



NHBP TRIBAL COURT

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

2221 1½ MILE ROAD • FULTON, MI 49052
P: 269.729.5151 • F: 269.729.4826

Tribal Court Case No. 13-043-CV

TERRY A. CHIVIS
Plaintiff In Pro Per
2020 ½ Mile Road
Fulton, Michigan 49052

v.

WILLIAM J. BROOKS (P43014)
Attorney for the Defendants
2221 1 ½ Mile Road
Fulton, Michigan 49052
269-729-5151

OPINION AND ORDER

At a session of said Court held in the Courthouse of the
Nottawaseppi Huron Band of the Potawatomi Tribal
Court on the Pine Creek Reservation on the 18th day of
June 2013

Honorable Melissa L. Pope Presiding

INTRODUCTION

The Plaintiff filed his Complaint against the Nottawaseppi Huron Band of the Potawatomi ("NHBP") Tribal Council and the Tribal Chairman under Article X §2(a) of the NHBP Constitution. He argues that the provisions in the NHBP Bereavement Benefit Plan ("Code") that specifically exclude the families of two named Tribal Members from receiving benefits under the Code violate the NHBP Tribal Constitution.

The Defendants have filed a Motion to Dismiss based on several grounds including, but not limited to, sovereign immunity and the failure to state a claim upon which relief can be granted. In addition, the Defendants argue that the provisions excluding the Plaintiff from benefits under the Bereavement Benefit Plan are constitutional.

RECIEVED

AUG 27 2013

JURISDICTION

The present case involves constitutional challenges to the Bereavement Benefit Plan, a legislative enactment of the NHBP Tribal Council. The jurisdictional issues presented in this case are discussed in the Analysis sections of this Opinion and Order.

STATEMENT OF FACTS

As stated in the Defendants' Motion to Dismiss and Memorandum of Points and Authorities ("Defendants' Motion to Dismiss"), "[i]n many material aspects, defendants have admitted the factual allegations contained in plaintiff's complaint." (Defendants' Motion to Dismiss at 3) This Statement of Facts reflects what appears to this Court to be the facts as agreed upon by the parties. Quotations and references to pleadings submitted to the Court are referenced throughout this section, in particular where there are differences in the pleadings as to the facts.

On February 23, 2011, RuthAnn Chivis, the Plaintiff's wife and respected Elder of the NHBP, walked on.

The NHBP contracted FireKeepers to cater the luncheon following the funeral with the cost being \$7,500.00 (See Defendants' Answer to Complaint with Special/Affirmative Defenses with Attachments, hereinafter "Answer"). The Plaintiff states that "he did know that a luncheon was going to be held for his wife. However, he did not request such luncheon be held. Plaintiff did not expressly or tacitly accept the Band's offer to host ("pay for") the luncheon as alleged by Defendants." (Plaintiff's Response to Defendants' Motion to Dismiss at 2) The Defendants state that Defendant Mandoka had at least one (1) conversation with Plaintiff at which time assistance was offered and Plaintiff responded that assistance with the meal at the memorial service would be helpful." (Answer at 15)

The Plaintiff states that "[s]everal months after the luncheon Tribal Chair, Homer Mandoka, had a conversation with the Plaintiff and informed the Plaintiff that the luncheon cost \$7,000.00 and requested that the Plaintiff pay him that amount. The Plaintiff refused to pay the Tribal Chair because he did not request the luncheon, did not plan it, and never would have spent that sum of money on a luncheon even if he did request it." (Complaint at page 2) The Plaintiff goes on to state that "the Tribal Chair informed the Plaintiff that if the Plaintiff would not pay for the luncheon he would have to take out a personal loan to pay for it." (Complaint at page 2)

The Defendants deny this allegation, but admit “that Defendant Mandoka had a subsequent conversation with Plaintiff at which time Defendant Mandoka informed Plaintiff that he was willing to assume personal responsibility for reimbursing the Band for the cost associated with the meal provided at the memorial service.” (Answer at 3)

On or about January 19, 2012, the Tribal Council adopted the Nottawaseppi Huron Band of the Potawatomi Bereavement Benefit Program (“Code”) which was amended on or about February 16, 2012. The families of Ruth Ann Chivis and Laura W. Spurr are specifically excluded from benefits in the Code. The details of this exclusion are discussed in the Analysis sections of this Opinion and Order.

The Defendants “admit that Defendant Mandoka voluntarily agreed to reimburse the Band for certain amounts the Band (sic.) for Ruth Ann Chivis’ memorial service.” (Answer at 4) The Defendants submitted copies of two mileage reimbursement checks issued to Defendant Mandoka. In the order provided in the exhibit, the first check, dated June 14, 2012, was in the amount of \$3,832.00. The second, dated March 7, 2012, was in the amount of \$2,468.36. (Defendants’ Motion to Dismiss, Exhibit 2)

A fundraiser was held on or about June 22, 2012. The Plaintiff states that he “had no knowledge of the fund raiser until after it has occurred and played no role in it.” (Complaint at 3) The Defendants’ state that “Defendant Mandoka, on his personal time and with his personal funds, sponsored a spaghetti dinner and committed to applying the funds raised to reimburse the Band for costs incurred with Ruth Ann Chivis’ memorial services.” (Answer at 4) The Defendants do not state the amount of money, if any, was raised through this fundraiser or what happened to the funds raised.

