



*MILLE LACS BAND OF CHIPPEWA INDIANS*  
*Judicial Branch of Tribal Government*

Opinion of the Solicitor General

017-DSG-84

TO: David Aubid, Commissioner of Administration  
FROM: Jay Kanassatega, Solicitor General  
RE: Legality Review of Proposed Personnel Policies

This is a response to your request for an opinion on the legality of personnel policies which are proposed and pending review of the Band Assembly before formal implementation. Further you request any suggestions that I may have which would bring these policies into legality and that would make them more suitable to the Band's needs. I am not certain whether the questions/concerns you raise fall within the statutory authority of the Solicitor General therefore, I offer this legal review and analysis of the proposed policy prior to responding to the basic jurisdiction question. The needs of the Band in this area must remain the sole responsibility of the Chief Executive and Band Assembly as they each consider the proposed document.

Section 1.1 - Given that the Band is in a separation of powers form of government and that each branch will have its own employees it seems proper to develop a set of personnel policies and procedures to effect each employee of a different branch other than the executive branch. For example the Band Assembly and Court of Central Jurisdiction should be mandated to use these policies in the hiring of employees, establishment of fringe benefits and discipline of employees, etc. This does not mean that all employees are hired by the Administrative Policy Board, for only employees of the executive branch should be hired in this manner and by this board. Thus the policy is one in which the substitution of another governmental branch or entity must be entered for employees of a different branch of government without altering the matter, character or intent of the policy. Secondly, it would benefit the purpose of a unified government if said personnel policies were to become law of the Band with the Chief Executive being granted authority to institute additional policies as he sees necessary and expedient. In this manner a body of administrative law could be created with the need for future ratification by the Band Assembly. This however needs further study to determine its feasibility.

Section 1.3 {b} It includes the administration of each branch of government.

Section 1.3 {c} - Add onto the end of the sentence "of the Executive Branch".

Section 1.3 {e} - Add onto the end of the sentence "on this date".

Section 1.3 {h2} - Add onto the end of the sentence "which has been previously authorized in writing by the appropriate Commissioner. Certain positions have this authorization.

Section 1.3 {k2} - This definition is inconsistent with knowledgeable legal terminology. The following description is recommended: "Proceedings which are brought against an employee as a result of general conduct detrimental to the Band. They include written or verbal reprimands or warnings. Also suspension, dismissal or demotion are possible forms of disciplinary action."

Section 1.3 {l} - Rewrite this section to read: "Termination of employment for just cause."

Section 1.3 {p} - The word normal should not be used, substitute by specifying forty hours.

Section 1.3 {q} - This definition is inconsistent with knowledgeable legal terminology. The following description is recommended: "A complaint filed by an employee for an injury, injustice or wrong which gives ground for complaint because it is unjust, discriminatory and oppressive. A process to seek relief from management decision."

Section 1.3 {r} - Strike this down, no one has this power.

Section 1.3 {s} - I notice you have deleted step and adopted relations. What about cultural law, Band Assembly before has instructed the Court to first consider cultural law. You must account for this.

Section 1.3 {t} - I suggestion the use of a definite or indefinite period of time.

Section 1.3 {w} - This definition is too broad. I recommend to redefine: "typically less than thirty hours per week."

Section 1.3 {x} - A matter of policy in defining this term, because permanent employees may not have permanent service in the government of the Band.

Section 1.3 {aa} - You need to specify in days or months the period of time.

Section 1.3 {ad} - I recommend that you consider not defining this word unless you intend to give seniority advantages over non-senior positions.

Section 1.3 {ae} - Throughout you inter-mingle terms of supervisor and contracting officer. Are you proposing a supervisor position, if so, how is it distinguished from the latter term.

Section 1.3 {af} - "Any suspension could be with pay pending results of an inquiry", this language should be added.

Section 1.4 - This statement of non-discrimination is illegal under Band law as presently in existence if the Band Assembly fails to grant these civil rights to those under the jurisdiction of the Band to the recent 9th Circuit Court decision regarding Indian Preference. This section as presently stated would be struck down in Court.

Section 1.6 - The words "may not" are permissary. I think you really mean "shall not", which is mandatory. Basically this section as presently written is arbitrary and capricious because the employee does not know what is and is not so classified. Should disciplinary action be taken against an employee for violation of this section it would be very difficult to uphold.

Section 1.9 - Legislators are not under the authority of the Speaker, just as Justices are not under the Authority of the Chief Justice.

Section 1.10 - The Commissioner of Administration may not delegate his status authority under present Band Law. In the absence of any Commissioner the Assistant Commissioner of Administration may invoke said authority of a Commissioner.

