

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
REMOVAL PETITION HEARING BOARD

IN RE:

Removal Petition of Unit 1
Board member, Michael Lumsden

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT

THERESA DELORME

Petitioner,

vs.

MICHAEL LUMSDEN,

Respondent.

A TRUE COPY

Toni Schopp
Sault Ste. Marie Chippewa
Tribal Court Clerk

PROCEDURAL BACKGROUND

Petitioner filed a petition for the removal of the respondent as a member of the Board of Directors for the Sault St. Marie Tribe of Chippewa Indians (hereinafter referred to as the "Tribe"). Said petition consisted of ten claims of respondent's alleged violations of the Tribe's Constitution, By-Laws, Ordinances and Policies and was presented to the Tribe's full Board of Directors for consideration. The Board of Directors reviewed the petition for its legal sufficiency and dismissed counts three (3) and seven (7) in their entirety for lack of probable cause. They also dismissed several additional allegations in the remaining counts also for lack of probable cause. On April 16, 2003, the Board of Directors directed that a full hearing on the remaining counts be held and appointed a Hearing Panel to conduct the evidentiary hearing and issue a decision.

The Hearing Panel consists of four Judges appointed *pro tem* as follows: the Hearing Officer, Patrick Shannon and the Hearing Board consisting of Judges Robert Kitticon, James Bittorf, and Kimberly M. Vele.

Attorney Leanne Barnes Demean represented the petitioner and Attorney Lyle Peck represented the respondent.

The Hearing Panel conducted a five-day trial on June 23, 24 and 25 and July 7 and 8, 2003, considered the testimony of numerous witnesses for both parties, and admitted into evidence numerous exhibits for both parties. Based on the Hearing Board's evaluation of the evidence, including the credibility of the witnesses and the weight of the evidence, the Hearing Board finds as follows:

FACTS

Respondent, Michael Lumsden, is an enrolled member of Sault Ste. Marie Tribe of Chippewa Indians, in the State of Michigan, and was first elected to the Tribe's governing body, the Board of Directors, in 1990. In addition to his duties as a member of the Board of Directors, Mr. Lumsden entered into an Employment Agreement with the Tribe on January 11, 2001 as the Executive Director for Tribal Operations. That employment position is recognized as a "Key Employee" for purposes of the Tribe's Gaming Compact with the State of Michigan and also for the Tribe's operation of its Detroit gaming facility. Key employees are subject to background investigations by the Michigan Gaming Control Board, which does not necessarily require all tribal key employees to possess a gaming license, but at least to qualify for a gaming license.

As the Executive Director, Mr. Lumsden's job duties required him to manage all of the Tribe's personnel employed to operate the Tribe's governmental operations. In turn, Mr. Lumsden reported directly to the Tribe's Chairman, Mr. Bernard Bouschor. Pursuant to the terms of the Employment Agreement between the Tribe and Mr. Lumsden, Mr. Lumsden served at Mr. the Board's pleasure, and could be terminated for any reason, provided that the Tribe continue to pay Mr. Lumsden's salary for the remainder of the contract's term. As Mr. Lumsden's supervisor, Mr. Bouschor was responsible for evaluating Mr. Lumsden's performance. At least through August 31,

2001, Mr. Bouschor rated Mr. Lumsden's job performance as Executive Director above average to excellent.

As a Board Member, Mr. Lumsden, along with all of the other Board Members, frequently received casino promotional packages that consisted of numerous discounts and coupons for cash for the Tribe's casinos. The packages were distributed to Board Members for distribution; each Board Member chose the benefactors of these packages, and the Tribe had no written policies requiring any accountability for the packages and no policies regarding a Board Member's personal use of the packages. Between 1995 and 1997, Mr. Lumsden, like the other Board Members, received over one hundred casino packages for distribution.

In 1998, when Mr. Lumsden's former live-in girlfriend, Donelda Harper, was moving from his residence, she found a packet of partially used casino promotional coupons among Ms. Lumsden's personal belongings. She and her brother, who was assisting in her move, also observed a cleaning bucket partially full of quarters in Mr. Lumsden's closet. Neither of these witnesses reported what they saw to the Tribe or any law enforcement authority.

