

2007 Court Opinions

Little River Band Court of Appeals-----Crampton v. Memberto Appellate Case Number: 07010AP

Summary: Does the Court of Appeals have jurisdiction over a case that was filed in an untimely manner?

Decision and Order: The Court of Appeals **found** that the Appellant filed within the 28 day calendar time-frame and therefor the Court of Appeals has subject matter jurisdiction.

Election ---Sam et al v LRBOI Election Board ---Case # 07061EB

Summary: The petitioners in this matter filed an ex-parte request for an injunction and for declaratory relief against the Election Board to require a new ballot with a restatement of all candidates who failed to qualify in the primary election held earlier.

Decision and Order: The **Court denies** the Petitioners' declaratory and injunctive relief and dismissed the matter as to all parties.

Reconsideration of Gaming Commission Decision ----Hyma-Cogswell v. Gaming Commission Case # 07084GA

Summary: Petitioner filed a request for a Declaratory Judgment claiming she was denied a hearing regarding her denial of a gaming license.

Decision and Order: The request for hearing was granted and the Court ordered the Gaming Commission to arrange a hearing.

Separation of Power ----Tribal Council v. Tribal Ogema----Case # 07085GC

Summary: This matter is presented to the Court in regard to the appointment of the Manistee Insurance Company as agent of record for the Tribe for health insurance.

Decision and Order: The naming of insurance agents of record is a function of the Ogema. Tribal Council shall refrain from initiation agreements to appoint any person or organization as an agent for the Tribe.

Separation of Power ----Tribal Council v. Tribal Ogema----Case # 07091GC

Summary: This matter is presented to the court in regard to the issue of Tribal Council passing an amendment to the 2007 budget aimed specifically at eliminating the position of Risk Manager.

2007 Court Opinions

Decision and Order: The budget amendment resolution removing the funding is void and has no effect. Tribal Council shall take no action to implement either the budget amendment or the override of the Ogema's veto of such amendment.

Election---- B. Crampton v. LRB Election Board----Case # 07093EB

Summary: The Plaintiff Crampton requests the court to rule the General Election for the Tribal Associate Judge be declared null and void and order another election. The Plaintiff was challenging the qualifications of one of the candidates running for office.

Decision and Order: The court ordered this matter dismissed with prejudice.

Employee Grievance---- Gamelin v. LRBOI----- Case # 07095GR

Summary: This matter was brought to the Employment Division of the Tribal Court by the Plaintiff as an appeal of his termination from employment.

Decision and Order: The court ordered the plaintiff to be reinstated as an employee and put in a position with equal pay and similar, if not the same, duties.

Order after Trial-----People v. N. Kelsey---Case # 07102TM

Summary: Defendant was charged with Sexual Assault 19.02c and Harassment 8.06. A bench trial was held in the matter.

Decision and Order: The court finds Defendant "guilty" of 19.02c and dismisses 8.06. The defendant appealed the ruling and the following order(s) are from the court of appeals on this case.

Court of Appeals---People v. N. Kelsey ----- Case # 08036AP 07102TM

Summary: The Court of Appeals conducted a motion hearing on two motions filed by the Appellant-Defendant, Mr. Kelsey. One for a motion for peremptory reversal of the conviction because he states the court lacks jurisdiction over the matter and another for reconsideration and the disqualification of Judge Bailey.

Decision and Order: Motion for the peremptory reversal is denied. Motion for remand is granted, but the motion to disqualify Judge Bailey is denied.

Order after Remand -----People v. N. Kelsey---Case # 07102TM

Summary: This matter was remanded back to Tribal Court for determination on the threshold of jurisdiction over the defendant.

Decision and Order: The Defendant's Motion to Dismiss for lack of subject matter jurisdiction is denied.

Court of Appeals-----People v. N. Kelsey-- - Case # 08036AP (07102TM)

Summary: Appellant-Defendant appealed his conviction of sexual assault. Appellant argues that the Tribal Court did not have criminal jurisdiction over him because the alleged crime occurred on fee land outside of the historical reservation.

Decision and Order: The Court of Appeals affirms the trial court decision in its entirety finding that the Tribe has criminal jurisdiction in this present matter.

(The newly elected Court of Appeals Justices and Special Associate Justice Ronald Douglas heard the Appellants Request for Stay Pending Habeas Review. That request was denied by the new justices.)

Tribal Council & Gaming Commission v. Ogema ---Case # 07103GC

Summary: The controversy arose following the issuance of an Executive Order which vested the authority in the Tribal Ogema to forgive criminal offenses committed by individuals in any jurisdiction "for purposes of Tribal self-governance and gaming licenses."

Decision and Order: The Constitution does not give the Ogema the power to pardon or issue orders of forgiveness.

Commercial Fishing---Israel Stone v. LRBOI Tribal Council---Case # 07125GC

Summary: The Plaintiff in this matter asked that the Court issue a "... Temporary Restraining Order against Tribal Council in taking any further action dealing with commercial fishing related activities..."

Decision and Order: The motion was denied but the Court found some "very urgent issues" after the hearing. It was order that an audit of the Commercial Fishing Program be done.

Final Order of the Court: “The Tribal Council is authorized to craft a legislative or procedural remedy to any practices determined to be inconsistent with any laws, regulations or rules governing the Commercial Fishing Program”.

LRBOI v Robert Hardenburgh --- #07135TM

Summary: This matter alleging that the Defendant engaged in the crimes of Count I Sexual Assault and Count II Harassment. The standard of proof on both counts is beyond a reasonable doubt.

Decision and Order: Considering the totality of the circumstances and incidents, reasonable doubt exists. The Court hereby finds the Defendant, not guilty on both counts.

Chapman v LRBOI & LRBOI Tribal Council --- #07164CC

Summary: Petitioner seeks to have a decision made on her motion as to whether the Tribal Court failed to carry out duties under the Tribal Constitution, when it voted not to approve the Tribal Judiciary’s unanimous recommendation to remove Appellate Justice from Office.

Decision and Order: Plaintiff’s action is dismissed. The issue of removal of tribal judges by the Tribal council is a political question in which the tribal Constitution accords finality to the Tribal council’s decisions in these matters. Further, the plaintiff in this action does not have a standing as a non-party to challenge the decision of the Tribal council in the context of the removal of a specific tribal judge.

07164CC Order appealed: Court of Appeals---Chapman v LRBOI & LRBOI Tribal Council---Case #08034AP

Chief Justice M. Pope, Justice J. Sam, Justice A. Guenthardt

Summary: First Issue on Appeal is whether Appellant has standing under the LRBOI Constitution to bring this action. Second issue that the Constitution mandates the removal hearings be “public” and does not permit the Tribal Council hold any portion in closed session

Decision and Order: The Opinion of the Appellate Court reverses the decision of the Tribal Court, finding that the Appellant has standing under the tribal Constitution to bring action. The Court orders that tribal Council conducts a public vote on whether Justice Champagne’s conviction is grounds for removal.

Hyma-Cogswell v Gaming Commission --- #07183GA

Summary: The petitioner requested declaratory relief in regards to the gaming Commission denial of Petitioners due process. Respondent's motion to dismiss due to Petitioner's filing an appeal with the Tribal Court after the entry of the order in which to file her appeal.

Decision and Order: Respondent's motion to Dismiss is granted.

Detz v Romanelli, LRBOI --- #07223GR

Summary: A request on appeal of an employee grievance matter was heard. The Petitioner asked the Court to rule on the validity of 3 Performance Improvement Plans.

Decision and Order: It was the Judgment of the Courts that the third Performance Improvement Plan shall be removed from the Petitioner file. The other two shall remain.

TRIBAL COURT OF APPEALS
LITTLE RIVER BAND OF OTTAWA INDIANS

BERNADENE CRAMPTON,
Pro Se Litigant,
Plaintiff-Appellant,

Case No. 07-010-AP

v.

LITTLE RIVER BAND OF OTTAWA
INDIANS and WILLIAM MEMBERTO,
Defendants-Appellees.

Appearances: Bernadene Crampton the Plaintiff-Appellant, and
Daniel Green for the Defendants-Appellees.

Before: Michael Petoskey, Chief Justice; Ryan L. Champagne, Appellate
Justice; and Ms. Julia Chapman, Tribal Elder, sitting by
designation.

By: Ryan L. Champagne, Appellate Justice, for a Majority Court.

I. Introduction

This matter comes before the Tribal Court of Appeals on an appeal of a decision of the Employment Division of Tribal Court. The Court rose on its own motion during the initial scheduling conferences in order to determine if the Court of Appeals has subject matter jurisdiction in the case in point. The Court asked both parties to submit a motion on whether the Court of Appeals has jurisdiction over a case that was filed in a possible untimely matter. Both parties raised arguments to support either the court has jurisdiction or the court does not have jurisdiction.

II. Factual Background

1. The Appellant received the lower court's opinion on January 2nd, 2007.
2. The Appellant filed an appeal on the January 12th, 2007.
3. Employment Manual Chapter VIII Grievance Procedure 8.3(a)(b) states every step in the grievance procedure allows 10 working days.
4. Employment Division of the Tribal Court Code Article IV Sec. 5.13 states "An employment division decision may be appealed to the Appellate Court if notice of appeal is filed within 7 calendar days of the issuance of the hearing decision".
5. Court Rules for Appellate Procedure Section 5.301(a) states "Civil Cases. An appeal to the Tribal Court of Appeals in civil cases must be filed no later than twenty-eight calendar days after the entry of the written Tribal Court judgment, order or decree".
6. Court Rules for Appellate Procedure Section 5.301(d) states "Untimely Appeals. Subject to the exception contained in (e) below, failure to file an appeal within the time period provided in this rule deprives the Tribal Court of Appeals of subject matter jurisdiction to hear the appeal. Late appeals shall be dismissed by the Tribal Court of Appeals unless leave for late filing has been granted".
7. Court Rules for Appellate Procedure Section 5.301(e) states "Grounds for Granting Late Appeal. The Tribal Court of Appeals may, in its discretion, grant leave for a late filing of appeal from any judgment, order, decree, upon a showing by the Appellant, supported by affidavit, that there is merit in the reasons for appeal and that the late filing was not due to the Appellant's or the Appellant's attorney/advocate's negligence".
8. Little River Band of Ottawa Indians Constitution *Powers of the Tribal Court* Section 8(a)8 states "Establish, by general rules, the practice and procedures for all courts of the Little River Band".
9. Little River Band of Ottawa Indians Constitution *Judicial Independence* Section 9 states "The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of the government shall exercise powers properly belonging to the judicial branch of government..."

III. Legal Analysis

Issue: *Does the Tribal Court of Appeals have subject matter jurisdiction over a possible untimely appeal?*

According to the Appellee, Appellant filed an untimely appeal according to the Employment Division of the Tribal Court Code Article IV Sec. 5.13 states "An employment division decision may be appealed to the Appellate Court if notice of appeal is filed within 7 calendar days of the issuance of the hearing decision".

According to the Appellant, Appellant filed an timely appeal according to Employment Manual Chapter VIII Grievance Procedure 8.3(a)(b) states every step in the grievance procedure allows 10 working days. Each party raised arguments that support the idea that the legislative and executive branched has the legal ability to set forth a time frame on appeals that are heard by the Tribal Court of Appeals. The Constitution of the Little River Band of Ottawa Indians clearly has three separate but equal powers of government; Judicial, Legislative, and Executive. The proud citizens of this Band have voted to adopt this Constitution that clearly has the intention that no branch may infringe on a power that the Constitution clearly states belongs to another branch of government. This idea of distinct and separate branches is what allows for the system of government to effectively operate. The inherent right that not one branch has more power than

the other two is incorporated throughout the Constitution of the Little River Band of Ottawa Indians. This allows for not one branch of government the ability to take control and that there is a proper system of checks and balances that takes place. If this Court were to erroneously allow for the legislative and executive branches of government to clearly infringe upon the Judicial Branch, we would be going against the very foundation that our Constitution has set forth by the citizens of the Little River Band of Ottawa Indians. According to Little River Band of Ottawa Indians Constitution *Judicial Independence* Section 9 states "The Tribal Judiciary shall be independent from the legislative and executive functions of the tribal government and no person exercising powers of the legislative or executive functions of the government shall exercise powers properly belonging to the judicial branch of government...". The Court clearly has the inherent and constitutional right to be free from infringement by the executive or legislative branch. According to the Little River Band of Ottawa Indians Constitution *Powers of the Tribal Court* Section 8(a)8 states "Establish, by general rules, the practice and procedures for all courts of the Little River Band". The power to establish procedures for the court, which include time frames, is a constitutional power of the Court. According to the Court Rules for Appellate Procedure Section 5.301(a) *Civil Cases* states "An appeal to the Tribal Court of Appeals in civil cases must be filed no later than twenty-eight calendar days after the entry of the written Tribal Court judgment, order or decree". The Court has established a clear timeframe for civil case to be heard by the Tribal Court of Appeals, which is 28 days. According to Court Rules for Appellate

Procedure Section 5.301(d) *Untimely Appeals* states “Subject to the exception contained in (e) below, failure to file an appeal within the time period provided in this rule deprives the Tribal Court of Appeals of subject matter jurisdiction to hear the appeal. Late appeals shall be dismissed by the Tribal Court of Appeals unless leave for late filing has been granted”, and according to Court Rules for Appellate Procedure Section 5.301(e) *Grounds for Granting Late Appeal* states “The Tribal Court of Appeals may, in its discretion, grant leave for a late filing of appeal from any judgment, order, decree, upon a showing by the Appellant, supported by affidavit, that there is merit in the reasons for appeal and that the late filing was not due to the Appellant’s or the Appellant’s attorney/advocate’s negligence”. The Court has clearly established the proper procedure for untimely appeals and how to handle untimely appeals.

IV. Chief Justice Petoskey, dissenting:

The sole issue before the Court is whether the Tribal Court of Appeals has authority, i.e. jurisdiction, when the Grievant-Appellant, admittedly, has filed her appeal after the statutory deadline has passed.

Ms. Crampton asks this Court to “[p]lease consider this case” despite her filing acknowledgment that it was filed one day after the statutory deadline had passed. She states that she “...was under the wrong assumption that there was a ten (10) [day] time frame as is the case in many other Tribal Ordinances.”

On the other hand, counsel for the Respondents-Appellees argues that the Tribal Court of Appeals has no authority to hear Ms. Crampton's appeal because it was filed late.

This Court must always consider its jurisdiction as a threshold issue for express determination at the commencement of every action. Fundamentally, it is a query about the authority of the Court. Rule of law, separation of powers and judicial efficiency are all promoted by the Court having its "eye on the ball". Failure to do so results in governmental confusion and dysfunction.

The legislative body of the Little River Band of Ottawa Indians, the Tribal Council, enacted the *Employment Division of Tribal Court Code*, Ordinance # 05-300-04, on June 27, 2005. Its stated purpose is "[t]o create a consolidated body of judicial review ... and ultimately the necessary expertise in Tribal employment law." Among its provisions are the hearing procedures for employee grievances. Section 5.13 provides that decisions of the Employment Division "*may be appealed to the Appellate Court if the notice of appeal is filed within 7 calendar days of issuance of the hearing decision.*"

It is clear that the intent of the Tribal Council in their adoption of this law was to create a system of employment justice that has employment law expertise, that is informal for employees who are not represented by counsel, that reflects the cultural aspects of the Tribe, and that has expeditious resolution for the parties. These are all laudable goals.

It is strangely ironic that Ms. Crampton asks this Court to ignore the deadline imposed by written Tribal law when her complaint against Appellees is that they did not follow the Tribe's written policies and procedures. Thus, she is asking this Court to do exactly what she alleges and complains that Appellees did. In addition, the untimely prayer for relief is made as though this Court has the discretion to ignore the deadline and make an exception for her. However, since Tribal law limits the authority of this Court in these matters when the aggrieved does not file an appeal within seven (7) calendar days, it is clear that this Court does not have any such discretion.

The Majority is rightly concerned about which branch of government has authority to prescribe the filing time frame that is at issue in this present matter. It is obvious that the Tribal Constitution, as the supreme law of the Tribe, is the starting point for any such analysis. The Majority correctly observes that the Tribal Constitution is the embodiment of the people's will in regard to the design, structure and operation of their government. In fact, it is the delegation of the collective tribal member authority to tribal officials who act on their behalf. Whatever power and authority government has comes from the people as prescribed by the Constitution.

The governmental design adopted by the people of the Little River Band of Ottawa Indians is about three (3) separate branches of government that have radically different **functions**. In a nutshell, the legislative branch **makes** the laws, the executive branch **implements** those laws and the judicial branch **interprets**

the laws. The focus of the Majority on co-equal branches of government is misguided, although it is correct in its observation that the design is one of checks and balances. Checks and balances are very important to ensure democratic government because it means that power, rather than being concentrated in a single individual or office, is distributed among the three separate branches. Co-equal branches is a misnomer because the distribution is not about equal powers, but about the distribution of governmental powers according to **function**. Maybe, the misnomer is of common usage because all three branches derive their powers from the same source, *i.e.* the people of the Little River Band. Thus, their legitimacy is equal.

There is a hierarchy or ranking of laws. They are not all of the same rank. The Tribal Constitution, again, is the supreme law of the law. It is the organic governing document of the Tribe and there is no higher Tribal Law. Next, are the legislative enactments of the Tribal Council as they carry out their governmental responsibilities to **make** the law. Lastly, are Court Rules which provide for practice and procedure before the courts of the Tribe **as they interpret the law**. This generally understood hierarchy is, in fact, what is prescribed by the people of the Little River Band. Specifically and expressly, the Tribal Constitution, Article VI, Section 8, *Powers of the Tribal Court* provides that "[t]he judicial powers of the Little River Band shall extend to all cases and matters in law and equity **arising under this Constitution, **the laws and ordinances...**" (Bold and underline added for emphasis). Under means under. **The laws and ordinances are a condition****

necessary for the jurisdictional power of the Tribal courts to be triggered.

The Tribal Constitution **then** goes on to further enumerate the powers of the Tribal courts, including the power to “[e]stablish, by **general** rules, the **practice and procedure** for all courts of the Little River Band.” (Bold for emphasis.) See *The Constitution of the Little River Band of Ottawa Indians*, Article VI, Section 8 (a)(8).

