

ELECTION COMMITTEE CONTEST

Complainant: Election Committee

Respondent: Dan Dumas

April 6, 2017

FACTS

A hearing was held on March 22, 2017, to consider a March 3, 2017, election complaint filed by the Election Committee (“Committee”) against Dan Dumas. Dumas is alleged to have, by exerting physical control over the Election Committee’s secure room, by prohibiting properly authorized MIS staff from working with those computers on behalf of the Election Committee, by disposing the Committee of its computer equipment and election data and by interfering with the conduct of an election, violated Tribal Code Chapter 10: Election Ordinance at §10.101, §10.102, §10.108(1) and §10.115(1)(e).

The Election Committee maintains a locked secure room in the tribe’s main administration building. That room houses the scanners, accompanying computers with their internal memory, hereinafter called hardware or election data that the Committee uses to scan and count the ballots and also houses various election materials from time-to-time. Access to the secure room is controlled by the Committee chairperson and by a lead Management and Information Systems (“MIS”) employee who works hand-in-hand with the Committee. The room is internally leased by the Committee and is paid for out of an elections budget through the office of the Executive Assistant to the Board of Directors. Mr. Dumas is employed by the tribe as its Security Administrator, also known as IT Security. In lay terms Dumas is responsible for the security of the tribe’s various computer systems.

Immediately after the 2016 general election, Mr. Dumas and his supervisor, the Executive Director, became aware of various allegations surrounding the integrity of the 2016 general election. Specifically, they became aware of allegations that the hardware and its internal memory, the election data, could be subject to manipulation by members of the tribe's MIS department. The memory is one of several components that make up the official record of the scanned ballots that the Committee relies on to call an election. The Committee was likewise generally aware of these unfounded allegations - they arise in one form or another every election cycle.

Dumas and the Executive Director discussed the allegations amongst themselves and decided that something had to be done. They did not discuss the allegations or the security of the room, the hardware or the election data with the Committee at any time.

Rather, on July 13, 2016, Dumas emailed McPherson and requested and received permission to change the lock to the Committee's secure room and to place a camera in the room. On July 14, 2016, Dumas emailed McPherson acknowledging that the locks to the Committee's room had been changed and that he was the only one with access. On July 15, 2016, Dumas emailed the MIS Director stating "the election equipment room has been secured and will be off limits until further notice." On July 19, 2016, Dumas emailed the Executive Director relaying that the lead MIS employee for election matters had approached him and indicated that he had been working on the Committee's hardware re-verifying the correctness of certain information. Dumas recorded this event on an incident form and advised the Executive Director that "information at this time can now be compromised with him [lead MIS staff] accessing the equipment."

After the passing of a statutorily prescribed time period, and depending on other fluid factors, the Committee shreds the ballots and other materials from the preceding election. On February 15, 2017, the Committee met at the main administration building to shred the 2016 general election material. The Committee discovered it was unable to access its secure room and realized that the locks had been changed for reasons unknown.

The Committee was directed to contact Dumas for an explanation. Dumas indicated he was not able to discuss the issue and directed the Committee to the Executive Director. The Executive Director did not respond to attempts to discuss the issue at that time. Shortly thereafter, and still on February 15th, Dumas contacted the Executive Assistant to the Board of Directors to the Committee and turned over the key to the Committee's room. It was at then that the Committee realized that someone had deliberately changed the lock to the secure room and had placed a camera in the secure room.

After a cursory review of information on hand the Committee conducted a formal investigation of the matter. The investigation revealed that Dumas, on his own initiative, sought to take physical possession of the Committee's secure room and its contents including the hardware. Based on the results of the investigation the Committee initiated an election complaint and ordered a hearing to be held on the matter.

Dumas states that his reason for doing what he did is that as IT security it is his job to secure any and all computers and data. The Executive Director provided a second reason being her desire to protect MIS staff from accusations of tampering with election data. We note, however, that Dumas and the Executive Director have a difference of opinion on this latter reason. The Executive Director has stated that it was her desire to protect MIS employees from accusations of tampering with election data, while Dumas' emails on the subject, discussed

below, state that the MIS employees had already caused the data to be suspect by default due to their having already worked with the data.

DISCUSSION

The issue is whether Dumas' duties and responsibilities as outlined in his job description, and equally whether his departmental procedures, take precedent over the Committee's duties and responsibilities as outlined in Tribal Code Chapter 10: Election Ordinance ("Ch. 10") in such a way as to authorize him to take the actions he did. Specifically, to dispossess the Committee of its secure room, to dispossess the Committee of its hardware and the election data, to prohibit properly authorized MIS staff to work on the election data and to interfere with the Committee's conduct of the election.

