

## COURT OF APPEALS

*Isaac McKechnie v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*

APP-16-05

Decided: July 15, 2016

BEFORE: HARPER, DIETZ, FINCH, JUMP and WICHTMAN Appellate Judges.

**Opinion and Order Affirming the Decision of the Election Committee**

Wichtman, Karrie, Chief Appellate Judge, who is joined by Appellate Judges Dietz, Jump, Harper and Finch.

For the reasons spelled out below, the Sault Ste. Marie Tribe of Chippewa Indians Election Committee's (Election Committee) June 29, 2016 decision entitled "Election Committee Contest" is hereby affirmed. In affirming the Election Committee's June 29, 2016 decision, this Court holds that retrieval of the Returned Ballots from the designated Post Office Box as required by the United States Postal Service (USPS) at 4:30 p.m. on the date of election does not violate Tribal Code Section 10.1151(1)(d) when Business Reply Postage Due mail processing that would allow ballot to be placed in the Post Office Box of the Election Committee ceases at 2:00 p.m.

***Procedural History***

The Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians ("Constitution") provides the foundation for voter eligibility in tribal elections. Art. V §§ 4 and 5. The Constitution further provides that "[t]he board of directors shall enact appropriate ordinances to implement nominations and the holding of elections." Art. V, § 6. Pursuant to its Constitutional authority, the Board of Directors enacted Chapter 10 of the Sault Tribe Code "to establish authority for holding tribal elections." STC § 10.101, Election Ordinance. The Election Ordinance establishes the Election Committee and the general procedural framework for conducting tribal elections including issuance of a Notice of Election, method and mailing of ballots, ballot procedures, security measures, nomination procedures, and the circumstances under which contests and complaints may be filed. STC §§10.107, 10.115, and 10.118-120.

The 2016 Notice of Election was posted by the Election Committee on January 29, 2016 establishing the timeline of the 2016 Election. The Primary Election was held on May 19, 2016. The General Election was held on June 23, 2016. On or about June 27, 2016, the Appellant filed a contest with the Election Committee pursuant to §10.118 alleging that the Election Committee "violated the Tribal Constitution and the Election Code by prematurely picking up the Election ballots prior to the end of business (5:00 p.m.) both for the Primary and the general Elections at the United State Post Office, therefore casting doubt on the integrity of the Election process and results" and requested as relief federal review of the election process. Notice of Appeal; *see* June 27, 2016 Contest Letter, APP-16-05 (July 6, 2016). On or about June 29, 2016, the Appellee

Election Committee issued a written decision to the Appellant's contest dismissing his allegations as being without merit pursuant to §10.120(2)(a) and for being untimely pursuant to §10.118(2). June 29, 2016 Election Committee Contest decision. The Appellant filed a *Notice of Appeal* with this Court on July 6, 2016 reasserting his allegations violations of the Election Code, in particular §10.115, which governs the process and procedure for mailing and retrieving ballot during the election process and raising for the first time in his *Notice of Appeal* certain constitutional arguments related to disenfranchisement of voters (matters not before the Election Committee). Notice of Appeal at pp. 3-4. In his *Notice of Appeal*, Appellant requested relief in the form of a new election "on behalf of himself and other dis-enfranchised voters". *Id.* at p. 4.

On July 7, 2016, this Court issued a Notice of Briefing Schedule that required Appellee's response by July 8, 2016 and Appellant's reply by July 11, 2016. Appellee submitted a *Brief in Response to Appellant's Appeal from the Election Committee* asserting that the Appellant lacks standing to bring the appeal, that his contest is void because he failed to serve the initial contest on the Committee and that the Election Committee's retrieval of the ballot box at 4:30 p.m. did not violate the Election Code. Brief in Response to Appellant's Appeal from the Election Committee dated July 8, 2016. Also on July 8, 2016, movants Jennifer McLeod (Director McLeod) and Mr. Michael McKerchie (Mr. McKerchie) filed papers interpreted by this Court as motions for leave to file an amicus curiae brief. On July 11, 2016, the Appellant submitted his reply to the Appellee's response arguing for the first time, in addition to the violations of Chapter 10 indicated in his *Notice of Appeal*, an equal protection claim and again requested that this Court order a new election for himself and other eligible voters. Appellant's Brief in Response to Election Committee's Brief of July 8, 2016. Having received briefs by both parties as of July 11, 2016, this Court, pursuant to § 82.209 issued a Notice of Oral Argument setting the date and time for oral argument on July 14, 2016 at 2:00 p.m. unless otherwise waived by the parties.

