IN THE CHOCTAW TRIBAL SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

KEVIN J. EDWARDS — PETITIONER

v.

CAUSE NO. SC 2017-02

VICKIE WISHORK-RANGEL; ELIJAH K. JIMMIE; CHRISTOPHER SHANE COTTON — RESPONDENTS

BEFORE: Chief Justice Kevin Briscoe, Associate Justice Brenda Toineeta Pipestem and Associate Justice Edwin R. Smith.

OPINION

This matter comes before the Court on Petitioner Kevin J. Edwards' March 1, 2017, "Petition for Emergency Review" filed under the authority of the Revised Tribal Election Ordinance, Article XIV ("Ordinance 6"), Section 3(c) and Section 4 challenging the February 8, 2017 decision of the Tribal Election Committee (TEC). Petitioner Edwards filed this action *pro se.* Respondents/Sponsors on March 21, 2017 filed an "Amended Response Of Vickie Wishork-Rangel, Elijah K. Jimmie And Christopher Shane Cotton To Petition For Emergency Review Of Petitioner, Kevin J. Edwards; and Emergency Request For Stay."

The TEC issued its decision on February 8, 2017, finding that "the Sponsors[']application for an initiative petition on the use of the *Ramah*[1] Settlement funds complies with requirements for an initiative under Ordinance 6, Article XIV." (italics added). During the pendency of the application from the date of filing with the Chief to the date of TEC's decision, the Tribal Council enacted resolutions CHO 17-031 and CHO 17-032 in direct conflict with the application's proposed initiative measure.

[1] *Ramah Navajo Chapter*, et al., *v. Jewell,* Case No. 90-CV-957 (D.N.M.)

Based on the analysis below, this Court reverses the decision of the TEC and denies the Respondents'/Sponsors' application due to the proposed measure as a whole not complying with the definition of an "initiative" and the fact that resolutions CHO 17-031 and CHO 17-032 were in place prior to the TEC's review and decision.

PROCEDURAL HISTORY

December 5, 2017: Application for an initiative filed with the Office of The Tribal Chief.

December 30, 2016: Chief Anderson forwarded to the TEC the application for an initiative along with her comments and concerns.

January 4, 2017: Respondent Vickie Wishork-Rangel sent a letter to the TEC, dated January 4, 2017, addressing Chief Anderson's December 30, 2016, letter stating, "Chief Anderson's point is well taken that the $17 million Ramah Settlement does not qualify as Tribal Trust Funds. We may voluntarily address that and make an amendment, but that too is not a procedural deficiency." (emphasis added) See *Petition for Emergency Review*, Exhibit "D".

January 10, 2017: The Tribal Council enacted Resolutions CHO 17-031 and CHO 17-032.

February 8, 2017: Chief Anderson notified the TEC about the two resolutions.

February 8, 2017: TEC issued its decision notifying respondents that their application for an initiative petition complies with Ordinance 6 requirements for an initiative measure and noted that the TEC was aware of the two Tribal Council resolutions enacted on January 10, 2017, on the same subject.

JURISDICTION

This Court has original jurisdiction over the March 1, 2017, Petition for Emergency Review ("Petition") under Ordinance 6, Sec. 3(c) that states that "any registered voter other than a Sponsor . . . may . . . file a petition for emergency review with the Choctaw Supreme Court."

STANDING

Respondents/Sponsors challenge the standing of Petitioner Edwards who under Ordinance 6, Article XIV Sec. 4(d) must have "established a right thereto under the legal standards applicable to cases seeking mandamus relief." Because the issue of standing is a question of law, we review *de novo*. As to "the legal standards applicable to cases seeking mandamus relief," the Court reviewed federal and Mississippi state case law and based on the standards enumerated below find that Petitioner Edwards has standing to bring this action for emergency review.

The U. S. Supreme Court in *Kerr v United States Dist. Court for Northern Dist., 426 U.S. 394 (1976)* referenced the conditions required for mandamus:

> [W]rit [of mandamus] will issue only in extraordinary circumstances, we have set forth various conditions for its issuance. Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires . . . and that he satisfy "the burden of showing that (his) right to issuance of the writ is 'clear and indisputable.'" "Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed."

Id. at 403 (internal citations omitted).

In regard to federal court review of agency actions, the court in *Newsome v. EEOC,* 301 F.3d 227, (5th Cir. 2002), stated that "to be granted a writ of mandamus, '[a] plaintiff must show a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other

adequate remedy is available.' *U.S. v. O'Neil*, 767 F.2d 1111, 1112 (5th Cir.1985) (quoting *Green*, 742 F.2d at 241)." Id. at 231.