In his Complaint, the Plaintiff provided receipts for expenses he incurred for the funeral of RuthAnn Chivis.

Although no specific dates were alleged, the Plaintiff states and the Defendants acknowledge, that the “Plaintiff has spoken to individual members of the Tribal Council and that no action to approve the Plaintiff’s request for payment of bereavement benefits to him has been taken.” (Answer at 5)

The Plaintiff submitted his Complaint in this case on or about January 25, 2013.

The Defendants submitted the Defendants’ Answer to Complaint with Special/Affirmative Defenses on or about February 15, 2013.

A Pretrial Hearing was held on March 13, 2013. Both parties appeared. The Defendants indicated that they would be filing a Motion to Dismiss. The parties agreed to submit a stipulated scheduling order.

On March 13, 2013, the parties submitted, and the Court entered, a Stipulated Scheduling Order. This Order set the briefing schedule for the Defendants' Motion to Dismiss with Oral Arguments scheduled for May 31, 2013.

On or about May 1, 2013, the parties submitted a Stipulation and Order to Amend Scheduling Order to provide the Pro Per Plaintiff additional time to respond to the Defendants' Motion to Dismiss. The Order stated that the Court would provide a new date for Oral Arguments, with that date being after June 12, 2013. The Court signed and entered this Order on May 1, 2013.

On May 30, 2013, the Court entered an Order of Adjournment and New Motion Hearing Date. The Court incorrectly identified that the trial, rather than Oral Arguments, was being adjourned. However, it stated correctly that Oral Arguments on the Respondents' Motion to Dismiss would be held at 10:00 a.m. on Tuesday, June 18, 2013.

Oral Arguments on the Defendants' Motion to Dismiss were held on June 18, 2013. Both parties appeared and presented arguments, as well as submitted briefs in support of their positions prior to the Hearing.

ANALYSIS OF COMPLAINT AGAINST THE NHBP TRIBAL COUNCIL

This has been a particularly difficult case to consider and decide. As stated at Oral Arguments, it involves several questions of law requiring significant analysis that will have a long-term impact on this Nation. These decisions on questions of law, however, will also have a very personal impact on a family who is challenging the Bereavement Benefit Plan in relation to a loved one who has walked on.

In the present case, the Plaintiff, the husband of RuthAnn Chivis, has brought suit under Article X § 2 of the NHBP Constitution. In his Complaint, he makes constitutional challenges to the Code that exclude the families of RuthAnn Chivis and Laura W. Spurr from receiving the bereavement benefits specified in the Code.

The Defendants filed a Motion to Dismiss and Memorandum of Points and Authorities ("Defendants' Motion to Dismiss") which included several arguments in support of their Motion.

Shortly after the Hearing on the Defendants' Motion to Dismiss, the case of *TenBrink and TenBrink v. NHBP and NHBP Election Board* was argued before the NHBP Supreme Court. One issue in the *TenBrink* case involved the authority of the Court to review the constitutionality of legislative enactments. As such, this Tribal Court waited for the release of the NHBP Supreme Court Opinion in the *TenBrink* case to provide guidance in the present case. The Opinion was issued on July 15, 2013 and will be discussed in this Opinion and Order.

As previously noted, the motion before the Court is the Defendants' Motion to Dismiss. The Tribal Court has previously ruled on motions to dismiss. As such, it is not a matter of first impression. However, the facts of this case have not been previously addressed. The Court, therefore, shall seek guidance from other jurisdictions where appropriate.

A motion to dismiss is governed by Chapter 5, Section 27(B) of the NHBP Tribal Court Rules of Civil Procedure:

A party against whom a claim, counter-claim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in its favor as to all or any part of a claim.

The NHBP Court Rules provide that a motion for summary judgment shall be granted unless the non-moving party has "set forth specific facts showing that there is a genuine issue for trial". NHBP Court Rule Chapter Five, Section 27(E)

The Defendants correctly state in their Motion to Dismiss that Chapter 5, Section 27(B) of the NHBP Tribal Court Rules of Civil Procedure is similar to the Michigan Court Rules (MCR). MCR 2.116 provides the requirements and considerations for a motion for summary disposition.

The Defendants argue that they are entitled to dismissal pursuant to MCR 2.116(C)(8) which states that "a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted."

In the present case, the Plaintiff has brought suit under Article X of the NHBP Tribal Constitution which states in pertinent:

Section 2. Authorization of Suits against Officials and Employees of the Band.

- a) Officials and employees of the Band shall be subject to suit if
 - 1. The suit is brought in the Band's Tribal Court.
 - 2. The suit is against such officials or employees in their official capacity;
 - 3. The suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief;
 - 4. The suit seeks to enforce legal rights and duties established by this Constitution and by the laws of the Band.

