



ENTERED on

3.20.2023 t/s

in the SSM Chippewa Tribal
Court of Appeals

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

Sheila Berger,

Appellant,

v.

Case No. APP-2023-02

The Election Committee of the Sault Ste.
Marie Tribe of Chippewa Indians,
Appellee.

Decided: March 20, 2023

BEFORE: BIRON, CORBIERE, DIETZ, and DEMOORE Appellate Judges.

Opinion and Order Affirming the Decision of the Election Committee

Biron, Karrie Chief Appellate Judge, who is joined by Appellate Judges Corbiere, Dietz, and DeMoore.

For the reasons explained below, the Sault Ste. Marie Tribe of Chippewa Indians Election Committee's (Election Committee) February 22, 2023 decision entitled *Decision of Election Committee, In Re Sheila Berger* is hereby affirmed. In affirming the Election Committee's February 22, 2023 decision, as more fully explained below, this Court holds that while the mailing of the ballots related to Special Advisory Election varied from the timeline established by the Election Committee on January 6, 2023 constituting error, such mailing, in this particular circumstance, was harmless error and no specific violations of the Tribal Code have occurred that would warrant the interruption of the 2023 Special Advisory Election.

Facts and Procedural History

On January 6, 2023, the Election Committee published the *Sault Ste. Marie Tribe of Chippewa Indians Notice of Special Advisory Election* ("Election Notice") for a vacant Unit One Director seat and set forth the following dates:

- Jan. 20thDeadline for voter registration. Last day to receive Letter of Intent for potential candidates. Roll of registered voters prepared and posted. Nomination petitions available.
- Jan. 27thNominating petition deadline.
- Feb. 1st List of eligible candidates available.
- Feb. 6th Deadline for contests relating to nominations and voter registration.
- Feb. 24thSpecial election ballots mailed to voters.
- Mar. 20thSpecial Advisory Election Day.
- Mar. 23rdDeadline for contest relating to vote count.

On February 13, 2023, several days earlier than indicated in the Election Notice, ballots were mailed to eligible voters for the vacant Unit One Director seat. (*Appellant’s Brief in Opposition* (“Brief in Opposition”), March 8, 2023, p. 5). On February 15, 2023, Appellant, “a candidate for the 2023 Special Advisory Election for Unit 1 Director filed an Election Complaint claiming that the Sault Ste Marie Tribe Election Ordinance” was violated because of the early mailing and requesting that replacement ballots be mailed to eligible voters with instructions regarding which ballot to use. (*Decision of Election Committee, In Re: Sheila Berger* (“Berger Decision”), February 22, 2023, p. 1). On February 16, 2023, the Election Committee convened to review the Appellant’s Election Complaint and to discuss the early mailing issue.¹ On February 17, 2023, the Election Committee issued a public statement admitting that “an unintentional clerical error” caused the Special Advisory Ballots to be mailed prior to the scheduled mailing date of February 24, 2023 and informing voters that they should use the ballots they received to vote in the Special Advisory Election. (*Notice of Appeal* (“Notice of Appeal”), February 27, 2023, Appendix A-1). On February 22, 2023, the Election Committee issued its Berger Decision finding the Appellant’s Election Complaint to be without merit and dismissed the Complaint. (*Berger Decision* at 7).

On February 27, 2023, the Appellant filed her Notice of Appeal alleging, in sum, that the Election Committee’s decision to proceed with the Special Advisory Election despite her complaint and proposed remedy was arbitrary, unreasonable and unlawful. (Notice of Appeal at 1). The Appellant further requested a stay of the Special Advisory Election until such time as this Court could render a decision in this matter. (*Ibid*). On February 28, 2023, the Appellee, Election Committee, by and through legal counsel, filed an appearance and an *Objection to Stay Pending Appeal*. (*Notice of Appearance and Objection to Stay Pending Appeal*, February 28, 2023). On March 1, 2023, this Court denied the Appellant’s Request for Stay, issued a *Notice of Expedited Briefing Schedule* and set the matter for oral argument by the parties on March 9, 2023. Both parties filed briefs and materials in accordance with the Court’s expedited briefing

¹ This Court is unclear as to whether the Complainant was provided notice and an opportunity to be heard at the “convening” of Election Committee on February 16, 2023. Since this issue was not raised by either party, this Court will not address it here but highlights the substantive rights of parties to an Election Complaint and the due process requirements mandated by this Court’s recent opinion in *Payment v. Election Committee*, APP-2022-02.

schedule. Both parties were present on the time and date set for oral argument - the Appellant, in pro per, and the Appellee, by and through legal counsel.

The Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians (“Constitution”) provide 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(1), Election Ordinance. The Election Ordinance establishes the Election Committee and the general procedural framework for conducting special advisory elections including issuance of a Notice of Election and Applicable General Election Rules. (STC §§10.201-206). STC §10.205(1) specifically directs the Election Committee to “prepare and post at each tribal office an [sic] Notice of Election, which shall explain the purpose of the Special Advisory Election, give the date of election, the manner by which the Vote is to be taken, the office to be filled, the procedures for the nomination of the Candidates, *the time limit for each stage of the election procedure* and the voting requirements for the elections (*emphasis added*).” STC §10.206 (3) provides, in relevant part, that “[t]he timelines for a Special Advisory Election shall be determined by the Election Committee in such a way as to accomplish the purpose and the intent of [the Special Advisory Election subchapter] and shall be published within the Notice of Election.”

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) written 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.” Chapter 82 “establishe[s] the procedures by which appeals are taken from decisions of . . . the Election Committee.” (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; 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(1) and the Election Committee has rendered a decision in writing in accordance with § 10.120. STC § 10.120(2)(c). “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) and result “in an Appellant being unfairly denied a substantial right or being caused to suffer an unjust result.” (STC § 82.210). Furthermore, this Court will not entertain arguments that were not first the subject of an election contest from which a written decision resulted. *Isaac McKechnie v. The Election Committee of the Sault Ste Marie Tribe of Chippewa Indians*, APP-16-05 (July 15, 2016).

In every matter before this Court, our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi’idiwin* (practice absolute kindness), *minadendmowin*, (respect – act

without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court's decision-making. *Payment v. The Election Committee of the Sault Ste Marie Tribe of Chippewa Indians*, APP-2022-02 (December 5, 2022).

Discussion

Tribal Elections are an integral part of self-governance and the task of administering a fair and impartial election is often daunting amidst the make-up of tribal communities – a close knit community of families, clans, and individuals with divergent political interests, strong viewpoints, varying values and beliefs who compete against one another for the opportunity to lead. There is no doubt that the desire to lead stems from noble intentions, but this westernized process sometimes leads to fractionization of community and lifelong rivalries. Emotions run high, suspicion runs rampant, and stress is at an all-time high. This Court observed this emotion, stress and suspicion in this matter and in the several election-related proceedings that have made their way before us over the last several months. As noted in a recent decision, as Anishinaabe people, “since time immemorial we have been living and governing ourselves in harmony, staying in balance with all of creation, otherwise known to the Anishinaabe as *mino-bimaadiziwin*. (*Ibid*) We are informed by our Elders that leadership was earned, that the willingness to follow resulted from one's ability to provide for the community as a whole and put the community's interest before their own and that decisions were made not just to alleviate the challenges of the present but to ensure the continuation of the Anishinaabe way of life (and survival of the Tribal community) for the next seven generations.

It is against this backdrop that this Court is tasked with reviewing decisions of the Election Committee examining whether the Election Committee acted in a manner inconsistent with Tribal law such that an appellant was denied a substantive right or suffered an unjust result. (STC § 82.210). In addition, this Court must first determine whether or not the appellant possesses the requisite standing to request review of the Election Committee in the first place. (STC § 82.201). Standing limits participation in lawsuits and asks whether the person(s) bringing a lawsuit, or defending one, has enough cause to “stand” before the court and advocate, since not anyone can go to court for any reason. In Western society, to have standing, a party must show an “injury in fact” to their own legal interests, that such injury is the result of the decision made by the Election Committee, and that this Court can grant the relief requested – otherwise known as redressability. See *Lujan v. Defenders of Wildlife*, 504 US 555 (1992). Under Tribal law, related to Election matters, an appellant's standing requires appeals from an Election Committee decision to be personal to appellant and not a generalized grievance “shared in equal measure by all or a large class of similarly situated parties.” (STC § 82.201).

