

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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| CARMEN TAGEANT,        | ) |                       |
|                        | ) | CASE NO. C19-1082-JLR |
| Plaintiff,             | ) |                       |
|                        | ) | SEATTLE, WASHINGTON   |
| v.                     | ) |                       |
|                        | ) | September 5, 2019     |
| MICHAEL ASHBY, et al., | ) | 10:00 a.m.            |
|                        | ) |                       |
| Defendants.            | ) | MOTION FOR            |
|                        | ) | EMPLOYMENT            |
|                        | ) | CERTIFICATION         |

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE THOMAS S. ZILLY  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

|   |   |
|---|---|
| For the Plaintiff:                      | GABRIEL S. GALANDA<br>Galanda Broadman, PLLC<br>PO Box 15146<br>Seattle, WA 98115   |
| For the Defendant<br>MICHAEL ASHBY:     | THOMAS B. NEDDERMAN<br>Floyd Pflueger & Ringer PS<br>200 W Thomas Street, Suite 500<br>Seattle, WA 98119-4296   |
| For the Defendant<br>the United States: | MICHELLE R. LAMBERT<br>United States Attorney's Office<br>1201 Pacific Avenue, Suite 700<br>Tacoma, WA 98402  |
| Reported by:                            | NANCY L. BAUER, CCR, RPR<br>Federal Court Reporter<br>700 Stewart Street, Suite 17205<br>Seattle, WA 98101<br>(206) 370-8506<br>nancy_bauer@wawd.uscourts.gov |

1 September 5, 2019

10:00 a.m.

2 PROCEEDINGS

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3 THE CLERK: Case No. C19-1082, Carmen Tageant versus  
4 Michael Ashby, et al.

5 Counsel, please make your appearances for the record.

6 MR. NEDDERMAN: Tom Nedderman on behalf of defendant  
7 Michael Ashby.

8 THE COURT: Thank you.

9 MS. LAMBERT: Good morning, Your Honor. Michelle  
10 Lambert on behalf of the United States.

11 MR. GALANDA: Good morning, Your Honor. Gabriel  
12 Galanda on behalf of plaintiff Carmen Tageant. And I  
13 apologize, Your Honor. She's stuck in traffic, trying to be  
14 here along with family, and I suspect she will be here in  
15 moments.

16 THE COURT: All right. Counsel, we will proceed  
17 because, as always around here, we're on a rather tight  
18 schedule.

19 This is a motion that's brought by Chief Ashby, and,  
20 therefore, I'll hear from, I guess, Mr. Nedderman first. I'm  
21 going to ask you some questions, and then give you a brief  
22 opportunity to argue.

23 I've had an ample amount of time to review this, and I  
24 thought it was an interesting question. I have not been  
25 asked to consider this before. So know that the court has

1 read everything that you filed. I note that there was a late  
2 filing yesterday of two affidavits. They appear to pertain  
3 to a case that -- or a situation that arose quite a while  
4 ago, and I don't see where it has any bearing on the issues  
5 that are before me, which is questions of federal  
6 certification. So I wouldn't spend much time addressing  
7 that.

8 Mr. Nedderman, I'll hear from you first, please.

9 Mr. Galanda, would you like to introduce your client,  
10 since she's now arrived?

11 MR. GALANDA: Yes, Your Honor.

12 For the record, plaintiff Carmen Tageant has just arrived,  
13 and she's seated with me at counsel table.

14 THE COURT: Thank you.

15 Please proceed.

16 MR. NEDDERMAN: Thank you.

17 As you know, this is our motion to certify federal  
18 employment for Chief Ashby.

19 The background of it is, tribal employees may be deemed  
20 federal employees while --

21 THE COURT: I'm aware of the background, sir.

22 MR. NEDDERMAN: Yeah, okay. So if the court had  
23 specific questions, I guess I could address those.

24 THE COURT: Well, it seems to me that there's some  
25 things that you all agree on, and I want to make sure that

1 that's clear on the record. The first of which is, the  
2 events here occurred -- this is, apparently, on January 5,  
3 2018, and that the Nooksack Tribe Election Office is not  
4 located on the reservation.

5 MR. NEDDERMAN: That is correct.

6 THE COURT: All right. And the most recent statement  
7 of Ninth Circuit law that I can find is the *Shirk* case, which  
8 is a 2014 case. Are you familiar with that case?

