

MASHPEE WAMPANOAG TRIBAL COURT
MASHPEE WAMPANOAG TRIBE

In re the matter of)
)
)

2014 ELECTION OF FOUR)
TRIBAL COUNCIL MEMBERS)
)
)
_____)

CASE NO# CV-13-003

**ADVISORY OPINION REGARDING
TRIBAL RESOLUTION 2013-RES-047**

The Question

At a meeting of the Mashpee Wampanoag Tribal Council held on November 7, 2013, the Tribal Council unanimously passed Resolution 2013-RES-047. This Resolution authorized the following question to be asked and requested an advisory opinion from the Supreme Court:

In order to conform the election cycle for Tribal Councilors to that provided for in the Constitution and Election Ordinance does the Tribal Council have the power pursuant to the Constitution of the Mashpee Wampanoag Tribe, including Article VI. § 2.A and Article IV. § 6, second subsection (a), to hold the election for the four Tribal Council members currently scheduled for February of 2014 and to shorten the length of term from four years to one year for each Tribal Council member office (the term will be 2014- 2015)?

In the interests of ensuring that the preliminary requirements for holding a tribal election are not impacted we issued a Rescript Opinion dated December 24, 2013. At that time we indicated that a full opinion would be issued at a later date. Issuance of a Rescript Opinion with a full opinion to follow is an approach that is consistent with other Tribal and Federal Courts.

Todacheene v Shirley et al. No SC-CV-37-10 (Navajo 7/30/10); *Bonas v Town of North Smithfield*, 265 F. 3d 69 (1st Cir. 2001).

An advisory opinion will be strictly limited by this Court to the question presented. We make no broad pronouncements on Tribal law but rather limit ourselves to the question asked. This practice is sound as there are no adverse parties to argue one set of facts or one interpretation of the Constitution of the Mashpee Wampanoag Tribe (herein “Tribal Constitution”) or other tribal law over another. A full airing of all aspects of a case is not made. *United States v Fruenhauf*, 365 U.S. 146, 157 (1961). No party has filed suit in this Tribal Court challenging the validity of any corrective election and this Court is limited to information supplied within the request for an advisory opinion. In this case, the Court has been supplied with a Proposed Order, a Proposed Ordinance, a letter with arguments in favor of the proposed Order and documents related to a referendum conducted by the Tribal Council.¹ Our opinion, therefore, is based solely upon the facts provided and the limited nature of the question presented.

Preliminary Considerations

When an advisory opinion is requested we must first determine whether the question is one that should be addressed by the Court. Without a doubt, this Court can and has issued an advisory opinion in the past. *In re that matter of: Termination and Settlement Agreement Between Mashpee Wampanoag Tribe et. al.*, Case #: CV -10-005 (2010).² Advisory opinions are not, however, to be issued lightly. As was held in the *Termination and Settlement Id.*, an advisory opinion should be issued only in matters of “grave importance.” *Id. at 7.*

The question that this Court is asked to respond to relates to the authority of the Tribal Council to act to correct the terms of sitting members of Tribal Council so that they conform to a

¹ All of these documents are available for review in the case file kept by the Tribal Court Clerk.

² Copies of all Tribal Court decisions are available by contacting the Tribal Court Clerk. The Tribal Court initially published all opinions on the Tribal Court web page but the Elders Judiciary Committee objected. The Tribal Council made it a duty of the Elders Judiciary Committee “To work on a continuous basis...to catalogue and publish court opinions...” Thus far, no action has been taken. 2013 ORD-003 Chapter 4, Section 2(f) (May 2013)

staggered terms odd-year election cycle. Interpretation of the Tribal Constitution and competing provisions of Tribal Election Ordinances are called for in the question. These types of election questions have been addressed by other Tribal Courts. *Cherokee Nation Tribal Council v. Smith*, 10 Am. Tribal Law 294 (2010) (involving application of term limits under new Tribal Constitution); *Todacheene v. Shirley*, No. SC-CV-37-10 (Navajo 07/30/2010) (involving question of term limits under Navajo law). Similarly, federal courts have looked to and resolved questions of local election law. See *Bonas v Town of North Smithfield*, 265 F. 3d 69 (1st Cir. 2001), (deciding that a town charter mandate for even-year elections trumped a town charter mandate for four year terms). *Mader v. Crowell*, 498 F.Supp. 226 (M.D.Tenn. 1980) (determining that voters who had been shifted from even-numbered to odd-numbered districts, which voted only in odd or even-numbered years, were not denied equal protection or any other constitutional provision).

