



THE MILLE LACS BAND OF
OJIBWE INDIANS

ORIGINAL

Executive Branch of Tribal Government

SOLICITOR'S OPINION 00-22

On October 22, 1999 the Solicitor General received written communication from the Commissioner of Administration requesting on Opinion of the Solicitor General concerning the authority of the Band Assembly to review contracts entered into by executive branch departments.

Relevant Statute

Section 26. Contract Administration.

- (b) All contracts for services and materials shall be reviewed and approved in the following manner:
- (1) The Office of Management and Budget shall review all contracts for budgetary and payment terms consideration.
 - (3) [sic] The Solicitor General shall review all contracts over \$5000.
 - (4) Administrative Policy Board approval is required for all executive branch contracts over \$5000.
 - (5) Band Assembly ratification shall be required for all contracts in excess of \$25,000.

Band Assembly Bill 08-01-17-98.

Question Presented

Does the Band Assembly have the authority to review executive branch contracts in excess of \$25,000?

Brief Answer

No. Section 26(b)(5) of Band Assembly Bill 08-01-17-98 is void and should not be followed.

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Discussion

Fundamental to the Mille Lacs Band's government is the concept of Separation of Powers. 2 MLBSA § 3, 4, MLBSA Titles 3-5. This concept emanates not from the Constitution of the Minnesota Chippewa Tribe (which neither follows a Separation of Powers theory of government, nor requires its six constituent Reservations to do so), but from the organic laws of the Mille Lacs Band itself. The Mille Lacs Band leaders, on deciding to adopt Separation of Powers in lieu of the unified "Reservation Business Committee" form of government, sorted through the duties and responsibilities inherent to the Band's sovereign power, and divided those duties in a way they thought best ensured that "no one person or governmental entity shall have absolute power." 2 MLBSA § 5. This balanced assignment of duties and responsibilities creates checks on the assumption of power by any one person or branch of government.

Among the responsibilities assigned to the legislative branch is the exclusive power to oversee the Band's "pursestrings." 3 MLBSA §§ 2(b), 7(a). The power to appropriate lies wholly within the Band Assembly, and responsibility for oversight of the Band Assembly appropriations lies with the Secretary/Treasurer. 3 MLBSA §§ 2(b), 4, 7(a), (c), (f). Thus, with very limited exceptions,¹ no member or officer of the executive or judicial branches may make any claim of financial superintendence and management, nor take any action which usurps the broad power of the legislative branch to manage the Band's fiscal affairs. In addition, the Band Assembly designs or authorizes the programs on which it wants to spend Band resources. 3 MLBSA §8(a)(1). Thus, by passing legislation requiring certain actions to be taken and then funding the program, the Band

Assembly has significant, indeed, almost total control of for what the Band's money may be used.

While the legislative branch exercises control of the pursestrings, the Chief Executive and the executive branch, through its various departments, is charged with carrying out the law by spending the public's money in strict accordance with the authorizing appropriation. Typically, the money is spent on programs or other services designed to provide for the welfare of the constituents of the Mille Lacs Band. 4 MLBSA § 7(a), (c), (d), (k). Thus, while Band Assembly has the broad and exclusive authority to design and authorize expenditures in a given program, the executive department in charge of the program has the sole authority to design, implement, and manage the program. See., e.g., 4 MLBSA §8(h), 9 MLBSA §16. Once the appropriation process has concluded, the executive branch official in charge of the program has significant freedom to implement the program as he or she deems appropriate, within the bounds of the authorizing legislation.

The executive official in charge of implementation does not, of course, have unfettered control of his or her department budget. Obviously, any restrictions contained in the authorizing legislation must be strictly followed. Budgets may not be substantially modified without the approval of the Band Assembly.² All financial operations must

¹ Upon proper delegation from the Band Assembly. This comes but infrequently, for example, in the duty of the Solicitor General to enforce all Band laws, including laws regulating finances.

