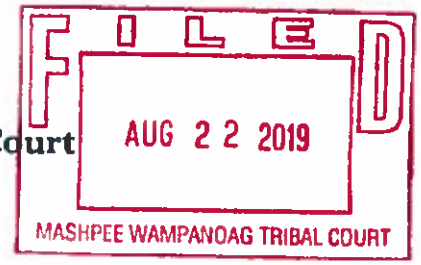
Mashpee Wampanoag Tribal Court



Aaron Tobey Jr., Plaintiff, v. **Rita Lopez** **Election Committee Director** Defendant.	Case No.: **CV-19-002**

ORDER
(Dismissal)

INTRODUCTION

The Court must determine whether to grant the defendant's request for dismissal of the plaintiff's *Complaint*. The plaintiff initiated a suit against the defendant in her official capacity. The defendant requested dismissal pursuant to sovereign immunity. The Court grants a dismissal; the basis, however, is due to the plaintiff's failure to meet the constitutional threshold for recall.

PROCEDURAL HISTORY

The plaintiff, Aaron Tobey, Jr., initiated the current action by filing the *Complaint* with the Court on May 7, 2019. Consequently, the Court issued a *Summons* on the same date. The plaintiff maintains the duty to serve a copy of the Summons and the above-mentioned pleading, by delivery of the documents by certified mail to the defendant. *See R. Civ. P. Mashpee Wampanoag Dist. Ct.*

(hereinafter *R. Civ. P.*), *Rule 10.*[1] On May 10, 2019, Acting Chief Justice Robert F. Mills issued a *Notice of Judicial Assignment* assigning Amanda L. WhiteEagle to the above-captioned matter.

The *Summons* informed the defendant of the right to file an *Answer* within twenty (20) days of receipt of the *Summons* and the above-mentioned pleading pursuant to *R. Civ. P.* 12. The defendant filed a request for an extension through her *Motion to Extent* [*sic*] *Time for an Answer* on May 23, 2019. *See R. Civ. P., Rule 12a.* The Court granted the extension and indicated that the defendant must file an Answer on or before June 17, 2019. *See Order Granting Mot. To Extent [sic] Time to Answer*, CV-19-002 (Mashpee Wampanoag Tribal Ct., May 29, 2019).

On June 17, 2019, the defendant filed a timely answer consisting of a *Motion to Dismiss the Complaint* and *Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint.* Additionally, a document was filed indicating a notice of special-limited appearance of Brandy K.M. Toelupe as attorney for the defendant. On July 8, 2019, a *Notice of Appearance* was filed, which indicated that the plaintiff had retained Jonathan M. Polloni as attorney. On the same date, the plaintiff filed *Plaintiff's Opposition to Defendants* [*sic*] *Motion to Dismiss.* In response, the defendant filed her *Reply in Support of Motion to Dismiss the Complaint* on July 16, 2019.

The Court mailed *Notice of Conference Hearing* to the parties on July 9, 2019, informing them of the date, time and location of the *Conference Hearing*. The Court convened the *Hearing* on July 19, 2019 at 1:00 p.m. EST. The following parties appeared at the *Hearing*: Jonathan M. Polloni, telephonically and on behalf of the plaintiff; Aaron Tobey, Jr., plaintiff; Brandy K.M. Toelupe, on behalf of the defendant; and Rita Lopez, defendant. At the Conference Hearing, the parties, in conjunction with the Court, determined to proceed with a *Motion to Dismiss Hearing* and scheduled the matter in open court for Friday, July 26 at 10:00 a.m. EST. Nonetheless, the

[1] The plaintiff dated the *Summons* for May 17, 2019.

Court provided a *Notice of Motion to Dismiss Hearing*. The following parties appeared at the *Hearing*: Jonathan M. Polloni, on behalf of the plaintiff; Aaron Tobey, Jr., plaintiff; Brandy K.M. Toelupe, on behalf of the defendant; and Rita Lopez, defendant.

APPLICABLE LAW

Constitution of the Mashpee Wampanoag Tribe

Article IV

Elections

Section 1. Voter Requirements
Any enrolled member of the Tribe who is registered to vote shall be entitled to vote in Tribal elections, except if such member is judicially declared mentally incompetent.

Section 2. Voting
Except as may be otherwise specified in this Constitution, voting in Tribal elections shall be by secret ballot cast at polls established by the Election Committee at such sites designated by the Election Committee. Write-in voting shall be permitted in accordance with such procedures as shall be established by the Election Committee. Write-in candidates must meet all eligibility requirements, constitutional or otherwise. No proxy or absentee voting shall be allowed in Tribal elections.