It is this provision of the Tribal Constitution that the Majority jumps on to assert that the Tribal courts have the sole authority to establish the appeal filing period at issue here. However, the provision cannot be read in isolation, ignoring other provisions that provide context and “the whole”. Furthermore, general rules are always trumped by specific rules or law. Here the general rules of the court are trumped both by a specific time frame and a law higher in the legal hierarchy.


Lastly, the subject matter of the issue present here is not practice or procedure before the courts. It is the very definition of a right, *i.e.* the right to appeal. All of this leads to the inevitable conclusion that there has been no infringement on the judicial power of the Tribal courts by the Tribal Council enactment present here.

V. Conclusion

WHEREFORE, FOR ALL OF THE FOREGOING, this Court determines, in accordance with the Constitution of the Little River Band of Ottawa Indians, that **any** legislative or executive action upon the Judiciary’s right to “Establish, by general rules, the practice and procedures for all courts of the Little River Band” is

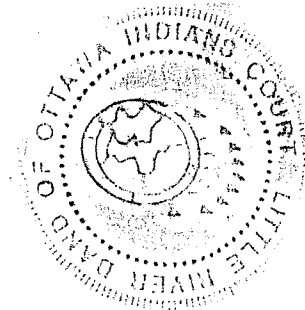
an infringement upon the Powers of the Tribal Court. This infringement upon the Tribal Court is a clear violation of Judicial Independence as set forth in this Band's Constitution. Separation of Powers is the core foundation which allows for this democratic government. Any branch infringing upon another is jeopardizing this foundation. This Court finds that the Judiciary has clearly set forth a time frame in which appeals can be heard in Tribal Court of Appeals and that time frame is 28 calendar days. It is found that the Appellant has filed within that 28 calendar day time frame, therefore the Tribal Court of Appeals has subject matter jurisdiction.

IT IS ORDERED, this 27th day in June in the year 2007 by a Majority Court.



RYAN L. CHAMPAGNE

APPELLATE JUSTICE



LITTLE RIVER BAND OF OTTAWA INDIANS

TRIBAL COURT

Janine M. Sam, Pamela Madahko,
Joan Spalding, Mary Dower
Plaintiffs

Case No: 07061EB

Civil Complaint

Little River Band of Ottawa Election Board
Berni Carlson, Peggy Vriesman,
Alesia Codon Terri Fisk
Sandy Mezeske,
Defendants

Petitioners In Pro-per

Barry L. Levine, Attorney at Law
P.O. Box 935
Traverse City, MI 49685
Attorney for Election Board

ORDER DENYING PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Whereas the Petitioners have filed an Ex-Parte request for an injunction and for declaratory relief against the Election Board to require a new ballot with a restatement of all candidates who failed to qualify in the primary election held earlier, which was denied and the matter set for a hearing upon notice to all parties and a hearing being held at 10:00 a.m. on April 16, 2007, with testimony given by both parties; the Petition is denied and dismissed based upon the following findings made from that hearing:

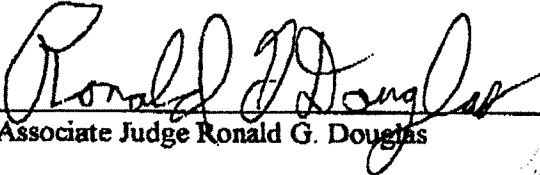
1. This court has jurisdiction over this matter under the Tribal Constitution and under the precedence in Little River Band of Ottawa Indians Election Board v. Beccaria, Case No. 05094-AP, and Lucas, Moore, Austin, and Hoover v. Little River Band of Ottawa Indians Election Board, Case No. 05-198-AP.
2. Those cases require this court to give strong presumptions of validity of continuing an election as scheduled by the Election Board as the voters granted this power in amending the Tribal Constitution to create an independent, elected board.
3. The Petition alleges an unconstitutional action in that the Constitution and the Tribal Election Ordinance does not specifically refer to a power to hold primary elections except for Ogema votes. However, there was no evidence presented to set aside the defense of it being an allowable administrative tool when there were excessive numbers of candidates as there is no specific prohibition of primaries stated in the normal elections.
4. The Election Board accepted an Administrative Officer's decision under its procedures approving its procedures for the election and decided to proceed with the scheduled General Election later this month. There was no evidence that this decision was biased or against the evidence presented so that this court should not rely on its proper acceptance.

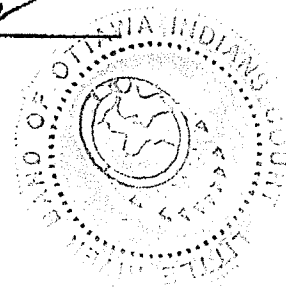
5. The injunctive relief sought was not shown by any evidence presented to be likely to prevent irreparable harm; and the Petitioners' delay was shown to cause great expense and delay of the scheduled election that could have been avoided since the testimony showed that there was an awareness of the plan for a "possible" primary election prior to the primary election.
6. Although the testimony showed that there may have been some questionable administrative decisions made by the Election Board, nothing showed an error that clearly violated the Constitution or the tribal Election Ordinance, or that would have been a violation of the Petitioners' rights or a reason to set aside the Administrative Hearing Officer's decision denying the petition to set aside the Primary Election.

THEREFORE IT IS ORDERED:

- A. The Petition for Declaratory and Injunctive Relief is denied and the matter is dismissed as to all parties.
- B. The Election Board's acceptance of the Administrative Officer's Hearing decision is affirmed as proper and binding on the Board to allow the General Election to continue as scheduled.

Dated: April 17, 2007


Associate Judge Ronald G. Douglas



CERTIFICATION OF SERVICE

I certify that a copy of this hearing notice was placed in the US mail system with sufficient postage attached and mailed to the parties or their attorneys at the addresses on file with the Court.


Deborah A. Miller - Clerk

4.18.07
Date

LITTLE RIVER BAND OF OTTAWA INDIANS

TRIBAL COURT

Brenda Hyma-Cogswell,
Petitioner,

Case No. 07-084 GA
Hon. Angela Sherigan

v.

Gaming Commission,
Respondent.

Brenda Hyma-Cogswell
Pro-Se
297 ½ Fourth Street
Manistee, MI 49660

Kimberly McGrath
Attorney for Gaming Commission
375 River Street
Manistee, MI 49660
231-398-6821

OPINION AND ORDER

Petitioner filed a somewhat in-artfully worded Petition for Declaratory Judgment with this court claiming she was denied a Hearing Upon Denial of License in violation of Gaming Ordinance #02-400-01. Petitioner asks this court to order the Gaming Commission to schedule and hold a (reconsideration) hearing in accordance with the Gaming Ordinance.

The Gaming Ordinance, #02-400-01, Article XII. Denials/Suspension/Revocation of License; Right to Appeal, Section 12.02 states as follows:

12.02 Hearing upon Denial of License. Any applicant who is affected by an adverse action by the regulatory agency in connection with denial of a license applied for under this ordinance may request a hearing before the regulatory agency by written request submitted within 30 days following notice of the action by the regulatory agency. Within 14 days following receipt of a notice requesting a hearing, the regulatory agency shall afford the applicant an opportunity to appear and be heard before the regulatory agency, in person . . . and to submit such evidence from the applicant or licensee, the Tribe, regulatory agency or any person or entity that the regulatory agency deems relevant to the matter. The regulatory agency shall either affirm or reconsider its decision to deny the license within seven days following hearing.

A hearing was scheduled in this matter for June 28, 2007, in which the Court heard oral arguments.

BACKGROUND:

On January 23, 2007, Petitioner applied for a gaming license at the offices of the Gaming Commission.

On March 23, 2007, Petitioner received notice that the Gaming Commission intended to deny her gaming license unless she could show cause as to why the license should not be denied, and set a show cause hearing for March 27, 2007 at 4:00 p.m.

Petitioner failed to appear at the hearing.

The hearing was held without Petitioner being present and the Gaming Commission made a determination to deny the license. On March 30, 2007, the Gaming Commission sent Petitioner a letter notifying Petitioner of the determination to deny her a gaming license and informed Petitioner that she could appeal the Gaming Commission's determination to the Tribal Court pursuant to Section 12.05 of the Gaming Ordinance.

On April 18th, 2007, Petitioner filed a written request for a rehearing or secondary hearing.

On April 27, 2007 the Gaming Commission sent a letter to Ms. Hyma-Cogswell stating that it would not schedule another hearing as it deemed the matter closed. The Gaming Commission's April 27th letter to Ms. Hyma-Cogswell also notified her that she could appeal to the Tribal Court pursuant to Section 12.05 of the Tribal Gaming Ordinance.

On May 17, 2007 Petitioner filed her Petition for Declaratory Judgment.

FINDINGS:

Respondent at the onset, challenged the jurisdiction of this Court to hear this matter, arguing that "1) Petitioner was in effect, appealing the final decision to deny her gaming license, arguing that the March 14, 2007 letter from the Gaming Commission to Ms. Hyma-Cogswell was the adverse action, and that the hearing was held on March 27, 2007, in which Petitioner failed to appear, and as such that the time for filing an appeal has run, and 2) that this Court has no jurisdiction to order the Gaming Commission to hold a hearing."

Petitioner is correct in her assertion that this is not an appeal of a final decision, as this case has not reached that point yet because of the denial of a hearing, and that the adverse action was the denial on March 27, 2007.

Section 12.02 of the Gaming Ordinance states: "[A]ny applicant who is affected by *an adverse action* by the regulatory agency in connection with denial of a license applied for under this ordinance may request a hearing before the regulatory agency by written request submitted within 30 days following notice of the action by the regulatory agency." (Emphasis added).

The adverse action in this case, and as contemplated in Section 12.02, is the actual denial of the gaming license, which did not occur until the March 27, 2007 hearing, not the March 14, 2007 letter from the Gaming Commission notifying Ms. Hyma-Cogswell of its intent to deny the license.

As to Respondents second challenge that this Court has no jurisdiction to order the Gaming Commission to hold a hearing is without merit.

Respondent next argues that a hearing was held, the March 27, 2007 show cause hearing, and therefore it has met the requirements of either 12.02 or 12.05.

Section 12.05 Appeal to the Tribal Court. States that a finding or licensing decision of the regulatory agency may be appealed to the Tribal Court.

Section 12.05 does not apply to this case at this point.

Respondent, by it's own testimony, testified that the normal procedure is that a decision is made and if the license is denied, the applicant is notified of the denial notify her or him of their right to a hearing. This initial decision is made by the staff. If a request is made for a hearing by the applicant, a hearing is held, and the final decision is made by the Gaming Commission. This procedure as testified to by Chairperson Joan Spalding is the correct procedure as required by the Gaming Ordinance. Chairperson Spalding confirmed in her testimony that the "normal" procedure was not followed in this case.


Section 12.02 states that it is the applicant who requests the hearing after she has been subject to an adverse action by the Gaming Commission. In this case, the hearing was scheduled by Gaming Commission staff before the Gaming Commission (or its staff) denied Ms. Hyma-Cogswell her gaming license.

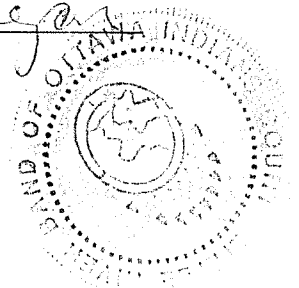
It has not gone unnoticed by the Court that Petitioner did not attend the hearing because she "mixed up the days".

While the Court appreciates the argument by Respondent that this Petition is merely an attempt to backdoor the process by the Petitioner, it is bound by the letter of the law. The law states that before a hearing can be held, there must be an adverse action, which is the denial of a gaming license. In this case the adverse decision did not occur until March 27, 2007, thus the Petitioner's written request for a hearing on April 18, 2007, is timely.

THEREFORE, IT IS HEREBY ORDERED that Petitioner be granted a hearing before the Gaming Commission.

Dated: July 11, 2007


Hon. Angela Sherigan



Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

Tribal Council
Plaintiff
V.

Case No. 07-085-GC

Tribal Ogema
Defendant

Mary Witkop
Legislative Council
375 River Street
Manistee MI 49660

Daniel Green
Council for the Ogema
375 River Street
Manistee MI 49660

The Council's case rests upon its assertion its appointment of Manistee Insurance as agent of record for the Tribe was not a contract. The Ogema asserts such an appointment falls within his constitutional authority as Tribal executive (Art. V, Section 5 (a)) who consults, negotiates, and executes agreements and contracts on behalf of the Tribe (Section 5(a),(3)).

The Court agrees with the Ogema that such an appointment was not within the authority of Council, and that the appointment was and is a contract, for the following reasons:

1. Council made a commitment to Manistee Insurance to name it agent of record for the Tribe. This commitment was fulfilled when Council notified Blue Cross/Blue Shield of its intent by sending a copy of the appointment resolution.
2. It is presumed that such an action was not completed without discussion between the parties at some level.
3. Manistee Insurance could anticipate receiving large commissions because of its appointment as agent of record.
4. Appointment of an agent to work on behalf of the Tribe, particularly in an area such as insurance coverage for all Tribal employees, is an executive function, not part of the legislative authority of Council.

Although the Ogema eventually approved the appointment of Manistee Insurance as agent of record for health care insurance, he did not agree to follow the appointment made in resolution 07-0418-188, naming Manistee Insurance as

Tribal Council
Plaintiff
V.

Case No. 07-085-GC

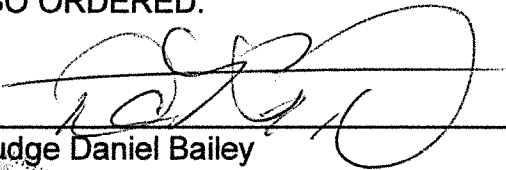
Tribal Ogema
Defendant

insurance representative for other employee insurance benefits. In his letter to the Council dated April 24, 2007, the Ogema explained his reasons for refusing to honor that appointment. In summary, the Ogema asserts such an appointment is a contract, the constitution gives the tribal executive authority to initiate such contracts, and that Council has only authority to authorize and ratify such contracts negotiated on behalf of the Tribe by the Ogema (Art IV, Section (b)). Again, the Court agrees with the Ogema .

Accordingly, IT IS ORDERED

1. The naming of insurance agents of record or insurance representatives is a function of the Ogema, as chief executive officer of the Tribe.
2. Council shall refrain from initiating agreements to appoint any person or organization as an agent for the Tribe, in whatever capacity.
3. Appointments made to date by the Ogema shall remain in effect.
4. All motions for injunctions or restraining orders or default are denied.

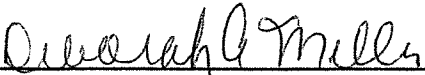
SO ORDERED:



Judge Daniel Bailey

7/31/07
Date

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.



Deborah A. Miller - Court Administrator

7.31.07
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

Tribal Ogema
Plaintiff

v.

Case No. 07091GC

Tribal Council
Defendant

Daniel Green
Attorney for Ogema
375 River Street
Manistee MI 49660

Mary Witkop (Kimberly McGrath)
Legislative Council
375 River Street
Manistee MI 49660

A Complaint was filed in the court by the office of the Ogema, on May 18, 2007, precipitated in large part by the Council's passing an amendment to the 2007 Tribal budget aimed specifically at eliminating the position of Risk Manager. The amendment resolution specifically mentions that Council seeks to eliminate the position because the Officer, Robert Keck, was making statements of which the Council did not approve. The Ogema vetoed the amendment resolution, and Council voted to override the veto. This action then ensued.

The Ogema's complaint requests five areas of relief based upon numerous allegations. Since no sworn evidence has been presented to the Court, this decision and order is based solely upon the pleadings and exhibits submitted to support those pleadings.

Hearing on the combined cases 07-085- GC and 07-091- GC was held July 9, 2007. It was and continues to be the impression of the Court the parties considered that hearing as argument on Motions for summary disposition, and that both parties seek a prompt resolution of the questions presented. Since the Court believes this to be a wise path, rather than dragging the matter into a contentious period of discovery and trial, it makes the following decision in this specific matter.

Tribal Ogema
Plaintiff

v.

Case No. 07091GC

Tribal Council
Defendant

The court finds in favor of the Ogema, for the following reasons:

1. This matter deals with a personnel issue which, by constitution, is within the executive authority of the Ogema. Art. V, Section 5 (a) (2) and (8) give the Ogema authority to "oversee the administration and management of Tribal government..." and to "manage the economic affairs, enterprises, property...and other interests of the Tribe..." The authority to hire and fire the personnel charged with performing these duties is part of the executive function.
2. The Constitution certainly gives Council a partnership position in formulating and passing a budget for tribal operations and enterprises. However, in this case, Council has overstepped its authority by targeting an individual and using the budget amendment process to fire that individual. The fact that Council passed the amendment resolution and then voted to override the Ogema's veto in closed sessions further supports the Ogema's contention the action of the Council was unconstitutional. Art V, Section 6 (d) of the Constitution specifically states that all votes of the Council shall be made at open meetings, except for personnel matters, business matters involving confidential matters, and claims by or against the Tribe.

The combined cases raise several other factual issues which the Court believes are important, but which are not dealt with in the pleadings and exhibits. Primarily those issues involve the timeliness of the Ogema's response to Council's resolution appointing Manistee Insurance as agent of record for health care coverage; and the timeliness of Council's attempt to amend the budget. As to the first, it is the opinion of the Court that a prompt and timely response by the Ogema to Council's appointment resolution might have provided an opportunity to resolve differences of opinion on an important issue. As to the second matter, it seems to the Court the Council should exercise self-constraint as to when the budget may be amended. In other words, how long after the budget is passed should it be subject to amendment. Perhaps the standard should be a "reasonable time." However, since these issues have not been addressed in the litigation, this paragraph must be considered dicta and has no bearing on the final outcome.

Tribal Ogema
Plaintiff

v.

Case No. 07091GC

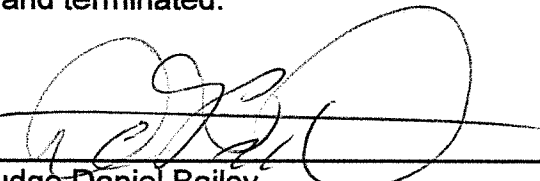
Tribal Council
Defendant

Since there was no sworn testimony or exhibits submitted to support the Ogema's allegation of conflict of interest on the part of any Council member who voted on the amendment resolution and override vote, the Court has not factored those allegations into its decision.