During that same move, Mr. Lumsden and Ms. Harper engaged in a heated argument that resulted in Mr. Lumsden destroying the telephone and threatening Ms. Harper with physical injury. He then left their residence, and Ms. Harper continued moving boxes until her brother arrived. After Mr. Lumsden left the residence, Ms. Harper called Mr. Paquin, the Tribe's Chief of Police, to report what had happened. Mr. Paquin noted her call and informed her that Mr. Lumsden was at his house. Later, Ms. Harper also reported Mr. Lumsden's threats to Sheriff Jeff Moran of the Chippewa County Sheriff's Department. Officer Moran stated that when he took Ms. Harper's statement, she was scared and upset, but that she insisted he only note her concerns. He recalled that she requested that he not file any charges or make any arrests. At that time,

Ms. Harper served as an Appellate Court Judge for the Tribe and did not want any adverse publicity. Mr. Moran acquiesced to her request and did nothing further.

About this same time in 1998, Mr. Paquin, The Tribal Chief of Police, also investigated threats of physical violence made by Tiffany Menard directed to Mr. Lumsden. Ms. Menard had had a brief sexual relationship with Mr. Lumsden at that time. She and Mr. Lumsden broke up, and when he left her residence, he left with her and her two sister's election ballots. In investigating Ms. Menard's threats against Mr. Lumsden, Mr. Paquin discovered the alleged ballot theft. According to Mr. Paquin, when he questioned Ms. Menard about the ballots, she admitted to him that the ballots were taken with her consent. At the hearing, Ms. Menard admitted to raising this issue with the Michigan Gaming Control Board when they investigated Mr. Lumsden's fitness as a key employee for the Tribe, but she denied ever having said anything to Tribal officials on this matter.

Ms. Harper also claimed that Mr. Lumsden took one of her election ballots off their kitchen counter when they were residing together. Ms. Harper never reported this fact to any tribal or law enforcement official.

Another witness, Ms. Wendi Pages, reported that in 1998, while Mr. Lumsden worked for the Michigan Inter-tribal Council and stationed near her office, he made numerous sexually suggestive remarks that made her feel uncomfortable. She reported Mr. Lumsden's behavior to her supervisor, but since Mr. Lumsden was not a Tribal employee, nothing could be done officially. Ms. Carr, Ms. Page's supervisor and the Executive Assistant to Mr. Bouschor, did report Mr. Lumsden's behavior to the Tribe's Chief of Police, Mr. Paquin. During Mr. Paquin's investigation of the complaint, Ms. Pages told Mr. Paquin that she did not necessarily want any legal action taken against Mr. Lumsden. She said she only wanted Mr. Lumsden's telephone calls to her home and his lewd comments at work to stop. Mr. Paquin, as Chief of the Tribal Police and as one of Mr. Lumsden's long-term friends, talked to Mr. Lumsden informally and requested that he

simply stop calling Ms. Pages. Mr. Lumsden complied with this request; however, it is against this background that Wendi Pages filed a sexual harassment complaint against Mr. Lumsden in June, 2002, while he was employed as the Tribe's Executive Director.

In her complaint, Wendi Pages alleged that Mr. Lumsden continued to request her specifically to do his work when she was extremely overworked already and when there was other secretarial help available to him. She alleged that he made her feel very uncomfortable. She again reported this to her supervisor, Ms. Carr, who reported it to Mr. Scott, the Director of the Tribe's Department of Human Resources.

Because of Mr. Lumsden's status as an executive Tribal employee and a qualifying Board Member, Mr. Green, the Tribe's Senior Staff Attorney, decided to direct the investigation himself, along with the Department of Human Resources. Mr. Green supervised the investigation mainly because of the sensitivity of the subject matter and its potential adverse consequences to the Tribe regarding its Greek Town Casino operations. On June 13, 2002, Mr. Green wrote the Michigan Gaming Control Board of the pending investigation against Mr. Lumsden, a key employee, and indicated he would notify them once the internal investigation was complete. As part of its investigation, the Department of Human Resources interviewed Ms. Pages and attempted to obtain Mr. Lumsden's statement regarding the allegations. Although Mr. Lumsden prepared a written response to the Department's written inquiry for more information, Mr. Lumsden refused to sign his statement and instead on July 2, 2002 sent a letter to the Department declining to cooperate any further. Neither Ms. Pages nor Mr. Lumsden identified any witnesses during the Department's investigation.

