

IN THE SUPREME COURT OF THE NAVAJO NATION

Lawrence Platero,
Appellee,

v.

Navajo Election Administration,
Appellant.

MEMORANDUM DECISION

Before YAZZIE, Chief Justice, and SHIRLEY, Associate Justice.

An appeal of the Office of Hearings and Appeals decision concerning Cause No. OHA-EC-019-10, Hearing Officer Karen Bernally presiding.

Franklin Hoover, Flagstaff, Arizona, for Appellant; and Joe Lennihan, Albuquerque, New Mexico, for Appellee.

This is an appeal from a decision of the Office of Hearings and Appeals (OHA) to invalidate unofficial general election results for the Alamo chapter. The OHA's decision is reversed.

I

A general election was held on November 2, 2010. Lawrence Platero (Appellee), the incumbent, was a candidate for Council Delegate for the newly-apportioned precinct of Alamo, To'hajiilee, and Ramah chapters. Platero lost the election to his challenger, George Apachito, 993 to 840 (a difference of 153 votes) according to the unofficial results for the entire precinct. On November 12, 2010, Platero filed a *Statement of Grievance* (Statement) in the OHA against the Navajo Election Administration (NEA) to dispute the outcome of the election in Alamo,

where he lost the election 453 to 214 (a difference of 239 votes) in that chapter. Platero listed the following grievances in his Statement:

Navajo Nation election halted due to lack of election ballots denying Alamo registered voters their right to cast their vote, 11 N.N.C. § 5(A)

Voters not given information on their right to appeal if they did not vote, 11 N.N.C. § 81.

November 2, 2010 Election, voting ballot was opened and an attempt was made to hand count voting ballots. No provision in code to open ballot box and do a hand count – provides for possible fraud and unfair election, 11 N.N.C. § 408.

Statement of Grievance (November 12, 2010).

Pursuant to 11 N.N.C. § 341(A)(1), the OHA found the grievances in the Statement sufficient on its face and proceeded to a hearing, which was held on November 22, 2010. NEA was represented by legal counsel and Platero appeared *pro se*. At the conclusion of the hearing, the Hearing Officer asked the parties to file proposed final judgments by November 29, 2010. On December 1, 2010, the OHA issued a decision concluding that “Appellants [sic] appeal is hereby granted” and “parties have a right to appeal this decision to the Navajo Nation Supreme Court within 10 days from the date of this decision pursuant to 11 N.N.C. § 341(A)(4).”

Findings of Fact and Conclusions of Law at 7, December 1, 2010.

On December 10, 2010, Appellants NEA filed a *Notice of Appeal* with attached affidavits. The Court issued an order setting an expedited briefing schedule. Platero proceeded with legal counsel. Briefs by the parties were timely filed. The Court now issues its decision.

II

The issue is whether the OHA’s conclusion that but for the irregularities - running out of ballots and the hand counting of ballots - the outcome of the election would have been different is supported by the law.

The scope of review of the decision of the OHA is limited to whether the OHA's decision is sustained by sufficient evidence on the record. 11 N.N.C. § 408(F) and §341(A). The Court will review the decision of the OHA under a sufficiency of the evidence standard. 11 N.N.C. § 341(A)(4). The clear and convincing standard and the actual impact on election outcome requirement have been clarified in *Chee v. NEA*, No. SC-CV-67-10 (Nav. Sup. Ct. December 28, 2010) and need not be repeated here.

III

The NEA appeal OHA's decision that Platero overcame the presumption of a proper and valid election in Alamo chapter. The face sufficiency of the *Statement of Grievance* is therefore not before the Court.

