IN THE COURT OF APPEALS FOR THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

SKYLUR G. GRAVERATTE, ET AL.,

Plaintiffs/Appellants,

v.

THE SAGINAW CHIPPEWA TRIBE OF MICHIGAN, et al.,

Defendants/Appellees.

Case Nos. 09-CA-1040, 09-CA-1041
Tribal Court Case Nos. 08-CI-0539, 09-CI-0071

MEMORANDUM OPINION AND ORDER

ANGELA AYLING, ET AL.,

Plaintiffs/Appellants,

v.

TRIBAL CERTIFIER, ET AL.,

Defendants/Appellees.

Before Judges Kevin K. Washburn, Robert Kittecon, and Dennis Peterson.

MEMORANDUM OPINION AND ORDER

The court has consolidated these cases for purposes of an opinion because they involve a review of the interpretation of Section 6(a) of the SCIT Enrollment Ordinance by the SCIT Office of Administrative Hearings (OAH) and Tribal Certifier. The OAH and the Certifier have interpreted Section 6(a) as exclusively limiting the evidence which an applicant for membership in the Tribe can present in establishing Saginaw Chippewa Indian blood. The Community Court upheld the denials of enrollment for the applicants. For reasons set forth below, we find this interpretation of Section 6(a) to undermine the enrollment rules in the tribal constitution and constitute a denial of due process to the applicants.

I. Background

Appellants applied for enrollment in the Saginaw Chippewa Tribe. The applicants in *Graveratte* were denied the opportunity by the OAH to submit evidence in support of their claims of Saginaw Indian blood quantum other than evidence which is specifically authorized in Section 6(a) of the SCIT Enrollment Ordinance. The OAH based its categorical exclusion of evidence on the grounds that Section 6(a)

> does not allow the use of Certificates of Degree of Indian Blood (CDIB's) issued by the Saginaw Chippewa Indian Tribe or the BIA, federal census records, school records, death records, or any other sources other than those specifically enumerated in Ordinance 14, Section 6(a) when calculating Saginaw Chippewa Indian Blood.

Graveratte v. SCIT, Hearing Officer's Report and Recommendation, Apr. 10, 2008, at 13 (citing *Nahgahgwon v. SCIT,* OAH No. C0074-BG (Oct. 24, 2007)); *dismissed without prejudice,* No. 08-Cl-0539 (SCIT Comm. Ct. Oct. 16, 2009).

The applicants in *Ayling* submitted historical evidence of descent from a Tribal Chief - Job Pe-ne-waw-bee-ne-se-waw-be - who was signatory to the Treaty of Detroit in 1855, and other evidence in the form of a memorandum from the SCIT Chief describing a practice during the nineteenth century annuity rolls of attributing the blood quantum of the head of household to the spouse, but this evidence was denied the presumptions which attach to documentation specifically identified in Section 6(a). *Ayling v. SCIT,* No. 09-Cl-0071 (SCIT Comm. Ct. Oct. 16, 2009)(dismissing without prejudice).

In both cases, the Appellants appeal on the grounds that Section 6(a) is unconstitutional because it effectively narrows the permissible scope of "Indian blood" which is to be considered in applications for enrollment under Article III, Section 1(b).

The cases are hereby consolidated for consideration because they present the common question as to whether an interpretation of Section 6(a) as categorically limiting admissible evidence of "Indian blood" is permissible under Article III, Section 1(b) of the SCIT Constitution. The standard of review applicable to the factual determinations of the Community Court in enrollment-related matters is whether the Court has committed clearly erroneous judgment; the legal conclusions of the Court are reviewable *de novo*. *See Gardner et al. v. Cantu et al.,* No. 08-CA-1027 (SCIT Ct. App. Sept. 12, 2008), at 5 n. 7.

II. Analysis

Article III, Section 1(b) of the SCIT Constitution provides for membership in the Tribe of "[a]ll children of at least one-quarter degree Indian blood born to any member of the Saginaw Chippewa Indian Tribe of Michigan." The SCIT Enrollment Ordinance defines "Indian blood"

as "the arithmetic sum of the blood quantum inherited from all Federally Recognized Indian Tribes." *Id.*, § 2k. The burden of proof is on an applicant for membership "to prove by a preponderance of the evidence that he or she meets the legal standards for membership." *Id.*, § 8.

Section 6(a) of the SCIT Enrollment Ordinance establishes a rebuttable presumption for ancestral blood quantums inherited by descendants of persons named on various specified annuity, allotment and tribal rolls.[1] This presumption favors certain categories of documentary evidence and streamlines adjudication, a function which is entirely proper. Legislative bodies may properly create rules that provide presumptions. *See, e.g.*, *Vance v. Terrazas,* 444 U.S. 252, 265-66 (1980); and *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 31 (1976) (both recognizing the traditional powers of the United States Congress to prescribe rules of evidence).

However, the OAH and the Tribal certifier have read this language, through negative implication, to exclude categorically the admission of *any other evidence*. This interpretation effectively narrows the plain language of Article III, Section 1(b) of "one-quarter degree Indian blood" to mean "one-quarter degree Indian blood <u>*as exclusively determined by the following documents*</u> ..." Neither Article III nor Article VI of the SCIT Constitution support such an interpretation.[2] The OAH and the Tribal Certifier may not interpret Section 6(a) in a manner which is inconsistent with the tribal constitution.

