

Complaint of Election Board - Hardenburgh v Election Board Case #99-200-02

Summary: The complaint before the court involved two separate, but related disputes. The complaint alleges that Ms Ruitter and the Election Board were attempting to “force” the board to take action with respect to the allegations made by Ogema candidate Robert Hardenburgh. Secondly, Bowen also alleges that Pat Ruitter and others were attempting to pressure her and the board members into taking action she did not support. Kathleen Bowen requested the Court to take over the Election Board’s handling of these complaints.

Court asks... is it proper for the Court to become involved in the Election Board’s business? However, this complaint filed against the Election Board indicated that the Election Board was making it impossible for the Tribe to complete the election. The Election Board is normally responsible for any election challenges. The challenge filed by Hardenburgh was a complaint against the alleged impropriety of the Election Board itself. The Tribal Constitution requires complaints of impropriety on the part of the Election Board should be decided by the Court, not the Election Board.

Decision and Order: The Court **ordered** that the election for Tribal Council and Tribal Ogema are true and just elections and that all complaints and or issues before the Election Board be dismissed. **(Appealed)**

Court of Appeals – Hardenburgh v Election Board – Appeal of Case #99-200-02

Summary: In this appeal the Appellants seek to overturn the Trial Court’s decision on the Trial Court’s assertion of superintending control over the Election Board.

Decision and Order: The Court of Appeals **overrules** the Trial Court’s decision. The Appellant’s request that the election be invalid cannot be granted by the Court of Appeals. These Election disputes must be resolved by the Election Board. The Court of Appeals **remands** these matters to the Election Board for resolution.

Side Note:

The order to remand was filed June 28, 1999. The Election Board provided the Court of Appeals with a timeframe of completion of 45 days. The Election Board’s timeframe was not met. The Court of Appeals issued a notice of Show Cause to the Election Board. Order after Show Cause attached.

Alleged Discrimination because of Race – Waitner v Carter Case#99-981015-2-8.3

Summary: In this case Ms. Waitner alleges that she received less pay than others who were Tribal Members based on her status as a Non-Tribal Member person while working at a similar position. She alleges that she has the same or more experience or education as the others and that she is not receiving proper compensation under the equal pay for equal work doctrine. Ms. Waitner in her complaint is seeking an increase in compensation to \$11.00 hour as relief.

Decision and Order: The Court **finds** that there is no evidence of discrimination based on race and the wages of Melissa Waitner, Dan Shepard, and Janine Szpliet.

The Court **ordered** the grievance be **dismissed** without cause.

Contempt of Court – Martin Wabindato – Court of Appeals Case#99-200-02.012-A1

Summary: This matter was presented to the Court of Appeals by Mr. Wabindato on an appeal of the Trial Court's finding of contempt of court. The Trial Court scheduled a hearing in a Tribal election dispute where Wabindato was an Election Board Member at that time. The Trial Court Judge found Wabindato in contempt of court for his failure to appear.

Decision and Order: The Court of Appeals **found** that Wabindato certainly had good justification for not being able to attend the hearing. The Court of Appeals **overruled** the Trial Court's decision. Furthermore, the Court of Appeals **declined to remand** this matter back because the proofs presented by Wabindato for non-appearance were clearly excusable.

Ethics Complaint against a Member of the Judiciary – Case #99-4.5.CR S2

Summary: In this matter a complaint was filed against Judge Daniel Bailey. The complaint alleges that Judge Bailey violated ethical cannons and that the violation was so egregious that a request was made to consider sanctions and removal.

Decision and Order: The Tribal Judiciary **finds and orders** that there was not sufficient proof given to conclude that there were violations of the Tribal Ethics Code or any other reasons to sanction Judge Bailey. They **further find** that Judge Bailey recused himself from any further matters involving the initial Tribal Council and initial Tribal Ogema elections.

1 Little River Band of Ottawa Indians

2 P.O. Box 314

3 Manistee, MI 49660-0314

4 Petition for Resolution of Robert Hardenburgh's

Case # 99-200-02

5 Complaint re: Robert Guenthardt Campaign Mailing

Opinion and Orders

6 Kathleen Bowen, Petitioner

7

8 **PETITION**

9 This matter came to the Court as a result of a petition filed by Election Board Secretary Kathleen Bowen
10 seeking the Court to take over the issue of Mr. Hardenburgh's complaints, petition alleged bias and the
11 inability of the Election Board to reach conclusion. Chief Judge Daniel Bailey held hearing on this matter
12 April 10, 1999. Judge Bailey ordered supervisory control and further dismissed complaints and declared
13 the elections true and valid.

14 **OPINION**

15 **IT IS OF MY OPINION**, that the complaint before the Court involved two separate, but related disputes.
16 First, was a complaint brought by Kathleen Bowen, Election Board Secretary, against Patricia Ruitter,
17 Election Board Chairperson and the Election Board. The complaint alleged that Patricia Ruitter and
18 Election Board members were attempting to "force" the Board to take action with respect to allegations
19 made by Ogema candidate Robert Hardenburgh, that the other Ogema candidate, Robert Guenthardt,
20 violated certain portions of the First Election Ordinance regarding campaigning. Kathleen Bowen alleged
21 that Patricia Ruitter and others were attempting to pressure her and other Board members into taking
22 action that she did not support. Kathleen Bowen's complaint requested the Court to take over the
23 Election Board's handling of these complaints.
24 Although the second dispute raised by Kathleen Bowen's complaint was not filed directly with the Court.
25 That second dispute, which was addressed by the Court, concerned the challenge that was filed by
26 Ogema candidate Robert Hardenburgh with the Election Board. Mr. Hardenburgh alleged that the failure
27 to address the complaints he had filed with the Election Board regarding candidate Guenthardt's
28 campaign resulted in his being denied a fair election. Apparently, Mr. Hardenburgh alleges that had the
29 Election Board properly addressed and resolved the complaints he had made against candidate

1 Guenthardt, apparently in the manner Kathleen Bowen alleged Patricia Ruitter and others were
2 attempting to force her to support, candidate Guenthardt would have been disqualified and he would
3 have won by default.