This Court finds that it has jurisdiction to issue an advisory opinion and that the question propounded relates to matters of interpretation of the Tribe's Constitution and Tribal law. It is precisely these types of Tribal Constitutional matters which constitute "matters of grave importance" and which are appropriate for the issuance of an advisory opinion.

Background

It is difficult to determine the answer to the question posed by Tribal Council without defining, at least to some extent, the nature of the problem generating the request. We therefore set forth the factual background, as gleaned from the documentation submitted to the Court.

The Tribal Constitution has established that there are thirteen members on the Tribal Council; but that two of these positions are not subject to the election cycle.³ Consequently, there are eleven members of the Tribal Council who are subject to the election schedule established under Tribal law. Apart from the initial election conducted under the Tribal Constitution, all members of the Tribal Council serve four year terms. Article VI, §1 (c).

The Tribal Constitution sets forth certain basic requirements for the election of Tribal Council members, but much of the details of the election cycle are left to the Tribal Council to be developed through legislation. Article IV, Section 6 (a). The Tribal Council enacted an Election Ordinance (Ordinance of June 9, 2005)⁴ which provides detailed procedures for the conduct of elections and which establishes a Tribal Election Committee who was granted primary responsibility for overseeing elections.

The Tribal Constitution is not a model of clarity when it comes to setting forth the requirements for the initial election under the new Tribal Constitution, but, according to our reading, it seems to intend that seven members of Tribal Council were to be elected at the initial election for the Council. Five of the seven members were to serve four year terms and two of the seven are to serve two year terms. Article IV, Section 6 (a) and (second “a”)⁵ Four remaining members of the initial Tribal Council were to be elected two years later. Article VI, Section 1 (c) All members are to serve four year terms after the initial election. This approach would result in either five or six members being up for election when elections are scheduled.

³ “...the Tribal Council shall be composed of 13 members of the Tribe...” Two of those positions, however, are occupied by the Tribal Medicine Man and Tribal Chief who, pursuant to Article VI, Section 1 are “...selected by the general Tribal membership according to Tribal custom and tradition.” These two positions, pursuant to Article VI, Section 1 (c) “serve without limit” and are not subject to re-election.

⁴ There is apparently no TCR number for this enactment.

⁵ The referred to sections are incorrectly numbered in the Tribal Constitution. There are two sub-sections (a) in Article IV, Section 6.

The Tribal Constitution was approved by membership on June 26, 2004, and certified by the Tribal Council on June 28, 2004. The first election was held in 2005. The fact that this election took place in an odd numbered year resulted in a requirement that all subsequent elections were to have been held during odd years.⁶

For reasons unknown to the Court, the Election Ordinance passed by the Tribal Council in 2005 provided for an election for four tribal council members in 2006 - an even year. Tribal elections under the 2005 Election Ordinance were conducted in 2005 (five members with four-year terms and two with a two-year terms), 2006 (four members with four-year terms), 2007 (two members with four year terms), 2009 (five members with four-year terms), 2010 (four members with four-year terms), 2011 (two members with four-year terms) and 2013 (five members with four-year terms). As we understand the existing situation, there are four members who are up for election in 2014, two members who are up for election in 2015 and five members who are up for election in 2017. Only two of these elections are to be held on odd years.

The Tribal Council has developed an Ordinance that will result in elections only during odd years by holding an election in 2014 that will elect four members for a one year term. In 2015 these four one year term members will run for election along with two other members whose term normally expires. Council will then have established an election cycle where six council members are elected in 2015 and five council members are elected in 2017. With both groups holding four year terms, elections will thereafter be held on odd years with a 6/5 alternative split.

⁶ The Tribal Constitution does not actually mandate elections during odd years. It does, however, require that elections are to be staggered and that the second election under the Tribal Constitution occurs two years after the first election. Accordingly, elections must occur on odd years because the first election was during an odd year. See Article IV, Section 6 (second a).

Analysis

The question propounded by the Tribal Council asks if the Tribal Council has authority, under the Tribal Constitution, to change the election cycle so that it actually conforms to the election cycle required in the Tribal Constitution. This will necessitate members of Tribal Council, whose four year term is coming to an end, being elected in 2014 to a one year term of office rather than a four year term.

The Tribal Constitution provides that the Constitution and enactments of the Tribal Council are the Supreme Law of the Tribe. Article V Section 2 states:

This Constitution, and ordinances of the Tribal Council adopted under this Constitution, shall be the supreme law of the Tribe. The Tribal Council shall exercise its powers consistent with the letter and spirit of this Constitution.

