

Oneida Tribal Judicial System

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ONEIDA TRIBAL JUDICIAL SYSTEM TRIAL COURT

**Merlin J. Cornelius,
Petitioner**

v.

**Fred Muscavitch,
Division of Land Management,
Oneida Land Commission,
Respondents**

Docket No: 08-TC-033

Date: September 24, 2008

Decision

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers, Mary Adams, Gerald Cornelius - Pro Tem, and Janice McLester, presiding.

I Background

This case involves a request for an immediate injunction to stop the Land Commission from leasing agricultural leased lands that were posted in the Kalihwisaks on February 28, 2008. Because we do not find any violation of existing Oneida law or regulations, the request for injunction is denied.

A. Factual Background

This case arises out of the Oneida Land Commission's lease of tribal farm lands and their use during the leases. Each year the Land Commission leases hundreds of acres of tribal land. This year the lands at issue were noticed on February 28, 2008 with an eight day deadline for submitting bids. Despite being an Oneida tribal member with 70-years of farming experience and his employment of Oneida tribal member farm hands, Petitioner Merlin Cornelius' bid was

not chosen. Rather the lease went to Mr. Kurt Jordan, a tribal member and Oneida Division of Land Management (DOLM) employee.

On or about March 5, 2008, Mr. Cornelius requested an injunction from the Oneida Land Commission. He requested the posted lands not be leased. Mr. Cornelius claimed the lands were unfairly leased to a DOLM employee and that although he is a tribal member, he was sharecropping the lands with a non-member.

Mr. Cornelius' request was granted and Dr. Fred Muscavitch, Division Director, was directed to investigate the situation. At a meeting of the Land Commission on March 17, 2008, Dr. Muscavitch reported back the results of his investigation. Dr. Muscavitch informed Mr. Cornelius there was no violation because only sub-leasing, not sharecropping, was prohibited by the regulations at that time.¹ The injunction was lifted by the Land Commission.

B. Procedural Background

On March 28, 2008 Petitioner, Merlin Cornelius, filed a petition against Respondents, Fred Muscavitch and Oneida Land Commission. Mr. Cornelius' claim falls into three categories. First, he asserts that in the case of one particular parcel, the eventual lessee had an unfair advantage in obtaining the lease because he is a DOLM employee. Second, Mr. Cornelius contends it is a violation of the spirit, if not the letter, of Oneida preference law for the Land Commission to allow non-members to physically farm land (as sharecroppers) which has been leased to Oneida tribal members. Third, Mr. Cornelius claims he was not afforded due process by the Land Commission when he brought his concerns forward in the spring of this year. Specifically, he claims he was due, but not given, a hearing before the Land Commission.

Prior to deciding the disposition of this case, the court held a pre-trial hearing pursuant to Rules of Civil Procedure, Rule 23(A & B). A pre-trial hearing was held on April 4, 2008. Petitioner argued Respondent violated the Division of Land Management's SOP 67.2.3-10(2.15), by leasing property to Kurt Jordan who then allegedly sub-leases (sharecrops) to a non-member

¹ Since the inception of this case, the relevant regulations have been amended and sharecropping is now expressly permitted along with subleasing.

farmer, thereby denying Petitioner the opportunity to farm said property. Respondents claim the lessee is sharecropping which is not the same as subleasing and does not violate Indian Preference or the SOP.

The parties submitted a Motion for a 10-day Stay to negotiate a possible settlement. The court granted the Motion. The parties were unable to settle the case.

Another pre-trial hearing was held on June 10, 2008. The court decided to schedule a motion hearing.

On June 27, 2008 Petitioner submitted a Motion for Extension based on the need for more time to work towards a settlement as a meeting was arranged for June 30, 2008. Petitioner's motion for an extension was granted.

On July 14, 2008 Petitioner submitted another Motion for an Extension in order to have sufficient time to meet with the Land Commission at their next scheduled meeting which is July 14, 2008. While this court encouraged the parties to reach a settlement, parties were required to submit documentation on status of settlement by July 28, 2008. The court granted the extension.

On July 18, 2008 Petitioner submitted a Motion for Immediate Injunction to stop the DOLM and the Land Commission from entering into any more contracts to lease and/or sell agricultural land, to include the renewing of any agricultural leases that end after July 18, 2008. Petitioner's motion includes the sale of any crops or resources located on such agricultural lands.

Given the time and issues surrounding this case, the court held this motion until the motions hearing in accordance with the Rules of Civil Procedure, Rule 31(F)(a). A motions hearing was held on August 14, 2008. In addition to the parties' issues, the court requested the parties to address the following issues:

1. Is sharecropping or subleasing a violation of the DOLM's SOP?
2. How does Oneida Indian Preference Law apply to leasing agricultural lands?