² Contrast the necessity to obtain approval on a budget modification over \$10,000 with the issue of contract approval, which is boilerplate language in every appropriation bill. In the former, the department is asking the Band assembly to change the appropriation itself; but in the latter, the commissioner is actually required to obtain permission from the Band Assembly to spend the money in accordance with Band Assembly's express mandate.

comply with the procedures of OMB (an arm of the legislative branch), and any laws of general applicability may not be transcended. Aside from these obvious restrictions, though, executive branch officials are free to, and indeed must, manage their programs in the way their training and experience tell them best accomplishes the goals of the authorizing legislation. Thus, the executive branch has the sole authority to determine how to implement Band programs. This is precisely the point of hiring commissioners and other department heads: the Band requires professional expertise in a narrow area in order to achieve the most efficient utilization of scarce governmental resources.

The provision requiring Band Assembly approval of contractual expenditures duplicates the appropriation and oversight processes, resulting in the kind of inefficient micromanagement inherent to the RBC form of government, but decidedly not intended in the Separation of Powers form.

Which brings us to the question at hand: Section 26(b)(5) requires Band Assembly approval on all “contracts over \$25,000.” This statute contains no ambiguity and leaves no room for semantic analysis. Thus, the question which this Opinion must address is not “What does the statute mean,” but “Does the statute violate the fundamental principles of the form of government enjoyed by the Mille Lacs Band?”³

The standard for conducting this type of analysis is detailed at Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Although federal caselaw does

² The propriety of this type of analysis is specifically affirmed in as In the Matter of the Interpretation of the Solicitor General 15-OSG-92, p. 8 (Ct. Central J. 1993).

not control here, Nixon provides a useful and relevant framework for analyzing the Band Separation of Powers government. The analysis, which is specifically adopted by this Opinion, is as follows:

Rather, in determining whether [a law] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents [one branch] from accomplishing its...assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the...authority of [another branch].

Nixon, supra, 433 U.S. at 442-43.

Given this framework, the answer to the question presented can only be “no.” The Band Assembly paints with a broad brush, and the detail work is left to the Chief Executive, through her commissioners and department heads. With a Band budget in excess of \$50 million, requiring subsequent Band Assembly approval of any previously authorized expenditure over \$25,000 (approximately 0.0005% of the total budget) disallows the executive officer or department head the freedom to exercise the judgment with which he or she is charged, and prevents that executive officer or department head from carrying out his or her assigned functions. In other words, §26(b)(5) constitutes an warranted intrusion of the legislative branch into the day-to-day affairs of the executive branch.

The impermissible function of Band Assembly is to revisit the appropriation once it is already made. This invites not only inefficiency, but also the type of improprieties which Separation of Powers is designed to avoid. For example,⁴ the Band Assembly could appropriate \$50,000 to the Department of Community Development for

⁴ The following example is illustrative only, and should not be seen as a reflection on any actual Band Assembly, past or present.

renovations to a building. The building renovations are put to bid, all bid procedures are followed, and the contract is awarded to X Construction Co. If the Band Assembly favors Y Construction Co. for some unscrupulous reason, it could, in accordance with §26(b)(5), refuse to approve the contract with X and require entrance into a contract with Y. This is exactly the type of interference Separation of Powers, with its checks and balances, is designed to avoid.

The legislative branch is not, however without recourse to check the expenditure of programming funds. At any time prior to the passage of a biennial budget, the Band Assembly can and must determine how to expend Band resources. The Band Assembly members must, in the course of preparing budgets, reduce or remove any expenditure they do not feel best helps the People of the Band. Thus, in the case of a construction project, the Band Assembly may feel that construction of a particular building is not appropriate; it should then refuse to appropriate the money necessary to effect the construction. This is, of course, not only perfectly acceptable, but also the sworn duty of the Band Assembly members.

