

Delaware Tribal Court

601 High Street
Caney, Kansas 67333

The Delaware Tribe of Indians,
Plaintiff

Case No. CIV-15-002

v.

Paula Pechonick,
Defendant.

OPINION AND ORDER AFTER TRIAL

Delaware Tribe of Indian
170 NE Barbara
Bartlesville, OK 74006

Paula Pechonick
210 NE Barbara
Bartlesville, OK 74006

Factual and Procedural History

On March 6th of this year, the Tribal Council initiated this lawsuit by filed a complaint against the former elected Chief, Paula Pechonick, which alleged fraud and violation of the Delaware Constitution. The dispute concerns three employment contracts. While serving as Chief, Ms. Pechonick signed employment contracts on October 1, 2014 with Jim Creed, Beau Watt and Nathaniel Scullawl on behalf of the Delaware Tribe of Indians (Tribe) and Delaware Facilities Maintenance Services (DFMS). The question we have been asked to determine is whether Ms. Pechonick exceeded her authority as Chief under the Constitution by signing these contracts in the absence of recorded Council action.

This Court issued a summons on March 10th giving Ms. Pechonick the opportunity to file a written answer to the complaint. On March 19th Ms. Pechonick was served a copy of the complaint and summons. Ms. Pechonick filed an Answer on April 7 in which she stated that the employment contracts “were entered into under the authority of the administration seated October 1, 2014, just as any other contracts which continue to be valid, per the Constitution and Bylaws” and alleged that the seated Tribal Council had directed the execution of the contracts.

On April 29 this Court issued a scheduling order setting the date for exchange of witness list, discovery, motion hearings and trial. It was mailed to the defendant certified mail. On May 19, 2015 the mailing to Paula Pechonick was returned to the court as undeliverable after three attempts were made in May. The court immediately resent the mailing regular first class mail to the above address.

On May 29, this Court issued a Notice of Intent to disallow any testimony in this case because neither party had submitted witness lists to the court and gave the parties an extension until June 8. This Court mailed copies of the Notice to both parties via first class mail. The Tribe submitted a witness list but the defendant did not.

A trial was held on June 27. The Tribe orally moved this court for an order of default because of the absence of Ms. Pechonick and the court took the request under advisement. The Court reviewed its records and determined that Ms. Pechonick was properly notified of the date and time of the hearing and no request for a continuance had been received. It was determined that the hearing would proceed. In addition, it was reported to the court by Ms. Pechonick's children, Beau Watt and Jenifer Pechonick, who were at the hearing, Paula Pechonick was aware of the hearing date and time but had another obligation and was not available. We have authority to hear this dispute under Article XII of the Tribe's Constitution. The Court heard testimony from Assistant Chief Bonnie Jo Griffith, Beau Watt, former Council member Jenifer Pechonick, Chief Chester Brooks, and Council member Dr. Nicky Kay Michael.

While serving as Chief, Ms. Pechonick signed employment contracts on October 1, 2014 with Jim Creed, Beau Watt and Nathaniel Scullawl on behalf of the Tribe and DFMS, a wholly owned subsidiary of the Tribe that was initially under DEA. According to the contracts, Jim Creed was employed as the CEO, Beau Watt as Document Retention clerk, and Nathaniel Scullawl as the Maintenance Supervisor for DFMS under the Tribe. Under the contracts, Jim Creed had been compensated at \$55,000 per year, Beau Watt at \$33,630 and Nathaniel Scullawl at \$40,600. Within the contracts there was a provision that if they were fired before the expiration of the five year term, they were to be compensated for a year's salary. Jim Creed's contract also contained a provision where he would be paid a 10% commission of gross sales by DFMS to Kroger/Dillon's Companies.

As Jenifer Pechonick and Chester Brooks testified, the tribe was in the process of seeking 8(a) status for DFMS at time the contracts were signed. At the time of entry, all three were

already employees of the DFMS and Jim Creed had a prior 2012 contract in place. According to Jenifer Pechonick, the contracts were executed as part of the 8(a) application. These three were the only DFMS or tribal employees to have any form of written employment contract at that time. Beau Watt is the son of former Chief Paula Pechonick and Jim Creed is the significant other of one of her children. According to testimony, however, Nathaniel Scullawl, although a Delaware tribal member, was not a particularly close relation or friend of the former Chief.

It was undisputed that the Tribal Council did not take recorded action (motion or resolution) to authorize these contracts. Assistant Chief Bonnie Jo Griffith testified that she had reviewed the approved minutes for August, September and October as well as the recordings of the council meetings and the contracts were not put to a vote or even raised during discussion. What is less clear is whether the council members had attempted to designate authority in a less official way. Paula Pechonick, in her written answer, stated that she had been directed by Council to enter into these contracts. Former Council member Jenifer Pechonick testified that Tribal Council had made such direction known during "workshops." Beau Watt testified that it was his understanding from individual Council members (Jenifer Pechonick, Janifer Brown, Verna Crawford, Annette Ketchum and Paula Pechonick) that Council members had given Paula Pechonick the authority during these workshops. The plaintiff put forward a different resuscitation of the history. Chief Brooks testified that he does not remember this authority ever being unofficially designated to Paula Pechonick during these workshops and that he had not missed a single workshop during this timeframe.