In the absence of any identified witness for either the complainant or Mr. Lumsden, the Department of Human Resources concluded its investigation and issued its final report finding that the investigation reached an unsatisfactory and inconclusive result. The report specifically found Ms. Pages credible as to her statements that she felt uncomfortable at her workplace. Taking the position that the Tribe has an affirmative

legal duty to maintain a working environment free of harassment, real or perceived, the investigation concluded that the Tribe had to take steps to rectify Ms. Page's issues. Accordingly, the report recommended that Ms. Pages not be required to work for Mr. Lumsden or be subject to his supervision. It further recommended that Mr. Lumsden attend a training course for executives to better sensitize him to harassment issues and the impact his behavior could have on employees even if that impact was not intended. On June 26, 2002, Mr. Green reported to the Michigan Gaming Control that although the investigation was complete and found to be inconclusive on the specific allegations, administrative action was being taken to avoid similar problems in the future. No other administrative sanctions were recommended or taken against Mr. Lumsden; however, Mr. Lumsden was reminded as part of the final report that the Tribe had a zero tolerance policy for retaliating against the complainant. Mr. Lumsden adamantly refused to accept the investigative findings and recommendations and instead, embarked on a course of conduct leading to the termination of his employment with the Tribe.

Following the release of the Final Investigative Report, Mr. Lumsden began an aggressive campaign to vindicate himself of what he perceived to be Ms. Page's frivolous claims against him for political purposes. He hired legal counsel who sent letters to Ms. Pages, Mr. Bouschor, Mr. Scott and Mr. Green threatening legal action against each if they did not sign an agreement to cease and desist what was characterized as illegal conduct and to agree to pay Mr. Lumsden's legal fees and costs. He also solicited statements from tribal employees and other community members about instances of Ms. Pages' sexually suggestive conduct that they may have witnessed. In August, 2002, Jennifer Clerc, Aaron Schlehuber, Toni Osterhout, and John Hatch all sent written statements to the Department of Human Resources indicating that Mr. Lumsden approached them for statements about Ms. Pages and each either provided such a statement or declined to submit a statement despite Mr. Lumsden's request. These statements were requested *after* the conclusion of the harassment investigation.

Consequently, the Department of Human Resources found that Mr. Lumsden's solicitation of these statements and the corresponding legal threats from his attorney constituted retaliatory conduct in violation of the Tribe's written zero tolerance policy against retaliation. Because of this violation of policy, the Tribe placed Mr. Lumsden on administrative leaves on August 27, 2002 and ultimately terminated his employment in December 2002.

Prior to his discharge, Mr. Lumsden, in his official capacity as the Tribe's Executive Director, in September 2001, issued a form letter certifying that Karen Howell, an enrolled tribal member who was purchasing a mobile home, may be exempt from the State of Michigan's state sales tax. Mr. Lumsden had earlier requested one of the Tribe's staff attorneys, Mr. Paul Shagen, to assist him in preparing a form letter to send out regarding the Tribe's official position on the sales tax issue for purchases made by Tribal members for property to be used on the reservation. The State of Michigan and the Tribe had opposing views on the tax issue. Mr. Shagen prepared the requested form letter and inserted a standard disclaimer for the Tribe's liability on the non-payment of the tax. This is the letter Mr. Lumsden gave to Ms. Howell to use in her purchase of a mobile home from Brewbaker Housing Company in Onaway, Michigan. Because of the disclaimer of liability and the uncertainty of her qualifying circumstances for the tax exemption, Ms. Howell escrowed any potential tax due and continued to assert her exempt status. Mr. Dick Harris, a Tax Investigator for the State of Michigan, met with Ms. Howell on December 17, 2003 and determined that her mobile home purchase did not qualify as an exempt purchase. Ms. Howell then paid the applicable tax from the escrowed funds, and Brewbaker Housing Company paid a minor penalty for late payment of the tax.

In pursuit of his re-election to the Board of Directors, in April 2002, Mr. Lumsden presented to the Tribe's Election Committee, his Letter of Intent to be an incumbent candidate for the Board of Director's seat for Unit One. Thereafter, Mr. Lumsden approached several Tribal and non-Tribal employees during working hours in the Tribe's

administration building to solicit their names on his nominating petition to officially run as a candidate for Unit One. He requested these Tribal members, including Mr. McKerchie, a member of the Tribe's Elections Committee, to sign his petition during their lunch breaks, in the hallways, stairwells, and in the parking lot adjacent to the Tribe's administration building. Several witnesses testified that although Mr. Lumsden did not physically force them to sign his nominating petition, they felt they had no choice in the matter because he was their direct supervisor and they felt that their failure to sign would jeopardize their job.

In response to complaints about Mr. Lumsden's campaign practices at the tribal offices, Lori Jump, the Chairperson of the Tribe's Election Committee (and Joanne Carr's sister) sent Mr. Lumsden a notice of violation of the Tribe's election ordinance that prohibits campaigning in tribal offices during office hours. That notice was dated May 9, 2002 and was Mr. Lumsden's second notice of a violation from that Committee. Mr. Lumsden received a similar notice dated May 5, 1998 for the same type of conduct in a previous Tribal election. Neither of the notices resulted in any sanctions against Mr. Lumsden, but merely pointed out that his conduct compromised the integrity of the election process. Mr. Lumsden won his bid for the Unit One seat and began his term in June 2002.

