Waganakising Odawak

Little Traverse Bay Bands of Odawa Indians

Ken Harrington, Tribal Chairman

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Health Department Statute Veto WOS -2010-002

3-9-10

I am vetoing the Health Department Statute because it violates Article 2, Section 8 of the Little Traverse Bay Bands of Indians Constitution which guarantees our citizens the right to due process under the law. The statute requires LTBB staff to hire for this Department only persons who possess "cultural proficiency." Health Department Statute, Section V, C. This standard is so vague and uncertain that the statute does not meet the requirements of due process and therefore must be vetoed.

Article 2, Section 8 of the LTBB Constitution guarantees LTBB citizens due process under the law. This article of the LTBB Constitution was modeled after the 14th Amendment to the United States Constitution. A long history of court cases led the Supreme Court of the United States to establish that vague statutes violate due process and are unconstitutional. *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Suddath v. Slane*, 539 F. Supp. 612 (W.D. Va. 1982); *Seals v. Hickey*, 186 Conn. 337 (1982); *Earl & Sons v. City of Boulder*, 192 Colo. 360 (1977); *LDS v. Healy*, 197 Colo. 19 (1979); *Postscript Enterprises v. Whaley*, 658 F. 2d 1249 (8th Cir. 1981). Although decisions of the US Supreme Court and other US courts are not binding on the LTBB Tribal Courts, in the absence of Tribal law, LTBB courts regularly find such decisions persuasive. *See Carey v. Victories Casino,* A-004-0606, (Appell. March 27, 2007); *See also Carey v. Victories Casino,* A-005-0507, (Appell. May 5, 2008); *TBA Credit Union v. Giem*, A-010-0708 (Appell. March 3, 2009); *Milligan v. LTBB GRC*, GRL-002-1206, (June 7, 2007). Therefore, it is likely that our Court would find that the LTBB Constitution also prohibits vague statutes.

Generally, due process of law requires clarity and definiteness of legislation, and a vague or uncertain statute does not meet the requirements of due process. If an act of the legislature is so vague or uncertain that persons of common intelligence must necessarily guess at its meaning and as to its application it denies to due process of law. Section 5, C of the statute states, "Only persons who possess cultural proficiency shall be eligible for hire in this Department." Section 2, C. states, ""cultural proficiency" means the knowledge, skills, and attitudes/beliefs that enable a person to work well with, respond effectively to, and be supportive of the Odawa Citizens." Section 2, B. states that "cultural" means, "aspects of the Odawa history, spirituality, traditions, arts and crafts, values and mannerisms." These definitions do not give the average person enough guidance to follow the law. Therefore, LTBB staff would have difficulty determining who has and who has not attained "cultural proficiency." LTBB Human Resources Director Jodi Werner wrote the following about the Health Department statute:

> "Cultural proficiency is a highly subjective characteristic and virtually impossible to quantify or measure for decision-making when selecting candidates for job openings. We, as Odawa people, have a very diverse, broad, and rich background in many spiritual and cultural areas. Who is qualified to determine another person's cultural proficiency? Who would prioritize traditions, values, mannerisms, and attitudes/belief that would be utilized to select candidates?"
>
> Werner Position Paper on Health Department Draft Statute.

Because this statute lacks the clarity that the average person would need to understand what the law requires, this statute is unconstitutional.

Additionally, I am vetoing the statute because there is a concern about the cost of the statute. Section V and VII of the Health Department Draft Statute directs that the Health Department shall be filled with appropriate existing staff and operate within the current budgets. Currently, there are three employees in leadership positions in areas covered by this

statute. Elevating one of these positions to a responsibility level to oversee the entire Health Department, as defined here, would require additional funding, as they are all currently directors. Additionally, a person with that level responsibility may also require advanced degrees and proven leadership ability that could be quite expensive to hire. Therefore, because I believe this statute will cause extra unaccounted for costs I am vetoing the statute.

Finally, I am vetoing this statute because the current structure of the Health Department, Substance Abuse and Mental Health Services is successful. The way our health services are currently structured the different departments complement one another and work well together. The proposed statute will diminish efficiencies and create logistical problems instead. The structure of our health services was built over many years with input from dozens of our employees, including professionals, who through experience and trial and error learned what was successful. I am hesitant to tear apart their efforts and replace them with a statute that has had no input from the key people on the ground that run our health services. Therefore I am vetoing the Health Department Statute.

I have attached proposed revisions to this Statute. Deleting the definition of "cultural" and changing "cultural proficiency" to "cultural sensitivity" would ensure that only persons capable of working with all are citizens are hired. This change would remedy the constitutional problem discussed above.

Health services present complex and unique circumstances due to the requirements of professional certifications, doctor/patient relations, therapist/patient relations, and compliance with a host of IHS and other federal laws and regulations. The hierarchical structure of a typical department does not fit this situation. The changes to Sections IV and V would give the

Executive Branch the tools it needs to structure the Department in a way that meets the health needs of LTBB citizens while complying with health services professional and legal standards.

A legislative work session or hearing with input from the Health Department Director, Medical Director, and Mental Health/Substance Abuse Director would aid in the development of this statute. Looking forward, I intend to work with the Legislative Leader to develop a standard procedure to provide input from knowledgeable and impacted Executive staff while draft legislation is still pending.

Respectfully Submitted,

Ken Harrington

WAGANAKISING ODAWAK STATUTE _____

Health Department

SECTION I. PURPOSE

This Statute is hereby enacted to establish the Health Department that is responsible for overseeing all Health related programs and personnel including physical and mental health to ensure a holistic approach by respecting and intertwining both modern and traditional healing.

SECTION II. DEFINITIONS

A. "Anishinaabemowin" means the language spoken by the Odawa people.

B. "Cultural Sensitivity" means the knowledge, skills, and attitudes/beliefs that enable a person to work well with, respond effectively to, and be supportive of the Odawa Citizens.

