IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED SEP 16 1996

CARRIE L. SVENDAHL
CLERK OF COURT
STATE OF MINNESOTA

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

Kimberly Amundsen, et al. Plaintiffs, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, et al., Defendants.	File No. 049-94

MEMORANDUM AND ORDER

Summary

This matter comes before the Court on cross motions for summary judgment, and on a motion by Plaintiffs for sanctions against Defendants' counsel. For the reasons set forth herein, the Court denies the Plaintiffs' motion for sanctions, grants in part and denies in part the Plaintiffs' motion for summary judgment, and grants in part and denies in part the Defendants' motion for summary judgment.

Discussion

The Plaintiffs are members of the Lower Sioux Indian Community in Minnesota, a Federally acknowledged Indian tribe occupying the Lower Sioux Indian Reservation near Morton, Minnesota. They seek to become enrolled as members of the Shakopee Mdewakanton Sioux

(Dakota) Community ("the Community"), and they contend that they have been denied the process to which they are entitled under the Community's Ordinance No. 6-08-93-001 ("the 1993 Enrollment Ordinance")[1]. The 1993 Enrollment Ordinance currently governs the processes by which persons are considered for enrollment in the Community. The Plaintiffs seek an Order of Mandamus from this Court, directing that the Enrollment Officer perform her ministerial functions; a declaration that the Defendants have violated the Plaintiffs' rights in contravention of the Indian Civil Rights Act, 25 U.S.C. §1302 (1994); compensatory and punitive damages; and an award of retroactive "per capita" payments from the Community.

The essential facts are undisputed. Each Plaintiff is a member of the Lower Sioux Indian Community[2]; and each has applied for membership in the Community on more than one occasion. The Community's Enrollment Officer has never processed the Plaintiffs' applications nor made recommendations to the Community's Enrollment Committee with respect to them. Instead, the Enrollment Officer has returned the applications to the Plaintiffs--in some instances promptly, and in some instances after having waited a considerable

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[1] After a considerable history, and for reasons which are discussed in a Memorandum and Order filed in this matter on January 17, 1996, the Court has held that the 1993 Enrollment Ordinance has not been amended by the Community, and remains law governing Community enrollment.

[2] The Plaintiffs have argued that although they are "technically enrolled" in the Lower Sioux Indian Community, "they are not actually members" of that tribe, but instead are members of a larger Tribe, of which both Communities are part. Plaintiff's Memorandum in Response to Defendants' Motion for Summary Judgment, at 3-4. But the fact is that the Lower Sioux Indian Community and the Shakopee Mdewakanton Sioux (Dakota) Community are distinct legal entities, with distinct governments, and are acknowledged as such by the Secretary of the Interior under the Indian Reorganization Act o 1934, 25 U.S.C. §476 (1994).

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period of time. This course of action, the Plaintiffs assert, is directly violative of the responsibilities which the General Council of the Community gave the Enrollment Officer, when the General Council adopted the 1993 Enrollment Ordinance.

The relevant portions of the 1993 Enrollment Ordinance are as follows:

> Section 6 - Filing and processing applications - Applications for enrollment in the Shakopee Mdewakanton Sioux Community shall be in a form approved by the General Council. The Enrollment Officer shall respond to request for applications. Applications shall only be filed at the Enrollment Office with the Enrollment Officer. No staff or Committee member shall accept applications for enrollment. Upon receipt of the applications in the Enrollment Office, they shall be assigned an identifying number and stamped with the date of receipt. A copy shall be presented to the Business Council by the Enrollment Officer. Applications shall be accompanied by a birth certificate or other evidence acceptable to the Enrollment Committee as to the date of birth and parentage. Applications for minors or mental incompetents or other unable to complete the form may be filed by a parent or legal guardian, next of kin, or the Enrollment Officer. The Enrollment Officer shall assist applicants in completing the form or obtaining necessary documents. However, the burden of proof is on the applicant to establish eligibility for membership. The Enrollment Officer shall verify the data shown on the application and the supporting documentation and recommend in writing acceptance or rejection of the application to the Enrollment Committee no later than thirty days after receipt of the application.
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> The Enrollment Committee shall approve or reject all enrollment applications based on the record presented and other evidence deemed acceptable by said Committee.
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> The Enrollment Officer shall notify all applicants in writing of the action of the Enrollment Committee and post the approved applications for ten calendar days and mail the identical information to all eligible voters all within five days of the Committee decision. Notice to rejected applicants shall be by certified mail and shall state the grounds for rejection and the right of the applicant to appeal as set forth in Section 7.

