

**BEFORE THE TRIBAL COMMISSION
FOR THE
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS**

IN THE MATTER OF JUDGE JOHN KERN

No. 2014-2331-CV-CV

Respondent.

PROCEDURAL ORDER

Procedural Status

On May 19, 2014, the Grand Traverse Band Judicial Commission, consisting of Chief Justice Mary Roberts and Associate Appellate Justices Quintin Walker and Matthew L.M. Fletcher, filed a Statement of Allegations in this matter, *In re Judge John Kern*. In accordance with Grand Traverse Band Court Rule 1.205(B), Respondent filed a request for a hearing and an answer on May 30, 2014.

Specific Procedural Orders

On June 16, 2014 through June 19, 2014, assuming additional days are necessary, the nonrecused members of the Tribal Judiciary acting as the Judicial Commission will hold a hearing in accordance with Grand Traverse Band Court Rule 1.205(D).

Attached to this Procedural Order are copies of the investigatory materials that form the file in this matter, including Judge Long's complaint, Chief Justice Robert's report to the Judicial Commission, related materials delivered to the Court

by the Tribal Council, and a witness list.¹ As soon as possible, the Court will provide to the Respondent and to witnesses the transcripts from the investigatory interviews conducted by Chief Justice Roberts and a witness list.

The hearing will be conducted in a manner analogous to administrative hearings conducted by the State of Michigan. *E.g.*, Department of Energy, Labor, and Economic Growth, State Office of Administrative Hearings and Rules, Due Process Procedures for Special Education Hearings Rule 84(g)-(j) (“Administer oaths or affirmations[;] Preside at the hearing and actively participate to ensure a fair, orderly, and full development of the evidence relevant to the claims and defenses asserted[;] Rule on objections to the conduct of the hearing and to the introduction of evidence and give effect to the rules of privilege.”). The Tribal Judiciary acting as the Judicial Commission will preside over the hearing in an inquisitorial manner, which means the Judiciary will call witnesses and ask questions of the witnesses. The Judiciary will also rule on motions from the Respondent as necessary. The Respondent has the right to counsel, of course, and may cross examine the witnesses. The Respondent may also call witnesses.

After the conclusion of the hearing and upon deliberation, the nonrecused members of the Tribal Judiciary, acting as the Judicial Commission, will vote on whether to remove the Respondent.

This Procedural Order constitutes the rules required by Grand Traverse band Court Rule 1.202 to be promulgated within 90 days of the establishment of the Judicial Commission, which formed after the complaint filed by Judge Long.

Memorandum on the Law Applicable to Judicial Removals

¹ The witness list may change depending on the availability of the witnesses.

As far as the Judicial Commission can determine, no tribal judge has ever been removed under Article V, Section 8. What happens in this process is a matter of first impression for the Grand Traverse Band. This memorandum is intended to provide general legal principles for the hearing to be held in accordance with Grand Traverse Band Court Rule 1.205(D), and to address the Respondent's several procedural motions.

1. Foundational Legal Principles

We begin, as we must, with the Constitution. Article V, Section 8 governs the removal of a Tribal Judge. That section provides:

The Tribal Judiciary may remove any judge by an affirmative vote of a majority of all other members of the Judiciary for:

- (a) Unethical conduct, as defined by the American Bar Association Code of Judicial Conduct;
- (b) Physical or mental disability which prevent the performance of judicial duties;
- (c) Persistent failure to perform duties;
- (d) Gross misconduct that is clearly prejudicial to the administration of justice; or
- (e) Ineligibility, under Section 5 of this Article, to serve as a member of the Tribal Judiciary.

Several years ago, the Court adopted subchapter 1.200 of the Tribal Court Rules to govern the removal of tribal judges, under which the Judicial Commission must hold a hearing. See Grand Traverse Band Court Rule 1.205(D) ("The hearing shall be conducted by the Judicial Commission under rules applicable to a trial of a civil action in Tribal Court. The hearing shall be recorded and shall be open to the public."). In May 2003, the Court entered into a Memorandum of Understanding to govern the relationship between the Court and the Tribal Council, two independent branches of government.

The irreducible minimum import of Section 8 is that three members of the Tribal Judiciary, which currently numbers five, may remove any judge for any of the reasons provided in the subsections. Under no circumstances may the court rules – or any other tribal law, for that matter – interfere with the irreducible minimum of Section 8 of the Constitution.

2. Respondent's Motion for a Private Hearing in Accordance with the Grand Traverse Band Personnel Policy Manual is Denied.

Respondent's first responsive pleading in this matter states Respondent's request for a private hearing before a hearing officer as provided for in the tribe's personnel policy. The request conflicts with Rule 1.205(D), which requires the hearing to be public. More importantly, the request conflicts with the tribal constitution, which guarantees judicial independence.