On July 12, 2016 the Appellant filed a *Notice of Motion, Motion to Continue Trial and Points and Declaration of Isaac McKechnie* requesting that this Court delay oral argument for 30 days. On July 12, 2016, this Court issued an *Order Granting Leave to Jennifer McLeod and Michael McKerchie to File Amicus Curiae Briefs*. Also on July 12, 2016, the Appellee filed a Supplemental Brief that included the Affidavit of Carla Alexander, Sault Ste. Marie Michigan Post Office Postmaster. On July 13, 2016, this Court issued an *Order Denying Appellant's Notice of Motion to Continue Trial*. The Appellee appeared before the Court on the date and time set for oral argument. The Appellant did not appear at the date and time set for oral argument and did not otherwise inform this Court that he would not be present after having been served of this Court's *Order Denying Motion to Continue Trial* and being advised that his failure to appear would constitute a waiver of his opportunity to supplement the record through oral argument.

For the reasons outlined below, Appellee Election Committee Decision of June 29, 2016 is affirmed and the Appellant's appeal fails.

### ***Jurisdiction and Standard of Review***

Tribal Code § 10.120(7) allows for direct appeal to this Court in limited original circumstances. Under Tribal Code § 10.120(7) decisions of the Election Committee "issued pursuant to

subsection (2)(c) may be appealed to the Sault Tribe Chippewa Tribal Court of Appeals pursuant to Chapter 82.” Tribal Code Section 10.120(2)(c) refers to the decisions of the Committee where it will “render a decision in writing and once all appeals have been exhausted according to Subsection (7), publish the decision.” Chapter 82 “establishe[s] the procedures by which appeals are taken . . . .” STC § 82.101. Section 82.201 establishes who may appeal the decision of the Election Committee and the limitations of such an appeal: (1) a challenge to the decision of the Election Committee must allege that the Election Committee acted in a manner not consistent with Tribal law that denied an appellant a substantive right or caused them to suffer an unjust result; and (2) the challenge must be personal to Appellant and not a generalized grievance. Section 82.202 sets forth that an appeal is proper before this Court if it “concerns a final decision of the Election Committee rendered pursuant to Tribal Code Chapter 10 at Section 10.120(c).”<sup>1</sup> Accordingly, this Court has limited jurisdiction to hear appeals where an Appellant has filed a proper challenge or contest in accordance with § 10.118 and the Election Committee meets and renders a decision in writing in accordance with § 10.120. STC § 10.120(2)(c).

When such a decision is rendered in accordance with § 10.120(2)(c), the standard of review for this Court “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 and unjust result.” STC § 82.210. “This Court will not substitute its judgment for the judgment of the Election Committee, unless the Election Committee’s actions were arbitrary or unreasonable.” *Catherine Hollowell v. Sault Ste. Marie Tribe of Chippewa Indians Election Committee*, APP 14-02, p. 2 (May 28, 2014).

### ***Discussion***

For purposes of this opinion and order this Court will focus on Appellant’s June 27, 2016 contest and the Elections Committee’s June 29, 2016 written decision. “As explained above, an original appeal is only allowable under § 82.202 from decisions by the Election Committee rendered pursuant to § 10.120(2)(c), which are decisions [reduced to] writing after receiving and deciding a properly filed contest of an Election Board decision pursuant to Tribal Code 10.118 and 10.120, respectively.” *Michael Jay Lumsden v. Sault Sainte Marie Tribe of Chippewa Indians Board of Directors and Election Committee*, APP-16-04, p. 3 (April 18, 2016). Therefore, Appellant’s arguments in his *Notice of Appeal* and *Brief in Response to Appellant’s Appeal from the Election Committee* made outside of the scope of the June 27, 2016 contest and Election Committee’s June 29, 2016 decision are not addressed here insofar as far as they constitute original actions that go beyond the scope of this Court’s review as currently provided in Chapter 82. Indeed, Chapter 82 makes clear, and this Court has recently concluded, that it lacks jurisdiction in arguments that set forth generalized grievances or were not first the subject of an election contest from which a written decision resulted as primarily defined by §10.120. STC § 10.120(7); *Id.* at 4.

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<sup>1</sup> In rendering its April 18, 2016 Opinion in *Michael Jay Lumsden v. Sault Sainte Marie Tribe of Chippewa Indians Board of Directors and Election Committee* this Court recognized that Tribal Code Section 82.202 contains a typo as it references Tribal Code Section 10.120(c), and there is no such provision of the Tribal Code. This Court interpreted the typo in Tribal Code Section 82.202 to reference Tribal Code Section 10.120(2)(c).