The Defendants argue that this action should be dismissed because Article X, § 2(a)(3) requires that "the suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief." The Plaintiff responded to this argument by stating that "[t]he suit does not seek monetary damages but merely seeks to enforce legal rights and duties established by the Constitution by virtue of an injunction." (Plaintiff's Response to Defendants' Motion to Dismiss at 3)

As noted in the Defendants' Motion to Dismiss, numerous courts have held that sovereign immunity bars the awarding of money, regardless of how the claim or argument is framed. The Defendants cite *Kirkwood v. Decorah* in the Ho-Chunk Nation Supreme Court which provides in pertinent part:

The granting of such relief would constitute compensation for a past statutory violation, which directly equates with a legal claim for monetary damages. The Court may not consider this option due to the absence of any express waiver of sovereign immunity from suit. CONST., ART. XII, § 1. The U.S. Supreme Court has 'refused to extend the reasoning of [*Ex Parte*] *Young* ... to claims for retroactive relief,' and this Court joins in this refusal. *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). A court cannot enjoin the occurrence of a past action, and simply identifying the manner of relief as equitable is both disingenuous and of no consequence. *Edelman v. Jordan*, 415 U.S. 651, 666, 94

S.Ct. 1347, 39 L.Ed. 662 (1974). This distinction between retroactive and prospective relief proves vitally important when adjudging a suit in equity. *Quern v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). *Kirkwood v. Decorah*, 6 Am. Tribal Law 188, 202.

This Court includes the full quotation for two reasons. The first is to demonstrate the full reasoning of the Ho-Chunk Supreme Court. The second is to show three different cases in which the United States Supreme Court considered this issue.

The Plaintiff did not provide, nor could this Court identify, any authorities for reaching a different conclusion. As such, this Court holds that the injunctive relief sought by the Plaintiff is, in fact, a request for monetary relief. Therefore, the Plaintiff's claim does not meet one of the requirements for bringing an action under Article X, § 2(a)(3) of the NHBP Constitution. For reasons to be discussed in this Opinion, however, the inquiry does not end here.

The Defendants also argue that they are entitled to a dismissal pursuant to MCR 2.116(C)(7) which provides in pertinent part:

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

- (7) Entry of a judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In relation to the facts of the present case, the Defendants argue that they are entitled to dismissal pursuant to MCR 2.116(C)(7) because immunity is granted by law pursuant to Article X of the NHBP Tribal Constitution which states the following with regard to sovereign immunity:

Section 1. Tribal Immunity

- a) The Nottawaseppi Band of the Potawatomi, as a sovereign Indian Nation, is immune from suit in all forums except to the extent that immunity is expressly waived in accordance with this Article.

The Code does not contain an express waiver of sovereign immunity. The Defendants, therefore, argue that the NHBP Tribal Court does not have subject matter jurisdiction because there is not an express waiver of sovereign immunity in the Code. While the Defendants are correct that this matter is barred by sovereign immunity and that the Plaintiff has not met the requirements to bring suit against the Tribal Council to obtain the relief sought, the recent decision in *TenBrink* appears to mean that the discussion does not end here.

TenBrink involved an appeal of a decision of the NHBP Election Board to remove four candidates¹ for the NHBP Tribal Council from the ballot for the April 27, 2013 election. The candidates were removed for violating certain provisions of the NHBP Election Code. After the ballots were mailed, the Pro Per Plaintiffs challenged these provisions as restricting the freedom of assembly and the freedom of speech in violation of the NHBP Constitution. They initially requested that the Court issue an Advisory Opinion declaring that the challenged portions of the NHBP Election Code were unconstitutional and that the candidates be returned to the ballot. A Hearing was held where the Pro Per Plaintiffs and the Defendants appeared and made arguments before the Court. The Plaintiffs did not present any factual evidence nor did they request that a transcript or recording of the January 31, 2013 NHBP Election Board proceedings be entered into evidence. The Trial Court denied the preliminary injunction for the Plaintiffs' failure to establish the four-part test for a preliminary injunction adopted by the NHBP Supreme Court in *Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, No. 12-005APP (NHBP S. Ct. Feb. 21, 2012). The Plaintiffs, by and through their newly retained attorney, filed a Motion for Reconsideration which the Trial Court denied. The Trial Court held that the absence of factual evidence prevented the Court from ruling on the constitutionality of the Code. The Plaintiffs appealed. The NHBP Supreme Court held that the section of the NHBP Election Code at issue was "contrary to the NHBP constitution and has no force and effect." (*TenBrink and TenBrink v. NHBP and NHBP Election Board*, No. 13-078-CV/TRO and 13-079-CV/TRO at 10 (NHBP S. Ct. July 15, 2013)). The Supreme Court did not void the election, in part because the Plaintiffs had filed their initial Complaint after the ballots had been mailed and did not file a challenge after the election was held.

¹ The NHBP Election Board held a Hearing on January 31, 2013. There were four candidates who were removed from the ballot. Of these four individuals, three filed suit in Tribal Court. One of the cases was dismissed with prejudice for failure to appear. The two remaining individuals filed an appeal to the NHBP Supreme Court.

Important to this case is that the NHBP Supreme Court struck down a portion of the NHBP Election Code even though it held that the relief requested by the Plaintiffs could not be granted. Although not expressly stated as such, this Supreme Court decision appears to support that the NHBP Tribal Court has the power of judicial review.

The concept of judicial review first appeared in *Marbury v. Madison*. The Court stated:

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. *Marbury v. Madison*, 5 U.S. 137 at 177-178, 1 Cranch 137, 2 L. Ed. 60 (1803)

The concept of judicial review was eloquently explained by then Chief Justice Charles Evan Hughes when he gave an address while laying the cornerstone brick for the U.S. Supreme Court building:

The Constitution of the United States is a carefully balanced document. It is designed to provide for a national government sufficiently strong and flexible to meet the needs of the republic, yet sufficiently limited and just to protect the guaranteed rights of citizens; it permits a balance between society's need for order and the individual's right to freedom. To assure these ends, the Framers of the Constitution created three independent and coequal branches of government. That this Constitution has provided continuous democratic government through the periodic stresses of more than two centuries illustrates the genius of the American system of government.