3. For purposes of jurisdiction, was Petitioner due a hearing from the Land Commission and if so, was he provided one?

II Analysis

A. Standing

Respondent's arguments

The Division of Land Management (DOLM) asserts Mr. Cornelius does not have standing to challenge the leasing practices of the DOLM. It uses the analogy that if a complaint is filed claiming a home owner is raising pigs in their basement, an investigation is done. If the pig is found in the owner's home, the Land Commission will make the decision to either allow time to cure or they may chose to evict the tenants for violating the applicable rule. Respondent points out that once a complaint is filed with DOLM and if found to have merit then the issue is between DOLM and the violator. Respondent claims this complaint should not be handled as a contested matter between the DOLM and Mr. Cornelius. Rather, the DOLM's view is that it is simply a complaint and the Land Commission found no violation. Therefore, this case should be dismissed for lack of standing.

Petitioner's arguments

Although Petitioner does not address standing directly in his filings, he alleges that he is directly harmed by his failure to be able to lease the lands in question. He states that he is forced to buy feed over the winter rather than being able to grow his own feed on the leased lands. Furthermore, Petitioner alleges he is a tribal member, he is a farmer and that he is interested in leasing the lands in dispute.

Court's analysis

We rule Mr. Cornelius does have standing to bring this case. Although Respondent would like to keep the issues between it and Mr. Jordan, Mr. Cornelius' claim is more than just a complaint about Mr. Jordan. He is also complaining about the process of the how lands are advertised and awarded for lease. Mr. Cornelius was an applicant for these lands and he has a direct stake in the process. Likewise, with respect to preference issues, he has a direct stake as well. Unlike the pig-in-the-basement example, Mr. Cornelius has something to directly gain if he would be the

beneficiary of tribal preference laws.

With that background, we turn to the rule of standing. The issue of standing was addressed by the Appellate Court in the case of Teller v Oneida Housing Authority, 01-AC-015. That case addressed the question whether Teller had standing to challenge the termination of a mortgage agreement between Oneida Housing Authority and Teller's mother. The Court stated the rule as follows:

The 'proper' party, in terms of standing, is the party that can establish that he/she/it has been sufficiently affected by the actions of the opposing party. Standing can be satisfied if the petitioner has a tangible interest at stake in the litigation.

Teller, 01-AC-015, 8 O.N.R. 3-21.

Under the rule described in Teller, Mr. Cornelius has standing. He is another farmer interested in leasing the lands at issue. He has been affected by the alleged actions of the opposing party. He has a tangible stake in the outcome. If there have been violations as he describes, he stands to be more likely to obtain a lease in the future.

B. Is sharecropping or subleasing a violation of the DOLM's SOP?

Petitioner's arguments

Mr. Cornelius argues that sharecropping is the same as subleasing and that according to the Land Commission's SOP, subleasing is a violation at the time he filed this case. Mr. Cornelius contends on March 10, 2008 the Land Commission granted his request for an injunction stopping leasing of all posted agricultural lands and revisions of the agricultural lease distribution selection process, and all related SOP's and an investigation of current agricultural leases to Kurt Jordan and Ike Jordan. On March 17, 2008 the Injunction was lifted because Dr. Muscavitch claims he investigated the issue of subleasing and found no violation. Mr. Cornelius essentially contends that sharecropping and subleasing are the same thing and therefore since subleasing was prohibited, so should sharecropping be prohibited. Sharecropping occurs where a landowner (or in this case the lessee) permits another to physically farm the land. Rather than paying rent, the sharecropper keeps some of the crop for himself and the rest goes to the landowner.

Respondent's arguments

The DOLM agrees an injunction was granted to Petitioner by the Land Commission and an investigation was done by Dr. Muscavitch. The DOLM contends Mr. Cornelius filed a complaint with the Land Commission and the Land Commission took action to grant an Injunction. The DOLM claims Dr. Muscavitch did an investigation and in his report found no violation. That report was given to the Land Commission and as no violation was found the injunction was lifted.

Respondents claim Mr. Jordan was not in violation of the Land Commission's SOP regarding subleasing. Respondents claim subleasing is not the same as sharecropping. Subleasing, they contend, is when a person charges the lessee a flat fee regardless of whether the lessor receives a profit. Sharecropping, on the other hand, is when a person permits someone to maintain their land and the crops are then shared between the owner and the person physically farming the land. Furthermore, Respondents point out the SOP was amended on May 27, 2008 and June 2, 2008, and now permit sharecropping and subleasing.