4 While the Court recognizes that election challenges are normally the responsibility of the Election Board
5 and that the Board should normally be given the opportunity to decide challenges before any decision of
6 the Board is reviewed by the Court, the challenge filed by Mr. Hardenburgh was basically a complaint
7 against the Election Board itself and Mr. Hardenburgh was basically alleging impropriety on the part of
8 the Election Board. Article IX, Section 4(c) of the Tribal Constitution requires complaints of impropriety
9 on the part of the Election Board to be decided by the Court, not the Election Board. It would not be
10 proper for the Election Board to be deciding a complaint filed against itself. Also, the election challenge
11 filed by Mr. Hardenburgh dealt with the exact same issues involved in the complaint filed by Kathleen
12 Bowen concerning the Election Board's handling of the campaign complaints Mr. Hardenburgh was
13 raising.

14 The Court recognizes that there are serious questions that have been asked whether it is proper for the
15 Court to become involved in the Election Board's business. By having a number of individuals testify and
16 speak at the hearing, the Court was attempting to fully disclose to the public the reasons the Court took
17 the steps that it did. The complaint filed against the Election Board indicated that the Election board was
18 making it impossible for the Tribe to complete this election and where the procedures that are defined in
19 the Constitution and in Tribal law are not allowed to work and where it is alleged that the bodies
20 responsible for administering those procedures are functioning properly, the Court has a responsibility to
21 address those deadlocks.

22 The Courts have a Constitutional duty and authority to resolve disputes that arise under Tribal law and in
23 Tribal system. IN this case, the Court was asked to take control over the Election Board's handling of
24 campaign complaints filed against Robert Guenthardt by Robert Hardenburgh. As I have noted
25 previously, these very same complaints were the basis for the election challenge that Mr. Hardenburgh
26 filed with the Election Board and that challenge was preventing the results of the tribal election from
27 being finalized.

28 The action taken by me on behalf of the Court was to take superintending control over the issues before
29 the Election Board in order to finally resolve the matters that were preventing the Election Board from

1 completing the Ogema election. The issues the Court took this superintending control of all concerned
2 the Election Board's handling of campaign complaints.

3 I believe that the Court had the authority to assume superintending control over the Election Board for
4 two reasons. First the Court has jurisdiction to decide the complaint that had been filed by Kathleen
5 Bowen. Second, the issues the Election Board was unable to resolve involved the Election Board's
6 attempt to carry out responsibilities delegated to the Election Board under the First Election Ordinance.
7 That ordinance authorized the Election Board to hear and decide complaints involving allegations of
8 violations of the campaign procedures of the First Election Ordinance. In carrying out those
9 responsibilities the Election Board's action were subject to review by the Court. While certain actions and
10 decisions by the Election Board directly related to the election process are delegated to the Election
11 Board by the Tribal Constitution, actions related to hearing and deciding campaign complaints are
12 delegated to the Election Board by Tribal Ordinance. The fact was recognized when the Court reviewed
13 and affirmed actions taken by the Election Board in the case of *Kequom v Election Board*. The action
14 taken by the Court was later reviewed and supported by the Court of Appeals.

15 When the Election Board acts to hear and decide complaints of campaign violations, and those decisions
16 are subject to review by the Court, the Election Board is clearly acting as a lower tribunal of limited
17 jurisdiction under First Election Ordinance. Section 2.01 of the Tribal Court Ordinance gives the Tribal
18 Courts the authority and responsibility to exercise superintending control over lower tribunals. This
19 superintending control gives the Court the power and responsibility to take control over the Election
20 Board's handling of these campaign issues if the Board is unable to address them or if the Board refuses
21 to follow the proper procedure of acting fairly as Kathleen Bowen alleged.

22 A number of issues have been raised with myself as a Tribal Judge regarding the appropriateness of my
23 acting on behalf of the Court. Complaints have been made verbally and in a petition that I have
24 improperly injected myself in the election Board's business and that these actions made it improper for
25 me to address the complaints filed by Kathleen Bowen or any other issue concerning the Election Board.
26 First, as a number of witnesses testified, the Court's involvement with the Election Board was done at the
27 request of the Election Board. Second, my responsibilities as the Chief Judge of the Court include the
28 obligation to meet regularly with the lower courts and tribunals such as the Election Board. Although
29 some may believe that my involvement with the Election Board caused me to have an ethical conflict that

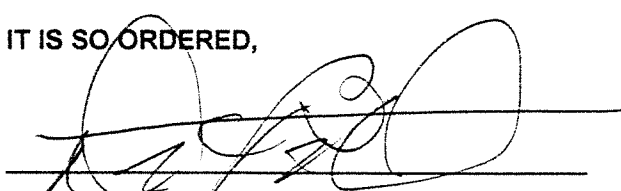
1 prevented me from handling the issue, I believe that my involvement and knowledge of the problems the
2 Election Board was having in properly and fairly resolving these campaign complaints was part of my
3 responsibilities as Chief Judge. Finally, since the Election Board was acting as a lower tribunal with
4 regard to the campaign complaints and with Mr. Hardenburgh's challenge, I do not believe the decision
5 of the Court to take superintending control over the Election Board under these circumstances was
6 affected by my involvement with the Election Board.

7 **My decision to exercise the Court's authority, to impose superintending control over the Election**
8 **Board**, was based on Robert Hardenburgh's complaint of not being able to receive due process within
9 the Election Board's authority. I further took into account Kathleen Bowen's request for the Courts to take
10 over the Election Board due to their inability to reach decisive decisions on issues and complaints, as
11 well as requests set before them.

12 Now with that said, **IT IS HEREBY ORDERED** that the election for Tribal Council and Tribal Ogema are
13 true and just elections,

14 **IT IS FURTHER ORDERED** that all complaints and or issues before the Election Board be dismissed.