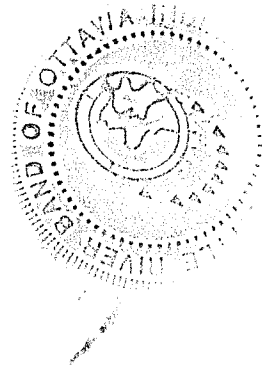
Accordingly, IT IS ORDERED:

1. The Budget Amendment resolution #07-0418-193 removing funding for the position of Risk Manager is void and has no effect.
2. Council shall take no action to implement either the Budget Amendment or the override of the Ogema's veto of such Amendment;
3. All preliminary injunctions or temporary restraining orders approved prior to this decision are removed and terminated.

7/31/07
Date



Judge Daniel Bailey



CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.



Deborah A. Miller – Court Administrator

7.31.07
Date

**Little River Band Tribal Court
3031 Domres Road
Manistee, MI 49660
231-398-3406**

Bernadene Crampton,
In Pro Per,

v

Case Number: 07093EB

Little River Band of Ottawa Indians Election Board, Defendant

Bernadene Crampton, In Pro Per
PO Box 131
Manistee, MI 49660
231-398-0756

Barry L. Levine (P29704)
Barry L. Levine & Associates, PLC
Attorney for Little River Band Election Board
PO Box 935
Traverse City, MI 49685
231-947-5297
231-929-5297 (fax)

ORDER OF DISMISSAL

On July 17, 2007, this matter came on for hearing on the Defendant, Little River Band Election Board's Motion to Dismiss based upon failure to state a claim upon which relief can be granted. The Plaintiff, Bernadene Crampton appearing in Pro Per, and the Defendant Little River Band Election Board appearing through their counsel, Barry L. Levine. The Court having heard the arguments of both parties and the Court being otherwise fully apprised of the premises.

FINDINGS OF FACT

1. The Plaintiff's Complaint requests that "2007 General Election for Tribal Associate Judge should be declared null and void and another Election should take place to correct this miscarriage of Election."
2. The Plaintiff's Complaint was formally filed with this Court on May 23, 2007.
3. The Election Board issued a decision on Plaintiff Bernadene Crampton's Challenge to the Associate Tribal Court Judge Election results, May 7, 2007 confirming the results of the April 27, 2007 General Election, in which Angela Sherigan was elected to the position of Associate Tribal Court Judge since the challenge submitted by Bernadene Crampton did not challenge the qualifications of Angela Sherigan but rather the qualifications of another candidate for office.
4. Plaintiff, Bernadene Crampton received Notice of the Election Board's Decision on May 11, 2007.
5. Angela Sherigan was sworn in to the position of Associate Tribal Court Judge on May 16, 2007, after notice of the swearing-in date to the electors.
6. Although Complainant Bernadene Crampton apparently emailed the Tribal Court on May 15, 2007, no formal complaint was filed in Tribal Court until May 23, 2007, after Angela Sherigan was sworn in.

CONCLUSIONS OF LAW

Plaintiff's Complaint is dismissed based upon the following:

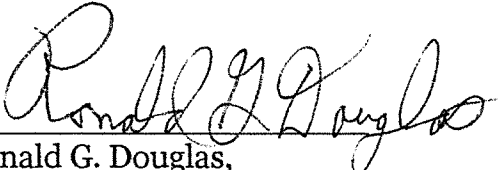
1. Angela Sherigan, having been sworn into office as a Tribal Judge can only be removed from office based upon Article VI, Section 6 (b) of the Tribal Constitution.
2. Removal can only be effectuated based upon the grounds stated in Article VI, Section 6 (b) upon a vote of 7 out of 9 members of the Tribal Council following a recommendation of removal by a majority by remaining tribal judges.
3. The Plaintiff admits that none of the grounds for removal stated in Article VI, Section 6 (b) 1-4 exists as to Associate Tribal Court Judge, Angela Sherigan.
4. Even if Ms. Crampton's Complaint alleged such grounds, this Court is deprived of jurisdiction to hear such a matter since the Constitution vests such authority with the Tribal Council.

For the reasons stated above, Plaintiff, Bernadene Crampton has failed to state a claim upon which relief can be granted and the **Defendant's Motion to Dismiss be and is hereby granted**, and this matter is dismissed with prejudice.

IT IS SO ORDERED.

Date:

7-23-07


Ronald G. Douglas,
Visiting Judge by Appointment

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

Herman Gamelin,
Plaintiff

v.

Case Number: 07095GR
Honorable Daniel Bailey

Dawn Smith, Assistant Tribal Manager
Larry Romanelli, Ogema
Sharron Detz, Human Resource Director
Little River Band of Ottawa Indians,
Defendants

Michelle J. Ambrozaitis
Attorney for Plaintiff
P.O. Box 179
Harrison, MI 48625

Daniel Green
Attorney for Defendants
375 River Street
Manistee, MI 49660

ORDER AFTER EMPLOYEE TERMINATION HEARING

This action is brought before the Tribal Court by the plaintiff as a formal appeal of his termination from employment based on the *Government Operations Personnel Manual*, "An employee who has received a final decision in regards to a grievance regarding a suspension, demotion or termination may appeal the decision to the Tribal Court in accordance with the Government Employee Relations Act of 2005."

Background:

Plaintiff, Herman Gamelin, was employed by the Tribe in March 2005 to work for the Housing Department in a maintenance capacity. Plaintiff was put on administrative leave on April 11, 2007 and terminated on April 25, 2007. The reason(s) given for his termination were "Violations of Employee Personnel Manual."

From all indications, prior to the investigation into allegations that "He verbally and physically confronted one of our tenants, who also happens to be an employee here..." and he "used profanity..." there were no prior disciplinary warnings. [Letter # 5, provided to the court by defendants.]

During the time period of the administrative leave, there was an investigation into the conditions of the rental properties plaintiff was responsible for. The defendant(s) found that complaints and pictures of sub-standard work were enough to consider the complaints against the plaintiff as "egregious" and terminated his employment with the Tribe. [Letter #5]

On May 29, 2007, Mr. Gamelin appealed his termination by filing an *Appeal of Termination under Government Employee Relations Ordinance* with the Tribal Court.

Plaintiff objected to the termination based on the fact he was unaware of any alleged complaints and was not given a chance to correct any perceived problems. He had not received any warnings, reprimands, or disciplinary actions prior to losing his employment as maintenance worker for the Housing Department.

Herman Gamelin,
Plaintiff

v.

Case Number: 07095GR
Honorable Daniel Bailey

Dawn Smith, Assistant Tribal Manager
Larry Romanelli, Ogema
Sharron Detz, Human Resource Director
Little River Band of Ottawa Indians,
Defendants

Summary of Testimonies:

Charles Fisher, Housing Director 2005-2007, testified that he did receive some complaints against the plaintiff, but that he counseled him and did not put anything in writing or in Mr. Gamelin's personnel file.

Fisher testified that he gave plaintiff all "4's" on the yearly evaluations that supervisor's were required to fill out every June.

Julia Chapman is on the Housing Commission and was called to testify. She said she had no complaints about the plaintiff. She stated that Mr. Gamelin acted in a professional manner with her. She couldn't remember if she heard complaints about plaintiff or not.

Jeannie Gibson testified that she submitted work orders to get a shed repaired that was at the Tribally owned house she rented. Ms. Gibson said she had a confrontation with the plaintiff and felt threatened. HR asked Gibson to document it for plaintiff's personnel file after he was placed on administrative leave.

Sue Majchizak an employee from Ace Hardware was called to testify. John Shepard, Maintenance Department for the Tribe, Brian Moore, Maintenance Department for the Tribe, and Tina Vaquera, prior HR Director (and sister of Mr. Gamelin) were also called. None of the witnesses gave negative testimony regarding a lack of professional behavior or work knowledge on the part of the plaintiff.

Mr. Gamelin testified on his own behalf and was cross-examined by the attorney for the defendants.

Dawn Smith, Tribal Manager was called to the stand. Smith explained why she put the plaintiff on administrative leave. The leave stemmed from the complaints of Jeannie Gibson and Denise Lewis. They both expressed fearfulness of Mr. Gamelin's behavior.

Smith said there was a progressive discipline policy for employees but there is an exception to that policy. An employee could be terminated if there is "egregious" behavior. Ms. Smith testified that an investigation was done after the plaintiff was placed on administrative leave.

Herman Gamelin,
Plaintiff

v.

Case Number: 07095GR
Honorable Daniel Bailey

Dawn Smith, Assistant Tribal Manager
Larry Romanelli, Ogema
Sharron Detz, Human Resource Director
Little River Band of Ottawa Indians,
Defendants

Sharron Detz was called to the stand in her capacity as the Director of Human Resources. She felt the personnel policies were followed in the termination of the plaintiff.

Denise Lewis was sworn in to testify. Ms. Lewis could hear Mr. Gamelin making loud noises in Mr. Gerhke's office. She has seen him lose his temper before. She didn't feel comfortable with those working conditions.

Chad Gerhke witnessed the plaintiff tear up work orders. He testified that on the day in question, the plaintiff was talking in a loud voice.

Michelle Bernache took the stand. She was asked about the smoke detectors that were not installed in the housing units. She said that she and Denise did an inspection and found a home that did not have a smoke detector.

Conclusion:

The Court finds that the disciplinary action (termination) was excessive and in violation of the Tribe's Employment Relation Law:

"The Tribal Government shall be required to identify and maintain progressive disciplinary policies and procedures. Progressive discipline identifies that an employee can improve their work product and work habits through education and knowledge..." (Government Employment Relations Law, #05-600-01, 11/2/2005)

An employee can be terminated for "egregious actions." (Government Operations Personnel Manual, 11/2/2005, p.14)

After testimony from all witnesses and exhibits entered during the trial, the levels of complaints against the plaintiff do not rise to the definition of "egregious." In a civil matter the standard of proof is met when there is a preponderance of evidence that is weightier on one side than the other. The evidence by the plaintiff outweighs the evidence of the defendant. The plaintiff's arguments and testimony were more convincing.

It appears to the Court that it was a matter of failing to follow protocols and procedures by the Housing Department. If there was a complaint or complaints about an employee, the complaint "...must be provided in written form to the supervisor." "The supervisor will

Plaintiff

v.

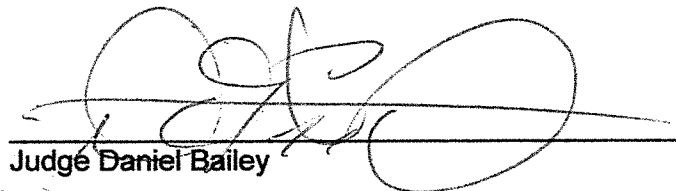
Case Number: 07095GR
Honorable Daniel Bailey

Dawn Smith, Assistant Tribal Manager
Larry Romanelli, Ogema
Sharron Detz, Human Resource Director
Little River Band of Ottawa Indians,
Defendants

make a decision in writing to both the employee and the individual who made the complaint." (The Government Operations Personnel Manual, p.18, Sec. 9.7)

IT IS ORDERED: the plaintiff, Herman Gamelin, be re-instated as an employee of the Tribe in a position equal in pay to the one he was terminated from. He must also be given a position that mirrors the job description he was initially hired to do in 2005. The Tribe/employer shall pay Mr. Gamelin back wages and any monies for out-of pocket expenses that would have been covered by Tribal benefits he would have been entitled to during the time period of his appeal.

SO ORDERED:

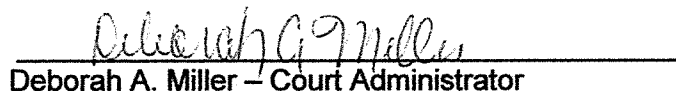


Judge Daniel Bailey

9/27/07
Date

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.



Deborah A. Miller - Court Administrator

9.28.07
Date

TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

The People of the Little River Band of Ottawa Indians,
Plaintiffs,

Vs.

Case Number: 07102TM
Honorable Daniel Bailey

Norbert Kelsey,
Defendant

William Gregory
Special Prosecutor
P.O. Box 233
Suttons Bay MI 49682

John Kelsey
Lay Advocate
18901 Nessen City Road
Copemish MI 49625

ORDER OF JUDGMENT

On June 8, 2007, a Complaint was filed against the Defendant, Norbert Kelsey, alleging that the Defendant engaged in the crimes of Sexual Assault in violation of Tribal Ordinance 03-400-03, Section 19.02, and Harassment under the same Ordinance, Section 8.06. The Complaint states that:

"The complaining witness says that on the date and location described, the Defendant, contrary to law, COUNT I – SEXUAL ASSAULT 19.02.c Did subject another person to any sexual contact; and A. did know or reasonably should know that the sexual contact is offensive to the victim; or D. he is in a position of authority over the victim and uses this authority to coerce the victim to submit."

The complaint also alleged " COUNT II – HARASSMENT 8.06 "Did knowingly pursue a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and which serves no lawful purpose; and the conduct is such that it would cause a reasonable person to suffer substantial emotional distress."

Based on the evidence presented, through the testimony of the witnesses and exhibits, the following findings were made:

The dominant issue in this matter is whether the Defendant did commit Sexual Assault on Heidi Foster and whether all the elements of the crime as charged, were met. Ms. Foster wore the same blouse that the Defendant touched on the day of the incident when testifying at the hearing held on January 7, 2008. Ms. Foster testified that the Defendant was standing close enough to her to be touching her shoulder; that he "grabbed my badge and pulled out and looked down my blouse and then he turned around and did it again. The same thing." There was sworn testimony from two eyewitnesses subpoenaed by the prosecution that corroborated her description of the incident.

The Court finds that by the position of the badge on Ms. Foster (even taking into consideration her rudimentary drawing of her shirt front) the Defendant had to touch Ms. Foster's breasts through her clothing when he pulled the badge away from her person. He did this twice. The Defendant had to know or reasonably should have known that a reasonable person would find this offensive. A partial definition of "reasonable" in Black's Law Dictionary is: *"Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view... Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair suitable, moderate, tolerable."* To touch a woman on her breasts, even if it is on the outside of her clothes, is sexual in nature and most certainly offensive. (Touching the breast area falls under 3.17 Sexual Contact in Ordinance 03-400-03.) The Defense said that this must be met for a determination of guilt to be found. The court finds that it has been met.

When asked by the defense why she didn't report the incident immediately she answered: "Because I know who he was...a Tribal Council Member." When questioned by the defense as to why she felt she "couldn't report something...?" Ms. Foster replied: "Because I know the power he has...my livelihood." The victim did feel that the Defendant was in a position of authority over her, as he was an elected official on the Tribal Council.

The Defendant's counsel, in his opening statement said: "Norbert has no authority whatsoever over the client, the Constitution says it, our testimony will establish it."

Donald Koon, Tribal Council Speaker was called to the witness stand by the Defense. When asked "...do you have the power to un-fund the position?", Mr. Koon stated "yes."

The Defendant's counsel asked if Bob Keck sued the Tribe. Mr. Koon replied that he had. He alleged that Keck believed his position was relevant to the Tribe, but that Council did not see it that way. (***The plaintiff in this matter was not Bob Keck. It was the Ogema's office. Tribal Council had enacted a Resolution removing the funding for the position of Risk Manager. The court ordered that that resolution was "void and has no effect."***) Mr. Koon also stated that the prior Council had defunded the position of Tribal Manager.

The witness was asked if Ms. Foster was employed in any capacity with the Legislative Branch and Mr. Koon said she wasn't. He did testify that in 2005 there was a fear that the Council was not going to fund the Clinic. Mr. Koon said that he didn't recall if any cuts were made at that time. He said that the budget for 2008 was done and regarding any cuts to this year's budget he replied "I don't believe we made any."

The prosecution questioned Mr. Koon if Council members carried some "authority or weight?" He answered "yes." Mr. Koon agreed that the Tribal Council has influence.

The Court finds beyond a reasonable doubt that the sexual assault did occur and did occur as the victim described. The counsel for the Defendant alleged that "I never objected to any abuse of authority." He said he objected to the element of "touching the female breast." The court believes that the victim's breast was touched, albeit, over her clothing. The Court also believes that the victim was intimidated by the Defendant because of his power and position on the Tribal Council. The Court found the Victim to be a highly credible witness with no personal gain to be had from this case.

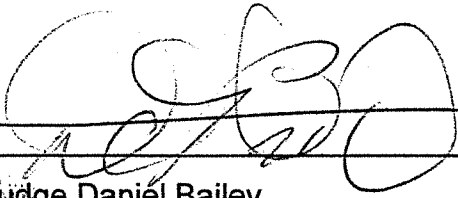
The second count the Defendant was charged with (harassment) was not established. Each incident that was described by the victim was in a Tribal activity setting. As a Tribal Council member, the Defendant had every right to be at that

particular function and as a legislator, it makes good political sense. The court understands that the victim may have felt harassed but there was not enough evidence or testimony for the Court to find that the Defendant actually was harassing the victim.

It is the ORDER of this Court that Mr. Kelsey is GUILTY AS CHARGED of sexual assault. Sentencing shall be set and noticed in the near future.

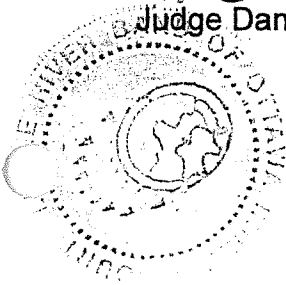
The Defendant has 28 days from the date of this order to appeal.

SO ORDERED:



Judge Daniel Bailey

1/21/08
Date



CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Deborah A. Miller – Court Administrator

1.22.08
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

The People of the Little River Band of Ottawa Indians,
Plaintiffs

Vs.

Case Number: 07102TM
Honorable Daniel Bailey

Norbert Kelsey,
Defendant

Eugene Zeller
Prosecutor

Ryan Glanville
Attorney for Defendant
P.O. Box 609
Ludington MI 49431-0609

John Kelsey
Lay Advocate
18901 Nessen City Road
Copemish MI 49625

ORDER OF SENTENCING

The Defendant, Norbert Kelsey, was found guilty of Sexual Assault as defined in Tribal Ordinance 03-400-03 after a bench trial that was held on January 7th and 8th of this year.

The Sentencing hearing was held on February 4, 2008. The Defendant is sentenced as follows:

Six months in jail held in abeyance while the Defendant complies with probation requirements under this conditional sentencing order.

The Defendant will be placed on probation for one year. As a condition of probation, the defendant will pay a \$5,000 fine. (Payments will be acceptable as long as the balance is taken care of within two years. Each payment shall be at least \$208.33 per month and payable to *TRIBAL COURT* with the first payment due March 15, 2008. Each subsequent payment shall be due on the 15th of the month until paid in full.)

The Defendant shall report to the Probation Department by phone each week on Monday, beginning with Monday, February 11, 2008, between the hours of 1:00 p.m. and 5:00 p.m. The phone number for the Probation Department is: 231-398-2239.

The People of the Little River Band of Ottawa Indians,
Plaintiffs

Vs.

Case Number: 07102TM
Honorable Daniel Bailey

Norbert Kelsey,
Defendant

The Defendant shall also arrange to perform community service for four (4) hours per week for one year. (This condition of sentencing shall commence beginning February 18, 2008.) The Probation Department has logs available to document the hours and the type of community service done. It will be the discretion of the Probation Officer as to how often the logs shall be turned in. (Not longer than 4 weeks.)

The Defendant shall not speak to any female employees of the Tribe. (This excludes any female Council Members, since they are not employees and the Tribal employee who the Defendant resides with.) The Defendant shall also submit a list of blood relatives that are employees of the Little River Band of Ottawa Indians that he may speak to during the course of their employment.

SO ORDERED:




Judge Daniel Bailey



Date

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.



Deborah A. Miller – Court Administrator



Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT OF APPEALS

THE PEOPLE OF THE LITTLE
RIVER BAND OF OTTAWA INDIANS,
Appellee-Plaintiff,

CASE NO. 08036AP

v.

Chief Justice Michael Petoskey
Associate Justice Stella Gibson
Associate Justice Ronald Douglas

NOBERT KELSEY,
Appellant-Defendant.

John Kelsey
Lay Advocate
18901 Nessen City Road
Copemish, MI 49625

Eugene Zeller
Prosecutor
3031 Domres Road
Manistee, MI 49660

ORDER AFTER HEARING ON MOTIONS

I. INTRODUCTION:

This Court conducted a *Hearing* on two (2) motions filed by Appellant-Defendant in this pending appeal on May 22, 2008. The *Motion for Peremptory Reversal* urges this Court to reverse and quash the conviction of Appellant-Defendant on Sexual Assault because the Tribe does not have criminal jurisdiction over this matter. In the alternative, the *Motion for Remand and Disqualification* asks this Court to remand this matter back to the Tribal Court for an evidentiary hearing and determination about whether the Tribe has criminal jurisdiction. In addition, the *Motion* asks this Court to disqualify Chief Judge Daniel Bailey, the presiding trial court judge, from presiding over the remand because of alleged bias.

RECEIVED

BY *DW* | DATE 6-23-08

At the *Hearing*, this Court asked the parties to submit copies of cited materials because such were not submitted with the briefs. The materials were received by mail on June 06, 2008. After review, this Court continued its deliberation on June 13, 2008.

II. PROCEDURAL BACKGROUND:

Both of these *Motions*, filed in appeal, arise from the decision of the Tribal Court to foreclose consideration of any additional motions filed after a set date. It is clear from a review of the record and transcripts, that Appellant-Defendant filed motion after motion in the proceedings below. It is also apparent Tribal Court, in an effort to maintain judicial control of the proceedings and to create efficiencies in the conduct of the trial, set a deadline for the filing of any further motions by either party.

After the deadline passed and after the trial itself, but before sentencing, Appellant-Defendant filed motions challenging, for the first time, the jurisdiction of the Tribe. The Tribal Court summarily denied the motions based upon the previously-established deadline for the filing of motions.

III. CONSIDERATION OF THE *MOTIONS*:

(1) Motion Variation

Motions are of various kinds. They are not all the same. Many go to the conduct of proceedings and to clarify the rights of the parties in those very proceedings. Such motions serve to ensure fairness and efficiency in the proceedings. Trial courts do establish deadlines for the filing of these kinds of motions in order to maintain an orderly flow of proceedings. In addition, such deadlines encourage competent and thoughtful advocacy.

Other motions, on the other hand, may challenge the very authority of the Court. Whether the courts of the Tribe have jurisdiction, *i.e.* authority, over matters is a **threshold** determination, which must be made by the courts in each and every case. See *Champagne v. The People of the Little River Band of Ottawa Indians*, Case No. 06-178-AP. (This Court's Note: The case caption should actually be: *The People of the Little River Band of Ottawa Indians v. Champagne*. The same on appeal as it was at the trial court level.) It is axiomatic that these kinds of motions can be filed in the Tribal Court at any time and the Tribal Court must make a determination regarding its own authority. The courts of the Tribe must respond to each and every challenge to its jurisdiction. **Thus, we find that the Tribal Court committed error in summarily denying Appellant-Defendant's motion challenging the Court's authority.**

(2) Recent Discovery

At the *Motion Hearing* on May 22, 2008, Appellant-Defendant asserted that he "just discovered" that the Community Center was just south of the "reservation boundary". Thus, this Court is being asked to consider a factual argument, on which there has been no judicial determination and that is not part of the record. LRB Court Rules prohibit such consideration. "*Facts which are not in the record shall not be presented in any manner to the Court of Appeals, and if presented, shall not be considered by that Court.*" See LRCR 5.402.

(3) Judicial Commission Complaint Against Advocate John Kelsey

On May 05, 2008, the Tribal Prosecutor filed a complaint against Advocate John Kelsey alleging, in essence, that he willfully made misrepresentations to the Tribal Court. That complaint and request for an investigation is pending. Thus, there is a question about the truthfulness of assertions made to the Tribal courts by Advocate John Kelsey.

(4) Request of the Parties to This Court to Make the Jurisdiction Determination

Both parties at *Motion Hearing* asked this Court to make a determination regarding the Tribe's jurisdiction in this matter because of "extensive briefing" and present argument to the Court. However, this Court must defer to the Tribal Court because the role of appellate courts is to review the actions and decisions of the Tribal Court, not to step into its shoes, even if it is expedient.

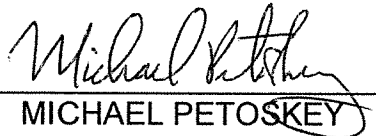
IV. ORDER:

WHEREFORE, FOR ALL OF THE FOREGOING, the:

- (1) *Motion for Peremptory Reversal* is **DENIED**; and
- (2) *Motion for Remand and Disqualification* is **GRANTED** as to remand but **DENIED** as to disqualification because nothing in the record or transcripts demonstrates bias on the part of the presiding judge.

IT IS ORDERED THAT the threshold issue regarding jurisdiction be determined by the Tribal Court by making: (1) specific findings of fact; and (2) conclusions of law.

06/21/08
DATE


MICHAEL PETOSKEY
CHIEF JUSTICE
for
a unanimous Court

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

THE PEOPLE OF THE LITTLE RIVER
BAND OF OTTAWA INDIANS,
PLAINTIFF

v.

Case Number: 07103TM
Honorable Daniel Bailey

NORBERT KELSEY,
DEFENDANT

Attorney for People
Eugene Zeller
3031 Domres Road
Manistee MI 49660

Lay Advocate for Defendant
John Kelsey
2317 Packard Street, #B302
Ann Arbor MI 48104

This case is before the court on remand from our Court of Appeals for a determination regarding the threshold issue of jurisdiction.

FINDINGS OF FACT

Defendant asserts this court does not have jurisdiction in this case, thus the conviction of Defendant for the crime of sexual assault should be "reversed" and the case dismissed. This assertion is based upon the belief that since the criminal act took place at the Tribal Community Center which is not located on the tribal reservation per se, it is not Indian country and therefore the Tribal court does not have territorial jurisdiction. Without territorial jurisdiction, Defendant argues, the Court has no subject matter jurisdiction.

Defendant has provided an extensive Brief which, he states, can support only one conclusion, i.e. since the site of the crime is not on the Reservation, it is not "Indian Country" and it is not a "dependent Indian community," the Tribe, through its Court has no jurisdiction. The preceding definitions come from 18 U.S.C. 1151, the federal Serious Crimes Act. Not until page 23 of this 26 page Brief does Defendant mention the Tribal Constitution, and then only to demonstrate how the Constitution is modified by LRBOI Ordinance No. 03-400-03, art. 4.03..

The salient facts in this case are as follows:

Defendant Norbert Kelsey, a member of the Tribal Council, appeared at Tribal function at the Little River Community Center. While there an incident between Defendant and a female Tribal employee took place, which led to charges of sexual assault being filed against Kelsey. Defendant was convicted after a bench trial held January 7 and 8, 2008, and sentenced February 4, 2008.

The incident giving rise to the criminal charges took place at the Little River Tribal Community Center. The victim of the sexual assault was a Native American tribal employee. The Center has been owned in fee by the Tribe for many years, and has been and remains a site of numerous tribal functions and events.

CONCLUSIONS OF LAW:

An understanding of "jurisdiction" must start with an understanding of tribal sovereignty. The preamble to the Constitution of the Little River Band of Ottawa Indians states: "As an exercise of our sovereign powers, in order to organize for our common good, to govern ourselves under our own laws... and to protect our homeland, we adopt this Constitution... as the Little River Band of Ottawa Indians."

Article I, Section 1, Territory, states: "The territory of the Little River Band of Ottawa Indians shall encompass all lands which are now or hereinafter OWNED (emphasis added) by or reserved for the Tribe including... all lands which are now or at a later date owned by the Tribe or held in trust for the Tribe or any member of the Tribe by the United States of America.

Section 2—Jurisdiction Distinguished From Territory. The Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe and federal law."

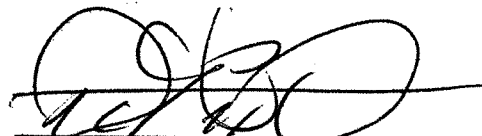
The sovereign nation of the Little River Band of Ottawa Indians has defined for itself where and who shall come under its jurisdiction. Since Defendant is a tribal member, his victim is a Native American, and the site of his crime was a facility owned by the Tribe, this case is clearly within the territorial and subject matter jurisdiction of this Court.

Accordingly, IT IS ORDERED,

Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby DENIED.

Date

8/21/08


Honorable Daniel Bailey



CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Court Clerk

8-22-08
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT OF APPEALS

THE PEOPLE OF THE LITTLE
RIVER BAND OF OTTAWA INDIANS,
Appellee-Plaintiff,

CASE NO. 08036AP

v.

Chief Justice Michael Petoskey
Associate Justice Stella Gibson
Associate Justice Ronald Douglas

NOBERT KELSEY,
Appellant-Defendant.

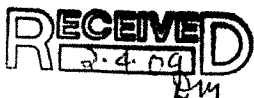
John Kelsey
Attorney At Law
18901 Nessen City Road
Copemish, MI 49625

Eugene Zeller
Prosecutor
3031 Domres Road
Manistee, MI 49660

OPINION AND ORDER REGARDING JURISDICTION

I. INTRODUCTION:

This threshold issue arises out of a present appeal of the conviction of Appellant-Defendant (hereinafter Defendant) on Sexual Assault. Defendant argues that the Little River Band of Ottawa Indians does not have criminal jurisdiction over this matter because the crime occurred on tribal fee land outside the "reservation". On the other hand, the People of the Tribe argued that the Tribe has the sovereign power to hold Tribal members and other Indians accountable for unacceptable behavior during a



Tribal event at their Community Center. This Court remanded this question back to the Tribal Court for “findings of fact” and “conclusions of law” because the issue had not been previously addressed by the Tribal Court. The Tribal Court issued its written decision on August 21, 2008. The Tribal Court ruled in favor of the People of the Tribe based upon the express language of the Tribal Constitution. Both parties to the present appeal have extensively briefed this issue for the Court and should be commended for their volume of work.

II. ISSUE:

Does the Little River Band of Ottawa Indians Tribal Court have criminal jurisdiction in a case when the criminal act occurred in the Tribal Community Center located on land owned by the Tribe, but not within the “reservation” boundaries and not on land held by the U.S. government as “trust” land, during a tribal event and when the Defendant is both a tribal member and a tribal official?

III. DISCUSSION AND ANALYSIS:

Whether the courts of the Tribe have jurisdiction, *i.e.* authority, over matters is a **threshold** determination, which must be made by the courts in each and every case. See *Champagne v. The People of the Little River Band of Ottawa Indians*, Case No. 06-178-AP. (This Court’s Note: The case caption should actually be: *The People of the Little River Band of Ottawa Indians v. Champagne*.) The beginning point for any analysis of tribal jurisdiction begins with the **inherent authority** of tribes to manage their internal affairs and domestic relations. See *Talton v. Mayes*, 163 U.S. 376 (1896). In fact, federal Indian law recognition of such inherent authority is well established and long-standing in the law.

The next step is to look for any limitations that may have been placed upon that inherent authority.

Defendant argues that the Tribal Community Center is not located within "Indian country" as that term is defined by 18 USC 1151. Defendant characterizes the present issue as "a very simple, textbook criminal jurisdiction issue". The vehemence of his argument is exceeded only by its misdirection. Defendant has submitted numerous federal cases which define the parameters of "Indian country" for the purposes of determining whether **federal courts** have **federal criminal jurisdiction** of crimes committed on such lands. That analysis has nothing to do with whether tribal courts have tribal criminal jurisdiction. **After diligent research of authorities, this Court cannot find any federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe.**

It is common knowledge that the Tribal Community Center has been the center of Tribal community activities ever since it was purchased by the Tribe many years ago. In fact, this very Court conducted several hearings in those facilities when the Tribal courts were first established and it is where the Tribal court offices were located for many years. Thus, it is imperative that judicial notice be taken of the **tribal nature** of all the activities that have occurred at the Community Center over many years now. In addition, the Center is a community gathering point to host varied and numerous tribal meetings, to serve community meals and to provide tribal office space for the conduct of the business of a tribal sovereign.

Criminal law simply put is the mere imposition of standards of behavior by defining that behavior which is unacceptable to the society, i.e. community, of people. It

is clear to this Court that the Tribe's standards of behavior **ought** to apply to the behavior of Tribal members and other Indians in the Tribal Community Center. The general welfare of the Tribe depends upon individuals deferring from behavior that offends community standards. The interests of the Tribe are very strong here. This case involves a tribal member in an elected position acting as an agent of the Tribe at a Tribal activity who committed a crime against a Tribal employee in a public setting openly visible to other employees and Tribal members who were present. It also involves a Tribal Court finding that Defendant exercised political influence affecting the victim and the Tribe's welfare. It is sad that the present Defendant is a member of the Tribal Council, who in an effort to escape accountability, argues that the Tribe does not have the sovereign authority to hold him accountable to his violation of Tribal standards of behavior. The people should expect that Tribal officials will always work to protect and promote tribal sovereignty, especially their elected **representatives**.

Nonetheless, the Court must consider whether the Tribe itself has imposed a limitation on the exercise of its inherent authority. Thus, we begin an examination of tribal law. Article I of the Tribal Constitution defines the "territory" of the Little River Band of Ottawa Indians as "*...all lands which are now or hereinafter **owned by or reserved for the Tribe...***"(bold added for emphasis by this Court). See *The Constitution of the Little River Band of Ottawa Indians*, Article I, Sec. 1. In fact, the provision includes a **mandate** that such lands "**shall**" be included in the definition. A constitutional mandate is a mandate of the people of the Band because the Tribal Constitution, as the organic governing document of the Tribe, is their collective consent

to be governed and it provides their framework for government. The design is mandated.

Section 2 of that same Article requires that “[t]he **jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.**” (bold added again for emphasis by this Court). Defendant argues that this Section which distinguishes jurisdiction from territory means that tribal jurisdiction is not synonymous with its territory. We agree, but reach a different conclusion than Defendant would have us reach. Defendant’s conclusion is that tribal jurisdiction is **smaller** than its territory because the Tribe cannot exercise criminal jurisdiction over the land it owns in fee. Defendant makes this argument despite the **express** words used in the People’s definition of “territory” cited above. However, this Court recognizes that tribal jurisdiction is **larger** than territory because some tribal authority extends beyond its land, e.g. tribal membership and self-regulation of tribal treaty rights within treaty ceded areas. The drafters of the Tribal Constitution wisely recognized such.

Next, the Court examines the laws enacted by Tribal Council. There are two (2) ordinances enacted by Tribal Council that apply to the instant matter. The *Law and Order – Criminal Offenses – Ordinance* details the territorial jurisdiction of the Tribe to include:

- (1) “all land within the limits of the Tribe’s reservation, including trust land, fee patented land and rights of way running through the reservation; and
- (2) all lands outside the boundaries of the Tribe’s reservation held in trust by the United States for individual members of the Tribe or for the Tribe; and
- (3) all other lands considered ‘Indian country’ as defined by 18 U.S.C. section 1151 that is associated with the Tribe.” See Ordinance # 03-400-03.

The second ordinance is the *Criminal Procedures Ordinance* and it provides that: “[T]he Tribal Court shall have jurisdiction over any action by any Indian as defined by this Ordinance, that is made a criminal offense under applicable Tribal Code and that occurred **within the territorial jurisdiction of the Tribe as defined in the Constitution**” (bold added for emphasis by this Court). See Ordinance # 03-300-03, Section 8.08. **Tribal Council is obligated by the Tribal Constitution, as this Court is, to assert jurisdiction over the Tribe’s territory.**

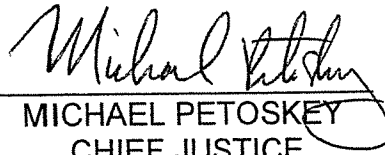
It is clear to this Court that the first of these two (2) Ordinances is unconstitutionally narrow in that it does not provide for the exercise of the inherent criminal jurisdiction over all tribal lands. As mentioned above, the Tribal Constitution requires that “[t]he **jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.**” See Tribal Constitution, Article I, Section 2. It is beyond dispute that Indian tribes have the inherent authority to manage their own affairs and domestic relations. There is no federal limitation over the exercise of tribal criminal authority over crimes committed by Indians on land which is owned in fee by the Tribe.

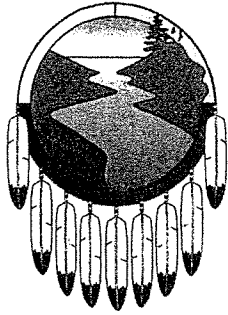
IV. ORDER:

WHEREFORE, FOR ALL OF THE FOREGOING, this Court **DENIES** Defendant's Motion for Peremptory Reversal **AND AFFIRMS** the Tribal Court decision in its entirety because the Tribe has criminal jurisdiction in the present matter.

