

Catherine Hollowell v. Sault Ste. Marie Tribe of Chippewa Indians Election Committee

APP 14-02

BEFORE Appellate Judges Finch, Harper, Jump, Nertoli and Warner.

For the reasons explained below, the Sault Ste. Marie Tribe of Chippewa Indians Election Committee's (Election Committee) May 9, 2014 decision, "Complaint Decision for Violation of Election Ordinance Catherine Hollowell", is reversed. In reversing the Committee's decision, this Court holds that the Committee's findings on the merits of the matter were "arbitrary and unreasonable" under Tribal Code Section 82.210. The Court, however, does not find that Director Hollowell's due process rights under the Indian Civil Rights Act, applicable to the Tribe through incorporation at Article VIII of the Tribe's Constitution and Bylaws, were violated.

Procedural History

At oral argument and in its supplemental brief, counsel for Appellee explained to the Court the procedural history in the case. On April 25th, the Election Committee received a complaint regarding Director Hollowell's unit report contained in the April 18th copy of the tribal newspaper.¹ The complaint alleged violations of Tribal Code Sections, including violations of Chapters 10, 16 and 72 [hereinafter "Complaint 1"].

The Election Committee received a second complaint on April 27, 2014. The second complaint did not mention the Tribal Code, but did express concerns about the content of the same unit report at issue in Complaint 1 [hereinafter "Complaint 2"].

All complaints filed with the Election Committee took issue with Director Hollowell's unit report published in the April 24, 2014 tribal newspaper. As detailed at page 2 of the Election Committee's May 9, 2014 Decision, the offending language was:

The 500 word limitation does not leave much room for laying out a comprehensive platform. You can be sure that the following are identified needs and priorities: access to services in health, education, social, cultural programs and resources; reinstated elders and family services, tribal treaty rights and you; fiscal management, environmental justice, designated use and clean water act; jobs, jobs creation and economic development; employment issues, tribal policies and labor law; constitutional reform, 'at large' constitutionally protected; citizenship and jurisdiction. I would like you to visit my website www.catherinehollowell.com. There I will lay out a more comprehensive platform than the 500 words I am allowed here. All candidates will be given campaign space in the May issue of the newspaper as well. But I am concerned the paper will arrive too late for voters to make an informed decision especially

¹ There seems to be some confusion about the date the tribal newspaper was published. At oral argument before this Court, Director Hollowell indicated that the newspaper was available in electronic form on April 14th and hard copy form on April 24th. In its supplemental brief, Appellee references April 18th. Given the Court does not have an original copy of the newspaper in question, it uses the April 18th date.

for those who live far away. So, please check it out. I always look forward to your calls, e-mails and meeting with you. Or you can Facebook me too but I think you will find my website [www. Catherinehollowell.com](http://www.Catherinehollowell.com), worth checking out.

On April 28, 2014, the Election Committee notified Director Hollowell via text that the two complaints had been filed against her. On April 30, 2014, the Election Committee e-mailed a hearing notice to Director Hollowell and attached electronic copies of Complaints 1 and 2. On May 2, 2014, Director Hollowell received a hard copy of the notice of hearing and complaints via certified mail. On May 5, 2014, the Election Committee received a third complaint regarding Director Hollowell's unit report [hereinafter "Complaint 3"]. Like Complaint 2, Complaint 3 did not make any specific mention of the Tribal Code. Director Hollowell received a copy of Complaint 3 the evening before the Election Committee hearing. On May 8, 2014, the Election Committee held a hearing in the matter and Director Hollowell appeared to defend herself against the allegations in the complaint.

On May 9, 2014, the Election Committee issued its decision finding that Director Hollowell had violated Tribal Code Sections 10.112(4) and 10.112(10). Director Hollowell was fined \$500 for these violations and the Committee also ordered that its decision be published as required by Chapter 10 of the Tribal Code.

