



LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TRIBAL COURT
7500 Odawa Circle ~ Harbor Springs, MI 49740 ~ (231) 242-1462

CIVIL DIVISION

Kevin A. Gasco,
Plaintiff,

V.

C-125-0711
Hon. Jenny Lee Kronk

The Little Traverse Bay Bands of Odawa
Indians Election Board,
Defendant.

Kevin A. Gasco
In pro per
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ORDER

On July 7, 2011, Kevin A. Gasco filed a Summons and Complaint¹ in this matter, challenging the un-official election results of the Little Traverse Bay Bands of Odawa Indians (LTBB) June 27, 2011 General Election. The LTBB Associate Judge, Jenny Lee Kronk, presided at a Scheduling Hearing in this matter on July 14, 2011, and issued a Scheduling Order on the same date. Present at the hearing were Kevin A. Gasco, "Plaintiff," and Attorney for the "Defendant," LTBB Election Board, Carlos Alvarado-Jorquera, who appeared by speaker phone. The Election Board agreed to file a Brief in Response of Protest by fax and serve via email the Plaintiff Kevin A. Gasco by close of

¹ Although this was a Challenge to the General Election preliminary results filed pursuant to the Tribe's Constitution which requires that the Court act on this challenge within 20 days, the plaintiff informed the defendant Election Board in the Summons that it had 28 days to reply to the complaint.

business the same day, July 14, 2011. The Plaintiff filed a Reply Brief on July 15, 2011. Oral arguments were held in this matter on July 15, 2011.

After hearing oral arguments, reading the Plaintiff's reply brief, and wanting to make certain that the challenger had a full and fair hearing,² the Court issued an Amended Scheduling Order on July 18, 2011, to schedule an evidentiary hearing for Friday, July 22, 2011. Subsequently, both parties objected to the evidentiary hearing, saying that they had stipulated to the facts, and requested that the Tribal Court issue its decision based upon the legal arguments made on July 15, 2011. The Court granted the request of the parties to cancel the evidentiary hearing.

Findings of Fact³

1. The LTBB Election Board's first tally of the votes of the Tribe's June 27, 2011 General Election revealed that John Keshick III had received one more vote than Kevin A. Gasco.⁴
2. A recount was conducted using a second machine, revealing a tie.⁵
3. A manual recount was then done and Candidate John Keshick III was declared the winner by 328 votes to Kevin Gasco's 327 votes.⁶

Basis of the Challenge

The Plaintiff agrees that a recount was conducted pursuant to the "C. Recounts" section of the Election Board Procedures Manual after he had one less vote than John Keshick III, which is a margin of less than one percent of the votes. He concedes that a second machine was used for the recount as required by this section of the procedures. After the recount, the Plaintiff says a tie was declared. The Plaintiff reports that the Election Board then did a hand recount and declared John Keshick III the winner by one vote.

The Plaintiff opines that the hand count was an error and that the Election Board failed to follow its own procedures. He maintains the Election Board should have declared a tie at the conclusion of the recount and conducted a special run-off election between himself and John Keshick III pursuant to the "B. Ties, 1. General Election (a)" section of the Procedures Manual.

² At the scheduling conference, the Court observed that it did not believe there was a disagreement about the facts in this case. The Election Board's attorney said he did not disagree with Mr. Gasco's facts as put forth in his complaint. Mr. Gasco did not say he agreed with the Election Board's facts. After the scheduling conference, the Election Board filed its brief and in his reply brief, Mr. Gasco, objected to additional facts that the Election Board argued in its brief.

³ The Court has limited its findings of fact to those found in the Plaintiff's Complaint.

⁴ See, July 7, 2011 letter to the Tribal Judiciary, appended to the Plaintiff's July 7, 2011 Complaint, p. 1.

⁵ *Id.*

⁶ *Id.*

Applicable Law

This is the first election challenge case for the LTTB under its new Constitution adopted February 2, 2005 and is a case of first impression for the Tribal Court. The Tribal Constitution and the Little Traverse Bay Bands of Odawa Indians Election Board Procedures Manual, adopted on January 9, 2009, is the governing law for this case.

The Tribal Constitution

Article XI, § A of the LTBB Tribal Constitution establishes the Election Board and directs that it shall conduct all general and special elections and adopt rules and regulations governing elections.⁷

Article XII, § F of the Tribal Constitution allows any registered tribal voter to challenge for cause the results of any election with Tribal Court.⁸

The Election Board Rules and Regulations

The applicable Election Board rules and regulations governing elections are found in its Little Traverse Bay Bands of Odawa Indians Election Board Procedures Manual,⁹ specifically, the ELECTION DAY PROCEDURES, C. RECOUNTS.¹⁰

Conclusions of Law

The Court agrees with the Challenger that at the completion of the canvas of the general election, the results of the tally revealed that John Keshick III had one more vote than he did. The Court also agrees that a recount was conducted pursuant to the “C. Recounts” section of the Procedures Manual. This section of the procedures allows for a recount of any election that ends in a margin of less than one percent of the vote between

⁷ “The Election Board is hereby created by this Constitution as an independent entity. The Election Board shall conduct all general and special elections. The Election Board shall adopt rules and regulations governing elections, including the number of signatures required for candidacy petitions. These rules may be amended as needed. The Election Board shall have the authority to employ their own staff to fulfill their duties under this constitution.” LTBB Const., Art. XI, § A.

