IN THE TRIBAL COURT OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

LOWER SIOUX INDIAN RESERVATION STATE OF MINNESOTA

David Larsen,

Petitioner,

Case No. C[illegible]

vs.

Lower Sioux Community Council,

Respondent.

FINDINGS OF FACT, MEMORANDUM OF DECISION AND ORDER

Petitioner David Larson filed an appeal pursuant to Section 5.9 of the Lower Sioux Indian Community Enrollment and Membership Privilege Ordinance (the "Enrollment Ordinance"), challenging Lower Sioux Indian Community Resolution No. 10-166, whereby the Community Council found he had ceased to maintain residency within the Community Area for a period of two consecutive years and is no longer a Qualified Member of the Lower Sioux Indian Community.

An initial hearing was held in this matter on March 25, 2011. At the hearing, the attorney for the Community Council, Shawn Frank, motioned the Court to remand the matter for further proceedings before the Enrollment Committee because of "procedural irregularities ... that would be fatal to the Community's ability to defend its actions," in light of a recent decision from the Lower Sioux Indian Community Tribal Court of Appeals. In an Order dated March 31, 2011, this Court remanded the matter back to the Enrollment Committee for further proceedings consistent with the *Wabasha v. Lower Sioux Indian Community Council*, Court File No. APP. 10-002 (LSIC Tr. Ct. App. May 2011).

Another hearing was held before the undersigned on August 26, 2011. Petitioner Larsen appeared pro se, along with his spouse Valerie Larsen. Joyce Pendleton, Chair of the Enrollment

Committee, also spoke on Larsen's behalf. Sarah Van Norman appeared on behalf of the Community Council, along with Kateri O'Keefe, the Enrollment Clerk. After hearing arguments from the parties, the Court took the matter under advisement.

The Court now issues the following Findings of Fact, Memorandum of Decision, and Order:

Findings of Fact

1. On May 7, 2010, the Clerk of the Enrollment Committee sent a letter to Larsen, the entire text of which stated as follows:

> The Enrollment Committee has some questions about your residency status, they would like to meet with you on June 9, 2010 at 3:30 p.m. This will be your chance to submit any evidence regarding your residency for the past two (2) years. Feel free to contact me at the Enrollment Office 507-697-6185 if you have any questions.

2. The May 7, 2010 letter was followed by two other letters from the Enrollment Committee to Larsen (dated June 4, 2010 and July 14, 2010 respectively), in which the Enrollment Committee rescheduled the hearing date and again advised him to bring any information he had concerning his residency for the past two years.

3. At an August 4, 2010 hearing before the Enrollment Committee, Larson testified that:

- his daughter and her family lived in his house for approximately 1 ½ years; and
- he had taken a temporary position at the University of Minnesota in Mankato the previous spring, had been asked to take on the position full time and had accepted, but would quit the job if the Committee felt it was necessary.

4. In a recommendation to the Community Council dated August 6, 2010, the Enrollment Committee stated in relevant part:

> The Committee voted to remove his membership privileges, the vote resulted in a split decision 3 REMOVE and 2 DO NOT REMOVE. After much thought Tammy Lund has attached a letter stating that she has decided to change her vote to DO NOT REMOVE, changing the vote tally to 2 REMOVE and 3 DO NOT REMOVE.

5. In Lower Sioux Indian Community Resolution No. 10-166, the Community Council, without citing to any specific evidence, found that a preponderance of the evidence supported the conclusion that Larson had failed to maintain residency for a period of two consecutive years, even though a majority of the members of the Enrollment Committee found to the contrary.

