In the Tribal Court of the Delaware Tribe of Indians
Caney, Kansas

Annette Ketchum, in her official Capacity as Secretary of the Tribal Council, Petitioner.	)	
and	)	
Karla Michelle Vernon, Intervening Petitioner,	)	
vs.	)	CASE NO: CV-16-001
Chester L. Brooks, in his official Capacity as Chief of the Delaware Tribe, Respondent,	)	
and	)	
Nathan H. Young, Council Member, And Bonnie Jo Griffith, Assistant Chief, Intervening Respondents.	)	

OPINION AND ORDER ON RESPONDENTS' MOTION TO DISMISS MOTION FOR SUMMARY JUDGMENT

On 8/2/16, Tribal Council Secretary Annette Ketchum filed paperwork with this court asking us to order an election date pursuant to three recall petitions of council members which allege malfeasance. The Initiative Petitions, among other things, called for the removal of Chester Brooks, Councilman Nathan H. Young, and Assistant Chief Bonnie Jo Griffith from office. On 8/5, this court vacated, for a multitude of reason, the "*Notice and Service of Petition to Set Election Date*" signed by the Court Clerk. In the same order, the Court gave the Petitioner the opportunity to refile pleadings that conformed to the Tribe's Rules of Civil Procedure.

On 8/11, the Petitioner filed a "*Complaint for Writ of Mandamus*," asking this court to order Chief Chester L. Brooks to set an election on three Initiative Petitions (16-01, 16-02, and 16-03). The three petitions seek to recall Assistant Chief Griffith (16-01), Councilman Young

(16-02), and Chief Brooks (16-03). All three petitions use the same language to define the purpose of the petition:

> An Act to recall the election of . . . held on the 3rd of November, 2014; to terminate the salary of . . . effective immediately; to prohibit . . . from holding any elected or appointed position with the Delaware Tribe of Indians in the future; and to prohibit the Tribal Council of the Delaware Tribe of Indians from reinstating the salary, office, or any other position, or employment for any reason in the future, and to prohibit the Delaware Tribe of Indians or any of its affiliated branches of businesses from hiring him/her in any capacity in the future.

The petitions continued to provide the crux of the purported resolution.

> Be it enacted by the eligible voting membership of the Delaware Tribe of Indians Pursuant to Article VIII of the Constitution and Article III of the Bylaws of the Delaware Tribe of Indians.
>
> 1. The election of [Chief/Tribal Council member] [Brooks/Griffith/Young] held on the [1st day of November, 2014 or 3rd day of November, 2012] is hereby recalled, effective immediately;
> 2. All payments of wages, salary, or fees to [Brooks/Griffith/Young] is terminated herein for acting in the capacity as [Chief/Tribal Council] of the Delaware Tribe and shall be terminated immediately; except those due and payable at the time this resolution is enacted.
> 3. The Tribal Council shall not reinstate the salary of [Brooks/Griffith/Young] as terminated herein for any reason, nor pay such individual any wages, salaries or fees as a consultant before [November 1, 2014 or 3rd day of November, 2012].
> 4. If any section of this resolution and act of the General Council acting within the powers as the supreme authority of the Delaware Tribe of Indians Shall be found unlawful, the remaining provisions shall be in full force and effective as tribal law.

The remaining narrative sections of the petitions vary a little from each other. As to Assistant Chief Griffith, it provides:

> We, the undersigned members of the Delaware Tribe of Indians, being duly enrolled, respectfully direct that Bonnie Jo Griffith be recalled and discharged from office *due to abuse of authority, dishonesty, interfering with Tribal Council members and officer duties, and using her office for personal gain;* I have personally signed this petition; I am an enrolled member of the Delaware Tribe of Indians, aged 18 or older; my address is correctly stated, and to my knowledge I have signed this petition only once.

As to Councilman Young, it provides:

> We, the undersigned members of the Delaware Tribe of Indians, being duly enrolled, respectfully direct that Nathan H. Young be recalled and discharged from office *due to abuse of authority, crimes of dishonesty, interfering with Tribal Council members and officer duties, and using his office wrongly;* I have personally signed this petition; I am an

> enrolled member of the Delaware Tribe of Indians, aged 18 or older; my address is correctly stated, and to my knowledge I have signed this petition only once.

As to Chief Brooks, it provides:

> We, the undersigned members of the Delaware Tribe of Indians, being duly enrolled, respectfully direct that Chester L "Chet" Brooks be recalled and discharged from office *due to malfeasance, the use of position for personal and financial gain, abuse of authority, crimes of dishonesty, interfering with Tribal Council members and officer duties;* I have personally signed this petition; I am an enrolled member of the Delaware Tribe of Indians, aged 18 or older; my address is correctly stated, and to my knowledge I have signed this petition only once.

Nowhere in any of the three petitions does it list details concerning any criminal convictions or specific criminal laws that have been violated.

The Petitioner's complaint alleges that the three petitions were verified and filed on 7/5/2016. All petitions contain at least 100 signatures. The Respondents dispute the validity of several of the signatures, but that concern will not be addressed in this Opinion and Order. As of today's date, 2/3 of the Tribal Council has not voted to recall any of the three individuals. As of today's date, no vote has been held by the membership concerning the petitions. When Chief Brooks failed to call for an election within 45 days of the filing of the petitions, the Petitioner sought the assistance of the Tribal Court.

