

NAVAJO NATION SUPREME COURT

Earl Apachito,
Appellant,

v.

Navajo Election Administration,
Appellee.

OPINION

Before SLOAN, A., Chief Justice, and SHIRLEY, E., Associate Justice.

David R. Jordan, Gallup, New Mexico, for Appellant; Levon Henry and Ron Haven, Window Rock, Navajo Nation, for Appellee.

Appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-NEA-014-17, Hearing Officer Richie Nez, presiding.

Appellant through counsel filed a complaint contesting his disqualification as a sitting school board member. The complaint was dismissed because appellant's counsel signed the complaint on behalf of his client. We reverse.

I

On May 8, 2017 Appellant Earl Apachito (Apachito) filed a complaint against Navajo Election Administration (NEA) in the Office of Hearings and Appeals (OHA). The complaint alleged that NEA wrongfully disqualified him from his position as a member of the Alamo Navajo School Board. A hearing was held on the complaint in Alamo, New Mexico. On June 22, 2017, upon NEA's motion, OHA dismissed the complaint because "[the complaint] was signed, not by Earl Apachito but by David R. Jordan, *Esq.* who represented him." *Order of Dismissal Without Prejudice*, at 1 (OHA June 22, 2017) (emphasis in original).

In its ruling, OHA stated “[t]he Navajo Election Code is clear that the ‘registered voter’ is the complainant. It also recognizes the role that legal counsel plays in the process of his/her Grievance. Legal counsel at the hearing stage represents the complainant; not before.” *Id.* at 2. OHA also stated “[t]he appeal ‘shall’ be made by the aggrieved candidate.” *Id.* As a result, OHA found “[i]n this case, legal counsel is not the ‘registered voter’ and not the complainant which case law recognizes.” Thus, OHA concluded “legal counsel has no standing to register this complaint.” *Id.* Apachito appeals OHA’s dismissal.

II

The issue is whether an Office of Hearings and Appeals complaint had to be verified by the complaining party or whether the complaining party’s attorney could verify the complaint to initiate an action under the Election Code.

III

When addressing the legal interpretation of administrative bodies, this Court applies a *de novo* standard of review.” *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12, slip op. at 4 (Nav. Sup. Ct. February 26, 2013). The Court therefore has the authority to examine the underlying legal interpretation, and can reverse an OHA decision if the law OHA relies on is not valid. *Id.* at 3-4.

IV

Apachito contends OHA abused its discretion when it dismissed his complaint because his attorney signed the certification portion of the complaint on his behalf. NEA, on the other hand, asserts OHA properly dismissed the complaint because Apachito did not write and sign the statement himself. NEA asserts OHA’s complaint form (a.k.a. OHA’s “Statement of Grievance”) “clearly requires the person filing must be a registered voter of the Navajo Nation and that the

registered voter is the one complaining.” *Brief of the Navajo Election Administration*, at 6. Although NEA acknowledges attorneys “speak for” clients, it argues the attorney/client relationship must be shown before the complaint is considered sufficient on its face to be heard.

First, this is not a typical appeal concerning a disqualification of a candidate. This is an appeal concerning a disqualification of an elected official for his failure to maintain the qualifications of his public office under the newly amended provisions of the Election Code. *See* Resolution No. CJA-02-14 (amending 11 N.N.C. §§ 8, 21 and 240) (signed into law on February 11, 2014). Thus, precedent with regard to “candidates” may not necessarily apply.

With that said, we consider the issue on appeal.

The Election Code provides “[w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Codes has not been complied with.” 11 N.N.C. § 341(A)(1) (2005). The Election Code is silent on verification of the complaint requirements now on appeal.

The fill-in-the-blank complaint form used by OHA that includes a certification section that states:

I, [the complaining party], a registered voter of the Navajo Nation hereby am contesting the event(s) which took place due to reason(s) stated and further I swear or affirm that person(s) listed as witnesses are aware they are listed as such to the best of my knowledge and belief the Statement of Grievance is true and correct.”

OHA’s Statement of Grievance, R. at 1. Pursuant to OHA’s authority to promulgate rules, NEA insists this form requires that the complaining party to verify the complaint himself or herself. OHA in its ruling and NEA in its brief, however, do not cite to a particular rule that supports that proposition. Nonetheless, as mentioned above, the Election Code is silent on verification requirements.

Under the Navajo Nation Bill of Rights, “no party to a civil action at law . . . shall be denied . . . the right to have the assistance of counsel, at their own expense” 1 N.N.C. § 7. Furthermore, no provision of the Navajo Nation Bill of Rights shall be abridged or deleted by amendment or otherwise, except by public referendum. 1 N.N.C. § 1 (2005). “This right is also guaranteed by the Navajo common law.” *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 436 (Nav. Sup. Ct. 1991). The person facing allegations has the right to have someone speak for him. *Id.* (citing *Boos v. Yazzie*, 6 Nav. R. 211, 214 (Nav. Sup. Ct. 1990). “This Navajo cultural standard [of having someone else speak for you] is stricter than that required by the Indian Civil Rights Act[.]” *Id.*

In amending the Election Code to enforce qualifications of elected officials, the Navajo Nation Council recognized the importance of due process in proceedings before OHA. “Due process, including right to counsel, is afforded at these administrative hearings.” Resolution No. CJA-02-14, Findings, ¶2 (citing Rule 2, Rules for Administrative Hearing under the Election Code) (requires only that counsel be licensed and in good standing). The Council said:

Although section 240 of the Election Code states the offenses for which the Council can remove officials (at least those listed thereunder), the section does not specify the procedural steps. The section also does not address hearing procedures and due process, such as notice requirements and *the right to legal counsel*.

Resolution No. CJA-02-14, Findings, ¶6 (emphasis added). In its efforts to make uniform the process of removal, like the one before us, the Navajo Nation Council intended to ensure one’s right to counsel at their own expense, expressing no limitations in one’s assistance by counsel. Although most complaints are filed by the complaining party before counsel is retained, a complaining party, like Apachito, should not be punished for retaining counsel to assist in the

filing of a complaint. We thus reject OHA's interpretation that the Election Code permits counsel to represent the complainant at the hearing stage and not before.

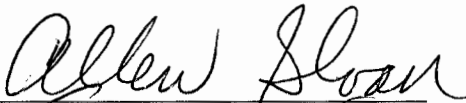
Because the right to counsel at one's own expense is a fundamental right, a holding that only a complaining party may verify a complaint by signing and filing the OHA complaint would not be in accordance with due process and fundamental fairness expected of Navajo tribunals. An attorney is bound by ethical and legal standards in the representation of his or her clients and subject to sanctions thereof. Accordingly, an attorney's signature on a complaint attests to the good faith of the allegations. We thus hold an OHA complaint can be verified by the complaining party's attorney as an incidental act to representing a client.

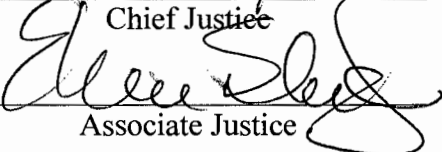
In the case at hand, Apachito secured the services of an attorney to assist him in filing his complaint. Apachito's attorney signed his own name "for Earl Apachito" to the complaint attesting to the alleged violations of the Election Code. We find the complaint sufficient on its face for purposes of a hearing on merits of the complaint.

IV

Based on the foregoing, we hereby REVERSE the Office of Hearings and Appeals and REMAND the case for reinstate of the grievance and a hearing on the merits.

Dated this 14th day of July, 2017.



Chief Justice


Associate Justice