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IN THE
SANTEE SIOUX NATION SUPREME COURT

CORA JONES

***APPELLANT/CROSS-
APPELLEE***

AP 13-01

v.

OPINION OF THE COURT

**SANTEE TRIBAL COUNCIL AND
SANTEE SIOUX NATION REMOVAL
COMMITTEE; In their Individual and
Official Capacities:**

ROGER TRUDELL;

ROBERT CAMPBELL;

MARION BRANDT;

LARRY "IKE" DENNY;

ROBERTA REDWING;

MARCELLA LAPOINTE;

FRANK WHIPPLE;

MARY JOHNSON;

WARREN MACKEY;

DARLENE BLUE BIRD; and

CLEMENT MACKEY.

***APPELLEES/CROSS -
APPELLANTS***

FILED

JOSEPH H. JAMES II, ADMINISTRATOR

DEC 16 2013

TIME 4:08 AM / PM
**SANTEE SIOUX NATION TRIBAL COURT
SANTEE, NEBRASKA 68760**

Introduction

In 2000, the Santee Sioux Tribal Council [hereinafter "Tribal Council"] enacted the Santee Sioux Nation Judiciary Act of 2000 [hereinafter "Judiciary Act"], creating the Santee Sioux Nation Judiciary in accordance with Article IV, § 1(s) of the Constitution and Bylaws of the Santee Sioux Nation [hereinafter "Constitution"]. In 2012, the Tribal Council created the Santee Sioux Nation Supreme Court. Earlier this year, the Tribal Council appointed the current

1 Santee Sioux Supreme Court Justices to the bench. This is the first appeal heard by this Court.
2 Our first appeal requires us to interpret Article V of the Constitution, as well as the Judiciary
3 Act, as amended. We do so with the greatest humility and respect due the people of the Santee
4 Sioux Nation.
5

6 7 **Procedural History and Factual Background**

8
9 In October and November 2012, the Tribal Council invoked Article V of the Constitution
10 and removed Plaintiff Cora Jones from her position as Tribal Secretary. It is undisputed that the
11 Council appointed five tribal members to a Removal Committee as required by Article V. It is
12 also undisputed that the Removal Committee held one public meeting at which Ms. Jones
13 presented written and oral testimony, that the Removal Committee generated a written report to
14 the Tribal Council, and that the Tribal Council acted to remove Ms. Jones as Tribal Secretary.
15

16 Ms. Jones petitioned the Tribal Court for declaratory and injunctive relief from the Tribal
17 Council's removal order. On February 13, 2013, after an evidentiary hearing, the Tribal Court
18 denied Ms. Jones' petition. She now appeals to this Court.
19

20 **Discussion**

21 22 **I. Tribal Sovereign and Official Immunity from Suits Challenging Article V Removals**

23
24 We hold that the Santee Sioux Nation Judiciary has jurisdiction over claims arising under
25 the tribal constitution brought by plaintiffs against tribal officials and employees for prospective
26 injunctive relief.
27

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1 As an initial matter, we hold the Constitution reserves the sovereign immunity of the
2 Santee Sioux Nation. The Santee Sioux Nation's preamble expressly states the purpose of the
3 Constitution is "to enjoy certain rights of self-government and self-determination . . . [and] to
4 protect the nation's sovereignty" CONST. pmbl. Well-settled federal and intertribal law
5 recognizes tribal sovereign immunity in federal, state, and tribal courts as a matter of common
6 law. *E.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Cash Advance and*
7 *Preferred Cash Loans v. State ex rel. Suthers*, 242 P.3d 1099, 1106-11 (Colo. 2010)
8 (acknowledging immunity of Santee Sioux Nation and its corporate entities); *Ameriloan v.*
9 *Superior Ct.*, 86 Cal.Rptr.2d 572, 578-80 (Cal. App. 2009) (same); *High Elk v. Iron Hawk*, 6
10 Am. Tribal Law 80, 82 (Cheyenne River Sioux Tribal Ct. App. 2006) ("It is an axiomatic
11 principle of Indian law that tribes possess sovereign immunity and that it may be waived only by
12 the federal government or the Tribe itself."); *Miner v. Standing Rock Sioux Tribe*, No. COMP
13 08-014, 2008 WL 7903914, at *2 (Standing Rock Sioux Tribal Ct., Apr. 21, 2008). Absent a
14 waiver of tribal sovereign immunity, this Court would not enjoy jurisdiction over suits brought
15 against the Santee Sioux Nation. *See High Elk*, 6 Am. Tribal Law at 82.

