

**BEFORE THE ELECTION BOARD
OF THE
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS**

In the matter of Election Dispute Filed
by MARK RUSSELL, dated July 2, 2010,
concerning candidate
THURLOW (SAM) McCLELLAN.

ELECTION BOARD OPINION AND DETERMINATION

This matter comes to the Election Board from an election dispute filed by Tribal member Mark Russell concerning his discovery on his work phone at the Eyaawing Museum and Cultural Center of a recorded phone conversation involving Respondent candidate Thurlow “Sam” McClellan. An Election Board hearing was conducted on Monday, July 12, 2010, pursuant to Article XIV(4) of the 2010 Election Regulations (hereinafter “Regulations”). A record of the hearing was made pursuant to the Article XIV, Section (4)(e) of the Regulations. Mark Russell and Thurlow “Sam” McClellan were both provided notice of the Election Board Hearing, and both were in attendance at the hearing. Both parties were given the opportunity to present evidence and make arguments in accordance with the Election Board Hearing Procedures adopted for this Election Hearing. Each party presented opening statements. Both parties presented testimony and exhibits to the Election Board. Both parties also presented closing arguments.

SUMMARY OF TESTIMONY AND ARGUMENTS MADE BY PARTIES

Complainant Mark Russell filed an Election Dispute related to a telephone voice mail message he found that was on his work telephone at Eyaawing Museum and Cultural Center, on or about June 29, 2010. Russell testified that he had been away from his desk most of the day due to mandatory meetings he had to attend, and that when he returned to his desk he found the message in question on his work voice mail at approximately 4:30 p.m. Russell recognized the voices on the message as that of Thurlow “Sam” McClellan and Tribal Councilor Brian Napont. Russell, believing that what he heard in the message to be a violation of the Election Regulations, taped copies of the message. The Election Board was presented with a copy of the voice mail message recording, as well as two separate transcriptions of the message, one which was prepared by Mary Lassaline, Tribal Council Transcriptionist, and one which was prepared by Pamela Jo Russell. Both transcripts are attached to this Opinion and Determination. Russell also presented an e-mail and an Outlook time recording showing approximately when McClellan and Napont were present at the Museum. Russell testified that he believed McClellan used the phone in his office to make or accept the phone call. Russell further testified that he made two

copies of the tape recordings of the message as he was concerned that any copies turned over would “disappear.” Russell also indicated that he had turned a copy of the tape recordings to Fred Raphael. The Election Board heard testimony from Mr. Raphael and others that the recording provided to Mr. Raphael for “safekeeping” had been played for several individuals, and that an effort was made by Mr. Raphael to play the recording to the Elders (although it apparently never was played for the Elders as a group).

Respondent Thurlow “Sam” McClellan did not contest that the recording was of himself and Brian Napont. McClellan testified rather that he was not at the Eyaawing Museum when the conversation took place with Napont. McClellan and Brian Napont testified that the conversation took place while both were at Napont’s home, and that Napont’s must have mistakenly dialed Mark Russell’s work telephone with his cell phone during that private conversation. Brian Napont testified in support of McClellan’s version of the events, and provided telephone records and e-mail documents in support.

McClellan further argues that the recordings were illegally obtained in violation of the GTB Personnel Policy, as there was no permission given by the GTB to remove the recordings or take them off GTB property. McClellan further argues that he was not “campaigning” during the telephone call in question, that the conversation merely stated opinion and observations, and that the conversation was never intended to be made public.

