



MILLE LACS BAND OF CHIPPEWA INDIANS
Judicial Branch of Tribal Government

Opinion of the Solicitor General

DLB-OSG-85

TO: Chief Justice, George G. Aubid, Sr.
Commissioner of Administration, David Aubid

FROM: Jay Kanassatega, Solicitor General

SUBJECT: Mediation Report - In the Matter of: Marilyn Davis

This mediation report and formal opinion is prepared to satisfy requirements of Band Statute 1024-MLC-3, section 1b so that an administrative cause of action may be brought in the Court of Central Jurisdiction. This matter arose with a letter of intent from Marilyn Davis dated August 22, 1984. Ms. Davis contends that she should have been hired for the position of W.I.C. - Clerk rather than Anita Britton who was recommended by a Human Service Personnel Selection Committee. Ms. Davis bases her claim on higher qualifications, irregularities in the hiring process and nepotism. She seeks to have the hiring decision over-turned, to be hired as the W.I.C. Clerk and receive retroactive wages to the hiring date. On July 27, 1984, the Administration Policy Board ratified the recommendation of the Selection Committee by vote of three affirmative and two silent. There were no dissenting votes. The position of W.I.C. Clerk is within the Human Services Administration. It must be pointed out that the Commissioner of Human Services did not vote to affirm the recommendation of the Selection Committee. However, during the mediation hearing the Commissioner defended the actions of the Selection Committee as proper and just. No minutes of the interview were recorded. The nepotism issue was dismissed upon concurrence of the parties and is therefore barred.

The mediation hearing was held on September 19, 1984 at 10:20 a.m. in the office of the Solicitor General. It concluded at 11:55 a.m. with no resolution of the issues involved. Ms. Davis was represented by Mr. Henry Davis. The Human Services Administration was represented by the Commissioner, Joseph Nayquonabe and two members of the Selection Committee, Rod Tester and Georgianna Day, both Contracting Officers within the Human Services Administration.

The foundation of this matter raised by Ms. Davis involves the interpretation of unwritten cultural law concerning marriage. A second concern is whether under the provisions of Indian Preference for employment opportunities, a Band member has an automatic advantage over Indians from other Bands' or Tribes' when qualifications of both are deemed comparable and equal. The statutes of the Mille Lacs Band do not address either issue. The Court is not the proper forum to determine basically an individual's decision regarding cultural marriage.

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Ms. Davis claims that Ms. Britton is not legally married to a male Band member. It is the contention of the Selection Committee and the Commissioner of Human Services that under the unwritten cultural law of the Band, she is considered to have married a male Band member. Given this belief, the Selection Committee deemed that it basically had a choice between two Band members. Neither side contests the cultural laws involving a female non-Band member who marries into the Band. There is also the open question of whether an Indian from another Band has an equal employment status as a Band member.

Additionally, given the recent Ninth Circuit Court of Appeals decision it is unclear what the provisions of section 1.05 - Personnel Policies, Indian Preference mean when the majority of the resident population are Band members. This is a trouble-some issue because it is unclear to whom the Band Assembly sought to give preference in enacting this provision. It must be remembered that this preference generated from the United States Supreme Court decision, Morton v. Mancari. It involved preference for Indian applicants over non-Indian applicants for employment positions in the Bureau of Indian Affairs. This is hardly the case present here in this matter. Judicial notice must also be taken of the Band's programmatic certification that it will not and does not discriminate on the basis of race in its hiring practices.

The program in question, W.I.C., is a State of Minnesota funded program. It appears that the equal opportunity provisions of this contract to the Band prohibits the Band from granting preference to Band members in deference to others who seek employment with programmatic funds of the Band. It is clear that the Band, as a matter of natural practice would seek to provide employment for its members utilizing these funds and the executive and legislative leadership have both openly advocated this practice. However, this does not seem to be the issue here.

Ms. Davis contends the issue is one that is primarily embedded in qualifications. The administration stated that Ms. Davis' qualifications were not superior to that of Ms. Britton's even though Ms. Davis had an advantage in her medical experience. The advantage in the medical area for Ms. Davis was erased by Ms. Britton's superior ability in inter-personal communication in the Selection Committee's opinion. Further, the Selection Committee cites, as justification, the verbal clarity of Ms. Britton during the oral interview as a significant difference in comparison to Ms. Davis. All other qualification factors were deemed to be of equal value for both candidates. Ms. Davis cites her practical experience as a Nurses Aide at the Medical Clinic and as the contract labor person who temporarily performed this position during the time the opening occurred and was filled by the hiring of Ms. Britton as the permanent employee.