Once a program is funded, the Secretary/Treasurer has broad powers to halt a malfunctioning program if that program, as administered, would result in “serious financial jeopardy or acts in violation of law.” 3 MLBSA § 7(f). The Secretary/Treasurer also has the right to investigate whether such irregularities are occurring, 3 MLBSA §7(d), and, upon the initiation of a lawful financial inquiry, to require the production of any goods, accounts, documents, and property that would aid him/her in the performance of his/her duties. 3 MLBSA § 7(e). Thus, upon any inkling that a program is not being


administered properly, the legislative branch may exercise its oversight authority to investigate any potential financial improprieties.

In addition, the OMB oversees, in the ordinary course of business, every single financial transaction processed by each department. To the extent the claim is made that contracts over a certain dollar amount are so potentially financially disruptive that they must be individually supervised by the members of the Band Assembly, the response must be made that OMB does not and cannot let questionable transactions through its doors.

Finally, §26(b)(4) indicates that the Band Assembly was perfectly aware of the interference the requirement of contractual approval would cause between the branches: Administration Policy Board approval is required for “*executive branch contracts over \$25,000.*” (Emphasis added.) By eliminating the interest of the executive officers in the administration of contracts originating in the legislative or judicial branches, the contract administration provisions facially indicate that such an interest improperly prevents one branch from accomplishing its statutorily-assigned functions.

The legislative branch has numerous opportunities to ensure that the Band finances are safeguarded. It does not, however, have the right to micromanage program. Because §26(b)(5) grants that right, it is incompatible with the Separation of Powers theory of government and Titles 2-5 of the Mille Lacs Band Statutes, and is hereby declared void and unenforceable.

Dated this 15 day of May, 2000.



Adam Altman, Solicitor General



**THE MILLE LACS BAND OF
OJIBWE INDIANS**

Legislative Branch of Tribal Government

May 15, 2000

*G- fa
Sol. op. file*

To: Marge Anderson, Chief Executive
Adam Altman, Solicitor General

From: Herb Weyaus, Speaker of the Assembly *HW*

Re: Notice of intent to annul Solicitor's Opinion 00-22
and Solicitor's Opinion 00-23

Notice is hereby given of the intent to annul Solicitor's Opinion 00-22 and Solicitor's Opinion 00-23 according to 3 MLBSA §17. A hearing is scheduled in the Band Assembly Chambers on May 16, 2000 at 2:30 p.m.

HW/ct

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THE MILLE LACS BAND OF
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Legislative Branch of Tribal Government

May 16, 2000

Adam Altman
Solicitor General
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

G -
for Sol. op.
file.

Dear Mr. Altman:

Pursuant to 3MLBSA §17 Band Assembly held a hearing May 16, 2000 in the Band Assembly Chambers to review the intent to annul Solicitor's Opinion 00-22 and Solicitor's Opinion 00-23. At the hearing a motion was made, seconded and unanimously approved by the Band Assembly to annul Solicitor's Opinion 00-22 and Solicitor's Opinion 00-23.

A Legislative Order will be issued addressing the Solicitor's Opinion 00-22 and Solicitor's Opinion 00-23.

If you have any questions feel free to contact me.

Sincerely,

Herb Weyaus / Sylvia Velleman

Herb Weyaus
Speaker of the Assembly

HW/ct

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THE MILLE LACS BAND OF
OJIBWE INDIANS

Executive Branch of Tribal Government

May 16, 2000

The Honorable Herbert Weyaus
Speaker
Mille Lacs Band of Ojibwe
Band Assembly
43408 Oodena Drive
Onamia, MN 56359

The Honorable Marge Anderson
Chief Executive
Mille Lacs Band of Ojibwe
43408 Oodena Drive
Onamia, MN 56359

Re: Withdrawal of Solicitor's Opinion No. 00-22.

Dear Chief Executive Anderson and Speaker Weyaus:

Additional statutory provisions have been brought to my attention which may affect the requested interpretation. Accordingly, I hereby withdraw Solicitor's Opinion No. 00-22, issued on May 15, 2000. An amended Solicitor's Opinion will be issued in the future.

Sincerely,

Adam Altman
Solicitor General