9 MR. NEDDERMAN: I am familiar with the case.

10 THE COURT: Judge O'Scannlain took great privilege in  
11 rewriting the English language, drawing a bunch of very  
12 technical distinctions. But, basically, it seems to me, what  
13 that case stands for is the proposition that you need to  
14 address this in two parts. The first is, is the -- you each  
15 call it by a different name, but I'm going to call it the  
16 "638 contract," which is really the key document in this.  
17 And then, secondly, if you get by that step, then you look to  
18 the scope of employment. Is that how you read the law?

19 MR. NEDDERMAN: It is; there's two steps.

20 THE COURT: All right. So let's have you concentrate  
21 on the first step, because that seems to be where the U.S.  
22 Attorney decided that your client was not entitled to  
23 certification.

24 In the contract, as I have had the opportunity to review  
25 it, I look, first, to the statement of work in Section 2.

1 MR. NEDDERMAN: Yes. I think that's on page 12 of  
2 67.

3 THE COURT: Page 12 of 67. And it's got, as Section  
4 A, sort of a statement of purpose. Then Subsection B,  
5 "Services shall be provided in accordance with defined  
6 authority," and then it lists 12 different things that I  
7 could look to to see what is covered by the contract, what's  
8 to be enforced. And then Section C has got some exceptions  
9 to that. Neither side particularly argues that the  
10 exceptions are important, but that seems to be something else  
11 that needs to be discussed.

12 And then, finally, Section 11, which is the Federal Tort  
13 Claims Act section, and in that I found that it was  
14 subparagraph A, Federal Tort Claims Act coverage, that seems  
15 to be the key issue in this complaint.

16 So is my framework for analysis correct?

17 MR. NEDDERMAN: I believe it is.

18 THE COURT: All right. Then help me, sir, because  
19 your brief cites two bases for finding that the chief's  
20 conduct was covered, and that's on your brief in several  
21 places, but, basically, you say on page 3 that I should look  
22 at his job description, and then on page 5, that your other  
23 explanation for why there would be coverage would be standard  
24 operating procedures for the tribal officers.

25 Help me understand why either of those is a basis for

1 coverage under the contract when they're not enumerated in  
2 Section 2.

3 MR. NEDDERMAN: Well, I think I focused more in the  
4 reply on the contract itself and these exceptions that were  
5 spelled out on page 13 of 67. The statement of work, and  
6 that's really what I've focused on, it talks about "services  
7 shall provide for the protection of lives and property for  
8 persons visiting or residing within the exterior boundaries  
9 of the Nooksack Indian Reservation." So it's talking about  
10 events that happen within the reservation.

11 And then it talks about exceptions. It gives six  
12 exceptions, but not limited to those six exceptions, where --

13 THE COURT: Well, tell me, are you claiming under any  
14 of those exceptions?

15 MR. NEDDERMAN: Well, I guess the one that's the most  
16 analogous would be No. 6, where an officer would go off  
17 reservation, interview victims, witnesses.

18 Again, this -- this happened about a mile and a half off  
19 the reservation. This was the Elections Board Office. There  
20 was an election upcoming. This involved Chief Ashby  
21 protecting and securing the elections process, and also  
22 protecting the property --

23 THE COURT: I understand that, sir, but I don't see  
24 where No. 6, which is interviewing victims -- well, the  
25 alleged victim --

1 MR. NEDDERMAN: No. I guess the only point of 6 is  
2 it's off reservation, and it's an activity that relates back  
3 to something that happened on the reservation. Certainly the  
4 election is something that happens within the boundaries of  
5 the tribe, and the Elections Office just happened to be off  
6 reservation.

7 THE COURT: Well, in offenses committed in Indian  
8 territory is that particular exception. I understand the  
9 election can take place, but this is an allegation that the  
10 chief assaulted someone off reservation. That's not  
11 connected to an election in terms of -- they're not putting  
12 the election on trial; they're talking about the conduct of  
13 your client.

14 MR. NEDDERMAN: That is true, but, of course, he  
15 denies the allegations.

16 THE COURT: I understand that.

17 MR. NEDDERMAN: But the purpose of him being in that  
18 location was to protect the Elections Office, which is tribal  
19 property, as well as the elections process.