15 **IT IS SO ORDERED,**

16 
17 _____
18 Daniel Bailey, Chief Judge

19 4/23/99
20 _____
21 Date

RECEIVED

OCT 19 1999

LITTLE RIVER BAND
OF OTTAWA INDIANS

TRIBAL COURT OF APPEALS
OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS

In re Robert Hardenburgh; and
Jonnie J. Sam I & Jeffrey L. Sam

Case No. 99-200-02/02-A2; and
Case No. 99-200-02/02-A3
Order After Show Cause Hearing

ORDER

This matter comes before the Tribal Court of Appeals on a Notice To Show Cause issued against the Tribal Election Board by the Court on its own motion. The Show Cause Hearing provided the Court an opportunity to ensure compliance with its Order issued on June 28, 1999. That Order had remanded the election complaints in the instant matter back to the Tribal Election Board for resolution.

Democratic "*rule of law*" ideals ensure that no one will be above the law, and that everyone must abide by the law. A critical component of "*rule of law*" implementation is that the judiciary must be concerned about compliance with its orders. A show cause hearing provides an opportunity for a judiciary to determine whether those subject to its power have followed the orders its courts. If not, the involved court may find those, who have not complied, in contempt of court.

Findings:

- (1) Since this Court issued its Order on June 28, 1999, the Tribal Election Board has followed the guiding advice of this Court to obtain the assistance of legal counsel.

Counsel will be able to provide guidance to the Election Board for the resolution of the involved election complaints in conformity with the Tribal Constitution, election ordinances & regulations and guarantees of equal protection and due process.

- (2) Retention of counsel for the Election Board took time because of retainer issues regarding authority to employ counsel, scope of work and payment.
- (3) The stated goal of counsel, working with the Election Board, is to have these matters resolved in the next forty-five (45) days or so.
- (4) In light of the foregoing, the interests of justice would not be furthered by holding the Election Board in contempt of court. It appears that they have endeavored to comply with this Court's Order.

WHEREFORE, IT IS ORDERED by this Court that the Election Board be not held in contempt of court.

10/17/99

DATE

Michael Petoskey

Michael Petoskey,
Court of Appeals Justice
for
the entire Court of Appeals

7.

**TRIBAL COURT OF APPEALS
OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS**

In re Robert Hardenburgh; and
Jonnie J. Sam I & Jeffrey L. Sam

Case No. 99-200-02/02-A2; and
Case No. 99-200-02/02-A3
Opinion After Oral Argument

OPINION

These matters come before the Tribal Court of Appeals as appeals of the Tribal Court's assertion of superintending control over the Tribal Election Board. Appellants seek to overturn the trial court's decision in these matters. Appellant Hardenburgh asks that the election be declared invalid. Oral argument on these appeals was conducted before the Court of Appeals on June 2, 1999.

Factual Background:

The instant matters arise out of two separate, but related complaints, as was recognized by the trial court. One complaint was filed in the Tribal Court by the Election Board Secretary against the rest of the Election Board and its Chairperson. The basis of the Secretary's complaint was that the Board's Chairperson and "others" were attempting to pressure her and other Board members to take action that she did not support. Her complaint asked the Tribal Court to take

over the Election Board's handling of complaints that had been filed with the Board. The other complaint involves a complaint filed with the Election Board by one of the Tribal Ogema candidates against other Ogema candidate. The Election Board scheduled a hearing on the complaint for April 10, 1999, but the hearing before the Election Board did not take place. The Tribal Court assumed "superintending control" and conducted a court hearing on these two matters on that very same date.

Context:

This is the first matter involving "superintending control" to be considered by the Tribal Court of Appeals. Although many in the tribal community have been impatient while they waited for this Court's written opinion in this matter, this appellate opinion is issued within thirty days of oral argument. This Court has been mindful of the fact that the instant matter raises the utmost concern and emotion of everyone involved because it involves a tribal election. Nonetheless, the Court of Appeals would not be unnecessarily rushed in this matter because of its obligation to develop sound tribal law. This Court had to research the law of other governments regarding "superintending control" to understand its concepts. The research was a critical requirement for a sound decision in this matter because there is no established tribal law on the subject. The experience and wisdom of other courts provides us with good guidance.

Right at the beginning, everyone should be reminded that the Little River Band of Ottawa Indians tribal government is in an early stage of development. All of us have high expectations of each other as we begin to exercise tribal sovereignty. However, during this early stage, there will be many challenges faced by the community and its government. Among such challenges are the

following: the lack of a clear understanding and definition about the appropriate roles and authority of various governmental institutions; the lack of a fully-developed government and service infrastructure, including the express adoption of rules, policies and procedures; and the lack of experience and training of various officials and staff. In particular, these challenges mean that the community will learn primarily from its experiences, conflicts and mistakes. None of this should be unexpected. After all, this exercise of tribal self-government by the community is relatively new and the vast majority of experiences will be positive. It is said that “one who makes no mistakes is doing nothing” and that “the price of the unwillingness to take any risk because there is fear of making a mistake is to do nothing.” None of us want our tribal governments to do nothing. We all must have empathy and patience for each other as we engage in the development of the tribal community and its government. We will make mistakes along the way. The important thing is that we strive to not make mistakes, and that we learn from them when they are made.

LEGAL ANALYSIS:

The resolution of the matters before this Court on these appeals must begin with an examination of the Tribal Constitution. It is the supreme law of the Tribe. It is the governing document as adopted by the people of the Tribe.

