

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

*Charles Forgrave v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*

APP-20-02

Decided: June 23, 2020

BEFORE: CAUSLEY, DIETZ, FINCH, JUMP and FELEPPA Appellate Judges.

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

Alfred Feleppa, Appellate Judge, who is joined by Appellate Judges Dietz, Jump, Causley, and Finch.

For the reasons spelled out below, the Sault Ste. Marie Tribe of Chippewa Indians Election Committee's (Election Committee) May 29, 2020 decision entitled "Decision of Election Committee in Charles Forgrave" is hereby affirmed. In affirming the Election Committee's May 29, 2020 decision, this Court holds there were no violations of the Tribal Code and that the 2020 election shall continue despite of the current Covid-19 pandemic.

***Procedural History***

Candidates for Tribal Office must collect, depending upon office sought and district, either 40, 50, or 100 nominating signatures. STC § 10.111(5) For the 2020 election those were due by April 17. Following primaries on May 22, 2020 general election ballots are then mailed to voters on June 5, 2020, and ballots are due by June 25, 2020.

On March 10, 2020 the Governor of the State of Michigan declared a state of emergency due to the serious threats to public safety posed by the corona virus. On March 23, 2020, the Governor issued State of Michigan Executive Order 2020-21, which placed restrictions on public gatherings in the State of Michigan violations of which are punishable as misdemeanors. Those restrictions are in phased lifting even now as this case is heard in mid-June of 2020. Certain activities were permitted to continue in the State of Michigan, including "activities necessary to manage and oversee elections." State of Michigan Executive Order 2020-21 part 6(b). This was mirrored in part by the Tribal Board declaring a state of Emergency, resolution 2020-72 on March 17, 2020 identifying the health risk as, "WHEREEAS, the novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is cause by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person."

The activities prohibited under Executive Order 2020-21 include ones where one might typically obtain nomination petition signatures: namely knocking on doors, meeting at events, and etc. For those seeking office however, there were other means for obtaining the requisite signatures: email or postal letter. The record contained no information whether similar stay at home orders were imposed by the Sault Tribe Board of Directors for lands held in trust.

On May 15, 2020 Appellant directed a complaint to the Election Committee claiming in essence:

- 1) Risk of harm to candidates over 75 years old due to the COVID-19 pandemic;
- 2) Negligence by the Board of Directors with the oversight of the 2020 election;
- 3) That election procedures favored the Chairman of the Board;
- 4) That nomination requirements violated the State of Michigan executive orders;
- 5) That mailing nominating petitions was cost prohibitive for both candidates and voters;
- 6) That the cost of mailing was particularly discriminative towards those on fixed budgets.

The Election Committee convened on May 22, 2020 and reviewed Appellant's various complaints. The Election Committee denied Appellant's complaints on the basis that he failed to cite a single violation of the Election Ordinance and as such concluded that he was not "unfairly denied a substantial right or was caused to suffer an unjust result" and issued a decision on May 29, 2020.

On June 11, 2020, Appellant filed this appeal with this court.

The Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians ("Constitution") provides the foundation for candidate 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." 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.

On June 12, 2020 this Court issued a Notice of Briefing Schedule that required Appellant's brief by June 16, 2020 and Appellee's reply by June 17, 2020. Both parties filed briefs in accordance with these timeframes. On June 18, 2020 through the use of Zoom software parties appeared for scheduled oral arguments. These expedited timeframes were laid out due to the upcoming June 25, 2020 Election Day.

For the reasons outlined below, Appellee Election Committee Decision of May 29, 2020 is affirmed.

### ***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).” 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***

Appellant’s frustrations with the realities imposed by the precautions instituted as a response to the health emergency of COVID-19 are very real and appreciated. That said, frustration with the public health crisis and does not change the legality of the nomination process that has been in place for many years, the application of those procedures in the 2020 election, and whether the May 29, 2020 review by the Election Committee constituted an abuse of discretion.