Under Mississippi case law, there are five requirements for standing under mandamus:

> (1) the petitioner must be authorized to bring the suit, (2) there must be a clear right in petitioner to the relief sought, (3) there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel, and (4) there must be no other adequate remedy at law. . . . In addition . . . [5] petitioners for writs of mandamus must also show that they have an interest "separate from or in excess of that of the general public" in order to have standing to seek the writ.

Bennett v. Board of Sup'Rs, 987 So.2d 984, 986 (2008) (internal citations omitted).

Recognizing that the federal requirements for mandamus are included and expanded upon in Mississippi case law, the Court will review standing under Mississippi law *de novo*. The Court assesses the Petitioner's standing under mandamus as follows: (1) Under Ordinance 6 Section 3(c), any registered voter not a sponsor may file a petition for emergency review. Petitioner Edwards is a registered voter. (2) and (5), Petitioner has a clear right separate from that of the general public because he is a member of the tribal council that has constitutional authority to allocate all tribal funds. See *DuPree v. Carroll*, 967 So.2d 27, 28 (Miss. 2007) (finding that a petitioner's clear right to the relief sought was found by finding that the petitioner had an interest in excess of the relief sought by the general public in its analysis in an action involving individual members of a city council against it's mayor: "The council members have demonstrated that, by virtue of their position as the legislative check and balance on the executive power of the mayor, they have a separate interest or an interest in excess of the general public. Accordingly, they have also demonstrated they have the standing necessary to seek a writ of mandamus."). (3) There is no disagreement that the TEC is under a legal duty to determine whether the initiative application complies with Ordinance 6, Sections 1 and 2. (4) Ordinance 6 provides no other remedy at law to hear Petitioner's claim that the TEC has no authority under Ordinance 6 or the Revised

Mississippi Band of Choctaw Indians Constitution ("Constitution") to approve an initiative measure to move forward or by-pass a Council Resolution that is in direct conflict. Based on Petitioner having met the requirements for standing, the Court finds that Petitioner may bring this action for emergency review.

ANALYSIS

Petitioner challenges the TEC's determination that the Respondents' application complies with the requirements for initiatives under Ordinance 6. The Court reviews questions of law *de novo*.

The rights of tribal members to propose and pass laws through the power of initiative has been reserved unto them under Article XI of the Constitution:

> Sec. 1. The members of the tribe reserve to themselves the power to propose ordinances and resolution[s] and to enact or reject the same at the polls independent of the tribal council . . . . The members of the tribe also reserve power at their own option to approve or reject at the polls any act of the tribal council.
>
> Sec. 2. The first power reserved by the members of the tribe is the initiative. Thirty percent (30%) of the registered voters shall have the right by petition to propose amendments to this constitution and bylaws and to propose ordinances and resolutions. The second power is the referendum . . . .
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> . . . .
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> Sec. 6. Referendum or initiative petitions filed under Article XI must be submitted under a cover letter signed by at least three (3) sponsors who are members of the tribe and who are registered to vote in tribal elections. ... [S]aid petitions must be filed in accordance with a procedure to be established by the tribal council.

The Tribal Council enacted Ordinance 6 thereby establishing the procedures for members of the tribe to propose, make or reject ordinances or resolutions through initiatives and/or referendums.

Ordinance 6 also confers the authority to administer the tribal regulation upon the TEC. As such, the Court will give the agency deference in its interpretation of an ordinance when there is an express or implied delegation to the agency about a particular question as long as the agency's interpretation is reasonable. See *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 US 837 (1984).

In order to determine whether the TEC committed legal error in its decision to certify the application as having met the requirements for initiative under Ordinance 6, the Court will conduct a two part analysis. Under the FIRST STEP, the Court will determine whether Ordinance 6 is silent or ambiguous in regard to the issue before the court. If it is, the Court will proceed to STEP TWO and will decide whether the TEC's interpretation of the issue is reasonable or permissible under the law. See id. at 843. However, if Ordinance 6 is clear and unambiguous in regard to the issue, the Court and the TEC must adhere to the language in the ordinance and the Court's review will end. See id. at 843.