IV

Firstly, we find it especially disturbing and clearly contrary to the established rule that there must be clear reasons for legal conclusions, *see, e.g., Charlie v. Benally*, No. SC-CV-19-07, slip op. (Nav. Sup. Ct. December 10, 2008), that OHA in its final judgment did not make any final determinations as to whether the election would be invalidated, and whether a special election should subsequently be held. There was, furthermore, no showing that the allegations had an "actual impact" on the election results. Instead, the OHA merely held that "Appellants [sic] appeal is hereby granted" and "parties have a right to appeal this decision to the Navajo Nation Supreme Court within 10 days from the date of this decision pursuant to 11 N.N.C. § 341(A)(4)." *Findings of Fact and Conclusions of Law* at 7, December 1, 2010. The OHA's lack of clarity in its final conclusions requires this Court to examine the entire record in minute detail to see what may be implied from the OHA's other findings.

The OHA found that the Alamo chapter polling site ran out of ballots at 6:47 p.m., that a list was developed, and that individuals who did not vote were not informed of their rights to appeal thereby denying them the right to vote. The OHA further found that local poll officials opened the ballot box after the election and hand counted the ballots. The OHA then concluded that Platero's "appeal is hereby granted" and that "[t]he parties have a right to appeal" to this Court. We conclude that the OHA erred for the below reasons.

The audio recording¹ of the hearing on November 22, 2010 did establish by sworn testimony that at 6:47 p.m. the Alamo chapter polling site ran out of ballots. The local polling officials were advised by the Election Office to compile a list of names, addresses, census numbers and social security numbers of all individuals present at the polling site and in line to vote before the poll closing at 7 p.m.. Polling officials testified that a police officer was placed at the end of the line at poll closing to ensure no one who arrived thereafter was included. The list documented 23 individuals who were present and in line, but did not vote because of the ballot shortage. No additional ballots were delivered. It is undisputed by the parties that these individuals were never contacted by the NEA, advised of their right to appeal, or offered an opportunity to later cast ballots.

Conflicting evidence by way of sworn live testimony on both sides was presented to the OHA regarding the list that developed during the ballot shortage. According to the testimony of local poll officials, a police officer was stationed at the end of the line at poll closing to prevent latecomers from joining the line. Testimony of L. Charley, poll judge, *Audio Recording of Hearing*, November 22, 2010. According to the testimony of Arlene Cohan, Voter Registration Specialist for the Eastern Agency Election Office, Laurie Charley, Poll Judge, and Deborah

¹ An audio recording of the hearing was ordered by the Court, in lieu of a transcript, due to the expeditious review required in election cases. The audio recording is deemed part of the record.

Begay, Chief Poll Judge, ballots ran out precisely at 6:47 p.m.. The names of all individuals who showed up to vote after the ballots ran out were placed on a list. 23 names were listed during the 13-minute ballot shortage between 6:47 p.m. and 7:00 p.m. when polls closed. It is not disputed that all the 23 individuals on this list were unable to vote.

In rebuttal, Platero's witness, Shyla Platero, testified under oath that she appeared at 6:15 p.m. to vote and stood in line behind 15 individuals. She testified that before she could vote, she was informed that there were no more ballots, suggesting that ballots ran out well before the 6:47 p.m. time testified to by all three ballot workers. She then stated that poll officials "took names" but that she was turned away without being placed on any list. However, she admitted that she did not complain when this happened, and did not testify that she saw anyone else being turned away by poll officials without being placed on the list. The three poll workers who testified concur on the time and the immediate actions taken upon the ballot shortage, including taking down of all names of those in line prior to poll closing. Additionally, poll judge Laurie Charley testified that she could see everyone in line after the ballot shortage occurred, including the last person in line, and did not recognize Shyla Platero.

Platero's witness further testified that she saw some voters who left the polling place inform others coming to vote that there were no ballots and encouraging them to go home. This testimony fails to provide numbers and names and, therefore, amounts to speculation and cannot be relied on with "reasonable certainty."

