

**POKAGON BAND OF POTAWATOMI INDIANS  
TRIBAL COURT**

In re: the Election held on July 11, 2009

**Case No. 09-545-ELE**

Donald Summers,  
  
Challenger,

**Hon. Michael Petoskey**

v.

Pokagon Band of Potawatomi Indians Election Board,  
  
Respondent.

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**OPINION REGARDING ELECTION CHALLENGE**

This *Opinion* is issued regarding an election challenge filed by Mr. Donald Summers, hereinafter referred to as "Challenger", to the Tribal Election held on July 11, 2009. The Challenger filed his challenge on July 15, 2009. Thereafter, the Pokagon Band of Potawatomi Indians Election Board, hereinafter referred to as "Respondent", filed a response to the election challenge on July 21, 2009. This Court conducted a hearing on the election challenge on July 22, 2009. The Pokagon Band of Potawatomi Indians Election Code requires this Court to "*endeavor to render a final decision on the Challenge by 5:00 P.M. of the first business day following the date of the hearing*". See Election Code, Sec. 14(E). It is within that goal for speedy and timely resolution that this *Opinion* issues.

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## **I. Jurisdiction.**

A threshold determination for this Court is whether it has jurisdiction over the matter before it. Article XIII, subsection 3(d) of the Constitution of the Pokagon Band of Potawatomi Indians, hereinafter referred to as “Constitution”, provides that decisions of the Election Board may be appealed to the Tribal Judiciary. Additionally, Sec. 14(A) of the Pokagon Band of Potawatomi Indians Election Code, hereinafter referred to as “Election Code”, implements the constitutional right to appeal by providing a process for challenge before the Tribal Court.

## **II. Standard of Review.**

*“The Challenger bears the full burden of proof and must demonstrate by clear and convincing evidence”* that the decision of the Board *“has been affected by a clear error in the application of Pokagon Band election law or federal law, if applicable, or by a conflict of interest or conduct violating the Code of Ethics”*. See Election Code, Sec. 14(C).

## **III. Introduction**

The Challenger asserts four (4) grounds in his challenge to the Election. First, he alleges that his “mission statement” (although, it is clear to the Court that he means his “Candidate Statement”) was altered before it was sent to registered voters. Secondly, he alleges that the Election Board mailing of the Statement that he actually submitted, after the Board realized that there were transcription errors in its original mailing, arrived “too late”. Thirdly, Challenger complains that “another Candidate was allowed more space than other Candidates were”. Lastly, Challenger asserts that the inner envelope for the secret ballot for absentee balloting identified the identity/address of the voter. Each of these assertions/complaints is addressed in turn below.

#### IV. Challenge I – Challenger’s [Candidate] Statement Was Altered and Sent to the Registered Voters

##### A. Findings of Fact:

(1) The Election Code permits candidates in an election to prepare a candidate statement for distribution to the voters by the Election Board. See Election Code, Sec. (H).

(2) A Candidate Statement is a “*one-page statement from a [c]andidate in an election regarding the [c]andidate’s background, qualifications, and views.*” See Election Code, Sec. 1(E)(7).

(3) The purpose of a Candidate Statement is to introduce the candidate to the voters. See Election Code, Sec. 5 (H)(1).

(4) Tribal law prescribes that “[t]he Election Board shall review the Candidate Statement solely for compliance with this Code. The Election Board shall not proofread Candidate Statements for errors in spelling, punctuation, or grammar.” See Election Code, Sec. 5 (H)(5).

(5) Tribal law further contemplates that Candidate Statements received from the certified candidates in the election that are prepared in accordance with the requirements of the Election Code and that are received before the filing deadline be mailed by the Election Board to the registered voters. See Election Code, Sec. 5(H)(9).

(6) As it has consistently for several years, the Election Board engaged an independent contractor, Automated Election Services (“AES”) of Rio Rancho, New Mexico, to perform certain services in connection with the July 11, 2009 election under the Board’s supervision and control.

(7) Among the services it performed for the July 11, 2009 election, AES transcribed all of the Candidate Statements received by the Election Board, compiled them into a booklet and mailed the booklet to the registered voters.

(8) Thereafter, the Election Board discovered an error in the transcription of the Challenger's Candidate Statement. As a remedial measure, the Election Board sent to all registered voters under cover letter dated June 29, 2009 copies of the actual Candidate Statements received by Election Board ("Original Candidate Statements").

(9) Although Challenger's notice of challenge did not specifically identify the "alterations" to his Candidate Statement, at the Hearing he identified two words which had been left out in the transcription process. Each word was in a different location in the text.

(10) Although two missed words may not seem like much, one of those words was the word "no" which changes the meaning of a statement by 180 degrees. It is like the difference between black and white, and the difference between day and night.

(11) Specifically, the difference in his Statement was that he had "...*limitations that would prohibit...*" him "... *from performing the essential duties of the tribal chairman*" when, in fact, his submitted Statement was that he had **no** limitations. (Bold for emphasis by the Court.)

(12) The word omission is significant because of the devastating affect on meaning.

(13) Challenger is understandably upset.

(14) Challenger presented no evidence that the Election Board altered or edited his Candidate Statement. He simply argues that the mistake put him in a bad light.

(15) Based upon all of the findings above, the Court further finds that the Election Board did not "alter" nor "edit" his Candidate Statement. It is clear that the word omissions were merely the product of unintended human error in the transcription process. Error, which is indeed unfortunate, but nonetheless it is unintended human error.

**B. Conclusions of Law:**

(1) Challenger has failed to carry his burden of proof that the Election Board did anything wrong, much less prove any clear violation of Tribal election law, in regard to the publication and its initial mailing of Candidates Statements.

(2) The challenge to the Election based upon this first ground is dismissed for lack of merit.

**V. Challenge II.** The Election Board “resent the original Statement,” but it arrived “too late”.

**A. Findings of Fact:**

(1) Challenger alleged that he knows personally a voter who received the Original Candidate Statements one day after he or she voted by absentee ballot.

(2) At the Hearing, he stated that the one person is a cousin and he argues that other absentee ballot voters could have already voted by the time of the second mailing. Thus, he deems the corrective mailing as one which was made “too late”.

(3) The mailing of the Original Candidate Statements was a remedial measure the Election Board decided to undertake to address the transcription error in the Challenger’s Candidate Statement. *See Affidavit of Julie Rodriguez, Respondent’s Exhibit A.*

(4) The Election Board mailed the Original Candidate Statements to all registered voters by cover letter dated June 29, 2009, ahead of the July 10, 2009 deadline for returning absentee ballots to the Election Board and Election Day, July 11, 2009. *See Affidavit of Julie Rodriguez, Respondent’s Exhibit A.*

(5) There is no deadline for any corrective mailing of Candidates Statements.

(6) It is clear that the Election Board did the only thing that it could have possibly done once it realized that there were errors made in the transcription process to the Candidate Statements.

(7) The act of resending the Candidate Statements to the registered voters in the form of copies of the actual Candidate Statements the Board received from the candidates violates no express requirement of the Election Code.

(8) Challenger did not present any witnesses or evidence that there was any actual effect on the outcome of the Election. He merely made a speculative argument.

(9) His loss margin to the highest voter getter for the Office of Tribal Chairman was very substantial, i.e. 301 to 41, and the absentee voting only represented about fifty percent (50%) of the total votes cast.

**B. Conclusions of Law:**

(1) Challenger has failed to carry his burden of proof that the Election Board was in clear violation of Tribal election law.

(2) The Election Board did the only thing that it could reasonably do under the circumstances.

(3) His challenge to the Election based on this second ground is dismissed for lack of merit.

**VI. Count III – Another Candidate Was Allowed More Space [in Their Candidate Statement] Than Other Candidates.**

**A. Findings of Fact:**

(1) The Challenger alleges that a candidate received an unfair advantage “*by allowing their candidate statement to be reproduced in a larger (sic) font size as everyone else who used a larger font (12). This allowed the unfair advantage of more space that when printed took up more than the stated two pages.*”

(2) The Election Code requires all Candidates Statements submitted to the Election Board from the candidates to be “*on white paper no larger than 8 ½” x 11. The Candidate*

*Statement may be on the front and back of one sheet of such paper or if the Candidate uses only front page, the Candidate may use the front of two pages.” See Election Code, Sec. 5(H)(3).*

(3) All of the Original Candidate Statements received from the candidates met this requirement.

(4) The Election Code does not require a specific font size. Some candidates used different font sizes and those that used a smaller font size could include more words on their statement. This is not a violation of the Election Code.

(5) Because candidates used different font sizes, when the Original Candidate Statements were transcribed, some statements used more space in the booklet than did others.

However, all of the Original Candidate Statements met the requirements of the Election Code.

(6) The Election Board exercised its discretion under the Election Code to have the Candidate Statements transcribed. The Election Code does not prohibit the Election Board from transcribing Candidate Statements and the Board determined that this action is within its discretion under the Election Code.

(7) Tribal law requires that the Court give deference to the reasonable interpretations of Pokagon Band law by the Election Board. *See Election Code, Sec. 149C).*

**B. Conclusions of Law:**

(1) Challenger has failed to carry his burden of proof that the Election Board violated Tribal election law in allowing Candidates to use different sizes of print to produce their individual Candidates Statements.

(2) The challenge to the Election based upon this third ground is dismissed for lack of merit.

**VII. Challenge IV – Inner Envelope of the Absentee Ballots Included the Name/Address of the Absentee Voter.**

**A. Findings of Fact:**

- (1) Challenger alleges that the inner envelope of his absentee ballot contained his name and address in violation of Section 6(J) of the Election Code, which requires that the inner envelope serve as the security envelope and that the inner envelope be placed into the outer envelope that the voter must sign.
- (2) Challenger presented no evidence to support this allegation.
- (3) Challenger did not keep a copy, nor take a photograph, nor present other voters who might testify that this happened to them as well.
- (4) The election process was put before the Court by the Affidavit of Julie Rodriguez, the Vice-Chairperson of the Election Board, and accompanying exhibits.
- (5) It is a process well understood by this Court.
- (6) With the total lack of any corroborating evidence, it is clear that Challenger's recollection is simply mistaken.

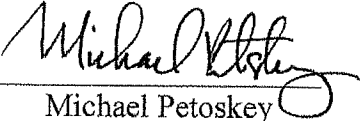
**B. Conclusions of Law:**

- (1) Challenger has failed to carry his burden of proof that the Election Board violated tribal election law.
- (2) The challenge to the Election on this fourth ground is dismissed for lack of merit.

**VIII. Order of the Court:**

**WHEREFORE, FOR ALL OF THE FOREGOING:** The challenges made to the Election held on July 11, 2009 by Mr. Donald Sumners are dismissed.

07/23/09  
Date

  
Michael Petoskey  
Chief Judge