IT IS ORDERED THAT an Appellate Scheduling Conference be scheduled to set a briefing schedule to resolve all other issues pending in this appeal.

DATE: 02/03/09


MICHAEL PETOSKEY
CHIEF JUSTICE
for
a unanimous Court



**Little River Band of Ottawa Indians
Tribal Court of Appeals**
3031 Domres Road
Manistee Michigan 49660
231-398-3406
Fax: 231-398-3404

**PEOPLE OF THE LITTLE RIVER BAND
OF OTTAWA INDIANS,**
Appellee-Plaintiff,

CASE NO. 08-036-AP

v.

Chief Appellate Justice Melissa L. Pope
Associate Justice Martha Kase
Special Associate Justice Ronald Douglas

NORBERT KELSEY,
Appellant-Defendant.

Eugene C. Zeller (P29339)
Tribal Prosecutor/Attorney for Appellee
3031 Domres Road
Manistee, Michigan 49660

John Kelsey (WI No. 1057098)
Attorney for Defendant/Appellant
P.O. Box 163
Manistee, Michigan 49660

ORDER AND OPINION

INTRODUCTION

On June 8, 2007, a Complaint was filed against the Appellant-Defendant (hereinafter "Defendant), Norbert Kelsey, alleging that the Defendant engaged in the crimes of Sexual Assault in violation of Tribal Ordinance 03-400-03, Section 19.02, and Harassment under the same Ordinance, Section 8.06. Chief Judge Daniel Bailey presided over a bench trial, held on January 7, 2008 and January 8, 2008. Defendant was found guilty of Sexual Assault and not guilty of Harassment in the Order of Judgment entered on January 21, 2008. Defendant was sentenced on February 4, 2008. Defendant, by and through his attorney, filed a Notice of Appeal on February 18, 2008. Chief Judge Bailey entered an Order Granting Partial Stay Pending Appeal on February 19, 2008. The Order provided that the jail sentence (held in abeyance), the probation reporting requirements, and the payments from fines would be stayed pending appeal. The Order modified, but did not stay, the requirement regarding communication with female employees as follows: "The Defendant shall not INITIATE any conversation with any female employees of the Tribe. He may provide an answer to any questions regarding Tribal or Council business and nothing more."

The Court of Appeals received briefs and heard oral arguments on May 22, 2008 regarding Appellant's Motion for Peremptory Reversal and Motion for Remand and Disqualification. The Court requested from the parties copies of cited materials not included with the briefs. The materials were received on June 6, 2008 and the Court continued its deliberation on June 13, 2008. In its June 21, 2008, Order After Hearing on Motions, the Court denied the Motion for Peremptory Reversal, denied the Motion for Disqualification, and granted the Motion to Remand on the issue of jurisdiction. On August 21, 2008, Chief Judge Bailey held that the Tribal Court properly had jurisdiction.

On January 20, 2009, Defendant submitted his Emergency Motion to Stay and Emergency Request for a Direct Expedited Appeal.

Defendant submitted his Request for Reconsideration of Opinion and Order Regarding Jurisdiction on February 17, 2009.

The Court of Appeals received briefs regarding Defendant's Second Motion for Peremptory Dismissal and Extraterritorial Jurisdiction. The Court of Appeals denied Defendant's Motion for Reconsideration and Alternative Request for Stay Pending Appeal in a written opinion on March 18, 2009.

On April 17, 2009, the Court of Appeals held a hearing to establish the Scheduling Order for remaining issues on Appeal. The Court of Appeals set a schedule on "other acts" and "1st Amendment/prior restraint issues" to be heard before the Court of Appeals on June 19, 2009.

Two new Appellate Justices were sworn in on June 10, 2009. A new Scheduling Order was entered on June 30, 2009 with the oral arguments scheduled for and heard at 3:30 p.m. on July 16, 2009.

Defendant's Appeal regarding "other acts" and "1st Amendment/prior restraint issues" is hereby **DENIED.**

SCOPE OF REVIEW

All of the issues on appeal involve conclusions of law and, therefore, are reviewed de novo by the Tribal Court of Appeals pursuant to Tribal Court Rule of Appellate Procedure R. 5401(E).

JURISDICTION

The Tribal Court has jurisdiction over this matter pursuant to Article VI, Section 8 of the Tribal Constitution which provides in pertinent part:

- (a) The judicial powers of the Little River Band shall extend to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:
1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party.

SENTENCE OF DEFENDANT

On February 4, 2008, Defendant was ordered to: pay a \$5,000 fine; report to the Probation Department by phone each week on Monday between the hours of 1:00 p.m. and 5:00 p.m.; perform community service for four (4) hours per week for one (1) year; and was prohibited from speaking with “any female employees of the Tribe (excluding female Tribal Council Members, since they are not employees and the Tribal employee who the Defendant resides with).” The Trial Court entered the Order Granting Partial Stay Pending Appeal on February 4, 2008 which stayed the entire sentence with the one exception being Defendant’s conduct with female employees of the Tribe which was modified as follows: “The Defendant shall not INITIATE any conversation with any female employees of the Tribe. He may provide an answer to any questions regarding Tribal or Council business and nothing more.” (Emphasis in Opinion). While the sentence was silent as to the length of the prohibition of this conduct, it can be surmised that the prohibition on conduct was to last the length of the probationary period. As such, the expiration of this prohibition was February 4, 2009, making the issue moot. The Court notes, however, that this prohibition was on Defendant’s conduct. Plaintiff correctly notes the court has the authority to restrict the conduct of those who are convicted of crimes. As noted by Plaintiff, Personal Protection Orders are an example of such restrictions. A person can be restricted from a variety of protected conduct such as being prohibited from being within a certain distance of the victim, calling the victim, or even having unsupervised parenting time with his or her children. Personal Protection Orders are often granted ex-parte with the accused having a hearing after the allegations are made to the Court and the restrictions imposed. In the present case, we have an individual who has been convicted of sexual assault. The purpose of the provision prohibiting Defendant from initiating conversations with female employees of the Tribe was to protect these women from unwanted sexual conduct, a reasonable restriction considering the conviction.

ADMISSION OF TESTIMONY

Defendant asserts that the Trial Court abused its discretion by allowing the testimony of Darlene Snyder and Tina Vaquera, arguing that their testimony was used to demonstrate “other acts”.

Plaintiff asserts that the reason for allowing the testimony of Darlene Snyder was to demonstrate the perceived authority of Tribal Council Members over employees of the Tribe. Plaintiff further argues that, even if the Trial Court did err in admitting this witness' testimony, the testimony provided cumulative evidence as there was another witness who testified as to the authority of Tribal Council Members. The Court agrees with this analysis.

With regard to Tina Vaquera, Plaintiff states that the testimony was offered within the scope of Rule of Evidence 4.205 and that proper procedure was followed, including advance notice of the intent to call the witness and for what purpose. A hearing on the matter was held on the matter and the Trial Court heard arguments on the matter. Further, there is no record of Defendant objecting when the witness was called or before cross-examination. Upon review of the briefs and the transcript, there is no evidence that the Trial Court abused its discretion. Defendant's Appeal on this matter is **DENIED**.

APPELLANT'S REQUEST FOR STAY PENDING HABEAS REVIEW

On June 12, 2009, Defendant submitted Appellant's Request for Stay Pending Habeas Review. This Request is **DENIED**.

CONCLUSION

The Appellate Court has thoroughly reviewed all documents filed to date, as well as the Trial Court transcript. The extensive, detailed briefs filed by the parties have resulted in this Court being well versed about the issues presented in Defendant's Notice of Appeal. In the interest of bringing closure to this matter and giving the victim the justice promised over a year ago, this Appeal must be resolved. While Tribal Court rules do not prohibit the Court from issuing an Opinion on all remaining issues, the Court will allow the submission of a final brief by Defendant to raise any issues enumerated in his Notice of Appeal that he does not feel have been fully considered. Defendant has twenty-one (21) days to submit a brief on any other issues raised in the Notice of Appeal. If no brief is submitted within twenty-one (21) days, the conviction will stand and the sentence will immediately commence less the restriction on initiating conversations with female employees of the Tribe as that restriction on conduct has already expired.

IT IS SO ORDERED.

Date: 9.14.09

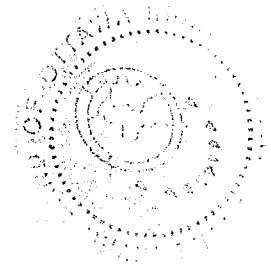
Melissa L. Pope
Melissa L. Pope, Chief Justice

Date: 9-14-09

Ronald D. Douglas
Ronald Douglas, Special Associate Justice

Date: 9-15-09

Martha Kase
Martha Kase, Associate Justice



CERTIFICATION OF SERVICE

I certify that I placed a copy of this order in the Tribal mail system to have adequate postage attached and taken to the Manistee Post Office on this date for mailing to the parties and/or the attorneys for the parties as listed.

9-18-09
Date

Deborah A. Miller

Little River Band of Ottawa Indians
Tribal Court
3031 Domres Road
Manistee, Michigan 49660

Tribal Council and Little River
Band Gaming Commission,
Petitioner,

v.

Ogema and Office of the Ogema,
Respondent

Case Number: 07103GC
Honorable Daniel Bailey

Daniel Green
Attorney for Ogema
375 River Street
Manistee Michigan 49660

Richard McGee
Attorney for Gaming Commission
Post Office Box 47068
Plymouth, MN 55447

Kimberly McGrath
Legislative Council
375 River Street
Manistee, Michigan 49660

ORDER FOLLOWING HEARING

This controversy arose following the issuance of an Executive Order which vested the authority in the Tribal Ogema to forgive criminal offenses committed by individuals in any jurisdiction "for purposes of tribal self government and gaming licensing." Tribal Council filed an Emergency Motion for a Restraining Order and a Verified Complaint for Injunctive and Declaratory Relief. The Restraining Order was entered by this Court on June 11, 2007 and briefing ensued. The Little River Band Gaming Commission was granted leave to intervene in this matter and also provided briefing and oral argument to this Court. In addition, this Court has reviewed the case law presented on the issue of mootness.

In response to the Verified Complaint, the Office of the Ogema filed a Motion to Strike which was denied. The Ogema's Office also filed a Motion to Dismiss for Mootness and Memorandum in Opposition to Plaintiff's Request for Relief and in Support of Defendant's Motion to Dismiss. Hearings were held on July 16 and July 23, 2007. It is the impression of this Court that the parties considered those hearings as argument on motions for summary disposition.

Tribal Council and Little River
Band Gaming Commission,
Petitioner,

v.

Ogema and Office of the Ogema,
Respondent

Case Number: 07103GC
Honorable Daniel Bailey

Since no sworn evidence has been presented to the Court, this decision and order is based solely upon the parties' arguments and the pleadings and exhibits submitted to support those pleadings. For the following reasons, the Motion to Dismiss is DENIED and the Petitioners' Request for Declaratory and Injunctive Relief is GRANTED.

1. The Court agrees with the petitioners' argument that this case was not mooted by Ogema Romanelli's repeal of the Executive Order. The Court finds that the United States Supreme Court case *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982) is instructive in this regard. There, the Court determined that the voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice. The petitioners' claim that the action of the Office of the Ogema was an illegal act requires that the Court decide the matter in order to clarify and settle legal relations between the parties.
2. The Respondent failed to meet its burden to demonstrate to this Court that there is no reasonable expectation that the wrong will not be repeated. In fact, the Office of the Ogema indicated by letter and at oral argument that it wishes to further pursue some sort of pardon process.
3. The Little River Band Constitution is silent on the power to pardon. While the Court recognizes that executive orders in general are necessary to carry out Tribal laws, policies and procedures, those executive orders are only legitimate when they derive from a specific grant of authority contained in the Constitution. Executive Orders, for example, which relate to the administration or management of Tribal Departments or to enforcement and execution of Tribal laws are clearly authorized by the Constitution. Executive Orders which violate Tribal laws, usurp the power of another branch of government, or purport to grant authority not clearly present in the Constitution are not legitimate acts.
4. The Executive Order Governing Forgiveness violated the Tribe's Gaming Ordinance and other Tribal Laws and directly impacted regulatory authority delegated by the Tribal Council to the Tribal Gaming Commission. The issuance of that Order was an illegal act. Only the Constitution can grant the power to pardon to a Tribal Entity.

Tribal Council and Little River
Band Gaming Commission,
Petitioner,

v.

Ogema and Office of the Ogema,
Respondent

Case Number: 07103GC
Honorable Daniel Bailey

THE COURT FINDS THAT:

1. This case was not made moot by the Ogema's repeal of the Executive Order Governing Forgiveness;
2. Only the Tribal Constitution can grant the power to pardon or issue orders of forgiveness to any Tribal entity;
3. The issuance of the Executive Order Governing Forgiveness was an illegal act as it violated Tribal laws and conflicted with powers vested in other branches of Tribal government;
4. The Office of the Ogema shall refrain from issuing executive orders which do not derive from a specific grant of power contained in the Tribe's Constitution;
5. The Office of the Ogema is enjoined from issuing Executive Orders which conflict with authority duly vested in another branch of government under the Little River Band Constitution, conflict with other duly enacted laws, or impinge upon regulatory authority associated with gaming activities.

SO ORDERED



Judge Daniel T. Bailey



Date



Little River Band of Ottawa Indians
Tribal Court
3031 Domres Road
Manistee, Michigan 49660

Tribal Council and Little River
Band Gaming Commission,
Petitioner,

v.

Ogema and Office of the Ogema,
Respondent

Case Number: 07103GC
Honorable Daniel Bailey

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Deborah A. Miller – Court Administrator

Aug. 3, 2007
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COUNCIL,
PETITIONER

V.

CASE NUMBER: 07103GC
HONORABLE DANIEL BAILEY

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL OGEMA,
RESPONDENT

Kimberly McGrath
Attorney for Petitioner
375 River Street
Manistee, MI 49660

Daniel Green
Attorney for Respondent
375 River Street
Manistee, MI 49660

Findings of Fact

On Friday, January 21, 2011, the Tribal Council, by and through their Attorney, Kimberly McGrath, presented a *Petition to Enforce This Court's Final Order Granting Injunctive Relief and to Show Cause Why the Ogema Should Not be Held in Contempt of Court*. A preliminary hearing was scheduled for Monday, January 24, 2011.

The Council had presented Executive Order (# 01-0104-01) which they allege violates the August 2, 2007, Order of this Court, barring the Ogema from "issuing Executive Orders which conflict with the authority duly vested in another branch of government under the Little River Band Constitution, [or] conflict with other duly enacted laws...".

The Petitioners asks that the Executive Order (#01-0104-01) which moved the supervisory capacity of Be Da Bin under the direction of Family Services, be declared null and void and to make a determination if the Respondents are in contempt of court for violating the August 2, 2007 Order.

The Respondent's Attorney Daniel Green, requested additional time to prepare an answer and defend the Ogema's position. It was granted, due to the expedited scheduling of the case.

It was established at the preliminary hearing on the 21st that until such time the Court makes a final decision on the allegations and issues, the program(s) shall remain: "Whatever the status is, right now." (Per Judge)

The parties were informed the next hearing would be held a week later on January 31, 2011. The Court could see that there may be an actual controversy over the interpretation of this Court's August 2, 2007 Order.

In the Interim between the first and next scheduled hearing, an updated *Program and Services Guide* was published and released on January 26, 2011. On page 10 of the Services Guide, William Memberto was listed as "Director" of Be Da Bin.

Tribal Council in their *supplemental documentation in support of its Petition to Enforce Order*, Page 4, Number 8. argues that the Court entered an order of "status quo" and that the Ogema released the Program Directory after that Order. The Directory had William Memberto listed as the Director of Be Da Bin.

Did the Ogema violate the Order of Status Quo?

After reviewing the audio/video from the hearing, the "status quo" would be to leave Mr. Memberto as Director until further determination of the matter. The reason the parties were originally *in* Court is due to the fact that the Ogema had placed William Memberto as the "Director" of Be Da Bin as early as January 4, 2011, by his Executive Order. It was never stated on record that he be removed.

The Ogema has not violated the Order of Status Quo.

Did the Ogema violate the Court's 2007 Final Order?

Tribal Council filed a Petition to Enforce This Court's Final Order Granting Injunctive Relief and to Show Cause Why the Ogema Should not be held in Contempt of Court for violating the August 2, 2007 Final Order with his Executive Order, No. 11-0104-01.

The August 2, 2007 Order was entered after Council filed a complaint to have Executive Order 06-01-07-01, Governing Forgiveness of Offenses, declared unconstitutional. Ogema Wilson issued that Executive Order giving the Ogema the power "to forgive any offence arising under Tribal law, and further, offenses arising under any jurisdiction for purposes of tribal self government and gaming licensing." Council quotes the August 2, 2007 Order, No.4, "The Office of the Ogema shall refrain from issuing executive orders which do not derive from a specific grant of power contained in the Tribe's Constitution."

The 2007 Order narrowly defined the issue regarding the power of the Ogema to grant forgiveness or usurp other powers of the Legislative Branch. As with the "other" sovereign we are living within, the presidential power to pardon is granted under Article II, Section 2 of the United States Constitution. The Tribe's Constitution has granted no such power to the Executive Branch. The August 2, 2007, Order also stated on page 2., number 3., "Executive Orders, for example, which relate to the administration or management of Tribal Departments or to the enforcement and execution of Tribal laws are clearly authorized by the Constitution." As with Administrative Orders issued by the Court, Executive orders are guides to offices and departments within the Executive Branch for management of the daily operations of that arm of the government.

The Ogema has not violated the August 2, 2007 Order.

Although the separation of powers is not defined or even stated in the Tribe's Constitution (or the United States Constitution, for that matter) it is an integral part of the Tribe's government. There are different functions performed by each branch that should result in separateness but reciprocity for the benefit of the Tribe's citizens.

When one branch of government assumes another branch's power, the spirit of "checks and balances" is lost.

The supplemental documents the Court allowed the parties to submit did expound the matter further. It appears that certain steps were lacking that were normally followed in the past, when a department was transferred. There was no testimony of any current detrimental effects from that Executive decision or the assignment of a Director to oversee a department with no supervisor.