An examination of the lawful authority and the appropriate roles for both the Tribal Court and the Election Board require a review of the provisions in the Tribal Constitution which create both of those institutions. The authority and role of the tribal courts is defined in Article VI. That Article creates the judicial system and delegates it broad judicial powers. Section 8 of

Article VI provides that the judicial powers “*shall extend to all cases and matters in law and equity...*” . Furthermore, the Tribal Court is a court of general jurisdiction. *Article VI, Section 3(a)*. The Tribal Judiciary is independent from the legislative and executive functions of government. *Article VI, Section 9*. **Thus, the Court has broad, independent authority in the judicial affairs of the Tribe.** The authority and role of the Election Board is likewise defined by the Tribal Constitution. The Election Board is created by the people “*...to register voters, hold elections, certify election results, and settle election disputes other than allegations of impropriety by the Election Board.*” *Tribal Constitution, Article IX, Section 4*. Thus, it is clear that the people wished to create an **independent** election board to conduct tribal elections that would be free from inappropriate political and judicial influences and interference.

DECISION REASONING:

One of the principles of good government is that election boards ought to be independent from government to ensure that fair, impartial elections are conducted. Other governmental bodies, including tribal councils and tribal courts, should not be involved in the business of the election board. **The Tribal Court must act only under its proper authority and within its appropriate role.** The same is true of all governmental institutions and bodies. Each has its own set of **exclusive** duties and responsibilities. The relevant example is that the responsibilities of the Election Board belong to the Election Board and no other institution of government. It is this political principle which provides the *context* for the Court’s opinion in this matter.

The only role for the tribal courts in election matters provided by the Tribal Constitution is to resolve allegations of impropriety by the Election Board. *See Article IX,*

Section 4(c). All other election disputes must be resolved by the Election Board. *See Article IX, Section 4(a)*. **Thus, the issue presented to this Court is whether the instant matter(s) involve impropriety by the Election Board.** The trial court assumed “superintending control” over the Election Board under a number of grounds because the court determined that the Election Board is a lower tribunal. Among those grounds was impropriety by the Election Board. The Court will come back to this in due course.

A threshold issue regarding the assumption of “superintending control” over the Election Board is whether the Election Board is a lower tribunal over which such control may be exercised by the courts of the Tribe. The power of supervisory control over inferior tribunals, which superior courts possess does not extend to executive or administrative officers and boards. The courts operate under the philosophy of the separation of powers, and courts are not vested with the authority to act as supervisory agencies to control and direct the actions of executive and administrative agencies or officials. *2 Am Jur 2d, Sec. 419, citing State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 NC 381, 269 SE2d 547*. The Tribal Election Board is an **independent** administrative board created to conduct tribal elections.

There appear to be two basic reasons for the trial court reasoning that the Election Board is a lower tribunal. The first is stated in the Court’s Opinion at page 2: “When the Election Board acts to hear and decide complaints of campaign violations, and those decisions are subject to review by the Tribal Court, the Election Board is clearly acting as [a] lower tribunal...”. The second reason is that the Tribal Court Ordinance, which pre-dates and is superceded by the adoption of the Tribal Constitution, gives the tribal courts the authority to exercise superintending control over lower tribunals.

The Tribal Court is mistaken in two important respects about “superintending control”. The first is that the Election Board is **not an inferior tribunal** over which a court of the Tribe may exercise supervisory control. The fact that the Election Board must resolve election disputes, and will at times conduct hearings to do so, **does not make it a tribunal** subject to judicial control and authority. The second respect is that **only the highest court** in a system may exercise “superintending control”. The Tribal Court does not have any authority to exercise superintending control. This power is inherent in the Tribal Court of Appeals and is distinct from its appellate jurisdiction. *See again 2 Am Jur 2d, Section 419.* Furthermore, the Court of Appeals cannot issue a Writ of Superintending Control without a hearing on whether such a writ should be issued. Judicial involvement in these matters then hinges on whether there were allegations of impropriety to be resolved by the Tribal Court. The trial court concluded that the election challenges filed by Appellant Hardenburgh were challenges against the Election Board itself and basically alleged impropriety. **Impropriety means more than simply disagreeing with the decisions of the election board, it means that there have been violations of ethical standards.** *Kimberly (Kequom) Crampton v. Jonnie J. Sam II, Case No. 98/200-0201.000846.* Assuming for the sake of argument that there are complaints against the procedures or processes of an election board, the appropriate role for the court is to conduct a hearing on the complaint(s), and then remand the underlying matters back to Election Board for resolution consistent with guidance regarding due process and/or equal protection. The court cannot simply take the matter over. That is inappropriate extension of judicial authority and is overreaching.

The Court of Appeals was presented with a version of reality at oral argument that the Election Board was stalemated because of tie votes. In fact, the Opinion of the trial court stated

that the Election board could not function and that Election Board decisions and actions were rendered impossible. Surely, in such a situation, the court has both the obligation and responsibility to act reasoned the Court. Tie votes simply mean that the proposed action fails. It is the Election Board's obligation and responsibility to the community to resolve impasses itself. It cannot rely on outside assistance. Even if the court is asked to intervene, it cannot. That's what exclusive authority and independence are all about. It is clear to this Court that the Election Board would benefit immensely from legal advice and guidance. Training would be extremely beneficial. All of the benefits would ultimately would flow to the community as situations like the present one could be avoided.

Ms. Bowen should have been allowed to withdraw her complaint filed with the Tribal Court. The trial court erred in denying her request to do so. A party may not be compelled to pursue a matter that they have voluntarily filed. At the instant that they no longer wish to pursue the matter, a "case" no longer exists for the court to resolve. Tribal courts should not involve themselves unless a case or controversy actually exists.

There were assertions at oral argument that the Election Board could not do its work because the trial court judge had directed the Election Board "to investigate" numerous complaints that were made in the community but not formally filed. The court cannot direct the Election Board to investigate complaints. The Election Board must follow its own process. A complaint is not made until filed in writing.

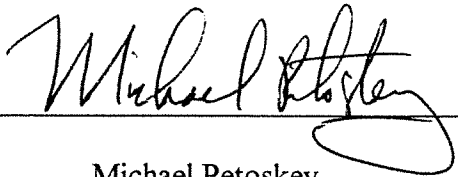
All motions formally filed with the court must be addressed by the court. They cannot be simply ignored. Some may require "briefing" and/or a hearing.