On May 14, 2014, Director Hollowell filed an appeal of the Election Committee's decision with this Court. This Court held oral argument in the appeal on May 16, 2014. During the oral argument, supplemental briefs were ordered. Appellee submitted its supplemental brief on May 20, 2014. Appellant submitted its supplemental brief on May 22, 2014. Appellant also submitted a Notice of Stay on May 22, 2014. Judges Nertoli and Jump issued a Stay on May 23, 2014.

Standard of Review

For appeals from Election Committee decisions, the standard of review "shall be abuse of discretion and shall be defined as the Election Committee acting in an arbitrary or unreasonable way that results in an Appellant being unfairly denied a substantial right or being caused to suffer an unjust result." Tribal Code Section 82.210. Accordingly, the Court reviews the Election Committee's May 9, 2014 decision to determine whether the Committee acted in "an arbitrary or unreasonable way". The Court will not substitute its judgment for the judgment of the Election Committee, unless the Election Committee's actions were arbitrary or unreasonable.

Discussion

In her written and oral appeals to this Court, Director Hollowell raised several legal issues. First, she argued that her due process rights had been violated by the Election Committee in relation to the hearing held on May 8, 2014. Second, she argued that the Election Committee's decision on the merits was flawed for several reasons. Each of these arguments is addressed below.

Due Process

As an initial procedural starting point, Director Hollowell, in her written submissions to this Court and again during oral argument before this Court, alleged that her right to due process was violated by the Election Committee's process used in the above described hearing. Due process protections apply to the Tribe by virtue of the Indian Civil Rights Act, which the Tribe incorporates into tribal law at Article VIII of the Tribe's Constitution and Bylaws. Accordingly, the Court reviews the process used by the Election Committee to determine whether the process and hearing violated the due process protections of the Indian Civil Rights Act. Specifically, Director Hollowell alleges that her due process rights were violated because of: 1) insufficient notice of the hearing; 2) denial of postponement; and 3) an inability to call two witnesses at the hearing. The Court will consider each of these in turn.

First, Director Hollowell alleges that notice of the hearing held by the Election Committee was insufficient, as she did not: 1) have adequate time to prepare and 2) understand the issues that would be discussed at the May 8, 2014 hearing. As to the first issue – the adequacy of the length of time Director Hollowell was given before the hearing – Appellee, in its supplemental brief to this Court, properly points out that the Tribal Code does not mandate a specific time period for notice of an Election Committee hearing. Appellee explains that flexibility in this regard is necessary given the dynamic and time sensitive nature of the tribal elections Appellee is charged with overseeing. This Court agrees. Given the Tribal Code does not mandate a specific time period and the policy issues applicable here, the Court determines that 11 days was adequate notice of the hearing. Moreover, Director Hollowell cannot demonstrate injury from this alleged inadequate time of notice, as she was more than capable of defending her actions both at the Election Committee hearing and before this Court. Accordingly, even if she did not receive adequate notice, there is no harm to Director Hollowell.

Relatedly, Director Hollowell argues that her due process rights were violated because the provided notice was not specific enough as to the claims she would have to defend against at the Election Committee hearing. Specifically, Complaint 1 referenced several provisions of the Tribal Code, including Chapters 10, 16 and 72, and, therefore, Director Hollowell was uncertain what allegations she should be prepared to defend at the May 8, 2014 hearing. As Appellee pointed out both at oral argument and in its supplemental brief, however, the hearing notice received by Director Hollowell specifically referenced Chapter 10. At page 10 of its supplemental brief, Appellee references the language at issue in the Notice of Hearing:

The purpose of the hearing is to hear the April 25, 2014, complaint filed by Aaron Payment alleging that **Director Catherine Hollowell's unit report in the April 18, 2014, issue of Win Awenen Nisitopung violated the Election Ordinance and to hear the April 27, 2014, complaint filed by Shelia Berger on the same issue.** (emphasis added)

As Appellee argued at oral argument and demonstrates by providing the Court with a copy of the Notice of Appeal, Director Hollowell was notified that the May 8, 2014 hearing would focus on the Election Ordinance. Accordingly, she had notice of the scope of the May 8, 2014 hearing.

Moreover, Director Hollowell does not explain how she was injured at the hearing on the basis of the Election Committee's alleged failure to notify her of the scope of the hearing. As explained above, Director Hollowell was able to defend herself during the May 8, 2014 hearing.

