Hyma-Cogswell v Election Board --- #09004DJ

Summary: Petitioner filed a petition for Declaratory Judgment on Article IV, Section 4(d) of the Constitution. In this case the Petitioner is asking the Court for clarification and Interpretation of Article IX, Section 4(d). "Tribal members who are holding elected office, or running for office shall not be eligible to serve as an Election Board member."

Decision and Order: The Court Declares that Election Board members can run for re-election.

LRBOI v Bisard-Smith --- #09015TM

Summary: The Defendant was charged with Section 11.02 - Fraud

A motion to reclaim the truck that was purchased with the commercial fishing start-up money.

Decision and Order: The tribal auditor has determined that $15,013.94 was not used for the start-up of Mr. Bisard-Smith's commercial fishing venture. He is responsible for repayment of that amount to come out of his per-cap. Defendant is placed on probation for one year and must make a contact once a month with the probation officer.

Ms. Bisard-Smith did not convince the court to release the truck back to her. He motion to return the pick-up truck was denied.

MOORE v LRBOI --- #09046GR

Summary: Mr. Moore stated that the PIP (Performance Improvement Plan) was not just cause to terminate him.

Decision and Order: It was ordered that the termination is hereby set aside. Mr. Moore to be reinstated and shall receive normal compensation and attorney fees.

DeVerney v Election Board --- #09048EB

Summary: The Petitioner seeks an Injunction to stop the continuation of the Election taking place, and to seek a declarative action.

The first issue deals with registration of voters. The second issue with the primary, the next issues are regarding holding an elected office and running for office, Prohibition against running for 2 offices and run-off of 2007 Election of Ogema.

Decision and Order: Issue one – the Court finds it is within the authority of the Election Board – Any duly enrolled member of the tribe 18 and over shall be eligible to vote. Issue two –The Court will hear arguments regarding this issue. The next issue has been dealt with in Hyma-Cogswell v Election Board. The next issue – this should go to the Election Board in compliance with the Election Board Rules and Regulations Chapter 12. and the last issue is dismissed as it is not part of this election.

Willis v LRBOI --- #09074GC

Summary: Plaintiff brought action alleging that Defendant violated the Indian Preference in the Employment Ordinance. Along with complaint, a request for injunctive relief was requested.

Decision and Order: The Court Ordered the injunctive relief and the Plaintiff was interviewed. Defendants' motion to dismiss based on no cause of action is denied. This case is dismissed.

Crampton v Election Board, Mezeske, Carlson and Condon --- #09084EB

Summary: Petitioner has filed a petition for Injunctive Relief regarding various issues including allegations of impropriety, and has asked for a stay of the certification of the Election, and a new Election to be conducted.

Decision and Order: The Court finds the impropriety here is so egregious and unique facts and circumstances in this case, the impropriety cannot be ignored or excused. The petitioner will be allowed to move to an evidentiary hearing.

The seat of Tribal Counsel, outlying, is Temporarily Stayed from being Verified, until the Hearing is held in this matter.

Wabsis v LRBOI Enrollment Commission --- #09142AP

Summary: This case has a long history and dates back over 5 years. Both parties appealed to the Tribal Court decision; 1) that the Tribal Court has an inherent authority to levy sanctions; 2) provided the test set for awarding attorney's fees; 3) that Plaintiffs request for $40,000 in attorney fees was excessive; and 4) awarded $500 in the form of a sanction against Enrollment Commission.

Decision and Order: This was remanded back to the Trial Court to specifically hold whether or not sovereign immunity bars sanctions that involved money; Make a factual finding regarding whether the Enrollment Commission should be sanctioned; and if sanctions are to be paid specifically stare the reasoning for the award amount.

Wabsis v LRBOI Enrollment Commission --- #09146EA

Summary: Petitioners appealed the decision denying the parties enrollment into the Tribe by the Enrollment Commission. Respondents' countered with Motion to Dismiss and/or Summary Judgment.

Decision and Order: Respondent's Motion to Dismiss was granted.

Cooper v LRBOI Gaming Commission --- #09151GA

Summary: Plaintiff argues that the Gaming Commission asked for inappropriate information beyond the scope and intent of the Gaming Ordinance.

Decision and Order: Plaintiff recalls giving permission to the GC to get a credit report in her name for license renewal. It is the opinion of the Court that the GC gave ample timed to the Plaintiff to provide requested information. The Court upholds the decision of the Gaming Commission denial of gaming license.

Martin v LRBOI Tribal Council, Ogema --- #09169GC& 09244GC

Summary: On August 17, 2009, Plaintiff filed the instant action in the Court against Ogema and Tribal Council. The complaint states claims similar to his previous complaint in case no. 08132GC, including contract claims and allegations of violations of the LCRA. On October 1, 2009 the Tribe notified Plaintiff that he was being discharges citing the reasons he had failed to obtain a license to practice law in Michigan, had violated his employment contract.

Decision and Order: The Court finds that Plaintiff's claims against the tribe have no basis in law and shall be dismissed. Said dismissal shall be with prejudice and shall be a final adjudication. The Tribe's motion for summary disposition is therefore GRANTED

LRBOI v Battice II --- #09207CO

Summary: Two tickets were issued to the respondent by Michigan DNR for a CORA violation. Testimony was taken and the Respondent plead responsible. The Officers prepared a list of the costs.

Before the order was written, Mr. Battice submitted a Motion regarding the restitution amount. A second hearing held to re-consider the amount.

Decision and Order: The Court finds Mr. Battice responsible for the abandoned nets that were pulled.

The Court on its own motion decreased the amount of restitution for. Mr. Battice and he shall pay monthly payments to the Court and his per capital payments to be taken for restitution and fines.

Martin v LRBOI --- #09248GC

Summary: Plaintiff filed a complaint alleging the Tribal Council, Ogema and Judge Sherigan took concerted actions to substantially change the outcome of a previously decided lawsuit and thereby violated Plaintiff's rights under the Indian Civil rights Act, the Tribal Constitution, and the Tribal Court Ordinance.

Decision and Order: The Court find's the Plaintiff's Civil rights claims against the Tribe, as well as Judge Sherigan, have no merit and shall be dismissed. Said dismissal shall be with prejudice and shall be a final adjudication. The Court finds the Plaintiff's claims against Judge Sherigan frivolous and without arguable merit. Plaintiff shall be required to pay Judge Sherigan's costs, including reasonable attorney fee. The Tribe's motion for dismissal and/or summary judgment is therefore GRANTED.

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

Brenda Hyma-Cogswell,
Petitioner,

Case No. 09-004 DJ
Hon. Angela Sherigan

v.

Election Board,
Respondent.

/

Brenda Hyma-Cogswell
Pro-Se

Barry Levine
Attorney for Election Board

/

DECLARATORY RULING REGARDING ARTICLE IX SECTION 4(d)

Petitioner filed a petition for a Declaratory Judgment on Article IV, Section 4(d) of the Constitution. This Court has authority to hear such matters under Article VI Section 8, and under Article IX, Section 4(c) of the Constitution.

Declaratory Rulings may be given in a case of actual controversy, within the jurisdiction, declaring the rights, status, and other legal relations of parties, whether or not further relief is or could be sought. A declaratory ruling has the force and effect of a final judgment or decree, and is reviewable as such. (28 U.S.C. 2201-2; Federal Rules of Civil Procedure; MCR 2.605)

In this case, the Petitioner is asking the Court for clarification and interpretation of Article IX, Section 4(d), which states: "[T]ribal members who are holding elected office, or running for office, shall not be eligible to serve as an Election Board member".

In the plain or literal reading of Article IX, Section 4(d) of the Constitution, no person currently seated as an Election Board member could run for that position for a second term, if they are deemed an elected official, unless that person was to resign from the Election Board prior to declaring one's candidacy.

The Election Board argues that the Election Board members are not "elected officials" per it's definitions of "elected official" and "elected office" pursuant to the Election Board Regulations. Plaintiff argues that the members are elected officials, holding elected office.

The Election Board pursuant to its authority, has promulgated rules and regulations, and has defined the terms "elected official" and "elected office" at Chapter 1, Section 2(l) of those Regulations as follows:

"Elected Official" or "Elected Office" means any of the following:

(i) A member of Tribal Council; (ii) the Tribal Ogema; and (iii) a Member of the Tribal judiciary, if elected rather than appointed"

The Election Board argues that it was necessary to define elected official and elected office as it did in order to comply with the intent of the drafters of the amendment to the Constitution.

Questions of interpretation of the Constitution are resolved by the Court. The Court shall be the interpreter of the Constitution. The Court has the power to review and ordinances and resolutions to ensure that they are consistent with the Constitution and to rule void those ordinances and resolutions deemed inconsistent with the Constitution. Article VI, Section 8 (a)2.

The Constitution was amended May 13, 2004 to allow for the election of judges and election board members. When a provision is clearly confusing, ambiguous, or in conflict with another provision, the Court shall look to the intent of the drafters. In this instant case, there are several documents that shed light on this issue.

The original language proposed by the Tribal Council for the amendment can be found in Resolution No. 02-0814-03, which states:

> "Tribal Members who are holding elected office as *Tribal Ogema, a member of Tribal Council or a judicial position,* or running for office as *Tribal Ogema, a member of Tribal Council, or a judicial position,* shall not be eligible to serve as an Election Board member." *(emphasis added)*

which was submitted to the Bureau of Indian Affairs for approval.

The Bureau of Indian Affairs then responded with a letter the Tribal Ogema, Jonnie J. Sam, dated February 13, 2003, suggesting a "technical amendment". Specifically it suggested that the specific enumerated offices be changed to the general term "elected office" and stated "since we do not know if the membership will vote for the election of Tribal judges, subsection 4(d) should be amended to say 'Elected Office' instead of listing all the different positions."

The Tribe responded to the Bureau by a letter dated August 13, 2003, and signed by the Council Speaker, Stephen Parsons, stating "the intent of the proposed amendment was to provide an opportunity to vote on three actions – 1. election of judges and appellate judges; 2, election of election board members; and 3 recall of judges and appellate judges." It also states at page 2 that "[T]he Tribal Council accepts the more precise language proposed by the Bureau of Indian Affairs. However, the Tribal Council does not agree with the technical amendments that go beyond the original intent . . ."

The intent was clearly to have Election Board members elected. The substantive result of the "technical amendment" was clearly overlooked by both the Tribal Council and the Bureau of Indian Affiars, that was not intended, resulting in an anomaly. No where in the Constitution or in the supporting documentation, is there any mention of

term limits on Election Board members. While the plain language of the Constitutional provision would not allow for currently seated Election Board members to run for re-election, it is contrary to the purpose and intent of the amendment creating ambiguity.

Therefore, the Court Declares that Election Board members can run for re-election.

SO ORDERED:

Dated: April 16, 2009

Angela Sherigan
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Deborah Miller
Deborah Miller, Court Administrator

4.16.09
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,
PLAINTIFF/RESPONDENT

V.

CASE NUMBER: 09015TM
HONORABLE DANIEL BAILEY

DEBRA SMITH (BISARD)
DEFENDANT/PETITIONER

Eugene Zeller
Tribal Prosecutor
3031 Domres Road
Manistee MI 49660

Debra Smith (Bisard)
In Pro Per
372 Creston Street
Muskegon MI 49442

ORDER AFTER MOTION HEARING

A motion hearing to reclaim a Dodge Dakota pick-up truck that was purchased with commercial fishing start up money was held today, January 4, 2010. The defendant asked the court to amend the sentencing order that had her turn the truck, keys, and title back to the Tribe. Ms. Smith (Bisard) wanted the truck back and to pay for it out of her per capita monies.

Ms. Smith did not convince the court to release the truck back to her. Her motion to return the pickup truck is DENIED.

SO ORDERED:

Judge Daniel Bailey

1/4/10
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 and the defendants (or their attorneys) at the addresses on file with the court.

Deborah G Miller
Court Clerk

1-5-10
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT
EMPLOYMENT DIVISION
3031 Domres road
Manistee, MI 49660

BRIAN MOORE,

Petitioner,

vs.

Case No. 09-046-GR
Hon. DANIEL BAILEY

LITTLE RIVER BAND OF OTTAWA INDIANS,
AND THE DEPARTMENT OF HUMAN RESOURCES
OF THE LITTLE RIVER BAND OF OTTAWA INDIANS
AND, BRAIN GIBSON, AND, LARRY ROMANELLI,

Respondents.