Job Description and Department Procedures as Authority.

Dumas argues that his authority lies within his job description, or job duties, and his departmental procedures. Where relevant his job description states:

The Security Administrator, under the direction of the Membership/Internal Services Executive Director, serves as the process owner for all ongoing activities that serve to provide appropriate access to and protect the confidentiality and integrity of customer, employee, and business information in compliance with organization policies and standards.

Dumas also argues that certain provisions of his department's procedures justify his actions. He argues that his procedure titled Information Technology Server Security Procedure,

dated May 18, 2016, gives him the authority to take the underlying actions. The procedure at section 1 reads:

This procedure establishes standards for the base configuration of internal server equipment that is owned and operated by Sault Tribe and Kewadin Casinos. Effective implementation of this procedure will minimize unauthorized access to Sault Tribe and Kewadin Casino information technology.

All employees, contractors, consultants, temporary and other workers at the Sault Tribe and Kewadin Casinos must adhere to this procedure. This procedure applies to server equipment that is owned, operated, or leased by the Sault Tribe, Kewadin Casino or registered under a Sault Tribe/Kewadin Casino network.

All internal servers deployed at the Sault Tribe or Kewadin Casino must be owned by an operational group that is responsible for system administration. Approved server configuration guides must be established and maintained by each operational group, based on business needs and approved by Information Technology Security. Operational groups should monitor configuration compliance and implement an exception procedure tailored to their environment. Each operational group must establish a process for changing the configuration guides, which includes review and approval by information Technology Security. For security, compliance and maintenance purposes, authorized personnel may monitor and audit equipment, systems, processes and network traffic.

The Committee accepts both at face value and assumes both were properly promulgated within the tribe's applicable systems.

Election Ordinance as Authority.

Ch. 10 establishes the Election Committee and lays out certain procedures that govern the conduct of elections. In more general terms, Ch. 10 at §10.101 and §10.102 authorize elections as follows. Ch. 10 at §10.101 reads:

- (1) The purpose of this Chapter is to establish authority for holding tribal elections. The regulations and procedures contained in this Chapter shall be administered in such a way as to accomplish this purpose and intent. The authority for this Chapter is Article V, Section 6 of the Constitution.
- (2) Each of the numbered sections and subsections of this Chapter shall be deemed to be discrete and severable. If any provision of this Chapter shall be held to violate the Constitution and/or By-laws of the Tribe, the validity of each and every other provision shall be unaffected thereby and all such other provisions shall remain in full force and effect.

§10.102 reads:

This Chapter shall govern all tribal elections pursuant to Articles IV and V of the Constitution. This Chapter shall be subordinate to the Constitution and By-laws. There shall be no amendments to this Chapter within the period of six (6) months prior to date of the general election held pursuant to this Chapter except by Positive Majority vote.

The Committee itself is created by §10.108(1) which reads:

All elections held pursuant to this Chapter shall be administered by the Election Committee.

§10.115 charges the Committee with the physical conduct of the election according to lengthy procedures which are not listed here. Further, §10.115 is instructive as to issues surrounding this complaint where §10.115(1)(e) reads:

- (1) The following procedures are applicable to all elections.
 - (e) The Election Committee shall be **responsible for organizing and implementing all security measures for handling Ballots and counting Votes to insure the integrity of the election.** [*Emphasis Added*]

Taken as a whole, these sections of Ch. 10 are the foundation upon which the Committee conducts the election. And not to be ignored is nearly 30 years of election history and practices that have developed pursuant to this language along with over 125 years of combined election experience and institutional knowledge.

§10.102(1)(e) is of particular importance as this section serves as the backdrop under which the Committee conducts all manner of business, whether it be holding secured ballots in a vault, police escort of the ballots from the post office to the count or numerous other undisclosed redundant precautions. It would be improper to list here each and every security precaution taken to protect the integrity of an election.

The Election Committee Room.

The Committee has always maintained a secure room to house sensitive election materials that is accessible only by the Committee, members of the Committee or select tribal employees performing election related work on behalf of the Committee. The key to the room has historically been held by the Committee chairperson, and in more recent years with the reliance on the hardware, by the Committee's lead MIS employee.

