

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT

CARTER MCFALL,
Appellant,

File No. A-002-1102
Trial Court file No.: C-025-0101

v.

06-09-03P01:51 FILE

VICTORIES CASINO,
LITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS
Appellee.

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Appellant In pro per
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History of the Case:

The Appellant was terminated from his position as Facility Manager at Victories Casino on September 8, 2000. During the time of his termination, the Appellant attempted to file for a hearing with the Grievance Panel, but the panel had been terminated by the Tribal Council's motion dated August 20, 2000, "*Motion by Councilor Shananaquet and Supported by Councilor Shomin to direct Gaming Administration to eliminate the Victories Casino Grievance Panel and direct those responsibilities to the Human Resources Department.*" The action of the Tribal Council delegated the authority of the Grievance Panel to the Human Resource function of the Gaming Administration.



Prior to the termination of the Appellant, another Casino employee Lonchar was terminated from employment at Victories Casino. At the time of Lonchar's termination, a grievance process was in place, the "Grievance Panel," and Lonchar availed that administrative process. Lonchar received an undesirable decision from the Grievance Panel and filed suit in tribal court. The Tribal Court dismissed the Lonchar case in a Motion for Summary Judgment based on the grounds of sovereign immunity.

Similarly the trial level court dismissed the case at hand, McFall v. Victories Casino, LTBB of Odawa Indians, on a *Motion for Summary Judgment and Dismissal* and based its decision on the precedents set in the Lonchar case.

Differentiating McFall from the Lonchar case:

The trial level court determined that the case at hand was similar to the Lonchar case, as stated:

"The instant case is substantially similar to Lonchar. This Court's analysis in that case regarding: tribal sovereign immunity under federal law, immunity of subordinate enterprises of the Tribe, effect of the Indian Civil Rights Act, and tribal sovereign immunity under tribal law applies to this case. The analysis, reasoning and holding of Lonchar are precedent for this case." Ruling on Defendant's Motion for Summary Judgment, McFall v. Victories Casino, October 22, 2002.

One difference between the Lonchar case and the McFall case raised by the Appellant and noted by the Appellate Court was the available use of the administrative process to address employees' grievances:

“The Court finds that the assertion of the defense of sovereign immunity by the Tribe in this case has been an absolute bar to Plaintiff’s petition for redress. The Plaintiff did avail herself to her right to petition through the administrative process that was provided all employees at that time. The Plaintiff conceded at the Motion Hearing that she did go through the administrative process but that her termination was upheld. The Plaintiff simply did not get the result she desired.” Ruling on Defendant’s Motion for Summary Judgment and Dismissal, Lonchar v. Victories Casino, February 11, 2002.

The Appellant argued that Lonchar had an administrative remedy to address due process.

This leaves the question to the Appellate Court in the case at hand whether Appellant McFall was absolutely barred from petitioning for redress thus not affording him due process.

Noncompeting interests: Due Process v. Sovereign Immunity

In the Lonchar case, due process and sovereign immunity were noncompeting interests. Lonchar was able to bring her grievance through an administrative process and have a determination by an impartial authority, thus providing for due process. After receiving an undesirable decision from the Grievance Panel, Lonchar filed suit against the tribe, where sovereign immunity of the tribe was recognized and the case was dismissed.

In McFall, both issues of due process and sovereign immunity were presented to the Tribal Court within the same preceding. Thus, in order to allow for due process, the issue of sovereign immunity became competing. It appears from the lower court proceeding, a hearing was held to determine whether Appellant McFall was wrongfully terminated, but before the decision was rendered, the Respondent raised sovereign immunity and the case was dismissed. The dismissal did not allow for the same due process that was afforded in the Lonchar case.

Appellant McFall raises an important question in his Appellant Brief *“I would ask the Court that if the Casino couldn’t give redress and the Tribal Court assumes it is not it’s jurisdiction, then whose jurisdiction is it to ensure the due process pledged in the Employee Handbook?”*

This Court looks not to the Employee Handbook as argued by the Appellant, but instead looks to the Little Traverse Bay Bands Tribal Constitution for guidance. The *Tribal Constitution of the Little Traverse Bay Bands of Odawa Indians* is a carefully balanced document. It is designed to provide for a sufficiently strong tribal government and yet sufficiently limited and just to protect the guaranteed rights of its tribal members. The Constitution permits a balance between the tribe's need for order and the members' right to freedom.

The Constitution is the voice of the people and the tribal government derives its authority from the Constitution.

According to Little Traverse Bay Bands of Odawa Indians Constitution, Article VIII - BILL OF RIGHTS:

"All members of the Little Traverse Bay Bands of Odawa Indians, Inc. shall be accorded . . . due process of law."

The Little Traverse Bay Bands Constitution guarantees that the government cannot take away a person's basic right of due process of law. Due process is best defined in one word - *fairness*. Due process provides the standards for fair treatment of citizens by governments. When a person is treated unfairly by the government, including the courts, he is said to have been deprived of or denied due process.

The Tribe must consider the Little Traverse Bay Bands Tribal Constitution is a superior, paramount law, unchangeable by ordinary means. This ensures that ordinary legislative acts, and like other acts cannot alter the meaning and intent of the Constitution. The Tribal Council may eliminate the Grievance Panel, but cannot legislate to eliminate a person's right to due process.

