

POKAGON BAND OF POTAWATOMI INDIANS

TRIBAL COURT

THE PEOPLE OF THE POKAGON
BAND OF POTAWATOMI INDIANS,
Plaintiff

Case No: 14-2905-CO

-vs-

BRADLEY G. ENGLE,
Respondent

HON. DAVID M. PETERSON

Annette D. Nickel (P46780)
Prosecuting Attorney
Pokagon Band of Potawatomi Indians
586820 Sink Road, P.O. Box 180
Dowagiac, Michigan 49047
(269) 783-0970
annette.nickel@pokagonband-nsn.gov

David M. Cox IV
Attorney for Respondent
Cox Law Office
9792 East Ridge Road, Suite C
Hobart, Indiana 46342
(219) 225-5269
dave@davecoxlaw.com

**OPINION AND ORDER REGARDING ENFORCEABILITY
OF SUBPOENA OF RESPONDENT**

BACKGROUND

The Respondent is not an enrolled member of the Pokagon Band of Potawatomi Indians nor a member of any other Native American Tribe and has been charged with a civil infraction.

On December 17, 2014, a telephonic status conference was held in the above matter between both attorneys and the Court. The issue of whether it is necessary to subpoena the Respondent to compel his appearance at the hearing to determine his responsibility for the civil infraction charge brought against him was discussed.

The Respondent has filed a brief supporting that a subpoena of the Respondent would be unenforceable.

Pursuant to the Order After Status Conference the Court has extended the dates of this Opinion and Order two days to January 15, 2015, because the Court was closed two days during the week of January 5th due to inclement weather.

LAW

Respondent argues in his brief that Section 6 of the Court Rules for Civil Infractions [improperly designated Tribal Court Code, Chapter 3, Section 6] excuses his appearance at the hearing in this matter.

Section 6.B. provides as follows:

Respondent must appear. Failure of a respondent or his/her attorney to appear at an initial appearance will result in a default judgment according to Section 5.

Since Respondent's attorney appeared at the initial appearance, he now argues he no longer needs to appear at any other Court hearings in this matter. Section 6.B. above clearly applies to the initial appearance and not the hearing to determine the Respondent's responsibility for the charges pending against him. It merely excuses the Respondent's appearance at the initial appearance.

Section 7.B.5. of the Court Rules for Civil Infractions provides as follows:

5. ***Default Judgment.*** If the respondent fails to appear, the court will enter a default judgment according to Section 5.

The above Section 7.B.5. clearly provides a sanction of responsibility by default should the Respondent fail to appear at the hearing on the civil infraction.

Next, Respondent argues the "waiver of rights" form which provides in pertinent part as follows:

1. A. If your plea is accepted, you will not have a trial of any kind and you will be giving up the rights you would have at a trial, including the right to:

- (9) remain silent during the trial;
- (10) not have your silence used against you; and
- (11) testify at trial, if you want to testify.

The above rights apply when a person is having a trial on the merits of a criminal case not a civil infraction. The "rights" were erroneously placed on the waiver of rights form and do not apply to a person charged with a civil infraction. Pursuant to Section 7.B.5., if the respondent fails to appear at a hearing, the Court will enter a default judgment.

If the Respondent appears at the hearing, since he is not placed in jeopardy of a criminal charge or conviction, the presenting officer may subpoena and call him as a witness [Michigan Court Rules 2.506(A) which is applicable pursuant to Section 7.D. of the Pokagon Band of Potawatomi Indians Tribal Court Code].

Further, Michigan Court Rule 2.506(F) provides in pertinent part as follows:

(F) **Failure of Party to Attend.** If a party or an officer, director, or managing agent of a party fails to attend...pursuant to a subpoena or an order to attend, the court may:

- (6) Enter judgment by default against that party.

It is well established law that an individual charged with a criminal charge has a right to remain silent and cannot be compelled to testify. Indeed, the Pokagon Band of Potawatomi Indians Constitution provides at Article XVI(d) as follows:

The Pokagon Band, in exercising the powers of self government, shall not:

- (d) compel any person in any criminal case to be a witness against himself/herself;

The above clearly does not apply to a person charged with a civil infraction.

The Pokagon Band of Potawatomi Indians Code of Offenses provides at PBCivO [Civil Offenses] at Section 2.G. as follows:

G. **Contempt.** The Court may find a non-Indian defendant who fails to attend a Tribal Court hearing or who fails to comply with a Tribal Court order to be guilty of civil contempt.

in addition to the above, PBCivO Section 3.A. provides as follows:

A. **Appearance Bond.** When a person who is not an enrolled member of the Pokagon Band of Potawatomi Indians is cited for a civil offense under this code, the law enforcement officer issuing the citation shall take bond as security for the non-Tribal member's appearance in Tribal Court. The person cited shall either post bond or pay the civil fine prior to release.

The above two provisions of the Civil Offense portion of the Code of Offenses clearly contemplate the required appearance of a person charged with a civil infraction to appear at the hearing to determine their responsibility for the charged offense.

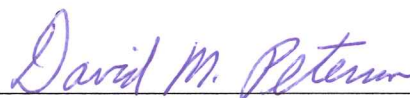
CONCLUSION

A careful reading of Section 6.B. and Section 7.B.5. of the Court Rules for Civil Infractions, Michigan Court Rules 2.506(A) and 2.506(F), Article XVI(d) of the Pokagon Constitution, PBCivO Section 2.G. and Section 3.A. all lead this Court to the legal conclusion that a non Indian charged with a civil infraction must appear at the hearing on the charges. The Court is of this opinion, notwithstanding the erroneous "waiver of rights" form provided to the Respondent's attorney at the initial appearance.

Since it is clear that the Respondent is required to appear at the hearing, the enforceability of a subpoena is moot as applied to this case. If the Respondent fails to appear, the sanction is clear, i.e. the Respondent will be defaulted on the charged offense. If the Respondent does appear, he will be subject to being called as a witness by the presenting officer for the reasons stated above.

IT IS SO ORDERED.

Dated: January 15, 2015



David M. Peterson, Trial Judge