

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
7500 Odawa Circle
Harbor Springs, MI 49740

TRIBAL RESOLUTION # 050607-02

Waganakising Odawak Employment Agreement and Contract Compliance

- WHEREAS** The Waganakising Odawak Nation, known as the Little Traverse Bay Bands of Odawa Indians, and its citizens are vested with inherent sovereignty and right to self-governance;
- WHEREAS** The Little Traverse Bay Bands of Odawa Indians (“LTBB” or “Tribe”) is a federally recognized Indian Tribe under Public Law 103-324, and is a party to numerous Treaties with the United States the most recent of which being the Treaty of Washington of March 28, 1836 (7 Stat. 491) and the Treaty of Detroit of 1855 (11 Stat. 621);
- WHEREAS** The Little Traverse Bay Bands of Odawa Indians Tribal Council has the authority to approve any and all negotiations with individuals according to the LTBB Constitution, Article VII, Section D (23);
- WHEREAS** The Little Traverse Bay Bands of Odawa Indians has a compelling interest to protect its financial and fiduciary responsibilities to the Tribal Citizens;
- WHEREAS** The Little Traverse Bay Bands of Odawa Indians Tribal Council passed a motion on December 21, 2003 in which the Tribal Council authorized and delegated the authority of negotiation to employment contracts and agreements to the Tribal Administrator provided that the employment agreements shall be reported to the Tribal Council;
- WHEREAS** At that same Tribal Council meeting the Tribal Council approved boiler-plate language for the two-year agreements;
- WHEREAS** It has been brought to the Tribal Council’s attention that there are two-year agreements that have been signed by the Tribal Administrator that have not been reported to Tribal Council;
- WHEREAS** It has been brought to the Tribal Council’s attention that there are two-year agreements that have been signed by the Tribal Administrator that do not contain the approved boiler-plate language;

THEREFORE, BE IT RESOLVED that any and all employee agreements that have not been reported to Little Traverse Bay Bands of Odawa Indians Tribal Council within a reasonable time after the signing of such agreements shall be null and void and that any and all two-year agreements that do not contain the approved boiler-plate language shall be null

and void and that the Executive has thirty-days (30) in which to revise past agreements and re-submit same to the Tribal Council for approval;

FURTHER, BE IT RESOLVED that any and all employee agreements and/or contracts from this date forward shall be submitted to the Tribal Council for a resolution of approval before being executed by the Executive and the motion of December 21, 2003 is hereby rescinded;

FINALLY BE IT RESOLVED that all employment agreements and/or contracts shall not be signed by the Executive until approved by resolution of the Tribal Council or such agreements and/or contracts will be null and void.

CERTIFICATION

As Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Tribal Resolution was duly adopted by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held May 6, 2007 at which a quorum was present, by a vote of 8 in favor, 0 opposed, 0 abstentions, 1 absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Regina Gasco Bentley	X			
Fred Harrington, Jr.				X
Dexter McNamara	X			
Mary Roberts	X			
Rita Shananaquet	X			
Alice Yellowbank	X			
Shirley Oldman	X			
Melvin L. Kiogima	X			
Beatrice A. Law	X			

Date: 5/6/07

Beatrice A. Law
Beatrice A. Law, Legislative Leader

Date: 5/6/07

Melvin L. Kiogima
Melvin L. Kiogima, Secretary

Received by the Executive Office on 5-7-7 by Elliot Payton

Pursuant to Article VII, Section D, Subsection 1 of the Little Traverse Bay Bands of Odawa Indians Constitution adopted on February 1, 2005 the Executive concurs in this action of the Tribal Council

Date: 5-18-07

Frank Ettaogessuk Tribal Chairman

VETO



Waganakising Odawak
Little Traverse Bay Bands of Odawa Indians
Frank Ettawageshik, Tribal Chairman
7500 Odawa Circle, Harbor Springs, Michigan 49740
Phone 231-242-1401 • Fax 231-242-1412

**Executive Veto of Tribal Resolution 050607-02
As passed by Tribal Council on May 6, 2007**

Tribal Council passed Tribal Resolution **050607-02 Waganakising Odawak Employment Agreement and Contract Compliance** and sent it to the Executive for signing. After careful consideration the Executive has decided to veto said resolution for the reasons outlined in this document.