6. Following the Court's March 31, 2011 remand, the Enrollment Committee sent another letter to Larsen, which provided in relevant part:

> Based on day-today observations of the Enrollment Committee, a question has arisen as to whether you have maintained residency within the Community Area for a period of two consecutive years, as required by the Constitution and the Enrollment and Membership Privileges Ordinance. Specifically, because the Committee has reason to believe that your daughter and her family were living in your home for a period of two years or more.
>
> The Enrollment Committee has scheduled a final hearing regarding your residency status for one of three dates, April 6, 2011 at 11:15 a.m. or April 20, 2011 at 10:15 a.m. or May 4, 2011 at 10:15 a.m. At the hearing, you will have the opportunity to present the Enrollment Committee with any evidence or testimony that you believe is relevant to establishing your continued residency within the Community Area for the two years in question. The hearing will be your only opportunity you will have to present evidence or testimony, so please bring all relevant evidence to your hearing.

7. Larsen met with the Enrollment Committee on May 4, 2011 and provided the following documentation:

- Larsen's W-2 Forms from the State of Minnesota for 2007-2010, showing his address as 32765 Reservation Highway #4, Morton, Minnesota 56270;

- Larsen's 2010 1099-MISC from the Lower Sioux Indian Community, showing his address as 32765 Res Hwy 4, Morton, MN 56270;

- A letter to Larsen from the Minnesota Department of Corrections dated February 4, 2009, concerning his volunteer work at MCF - Shakopee, showing his address as 32765 Res Hwy 4, Morton, MN 56270;

- Three partial bank statements from MINNWEST BANK, M.V. dated 1/09/08, 12/09/09, and 12/08/10, showing Larsen's address as 32765 Res Hwy 4, Morton, MN 56270;

- Two notices from the Minnesota Department of Public Safety, the first notifying Larsen that his driver's license was cancelled for failure to submit a satisfactory physical exam report, and the second providing a notice of reinstatement, dated February 2, 2009 and April 3, 2009 respectively, both showing his address as 32765 Res Hwy 4, Morton, MN 56270;

- A May 2009 renewal notice from the Minnesota DVS showing his address as 32765 Res Hwy 4, Morton, MN 56270;

- Players Card information from Jackpot Junction Casino in Morton, Minnesota showing 46 days of play for Larsen in 2008, as well as 42 days of play in 2009, and 86 days of play in 2010;

- A letter to Larsen from American Family Insurance Group dated December 16, 2008, showing his address as 32765 Reservation Highway 4, Morton, MN 56270; and

- A letter from Xcel Energy to Larsen's daughter, Terri Schemmel, dated May 6, 2011, verifying that the service for 32765 Reservation Highway 4, Morton, MN had been in her name between 01/18/2008 and 12/29/2009.

8. In a recommendation dated May 5, 2011, the Enrollment Committee notified the Community Council that it had voted 3-2 in favor of Larsen going "back to Court."

9. For some reason not reflected in the record, on June 21, 2011, the Enrollment Committee revisited the issue of whether Larsen should "go back to Court" and the new vote was 4-1 in favor of going back. The 4 members voting in favor of going back to Court felt Larsen

"didn't have enough evidence," whereas the other member pointed out that the only evidence the Committee had before it was that Larsen's daughter had moved out of the house at 32765 Reservation Highway 4, Morton, Minnesota, 20 days before the two years was up.

10. In a recommendation dated June 21, 2011, the Enrollment Committee notified the Community Council that:

> After meeting with David, the Committee voted on whether David should take his case back to Tribal Court and the vote was 4-1. One Committee Member feels that the original decision should be overturned.

11. The Court heard uncontroverted testimony from Larsen at the hearings on March 25, 2011 and August 26, 2011 that:

- He lived at 32765 Reservation Highway 4, Morton, Minnesota all along, and was "never gone two years;"
- He did take a position at MSU Mankato, but this was only 65 miles away from the Reservation;
- He allowed his daughter and her family (including 4 children and a niece) to live in his home at 32765 Reservation Highway 4, Morton, Minnesota, because she did not have a place to live and such sharing is the traditional Dacotah way;
- During the time his daughter lived in his home, he would stay there sometimes, but would often stay at the casino or the Morton Inn because the home was small and overcrowded; and
- His daughter lived in his home for less than two years.