Shortly after his installation as a re-elected Board Member, the Tribe's Board of Directors passed a resolution authorizing a \$700,000 plus compensation package to Mr. Bouschor, the Tribal Chairman and the Chief Executive Officer of the Tribe's gaming enterprises. Mr. Lumsden voted against the compensation package. He also initiated the Board's recent action to rescind Chairman Bouschor's authority to enter into employment agreements such as Mr. Lumsden's employment contract with the Tribe.

The petitioner, Theresa Delorme, worked as Mr. Bouschor's Executive Secretary until her retirement in May 2001. Ms. Delorme, a Tribal elder, was shocked to hear of some of Mr. Lumsden's conduct. Because no one was willing to take any action for fear

of losing their jobs, she drafted the petition calling for the removal of Mr. Lumsden as a member of the Board of Directors. She based the allegations on what she heard from others at a party at the home of Jessica Bouschor, Bernard Bouschor's daughter.

DECISION

Jurisdiction and Standards for Removal

The Sault Ste. Marie Tribe of Chippewa Indians is a federally recognized Tribe organized under the Indian Reorganization Act of 1934. 25 U.S.C. s. 476. See also City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157 (D.DC 1980) and United States v. Michigan, 471 F. Supp. 192 (WD Mich. 1975). As such, the Tribe is a separate sovereign that retains its inherent authority to choose its own form of government. Santa Clara Pueblo v. Martinez et al, 436 U.S. 49, 56 (1978) citing Worcester v. Georgia, 6 Pet. 515, 559 (1832). Subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves undermines the Tribe's authority and infringes on the Tribe's right to be self-governing. See Fisher v. District Court, 424 U.S. 382, 387-388 (1976), Williams v. Lee 358 U.S. 217, 223 (1959). Self governance includes the Tribe's exclusive right to interpret its own Constitution, By-laws, ordinances and other Tribal laws; to determine the composition of the Council or other governing body; and to resolve employment disputes involving employees of the Tribe's government. National Farmers Union Insurance v. Crow Tribe of Indians et.al, 471 U.S. 845 (1985), Bowen v. Doyle, 230 F. 3d 525 (2ndCir. 2000).

This case involves a petition filed by an enrolled member of the Sault Ste. Marie Tribe of Chippewa Indians in Michigan to remove another enrolled Tribal member from the Tribe's governing Board for alleged violations of the Tribe's Constitution, By-Laws, Ordinances, and Resolutions in accordance with the Tribe's constitution. The Tribe's right to determine the validity of the allegations in the removal petition is primary and is exclusive of all other forums.

Removal of Board Members is authorized by the Tribe's Constitution. Article VI, section 3 states as follows:

Removal of the tribal chairperson or any member of the board of directors may be initiated by means of filing charges against such person with the board of directors in the form of a petition signed by at least one hundred (100) eligible voters which alleges specific facts, which, if shown to be true, would establish that the official has engaged in conduct which constitutes a violation of this constitution and bylaws or any duly enacted tribal ordinance or resolution. Sault Ste. Marie Constitution, Art. VI, Sec. 3.

Section 4 of the Constitution provides a hearing process for removal petitions as follows:

All officials so charged shall be accorded the protection of the following procedure:

- (a) The accused shall be served with a written notice of the charges against him or her within fifteen (15) days after receipt of the petition by the board of directors. Such notice shall state the date, time and place of the hearing provided for in subsection (b), but no such hearing shall be held less than fifteen (15) days from the date that notice is served.
- (b) The accused shall have the right to be heard before a hearing board created by the board of directors for the specific purpose of hearing the charges and evidence against the accused. The hearing board shall decide whether the accused shall be removed from office within sixty (60) days after receipt of the petition. The decision of the hearing board shall be final. Sault Ste. Marie Constitution, Art. VI, Sec. 4.

According to Section 2.8 of the Tribe's Interim Procedures for Hearings on Petitions for Removal, "The petitioner shall have the burden of going forward with the evidence and the burden of proving the allegations of the petition by clear and convincing evidence." INTERIM PROCEDURES FOR HEARINGS ON PETITIONS FOR REMOVAL. Sec. 2.8.