Council was concerned about the IHS Contract and the ramifications that may occur from moving Be Da Bin and re-assigning to another department's director. The Court finds under the Multi-Year Funding Agreement, Section 2 – Obligations of the Little River Band 3.5 [Reallocation, Redesign, and Consolidation], that:

U.S. Code: Title 25, 458aaa-5 (e.) Redesign and Consolidation, says: "An Indian tribe may redesign or consolidate programs, services, functions, and activities ... included in a funding agreement under section 458aaa-4 of this title and reallocate or redirect funds for such programs...in any manner which the Indian tribe deems to be in the best interest of the health and welfare ... of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law. "

There has been no showing of denial of services to any Tribal member because of the move.

The Tribal Council has valid complaints about the Ogema missing certain steps in his management of moving the administration portion of Be Da Bin to Family Services. The Court has looked at the briefs and re-looked at the video from the hearing. These questions and the answers to these questions do not provide the Court with a valid case and controversy.

Has there been a request for a supplemental budget modification in either budget?

Not according to testimony and exhibits.

Has there been any reallocations of funds?

Not according to testimony or exhibits.

Have the accounting line items been changed within Family Services and Be Da Bin's Budget?

Not according to the exhibits. They both appear to have separate budgets (as was the outcome of the Prosecutor's move to the Court for administrative purposes.)

Has the Organizational Chart been Changed for Family Services and Be Da Bin?

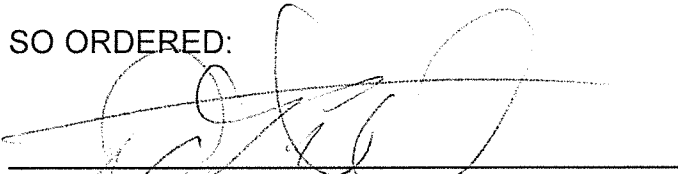
Yes it has, according to testimony and exhibits. There was a position for an administrative assistant on the chart that was not in the approved 2011 Budget. It is a

position that is vacant and will not be able to be filled without a supplemental appropriation (which has not been done, nor can it be done without Council approval.)

It is also apparent from testimony and exhibits that the overall governmental organizational chart has not been updated for at least a few years.

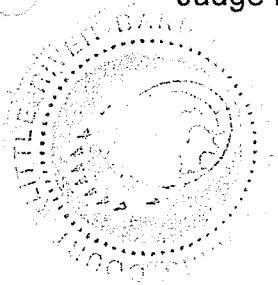
It is not a judicial function to issue advisory orders based on "what ifs." Unless there is a true case or controversy, the Court cannot intrude into areas committed to another branch of government. The other issues outlined in the supplemental documentation provided by the Tribal Council appear to be based on perceived future events. The Court cannot make a ruling on future violations or what may be the outcome from the change of having William Memberto oversee Be Da Bin.

SO ORDERED:



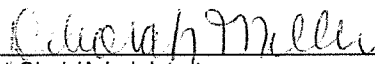
Judge Daniel Bailey

2/14/11
Date



CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached. It will then be taken to the Manistee Branch of the United States Post Office and mailed to the plaintiff/petitioner and the defendant/respondent (or their attorneys) at the addresses on file with the court.



Court Clerk/Administrator

2.14.11
Date

Little River Band of Ottawa Indians
Tribal Court
3031 Domres Road
Manistee, Michigan 49660
231-398-3406

ISRAEL STONE,
PLAINTIFF
12170 CABERFAE HIGHWAY
MANISTEE MI 49660

V.

CASE NUMBER: 07125GC

LITTLE RIVER BAND TRIBAL COUNCIL,
DEFENDANTS

Israel Stone
In Pro Per

Joseph H. Martin
Little River Band Legislative Counsel
375 River Street
Manistee, MI 49660

FINAL JUDGMENT

A Summons and Complaint was received by the Court and issued on July 11, 2007. Tribal Council was properly served. Jurisdiction in this matter is based on the powers of Tribal Court in the Constitution of the Little River Band of Ottawa Indians (Section 8, § (a.) 1-4.)

The Plaintiff requested relief of a Temporary Restraining Order based on his complaint. The order resulting from this initial hearing held on July 16, 2007 was to deny the request. **This should have terminated the complaint in this case.** However, the Court found some "very urgent issues" after testimony "involving the Commercial Fishing Program" and ordered a conference to be held on July 30, 2007.

ISRAEL STONE,
PLAINTIFF
12170 CABERFAE HIGHWAY
MANISTEE MI 49660

V.

CASE NUMBER: 07125GC

LITTLE RIVER BAND TRIBAL COUNCIL,
DEFENDANTS

On July 30, 2006 the Defendant motioned for a "*Stay of Proceedings*" that was granted ex parte, giving them an additional 30 days before another hearing was held. This was to allow extra time so the parties may "...attempt to resolve their disputes and the Tribe shall obtain neutral assistance in ensuring that the Tribal commercial fishing operations comply with all binding laws, regulations, rules and procedures." This order was signed on July 30, 2007.

On September 14, 2007, the Plaintiff submitted a letter to the clerk. The Court considered it to be a motion for a show cause hearing. (A hearing was scheduled for September 24, 2007) Plaintiff alleged that Tribal Council had "...seeming unwillingness...to follow the directives of the Court."

At that hearing it was determined that the mediation between the parties would be held no later than October 26, 2007. It was also ordered that RSM McGladry should conduct an audit of the Commercial Fishing Program beginning October 1, 2007.

On October 16, 2007, Council's Attorney presented a *Motion to Modify the Order* of October 3, 2007. Ten (10) extra days were given to schedule the mediation between the parties. The Court is in receipt of a copy of a letter to Council's attorney that the plaintiff was not satisfied with the "mediator" chosen and did provide the names of four (4) other trained mediators in the area.

ISRAEL STONE,
PLAINTIFF
12170 CABERFAE HIGHWAY
MANISTEE MI 49660

CASE NUMBER: 07125GC

V.

LITTLE RIVER BAND TRIBAL COUNCIL,
DEFENDANTS

There was no further contact between the counselors for either party that the Court was aware of. No paperwork was received from the parties for the ordered mediation. On the Court's own motion a Show Cause Hearing was held on November 19, 2007.

The plaintiff and the attorney for the defendant appeared at the hearing. It was explained that due to miscommunication between the parties the mediation was not held. There were no negative sanctions given to either party. They have agreed to continue with the mediation and have said that it will happen before December 7, 2007. They also requested that the Ogema or a representative be invited and allowed to attend the mediation. The parties will be responsible for contacting the Ogema's office and arranging their involvement.

FINAL ORDER OF THE COURT:

The outcome of the September 24, 2007, hearing and the order signed after that hearing, specifically #7: "Following the receipt of the McGladry findings, Tribal Council is authorized to craft a legislative or procedural remedy to any practices determined to be inconsistent with any laws, regulations or rules governing the Commercial Fishing Program" (ordered on 10/3/07) will now be allowed.

SRAEL STONE,
PLAINTIFF
12170 CABERFAE HIGHWAY
MANISTEE MI 49660

V.

CASE NUMBER: 07125GC

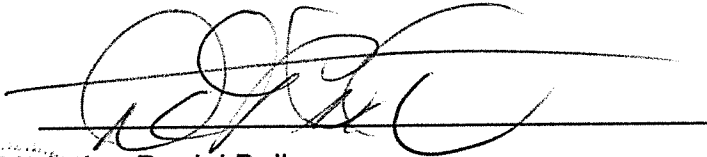
LITTLE RIVER BAND TRIBAL COUNCIL,
DEFENDANTS

The Final Report by RSM McGladry was delivered to the Court on November 15, 2007. It was hand-delivered to the attorney for Council (Martin) and mailed by regular mail to the plaintiff on November 16, 2007.

Council may commence crafting legislation, regulations, and procedures to protect the Tribe and its Commercial Fishing Program for the benefit of its members and the future of Commercial Fishing.

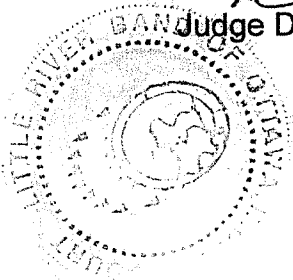
No further action is required in this matter by the Court.

SO ORDERED:



Judge Daniel Bailey

11/19/07
Date



CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Deborah A. Miller - Court Administrator

11-19-07
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

Israel Stone,
Plaintiff/Petitioner

v.

Case Number: 07125GC

Little River Band of Ottawa Indians
Tribal Council,
Defendant/Respondent

Joseph Martin
Legislative Attorney
375 River Street
Manistee MI 49660

ORDER REGARDING EXPERT REPORT

The court requested an audit of the Commercial Fishing Program be done by the firm RSM McGladrey beginning October 1, 2007. This *Preliminary Expert Report* was provided to the Court on October 29, 2007.

A Gag Order was signed regarding the contents of the initial report. Only the attorneys or unrepresented party had access to the report and only in the court offices.

RSM McGladrey presented the final *EXPERT REPORT* to the Court on November 13, 2007. It was delivered by Mike Zimmerman.

Both the plaintiff and the defendant's counsel received a copy.

There are no sanctions regarding the dissemination of the final report prepared and submitted by RSM McGladrey. The parties may use the information to make adjustments, rules and regulations for the Commercial Fishing Program that will benefit all concerned.

SO ORDERED:



Judge Daniel Bailey



Date



Israel Stone,
Plaintiff/Petitioner

v.

Case Number: 07125GC

Little River Band of Ottawa Indians
Tribal Council,
Defendant/Respondent

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Deborah A. Miller – Court Administrator

11.28.07
Date

LITTLE RIVER BAND OF OTTAWA INDIANS

TRIBAL COURT

People
of the Little River Band of Ottawa Indians,
Plaintiff,

Case No. 07135TM
Hon. Angela Sherigan

v.

Robert Hardenburgh,
Defendant

Gene Zeller
Prosecuting Attorney
3031 Domres Rd.
Manistee, MI 49660

Mark Quinn
Attorney for Defendant
402 Maple Street
Manistee, MI 49660

ORDER OF JUDGMENT

This matter having come before the court on a Complaint filed July 20, 2007 alleging that the Defendant engaged in the crimes of Count I - Sexual Assault in violation of Tribal Ordinance #03-400-03, Section 19.02, and Count II - Harassment under the same Ordinance, Section 8.06. A bench trial being held on December 21, 2007, continuing and concluding January 10, 2008, in which both parties were represented, the Court hereby makes the following findings:

The standard of proof on both counts is beyond a reasonable doubt.

Section 19.02, Tribal Ordinance #03-400-03, Sexual Assault, states:

- C. "Did subject another person to any sexual contact; and
 - A. did now or reasonable should know that the sexual contact is offensive to the victim"

A hug, in and of itself, is not sexual harassment. However, this Court warns that when a hug goes beyond that, and there is rubbing up against a woman's chest, it is sexual harassment. The complaining witness testified that the Defendant rubbed up against her chest, and made crude sexual comments about her breasts. Defendant denied such conduct. In this case there was also video evidence, Exhibit A, casino security tape of June 21, 2007. There is no sound on the video. This court has reviewed the tape several times, at trial and after the trial, and finds that the tape is inconclusive as to which witness' testimony is accurate and therefore the court finds that there is reasonable doubt.

LITTLE RIVER BAND OF OTTAWA INDIANS

TRIBAL COURT

People
of the Little River Band of Ottawa Indians,
Plaintiff,

Case No. 07135TM
Hon. Angela Sherigan

v.

Robert Hardenburgh,
Defendant

Section 8.06 of the same Ordinance states:

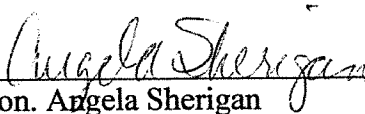
“Did knowingly pursue a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and which serves no lawful purpose; and; is conduct that is such that it would cause a reasonable person to suffer substantial emotional distress”

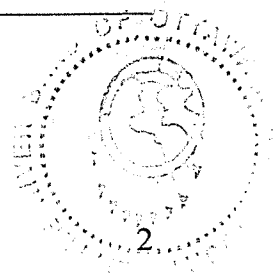
For a finding of guilt on Count II both elements must be met. While there is no doubt that the complaining witness in this case, through her testimony and her demeanor, is clearly upset about the situation and appears to be afraid of the Defendant, this Count also fails. From the testimony given at the trial, the Court finds that the Defendant did not “knowingly pursue a pattern of conduct”. Of the incidents that were testified to at the trial, the testimony indicates that in most of the contacts the circumstances were that the defendant did not initiate the contact with the complaining witness and the contact was initiated by Michael Sprague who was accompanied by the complaining witness and that the conduct which the complaining witness and Michael Sprague testified consisted of looking at complaining witness up and down and puffing out chest, did not rise to level that a reasonable person would have suffered substantial emotional distress on those occasions. Even considering the totality of the circumstances and incidents, reasonable doubt exists.

WHEREFORE, the Court hereby finds the Defendant, Robert Hardenburgh, Not Guilty on both Counts.

SO ORDERED:

Dated: January 30, 2008


Hon. Angela Sherigan



RECEIVED
BY DW DATE 2-12-08

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

CANDACE CHAPMAN,
Plaintiff,

Case No. 07-164-CC

v.

MEMORANDUM OPINION
AND ORDER

LITTLE RIVER BAND OF OTTAWA INDIANS
and LITTLE RIVER BAND OF OTTAWA INDIANS'
TRIBAL COUNCIL
Defendants.

I. Introduction

On or about September 4, 2007, Ms. Candace Chapman, plaintiff in this action, filed a *pro se* pleading captioned "Motion for Declaratory Judgment" against the Little River Band of Ottawa Indians Tribal Council as named defendant. The gravamen of her "motion" was that the Tribal Council failed to carry out its duties under the Tribal Constitution, when it voted *not* to approve the Tribal Judiciary's unanimous recommendation to remove Appellate Justice Ryan Champagne from office. The basis for the removal action was that Justice Champagne was convicted in Tribal Court of the crime of attempted fraud in that he intentionally made a false statement in an attempt to obtain money from the Tribe.¹

¹ More precisely, Justice Champagne was convicted in a bench trial before Special Judge Brenda Jones Quick of the crime of Attempted Fraud in violation of Tribal Ordinance 03-400-03, Article X § 11.02, incorporating MCL 740.92 pursuant to Tribal Ordinance 97-300-01. The complaint stated that

Through deceit, misrepresentation, and intimidation, the defendant has attempted to coerce the Tribe to reimburse him for damages suffered t his vehicle involved in a two car accident. The defendant reported to his supervisor that neither driver was at fault. The Tribe learned later that the defendant was cited by a state trooper for failure to yield; the citation was upheld after an appeal. Defendant claims he was on Tribal business, a claim disputed by his supervisor.

Judge Quick imposed a sentence of a fine in the amount of \$1,200 and fifty hours of community service.

Justice Champagne appealed his conviction to the Little River Band of Ottawa Indians Tribal Court of appeals. The conviction was upheld by a unanimous vote of 3-0 by a specially appointed appellate panel.

Based on this conviction, an action was initiated by Tribal Judge Daniel Bailey to remove Justice Champagne from office pursuant to Art. VI, Sec. 6(b) of the Tribal Constitution, which provides "If a member of the judiciary obtains information which indicates that grounds exist for a removal of another judge, he/she shall written notice of the charge and specify the facts supporting such charge to all Tribal judges, including the

Defendant Tribe subsequently filed a written answer in which it requested that it be granted a favorable judgment on the pleadings or summary disposition because the plaintiff failed to state a claim upon which relief might be granted. The principal assertion of the Tribe was that removal of Tribal judges was a 'political question' not subject to judicial review. Ms. Chapman, now represented by Mr. William Brooks as counsel of record, filed a "Response in Opposition to Defendant's Motion on the Pleadings on Summary Judgment," which essentially asserted that there was no bar to proceeding to a determination of whether the Tribal Council acted unconstitutionally, both in procedure and substance, in its failure to remove Justice Champagne from office.²

Oral argument on defendants' motion was heard before Special Judge Frank Pommersheim³ on December 17, 2007.

II. Issues

The motion raises two principal issues namely: whether the Tribal Council's removal power is essentially a 'political question' and thus not subject to judicial review and whether the plaintiff has standing sufficient to seek the declaratory relief requested. Each issue will be discussed in turn.

accused." The grounds asserted for removal were that Justice Champagne's criminal conviction in Tribal Court was "unethical conduct as defined by the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct." *Id.* at Art. VI, Sec. 6(b)(1) and "Ineligibility under Section 2 of this Article, to serve as a member of the Tribal Court." *Id.* at Art. VI, Sec. 6(b)(3).

A public hearing was held on Justice Champagne's removal in which Justice Champagne participated. The Tribal Judiciary, by a unanimous vote of 5-0, ordered that Justice Champagne be immediately suspended and that "This matter be referred to the Tribal Council for removal of Justice Ryan Champagne." This order was dated August 2, 2007.

The Tribal Council held a "Special Meeting on August 30, 2007 for the purpose of conducting a removal hearing regarding Justice Ryan Champagne." The vote on the motion to remove Justice Champagne was five in favor, three opposed and one abstention. The motion to remove *failed* as it lacked the necessary seven of nine affirmative votes required by the Tribal Constitution. *Id.* at Art. VI, Sec. 6(b).

² The core of these alleged Tribal constitutional violations were that the Tribal Council violated Art. VI, Sec. 2(a) by allowing an individual not qualified to "serve as a Tribal Judge" to continue to hold office and further violated Art. VI, Sec. 6(b)(3) in that by ignoring the grounds for removal, the Tribal Council's actions were "arbitrary and contrary to the mandate of the Constitution." Plaintiff's Response at 10.

³ At oral argument, counsel for the Tribe made an oral motion (without any cited authority) to recuse Special Judge Pommersheim because he sits with Appellate Justice Michael Petoskey of the Little River Band on the Appellate Court of the Saginaw Chippewa Tribal Court of Appeals. The Saginaw Chippewa Tribal Court of Appeals has not dealt with any cases involving the removal of tribal judges. In addition, having not otherwise discussed this case in any manner with anyone, the motion is denied.