⁸ “Any registered voter of the Little Traverse Bay Bands of Odawa Indians may challenge for cause the results of any election by filing a written challenge with Tribal Court within ten (10) days after the election. The Tribal Court shall act on a challenge to any election within twenty (20) days of receiving the challenge in Tribal Court.” LTBB Const., Article XII, § F.

⁹ The Court notes that the procedures in the Tribal Elections and Election Board Statute, WOS 2010-019, are the same as the procedures found in the Election Board’s Manual.

¹⁰ “C. RECOUNTS

Any contest that ends with a margin of less than on (*sic*) percent shall be subject to an automatic recount. A second machine will be used for the recount. Recount of elections that end with a margin of on (*sic*) percent or greater shall not be subject to a recount except in cases where a candidate has shown to Tribal Council credible evidence of fraud that would change the election results.” LTBB Election Board Procedures Manual, p. 6.

the candidates. The Court also agrees that a second machine was initially used for this recount as set out in the Election Board rules.

The recount with the second machine showed a different result, a tie, whereas the original tally on the first machine showed that John Keshick III had won by one vote over Kevin A. Gasco. There is nothing in this section of the procedures that say the tally of the second machine should be used over the tally of the first machine if there are different results. Further, there is nothing in this section that prohibits the Election Board from doing a hand count in the event that the tallies of the two machines show different results.

The Challenger's argument that: (1) the Section B. Ties¹¹ portion of the Procedures Manual should govern this situation; (2) that the count of the second machine should be the result of the election; and (3) that a special run-off election should be conducted, is misplaced. Section B of the procedures for recounts applies only in a situation where the initial tally revealed a tie. That was not the case in the Challenger's case. The recount in this situation was done according to Section C when the margin between the two candidates is less than one percent.

However, Section B of the procedures can give some guidance and further confirms that the actions taken by the Election Board were reasonable. Section B allows for a recount if there is a tie, and if a tie still exists at the end of a recount, then a tie will be declared after the two tallies have the same result. In the Challenger's situation, the two machines revealed different tallies; therefore, it was reasonable for the Election Board to do a hand count to determine which tally was correct.

The Court gives deference¹² to the constitutional mandate that "the Election Board shall conduct all general and special elections," and will not substitute its judgment for that of the Election Board unless its actions were a violation of its rules and regulations or clearly erroneous. The Court finds that the Election Board did not violate its procedures. Further, it acted properly in conducting a hand vote to confirm which machine's tally

¹¹ "B. TIES

1. GENERAL ELECTION

A. In the event that at the completion of the canvas of the the (*sic*) General Election results the tally reveals that any candidate has received the same amount of votes as received by another candidate in that contest, the Election Board will conduct a recount of the ballots cast in the contest. Should a tie exist at the completion of the recount, the Election Board will conduct a special run-off election limited to the tied candidates unless the breaking of such tie will not effect (*sic*) the outcome of the election. Such a run-off election shall be immediately noticed to be held not more than forty-five (45) days from the General Election." Election Board Procedures Manual, p. 6.

¹² See, *Little Traverse Bay Bands of Odawa Indians Gaming Regulatory Commission v Milligan*, LTBB Appellate Case A-006-0707 (October 1, 2008), where the LTBB Appellate Court observed, "in general, most tribal, federal and state courts give some degree of deference to agency decisions on matters that are within the agency's delegated authority because the agencies tend to have more expertise in their designated subject areas than the courts. However, before the Appellate Court exercises such deference, it must first conclude that the relevant agency acted within its legally-authorized, delegated authority." p. 3.

should be used and certifying un-official results that John Keshick III had won a seat on the Tribal Council by one vote over Kevin A. Gasco.

Based upon all of the above, the LTBB Tribal Court finds that Kevin A. Gasco's challenge of the Election Board's June 27, 2011 un-official general election results is without cause, denies the relief requested, and affirms the un-official general election results as posted by the LTBB Election Board.

Therefore, it is **ORDERED** that Kevin A. Gasco's Challenge of the Little Traverse Bay Bands of Odawa Indians Election Board's Un-Official Results of the Tribe's June 27, 2011 General Election is **DENIED**, and the Little Traverse Bay Bands of Odawa Indians Un-Official June 27, 2011 General Election Results, as posted, are **AFFIRMED**.

July 22, 2011
July 22, 2011

Hon. Jenny Lee Kronk, LTBB Associate Judge