Next, Director Hollowell argues that her due process rights were violated because the Election Committee rejected her request for an extension as to the date of the hearing. Appellee argues that an extension was not appropriate given the need for timely resolution of the matter given the ongoing election cycle. Moreover, Appellee explains in its supplemental brief that all requests for an extension were rejected for this same reason. Accordingly, Appellee demonstrates that Director Hollowell was not treated differently from similarly situated individuals. Furthermore, Director Hollowell fails to explain how she was injured by the failure to grant an extension. Accordingly, the Court concludes that the Election Committee was justified in its denial of an extension and Director Hollowell was not injured by this decision.

Finally, Director Hollowell argues that her due process rights were violated because she was unable to bring forward two witnesses in person at the May 8, 2014 hearing. As a result, Jennifer Dale-Burton provided testimony to the Election Committee via a written transcript and Lana Causley was unable to provide any testimony. In its supplemental brief, Appellee explains that the Election Committee did take the written transcript of Ms. Dale-Burton answering questions posed by Director Hollowell under advisement. Moreover, the Election Committee did not permit Ms. Causley to testify as her testimony would have gone to the character of Director Hollowell, which was inappropriate given the scope of the hearing. Accordingly, the Committee did consider the transcript of Ms. Dale-Burton or at least took it under advisement. Additionally, the testimony of Ms. Causley was likely not relevant to the May 8, 2014 hearing. Finally, as with the other due process arguments raised by Director Hollowell, even assuming that the denial to hear these witnesses at the May 8, 2014 hearing did constitute a due process violation, it is unclear how the Election Committee's decision negatively impacted Director Hollowell.

Therefore, for the reasons explained above, the Court rejects Director Hollowell's due process arguments.

Merits of the Election Committee Decision

In reviewing Complaints 1-3, the Election Committee focused its analysis on Tribal Code Sections 10.112(4) and 10.112(10). Tribal Code Section 10.112(4) provides in relevant part that "[n]o tangible or intellectual property of the Tribe may be used for any Campaigning purposes" Tribal Code Section 10.112(10) provides that "[e]xpress endorsements or express statements of opposition to a Candidate in unit reports or the Chairperson's report distributed by the Tribe are prohibited. During Election Cycles, Candidates' unit reports distributed by the Tribe shall be limited to space equivalent to ¼ page." "Campaigning" is defined at Tribal Code Section 10.103(4) and "shall mean all efforts designed to influence Members to support or reject a particular Candidate, including without limitation, advertising, rallying, public speaking, or other communication with Members."

According to the Election Committee:

In order for a violation of Ch 10 to be found two elements must be met. First the unit report must meet the definition of campaigning. Second, at least one or both of the following must be true. The tribal newspaper must be found to be tangible property of the tribe or the above quoted context of the unit report must be found to be an express endorsement of a Candidate.

Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 3 (May 9, 2014).

Based on the foregoing, the Court will first examine whether the Election Committee's decision in regard to Tribal Code Section 10.112(4) was unreasonable or arbitrary. Second, the Court will do the same for the Election Committee's decision in regard to Tribal Code Section 10.112(10).

Tribal Code Section 10.112(4): Use of Tribal Property for Campaigning Purposes

On the issue of whether Director Hollowell used tribal property for campaigning purposes (i.e. her unit report published in the tribal paper), the Election Committee concluded that

[t]he tribal newspaper is wholly owned and operated by the tribe. And while its content may be defined as intangible property of the tribe or intellectual property of the tribe, for our purposes the newspaper is a physical thing that is tangible. Accordingly, campaigning in the tribal newspaper is prohibited by §10.112(4).

Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 5 (May 9, 2014).

Accordingly, this Court reviews the Election Committee's findings in relation to Tribal Code Section 10.112(4) to first determine whether Director Hollowell's unit report falls within the definition of "campaigning" at Tribal Code Section 10.103(4) and, second, whether the tribal newspaper constitutes "property" as the term is used at Tribal Code Section 10.112(4).