We clarified in *Chee, supra*, that "[i]t is a settled doctrine of Navajo Nation election law that once an allegation has been proven true, the aggrieved party must overcome the presumption of a valid and proper election. Specifically, 'the one contesting the election must then show by sufficient evidence that the misconduct or irregularity *actually changed the result of the election*

or prevented a fair election.’ The grievant is required to prove that the outcome of the election was affected and that the election results would have been different but for the error. Speculation is not enough to overturn the results of an election.” *Id.*, slip op. at 4 (internal cites omitted)(emphasis in original).

The burden is on the challenger of a valid election to prove an allegation by “clear and convincing evidence”. *Chee, supra*. Higher than preponderance of evidence, but lower than beyond a reasonable doubt, the standard means “to a reasonable certainty.” *Id.* It is the finding of this Court that this legal standard was not met in this situation, where we have one witness claiming, without corroboration, that all three Alamo poll workers essentially lied both about the timing of the ballot shortage and the remedial actions immediately undertaken by them.

The audio recording also established that after the polls closed, local polling officials were unable to run a computer generated tally of the votes cast, or to report the outcome of the election, and, therefore, ballots were hand-counted by local polling officials to document the number of votes deposited during the election, but not to ascertain the results of the election. A computer tally of the election was later generated by the agency office, and the results of the hand count matched the computer generated count. Testimony of A. Cohan, *Audio Recording of Hearing*, November 22, 2010.

11 N.N.C. 408(C) mandates that “[a]t the close of election, the election judges “shall tabulate the results of the balloting, seal and lock the ballot boxes with the poll books and keys in the ballot boxes, and transmit the results of the balloting to the Election Administration at Window Rock by telephone or radio communication.” The Chief Poll Judge, Ms. Cohan, testified that physical removal of the ballots from the ballot box was normal procedure because the Chief Poll Judge has to count each ballot to ensure that the *Statement of Disposition* was

filled out and returned along with the election equipment. She testified that 727 ballots were hand counted; of the 727 ballots, 17 were absentee ballots. The Alamo poll workers testified that normally, ballots are fed into a machine to be counted, and a count is printed out on a tally tape, whereupon a *Statement of Disposition* is completed requiring the ballot box to be opened and all ballots to be accounted. In this case, the machine had run out of tally tape, therefore the computer generated tally could not be printed. The poll workers therefore skipped the machine tally and proceeded to count and re-count the ballots by hand.

Platero presented a witness who testified that in her past experience as a poll judge, she “thought they don’t do that and that they take back like that.” Testimony of D. Ganadonegro, *Audio Recording of Hearing*, November 22, 2010. In this case, however, Ms. Ganadonegro was testifying as a community member as to how ballots were handled once before in her experience, and not as a polling procedure expert; therefore her testimony neither served to impeach that of Ms. Cohan nor served to present different procedural standards. Based on the foregoing, there is no evidence established by clear and convincing evidence that poll officials acted contrary to statutory law.

Platero having lost by 153 votes, the 23 voters who did not vote because of the ballot shortage are not numerically significant to impact the election results. Platero, therefore, did not establish by clear and convincing evidence that the outcome of the election was affected and that the election results would have been different but for the errors. Platero failed to overcome the presumption of a valid and proper election. The OHA erred.

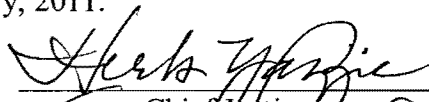
The conclusion as to whether an election is impacted must, invariably, be based on sufficient numbers. In this case, the numbers impacted are not numerically sufficient. However, in concluding that the OHA erred, we clarify that this Court in no way condones the

disenfranchisement of the voting right of any voter. The Navajo Election Administration must do its utmost to ensure that the issues that occurred in this case do not re-occur in future.

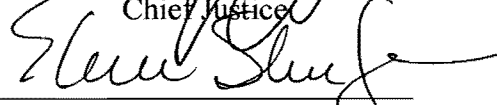
V

The decision of the OHA is REVERSED. The NEA shall immediately CERTIFY the election results in accordance with this decision.

Dated this 3rd day of January, 2011.



Chief Justice



Associate Justice