In closing, the Court of Appeals has no reason to believe that the trial court acted without good faith. Tribal elections can be problematic for a community because of the emotional attachment each of us has to our own political opinions. This Court sincerely hopes that this Opinion will be taken as a whole.

FOR ALL OF THE FOREGOING, the Court of Appeals OVERRULES the trial court's decision in this matter. However consistent with this OPINION, Appellant's prayer for declaration that the election is invalid cannot be granted by the Court of Appeals. These election disputes must be resolved by the Election Board. THUS, the Court of Appeals REMANDS these matters to the Tribal Election Board for resolution.

6/28/99

DATE



Michael Petoskey,
Court of Appeals Justice
for
the entire Court of Appeals
in this unanimous OPINION

ENTERED
JUN. 28 1999

13

**TRIBAL COURT OF APPEALS
OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS**

In re Robert Hardenburgh; and
Jonnie J. Sam I & Jeffrey L. Sam

Case No. 99-200-02/02-A2; and
Case No. 99-200-02/02-A3
Order After Show Cause Hearing

ORDER

This matter comes before the Tribal Court of Appeals on a Notice To Show Cause issued against the Tribal Election Board by the Court on its own motion. The Show Cause Hearing was held on January 27, 2000 at 7:30 P.M. The Hearing provided the Court an opportunity to ensure compliance with its previous Orders. The Order issued on June 28, 1999 remanded the election complaints in the instant matter back to the Tribal Election Board for resolution and the Order issued on October 17, 1999 incorporated the Election Board's own stated goal of completing its work "*in forty-five (45) days or so*". Over one hundred (100) days has passed without completion of the work that was remanded by this Court.

Findings:

- (1) Since this Court issued its Orders on June 28 and October 17, 1999, the Tribal Election Board has carefully worked, following the guiding advice of legal counsel, to resolve the involved Tribal Election complaints. The on-going work has involved training of the Election Board, the development of written hearing

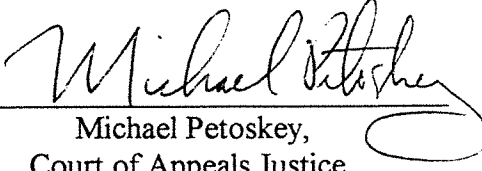
procedures, the identification of issues needing resolution, and the scheduling & conduct of election dispute hearings.

- (2) Now, the stated goal of the Election Board is to have these matters resolved by the end of February.
- (4) It appears that justice would not be furthered by holding the Election Board in contempt of court because it appears that the Board has endeavored to comply with this Court's Orders, although the Court is concerned that these matters have taken so long to resolve.

WHEREFORE, IT IS ORDERED by this Court that the Election Board:

- (1) not be held in contempt of court at this time;
- (2) be held to its second stated time frame for resolving these election disputes by giving the Election Board notice now that:
 - (a) a Show Cause Hearing is hereby scheduled for Friday, March 3, 2000 at 7:00 P.M. for the Election Board to show cause if they fail to meet their own second stated time frame for completion of their work on the instant matters; and
 - (b) this Court proposes to impose a fifty-dollar (\$ 50.00) fine on each individual Board member for each calendar day past February 29, 2000 that these matters remain unresolved.

1/28/00
DATE


Michael Petoskey,
Court of Appeals Justice
for
the entire Court of Appeals

1 Little River Band of Ottawa Indians

2 P.O. Box 314

3 Manistee, MI 49660-0314

4 Melissa Waitner, Aggrieved

Case # 99-981015-2-8.3

5 v.

Alleged Discrimination Because of Race Based
on Section 2.2 of Personnel Policy Manual.

6 Tammy Carter, Assistant Manager

7
8
9 The Court finds no evidence of discrimination based on race, and so dismisses the grievance.

10 **SUMMARY**

11 The matter before the Court is a Grievance filed by Melissa Waitner, brought before the Court in the
12 proper manner. On July 7, 1999, Melissa Waitner filed a grievance with Tribal Manager Robert
13 Guenthardt. Not accepting the response of Mr. Guenthardt, Ms Waitner then took the Grievance to the
14 next step, Acting Ogema Joan Spalding. Ms. Spalding asked and Ms. Waitner agreed to have the Tribe's
15 Human Resource Director Daniel Coates review the matter and respond. Ms. Waitner was not satisfied
16 with that response, and so asked the Acting Ogema to respond. Still not accepting the response, Ms
17 Waitner now presents the Grievance to the Court, as is her right. Ms Waitner seeks an increase in
18 compensation to \$11.00 hour as relief.

19 **ISSUE**

20 The sole issue for the Court to decide is whether or not Ms Waitner received less pay than others who
21 are Tribal Members based on her status as a Non-Tribal person, while working at a similar position.

22 **ARGUEMENTS**

23 In her Grievance and written statements, Ms Waitner asserts that two members, Dan Shepard and
24 Janine Szpliet, of the Little River Band of Ottawa Indians have been hired following her employment as
25 Economic Development Associate in positions comparable to hers at a rate of pay equal or higher to
26 hers. She states she has the same or more experience or education as the others and that she is not
27 receiving proper compensation under the equal pay for equal work doctrine. Ms Waitner further asserts
28 the job description for the Strategic Planning Coordinator is *"significantly less stringent and demanding"*
29 as hers. The person who was hired as Strategic Planning Coordiniator applied for the same position Ms

1 Waitner now has. The person hired as Legal Assistant, she asserts, also applied for the position Ms
2 Waitner now holds. Ms Waitner's hiring over the other individuals is 'proof' the qualifications were not
3 equal, *"If that were true, then why did Dan Shepard NOT receive the job of Economic Development*
4 *Associate?"*(Response to Human Resource Director's response to grievance).

5 Ms Waitner also asserts that *"Tammy Carter made the decision on my pay without consulting my*
6 *Supervisor, Mr. Wabindato"*, while consulting with others prior to setting the wages. Specifically Bill
7 Brooks with regard to the Legal Assistant's wage.