Section 3. Regular and Special Elections
The Tribal Council shall provide by ordinance for the holding of regular elections, including establishing dates, times and places for holding such elections. The Tribal Council shall also provide by ordinance for the holding of special elections by establishing the procedure by which such elections may be called and held with adequate notice provided to registered Tribal voters.

Section 4. Election Committee
(a) Within 60 days of the effective date of this Constitution an Election Committee composed of five Tribal members, who are registered voters of the Tribe, shall be appointed for staggered terms of three years by a majority vote of the members of the Tribal Council present at a meeting called for the purpose of making such appointments. The initial term of each Committee member first appointed shall be randomly assigned with three Committee members serving three years and two Committee members serving two years. Committee members may be removed from office by a majority vote of the members of the Tribal Council present at the meeting prior to the expiration of their term only for cause. Any person who holds any elective or appointive Tribal office or is a candidate for such office shall be ineligible to serve on the Election Committee; however, one member of the Tribal Council may be allowed to serve on the Election Committee. Any member of the Election Committee who becomes a candidate or is elected or appointed to Tribal office

shall automatically forfeit the remainder of their term of office on the Election Committee if one member of the Tribal Council is currently serving on the Election Committee.

(b) The Election Committee shall be responsible for enforcing Tribal election laws. The duties of the Election Committee shall include, but shall not be limited to, the following:

(1) establishing and maintaining a system of voter registration, and

(2) maintaining a current list of registered voters of the Tribe, and

(3) certifying eligibility of candidates for Tribal offices (both elective and appointive) according to eligibility requirements specified in Article VI or by Tribal ordinance, and

(4) conducting Tribal elections, and

(5) certifying the results of Tribal elections.

(c) The Election Committee shall perform such other duties as may be delegated to the Committee by ordinance.

(d) The Election Committee may issue such regulations as may be necessary to carry out Tribal election ordinances.

Section 5. Election Ordinance
The Tribal Council shall enact an election ordinance that shall include, but shall not be limited to, voter registration requirements, a provision for the appointment of a five-member Election Committee, and a provision to judicially resolve disputed elections.

Section 6. First Election
(a) The first election under this Constitution shall be held on the date of the next regular election that was scheduled under the Constitution and Bylaws and shall be supervised and conducted pursuant to an election ordinance enacted by the Tribal Council then in office, pursuant to Section 5 of this Article. The office of Tribal Council Chairperson, Vice-Chairperson, Secretary and Treasurer and one of the five vacancies on the Tribal Council which would have occurred for that election, shall be filled for four years. The remaining four member vacancies, which include the office of Historian, are abolished and shall not be filled in accordance with Article VI, Section 1 (a)[.] The terms of the remaining four member incumbents shall be two years from the date of the first election, at which time their successors shall be duly elected and installed. Thereafter, there shall be an election every two years so as to continue the system of staggered terms of office.

(b) All members of the Board of Directors at the time this Constitution becomes effective shall continue to serve and shall be entitled to exercise all powers granted by this Constitution to the Tribal Council until such time as their successors are elected and installed in accordance with this Constitution.

(c) All members who are elected to the Tribal Council shall also serve as members of the Board of Directors of the Mashpee Wampanoag Indian Tribal Council, Inc., as well as members of the Board of Directors of the Old Indian Meetinghouse Authority, Inc. The Elected Chairperson of the Tribal Council shall serve as President of both the Wampanoag Indian Tribal Council, Inc. and of the Old Indian Meetinghouse Authority, Inc., the elected Vice Chairperson shall serve as Vice President of the Mashpee Wampanoag Indian Tribal Council, Inc. and of the Old Indian Meetinghouse Authority, Inc., the Secretary shall serve as Clerk of the Mashpee Wampanoag Indian Tribal Council, Inc. and of the Old Indian Meetinghouse Authority, Inc., and the Treasurer shall serve as Treasurer of the Mashpee Wampanoag Indian Tribal Council, Inc. and of the Old Indian Meetinghouse Authority, Inc.

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ARTICLE VIII

Vacancies and Removal of Tribal Officials

Section 1. Recall

(a) The registered voters of the Tribe may recall any elected official of the Tribe from office in accordance with the procedure set forth in subsection (b) of this Section; provided that, recall shall not be a remedy against alleged action by a Tribal official which may constitute a major crime.