COUNTS I and II

ELECTION ORDINANCE VIOLATIONS

Petitioner alleges that in the 2002 election, the respondent's solicitation of signatures from subordinate Tribal employees to his nominating petition in the hallways, staircase, and parking lot of the Tribal Administrative Office Building during office hours violates the Tribe's Election Ordinance which prohibits such conduct. The respondent argues that he did not violate the terms or the spirit of the ordinance because he was requesting the signatures on his breaks, at lunchtime, in the stairwells and in the adjacent parking lot, which the City of Sault Ste. Marie owns. Respondent reasons that taking care of personal business during breaks and lunch on city-owned property is acceptable and does not violate Tribal election laws.

The Tribal Election Ordinance was adopted by Resolution 98-18 on February 18, 1998. It defines a "candidate" as a person who files with the Tribe's Election Committee "...a Letter of Intent prior to receiving nominating petitions to run for a particular office." SAULT STE. MARIE ELECTION ORDINANCE, Ch. 10, Parts 10.103(4) and 10.111(1). Subsection (2) of 10.111 prohibits the candidate's filing of the Letter of Intent until after the Election Announcement is posted; Subsection (3) of 10.111 states that "No campaigning shall take place in any of the tribal offices or any tribal enterprises," and subsection (4) of 10.111 states that "Candidates who are tribal employees shall not campaign during office hours."

Clearly, the respondent had filed his Letter of Intent with the Election Committee because he was requesting subordinates to sign his nominating petition. Thus, the respondent was a candidate as defined under the Tribe's Election code. Candidates were not allowed to campaign in any of the tribal offices. This is a sound, commonsense rule. Permitting candidates to conduct campaign activities in the tribal offices would be

extremely disruptive to the tribe's administrative and governmental operations. It would also unfairly expose tribal employees as a captive audience to possible unwelcome campaign activities. Respondent attempts to argue a hyper technical point by claiming that the hallways, stairwells, and the adjacent city-owned parking lot are not part of the tribal offices. They are. This is space which employees necessarily use to get from one part of the tribal offices to another part. It is part of the total office space and as such provides no safe haven to the respondent for his solicitations.

The record clearly indicates that the respondent was employed as the Tribal Executive Director during the 2002 elections. As such, he was a tribal employee and was expressly prohibited from campaigning during office hours. This rule is also grounded in solid public policy. Employees are hired and paid in exchange for the work they perform for the Tribe, not for their personal, political activities on company time. Campaigning during office hours is distracting and, depending on the candidate's position, could be construed as coercive. It is disingenuous for the respondent to argue that he did not know that his solicitation of signatures from his subordinate employees could be construed as coercive given his high-ranking position in the Tribe's organization. The testimony was clear; his executive position clearly influenced the employees' decisions to sign his nomination papers even when they did not necessarily support his candidacy. They repeatedly testified that they feared for their jobs and felt they had no choice. Respondent's attempt to distinguish during morning, afternoon and lunch breaks from regular office hours is equally unpersuasive. The statute's language makes no distinction between time used for official duties and break time or unofficial duties, and we decline to adopt such a distinction.

The evidence is clear and convincing, the respondent violated the Tribe's clear and

unequivocal prohibition on campaigning at the tribal office during office hours.

We note that although counts one and two of the petition also allege that the respondent's election campaign activities violated the Tribe's Code of Professional Conduct adopted as resolution 93-123 on October 5, 1993, we regard the code as an expressed ideal. It specifically calls for the "highest standards of personal and professional conduct," and while we find such declarations laudable, they are simply too vague to enforce. As drafted, the code of professional conduct is best regarded as a backdrop against which the evidence is reviewed and as a guide for the Tribe's electorate to judge a person's qualifications and integrity to serve in public office. We encourage them to use it as such.

For these same reasons, we decline to find, as a matter of law, that any alleged violations of the ethics code in this case, in and of themselves, clearly and convincingly establish violations of tribal law as a basis for justifying removal action.

COUNTS IV and V
(a) VIOLATION OF CRIMINAL CODE
PROHIBITING HARASSMENT

Petitioner alleges that the respondent's refusal to accept the Department of Human Resource's findings and recommendations in reference to Ms. Page's complaint for sexual harassment and subsequent effort to defame and threaten her not only violated the Tribe's zero tolerance policy against retaliation, but constituted harassment. Respondent adamantly denied he ever called Ms. Pages or made the comments she alleges he made. He denied ever making offensive comments or remarks to her or about her, and he denied that he forced her to do his work when others were available and able to assist him. Respondent asserts that Ms. Page's complaint is part of a larger conspiracy by the office

staff who support Mr. Bouschor, and intended to discredit and defame the respondent in an effort to extinguish Mr. Bouschor's competition in future elections. Respondent further claims that any recommendations made in the Final Investigative Report were mere suggestions and not requirements of his job. Finally, we note that the respondent flatly denied that he solicited any statements from anybody. He claimed that following the sexual harassment investigation, anyone who came forward with statements about Ms. Pages came forth voluntarily and on their own volition.

