



FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

In the Matter of: ) Case No.: EC-003-14
)
APRIL 1, 2014 PRIMARY ELECTION ) FINAL DECISION
CONTEST OF SECRETARY/TREASURER )
)
MARY J. DIVER, )
)
Contester.

This matter was heard on April 14, 2014. The following persons appeared for the hearing:

- Mary J. Diver – Contester
Joe Halloran – Attorney for the FDL General Reservation Election Board
Veronica Smith – Chair, FDL General Reservation Election Board

Ms. Diver alleges a violation of the MCT Election Ordinance #10 (Revised 11/5/2013) arguing that the post office box used by the FDL General Reservation Election Board (“Board”) was closed during the absentee voting period and therefore absentee voters were denied their right to vote.

The Court heard testimony from Ms. Diver, Contester, and from Veronica Smith, Chair, FDL General Reservation Election Board.

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

- Diver Exhibit #1 - A copy of a letter from Gary S. Frazer, Executive Director of the MCT, with attached minutes from the November 5, 2013 TEC meeting;
Diver Exhibit #2 - A copy of the front of a postcard addressed to FDL Election Board and containing a stamped statement “Box Closed Unable to Forward Return to Sender.”
Diver Exhibit #3 - A copy of a letter from Todd Manisto to FDL Election Board dated March 21, 2014;
Diver Exhibit #4 - A page with copies of two post cards addressed to FDL General Election Board (1) and FDL Election Board (1).
Diver Exhibit #5 - A copy of a an unsworn written note from Connie Reinke dated March 31, 2014;
Diver Exhibit #6 - A page containing addresses for the FDL General Election Board;
Diver Exhibit #7 - A copy of a handwritten transcription of a conversation with Todd Manisto



Diver Exhibit #8 – A CD containing a recording of a conversation with Todd Manisto;

Diver Exhibit #9 – A copy of the Board’s call log beginning on March 17, 2014;

Board’s Exhibit #1 – A copy of an email from Karen Diver to Veronica Smith and others dated March 17, 2014;

## PROCEDURAL MATTERS

1. 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.
2. 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 a.m.
3. Ms. Diver did not appear at the hearing on the Motion for Protective Order.
4. 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.
5. The Board promptly provided the discovery ordered by the Court, redacted as approved by the Court. Response to Discovery Order filed April 14, 2014.
6. At the hearing on the Motion for Protective Order, Contester Tina Sadler objected to the use of MCT Election Ordinance #10 (Revised 11/5/2013) on the basis that the Ordinance does not have a TEC resolution attached. The Court requested and the Board promptly provided a letter from Gary Frazer, Executive Director of the MCT, advising that MCT Election Ordinance #10 (Revised 11/5/2013) was adopted by the TEC on November 5, 2013. Mr. Frazer attached a copy of the meeting minutes at which the Ordinance was adopted. This document was provided to the Contester in each of the Election Contests filed concerning the April 1, 2014 FDL primary election.
7. As part of its Order Following Hearing on Discovery Motion, the Court advised the parties that it had no jurisdiction to interpret the Constitution or Bylaws of the MCT and accepted MCT Election Ordinance #10 (Revised 11/5/2013) as the current Ordinance under which this matter is to be heard and determined. *See* Order Following Discovery Motion Hearing filed April 11, 2014. This Order applied to all Contests filed regarding the April 1, 2014 FDL primary election. *Id.*
8. At the start of her hearing in this matter, Ms. Diver raised the issue regarding the proper adoption of MCT Election Ordinance #10 (Revised 11/5/2013). The Court advised Ms. Diver that the



Court had already made a decision in this regard, as set out in its Order Following Discovery Motion Hearing. Ms. Diver advised the Court that she was not seeking a constitutional interpretation, but wanted information about what changes had been before the TEC on November 5, 2013, so that she could determine that the Ordinance provided to the Band was consistent with the changes made to the Ordinance on that date.

9. The Court ordered the Board to provide that document. The Board promptly complied. Ms. Diver was given until 12:00 p.m. on April 15, 2014 to file a motion with the Court if she determined that there were inconsistencies between the Ordinance provided to the Court and to Band members, and the changes to the Ordinance voted on by the TEC on November 5, 2013.
10. On April 15, 2014, Ms. Diver filed a motion renewing her argument that the MCT Election Ordinance #10 (Revised 11/5/2013) was unconstitutional. The Board objected to motion as repetitive and not within the scope of the Court's order on April 14, 2014. The Court denied the motion as inconsistent with the Court's order regarding additional discovery, and on the basis that the Court has no jurisdiction under the Ordinance to interpret the Constitution or Bylaws of the MCT.

## FINDINGS OF FACT

1. Mary J. Diver was a candidate in the April 1, 2014 FDL Primary Election for Secretary/Treasurer and was therefore qualified to contest this election.
2. Mary J. Diver timely filed her Notice of Contest at the Office of the FDL Reservation Election Judge on April 8, 2014.
3. Mary J. Diver timely filed his Notice of Contest with the Executive Director of the Minnesota Chippewa Tribe on April 8, 2014.
4. The rent for the P.O. Box used by the FDL General Reservation Election Board to obtain election-related mail, including requests for ballots from absentee voters, was allowed to lapse on or about July 31, 2013. Diver Exhibit #3. As a result, on or about August 10, 2013, the Post Office 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 P.O. 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 to inquire about the returned mail. She was advised that the box was open and receiving mail, and there were no problems with the box. *Id.*
9. On March 18, 2014, the Board received another inquiry about an absentee ballot request being 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)” for the box. *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.” Diver Exhibit #3.
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, 2104. *Id.*
12. 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.
13. The Board had no control over the programming of the USPS automated delivery program. Testimony of Veronica Smith.
14. 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.
15. 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. Testimony of Veronica Smith. 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. *Id.* Such postcards would not have been delivered to the Board. *Id.* The postcards presented as evidence also contained no indication that a return address was suggested or required. Diver Exhibit #4. Postcards without a return address could not have been returned to the sender and would have been shredded. Testimony of Veronica Smith.
16. Only two absentee voters contacted the Board prior to the election. Testimony of Veronica Smith.

## 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. Ms. Diver 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.

Ms. Diver presented evidence that the United States Postal Service erred when it failed to properly remove an order from its automated system after the Board’s post office box was re-opened in September 2013. Ms. Diver did not provide any evidence that the Board itself was at fault or even aware of the USPS 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. The evidence presented therefore does not support the allegation that there was a violation of MCT Election Ordinance #10 (Revised 11/5/2013) during this election.

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 the candidates themselves printed and mailed.

Ms. Diver argued that a new election should be held because some absentee voters might not have received their ballots in a timely manner. A perception of unfairness caused by circumstances

outside of the Board's control and without a violation of the Ordinance does not trigger a new election.

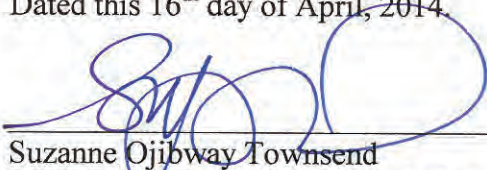
Many circumstances affect voter turn-out in an election. Extreme bad weather affecting the ability of in-person voters to get to the polling place is but one example. The General Reservation Election Board has no authority under the Ordinance to cancel an election or to extend the time of the election, 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).

## CONCLUSIONS OF LAW

For the reasons set out above, Contester failed to meet her 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 for Secretary/Treasurer are **AFFIRMED**.

Dated this 16<sup>th</sup> day of April, 2014.



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