8 In written response to the grievance, Dan Coates, Human Resource Director, stated that after an
9 investigation of the grievance he found: ... *"hiring policies and past methods of establishing starting*
10 *wages were reviewed and found to be in agreement with accepted practices and standards of the Little*
11 *River Band of Ottawa Indians Administrative Office"*. Mr. Coates further states: *"Melissa Waitner was*
12 *selected for the position of Economic Development Associate above those candidates cited above (Dan*
13 *Shepard, Janine Szpliet) and others that were considered eligible..."*.

14 Further, it was noted in the response that Ms Waitner was informed of the starting wage, both verbally
15 and in writing, and agreed to that wage. Mr. Coates also noted that the investigation "did not result in any
16 substantiating evidence of discrimination in compensation because on race based on Section 2.2 (Page
17 3) of the Personnel Manual."

18 The grievance is then dismissed based on those findings by Mr. Coates.

19 Following this dismissal, Ms Waitner contacted the Court, and had a meeting with the Tribal Acting
20 Ogema, Joan Spalding. Ms Spalding's written response cited the Personnel Manual and Policies in her
21 response to Ms Waitner's grievance. Ms Spalding cited: *"Employees shall be paid a wage within the*
22 *established range for the position"*. Ms Spalding also cites *"The actual starting wage for one employee is*
23 *negotiated within the range"* (Wage Grid Comments, page 1). Finally, Ms Spalding cites *"All newly hired*
24 *employees shall begin at a...specific hourly rate negotiated at hiring. Starting wages in excess of the*
25 *maximum may be negotiated..., but in no case shall the negotiated wage exceed the maximum by more*
26 *than 5%"*(Wage Grid Policy Comments, page 1). Ms Spalding concludes with *".., I find no evidence of*
27 *violation of Section 2.2 of the Policy."*

28 **ORAL ARGUMENTS AT HEARING**

1 Ms Waitner began the hearing with her statement. During her statement , Ms Waitner discussed the
 2 reason for her grievance as being one of fairness, and restated or elaborated on the grievance itself. Ms
 3 Waitner could not offer any direct proof or evidence as the materials she wished to refer to were not
 4 available to her. She requested that the resumes and job descriptions of all three persons be reviewed.
 5 Ms Waitner also stated that the issue of how she got information, seemed more important during the
 6 discussions than the issue of the grievance itself. Ms Waitner stated that the comment by the acting
 7 Ogema referring to all positions being level three and within the wage grid as ignoring the doctrine of
 8 equal pay for equal work.

9 Mr. Guenthardt then made his statement, and explained why he did not respond to the grievance, as he
 10 was going to be out of town. He then made two comments: every job is different, so what constitutes
 11 equal pay for equal work? One of the positions is part time and the other is temporary - for one year, and
 12 that may contribute to the wage differences.

13 Tammy Carter then described in her own words the manner in which she established Ms Waitner's
 14 starting wages and that she agreed to it. Then she said she contacted Ms Waitner's supervisor and let
 15 him know she would be in contact with him. There was nothing said about that. Ms Carter stated the
 16 method of establishing the wage for the Strategic Planning Coordinator's wage, after contacting those
 17 working on this grant. Ms Carter took the responsibility for setting the wage herself. In regard to the
 18 Legal Assistant's starting wage, Bill Brooks recommended \$10.50 - \$10.75, but left it up to Ms Carter to
 19 establish the wage. Ms Carter then stated that the Policies did not require that she contact the supervisor
 20 when negotiating the wages. Ms Carter felt she made the best decision she could based on education
 21 and experience.

22 Mr. Coates explained how he got involved, and that it was by agreement between Ms Spalding and Ms
 23 Waitner. Mr. Coates then explained the nature of his involvement and investigation. Mr. Coates stated that
 24 the meeting with Mr. Coates, Ms Spalding and Ms Waitner became adversarial in nature, and that he
 25 responded in kind. Ms Waitner made no response for her records, but did mark up the report. At this
 26 point Ms Spalding became involved.

27 Ms Spalding explained how she became involved and the reasons to have the Human Resource Director
 28 review the issue and Ms Waitner agreed. Ms Spalding then explained her findings and conclusions as
 29 stated in writing to Ms Waitner.

1 Prior to closing statements, the Judge asked some questions in the attempt to find out the process for
2 hiring and wage setting. Also to learn the date of hire for Ms Waitner, and status of wages now, and the
3 resume differences between now and then. The exact chain of command, and agreement to meet with
4 Mr. Coates. Was there any effort to compare others to Ms Waitner, other than those discussed? (None
5 was made.) "Chain of Command" issues were also addressed.

6 **CLOSING STATEMENTS**

7 Ms Waitner's closing statement referred to topics brought up during hearing. Ms Carter's "working in the
8 dark" when setting the wage for Strategic Planning Coordinator. All she stated she wanted was a
9 comparison or review of the situations of herself and the other two employees. Ms Waitner then
10 reiterated the positions in her grievance.

11 Ms Carter then restated how she developed the wages for Strategic Planning Coordinator, in
12 consultation with the "grant team" and the controller.

13 Mr. Coates then stated how it was to Ms Waitner's favor to have him be an outsider, it increased the
14 fairness as there was no prior knowledge.

15 Ms Spalding restated her belief that the matter is based on the manual and whether the wage grid
16 followed. She felt it was.

17 Mr. Guenthardt stated that all the employees were good employees. Stated regrets that it had to come to
18 this situation.