The Election Ordinance, enacted by the Tribal Council, and the Tribal Constitution, authorized and approved by Tribal membership, are at odds, as will be explained more fully herein. We are of the opinion that, while the Tribal Council enactments are among the “supreme” law of the Tribe, any enactment of the Tribal Council must be consistent with the letter and spirit of the Tribal Constitution. The Tribal Council is not free to ignore or enact a law that is contrary to the requirements of the Tribal Constitution. Any powers exercised by the Tribal Council must be consistent with the letter and spirit of the Tribal Constitution. As between two authorities, the Constitution trumps the authority of the Tribal Council.

The question propounded by the Tribal Council makes specific reference to Article IV, Section 6 (second a). This Article goes to great lengths to set up an initial election under the new Tribal Constitution that would result in staggered terms of office. This section does not specifically authorize the Tribal Council to take any action to correct an election cycle but it does

clearly state the approval of membership for an election cycle with staggered terms. We are of the opinion that the Tribal Council must do everything that it reasonably can to achieve the staggered terms of office mandated in the Tribal Constitution.

The positive public policy considerations that lie behind staggered terms are well recognized. Staggered terms typically results in a continuity of leadership that protects against wild swings of tribal policy. Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform*, 26 Am. Indian L. Rev. 147, 163 (2001/2002).

The Tribal Constitution also is clear that all members of Tribal Council are to have a four year term of office. Article VI, Section 1 (c) provides “The elected members of the Tribal Council shall serve four-year terms of office...” Again, the Constitutional objective is quite clear. There is, however, an obvious conflict between this four-year term of office requirement and the proposed action of Tribal Council that will result in a one year term of office.

In *Bonnas v Town of North Smithfield*, *supra*. the Federal Circuit Court was faced with a similar dilemma. In *North Smithfield* the town held a referendum in 1999 that changed the odd-year election cycle mandated in the Town’s Charter to an even-year election cycle that was to start in 2002. The referendum did not mandate what was to be done in 2001 to affect the change-over. As here, once elected, all North Smithfield office holders were to serve a four-year term. The Town decided, without voter input, to eliminate the 2001 election, thus extending the incumbent’s term of office for an additional year. The Court observed: “[t]o transition from an odd-year election cycle there must, by necessity, exist at least one irregular term.” *Id.* at 76-77. The Court in *North Smithfield* rejected the hold-over method selected by the Town, however, since it prevented a vote by the electorate in 2001. Instead, the Court mandated that the Town

hold the 2001 elections, but that the elected councilors would serve only one year until the 2002 election. *Id.* at 77. The Court favored providing the electorate with an opportunity to vote rather than extending the term of office of those in power.

While *North Smithfield* is not a Tribal Court case, it is instructive on two points. First, if it is necessary to have a single off-year election in order to achieve the mandate of even or odd year elections, then so be it. As the old adage goes, “you can’t make scrambled eggs without breaking a few shells.” The larger goals of staggered four-year terms, and elections conducted on odd years, was seen by the Court as higher public policy goals and must govern.

As in *North Smithfield*, staggered terms occurring on odd numbered years seems pretty clearly to be the ultimate election cycle that the Tribal Constitution intended. It was that election cycle that membership approved when the Tribal Constitution was ratified.

Second, *North Smithfield* was instructive in that it mandated an election in 2001 to provide an opportunity for voters to express their opinion as opposed to simply keeping office holders in office. To continue the broken egg analogy, if you do have to break some shells do so in a manner that permits maximum voter participation. The proposed Ordinance and the question propounded by the Tribal Council does just that. It permits a vote in 2014 but those Tribal Council members elected will run again one year later.

We recognize that the Mashpee Wampanoag election cycle is out of kilter. Because the first election was held in an odd year and because elections are mandated to be held every two years thereafter, elections can only be held in odd numbered years. Despite this, a vote was held in 2006 and 2010. Rather than perpetuate this error, Council proposes to hold an election in 2014 that will result in four members being elected to a one-year term. These four members will

run (along with two other members) in 2015 and every four years thereafter. The approach chosen by the Tribal Council follows *North Smithfield* in that the option selected results in greater voter participation and not less. If the membership disagrees with the approach taken by Tribal Council then that disagreement can be expressed at the ballot box.

Other Federal Courts have faced situations where voters have challenged the Constitutionality of shifting voters from even to odd-year election cycles. In *Mader v. Crowell*, *supra.*, the Court was faced with a reapportionment that was mandated by Court order. The State legislature had enacted a reapportionment plan that resulted in 117,000 voters being shifted to districts which voted in odd rather than even election year cycles. As the Court pointed out “Defendants insist and Plaintiffs concede that such shifting of voters is a natural and mathematically inevitable byproduct of reapportionment. *Id.* at 230. As in *North Smithfield*, it is simply impossible to achieve the Constitutional mandate required under reapportionment without shifting some voters and temporarily impacting their right to vote in one election to achieve the mandate of reapportionment. As in *North Smithfield*, the Court in *Mader* recognized that “Shifts from odd-numbered to even-numbered districts and vice versa are an unavoidable consequence of reapportionment ordered by this Court. *Mader*, at 231 (emphasis added).