FINDINGS OF FACT AND DETERMINATION

The Election Board has considered all of the testimony and arguments made by the parties, as well as the exhibits which were provided by both parties. The Election Board carefully considered the testimony of the parties. The Election Board also listened to the taped phone message several times. The evidence shows that the recorded portion of the phone conversation is approximately five minutes in length, and that the recording does not show the entire conversation between McClellan and Napont. In other words, the recording picks up at some point after the conversation had begun, and the recording ends prior to the conversation being concluded. The call appears to have been made from Napont’s phone to the Eyaawing Museum at approximately 1:15 p.m. on June 29, 2010. In addition to the testimony and the recorded phone message, the Election Board reviewed and considered both transcripts of the recorded conversation submitted to the Board, as well as all of the other documents submitted by the parties, with one exception. The Election Board did not consider the statutory materials provided by Complainant Mark Russell, being Michigan Compiled Laws (MCL) 168.931, as that State of Michigan statute is inapplicable to Tribal Election which are governed instead by the 2010 Election Regulations.

In considering all of the evidence and all of the testimony, the Election Board believes that the testimony of Thurlow “Sam” McClellan and Brian Napont as to their how the call was made and their whereabouts during the call that was made was not credible, as their testimony related to the timing of events appeared to change and/or be inconsistent with their own prior testimony. The Election Board finds that McClellan was not with Napont at the time of the

recorded phone conversation, but rather that McClellan was at the Eyaawing Museum when Napont called the museum from his phone. The Election Board finds that McClellan, being in the museum, picked up the phone in Russell's office.

The Election Board also finds that Sam McClellan was "campaigning" as that term is defined under the 2010 Election Regulations during the recorded phone conversation. Article X(10) of the regulations states in part: "For purposes of these regulations, the term "campaigning" includes canvassing of voters, giving speeches or presentations to groups of voters and other activities which may reasonably be considered as intending to persuade voters in a political campaign." The Election Board finds that during the phone call, McClellan was discussing campaign issues and strategy concerning certain candidates and other Tribal officials. The Election Board finds that the conversation was intended to garner votes for McClellan and support from Napont and in that way influence the outcome of the election. For these reasons, the Election Board finds that McClellan was "campaigning" during the phone call in question as that term is defined under the 2010 Election Regulations.

Article X(3)(c) states that "No campaigning of any kind may be conducted in Tribal Government buildings, Tribal Enterprise buildings, and in the parking lots or other common areas (i.e. entrance; sidewalks, yard) of such buildings. Article X(3)(e) clarifies that "For the purposes of these Regulations, the term 'Tribal Government Building' includes any building or structure housing the office of any Tribal Government employee, or at which Tribal Government or community meetings are held, or at which Tribal Government program activities are conducted or services to Tribal members are delivered." The Election Board finds that the Eyaawing Museum and Cultural Center is a "Tribal Government Building" as defined in the 2010 Election Regulations, and that therefore, Thurlow "Sam" McClellan violated Article X(3)(c) by campaigning within a Tribal Government Building.

Article X(6) of the 2010 Election Regulations states in part that "Candidates, employees of GTB and all other persons are prohibited from using any Tribal Government or Enterprise property (i.e. phones; facsimile; Tribal Website; e-mail; office supplies) for campaign activities." Consistent with the above, the Election Board finds that Thurlow "Sam" McClellan violated Article X(3)(c) by campaigning utilizing a Tribal Government phone.

Article X(5) of the 2010 Election Regulations states that "Candidates who are employees of the GTB Tribal Government or Enterprises may not engage in any campaign activities during his/her assigned working hours. Candidates who are employees of the GTB Tribal Government or Enterprises may, however, campaign while on vacation or personal time provided their campaign activities are concluded in compliance with all other restrictions contained in these regulations." The Election Board finds that the evidence was not clear and convincing as to whether Thurlow "Sam" McClellan violated this provision. McClellan indicated he was on his lunch hour when the call was made at approximately 1:15 p.m. McClellan also testified that he had requested general personal time (GPT) for that afternoon. Therefore, the Election Board does not find enough evidence to support a violation based on Article X(5) of the 2010 Election Regulations.

CONCLUSION

The Election Board finds that the complaining party has proven by clear and convincing evidence that candidate Thurlow "Sam" McClellan failed to comply with the election regulations by engaging in campaigning on Tribal Property in violation of Article X(3)(c), and by utilizing Tribal property to campaign in violation of Article X(6). Therefore, having determined that the Respondent violated the 2010 Election Regulations, the Election Board must next determine what sanction is fair and appropriate under the circumstances.