The Tribe's personnel policies and procedures manual is referred to as the "Sault Ste. Marie Tribe of Chippewa Indians Governmental Team Member Manual." The Tribe's Sexual Harassment Complaint Policy indicates that "Reprisals against team members who report harassment claims and/or assist in an investigation will not be tolerated." *Id.* on pages BX1 (emphasis added). Depending on the specific circumstance recommended action following an investigation might range from training to termination. *Id.*

In this case, the investigation was inconclusive due to the respondent's failure to cooperate and the lack of any witnesses who might corroborate Ms. Page's allegations or exonerate the respondent. Since there were no witnesses to the events comprising Ms. Page's complaint, the sexual harassment was not proven; however, the investigative team found some credibility to Ms. Page's statements that she simply felt uncomfortable at her work station because of the respondent's behavior. Validating that much, the team made some rather innocuous recommendations including executive training for the respondent on the importance of effective communication to make him more aware of the fact that his behavior could be misconstrued by subordinates.

Instead of accepting the recommendations and putting closure to the issue, the respondent responded by actively soliciting any and all information from co-workers and community members about Ms. Pages' prior sexual conduct. Indeed, several witnesses prepared statements and sent them to the Department of Human Resources. Although the respondent denies he solicited any statements from anybody, we find his testimony on this point incredible. All of the statements about Ms. Pages that were forwarded to the Department of Human Resources disclosed that they were being sent *at Mr. Lumsden's request*. In addition to soliciting any defamatory information about Ms. Pages after the conclusion of the investigation, Mr. Lumsden had his attorneys send letters to Mr. Bouschor, Mr. Green, Mr. Scott and Wendi Pages to threaten suit against them.

The problem with the statements and the threats of further legal action is that they were solicited and sent *ex post facto* to the investigation. Respondent's arguments would have been much more persuasive if he had made this information available to the investigators *during* the investigation. The respondent, as an executive, knew or should have known that his behavior in this regard could be construed as a violation of the Tribe's anti-retaliation policy or prohibitions against harassment.

Harassment is prohibited under the Tribe's criminal code. Chapter 71.706 (1) states that the offense is committed if a person:

(A)...knowingly pursues a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and which serves no lawful purpose; and

(b) the conduct is such that it would cause a reasonable person to suffer substantial emotional distress.

SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Parts 71.706(1). Had the respondent disclosed potential witnesses during the



investigation, or had his attorney provided any legal basis justifying the respondent's refusal to participate in the investigation during the investigation, there might have been a lawful reason for soliciting the statements and making legal threats. This was not the case. The respondent simply communicated his refusal to cooperate in the investigation. He provided no witnesses, and he took no legal position until after the matter was closed. Furthermore, the matter was closed with the results of the investigation being "inconclusive." Thus, the respondent had no lawful purpose for soliciting the statements or issuing threats. As such, we find that the respondent's *untimely* response to the Final Investigative Report clearly had no purpose other than to annoy, alarm and terrorize Ms. Pages in violation of the Tribe's criminal code prohibiting harassment.

VIOLETION OF CRIMINAL CODE PROHIBITING

(b) ABUSE OF OFFICE

We next consider whether the same facts support a finding that the respondent violated the Tribe's criminal code that prohibits an abuse of office. The offense is committed if:

A person...intentionally acts or purports to act in an official capacity, including willful failure to act, so as to obtain any personal or pecuniary benefit, gain, advantage, or privilege to which he is not entitled in or by the performance of his official duties.

SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Parts 71.1101(1). There was no evidence that the respondent used his office or his official position to obtain the derogatory statements about Ms. Page's conduct. Accordingly, we do not find that the evidence was clear or convincing in this regard.

COUNT VI
Aiding and Abetting Solicitation and Fraud

Petitioner next claims that the respondent's participation as the Tribe's Executive Director, in certifying Ms. Howell's tax exempt status when he knew that her mobile home purchase did not qualify for exempt status under Michigan state law, amounted to aiding and abetting the crimes of solicitation and fraud. Solicitation, as defined under the Tribe's criminal code, is commanding, inducing, entreating, or attempting "...to persuade another person to commit an offense, whether as principal or accomplice, the {t}he (sic) intent to promote or facilitate the commission of that crime. SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Parts 71.603(1). To commit fraud under the Tribal code, one must obtain "...money, property, gain, advantage, credit, interest or assets from another by intentionally (sic) misrepresentation or deceit." Id at Part 71.1002.