Leslie Van Alstine II, PLLC
By: Leslie Van Alstine (P52802)
255 River Street
Manistee, MI 49660
231- 723 - 3250

Attorney for Petitioner

Daniel T. Green (P25548)
General Counsel
Little River Band of Ottawa Indians
375 River Street
Manistee, MI 49660
231-398-6802
Attorney for Respondents

ORDER AFTER INFORMAL HEARING

At a session of court held in the courthouse in Manistee, Michigan, on March 26, 2009. Present: Honorable Daniel Bailey, Tribal Court Judge

This Honorable Court finds that during the informal hearing held on March 26, 2009 that the Performance Improvement Plan issued on January 21, 2009 regarding Brian Moore was not just cause grounds for his termination, therefore the Court orders as follows:

IT IS HEREBY ORDERED, that the termination entered into Brian Moore's personnel file on January 21, 2009 is hereby set aside; and,

IT IS FURTHER ORDERED AND ADJUDGED, the Performance Improvement Plan entered into Brian Moore's personnel file and dated January 21, 2009 shall be modified to show that it is a written warning and not a termination; and,

IT IS FURTHER ORDERED AND ADJUDGED, that Brian Moore shall receive all of his normal compensation from January 21, 2009 up to and including March 27, 2009; and,

IT IS FURTHER ORDERED AND ADJUDGED, that Brian Moore shall be reinstated as Maintenance Mechanic for the Little River Band of Ottawa Indians at the same rate of pay as he received on January 21, 2009; and,

IT IS FURTHER ORDERED AND ADJUDGED, that Brian Moore shall report to the Human Resources Department on March 30, 2009 at 8:00 a.m. to execute and complete all necessary documents to enforce this order; and,

IT IS FURTHER ORDERED AND ADJUDGED, that the Little River Band of Ottawa Indians shall issue a payment in an amount approved by this Honorable Court to Leslie E. Van Alstine II for the payment of Brian Moore's reasonable attorney fees and costs related to this matter.

Approved as to form, content, and entry.

Date: 4/13/09

Leslie E. Van Alstine II, Attorney for Petitioner

Date: 4/13/09

Daniel Green, Attorney for Respondent

IT IS SO ORDERED:

Date: 4/13/09

Honorable Daniel Bailey, Tribal Court Judge

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

Cornelius DeVerney, et. al,
Petitioners,

Case No. 09-0048 EB
Hon. Angela Sherigan

v.

Election Board,
Respondent.

/

Cornelius DeVerney
Pro-Se, for the Petitioners

Barry Levine
Attorney for Election Board

/

ORDER AFTER HEARING

At a session of said Court on March 17, 2009,
In the Reservation Boundaries of the
Little River Band of Ottawa Indians,
State of Michigan
PRESENT: HON. ANGELA SHERIGAN

A Hearing regarding Petitioner for Injunctive Relief, was held in this matter, in which all parties, or their representatives, were present, and the Court being advised in the premises, finds as follows:

The Petitioners seek an injunction to stop the continuation of the election now taking place, and to seek a declarative action. The burden on the moving party, who wishes to stay a future election, must be high. The proper standard should be similar to that required in preliminary injunctions. Those factors are:

(1) whether the movant has a strong likelihood of success on the merits;

(2) whether the movant would otherwise suffer irreparable injury;

(3) whether the issuance of a preliminary injunction would cause substantial harm, to others; and

(4) whether the public interest would be served by issuance of a preliminary injunction.

The Petitions contains several issues, each will be addressed separately.

The first issue deals with registration of voters. The Petition ask for the Election Board to change the rules and regulations back to state that when a tribal member turns eighteen, that tribal member must register in order to vote. Article IX Section 3 – Voting states at (a) Any duly enrolled member of the Little River Band of Ottawa, who is at least eighteen (18) years old, and is registered to vote on the date of any given tribal election shall be eligible to vote in that

tribal election. The Election Board through its authority to promulgate rules and regulations, registers tribal members as voters automatically when they become 18 years old. The Court finds that this is within the authority of the Election Board and is does not violate the Constitution because it does not deny anyone who is at least eighteen years old the right to vote. Any change to the rule must be presented to the Election Board.

The second issue deals with the issue of a primary. Petitioners allege that the Constitution does not allow for a primary. Respondants argue that this matter has already been decided in *Sam, et al, v. LRBOI Election Board, Case No. 07061EB.* The Court has reviewed the Order in that case and finds that this specific issue was not definitely resolved by the Tribal Court's Order in the *Sam* case. Nevertheless, the Petitioners in the instant case purposely chose to delay filing their complaint in this case until the primary election was well underway. Petitioners knew from previous elections and from the timeline for the election announced by the election board in 2008 a primary election would take place this election. Both the Election Board and tribal voters took actions in reliance upon the primary election process set forth in the regulations governing this election. Because Petitioners are asking the Court to stop the election from continuing, the Court must consider the rights and harm/prejudice to other parties. Under the circumstances in this case, the Court has decided that it will not intervene in, and stop, the election that is already in progress. If Petitioners intended for this matter to be resolved before the election was concluded they should have filed earlier. However, the Court will hear arguments regarding this issue. This part of the Petition will move forward.

The next issue is that of Article IX, Section 4 (d) which states: "[T]ribal members who are holding elected office, or running for office, shall not be eligible to serve as an Election Board member". This issue has been dealt with in *Hyma-Cogswell v. Election Board, Case No.09004 DJ.*

The next issue deals with Chapter 3, Section 3 of the Election Board Rules and Regulations[1], specifically: "Prohibition Against Running for Two (2) Offices. No Tribal member may be a candidate for more than on Elected Office at the same time. By way of explanation but not by way of limitation, this prohibition includes running or more than one seat on Tribal Council at the same time. This prohibition also includes running for a seat on Tribal Council and for Ogema at the same time." Petitioners argue that Sandy Meseske broke the regulation. Ms. Meseske has resigned her position as an election board member. The Respondents argue that the Petitioners have not exhausted the remedy for disputes as provided in the regulations. The Court agrees.
This issue should go to the Election Board in compliance with the Election Board Rules and Regulations, Chapter 12.

The next issue deals with the run-off for Office of Ogema from the 2007 election. The 2007 election was completed and certified. Petitioners have not stated exactly how they believe the 2007 election for the Office of Ogema violates the Constitution. In any event, the time for raising issues challenging the process and outcome of that election has long since passed. In

---

[1] The Petition lists "Page 10, Section 3" of the Regulations, this is incorrect as the Petitioner was provided with and relied on the proposed changes to the regulations and not the actual regulations currently in place. This Court does note that the current Rules and Regulations are not online, even though this Tribe is currently in an election cycle.

addition, the Office of the Ogema is not part of the current election and the Election Board has not published regulation governing the next election cycle. If the Election Board's regulations for election of the Ogema in 2011 include the same procedures Petitioners claim were unconstitutional in the 2007 election, Petitioners can re-file their claims at time - far enough in advance of the dates set for the primary and general elections to allow the Court to address any arguments Petitioners may raise without interrupting the election schedule. This allegation is dismissed.

The next issue deals with Chapter 2 Section 1 (a) of the Election Board Rules and Regulations[2]. This issue will not be dealt with as it is currently not applicable, but rather is a proposed change.

The next issue deals with Election Ordinance #01-200-20, which was repealed the Wednesday before this hearing, thus making it moot. Further, the issue regarding this allegation was from the 2007 election. The time period allowed for election challenges for that election has passed. This allegation is dismissed.

THEREFORE, IT IS HEREBY ORDERED:

Petitioner's Request to Stay the Election is DENIED.

The issue of the primary election will move forward. Legal Briefs on the issue are due May 29, 2009. The hearing will take place June 17, 2009 at 1:00 p.m.

Dated: April 15, 2009

Angela Sherigan (RW)
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Deborah Q Miller
Deborah Miller, Court Administrator

4.16.09
Date

[2] See Footnote 1.

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

Cornelius DeVerney, et. al,
Petitioners,

Case No. 09-048 DJ
Hon. Angela Sherigan

v.

LRBOI Election Board,
Respondents.

/

Cornelius DeVerney, In Pro Per
In Pro-per

Barry Levine
Attorney for Election Board

/

ORDER AFTER HEARING

The Court being advised in the premises, after a hearing on the issue of the constitutionality of the primary election process, in which all parties were present, testimony was given and evidence was presented, the Court finds that:

Petitioner has filed a petition for Injunctive Relief regarding various issues, many of which were previously decided by this Court. The sole issue left is the constitutionality of the primary election process.

The Tribal Court has authority to hear this matter under Article VI Section 8 of the Constitution.

The Petition alleges an unconstitutional action in that the Constitution does not specifically provide for to primary election except for the office of the Ogema. However, no evidence was presented to set aside the defense of it being an allowable administrative tool when there are excessive numbers of candidates. The Petitioners' have failed to meet their burden.

THEREFORE, IT IS HEREBY ORDERED:

The Petitioners' case is dismissed.

Dated: October 13, 2009

Angela Sherigan
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Janeen Codden
Janeen Codden, Court Clerk

10-14-09
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

LAURIE WILLIS,
Plaintiff,

Case No. 09-074-GC
Hon. Angela Sherigan

v.

LITTLE RIVER BAND OF OTTAWA INDIANS,
Defendant.
/

Israel Stone	Daniel T. Green
Attorney for Plaintiff	Attorney for Defendant

/

AMENDED OPINION AND ORDER

This matter having come before the Court on a complaint of violations of the Indian Preference in Employment Ordinance, and proceeding to Trial, the Court finds as follows[1]:

Plaintiff brought this action alleging that Defendant violated the Indian Preference in Employment Ordinance (hereinafter referred to as the Preference Ordinance) sections 4.07, 4.08, and 4.09. Along with the complaint, a request for injunctive relief was requesting that the Defendant be ordered to interview the Plaintiff, as she was a preference candidate and met the minimum qualifications. The Court ordered the injunctive relief and Mrs. Willis was interview for the position of payroll administrator.

A trial was conducted. At the end of the trial, the Defendant moved to dismiss claiming that the Preference Ordinance does not provide for a cause of action. Whether or not the Indian Preference in Employment Ordinance provides a cause of action is a question of first impression for this Court, and will be answered along with *Price v. LRBOI,* Case No. 09-182 GC.

Defendant cites *Guenthardt v. Wilson and LRBOI* Case No. 06-228 GR in support of its position. However, in that case, the Court did find that it had jurisdiction, but stated that due to the Plaintiff's delay, there was no remedy to award any damages or restoration to the position that was terminated. It did not state that there was no cause of action.

The Tribal Court of Appeals, in *Chapman v. LRBOI*, Case No. 08-034-AP, stated: "to deny . . . a Tribal citizen seeking mandamus or declaratory/injunctive relief when Tribal Council fails to perform duties mandated by the Tribal Constitution which result in

[1] The Court notes that this is an employment action, closed to the public, and as such, much of the specific details have been intentionally omitted.

a public harm would leave Tribal Citizens without any remedy to uphold and enforce the Tribal Constitution . . ."

While the Ordinance does not specifically provide for a cause of action, it is an Ordinance which this Court has power to review under, Article VI Section 8 (a)2 of the Constitution, and as such, the Court may declare if the ordinance has been violated.

Based on the testimony that was presented, Ms. Willis was not the highest ranked candidate, nor was she the first ranked in the order of preference[2]. In administrative matters, the Court will not substitute its judgment for that of the administrative body, without a showing of the proper standards. In this case the court will only review on abuse of discretion and failure to follow the laws/ordinances. For those reasons, Plaintiff's case fails.

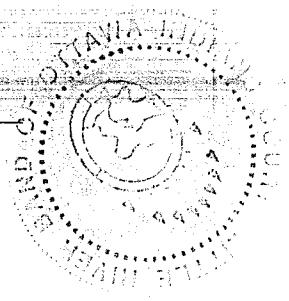
THEREFORE, IT IS HEREBY ORDERED:

Defendants, Motion to Dismiss based on no cause of action is denied.

The Courts Order that Mrs. Willis be granted an interview prevented a harm from happening, (a preference candidate who meets the minimum requirements not being interviewed) and no harm or violation occurred. The case is dismissed.

Dated: May 17, 2010

Angela Sherigan
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Deborah C Miller
Deborah Miller, Court Administrator

5·17·10
Date

[2] Testimony was also presented that the Human Resources Department does/did not always follow the same set of rules, when dealing with preference candidates. This is very disturbing to the Court, and could not go without mentioning.

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

Shannon Crampton,
Petitioner,

Case No. 09-084 EB
Hon. Angela Sherigan

v.

Election Board,
Sandy Lempke-Mezeske, Bernie Carlson,
and Alesia Condon,
Respondents.

/

Shannon Crampton
In Pro-per

Barry Levine
Attorney for Election Board

/

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, the 1st day of May, 2009.
PRESENT: HONORABLE ANGELA SHERIGAN

The Court being advised in the premises, after a hearing on Petitioner's Request for a Stay of the Certification of the Election, in which all parties were present, the Court finds that:

Petitioner has filed a petition for Injunctive Relief regarding various issues including allegations of impropriety, and has asked for a Stay of the certification of the election, and a new election to be conducted.

The Tribal Court has authority to hear allegations of impropriety of the Election Board and Election Board Members under Article IX Section 4 (d) of the Constitution.

The burden on the moving party who wishes to stay an election, must be high.
The standard required for an injunction is as follows:

(1) whether the movant has a strong likelihood of success on the merits;
(2) whether the movant would otherwise suffer irreparable injury;
(3) whether the issuance of a preliminary injunction would cause substantial harm to others; and
(4) whether the public interest would be served by issuance of a preliminary injunction.

Each one of these factors must be proven. If one factor is not proven, the request for the injunction must fail.

In addition, to stay or overturn an election that has already been conducted, there must be clear and convincing evidence presented that shows that 1) there was an impropriety and 2) that the impropriety affected the outcome of the election.

Petitioner in this case has alleged several allegations, which require a great deal of attention and fact-finding. This instant Order will only address one of those issues, the issue of the allegation of impropriety regarding an Election Board member running for office other than that of election board. More specifically, Sandy Lempke-Mezeske, ran for the seat of Tribal Council Outlying, and was allowed to do so by the Election Board, in violation of the Election Board Rules and Regulations, Chapter 12, Section 2 (b)(i). All other issues raised at the hearing will be decided in a supplemental Order, which will be issued on Monday, May 11, 2009.