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19 However, we find an express, *but limited*, waiver of tribal immunity in the Judiciary Act
20 through a combination of two provisions. The first provision is a broad grant of authority by the
21 Tribal Council to the Tribal Judiciary, as Tribal Council's counsel recognized at oral argument:
22

23 The Santee Sioux Tribal Judiciary shall exercise jurisdiction over all
24 matters to the fullest extent consistent with self-determination and the sovereign
25 powers of the Tribe over *all matters* within the power and authority of the Santee
26 Sioux Nation including controversies arising out of the Constitution of the Santee
27 Sioux Nation
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1 Judiciary Act, § 8(A) (emphasis added). Section 6(A) significantly ratchets down this broad
2 grant of jurisdiction by limiting this Court's jurisdiction to suits brought against tribal officials in
3 their official capacities for prospective injunctive relief:
4

5 Except as required by a federal law, or the Constitution of the Santee Sioux
6 Nation, or as specifically waived by a resolution or ordinance of the Council
7 specifically referring to such, the Santee Sioux Nation shall be immune from suit
8 in any civil action, and their officers and employees immune from suit for any
9 liability arising from the performance of their official duties. In any action
10 otherwise authorized by or against the Tribe its officers or employees arising from
11 the performance of their official duties, the following modifications to the rules
12 and procedures set forth in this Code shall apply:

13 1. Neither the Tribe nor its officers or employees when
14 involved in a civil action arising from the performance of their
15 official duties shall be liable for the payment of the costs or
16 expenses of the opposing party.

17 2. Neither the Tribe nor its officers or employees when
18 involved in a civil action arising from the performance of their
19 official duties shall be required to post a security bond or otherwise
20 for any purpose.

21 *Id.* § 6(A). By its terms Section 8(A) provides jurisdiction over "all matters" arising under the
22 Constitution, and is thus a sufficiently clear expression of the intent of the Tribal Council to
23 grant judicial jurisdiction over all cases arising under the Constitution. That section must be read
24 in light of Section 6(A), however, which expressly preserves tribal sovereign immunity and
25 official immunity from claims for money damages.

26 Ms. Jones asks this Court to recognize and apply the federal doctrine announced in
27 *Ex parte Young*, 209 U.S. 123 (1908), which allows suits alleging violations of federal law
28 against state and federal officials for prospective declaratory and injunctive relief only, as some
tribal courts have. *E.g.*, *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rep. 6235
(Ho-Chunk Tribal Ct. 1996); *Rave v. Reynolds*, 23 Indian L. Rep. 6150 (Winnebago Supr. Ct.
1996). Ms. Jones also asks this Court to recognize that the Indian Civil Rights Act, 25 U.S.C.

1 § 1301 et seq. [hereinafter “ICRA”], works as a congressional waiver of tribal immunity. Some
2 tribal courts have held ICRA abrogates tribal immunity, and others have held it does not.
3 *Compare LeCompte v. Jewett*, 12 Indian L. Rep. 6025 (Cheyenne River Sioux Tribal Ct. of App.
4 1985) (holding ICRA abrogated tribal immunity), and *Oglala Sioux Tribal Personnel Brd. v. Red*
5 *Shirt*, 16 Indian L. Rep. 6052 (Oglala Sioux Tribal Ct. App. 1983) (same), with *Lonchar v.*
6 *Victories Casino*, No. C-022-1200, 2002 WL 34512648, at 1 (Little Traverse Bay Bands of
7 Odawa Indians Tribal Court, Feb. 11, 2002) (holding ICRA did not abrogate tribal immunity),
8 and *McCormick v. Election Committee of the Sac & Fox Tribe*, 1 Okla. Trib. 8, 20, 1980 WL
9 128844 (Sac & Fox Ct. Indian Offenses 1980) (same). Since we locate jurisdiction in the
10 Judiciary Act, we need not address these claims. *Cf. DeCoteau v. Fort Peck Tribes*, 4 Am. Tribal
11 Law 277, 282 (Fort Peck Ct. App. 2002) (holding that since the tribe “provided a statutory
12 scheme to protect the rights of its constituency and grant appropriate relief when those rights are
13 violated,” the court need not address whether ICRA abrogated tribal immunity).

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17 The Tribal Council’s adoption of Section 8(A) effectively precludes these arguments.
18 Assuming for the sake of argument that the Court is persuaded to import from federal
19 constitutional law the doctrine of *Ex parte Young*, or that the Indian Civil Rights Act has
20 abrogated aspects of tribal sovereign immunity, we must still recognize that the Tribal Council
21 has primary legislative authority within the Santee Sioux Reservation under Article IV of the
22 Constitution. Rather than unnecessarily importing federal law and all of its attendant
23 consequences in this context, we find that the Tribal Council has spoken, and that the Judiciary
24 Act works as a grant of authority to the Tribal Judiciary to hear this particular claim.
25

26 The tribal defendants argue that the Judiciary Act does not clearly express the intent of
27 the Tribal Council to waive tribal immunity, and presumably provide for suits against tribal
28

1 officials for prospective injunctive relief. To reiterate, we agree that the Santee Sioux Nation's
2 tribal sovereign immunity remains intact. However, if this Court were to hold that tribal law
3 forecloses suits for prospective injunctive relief against tribal officials as well, then the Tribal
4 Council's provision of rules relating to suits against such officials and employees would be
5 rendered moot. "It is an elementary rule of construction that effect must be given, if possible, to
6 every word, clause and sentence of a statute[.]" as the Navajo Supreme Court recently stated.
7 *Office of Navajo Nation President and Vice-President v. Navajo Nation Council*, 9 Am. Tribal
8 Law 46, 58 (Navajo Nation Supr. Ct. 2010). In order to give full meaning to the plain language
9 of Section 6(A), we must hold that the Judiciary Act authorizes the Tribal Judiciary to hear suits
10 alleging illegal acts by tribal officials and employees for nonmonetary relief.
11

12
13 In sum, plaintiffs may bring suits alleging violations of law by tribal officials and seeking
14 prospective injunctive relief. However, suits against the tribe, and against tribal officials and
15 employees for money damages and other retroactive relief, are foreclosed by the tribe's
16 immunity. As Plaintiff Cora Jones brings suit against the individual members of the Tribal
17 Council and other tribal officials, not the Santee Sioux Nation, her suit is cognizable by the
18 Tribal Judiciary. Importantly, while we recognize her right to sue tribal officials in their official
19 capacities, we do not and cannot authorize suits against any of the tribal defendants in this case
20 in their individual capacities or for money damages.
21
22

23 II. The Reviewability of Removal Actions under Article V 24

25
26 We hold that the Tribal Council may have violated its Article V mandate to "hear
27 testimony of the accused" during the removal process. However, on the record presented to this
28 Court, and apparently even the trial court, we cannot determine whether the Tribal Council

1 complied with the "hear testimony" requirement. We therefore remand for a limited evidentiary
2 hearing on this question.

3 As a preliminary matter, we hold that challenges to the procedures employed by the
4 Tribal Council under Article V of the Constitution are reviewable by the Tribal Judiciary. We
5 leave open the question whether a challenge to the substantive decision of the Tribal Council to
6 remove a sitting Council Member is reviewable by the Judiciary, a question we need not decide
7 here.

8
9 Article V, Section 1 of the Constitution provides a specific process by which the Tribal
10 Council may remove a sitting Council Member:

11
12 The removal from office of a member of the tribal council shall be as
13 follows: In the event of a complaint in writing specifying improper conduct or
14 neglect of duty from twenty-five members of the tribe against a member of the
15 tribal council, it shall be the duty of the tribal council, if such complaint is
16 considered of sufficient merit, to appoint a committee of five members of the
17 tribe, independent of its own membership and those making such complaints, to
18 hold a public hearing and make written report to the tribal council of its findings,
19 a copy of such report to be furnished to accused. Upon receipt of such reports, the
tribal council shall meet in executive session to consider such report and hear
testimony of the accused. The tribal council shall exercise the right of removing
such accused officer. If the tribal council shall expel a member, that member may
seek reelection at the next annual election.

20 It is helpful to break down the process of removing a tribal council member into the several steps
21 outlined by Article V, Section 1:

- 22 1. "[A] complaint in writing...."
- 23 2. "[S]pecifying improper conduct or neglect of duty...."
- 24 3. "[F]rom twenty-five members of the tribe...."
- 25 4. "[A]gainst a member of the tribal council...."
- 26 5. "[I]f such complaint is considered of sufficient merit....," presumably by the tribal
council.
- 27 6. "[I]t shall be the duty of the tribal council ... to appoint a committee of five members of
the tribe independent of its own membership and those making such complaints...."
- 28 7. The committee must "hold a public hearing...."
8. The committee must "make written report to the tribal council of its findings...."
9. The committee must cause "a copy of such report to be furnished to accused."