Court's analysis

The factual record is not developed enough for the Court to make a ruling on this issue. There are many unanswered questions which bear on whether sharecropping occurred or not. For example: What exactly was the arrangement between Mr. Jordan and the alleged sharecropper? Was there a written agreement? How were resources pooled (if at all) and how was money shared? Was the alleged sharecropper an Oneida member? Without these facts, we decline to find sharecropping was occurring or whether it violated the rules at the time this case was filed.

C. Oneida Indian Preference, how does this law apply to leasing agricultural lands?

Petitioner's arguments

Petitioner argues Oneida's preference laws apply to Mr. Jordan and require him to hire Oneida members when subleasing or sharecropping the leased lands. Oneida's Indian Preference laws are found at Chapter 57. Mr. Cornelius contends that Mr. Jordan is an entity as that term is used in Chapter 57. According to Indian Preference Law (ch. 57), 57.3-9 under definitions, *Entity* means any employer employing 2 or more employees...to a contract entered into with the

Oneida Tribe. Mr. Cornelius contends Kurt Jordan is an employer who is subleasing/share cropping and therefore falls under this definition.

Petitioner claims according to Chapter 57.9-1, all Entities shall give preference in contracting and subcontracting to Indian-owned businesses. This includes Respondents and Kurt Jordan. Petitioner contends that preference was not given because a non-member is physically farming the lands leased to Kurt Jordan.

Petitioner contends Chapter 57.9-2(a), covers all contracts entered into by the Oneida Tribe, including leases. That section states that tribal agencies shall specifically stipulate that compliance with the Indian Preference Law is awarded to members of the Oneida Tribe.

Petitioner provides documentation from the Indian Preference Department, dated August 8, 2008 to support his allegation that Respondents violated several citations within Chapter 57. The August 8, 2008 memorandum is about a page and a half in length and provides a short treatment of the issue.

Respondents' arguments

Respondents claim if Mr. Jordan was subleasing, Petitioner still would not have standing to challenge what Mr. Jordan is doing on that property. Respondents claim Dr. Muscavitch investigated Petitioner's complaint and found no subleasing violation. Respondents add if Petitioner believed Respondents were in violation of the Chapter 57 then he should have filed his complaint with the Indian Preference Department and not with the Land Commission.

Respondents question the application of the Indian Preference Law to agricultural leases with the DOLM. Currently the DOLM does not require the agricultural lessees to sign an acknowledgement of Chapter 57.

Respondents refer to the August 8, 2008 memo which reads that every single contract entered into with the Oneida Tribe requires Chapter 57 to be attached and followed. Respondents claim this is not possible as a practical matter. They argue there must be some natural cut-off point as to which contracts require the Indian Preference rider.

Respondents assert it would be unreasonable to require all contracts need to follow Chapter 57. Respondents use the example of residential leases. If Chapter 57 applies in all residential leases, then lessees would be required to use the Qualified Indian Traders list for simple repairs. Therefore, if the lessee needed to replace their roof or do some remodeling they could be essentially punished or dragged into court for not hiring from the Qualified Indian Traders list. Respondents contend if this theory is used then the Tribe's service agreements with Brown County would need to follow the Tribe's Chapter 57, including our compact with the State of Wisconsin, all of which are contracts. Respondents assert Chapter 57 does not apply to residential leases.

Court's analysis

The Indian preference aspect of this case has two parts: procedural and substantive. With respect to the substantive aspect, our reading of Chapter 57 is that preference in contracting must first be given to tribal members. There is no question that occurred here as Mr. Jordan is an Oneida member. The more difficult question is whether Mr. Jordan, as a contractor, was himself required to apply preference in his selection of a sharecropper. It appears Petitioner may be relying on Sec. 57.4-2 which states:

Indian preference as set out in this Law shall be applied to all contracts entered into by the Oneida Tribe. All businesses on or near the Oneida Reservation that have a contract with the Oneida Tribe must utilize the Skills Bank to obtain employees or the listing of certified businesses for subcontracting. All other businesses on or near the Oneida Reservation may utilize Indian preference for their employment and contract needs.

Based on the record before us, we cannot determine whether Kurt Jordan is a "business" as that term is used in the section above, or whether the sharecropper is an "employee" as that term is used. There are simply not enough facts for us to make a ruling either way. Furthermore, given Sec. 57.14 requires complaints go to the Indian Preference Department first, we will not address these issues. We will respect the process established in Chapter 57 for complaints regarding Indian preference. That process gives the Indian Preference Department adequate tools and authority to investigate and enforce Chapter 57.