The Election Board has considered the seriousness of the incident, the Respondent's history of past Election Rules violations, and the extent to which the violation has impacted the integrity of the election. See 2010 Election Regulations, Article X(11). In fashioning the following penalty, the Election Board believes it is reasonably calculated to remedy any harm resulting from the violations. *Id.* While it is clear that McClellan did not intend for his phone conversation with Napont to be recorded, or for it to be circulated among members of the Tribe, the fact remains that the message *was* recorded, and that the message *has* been circulating among Tribal voters. Both parties submitted either a copy of the recording or a transcript of it to the Election Board for consideration. The Election Board makes no findings relative to whether obtaining the phone message or providing copies of the tape to others was a violation of the GTB Personnel Policies. It is not the concern or role of the Election Board to determine whether the Personnel Policies have been violated. The Election Board's concern is enforcement of the 2010 Election Regulations and thereby protecting the integrity of the election process.

The Election Board therefore Orders pursuant to Article X(11) of the 2010 Election Regulations that the Respondent candidate Thurlow "Sam" McClellan shall do the following:

1. Respondent shall submit to the Election Board by Friday, July 16, 2010, a written apology letter which shall be addressed to the registered voters of the Tribe, but also specifically to those persons who were mentioned in the recorded telephone message, including, but not limited to: Tom Shomin, Derek Bailey, Jane Rohl, Steve Feringa, Connie TwoCrow, Rebecca Woods, Matthew McClellan and Sandy Anderson.
2. Respondent must mail the letter of apology (which has been approved by the Election Board) to each of the registered voters for the 2010 general election by Thursday, July 22, 2010. Proof of mailing (via affidavit or a signed written statement) and a copy of the mailed letter must be provided by Respondent to the Election Board Chairperson by July 22, 2010 at 4:00 p.m.
3. If the Respondent fails to comply with the above requirements, his name shall be removed from the 2010 general election ballot.

In light of the above, the Election Board determines that the general election previously scheduled for July 15, 2010 shall be postponed to a later date to be determined by the Election

Board. This determination was made unanimously by the Election Board members who participated in the deliberations¹ following the hearing in this matter.

Pursuant to Article VII, Section 5(a) of the Grand Traverse Band Constitution, the decision of the Election Board shall be final and conclusive.

Dated: July 13, 2010



Nancy Fuller
Election Board Vice-Chairperson

¹ Election Board member Ardith “Dodie” Harris was not present at the hearing. With the consent of both parties, Election Board Chairperson Desmond Berry chaired the Election Board Hearing, but did not participate in the deliberations as he is Thurlow “Sam” McClellan’s direct supervisor.

Verbatim Telephone Transcription between Sam McClellan and Brian Napont:
(Transcribed from cassette tape)

Note: Inaudible sections throughout tape. Tape also reviewed with Mike Teeple, Interim HR Director.

Sam - I get from Peshawbestown. So their support came from just statements because I told my friend to vote for him. We were looking to vote for somebody. Tom (?) ... Tom was one of them. I voted for Tom.

Inaudible:vote on....But what ...some of family...

He is good friends with Derek. We do not like Derek.

Inaudible: This guy is...get the same votes from the...

Brian - I can work with just about anybody, I can say that much for sure. My choice... what I told my family is you and Jane. You know, I'm kind of a little bit disappointed in Jane for not trying harder here.

Sam -Well, I was wondering what she was doing. I haven't had a chance to talk to her because I feel the same way. You see, I'm thinking if she thinks, thinking the same way that it was right after the ...

Brian - I think she's thinking like Brenda (?). She doesn't really want...

Sam - Right. If I get it, I get it; If I don't, I don't....

Brian - You can't. You cannot do it.