Respondent attempted to assist an enrolled member in realizing a benefit of being a member of a federally recognized tribe, tax-exempt status for state taxation of purchases used on or near a reservation. See McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) and Central Machinery v. Arizona Tax Commission, 448 U.S. 160 (1980). Determining the legal incidence of the applicability of the tax often involves rather complex legal analysis to which reasonable minds may conclude differently. Indeed, the respondent sought and received assistance from the Tribe's legal department to analyze the requirements and draft a form letter that could be distributed to enrolled members seeking to claim the exemption.

Mr. Shagen, one of the staff attorneys, did prepare the requested form cautiously noting on the face of the document that the Tribe's position and the State of Michigan's position on the issue were possibly at odds. Mr. Shagen, realizing that each purchase includes a unique set of facts that may drive differing conclusions, included a general disclaimer on the Tribe's liability for any specific transaction, including Ms. Howell's. Ms. Howell took note of this general disclaimer, and in an effort to protect herself, escrowed any potential tax in the event it was determined that her transaction was not exempt. Ultimately, Ms. Howell's transaction did not qualify and the tax was paid.

Respondent's participation in providing the form letter to Ms. Howell was nothing more than standard operating procedure for similarly situated enrolled members. The form letter with fill-in blanks for member names was specifically designed to assist members in taking advantage of their tax-exempt status and exposed the Tribe to no liability for its use. Even the seller in Ms. Howell's transaction, Mr. Brewbaker of Brewbaker Housing Company, believed that it was worth trying. There was no evidence that the respondent knew that Ms. Howell was not qualified to claim the tax exemption. Accordingly, we find that the evidence does not clearly support a finding that the respondent aided or abetted Ms. Howell in any effort to defraud the State of Michigan of a sales tax. Further, we decline to find that the respondent's mere act of giving Ms. Howell the form constituted an inducement of her to try to claim an unlawful tax exemption.

COUNT VIII Election Fraud

Petitioner next claims that the respondent violated the Tribe's criminal code prohibiting election fraud by his taking Ms. Harper's, Ms. Menard's and Ms. Menard's

sisters' election ballots in 1998. Petitioner claims that the respondent took the ballots without the members' consent. The respondent completely denies that he took any ballots at any time. The Tribe defines election fraud in part 71.1103 of its criminal code. That part states that a person commits election fraud if:

- (e) votes or attempts to vote, more than once in the same election; or
 - (f) opens, marks, alters, or destroys any ballot sent to another person;
- SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Parts 71.1103(e) and (f).

The petitioner claims that if the respondent took the ballots without the owners' consent, he committed fraud.

The testimony was rather vague and inconsistent on the taking issue. Ms. Menard testified that in 1998 she and the respondent had ended a brief sexual encounter and when he left her house, he took three ballots off her kitchen counter. One ballot was hers and the other two were her sisters'. Mr. Paquin, the Tribal Officer, when investigating alleged threats of physical harm directed from Ms. Menard to the respondent at that same time, discovered the alleged theft of the ballots. Ms. Menard advised the officer during his investigation that the ballots were taken with the consent of all owners. Her story changed five years later when she recalled on the stand in this case that her sisters did not consent to Mr. Lumsden taking the ballots. That statement was again recanted at the end of her testimony when she admitted that all were taken with the owners' consent. It is also unclear why Ms. Menard and her sisters' would have consented to the respondent's taking of the ballots. There was no testimony on this point at all. Because of these inconsistencies and lack of testimony on the reason for Ms. Menard's consent, we find the evidence on this issue too fuzzy to conclude that the respondent clearly committed any election fraud.

Ms. Harper also testified that in 1998 the respondent took her ballot; however, she further testified that she did not report this to any tribal official or law enforcement officer. For what purpose he may have taken the ballot is also unclear as the record is void of any testimony on this issue. While the evidence may support an inference that he improperly used ballots, it is not clear and convincing, and we decline to draw any inferences from the absence of testimony in this regard. Accordingly, we find that the evidence does not clearly and convincingly establish that the respondent committed election fraud.

COUNT IX Abuse of Office

Petitioner next claims that the respondent's use of casino promotional packages was an abuse of his office, a punishable offense under the Tribe's criminal code. Petitioner argues that the respondent would not have received the coupons but for his position as a Board member and that there was a clear understanding that the coupons were to be used to solicit casino business. At least two people, Ms. Harper and her brother observed a bucket of quarters in the respondent's closet, and Ms. Harper produced a packet of partially unused coupons in the respondent's personal belongings. Most of the packet stubs were missing the cash coupons. Petitioner suggests this information, taken together, clearly established that the respondent kept the coupons for his personal benefit. That conclusion may be true, but the record clearly established the absence of any written policies on this issue.