19 **REASONING**

20 The Court has reviewed the resumes and the job descriptions of the employees in question and has
21 reviewed the resumes of other positions from prior to the hiring of Ms Waitner, Ms Szpliet and Mr.
22 Shepard. The position themselves are different and each has a different set of variables. As was noted
23 the Strategic Planning Coordinator's position is a grant based position and "ends" when the grant period
24 ends. The temporary nature is routinely reflected in a 'higher' wages for the position to attract someone
25 for the limited period. The Legal Assistant position is part time and as such carries limited fringe benefits,
26 and so is often compensated higher to offset that limitation. The resumes are indeed similar in nature,
27 depending on what one looks for. Ms Waitner has more formal education than Ms Szpliet, but Ms Szpliet
28 has a "better" experience background. Mr. Shepard is comparably educated to Ms Waitner (same school
29 same degrees) but lacks related experience. Is her hire as Economic Development Associate evidence

1 of better qualifications, or a violation of policy? That can only be answered by the interviewers, and really
 2 adds nothing to this discussion. The policy places the onus of ranking applicants after interview on the
 3 "interview team", and it is assumed that they would factor in Tribal preference as well as the interview
 4 and resume. (In this area Ms Waitner has related experience for Little River Band of Ottawa Indians.
 5 Maybe that's what made her the selection.) Several employees with similar backgrounds started at less
 6 than the three in question, and the wage grid itself has been raised since some employees have started.
 7 In the end review, this case comes down to the evidence existing of discrimination in wages based on
 8 Melissa Waitner not being a member of the Little River Band of Ottawa Indians. Stated another way, it is
 9 that the salary of the Tribal Members is higher than it should be due to their being members.

10 Evidence of this discrimination, or evidence supporting the claim of discrimination was not developed
 11 beyond the basic, I should earn more than these two because I have a better resume. As shown earlier,
 12 resumes are subjective, and not conclusive of discrimination.

13 The process for hiring of these positions did indeed meet the requirements set forth in the Personnel
 14 Policy, and within the Wage Grid Guidelines. The starting salary is not set by the supervisor, and there is
 15 nothing in the Policy that requires asking a supervisor's opinion.

16 When Ms Waitner accepted the starting wage, it was not with the provision that no one start at a higher
 17 or similar rate within the wage level 3 employees. Nor is the wages of future wage grid 3 employees set
 18 by existing employees starting wages.

19 Still the Court decides based on existing evidence and there was none found or offered.

20 **FINDING**

21 For that reason I find that there is NO discrimination existant in the wages of Melissa Waitner, Daniel
 22 Shepard and Janine Szpliet and rules to dismiss the grievance as without cause.

23 So ORDERED,

24 
 25 Associate Judge

AUG 3 0 1995
 Date

ENTERED

**TRIBAL COURT OF APPEALS
OF THE
LITTLE RIVER BAND OF OTTAWA INDIANS**

In re Contempt of Martin D. Wabindato:

Case No. 99-200-02/012-A1
Contempt of Court Appeal

OPINION

Factual Background:

This matter comes before the Tribal Court of Appeals as an appeal of the Tribal Court's finding of contempt of court against Mr. Martin Wabindato. Oral argument on this appeal was conducted before the Court of Appeals on June 2, 1999.

The trial court scheduled a hearing in a tribal election dispute for April 10, 1999. Mr. Wabindato had a schedule conflict and did not appear at the hearing. The trial court judge summarily, i.e. "on the spot", found Mr. Wabindato in contempt of court for his failure to appear.

At oral argument Mr. Wabindato testified and submitted other proofs that he had committed himself to being the Head Dancer at the Western Michigan University Pow-Wow on the same date of the hearing. In fact, he had signed a contract to fulfill the responsibilities and to perform the duties of that pow-wow position several weeks earlier. He argued that he had contacted the Court Administrator to inform the Court about his conflict, but did not hear back from the Court in spite of being told that the Court would get back to him.

Opinion Reasoning:

Contempt is action or inaction which violates a court order, impedes the functioning of the court, or impairs the authority of the court. *People v Matish*, 384 Mich 568, 572 (1971); *In re Gilliland*, 284 Mich 604, 610-611 (1938). * Please note that Michigan law is cited here because it was used as a guide by the Court of Appeals in the absence of tribal law. It fully understood that the Tribe will develop its own substantive (tribal codes) and procedural (court rules) law as a matter of tribal sovereignty as tribal institutions develop.

The primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. *People v Kurz*, 35 Mich App 643, 656 (1971). A secondary purpose is to protect and enforce the rights of parties by compelling obedience to court orders. *In re Contempt of Rochlin*, 186 Mich App 639, 647 (1990); *Havery v Lewis*, 10 Mich App 709, 715-716 (1968).

The power of the courts to punish for contempt is inherent. *People v Joseph*, 384 Mich 24, 35 (1970); *In re Daugherty*, 429 Mich 81, 91, *fn* 14 (1987). The source of this power is the duty of the court to preserve its own effectiveness. *People v Kurz*, *supra*. The contempt power is not therefore dependent upon legislative provisions for either its validity or procedures. It cannot be taken away or limited by acts of the legislature. *Langdon v Wayne County Circuit Judges*, 76 Mich 358, 367 (1889).

There are different types of contempt. For our purposes here, we need only to consider ourselves with “direct” and “indirect” contempt. Direct contempt occurs “during its sitting” and in the “immediate view and presence of the court.” MCL 600.1701; MSA 27A.1701(1). Direct contempt **may** punished summarily by fine or jail time. MCL 600.1711(1); MSA 27A. 1711(1).

On the other hand, indirect contempt occurs outside the immediate view and presence of the court. Such contempt **may not** be punished summarily, but only “after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend. MCL 600.1711(2); MSA 27 A.1711(2); MCR 3.606.

Failure to appear is always indirect, i.e. committed outside the immediate view and presence of the court. This is so because the court may have direct knowledge of a party’s failure to appear, but does not without a hearing know why the party failed to appear. Therefore, the court may not act summarily but must instead schedule and conduct a show-cause hearing. *In re Contempt of McRipley, 204 Mich App 298, 300-301 (1994)*. Applying this standard to the instant situation, a separate Show Cause Hearing should have been conducted, after due notice, by the trial court upon Mr. Wabindato’s non-appearance. This requirement still holds even if Judge Bailey knew of Mr. Wabindato’s telephone request to the court through the Court Administrator that he be excused because of his schedule conflict. The proofs must become a part of the record by recording the hearing. One cannot be held in contempt of court for non-appearance without a hearing at which the non-appearing party has an opportunity to explain the non-appearance. After hearing the explanation, the Court may excuse some specific instances non-appearance in the interest of fairness and justice.