First, on the issue of campaigning, the Election Committee found that "[i]t is the totality of the language that convinces us that the unit report sought to campaign for Respondent as it is clearly a communication to potential voters designed to influence their decision on whom to give their vote." Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 5 (May 9, 2014). Unlike Tribal Code Section 10.112(10), which requires an "express" endorsement as discussed below, the definition of "campaigning" is quite broad and includes "all efforts designed to influence Members to support or reject a particular Candidate". Tribal Code Section 10.103(4). Accordingly, it was reasonable for the Election Committee to conclude that Director Hollowell's unit report was designed to "influence" the electorate. This conclusion is buttressed by the fact that none of the parties have focused their arguments on whether or not Director Hollowell's unit report constituted "campaigning". The Election Committee's finding on this point is therefore affirmed.

Second, on the issue of whether publication of Director Hollowell's unit report in the tribal newspaper constituted using tribal property for campaigning, the Election Committee found that

“for our purposes the newspaper proper is a physical thing that is tangible.” Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 5 (May 9, 2014). In other words, the Election Committee determined that the tribal newspaper is tribal property for purposes of Tribal Code Section 10.112(4).

When considering the Election Committee’s decision in light of the totality of Tribal Code Section 10.112(4), however, this Court determines that the Committee’s interpretation is unreasonable. Although not necessarily an exhaustive list, Tribal Code Section 10.112(4) details examples of the type of property it is referencing. Specifically, it references “computers, photocopying, telephones, fax machines, database information and office supplies.” In other words, the examples provided in Tribal Code Section 10.112(4) focus on personal property or chattels. The Section does not reference businesses owned by the Tribe nor real property. Accordingly, the examples used in Tribal Code Section 10.112(4) suggest the provision was designed to apply only to chattels.

This conclusion is supported by an examination of how elections are conducted by the Tribe. First, tribal lands² are used for campaigning purposes. For example, when driving through the Tribe’s Sault Ste. Marie reservation, one will currently see several campaign signs for various candidates outside of homes on tribal lands. Accordingly, in practice it would appear that Tribal Code Section 10.112(4) does not apply to campaigning purposes on real property. This supports the conclusion above that Tribal Code Section 10.112(4) was meant to apply to chattels and intellectual property.

Second, a review of the April 24, 2014 tribal newspaper shows that several campaign advertisements were included in the paper. Tribal Code Section 10.112(4) states that “[n]o tangible or intellectual property of the Tribe may be used for any Campaigning....” (emphasis added). The Code does not distinguish between campaigning that is paid for (i.e. campaign advertisements) and free campaigning (i.e. alleged misuse of unit reports). Rather, the Tribal Code prohibits any campaigning using tribal property. Accordingly, one or the other must be true, either: 1) the tribal newspaper is tribal property as intended under Tribal Code Section 10.112(4) and all campaigning is prohibited in the newspaper, which means that all of the candidates who have purchased campaign advertisements in the newspaper have violated this provision of the Tribal Code; or, 2) Tribal Code Section 10.112(4) was not intended to apply to the tribal paper itself, as the paper is neither a chattel nor intellectual property (notably, the paper itself is not intellectual property although its content may be). Given that no other complaints have been brought to the Election Committee alleging campaign advertisements in the tribal newspaper violate Tribal Code Section 10.112(4), the reasonable conclusion is that the latter is true.

Accordingly, based on the language of Tribal Code Section 10.112(4) combined with how tribal elections are currently implemented, the Election Committee acted unreasonably in finding that

² For purposes of this decision, it is not necessary to distinguish between land held in fee by the Tribe and tribal trust land held for the benefit for the Tribe, as the Election Ordinance at Chapter 10 of the Tribe’s Code would likely apply to either category of real property.

the tribal newspaper constituted tribal property as intended under the Code. Therefore, this Court holds that Tribal Code Section 10.112(4) does not apply to the present matter.