It is apparent from the mediation hearing that the Selection Committee deemed the inter-personal relationships category to be more critical to effective performance of this position than the medical aspects of job performance. The Selection Committee even de-emphasized the skill level necessary to perform a 'hematocrit' test. A test for taking blood samples from eligible

participants. This determination appears to be well within the boundaries of a Selection Committee provided, the position announcement does not indicate something to the contrary so as to mislead any applicant. Additionally, the Selection Committee rendered a decision which does not appear to be subjectively based and no allegation was presented to indicate otherwise. The claim of Ms. Davis that the Selection Committee failed to give importance to her prior training, education and medical experience was denied by the Committee and the Commissioner. The Selection Committee's position at the mediation hearing concerning qualifications of the candidates is however, somewhat different than the response previously submitted in their letter of September 11, 1984.

"Upon coming to the conclusion that both Ms. Davis and Ms. Britton were about {emphasis added} equally qualified counting all {Committee emphasis} factors, it was pointed out that Ms. Davis, if hired, would have her mother as supervisor and this was not allowed under Band policy."

It was mutually agreed upon at the mediation hearing that the role of supervisor is not a factor in this matter as precedence exists and that any reference by the Selection Committee to this factor was erroneous.

The issue of qualifications of one candidate was opposed to another is one matter which Ms. Davis requests certification for trial. In reviewing the Personnel Policies as adopted by the Band Assembly, it is my opinion that judicial review of these types of matters would constitute an illegal intrusion into matters properly belonging to another branch of government. This would violate Band Statute 1002-MLC-2, Section 1.01 but, also the intent of our separation of powers government. Additionally, it would become virtually impossible to find administrators to serve on a Selection Committee if selection decisions were open to judicial review by candidates who are not recommended for employment. As this case has clearly demonstrated, every candidate for employment is likely to believe they are most qualified. Here, the Selection Committee disagreed, as well as the Administration Policy Board. Therefore, the certification request to challenge this close decision of the Selection Committee is not certified for trial, if the appeal rests only on the question, "Who was better qualified?"

Since, on the other hand, Ms. Davis also seeks to determine that the Selection Committee improperly considered Ms. Britton to be a Band member as a result of cultural marriage, I grant certification for trial on the question,

"Does a female non-Band member who culturally or otherwise marries a male Band member, have equal status with an enrolled Band member in employment opportunities with the Band?"

Additionally, I grant certification for trial on the question,

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"Did the Band Assembly confer preference for employment upon Band members over Indians from other Bands or Tribes or over non-Indians in adopting an Indian Preference provision of policy?"

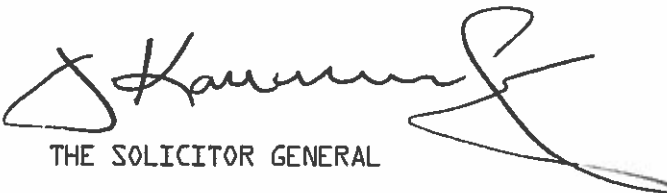
"If so, does this preference violate the equal protection clause of Band Statute 1011-MLC-5, Section 8, or the equal employment opportunity certifications of grants and contracts or the prohibition against discriminatory hiring practices found in Section 1.01 - Personnel Policies?"

"What is the legal application of Indian Preference?"

Since the outcome of these questions form the basis of Ms. Davis' complaint that the hiring decision should be over-turned due to irregularity in the process, I hereby formally request a hearing pursuant to Court Order 008, Section D(2). The questions being interpretive of official acts of the Band Assembly.

The questions raised above are hereby remanded to the Administration Policy Board for the preparation of the Band's position on each. The Board is hereby directed to respond in writing no later than Thursday, November 1, 1984. Further, the Board is directed to review the determination of the Selection Committee to ascertain if any acts of the Committee were irregular and if so whether any were of sufficient nature and degree so as to cast doubt upon the outcome.

Due to the substantial matters at issue in this case, this mediation report is published as an official opinion. The foregoing 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. Should you require additional clarification, please forward an official written request.


THE SOLICITOR GENERAL

Dated at Vineland, Minnesota this 22nd day of October, 1984.

OFFICIAL SEAL OF THE BAND