As to factor (1) a strong likelihood of success on the merits, weighs heavily in the Petitioner's favor. There is no question that Ms. Lempke-Mezeske was an Election Board member at the time she turned in her candidate application packet, which was accepted by the Election Board, and that Ms. Lempke-Mezeske did not resign from her position as an election board member until after the primary election, in violation of the Election Board Rules and Regulations of Chapter 12, Ethical Standards, Section 2(b)(i).

As to factor (2) whether the movant would otherwise suffer irreparable injury if the stay is not granted, the Petitioner states that neither he, nor any other candidate that is not an Election Board member, would not be allowed to be placed on the ballot if they were in violation of the regulations and did not otherwise qualify for the seat, as the application would not have been accepted. It is his specific interest that must be weighed against the general interest. The membership has a general interest in having elections conduction in compliance with the Rules and Regulations as set by the Election Board, including adherence by the Election Board itself. Respondents argue that Ms. Lempke-Mezeske did not participate in the primary process, and that there is no irreparable harm, as there is no harm. Both sides being equal, Petitioner has failed to meet this factor.

As to factor (3) whether the issuance of a preliminary injunction would cause substantial harm to others, Petitioner stated the same arguments as in factor (2). Respondents argue that a great deal of money has been expended on conducting the election and that issuance of this injunction would cause substantial harm to the other candidates as the Election Board is close to certifying the election, pending any challenges. Petitioner has met this factor, as integrity and confidence in the election process is vital, and in this particular case outweighs the financial considerations.

As to factor (4) whether the public interest would be served by issuance of a preliminary injunction, Both parties state essentially the same factors and listed in factor (3), with the Respondents making the additional argument that laches[1] should apply because Petitioner waited until April 22, 2009 to bring this matter before the Court. Petitioner has failed to meet this factor.

---

[1] Laches is a legal term defined as neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.

Petitioner has not met the four factors required for an issuance of a stay.

The Court next looks at whether or not the Petitioner has 1) shown that there was an impropriety, and 2) that the impropriety affected the outcome of the election.

Petitioner has met the burden as to factor 1 in this analysis, but has failed to meet factor 2. However, Petitioner has asked this Court to consider the ruling in *Bailey vs. Grand Traverse Bands of Ottawa and Chippewa Indians Election Board, Case No. 2008-1031-CV-CV, By the Tribal Judiciary En Banc.*

In that case, the court stated that while the Plaintiff did not show by clear and convincing evidence that the impropriety, (or violation of the regulations) affected the outcome of the election, which would normally be fatal to the Plaintiff, the unique facts and circumstances of the case, under fundamental fairness, could not be ignored or excused, and that it required a remedy.

This Court finds the impropriety here is so egregious and the unique facts and circumstances in this case, the impropriety cannot be ignored or excused. The Petitioner will be allowed to move to an evidentiary hearing to further explore this issue.

THEREFORE, IT IS HEREBY ORDERED:

The seat of Tribal Counsel, Outlying, is TEMPORARILY STAYED FROM BEING CERTIFIED, until the Evidentiary Hearing in this matter.

All other positions/seats in the Election shall be certified, pending resolution of any election challenges.

The evidentiary hearing in this matter shall be Thursday May 21, 2009 at 1:00 p.m.

Dated: May 8, 2009

Angela Sherigan
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Janeen Codden
Janeen Codden, Court Clerk

5-8-09
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

SHANNON CRAMPTON,
Petitioner,

Case No. 09-084-EB
Hon. Angela Sherigan

v.

ELECTION BOARD, et al
Respondents,

v.

NORBERT KELSEY,
Intervening Respondent.
/

Shannon Crampton
In Pro-per

Barry Levine
Attorney for Respondents

John Kelsey, Attorney for Intervening Respondent
/

ORDER AND OPINION

On May 28, 2009, the Court issued "Order After Hearing" after an evidentiary hearing on Petitioners Request to Stay the Certification of the Election, and an Amended Order on May 29, 2010. That Order gave the Petitioner the option of another hearing or the Court issuing a Declaratory Judgment without hearing. Petitioner opted for a hearing.

On May 28, 2009, the Court also issued "Order After Hearing on Petitioner's Oral Motion for Disqualification", which denied Petitioner's Motion to Disqualify Judge Sherigan. That Order was appealed by Petitioner, which stayed the issuance of this current Order. However, on June 18, 2009 a hearing was conducted on the remaining issues, in which all parties were present.

On September 15, 2009, the appeal was denied by the Court of Appeals. Then on December 3, 2009, the Court of Appeals denied Intervening Respondent's Motion for Reconsideration.

The Court being fully advised, hereby finds as follows:

Petitioner filed a Petition alleging various allegations of impropriety. The Court has authority to hear allegations of impropriety on the part of the Election Board under the Election Board Regulations.

Petitioner's first allegation is that Election Board members, Sandy Lempke-Mezeske, Berni Carlson, and Alesia Condon, ran for elected office in violation of Chapter 12, Section 2(b)(i) of the Election Boards Regulations which states that Election Board members shall not run for elected office. Ms. Lempke-Mezeske was running for the office of Tribal Council, and Ms. Carlson and Ms. Condon were running for the office of Election Board.

This Court has previously ruled that Election Board members may run for re-election for the office of Election Board, in *Hyma v. Election Board. Case No. 09-004-DJ.* Thus, Ms. Carlson and Ms. Condon did not violate Chapter 12, Section 2(b)(i).

The Court did not address the issue of election board members running for office other than that of election board. The Election Board argues that because Ms. Lempke-Mezeske resigned her position from the Election Board after the primary, this is a moot point. The Court disagrees. The violation does not go away, or become moot, simply because she resigned. The violation occurred when she submitted her application to run for Tribal Council, and did not resign her position from the election board. Ms. Lempke-Mezeske violated the regulation by continuing her position on the election board while running for a seat on the Tribal Council. Testimony was given that if Ms. Lempke-Mezeske resigned immediately, that the Election Board could not function, and the election could not move forward. The resignation came after the primary election.

Next Petitioner alleges that Election Board members, Sandy Lempke-Mezeske, Berni Carlson, and Alesia Condon, violated Chapter 12, Section 2 (b)(ii) of the Regulations by campaigning at the Wisconsin candidates forum. Testimony was given that Ms. Carlson asked Nancy Kelsey, who was also running for a seat on the Election Board, a question at the forum, which was more for clarification regarding the meaning of "the Manistee 500". The Election Board also briefly argued freedom of speech and equal protection. This allegation should have been brought as a complaint to the Election Board first, thus the administrative remedies were not exhausted.

Petitioner also alleges violations of Chapter 12, Section 2 (b)(v), which states that Election Board members shall not deliberate or vote on any Election Board action that would have a beneficial impact on that member. Petitioner claims that three of the five members could not vote on determining whether the candidates that submitted applications to run for an office, since they were running for office, thus there would not have been a majority vote in order to certify the slate of persons running for office.

Testimony was given that the Election Board separated out the various offices and voted to accept applications that way, and then those running for election board did not vote on their own. The Court finds that adequate safeguards were put into place to protect the integrity of the process as to voting to accept the applications, given the inherent problems with election board members having to run for office.

Testimony was also given that Ms. Lempke-Mezeske did not immediately resign her position as an Election Board member that if she did there would not have been enough people on the Election Board to accept Mr. Crampton's application, as two of the Election Board

members have familial ties to Mr. Crampton. Testimony was also given that the Election Board sent a letter to the Tribal Council about the vacancy on the election board, but never received a response from the Council or the Ogema. Whatever good intentions there may have been, Ms. Lempke-Mezeske's continuation on the board was still a violation, and Mr. Crampton's application should not have been accepted. However, the Court finds that this was harmless error as the error did not affect the outcome of the election, as all the applications that were accepted for the seat Mr. Crampton was running for, were put on the ballot for the primary election and ultimately, Mr. Crampton did not survive the primary.

The next allegation of impropriety is that the Election Board members have proprietary knowledge regarding which tribal members vote and which do not, and where the largest numbers of votes come from, resulting in an unfair advantage because they would know where to direct their campaigns. Testimony was given by Ms. Condon that while data could be generated to see where the largest number of votes come from, they have never requested it from Automated Election Services, and that there is no way to know who voted for who as the ballots will only show what district it came from, not who the individual is. The court is satisfied that the Election Board is not able to discern who voted for whom from the ballots that are returned.

For the reasons stated above, the Court declares as follows:

1. That Ms. Carlson and Ms. Condon did not violate Chapter 12, Section 2(b)(i).
2. That the allegation of violations of Chapter 12, Section 2 (b)(ii) of the Regulations is barred by failure to exhaust administrative remedies.
3. That Ms. Lempke-Mezeske's continuation on the Election Board was a violation of Chapter 12, Section 2 (b)(v).
4. That the violation of Chapter 12, Section 2(b)(v), in this instance was harmless error.
5. That the Election Board was not able to determine who voted for whom in previously elections as to be able to target certain voting populations by current sitting members for the purpose of concentrating her/his campaign to those voters.

Dated: November 19, 2010

Angela Sherigan
Hon. Angela Sherigan

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 petitioner and the respondent(s) (or their attorneys) at the addresses on file with the court.

Debra Miller (Deborah)
Debra Miller, Court Administrator

11-22-10
Dated

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

Case Number: Case No. 09-142-AP

WABSIS
Plaintiffs,

v.
LRBOI Enrollment Commission

Defendants.

Chief Appellate Justice Melissa L. Pope
Associate Justice Martha Kase
Special Associate Justice Thomas Carey

For the Plaintiffs:
Jana M. Bereger
24255 West 13 Mile, Suite 200
Bingham Farms, Michigan 48025
248-540-9636

For Defendants:
Kimberly McGrath
375 River Street
Manistee, Michigan 49660
231-398-6821

ORDER AND OPINION

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 on the 22nd day of January 2010;

Brief Factual Background

The present case has a long history that dates back over five (5) years and involves the enrollment and then subsequent disenrollment of Plaintiff-Appellant (hereinafter "Plaintiffs"). In summary, Plaintiffs were enrolled in the Little River Band of Ottawa Indians in July of 2000. Following their enrollment, the

Enrollment Ordinance was modified and amended with provisions added for the bi-annual review of all membership files. Plaintiffs were disenrolled in October of 2004.

Pursuant to the Little River Band of Ottawa Indians Enrollment Regulations (Regulation #R200-01:EC) Chapter 1. Application for Membership (Regulation #R200-01: EC-01), Sections 3-10 which states, "If you are not satisfied with the Enrollment Commission's decision after the conference, you will receive a final decision from the Enrollment Commission and you can appeal that decision to the Tribal Court within thirty days." Plaintiffs appealed to the Little River Band of Ottawa Indians Tribal Court.

In January of 2005, Defendant-Appellee (hereinafter "Defendants" or "Enrollment Commission") filed a Motion to dismiss the appeal. In April 2005, a hearing was held and the parties heard. On April 14, 2005, the Trial Court, with Judge Ronald Douglas presiding, found that there was no "mistake of fact" and that the Enrollment Commission had committed an "error of law". The Court remanded the case to the Enrollment Commission with the directive "to reconsider their decision based on whether the earlier decision of 2000, was due to fraud or bias; was not supported by any evidence, or was totally against all of the evidence" and well as "to determine whether the later hearing was barred by the Enrollment Ordinance's stated appeal period limitations; and whether or not the later policy change in interpreting the two clauses in the Constitution and in the Ordinance may be applied retroactively without creating new substantive conditions barred by the Tribal Constitution and Enrollment Ordinance."

In July of 2005, Plaintiffs filed a Motion with the Tribal Court to enforce the April 2005 Order. The Trial Court held a hearing and issued an order clarifying its April 2005 Order. In addition to other provisions, the Court ordered the Enrollment Commission to reinstate the enrollment Plaintiffs.

In August of 2005, the Enrollment Commission disenrolled Plaintiffs again using a new "mistake of fact" basis for disenrollment. The Enrollment Commission appears to have placed the burden for proving their eligibility which contradicts Section 15.03 which places the burden of proof on the Enrollment Commission. In September of 2005, Plaintiffs appeared before the Enrollment Commission and their request

to be reinstated was denied. Plaintiffs filed an appeal to the Tribal Court for the Enrollment Commission's disenrollment and violation of the previous Order.

The Trial Court held a hearing and affirmed its decision that a disenrollment can only be based on a "mistake of fact." Plaintiffs requested a sanction against the Enrollment Commission in the form of attorney's fees. The Trial Court requested briefs on the matter. Plaintiffs submitted a brief, but Defendant did not. In June of 2006, the Trial Court found that a sanction against the Enrollment Commission was appropriate because "this court feels this protracted litigation was so frivolous and totally unwarranted." The Enrollment Commission appealed.

Briefs were submitted and oral arguments were heard by the Appellate Court. On July 20, 2007, the Court of Appeals, with Chief Justice Michael Petoskey writing for a unanimous Court, ordered that the case be remanded to the Trial Court, in summary, to: 1) provide a finding on the issue of sovereign immunity; 2) apply the test for sanctions provided in the July 20, 2007 Appellate Court Order and Opinion if the sanction is not barred by sovereign immunity; 3) make findings of fact as to why the Little River Band of Ottawa Indians Enrollment Commission should be sanctioned; and 4) provide reasoning for amount of the award.

