

**TRIBAL COURT
OF THE
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**

FREDERICK R. HARRINGTON, JR.,
Plaintiff,

v.

Case No. C-021-1100

TRIBAL COUNCIL OF THE LITTLE
LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS,
Defendant.

*DECISION ON DEFENDANT'S
MOTION FOR SUMMARY
DISPOSITION*

SUMMARY DISPOSITION DECISION

Understanding context is important to complete understanding. Therefore, at the outset of this written decision, the Court deems it necessary to publicly reflect on its role to ensure the development and adherence to, what is commonly called, the “*rule of law*”. Rule of law means that the laws of particular jurisdiction reign supreme. Laws provide the foundation and framework for societal relationships and interaction. Such laws apply across the board to everyone.

The supremacy of law provides for the regular exercise of power, as opposed to the arbitrary exercise of power. This standard in its application to everyone applies to the Court as well. The regular exercise of power means that “justice is blind”. Courts must be blind to the identity of the parties who come before it. The resolution of cases is by the law and their merits, without any regard to the parties’ identity. Invariably, this mostly likely means that sometimes a plaintiff will prevail over a defendant, but it may be just as likely that the defendant will prevail. Likewise, in tribal member suits against the Tribe, sometimes the tribal member may prevail, but it may be just as likely that the Tribe will prevail. The critical variables that are determinative are the law and its application to the facts particular to each situation. That is how this Court has decided this case. The Court is neither pro-Tribal Council nor pro-tribal member in disputes between the two. Rule of law is the guiding principle.

ISSUE:

The sole issue before this Court is whether the tribal employment prohibition against being employed by tribal governmental services while at the same time serving on the Tribal Council is constitutional?

RULE OF LAW:

The *Constitution and By-Laws of the Little Traverse Bay Bands of Odawa Indians* is the interim governing document of the Little Traverse Bay Bands under the *Reaffirmation Act*, PL 103-324, 25 USC 1300k-6. It is the law that applies to this matter.

ANALYSIS:

Summary disposition of a case before the Court is appropriate when there is no genuine issue of fact and a party is entitled to judgment as a matter of law. Both parties to this matter concede that there is no dispute about the facts in this matter. Both argue that they should prevail as a matter of law. Thus, summary disposition is appropriate.

Defendant's Argument:

Defendant moves for summary disposition on the grounds that the adoption of the prohibition in the governmental personnel policy is an employment prohibition, not a prohibition against service on the Tribal Council. Furthermore, Defendant argues that the policy is rationally based upon Defendant's desire to promote effective governmental administration. Defendant argues that it has a fiduciary duty to adopt reasonable and prudent employment criteria in a effort to minimize the potential for conflict-of-interest in the operation of tribal government.

Plaintiff's Arguments:

Plaintiff's primary concern is that the employment prohibition is enacted as a matter of policy not as law. He reasons that if the prohibition was enacted as law then tribal membership could force a referendum on the prohibition under Article IX - *Right of Referendum* of the LTBB Constitution. Plaintiff argues that policy is not subject to membership oversight like enactments of law. Thus, the objection is one of the lack of membership voice on the policy. Plaintiff's argument implies that if tribal membership approved the policy it would be okay. However, such argument is misguided because either the prohibition is unconstitutional or it's not. It really makes no difference who adopts the prohibition. Just because the people give their consent to some law, it does not necessarily follow that the law is constitutional. Furthermore, that very argument plays into Defendant's contention that the adoption of the prohibition policy is a political question.

Plaintiff also argues that the adoption of the policy violates equal protection of the laws in two different respects. First, he objects to the “grandfather” clause allowing the continued employment of a current serving Tribal Council member. Secondly, he objects to the lack of a similar provision against tribal enterprise employees.