To satisfy the Constitutional requirement of due process, this can be accomplished in many various forms. As long as the basic elements of due process are provided for: fairness and right to be heard.

“What due process of law means in the procedural context depends on the circumstances. It varies with the subject matter and the necessities of the situation. Due process of law is a process which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.” Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884); Hurtado v. California, 110 U.S. 516, 537 (1884).

As noted, due process can be legislated or delegated and may appear in many forms:

“sanctioned by age or custom or newly devised in the discretion of the legislative power”.

Delegation of Authority to Ensure Due Process

On September 5, 1997, the Tribal Council delegated its authority on Human Resource and Personnel Management issues to the Gaming Administration through its General Manager as stated in the Memorandum entitled “Roles of Gaming Administration and Gaming Regulatory Commission.” Under Section IV: Duties and Function of Gaming Administration:

“A. Duties

The Gaming Administration shall have the authority and responsibility for developing, reviewing and approving policies and procedures for the orderly and efficient operation, management and maintenance of the Enterprise, including the following:

- 1. Human resources and personnel management; . . .”*

Further, the Tribal Council mandated the following:

“C. Implementation

“1. The policies and procedures developed by the Gaming Administration will be implemented through a general manager employed by the Tribe . . .”

On August 20, 2000, Tribal Council eliminated the procedure set by the Gaming Administration to handle employee grievances, i.e., the Grievance Committee, and further delegated this authority to the Human Resource Department. In the case at hand, the Appellant attempted to avail himself with the process set forth through the Human Resource department and received the following response through the Gaming Administration’s agent, Ronnie R. Olson, General Manager.

“If you still believe that this termination is unjustified you have the right to appeal to the Tribal Courts. Therefore, I am requesting your cooperation in ceasing further questions regarding your employment status.” A letter by Ronnie R. Olson, General Manager, October 5, 2002.

It is the conclusion of this Court, that the Gaming Administration, through its agent, to ensure adequate due process protections, delegated its authority to the Tribal Court.

The Tribal Court correctly administered a venue to afford McFall his right to due process. As found in the Lonchar case, the action of allowing for due process does not intrude on the Tribe’s sovereign immunity as argued by the Respondent. It was not until Lonchar disagreed with the decision of the panel and pursued the issue further did sovereign immunity become an issue. In the McFall case a decision was not made for him to agree or disagree with, thus the argument of sovereign immunity did not yet need to be addressed until the avenue for due process was fulfilled. With the elimination of the Grievance Panel and the delegation to the Tribal Court, the Tribal Court attempted to protect the right of due process, but did not accomplish this when the case was dismissed without a decision.

The Appellate Court agrees with the trial level court's decision as argued by the Respondent that sovereign immunity cannot be waived through the delegation to an agent or subordinate enterprises. This is clearly analyzed and set forth in the lower court's decision.

"This Court finds that federal law recognizes the inherent immunity of tribal governments and its subordinate enterprises and that there has not been any express abrogation of that immunity by Congress" Ruling on Defendant's Motion for Summary Judgment and Dismissal, Lonchar v. Victories Casino, February 11, 2002.

Although sovereign immunity cannot be abrogated through an agent without express consent by the tribe, due process can be delegated as was in the case at hand.

Remand to Trial Level Court with Remedies and Alternatives:

The Grievance Committee had the following responsibilities and authority:

"1016.03 Responsibilities of the Grievance Hearing Committee

The Grievance Hearing Committee shall determine:

- A) whether there has been a violation of the employee's rights under the Employee Handbook's Policies and Procedures Manual, and*
- B) whether the violation substantively affected the employee's ability to receive fair consideration of his or her claim*
- C) make recommendation to the General manager of a fair and equitable settlement."*

"1017.03 Report of the Grievance Hearing Committee

The report of the Grievance Hearing Committee shall include the findings of fact on each issue presented and make recommendations regarding appropriate action(s) to be taken. The Chair of the Grievance Committee shall forward the Report of the hearing to the General Manager of the Human Resources manager within three (3) working days . . . "

The delegation of authority to the Tribal Court was limited to the original delegation to the Grievance Committee, as outlined above. Based on the record, the Appellant was not afforded due

process through any administrative means provided by the Gaming Administration except through its limited delegation to the Tribal Court. The Tribal Court had a duty and responsibility to exercise that authority by providing the Appellant a forum for due process. Alternatively, if the Tribal Court does determine on remand that the Appellant did indeed receive due process through the Gaming Administration, then the Tribal Court has no further responsibility in seeing that due process was afforded.

THEREFORE, the Appellate Court remands this case to the Tribal Court to make a determination on the employee's finding of fact of each issue presented and make recommendations regarding appropriate actions to be taken based on the limited responsibility and authority as delegated, or to make a determination that due process was afforded through the Gaming Administration. **Furthermore**, pursuant to the theory of delegation of authority, the decision of the lower court shall be final. "*Grievance Committee Policies and Procedures 1019.00 Cessation of the Grievance Process . . . the decision rendered by the grievance process is final*".

Further, the Appellate Court recognizes the length of time involved in this case, and requests that the Trial Level Court use due diligence in deciding this case on remand, thus affording both parties an expedient resolution.

This is a unanimous decision of the Appellate Court.

06-09-03
Date

Doris Adams, Chief Justice Appellate