

**FOREST COUNTY POTAWATOMI COMMUNITY
TRIBAL COURT**

**IN RE:
The Election Challenge of November 4, 2006.**

**JOSEPH DANIELS, ANTHONY PETONQUOT,
BRENDA JACOBSON, STEVEN DANIELS,
STEPHANIE BAREA, KRISTIE DEHOYOS,**

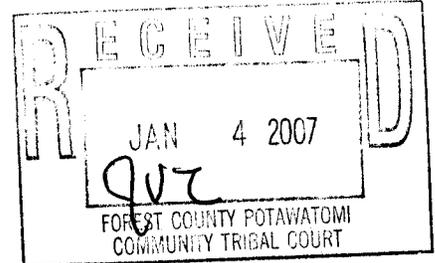
Petitioners,

v.

Case No. 06-CV-0192

**CRYSTAL DESCHINNY, in her official
capacity as Forest County Potawatomi
Election Ballot Judge, FOREST COUNTY
POTAWATOMI COMMUNITY,**

Respondents.



DECISION AND OPINION

INTRODUCTION

The case before the Forest County Potawatomi Tribal Court is an appeal of a decision by Election Board Ballot Judge Crystal Deschinny regarding a challenge to the tribal elections held on November 4, 2006. Even viewing all of the facts in favor of the Petitioners, the Petitioners have not demonstrated to a reasonable degree of certainty that different persons would have been elected. Therefore, the Court denies Petitioners' request to overturn the election.

JURISDICTION

This Court has jurisdiction to hear the appeal pursuant to Section 8.01 of the Forest County Potawatomi Ordinances. Section 8.01(D) states:

Any appeal of the Election Board Ballot Judge's decision must be filed with the Potawatomi Community Tribal Court within forty-eight (48) hours of issuance. The Tribal Court shall hold hearing within seventy two (72) hours to review the matter and render its decision within twenty four (24) hours of completion of the hearing. Any decision of the Tribal Court shall be final.

BACKGROUND

The Court will briefly recount this case's procedural history. On November 4, 2006 the Tribe held its annual election pursuant to the requirements of the Tribal Constitution and the Election Ordinance. The offices of Vice-Chair, Treasurer and Secretary were up for election.

On November 6, 2006, pursuant to the Election Ordinance, Petitioners submitted a challenge of the November 4, 2006 election. Petitioners alleged several violations including: 1) the balloting was not done secretly; 2) The ballots used were not official ballots; and 3) the procedure for casting ballots was not followed. Respondent Crystal Deschinny, the Election Board Ballot Judge, conducted a public review of the ballot box in the auditorium at the New Executive Building at 3:00 p.m. on November 8, 2006. Although the parties disagree, Respondents assert by affidavit the Election Board Ballot Judge's decision was posted around 5:00 p.m. in the lobby of the New Executive Building.

In her decision Ms. Deschinny addressed each one of the Petitioners' challenges pursuant to Sec. 8.01(B) which requires challengers "to demonstrate to a reasonable degree of certainty that the election results would have resulted in the election of different persons if" the alleged violations had not occurred. Ms. Deschinny made several findings including: 1) voting properly took place at the New Executive Building and all voters were mailed notice as to where the polls would be located;¹ 2) The ballots were not numbered and therefore voting was by secret ballot; 3) Although three

¹ It is unclear why Ms. Deschinny addressed the legality of the polling place even though Petitioners did not raise it in their November 6, 2006 challenge.

ballots were not initialed, even if these ballots were disallowed, it would not have changed the outcome of the election; and 4) There was no violation of § 2.08(G) with respect to the inspection of the ballots and their deposit into the ballot box.

On Monday, November 14, 2006, at 7:45 a.m. Petitioners appealed Ms. Deschinny's decision by filing their Petition with the Tribal Court. The Petition was received by fax. The filing fee was not paid at the time of filing. In addition to the arguments in the Petitioners' original challenge filed with the Election Board Ballot Judge, the Petition included the allegation the polling place was improper.

In order to meet the 72-hour hearing requirement of the Election Ordinance, the Court scheduled a hearing at 7:30 a.m. on November 17, 2006. At that hearing counsel for Petitioners appeared by phone. No substantive proceedings were held. The hearing was recessed until November 21, 2006.

On November 20, 2006, Petitioners amended their pleadings to include new grounds for challenge beyond those originally considered by the Election Board Ballot Judge.²

On November 21, 2006, the Court reconvened the hearing. Petitioners challenged the legality of the representation of Respondents by Attorney Bruce Reynolds. They claimed Attorney Reynolds' representation was not in compliance with the Constitution. Article IV, Sec. 1(a) of the Constitution states the General Council has the power to employ legal counsel. Petitioners alleged Mr. Reynolds was representing Respondents without a General Council-approved contract. The Court ordered the parties to file simultaneous briefs on the attorney contract issue by December 15, 2006. The Court scheduled the hearing on the attorney contract issue for January 3, 2007.

On December 2, 2006, the General Council approved Mr. Reynolds' contract by Resolution No. GC016-2006. Petitioners subsequently withdrew their challenge to Mr. Reynolds' representation.

On December 15, 2006, Respondents filed a Motion for Summary Judgment and Motion to Dismiss. Petitioners failed to make a responsive filing to either of Respondents' motions.

² The Amended Appeal contained two new allegations: 1) the Ballot Clerks and Judge were not appointed at the

By letter on December 20, 2006, the Court notified the parties the hearing on January 3, 2007 would be a motions hearing only and gave the Petitioners until December 29, 2006 to make any filings.

DISCUSSION

A. Nature of the action

There has been some confusion about the nature of this action, specifically whether this action is an appellate action, original action or something else. In fairness to all parties, the Court will clarify this issue. The Election Ordinance uses the words "appeal" and "review." Despite this language, the parties have proceeded as though it is a trial court proceeding with the possibility of testimony and evidence. Respondents filed a motion for summary judgment, a proceeding usually unavailable in appellate actions.

The Court views this matter as a unique proceeding with characteristics of both original and appellate actions. It is like an appeal because it is a review of the Election Board Ballot Judge's decision. Appellate actions are usually a review of legal issues only. Appellate courts do not engage in fact finding.

However, this matter did not come to the Court as most administrative appeals do with a full record and transcript. In the absence of formal fact finding on the record at the agency level the Court needs the ability to take testimony and receive evidence. Taking testimony and receiving evidence is the function of a trial court.

Therefore, even though the Election Ordinance uses the word appeal, when reviewing the Election Board Ballot Judge's decision, the Court is functioning as a trial court and the Rules of Civil Procedure apply. The Court is permitted to conduct a de novo (complete) review including the taking of new evidence.

caucus, and 2) the Election Board Ballot Judge failed to thoroughly investigate.

B. Motion to Dismiss

The Respondents filed a Motion to Dismiss alleging three grounds for dismissal: 1) The initial filing was filed by facsimile; 2) The initial filing was not accompanied by a filing fee and 3) The initial filing was late. The Court will address each issue in turn.

With respect to the issue of filing by facsimile, although Respondents are correct about what the rule states, dismissing the appeal on this basis would be unfair to Petitioners. When the Petitioners' filing was received by the Court it was date-stamped and accepted by court staff. Therefore, Respondents' Motion to Dismiss on this ground is denied.

Likewise with respect to the issue of the filing fee, the Respondents are correct about what the rule states. However dismissal on these grounds would be unfair to Petitioners. Petitioners' filing was accepted by court staff. Therefore, Respondents' Motion to Dismiss on this ground is denied.

The issue of the timeliness of Petitioners' filing is a closer call. The Election Ordinance states any appeal must be filed within 48 hours of its "issuance." Respondents contend the decision was posted at 5:00 p.m. on November 8, 2006 in the lobby of the New Executive Building and therefore this is the time of its issuance. Petitioners contend the decision was issued at 8:00 a.m. on November 9, 2006 because this is when it became generally available to the public. The determination of when the decision was issued is significant because once the decision was issued, Petitioners had 48 hours to file their appeal. (See § 8.01(D)).

For the sake of argument only, even if the Court accepts Respondents' assertion the decision was posted at 5:00 p.m., the timeliness of Petitioners appeal turns on how the Court construes the word "issuance." Petitioners' appeal was submitted by fax at approximately 7:45 a.m. on Tuesday, November 14, 2006. If the Ballot Judge's decision was issued at 5:00 p.m. on November 8, 2006 the appeal was due at 5:00 p.m. on Monday, November 13, 2006. If the decision was issued at 8:00 a.m. on November 9, 2006, the appeal was due by 8:00 a.m. on Tuesday, November 14, 2006.³

³ Although the Election Ordinance requires the filing of within 48 hours, Saturdays, Sundays and legal holidays are excluded under Section 8.01(E).

Petitioners point out that even if the decision was posted at 5:00 p.m. on November 8, 2006, regular office hours for the Executive Building end at 4:30 p.m. Furthermore, Ms. Deschinny indicated in her affidavit that at the meeting on Tuesday afternoon, November 8, 2006, she informed the public she would post her decision "by" 8:00 a.m., Wednesday, November 9, 2006.

The Court finds even if the decision was posted at 5:00 p.m. on November 8, 2006, as a matter of law its issuance under sec. 8.01 occurred at 8:00 a.m. on November 9, 2006. Posting the decision at 5:00 p.m. on November 8, 2006, in a government building where the work day ends at 4:30 p.m. does not provide meaningful notice to the public or Petitioners that their appeal time began running. Enforcing the rule as literally as urged by Respondents could lead to mischief in the election challenge process and "issuance" of election decisions at 3:00 a.m. in the morning. In order to have meaningful appeal rights, the public must have adequate notice of when the decision is being issued. Decisions posted during non-working hours are considered issued the next business morning unless actual notice is given otherwise. The Respondents' Motion to Dismiss on this ground is denied.