12. The Court heard uncontroverted testimony from Valerie Larsen at the hearing on August 26, 2011 that:

- Larsen has resided on the Reservation all of his life, except during Viet Nam when he was in the Navy;
- Although Larsen took a position at MSU Mankato, he did not intend to leave the Community and in fact, did not leave the Community;

- Larsen's daughter lost her home, so he allowed her to live in his home at 32765 Reservation Highway 4, Morton, Minnesota, along with her 4 children and her niece; and

- During the time Larson's daughter lived in his home, he often chose to stay at the inn in Morton or at the Casino hotel because the house was overcrowded.

13. The Court heard uncontroverted testimony from Joyce Pendleton (Chair of the Enrollment Committee) at the hearing on August 26, 2011 that:

- She personally knows that Larsen lives on the Reservation because they share grandchildren together; and

- She knows for a fact that Larson has not lived away from the Reservation because "she see's him all the time ... at Jackpot, the grocery store ... everywhere."

14. There is documentary evidence in the record reflecting that the power to the home at 32765 Reservation Highway 4, Morton, Minnesota was in the name of Larsen's daughter from January 18, 2009 to December 29, 2009, which is less than two full years.

Memorandum of Decision

I. Burden of Proof.

In this appeal, Larsen bears the burden of proof to rebut by clear and convincing evidence, the presumption that he had ceased to maintained residency within the Community Area for two consecutive years and is thus no longer entitled to membership privileges. *See* Enrollment Ordinance at Section 5.9 (person appealing has the burden of demonstrating decision of the Community Council was clearly erroneous).

However, it is equally important to keep in mind that there is a different standard of proof applicable to the proceeding before the Enrollment Committee that results in a recommendation to the Community Council. *See Wabasha*, Court File No. APP. 10-002 at 10. In any challenge to residency under the Enrollment Ordinance, the party challenging residency bears both the

burden of production and the burden of persuasion, and the decision of the Enrollment Committee must be supported by a preponderance of the evidence. *Id.* at 10-13.

II. Due Process.

As a general rule, due process requires reasonable notice and a meaningful opportunity to be heard. *In re C.W. Mining Co.*, 625 F.3d 1240, 1244-45 (10th Cir. 2010) (*citing LaChance v. Erickson*, 522 U.S. 262, 266 (1998)). In the context of residency challenges under the Enrollment Ordinance, this means:

> ... If the Enrollment Committee believes that it has received credible evidence, either from a petition received by another qualified member or from such other source as the Enrollment Committee considers sufficient, that a Qualified Member has ceased to maintain residency within the Community Area for a period of two consecutive years, then the Enrollment Committee shall investigate the residency of the member. *The Enrollment Committee shall provide written notice to the Member whose residency is being challenged, summarizing the evidence that has prompted the Enrollment Committee's inquiry, and specifying a hearing date, at least thirty days after the date of the notice, at which time the member may provide the Enrollment Committee with any evidence or testimony that the challenged member deems relevant.*

Enrollment Ordinance, Section 5.3 (emphasis added).

In the instant case, there was a failure to meet both the notice requirements and the hearing conduct requirements of the Enrollment Ordinance. This was further exacerbated by the Community Council's finding that a preponderance of the evidence supported removing Larson, when the majority of the Enrollment Committee initially found to the contrary and when a preponderance of the evidence clearly favored Larsen. The problems with the case against Larsen are briefly cataloged below.

The Enrollment Committee sent four different letters to Larsen (three prior to the remand and one thereafter), none of which were sufficient to comply with the notice requirements of

Section 5.3. The first letter dated May 7, 2010, merely advised Larson that the Enrollment Committee "has some questions about your residency status." The next two letters, dated June 4, 2010 and July 14, 2010, simply informed Larsen that the Enrollment Committee "would still like to meet with you to discuss your residency status." The Court of Appeals has made clear that such notices are completely inadequate. *Wabasha*, Court File No. APP. 10-002 at 5.