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(Emphasis supplied).

The Plaintiffs contend that the underscored portions of the 1993 Enrollment Ordinance give the Enrollment Officer no discretion. Upon her receipt of an application for enrollment, they say, she must within thirty days make a written recommendation to the Enrollment Committee; and since it is undisputed that this never happened with any of the Plaintiffs' applications, the Plaintiffs contend that they are entitled to a writ of mandamus.

In response, the Defendants emphasize the Plaintiffs' membership in another Indian tribe. They argue that there is nothing, in the 1993 Enrollment Ordinance or in any other law governing the Community's enrollment procedures, that requires the Enrollment Officer to process applications for enrollment where the applicants have not, prior to the submission of their application, relinquished their enrollment in all other Indian tribes. And they call to the Court's attention the prohibition against dual enrollment contained in Article II of the Community's Constitution, which states, in pertinent part--

> Section 1. The membership of the Shakopee Mdewakanton Sioux Community shall consist of:
>
> ...
>
> (c) All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled as members of some other tribe or band of Indians.
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> (Emphasis supplied).

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The Defendants urge the Court to consider that on February 13, 1996, at a Special General Council meeting, the Community's General Council, by motion, directed--

> ...the Enrollment Officer and the Enrollment Committee not to process the applications of persons who have not first and finally relinquished their memberships in other Tribes.

These are telling points; and, for reasons which are discussed below, the General Council's February 13, 1996 action is well within its executive authority. But during the period before the General Council took that action, and specifically in early 1994, it appears that the General Council permitted members of other Indian tribes to apply for enrollment, and did not require a prior relinquishment of the applicant's earlier enrollment before processing the application. Then, if the applicant ultimately were accepted as a member by the Community, the applicant would receive a notice that his or her Community membership would not be effective until and unless the Community received proof, within a specified period of time, that his or her other enrollment had been relinquished.

Nothing in the law of the Community or in Federal law prohibited the Community from changing that practice prospectively--that is, the action taken by the General Council on February 13, 1996 did not contravene the 1993 Enrollment Ordinance, the Community's Constitution, the Indian Civil Rights Act, or any other provision of applicable law. The General Council has executive power, as well as legislative power; and the authority to make reasonable policy decisions that are consistent with the 1993

Enrollment Ordinance certainly is within that executive power.

However, the General Council did not give the Enrollment Officer this new direction until February 13, 1996; and in the view of the Court, the Enrollment Officer cannot claim that her earlier failure to process the Plaintiffs' applications, when they were received in 1994, is protected by the General Council's new direction.

The Defendants also argue, however, that the Enrollment Officer's duty, with respect to the Plaintiff's applications, was affected by the tortuous history which the Community's enrollment legislation recently has experienced. The Enrollment Officer contends that she believed, from December, 1994 until at least May, 1995, that the 1993 Enrollment Ordinance had been rescinded and replaced by Community Resolution 12-28-94-005. (That Resolution, which apparently had been approved by the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs in early 1995, then was the subject of an apparently disapproving decision of the Assistant Secretary -- Indian Affairs in May, 1995; and, for different reasons, was held to be ineffective by this Court on January 17, 1996.[3])

But in the view of the Court, the Plaintiffs are correct when they say that--whatever the good faith belief of the Enrollment Officer may have been from late 1994 through January, 1996--the fact remains that she had a duty to process the Plaintiff's

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[3] The history of the various enrollment provisions is addressed in more detail in the January 17, 1996 decision filed in this matter.

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applications when she first received them, in early 1994. The Enrollment Officer's duty did not dictate any result--she could have recommended approval or disapproval (and, under the Order entered today, she still can). But she did have the duty to process the applications and to recommend something.