(b) The procedure by which an elected Tribal official may be recalled shall be as follows:

(1) Petitioners Committee. Any 100 registered voters of the Tribe may commence recall proceedings by filing with the Election Committee an affidavit (1) stating their names, addresses, and the names and addresses of three representatives of the Petitioners Committee to which all notices regarding the petition are to be sent, and (2) stating that they will constitute the Petitioners Committee and will be responsible for circulating the petition and filing it in proper form, and (3) naming the Tribal official sought to be recalled, and (4) stating in less than 250 words the specific reasons upon which it is alleged that the named Tribal official should be recalled. If more than one official is sought to be recalled, there shall be separate affidavits of charges filed for each such official. The Election Committee shall promptly thereafter serve in person or by registered mail a copy of the affidavit of the Petitioners Committee upon the named official. The named official shall have 15 days after receipt of service to file an affidavit in defense with the Election Committee answering, in less than 250 words, the charges made against him or her.

(2) Certificate of Sufficiency

(A) Certificate of Sufficiency.

Within 5 working days after a petition is filed, the Election Committee shall certify as to its sufficiency.

(B) If Certified Insufficient.

If the petition is certified insufficient, the Election Committee shall state in the certificate with particularity the reasons it is insufficient. A copy of the certificate of insufficiency shall be promptly sent to the Petitioners Committee by registered mail, or served personally upon, the Petitioners Committee. A petition certified insufficient for lack of required number of valid signatures may be supplemented once, and for this purpose an

appropriate number of petition forms shall be mailed or given personally to the Petitioners Committee along with the certificate of insufficiency. Such supplemental petition shall comply with the requirements of this section. Petitioners Committee shall have 15 days after receipt of the certificate of insufficiency to file a supplemental petition with the Election Committee. Within 5 working days after the filing of the supplemental petition, the Election Committee shall certify as to the sufficiency of the petition as supplemented and promptly send a copy of such certificate to the Petitioners Committee by registered mail, or shall serve a copy personally upon the Petitioners Committee.

(C) If Certified Sufficient.

If an original petition or a petition a supplemented in accordance with Section 1(b)(2) (B) of this Article is certified as sufficient by the Election Committee, it shall promptly send a copy of the certificate of sufficiency by registered mail to, or serve it personally upon, the Petitioners Committee, and the certificate of sufficiency shall promptly be presented to the Tribal Council. Immediately thereafter, the Tribal Council shall promptly send by mail to all registered tribal voters a copy of the certified petition.

(c) Recall Election

(1) The Election Committee shall hold a meeting of the general Tribal members giving each side equal time to present their arguments and to answer any questions posed by participants at a hearing. Immediately following the hearing, a recall election shall occur. The affirmative vote of 60 percent of those voting at the recall election shall effect a recall of the official from office; provided that, at least 40 percent of the total number of registered Tribal voters who voted in the next immediately preceding annual election of Officers vote in the recall election. The 40 percent requirement shall be certified based on the attendance log at the beginning of the hearing. If the 40 percent requirement is not met, then the hearing and recall election shall be immediately canceled. In the event the official is recalled, the office shall be deemed vacant and shall be filled in accordance with Section 4 of this Article.

(2) The ballot for the recall election shall, for each official sought to be recalled if more than one, state the grounds set forth in the recall petition for demanding such recall and the answer of the official sought to be recalled. The ballot shall set forth the following question: Shall (name of the official sought to be recalled) be recalled from the office (title of office). Following such question shall be two choices of words, "yes" or "no" on separate lines with the blank space to the right of each in which the voter shall indicate by marking a cross "x" for his or her vote for or against recall.

DECISION

The defendant, Rita Lopez, in her capacity as Election Committee Chair, seeks dismissal of the above-captioned matter. The proffered arguments are that 1) she is protected by sovereign immunity, 2) sovereign immunity is not waived, 3) the *Complaint* fails to state a claim which relief

may be granted, 4) insufficient service exists regarding the *Complaint*, and 5) the Court lacks personal jurisdiction. *Memorandum of Law in Supp. of Mot. to Dismiss Plaintiff's Compl.* (July 17, 2019). The plaintiff counters with a constitutional violation, as well as a tribal official exceeding her authority. *Plaintiff's Opposition to Defendants* [*sic*] *Mot. to Dismiss* (July 8, 2019).

First, the Court finds that service was proper. The Mashpee Wampanoag Tribal Court issued its *Summons* on May 8, 2019. Although assertions were made indicating that it was improper, proof of service was provided when the plaintiff indicated that the *Summons* was sent on May 17, 2019. *See Summons*, CV-19-002 (Mashpee Wampanoag Tribal Ct., May 8, 2019)[2]. All of the filings were received timely. Any delay did not unduly prejudice the parties. Additionally, the Court granted a continuance in order to for the defendant to secure counsel. *See Order Granting Mot. to Extent* [*sic*] *Time to Answer*, CV-19-002 (Mashpee Wampanoag Tribal Ct., May 29, 2019).