Mader also found that there was no equal protection or other Constitutional violation when some voters, as a byproduct of Court ordered reapportionment, were disenfranchised temporarily by being shifted from one district to another. *Mader* at 230 Other Federal Courts have come to a similar conclusion *Pate v. El Paso County*, 337 F. Supp. 95 (W.D. Tex.) *aff'd without opinion*, 400 U.S. 806, 91 S.Ct. 55, 27 L.Ed. 2d 38 (1970); *Carr v Brazoria County, Texas* 341 F. Supp (155 (S.D. Tex) *aff'd* 468 F 2d 950 (5th Cir 1972).

We take from *Mader*, as in *North Smithfield*, that necessity can justify the temporary deviation from Constitutional and statutory mandates if the objective is to bring a voting cycle in compliance with higher Constitutional principles. Rather than perpetuate an error, temporary and necessary action taken by the legislature to conform to a high Constitutional mandate is acceptable. See *Mader and North Smithfield, supra*.

In the Mashpee Wampanoag situation, the Tribal Constitution mandates staggered terms and a four year election cycle. We find these to be the preeminent Constitutional requirements. As stated, staggered terms are a sound Tribal policy approach to elections and the Tribal Constitution, at least on this point, is clear that members of Tribal Council are to have four year terms of office. As in *North Smithfield, supra*, “[t]o transition from an odd-year election cycle there must, by necessity, exist at least one irregular term.” Something must give and the Council, by necessity, must choose a solution.

We note that the Tribal Council held meetings to discuss the election alternatives and that a vote was taken to provide guidance to Tribal Council.⁷ The issue was discussed at a general membership meeting on September 8, 2013 and a vote was taken during a “Special Meeting” held on September 28, 2013. The result of this vote was certified by the Election Committee of the Mashpee Wampanoag Tribe and the option that was chosen by the membership is the same as that proposed by Council. We express no opinion on the propriety of the approach taken since that is beyond the scope of the question asked but we do note that as a part of the process of determining what approach to take Tribal Council did solicit membership comment and did adopt the approach recommended by membership.

⁷ There is some confusion in the proposed Tribal Council Ordinance, at some points the September 8, meeting is called a “general meeting” and at other points it is referred to as a “Special Meeting”. The actual notices for the meetings and the vote tallies, which have been submitted to the Court, are sufficient evidence of the consultation process.

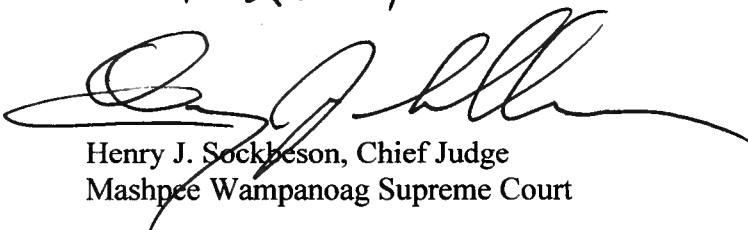
We have been unable to find case law from other tribal jurisdictions to support the approach taken in this advisory opinion, but we take comfort from the *Barras and North Smithfield* cases. We believe and advise that our approach and advice is sound.

The question propounded by the Tribal Council asks specifically if Article VI. § 2.A (in addition to Article IV §6 which has already been discussed) provides sufficient Constitutional authority to do what the Tribal Council proposes to do. This Section outlines the powers of Tribal Council and states that Tribal Council is authorized: "To promote and protect the ...political integrity... of the Tribe and its members."

There is a clear error in the election cycle and the Tribal Council proposes, after due consultation with membership, to implement a temporary correction to the election cycle to bring it back into its proper pattern. We advise that this action falls within the "promotion and protection" of the "political integrity" of the Tribe. It is also a necessary act to achieve the staggered four year term of office with elections being held in odd years that the Constitution intended. On this basis we advise that the proposed action as outlined in the question propounded is acceptable and within the authority of Tribal Council.

It was for the foregoing reasons that the Rescript Order was issued.

Dated: 1-28-14



Henry J. Sockbeson, Chief Judge
Mashpee Wampanoag Supreme Court

CONCURRING
Judge Robert Mills,
Mashpee Wampanoag Supreme Court

Judge Rochelle Ducheneaux,
Mashpee Wampanoag Supreme Court