20 THE COURT: Well, interviewing --

21 MR. NEDDERMAN: I'm not saying that.

22 THE COURT: Please don't interrupt me.

23 MR. NEDDERMAN: I didn't mean -- sorry. I apologize.

24 THE COURT: Interviewing victims, that doesn't count;  
25 witnesses, that doesn't count; suspects involved or alleged

1 to be involved, that doesn't -- "in offenses committed in  
2 Indian Country," and the offense here is the alleged assault.  
3 That's, as I understand it, what's on trial in Whatcom  
4 County.

5 MR. NEDDERMAN: I'm sorry. My point was, I'm not --  
6 I guess I wasn't being clear. I'm just suggesting that there  
7 are examples given here where events happen off reservation,  
8 and I was simply pointing out that that gives an example,  
9 where an officer would be off reservation, where he would  
10 still be in the scope of his employment, and that it falls  
11 within the two-point or the two-step approach that *Shirk*  
12 evaluated, namely the first step.

13 THE COURT: Well, I was entertained by  
14 Judge O'Scannlain's careful parsing of the English language.  
15 I guess I have to give him credit for saying, you know, he's  
16 adopted the Supreme Court's view of interpretation, which is  
17 you're supposed to give meaning to all of the words that are  
18 there. In the beginning part of C, long before we get into  
19 the six examples is, "when operating within the scope of this  
20 contract."

21 MR. NEDDERMAN: Right.

22 THE COURT: Well, operating within the scope of this  
23 contract is -- how does that cover -- I mean, it's not in any  
24 of the documents that are found in part B, "Services shall be  
25 in accordance with defined authority."



1           What you argue in your briefing is that it was either the  
2 job description, or it was standard operating procedure, and  
3 I don't see either of those listed, and I don't see how you  
4 can now say, well, a clause that begins "when operating  
5 within the scope of this contract" will subsume information  
6 that's not listed in the contract, namely the job description  
7 or the standard operating procedures.

8           MR. NEDDERMAN: Well, it seems that the -- when the  
9 U.S. Attorney was ultimately deciding on whether to accept  
10 the tender, they focused simply on the location of where the  
11 event occurred. They did not dispute that he was within the  
12 scope of his employment under the contract.

13           THE COURT: I agree that was the interpretation of  
14 the U.S. Attorney, but that doesn't get you over the first  
15 step, the first hurdle, which is, you've got to be operating  
16 within the parameters of the contract, and scope of  
17 employment is, basically, limited in the scope of the  
18 contract to the enumerated documents that are found in B.

19           I've wasted a bunch of your time here. Why don't you tell  
20 me what you'd like me to know that we haven't covered yet.

21           MR. NEDDERMAN: No, I think we've covered it.  
22 Although, I mean, I haven't studied all 12 of the services  
23 provided and whether specifically he fits in within one of  
24 those 12.

25           THE COURT: I actually did, and I can't find anything

1 that suggests that. And I would think the Assistant United  
2 States Attorney, who is sitting here, would have done the  
3 same thing, and her conclusion was it's not within the scope  
4 of the contract.

5 MR. NEDDERMAN: But it certainly covers law  
6 enforcement and the protection of lives and property, and the  
7 chief of police was protecting the tribe's property.

8 THE COURT: All right. Thank you, sir.

9 MR. NEDDERMAN: Thank you.

10 THE COURT: Mr. Galanda, you're winning here. Do you  
11 want to be heard?

12 MR. GALANDA: I would, Your Honor, but I'd defer to  
13 Ms. Lambert, since she's opposed the motion in chief.

14 THE COURT: Ms. Lambert, do you want to be heard?

15 MS. LAMBERT: Does the court have any questions for  
16 the United States?

17 THE COURT: No.

18 MS. LAMBERT: Then we'll rest on our papers.

19 MR. GALANDA: Does the court have any questions of  
20 the plaintiff, Your Honor?

21 THE COURT: Well, I'd like you to respond to what  
22 Mr. Nedderman said.

23 MR. GALANDA: I'd be happy to. Thank you, Your  
24 Honor.

25 We agree with Your Honor that the *Shirk* analysis and

1 two-prong test applies. We also agree that Mr. Ashby fails  
2 to overcome the first prong. But at least indulging the  
3 analysis of both prongs, *Shirk* counsels this court to  
4 emphasize the plain language of the contract in looking at  
5 both prongs, both the contractual analysis and the employment  
6 analysis.

7 And if you read the contract, as Your Honor has, in total,  
8 you will appreciate, as I believe Your Honor has, that the  
9 scope of work of Mr. Ashby and other Nooksack police officers  
10 is confined to Nooksack Indian Country or the Nooksack Indian  
11 Reservation.

