IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In the Order entered in this matter on July 17, 1992, we left open the question of whether our Order, granting the Plaintiff the right to participate in the "per capita" payments made by the Defendant Shakopee Mdewakanton Sioux Community ("the Community") to various persons, could and should be retroactive to some date. We established a briefing schedule on those questions, and now have reviewed the written materials submitted in response and heard the argument of the parties.

We today hold that this Court does have the authority to make a retroactive award of per capita payments, and that while it is not appropriate to exercise that authority to the full extent sought by the Plaintiff--that is, it is not appropriate to award

the Plaintiff payments retroactive to December 29, 1988, the date that Ordinance No. 12-29-88-002 was adopted by the Community--it is appropriate to award payments retroactive to the date upon which this action was filed.

Discussion

In response to the Court's request for the parties' views, excellent briefs were filed by both counsel. The parties agreed that this Court has the inherent authority to make retroactive awards of damages, and we concur.

The Community suggested, however, that given the terms of Ordinance No. 12-29-88-002, the Court might lack the authority to fashion a remedy that would implement a retroactive award in this case. Specifically, the Community expressed doubt that monies legally could be found, under Ordinance No. 12-29-88-002, to make a retroactive payment. The Community observed that the Ordinance establishes a Development Reserve, where presumably monies exist, but correctly noted that the Ordinance prohibits the use of those monies for per capita payments. And the Community noted that, absent the adoption of welfare programs, and save for another reserve account which could be established to permit payments at a previously budgeted level, the remaining amount of net proceeds must be distributed in equal payments to the persons entitled to receive them.

In short, the Community argued that to accomplish a retroactive payment to the Plaintiff, the Court would be obliged to direct the General Council of the Community to adopt amendatory legislation--a power which the Community asserted this Court lacks.

In the Court's view, however, it will not be necessary for the Court to direct that any Ordinance or Resolution of the Community be amended, in order to provide for a retroactive award. If the Community had made an administrative mistake in the distribution of its proceeds in a given month, it unquestionably could correct that mistake in a future month without violating the Business Proceeds Distribution Ordinance. For example, if the Community failed to issue a per capita distribution check to a person who should have received it in a given month, as a result of a bookkeeping or computer error, and if in that month all proceeds available for per capita payments were paid out to the other eligible recipients and therefore none remained to pay the injured person, the Community would have the authority to correct that error in the future. The persons who received payments in the previous month actually would have received more than their share, because some part of their checks reflected an amount which should have gone to the injured person. Therefore, an adjustment to correct mistakes would be an implementation of Ordinance 12-29-88-002, not a violation of it. Similarly, here, to make a retroactive award to Mr. Ross would require not an amendment of the Business Proceeds Distribution Ordinance, but merely its correct implementation.

But this analysis goes only to the Court's power to order that Mr. Ross receive retroactive payments. It does not decide the appropriateness of such an order in this case.

As to that, we believe it is appropriate to look to the law pertaining to retroactivity of Constitutional decisions as it generally is applied in non-Indian contexts. The Community

correctly noted in its brief that the law in this area is murky, and that the United States Supreme Court, in James B. Beam Distilling Co. v. Georgia, 115 L.Ed.2d 481 (1991), recently failed to illuminate the case law in any significant way.

Clearly, though, a decision based on Constitutional grounds need not always be retroactive in its effect, Chevron Oil Co. v. Hudson, 30 L.Ed.2d 296 (1971). And a three part test as to when non-retroactivity apparently should obtain. Established in Chevron, it appears to be as follows:

> 1. The decision to be applied non-retroactively, i.e. prospectively, must establish a new principle of law, either by overruling a past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
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> 2. The court must examine the prior history, purpose, and effect of the rule in question to determine whether retrospective operation will further or retard its operation; and
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> 3. The court must determine whether retroactive application would impose inequitable results or substantial injustice.
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> 30 L.Ed.2d, at 306.

The Community has argued that, as to the first part of this test, our July 17, 1992 decision was one of first impression, and that it was not foreshadowed by other actions of the Court. The argument is that the Community had no way to know what was in store for it.

As to the second part of the test, the Community notes that Mr. Ross now is receiving per capita payments, and that the Community has no reserves in the amount of $250,000.00--which is the amount the Community asserts would be owing to Mr. Ross, should our decision be made retroactive to December 29, 1988, the date on

which Ordinance No. 12-29-88-002 was adopted.

As to the third part of the test, the Community argues that retroactive application of our decision would take resources from the Community government which otherwise would be used to benefit the Community as a whole.

To the Court, however, the second and third factors in the Chevron test do not operate in the manner suggested by the Community. The point of our July 17, 1992 decision was that when the Community removed its residency requirements for persons who had been receiving the payments in the past, but permitted the effect of the residency requirements to continue for persons who had not been receiving them, and in so doing the Community acted inconsistently with Article VI of its Constitution. So, for the period from December 29, 1988 to the present, the persons who were receiving payments were benefitting at Mr. Ross' expense, in a manner that was inconsistent with Article VI. The fact that Mr. Ross now is receiving payments does not eliminate that injury; and if the Community receives somewhat less, for a period of time, and Mr. Ross receives somewhat more, in our view that does not impose inequitable results, but instead eliminates them.

The first Chevron factor--which essentially goes to the predictability of the result in this case--is another matter. The Community is correct in observing that this case was one of first impression, and that before it was filed there was nothing which foreshadowed its outcome. This Court had been created, and its doors were open to Mr. Ross or to any others who believed they were similarly situated; but until someone raised the issue presented by

List C of Ordinance No. 12-29-88-002, the Community can truly be said to have been without warning. Until this case was filed, on January 3, 1991, the Community had not been put on notice that there might be a flaw in the manner in which per capita payments were being made.

Therefore, we decline to award Mr. Ross any payments for the period from December 29, 1988 through January 3, 1991, when this case was filed. However, in our view matters were different, once Mr. Ross formally made his claim. The Community at that point could not reasonably suggest that it was not on notice that Mr. Ross believed he was being treated in a manner that was consistent with the Community's Constitution; and although the manner in which Mr. Ross pleaded his case was not precisely the manner in which this Court decided it, in our view the simple pendency of the case, and the absence of any strong argument to justify the distinction made between Mr. Ross and persons who were receiving per capita payments, provided sufficient foreshadowing to justify an award retroactive to the initiation of the case.

We are fully aware that, even though the retroactivity we are giving the award here is limited, it still must be dealt with carefully; and we note that it may be appropriate to extend the payment of the award over a period of time. We therefore direct that counsel for the parties arrange with the Clerk of Court for a conference--preferably, a conference that is simultaneous with the one we are today directing in Welch and Vig v Shakopee Mdewakanton Sioux Community, No. 022-92--to discuss the most appropriate manner for the implementation of the award.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant Shakopee Mdewakanton Sioux Community shall pay to the Plaintiff an amount equal to the per capita payments the Plaintiff would have received, had he been receiving such payments from January 3, 1991 to the date in 1992 that he began to receive payments. Such amount shall include interest at the rate of 3.25% compounded monthly, and shall be paid in accordance with a schedule to be established by the Court after consultation with the parties.

2. Counsel for the parties are directed to contact the Clerk of Court, to establish a date for a conference with the Court, to facilitate the establishment of a schedule for the payment of the award.

Date: June 3, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

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