The duty that the Executive shares with other governmental officials to protect and uphold the Constitution is of utmost importance for the coming generations. Sometimes what seems to be an issue of lesser significance actually has very broad implications for the operation of our Constitution and government. I believe the issues that are brought to light as we consider Tribal Resolution 050607-02 rise to a very high significance.

We all are on this journey to implement the Constitution and to develop the three branches of government that the Constitution establishes. An open, transparent and accessible government is the goal of this work. We are building an understanding of how the powers granted to each branch of government are balanced by the powers of the other branches and how the limits of authority for each branch are integral to the success of this separation of powers.

The powers of the Legislative, Executive and Judicial branches are set out in detail in the Constitution. The Legislative authority to create laws that set parameters for how our government as a whole will operate is vast. However, I believe there is a significant difference between exercising Legislative authority and unconstitutionally asserting authority to approve or disapprove day-to-day Executive actions.

In what follows I will outline my thinking on this issue regarding 1) adoption and implementation of personnel policies; 2) the transition from the interim constitution to our current constitution; and 3) the veto of Tribal Resolution 050607-02.

Adoption and Implementation of Personnel Policies

A Tribal Council motion on December 21, 2003 adopted a policy that was superseded by a Tribal Council motion on June 6, 2004 that adopted a new personnel policy to be effective July 4, 2004. This new personnel policy was reviewed and marked up extensively by Tribal Council in work sessions before being approved by the Council. We have been following this policy since its approval. While a two-year work agreement

for non-Tribal citizens is required under the terms of the approved personnel policies, we find no evidence that a boiler plate two-year agreement was ever adopted or referenced in a Tribal Council motion.

Recently it has been brought to our attention that part of a sentence in our existing two-year agreements is improper and needs to be changed. When brought to my attention I initiated a process to investigate and take corrective action the Monday following the Tribal Council meeting at which I became aware of the issue. I met with the Tribal Administrator and the Human Resources Director. We discovered that the language in question was included in all existing two-year agreements. We agreed that the language would be eliminated. I consulted with the Legal Department to get advice on the best way to proceed on this issue. I got the verbal opinion on Thursday, May 17th and the written opinion in the morning on May 18th. Based on the verbal opinion, we crossed out the language in the Human Resource Director's agreement and he and I both initialed and dated the change (copy of amended agreement attached). From the written opinion by our Legal Department it appears that attempting to change the language on the balance of the agreements would be unnecessary (the written opinion is attached to this document). The language has been struck from the draft that we plan to use for any future agreements.

Other than the language mentioned above, the two-year agreement that we are using meets the requirements of the current personnel policy. There was no tribal law or resolution adopted regarding the personal policies. These were policies adopted by motions and both actions were taken under the Interim Constitution prior to the implementation of the new Constitution.

Implications of New Constitution

As stated above, both the December 21, 2003 motion and the motion approving the personnel policies on June 6, 2004 are actions under the Interim Constitution. In the new Constitution adopted on February 1, 2005 in Section VI, C, Delegation of Authority, it states that "The Tribal membership, through this document, authorizes: ...the Executive Branch to administer such funds, enforce this Constitution and laws passed thereunder, and implement policies and procedures enacted by the Tribal Council in accordance with Article VIII; ..." In Section VI, D, Separation of Functions, it states "No branch of the government shall exercise the powers, duties or functions delegated to another branch."

The third Whereas of Resolution 050607-02 states that "The Little Traverse Bay Bands of Odawa Indians Tribal Council has the authority to approve any and all negotiations with individuals according to the LTBB Constitution, Article VII, Section D (23)."