In June of 2009, after briefs were submitted and hearings were held, the Trial Court, with Judge Angela Sherigan presiding, in summary, held: 1) that the Tribal Court has the inherent authority to levy sanctions; 2) provided the test set for awarding attorney's fees; 3) that Plaintiffs request for $40,000 in attorney's fees was excessive; and 4) awarded $500 in the form of a sanction against the Enrollment Commission. Both parties appealed.

Present Appeal

In the July 2007 Order and Opinion of the Little River Band of Ottawa Indians Appellate Court, Chief Justice Petoskey, on behalf of a unanimous Court, remanded this case to the Trial Court for the issue of

sanctions. The Court stated, "Since this remand involves an ancillary proceeding, which will litigate the matter of sanctions basically anew, and because an award of attorney's fees and costs necessarily involves an expenditure from the public treasury, the Court must add the Little River Band of Ottawa Indians as a necessary and indispensable party for resolution of the defense of sovereign immunity and to ensure full and complete litigation." While the Trial Court rightly held in its June 5, 2009 Opinion and Order After Hearing, that the Little River Band of Ottawa Indians Tribal Court "has the inherent authority to enforce their own orders," it did not make a specific finding whether sovereign immunity bars the awarding of attorney's fees in the form of a sanction to the other party. As such, we are remanding this case back to the Trial Court to make such a determination.

With regard to the question regarding sanctions, the Appellate Court in its July 20, 2010 Order and Opinion, recognized that Courts have discretion in choosing the means to enforce its orders, but noted that such enforcements "may include, but are not limited to the following: contempt, a fine or sanctions, so long as they are appropriate to the circumstances of the case" referencing Am. Jur. 2nd, Vol. 56, Section 56. The Appellate Court went on to provide the factors to be considered when determining a sanction for failure to comply with a court order, specifically, "the nature of the party's conduct, whether the conduct was willful, the length of any delay in complying with the court's order, the reason for the delay, and any prejudice to the opposing party," referring again to Am. Jur. 2nd, Vol. 56, Section 56. The Appellate Court held that the Trial Court did not make findings of fact regarding whether the Enrollment Commission should be sanctioned, stating that the Trial Court, in the Order and Opinion of the Judge Ronald Douglas, summarized the behavior of the Enrollment Commission instead of making a finding as to whether the Enrollment Commission should be sanctioned. The Appellate Court stated that the, "Imposition of sanctions is a serious matter, too serious to be handled in a summary fashion."

When looking at the specifics of this case, the Trial Court, in its June 5, 2009 Order, did not make a finding of fact regarding whether sanctions are warranted, stating: "This Court is not going to rehear if there

was a violation of the court's order, as it is clear that Judge Ron Douglas has already made a determination and this Court has not been directed to do so." As the Appellate Court stated that a finding of facts was necessary for such a serious matter as sanctions, we affirm that holding of the previous Appellate Court and remand this case to the Trial Court to make such a finding.

In its June 2009 Order, the Trial Court stated, "The plaintiff's have asked for $40,000.00 and the Defendants have argued for $0.00. The Court feels that $40,000.00 is excessive." It then awarded "$500.00 in attorney's fees to Jana Berger as a sanction for violation of the Court's order." While the Appellate Court recognizes that $500.00 is a common amount for sanctions in state courts, the reasoning for granting this amount was not articulated. As such, we remand this case to the Trial Court to provide reasoning for the amount of the sanction, if the sanction is not barred by sovereign immunity and the Trial Court makes a finding of facts that such a sanction is warranted.

THIS COURT HEREBY ORDERS THIS CASE REMANDED TO THE TRIAL COURT TO:

(1) Specifically hold whether or not sovereign immunity bars sanctions that involve an award of money paid to the other party;

(2) Make a factual finding regarding whether the Enrollment Commission should be sanctioned, applying the facts of this case to the test for sanctions provided in the July 20, 2007 Appellate Court Order, specifically, the nature of the party's conduct, whether the conduct was willful, the length of any delay in complying with the court's order, the reason for the delay, and any prejudice to the opposing party if the sanction is not barred by sovereign immunity;

(3) If the trial court determines that the sanction is not barred by sovereign immunity and, after making a finding of fact determines that the Enrollment Commission warrants an award of a sanction to be paid to the opposing party, specifically state the reasoning for the amount awarded.

IT IS SO ORDERED.

5·20·10
Date

Melissa L. Pope
Chief Appellate Justice Melissa L. Pope

5-20-10
Date

Martha Kase
Associate Justice Martha Kase

5/12/10
Date

Thomas Carey
Special Associate Justice Thomas Carey

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.

5·21·10
Date

Deborah C. Miller
Court Administrator Deborah Miller

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

JOHN WABSIS, et al.,
Petitioners,

Case No. 09-146-EA
Hon. Angela Sherigan

v.

LRBOI ENROLLMENT COMMISSION,
Respondent.

/

John Gregory Kelsey Attorney for Petitioners P.O. Box 163 Manistee, MI 49660	Kimberly G. McGrath Attorney for Respondent 375 River Street Manistee, MI 49660

/

OPINION AND ORDER

The Court being advised in the premises, after a hearing regarding Respondent's Motion to Dismiss, and Petitioners' Cross-Motion for Summary Judgment, in which all parties were present, the Court finds as follows:

This matter comes before the Court as an appeal from the denial of enrollment for membership of John Wabsis, John Wabsis Jr., Robert Wabsis, James Wabsis, Mary Wabsis, and Joseph Wabsis, into the Little River Band of Ottawa Indians.

Eligibility for Membership is defined in the Constitution at Article II. Article II, Section 1 states as follows:

An individual is eligible for membership in the Tribe, if he/she possess at least one-fourth (1/4) degree Indian blood, of which at least one-eighth (1/8) degree must be Grand River Ottawa or Michigan Ottawa blood and:

(a) is a lineal descendant of a member of the historic Grand River Bands who resided in Manistee, Mason, Wexford, or Lake Counties in the State of Michigan, who was listed on the schedule of Grand River Ottawa in the Durant Roll of 1908 as approved by the Secretary of the Interior on February 18, 1910; or,
(b) Is a lineal descendant of individuals listed on the 1870 Annuity Payrolls of Chippewas and Ottawas of Michigan listed under the following Ottawa Chiefs: Kewacushkum; Pay-quo-tush; Me-tay-wis; Shaw-be-quo-ung; Penayse; Kaw-gay-gaw-bowe; Maw-gaw-ne-quong; Ching-gawa-she; Aken Bell; and
(c) Is not currently enrolled in any other federally recognized Indian Tribe, band, or group.

Petitioners' claim that they meet the requirements for membership as stated in the constitution, and that the Enrollment Commission's legal interpretation of requiring those seeking membership to trace to a lineal descendant who was listed on the Durant Rolls *and* residing in one of the four counties at the time of the Durant Roll is erroneous (improper). Petitioners' also claim that pursuant to *Wabsis v. Enrollment Commission*, 04-085-GC, that this requirement that the descendent must have resided in the four county area at the time of the Durant Roll is a substantive addition to the requirements listed in Constitution, and thus improper.

Respondent's filed a Motion to Dismiss/Motion for Summary Judgment under Tribal Court Rule 4.3, Federal Rule 56b, and Michigan Court Rule (MCR) 2.116(c)(10), claiming that there is no genuine issue of material fact, and that they are entitled to dismissal/judgment as a matter of law. Petitioners filed a Cross-Motion for Summary Judgment under MCR 2.116(c)(10) claiming that there is no genuine issue of material fact, and that they are entitled to summary judgment as a matter of law.

In presenting a motion for summary disposition pursuant to MCR 2.116(C)(10), the moving party must specifically identify in its motion the issues regarding which the moving party believes there is no genuine issue of material fact. Summary disposition is appropriate only when the court is satisfied that "*it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome.*" *Rizzo v Kretschmer,* 389 Mich 363, 372, 207 NW2d 316 (1973) (emphasis added); *accord Horton v Verhelle*, 231 Mich App 667, 672, 588 NW2d 144 (1998). The burden is on the moving party.

Membership in the Tribe is something that is taken very seriously by this court, as it is more than just "membership" and entitlement to benefits, it is one's identity.

The issue before the court, (on both motions), is whether or not the Enrollment Commissions interpretation of the membership requirements is correct.

Respondent's have presented evidence that one who is seeking membership must show that she/he is a lineal descendant of a member of the historic Grand River Bands that resided in Manistee, Mason, Wexford, or Lake Counties in the State of Michigan, that was listed on the schedule of Grand River Ottawa in the Durant Roll at the time it was prepared/approved. The affidavit of Johnnie Jay Sam at paragraphs 11, 12, and 14 support this as well as the affidavit of Barbara Madison at paragraphs 13, 15, 16 and 21.

Further, the Court finds that the plain reading of the constitution supports this. This requirement is listed in one paragraph, paragraph (a) and is not separated into separate paragraphs.

This requirement has historical significance. Evidence has been presented that the Grand River evolved into two separate and distinct political entities or communities, each with different issues and each claiming different Chiefs. This continues today.

In this instant case, Petitioners are relatives of those in *Wabsis v. Enrollment Commission*, 04-085-GC, who are enrolled members. It is important to note that in that case Judge Douglas, limited the ruling to the petitioners in that case. It is also important to note that the order states "[T]his Order and Finding of Law does not affect any other Enrollment decisions originally based upon the change to the later interpretation of residency *as that interpretation is not disputed . . .*" (emphasis added). Furthermore, in the appeal of that case, 05-141-AP, the Appeals Court notes at page 3 that "*it is important to notice at the outset that this is a disenrollment case, not an enrollment case. The two kinds of matters are not the same. In fact, they are very different.*" This instant case is an enrollment case. Petitioners' argument that because they are related to the petitioners in the 04-085-GC case, who continue to be enrolled members, they should be enrolled also fails.

Based on the evidence presented in Respondent's brief, in particular the Affidavit of Johnnie Jay Sam, and the affidavit Barbara Madison, and the court being the final interpreter of the Constitution, the court finds that the interpretation is correct as a matter of law, and that there is no genuine issue of material fact that could proceed to trial.

The Court finds that the interpretation that those seeking membership in this Tribe, to trace to a lineal descendant who was listed on the Durant Rolls that resided in one of the four counties at the time of the Durant Roll is correct as a matter of law.

THEREFORE, IT IS HEREBY ORDERED:

Respondent's Motion to Dismiss is GRANTED.
Petitioners' Cross-Motion for Summary Judgment is DENIED.
This case is dismissed.

Dated: February 11, 2010

Angela Sherigan
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 them mailed from the Manistee Post Office to all parties and attorneys of record.

Deborah L. Miller
Deborah Miller, Court Administrator

2-11-2010
Date

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

VICTORIA COOPER,
PLAINTIFF

V.

CASE NUMBER: 09151GA
HONORABLE DANIEL BAILEY

LITTLE RIVER BAND OF OTTAWA INDIANS
GAMING COMMISSION,
DEFENDANT

Bradley Manzolillo Attorney for Plaintiff Five Gateway Center Pittsburg, PA 15222	Richard McGee Attorney for Defendant P.O. Box 47068 Plymouth, MN 55447

ORDER AFTER MOTION HEARING

On December 21, 2009, the Court heard the Defendant's Motion to Dismiss and the Plaintiff's Response to the Motion to Dismiss.

Bradley Manzolillo, Attorney for Victoria Cooper the Plaintiff, Ms. Cooper, and Attorney Richard McGee were present in the courtroom.

Attorney Manzolillo argued that the Gaming Commission asked for inappropriate information beyond the scope and intention of Tribal Council in drafting the Gaming Ordinance. He cited Article X, 10.03 Sec. (m.) "*For all applications for licenses for principals and general managers, or primary management officials, a complete financial statement and/or income tax records showing all sources of income ....*"

The plaintiff did not hold a principal position, nor was she a general manager or a primary management official, thus, she argues that the information she was asked to provide was intrusive. The Plaintiff provided a copy of Tribal Council Resolution 09-0805-220 that was passed on August 5, 2009, whereby clarifying the intent Article X, Section 10.03 of the Gaming Ordinance. In that resolution (page 2 of 4) it says in part: "...the Gaming Commission is not empowered to require that credit deficiencies be explained or that applicants must answer to the Commission, with the exclusion of Primary Management Officials, regarding any collection activity prior to making a determination for licensure; and (Page 3 of 4) "WHEREAS, the Tribal council finds that where the Ordinance is silent on the application of any credit history information ...and that request for additional information, including how an applicant will correct any collection activity is beyond the scope of the current delegation of authority for this licensing agency;..."

The Gaming Commission argues that the court has a narrow focus of review in this matter. The Commission has been given the power to govern such regulatory matters by Tribal Council Ordinance and other applicable Federal Gaming Laws.

The Commission argues that Ms. Cooper's gaming license was revoked for a lawful reason (12.04, a, "5: The licensee willfully refused to comply with any lawful order of the regulatory agency, the Tribal Court or the National Indian Gaming Commission.") She failed to cooperate by not filling out the form that was provided to her.