Dumas argues that any room containing a computer of any type is subject to his oversight or physical control and by default he is authorized to physically take possession of it. He relies

on a combination of his job description and his departmental procedure as his authority. The Committee has reviewed both and finds absolutely nothing in either that authorized Dumas to physically take possession of a room that is under the authority of a tribal entity, department or program; regardless of whether or not the room in question contains computers or not. The authority simply is not there. Nonetheless, Dumas makes other arguments on why his actions were justified.

Dumas argues that the room and its contents were not secure because, in his opinion, unlimited numbers of MIS staff had access to it. This is not true. During the Committee's investigation, Dumas indicated that his own informal investigation into who was accessing the Committee's room revealed that MIS, as a whole department, had access to the room. Dumas was pressed on this point and he stood firm. Dumas stated that he relayed this same information to the Executive Director and it was one of the reasons he believed that he should have physical control of the room to the exclusion of others.

Dumas was informed that in fact only the lead MIS employee had a key to the room and only he or three others were allowed to access the room for election related work – this at the specific direction of the Committee. The Committee's investigation revealed this to be a true and accurate recitation of the facts as they have existed since at least 2004.

Dumas used an extremely misleading presentation of the facts to convince others that the room needed to be secured under his stewardship. In the Committee's eyes, what resulted from this chain of events was that MIS staff members, who were entering the room under the Committee's direction, with that access being controlled by the lead MIS staff member, were stood down so that the access and control could be placed instead with Dumas by Dumas to be

governed by Dumas. We find no authority that would authorize Dumas' actions even if his facts accurate – which they are not.

The Scanners and Computers.

The Committee's secure room contained hardware that scans the ballots, tabulates the votes and projects the results onto a screen for the public's viewing. The Committee takes notice of the following. This hardware, or similar hardware, has been used by the Committee since 2002. The hardware was used to verify an election recount in 2002 and was used for the general election in 2004 and for all primary elections, general elections and referendum elections thereafter – some 23 elections in total.

For the 2002 and 2004 elections the hardware was physically housed by MIS. Between the 2004 and 2006 elections, MIS informed the Committee that it did not believe it was proper that MIS be responsible for the housing of and physical security of the hardware as it was not part of the tribal systems and because the hardware was only for election purposes and all that negative attention that entails. The Committee recognized it was unintentionally putting significant negative political attention on MIS and agreed that it should shoulder the responsibility for hardware and has done so ever since.

Since that time, the hardware has been kept by the Committee in its secure room and has been considered by tribal administration, the Board of Directors and MIS to be under the control of the Committee - yet operated and maintained by properly authorized MIS staff. That the

hardware, now in 2017, is thought by Dumas to no longer be the Committee's to control, operate and secure is surprising to say the least.¹

Dumas argues that, per his job description and department procedures, he is authorized to exact whatever level of security upon the hardware he finds to be appropriate. He believes that §10.115(1)(e)'s charge that the Committee is responsible for "organizing and implementing all security measures for handling Ballots and counting Votes to insure the integrity of the election" does not bestow upon the Committee any authority to control the hardware. Dumas argues that because the words "computer" or "scanner" or "server" do not appear in Ch. 10 their presence cannot be inferred and therefore his job description then enters the mix giving him control. We disagree. Dumas cannot have it both ways.

If we are to accept Dumas' position that "all security measures" does not include keeping secure the election hardware, if we are to accept that incredibly literal reading, which we do not, then we ought to apply the same level of scrutiny to his job description. Dumas' job description reads

provide appropriate access to and protect the confidentiality
and integrity of **customer, employee, and business information**
in compliance with organization policies and standards.
[*Emphasis Added*]

The conduct of an election and the information and materials and hardware associated therewith are not customer related, they are not employee related and they are not business related. They are a thing unto themselves completely governed by Ch. 10 and have been for decades. Further, the Committee does not accept that access to its own critical election data is subject to Dumas' control as the "process owner".

¹ We acknowledge and appreciate that MIS staff plays a role in ensuring the integrity of the hardware and data when they are up and running during an election event and this activity is recorded in a log that Dumas referenced in the hearing.

We remain unconvinced that §10.115(1)(e) does not make the Committee liable for the security of everything election related and we remain unconvinced that a job description can by operation of law trump Ch. 10. This is an empty argument that is unsupported by Ch. 10, past practice and the realities of a tribal election.

Dumas next argues his department's procedures justify his actions. The procedures where relevant read:

All employees, contractors, consultants, temporary and other workers at the Sault Tribe and Kewadin Casinos must adhere to this procedure. This procedure applies to server equipment that is owned, operated, or leased by the Sault Tribe, Kewadin Casino or registered under a Sault Tribe/Kewadin Casino network.

The Committee is not convinced that this procedure authorizes Dumas to take the actions he took. Nothing in the procedure authorizes Dumas to dispossess the Committee of its secure room. Nothing in the procedures authorizes Dumas to prohibit authorized MIS staff from working on behalf of the Committee. And nothing in the procedures authorizes Dumas to unilaterally dispossess the Committee of highly sensitive election data – particularly at a point in time when that very data was the subject of heated debate within the tribal community.

Lastly, the Committee's hardware is not part of the tribe or Kewadin's networked systems and that fact alone appears to disqualify the hardware from the procedure as it very clearly states that it applies to network computer systems. A cursory review of non-networked computers not falling under Dumas control reveals several such computers. For example, the tribe's law enforcement vehicles contain laptops that are not tied into a tribal or Kewadin network to be governed by Dumas– we highly doubt Dumas would argue he is authorized to

unilaterally change the locks on the police cars and then prohibit officers from entering the cars. The examples are many.

Ch. 10, and all that it authorizes, is not an employee, contractor, or consultant as those words are used in the procedure. A tribal election is the ultimate expression of sovereignty that is tightly governed by tribal law and the Committee is not convinced that a departmental procedure, or a job description, trumps the tribe's charge to the Committee to make secure an election.

Election Data As Important as the Physical Ballots

Dumas argues that because only the word "ballots" appears in the Committee's charge to secure the election, at 10.115(1)(e), by default the hardware and the data are excluded. The Committee disagrees with such a simple result driven argument. The Committee thinks the proper reading of "all security measures for handling Ballots and counting Votes to insure the integrity of the election" clearly covers the hardware and the memory or data contained therein - as it has since 2004.

The data generated by the scanner simply is the election – the data becomes, for computation of the final election results, the ballots themselves. From there on, the scanned data is as important as the ballots for purposes of a recount, challenge to the election or for addressing issues of the election's integrity should that need arise. This data simply can never leave the Committee possession - let alone without the Committee's knowledge.

To argue otherwise is counter intuitive as the result would be that the tribe's IT security department, and not the Committee, would be the entity ultimately putting forth the veracity and

legitimacy of election data. That is an absurd result not supported in any way by Ch. 10 at §10.101, §10.102, §10.108(1) or 10.115(1)(e).

Dumas' arguments hang on his belief that a job description and or departmental procedure trump tribal law. He offers no supporting argument, legal or otherwise. Rather he asks the Committee to simply walk away from arguably one of its most important functions based solely on his employment and the existence of his sphere of influence. This, the Committee cannot agree with.

Excluding Staff Assisting Election Committee From the Room.

In order for the Committee to perform its duties, the tribe has acknowledged that it needs assistance from tribal employees offering a specialized service. This assistance comes in the form of ministerial assistance, Enrollment Department assistance, legal representation and information technologies assistance. In order to facilitate the provision of these services to the Committee, the tribe promulgated §10.108(1) which reads in part:

The Committee may assign specific tasks or duties as necessary to carry out ministerial tasks or duties, consistent with the Constitution and this Chapter.

The Committee trusts and expects all staff that assists them, including the lead MIS employee, to perform tasks without needing specific prompting from the Committee. If MIS staff feel that something needs to be done then they are entrusted to access the hardware and perform whatever work needs to be done. This has for years taken place pursuant to §10.108(1).

In July of 2016, Dumas unilaterally declared MIS staff's ability to access the Committee's room to, by default, have compromised the integrity of the election data and uses

his version of events as one of the reasons for his actions – namely excluding MIS staff from the secure room.

On May 19, 2016, when conducting his own improper investigation into the hardware Dumas was told by MIS staff that work had been ongoing in the room and specifically on the hardware in the room. Dumas sent an email to the Executive Director stating:

Information [election data] at this time can now be compromised with him [lead MIS staff] accessing this equipment.

The only evidence to support such a statement was Dumas' own personal belief leaving these accusations unwarranted and irresponsible.

Dumas further filled out an incident form which reads:

Access to this equipment after the election should not be allowed without proper permission. This type of unauthorized access can compromise the integrity of the systems and data. Procedures need to be in place to limit and control access to this equipment.

Dumas again cast suspicion based on no facts whatsoever, contrary to facts actually, as there was a mechanism in place covering authorized access, and conveniently suggest that the best resolution is one grounded within his sphere of influence. In addition to being unwarranted and irrespirable it is obviously self-serving.

Setting aside the unwarranted accusation issues, Dumas argued at the hearing that he in fact did not prohibit select MIS staff's access to the secure room and thus the hardware and therefore did not violate §10.108(1). This is not true. On July 15, 2016, Dumas emailed to the MIS Director, who forwarded to MIS staff that performs election work, an email stating that:

The election equipment and room has been secured and will be off limits until further notice.

We are hard pressed to find this to be anything but an aggressive assertion of control over the room and its contents with specific direction to stay out of the room. There was no further notice inviting the election work to continue. The email cannot be read any other way. This action directly interfered with the Committee's authority pursuant to §10.108(1) to have work done on its behalf.

In short, Dumas made unsubstantiated accusations and based upon those accusations supplanted the Committee's trust of its own committee members and its colleagues in MIS, for his trust in himself. That may be fine and good for Dumas but it is a woefully lacking excuse for the Committee and is not supported by §10.108(1) or Ch. 10 in general.

Chain of Command.

At the hearing Dumas argued that he performed all actions via direction from his chain-of-command, the Executive Director, and should be held blameless. Upon review of all materials submitted for this hearing, we see nothing that would lead us to believe that Dumas was simply following orders. The emails provided clearly state that all action taken was initiated by Dumas.

Further, during the investigation Dumas clearly stated several times that events discussed herein were very much his idea and he specifically rejected the idea that he was simply following orders. The Committee cannot then accept his argument at the hearing to the contrary.

The investigation revealed that the only role the Executive Director played was signing-off on or agreeing to Dumas' recommendations. During the Committee's investigation, the Executive Director generally agreed that Dumas made a series of recommendations and she agreed with them. Nothing presented at the hearing casted doubt on that as Dumas did not avail himself of the opportunity to present any testimony or information that would show that he acted in all ways at the direction of his chain-of-command to such a degree that he was merely a harmless functionary – contrary to his statements made during the investigation.

This, taken together with Dumas' inaccurate presentation of facts, convinces the Committee that it would be improper to assign any level of blame to the Executive Director as she relied on Dumas' expertise in the IT security field, his recitation of facts and his framing of his sphere of influence. Simply put, this is why no complaint was filed against the Executive Director.

Tribal Administration's Involvement in Elections.

It is a pillar of the tribe's election process that the Board of Directors and tribal administration be as far removed from the conduct of the election as possible. It is, with this in mind, that the Committee was established, that they were charged with alone conducting elections, that they were authorized to assign staff to assist them as they direct and that they be in charge of all security matters. To say this is a pillar of the tribe's election process is in fact not strong enough - it is a core tenant that from time-to-time is challenged in some unique way and after every challenge reemerges intact and stronger.

Dumas would have the Committee accept that this pillar be toppled and that, via his job description and departmental procedures, tribal administration under the direction of a senior employee subject to the oversight of the Board of Directors, would have unfettered control over the critically important election hardware and data, the ability to unilaterally take away from the Committee its secure room and to determine whether or not MIS employees performing election work would in fact be allowed to do so. This is simply not grounded in reality, the Committee is uniquely aware that Ch. 10 was promulgated to prohibit this very thing. This is not debatable.

Of all the arguments made herein, the Committee believes this to be the most compelling. If it was the desire of the tribe to insert tribal administration, against all history and precedent, into the election process by transferring a major security component from the Committee to Dumas or tribal administration it would be not done as Dumas would have us believe. Such a transfer of responsibility must be done via an amendment to Ch. 10. The Committee steadfastly refuses to adhere to anything less.

FINDING

With those present voting unanimously we find:

1. Changing the lock to the Committee's secure election room violated §10.115(e).
2. Prohibiting MIS staff from entering the room to work with the hardware is a violation of §10.108(1) and §10.115(e).
3. Dispossessing the Committee of the election hardware and data is a violation of §10.115(e).
4. By doing the above, the Committee's ability to conduct an election was infringed upon in violation of §10.101, §10.102 and §10.108.

5. Because the Committee has in place various security mechanisms that Dumas was not aware of, Dumas' actions greatly weakened, but did not fully endanger, the integrity of the election and we therefore do not levy a fine nor do we issue any punishment beyond the contents of this finding.
6. This finding may be appealed to the Court of Appeals.

The Election Committee