

**POKAGON BAND OF POTAWATOMI INDIANS
TRIBAL COURT**

Charles LaBoy,

Petitioner,

Case No. 19-5342-CV

v.

Hon. David M. Peterson

Pokagon Band Gaming Commission

Respondent

Charles LaBoy
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OPINION AND ORDER

INTRODUCTION

Petitioner has filed a Complaint asserting he could find no record on the posted agenda of the Pokagon Band Gaming Commission that indicated a discussion or decision would be had concerning his employment. Petitioner states that the Pokagon Band Gaming Commission is required to follow the Open Meetings Act. Petitioner further asserts the Ethics Code requires decisions or actions be taken on the record in a public manner. Lastly, Petitioner seeks an injunctive order invalidating the non-renewal of his employment contract. The Court has carefully considered all pleadings and oral arguments were held.

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Although Petitioner has failed to state facts of a cause of action with specific allegations of the nature of his claim, the Court elects to treat the Complaint as a violation of the Open Meetings Act and Ethics Code to which Petitioner is claiming relief.

The Respondent has filed a motion and supporting brief for summary disposition based on sovereign immunity, lack of standing and for failing to state a claim upon which relief can be granted.

BACKGROUND

Petitioner was employed as the Executive Director of the Pokagon Band Gaming Commission under an employment contract with a 30 day term which shall automatically renew for successive periods of 30 days unless terminated by either party. The Respondent elected to provide Petitioner with a non-renewal notice at a closed meeting of the Pokagon Band Gaming Commission.

The Commission caused to be posted, in accordance with the requirements of the Open Meetings Act, notice of a Gaming Commission meeting to be held on June 21, 2019 at 1:30 p.m. ("Meeting"). (Compl., Ex. C, p. 1). That day, before the Meeting, the Band received Petitioner's timely notice of revocation of a previously agreed Severance Agreement ("Revocation"). As a result, at the Meeting, the Commission amended the agenda to address the Revocation and then approved the non-renewal of the Contract and provided the notice of non-renewal of the Contract to Petitioner (both in written and electronic form). (Compl., Ex. A.)

The Pokagon Band of Potawatomi Indians ("Band") is a sovereign, federally recognized Indian tribe, as reaffirmed under P.L. 103-323, enacted September 21, 1994. The Band is organized under a constitution, which was adopted on November 1, 2005 and became effective on December 16, 2005 ("Constitution"). In accordance with P.L. 103-323 and, pursuant to Article

IX of the Constitution, the Tribal Council is the governing body of the Band and is vested with the sovereign powers of the Band, including those set forth in Article IX, Section 2, of the Constitution. See Constitution, art IX, § 2.

STANDARD OF REVIEW

As stated by Respondent, the Pokagon Court Rules do not address motions for summary dispositions. Under the Tribal Court Code, 10-21-2002, Section 7B, see also *Zimmerman v. Pokagon Band Gaming Commission*, 14-2572-CV and *Fenderbosch v. Pokagon Band of Potawatomi Indians Tribal Council*, the Court may look to the rules of practice and evidence applicable in the State of Michigan. Therefore, MCR 2.116(C)(1) and (7) are applicable to this case.

For motions under MCR 2.116(C)(1), “[t]he plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition.” *Yoost v. Caspari*, 295 Mich. App. 209, 221, 813 N.W.2d 783 (Mich. App. 2012). The “complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties.” *Id.* (citations omitted). Accordingly, “when allegations in the pleading are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction.” *Id.* (citations omitted).

For motions under MCR 2.116(C)(7), the court must accept the contents of the complaint as true, “unless contradicted by documentation submitted by the movant.” *Maiden v. Rozwood*, 461 Mich. 109, 119, 597 N.W.2d 817 (1999) (citation omitted). The court must consider all documentary evidence submitted by the parties. *Glancy v. Roseville*, 457 Mich. 580, 583, 577 N.W.2d 897 (1998) (citations omitted).