Attorney McGee testified for the Commission that the Plaintiff's complaint utilizes the Gaming Commission Ordinance; that there have been no allegations of fraud (there was an admission of confusion by the petitioner, who was unsure if she held a gaming or non-gaming license,) and attests that the regulatory agency has dispensed due process in this matter.

The Resolution that was cited by the Plaintiff (09-0805-220) was not enacted until three weeks after the Plaintiff's license was rescinded. The Commission argues that the resolution has no real application in this case.

FINDINGS OF FACT:

First and foremost, the Court, by Ordinance and Tribal Law is bound by 12.05, "...The Tribal Court review of Gaming Commission hearing determinations are limited to interpretation and application of law or regulation."

It is evident that the Resolution (09-0805-220) done ex post facto, clarifies the Tribal Council's Gaming Ordinance in relation to non-principal employees (Article X, Section 10.03) The resolution was done after-the-fact and will not, nor cannot, be utilized by the parties or the Court.

The Court finds the Gaming Ordinance specifically states under 10.03 (m.) "For all applications for licenses for principals and general managers, or primary management officials, a complete financial statement and/or income tax records showing all sources of income..." The Court also finds that Ms. Cooper is not a principal or manager.

In another section of the Ordinance (Article X, Section 10.03 (p) it says: "Written permission giving the regulatory agency the right to investigate the applicant's background, including his criminal records, civil and criminal judgments and credit history;" and 10.03 (r): "Any other information the regulatory agency deems relevant;" This portion of the Ordinance covers the simple form that she was requested to complete.

The Plaintiff recalls giving permission to the Gaming Commission to get a credit report in her name to determine her suitability to have her license renewed.

After testimony, and reviewing the briefs submitted by the parties, it is the opinion of the Court that the Gaming Commission gave Ms. Cooper ample time to provide the requested information. The Gaming Commission had the legal right, pursuant to the Ordinance, to request a history of any civil or criminal judgments from their employees or prospective employees.

Ms. Cooper did not request more information, or help, from the Commission or anyone else when she felt confused about filling out the form. Her opinion "based on an impression" by agents and some supervisors that the Gaming Commission may discipline an employee for seeking assistance was broad and not backed by any evidence or exhibits.

For these reasons, the Court upholds the decision of the Gaming Commissions denial of Ms. Cooper's gaming license.

SO ORDERED:

Judge Daniel Bailey

1/7/10
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 and the defendants (or their attorneys) at the addresses on file with the court.

Deborah A. Mills
Court Clerk

1-8-10
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT
3031 Domres Road
Manistee, Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

JOSEPH MARTIN,

Plaintiff,

v.

LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COUNCIL, LITTLE RIVER BAND OF OTTAWA INDIANS OGEMA LARRY ROMANELLI,

Defendants.

Case No. 09169GC
Case No. 09244GC

Hon. Wilson D. Brott

Joseph H. Martin
Plaintiff – *Pro se*
362 1st Street
Manistee, MI 49660

David A. Giampetroni (P69066)
Attorney for Defendants
Kanji & Katzen PLLC
101 N Main St Ste 555
Ann Arbor, MI 48104
(734) 769-5400

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY DISPOSITION

Defendants Little River Band of Ottawa Indians, its Tribal Council and Ogema (hereinafter collectively "the Tribe") filed a Motion to Dismiss and/or For Summary Disposition as to the claims filed by Plaintiff Joseph Martin in the above matter. All parties were given the opportunity to file briefs in response, and were given the opportunity to make oral arguments to the Court. It is noted that Plaintiff did not file a written response to the Defendant's motion, but did present oral arguments to the Court. With some exceptions related to cases or ordinances cited during oral argument, Plaintiff has for the most part failed to cite authority in opposition to those cited by Defendant, thereby putting himself at a serious disadvantage in this case. The Court does not have a duty to search for law to sustain or reject a party's position, and can be

considered by the Court to be deemed an admission of the arguments made by the opposing party. Although the Court has discretion to summarily grant the Defendants' motion based upon Plaintiff's failure to file a response brief, as Plaintiff made oral arguments in opposition to Defendants' motion, the Court has considered both parties arguments.

FACTS

The facts of this case are largely undisputed. Plaintiff Joseph Martin was hired by the Tribe on September 10, 2007 to be their Chief Legislative Counsel for the Tribal Council. The parties entered into a contract on that date. The contract that was signed by parties relative to Plaintiff's hiring indicated that Plaintiff would obtain membership to the Michigan bar within six months of the date of the contract. In March 2008, the Tribal Court became aware that the Plaintiff did not have a valid license to practice law in the State of Michigan or in the State of Illinois (where Defendant had previously been licensed), which is a prerequisite for admission and practicing before the Tribal Court.

On April 14, 2008, the Tribal Ogema discharged Plaintiff and issued a Notice of Termination, citing Plaintiff's failure to maintain good standing with the State Bar of Illinois and failure to obtain a license with the State Bar of Michigan. As a result, on April 15, 2008, Plaintiff was escorted from his office by Tribal representatives. Plaintiff sought and obtained from the Tribal Court a restraining order preventing the Ogema from enforcing the April 14, 2008 notice, pending judicial determination as to whether the Ogema had the legal authority to unilaterally discharge the Plaintiff from his employment. The Tribal Council also filed suit in the Tribal Court to determine the Ogema's authority to terminate Plaintiff's contract. See *Tribal Council v. Tribal Ogema*, Case No. 08093GC.

On May 23, 2008, Plaintiff filed a breach of contract lawsuit in the Tribal Court against the Ogema based on the April 14, 2008 Notice of Termination. See *Martin v. Tribal Ogema*, Case No. 08132GC.

On January 22, 2009, in *Tribal Council v. Tribal Ogema*, Case No. 08093GC, the Tribal Court issued a ruling concerning the Ogema's authority to terminate Plaintiff's contract, finding that the Ogema did possess that authority. That ruling effectively lifted the restraining order which the Court had previously issued.

On February 16, 2009, Plaintiff filed a motion to amend his complaint in *Martin v. Tribal Ogema*, Case No. 08132GC to add claims against the Tribal Council, including allegations of violations of the Legal Counsel Reform Act ("LCRA") that are very similar to the claims filed in the instant case.

By letter dated April 6, 2009, the Ogema informed Plaintiff that he had rescinded the Notice of Termination dated April 14, 2008, in part due to Plaintiff having restored his good standing as an attorney with the Illinois State Bar. The letter also noted that the issue of whether Plaintiff was licensed in Michigan remained open, and requested that Plaintiff contact him with regard to his plans on the issue within thirty days. Plaintiff allegedly failed to respond to the request. On April 30, 2009, upon stipulation of the parties, the Court ordered a dismissal of the Plaintiff's complaint in *Martin v. Tribal Ogema*, Case No. 08132GC, as the issues were moot since Plaintiff's employment had been restored.

On July 16, 2009, the Court issued an order clarifying its January 22, 2009 ruling in *Tribal Council v. Tribal Ogema*, Case No. 08093GC, stating that "Both the Ogema and the Council have the authority to terminate [Plaintiff's] contract."

On August 17, 2009, Plaintiff filed the instant action (Case No. 09169GC) in the Tribal Court against the Ogema and the Tribal Council. The complaint states claims very similar to his previously filed complaint in *Martin v. Tribal Ogema,* Case No. 08132GC, including contract claims and allegations of violations of the LCRA.

On August 21, 2009, Tribal Council voted to exclude Plaintiff from government facilities due to having been named as a defendant in a lawsuit filed by its own attorney (Plaintiff). Reportedly, the Tribe continued to pay Plaintiff his full salary.

On September 18, 2009, the Tribe alleges it discovered files which showed that Plaintiff had prepared an invoice dated March 18, 2008, directed to the Chamber of Commerce of Lac Du Flambeau, Wisconsin for legal work done while Plaintiff was employed by the Tribe. Plaintiff argues that the Tribe was aware that he had other legal matters that he was wrapping up, and that his contract did not prevent him from representing others.

On October 1, 2009, the Tribe notified Plaintiff that he was being discharged effective October 16, 2009, citing the reasons that he had failed to obtain a license to practice law in Michigan, had violated his employment contract with the Tribe by engaging in outside employment, and had violated the Tribe's policy against using government computers for personal profit-making purposes. The Tribe effectuated the termination on October 16, 2009.

Plaintiff then filed a separate lawsuit alleging claims under the Tribe's Whistleblower Protection Act, in Case No. 09244GC, which was later consolidated into the instant case (Case No. 09169GC) by the Court. An amended complaint was filed by the Plaintiff (with permission of the Court) on February 15, 2010, incorporating all such claims.

STANDARD FOR DECIDING MOTIONS TO DISMISS OR FOR SUMMARY DISPOSITION

There are several standards cited by the Defendant concerning their motion to dismiss and/or for summary disposition. First, the Defendant cites the Tribal Court Rules of Civil Procedure ("TRCP") 4.3, which provides in relevant part:

> 4.3 Dismissal of Actions. Actions before the Court may be dismissed in the following manners:
>
> * * *
>
> 2. Involuntary dismissal. If the Plaintiff fails to comply with these rules or a court order or if there is no basis for action in laws or claim, a defendant may move for dismissal of an action against that defendant.
>
> (a) In an action tried without jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if motion is denied, may move for dismissal on the ground that the facts and the law the plaintiff has no right to relief. The court may then determine the facts and render a decision, or may hold until all evidence is presented.

> (b) Unless specified in an order of dismissal, any dismissal of an action under these rules operates as an adjudication on the merits. Exception to this rule is dismissal for lack of jurisdiction.

Pursuant to Tribal Court Ordinance No. 97-300-01, § 9.01, the Tribal Court applies the Michigan Court Rules of Civil Procedures where such rules are not superseded by procedural rules enacted by the Tribal Courts.

Defendants also cite the following Michigan Court Rules as being in support of their motion for summary disposition: MCR 2.116(C)(4) (the court lacks jurisdiction of the subject matter); MCR 2.116(C)(6) (another action has been initiated between the same parties involving the same claim); MCR 2.116(C)(7) (the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action); MCR 2.116(C)(8) (the opposing party has failed to state a claim on which relief can be granted); and MCR 2.116(C)(10) (except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law). In spite of citing all these sub-rules, it appears that the Defendants rely primary upon MCR 2.116(C)(8) and (C)(10).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *USA Cash # 1, Inc. v. Saginaw,* 285 Mich. App. 262, 265, 776 N.W.2d 346 (2009). All well-pleaded allegations must be accepted as true and viewed in the light most favorable to the nonmoving party, and the motion may only be granted if the claim is so legally deficient that recovery would be impossible. *Id., Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d (1999). The Court reviews the motion to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Smith v. Kowalski,* 223 Mich. App. 610, 612-613; 567 NW2d 463 (1997). As noted in MCR 2.116(I)(1): "If the pleadings show

that a party is entitled to judgment as a matter of law, ... the court shall render judgment without delay."

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties, and view that evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v. Rozwood,* 461 Mich. 109, 119-120; 597 NW2d 817 (1999). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden,* 461 Mich. at 120. MCR 2.116(G)(4) requires:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Maiden, *supra,* at 120-121. A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). *Id.* The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.*

PLAINTIFF'S CONTRACT CLAIMS

Plaintiff's Complaint, as amended, claims that the Defendants breached his employment contract in several counts (Counts I-III) Plaintiff is requesting both injunctive relief and money damages for the alleged breach of contract by Defendants. Plaintiff claims that, under the facts outlined above, the Tribe did not provide 60 days written notice as required under the Termination clause of the contract. Plaintiff also complains that paragraph 4.3 of the contract

specified that Plaintiff "shall have authorized sufficient training and travel, and related expenses, to attend appropriate continuing legal education training," but that the Tribe eliminated all training and travel funding from Plaintiff's budget, thereby forcing Plaintiff to spend his own funds to obtain said training.

Plaintiff also alleges that the Tribe violated the Legal Counsel Reform Act of 2005 (LCRA). Plaintiff alleges that the Tribal Counsel consulted with and received advice from Associate Legislative Counsel Kimberly McGrath on several issues without his knowledge or consent, when under Section 4.02.b. of the LCRA, Plaintiff is to be her direct supervisor. Plaintiff claims that this is not only a violation of the LCRA, but also of his contract which incorporates the LCRA.

Defendants make several arguments as to why Plaintiff's contract claims should be dismissed. Defendant first argues that the Plaintiff's contract claims are barred by the doctrine of sovereign immunity. Article XI of the Tribal Constitution states:

> Section 1 - The Tribal Council shall not waive or limit the right of the Little River Band to be immune from suit, except as authorized by tribal ordinance or resolution or in furtherance of tribal business enterprises. Except as authorized by tribal ordinance or resolution, the provisions of Article III of this Constitution shall not be construed to waive or limit the right of the Little River Band to be immune from suit for damages.
>
> Section 2 - Suits against the Little River Band in Tribal Courts Authorized.
>
> > (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.
> >
> > (b) Notwithstanding the authorization provided in subsection (a) of this Section, persons shall not be entitled to an award of damages, as a form of relief, against the Tribe, its Tribal Council members, the Tribal Ogema, or other Tribal officials acting in their official capacities; provided that the Tribal Council may by ordinance waive the right of the Tribe or Tribal officials to be immune from damages in such suits only in specified instances when such waiver would promote the best interests of the Band or the interests of justice.

> (c) The Tribe, however, by this Article does not waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state.

