 9th, and neither the respondents nor any legal counsel for the respondents appeared. Instead, both the Office of Legislative Counsel and the Office of the Attorney General issued notice to the court that they would not be representing the respondents. When questioned by the court on December 9, 2009, Henry Howe (attorney with the Office of the Attorney General) confirmed that the respondents had not been notified in writing about the non-representation as required by 2 N.N.C. §1964. At the hearing the court initially ruled that the respondents were entitled to at least 20 days to respond to the motion for TRO, pursuant to the Sovereign Immunity Act. At the conclusion of the hearing, the petitioners made an oral motion to reconsider, which the court stated it would take under advisement. On December 10th the petitioners submitted a

supplemental pleading which the court reviewed in its reconsideration. That supplemental pleading did not raise new issues, but reduced the petitioners' previous arguments to writing.

After further consideration the court granted the reconsideration in part. On December 11 the court issued an order of continuance, and rescheduled the hearing to December 14, 2009 at 1:00 p.m., stating exactly what it wished to discuss at the hearing. To ensure that all appropriate parties and counsel received notice of the hearing, the court requested that copies of the order be personally served on the Office of the Attorney General, Lawrence Morgan personally, and to the Office of Legislative Services for distribution to individual delegates. The Attorney General has an affirmative duty to represent the respondents unless he notifies his clients in writing that is disqualified from doing so. Unless the court knows that has been done, it still considers the Attorney General to be respondents' lawful counsel. The Office of Legislative Counsel was not delivered a copy, because it had already made itself clear that it would not be representing the respondents and is not under statutory duty to do so.

The dispute about who will provide legal representation to the respondents is a serious one, but the court is not willing to let that dispute cause continued delay in this case. That the respondents be challenged for their action in this matter was not unforeseen, and it is unclear to the court why the Office of the Attorney General did not have a plan for how respondents would be represented in the event that legal action was taken. In any event, the respondents have known since at least December 4th that the petitioners intended to file suit in this court. The notice of intent to sue was received by the Office of the Attorney General on December 4th, and that office is under the statutory responsibility to provide legal services to the respondents or to give written notification of disqualification so that outside counsel can be sought. Copies of the Application for TRO and Preliminary Injunction were personally served on the Office of Legislative Counsel and Office of the Speaker on December 8, 2009, as evidenced by a certificate of service filed with the court on December 9th. The court concedes that the hearings in this case have been scheduled on short notice, but finds that the respondents and the Office of the Attorney General have had sufficient time in which to prepare and appear. The court is disappointed that the office statutorily required to provide representation to the respondents seems to be satisfied with not appearing and failing to plan. The Office of Legislative Counsel has been placed in a very awkward position, and the court acknowledges that office's

determination to appear for the respondents, even in a limited capacity, in the absence of the Office of the Attorney General.

Requests for TROs are considered in an expedited manner in all cases, and this case should be treated no differently. But before the court can proceed in its usual expedited manner, it *must* make the determination about whether the respondents are entitled to the protections of the Sovereign Immunity Act. Therefore the discussion about the *Chapo* six-factor test and the scope of authority determination must be scheduled quickly. The respondents should not be able to delay the court's consideration simply by not appearing for a hearing for which they received notice. The respondents' motion for continuance is denied.

Office of Legislative Counsel's Representation of Respondents. After the court denied the continuance, the Chief Legislative Counsel made a motion for a general appearance on behalf of the respondents. The petitioners objected for the same reasons that they objected to the limited appearance. The court granted the entry of appearance, with the condition that Tamsen Holm rather than Frank Seanez provide the representation. The court finds that if this concession by the Office of Legislative Counsel alleviates enough of the conflict for that office to continue with representation, that is a decision it leaves to the Office of Legislative Counsel.

EVIDENTIARY HEARING TO DETERMINE SCOPE OF AUTHORITY

The primary purpose of the hearing was to determine whether the respondents' acts were within their scopes of authority. Our Supreme Court has set out a six-factor test to guide the court in the determination. *Chapo v. Navajo Nation,* 8 Nav. R. 447 (Nav. Sup. Ct. 2004). The factors for this court to weigh are: 1) the officials' positions, 2) the action taken by the officials, 3) the officials' authority and restrictions on that authority defined by applicable statute or regulation, 4) the officials' responsibilities as defined in a job description or departmental policies and procedures, 5) any valid instructions to act or not to act received from a supervisor or other superior official, and 6) responsibilities and restrictions on the authority of leaders under Navajo Common Law. *Id.* The court analyzes each factor separately with respect to the respondents' actions.

Officials' positions. Lawrence Morgan is the Speaker of the Navajo Nation Council. The Navajo Nation Council is, as a whole, the governing body of the Navajo Nation.

Actions taken by the officials. The petitioners elicited testimony about many different actions and purported motivations of the respondents, some of which were unrelated to the complaint or petition for TRO and preliminary injunction. The specific actions taken by the officials which has led to the complaint is the adoption and enforcement of resolution CO-41-09. The enforcement of resolution CO-41-09 placed President Shirley on administrative leave with pay, "during the pendency of the investigation and possible prosecution of ethical, civil and criminal charges by the Navajo Nation through a Special Prosecutor." An Action Relating to an Emergency; Placing Certain Navajo Nation Officials on Administrative Leave, Referring Reports to the Attorney General for Application to the Special Division of Window Rock District Court for a Special Prosecutor, Resolution CO-41-09, October 26, 2009. The petitioners argue that the respondents acted outside of the scope of authority when they passed this resolution.

The officials' authority and restrictions on that authority defined by applicable statute or regulation. Respondents' authority and restrictions are codified throughout Title 2 of the Navajo Nation code. Specifically, section 102 directs that the "Council shall be the governing body of the Navajo Nation ... and [a]ll powers not delegated are reserved to the Navajo Nation Council." 2 N.N.C. §102(A), (B). Section 164 authorizes the Council to review and approve statements of policy, enactment of positive law, intergovernmental agreements, budget resolutions, and reallocations pursuant to statutory procedure. 2 N.N.C. §164. The Speaker's specific powers and duties are outlined in 2 N.N.C. §285. All government officials and employees, including the respondents in this case, must "at all times conduct themselves so as to reflect credit upon the Navajo People and government; and comply with all applicable laws of the Navajo Nation with respect to their conduct in the performance of the duties of their respective office or employment." 2 N.N.C. §3744.

Statutory provisions within Title 11 were also discussed as authority for the respondents' actions in placing the President on administrative leave. See 11 N.N.C. §240. Petitioners make two arguments with respect to this provision. First, they argued that CO-41-09 does not comply with 11 N.N.C. §240. Second, petitioners argued that §240(C) is "antiquated," is in conflict with the powers of the President in Title 2, and is ultimately void. The court declines to comment on the validity of 11 N.N.C. §240(C), or to analyze whether CO-41-09 complies with the requirements of that section. The court concludes that CO-41-09 was approved in violation of 2

N.N.C. §164, and therefore need not address the issue of compliance with or validity of 11 N.N.C. §240 in this case.

The petitioners also argued that CO-41-09 illegal because it is a bill of attainder, and presented testimony that CO-41-09 was part of a pattern of proposed legislation intended to punish the President for his political initiatives. The court's ruling in this action is based on the respondents' non-compliance with 2 N.N.C. §164, and the court need not speculate as to respondents' intentions or motivations. Therefore, the court does not make any findings or conclusions with respect to petitioners' arguments about CO-41-09 being a bill of attainder.

The officials' responsibilities as defined in a job description or departmental policies and procedures. There was no testimony or evidence about how the respondents' job descriptions or any departmental policies or procedures impact this case, and neither party made any legal argument about this factor. Since the respondents' authority in question is derived from statutes, the court finds that job descriptions or department policies would not influence its decision.

Any valid instructions to act or not to act received from a supervisor or other superior official. Both sides argued vigorously about the affect and weight of an October 26, 2009 letter to the Speaker from the Attorney General. The letter was admitted as exhibit G. In the letter, the Attorney General discusses the authority and requirements for placing the President or Vice President on administrative leave, and concludes that "[i]t is my conclusion that the Navajo Nation Council has no basis for placing the Vice President on Leave and should exercise caution in action on Legislation No. 0617-09." Exhibit G. Petitioners argue that the letter was the Attorney General's legal opinion prohibiting the respondents from acting on legislation 0617-09, while the respondents argue that the letter constitutes legal advice from the Attorney General simply cautioning the respondents in acting on legislation 0617-09.