Tribal Code Section 10.112(10): Prohibition on “Express Endorsements”

Next, the Election Committee determined that Director Hollowell’s unit report violated the Tribal Code Section 10.112(10) prohibition against “[e]xpress endorsements...in unit reports...” In reaching this conclusion, the Election Committee explained that “[t]aking the content as a whole we are hard pressed to dismiss Complainants’ position that the unit report sought to highlight to potential voters Respondant’s campaign platform, direct them how to further explore that platform and express a concern that the potential voters may not be able to fully appreciate what the Respondant’s reelection has to offer due to the timing of the newspaper’s delivery.” Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 7 (May 9, 2014). Accordingly, the Court reviews the contents of Director Hollowell’s unit report, specifically those mentioned above, to determine whether they violate Tribal Code Section 10.112(10).

As an initial starting point, it must be noted that the Court limits its review of the Election Committee’s decision to the definition of “express” and “endorsement” supplied by the Committee at page 6 of its Decision. In its May 9, 2014 decision and again at oral argument before this Court, the Committee referenced “common sense” and “legislative intent” as other sources supporting its decision. However, neither of these two sources is written down and available to Director Hollowell. Therefore, given Director Hollowell did not have access to such materials, the Court cannot now apply such standards against her. An alternative holding would be a violation of the equal protection and due process provisions of the Indian Civil Rights Act, which are applicable to the Tribe. This conclusion is also consistent with Appellee’s supplemental brief, as Appellee argues at page 17 of its supplemental brief that this Court should be guided by statutory construction and apply the plain meaning of the applicable terms in the Tribal Code.

In reaching its conclusion that the content of Director Hollowell’s unit report constituted an “express endorsement” violating Tribal Code Section 10.112(10), the Election Committee relied on definitions of these key terms. As the Election Committee explained:

Webster’s Third New International Dictionary defines express as something that is directly and distinctly stated or expressed rather than implied or left to inference. Webster’s defines endorsement as sanction, support or approval. Express endorsement then is taken to mean a statement or totality of statements that is very much intended to convey support for a particular candidate.

Sault Ste. Marie Tribe of Chippewa Indians Election Committee, Complaint Decision for Violation of Election Ordinance Catherine Hollowell, 6 (May 9, 2014).

First, the Election Committee’s concluding third sentence here does not reasonably follow the definitions supplied above. The Election Committee concludes that an “express endorsement” can include a “totality of statements...intended to convey support...” However, this conclusion is

contrary to the definitions supplied which require “something that is directly and distinctly stated or expressed”.

In its May 9, 2014 decision and again at oral argument, the Election Committee argues that Director Hollowell’s unit report constitutes a violation of Tribal Code Section 10.112(10) when the statements contained therein are considered in their totality. For example, at oral argument, counsel for the Election Committee explained that any of the statements in the unit report individually would likely not violate Tribal Code Section 10.112(10). However, counsel argued that when the references to “platform”, several issues and the Director’s website are examined together, in totality, they constitute an express endorsement.

The Court finds this conclusion unreasonable. The definition used by the Election Committee states that something is express if it is “directly and distinctly stated rather than implied or left to inference.” The Election Committee implied an endorsement based on the totality of statements in Director Hollowell’s unit report, as explained in its May 9, 2014 decision and again at oral argument. Given the Election Committee is unable to point to a “direct or distinctly stated” statement in Director Hollowell’s unit report, the contents of the unit report cannot constitute an “express endorsement” for purposes of Tribal Code Section 10.112(10). Accordingly, the Election Committee’s decision in regard to Tribal Code Section 10.112(10) is unreasonable and therefore rejected.

Based on the foregoing analysis, the Election Committee’s May 9, 2014 Complaint Decision for Violation of Election Ordinance Catherine Hollowell is deemed unreasonable and arbitrary. Accordingly, per Tribal Code Section 82.203, the Election Committee’s decision is reversed and set aside.

The Court is not unsympathetic to the tenuous position the Election Committee finds itself in, as detailed in Appellee’s supplemental brief and at oral argument. However, as Appellee itself explains, the Court must apply the plain meaning of the existing Tribal Code provisions. To avoid similar problems in the future, it may be helpful for the Election Committee to provide written guidance on these Code provisions.

IT IS SO ORDERED.