12 Sections C(a)(13) --

13 THE COURT: You need to slow down, sir. First, the  
14 court reporter is going to glare at you, and second, you  
15 won't have a transcript unless you slow down.

16 MR. GALANDA: Great.

17 So Section (C)(a)(13), (C)(b)(2)(A), (C)(2)(g),  
18 (C)(13)(c), or (C)(i)(3)(C), excuse me, or (CM), those are  
19 all provisions of the contract that expressly discuss terms  
20 of art, which are Indian Country or Nooksack Indian  
21 Reservation, and as Your Honor has already observed, it's  
22 undisputed that this did not happen either on Nooksack  
23 Reservation lands -- in fact, Mr. Nedderman just conceded it  
24 happened over a mile away from the Nooksack Indian  
25 Reservation -- nor did it happen in Indian Country as defined

1 by 18 U.S.C. 1151.

2 Looking to the second prong, this is a unique 638 contract  
3 in that just beyond the provisions and the statement-of-work  
4 provisions Your Honor has cited, there are, essentially, 33  
5 pages in a 67-page agreement that is the Nooksack police  
6 force's scope of work, which also incorporates all those  
7 other federal laws, manuals, and policies. That is a much  
8 more detailed analysis than we saw in *Shirk* or *Allender*, or  
9 any other case discussed by the parties.

10 In fact, I have -- if it's helpful to Your Honor, I have  
11 the tribe's 638 contract with IHS, which has a very general  
12 scope of work, such as provide dental assistance, provide  
13 medical assistance, provide such other medical care. Here,  
14 you have 33 pages of very specific statements or scope of  
15 work, all of which is confined to Indian Country of the  
16 Nooksack Tribe or the Nooksack Indian Reservation.

17 So turning to the second prong, you can give great weight  
18 to the scope of work that is set forth in that contract,  
19 assuming they overcome the first prong, which they don't.  
20 You can also look to the job description of Mr. Ashby, which  
21 talked about the fact that the interim police chief's  
22 authority is limited to tribal law enforcement within its  
23 jurisdiction. That's at Docket 71 at page 2, paragraph 4.

24 THE COURT: Mr. Galanda, I'm going to interrupt you.  
25 Since I'm likely not going to get to the scope-of-work issue

1 because I can't get by the first hurdle, I wouldn't spend a  
2 lot of time on it.

3 MR. GALANDA: Great. Well, I'll just conclude in  
4 saying, even if you got to the second prong, and you looked  
5 again at the 33-page statement of work, which you already  
6 have, meaning beyond just the section that we've been  
7 focusing on, or you were focusing on with Mr. Nedderman, you  
8 also look at his job description, at the defendant's  
9 invitation, and then you look at state law, and not  
10 necessarily state employment law, but you look at *Eriksen*.  
11 *Eriksen* makes plain that the Nooksack Tribal Court, in a case  
12 arising from Whatcom County -- excuse me -- the Nooksack  
13 Tribal Police, in a case arising in that jurisdiction, has no  
14 authority whatsoever off of Nooksack Indian Country or  
15 Nooksack Reservation lands. So if you got to the second  
16 prong -- I'm encouraging here you might not -- the contract,  
17 the job description itself, and state law on Mr. Ashby's  
18 jurisdiction or lack of jurisdiction would also defeat the  
19 plaintiff, or, I suppose, the moveant's burden to establish  
20 jurisdiction under *Shirk*.

21 THE COURT: All right. Mr. Nedderman, you get the  
22 last word, since you're the moving party.

23 MR. NEDDERMAN: Thank you.

24 Again, looking at Section 2, which is the statement of  
25 work, and then Section B, which talks about the various --

1 that lists the 12 different categories, and I would argue  
2 that the elections, the tribal elections falls under the  
3 Nooksack Tribe Constitution, which is number one. And I'm  
4 sure if I studied these a little more, I could find some  
5 other categories of which Chief Ashby's presence in the  
6 elections office it falls under.

7 And again, I remind the court that he was simply there to  
8 protect the property of the tribe. He was off reservation.  
9 There are exceptions to the scope with respect to it having  
10 to be in Indian Country and on the reservation.

11 And the six examples are only for -- they're not  
12 exclusive. And I believe our reply brief specifies why this  
13 falls under this contract -- why his activities fall under  
14 the 638 contract.

