



FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

In the Matter of:) Case No.: EC-005-14
APRIL 1, 2014 PRIMARY ELECTION)
CONTEST OF DISTRICT II (SAWYER)) FINAL DECISION
JOHN B. MCMILLEN,)
Contester.)

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

- John McMillen – Contester
Juanita Anderson - Witness
Joe Halloran – Attorney for the FDL General Reservation Election Board
Veronica Smith – Chair, FDL General Reservation Election Board

Mr. McMillen alleges a violation of Sections 1.6(C) and 2.2(B)(1)-(5) of the MCT Election Ordinance #10 (Revised 11/5/2013) arguing that The FDL General Reservation Election Board (“Board”) failed to obtain and pay for a post office box and number for the April 1, 2014 FDL Primary Election, and failed to retrieve and record election material from a post office box during that election. Mr. McMillen further argues that the alleged violations affected the outcome of the election.

The Court heard the testimony of Mr. McMillen, Contester; Veronica Smith, Chair, FDL General Reservation Election Board; and Juanita Anderson, witness for Mr. McMillen.

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

McMillen Exhibit #1 - A copy of a letter from Todd Manisto to FDL Election Board dated March 21, 2014;

McMillen Exhibit #2 - A copy of the affidavit of Valerie A. Whitebird;

McMillen Exhibit #3 - A copy of a the front of three postcards addressed to FDL Election Board (2) and FDL General Election Board (1) containing “Return to Sender FDL Election Board Box Closed” stickers.

McMillen Exhibit #4 – A copy of the 2014 FDL Reservation primary election results;

McMillen Exhibit #5 – A copy of the 2012 FDL Reservation primary election results;

McMillen Exhibit #6 – A copy of the March 30, 2010 FDL Reservation primary election results;

McMillen Exhibit #7 – A copy of the April 1, 2008 FDL Reservation primary election results;

McMillen Exhibit #8 – A copy of the Fond du Lac General Reservation Board’s call log for the April 1, 2014 primary election.*

* The Court notes that attached to Exhibit #8 are two pages containing copies of the front and back of four absentee voter request post cards, each containing a sticker marked “Return to Sender”. These documents do not appear to be part of Exhibit #8, but they were submitted with Exhibit #8 and not otherwise submitted into evidence.

McMillen Exhibit #9 – A copy of the Election Calendar for 2013 -2014;

Board’s Exhibit #1 – A copy of the April 4, 2006 FDL Reservation primary election results;

Board’s Exhibit #2 – A copy of the July 11, 2006 FDL Reservation primary election results for District II (Sawyer);

Board’s Exhibit #3 – A copy of the September 26, 2006 FDL Reservation primary election results for District II (Sawyer);

Board’s Exhibit #4 – A copy of the January 29, 2013 FDL Reservation special general election results;

Board’s Exhibit #5 – A copy of the November 27, 2012 FDL Reservation special primary election results for District II (Sawyer);

Board’s Exhibit #6 – A copy of the December 5, 2006 FDL Reservation general election results;

Board’s Exhibit #7 – A copy of the June 8, 2010 FDL Reservation general election results;

PROCEDURAL HISTORY

1. Within his Notice of Contest, Mr. McMillen sought discovery of certain documents held by the FDL General Election Board (“Board”).
2. On April 9, 2014, the Court entered and served on all parties its Discovery Order, which Order governed Mr. McMillen’s Contest and each of the four other contest hearings filed concerning the April 1, 2014 FDL Primary Election. Discovery Order dated April 9, 2014. This Order required the production of the documents described in Mr. McMillen’s discovery request.

3. On April 10, 2014, the FDL General Reservation Election Board filed a Motion for Protective Order concerning the discovery ordered by the Court. The Court scheduled argument on the Board's Motion for Protective Order for April 11, 2014 at 10:00 a.m.
4. Mr. McMillen appeared at the hearing on the Motion.
5. 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.
6. The Board promptly provided the discovery ordered by the Court, redacted as approved by the Court. Response to Discovery Order filed April 14, 2014.
7. On April 14, 2014, immediately prior to the hearing on this Contest, Mr. McMillen filed another request for discovery. This request was denied as untimely.

FINDINGS OF FACT

1. John B. McMillen was a candidate in the April 1, 2014 FDL Primary Election for District II (Sawyer) and was therefore qualified to contest this election.
2. John B. McMillen timely filed his Notice of Contest at the Office of the FDL Reservation Election Judge on April 8, 2014.
3. John B. McMillen 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. McMillen Exhibit #1. 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.” McMullen Exhibit #1.
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. 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; McMullen Exhibit #1.
13. The Board had no control over the programming of the USPS automated delivery system.
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 on the metered stamp. McMullen Exhibit #8 (attachments); 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. Testimony of Veronica Smith. Such postcards would not have been delivered to the Board. *Id.* 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. *Id.*
16. The postcards presented as evidence also contained no space or printed format for a return address. McMullen Exhibit #8 (attachments). 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.
17. 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. McMillen 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. McMillen 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. McMillen 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. The evidence presented therefore does not support the allegation that the Board failed to comply with the provisions of Sections 1.6(C) or 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. McMillen argued that a new election should be held because some absentee voters might not have received their ballots in a timely manner and were thus denied their right to vote. He offered evidence that absentee voting had been higher in some prior FDL elections. Although it is very frustrating to all involved that the actions of the USPS may have caused difficulties to some absentee voters, those voters had an independent obligation to ensure that their requests for ballots were honored in a timely manner. 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 it affects the election, does not trigger a new election in the absence of a violation of the Ordinance. As discussed above, a violation of the Ordinance was not proven here.

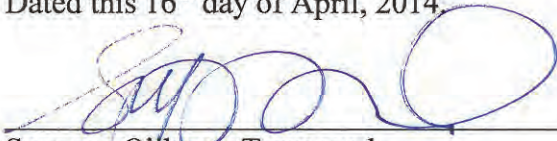
The General Reservation Election Board has no authority under the Ordinance to cancel an election or to extend the time of the election, no matter what outside circumstances occur. Further, the Ordinance does not provide the Election Judge with authority to order a new election in the absence of a proven 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 his burden to prove by clear and convincing evidence that a violation of the Ordinance occurred in this election. 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