THE APPLICATION'S MEASURE DOES NOT QUALIFY AS AN "INITIATIVE"

The first issue that Court will address is Petitioner's claim that the TEC should not have made a favorable decision on the application because the proposed "Measure does not provide any legal process for addressing the remainder of the *Ramah* funds after the proposed per capita payments are completed." (emphasis added). Petition, at 5. The Sponsor concedes this point in its January 4, 2017, letter to the TEC[2] but neglected to address the conceded point by either amending the proposed action or removing the proposed action in the application's measure. The application could have been amended prior to the TEC reviewing the application because Respondents were not required to address all the *Ramah* Settlement funds. However, once a proposed action is included in a measure for TEC review, the TEC must make its determinations under Ordinance 6

[2] "Chief Anderson's point is taken that the $17 million dollar Ramah (sic) Settlement does not qualify as Tribal Trust Funds. We may voluntarily address that and make and amendment, but that too is not a procedural deficiency."

Sec. 3 that provides:

(a) Upon the Tribal Election Committee's receipt from the Chief of an initiative cover letter and application for a petition, the Committee shall determine if the application complies with the applicable requirements set forth in Sections 1 and 2 hereof, including determination of whether the initiative proposed is legislative or administrative in nature . . . That application for a petition for a proposed initiative ... may be filed with the Chief at any time.

(emphasis added).

Respondents, however, misunderstand the scope of the TEC in reviewing their application for compliance with Ordinance 6 initiative requirements. In the Wishork-Rangel's letter to the TEC dated January 4, 2017, the sponsor states that the TEC is "charged with evaluating the petition application based on the seven (7) requirements stated in Article XIV, Section 1 (d). The Tribal Election Committee will make a procedural assessment and will either approve or reject the application based solely on those seven (7) requirements." But, Section 1(d) is just one part of the Section 1 analysis that the TEC is required to undertake under Section 3(a) as discussed above. In fact, the 7 requirements listed under Section 1(d) arguably represent the final checklist for an application under the TEC's review.

In fact, the initial threshold question that the application must pass is whether the proposed measure is in fact an "initiative" as defined by Ordinance 6 Section 1(b)(ii):

> An 'initiative' is any legislative measure proposed by members of the Tribe to adopt an ordinance or resolution which if enacted by the Tribal Council would constitute 'legislative action' except for an ordinance or resolution that would amend or change a prior ordinance or resolution, which actions can only be taken by referendum.

Before that question can be answered, a review of the definition of "legislative action" under Ordinance 6 is warranted. Section 1(b)(iv) defines it as "a Tribal Council action which adopts or enacts a new law, new tribal policy or new plan approving a particular project, program, business

or other objective." That the application's initiative measure[3] proposes two actions was recognized by the TEC in its Decision -- "The document submitted seeks to adopt a new plan or policy governing the use of tribal funds . . . [1] for per capita payments to tribal members in the amount of $1000 and then [2] *place the remaining balance in a tribal trust account for future use*." (emphasis added).

The Court agrees with the TEC finding that "[t]he Sponsors' proposed initiative to enact the proposed new plan or policy to appropriate the use of the Ramah Settlement funds for per capita payments to tribal members does seek to enact a resolution which is legislative in nature." (emphasis added). The TEC, however, did not address the second action of the proposed initiative measure that "place[s] the remaining balance in a tribal trust account for future use." This they should have done. Under Ordinance 6 Section 3(a) above, since the proposed measure has two proposed actions, each action must be assessed as to whether it is legislative or administrative in nature in order to make a complete determination on whether the proposed Measure as a whole qualifies as an "initiative." This inaction by the TEC in regard to the second action proposing to "place the remaining balance in a tribal trust account for future use" (Trust Account") makes their analysis incomplete. This is a particularly compelling omission in light of the Sponsor Wishork-Rangel's concession that "Chief Anderson's point is taken that the $17 million dollar Ramah Settlement does not qualify as Tribal Trust Funds. We may voluntarily address that and make an amendment, but that too is not a procedural deficiency." The initiative procedures under Ordinance 6 do not expressly allow for amendments once the TEC has determined that that application complies with the requirements of Ordinance 6 and the question has been formulated based on the information in the application. This announced plan for possible future modification if it were allowed therefore leaves open the question as to whether any future modification in the proposed action would be legislative or administrative in nature. Furthermore, the 300 signatories to the proposed initiative measure (if they were obtained) would have had no way of knowing that

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[3] The application measure proposed states that "[t]he proposed initiative measure . . . proposes per capita payment to individual tribal members in the amount of $1,000 and the reminding [sic] balance to be deposited in the Tribal Trust Account for future use"

they were signing onto a plan that the Sponsor Wishork-Rangel had already conceded to the TEC was legally impracticable. Finally, neither the Court nor the TEC could make a determination now as to what the nature of the possible change in action would be at a future time.