We will first address the standing issue, as the Appellee asserts that Appellant's grievance is general in nature thus barred by Tribal law. Appellee argues that, as a candidate (the purported class), the Appellant suffered no legal impact that wasn't also experienced by the two other candidates on the ballot in the Special Advisory Election. This Court agrees that the Appellant suffered no legally cognizable “injury in fact” that would normally allow standing to bring her grievance before this Court. However, a class of 3 is hardly “a large class of similarly situated parties” which seems to this Court would make any injury, if shown to be imminent and concrete, to a particular candidate - personal. It is the word “personal” that instructs this Court to look beyond the westernized legal elements of standing and apply our Anishinaabe teachings of

nibwaakaawin (wisdom-use of good sense), *zaagi'idiwin* (practice absolute kindness), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) to determine whether standing exists. In fact, fifteen years ago, the question of standing was raised in an appeal, and this Court offered a broad interpretation of standing based on then existing law opining, “It is our understanding that historically the leaders of our Tribe welcomed the feedback from all tribal members on the wisdom of the decisions of tribal leaders. It would therefore be consistent with this tribal custom to allow any tribal member to challenge the decisions of the Election Committee, as decisions of the Election Committee are fundamental to the internal governance of the Tribe.” *Lidel and Freiheit v. SMTCI Election Committee*, APP-08-05 (March 25, 2008). Based on this Court’s previous opinions and our Anishinaabe teachings of *minadendmowin* and *ayaangwaamizi* which guide this Court, we find that the Appellant has a right to stand before this Court and advocate on her own behalf. The Appellee’s challenge to the Appellant’s standing fails.

That being said, a candidate’s campaign strategy is not a protected right. While a candidate’s reliance on the timeline developed and published in accordance with Tribal law has meaning – the Appellant failed to provide evidence that she experienced an “injury in fact” as a result of the early mailing of ballots. Indeed, at oral argument, the Appellant conceded that while a portion of her mailers were to arrive ahead of the ballot scheduled for mailing on February 24, 2023; a second mailing was scheduled to arrive AFTER the ballots had been received. In addition, the Appellant conceded that the cost attributed to her campaign strategy did not increase as a result of the early mailing of ballots nor did she produce any evidence that she was denied votes as a result of the early mailing of ballots. Here, the Appellant was a candidate listed on the ballot and voters had equal opportunity to cast their vote for her as they would for any other candidate – regardless of the receipt of campaign materials.

The Appellant argues that the mailing of the Special Advisory Election Ballots was an “egregious and irrevocable violation of the timeline” posted in the Notice of Election. (February 15, 2023 Election Committee Complaint). The Appellant asserts that the dates contained within the Notice of Election are “mandatory and jurisdictional” concluding that any variation constitutes a violation of STC, Chapter 10, Election Ordinance. This Court appreciates the Appellant’s displeasure with the “unintentional clerical error” that resulted in the current Special Advisory Election ballots being mailed earlier than established by the Notice of Election. This Court agrees that Candidates and voters alike should be able to rely on the Notice of Election and the dates contained therein. (STC §10.205). Otherwise, what is the purpose of the development of a timeline and publication of the Notice of Election? As such, the Court notes that this decision should not be interpreted as rendering the requirements of §10.205 illusory going forward. §10.205 poses meaningful requirements, which provide consistency and predictability in the Tribal Election process and must be followed by the Election Committee.