Section 8 is unusual in the realm of tribal judicial discipline. Other tribal constitutions provide for the removal of tribal judges by the tribal council. *E.g.*, *LaRance v. Hopi Tribe*, 10 Am. Tribal Law 345 (Hopi Tribe Appellate Court 2010) (adjudicating tribal council's termination of tribal judge's employment). *Cf.* *Chapman v. Little River Band of Ottawa Indians*, Nos. 07-164-CC, 08-034-AP, 2008 WL 6928160 (Little River Band of Ottawa Indians Tribal Court, Aug. 5, 2008) (adjudicating matter involving tribal council's authority to ratify tribal judiciary's recommendation to remove tribal judge). In legal structures where an outside political entity like a tribal council can act to remove tribal judges, judicial independence may be questioned. *See generally* Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 115, 130-32 (Miriam Jorgensen, ed. 2007). Grand Traverse Band's constitution, ratified in 1988, is the first tribal constitution in Michigan to guarantee judicial independence. *See* Michael D. Petoskey, *Tribal Courts*, 67 Mich. B.J. 366, 366-68 (1988).

Contrary to these principles, Respondent argues that the 2003 Memorandum of Understanding with the Tribal Council compels the Judiciary to hold judicial removal hearings in accordance with the tribal government personnel policy. That document provides for the utilization of a hearing officer "with respect to employment decisions (including hiring and termination." The motion apparently seeks to replace the Judicial Commission, and therefore the Tribal Judiciary, with a tribal governmental administrative hearing officer. This we will not do. Judge Kern is no mere employee. He is the Chief Judge, and like all tribal judges subject to removal by the Tribal Judiciary under Article V, Section 8.

In short, it is the exclusive duty of the Tribal Judiciary, which is acting as the Judicial Commission in this matter, to act, not the tribal government.

3. Respondent's Motion to Recuse Chief Justice Mary Roberts is Denied.

Respondent also moves to recuse Chief Justice Roberts from this matter on the grounds that she acted as an investigator for the Judicial Commission in this matter prior to the filing of the Statement of Allegations.

Other Michigan tribal constitutions ratified since 1988 have followed the lead of the Grand Traverse Band in providing for judicial independence, including the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians. In both tribal constitutions, the tribal judiciary has a role to play in the removal of tribal judges. The constitution of the Little Traverse Bay Bands is particularly instructive. Article XIII, Section (B)(1) restricts the judicial removal authority to the Tribal Judiciary itself, just as it rests with the Tribal Judiciary in the Grand Traverse Band constitution. The Little Traverse Bay Bands constitution also provides for minimum procedural requirements for removal; specifically:

If a Judge or Justice believes that grounds for removal of another Judge or Justice, they shall state the charges in writing, and distribute copies of the written charges to all members of the Tribal Judiciary, including the accused. As soon as practicable, but no more

than sixty (60) days after receipt of the written charges, the Judiciary shall hold a hearing with all members present at which the accused shall have the opportunity to call and cross examine witnesses and be represented by an attorney.

Little Traverse Bay Bands of Odawa Indians Constitution, art. XIII, § B(2)(a). The Grand Traverse Band's constitution does not provide this level of specificity, but we find the Little Traverse Bay Bands' procedural requirements helpful. Importantly, the Little Traverse requirements allow for the participation in the decision-making process of the judge that filed the statement of charges.²

Moreover, Respondent likely will suffer no injury in the continued participation of Chief Justice Roberts. As Chair of the Judicial Commission, she conducted an investigation in accordance with the Grand Traverse Band Court Rules that served to confirm the prima facie factual basis of the complaint filed by Judge Long. Judge Long's complaint, Chief Justice Roberts report to the Judicial Commission, and the Judicial Commission's Statement of Allegations are not dispositive. The fact-finding in this process will occur during the Rule 1.205(D) hearing. Moreover, as there are only three nonrecused judges remaining, Respondent must only persuade *one* judge to not vote in favor of his removal. See Article V, Section 8 ("The Tribal Judiciary may remove any judge by an affirmative vote of a *majority of all other members of the Judiciary....*") (emphasis added). Even assuming Chief Justice Roberts' impartiality could be questioned, Respondent might still prevail.

² While we are persuaded that the participation of Judge Long, who is the judge that initiated this process by filing a complaint against Judge Kern in April, is permissible, he has chosen to recuse himself in this matter.

Signed by Chief Justice Mary Roberts, on behalf of the Appellate Justices Quintin Walker and Matthew L.M. Fletcher, Tribal Judiciary (Associate Judge Michael Long recused):

Mary Roberts
Chief Justice Mary Roberts

6-3-14
Date

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
TRIBAL COURT

John A. Kern, Chief Judge
Michael J. Long, Associate Judge
Cristine Campos, Court Administrator
Dana M. Greensky, Court Clerk/Assistant Probation Officer
Eric Placer, Court Clerk/Bailiff
Pam Soffredine, Probation Officer

2605 N. West Bay Shore Drive, Peshawbestown, MI 49682
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ITMO JUDGE JOHN KERN

CASE NO. 2014-2331-CV-CV

I, Cristine Campos, being duly sworn, deposes and says that on the date below I sent by:

☒ first class mail, ☐ certified, ☐ restricted, ☐ inter-office mail, or ☒ email

addressed to their last known address by placing a copy of the same in the United States Postal Service Mail in Omena, Michigan.

Proof of mailing for: **PROCEDURAL ORDER**

To:	Court File	Original
	Justice Matthew Fletcher	Via Email
	Justice Quintin Walker	305 W Upright Charlevoix, MI 49720
	Justice Mary Roberts	Hand Delivery 6/3/2014

I declare that the statements above are true to the best of my information, knowledge, and belief.

Date: 06/03/2014

Cristine Campos
Cristine Campos, Clerk of the Court