The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions

which, in the Court's considered judgment, conflict with the Constitution. This power of 'judicial review' has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a 'living Constitution' whose broad provisions are continually applied to complicated new situations. See Supreme Court of the United States, About the Supreme Court, The Court and Constitutional Interpretation (<http://www.supremecourt.gov/about/constitutional.aspx>)

Within this explanation and the court cases of the United States, is the foundational belief, affirmed since the founding of the country, that the U.S. Constitution is the supreme law of the land. This Court finds that this is also the case with the NHBP Tribal Constitution for this Nation.

The NHBP Constitution embodies the Bode'wadmi values of this Nation. It affirms the sovereignty held since long before the arrival of European countries trying to claim the land for their crown or the establishment of the United States. It articulates the responsibilities of those elected to serve the people. It guarantees rights of its citizens. It defines the jurisdiction of the Nation.

The recognition of the NHBP Constitution as the primary source of authority for the Nation can be found in numerous places. One such place is legislation enacted by the NHBP Tribal Council. Take, for example, the Code in question here. The Code provides in pertinent part:

Sec. 1. Creation of Nottawaseppi Huron Band Bereavement Benefit

1.01. *Creation.* A tribally sponsored bereavement benefit for members of the Nottawaseppi Huron Band of the Potawatomi is hereby established.

1.02. *Findings.* The Tribal Council of the Nottawaseppi Huron Band of the Potawatomi finds that:

- a. the Constitution of the Nottawaseppi Huron Band delegates to the Tribal Council the responsibility to adoption of resolutions and laws not inconsistent with the Constitution to promote, protect and provide for public health, peace, morals, education and general welfare of the Band and its members.

Within this short excerpt, the NHBP Tribal Council affirms that the authority and responsibility to adopt resolutions and laws for the benefit of the Nation is derived from the Constitution, as well as acknowledges that the resolutions and laws adopted must be consistent with the Constitution.

The importance of the NHBP Constitution has been affirmed by this Tribal Court in its earliest decisions to present day. “The People of the Band have established courts of general jurisdiction. See Tribal Constitution of the Nottawaseppi Huron Band of Potawatomi, Article X, Section 1.” (*Capitano v. Tribal Council of the Nottawaseppi Huron Band of Potawatomi*, No. 07-002-CV at 1-2, December 10, 2007) “To determine whether the NHBP Tribal Council has denied due process in these removal proceedings, we must first turn to the NHBP Tribal Constitution.” (*Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council*, No. 11-228TRO at 3, December 16, 2011) “We begin, as we must, with the Constitution.” (*Spurr v. Nottawaseppi Huron Band of the Potawatomi Tribal Council, Plante Moran LLP, and Tribal Election Board*, No. 12-005APP at 3, February 21, 2012) “The care of its members, including within the context of Bode’wadmi values, traditions and beliefs, is established throughout the NHBP Constitution.” (*Kent County Friend of the Court v. Day*, Numbers 12-142CS/PC through 12-146CS/PC at 7, June 26, 2013) “Although the Court may look to other jurisdictions for persuasive authority, the proper place to begin matters of first impression is with the NHBP Constitution.” (*In re K*, No. 13-123-GM at 3, July 11, 2013)

With the understanding that the NHBP Tribal Constitution is the foundational law for this Nation from which the authority of the branches of government is derived, the affirmation in NHBP Tribal Court and NHBP Supreme Court decisions establishing that legislative enactments cannot conflict with the NHBP Tribal Constitution and the recent decision in *TenBrink* that permits constitutional challenges to legislative enactments regardless of whether the original or amended relief can be granted, it is clear that it is the responsibility of the NHBP Tribal Court to review legislative enactments to determine whether they are constitutional when challenged within the laws of the NHBP and the Court Rules of the NHBP. The Court notes in formalizing judicial review that this does not mean that suits can be filed and sustained simply because a plaintiff has said the challenged legislative enactment violates the Constitution. The claims must be legitimate, meaning that the plaintiff must have a real interest or stake in the outcome of the lawsuit.

Based on all of the above, it is the responsibility of this Court to review the challenged provisions to determine if they are constitutional. In the present case, the Plaintiff's constitutional challenges all stem from two provisions in the Code that exclude the families of two individuals. There are two references to these individuals in the Code that provide in pertinent part:

Section 2; Amendment; Repeal; Severability

2.04. Effective Date. This benefit was established by this Code is effective as of the date of adoption by resolution # 01-19-12-09; provided that the benefit provided under Section 4.01 shall be retroactive to January 1, 2010. The retroactive application of the benefit established by 4.01 of this Code is specifically intended to ratify and confirm bereavement-type benefits received by the families of Laura W. Spurr, and RuthAnn Chivis to cover expenses associated with the memorial services for those individuals; however, nothing in this Code shall obligate the Band to provide additional bereavement benefits to the families of those individuals.

Section 4. Amount.

a. Retroactive Benefits.

- 2) For any other Tribal Council Member, other than those individuals referenced in Section 2.04, bereavement benefits in the amount of \$7,500.00 shall be paid in accordance with the procedures/criteria described in Section 6.02.

The Court shall first address the allegation that the Code violates Article VII, Section 1(a)(9) which states:

Section 1 – Individual Rights.

a) The Band, in exercising the powers of self-government, shall not:

9. Pass any legislation, directed against a designated person, pronouncing him/her guilty of an alleged crime, without trial or conviction or ex post facto law, which retroactively changes the legality or consequences of a

fact or action after the occurrence of that fact or
commission of the act

The Plaintiff argued that the naming of Laura W. Spurr and RuthAnn Chivis in the Code violates Article VII § 1(a)(9) because it is “directed against a designated person”. This constitutional provision, however, must be read within the full context of the paragraph. The remainder of the paragraph specifically prohibits legislation that is directed against a person that pronounces the individual guilty of an alleged crime, without a trial or a conviction or “ex post facto law,” also referred to as a retroactive law or a law “after the fact.” An example of this would be if the Tribal Council passed a law that stated a Tribal Member was guilty of a crime even though they had not had a trial, had not been convicted, or the act they engaged in was not a crime at the time they engaged in it. As such, this constitutional challenge to the Code fails. The Court notes that it does not find that the Plaintiff tried to mislead the Court by not providing the full paragraph in his Complaint. The Plaintiff presented the provision as he understood it and as he thought it should apply as a Pro Per Plaintiff.

This Court shall next address the Plaintiff’s allegation that the Code violates Article VII §1(a) of the NHBP Constitution. This Article states:

Section 1 – Individual Rights.

- a) The Band, in exercising the powers of self-government, shall not:
 - 8. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law

In other jurisdictions, a Court will determine the level of scrutiny with which to analyze whether a law violates the constitution of that jurisdiction. The majority of jurisdictions have adopted three levels of scrutiny when reviewing legislative enactments: strict scrutiny; heightened or intermediate scrutiny; and the least stringent level of scrutiny, the rational basis test.

The strict scrutiny test is defined in Black’s Law Dictionary as follows:

Under this test for determining if there has been a denial of equal protection, burden is on government to establish necessity of the

statutory classification. *Poulous v. McMahan*, 250 Ga. 354, 297 S.E.2d 451, 454. Measure which is found to affect adversely a fundamental right will be subject to 'strict scrutiny' test which requires state to establish that it has compelling interest justifying the law and that distinctions created by law are necessary to further some governmental purpose. *In re Valenti*, 2 Dist., 178 C.A. 3d 470, 224 Cal.Rptr. 10, 12.

As stated by the Defendants, strict scrutiny is generally applied when there is a classification of citizens based on "suspect factors", such as race, national origin, religion or 'a fundamental right' – such as voting or loss of citizenship." (Defendants' Motion to Dismiss at page 11, referencing *Jacobson v. Eastern Band of Cherokee*, ---Am. Tribal law ---, 2005 WL 6437829 (Eastern Cherokee Ct); *Harvey v. Michigan*, 469 Mich 1, 6-7; 664 NW2d 767 (2003)). The Eastern Cherokee Court uses the same test as outlined in the Black's Law Dictionary, requiring that the government must demonstrate that its classification has been precisely tailored and it must serve a compelling governmental interest. *Jacobson* at 5.

The next strictest level of scrutiny is often referred to as either intermediate or heightened scrutiny. The Court in *Harvey* states in pertinent part:

The United States Supreme Court has recognized an intermediate level of review, between strict-scrutiny and rational-basis review, under which a challenged statutory classification will be upheld only if it is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). This "heightened scrutiny" standard has been applied to legislation creating classifications on such bases as illegitimacy and gender...However, where a challenged statute is substantially related to an important state interest, the statute should be upheld. *Mills*, *supra* at 98-99[, 102 S.Ct. 1549]. [*Crego*, *supra* at 259-261, 615 N.W.2d 218.] *Harvey* at 771.

This heightened scrutiny provides an "intermediate level of scrutiny that lies [b]etween [the] extremes of rational basis review and strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L. Ed. 2d 465 (1988). "Intermediate scrutiny typically is used to review laws that employ quasi-suspect classifications . . . such as gender, *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), or [il]legitimacy, *Mills v. Habluetzel*, 456 U.S. 91, 98–99, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982)." (*Kerrigan et al v. Commissioner of Public Health*

et al., 289 Conn. 135, 957 A.2d 407, 422-423 (October 28, 2008)) The Court notes that quasi-suspect classifications are not limited to gender and illegitimacy. While they are the primary examples of quasi-suspect classifications, some courts have included other factors, such as sexual orientation. (See generally *Kerrigan et al v. Commissioner of Public Health et al.*) As such, circumstances requiring intermediate scrutiny require more than dismissing this level of scrutiny if illegitimacy or gender is not involved.

The Black's Law Dictionary provides the following definition for the rational basis test:

Under this test, an appellate court will not second guess the legislature as to the wisdom or rationality of a particular statute if there is a rational basis for its enactment, and if the challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective. The same test may be applied when a court is reviewing a decision of an administrative body because of the expertise of such body. It has been said that the protection of the public from unwise or improvident statutes is to be found at the voting polls or by referendum, not in court. *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77. This test does not apply, of course, if the statute or decision is unconstitutional.

As a standard of review for statutory enactments challenged on equal protection grounds, this test requires that classifications created by a state must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Aladdin's Castle, Inc. v. City of Mesquite, C.A.Tex.*, 630 F.2d 1029, 1039.

The *Harvey* case provides a compilation of holdings that are helpful in this case. The Court states in pertinent part:

Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v. Employment Security Comm.*, 410 Mich. 231, 271, 301 N.W.2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable.

Shavers v. Attorney General, 402 Mich. 554, 613-614, 267 N.W.2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v. State Farm Mut. Automobile Ins. Co.*, 404 Mich. 524, 542, 273 N.W.2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra*. *Harvey* at 770.

The NHBP Supreme Court discussed strict scrutiny in *TenBrink*. It stated that "[o]ther tribal courts apply strict scrutiny to government action burdening individual speech." (*TenBrink* at 7). The Court went on to state that "[o]nce the court determines an action by the tribal government is inconsistent with the NHBP constitution, the tribal government must establish it has a compelling interest in restricting speech and that the limitation is narrowly tailored to meet the tribal government's interest." (*TenBrink* at 8). The discussion and holding in *TenBrink* indicates that this Court should apply the three levels of scrutiny adopted in other jurisdictions when determining whether a legislative enactment at the NHBP is constitutional.

The specific exclusion of the families of Laura W. Spurr and RuthAnn Chivis gives pause as it is unusual for the names of individuals to appear in legislation. However, this classification does not involve suspect factors, such as race, national origin or religion. It also does not involve a fundamental right. Although the Code clearly provides a benefit to Tribal Members, such benefits are not fundamental in nature. The benefits in the Code were established by legislation. As such, and unlike fundamental rights, they can be eliminated by legislation. Other Tribal courts have also explored this issue and reached the same conclusion. For example, in *Maney v. Maney*, the Cherokee Supreme Court held that per capita benefits were not fundamental rights. *Maney v. Maney*, --- Am. Tribal Law ---, 2005 WL 6438072, May 10, 2005 (Eastern Cherokee Sup. Ct.) As the Code's exclusion of Laura W. Spurr and RuthAnn Chivis does not involve suspect factors or a fundamental right, strict scrutiny is not the appropriate level of review.

The exclusion of the two named individuals also does not fit the criteria for heightened scrutiny. To apply the intermediate level of scrutiny, there needs to be some indication of a quasi-suspect class. The Plaintiff did not identify any factors, such as gender, that would indicate that these two individuals comprise a quasi-suspect class. "Plaintiff fell within a distinct, albeit small, class – family of Tribal Leaders for whom the Tribal Council had

authorized the expenditure of public funds to cover expenses associated with the funeral/memorial services held for those individuals.” (Defendants’ Motion to Dismiss at 6) It is important to note that there must actually be a quasi-suspect class in order to apply the intermediate level of scrutiny.

Based on the discussion thus far, the Court must apply the rational basis test to the facts of the present case. Under rational-basis review, the burden is on the Plaintiff to show that the legislation is “arbitrary and wholly unrelated in a rational way to the objective of the statute.” The NHBP Tribal Council stated in their pleadings and at Oral Arguments that the purpose of the Code is to provide to all Tribal Members the benefits that were provided to Laura W. Spurr and RuthAnn Chivis. The Code states that “[t]he retroactive application of the benefit established by 4.01 of this Code is specifically intended to ratify and confirm bereavement-type benefits received by the families of Laura W. Spurr, and RuthAnn Chivis to cover expenses associated with the memorial services for those individuals.” The Defendants state that “[a]lthough plaintiff (and even Court) might disagree with the Tribal Council’s judgment in this regard, it cannot be said that the Council’s decision to treat plaintiff differently under the Program Code was unrelated to the purposes sought to be promoted in providing retroactive benefits to certain families.” (Defendants’ Motion to Dismiss at 12).

The Defendants are correct that the provisions challenged in this case meet the rational basis test. As such, the Court must uphold the Code. The Court acknowledges that the circumstances have changed since the enactment of the Code, specifically that Defendant Mandoka paid the Nation for the majority of the costs associated with the memorial luncheon. As such, the NHBP did not, in fact, pay for RuthAnn Chivis’ memorial luncheon. Since these donations were made after the enactment of the Code by Tribal Council, the legislative intent expressed in the Code was true at the time of adoption.

The Defendants stated at Oral Arguments that, in enacting the Code, they wanted to treat all Tribal Members with the same respect that had been shown Laura W. Spurr and RuthAnn Chivis to honor the traditional values of the Nation.

The NHBP Constitution establishes the Guiding Principles in the NHBP Tribal Constitution:

Article II § 2(b)

Guiding Principles. In exercising the jurisdiction and sovereign powers of the Band, the Tribal Council and other institutions of the Band's government shall be guided by the following principles:

1. Promote the preservation and revitalization of Bode'wadmimen and Bode'wadmi culture

One aspect of Bode'wadmi culture is the Seven Grandfathers' Teachings. The NHBP Tribal Council has stated it is honoring these Teachings by showing respect, one of these Teachings, through the offering of the same bereavement benefits to all Tribal Members.