III. Discussion

A. Political Question

The political question doctrine is generally understood in federal courts' parlance to be an element of the requirement of justiciability required by Article III of the United States Constitution. More broadly, it has come to mean that within the *structure* of any constitution, including a Tribal constitution, that despite an otherwise legitimate claim that the constitution has been violated, there may be a textual commitment within the constitution that such disputes are inappropriate for judicial review. Therefore such disputes are best resolved within the political process involving the other branches of government, namely the executive and legislative branches. *See e.g.* Erwin Chemerinsky, *Federal Jurisdiction* 147 (5th ed. 2007).

While this doctrine is rooted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it finds its most classic, modern statement in *Baker v. Carr*, 369 U.S. 186, 217 (1962):

Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Despite this oft quoted statement, it is worth noting that the Constitution itself does not specifically mention judicial review, much less the political question doctrine.⁴ The Supreme Court has nevertheless applied the political question doctrine in several discrete areas such as the republican form of government clause and the electoral process; foreign affairs; regulating Congress' internal processes; ratifying constitutional amendments; shaping equitable relief; and the impeachment process. *Chemerinsky* at 150. Any of these concerns are equally applicable to the Constitution of the Little River Band of Ottawa Indians and present significant questions of first impression to this court.

⁴ See many scholars on both sides of the issue about whether there should be a political question doctrine, whether it is constitutional or prudential in nature. *Chemerinsky* at 150-53.

The most relevant (federal) area for the purposes of this opinion is that of impeachment and removal from office. In the context of impeachment, the Constitution in Art. I, Sec. 2 provides that the House of Representatives has the sole authority to adopt articles of impeachment and Art. I, Sec. 3 provides that the "Senate shall have the sole power to try all impeachments." In the case of *Nixon v. United States*, 506 U.S. 224 (1993), the Court held that the judiciary could not review the Senate's use of a committee (as opposed to the entire Senate) to hold a hearing and make a recommendation on the impeachment of a federal judge.

The Court found that judicial review in this instance would be inconsistent with the checks and balances structure of the Constitution that provided impeachment and removal as the sole legislative check on the judiciary. Nevertheless, the concurrence of Justice Souter suggested that potential judicial review of the Senate decision might exist if the manner of its decisionmaking threatened the integrity of its results if, for example, the Senate decided removal on the basis of a coin toss.⁵

The structure of the Little River Band of Ottawa Indians Constitution for removal purposes is arguably quite dissimilar to the United States Constitution. Removal proceedings are *initiated* by the Tribal Judiciary, Art. VI, Sec. 6(b), but such a removal "recommendation" must be approved by seven of the nine Council members before the removal becomes effective. *Id.* Thus procedurally, removal under the Little River Band of Ottawa Indians Tribal Constitution requires *complementary* actions of both the judicial and legislative branches of Tribal government as opposed to the United States Constitution, which assigns *all* impeachment and removal authority to the legislative branch.

Yet it is also true that the Tribal Constitution requires the participation of the *entire* Tribal judiciary to seek removal. *Id.* This creates the problem of how the judiciary could "review" actions of the Tribal Council in the context of removal without avoiding obvious conflicts of interest. Indeed, this is the case at bar, which required the appointment of a special judge because the entire Tribal judiciary participated and voted in the proceeding to recommend the removal of Justice Champagne. It would be

mc Id that challenges to the Tribal Council's decision in removal actions would *always* have to be

at 253-254 (Souter, J., concurring).

decided by Special Judges, who were not regularly elected members of the Tribal judiciary. This could not be the intended result of either the drafters or members of the Little River Band of Ottawa Indians who voted for the adoption of the Tribal Constitution in 1998.

This conclusion is reinforced by the fact that in the context of removal of the Tribal Ogema or any member of the Tribal Council, the decision of the Tribal Council "shall be final." Tribal Constitution, Art. X, Sec. 3. The vote of the Tribal Council for removal of the Tribal Ogema or any member of the Tribal Council expressly requires the same majority vote of seven out of nine members. *Id.* There is no indication whatsoever in the Tribal Constitution that the decision of the Tribal Council, when voting on the removal of Tribal judges, would be any less final, especially in light of the problems discussed above.⁶

It is this structural configuration that leads to the conclusion that questions concerning the removal of Tribal judges by the Tribal Council are political questions beyond *ordinary* judicial review. Nevertheless, just as in *Nixon v. United States*, there is a significant caveat and recommendation in this regard. There are likely outer limits pertinent to due process and equal protection guarantees under the Tribal Constitution at Art. III, Sec. 1(h) and the Indian Civil Rights Act, 25 U.S.C. § 1302(8), beyond which the Tribal Council arguably cannot go. Therefore it is incumbent upon the Tribal Council, as the United States Senate, to adopt written rules governing removal proceedings in order to insure basic elements of due process, equal protection, and cultural fairness. Such rules do not currently exist.

B. Standing

The doctrine of standing involves the determination of "whether a specific person is the proper party to bring a matter to the Court for adjudication." *Chemerinsky* at 57. As stated by the Supreme Court in *Warth v. Seldin*, 422 U.S. 490, 498 (1978) "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." The core of standing in *federal* court adjudication derives from Article III's constitutional requirement that federal courts may only adjudicate "cases and controversies."

⁶ To be sure, the text of the Tribal Constitution is not perfectly lucid in its various removal provisions, but there does not appear to be any structural or (constitutional) policy grounds to treat these provisions differently as to whether there is available judicial review.

While standing jurisprudence has varied significantly over time, it is generally understood that its bedrock (constitutional) ingredients consist of injury in fact to the plaintiff, causation or traceability of the alleged harm to the defendant, and redressability, that is the ability of the court to fashion appropriate relief. *See e.g., Bennett v. Spear*, 520 U.S. 154, 167 (1997). These requirements, but particularly the injury requirement, are thought to serve important values embedded in the structure of Article III of the Constitution, which establishes a federal judiciary of limited, not general jurisdiction:

The injury requirement is viewed as advancing the values underlying the standing and justiciability doctrines. Requiring an injury is a key to assuring that there is an actual dispute between adverse litigants and that the court is not being asked for an advisory opinion. The judicial role in the system of separation of powers is to prevent or redress particular injuries. Judicial resources are thought to be best saved for halting or remedying concrete injuries. An injury is said to give the plaintiff an incentive to vigorously litigate and present the matter to the court in the manner best suited for judicial resolution. An injury assures that the plaintiff is not an intermeddler, but rather someone who truly has a personal stake in the outcome of the controversy.

Chemerinsky at 62.

Such structure and values are not, however, necessarily those reflected in Tribal constitutions.

For example, in the case of *Village of Mishongnovi v. Humeyestewa* (Hopi Court of Appeals, 1998), the Hopi Court of Appeals noted that Hopi courts diverged from federal courts in two significant respects. First, Hopi courts were rooted “within a custom and tradition of open and consensual dispute resolution” and second, under Hopi law, its courts were courts of general, not limited, jurisdiction. With these concerns in mind, the Hopi Court of Appeals announced a flexible standing rule consistent with the “participatory traditions” of Indian dispute resolution such that “a party need only assert some actual or threatened injury that is basically related to the legal claims it seeks to present to the court.” *See also Rave v. Reynolds*, 23 Ind. L. Rep. 6150 (Winnebago Sup. Ct. 1996).

While the issue of standing was not raised by the Tribe, it cannot be either ignored or assumed for it is a basic underpinning for any functioning judiciary. The structure of Little River Band of Ottawa Indians Constitution appears in accord with the general principles articulated in the *Village of Mishongnovi* case. The Little River Band of Ottawa Indians Constitution establishes a Tribal Court of general jurisdiction at Art. VI, Sec. 8(a), which states that “the judicial powers of the Little River Band

shall extend to all cases and matters in law and equity.” The Constitution also establishes an express separation of powers with judicial independence at Art. VI, Sec. 9.

The Tribal Constitution also appears to reflect notions of “participatory traditions” in Article VII, which specifically requires two yearly meetings of the General Membership with authority of the general membership to adopt motions and ordinances. Art. VII, Sec. 1(a)(3). Given this structure of Little River Band of Ottawa Indians Constitution, this court adopts the definition of standing as articulated in the *Village of Mishongnovi* case; a party need only assert some actual or threatened injury that is basically related to the legal claims it seeks to present to the courts.

While such a broad and appropriate definition of standing might suggest that the plaintiff in this case has standing, this is not so. It is not so because of the unique posture of the case. While declaratory relief is authorized under Art. XI, Sec. 2(a) of the Tribal Constitution, this action, despite its caption, is not an action for declaratory relief. A declaratory judgment action is a proceeding that establishes the rights and responsibilities of adverse litigants in the context of an actual dispute and usually does not result in the granting of affirmative relief. In the case at bar, these requirements are not satisfied. There is no actual legal dispute or adversity between the plaintiff and the defendant. The plaintiff does not seek a declaration of rights and responsibilities, but rather a reversal and remand of a decision made by the Tribal Council.

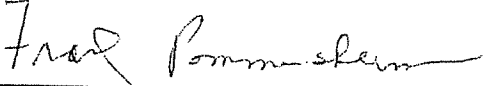
Plaintiff’s action in this instance is most analogous to an attempt by a non-party to intervene in and to obtain judicial review (and remand) of a final decision; a final decision made by the Tribal Council pursuant to its Constitutional duty to rule on a recommendation from the Tribal Judiciary to remove one of its members. The plaintiff does *not* have standing as a non-party to seek such intervention and judicial review. The plaintiff does not have standing in this unique context because it is not authorized by Tribal law and conflicts with basic Tribal (constitutional) values. To somehow recognize standing in this framework would completely undermine any notion of finality or reliability of Tribal Council decisions in situations involving the potential removal of a Tribal judge.

IV. Conclusion

For all of the above-stated reasons, plaintiff's action is dismissed. The issue of removal of Tribal judges by the Tribal Council is a political question in which the Tribal Constitution accords finality to the Tribal Council's decisions in these matters. Further, the plaintiff in this action does not have standing as a non-party to challenge the *decision* of the Tribal Council in the context of the removal of a specific tribal judge.

Nevertheless, as noted *supra* at p. 5, due process and equal protection guarantees in both the Tribal Constitution, Art. III, Sec. 1(h) and the Indian Civil Rights Act, 25 U.S.C. § 1302(8), likely create outer boundaries, which the Tribal Council cannot ignore. In other words, in a different and more egregious context, the impediments of both the political question and standing doctrines may well be overcome. Therefore the Tribal Council is well advised to adopt appropriate guidelines to insure protection of these rights, as well as advancing cultural legitimacy and integrity.

IT IS SO ORDERED.



Frank Pommersheim
Special Judge

Dated: January 15, 2008.

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

CANDACE CHAPMAN,
Plaintiff

v.

LITTLE RIVER BAND OF OTTAWA INDIANS,
LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COUNCIL,
Defendants

Case Number 07-164-CC
Case Number 08-034-AP
OPINION AND ORDER

I. Introduction

On December 1, 2006, Tribal Court Judge Brenda Jones Quick, in a written Opinion and Order, found Little River Band of Ottawa Indians Court of Appeals Justice Ryan L. Champagne guilty of Attempted Fraud in violation of Tribal Ordinance 03-400-03, Article X §11.02, incorporating MCL 750.92 pursuant to Tribal Ordinance 97-300-01, against the People of the Little River Band of Ottawa Indians. This Opinion and Order was affirmed in its entirety by the Tribal Court of Appeals on June 6, 2008.

A public hearing as to whether to refer Justice Champagne for removal to the Little River Band of Ottawa Indians Tribal Council was held on July 30, 2007. Chief Judge D. Bailey presented the complaint and Justice Champagne presented his response via telephone conference. On August 2, 2007, Justice Stella Gibson, upon unanimous agreement by all Tribal Court judges, submitted to Tribal Council an Order after Public Hearing Referral for Removal Appeals Court Judge Ryan Champagne.

On August 8, 2007, Tribal Council unanimously voted to set a special meeting date for a public hearing on the judicial recommendation to remove Appellate Justice Ryan Champagne for

1:00 p.m. on August 30, 2007 in the Three Fires Conference Room at the Little River Casino Resort. The removal hearing was held with the Motion to Remove Justice Champagne failing.

On or about September 4, 2007, Candace Chapman, Plaintiff, filed a *Pro Se* Complaint for Declaratory and Injunctive Relief against the Little River Band of Ottawa Indians Tribal Council, Defendant, alleging procedural and substantive violations of the Tribal Council in the removal action of Court of Appeals Justice Ryan L. Champagne. Oral arguments were held before Special Judge Frank Pommersheim on December 17, 2007. On January 15, 2008, Judge Pommersheim issued a written Memorandum Opinion and Order dismissing Plaintiff's complaint holding that for lack of standing holding that "the issue of removal by the Tribal Council is a political question in which the Tribal Constitution accords finality to the Tribal Council's decisions".

Plaintiff filed notice to appeal as a matter of right. Plaintiff filed a timely Brief on Appeal. Defendant filed a timely answer. Oral arguments were heard by the Little River Band of Ottawa Indian Tribal Court of Appeals on June 24, 2008.

For the reasons set forth in this Opinion and Order, the Tribal Appellate Court reverses the Trial Court Opinion.

II. Scope of Review

All of the issues on appeal involve conclusions of law and, therefore, are reviewed de novo by the Tribal Court of Appeals pursuant to Tribal Court Rule of Appellate Procedure R. 5401(E).

III. Jurisdiction

The Tribal Court has jurisdiction over this matter pursuant to Article VI, Section 8 of the Tribal Constitution which provides in pertinent part:

- (a) The judicial powers of the Little River Band shall extend to all cases and matters in law and equity arising under this Constitution, the laws and ordinances of or applicable to the Little River Band including but not limited to:
1. To adjudicate all civil and criminal matters arising within the jurisdiction of the Tribe or to which the Tribe or an enrolled member of the Tribe is a party.
 2. To review ordinances and resolutions of the Tribal Council or General Membership to ensure they are consistent with this Constitution and rule void those ordinances and resolutions deemed inconsistent with this Constitution.

IV. Standing

The first issue on appeal is whether Appellant has standing under the Little River Band of Ottawa Indians Tribal Constitution to bring this action. In this issue of first impression, the Court holds that Tribal Citizens have standing to bring suit against Tribal Council when Tribal Council fails to fulfill duties mandated by the Tribal Constitution.

Appellant makes a compelling argument that there is a "public harm" when Tribal Council fails to execute duties mandated by the Tribal Constitution. In the present case, Tribal Council's failure to follow procedures required by the Tribal Constitution has threatened the integrity of the Tribal Court, the integrity of the removal process, and the integrity of Tribal Council decisions. We find this to be a "public harm" sufficient to fulfill the requirements for standing. In determining that Appellant has standing in this case, the Court notes that to deny standing to a Tribal Citizen seeking mandamus or declaratory/injunctive relief when Tribal Council fails to perform duties mandated by the Tribal Constitution which result in a public harm would leave Tribal Citizens without any remedy to uphold and enforce the Tribal Constitution which is in effect for their protection and that of the Tribe itself.

The Court finds further support for standing pursuant to Article XI, Section 2 (a) of the Tribal Constitution which states the following:

- (a) The Little River Band, its Tribal Council members, Tribal Ogema, and other Tribal officials, acting in their official capacities, shall be subject to suit for declaratory or injunctive relief in the Tribal Court system for the purpose of enforcing rights and duties established by this Constitution and by the ordinances and resolutions of the Tribe.

This provision clearly provides that suit can be brought against Tribal Council to enforce rights and duties established by the Tribal Constitution. As discussed below, we find that Tribal Council failed to perform duties mandated by the Tribal Constitution.

Because the Court holds that Tribal Citizens have standing under the Tribal Constitution in this case, it does not address whether Tribal Citizens have standing under traditional or common law to bring such an action.

V. Political Question

The Trial Court held that review of a Tribal Council decision to not remove a Tribal Judge was a political question that cannot be reviewed by the Tribal Court, but rather, is to be resolved by the Tribal Council in the adoption of written rules governing removal proceedings. The Trial Court held that the process for removing a Tribal Judge, with the recommendation for removal being made by the entire Tribal judiciary but the removal not taking effect until seven of nine Tribal Council members voted to approve the recommendation for removal, “creates the problem of how the judiciary could review actions of the Tribal Council in the context of removal without avoiding obvious conflicts of interest”. The Trial Court points to appointment of a Special Judge to hear this as evidence of this being a political question. We disagree. The fact that a Special Tribal Judge and a Special Tribal Justice were asked to hear this case in order

to avoid any conflict of interest demonstrates that the Tribal Court wanted to guarantee the integrity of the Court and the process, something we see as a focus of the Tribal Constitution. The Trial Court stated that its conclusion was supported by the fact that Article X, Section 3 of the Tribal Constitution states that the removal of the Tribal Ogema or any member of the Tribal Council, "shall be final". In using this Constitutional provision to support its argument, the Trial Court fails to recognize that the provision addressing the removal of a Tribal Judge does not state that Tribal Council's decision "shall be final". The framers of the Tribal Constitution appear to have taken great pains to be explicit throughout the document. This Court finds that the fact that the language "shall be final" is not present in Article VI, Section 6 demonstrates that the framers of the Tribal Constitution purposely did not include this language so that such a Tribal Council decision would be reviewable by Tribal Court. The fact that there are some instances when a Special Judge and/or Special Justice may be called to avoid any conflict of interest is not a persuasive reason to hold this is a political question and we, therefore, reverse the decision of the Tribal Court regarding this matter.

VI. Tribal Council Duties Mandated by the Tribal Constitution in Removing a Tribal Judge

The Tribal Constitution is specific regarding the considerations in removing a Tribal Judge. Article VI, Section 2 states in pertinent part that a Tribal Judge cannot be "convicted of any crime of dishonesty, or moral turpitude, nor been convicted of a felony under Tribal or State law..." This applies under subsection (a) for members of the Tribe and subsection (b) for non-members of the Tribe.

The Tribal Constitution is also specific regarding the process and responsibilities of the Tribal Court and Tribal Council for removing a Tribal Judge. Article VI, Section 6 provides in pertinent part:

(b) Removal. A Tribal Judge may only be removed by a vote of seven (7) of the nine (9) Council Members following a recommendation of removal by a majority of the remaining Tribal Judges for the following reasons:

1. Unethical conduct, as defined by the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct;
2. Gross misconduct or malfeasance in office that is clearly prejudicial to the administration of justice;
3. Ineligibility, under Section 2 of this Article, to serve as a member of the Tribal Court;
4. Inability to fulfill the duties of the office due to mental or physical disability, to the extent that he or she is incapable of exercising judgment about or attending to the duties of the Tribal Court. Such determination shall be based upon or supported by competent medical evidence or opinion.

