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

CIVIL DIVISION

Ken Harrington,
Plaintiff,

V.

Case No. C-134-1011
Hon. Jenny Lee Kronk

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

Ken Harrington
Plaintiff *In pro per*

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ORDER FOLLOWING MOTION HEARING

On October 4, 2011, Ken Harrington, Plaintiff, filed a Complaint to Void Certification of Recall Election Results and Verified Complaint for Injunctive Relief. On November 1, 2011, the Defendant Little Traverse Bay Bands of Odawa Indians (LTBB) Election Board's attorney filed a Notice of Appearance, Defendant's Motion to Dismiss, Brief in Support of Motion to Dismiss, Notice of Hearing, Motion to Dismiss, Proposed Order, Proof of Service, and filing fee. The LTBB Associate Judge, the Honorable Jenny Lee Kronk, heard oral arguments on the Motion to Dismiss on November 30, 2011.

Stipulation to Facts by the Defendant

- On August 8, 2011, a recall election was held for the purpose of recalling the Tribal Chairperson. See, *Plaintiff's Complaint*, ¶ 5, p. 2.
- As a result of this recall election, a majority of the voters voted to recall the Tribal Chairperson. See, *Plaintiff's Complaint*, ¶ 6, p. 2.

- On August 22, 2011, at approximately 5:00 p.m., the Election Board certified the August 8, 2011 election results. See, Plaintiff's *Complaint*, ¶ 9, p. 3.

Plaintiff's Position

Plaintiff says his Article IX C and Article XVIII B rights and privileges under the Tribal Constitution have been violated by the actions of the Defendant, the LTBB Election Board. Plaintiff argues that the Election Board acted in an unlawful manner, by certifying on August 22, 2011, the August 8, 2011 election in which he was recalled because he had filed a challenge to the election on the same date as the certification. The Defendant, he opines, acted improperly by certifying the election because an election challenge remained unresolved. The Plaintiff maintains that the Defendant usurped the Tribal Court's constitutional right to resolve election challenges. Until such time, the Plaintiff concludes, that his challenge in resolved by the Tribal Court or Appellate Court, the Election Board cannot certify the election.

The Plaintiff further surmises that until the certification issue is resolved, a new Tribal chairperson cannot be sworn-in. Although not pled in his Complaint but argued in his response to the Defendant's motion to dismiss, the Plaintiff says the oath of office was a violation of Article XII (G) of the Tribal Constitution because it was not done at the next regularly scheduled Tribal Council meeting at least thirty days following the certification of the election results. Therefore, he concludes, that the oath of office administered to his successor Tribal chairperson should be declared null and void and that he should remain in office until the August 8 election is properly certified so he may enjoy all the rights, privileges and compensation due the Tribal chairperson.

The Plaintiff requests that the Tribal Court: (1) issue a preliminary injunction to restrain the certification of the August 8 election; (2) after a full trial issue a permanent injunction voiding the August 8 election until the election is resolved; (3) determine that the oath of office administered to Dexter McNamara be declared null and void; (4) restore the Plaintiff to the Tribal Chairperson position; and (5) determine that he is the Tribal Chairperson from August 22, 2011, until which time there is a proper certification.

Defendant's Position

The Defendant Election Board states that the Court lacks jurisdiction over this matter because the election challenge was not filed within ten days as required by the Tribe's constitution. At the time of the certification, the Defendant argues, there was no challenge filed, as the time period allowed by the Constitution to file any challenges had already expired. Further, the Election Board says, the Plaintiff's complaint does not state a claim for which relief can be granted because there is no relief to a challenge filed after the time allowed by tribal law.

Conclusions of Law

Subject Matter Jurisdiction

The Court agrees with the Defendant that it has no subject matter jurisdiction in this case. The Tribal Constitution gives the Tribal Court jurisdiction over election challenges:

> 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 the Tribal Court within ten (10) days after the election.

See, LTBB Const. Art. XII, § F. The Court only has jurisdiction over election challenges filed within ten days of an election. However, this election challenge was filed on August 22, 2011, and, therefore, was not filed "within ten (10) days after the election" which was held on August 8, 2011. This challenge was filed 14 (fourteen) days after the election, therefore Tribal Court does not have jurisdiction. This issue was decided in *Ken Harrington* v. *Little Traverse Bay Bands of Odawa Indians Election Board,* LTBB Case No. C-129-0811 (September 9, 2011 at 3) where the Court found:

> This election challenge and motion were not filed within ten days and are, therefore, untimely and deprive the court of jurisdiction. Therefore, the Court finds that it has no jurisdiction in this matter and the case should be dismissed.

Therefore, the Court finds that it has no subject matter jurisdiction in this "election challenge" because it was not filed within ten days as required by the Tribal Constitution.

Failure to State a Claim for which Relief may Be Granted

The Court further agrees with the Defendant and finds that the case must be dismissed because the Plaintiff has failed to state a claim for which relief can be granted.

The Court agrees with the Plaintiff that the Defendant is "the entity empowered to conduct all elections and recalls for the Little Traverse Bay Bands of Odawa Indians." See, *Plaintiff's Complaint*, ¶ 2, p. 3. The Court finds that the Election Board did not act in an unlawful manner when it certified the August 8, 2011 recall election results on August 22, 2011 at 5:00 p.m., because there are no factual allegations to indicate that the Election Board was aware that an untimely "election challenge" had been filed with the Tribal Court less than two hours prior to its certification. The Court agrees with the Defendant that a motion to dismiss under Fed. R. Civ. P. 12(b) (6), is equivalent to LTBBRCP XVI (b) (6) motion to dismiss, which requires the Court to construe the complaint in the light most favorable to the plaintiff, accept all the Complainant's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would warrant relief. *Meador* v. *Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir. 190), *cert. denied*, 498 U.S. 867 (1990). However, the Court need not accept as true legal conclusions or unwarranted factual inferences. See, *Blackburn* v. *Fisk University,* 443 F.2d 121, 124 (6th cir. 1971): the court is "required to accept only well pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the pleaded facts."