The source of the jurisdiction is the *Constitution of the Mashpee Wampanoag Tribe* (hereinafter *Constitution*). Matter of fact, the *Constitution* contains a near step-by-step guide as to how *Vacancies and Removal of Tribal Officials* can occur, and the *Constitution* is the supreme law of the land. *See generally Const.*, Art. V, §2; *id.*, Art. VIII. The defenses raised effectively deny individual tribal members the ability to engage in a process with judicial review. The defendant is placed in the position of being accused of "running with the hare and hunting with the hound." The defendant cannot placate both sides, which in this instance involves several members of the Tribal Council, who appoint the Election Committee members. *See Amended and Restate Mashpee Wampanoag Election Ordinance, 2016-ORD-014*, §1(A). In the current situation, if the defendant had determined that the officials were subject to recall, then the same defenses could be

[2] The Court notes that there was a clerical issue contained on the *Summons*, specifically regarding the Court case number. Court Clerk Nancy Rose ensured that it was addressed. The correct case number is CV-19-002.

raised. The affected Tribal Council members would be precluded from filing suit. The Election Committee Chair, as well as the Election Committee, are placed in the tenuous, political position of finality.

The Court concurs with the defendant's assertion that the Election Committee retains sovereign immunity. *Memorandum of Law in Support of Mot. To Dismiss Plaintiff's Compl.* at 4. However, the plaintiff did not initiate suit against the Election Committee. He specifically alleges that the defendant acted outside of the scope of her authority. However, a poignant question exists as to whether the defendant retains official immunity. This is particularly important as the plaintiff alleges that the defendant acted outside of the scope of her official capacity. It would be in the best interest of the Election Committee Director, the Election Committee, the Tribal Council, and ultimately the Wampanoag tribal members, to ensure that the *Amended and Restate Mashpee Wampanoag Election Ordinance* is amended to include clear expectations regarding the *Vacancies and Removal of Tribal Officials* process.

Nonetheless, the Court declines to address the defenses at this juncture. The Court finds that the *Recall Petitions* are insufficient as presented. The *Constitution* states:

> The procedure by which an elected Tribal official may be recalled shall be as follows:
> (1) Petitioners Committee. Any 100 registered voters of the Tribe may commence recall proceedings by filing with the Election Committee an affidavit (1) stating their names, addresses, and the names and addresses of three representatives of the Petitioners Committee to which all notices regarding the petition are to be sent, and (2) stating that they will constitute the Petitioners Committee and will be responsible for circulating the petition and filing it in proper form, and (3) naming the Tribal official sought to be recalled, and (4) stating in less than 250 words the specific reasons upon which it is alleged that the named Tribal official should be recalled. If more than one official is sought to be recalled, there shall be separate affidavits of charges filed for each such official. The Election Committee shall promptly thereafter serve in person or by registered mail a copy of the affidavit of the Petitioners Committee upon the named official. The named official shall have 15 days after receipt of service to file an affidavit in defense with the Election Committee answering, in less than 250 words, the charges made against him or her.

The *Complaint* provides attachments, specifically the recall petitions. *See Compl.*, CV-19-002 (May 7, 2019) at 6-25. It is unclear who represents the *Petitioners Committee*, specifically the three representatives. Furthermore, an affidavit is not present. An affidavit is commonly known as a sworn, written attestation of the truth, and may be used in court proceedings. Additionally, nothing contained within the *Complaint* indicates that there was a reasoning in less than 250 words, which specifically alleged why the named Tribal officials should be recalled. The Court need not proceed any further in its inquiry. Based upon the foregoing, the Court hereby DISMISSES the instant matter.

To the extent any party feels aggrieved by this order of the Court, the parties retain the right to file an appeal. "Any party who does not believe that the judgment of the District Court is supported by law or fact may file a Notice of Appeal with the Court Clerk within thirty (30) days after the judgment is entered with the clerk." *R. Civ. P.*, Rule 41a. Furthermore, "[a]ppeals are governed by the Mashpee Wampanoag Supreme Court Rules of Appellate Procedure." *Id.*, Rule 41c.

IT IS SO ORDERED this 22nd day of August 2019, by the Mashpee Wampanoag Tribal Court located in Mashpee, Massachusetts within the sovereign lands of the Mashpee Wampanoag Tribe.

Amanda L. WhiteEagle

Honorable Amanda L. WhiteEagle
Alternate District Court Judge