- 1 10. "Upon receipt of such reports, the tribal council shall meet in executive session to
2 consider such report..."
- 3 11. While in executive session, the council shall "hear testimony of the accused."
- 4 12. "The tribal council shall exercise the right of removing such accused officer."
- 5 13. "If the tribal council shall expel a member, that member may seek reelection at the next
6 annual election."

7 The majority of these procedural requirements are clear and specific mandates to the
8 Tribal Council with respect to which the elected officials clearly have no discretion. For
9 example, the Tribal Council must meet in executive session to consider a report from the
10 Removal Committee, and at that executive session, the Council must hear testimony from the
11 council member who is subject to removal. This Court has authority to enforce the mandates of
12 the clear and specific procedural requirements under Sections 8(A) and 6(A) of the Judiciary
13 Act.

14 The Cheyenne River Sioux Tribal Court of Appeals in *High Elk v. Iron Hawk*, 6 Am.
15 Tribal Law 80 (Cheyenne River Sioux Tribal Ct. App. 2006), faced an analogous situation.
16 There, a plaintiff sued the Tribal Secretary of the Cheyenne River Sioux Tribe, an elected
17 official, over the alleged failure of the Tribal Secretary to issue a certificate of incorporation after
18 the plaintiff had properly submitted the Articles of Incorporation to the plaintiff's entity. *See id.*
19 at 81-82. Plaintiff specifically asked for a writ of mandamus requiring the issuance of the
20 certificate and a declaratory judgment, both examples of prospective injunctive relief. *See id.* at
21 82. The defendants raised the defense of sovereign immunity, but in an opinion authored by
22 Chief Justice Pommersheim the court held that the tribe's immunity was not available to
23 foreclose a suit designed to require a tribal official to perform a ministerial, rather than a
24 discretionary, duty. *See id.* at 84.

25 The tribal appellees argue forcefully that tribal council decisions under Article V are
26 completely unreviewable by the Tribal Judiciary. Arguing that the Plaintiff's sole remedy is to
27
28

1 seek reelection, the tribal defendants cite to Article V, Section 1, which states: "If the tribal
2 council shall expel a member, that member may seek reelection at the next annual election."

3 Although we may be inclined to agree that in cases where the Tribal Council fully complied with
4 Article V's procedural requirements the Council's decision to remove a council member is
5 entitled to great deference and may be unreviewable, that is not the fact pattern alleged here. We
6 leave this question open for another day. However, the question whether the Tribal Council
7 complied with the purely procedural mandates, which are obligations imposed on the Tribal
8 Council by the Tribal Constitution, is reviewable. Failure of the Tribal Council to comply with
9 the specific mandates provided for in Article V is actionable.
10

11
12 Plaintiff Cora Jones has made a series of procedural objections to her removal from the
13 Tribal Council under the Article V process. First, Ms. Jones challenges the Removal
14 Committee's processes. Specifically, Ms. Jones alleges that the Removal Committee once met in
15 public with fewer than five members and a second time with five members but not in public. In
16 Article V, Section 1, there are four requirements for the Committee:
17

- 18 1. "[I]t shall be the duty of the tribal council ... to appoint a committee of five members of
19 the tribe independent of its own membership and those making such complaints...."
- 20 2. The committee must "hold a public hearing...."
- 21 3. The committee must "make written report to the tribal council of its findings...."
- 22 4. The committee must cause "a copy of such report to be furnished to accused."

23 We find, as did the trial court and as conceded by all parties, that the Committee consisted of five
24 members who were neither sitting Tribal Council Members nor complainants, that the
25 Committee held a public hearing with a majority of its members present, that the Committee
26 made a written report, and that the Committee furnished the report to the accused, Ms. Jones.
27 That is all that is required by Article V.