This Court notes, however, and Appellee argues, that the Election Committee took action upon discovering the error in mailing of the ballots to inform the public within 48 hours after discovery of the error. (Brief in Opposition at 7). The Appellant was a member of the public who received the notice of error and was previously aware of the issue as she made a formal complaint to the Election Committee that has brought us to this point. (Notice of Appeal, generally). The question becomes whether the decision to allow the Special Advisory Election

to proceed as stated in the Notice of Election, despite the Appellant's complaint, was in violation of Tribal law, arbitrary and capricious and otherwise affected a substantive right of the Appellant or caused the Appellant to suffer an unjust result.

The gravity of the responsibilities undertaken by the Election Committee to carry out its duties under the STC, Chapter 10, Election Ordinance – an especially daunting task during the regular election cycle, let alone when such an election occurs outside of that cycle as is the case with Special Advisory Elections, does not go unnoticed. Moreover, this Court takes into consideration the following statement within the Notice of Election:

Election Ordinance & Constitution: This Notice is a narrative statement of the requirements of the Election Ordinance and the Constitution. In the event of any discrepancies between this Notice and the Election Ordinance and Constitution, the requirements imposed by the Election Ordinance and Constitution shall control and all other provisions of this Notice shall remain in force. Questions regarding the election should be directed to the Election Committee.

Notice of Election, p 2.

Here, on or before January 6, 2023, the Election Committee met to discuss the timeline for the Special Advisory Election and published the same in the form of a Notice of Election pursuant to STC §§10.205 and 10.206 (3), thereby fulfilling the requirements of both provisions of Chapter 10. The Notice of Election stated that Special Advisory Election Ballots would be mailed to eligible voters on February 24, 2023. The Appellee's admit that an error occurred in the mailing of the Special Advisory Election Ballots. Upon becoming aware of the mailing error, on February 16, 2023, the Appellee met to discuss the error, the Appellant's complaint and next steps. The record reflects that the Appellee considered all options, including the proposal of the Appellant to mail a replacement ballot on the date specified in the Notice of Election and concluded that the early mailing of the Special Advisory Election ballots "would ... have no impact on the overall integrity or security of the electoral process." (Brief in Opposition at 7). It is clear from the record that the Election Committee acted in an intentional, measured, neutral and expeditious manner to address the early mailing error. This Court is not in a position to second guess the Election Committee and has not been presented with any evidence that the Election Committee acted in a malicious or otherwise unlawful manner,

In her Notice of Appeal and at oral argument, the Appellant, for the first time, raises allegations of potential fraud and collusion on the part of the Election Committee related to the early mailing of the Special Advisory Election ballots. Assuming *arguendo*, the Appellant had raised such grave and concerning arguments in the first instance, the record is void of any proof of such acts in her materials. Further, Appellant conceded at oral argument that she is making these claims based on her "knowledge of how things work in the office of the Tribal Chairman" and her "gut feeling". This Court cannot base its opinions and orders on conjecture and gut feelings. More importantly, these arguments were not raised in her original complaint to the Election Committee and cannot be raised now. (*McKechnie*, APP-16-05, "this Court will not entertain arguments that were not first the subject of an election contest from which a written decision resulted.").

After review of the materials presented to the Court both in writing and at oral argument, this Court finds that while the early mailing of the Special Advisory Election Ballots was an error and not in line with the Notice of Election, no actual violation of Tribal law occurred. The Appellant has not presented evidence that her substantive rights were violated as her name was on the ballot mailed and voters were able to cast their vote in her favor the same as any other candidate appearing on the ballot - rendering the early mailing of the ballots, while no doubt error – in this instance such an error is found to be harmless. Likewise the Appellant has failed to show that she suffered an unjust result from the early mailing of the ballots - she was not prevented in the entirety from campaigning, by her own admission - part of her campaign strategy was for campaign materials to arrive after the February 24 ballot mailing date, she provided no evidence that the earlier mailing affected the number of votes that she may have or will receive, and she incurred no greater costs as a result of the early mailing.

ORDER

For the reasons specified above, the Appellee’s Election Committee Decision of February 22, 2023 is affirmed, the Appellant’s appeal fails and the Special Advisory Election should proceed as scheduled in the Notice of Election.

It is SO ORDERED.