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in the SSM Chippewa Tribal
Court of Appeals

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

Aaron Payment
Appellant,

v.

Case No. APP-2022-02

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

Before: Feleppa, Corbiere, Dietz, Jump, and Biron, Appellate Judges.

OPINION AND ORDER

Biron, Karrie, Chief Appellate Judge and Feleppa, Appellate Judge, who are joined by Appellate Judges Corbiere, Dietz, and Jump. This Court heard oral arguments for this matter on July 15, 2022 via zoom.

As explained more fully in the discussion below, this Court vacates the Election Committee's June 8, 2022 Decision delivered by Addendum as arbitrary and an unconstitutional exercise of the Election Committee's authority granted by Chapter 10.

FACTS AND PROCEDURAL BACKGROUND

This genesis of this appeal was the May 4, 2022 printed advertisement in a local newspaper by former chairman Aaron Payment during an election cycle. On May 17, 2022, the Election Committee deemed this advertisement to be a violation of Ordinance 10.112(13) prohibiting campaigning by a non-candidate registrant. The sanction for this violation was:

Aaron Payment has 15 days from the date of this decision to comply with the Election Code by registering as a Non-Candidate Registrant and to comply with all financial disclosures. Failure to do so will result in the Election Committee referring this matter over to the Tribal Prosecutor's Office for Election Fraud.

The 15 days lapsed.

Mr. Payment neither appealed the Election Committee decision in the five days allotted under STC 82.204 nor had he registered as a non-candidate registrant.

Twenty-two days later, on June 8, 2022, the Election Committee generated an "Addendum to the Decision of Election Committee In re Aaron Payment" ("Addendum")

relating back to the same May 4, 2022 advertisement. Because Dr. Payment had not either registered nor appealed the May 17, 2022 the Election Committee found the May 4, 2022 violation un-cured and levied a \$1,500 sanction. On June 14, 2022, Appellant Payment timely filed this notice of appeal related to the Addendum. Briefs were filed consistent with a briefing schedule as were oral arguments.

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).”¹ Accordingly, this Court has exclusive jurisdiction to hear appeals where an Appellant has filed a proper complaint in accordance with § 10.119 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 an 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

In this matter the Appellee argues that “[t]he Election Committee has the duty to carry out and enforce the Election Ordinance as written; it has no discretion to deviate from the express and mandated provisions” of Chapter 10 as written. (Appellee’s Brief at pg. 3.) The Appellee contends that there is nothing in the Election Ordinance that prevents the Election Committee’s actions to issue the Addendum. (July 15, 2022 Oral Argument at 6:40). The Appellee further states that there is nothing in the Addendum that prohibits Appellant’s right to appeal its decision. (*Id.* at 6:40). The Appellee further argues that, but for the Appellant’s refusal to

¹ 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 Chapter 10 at Section 2(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).

comply with its May 17, 2022 Decision to register as a Non-Candidate Registrant, it would never have had to issue the Addendum. (*Id.* at 7:28). The Appellee argues that the subsequent imposition of the fine was within the authority of the Election Committee pursuant to Section 10.120(6) which allows for imposition of fines by the Election Committee. (*Id.* at 8:45.). The Appellee proclaimed at oral argument that the intent of the Addendum was not to preclude any appeal the Appellant may have regarding BOTH the findings of the May 17, 2022 Decision and the new sanctions at issue in the Addendum. (*Id.* at 13:13-14:09.). The Appellant conceded at oral argument that in hindsight better language could have been used initially and he is not aware of anything that prohibits the Election Committee from “making adjustments” to its decision. (*Id.* at 21:56.). The Appellant further agreed at oral argument that when the Election Committee issues an order that is appealable pursuant to Section 10.120, that that is a final order. (*Id.* at 23:40.). Despite this concession, the Appellee maintains that there is nothing that prevents the Election Committee from modifying its order, resetting the clock for the timeframe to appeal. (*Id.* at 23:48-23:55). The Appellee further argues, anew at oral argument, that when a party refuses to comply with the decision of the Election Committee, that failure to comply is a new violation of the Election Ordinance. (*Id.* at 27:42 – 28:42).

The Appellant acknowledges that his failure to comply with the May 17, 2022 decision subjects him to possible prosecution. (“Appellant in this matter was willing to have the matter referred to the Prosecuting Attorney for review....”)(Appellant’s Brief at p. 2). Appellant further stated that “[w]hile he does not object to the referral to the prosecuting attorney for review of this matter, he strongly objects to the after the fact addition of a monetary penalty for his alleged violations.” (*Id.*) He argues that had the fine been imposed in the first instance he would have appealed and asserts that the issuance of the Addendum was a blatant violation of his due process rights afforded him under the Constitution and Bylaws of the Sault Ste. Marie Tribe of Chippewa Indians (“Constitution”) which incorporates by reference 25 USC 1302 – commonly known as the Indian Bill of Rights. (*Id.*) The Appellant further argues that the decision of the Election Committee to add penalties after the fact is arbitrary and unreasonable. (Oral Argument Hearing at 5:13). He offers that the decision to impose the fine was “an action taken not in compliance with the law but is merely an exercise of power” - the very definition of arbitrary. (*Id.* at 5:39 - 6:07). The Appellant further asserts that the Election Committee is collaterally estopped from adding to its initial decision as the Appellee suggests; otherwise, there is nothing to stop the Election Committee from changing its mind and issuing more sanctions a week from now. (*Id.* at 30:55 – 33:08).