28 Ms. Jones alleges that the second meeting of the Committee, allegedly taken in the Tribal
Chairman's office with the Chairman and tribal counsel present and without notice to Ms. Jones,

1 violates these provisions. We disagree. Surely the Removal Committee may meet in addition to
2 the required public hearing, and perhaps even seek the advice of tribal counsel and the Chairman.
3 Ms. Jones argued in the trial court below, and before this Court, that the second meeting was
4 unseemly; and indeed the trial court even found that the "nature and purpose of the second
5 meeting was unseemly." Nevertheless, we find nothing in Article V prohibiting this second
6 meeting. That we might be able to imagine a scenario wherein a meeting of the Removal
7 Committee under Article V somehow violated the due process rights of an aggrieved council
8 member does not mean the meeting in this case violated Ms. Jones due process rights. And, as
9 Ms. Jones has alleged nothing here that violates the express mandates of Article V, we are loathe
10 to imply a due process violation from an "unseemly" meeting without significant additional and
11 relevant evidence, evidence the aggrieved plaintiff bears the burden of establishing.

14 Second, Ms. Jones alleges that the Tribal Council violated the Tribal Constitution's
15 Article V mandates as well. The Tribal Council's mandate under Article V, Section 1 includes:

- 17 1. "Upon receipt of such reports, the tribal council shall meet in executive session to
18 consider such report..."
- 19 2. While in executive session, the Council must "hear testimony of the accused."

20 There is no challenge to the first mandate that the Tribal Council meet in executive session, but it
21 is unclear from the record whether the Tribal Council did go into executive session. More
22 importantly, Ms. Jones further alleges that the Tribal Council violated its obligation to "hear
23 testimony of the accused." The trial court made no specific findings of fact about the relevant
24 council meeting, merely concluding that "the Plaintiff, by her own testimony, appeared in front
25 of the Tribal Council pursuant to Notice and was given the opportunity to be heard." Order
26 Denying Plaintiff's Petition for Declaratory and Injunctive Relief at 10, ¶ 10. The transcript of
27 the proceedings before the trial court is inconclusive on the question of whether the Tribal
28 Council met the "hear testimony" mandate.

1 At oral argument, counsel for Ms. Jones alleged that the Tribal Council "cut off"
2 Ms. Jones and therefore did not comply with the "hear testimony" mandate. If the Tribal Council
3 did not allow Ms. Jones to speak in executive session, then the Council has flatly violated
4 Article V's procedural mandate, and its decision to remove Ms. Jones is void. As this Court is
5 not authorized to sit as a finder of fact, we must remand to the trial court to conduct a limited
6 evidentiary hearing.
7

8 9 ORDER

10
11 This matter is remanded to the trial court for a limited evidentiary hearing to be held
12 within thirty (30) days of this Order requiring the trial court, as soon as possible after the
13 hearing, to find as a matter of fact whether the Tribal Council complied with the "hear
14 testimony" mandate.
15

16 If the trial court concludes as a matter of fact that the Tribal Council did not allow
17 Plaintiff Cora Jones to present her testimony before the Tribal Council in executive session as
18 required by Article V, then the trial court must order Ms. Jones' reinstatement to her position on
19 the Tribal Council and vacate the Tribal Council's removal decision.
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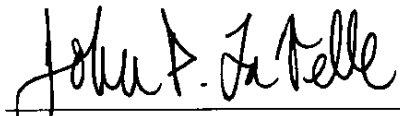
21 If the trial court concludes as a matter of fact that the Tribal Council did allow Ms. Jones
22 to present her testimony before the Tribal Council in executive session as required by Article V,
23 then the trial court must deny Plaintiff's Petition for Declaratory and Injunctive Relief.
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25 **IT IS SO ORDERED** this 16th day of December, 2013, by the Santee Sioux Nation
26 Supreme Court located in Niobrara, Nebraska, within the sovereign lands of the Santee Sioux
27 Nation.
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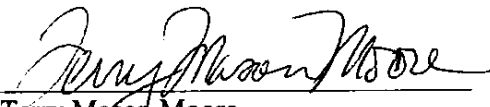
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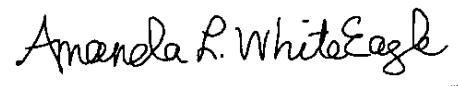
Andrew Adams III
Chief Justice



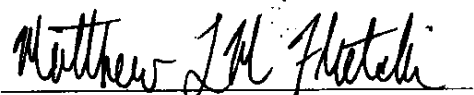
John LaVelle
Justice



Terry Mason Moore
Justice



Amanda L. WhiteEagle
Justice



Matthew L.M. Fletcher
Justice

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