With regard to Plaintiff's contract claims for money damages, Plaintiff has not cited any ordinance or statute whereby the Tribe has waived its sovereign immunity as it relates to Plaintiff's contract claims for money damages. Therefore, to the extent that Plaintiff's contract claims seek money damages, they are barred by the doctrine of sovereign immunity and the provisions of Article XI, Section 2(b) of the Tribal Constitution.

Plaintiff also indicates in his complaint that he is seeking injunctive relief against the Tribe based upon his contract claims. In his prayer for relief, Plaintiff requests that the Court issue an injunction preventing the Tribe from engaging in conduct calculated to disparage or harm Plaintiff for the duration of the suit. As noted above, Tribal officials are subject to suit in their official capacity for declaratory or injunctive relief, in the Tribal Court system for the purpose of enforcing rights and duties established by the Tribal Constitution and by the ordinances and resolutions of the Tribe. Defendants point out that the Plaintiff's contract claims do not attempt to enforce any rights or duties established under the Constitution or ordinances or resolutions of the Tribe. The Court agrees, and would note that the allegations in Plaintiff's complaint for breach of contract does not cite any specific Constitutional provisions, statutes or ordinances which establish declaratory or injunctive relief relative to a breach of contract action. While Plaintiff cites breach of the Legislative Counsel Reform Act, that act does not provide a remedy sounding in breach of contract, nor for declaratory or injunctive relief.

Plaintiff argues that there was in implied or implicit waiver of sovereign immunity under Article XI, Section 1 which provides "The Tribal Council shall not waive or limit the right of the Little River Band to be immune from suit, except as authorized by tribal ordinance or resolution **or in furtherance of tribal business enterprises**." (Emphasis added). Plaintiff argues that the contract between the parties was in furtherance of tribal business enterprises and that therefore exempt from the normal immunity from suit. However, paragraph 1 of the contract between the

parties indicates that Plaintiff was hired to be "an attorney for the Tribe to serve as Chief Legislative Counsel." The duties indicated in paragraph 2.1 of the contract also show that Plaintiff's role was much more governmental rather than in furtherance of a "tribal business enterprises." Those duties included "assisting with the review, drafting and amendment of Tribal laws and regulations;" "providing legislative reviews of state and federal laws, etc." There is no mention in the contract of assisting or representing the Tribe as to any tribal business enterprises. The very title of the position as "Legislative Counsel" indicates that the nature of the job is legislative, and thereby governmental in nature.

It is well settled Tribal law that any waivers of sovereign immunity must be explicit, and cannot be implied. The Court does not find that Plaintiff's employment was specifically in furtherance a business enterprise of the Tribe, nor that there was any express waiver of sovereign immunity related to Plaintiff's contract.

For the reasons stated above, Plaintiff's contract claims for both damages and for injunctive relief are barred under the doctrine of sovereign immunity and the specific provisions of Article XI of the Tribal Constitution, and dismissal of Plaintiff's contract claims is appropriate under TRCP 4.3, subsection 2. As Plaintiff's contract claims are barred by sovereign immunity, it is not necessary for the Court to address the other issues related to Plaintiff's breach of contract claims.

PLAINTIFF'S WHISTLEBLOWER CLAIMS

The Tribe has adopted a Fair Employment Practices Code, Ordinance # 05-600-03 (hereinafter "FEPC"), to "prevent and remedy discrimination in employment, unless in furtherance of Indian employment preferences, on the basis of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation" and "establish standards for fair and safe working conditions." FEPC, Article I, Section 1.02. Article XII of the FEPC is entitled "Whistleblower Protection" (hereinafter "WPA") and contains provisions very similar to the State of Michigan's Whistleblower Protection Act (hereinafter "MWPA"). The purpose of that

Article is "is to protect employees who report violations of law from employment discrimination." WPA, Section 12.01.

The WPA states in part:

> Except as otherwise provided by sections 12.04-12.07, no employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
>
> a. The employee, acting in good faith, or a person acting on behalf of the employee, reports, in writing, to the employer or to the Tribal Prosecutor what the employee has reasonable cause to believe is a violation of applicable law;

The WPA requires that notice be provided to the employer so that the employer may have a reasonable opportunity to correct the alleged violation of the WPA, unless the employee has specific reason to believe that a report to the employer will not result in promptly correcting the alleged violation:

> 12.04. *Initial report to employer required; exception.* Section 12.03 does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to the Tribal Prosecutor unless the employee has first given written notice of the alleged violation, condition or practice to a person having supervisory authority within the employer and has allowed the employer a reasonable opportunity to correct the alleged violation of applicable law, condition or practice. Prior written notice to an employer is not required before reporting to the Tribal Prosecutor if the employee has specific reason to believe that a report to the employer will not result in promptly correcting the alleged violation of applicable law, condition or practice.

Also, Section 12.07 the WPA requires that except as provided in Section 12.04, reports or notices of violations must be made in writing as follows:

> 12.07. *Written Report Required.* Except as provided by section 12.04, reports or notices of violations of applicable law, conditions or practices alleged in to be in violation of section 12.03 must be made in writing and shall include:
>
> a. The name of the individual making the report and their position within, or relationship to, the Tribe, subordinate economic entity or other employer at issue;
>
> b. The date the alleged violation of applicable law, or condition or practice at issue occurred;
>
> c. The factual circumstances surrounding the alleged violation of applicable law, or condition or practice at issue;
>
> d. Where a violation of applicable law is at issue, identification of the law alleged to have been violated;

e. How the individual has knowledge of the alleged violation of applicable law or condition or practice; and
f. The signature of the individual filing the report.

The Plaintiff states in his First Amended Complaint, Paragraph 71, that his motion filed (in Case No. 08132GC), dated February 16, 2009, and this lawsuit filed on or about August 17, 2009 (Case No. 09169GC) were a report or notice of violations of applicable law (the LCRA) within the meaning of the WPA, Section 12.07. Plaintiff states that he was removed from his office, and was eventually was discharged from his employment as a direct result of his filing of the instant lawsuit against the Tribe, and that his discharge was therefore in violation of Section 12.03 of the WPA. Plaintiff cites the letters he received from the Tribe dated August 21, 2009, September 18, 2009, October 1, 2009, and October 16, 2009, and their actions in conformity therewith, and states that they were issued in response to his report of violations of applicable law (via his lawsuit) as prohibited by Section 12.03 of the WPA.

Section 12.08 of the WPA also indicates that "An employee who believes he or she has been subject to unlawful employment discrimination in violation of Section 12.03 shall have all the procedural and substantive rights and remedies under Article VI..." Article VI of the FEPC states a procedure for a person who believes they have been the subject of employment discrimination to file a "Charge of Discrimination" with the Tribal Court within 180 days of the alleged discriminatory act, which would then be referred to a Fair Employment Practices Investigator (FEPI). FEPC, Article VI, Section 6.02. The FEPI must investigate the charge, give the employer notice of the complaint, and issue a written report. FEPC, Article VI, Section 6.03. If the report indicates that there is reasonable cause to believe discrimination prohibited under the FEPC occurred, the FEPI must convene a meeting of the employer and employee in an attempt to reach a "conciliation agreement." FEPC, Article VI, Section 6.03.d. If within 60 days of the date of mailing the report the parties have not reached conciliation or otherwise settled the matter, the FEPI shall issue a "right to sue" letter to the complainant. FEPC, Article VI, Section 6.03.f. FEPC, Article VI, Section 6.04 then discusses the right of a person claiming to

be the subject of unlawful employment discrimination to file a civil action in the Tribal Court against the employer.

There is a potential inconsistency between the provisions of the FEPC as to whether a person who has been discriminated against must first go through the procedures stated in Article VI, Sections 6.02-6.03 to obtain a "right to sue" letter prior to filing a civil action, or whether they may go directly to the Tribal Court for relief. Nowhere in Article VI of the FEPC does it specifically state that the complaining party must obtain a "right to sue" letter prior to filing a civil action in the Tribal Court. The language throughout appears to be permissive, rather than mandatory. However, the use of the language "right to sue" implies that the procedure outlined in Sections 6.02-6.03 of Article VI are intended to be require a complainant to go through that procedure before they would have the right to sue the employer.

The rules regarding judicial review of statutory language are well established. Questions involving statutory interpretation present questions of law subject to review de novo. *Hunter v. Hunter* 484 Mich. 247, 257; 771 NW2d 694 (2009). The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature (in this case, the Tribal Council). *In re Certified Question,* 433 Mich. 710, 722; 449 NW2d 660 (1989); *Amburgey v. Sauder,* 238 Mich. App. 228, 231-232; 605 N.W.2d 84 (1999). Once the intention of the Tribal Council is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *Certified Question,* 433 Mich. at 722. The language of the statute expresses the legislative intent. *Dep't of Transportation v. Tomkins,* 481 Mich. 184, 191; 749 N.W.2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id.* Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* "[A] dogged literalism should not be employed to defeat the Legislature's intent." *Goodridge v. Ypsilanti Twp Bd,* 451 Mich. 446, 453, n 8; 547 N.W.2d 668 (1996).

A statutory provision is ambiguous if it irreconcilably conflicts with another provision or when it is equally susceptible to more than one meaning. *Fluor Enterprises, Inc v. Dep't of Treasury,* 477 Mich. 170, 177 n 3; 730 N.W.2d 722 (2007). A statutory provision should be viewed as ambiguous only after all other conventional rules of interpretation have been applied and found to be wanting. *Id.* If a statute is ambiguous, judicial construction is appropriate. *Capitol Properties Group, LLC v. 1247 Ctr St, LLC,* 283 Mich. App. 422, 434; 770 N.W.2d 105 (2009). "Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v. Hartford Accident & Indemnity (After Remand),* 444 Mich. 638, 644; 513 N.W.2d 799 (1994). When construing statutory sections, the terms of statutory provisions with a common purpose should be read in pari materia. *World Book, Inc v. Dep't of Treasury,* 459 Mich. 403, 416; 590 N.W.2d 293 (1999). The objective of the pari materia rule is to give effect to the legislative purpose as found in statutes addressing a particular subject. *Id.* "Conflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies whenever possible." *Id.* at 416-417.

When construing a statute, a court should not abandon the canons of common sense. *Marquis,* 444 Mich. at 644. "We may not read into the law a requirement that the lawmaking body has seen fit to omit." *In re Hurd-Marvin Drain,* 331 Mich. 504, 509; 50 N.W.2d 143 (1951). When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. *Houghton Lake Area Tourism & Convention Bureau v. Wood,* 255 Mich. App. 127, 142; 662 N.W.2d 758 (2003). Therefore, when necessary to interpret an ambiguous statute, the appellate courts must determine the reasonable construction that best effects the Legislature's intent. *Id.*

The Court finds that in adopting the FEPC, it was the Tribal Council's intent to require that notice be given to an employer in the form of a written report which would allow the Tribe to attempt to redress and rectify the alleged violation in order to avoid costly litigation. Nowhere in the FEPC does it state that the filing of a civil complaint is the equivalent of a notice under Section 12.07. The Court finds that the filing of a lawsuit by Plaintiff did not constitute a report or notice of violations of applicable law (the LCRA) within the meaning of the WPA, Section 12.07. Furthermore, consistent with the legislative scheme of the FEPC and the clear intent of the Tribal Council in adopting it, the Court finds that the reference in Section 12.08 of the WPA that a complainant shall have all of the substantive and procedural rights contained in Article VI should be interpreted to require that a complainant seek a "right to sue" letter under the procedures in Article VI prior to being able to commence litigation for a violation of the WPA. To rule otherwise would render that reference totally without meaning. The Court's holding is also supported by the Tribal Council's findings as stated in Article XVII of the FEPC, Section 17.1(b), where it states:

> In providing for procedures, rights, and remedies for employers, employees, and labor organizations under this Code, including those afforded through actions in the Little River Band of Ottawa Indians Tribal Court, the Tribal Council has carefully considered (and continues to consider) the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake. This has included careful consideration of, amongst other things, (i) the time, costs, and inconvenience of parties and witnesses involved in proceedings to resolve controversies or to establish rights and remedies under this Code; (ii) **the need to protect the governmental operations of the Band from undue burdens from litigation**, while according fair treatment to employees within those operations; and (iii) methods to resolve disputes through early settlement, including mediation. (Emphasis added).

Therefore, because the Court finds that the Plaintiff's civil complaints do not equate to the notice required under Section 12.07 of the WPA, and because the Plaintiff did not follow the procedures of Article VI of the FEPC and obtain a "right to sue" letter prior to commencing this litigation, Plaintiff's WPA claims must fail.

CONCLUSION

The Court finds that Plaintiff's claims against the Tribe have no basis in law and shall be dismissed pursuant to Little River Band Civil Procedure Rule 4.3.2. Said dismissal shall be with prejudice and shall be a final adjudication pursuant to Rule 4.3.2(b).

The Tribe's motion for dismissal and/or summary disposition is therefore GRANTED.

IT IS SO ORDERED.

Dated: July 7, 2010

Hon. Wilson D. Brott
Judge Pro Tem

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,
PETITIONER

V.