The Constitution, among other things, sets forth the powers of the Sault Tribe Board of Directors - the governing body that exercises the power of self-government on behalf of the Tribe.² The Constitution also places certain limitations on the actions of government and sets forth protections for tribal members. (Constitution, Article VIII, Bill of Rights).³ It is worth

² Sault Tribe Constitution Article VII, Section 1 defines the scope of the powers of the Tribe’s governing body (the Sault Tribe Board of Directors). “The board of directors shall exercise the following powers, subject to any limitations imposed by the laws of the United States and subject to all express restrictions upon such powers contained in this constitution and bylaws:”

³ Sault Tribe Constitution, Article VIII states “[a]ll members of the Sault Ste. Marie Tribe of Chippewa Indians shall be accorded equal protection of the law under this constitution. No member shall be denied any of the rights or guarantees enjoyed by citizens under the Constitution of the United States, including but not limited to freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for

noting that the Election Committee derives its authority by delegation (Constitution, Article VII, Section 1 (n)). To be sure, the Constitution, Article VIII, must guide the application of the Election Ordinance and the conduct of the Election Committee when deciding contests, complaints and issuing sanctions and fines. Chapter 10 of the Sault Tribe Code, entitled Election Ordinance, sets forth the obligations and the authority of the Election Committee.⁴ STC Ch. 10, Section 10.108. Such authority must be exercised with due care and arguably cannot exceed the constitutional authority enjoyed by the Board of Directors.⁵ Chapter 10 further provides that when the Election Committee receives a complaint, as was the case here, it shall convene within a particular timeframe and use the myriad of tools described in Section 10.120 to reach a decision related to the complaint. (STC Chapter 10, Section 10.120.). Section 10.120(6) sets forth that “[h]earings under this Section are civil administrative proceedings and the imposition of any fines or penalties under this Subsection does not preclude prosecution and imposition of penalties for any crime in violation of Tribal Code Chapter 71.” Finally, Section 10.120 (7) provides that once “[a] decision [is] issued pursuant to subsection [10.120](2)(c) [that decision] may be appealed to [this]... Court.”

As Anishinaabe people, and in carrying out duties delegated from one authority to another, we would be remiss if we did not seek out our Ojibway teachings to inform this Court’s due process jurisprudence. Indeed, the notion of due process emanates from the concept of achieving harmony in life, to live in balance with all of creation, otherwise known to the Anishinaabe as *mino-bimaadiziwin*. (Cholewka v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council, No. 2013- 16-AP (Grand Traverse Band of Ottawa and Chippewa Indians App. Ct. 2014). There is no doubt that the Appellant is a tribal member cloaked with the protections of Article VIII and that this Court has been granted jurisdiction to hear and decide such matters pursuant to Chapter 82 of the Sault Tribe Code. In doing so, this Court is keenly aware that “an Indian Tribal Court’s interpretation of due process represents the unique tribal sovereign, its distinctive culture and mores.” (Alexander v. Conf’d Tribes of Grand Ronde, 13 Am. Tribal Law 353 (Ct. of App. of the Confederated Tribes of the Grand Ronde Cmty. 2016)(quoting Synowski v. Conf’d Tribes of Grand Ronde, 4. Am. Tribal Law 122, 125 n. 4 (Grand Ronde Ct. App. 2003)). 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.

This Court is further informed by our Elders that the Anishinaabe achieve wisdom through their understanding of the “ordinances of creation.” The tenets represented in the rhythm of the earth and all of creation, are utilized in our established systems of governance and can be used to identify the principles of due process. For example, the Anishinaabe are no

action or the redress [of][sic] grievances, and due process of law. The protection guaranteed to persons by Title II of the Civil Rights Act of 1968 (82 Stat. 77) against actions of an Indian entity in the exercise of its powers of self-government shall apply to members of the tribe.

⁴ See Article VII, Section 1 (n) which sets forth that the board of director has the power “[t]o establish and delegate to subordinate boards, organizations, cooperative associations, tribal officers, committees, delegates or other tribal groups, any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power or to cancel any delegation.”

⁵ 25 U.S.C. 1302 (a)(8) “deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law”

stranger to respectful listening to the position of all interested persons on any important issue. To be sure, one only need to look to the Seven Grandfather Teachings of the Anishinaabe to understand that Indian nations did not learn “due process” and “fairness” from Anglo–American cultures. (See e.g., *Begay v. Navajo Nation*, 6 Nav. Rptr. 20, 24–25 (Navajo Nation Sup.Ct. 1988) (“The concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act . . . The Navajo people have an established custom”).

Indeed, this Court is called upon to consider the last time its members participated in a talking circle – we think of the order of the circle as it exists in our traditional ways, the importance of the talking stick or eagle feather as the object that enables respectful discussion as well as demands respectful listening. We also think of expected outcomes and finality of the decisions made that result from the open, honest and respectful discussion. It could be said that the application of the Ojibway talking circle principles speak to the essence of due process - a governmental respect for all individuals subject to its authority. Like other Indian communities, this respect can be pragmatically translated in legal proceedings to mean notice and the opportunity to be heard when the deprivation of property or liberty is at stake. (*Zephier v. Walters*, No. 15A06 (Cheyenne River Sioux Tribal Ct. of App. 2017).

In this case, a decision on the complaint was issued on May 17, 2022 that found that the Appellant had acted in violation of the Election Ordinance by campaigning and failing to register as a non-candidate registrant. (May 17, 2022 Decision of the Election Committee (“May 17 Decision”). The May 17 Decision required the Appellant to register as a non-candidate registrant within 15 days or face possible criminal prosecution for election fraud.⁶ The Appellant did not register as directed nor did he appeal the decision. Thereafter, on June 8, 2022, and after the timeframe to appeal the May 17 Decision had expired, the Election Committee issued the Addendum imposing a \$1,500 fine on the Appellant citing as its authority Section 10.120 (2)(c). While this Court agrees that the Election Committee can impose fines for violations of the Election Ordinance, there is nothing in Section 10.120(2)(c), that references the imposition of fines or penalties but merely refers to the “render[ing] a decision in writing”. This Court notes that it is Section 10.120(6) that sets forth that the Election Committee’s authority to impose penalties and fines. Furthermore, because a fine or a sanction may rise to the level of deprivation of liberty or property, Section 10.120(6), as precursor, requires an administrative hearing to ensure the due process afforded to Tribal members by Article VIII of the Tribe’s Constitution.

⁶ Sault Tribe Code, Chapter 71, Section 71.1103. 71.1103 Election Fraud. (1) Offense. A person commits the offense of election fraud, if the person: 71-45(a) gives or offers to give anything of value to another person to induce that person to vote, or to refrain from voting, for any candidate, signing a nominating petition, or registering to vote; or (b) acts to compromise the integrity of the election, or attempts to do so by falsifying any document, including documents filed with the Tribal Election Committee or Board of Directors; or (c) compromises the security of the ballots and other election documents; or (d) discharges or threatens to discharge a tribal employee for the purpose of influencing the employees vote or signature on a nominating petition; or (e) votes, or attempts to vote, more than once in the same election; or (f) opens, marks, alters, or destroys any ballot sent to another person; or (g) interfered with the mailing or election materials; or (h) he alters, defaces or destroys any election documents, including candidate signs or literature; or (i) files a false report required by Tribal Code '10.112. (2) Sentence. A person convicted of election fraud may be sentenced to imprisonment not to exceed one (1) year, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both.

Just as the complainant that brought this matter to the Election Committee to be heard through a written complaint, the respondent – Appellant must be afforded the same courtesy if the result infringes upon his due process rights as afforded under our Ojibway way of life and by Article VIII. At a minimum that would have included notice of the complaint and an opportunity to be heard. The record does not reflect that such notice or an opportunity to be heard was afforded to the Appellant with either the May 17 Decision or the June 8 Addendum. In other words, the Election Committee has no authority to render a decision that deprives a tribal member of property without due process of law. While this Court in no way condones the inaction of the Appellant that gave rise to the Election Committee’s decision to issue further sanctions via an Addendum, this Court is not convinced that such authority exists after a final decision has been rendered. This exercise of unauthorized authority constitutes an abuse of discretion by the Election Committee. The notion that a one-time publication constitutes an ongoing violation in which the jurisdiction of the Election Committee is retained after service of a final order is not supported by Chapter 10. The May 17 Decision was based on a complaint related to a one-time newspaper advertisement. Upon receipt of the complaint the Election convened, reviewed and decided how to dispose of the complaint, and ultimately issued the May 17 Decision. If the Election Committee desired to impose a fine for the Appellant’s violation of the Election Ordinance or non-compliance with its initial order, it should have done so or put the Appellant on notice that that was an added consequence of his failure to act. This Court can find no basis in law and the issuance of the Addendum was arbitrary and an unconstitutional exercise of the Election Committee’s authority granted by Chapter 10.

Because of the forgoing discussion acts as an absolute basis to vacate the Election Committee’s June 8, 2022 Addendum, this Court need not address the Appellant’s collateral estoppel argument.

ORDER

For the reasons cited above, this Court vacates the June 8, 2022 Addendum to the Decision of Election Committee In re Aaron Payment as being an arbitrary and capricious abuse by the Election Committee and a violation of the Article VIII Due Process rights of the Appellant.

It is so ordered.