15 THE COURT: Thank you, sir.

16 The following will constitute the opinion of the court in  
17 lieu of a written decision:

18 We are here for defendant Ashby's motion for certification  
19 of employment, which is found at Docket No. 6. The Federal  
20 Tort Claims Act case that's before me involves an  
21 off-reservation incident in which then-interim chief of  
22 police, Michael Ashby, secured the Nooksack Tribe's Election  
23 Office, which is outside of either the reservation or Indian  
24 Country, allegedly causing damage and injury to plaintiff  
25 Carmen Tageant.

1 Ms. Tageant filed a complaint on January 10, 2018, in  
2 Washington State Superior Court for Whatcom County. The  
3 United States subsequently removed the action to the U.S.  
4 District Court for the Western District of Washington.  
5 That's found at Docket 1.

6 In terms of the law in this matter, the parties are not in  
7 dispute. A party seeking review of a denial of certification  
8 may petition the court to find that he or she was acting  
9 within the scope of their office or employment.

10 The party seeking review of a denial of certification  
11 bears the burden of presenting evidence and disproving the  
12 decision by a preponderance of the evidence. That's the  
13 *Green v. Hall* case from the Ninth Circuit in 1993.

14 My decision today is guided by the most recent opinion  
15 from the Circuit, which is not all that recent. It being  
16 *Shirk*, 773 F.3d 999.

17 The court, in reaching its conclusions, has examined all  
18 67 pages of the contract but paid special attention to  
19 Section 2, part A, being the general purpose; part B, being  
20 the defined authorities which are to be followed, which are  
21 defined as "defined authority, procedures, and guidelines,"  
22 and therefore, in effect, 12 of them listed; and then, C,  
23 some exceptions to the scope of work, which involve,  
24 basically, outside of Indian Country.

25 Both sides agree that the real battleground in this is

1 Section 11(a), which reads, for purposes of FTCA coverage,  
2 the contractor, which, in this instance, the tribal police,  
3 and its employees, including individuals performing personal  
4 services contracts with the contractor to provide health care  
5 services -- and I believe this is really the critical  
6 language -- are deemed to be employees of the federal  
7 government while performing work under this contract.

8 It seems to me that the plaintiff in this matter, which  
9 technically would be -- I guess I should say the defendant in  
10 this matter, which would be Chief Ashby, confuses these two  
11 concepts. The first is Section 11(a), which says, "Under the  
12 contract," and repeatedly in the briefing, Chief Ashby argues  
13 that's scope of employment.

14 As counsel has noted in their reply in response to  
15 arguments raised by the plaintiff, there is an effort to try  
16 and say, Well, there is, this work was being performed under  
17 the contract. I can find no support for that. It's outside  
18 the reservation, it's outside Indian Country, and saying that  
19 it's in his job description or it's standard operating  
20 procedure somehow loops it back to be under Section 2 is  
21 simply not factually or legally supportable.

22 The last question left for me, then, is the language  
23 that's in 2(c), which are a series of exceptions. A careful  
24 examination of those exceptions is guided by the guidance  
25 given to me, that I should not allow the exceptions to



1 consume the specific detail of the contract.

2 Those different situations talk about traveling and  
3 transporting off reservation, and the one that, perhaps,  
4 arguably, gets closest is No. 4, traveling to and from Indian  
5 Country to service facilities located outside Indian Country.  
6 But, once again, that language is "traveling to and from."  
7 It doesn't say once you get off or outside Indian Country  
8 that you continue to have federal employment or federal  
9 designation.

10 Therefore, it is the decision of this court that the  
11 motion to certify is denied. I order this case to be  
12 remanded to Whatcom County, and the federal action is  
13 dismissed with prejudice.

14 That will constitute the ruling of the court.

15 Mr. Nedderman, it was your motion. Do you have anything  
16 further you wish to address?

17 MS. LAMBERT: I do not, Your Honor.

18 THE COURT: All right. Ms. Lambert?

19 MS. LAMBERT: No. Thank you, Your Honor.

20 THE COURT: Mr. Galanda?

21 MR. GALANDA: Your Honor, will that ruling be  
22 reflected in some sort of minute order in the docket?

23 THE COURT: It will simply say that the motion is  
24 denied for the reasons stated during the hearing.

25 MR. GALANDA: Thank you, Your Honor.

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THE COURT: If there's nothing further, we will be in recess.

(The proceedings concluded at 10:28 a.m.)

## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 5th day of September 2019.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter