



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

03-OSG-83

No  
Review  
6-0

Opinion of the Solicitor General

TO: Chief Justice, Court of Central Jurisdiction  
ATTENTION: Alfred Nickaboine, Administrative Law Justice  
FROM: Jay Kanassatega, Solicitor General  
SUBJECT: Mediation Report, Nickaboine vs. Mille Lacs Band

This opinion is prepared to satisfy requirements of Band Statute 1024-M.L.C-3, Section 16, with regard to a complaint filed by Mr. A. J. Nickaboine on May 17, 1983.

This case was filed by Mr. Nickaboine, an employee of the Band, working with the Minnesota Chippewa Tribe's Talent Search Program, after he was suspended without compensation for five days, May 9-13, 1983, inclusive. This suspension relates to the absence of said employee on May 5 and 6, 1983. The reason for the suspension is listed in a letter dated May 9, 1983, signed by the Assistant Superintendent, Lon Burr, as "failure to return to work following the N.C.A.I meeting in Minneapolis". Although the notification letter was dated May 9, 1983, the suspension matter was discussed and endorsed at a formal meeting of the Administration Policy Board on May 6, 1983.

It is the contention of the Administration Policy Board, represented by Commissioner Wedll, that the plaintiff failed to comply with provisions of Section 2.01 of the Personnel Policies by filing his appeal on the appropriate form within three (3) days

following disciplinary action since the complaint is dated May 17, 1983. The plaintiff submitted a notice of intent to appeal to the presiding Administrative Law Justice on Tuesday, May 10, 1983.\* Under court rules, the letter of intent from any individual employee received within the three-day limitation satisfies requirements of that portion of Section 2.01. Therefore, the objection of the Board to non-compliance of policy is over-ruled.

A second procedural question concerns the authority of the mediator selected by the Commissioner of Administration to negotiate a settlement of any issue during mediation proceedings without the need to gain full Board acceptance of the settlement. Since it is the intention of the Band Assembly to attempt to reconcile differences between parties before the institution of court proceedings, mediators need to have authority to compromise positions in the interest of settlement. For the Policy Board to instruct or imply their mediator not to compromise on any issue has the effect of illegal diminishment of the intent of the Band Assembly when it enacted Section 16 of Band Statue 1024-MLC-3. Therefore, both parties of a mediation proceeding shall now and hereafter be deemed to possess full and absolute authority to negotiate a binding settlement of any issue on each party, provided the Court of Central Jurisdiction accepts the legality of the settlement.

## PHASE II

It is the contention of the Administration Policy Board that:

- 1) the plaintiff is in violation of Section 1.10 by failing to notify his supervisor of his impending absence from work not later

\* The plaintiff's letter was not dated. Mr. Justice Nickaboine certified the date of receipt as May 10, 1983.

From a policy perspective, the Administration Policy Board does possess the authority to develop administrative law which implements the intentions of the Band Assembly as regard policy. In this particular case, the Commissioner has stated, as a matter of administrative law, that an employee's behavior cannot be viewed from an isolated position, but rather must be viewed with all matters considered in attempting to determine if disciplinary action is warranted. This position generally does not violate Band Statutes provided employees have been given due process as regards their knowledge of new administrative law. Since the Commissioner cannot produce documentation of the adoption of new policy/administrative law, I can only conclude that the Administration Policy Board failed to provide due process notification to employees, in general. Under these circumstances, it would be illegal for the Band to exercise this rationale as the basis for their position.

It is the contention of the Administration Policy board that any contracting officer or commissioner possesses the authority to deny any request for sick or annual leave request. Such a denial would be legal under terms of the Personnel Policies and Civil Rights Statutes, provided the decision to deny is not arbitrary or capricious and is consistent with established administrative law which establishes regulations to govern any said denial, and employees have been afforded due process notification through a published intent to establish administrative law.

It is the contention of the Administration Policy Board that any contracting officer that has received notification of an employee's impending absence, within a reasonable period of time, and said contracting officer assents to the notice, that said assent implies only that the employee desires to continue his employment and is not subject to termination as a result of his absence. Additionally, the

than 1/2 hour after commencement of the work shift; 2) the plaintiff failed to notify the supervisor of his reason for absence, nor request sick leave; 3) the plaintiff failed to return to work following his authorized travel to Minneapolis to attend a convention of the National Congress of American Indians (as a member of the Human Services Policy Board); 4) the previous history of the plaintiff establishes a behavior pattern that justifies discipline for the plaintiff since his January 25, 1983 re-employment date; and, 5) as a result of the previous items was suspended for five days by the Assistant Superintendent of Nay-Ah-Shing School, Lon Bur.

It is the contention of the plaintiff, Mr. A. J. Nickaboine, that: 1) the defendant was notified on time on May 5, 1983, and his supervisor could not be located, and in his absence failed to designate, in writing, another authority as required by Section 1.10; 2) the defendant was notified just after 8:30 a.m. on May 6, 1983, and informed his supervisor of his impending absence. The supervisor responded, "o.k."; 3) the defendants failed to authorize requested leave without sufficient cause, and; 4) since the defendants have no documentation supporting previous wrong doings, they cannot use them to justify disciplinary action in this case.

### PHASE III

The defendants in this case have assumed a position that essentially includes circumstances related to the plaintiff's non-attendance at a convention as being directly related to the absence of the plaintiff from work on the two consecutive days following the close of the conference. The plaintiff maintains that his attendance or non-attendance of the conference is not related to his status on May 5 and 6, 1983, since he was ill on those days. All attempts to mediate this fundamental difference of opinion failed because each side refused to modify their opening positions.

said employee may be recipient of disciplinary action should the employee's reasons for absence not be determined to be legitimate. If an employee fulfills the provisions of policy by notifying his employer of his impending absence, and he receives any type of positive agreement to his notice, the employee is likely to believe that his employment is secure from any jeopardization. The 'security clause' provisions established in this opinion have their foundations in Band Statute 1011-MLC-5, Section 2. The Band Assembly, in all its wisdom, thoughtfully deliberated the issues related to the individual protections which each person under the jurisdiction of the Band could enjoy. To be secure in one's employment with this tribal government is in many ways closely linked to the security of one's person, house or papers, provided there exists no violation of law. As a result, this contention, advanced by Commissioner Wedll, is hereby remanded to the Administration Policy Board with the opinion that it is not consistent with basic Civil Rights protections enacted into law and is therefore indefensible.

#### PHASE IV

The positions of the Administration Policy Board, with regard to actions taken in this matter are hereby declared to be inconsistent with the mandates of personal freedoms mandated by Band Statutes. It is speculation to indicate that mere conformance to the established personnel policies satisfies requirements of law. In this case, the speculation has sufficient merit to remand the case back to the Administration Policy Board for further consideration and modification of significant aspects under guidelines established herewith.

Certification of Nickaboine vs Administration Policy Board for trial is hereby denied. The case is remanded back to defendants for further consideration.

IT IS SO ORDERED

Jay Kanassatega, Solicitor General