In upholding these provisions as constitutional, the Court notes that the reason given by the Defendants for excluding the family of RuthAnn Chivis, that paying bereavement benefits to the family would result in the receipt of double benefits by the family since the NHBP paid for the memorial luncheon, is now not only not true, it has resulted in the family not being treated in the same manner or with the same respect as the families of all other Tribal Members who have walked on.

In the present case, it can be argued that the Plaintiff received the same benefit as other families of Tribal Members as the cost of the memorial luncheon was equal to the benefits under the Code and paid by the Nation. However, unlike the families of other Tribal members who have walked on, the Plaintiff was not able to apply the funds to the costs he incurred, meaning he bore a burden the other families did not.

With the majority of costs associated with this memorial luncheon repaid to the Nation by Defendant Mandoka after the enactment of the Code, and the Plaintiff still not entitled to receive any assistance under the Code with the funeral expenses he paid, it is difficult to see how the Code still fulfills the original intent "to ratify and confirm bereavement-type benefits received by the families of Laura W. Spurr, and RuthAnn Chivis to cover expenses associated with the memorial services for those individuals" or to treat all Tribal Members with equal respect.

ANALYSIS OF COMPLAINT AGAINST NHBP TRIBAL CHAIRMAN, HOMER A. MANDOKA

In his Complaint, the Plaintiff named Defendant Mandoka in addition to the NHBP Tribal Council. The Defendants argue that the Plaintiff's claims against Defendant Mandoka are not permitted under Article X § 2(b)(3) for the same reasons as they are not permitted against the

NHBP Tribal Council, specifically that the Plaintiff seeks monetary relief. The Defendants state the following in footnote 6 of their Motion to Dismiss:

Admittedly, plaintiff's suit also names the Council Chairperson, Homer A. Mandoka, in his individual official capacity. Defendants also acknowledge that plaintiff may seek to amend his complaint to name all of the current and/or future members of the Tribal Council in their official capacities, which would appear to overcome the Band's claim to absolute immunity Section 1 of Article X. Nevertheless, for the reasons stated in Section IV of this Memorandum, plaintiff's claims seeking monetary damages against Chairman Mandoka, or other members of the Tribal Council (or other Tribal government officials) in their official capacities, are barred by Article X § 2(b)(3). (Defendants' Motion to Dismiss at page 7)

While it is true that monetary relief from the public treasury is prohibited by Article X § 2(b)(3), what is not clear and what has not been addressed by this Court in other cases or by the parties in the present case, is whether a Tribal official can be held personally liable in certain circumstances.

In *Scheuer v. Rhodes et al*, the U.S. Supreme Court held that an official can be personally liable in some circumstances:

While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman v. Jordan, supra*; *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U. S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U. S. 459 (1945); *Great Northern Life Insurance Co. v. Real*, 322 U. S. 47 (1944), damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. *Myers v. Anderson*, 238 U. S. 368 (1915). See generally *Monroe v. Pape*, 365 U. S. 167 (1961); *Moor v. County of Alameda*, 411 U. S. 693 (1973). *Scheuer v. Rhodes et al*, 416 U.S. 232 at 238 (1974).

In taking all of the facts as stated by the Plaintiff as true as required when considering a motion to dismiss, the Plaintiff was offered assistance from the NHBP by Defendant Mandoka with the luncheon at the Memorial Service for RuthAnn Chivis, but did not request that the luncheon be provided and did not know that such a large amount of money would be spent on the luncheon. The latter is supported by the Plaintiff having contracted members of the community

to provide additional food for a potluck, the type of luncheon he anticipated based on his experiences and a common practice in many American Indian communities.

The memorial luncheon provided by the NHBP was contracted through FireKeepers with a total cost of \$7,500.00 (See Answer and Attachments). Both parties indicated that Defendant Mandoka arranged for FireKeepers to cater the luncheon. It can be reasonably deduced that this authorization by Defendant Mandoka was due to his position as the NHBP Tribal Chairman.

The paying of this cost appears to have resulted in significant criticism of the NHBP Tribal Council. The Defendants stated that it was this criticism that served as the catalyst for enacting the Code. This criticism also appears to have been a catalyst for Defendant Mandoka making personal financial donations to the Nation to help cover the costs of the luncheon. (See: Complaint and Exhibit B; Answer; Defendants' Motion to Dismiss; and Plaintiff's Response to Defendants' Motion to Dismiss)

In his Complaint, the Plaintiff alleged the following:

The Plaintiff learned that on June 22, 2012 a fund raiser was held at the Band's community center to cover the costs of his wife's luncheon. The Plaintiff has no knowledge who initiated and planned the fund raiser, how much was raised or what was done with the funds that were raised. The Plaintiff had no knowledge of the fund raiser until after it has occurred and played no role in it. To the best of Plaintiff's knowledge and believe (sic.) the fund raiser was held by Homer Mandoka. (Complaint at page 3)

In their Response to the Complaint, the Defendants confirmed that Defendant Mandoka held a fundraiser to help cover the costs of the memorial luncheon:

Notwithstanding, Defendants admit that Defendant Mandoka, on his personal time and with his personal funds, sponsored a spaghetti dinner and committed to applying the funds raised to reimburse the Band for costs incurred in connection with RuthAnn Chivis' memorial services. (Answer at page 4)