With respect to procedure, the Court agrees with Respondents that alleged violations of Chapter

57 must be brought first to the Indian Preference Department (IPD). Sec. 57.14 describes a detailed process whereby complaints are investigated by the IPD. The IPD is given tools to try to remedy a found violation. If the violator is uncooperative, then the IPD would bring a claim to the Oneida Tribal Judicial System (OTJS) and there are provisions for remedies and actions the OTJS can take. Given that Oneida law requires this process to be followed, the Indian preference claim is not properly before us and we decline to take it up.

D. For purposes of jurisdiction, was Petitioner provided with a hearing?

Petitioner's arguments

Petitioner asserts DOLM has ignored his complaint since 2006. Petitioner claims Respondents are continuing to lease hundreds of acres of Oneida Tribal land to non-tribal farmers who are not actively farming. Petitioner claims he was never provided with a copy of the investigation that Dr. Muscavitch completed. Furthermore, Petitioner argues he was never provided with a hearing from the Land Commission.

Mr. Cornelius argues the Land Commission based its opinion solely on Dr. Muscavitch's report without allowing Mr. Cornelius to attend the meeting. Mr. Cornelius asserts Dr. Muscavitch failed to do an adequate investigation. Furthermore, Mr. Cornelius argues Respondent's decision to lift the Injunction to allow non-Oneidas to sublease or sharecrop has caused him to purchase feed for his cattle because he does not have enough land to operate his farming business.

Respondents' arguments

Respondents argue if this case is remanded back to the Land Commission to hold a hearing it would not be in the best interest of justice. In the normal course of business the Land Commission has a number of tenants and people complaining about all kinds of things. Respondents claim it is not possible to hold a full blown hearing every time a resident or passerby submits a complaint. These complaints are investigated, a report is submitted and the decision to take action lies with the Land Commission. Respondents assert their decision not to hold a hearing is not a violation of the Administrative Procedures Act or the Oneida Indian Preference law.

Respondents claim there is no right for a hearing because there is no tribal law that says if an individual doesn't like that someone is subleasing/sharecropping you can file suit. Respondents also claim this matter is not a contested case. Contested cases are those where the agency is required to provide a hearing. Respondents assert nothing in the Real Property Law requires them to grant a hearing to Mr. Cornelius.

Respondents suggested at oral argument that a declaratory action about how an agency applies the law is possible. Respondent points out the only relief available in this type of action is declaratory relief. Mr. Cornelius seeks injunctive relief. Therefore, Respondents imply that even if Mr. Cornelius' suit is viewed as one for a declaratory ruling, he is not entitled to an injunction. A request for injunctive relief and a request for a declaratory ruling are very different cases and they cannot be treated the same. The case presented by Petitioner is a civil action for an injunction to block the well established process of leasing tribal agricultural land and therefore, Respondent asserts, this court lacks the requisite jurisdiction to hear Petitioner's claim.

Court's analysis

While we are somewhat troubled by the allegations in this case and the way this matter has been handled by the DOLM and Land Commission, we are constrained by the law to rule in favor of Respondents.

We cannot find any support in the law for the assertion that Mr. Cornelius was due a hearing. This matter does not meet the definition of a "contested case" as defined in the APA. The APA defines a contested case as:

A proceeding before an "Agency" in which an opportunity for a hearing before said "Agency" is required by law prior or subsequent to the determination of the "Agency" of the legal rights, duties, or privileges of specific parties unless otherwise provided for by tribal law. This shall include the revocation, suspension, or modification of a license or permit when a grant of such application is contested by a person directly affected by said licensing or permitting.

APA, Sec. 1.3-1(c).

Petitioner has not shown nor have we found any law which requires the DOLM and the Land Commission to give Mr. Cornelius a hearing. The Real Property Law does not require it. Therefore this matter is not a contested case.

Nevertheless, Petitioner is not without avenues for redress. Several options are available. As discussed above, Chapter 57 gives the Indian Preference Department authority to address alleged violations. As suggested by Respondent, a declaratory action under Sec. 1.9-1 should be considered by Petitioner. We express no opinion as to whether such a claim is legally viable much less how we would rule on it. But it is a statutorily authorized means for Petitioner to raise at least some of his issues. In addition, Petitioner is always free to directly petition the Land Commission, the Business Committee and the General Tribal Council to air his grievances and seek changes to the existing rules and practices.

III Decision

Petitioner's request for injunction is denied.