The Enrollment Officer asserts that her office was swamped with applications and that she simply did not have the staff to deal with them. But again, the 1993 Enrollment Ordinance speaks in mandatory terms: "The Enrollment Officer shall verify the data shown on the application and the supporting documentation and recommend in writing acceptance or rejection of the application to the Enrollment Committee no later than thirty days after receipt of the application." (Emphasis added). The Plaintiffs are correct when they say that, if the paperwork burden was excessive, the Enrollment Officer was obliged by Community law to ask for additional staff, or in some way find the means to perform the duty which the General Council had given her.

Given this mandatory duty, which was left undone in 1994, this Court must issue an Order of Mandamus to the current Enrollment Officer to process the Plaintiff's applications, and to make a recommendation to the Enrollment Committee[4].

This Order should not be understood in any way to undercut or nullify the General Council's February 13, 1996 directive to the

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[4] The Court notes that the practice of the Enrollment Office has been to return the Plaintiffs' applications to them; so it may be that the Enrollment Office does not presently have any of the applications. If that is the case, the Enrollment Officer can obtain a copy of the applications from the Court's records and use those documents for processing.

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Enrollment Officer. That directive clearly applies to all applications for enrollment that were pending before the Enrollment Officer on February 13, 1996, and that have been received thereafter. What this Court's Mandamus Order does is put the Plaintiffs in this lawsuit, and the Enrollment Officer, back to where they were when the Plaintiffs' applications first were received in 1994, and directs the Enrollment Officer to process the applications and, within thirty days, to make a recommendation on each of them to the Enrollment Committee.

Thereafter, the issue of whether to accept the applications or reject them is entirely up to the Enrollment Committee and the General Council. Nothing in the 1993 Enrollment Ordinance or any other ordinance or law requires those entities to accept the applicants or to reject them.

The same leeway which the Enrollment Committee and the Business Council possess, with respect to the recommendations of the Enrollment Officer, requires that the motions for summary judgment in favor of the Enrollment Committee and its members, and of the Business Council and its members, must be granted. The Plaintiffs suggest that the Enrollment Committee and the Business Council have not properly supervised the Enrollment Officer; but neither the provisions of the 1993 Enrollment Ordinance nor any other applicable law creates anything like the clear, nondiscretionary duty, for those persons or entities, which would justify mandamus. In simplest terms, there is nothing in the record of this case that the Business Council, the Enrollment

Committee, or any persons who serve on those bodies have violated any mandatory legal duty to the Plaintiffs.

Finally, there is the matter of the Plaintiffs' motion for sanctions. It arises from a motion which the Defendants' counsel filed on May 6, 1996, asking that the Court partially reconsider its Order of January 17, 1996. The January 17, 1996 Order held that the 1993 Enrollment Ordinance was the effective enrollment ordinance for the Community. The Defendants' counsel filed their May 6, 1996 motion because they had formed the belief that, through bureaucratic oversight, the 1993 Enrollment Ordinance may never have received the necessary approval of the Bureau of Indian Affairs.

When Plaintiffs' counsel received the Defendants' May 6, 1996 motion, they immediately sent a request, under the Freedom of Information Act, to the Bureau of Indian Affairs, asking for a copy of the documents which reflected the approval of the 1993 Enrollment Ordinance; and in response they promptly received a copy of the documents establishing that that agency in fact had given the 1993 Enrollment Ordinance the necessary blessing. That that material was provided to Defendants' counsel, and the May 6, 1996 motion promptly was withdrawn.

The Plaintiffs' contend that sanctions are appropriate because, they assert, when doubts arose in Defendants' counsel's minds as to whether the 1993 Enrollment Ordinance had been approved by the Bureau of Indian Affairs, it was malfeasance not to themselves have filed a Freedom of Information Act request with the

Bureau of Indian Affairs.

But it is uncontested in the record that officials of the Bureau of Indian Affairs had told Defendants' counsel that they had no evidence of the 1993 Enrollment Ordinance's approval. Indeed, the aforementioned decision of the Assistant Secretary -- Indian Affairs, in May, 1995, asserted that the Office of the Assistant Secretary had no such evidence. Now, it may be that a Freedom of Information Act request by Defendants' counsel might have elicited the same response as did the Plaintiffs' request. But that is not without some doubt: although Defendants' counsel was not aware of the fact until the Plaintiffs' motion for sanctions was filed, it appears that in November, 1995 an attorney for an unrelated third party had filed such a request and been told no such document could be located--by the same Bureau of Indian Affairs officials who located the approval documents in response to Plaintiffs' counsel's request...and who had earlier told Defendants' counsel that they could not locate the documents.