At oral argument, Plaintiff argued that “*The Universal Declaration of Human Rights*” adopted by the *United Nations* is applicable to this action under Article VIII - *Bill of Rights*, LTBB Constitution. He argued that the Universal Declaration guarantees everyone the right to work and the free choice of employment. Plaintiff concedes that reasonable restrictions on complete freedom of choice may be imposed by law if duly adopted. This brings Plaintiff back to his argument that the employment prohibition must be adopted as a law if it is to be deemed a reasonable restriction.

COURT’S DECISION AND REASONING:

Defendant bears the burden of persuading the Court that it is entitled to judgment as a matter of law because it filed the *Motion For Summary Disposition*. This Court decides this matter in favor of Defendant and rejects Plaintiff’s arguments.

The employment prohibition does not alter the constitutional eligibility requirements for serving on the Tribal Council. It is an employment prohibition. It does not prevent anyone, otherwise qualified, from seeking election to Tribal Council. If a governmental employee is elected, the elected employee must resign from their position of employment to serve on Tribal Council. This policy is rational directed toward ensuring good government. It seeks to minimize the number of conflict-of-interest situations that would otherwise arise. It is true that many tribal governments do not have such a prohibition, as plaintiff contends. He argues that conflict-of-interest situations are not a problem in those communities. However, the reality is that there are a number of conflict-of-interest situations that arise and work against fair, open government with a separation of functions and systems of “check and balance”. One cannot be both employee and employer. The Tribal Council does have a fiduciary responsibility to develop reasonable and prudent employment criteria that best meets to needs and interests of the Tribe. The employment prohibition in question was adopted to meet that fiduciary responsibility. It is a rational condition of employment designed to avoid the conflict-of-interest situations that plague many tribal governments.

The Court expressly rejects plaintiff’s argument that the policy must be enacted as law to be constitutional. Clearly, if the prohibition is unconstitutional, it is unconstitutional, even if ratified by tribal members.

The equal protections arguments of Plaintiff fail for different reasons. Equal protection does not mean that everyone must be treated equally. However, it does mean that everyone who is equally situated must be treated equally. Not all tribal employees are the same. They may be

very different. Thus, there may be different classes to identify those who are equally situated. The tribal scheme before the Court is one of distinguishing tribal governmental employees in one class and tribal enterprise employees in another class. The Court is convinced that these two sets of employees are sufficiently different in terms of management, funding, eligibility for employment, terms of employment and licensing conditions that they should be in different classes. Thus, there is a rational basis for developing the different classes and having separate employment policies. A good example is work on holidays. Tribal government employees receive the typical holidays off, while the enterprise employees must work because those are the days when the enterprises are the busiest.

The equal protection argument against the "grandfather clause" in the employment prohibition fails because tribal governments must provide due process of law to anyone affected by their action. Due process means fundamental fairness in governmental dealings. Obviously, the election of a tribal employee, which brings light to the myriad of conflict-of-interest scenarios which might develop, dictates the development of a system which minimizes the potential in the future. This tribal government is new and emerging. It is in its early stages of development. It does not have everything in place that hard work and the future will bring. Thus, it is unreasonable to expect this new government to have everything in place. One would expect tribal government to recognize a problem, and then to take corrective action. That's exactly what they did. However, it would have been fundamental unfair to force Councilor Wysocki to resign here employment position, when she was not on notice that she would be forced to make a choice if she was elected. Her election prior to the adoption of the employment prohibition policy places her in a separate class. However, she is now on notice that if she runs for re-election and is elected she will have to leave her employment position to continue serving on Tribal Council.

The Court also rejects Plaintiff's argument that the Universal Declaration guarantees complete freedom of choice in employment for the reasons stated above. Federal Indian law principles provide tribes the flexibility to define for themselves what the civil guarantees of "due process" and "equal protection" mean under tribal law. Plaintiff has urged the Court not to blindly adopt Euro-Anglo systems and concepts. The Court will give a tribal meaning to these concepts.

**WHEREFORE, THIS HONORABLE COURT GRANTS DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION AND FORMALLY DISMISSES
PLAINTIFF'S LAWSUIT.**

1-5-01

Michael Petoskey
Chief Judge