As such, both the Plaintiff and the Court had confirmation that this fundraiser was held and that it was sponsored by Defendant Mandoka. The Plaintiff states in pertinent part in the Plaintiff's Response to Defendants' Motion to Dismiss:

A fund raiser was held at the Band's Community Center to cover the costs of RuthAnn Chivis' luncheon. To the best of the Plaintiff's believe (sic.) Defendant, Homer Mandoka, sponsored this event. If a fund raiser was held for the costs of Plaintiff's deceased wife the assumption by those attending and donating funds would be that the funds would go [to] RuthAnn Chivis' family. Even though Plaintiff did not request, or even tacitly approve, of the Band's payment of his wife's luncheon, he believes that any funds that were received over and above the cost of the luncheon should rightfully go to him, as RuthAnn Chivis' heir. However, if Defendant Mandoka is allowed to keep funds over and above the cost of the luncheon he is in fact receiving a benefit to which he is not entitled. (Plaintiff's Response to Defendants' Motion to Dismiss at pages 7-8)

The actions taken by Defendant Mandoka, some as the NHBP Tribal Chair and some as a private citizen, are problematic. If these actions were undertaken by Defendant Mandoka as a private citizen, then there is no protection from liability. If these actions were undertaken as the NHBP Tribal Chair and authorized by the NHBP Tribal Council, then the defense of sovereign immunity may be available to him.

Defendant Mandoka's actions raise five fundamental questions that need to be addressed before the Court can render a decision.

1. How the fundraiser was advertised;
2. Whether a reason person would believe the proceeds were going to the Chivis family, the NHBP treasury or Defendant Mandoka;
3. Whether a reasonable person would believe that if this was being held by Defendant Mandoka as the Tribal Chairman or by Defendant Mandoka as a Tribal Member, independent of his position as the Tribal Chairman;
4. What actually happened to any proceeds that were raised; and
5. Who should be entitled to any proceeds that were raised?

These questions are the preliminary inquiries as we move towards a discussion and analysis of the complicated issues before the Court, all of which are matters of first impression. They are also questions that have not been addressed by the parties. Finally, they are questions that need to be addressed in relation to factual evidence.

In taking all of the Plaintiff's allegations as true as required by the NHBP Court Rules when considering a motion to dismiss, there are genuine issues of material fact in this case with regard to the claims against Defendant Mandoka to resolve at trial.

CONCLUSION

The Complaint against the NHBP Tribal Council is dismissed on two grounds. First, the Plaintiff's claim against the NHBP Tribal Council is not properly brought under Article X, § 2(a)(3) of the NHBP Constitution as the injunctive relief sought by the Plaintiff is, in fact, a request for monetary relief. Second, the claim is barred by sovereign immunity as the Bereavement Benefit Plan does not expressly waive sovereign immunity as required in Article X of the NHBP Tribal Constitution.

Pursuant to the NHBP Supreme Court decision in *TenBrink*, the Court has the responsibility of judicial review to determine whether a legislative enactment violates the NHBP Constitution.

With the understanding that the NHBP Tribal Constitution is the foundational law for this Nation from which the authority of the branches of government is derived, the affirmation in NHBP Tribal Court and NHBP Supreme Court decisions establishing that legislative enactments cannot conflict with the NHBP Tribal Constitution and the recent decision in *TenBrink* that permits constitutional challenges to legislative enactments regardless of whether the original or amended relief can be granted, it is clear that it is the responsibility of the NHBP Tribal Court to review legislative enactments to determine whether they are constitutional when challenged within the laws of the NHBP and the Court Rules of the NHBP.

Article VII § 1(a)(9) prohibits the enactment of legislation that is "directed against a designated person" in criminal, not civil, matters.

In determining the constitutionality of a legislative enactment, the Court shall apply strict scrutiny, intermediate scrutiny or rational basis scrutiny as the circumstances require. In the present case, the Court applied the rational basis test as the individuals excluded from the Code did not constitute a suspect class or a quasi-suspect class. The Plaintiff failed to meet his burden of showing that the challenged provisions in the Code are "arbitrary and wholly unrelated in a rational way to the objective of the statute."

The actions of Defendant Mandoka raise several issues that need to be tried in order to determine liability. In taking all of the allegations as true as required under the NHBP Tribal Court Rules when considering a motion to dismiss, there are genuine issues of material fact sufficient to go forward to trial.

IT IS HEREBY ORDERED:

1. The claims against the NHBP Tribal Council are dismissed with prejudice;
2. Using the rational basis test, the provisions in the Bereavement Benefit Code that exclude the families of Laura W. Spurr and RuthAnn Chivis do not violate the NHBP Tribal Constitution as they are not arbitrary and wholly unrelated in a rational way to the objective of the statute;
3. The claims against Defendant Mandoka shall go forward to trial; and
4. A second Pre-Trial Conference shall be held at 10:00 a.m. on Tuesday, September 17, 2013.

8-27-2013

Date

Melissa L. Pope

Hon. Melissa L. Pope, Chief Judge

CERTIFICATE OF MAILING

I certify that on this date I mailed copies of the *Opinion and Order* to the above parties by ordinary first-class mail addressed to their last known addresses as stated above with proper postage affixed.

8/27/2013

Date

R. Scott Ryder

R. Scott Ryder, Tribal Court Administrator

RECEIVED

AUG 27 2013

NHBP TRIBAL COURT