Here, the Appellant argues that the Election Committee's action of retrieval of Returned Ballots from the Election Committee's Post Office Box at 4:30 p.m. on June 23, 2016, a time not indicated on the Notice of Election is a violation of Article §10.115(1)(d) and (e). The Appellant's arguments fail. The Notice of Election issued by the Election Committee, while instructive to voters, cannot stand in the place of Tribal law. STC §10.107. The phrase "close of business" is not defined in Chapter 10 of the Tribal Code. While the phrase could be interpreted to mean at 5:00 p.m. or other such other time as posted as close of the Post Office as the Appellant suggests, this interpretation fails to take into account the broader meaning of "close of business" which includes for many businesses much more than the close of the physical office to the general public. Indeed, the USPS is in the business of sorting, processing, and distributing mail and, as argued by Appellee and supported by Affidavit of the Sault Ste. Marie Post Office, the close of business involves certain closing procedures.<sup>2</sup> The Appellee argues that it is an interpretation of "close of business" that takes into account USPS processing procedures that guides the actions of the Election Committee. The Election Committee supports its argument that "close of business" means more than just a time before the closing of the physical office to the general public with an Affidavit of the Sault Ste. Marie Post Office Postmaster whose sworn statement indicates (in relevant part):

All business reply postage, such as that being used by the Sault Tribe for its election process, is required to be sent to Traverse City for processing in the same manner as all other mail and is then delivered to the Sault Ste. Marie Post Office each morning. Upon receipt at the Sault Ste. Marie Post Office each morning, such mail processed at the Traverse City [USPS Processing and Distribution Center (P&DC)] is distributed and deposited into the Sault Tribe Election Committee's box by 2:00 p.m. that afternoon. No additional processed mail can be placed in that box until the following day when the next delivery is received from the Traverse City P&DC. No mail that has not been processed through the Traverse City P&DC can be placed in the Election Committee's box.

July 12, 2016 Supplemental Brief, ¶3, Alexander Affidavit.

This Court agrees with the Appellee Election Committee's interpretation of "close of business" and finds that the retrieval of Returned Ballots at 4:30 p.m. versus 5:00 p.m. on election day is permissible. Tribal Code §10.115(1)(d) is clear that "the Election Committee shall be

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<sup>2</sup> The USPS is an independent establishment of the Executive Branch of the Government of the United States and operates in a business-like way. Its mission statement can be found in Section 101(a) of Title 39 of the U.S. Code, also known as the Postal Reorganization Act: "The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities." UNITED STATES POSTAL SERVICE, *Postal Service Mission and Motto* (October 1999), <https://about.usps.com/who-we-are/postal-history/mission-motto.pdf>

responsible for picking up all Returned Ballots at the designated Post Office following the close of business on the day of the election and for the delivery of the Returned Ballots to the designated site for counting Votes.” STC §10.115(1)(d). Tribal Code § 10.103(25) defines “Returned Ballot” as “a Ballot which has been returned by the voter to the Election Committee prior to the deadline for the election.” STC §10.115(1)(d). Taking into account USPS procedures, all “Returned Ballots” present in the ballot box by 2:00 p.m. on the day of the election would be considered “Returned Ballots.” The Appellant had every opportunity to place his ballot in the mail and have it processed in accordance with USPS procedures prior to the date of election. His failure to do so in reliance on his interpretation that advisory language in the Notice of Election related to a 5:00 p.m. submission deadline cannot stand. This Court finds that the Appellant was not denied a substantial right and was not caused to suffer an unjust result. The Court further finds that the Election Committee did not act arbitrarily or unreasonably in this instance in complying with the Sault Ste. Marie Post Office requirement that the Election Committee’s retrieval of Returned Ballots from the Election Committee’s Post Office Box at 4:30 p.m. on June 23, 2016. Therefore, this Court finds that the Election Committee’s retrieval of Returned Ballots from the Election Committee’s Post Office Box at 4:30 p.m. on June 23, 2016 – a time after which processing for mail that would constitute a “Returned Ballot” would have been placed in the ballot box-- does not violate §10.115(1)(d). Accordingly, this Court also declines to find a violation of §10.115(1)(e) in the present matter. Allegations made by the Appellant that because the Election Committee retrieved the ballot box at 4:30 p.m. instead of 5:00 p.m. late ballots are untraceable and not counted are not supported in fact or in reality as all mail sent through the USPS would be processed and placed in the Election Committee’s P.O. Box. Thus, the late ballots are both traceable and countable, but still late.

### **ORDER**

For the reasons specified above, the Appellee Election Committee Decision of June 29, 2016 is affirmed and Appellant’s appeal fails.

It is SO ORDERED.