C. "Department" means Health Department.

D. "Director" means the Health Department Director.

E. "Tribe" means the Little Traverse Bay Bands of Odawa Indians.

SECTION III. CREATION OF THE DEPARTMENT

A. Pursuant to Article VII (D) (22) of the Tribal Constitution the Tribal Council shall have the power to: "Approve the creation or dissolution of Executive divisions or departments to promote and protect the peace, health, safety, education, and general welfare, including but not limited to cultural and natural resources, of the Little Traverse Bay Bands of Odawa Indians and its members".

B. The Tribal Council hereby approves the creation of the Health Department within the Executive Branch of government.

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Deleted: " means aspects of the Odawa history, spirituality, traditions, arts and crafts, values and mannerisms.¶ <#>¶ "Cultural Proficiency

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SECTION IV. AUTHORITY AND DUTIES

A. The Department shall have the following duties:

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1. Promote, design and implement health programs for each facet of our tribal community.

2. Strive to improve and enhance the understanding of health related issues within our community and in the greater community.

3. Assist with annual community events that incorporate health and wellbeing.

4. Provide services and programs that increase health and wellbeing.

5. Administer health-based programs, grants and projects that assist our Tribal Citizens with an awareness of the unique needs of our Tribal Citizens.

6. Establish more interactive resources for tribal citizens that utilize the most current and feasible technologies.

7. Administer all Indian Health Services' health-related programs and funding received by the Tribe, as appropriate.

8. Administer all funds and grants to the Tribe related to health matters, as appropriate.

9. Establish appropriate programs such as health clinic, dental clinic, contract health, healthy start, community outreach, diabetes self-management, substance abuse, mental health and any other applicable health related opportunities.

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SECTION V. STAFFING

A. The Department shall begin operations with current staff of the health clinic, dental clinic, contract health, healthy start, community outreach, diabetes self-management, substance abuse, mental health and any other applicable health related department, division or program, as appropriate.

B. The Chairman, in consultation with the Tribal Administrator, Director, medical director, health/substance abuse director, and such other staff as needed, shall authorize and implement such divisions and programs, and structure departmental reporting and chains of command, as necessary to meet the health related needs of the Tribal community and ensure compliance with all applicable laws, regulations, professional standards and grant requirements.

C. Only persons who possess cultural sensitivity shall be eligible for hire in this Department with the exception of hiring persons that provide technical expertise outside of the Odawa Cultural or Anishinaabemowin.

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SECTION VI. REGULATIONS REQUIRED

Any regulations shall be developed by the Executive Branch and presented to Tribal Council for approval in accordance with the Administrative Procedures Act.

SECTION VII. APPROPRIATIONS AUTHORIZED

Any current appropriations for the health clinic, dental clinic, contract health, healthy start, community outreach, diabetes self-management, substance abuse, mental health and any other applicable health related department, division or program, as appropriate, shall be used to implement this Statute and the Executive shall present Tribal Council with future annual budgets necessary to implement this Statute.

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SECTION VIII. SEVERABILITY

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If any section, subsection, paragraph, sentence, phrase or portion of this Statute is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION IX. EFFECTIVE DATE

Effective upon signature of the Executive or 30 days from Tribal Council approval which ever comes first or if the Executive vetoes the legislation, then upon Tribal Council override of the veto.

Certification

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WAGANAKISING ODAWAK STATUTE 2010-002
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B. The Tribal Council hereby approves the creation of the Health Department within the Executive Branch of government.

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A. The Department shall have the following duties under the direction of the Director:

1. Promote, design and implement health programs for each facet of our tribal community.

2. Strive to improve and enhance the understanding of health related issues within our community and in the greater community.

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B. The Director shall authorize and implement such divisions and programs as necessary to meet the health related needs of the Tribal community.

C. Only persons who possess cultural proficiency shall be eligible for hire in this Department with the exception of hiring persons that provide technical expertise outside of the Odawa Cultural or Anishinaabemowin.

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Any regulations shall be developed by the Executive Branch and presented to Tribal Council for approval in accordance with the Administrative Procedures Act.

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D. Any current appropriations for the health clinic, dental clinic, contract health, healthy start, community outreach, diabetes self-management, substance abuse, mental health and any other applicable health related department, division or program, as appropriate, shall be used to implement this Statute and the Executive shall present Tribal Council with future annual budgets necessary to implement this Statute.

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If any section, subsection, paragraph, sentence, phrase or portion of this Statute is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion

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shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION IX. EFFECTIVE DATE

Effective upon signature of the Executive or 30 days from Tribal Council approval which ever comes first or if the Executive vetoes the legislation, then upon Tribal Council override of the veto.

CERTIFICATION

As the Tribal Council Legislative Leader and Tribal Council Secretary, we certify that this Statute was duly passed by the Tribal Council of the Little Traverse Bay Bands of Odawa Indians at a regular meeting of the Tribal Council held on February 7, 2010 at which a quorum was present, by a vote of 8 in favor, 1 opposed, 0 abstentions, and 0 absent as recorded by this roll call:

	In Favor	Opposed	Abstained	Absent
Marvin Mulholland	X			
Belinda Bardwell	X			
Melvin L. Kiogima	X			
Gerald V. Chingwa	X			
Rita Shananaquet		X		
Aaron Otto	X			
John Bott	X			
Regina Gasco Bentley	X			
Julie Shananaquet	X			

Date: 2-7-10 _____

Julie A. Shananaquet, Legislative Leader

Date: 2-7-10 _____

Regina Gasco Bentley, Secretary

Received by the Executive Office on 2-9-10 by _____

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: 3-9-10 _____

Ken Harrington, Tribal Chairperson

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