The court acknowledges that the Attorney General is the Chief Legal Officer of the Navajo Nation (*see 2 N.N.C. §1964(A)*), but it is not convinced that that position is a "supervisor" or "superior official" in relationship with any of the respondents. The Attorney General renders legal services to the government through direct representation, attorney general opinions on questions of law, and in many other ways. There may be serious repercussions when a client acts contrary to the advice of their designated legal counsel, but there is no Navajo Nation statutory or case law that requires clients to comply with counsel's advice. With respect

to this factor of the *Chapo* test, the court finds that the Attorney General was not the Speaker's supervisor or superior official.

Responsibilities and restrictions on the authority of leaders under Navajo Common Law. Petitioners argue that the respondents violated k'é in approving CO-41-09. Specifically, they argue that k'é informs the Navajo analysis of due process, and that k'é requires that the President receive notice of the proposed resolution and an opportunity to defend his position against administrative leave. The court agrees that k'é is a cornerstone upon which our society is created and continues, and that all of our leaders should act as required by k'é. But since 2 N.N.C. §164(4) itself specifically requires copies of proposed resolutions be sent to the Office of the President, the court need not base its decision on a violation of k'é.

Weighing of factors:

In weighing the six factors as required by *Chapo*, the court finds that the respondents acted outside of their authority in enacting resolution CO-41-09. The reason for this is that they failed to comply with the mandates of 2 N.N.C. §164. The respondents have no authority to act contrary to the procedures in the Navajo Nation Code. Section 164 dictates how a proposed resolution is introduced to standing committees and to the Council, and the procedures that must be followed. After a proposed resolution is drafted and assigned a tracking number, "the Speaker of the Navajo Nation Council shall assign the proposed resolution to the respective oversight committee(s) of the Navajo Nation Council having authority over the matters contained in the proposed resolution for proper consideration and distribute a photocopy of the proposed resolution to the Office of the President, Office of the Attorney General, Office of the Controller and the affected division, department and/or program." 2 N.N.C. §164(A)(4). After consideration, the appropriate standing committee(s) may take one of three actions on the proposed resolution: pass it, defeat it, or table it. §164(A)(4). If the proposed resolution is marked up (changed) by the standing committee(s) then it is presented to the Council as an amendment. §164(A)(5). Then, at least 15 days before a scheduled regular Council session, the Ethics and Rules Committee develops a proposed agenda. "The proposed resolutions to be placed on the proposed Navajo Nation Council agenda shall have completed the procedures set forth in Subsections (1), (2), (3) and/or (4) of this Section prior to placement on the agenda." Section 164(A)(7).

Both parties agree that proposed resolution CO-41-09 was not assigned to any standing committee, nor was it sent to the Office of the President. The petitioners argue that proposed resolution CO-41-09 was subject to the requirements of §164(A)(4) and is void because those procedures were not followed. Respondents argues that because CO-41-09 was an emergency resolution, that it was not subject to the provisions of §164(A)(4). The parties argued at great length about whether CO-41-09 was appropriately an emergency resolution pursuant to section 164(A)(7)(a). The court finds that it is not necessary to consider whether the proposed resolution was or was not an emergency. Emergency and non-emergency resolutions are all subject to the provisions of §164(A)(4).

Section 164(A)(7)(a) does include a waiver of some procedure for emergency resolutions. Specifically, section 164(A)(7)(a) states that "Resolutions which address matters which constitute an emergency shall not be subject to this provision." The question, then, is what the phrase "this provision" means in terms of waiving procedure for emergency legislation. The court finds that "this provision" refers only to the requirements of section 164(A)(7) and not to the other subsections of section 164. The language in §164(A)(7)(a) and the disagreement about its meaning and effect leads the court to find that it is ambiguous. "Shall not be subject to *this provision*" could be read as a waiver of all subsections within section 164, or could be read as a waiver of only some of the sections. When statutory language is ambiguous, the court turns to rules of statutory construction to make an appropriate interpretation.