The TEC cannot choose to ignore its role and responsibility under the ordinance to evaluate the measure in its entirety, particularly in circumstances such as here where the second half of the proposal is conceded to be legally impossible. Its action in choosing to do so is both arbitrary and capricious and therefore, cannot be sustained by this Court.

The application's Trust Account proposal gives rise to further ambiguity in that it does not constitute "legislative action . . . which adopts, or enacts a new law, new tribal policy or new plan" under Section 1(b)(iv). Instead the Trust Account language merely performs a mundane administrative action of "plac[ing] the remaining funds in a tribal trust account" after the legislative action of authorizing per capita for tribal members is completed. Under Ordinance 6 Section 1(b)(v) "administrative action" is defined as an:

> [A]ction which approves a particular stage or step or contract award in furtherance of or to implement a law, tribal policy or plan previously approved or enacted by the Tribal Council. Administrative actions of the Tribal Council are not subject to referendum or initiative."

Under this definition, part two of the proposed action may well be "administrative" because the action being proposed is more in the nature of being in furtherance of or in implementation of the first proposal than it is of adopting a new plan or policy, as the *Ramah* funds were arguably already in an account awaiting future use at the time the proposal was submitted. Again, there is no requirement that Sponsors propose a plan in their Measure to allocate the use of all *Ramah* Settlement funds, but since they did, none of the proposed actions can be found to be administrative in nature. For the above reasons, again, the action of the TEC characterizing the whole of the proposal as an "initiative" fails, when a later determination of the second half can only be speculative; is presently written with the legal impossibility of placing the remaining

funds in a tribal trust fund account; and the action itself of depositing remaining funds in an account is found to be administrative in nature. Again, there is no requirement that the Respondents/Sponsors allocate the whole of the Ramah settlement funds, but since they chose to do so, the second half of the proposed plan cannot be purely administrative in nature.

Under the Court's analysis to determine whether deference will be given to the TEC decision, the language of the ordinance is clear and unambiguous. The TEC neglected to determine the status of the application's Trust Account proposal. Under the definitions provided in the ordinance, the Trust Account proposal is administrative in nature, and therefore, cannot be the subject of an initiative. Therefore, the proposed Measure in its totality does not qualify as an initiative. The TEC, again in that respect, erred in its finding that the application complied with the requirements under Ordinance 6 for initiative measures.

Resolutions Duly Enacted Under Law May Not Be Circumvented by An Unapproved Application for Initiative Measure

Petitioner Edwards also argues that the initiative "[m]easure is unconstitutional and cannot be enacted due to the actions of the Tribal Council approving a budget submitted by the Chief for specific Tribal projects and priorities to be funded with the *Ramah* funds through Resolutions CHO 17-031 and CHO 17-032." (Petition, at 4). Edwards further states that "there is no authority in Article XI or in Ordinance 6 that permits the power of the initiative to *by-pass* the constitutional role and authority of the Tribal Chief and Tribal Council to legislate regarding all tribal funds." (emphasis added).

The next issue before the Court is whether the TEC, with knowledge that the Tribal Council had passed CHO 17-031 and CHO 17-032, committed legal error in deciding to use December 5, 2016, as their date to assess the application's compliance with the requirements in Ordinance 6 instead of using the TEC's actual date of review, and we find that they did.

Under STEP ONE of weighing deference to the TEC's interpretation of Ordinance 6, there is only one reference to timeframes under the ordinance. Its Section 3(a) states that "[u]pon the Tribal Election Committee's receipt from the Chief . . . the Committee shall determine if the application complies with the applicable requirements set forth in Sections 1 and 2 hereof . . . ." Ordinance 6, however, provides no guidance to the TEC in regard to selecting any date (e.g., filing date with the Chief, actual date of review, etc.) or timeframe in which the application will be reviewed by the TEC after receipt. Ordinance 6 is silent and, therefore, ambiguous in regard to identifying the date in which the TEC is to determine compliance with an application for a proposed initiative measure under Ordinance 6 Section 3.