FOR ALL OF THE FOREGOING, the summary finding of contempt against Mr. Martin Wabindato is OVERRULED.

FURTHERMORE, the Court of Appeals declines to remand this matter back to the Tribal Court for a Show Cause Hearing because the Court of Appeals has considered the proofs

presented in this appeal and has unanimously decided that the non-appearance is clearly excusable. The trial court could not find otherwise. Mr. Wabindato certainly had a good justification for not being able to attend the April 10th hearing. There were other Election Board members present at the hearing. Thus, his appearance was not critical to the conduct of the hearing. In fact, the hearing proceeded in his absence. Certainly, the interests of justice would not be served by finding Mr. Wabindato in contempt.

6/16/99

DATE

Michael Petoskey

Michael Petoskey,
Court of Appeals Justice
for
the entire Court of Appeals
in this unanimous OPINION

Little River Band of Ottawa Indians Tribal Court

File NO: 99-4/5/CR S2:

Judge Ronald G. Douglas Presiding**ETHICS HEARING RESPONSE**

To: Robert Hardenburg and other Interested Parties:

A complaint was received by the Little River Band of Ottawa Indians' Tribal Court, alleging that a member of the judiciary, Honorable Daniel Bailey, had violated ethical cannons to such an extent that a request was made to consider sanctions including removal of Judge Bailey from his position or at least to have him avoid hearing any further matters involving the current Election Board.

This Court's judiciary takes all ethical complaints seriously, the Tribal judiciary convened a hearing with other tribal and appellate justices present, on July 28, 1999, to take first-hand testimony of witnesses in order to determine whether there is a basis to the complaint and what action should be taken, if any is required.

The Investigative Hearing was informal with no counsel present, and all relevant, competent information accepted.

**BASED ON THE TESTIMONY AND EVIDENCE PRESENTED, THIS COURT
MAKES THE FOLLOWING FINDINGS AND ORDER:**

There was testimony, which involved the Petition of Robert Hardenburg, et al., File Number 99-200-02/02 A2& A3, which was recently heard on appeal, reversed and remanded. Much of the testimony was interwoven with the legal issues of that case which has been sent back to the Election Board to resolve. It does not involve ethical violations.

Most testimony involved four events: (1) Mr. Bailey's appearance at a meeting on March 6, 1999; (2) a community member's funeral; (3) a planning meeting where travel to Wisconsin was discussed; and (4) a meeting to count ballots. All of these were public events. None of these were recorded.

Some hearsay was presented, but discounted as the alleged speakers and other Petitioners and witnesses were notified of their duty to testify, but failed to appear. Other material presented in the Petition was shown as in error. The testimony actually given was consistent by several witnesses present.

The parties making the complaint did not present evidence of behavior that would allow the members of the judiciary to determine that Mr. Bailey's behavior has been in violation of the Model Code of Judicial Ethics. They did show that the community political process is fraught with highly charged emotional issues, questions over motives and suspicions regarding actions taken. These were clear. Ethic violations were not clear. The complaints must be found as without a valid basis and further action is denied.

The political problems and personality conflicts were clearly proven. Mistakes in judgment were shown by all parties. A legal error by Judge Bailey was shown, but has resolved by the normal process, its appeal. The Election Committee is a volunteer board with little training or experience to guide them. It appears that they made errors in allowing community members to give continuous input into their meetings, including, judges, candidates, and Tribal Council Members. There was further error when several board members requested that Judge Bailey participate in the board's meeting rather than to obtain independent legal counsel.

The totality of the events is that the Election Board has dragged Judge Bailey into their fray and now is complaining because he participated. That error cannot be taken back or appealed. The court should not be involved in administrative hearings; it should not give specific advice or ongoing review of these meetings. A judge could be present, but should not participate in an official capacity. The Board members, apparently, were not able to get legal advice anywhere else and turned to Judge Bailey due to their inexperience and in a misguided attempt to do the right thing.

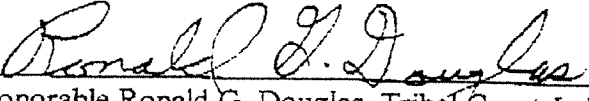
The Court finds that there is no way that the community would now view Judge Bailey as unbiased and impartial to this Election Board's proceedings at this point. His involvement has been so intertwined, rightfully or wrongfully, that both the Board and Mr. Bailey would be questioned as to their impartiality if he hears any matters regarding the initial election for Tribal Council and Tribal Ogema. This is not found as due to any ethical violations of Mr. Bailey. The Board Chairperson failed to correct matters at meetings. The Chairperson failed to take a stance objecting to Mr. Bailey's statements or to his presence. Legal counsel was not provided to the Board. Experience was not there in this first-time election and mistakes were understandable. Mr. Bailey is not found as the cause of those mistakes.

The Tribal Judiciary Orders that Mr. Bailey recuse himself from any further matters involving the initial Tribal Counsel and initial Tribal Ogema elections to prevent any further community impressions that the close involvement (or dispute) between this Board and Judge Bailey remains. The judiciary further Orders that the Election Board stop asking Mr. Bailey for advice or for his appearance at meetings to counsel the Board in any capacity.

In Summary, this panel finds that there was not sufficient proof given to conclude that there were violations of the Tribal Ethics Code or that there were any other reasons

to sanction Judge Bailey. The panel finds that another judge should be assigned to hear any cases involving the initial election. The panel further finds that the Election Board has a duty to locate legal counsel independent of the tribal court, and to keep thorough written, contemporaneous records and minutes of their meetings. This would avoid further disputes or allow clearer resolution of complaints.

Dated: August 14, 1999


Honorable Ronald G. Douglas, Tribal Court Judge,
for the Judiciary En-Banc

ENTERED