Sam - No.

Brian - You have to have strength.

Sam - You see, but that's the reason why, where, you know that's why we got into this situation, because people were voting, you know, and that's what I said, people that are in there, I don't know if Connie and Becky voted or not or what but they were right in there where they could have...put a vote on, if they wanted to.

Brian - Right

Sam - ...casino. But definitely you're the only one in there, oh, besides Sandy but Sandy don't even count. She was a horrible thing and now she's trying to, some of the stuff that she's doing out there, she's not telling and you know again, people, you know of course they're listening to the Councilors and what can you say. People say, I do it because out of fear of my job. I know what they're talking about.

Brian - You know, I don't think that any one of us, I don't have that much (strength in carrying him???), I mean as far as government goes.

Sam - Oh no, Connie, they go after. They're true though.

Brian - Oh yeah. Yeah.

Sam - They make sure you know...I mean, if they could get rid of Matt, they would. Why? Because he's not, he's not following what they're saying. And there's what I said about, if you ask, it's always been my view as a supervisor, if I put somebody in charge over something that, you know, I made this, that this is to put him over any of the jobs or whatever, for Matt

Brian - ... TwoCrow

Sam - Oh yeah, Shawn.

Brian - Yeah.

Sam - I never believed in, you know, if they didn't do exactly or if they did something that was different, I never turn around and got mad.

Brian - (couple of words said; inaudible)

Sam - I was the one, I wasn't ...If you could explain it specifically or something, that's the only reason. I couldn't turn on him and

Brian - I went through these guys

Sam - No. But that's been a thing that I've heard people saying, there's been, both Matt and Jane have been scapegoats. They're getting the blame for decisions that Council did not make or they get on them.

Brian - No. I mean, I came in fully prepared to make these decisions and my route was I couldn't get these guys to budge. I couldn't get these guys to budge on any method to go about making any cuts so then this method came along with, you know, having the Reorganizational Act. The Reorganizational Act basically gave us the ability to do it to where (end of message)

Message on tape after "end of message" above:

Note: This tape was recorded by Mark Russell, taken from his message machine at the Ewaawing Museum Cultural Center; area code (231) 534-7768. Recorded on June 29, 2010, at approximately 1:22 in the afternoon.

Reason for the recording: To inform the Grand Traverse Band Election Board and informing them of what I consider a blatant disregard for the Election Process by using tribal property during working hours and strategizing, what I consider strategizing, with a current Councilor about current affairs within the *Grand Traverse Band of Ottawa & Chippewa Indians*.

This was recorded at 7:06 and I, hopefully it won't be recorded from my messages...by tomorrow, July 1st, so that any of the Election Board members can come over and listen to the original recording on my telephone.

I am currently sending an email to Desmond Berry, Chairman of the Election Board, and Delores Wanageshik, on the Election Board, because at this time I don't know the other Board members.

I'm also sending it to the current Tribal Council, in that one of their fellow Councilors, who was doing and talking to a candidate and discussing current matters of the Grand Traverse Band. Thank you. Megwetch.

Respectfully submitted,

Mary Lassaline
Tribal Council Transcriptionist

7/12/10

June 29, 2010, Recorded Conversation

Between

Brian Napont, Current Grand Traverse Band Tribal Councilor

and

**Sam McClellan, GTB Department of Natural Resources and
Current Candidate for Tribal Council in upcoming Tribal Election**

Regarding Upcoming Tribal Election

On June 29, 2010, at 1:22 p.m., the following conversation was recorded on Mark Russell, Ewaaying Museum Director's office telephone number 534-7768. The telephone call was originated from Tribally owned cell phone number 1-231-348-9048, which was issued to Brian Napont in his capacity as Tribal Councilor.

SAM MCCLELLAN: None. Til I get to Peshawbestown. So their support stems from just statements, you know, cause told Kirk, I said we'd vote for them then. We were looking to vote for somebody. Um and and Tom was one of them. I voted for Tom. I still don't know were that was good though. But with talking with some of, and that made sense. And he he's good friends with Derek. We do not like Derek. He denied that he was (inaudible).

BRIAN NAPONT: Well I can work with about anybody that matters. You know, I can say that. My, my choice when I told my family is you and Jane.

SAM MCCLELLAN: Yeah.

BRIAN NAPONT: But, you know, I'm kinda little bit disappointed with Jane for not trying harder here.

SAM MCCLELLAN: Well, I was wondering what she was doing. I haven't had a chance to talk to her because I feel the same way. You see I'm thinking is she thinks, inching the same way that isn't not necessarily, uh.

BRIAN NAPONT: I think she's thinking like Feringa. She doesn't really want it.

SAM MCCLELLAN: Right, and, and, I get it, I get it. If I don't I don't.

BRIAN NAPONT: Well, you can't, you can not do it.

SAM MCCLELLAN: No.

BRIAN NAPONT: It's, you gotta have strength.

SAM MCCLELLAN: But see that's the reason why, we're, you know, that's why we got into this. Because people were voting, you know. And that's what I said, you know, the people that are in there. I don't know it Connie and Becky voted for (inaudible) or what, but they were right in there where they could've, uh, put a (inaudible). If they wanted.

BRIAN NAPONT: Right.

SAM MCCLELLAN: Casino. But definitely, you're the only one in there, oh besides Sandy. But Sandy don't even count. She was a horrible pick. And now she keeps trying to, some of the stuff that she's doing out there she's not telling. And, you know, again people, you know, (inaudible) they listen to the, uh, Councilors and what can you say. People try to. Uh, I do it cause out of fear of my job. I know what they're talking.

BRIAN NAPONT: Uh, yeah, uh. I don't think that any one of us. I, I don't have that much strength up there, you know. I mean as far as government goes.

SAM MCCLELLAN: Oh no. Connie, they go after. And they're true though.

BRIAN NAPONT: Oh yea, yep. They, they make sure, you know. Do.

SAM MCCLELLAN: I mean, look it, if they could get rid of Matt, they would. Why? Because he's not, he's not, he's not following what they're saying. And here's what I said about, you ask him, always been like you as a supervisor. When I put somebody in charge over something that, you know, I, I made this decision to put them over (inaudible) in, you know, uh, over in the, uh jobs or whatever, Tom (inaudible).

BRIAN NAPONT: That was, uh, Twocrow.

SAM MCCLELLAN: Oh yea. Shawn.

BRIAN NAPONT: Yeah.

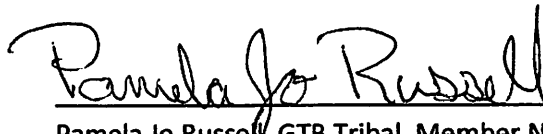
SAM MCCLELLAN: Um. I never believed that, you know, they didn't do exactly or they did something that was different and I never turned around and... got me. But there but, I was the one, I wasn't explain it specifically or something. That's the only reason. And I couldn't turn on them. And uh.

BRIAN NAPONT: I can help you, these guys, calling over every once too often?

SAM MCCLELLAN: No. But that's been a, a thing that, you know, I've heard people saying. Cause that's a, both Matt and Jane have been scape(goats?). They're getting the blame for decisions that, uh, the Council did not make. So, so they get on them.

BRIAN NAPONT: No. I mean, I, I, I came in fully prepared to make these decisions. And my route was I couldn't get these guys to budge. I, I, I couldn't get these guys to budge on any method and go about making any cuts. So then this method came along, when, you know, having the Reorganizational Act. And the Reorganization Act basically gave us an ability to do it to where... **TAPE ENDS**

Respectfully Submitted,

A handwritten signature in black ink that reads "Pamela Jo Russell". The signature is written in a cursive style and is positioned above a horizontal line.

Pamela Jo Russell, GTB Tribal Member No 2116