The Tribe had an election and on November 8, 2014, a new Chief was seated as well as a number of new tribal Council members. Shortly thereafter Jim Creed, Beau Watt and Nathaniel Scullawl's employments were terminated. Sometime after that the Tribal Council decided to dismantle DFMS. In January of 2015, the Tribe received demand letters from attorneys for these three terminated employees asking for a year's worth of compensation for each of the three pursuant to the contracts.

We also heard testimony about Kroger issuing three checks in December of 2014 and January 2015 to DFMS Commercial Properties Management for work performed by DFMS (totaling \$3,255.00) after the three had been terminated but before DFMS had been dismantled. The checks were deposited into an account the Tribe could not access and it is believed to have

been controlled by Jim Creed. No testimony was provided that Paula Pechonick was a signatory on this account or that she was aware of any moneys being deposited into it.

Analysis

We have jurisdiction to hear this case as it is a dispute between the current Tribal Council and the former Chief regarding the legality of actions she took while in office. Article XII of the Delaware Tribal Constitution specifically gives the court authority “to hear and resolve any disagreements arising under any provisions of this Constitution or any civil or criminal acts against the Tribe, members or persons under the jurisdiction of the Delaware Tribe.” Second, tribal courts are courts of general jurisdiction and, like state courts, tend to have subject matter jurisdiction over most disputes. Third, while the defendant was Chief, the tribal council, via ordinance, granted this court the authority to “exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Delaware Tribe of Indians, the Indian Civil Rights Act of 1968, as amended, and any specific restrictions or prohibitions contained in Federal law.” Civil Procedure, 13-102.

The Delaware Constitution recognizes two bodies of government – the Court and the Council. The Tribal Council serves as both the legislative and the executive bodies. Article I, Section 1 of the Bylaws spells out the authority of the Chief, making it very clear that the Chief position is a part of the Council and not a separate branch of government: “The Chief of the Tribal Council, hereinafter referred to as the Council, shall preside over all meetings of the Council, perform all duties of a Chairman and exercise any authority given him specifically by the Council or by a General Council of the Tribe. The Chief shall have the power to vote.” In April of 2014, this Court was called upon to interpret this provision of the Constitution in *Brooks v. Pechonick* and ruled that the Chief did not have authority to terminate contracts over the objections of the Tribal Council.

We are asked to resolve a slightly different question here. It is undisputed that there was no official vote of the Council authorizing these contracts. We must determine how authority to act may be designated to the Chief by the Council. Does it require an official action or can instructions be made in a less formal way? During the trial, the Court questioned more than one witnesses about how common of a practice it was for the Council to delegate authority to the Chief without official Council action being taken. A number of witnesses indicated it was

common under the prior administration for Council members to express approval short of votes during Council meetings. Further, Chief Brooks volunteered that he himself had taken action on a recent federal contract with the Tribal Council's knowledge and support but the delegation itself fell short of official vote.

Even if the practice of informal delegation of power is not uncommon, the language of the Bylaws is instructive. Article II, Section 5 reads "Matters of business for the Council shall be decided by a majority vote." Accordingly, anything less than a motion or resolution cannot transfer Council authority to the Chief. As a result, the Chief did not have the authority to enter into these employment contracts on behalf of the Tribe because even if council members had instructed her to do so during the workshops, it was not sufficient to properly designate the authority. Under the Constitution, the Chief can only sign contracts when explicitly authorized by the Council pursuant to a vote.

It is concerning to the Court that this practice seems not uncommon under both the prior and current administrations. We once again suggest to the Council that there is a real need for Constitutional reform. Short of that, we ask that the Council either pass a resolution or ordinance designating clear authority to the Chief to act in its place or as an executive branch in particular, limited situations.

The Tribe asks for restitution in the amount of \$3,255.00 to cover the checks issued by Kroger for work performed by DFMS. This issue appears to the Court to be outside of the scope of the original complaint concerning the legality of the employment contacts and would be an action more properly brought as a separate legal action against a different party. Through the discovery process (subpoenas, depositions, etc.), the Tribe would be better able to present a more complete picture of who controlled the account into which the checks were deposited and where the moneys went from there.

The Tribe also asked for damages to cover any legal expenses incurred possibly defending against the enforcement of these contacts or other expenses. We believe granting this request is appropriate given that Ms. Penchonic was put on notice regarding this concern in *Brooks v. Pechonick*. The Tribe did not present evidence on any damages incurrent to date although given the opportunity. Should the Tribe incur any expenses from this date forward concerning these contracts, this Court would entertain a motion to reopen this case to receive evidence on this issue.

Dated: July 7, 2015



Judge Cameron Ann Fraser
on behalf of a three judge panel consisting of
Judge Charles Randall
Judge Rick Barnes