The Plaintiff did not allege in his Complaint and pled no facts to indicate that the Election Board had been served prior to its August 22 certification meeting. The Court cannot conclude that the Election Board had knowledge of the untimely "election challenge" before it certified the August 8 recall election on August 22, 2011. Even if the Election Board knew that the complaint had been filed, the election Board has a constitutional mandate to recognize only a filing of "a written challenge with the Tribal Court within ten (10) days after an election."[1] Any error on the Election Board's part was harmless error, because the Tribal Court does not have jurisdiction over election challenges filed more than ten days after an election. The Election board at all times acted consistent with the Tribal Constitution because it knew that no election challenge had been filed by August 18, 2011, within ten days of the August 8, 2011 recall election.

The Plaintiff opines that there is an "election challenge" because the Tribal Court held a hearing in this matter and the case is presently before the Tribal Appellate Court. The Court finds that it could have issued a decision on August 22, 2011, dismissing the challenge because it was untimely, therefore depriving the Tribal Court of jurisdiction. However, the Tribal Appellate Court has directed the Tribal Court to hold hearings prior to issuing a decision in a matter. See, *In the matter of JCW-042-0209*, LTBB Appellate Court, Case No. A-014-0410 (February 9, 2011) at 8, and *In the matter of JCW-048-0810,* LTBB Appellate Court (March 30, 2011) at 5.

Finally, although not alleged in the Complaint and, therefore, not addressed by the Defendant in its motion to dismiss, the Plaintiff says that the oath of office was a violation of Article XII § G of the Tribal Constitution because it was not done at the next regularly scheduled Tribal Council meeting at least thirty days following the certification of the election results. However, the Plaintiff's argument is misplaced. The Court takes Judicial Notice of an email that the Plaintiff sent to the entire LTBB Staff (which included the Court and the Chairman of the Election Board, who is the Human Resource Director).[2] See, Appendix A. In this email, sent fifty-nine minutes after he had filed his

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[1]LTBB Const., Art. XII, § F.

[2]From: Ken Harrington
Sent: Monday, August 22, 2011 4:11 PM
To: LTBBstaff
Cc: Dexter McNamara
Subject: Tribal Chairman
To all,

At 5pm today, August 22, 2011 the LTBB Odawa Election Board is scheduled to certify the recall election results. At 9am on August 23, 2011 Dexter McNamara will be sworn in as Tribal Chairman and current Tribal Chairman Ken Harrington will step down.

Please direct any and all issues for the Tribal Chairman to Dexter McNamara and I urge all to support him.

It truly has been a pleasure to serve and I thank you for the opportunity.

Respectfully, Ken Harrington
Tribal Chairman for the Little Traverse Bay Bands of Odawa Indians

untimely "election challenge", the Plaintiff informed the LTBB Staff that Dexter McNamara would be sworn in the next morning, that he would be stepping down, and urging everyone to support Dexter McNamara.

In his August 22 Complaint for a Preliminary Injunction, the Plaintiff asked the court to issue a preliminary injunction enjoining and restraining the results of the recall election and subsequently order a permanent injunction after a full trial, voiding the August 8 recall election based upon him being submitted to more than one recall election in a calendar year. In his August 22 Complaint, the Plaintiff did not request that the Tribal Court should be restrained from administering the oath of office to the new chairman. What is complained of in this case should have been a part of the August 22 filing. Indeed, the Plaintiff's August 22 email to the LTBB Staff seemed to indicate that he had no issue with the certification of the August 8 recall results or the swearing-in of the new chairman the next day.

Regardless, Plaintiff's argument that the Tribal Court's administration of the oath of office to the new tribal chairperson, Dexter McNamara, on August 23, 2011, is without merit and did not violate Article XII (G) of the Tribal Constitution. Article XII of the Tribal Constitution sets forth the time period after which a new chairperson, vice chairperson and tribal councilor may be administered the oath of office after an election at which they were elected. However, in this instance, the new Tribal Chairperson, Dexter McNamara, was not elected to office and, therefore, Article XII of the constitution does not apply. Dexter McNamara assumed his position under Article XIII of the Tribal Constitution after the previous chairperson was recalled: "If the Chairperson's seat is vacant, the vice-chairperson shall assume the position of Chairperson." See, LTBB Const. Art. XIII, §, cl. 1. The Article XIII Vacancies Section of the Tribal Constitution does not contain the time requirements for the administration of the oath of office to the new tribal chairperson assuming that office which is required by the Article XII transition following a tribal election. The Court finds that the oath of office it administered to the new Tribal Chairperson on August 25, 2011 did not violate the Tribal Constitution.

Moreover, the Court finds that the appropriate time to have raised constitutional objections regarding the Election Board's certification of the August 8 recall election results and the Tribal Court's administration of the oath of office to the new tribal chairperson should have been made prior to the occurrence of the events, by having included such arguments, prior to them taking place within ten days of the August 8 recall election, or at the very latest, in the Plaintiff's August 24, 2011 filing. By allowing the certification of the recall election and administration of the oath of office to proceed as scheduled and then complaining, the Plaintiff has found himself in the position of stating a claim for which no relief may be granted.

Therefore, it is **ORDERED** that this case is **DISMISSED,** because the Court lacks subject matter jurisdiction in this case and the Plaintiff has failed to state a claim for which relief can be granted.

Jan. 11, 2012
January 11, 2012

Hon. Jenny Lee Kronk, LTBB Associate Judge