Since Ordinance 6 is ambiguous, this review continues to STEP TWO to determine whether the TEC's choice of the application's filing date of December 5, 2016, as the date for its review is reasonable or permissible under the ordinance and Constitution. It is unclear from TEC's Decision why the December 5, 2016, filing date was chosen. It is also unclear why the TEC delayed their review for over a month after they received the application. Further, even though the TEC knew during their review that the Tribal Council had enacted CHO 17-031 and CHO 17-032 on January 10, 2017, the TEC failed to cite any authority that would allow them to disregard or dismiss any significance as to the previously duly enacted resolutions when reviewing the application for compliance under Ordinance 6. Instead, the TEC stated that "Ordinance 6 is silent on whether a subsequent resolution on the same subject enacted shortly after an initiative filing would render the initiative application moot or require that the proposed initiative action be taken as a referendum." Therefore, the TEC determined that "[i]n the absence of such legislative guidance, the TEC is bound to interpret the Sponsor's initiative application [filed on December 5, 2016,] against the current initiative requirements set out in Article XIV of Ordinance 6." This Court disagrees.

No language in Ordinance 6 expressly or impliedly requires or authorizes the TEC to use the

application's initial filing date with the Chief as the date of effective review. Sec.1(c) simply states that "[t]o begin this process, qualified electors must file with the Chief . . . an application for a petition for the proposed referendum or initiative...." The ordinance does not provide any timeframe in which the Chief must forward the application to the TEC for review. In this case, the Chief forwarded the application within 30 days, but the Chief could have waited indefinitely under the ordinance. Under Section 3(a), "[u]pon the Tribal Election Committee's receipt from the Chief . . . the Committee shall determine if the application complies. . . ." Neither Section 3(a) nor any other part of Ordinance 6 provides a time frame in which the TEC review must be completed. Under the ordinance, the TEC could theoretically wait months to review and issue their decision about an application's compliance. In this case, the TEC waited over a month to review and/or issue its decision. However, nothing in the ordinance authorizes the TEC to retroactively conduct its review based on the application filing date. Further, there is no language in Ordinance 6 that an application's filing date is anything more than just "starting the process." To read Ordinance 6 otherwise is to run into a potential conflict with the constitutionally authorized parallel process of the Tribal Council's duties to enact legislation to maintain, manage and allocate all tribal funds.

As such, Article XI of the Constitution cannot be read to authorize or permit the tolling (stopping) of time based on the filing date of an application for a proposed initiative that would prevent the Tribal Council and Tribal Chief from enacting a resolution(s) on the same subject under the constitutionally authorized parallel process for legislative passage of ordinances and resolutions. The Tribal Council has authority to enact resolutions that may be in contravention of or thwarting of a proposed legislative action in an application's proposed initiative measure at least until the actual date of TEC review and notification of the parties of its determination of an application's compliance with the requirements under Sections 1 and 2 in Ordinance 6. *See, Earth Island* 456 S.W. 3d 27 (2015) ("while the legislature may amend or repeal a statute adopted by initiative or referendum after it has been adopted, it may not validly do so once the measure is *approved* for circulation and prior to its passage.". (emphasis added)). Otherwise, three qualified electors

would be able to prohibit the Tribal Council from performing its legislative duties through the mere filing of successive applications for initiative measures that may or may not meet the requirements under Ordinance 6 Sections 1 and 2. Therefore, the TEC decision to use December 5, 2016, as the effective date of review is both impermissible and unreasonable under the law. The TEC could have reviewed the application immediately upon receipt, but instead delayed its review as allowed under Ordinance 6. The TEC must conduct its compliance review of an application for an initiative based on the facts present on the actual date of review, not on an arbitrary filing date.

CONCLUSION

The TEC conducted its review on February 8, 2017, and included in its Decision that "[t]he TEC recognizes that the Tribal Council took action on January 10, 2017 [passing CHO 17-031 and CHO 17-032] to authorize the use of the Ramah Settlement funds." The TEC's finding that the Respondents' application for an initiative petition on the use of the *Ramah* Settlement funds complies with the requirements for an initiative under Ordinance 6 is reversed. The Court does note that Ordinance 6 is ripe for additional amendments to clarify the issues presented in this petition for emergency review. The TEC was presented with a truly challenging task of trying to interpret an ordinance that failed on many fronts to provide clear guidance for reviewing applications for initiative measures in the face of competing Tribal Council resolutions enacted immediately in advance of their review. The Court need not address Petitioner's argument that the substance of the application's proposed initiative measure is unconstitutional.

Based on the above analysis and findings, the TEC's determination that the application meets the requirements for an initiative under Ordinance 6 is hereby REVERSED and RENDERED.

SO ORDERED, this the 3rd day of May, 2017.

Chief Justice

Brenda Toinsata Pipestem
Associate Justice

Associate Justice

CHOCTAW SUPREME COURT
CHOCTAW, MS

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 3rd day of May, 2017, caused to be forwarded by the United States Mail or Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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