The OAH and the Tribal Certifier also apparently read Section 6(a) to deny consideration of federally or tribally issued Certificates of Degree of Indian Blood. *Graveratte,* SCIT Response Brief, at 12. We do not believe that Section 6(a) supports such an approach on the basis that tribal certificates of degree of Indian blood are unreliable. This is akin to accusing the Saginaw Chippewa Indian Tribe of lying in official documents; we cannot countenance such an unsubstantiated conclusion without more explanation or an affirmative finding by the legislative body. If the Saginaw Chippewa Tribe has certified a person's Indian blood quantum, then the OAH must accept this certification or explain why the certification is unreliable as to that particular certificate. If the tribe has certified a fact, then a tribal fact-finder must accept that certification, absent good cause to deny it.

This Court has emphasized that the enrollment standards of Article III, Section 1 must be strictly interpreted and applied. *See Gardner, supra* (upholding the denial of enrollment under Art. I, § 1(b) to individuals born to persons named on the 1939 SCIT roll, which is not included as a base

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[1] Persons named on the 1857, 1858, 1859, 1861, 1864, 1865, 1866 and 1867 annuity rolls, and on the 1883, 1885 and 1891 allotment rolls are presumed to possess 4/4 degree Saginaw Chippewa blood (SCIT Ord. #14, §§ 6(a) (1) & (3)), and persons named on the 1939 Tribal roll and the 1940 Indian census roll are presumed to possess the blood quantum ascribed in those documents. *Id.*, §§ 6(a) (1) & (3).

[2] The Court recognizes its responsibility to avoid unnecessary judicial review of the constitutionality of ordinances enacted by the Saginaw Tribal Council when there is a plausible constitutional interpretation of the ordinance. *Accord Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-49 (1936) (Brandeis, J., conc.).

roll in Art. I, § 1(a)); and *Tribal Certifiers et al. v. Nedwash,* No. 08-CA-1030 (SCIT Ct. App. Sept. 12, 2008) (limiting the equitable tolling for minors established under *Carmona-Bryant v. Saginaw Chippewa Tribal Clerk*, No. 04-CA-1016 (SCIT Ct. App. March 21, 2005), to 18 months beyond the eighteenth birthday). The requirement of strict adherence to Article III applies to the tribal government as well as to the applicant.

This Court has also previously recognized the significant procedural interests of applicants for enrollment. *Id.*; *Fisher v. Saginaw Chippewa Tribal Clerk et al.,* No. AC-1010 (SCIT Ct. App. Nov. 19, 2001). Membership in the Tribe involves important features of personal identity for the applicant which reach beyond liberty or property interests into whether the applicant possesses a hereditary birthright to participation in the Tribal community. It is, therefore, incumbent upon this Court to insure that the laws of the Tribe are interpreted in a manner which fully comports with the promise of Article III, Section 1(b) that an applicant born to a member of the Tribe who possesses one-quarter degree Indian blood shall be eligible for enrollment in the Tribe.

Under the terms of the Constitution, it is a question of fact whether a person is entitled to membership. The Constitution makes certain facts relevant. The OAH has interpreted Section 6(a) in a matter than makes constitutionally-relevant facts inadmissible. This is problematic from a due process standpoint. In American courts, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean,* 234 U.S. 385, 394 (1914)). We think that this principle is also compelling in the Saginaw Chippewa community.

It is the opinion of this Court that Article III(b) of the SCIT Constitution requires, at minimum, that the process afforded to each applicant for enrollment must include an opportunity to present such evidence which is deemed by the applicant to be supportive of his or her application, and to have the reliability and relevance of that evidence tested and ruled upon by the Hearing Officer in a particularized manner. The interpretation at issue does not meet this requirement.

Indeed, the structure and operation of the SCIT Office of Administrative Hearings (OAH) clearly contemplates an individualized fact-finding function which is consistent with the requirements of Article III, Section 1(b): The OAH is established as "an independent administrative hearings agency of the Tribe". SCIT Ordinance No. 14, § 13(a)(1). The Hearing Officer is required to

> afford all interested parties a reasonable opportunity to submit data, analysis, or arguments, orally or in writing at the hearing and to address and respond to any document in the Hearing Office's files or otherwise provided to the Hearings Office as part of its administrative record ... Every party may call and examine witnesses, introduce exhibits, cross-examine witnesses who testify and submit rebuttal evidence.

Id., § 13(g)(3.3). The OAH is further authorized "to issue rulings on all procedural and scheduling issues and on all questions involving the admissibility of evidence." *Id.,* § 13(b)((2)(c). These procedures are designed to provide applicants a meaningful opportunity to be

roll in Art. I, § 1(a)); and *Tribal Certifiers et al. v. Nedwash,* No. 08-CA-1030 (SCIT Ct. App. Sept. 12, 2008) (limiting the equitable tolling for minors established under *Carmona-Bryant v. Saginaw Chippewa Tribal Clerk*, No. 04-CA-1016 (SCIT Ct. App. March 21, 2005), to 18 months beyond the eighteenth birthday). The requirement of strict adherence to Article III applies to the tribal government as well as to the applicant.

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heard. Section 6(a) must be accordingly be interpreted in a manner which facilitates the ability of applicants to make their best case.

III. Conclusion

For these reasons, we hold that Article III(b) of the Saginaw Chippewa Tribal Constitution prohibits an interpretation of Section 6(a) of the Saginaw Chippewa Tribe Enrollment Ordinance which categorically excludes all other documentary evidence.

For these reasons, the Community Court's decisions in both cases are hereby REVERSED, and REMANDED to the Community Court for further proceeding in accordance with this opinion. It is so ordered this 16th day of August, 2010.

For a unanimous Court:

Robert Kittecon, Associate Judge

Dennis Peterson, Associate Judge

Kevin K. Washburn, Chief Judge