Respondent asserts that Board members, executive personnel, and the Tribe's business associates often received the casino packages as "perks". He claims that

recipients of these packages were free to give them to whomever they wanted or keep them for personal use.

Richard McDowel, the Tribe's Chief Financial Officer for Gaming Operations, made quite clear that the Tribe's past practices did not include any written policies to guide the distribution and redemption process and that there was no meaningful way of tracking the packages. He further testified that there was simply a loose understanding that the packages were meant for promotional purposes only. He admitted that other Tribal employees had been discharged for misusing the coupons, and in a couple of cases, those employees either served time in jail or were ordered to pay restitution. He provided no additional specifics. Finally, he acknowledged that, on at least one occasion, Board members did receive up to 100 casino packets each.

The evidence on this issue suggests that the respondent may have used numerous casino coupons for his personal benefit, but it does not appear that there was a clear prohibition against this. In the absence of a violation of a clear policy on the dissemination and redemption of casino packages, we find that the evidence does not clearly and convincingly establish that the respondent unlawfully abused his office.

COUNT X Domestic Abuse

Finally, the petitioner claims that the respondent's threats of physical abuse against his former girlfriend, Donelda Harper, violated the Tribe's criminal code prohibiting domestic abuse. The respondent alleges that Ms. Harper is untruthful and willing to give false testimony to retaliate against him for breaking up with her.

The Tribe criminally prohibits acts of domestic abuse. The relevant portion of the Tribe's Code is Chapter 71, Part 71.1404, which prohibits any intentional threats of

physical pain against a girlfriend/boyfriend or household member. SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Part 71.1404 (1)(a-c).

Ms. Harper, a Tribal Court Judge, testified that she and the respondent lived together for several years. When they broke up in 1998, the separation was quite acrimonious and resulted in a heated argument between them on the day she moved out. She stated that the respondent threatened to kill her and that when she attempted to call the police, he destroyed the telephone. He then left, and she waited for her brother who had previously agreed to help her move from the respondent's residence. She testified that she was afraid for her safety and then called the Chippewa County Sheriff's Department and Mr. Paquin, the Tribal Chief of Police to file a report for the record.

Mr. Paquin testified that Ms. Harper called him at home to report the threats from the respondent, and that the respondent was at his home when she called. Officer Moran, the Chippewa County Sheriff, testified that he took Ms. Harper's statement noting that she was upset and very frightened by what happened. Despite her anxiety, Officer Moran stated that he did not investigate the matter any further at Ms. Harper's request. He understood that she was a Tribal Judge at the time and wanted to avoid the scandal such an incident would cause in the community.

Ms. Harper's romantic involvement and living arrangements clearly makes her a person whom the respondent has established a "dating relationship" as referenced in the Tribal Criminal Code for domestic Abuse. SAULT STE. MARIE TRIBAL CODE OF CRIMINAL OFFENSES, Ch. 71, Part 71.1404 (1)(a-c). Despite the respondent's denial that he ever threatened to physically harm Ms. Harper, his testimony is untrustworthy and self-serving. In contrast, Sheriff Moran fully corroborated Ms. Harper's testimony on this incident. The respondent can not in good faith suggest that Officer Moran had any

ulterior motive in this case, political or otherwise. Officer Moran simply recalled the events as he remembers from his contact with Ms. Harper in 1998, and we find his report of this occurrence credible.

Accordingly, we find that the evidence clearly and convincingly established that the respondent engaged in domestic abuse in violation of the Tribe's criminal code prohibiting such conduct. It should also be noted that the respondent was also serving as a Board member when he engaged in this abusive conduct.

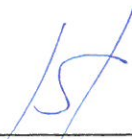
ORDER

We find that the evidence clearly and convincingly proves that the respondent engaged in election violations, harassment, and domestic abuse while serving as a member of the Tribe's Board of Directors. These acts violated Tribal law and are constitutional grounds for removing the respondent from the Sault Ste. Marie Tribe of Chippewa Indians' Board of Directors.

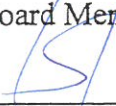
IT IS SO ORDERED THIS 15th day of July, 2003.



Honorable Robert Kitticon
Hearing Board Member, Pro Tempore



Honorable James Bittdorf
Hearing Board Member, Pro Tempore



Honorable Kimberly M. Vele
Hearing Board Member, Pro Tempore