CASE NUMBER: 07207CO
HONORABLE DANIEL BAILEY

JEFFREY D. BATTICE II
1353 E. US.S. HWY. 10
SCOTTVILLE MI 49945,
RESPONDENT

ORDER AFTER HEARING AND NOTICE OF RE-CONSIDERATION HEARING

On September 17, 2009, two tickets were issued to the Respondent by Officer Huff of the Michigan Department of Natural Resources for a CORA violation. This was a civil offense against the CORA Regulations, Section IX. (k.)§ (1): *"No tribal fisher shall have unattended nets in the 1836 Treaty waters. Unattended and abandoned nets may be seized by an enforcement officer and forfeited; provided, that if the nets have been reported to the appropriate Tribe as vandalized or lost prior to seizure, the fisher shall be provided a reasonable opportunity to retrieve the nets."*

The appearance date was noted on the tickets as October 5, 2009, at 10:00 a.m. The hearing commenced as scheduled. Officer Mark Szynski and Corporal Steve Huff were present for the Tribe and Jeffery Battice as the respondent.

After taking testimony and repeatedly asking the respondent if he understood the charges and if he understood that fact that he was accepting responsibility for those charges, the court accepted Mr. Battice's plea of responsible.

The Officers had prepared a list of costs that was presented to the court, but not the respondent. This list enumerated wages/expenses and want/waste/ fish kill values. The cost incurred according to the officers was for $17, 936.06.

This amount was only revealed to the respondent after he pled "responsible." Mr. Battice became very emotional and begun to get defensive. The Judge asked him if he wanted to withdraw his plea and a trial would be scheduled. Mr. Battice said it would be a "...waste of time and money for the system..."

Before the written order of the court could be drafted, Mr. Battice faxed the clerk a "motion" (a request in letter form) on October 6, 2009, that he was contesting the ruling.

The court believes that Mr. Battice understood his responsibility and accepts his plea in regard to the abandoned nets. The court is willing to re-consider some of the restitution amount if evidence is introduced that will persuade it to modify or change the amount that was sought by the petitioners ($17,936.06.)

The court finds Mr. Battice responsible for the abandoned nets that were pulled by the MDNR and LRBOI DPS. The fine for each ticket is $100 ($200 for both.)

A hearing to establish and order or modify the restitution amount will be held on:

Monday, November 2, 2009 at 11:00 a.m.

SO ORDERED:

Judge Daniel Bailey

10/9/09
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 and the defendants (or their attorneys) at the addresses on file with the court. (Hand delivered to LRBOI DPS and mailed to Corporal Huff at 970 Emerson Road, Traverse City, MI 49686)

Deborah Miller
Court Clerk

10·12·09
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

V.

CASE NUMBER: 09207CO
HONORABLE DANIEL BAILEY

JEFFREY D. BATTICE II
1353 E. U.S .SOUTH HWY. 10
SCOTTVILLE MI 49454

ORDER OF RECONSIDERATION

The hearing to re-consider the restitution amount that was placed on record at the October 5, 2009 hearing was held today, November 2, 2009. The petitioner Battice, Officer Szynski from LRBOI DPS, and Officer Steve Huff from the Michigan Department of Natural Resources were present.

The report regarding the restitution was broken down by wages and expenses and want/waste fish kill values by the investigating officers. These are their estimates that were utilized at the first hearing.

"Wages/Expenses	
LRBOI Officer wages(s)	**$ 883.80**
MDNR Officer wage(s)/expenses	**$2091.87**
Fuel for the Patrol boat	**$ 510. 39**
Total:	**$3486.06"**

"Want/Waste Fish Kill Value(s)		
9/1/09; 1500lbs. Bloater Chugs	**$5400.00**	
9/1/09 1000lbs of Lake Trout	**$ 750.00**	
9/1/09 50lbs Burbot	**Unknown**	
9/2/09 Estimated total	**$9000.00**	
Fish Kill Total Commercial Value	**$14,450.00"**	(Actually: $15,150)

Total of wages and want/waste:	$18,636.06

After testimony from Mr. Battice and a video presentation by the officers the court has reconsidered the restitution amount.

Mr. Battice shall be responsible for the wages and expenses for the MDNR. This amount is: **$2,602.26.** This restitution shall be paid first to the office of the Tribal Court. (The court will make sure the MDNR gets the payment at: MDNR Cashiers Office, Attention: Amy Doss, P.O. Box 30451, Lansing MI 48909-7951)

Mr. Battice appeared to be remorseful for his wanton waste of the fish; not only for his own coffers, but for the commercial fishing program and the community at large.

The court, on its own motion, shall decrease the amount of the restitution for the fish kill to a flat **$8000.** This added to the restitution to the MDNR **$2,602.26** and the **$200** fine to the court, comes to a total of: **$10,802.26.**

Mr. Battice shall pay $50 per month to the Court Offices by check or money order and his per capita payments shall be taken until his restitution and fines are paid in full.

SO ORDERED:

Judge Daniel Bailey

11/2/09
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 and the defendants (or their attorneys) at the addresses on file with the court.

Court Clerk

11.5.09
Date

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT
3031 Domres Road
Manistee, Michigan 49660
(231) 398-3406
Fax: (231) 398-3404

JOSEPH MARTIN,

Plaintiff, Case No. 09248GC

v. Hon. Wilson D. Brott

LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL COUNCIL, LITTLE RIVER BAND OF OTTAWA INDIANS OGEMA LARRY ROMANELLI, and HON. ANGELA SHERIGAN,

Defendants.

Joseph H. Martin
Plaintiff – *Pro se*
362 1st Street
Manistee, MI 49660

David A. Giampetroni (P69066)
Attorney for Defendants LRBOI, Tribal Council & Ogema
Kanji & Katzen PLLC
101 N Main St Ste 555
Ann Arbor, MI 48104
(734) 769-5400

William Rastetter (P26170)
Attorney for Defendant Hon. Angela Sherigan
Olson Bzdok & Howard PC
420 E Front St
Traverse City, MI 49686
(231) 946-0044

ORDER REGARDING MOTIONS TO DISMISS AND/OR FOR SUMMARY DISPOSITION AND MOTION FOR AWARD OF COSTS INCLUDING ATTORNEYS' FEES (CORRECTED)[1]

Defendants Little River Band of Ottawa Indians, its Tribal Council and Ogema (hereinafter collectively "the Tribe") filed a Motion to Dismiss and/or For Summary Disposition as to the claims filed by Plaintiff Joseph Martin in the above matter. Defendant Hon. Angela Sherigan (hereinafter "Judge Sherigan") also filed a Motion for Summary Disposition (and renewed Motion for Summary Disposition) in the above matter, as well as a Motion for Award of Costs, Including Attorneys' Fees. All parties were given the opportunity to file briefs in

[1] This Order is issued to correct a spelling and pagination error in the Order which was originally issued. No substantive changes have been made to the Order.

response, and were given the opportunity to make oral arguments to the Court. It is noted that Plaintiff did not file a written response to the Defendant's motion, but did present oral arguments to the Court. With some exceptions related to cases or ordinances cited during oral argument, Plaintiff has for the most part failed to cite authority in opposition to those cited by Defendant, thereby putting himself at a serious disadvantage in this case. The Court does not have a duty to search for law to sustain or reject a party's position, and can be considered by the Court to be deemed an admission of the arguments made by the opposing party. Although the Court has discretion to summarily grant the Defendants' motion based upon Plaintiff's failure to file a response brief, as Plaintiff made oral arguments in opposition to Defendants' motion, the Court has considered both parties arguments.

FACTS

Plaintiff filed a complaint on November 6, 2009, alleging that the Little River Band of Ottawa Indians, the Little River Band of Ottawa Indians Tribal Council, and Little River Band of Ottawa Indians Ogema Larry Romanelli (hereinafter collectively referred to as "the Tribe"), as well as Hon. Angela Sherigan (hereinafter "Judge Sherigan") took concerted actions to substantially change the outcome of a previously decided lawsuit and thereby violated Plaintiff's rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301, et seq. (hereinafter "ICRA"), the Tribal Constitution, and the Tribal Court Ordinance, Ordinance #97-300-01 (hereinafter "TCO"). Plaintiff seeks declaratory and injunctive relief.

Plaintiff's claims are based meeting occurred on or about July 16, 2009 between Judge Sherigan, Ogema Larry Romanelli and Tribal Council Speaker Steve Parsons regarding the January 22, 2009 Order issued by Judge Sherigan in the matter of *Tribal Council v. Tribal Ogema*, Case No. 08093GC. The only parties to that action were the Tribal Council and the Tribal Ogema; Plaintiff was not a party to that civil action. The January 22, 2009 order (hereinafter "Original Order") indicated that the Ogema had authority to terminate Plaintiff's

contract, but did not address the authority of the Tribal Council. At the meeting, it is alleged that the Ogema and Tribal Council Speaker requested clarification of the Court's ruling, and that as a result of that meeting, Judge Sherigan issued an order on July 16, 2009 (hereinafter "Subsequent Order") in the same case (Case No. 08093GC), which clarified the Court's prior order dated January 22, 2009, holding that the Tribal Council also had the authority to terminate Plaintiff's contract, and that both the Ogema and the Tribal Council have the authority to terminate the contract, independent of each other. It is undisputed that the above-referenced meeting was not attended by the Plaintiff, nor was he invited or his input sought as to the subject of the meeting. It is also undisputed that no appeal was filed in that case by either party. Plaintiff has however filed the instant action against the above-named Defendants.

CIVIL RIGHTS CLAIMS

Plaintiff claims that the issuance of the Subsequent Order violates the Plaintiff's civil rights under ICRA, including the provision that "No Indian Tribe in exercising the powers of self-government shall: ...deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." That provision is mirrored in Article III, Section 1 of the Little River Band of Ottawa Indians Constitution. Plaintiff claims he was denied equal protection and due process because no hearing was held on the record with all parties present. Plaintiff also alleges that the Subsequent Order was issued in violation of the TCO, Section 7.03, which requires that "The Tribal Courts shall be courts of record and a record of all official proceedings in the Tribal Courts shall be made and maintained by and filed in the Office of the Tribal Court Clerk."

The Tribe argues that the Defendant's claims are barred by the doctrine of sovereign immunity, and that this Court therefore has no jurisdiction to hear such claims. The Tribe further argues that the Plaintiff has not sufficiently stated facts or law which would support his claims of denial of his Constitutional and ICRA rights to equal protection and/or due process of law. The

Tribe further argues that the Tribal Court Ordinance creates no private right of action for a violation of the ordinance.

A. Sovereign Immunity

Article XI of the Tribal Constitution sets out provisions concerning the Tribe's sovereign immunity. Section 2(a) of Article XI states the circumstances in which the Tribe allows itself to be sued, which states:

> Section 2 - Suits against the Little River Band in Tribal Courts Authorized.
> (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.

Because Plaintiff has made claims that are based not only on alleged violations of ICRA, but are also based on violations of the nearly identical provisions contained in the Little River Band of Ottawa Indians Constitution, the Plaintiff's suit falls squarely within the exception of Article XI, Section 2(a), and therefore the Tribe cannot utilize sovereign immunity as a defense to Plaintiff's civil rights claims which are based upon the Constitutional violations alleged. However, as to violations of the Tribal Court Ordinance, sovereign immunity **does** prevent the Plaintiff from making such a claim, to the extent the claim is not based upon a Constitutional violation.

B. Equal Protection

Plaintiff alleges in part that his right to equal protection under ICRA and the Little River Band of Ottawa Indians Constitution has been violated based upon the facts alleged above. The Court would note that the provisions of Tribal Constitution here are substantially identical to the provisions in the United States Constitution, as well as ICRA. Therefore, in the absence of Tribal Authority from this Court on the issue, the Court may look to federal law. *See* Tribal Court Ordinance No. 97-300-01, §8 (courts of the Little River Band shall apply Tribal and applicable federal substantive law.). The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws,"

which is essentially a direction that all persons similarly situated should be treated alike. U.S. Constitution, Amendment XIV; *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). A state practice generally will not require strict scrutiny unless it interferes with a fundamental right or discriminates against a suspect class of individuals. *Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Plaintiff has not alleged violation of a fundamental right. Because neither a fundamental right nor a suspect class is at issue, the rational basis review standard applies. *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby,* 470 F.3d 286, 298 (6th Cir. 2006). "Under rational basis scrutiny, government action amounts to a constitutional violation only if it 'is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.' " *Id.* (quoting *Warren v. City of Athens,* 411 F.3d 697, 710 (6th Cir. 2005)). To prove his equal protection claim, Plaintiff must demonstrate "intentional and arbitrary discrimination" by the state; that is, he must demonstrate that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Stated another way, to state an equal protection claim, a plaintiff must factually allege the existence of other persons who were treated more favorable than the plaintiff and who are similarly situated to the plaintiff in every material respect. *Ross v. Duggan,* 402 F.3d 575, 588 (6th Cir. 2004).

In the instant case, Plaintiff has not made allegations in his complaint or in his subsequent arguments to support a claim for violation of his rights to equal protection under the Tribal Constitution (or ICRA, or the U.S. Constitution). Plaintiff does not make any allegations that he was treated differently than any other person, or that other persons who are similarly

situated to him were treated more favorably. Therefore, Plaintiff's equal protection claims are without merit as there are not sufficient facts even alleged by Plaintiff to support them.

C. Due Process

Plaintiff also claims that the Tribe violated his Constitutional right to due process. The basis for Plaintiff's claim is in essence that the meeting which took place between Judge Sherigan, the Ogema and the Tribal Council Speaker took place off the record, without Plaintiff being present or notified, and that it resulted in the Subsequent Order being issued without input being provided by both parties. Plaintiff claims that the Subsequent Order deprived him of a property right as it modified the terms of his contract by allowing either the Ogema *or* the Tribal Council to terminate his contract, when the Original Order only specified that the Ogema had that right.

As noted above, the provisions of Tribal Constitution as to due process are substantially identical to the provisions in the United States Constitution, as well as ICRA. Therefore, in the absence of Tribal Authority from this Court on the issue, the Court may look to federal law. Tribal Court Ordinance No. 97-300-01, §8. The Due Process Clause of the Fourteenth Amendment provides that no state "shall deprive any person of life, liberty, or property without due process of law." United States Constitution, Amendment XIV. Thus, the Constitution is implicated only if a person is deprived of an interest protected by the Due Process Clause. Without a protected liberty interest, plaintiff cannot successfully claim that his due process rights were violated because, "[p]rocess is not an end in itself." *Olim v. Wakinekona,* 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). To establish a procedural due process violation the Plaintiff is required to demonstrate three elements: (1) that it had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment; (2) that it was deprived of that protected interest within the meaning of the due process clause; and (3) that the state did not afford it adequate procedural rights before depriving it of its protected interest. *See Med. Corp., Inc. v. City of Lima,* 296 F.3d 404, 409 (6th Cir.2002).

The Court finds that Plaintiff has not established that he had a property interest that was affected by the ruling of the Subsequent Order on which his claim is based. The ruling of the Subsequent Order, as well as the Original Order in the case of *Tribal Council v. Tribal Ogema*, Case No. 08093GC, dealt with the respective governmental powers of the Tribal Ogema and the Tribal Council. As such, it dealt with the rights and authority of the *Tribal government*, not of the Defendant, regardless of the fact that the subject of the dispute was over who had authority to terminate Defendant's employment contract. Neither the Original Order, nor the Subsequent Order, purported to alter or modify the terms of the Plaintiff's employment contract. Plaintiff was not even a party to that civil action. Therefore as the Subsequent Order did not affect any property interest of the Plaintiff, Plaintiff's due process claims must also fall.

JUDICIAL IMMUNITY

Judge Sherigan requests that this Court grant summary disposition in her favor under the doctrine of judicial immunity, which has developed in English common law as a method to protect judges from suit and instead encourage aggrieved parties to file appeals rather than civil suits against the presiding judge. Plaintiff responds that Judge Sherigan's actions, based on ex parte communications off the record and without notice to all parties, deprived Plaintiff of his Constitutional rights and violated the Tribal Court Ordinance, and that therefore Judge Sherigan should not be immune from suit for her actions.

A. Judicial Immunity Doctrine

The doctrine of judicial immunity has its roots in English common law centuries ago. The doctrine was created as a means to encourage those who disagreed with the judge's decision to file an appeal rather than challenging the decision by suing the judge who issued the decision. Judicial immunity was created "as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Although

unfairness and injustice to a litigant may result on occasion, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher,* 80 U.S. 335, 13 Wall. 335, 347, 20 L.Ed. 646 (1872). The doctrine has been summarized by the United States Supreme Court as follows:

> Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mitchell v.Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Pierson v. Ray,* 386 U.S., at 554, 87 S.Ct., at 1218 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly").See also *Harlow v. Fitzgerald,* 457 U.S. 800, 815-819, 102 S.Ct. 2727, 2736-2739, 73 L.Ed.2d 396 (1982) (allegations of malice are insufficient to overcome qualified immunity).
>
> Rather, our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.,* actions not taken in the judge's judicial capacity. *Forrester v. White,* 484 U.S., at 227-229, 108 S.Ct., at 544-545; *Stump v. Sparkman,* 435 U.S., at 360, 98 S.Ct., at 1106. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.,* at 356-357, 98 S.Ct., at 1104-1105; *Bradley v. Fisher,* 13 Wall., at 351.

Mireles v. Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352.

Judicial immunity has also been applied with regard to Tribal Court Judges, including those in Michigan. In *Sandman v. Dakota*, 816 F.Supp 448, (W.D. Mich. 1992), the United States District Court for the Western District of Michigan dismissed two claims naming Chief Judge Bradley Dakota of the Keweenaw Bay Tribal Court as a defendant. In the first case, the

Plaintiffs argued that Judge Dakota had violated Plaintiff's due process rights sending their children to foster care in Minnesota and by continuing to make decisions about the children's placement and treatment without affording plaintiffs notice or an opportunity to be heard. In the second case, the Plaintiff claimed that she was wrongfully incarcerated without due process by the Keweenaw Bay Tribal Court, and sought money damages. Plaintiffs in those cases claimed that they had a right to sue Judge Dakota pursuant to the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. The *Sandman* Court held that the Plaintiffs' claims were barred under the doctrine of judicial immunity stating:

> Under common law, officials who are acting in a judicial capacity are protected by judicial immunity. A claim for damages cannot be maintained against a judicial officer exercising the authority vested in the position. *Stump v. Sparkman,* 435 U.S. 349, 355-56, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978); *Bradley v. Fisher,* 80 U.S. (13 Wall) 335, 351, 20 L.Ed. 646 (1872). In fact, judges cannot be held liable even where their actions are "in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump,* 435 U.S. at 356-57, 98 S.Ct. at 1104 (quoting *Bradley,* 80 U.S. (13 Wall) at 351).
>
> [Plaintiff] argues that the doctrine of judicial immunity should not be applied to a tribal judge when the violation of a right is egregious. There is, however, no support for plaintiff's position in the law. The Supreme Court has held that the doctrine of judicial immunity is applicable in civil rights suits. *Id.* at 356, 98 S.Ct. at 1104. It is thus appropriate to apply it to suits under the Indian Civil Rights Act. It is also appropriate to afford the common law protection of judicial immunity to tribal judges, in light of the rule that Indian tribes generally possess a common law immunity from suit. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 58, 98 S.Ct. at 1677. Tribal immunity extends to individual tribal officials acting in their representative capacity within the scope of their authority. *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir.1985).

Sandman, supra, 816 F.Supp at 452. *See also Penn v. United States,* 335 F.2d 786, 789-790 (8th Cir. 2003) ("A tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges.").

B. Application of Judicial Immunity Doctrine

The above cases make it crystal clear that the doctrine of absolute judicial immunity as stated above applies to Tribal Court Judges, including the judges of the Little River Band of Ottawa Indians Tribal Court. Although Plaintiff is alleging that he is entitled to make a claim

against Judge Sherigan under the Indian Civil Rights Act, he cites no authority for this proposition.

As noted above, judicial immunity is an immunity from suit. Judicial immunity is not overcome by allegations of bad faith or malice or even corruption. Rather, judicial immunity is overcome only under two circumstances. First, a judge is not immune from liability for nonjudicial actions, in other words, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

Applying these principals to the case at bar, the Court finds that Judge Sherigan was acting in a judicial capacity when she met with the Ogema and Tribal Council Speaker on July 16, 2009, and when she subsequently issued the Subsequent Order on that same date. Whether her actions were proper from a legal standpoint is a matter which could have been addressed by either party filing an appeal in that case. This Court makes no ruling in regard to whether Judge Sherigan should or should not have issued the Subsequent Order as it is not properly before this Court at this time. Regardless, the issuance of that Subsequent Order which modified a previously issued opinion, even if done due in response to ex parte communications not on the court record, are not actions which were taken by Judge Sherigan outside of her judicial capacity.

Further, despite Plaintiff's argument to the contrary, Judge Sherigan's actions were not taken in the complete absence of all jurisdiction. It is clear that the Tribal Court had jurisdiction over the case in which the clarifying opinion was issued, and that the Court had jurisdiction over the subject matter, and thus, Judge Sherigan had jurisdiction to issue the clarifying opinion. Again, whether or not the clarifying opinion *should* have been issued or not is a collateral issue which is properly taken via the appellate process, not by a collateral attack on the judge that issued the opinion.

Little River Band Civil Procedure Rule 4.3.2 states in part that "if there is no basis for action in laws or claim, a defendant may more for dismissal of an action against that defendant." For the reasons stated above, this Court finds that Judge Sherigan has demonstrated that the doctrine of judicial immunity should be applied in this case, and that Plaintiff's claims against Judge Sherigan should be dismissed.

MOTION FOR COSTS AND ATTORNEY FEES

In her initial responsive Pleading and again in her renewed motion for summary disposition, Judge Sherigan requested that costs including attorney fees be levied against Plaintiff. As noted by Judge Sherigan in her filing submitted to the Court, the doctrine of judicial immunity has been in existence for over 1,000 years in the English/Western system of justice. It clearly has been a part of the United States justice system since its inception, and has been applied to modern Tribal Justice systems as well.

While Plaintiff is representing himself as a *pro se* litigant, and *pro se* litigants are normally given more leeway in the claims they file, Plaintiff is also a well-educated, licensed attorney who is bound by the Tribal Court rules governing attorney conduct. LRB Tribal Court Rule 2.306(A) states in part that:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer may offer a good-faith argument for an extension, modification, or reversal of existing law.

See also MCR 2.114(D) (which has a similar requirement, but also requires than an attorney certify that a filing "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.")

As a lawyer practicing before this Court, Plaintiff is subject to his rule and must be held to that higher standard. Plaintiff should be and is fully expected to know the law in regard to any claims he files and should have a basis in law or in fact for the claims he files, or at the very

least a good-faith argument for the extension, modification or reversal of existing law. There is no precedent in federal, state or tribal law which establishes a claim against a sitting judge under the circumstances which were pled by the Plaintiff. Plaintiff did not file a brief in response to the motion for summary disposition filed by Judge Sherigan, nor did he cite any legal authority in his oral argument for the proposition that a sitting judge should be held personally liable. Plaintiff did not argue or provide any authority for a good-faith extension, modification or reversal of the doctrine of judicial immunity, except for very vague general notions that "this is a Tribal Court that is not bound by the doctrine of judicial immunity and can do what it wants." While there may not be existing precedent in the Little River Band Tribal Court regarding judicial immunity, the cases above demonstrate that the judicial immunity doctrine is very well established, and there are many reasons why a Court, Tribal or otherwise, should follow the doctrine of judicial immunity so that litigants with issues regarding how a Tribal judge has ruled are encouraged to utilize the appellate court system, and discouraged from subjecting a Tribal judge to the cost and expense required to defend a personal action involving his or her judicial rulings. Plaintiff has made no significant effort to justify his position or to argue for the modification or reversal of this well-known and well thought out doctrine. Even giving Plaintiff the benefit of taking all of his factual allegations as true, there is still no basis in law to grant Plaintiff's relief, and Plaintiff's claims against Judge Sherigan are devoid of merit, for the reasons stated above.

Furthermore, it is this Court's belief that Plaintiff filed the instant action against Judge Sherigan (and a separate action against Chief Judge Daniel Bailey, *Martin v. Bailey,* Case No. 10016GC) specifically to harass each respective Judge, and to force them to have to recuse or remove themselves from hearing the other pending cases involving Plaintiff to which they had been assigned. The filing of these lawsuits has also cost the judges time and money, as well as the Tribal Court which was then required to locate and hire a judge pro tem to hear Plaintiff's case. The record before the Court, and the lack of effort made by Plaintiff to defend against the

motions for summary disposition, lead this Court to believe that Plaintiff intentionally filed his claim against Judge Sherigan for this purpose. This sort of intentional manipulation of the court system cannot be allowed to stand unchecked, and is contemptuous of the Tribal Court system. Plaintiff, as a practicing attorney before this Court, knew or should have known that his claims of error involving orders issued by the judge in the prior underlying action on which his claim is based should have been brought by filing appeals in those actions, rather than by filing new collateral claims against the judges who issued the orders. These actions also support the finding that Plaintiff's claims against Judge Sherigan are frivolous and subject Plaintiff to sanctions being issued against him.

For the reasons stated above, the Court finds that Plaintiff's claims against Judge Sherigan are frivolous and without arguable merit. Therefore, pursuant to Little River Band Civil Procedure Rule 5.3 and MCR 2.114, the Court orders that Plaintiff shall pay Judge Sherigan's costs in this matter, including reasonable attorney's fees. Judge Sherigan shall submit a Bill of Costs complying with Little River Band Civil Procedure Rule 5.3 within 21 days of the date of this Order.

CONCLUSION

The Court finds that the Plaintiff's Civil rights claims against the Tribe, as well as Plaintiff's claims against Judge Sherigan, have no merit and shall be dismissed pursuant to Little River Band Civil Procedure Rule 4.3.2. Said dismissal shall be with prejudice and shall be a final adjudication pursuant to Rule 4.3.2(b).

Further, the Court finds the Plaintiff's claims against Judge Sherigan were frivolous and without arguable merit, and this Plaintiff shall be required to pay Judge Sherigan's costs, including reasonable attorney fees, pursuant to Little River Band Civil Procedure Rule 5.3. Judge Sherigan shall submit a Bill of Costs pursuant to Rule 5.3 within 21 days.

The Tribe's motion for dismissal and/or summary disposition is therefore GRANTED.

Judge Sherigan's motion for summary disposition and for costs including attorney fees is also GRANTED.

IT IS SO ORDERED.

Dated: July 7, 2010

Hon. Wilson D. Brott
Judge Pro Tem