As discussed above, there are many requirements within section 164, contained in separately numbered subsections. When the Council intends to include multiple subsections in a statute, it does so by specifically identifying the subsections it is referring to. This is clear in the language of 2 N.N.C. §164(A)(7) itself: "The proposed resolutions to be placed on the proposed Navajo Nation Council agenda shall have completed the procedures set forth in *Subsections (1), (2), (3) and/or (4) of this Section* prior to placement on the agenda." *Italics added.* If the Council intended that some, but not all, subsections of §164 be waived for emergency resolutions, it would have specifically identified which subsections were waived, like it did in subsection 7. But the Council did not identify specific subsections to be waived for emergency resolutions, stating only that emergency resolutions are not subject to "this provision."

It is not reasonable that "this provision" means the all of the subsections of section 164. If, for example, emergency resolutions were exempt from subsection (A)(1) of section 164, then

any individual could introduce proposed emergency resolutions to the Council, instead of only delegates, standing committees or certain authorized employees. And if emergency resolutions were exempted from the requirements of subjection (A)(3) of section 164, then it would not be assigned a tracking number by the Office of Legislative Services. It is *possible* that the Council intended to exempt emergency resolutions from all of section 164(A)'s requirements, but the court finds that it is more likely that the exemptions for emergency resolutions were intended to be limited to subsection (A)(7) of section 164. Instead of exempting emergency resolutions from all of the requirements of section 164, the court finds that they are only exempt from the requirements in subsection (A)7 – that is, they are exempt from the requirement of being placed on the proposed agenda at least 15 days before the Council session. Because of the exemption from that requirement, emergency resolutions may be considered for placement on the Council's agenda from the council floor.

Based on the above discussion, the court finds that the only provision that emergency resolutions are exempt from is subsection 7 of 2 N.N.C. §164. Emergency resolutions are still subject to the requirements of subsection (A)4 of section 164, including consideration by appropriate standing committees and distribution to the Office of the President. Both parties agree that resolution CO-41-09 did not follow the requirements of section 164(A)(4). The respondents are only authorized to consider and approve legislation in compliance with statutory requirements, and since CO-41-09 was approved in violation of 2 N.N.C. §164 it was outside of the respondents' scope of authority.

Because the respondents acted outside of their scope of authority, a suit against them does not fall within the Sovereign Immunity Act, and they are not entitled to that act's defenses or protections. That means that the respondents are not entitled to at least 20 days to respond to the motion for temporary protection order, and that the court can proceed in considering that request pursuant to Nav. R. Civ. P. 65.1.

DIRECTED VERDICT

After the court concluded the evidentiary hearing and determined that the respondents were not acting within the scope of their authority, it was prepared to proceed to a discussion about the petitioners' request for a temporary restraining order. Before that discussion, however, the petitioners made an oral motion for directed verdict, asking the court to declare CO-41-09

null and void. That motion was granted. Directed verdicts are appropriate only in the jury trial context, and to that extent the petitioners are not entitled to a "directed verdict" per se. *See* Nav. R. Civ. P. 47; *Judy v. White*, 8 Nav. R. 510 (Nav. Sup. Ct. 2004). Nevertheless, the court finds that the necessary consequence of finding that the respondents acted outside of their scope of authority is to declare that the legislation enacted pursuant to that unauthorized action is null and void. It cannot be otherwise.

It is self-evident that the Navajo Nation Council can only approve legislation within the bounds of its authority. If it exceeds its authority, any purported action taken cannot be valid. In this case, the court has already found that the Council acted outside of its authority because it did not follow the statutory procedures mandated by 2 N.N.C. §164. Therefore, the legislation that it passed in violation of §164 is not valid.

There is no need to continue with a hearing on the temporary restraining order or preliminary injunction. Since CO-41-09 is null and void, it cannot be enforced. The respondents are therefore permanently enjoined from enforcing any aspect of CO-41-09 since it has been declared null and void.

CONCLUSION

No individual and no government authority is above the law. In this case, the Navajo Nation Council purported to enact a resolution without following the law, and that is not allowed. Unless and until it is changed, Title 2 is organic law and it creates a three-branch government of separate powers, with intended checks and balances within each branch. If the Council believes that the President has acted inappropriately with respect to his dealings with private companies ONSAT and BCDS, or in any other respect, it may take action by following all of the requirements of the law. This decision makes no comment on the appropriateness of any government or individual actions other than the Council's purported enactment of CO-41-09.

Resolution CO-41-09 is unenforceable because the respondents did not follow the appropriate procedures when approving it.

So ordered December 16, 2009.

Judge G. Benally, Window Rock District Court