On 8/16, Chief Brooks submitted a "*Motion to Dismiss*," which was signed by himself, Assistant Chief Griffith, and Councilman Young. On 8/18, Chief Brooks filed a pleading entitled "*Amendments to Response of Complaint of Writ of Mandamus and Motion to Dismiss*." Because of the nature of this case, the Court wanted to handle it on an expedited timeframe. On 8/18, in order to handle the arguments raised by Chief Brooks and the other members of the Council and this case in general in a timely fashion, this Court set the Defendant's Motion for a hearing and added Councilman Young and Assistant Chief Griffith as Intervening Respondents. On 9/6, Secretary Ketchum filed an *Objection to the Motion to Dismiss* and her attorney, Alyssa D. Campbell, filed an *Entry of Appearance*. On 9/9, Karla Michelle Vernon asked to be allowed to intervene in the lawsuit because she was the drafter of the petitions. On 9/14, this Court granted Ms. Vernon's request to intervene. The Court also granted the Petitioner's request to adjourn the hearing date. A hearing was held on the Respondent's Motion to Dismiss in the afternoon of 10/5.

Standard of Review

The *Respondents' Motion to Dismiss* was a request to rule on the law; in effect, whether the petitions filed meet the constitutional requirements for recall petitions. Although it appeared that there are contested facts (e.g., whether signatures were in fact, true and accurate), those contested facts do not prohibit the court from issuing a ruling on the law as to the correct procedure to seek recall under the Constitution. As a result, the court treated the *Motion to Dismiss* as a Motion for Judgment on the Pleadings in accordance with Section 13-207(c) of the Tribe's Civil Procedure Rules.

Summary judgment is appropriate where the pleadings and discovery show that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law. The moving party, the Respondents in this case, has the initial burden of proving that no genuine issue of material fact exists and the court must draw all reasonable inferences in the light most favorable to the nonmoving party. When a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, summary judgment is appropriate.

ANALYSIS

Although we are an old Tribe, our laws and the use of our court is fairly new. As with any government, there will be disputes and we are pleased to see the membership attempt to resolve them through the court system. It is a part of good governance for our elected officials to be mindful of the law and for our citizens to hold our elected officials accountable. We would like to think that this lawsuit was brought in that spirit. That said, the process pursued by the Petitioners does not comport with the Tribe's Constitution. The ruling today does not speak to whether the elected officials are performing their jobs well or whether they have done bad things in their past. The Order today only addresses what is allowed under the Tribe's Constitution.

Article X of the Constitution of the Delaware Tribe provides for Recall/Removal from Office. Under the Cannons of Construction, because there is a provision in the Constitution that governs recalls and removals, anything not listed in that Article is not allowed under the law. Article X in its entirety states:

> Section 1. If any elected member of the Delaware Tribal government is convicted of a felony or crime which involves dishonesty, his office shall be considered forfeited upon 2/3 vote of the Tribal Council by resolution, or by 2/3 of votes cast by eligible voting membership.
>
> Section 2. Any member of the Delaware Tribal Council not in attendance of two consecutive, unexcused absences, at the regularly scheduled Council meetings, shall forfeit his office.

Accordingly, elected officials of the Delaware Tribe can only be removed under one of those two provisions. Also important to our analysis, the Tribe's Constitution does not spell out qualifications to hold office.

It was made clear during oral argument that we are dealing only with Section 1 and not Section 2. Section 2 of Article X is written such that a vote of Council or the membership is not required. If two consecutive meetings are missed and not excused, the individual is automatically no longer on Council. Section 1 is written differently. Section 1 requires a conviction and a vote of either the membership or the Council. As discussed above, there has been no vote of the council or membership as of yet. Although there are petitions calling for a vote of the membership, we still have to determine whether a prerequisite conviction exists.. In order for a vote of Council or the membership to be held, the triggering conviction must have occurred.

In order for an elected official to be removed from office, the conviction must have occurred while the official is serving an elected term. First, the Constitution does not prohibit candidates with convictions in their past from seeking office. Second, the language is also in the present tense, where an elected official "is convicted" and not "has been convicted." Third the plain language of the Constitution refers to an "elected member" being convicted, making it clear that the person receiving the conviction is at that time an elected official. Fourth, the drafters of the Constitution decided to make it very hard to remove elected officials and we want to respect their desires and the will of the electorate that voted-in these officials. Accordingly, under Section 1, the only basis for recall is a felony conviction or a conviction for a crime involving dishonesty received while the official is in office.

As discussed above, the moving party has the initial burden of proving that no genuine issue of material fact exists and the court must draw all reasonable inferences in the light most favorable to the nonmoving party. Nowhere in the Complaint for Writ of Mandamus were any convictions referenced. Nowhere in any of the three petitions were listed any convictions by any

of the three Respondents. At oral argument there did appear to be disputed facts as to what crimes, if any, of which Chief Brooks and Councilman Young have been convicted. However, the Petitioners also did not allege that either Chief Brooks or Councilman Young were convicted of any crimes while serving their terms in office. No allegations were ever made that Assistant Chief Griffith has been convicted of a crime. As a result, there are no genuine issues of material fact before the court because there is no allegation that any of the three have been convicted of a felony or convicted of a crime involving dishonesty while they were in office. Without the prerequisite convictions, there is no legitimate recalled election to be set and, as a result, Chief Brooks appropriately did not ask either the Council or the membership to vote on whether the officials should be recalled.

CONCLUSION

Section 1 of Article X of the Tribe's Constitution only allows for a vote of the membership on recall if the elected official was convicted of a felony or convicted of a crime involving dishonesty while in office. Because there is no allegation that any of the three Respondents have been convicted of any crimes while during this term, the Constitution does not allow for a recall election at this time.

Dated: **October 13, 2016**

Assistance Chief Judge Cameron Ann Fraser

Judge Richard Barnes