DISCUSSION AND ANALYSIS

The Respondent asserts it is immune from Petitioner's claim because of sovereign immunity. Tribal sovereign immunity is jurisdictional and therefore must be addressed.

"When [a] defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (citation omitted). The court must consider the Respondent's (C)(7) (immunity) challenge along with Respondent's (C)(1) (jurisdiction) challenge first. If the court lacks jurisdiction then the balance of Petitioner's claim becomes moot.

Since tribal sovereign immunity is a jurisdictional doctrine, that means it must be addressed first. If it shields the tribe, the court has the power to say that (and only that) and to dismiss the claim for lack of subject-matter jurisdiction. *Memphis Biofuels, LLC v. Chicksaw Nation Indus., Inc.*, 585 F.3d 917, 919-20 (6th Cir. 2009) ("[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address other issues. See *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Id.* At 788 (citations omitted). That sovereignty includes "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). It shields not only an Indian tribe itself, but also "arms of the tribe" acting on its behalf. *Memphis Biofuels*, 585 F.3d at 921; *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 754-55 (1998). As the Supreme Court recently reminded us, the baseline rule "is tribal immunity." *Bay Mills*, 572 U.S. at 790.

The Constitution grants Congress plenary control over tribes, and thus the power to abrogate tribal sovereign immunity. *Id.*; *United States v. Lara*, 541 U.S. 193, 200 (2004). To do so, "Congress must 'unequivocally' express that purpose." *C & L Enters., Inc. v. Citizen Band*

Potawatomi Tribe of Okla., 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58); *Bay Mills*, 572 U.S. at 790. Indeed, Indian tribes remain separate sovereigns that pre-existed the Constitution, and “courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Bay Mills*, 572 U.S. at 790. “Thus, unless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” *Id.* at 788 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

Article XVIII Section 1 of the Pokagon Constitution provides in pertinent part:

“The Pokagon Band, as a sovereign Indian Nation, is immune from suit in all forums except to the extent that immunity is expressly waived as provided in this Article.”

The Pokagon Band has adopted The Pokagon Band Gaming Regulatory Act which provides:

Section 3.01 The Tribal Council hereby establishes the Pokagon Band Gaming Commission as an independent governmental subdivision of the Tribe.

Section 3.02 As a political subdivision of the Tribe, the Commission possesses all the rights, privileges, and immunities of the Tribe, including but not limited to the sovereign immunity of the Tribe from suit absent express consent from Tribal Council. The individual members of the Commission are officers of the Tribal government and shall be immune from suit when acting in their official capacity to the fullest extent permitted by law. (Emphasis added).

The Tribal Court Code provides at Section 11 as follows:

Jurisdiction of the Tribal Court shall not extend to any action against the Band or its officials unless the sovereign immunity of the Band has been explicitly and unequivocally waived by the Tribal Council, or explicitly and unequivocally waived by an authorized Tribal entity or authority pursuant to an express authorization of the Tribal Council. (Emphasis added).

Based on the above case law and Tribal law:

1. The Pokagon Band enjoys sovereign immunity from all forms of suit. (Article XVIII, Sec. 1, Pokagon Constitution)
2. The Gaming Commission as a political subdivision of the Tribe possesses all the immunities of the Tribe including sovereign immunity. (Sec. 3.02, Gaming Regulatory Act)
3. The Tribal Court jurisdiction does not extend to any action against the Band or its officials (Gaming Commission) unless explicitly waived. (Sec. 11, Tribal Court Code)
4. There has been no waiver as applied to these Respondents in this case.

CONCLUSION

The Pokagon Band possesses sovereign immunity which is extended to the Gaming Commission and its members. Pursuant to MCR 2.116(C)(1) and (7) and Section 11 of the Tribal Court Code, this Court lacks jurisdiction over the Respondent's (Gaming Commission and its members) because the Respondent's enjoy immunity from suit. Because the Respondent's enjoy immunity, the Court need not address the other issues asserted. Accordingly, this case is dismissed in its entirety.

IT IS SO ORDERED.

Dated: September 23, 2019

David M. Peterson
David M. Peterson, Tribal Judge