



FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

In the Matter of:) Case No.: EC-002-14
APRIL 1, 2014 PRIMARY ELECTION) FINAL DECISION
CONTEST OF DISTRICT II (SAWYER))
BRUCE M. SAVAGE,)
Contester.)

This matter was heard on April 11, 2014. The following persons appeared for the hearing:

- Bruce M. Savage – Contester
Joe Halloran – Attorney for the FDL General Reservation Election Board
Veronica Smith – Chair, FDL General Reservation Election Board

Mr. Savage alleges a violation of Section 2.2(B) of the MCT Election Ordinance #10 (Revised 11/5/2013) arguing that postcard ballot requests from some absentee voters ballots were shredded or returned to sender due to the “No Order” status of the Post Office Box used by the FDL General Reservation Election Board (“Board”) during a portion of the primary election. Mr. Savage further argues that the alleged violation affected the outcome of the election “within a margin of contest.”

Mr. Savage testified at the hearing, but called no other witnesses. The Court also heard the testimony of Veronica Smith, Chair, FDL General Reservation Election Board.

The following exhibits were offered and accepted by the Court, without objection:

- Board’s Exhibit #1 - A copy of the USPS Quick Service Guide 604e;
Savage Exhibit #1 - A copy of a (blank) postcard requesting an absentee ballot;
Savage Exhibit #2 - A copy of a (blank) postcard requesting an absentee ballot, with a metered mail stamp imprint;
Savage Exhibit #3 - A copy of the FDL Reservation 2014 Primary Election Vote Count;
Savage Exhibit #4 - A copy of the MCT Announcement to FDL RBC regarding the June 10, 2014 Regular Election;
Savage Exhibit #5 - A copy of the Election Calendar for 2013 -2014;
Savage Exhibit #6 - A copy of the USPS Mailing Services handout concerning Mailer Services;

Savage Exhibit #7 - A copy of a letter from Todd Manisto to FDL Election Board dated March 21, 2014;

Savage Exhibit #8 - A copy of the USPS "About" webpage concerning Mail Recovery;

Savage Exhibit #9 - A copy of an affidavit of Wanesia Spry;

Savage Exhibit #10 - A copy of an affidavit of Michael J. Oseland;

Savage Exhibit #11 - A copy of an affidavit of Terry Brian Savage.

PROCEDURAL MATTERS

1. On April 11, 2014, Tina Sadler, Contester in Case No. EC-004-14, and Mary Diver, Contester in Case No. EC-003-14 jointly filed a document described as an "Offer of Proof" requesting "the option of respond if so warranted /needed." No proof was provided with the filing, and the filing was not served on the Board.

Upon questioning of Ms. Sadler and Ms. Diver, it was determined that neither Ms. Sadler nor Ms. Diver wished to respond to this Contest. Rather, both wished to participate in presenting Mr. Savage's Contest. Mr. Savage did not intend to call either Ms. Sadler or Ms. Diver as a witness in his case.

For the reasons set above, the Court rejected the Offer of Proof.

2. On April 9, 2014, the Court entered and served on all parties its Discovery Order, which Order governed all contest hearings filed concerning the April 1, 2014 FDL Primary Election. *See* Discovery Order dated April 9, 2014. On April 10, 2014, the FDL General Reservation Election Board filed a Motion for Protective Order. The Court scheduled argument on the Board's Motion for Protective Order for April 11, 2014 at 10:00 a.m. Mr. Savage did not respond to the Motion for Protective Order and did not appear at the hearing on the Motion.

After hearing argument on the Motion for the Protective Order, the Court issued an order granting the motion in part. *See* Order Following Discovery Motion Hearing dated April 11, 2014.

3. Mr. Savage had not yet received all of the discovery documents at the start of this hearing. The Court delayed the start of the hearing to give Mr. Savage time to review the documents.

FINDINGS OF FACT

1. Bruce M. Savage was a candidate in the April 1, 2014 FDL Primary Election for District II (Sawyer) and was therefore qualified to contest this election.

2. Bruce M. Savage timely filed his Notice of Contest at the Office of the FDL Reservation Election Judge on April 8, 2014.
3. Bruce M. Savage timely filed his Notice of Contest with the Executive Director of the Minnesota Chippewa Tribe on April 8, 2014.
4. The rent for the post office box used by the FDL General Reservation Election Board to obtain election-related mail, including requests for ballots from absentee voters, lapsed on or about July 31, 2013. Savage Exhibit #7. As a result, on or about August 10, 2013, the USPS closed the box. *Id.* The box was reopened on or about September 20, 2013. *Id.*
5. The FDL General Reservation Election Board was appointed on February 24, 2014. Testimony of Veronica Smith. Ms. Smith had no knowledge that the post office box usually used by the Board had been closed and re-opened prior to the appointment of the Board. *Id.*
6. On March 7, 2014, members of the Board picked up mail at the post office box. *Id.* The Board continued to receive mail at the box throughout the election. *Id.*
7. On March 17, 2014, the Board received a call from a voter advising the Board that his request for an absentee ballot had been returned. *Id.*
8. Ms. Smith visited the post office within 30 minutes of the call and inquired about the returned mail. She was advised that the box was open and receiving mail, and that there were no problems with the box. *Id.*
9. On March 18, 2014, the Board received another inquiry about an absentee ballot request that had been returned to the sender. *Id.* The Board contacted the post office within 30 minutes of receiving the inquiry. *Id.* On this date, the post office discovered that after the box had been re-opened, it had failed to properly cancel a “Box (No Order)” in its automated delivery system. *Id.* Also on this date, Todd Manisto, the USPS Supervisor of Customer Service, advised the Board that “some of [the Board’s] mail was returned to sender.” Savage Exhibit #7.
10. Mr. Manisto advised the Board that as a result of the USPS error, mail addressed to “FDL Election Board” would have been returned by the USPS automated system, but that other mail would have been delivered. *Id.*
11. The USPS advised the Board that it had corrected the error in their automated system on March 18, 2014. *Id.*
12. Some absentee voter request cards may not have been received at the post office box. Savage Exhibit #10.
13. The Board had no way to know that the USPS had erred when it re-opened the box; in fact, USPS itself did not appear to know that a computer error had occurred until it investigated further after the Board’s second inquiry. Testimony of Veronica Smith; Savage Exhibit #7.

14. The Board had no control over the programming of the USPS automated delivery system.
15. The Board does not print the ballot postcards used by candidates, nor does it prescribe the form of the postcards. Neither does the Board have authority to oversee the use of metered mail stamps by candidates. Testimony of Veronica Smith.
16. Some postcards sent to absentee voters by a candidate or candidates made improper use of a bulk mail postage stamp by including a mailing date on the metered stamp. Savage Exhibit #2. USPS regulations prohibit the use of a bulk mail pre-paid stamp that includes a date, unless the stamped item is mailed on the same date as the stamp. See Board's Exhibit #1; Testimony of Veronica Smith. Such postcards would not have been delivered to the Board. Testimony of Veronica Smith. Therefore, at least some absentee voter request postcards were likely discarded by USPS for reasons unrelated to the error with the post office box, because they were improperly stamped with metered mail that included a date. Savage Exhibit #2; Board Exhibit #1.
17. The postcards presented as evidence also contained no space or printed format for a return address. Savage Exhibits #1 and #2. Postcards without a return address could not have been returned to the sender and would have been shredded or recycled by the USPS. Testimony of Veronica Smith.
18. Only two absentee voters contacted the Board prior to the election. Testimony of Veronica Smith. In each of these cases, the Board was able to accommodate the voters by providing absentee ballots. *Id.*

DISCUSSION

The provisions of MCT Election Ordinance #10 (Revised 11/5/2013) govern this contest of the April 1, 2014 Fond du Lac Reservation Primary Election.

Chapter III, Section 3 of the MCT Election Ordinance #10 (Revised 11/5/2013) provides in relevant part, as follows:

* * *

3.2(B) (1) the burden of proof rests with the contester who must show by clear and convincing evidence the alleged violations of this Ordinance. There shall be a presumption of correctness in favor of the General Reservation Election Board and other candidates until the contester has met his or her burden of proof.

3.2(B) (2) the contester * * * must present relevant and material evidence demonstrating how any violations of the Ordinance, alleged and proven, affected the outcome of the election.

* * *

MCT Election Ordinance #10 (Revised 11/5/2013), Chapter III, Section 3.2(B)(1); 3.2(B)(2).

“Clear and convincing evidence” is a higher standard of proof than a mere preponderance, and is generally understood to mean evidence “that the thing to be proved is highly probable or reasonably certain.” Black’s Law Dictionary (Ninth Edition).

The evidence showed that FDL failed to pay the rent on its long-time post office box. However, this failure occurred well before this election. Mr. Savage did not provide any authority to support an argument that the post office box in question was required to be open in the months prior to this election, and this Court is aware of no such requirement. It was therefore, not a violation of the Ordinance when the box was allowed to close.

Mr. Savage presented evidence that the United States Postal Service erred when it failed to properly remove an order from its automated delivery system after the Board’s post office box was re-opened in September 2013. Mr. Savage did not provide any evidence that the Board itself was at fault or even aware of the USPS computer system error after the box was re-opened. The Court finds no authority to support a contention that an error by the USPS should be considered an error of the Board. The Board has no authority over the United States Postal Service. Likewise, the MCT Election Ordinance does not govern the actions of the USPS. The evidence presented therefore does not support the allegation that the Board failed to comply with the provisions of Section 2.2(B) of the MCT Election Ordinance #10 (Revised 11/5/2013).

The candidates are responsible for the development and mailing of the postcards they send to registered voters. The evidence does not support a violation of the Ordinance by the Board based on the use by candidates of postcards that were designed, printed and mailed by the candidates themselves.

Mr. Savage argued that a new election should be held because some absentee voters might not have received their ballots in a timely manner. Although it is very frustrating to all involved that the actions of the USPS caused difficulties to absentee voters, those voters had an independent obligation to ensure that their requests for ballots were honored in a timely manner, and indeed some voters did just that. Testimony of Veronica Smith.

Many circumstances that are not violations of the Election Ordinance may affect voter turn-out in an election. Extreme bad weather affecting the ability of in-person voters to get to the polling place is but one example. However, an outside circumstance, even if it affects voter turn-out, does not trigger a new election in the absence of a violation of the Ordinance.

The General Reservation Election Board has no authority under the Ordinance to cancel an election or to extend the time of the election, no matter what outside circumstances occur. Further, the Ordinance does not provide the Election Judge with authority to order a new election in the absence of a proven violation of the Ordinance. MCT Election Ordinance #10 (Revised 11/5/2013), Section 3.2(B) (8).

\\
\\

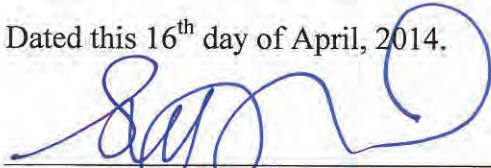
FINAL DECISION

CONCLUSIONS OF LAW

For the reasons set out above, Contester failed to meet his burden to prove by clear and convincing evidence that a violation of the Ordinance occurred. The Court therefore does not make any findings of fact or other determinations regarding whether the violations alleged affected the outcome of this election.

NOW THEREFORE, IT IS ORDERED: The results of the April 1, 2014 primary election in District II (Sawyer) are **AFFIRMED**.

Dated this 16th day of April, 2014.



Suzanne Ojibway Townsend
Fond du Lac Election Contest Judge
April 1, 2014 Primary Election