The current question is over Council approval of employment contracts; however it is clear from the language of the resolution in question that this interpretation could

easily be extended to all contracts. While under the Interim Constitution the Council could require that it approve all contracts and agreements, I believe that this authority does not exist under the new Constitution. If Council required all contracts be submitted for approval, and perhaps disapproval, this would extend the Legislative branch into Executive functions creating a conflict between Article VI, D, Separation of Functions, and article VII, D (23) "approval of negotiations". However, one would assume that the framers would have drafted the Constitution without direct conflicts. Thus if an interpretation of these two clauses can be found that allows them to coexist without causing a conflict, such an interpretation would be the correct one.

There is little question that Article VII, D (23) "approval of negotiations" applies to treaties; to intergovernmental agreements, accords, MOU's and MOA's; to agreements that need a waiver of sovereign immunity; and to agreements that need new appropriation of funds or will obligate tribal assets. At this point there are no conflicts between the two clauses.

However, to expand the interpretation of Article VII, D (23) "approval of negotiations" to include the approval of individual agreements and contracts that are implementing laws and policies or implementing approved budgets would be extending the Legislative authority into Executive functions. The approval of Resolution 050607-02 would erode the separation of powers between the Legislative and Executive branches of government and should not be enacted into law.

Veto of Tribal Resolution 050607-02

Due to the concerns laid out above I am vetoing Tribal Resolution 050607-02. I understand that among the Council's choices upon receipt of this veto are to attempt to override the Executive's veto, or to prepare and pass a revised version of the resolution that addresses the Executive's concern. If such a revised version of this resolution was presented to me I would again give it serious consideration.

Prepared and signed May 18, 2007.


Frank Ettawageshik, Tribal Chairman

Attachments:

- 5-17-07 Human Resource Director's Amended Work Agreement
- 5-18-07 Legal Department Opinion re: Provision in two year contracts

EMPLOYMENT AGREEMENT

PARTIES

1. The Little Traverse Bay Bands of Odawa Indians (hereafter "LTBB") is a federally recognized Indian tribe.
2. Ken Fegan (hereafter "Employee") Is an individual entering into this Agreement to be employed by LTBB as a Human Resources Director in the Human Resources Department.

AGREEMENT FOR SERVICES AND PAYMENT

3. **LTBB Personnel Policies.** This Agreement governs the employment relationship between LTBB and employee ~~and overrides any other tribal law, regulation or policy.~~ The LTBB Personnel Policies and Procedures currently in effect or as revised or amended in the future, including by way of example only, hours of work and fringe benefits, are incorporated into this Agreement by reference to the extent they are not inconsistent with the express provisions of this Agreement.
4. **Services.** 1) The employee shall perform all of the services and functions set out in the attached job description, which is incorporated into and made part of this Agreement; and 2) The employee will prepare the Human Resources Department and processes to encourage capacity building for current staff and potential candidates for human resources management positions to include director level responsibility. The goal of this capacity building and candidate training during the term of this agreement is to prepare an opportunity for a qualified Native American to assume the human resources director level responsibilities.
5. **Compensation.** Employee shall be exempt status and be paid a starting wage of \$85,000 as provided in the LTBB wage grid. Annual reviews of the compensation are conducted on the employee's anniversary date. Travel and other out of pocket expenses are subject to LTBB Travel Policy or other applicable LTBB law, Regulations or policies.
6. **Term.** This Agreement is for a term of two (2) years commencing on February 21, 2006 and ending on February 20, 2008. It may be renewed for additional terms upon mutual agreement of the Parties in accordance with the policies and practices of LTBB employment.