## ARTICLE II

I have a number of legal concerns in Article II which invoke the arbitrary and unnecessary restrictions of the lawful authority of the Commissioners of the Administration Policy Board. I would think as a matter of practice that you want to follow this course of action in reference to section 1 and 2. With regard to 2.5 and 2.6 the proposed policy indicates that if the purpose is not discrimination then the question may be asked. I suggest a careful rewrite here.

Section 2.6 {b, c} - Extreme caution is urged as you do not state who will make this determination and how they will know this. Section b would pass Court review upon advice of physician but Section c is in a very gray area and needs more work. The major question with this section is how do you propose to prohibit the use of personal knowledge by a selection committee. The committee is suppose to be fair and unbiased.

Section 2.9 - I strongly recommend that the probationary period be firmly established without possibility of reducing the time period.

Section 2.9 {b} - The last sentence suggests a pay raise is automatic if probation period is passed, is this so?

Section 2.9 {d} - Here I notice a major policy shift for probation employees to appeal decisions of the government. I suggest careful rewriting.

## ARTICLE III

This article causes deep hesitation as much of its contents could well be considered arbitrary and capricious when they are used to discipline employees. I offer the following definition of arbitrary and capricious to assist you in the deliberations of this article:

Arbitrary - conduct or acts based upon one's will, and not upon any course of reasoning and exercise of judgment.

Arbitrary & Captitious - a characterization of a decision or action taken by an administrative agency meaning willfull & unreasonable action without consideration or in disregard of facts or without delermeaning principle.

Section 3.4 {d, g, m, n} - These sections are particularly appropriate with consideration of the above definitions.

Section 3.4 {h} - The section presents the most problematical of the policy because it imposes an individuals subjective opinion. I recommend the addition of such things as larceny, theft by check, drug use/sale, fraud, obstructing justice, obstructing governmental function, damage to government property, rendering criminal assistance of any kind to avoid prosecution. I don't think we want to get into moral turpitude but if you do, specify.

Section 3.5 {a} - No permanent employee - what about other types of employees. This appears to limit your jurisdiction to only this classification. Is this what you want?

Section 3.5 {b} - This indiciates that for first offenses you can only discuss the matter with an employee. Nothing else is authorized.

Section 3.5 {c} - Conflictory with above 'b'. "Shall serve as prima facie evidence of delivery", I think you mean the employee's signature is prima facie evidence of receipt rather than the document existence in file.

Section 3.6 - Opening sentence implies your concurrence with any grievance filed - suggest re-wording.

This section seems to be more intended to settle grievances that are not related to disciplinary procedures. If it is your intention to include these types of actions as a means of settelment, I offer the following observations:

- a. Employees do not have a civil right to an appeal hearing involving disciplinary action. This has been the practice here because of various clauses in our contracts. Presently, employees have the right to go into the Band's Court to seek relief from such actions. Here, Administration Policy Board is purporting to be the forum for the redress of grievance of any type. This conflicts with Band Statute 1024-MLC-3, Section 2.01, whereby the Band Assembly conferred upon the Court the forum for the redress of grievance. Additionally, Band Statute 1028-MLC-1, Section 13 confer upon Administration Policy Board the power to regulate the behavior of employees through authorized personnel policies. Here, you purport to exercise an adjudicatory power inconsistent with present Band law. However, the only way to test the legality of the policy as presently drafted is to pass it as is and wait for a challenge. Another option would be to ask for a Solicitor's Opinion on the matter and resolve it that way.

I am concerned about discretionary authority which may be arbitrary or capricious.

I am concerned about the consequences of the Administration Policy Board reviewing and potentially overturning an action of a Commissioner. It may be that this authority has been retained by the Band Assembly since they may veto a Commissioner's Order. Also the problem with Administration Policy Board review exclusive of the Commissioner who entered original judgment. This means the Corporate Affairs Commissioner must be brought into a grievance matter outside of his direct responsibility.

I recommend the addition of a severability clause so that if the Court strikes down one provision of the total policy, it does not wipe-out the whole policy.

#### ARTICLE IV

Section 4 - Too many days off? What about true Band days off?

Section 4.1 - Statement from Nurse? Do you really want this?

Section 4.2 - In the last paragraph, there will be a fight over who in the decendency list gets this money. Really can't be paid to any person. Funds belong to the deceased's estate not to any decendent. Practice is ok but, from there on is in violation of probate laws. Debts owed to Band cannot be subtracted before payment. Band must file claim within 120 days of notice.

A person cannot be on two statuses at the same time, say annual & holiday, leave & holiday. Need to draft a policy on this.

Section 4.3 - No comment other than what about those Band members who are under the care of an Indian Doctor?