But, whether or not a Freedom of Information Act request by the Defendants would have elicited the evidence of the 1993 Enrollment Ordinance's approval, the decision by Defense counsel not to file such a request is light years distant from the sort of misbehavior or nonfeasance which would warrant sanctions. In light of the representations which already had been made by the Bureau of Indian Affairs, it is the opinion of the Court that Defense counsel acted reasonably under the circumstances; and when the approval document happened to surface the files of the Bureau of Indian

Affairs, the motion to partially reconsider was promptly and appropriately withdrawn.

In oral argument on this issue, Plaintiffs' counsel suggested that the credibility of the Court was at stake: if the Court did not sanction the Defendants' counsel, the Court would be open to charges of favoritism, and the legitimacy of all of the Court's functions would be in doubt. That suggestion has played no part, one way or another, in the crafting of this decision. But it seems clear that the credibility of and legitimacy of this Court, and every court, is at issue in each and every decision it makes; and the undersigned is altogether comfortable with the record established by this Court throughout the eight and one-half years of its existence.

There is no basis for sanctions against the Defendants' counsel, and none will be imposed.

ORDER

For the foregoing reasons, it herewith is ORDERED:

1. The Motion for Summary Judgment by the Defendants Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, and its members Anita Campbell (Barrientez), Susan Totenhagen, Darlene McNeal, Cherie Crooks-Bathel, and Lanny Ross, are granted;

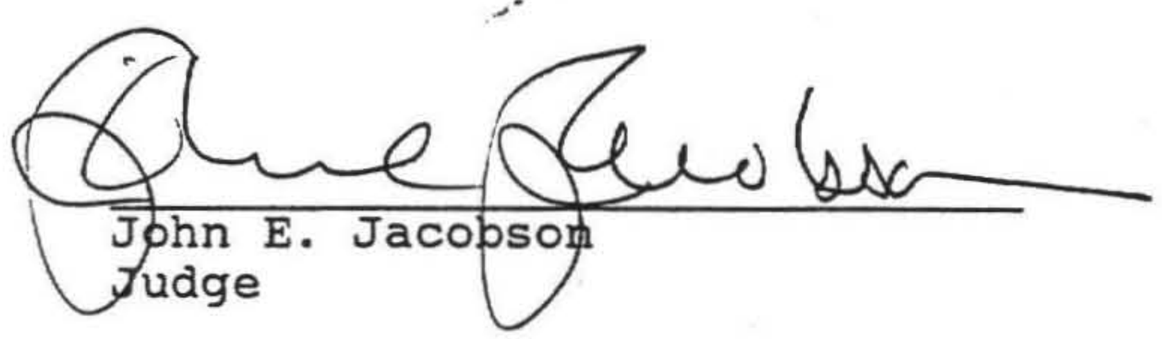
2. The Motion for Summary Judgment by the Defendants Shakopee Mdewakanton Sioux (Dakota) Business Council, and Stanley R. Crooks, Kenneth Anderson and Darlene McNeal, its members, are granted;

3. The Motion for Summary Judgment by Susan Totenhagen, or

her successor, as Enrollment Officer of the Shakopee Mdewakanton Sioux (Dakota) Community is granted on all prayers for relief except that the Motion for Summary Judgment by the Plaintiffs, with respect to their prayer for an order of mandamus directed to the Enrollment Officer is granted: the Enrollment Officer shall verify the data shown on the application of each Plaintiff, which was submitted between April and June, 1994, and the supporting documentation, and recommend in writing acceptance or rejection of the application to the Enrollment Committee no later than thirty days after the date of this Order.

4. All other motions pending in this matter, including the Plaintiffs' motion for sanctions against Defendants' counsel, are denied.

September 16, 1996



John E. Jacobson
Judge

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