The planet was impacted in the spring of 2020 due to the COVID-19 pandemic. All candidates equally faced the unique challenges of navigating the nomination process with limitations on “normal” behaviors. The health risks associated with this virus for the elderly and / or individuals with high risk factors was an obstacle facing all candidates. Yet the other candidates were able to obtain signatures necessary for nomination. Per statements at arguments, Appellant procured only five or six nominations of the one hundred necessary for his bid as Chairperson before choosing to end his campaign for office.

Complaints with the nomination procedures (which are the essence of the Appellant’s six claims) fail for being untimely raised.

#### 10.118 Election Contests.

(1) Any Member may Contest the results of an election or decisions of the Election Committee as provided in this Section. All Contests must be submitted to the Designated Representative at the Designated Office in writing setting

forth the grounds for the Contest. The Designated Representative shall forward all Contests to the Chairperson of the Election Committee.

(2) All Contests regarding voter registration, nominating petitions, or the nomination and eligibility of Candidates **must be submitted within three (3) days of the list of eligible nominated Candidates being posted in accordance with Section 10.110(2). Emphasis added.**

On April 27th the deadline for contests relating to nominations and voter registration were due with blank primary ballots being mailed to voters on May 1<sup>st</sup>. The May 15, 2020 filing of this complaint with the Election Committee two weeks *after* primary ballots were mailed to voters prevents any meaningful remedy. Having oral arguments days before final ballots are to be opened after candidates have placed yard signs, sent letters, and done the myriad of activities one does when seeking public office does not give this Court any meaningful options. A do-over will not work.

The public health crisis and the measures to protect the public experienced during this election cycle are as unique as they are unprecedented. Few, if any, laws had contingencies built in that permit for a multi-month shutdown from a public health emergency. The election committee's accommodation in light of the Covid-19 pandemic for permitting the circulator and the individual nominating to be one and the same person, the primary requirement being an original signature as paramount as well as permitting circulating by mail all fit within STC § 10.111(5) and are appropriate accommodations that do not require changes to the code.

Importantly, the Tribal Code "prevents amendments to the election Chapter within the period of six (6) months prior to the date of the general election." STC § 10.102 The purpose behind establishing the ground rules for an election at least six months prior prevent any last minute adjustments that could benefit a particular candidate. That however, restricts any last minute adjustments due to impending health crisis.

Any allegation that a privately held list of emails alleged to be possessed by Chairman Payment does not constitute a violation Election Ordinances. Inside budgetary and campaigning restrictions, none of which are specifically alleged to have been violated, there are no restrictions on candidates from setting up Facebook accounts or similar social media seeking email addresses of members, especially members seeking to nominate a particular candidate. At oral arguments both parties stated they were aware of no publicly kept email database that would arguably be available to the Election Committee. By Resolution, the Election Committee is only required to provide membership list. STC § 10.111(4) The resourcefulness of opposing candidates should not be held against them.

This Court does not find:

- That the Election Committee did not act "in a manner not consistent with Tribal law that denied Appellant a sustentative right or caused them to suffer an unjust result.
- That the Election Committee's actions were not "arbitrary or unreasonable."

- That it will not supersede the judgment of the Board of Directors in their long established election procedures nor does this Court have the authority to order new procedures as requested by the Appellant beyond those contained in the Election Code.
- That requiring 100 nominating petitions in the roughly 90 day deadline for the office of Chairperson from a total membership nearing 40,000 is not an unreasonable requirement for entry to an election and to appear on a ballot.
- That State Law is not governing regarding a stay at home order for lands held in Trust, *California v Cabazon Bands of Indians*, 480 U.S. 202 (1987) and even if it had, Michigan Executive Order 2020-21 expressly permitted the activities necessary to the management of elections.
- The 24<sup>th</sup> Amendment to the United States Constitution was not violated in that there was no poll tax imposed. While an individual printing and mailing a nominating petition involves a cost, it was not the sole means of signing a petition nor was it a tax levied as a barrier for casting a vote. It is a nominal expense involved in the signing of a nomination petition, not much different than the cost of driving to a polling booth to cast a ballot, an expense and use of time not born by Members with primary and election ballots being sent through the mail.

### **ORDER**

For the reasons specified above, the Appellee Election Committee Decision of May 29, 2020 is affirmed and Appellant's appeal fails.

It is SO ORDERED.