Section 4.4 - In the last paragraph add: "While on Medical Status - no leave { annual } is permitted." If female employee terminates medical status to receive annual leave, said leave may be denied and she can be forced to return to government service. If she refuses she may be demoted/transferred/terminated.

Section 4.5 - It is my considered opinion that this policy would again be struck-down by the Court as a violation of cultural law. Deficiencies of last policy have not been corrected by this new effort.

Section 4.9 {d} - Limited to Band elections? My concern here is with elected employees who are granted permission to attend conferences outside of their normal duties. Need to draft policy to cover this. If for example School Board votes to send an elected member to workshop, does Administration Policy Board have authority to deny attendance by withholding approval? Think about this one.

#### ARTICLE V

You use terms rating officer - supervisor interchangeably. Do you really mean Contracting Officer or are you creating new titles.

Section 5.4 - Why wait two years to dismiss an employee who isn't performing satisfactorily. Can not maintain confidentiality if evaluations are subpoenaed.

Section 5.6 - I am concerned about an impression that everyone is eligible for up to 10% raise in pay yearly. I would revise this lest the Band find itself spending a large portion of program dollars to meet salaries. What will you do to control salaries at each position, range of salaries, maximum. We could have a situation where a Secretary makes more money than a Contracting Officer, etc.

#### ARTICLE VI

Section 6.1 - Court may strike down Commissioners authority to authorize early release of checks as arbitrary and capricious. This is the kind of thing whereby an exception can get you into real trouble. Present policy prohibits early release of checks under any circumstances.

Section 6.2 - I do not recommend unlimited accrual of comp. time.

Section 6.3 - Court may strike down Commissioner's authority to authorize early release of checks are arbitrary and capricious. This is the kind of thing whereby an exception can get you into real trouble. Present policy prohibits early release of checks under any circumstances.

Section 6.4 - Band has had this problem before, we can not treat employees differently. This would probably be struck down by the Court. Much problem here.

Section 6.8 - I recommend no listing of fringe benefits.

Section 6.9 - I recommend incorporation of this into the policies.

#### ARTICLE VII

Section 7.1 - Make this mandatory. Fifteen day postings required - work with replacement employee, etc.

Section 7.2 - No way to notify employees of this - will cause much confusion. Who has authority to shut down what. Can school be open and clinic closed. Much to be decided here. Presently this is insufficient.

Section 7.5 - The last sentence violates right to due process notification. Appears that a new law is being created here to regulate these matters within. Changes required advance notice of intent to change, proposed change, comment period and final regulations.

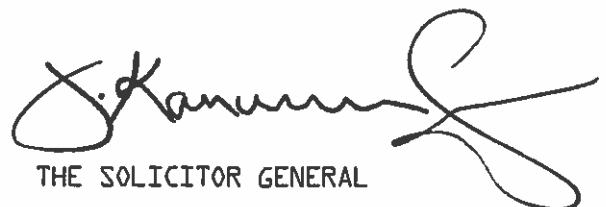
Section 7.6 - Not comment but, what happens if they don't make it in new position and old position has been filled?

Section 7.8 - I really don't know if seniority is any real advantage - maybe you don't want to isolate this if Band can't use it. For example 7.6 above.

Band Statute 1024-MLC-3, Section 19.01 authorizes the Solicitor General for the "interpretation of all laws and policies on behalf of the Mille Lacs Band of Chippewa Indians." Since the document you forwarded for legal review is not a law or policy, it would not be legal for me to issue a binding opinion. Further, legally binding opinions are the only type authorized for issuance.

As a result of this, I find the Solicitor General has no authority to issue a binding opinion on any proposed law or policy. Since the document forwarded for review and analysis could develop into law or policy, I offer all comments as suggestions only. You have full authority (Band Statute 1032-MLC-1, Section 21) to proceed with the further development of this document as you deem reasonable and necessary. Further, I have responded to the proposed contents of said document and make no attempt to deem them as comprehensive and all inclusive. There may be issues outstanding that should be addressed and as yet remain undiscovered. Lacking subject matter jurisdiction for the development of policy, I must defer to your assessment of the need for further policy in this area. Here, the full Administrative Policy Board should be of great assistance to you.

The foregoing opinion shall be legally binding unless annulled by the Court of Central Jurisdiction or amended by the Band Assembly pursuant to Band Statute 1024-MLC-3, Section 19.01. Since it appears likely that some modification of the proposed policy will be enacted into law I recommend the creation of an administrative record of your administrative deliberations to assist in the inevitable future interpretation of the intent of your board.

  
THE SOLICITOR GENERAL

Dated at Vineland, Minnesota this 31st day of August, 1984

OFFICIAL SEAL OF THE BAND