If a member of the Tribal judiciary obtains information which indicates that grounds exist for removal of another judge, he/she shall provide written notice of the charge and specify the facts supporting such charge to all Tribal Judges, including the accused. The Judge so charged shall be notified so he/she may answer the charges at a public hearing of all members of the Tribal Court held for that purpose. Such hearing shall be noticed at least ten (10) days prior to the hearing at which the Judge's referral for removal is to be considered. If a majority of the remaining of the Tribal Court vote to refer the Judge to the Tribal Council for removal, the grounds for removal shall be set forth with specificity and the Tribal Judge shall be suspended from office until the Tribal Council acts on the referral at a public meeting of the Tribal Council held to consider that referral. At least ten (10) days before the meeting of the Tribal Council at which the vote for removal will be taken, the affected judge shall be provided with a reasonable opportunity to answer the charges at the Tribal Council meeting. If the Tribal Council, by affirmative vote of seven (7) of the nine (9) Council members, finds that grounds for removal as stated by the Tribal Court exist, the Tribal Council shall remove the judge from office. If the Tribal Council find that the grounds for removal do not exist, the suspended judge shall be fully reinstated to the Tribal Court.

There is no dispute that the Tribal Court followed the requirements for removal as set forth in Article VI, Section 6 of the Tribal Constitution. Following Justice Champagne's

...tion and the subsequent Tribal Court of Appeals Order affirming the conviction, the Tribal Court instituted actions pursuant to Article VI, Section 6 of the Tribal Constitution to determine if the Tribal Court should recommend Justice Champagne's removal to the Tribal Council. Justice Champagne was notified of the hearing and presented his response via telephone conference. The Tribal Court submitted an Order after Public Hearing and Referral for Removal of Appeals Court Judge Ryan Champagne to Tribal Council on August 2, 2007.

Pursuant to Article VI, Section 6 of the Tribal Constitution, Tribal Council held a public hearing on the removal of Justice Champagne. That is where Tribal Council's compliance with the duties mandated by the Tribal Constitution ended.

Article IV, Section 6 of the Tribal Constitution provides the specific requirements for Tribal Council meetings. It provides in pertinent part:

(d) All meetings of the Tribal Council shall be open to the Tribal Membership. However, the Council may meet in closed session for the following purposes:

1. Personnel Matters, provided the employee in question did not request a public meeting, or
2. Business matters involving consideration of bids or contracts which are privileged or confidential, or
3. Claims by and against the Tribe.

Minutes shall be maintained relating to all business conducted in open or closed session. The general reason for a determination to meet in closed session shall be placed on the record in open session...

Both parties acknowledge that there was a period of time during which Tribal Council was not present at the removal hearing. Appellant argues that Tribal Council went into closed session, violating Article IV, Section 6 of the Tribal Constitution which requires open meetings other than in cases of personnel matters, business matters involving consideration of bids or contracts which are privileged or confidential, or claims by and against the Tribe. This provision further requires that Tribal Council must state on the record which of the three reasons list above are the

basis for going into closed session. Appellee argues that Tribal Council did not go into a closed session, but rather, recessed in order to confer with legal counsel. The Court does not find Appellee's explanation compelling since Tribal Council voted on whether to remove Justice Champagne after returning from this recess. The Court, therefore, holds that Tribal Council went into a closed session without placing the reasons for the closed session on the record in violation of Article IV, Section 6 of the Tribal Constitution.

Appellant contends that Tribal Council did not follow the voting procedures mandated by the Tribal Constitution in Article VI, Section 6. Specifically, Appellant argues that Tribal Council is required to take a vote on whether the grounds for removal of a Tribal Judge pursuant to the assertions in the recommendation for removal from the Tribal Court exist. This Court agrees. In this case, the Tribal Court stated in its Order after Public Hearing and Referral for Removal of Appeals Court Judge Ryan Champagne that Justice Champagne's conviction of Attempted Fraud against the Little River Band of Ottawa Indians violated 2.102 (Integrity and Independence of the Tribal Judiciary) and 2.103 (Impropriety and the Appearance of Impropriety) of the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct, as well as Article VI, Section 2 of the Tribal Constitution with the conviction of Attempted Fraud against the Little River Band of Ottawa Indians constituting a crime of dishonesty. Article VI, Section 6 requires that Tribal Council vote as to whether Justice Champagne's conviction violates the provisions of the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct and/or Article VI, Section 2 of the Tribal Constitution. The Tribal Council violated this constitutional requirement when it only voted on whether to remove Justice Champagne. Tribal Council must, therefore, take a new vote with Tribal Council Members first voting on whether the conditions for removal exist as stated in the Order after

Public Hearing and Referral for Removal of Appeals Court Judge Ryan Champagne. This Court notes that Article VI, Section 6 states that if seven of the nine Tribal Council Members vote that grounds for removal exist, “the Tribal Council shall remove the Judge from office”. The use of the word “shall” means that the action is mandatory.

As Tribal Council holds a new Tribal Council vote on the recommendation of the Tribal Judiciary to remove Justice Champagne, we remind Tribal Council that there are specific provisions relating to abstention. Article IV, Section 6 (f) (2) provides in pertinent part as follows:

(f) Quorum required to conduct business.

2. When a Council Member has a personal interest in an issue or matter to be voted on by the Council, other than those common to all Tribal Members, which would require balancing personal interest against interests of the Tribe, such member shall abstain from voting on that matter due to conflict of interest and shall disclose the nature of the conflict.

Tribal Council Member Koon abstained during this vote without disclosing the nature of the conflict. Again, the use of the word “shall” makes it mandatory for a Tribal Council Member to state the reasons for the abstention. If there are any abstentions during the new vote of Tribal Council ordered by this Opinion, reasons for the abstention must be stated.

Conclusion

For the reasons set forth in this Opinion, this Tribal Appellate Court hereby reverses the decision of the Trial Court, finding that Appellant has standing under the Tribal Constitution to bring this action. The Court hereby orders that Tribal Council conduct a public vote on whether Justice Champagne’s conviction of Attempted Fraud against the Little River Band of Ottawa Indians is grounds for removal pursuant to the Tribal Judiciary’s Order after Public Hearing and Referral for Removal of Appeals Court Judge Ryan Champagne. Specifically, each Tribal

Council Member must each vote publically on whether Justice Champagne's conviction for Attempted Fraud against the Little River Band of Ottawa Indians violates 2.102 (Integrity and Independence of the Tribal Judiciary), 2.103 (Impropriety and the Appearance of Impropriety) of the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct and/or Article VI, Section 2 of the Tribal Constitution with the conviction constituting a crime of dishonesty. They must then vote on whether to remove Justice Champagne in accordance with the requirements of the Tribal Constitution. Any closed sessions held by Tribal Council must be stated on the record with the reasons for the closed session also stated on the record. Any Tribal Council Members that abstain from voting must place the reasons for the abstention on the record.


IT IS SO ORDERED.

Justice Anna Jean Guenthardt

Date

Justice Melissa L. Pope

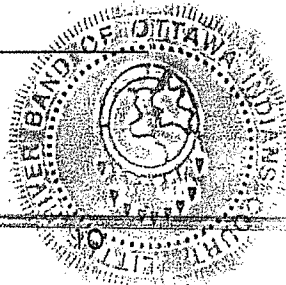
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Justice Jonnie J. Sam

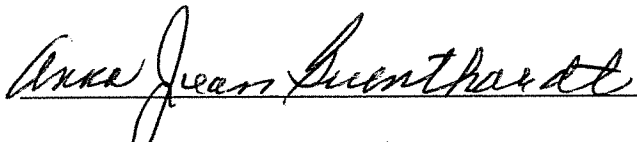
August 4, 2008

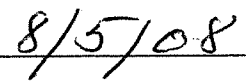
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Council Member must each vote publically on whether Justice Champagne's conviction for Attempted Fraud against the Little River Band of Ottawa Indians violates 2.102 (Integrity and Independence of the Tribal Judiciary), 2.103 (Impropriety and the Appearance of Impropriety) of the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct and/or Article VI, Section 2 of the Tribal Constitution with the conviction constituting a crime of dishonesty. They must then vote on whether to remove Justice Champagne in accordance with the requirements of the Tribal Constitution. Any closed sessions held by Tribal Council must be stated on the record with the reasons for the closed session also stated on the record. Any Tribal Council Members that abstain from voting must place the reasons for the abstention on the record.

IT IS SO ORDERED.


Justice Anna Jean Guenthardt

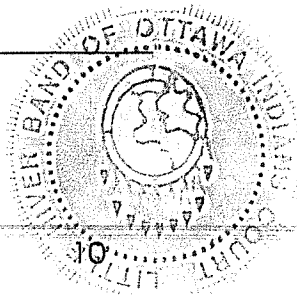

Date

Justice Melissa L. Pope

Date

Justice Jonnie J. Sam

Date



Council Member must each vote publically on whether Justice Champagne's conviction for Attempted Fraud against the Little River Band of Ottawa Indians violates 2.102 (Integrity and Independence of the Tribal Judiciary), 2.103 (Impropriety and the Appearance of Impropriety) of the Michigan Indian Judicial Association Model Code of Tribal Judicial Conduct and/or Article VI, Section 2 of the Tribal Constitution with the conviction constituting a crime of dishonesty. They must then vote on whether to remove Justice Champagne in accordance with the requirements of the Tribal Constitution. Any closed sessions held by Tribal Council must be stated on the record with the reasons for the closed session also stated on the record. Any Tribal Council Members that abstain from voting must place the reasons for the abstention on the record.

IT IS SO ORDERED.

Justice Anna Jean Guenthardt

Date

Melissa L. Pope

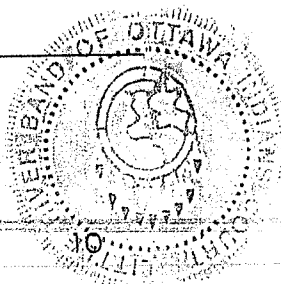
Justice Melissa L. Pope

8-5-08

Date

Justice Jonnie J. Sam

Date



LITTLE RIVER BAND OF OTTAWA INDIANS

TRIBAL COURT

Brenda Hyma-Cogswell,
Petitioner,

Case No. 07-183 GA
Hon. Angela Sherigan

v.

Gaming Commission,
Respondent.

Brenda Hyma-Cogswell
Pro-Se
189 Quincy Street
Manistee, MI 49660

Matthew Leskey
Attorney for Gaming Commission
375 River Street
Manistee, MI 49660
231-398-6821

OPINION AND ORDER AFTER HEARING

At a session of said Court held in the Courthouse of the Little River Band Of Ottawa Indians on the Little River Band of Ottawa Indians Reservation, this 29th day of November, 2007.

PRESENT: HONORABLE ANGELA SHERIGAN, Tribal Court Judge

The Court being advised in the premises, after a hearing on Respondent's Motion to Dismiss, in which all parties were present, the Court finds that:

On August 16, 2007, the Gaming Commission held a hearing regarding the Petitioner's gaming license. Petitioner was notified of the decision on September 6, 2007, by registered, return receipt mail.

Section 12.05 of the Gaming Ordinance, Appeal to the Tribal Court, provides that a finding or licensing decision of the regulatory agency may be appealed to the Tribal Court. The Gaming Ordinance does not establish any time period within which a party must file his/her appeal to the Tribal Court.

The Tribal Court Rules and Procedures at Section 5.301(a), allows for twenty-eight (28) days to file an appeal, after the entry of the written judgment, order or decree. The Tribal Court Rules of Civil Procedure at Section 6.2 provides for a twenty day (21) time limit on filing appeals. Where there is confusion regarding which Tribal Court Rule is applicable, and there is no prescribed time period in the Ordinance or Regulation

from which regulatory body the appeal is coming from, the court will allow for the most liberal time period to control.

Petitioner argues that the counting of days should be the date of service, and not the date of entry. None of the potentially applicable rules support that interpretation. While the Court does recognize that it has the discretion to allow late filings, Petitioner was in a much better position to know that the time for filing an appeal commenced as of the date the order was entered by virtue of her service on the Court of Appeals.


Petitioner had 28 calendar days from the date of *entry of the order*, in which to file her appeal. The entry of the order was August 30, 2007, thus making the last day to file the appeal to the Tribal Court was September 27, 2007.

Petitioner filed an appeal with the Tribal Court on October 2, 2007, thus the appeal was filed in an un-timely manner.

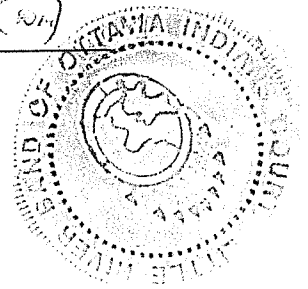
WHEREFORE, IT IS HEREBY ORDERED:

Respondent's Motion to Dismiss is granted.

Dated: December 6, 2007



Hon. Angela Sherigan



CERTIFICATION OF SERVICE

I certify that a copy of this Order was placed in the Tribal mail system to have sufficient postage attached and then mailed from the Manistee Post Office to all parties and attorneys of record.



Deborah Miller, Court Administrator

Dec. 7, 2007
Date

Little River Band of Ottawa Indians
TRIBAL COURT
3031 Domres Road
Manistee Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

Sharron Detz,
Petitioner
194 Quincy Street
Manistee MI 49660

v.

Case Number: 07223GR
Judge Daniel Bailey

Larry Romanelli, Tribal Ogema
Little River Band of Ottawa Indians,
Respondents

Matthew Lesky
Attorney for Ogema
375 River Street
Manistee, MI 49660

ORDER AFTER HEARING

A hearing on appeal of an employee grievance matter was heard on February 4, 2008. The Petitioner asked the Court to rule on the validity of three Performance Improvement Plans that have been placed in her personnel file; the last one resulting in a four-day suspension.

According to the Employment Ordinance #05-300-04, 6.01, the Court "...may review the record for prior progressive disciplinary actions in making a determination regarding the appealed grievance matter."

The Court takes the first two Performance Improvement Plans into consideration as exhibits of the progression of the disciplinary processes outlined in the Employment Ordinance. The Court has no jurisdiction to rule on the first two PIP's under Article VI, 6.01. *Authority*, a. "Only...actions regarding demotions, suspensions and terminations..." which were not an outcome of those PIP's.

The third (3rd) Performance Improvement Plan was given for "Failing to follow policies and/or procedure, Performance of self and/or staff which causes confusion in employment related issues, regard hiring of Candace Chapman, Matthew Lesky."

It appears from the exhibits presented by the Attorney for the Ogema that most of the e-mail documentation regarding Candace Chapman was initiated by the HR assistant Kim Montney due to the Petitioners absence from work. There is reference to a verbal acknowledgment that Ms. Chapman would receive a restoration of her previous benefits, but no written exhibit was entered. There was also no reference as to who verbally informed Ms. Chapman that this could be a benefit of her acceptance of employment. The only e-mail exhibit entered by Respondent that was sent from Ms. Detz's account was to the Ogema on November 21, 2007 stating "...it is my recommendation that we remain consistent with our policies and her benefits not [emphasis added] be restored."

Sharron Detz,
Petitioner
194 Quincy Street
Manistee MI 49660

Case Number: 07223GR
Judge Daniel Bailey

v.

Larry Romanelli, Tribal Ogema
Little River Band of Ottawa Indians,
Respondents

The Human Resource Director is ultimately responsible for the smooth operation of the department. The Director should have extensive knowledge of the Personnel Policies of the Executive Branch. The confusion regarding restoration of benefits definitely falls on Petitioners shoulder. It appears from the exhibits and testimony that she (and Ms. Montney) did try to rectify the situation after the initial discussion with Ms. Chapman. The Ogema made an Executive decision to restore the benefits after careful consideration of the circumstances involved.

The Petitioner's exhibits contained two conflicting documents concerning the hiring and salary amount for Mr. Lesky. The first document is from the day of the interviews for the position of Associate Legislative Attorney. The document has the handwritten ranking of the candidates that interviewed on July 27, 2007 and a note "Beginning offer \$55,000/year." It was initialed by S.P., L.J.B., NJK, and R.E.H. The other document "REFERENCE INFORMATION REPORT" dated and signed on August 1, 2008 by Sharron Detz and Dawn Smith and then subsequently signed by Beccaria, Hardenburgh, Alexander, and Whiteloon on August 3, 2008, has the statement: "Wages start same as Mary Witkop" and initialed by Kim Alexander.

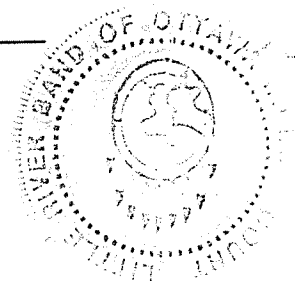
The Court feels that the appearance and representation of the Ogema by Matthew Lesky was a direct conflict of interest. He was listed in the PIP and although he said he wouldn't argue that point, his involvement should have been enough for him to defer to the Ogema's other legal counsel. The "mistake" certainly benefited the Attorney for the Respondent.

The Court strives for justice and the equitable resolution to the problems brought before it. The Court finds that both parties were at fault for the mistakes and confusion enumerated in the PIP. The expensive mistake regarding the hiring of Mr. Lesky appears to fall on the shoulders of Council and the Human Resource Director equally.

It is the judgment of the Court that the Third Performance Improvement Plan shall be removed from the Petitioners personnel file and the Petitioner shall only have two progressive disciplinary write-ups in her file. The Respondent will not be ordered to reimburse the Petitioner for lost wages during the four-day suspension.

SO ORDERED:


Judge Daniel Bailey



2/7/08
Date

Sharron Detz,
Petitioner
194 Quincy Street
Manistee MI 49660

Case Number: 07223GR
Judge Daniel Bailey

v.

Larry Romanelli, Tribal Ogema
Little River Band of Ottawa Indians,
Respondents

CERTIFICATION OF SERVICE

I certify that a copy of this order was placed in the Tribal mail system for sufficient postage to be attached and mailed to the plaintiff and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Miller
Deborah A. Miller – Court Administrator

2-8-08
Date