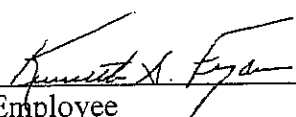
F.E. 5-17-07
KAF 5-17-07

- 7. **Termination.** This Agreement may be terminated by either party in accordance with the personnel policy and procedure manual. If necessary to protect vital tribal interests, LTBB may suspend all duties of the employee and deny access to tribal facilities and reclaim keys and/or department issued equipment in the employee's possession for a period up to (14) days, while a decision about employment matters is investigated.

- 8. **Non-assignability.** Neither party may assign any of its duties or obligations under this Agreement to any other individual or entity.

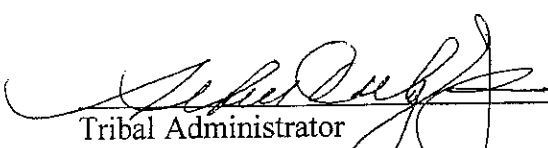
The undersigned Parties have read and understood this agreement, and agree to be bound by all of its terms.

LITTLE TRAVERS BAY BANDS OF ODAWA INDIANS



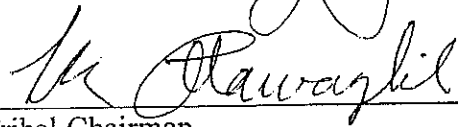
Employee

2/21/06
Date



Tribal Administrator


2/21/06
Date



Tribal Chairman

2-21-06
Date

MEMO

To: Frank Ettawageshik, Tribal Chairperson
From: James A. Bransky 
Date: May 18, 2007
Subject: Provision in two year contracts

It has come to our attention that a number of employment contracts contain the following sentence: "This Contract governs the employment relationship between LTBB and Employee and overrides any other tribal law, regulation or policy." This sentence is problematic in that a contract cannot override a tribal statutory enactment, nor regulations or policies where they are intended to have the force of law. This memo addresses the following questions: 1. Does this provision render the entire contracts void or unenforceable?, and 2. What corrective action should be taken?

Assuming this provision is invalid since parties cannot contract to override laws, the question becomes whether this voids the entire contract or whether a court would sever the provision and leave the rest of the contract in place. The LTBB Court has not had an occasion to rule on the severability of invalid contract provisions making it impossible to definitively predict the LTBB Court's approach. However, a review of federal case law, state case law, and contract treatises, reveals a virtually universal philosophy of attempting to remain true to the intent of the contracting parties. The presence or absence of a savings clause appears to be just one factor considered by the courts, which is not as important as analyzing the questionable provision in light of the overall intent of the parties expressed in the contract as a whole. If the offending provision is central to the basic deal between the parties, the entire contract generally fails. If the essence of the agreement between the parties can remain intact without the offending provision, then courts generally sever that provision and leave the contract in place as an enforceable agreement.¹

In this situation, the sentence in question is not material to the contract. It is essentially superfluous in that it does not relate to job duties the person is contracted to perform or the

¹ See, *i.e.* 8 Williston on Contracts § 19:69 (4th ed.); Restatement (Second) of Contracts § 184 and cases cited therein.

James A. Bransky, Attorney

General Counsel, Little Traverse Bay Bands of Odawa Indians

payment they are to receive.² Since the provision is not central to the basic intent of the contracting parties, it does not render the entire contract void or unenforceable.

Two options exist to address this situation:

1. Tribal Administration could attempt to delete this sentence from the contracts by having the Tribe and contracted employee cross out and initial the phrase, or executing a separate amendment that deletes the language. This could prove a logistical challenge based on the number of contracts, and the fact that multiple copies likely exist in various files.

2. Tribal Administration could make sure that no future contracts contain this language, and let it simply disappear by attrition. Since the language is invalid, but does not render the remainder of the contract unenforceable, this option would also be acceptable.

² It is conceivable that a law could be enacted that would have the effect of interfering with or even preventing further performance of a contract. Notwithstanding the language in question, the contract could not trump a such statutory enactment. However, in such circumstance a breach of contract action could exist with or without this provision.