The record contains little information about exactly what took place at the subsequent hearing before the Enrollment Committee on August 4, 2010, since there is no transcript of the proceeding. However, what information we do have from the Enrollment Committee's summary does appear to support the Committee's 3-2 vote in favor of Larsen maintaining his membership privileges (i.e., a preponderance of the evidence showed that Larsen had not ceased to maintain residency for a period of two consecutive years).

Although the Community Council cited this 3-2 vote in favor of Larson in Resolution 10-166, it still went on to make a finding that a preponderance of the evidence is supportive of the conclusion that Larsen had not made the Community Area his permanent home. There is simply nothing in Resolution 10-166 supportive of this conclusion, and the Community Council lists no evidence it relied upon in its decision to disregard the recommendation of the Enrollment Committee.

When Larsen appealed Resolution 10-166 and the matter came up for an initial hearing before this Court, Mr. Frank basically asked the Court to give the Enrollment Committee and Community Council an opportunity to fix the procedural irregularities that had taken place. This request was granted when the Court remanded the matter for further proceedings consistent with the *Wabasha* case. However, the aforementioned parties did not take advantage of this

opportunity.

The April 1, 2011 notice to Larsen merely cited the generic "day-to-day observations of the Enrollment Committee," and the more specific allegation that "the Committee has reason to believe that your daughter and her family were living in your home for a period of two years or more." This letter clearly failed to put Larsen on notice that the Enrollment Committee had received and investigated a challenge to his residency, that it considered the challenge to be based upon credible evidence, and that a potential outcome of the meeting with the Committee could be a loss of membership privileges.

When Larsen met with the Enrollment Committee again on May 4, 2011, he provided the Committee with significant written evidence (detailed in Finding of Fact # 7 above) showing that his home address during the time-frame of 2007-2010 was 32765 Reservation Highway 4, Morton, Minnesota, clearly within the Community Area. Once again, it is difficult to know exactly what took place at this hearing, but presumably there was at least some discussion of Larsen's position that his daughter had lived in his home less than two years, as supported by the evidence submitted showing that the Excel Energy bill had been in his daughter's name for less then 24 months.

Despite the significant evidence submitted by Larson that was supportive of his position that 32765 Reservation Highway 4 was his home and that he had never left the Community Area for two years, the Enrollment Committee nonetheless voted twice (on May 5, 2011 by a 3-2 vote, and on June 21, 2011 by a 4-1 vote) in favor of Larsen going "back to Court." Beyond the fact that the preponderance of evidence seemed to support Larson's position, the Court is also troubled that the Enrollment Committee failed to send a clear recommendation to the Community

Council on whether it should remove or not remove Larsen, but merely recommended he go back to Court, something not contemplated in the Enrollment Ordinance. The Court is further troubled that the Community Council did not in any way revisit its decision in Resolution 10-166, despite being given the opportunity to do so.

The testimony given during the August 26, 2011 hearing before this Court, which was limited to discussion concerning documentation already in the record, serves to strengthen the Court's belief that the decision of the Community Council that Larsen is no longer a Qualified Member was clearly erroneous. A preponderance of evidence before the Enrollment Committee and Community Council shows that although Larsen took a job 65 miles away from the Reservation, let his daughter live in his home for 23 months and some odd days when she lost her own home, he continued to maintain residency within the Community Area and did not leave for a period of two years.

Order

For all of the reasons set forth above, Petitioner David Larsen has met his burden of demonstrating that the decision of the Community Council was clearly erroneous.

It is hereby ORDERED, ADJUDGED and DECREED that Larsen's appeal is GRANTED, Lower Sioux Indian Community Resolution No. 10-166 is REVERSED and Larsen's membership privileges are REINSTATED. This Order is hereby STAYED for ten (10) days after its entry to allow the Community Council to file an appeal if it so desires.

IT IS SO ORDERED this 4th day of November, 2011

Kurt V. BlueDog, Chief
Tribal Court of the Lower Sioux Community in Minnesota