C. Motion to Strike Affidavits

Respondents move to strike the affidavits submitted with Petitioners' initial filing. Respondents argue the affidavits are insufficient under § 8.01(B) and therefore should be struck. The Court denies the motion. The affidavits' alleged insufficiency does not justify there being struck. Respondents' arguments go to the merits of the legal questions involved, not whether the affidavits may be submitted at all.

D. Motion for Costs

Respondents have moved for costs with respect to Petitioners' Motion to Disqualify Counsel. The Court denies the motion. There is no evidence this portion of the litigation was conducted in bad faith or was frivolous.

E. Motion for Summary Judgment

The Tribal Court Rules of Civil Procedure are very similar to the Federal Rules of Civil Procedure. Rule 56 of the Tribal Rules governs summary judgment. Rule 56(C) states in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Petitioners have moved for summary judgment under Rule 56. Petitioners allege there are no genuine issues of material fact and they are entitled to judgment as a matter of law. The Court agrees.

The crux of this case is whether any alleged or established violation would have resulted in the election of different persons. § 8.01(B), Election Ord. None of Petitioners' allegations meet this standard. The Court addresses each allegation in turn.⁴

1. *The polling place.*

Although this issue was not included in the Petitioners' original challenge, the Election Board Ballot Judge's decision addressed the issue. Therefore, the Court will review it. The Election Board Ballot Judge found the polling place was proper and found no violation of § 2.05. The Court agrees and upholds the Election Board Ballot Judge's determination on this matter. Eligible voters were mailed notice of the polling place. Furthermore, no allegation, much less evidence, was introduced demonstrating the location of the polling place affected the outcome of the election. For example, there is no allegation voters failed to vote because of the new polling place.

⁴ The Court is not going to consider the issues raised by Petitioners in their Amended Appeal. The Election Board Ballot Judge did not have a chance to address these issues in the first instance therefore the Court will not consider them for the first time on appeal.

2. *Secret ballots.*

Petitioners allege the voting was not done by secret ballot as required under Article IV, Section 1 of the Tribal Constitution and § 2.08(D) of the Election Ordinance. Petitioners assert the ballots were numbered and therefore could have been traced back to individual voters to determine for whom they voted. It appears to be disputed between the parties whether the ballots were numbered. However, this dispute is not a material fact. Even assuming Petitioners' allegations are true, there is no allegation any voter changed his or her vote because of the alleged numbering of the ballots. In other words, even if the allegations are true, they would not have resulted in the election of different persons. In addition, Respondents presented several affidavits which alleged Petitioner Anthony Petonquot was present at the ballot review on November 8, 2006 and acknowledged seeing no numbers on the ballots. Mr. Petonquot's statement is uncontested by Petitioners.

3. *Official ballots.*

Petitioners allege the ballots were not official ballots as required under § 2.08(C) of the Election Ordinance. Petitioners assert three of the ballots were not initialed by Election Board members. The Election Board Ballot Judge found three ballots were not initialed by Election Board members. There is no factual dispute between the parties on this issue. The Election Board Ballot Judge noted in her decision that the "three ballots would not change or alter the outcome of the election of any officer."

The only office up for election where a change of three votes could make a difference was in the race for Tribal Treasurer. There were three candidates for Treasurer: John Alloway, Joseph Daniels, and Brenda Jacobson. The posted vote totals for Treasurer were as follows: John Alloway 111, Joseph Daniels 109, and Brenda Jacobson 77. Of the three ballots in question, only one contained a vote for Joseph Daniels. One of the ballots was a vote for Mr. John Alloway. Mr. Daniels trailed Mr. Alloway by two votes after the votes were counted. Even if the unofficial ballots are disallowed, he will still trail by two votes and the John Alloway would still receive the highest number of votes.

4. *Casting ballots.*

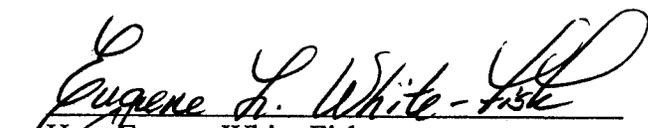
Petitioners allege the voting procedures used violated § 2.08(G). There is genuine dispute of the material facts surrounding this issue. Section 2.08(G) requires each voter to fold and deliver his or her ballot to the designated member of the Election Board who must check the ballot for the official initial or stamp. The voter then deposits the ballot in the ballot box. Petitioners allege their ballots were not inspected by an Election Board member and Respondents do not dispute it. Even assuming Petitioners' allegations are true, there is no allegation or evidence explaining how this violation would have changed the outcome. For example, there is no allegation of how the failure to inspect might have led to events which altered the outcome of the election. The failure to inspect the ballots by itself, even if true, does not change the outcome of the election.

CONCLUSION

The Court denies the Petitioners' request to overturn the election. Petitioners have not demonstrated to a reasonable degree of certainty the alleged violations would have resulted in the election of different persons.

Dated at Crandon, Wisconsin this 4th day of **January, 2007**.

BY THE COURT:


Hon. Eugene White-Fish
Forest County Potawatomi Tribal Court Judge