

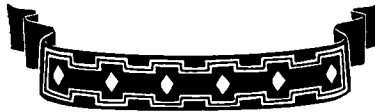
Oneida Appeals Commission

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Trial Court

Ed Delgado,
Petitioner

Docket No. 03-TC-335

Vs.

Oneida Election Board
Respondent

Date: November 5, 2003

Final Decision

This case has come before the Oneida Appeals Commission, Leland Wigg-Ninham, Janice McLester and Marjorie Stevens presiding.

Background

On October 2, 2003, the petitioner filed a motion for injunctive relief, seeking an injunction against any Oneida Election Board declaration or determination of a vacancy or Special Election for a seat on the Oneida Appeals Commission. The Oneida Appeals Commission denied the Petitioner's request for an immediate injunction but ruled that the Petitioner had established grounds for a hearing according to Rule 31 of the Oneida Appeals Commission Rules of Civil Procedure.

In the election of July 26, 2003, there were eleven positions up for election for the Oneida Appeals Commission. The Petitioner received 142 votes and was the twelfth (12th) highest vote getter. Gary Jordan was a candidate and was successful in being elected to one of the eleven (11) positions with 184 votes. On August 6, 2003, the Final Report of the July 26, 2003 elections results was submitted to the Oneida Business Committee. On August 13, 2003, the Oneida

Business Committee certified the July 26, 2003 Election results with the exception of the Oneida Gaming Commission.

A Special Election was held on September 27, 2003 for the Oneida Gaming Commission. Gary Jordan was a candidate and won a seat on the Oneida Gaming Commission. On September 29, 2003, prior to taking the oath of office, he sent a letter to the Oneida Appeals Commission declining his seat. The Oneida Appeals Commission accepted Gary Jordan's letter of declination on October 13, 2003.

Issues

Is a Special Election required to fill a vacated seat as opposed to giving the next runner up the seat?

Analysis

The Petitioner contends that the Oneida Election Law is silent about candidate non-acceptance of an elected position, when a candidate originally elected declines that position. The Petitioner argues this is because the customary practice of the Election Board in several instances has been to certify the next highest vote getter as the winner in an election. The "runner up" then takes the office as if he/she had been elected.

The Respondent argues that the Election Board moves the next highest vote getter up as the winner only if an individual elected to a seat declines a seat prior to the issuance of the Final Report. The Respondent contends that this is the way it has been done in the past. The Respondent further argues that in this present case, the winner, (Gary Jordan) declined the seat on the Oneida Appeals Commission after the Election Board issued its Final Report. Respondent argues the seat is therefore vacant.

The argument of the Respondent is persuasive. This court concurs that it has been a customary practice of the Election Board to certify the next highest vote getter, and there is a process for

doing so in place. The Respondent has provided evidence in Exhibits #1 and #4 of the court record, which convinces this court that the next highest vote getter was selected only before a Final Report has been issued by the Election Board and the Oneida Business Committee has declared the results of an election official. *Election Law Section C. Declaration of Results/Challenges¹*

Exhibit # 1 is a Special Election Final Report sent to the Oneida Tribal Secretary from the Chairperson of the Election Board validating that two candidates were elected to two (2) different entities in 2003, the Oneida Appeals Commission and the Oneida Land Claims. Before the election was certified, both winners withdrew from the Land Claims Commission, allowing the next two candidates with the highest votes to fill the vacancy created on the Land Claims Commission.

Exhibit # 4 is a memorandum from a candidate who was elected to two (2) entities in 2000, to the Election Board Chairman, declaring his acceptance of a position on the Oneida Appeals Commission and declining his position on the Oneida Trust Committee, thus creating a vacancy on the Trust Committee. In both of these instances, the candidates with the next highest votes were moved into those positions only because it occurred before a Final Report was issued.

This court concludes that the Respondent's have fulfilled their burden of proof that there is a process in place to fill a vacated Oneida Elected position and that the only time the next highest vote getter was moved into a vacated position was only before a Final Report had been issued by the Oneida Election Board.

The Petitioner further contends Gary Jordans decision to decline his position on the Oneida Appeals Commission did not create a vacancy. The Petitioner reasons that because the Oneida

¹ 2.10-5 The Oneida Business Committee shall declare the official results of the election and send notices regarding when the swearing in of new elected officials shall take place within thirty (30) days of receipt of the Final Report.

Appeals Commission did not take office until October 6, 2003, the seat had not been filled.

Black's Law defines vacancy as; "*The state or fact of a lack of occupancy in an office, post, or piece of property.*" This court disagrees with the Petitioner's contention because when Gary Jordan submitted his resignation to the Oneida Appeals Commission he gave formal notification of relinquishing his position, he in effect, surrendered his elected right to hold that position. When the Oneida Appeals Commission accepted his resignation, that elected position then became vacant. Furthermore, the Petitioner's contention that because the Oneida Appeals Commissioner's did not take the oath of office until October 6, 2003, the seat had not been filled, has no merit. The oath of office is an oath taken by a person by which the person promises to perform the duties of that office in good faith. In conclusion, when Mr. Jordan was elected to the Oneida Appeals Commission by the Oneida General Tribal Council on July 26, 2003 he became an elected official, when he resigned from that position on September 29, 2003, his elected position became vacant.

In part of its argument, the Respondent contends that if an individual declines a seat after the Election Board has issued a Final Report and the Oneida Business Committee has declared the results official, the entity with the declined seat or vacancy has the responsibility to fill the seat pursuant to its Internal By-Laws and Procedures. Furthermore the Election Board claims that their duties do not include declaring vacancies or calling for Special Elections and that it is the responsibility of the entity affected to make that determination.

This court must agree with the Respondent and finds this argument persuasive. The Election Law is very clear on the duties of the Election Board; there nothing in Article IV., Election Board, Section B., 4-4. Duties of the Election Board, that grants the Election Board the authority to declare vacancies or call Special Elections.

There are three facts which occurred in this situation. 1.) Gary Jordan was elected by the Oneida General Tribal Council and became an elected Appeals Commissioner. 2.) Gary Jordan

submitted his letter of resignation to the Oneida Appeals Commission. 3.) The Oneida Appeals Commission accepted Gary Jordans letter of resignation. According to the internal procedures for filling a vacancy, in the Oneida Appeals Judicial Code, Article I, Oneida Judiciary, Section 6, Vacancies, Subsection A², it follows then, that it is the responsibility of the entity where the vacancy occurs to notify the proper entity to schedule a Special Election. The Oneida Election Law is clear that the proper entity to set Special Elections is the Oneida Business Committee.³

The petitioner has filed a Motion for Stay upon Motion for a New Trial on October 29, 2003. The Petitioner contends that neither the Petitioner nor his advocate received Respondent's brief until the middle of the trial court proceedings. The Petitioner claims that he was denied the information held by the Oneida Election Board and didn't have ample opportunity to respond to opposing arguments. The Petitioner further claims that this is a Prima Facie inequitable barrier for his ability to respond to the information central to his case.

The Petitioner has filed a Motion to Stay based upon Rule 27(C) of the Oneida Appeals Commission Rules of Civil Procedure. This Rule states:

(C) *Stay Upon Motions for a New Trial or for Amended or New Judgement: In its discretion and upon such conditions as are deemed proper for the security of the parties, Oneida Appeals Commission may stay the execution of, or any proceedings to enforce, a judgement pending the disposition of a motion for a New Trial or for amendment to the findings or for additional findings.*

It is within the discretion of the court to grant a stay, as well as within its discretion to grant a new trial. A motion for a new trial is most appropriately filed after entry of the written decision. No such written decision was issued on October 14, 2003, though a verbal decision in favor of

² *When a seat becomes vacant on the Oneida Appeals Commission due to retirement, illness, resignation, or any other reason, a Special Election will be held to fill that seat for the remainder of the term vacated.*

³ *11-3, Dates of all Special Elections shall be set, as provided for in this ordinance, by the Oneida Business Committee.*

the respondent was stated at the conclusion of the hearing. The Petitioner's motion for a new trial is based upon allegations which are more appropriately presented for appellate review.

In instances of an injunction the Respondent is afforded the opportunity to file a brief in response to the injunction request. The Petitioner may have an opportunity to rebut at the hearing, but the Petitioner has presented the first argument and is not given the same time to prepare the rebuttal to the Respondent's answer to the complaint. The Petitioner has argued that it is the customary practice of the Election Board to promote a runner up in an election to the status of winner when an actual winner declines the position. The Respondent has effectively countered this argument and explained the circumstances under which such a promotion is made. The matter is closed and there is no basis for a new trial or a stay regarding this decision. The Petitioner was given the opportunity at the time of the hearing to rebut the arguments and analysis of the Respondent. This is proper procedure in an injunction case. The Petitioner's appropriate exercise of rights in the event that he disagrees with this decision is to file an appeal to the Oneida Appeals Appellate Court.

Decision

The Respondent has provided this hearing body with the burden of proof that there is a process in place to fill vacated elected positions. A vacated elected position can be filled with the next highest vote getter only before the Oneida Election Board submits a Final Report. After the election results are certified the vacancy must be filled by a Special Election.

It is this court's decision to rule in favor of the Respondent.