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COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT | STATE OF MINNESOTA

In Re Leonard Louis Prescott
Appeal from July 1, 1994 Gaming
Commission Final Order

Court File No. 041-94

MEMORANDUM OF LAW

I.

This matter involves the appeal of Leonard Louis Prescott from a final order of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (Commission), dated July 1, 1994. In that order, the Commission revoked Mr. Prescott's Gaming License. The matter presently is before the Court pursuant to the Appellant's motion to remove the Judges of this Court, John E. Jacobson, Robert Grey Eagle, and the undersigned (the Judges), for bias, prejudice, or appearance of impropriety, and to disqualify counsel for the Commission.

II.

The Appellant alleges that the Judges' should be removed and the Commission's counsel disqualified by this court because of contact between the Judges and the Commission's counsel. The Commission's counsel is associated with the BlueDog law firm; and attorneys for the BlueDog firm have been appointed to serve as judges and clerk on the Tribal Courts of the Lower Sioux Community in Minnesota and the Prairie Island Indian Community. Specifically, attorneys Andrew Small, Steven Olson, and Kurt BlueDog, serve as Judges on the Lower Sioux Community in Minnesota Tribal Court, and attorney Vanya Hogen-Kind serves as the Clerk of that Court. Judges Jacobson and Buffalo represent the Lower Sioux Indian Community in

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Minnesota and, accordingly, on occasion Judge Jacobson appears before the Lower Sioux Court. The undersigned has not appeared before the Lower Sioux Court. Attorneys Small, Olson, and BlueDog also serve as Judges on the Tribal Court of the Prairie Island Indian Community and attorney Hogen-Kind serves as the Clerk of that Court. Judge Grey Eagle represents the Prairie Island Community and, accordingly, on occasion appears before the Prairie Island Court.

The Appellant contends that the foregoing facts create an inherent conflict of interest in each of the Judges which warrants their removal, and also constitute violations of the Minnesota Rules of Professional Conduct which require the disqualification of counsel for the Commission.

III.

The Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community was created by, and is governed in accordance with, Ordinance Number 02-13-88-01 (the "Ordinance"). Section IV of the Ordinance provides that "there shall be three Judges on the Tribal Court" and that the "Judges of the . . . Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council. . . ." Id. The Ordinance further provides that the General Council may fill vacancies on the Court within ninety (90) days of the resignation, death, or recall of a judge or judges.[1] Section V(D) of the Ordinance authorizes judges to make appointments only under extraordinary circumstances. In fact Section V(D) is entitled "Extraordinary Appointment of Judges"[2] No other procedures exist for the appointment or removal of judges on the Shakopee Mdewakanton Sioux Community Tribal Court.

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[1] Judges are subject to recall only upon passage of a Resolution of Recall by absolute two-thirds majority of all enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Ordinance 02-13-88-01 at Section IV(A).

[2] Section V(D) provides that if ninety days pass without an appointment by the Chairman with the advice and consent of the Council then the remaining judges may then exercise their power of extraordinary appointment.

Section VII of the Ordinance provides that "cases shall be heard by one judge . . . " and that "a matter may be certified for appeal to a three-judge panel of the full Court. . . ." Id.

IV.

The Appellant contends, and this Court does not dispute, that a judge should not hear a case where it appears that he or she is biased or prejudiced against either party. State and federal courts all recognize this principle; so too does this Court. In fact, Rules 32(a) and (b) of the Tribal Court Rules of Civil Procedure specifically so provide.[3] The Appellant contends that contact between the Judges and the Commission's counsel warrants disqualification under the Rules. However, in cases such as the one at bar, where recusal of an arguably disqualified judge would destroy the jurisdiction of the only Court which could hear the matter, the rules regarding disqualification yield to the Rule of Necessity. State ex rel. Gardner v. Holm, 241 Minn. 125, ____, 62 N.W.2d 52, at 53-54 (1954), Atkins v. United States, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978), Pilla v. American Bar Assn., 542 F.2d 56 (8th Cir. 1976), Evans v. Gore, 253 U.S. 245 (1920), United States v. Will, 499 U.S.

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[3] Rules 32(a) and (b) provide as follows:

Rule 32. Disqualification of Judge.

(a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned,

(b) A judge of the Court of the Shakopee Mdewakanton Sioux Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where is private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

200, at 213 (1980).

The United States Supreme Court has held that where disqualification would destroy the jurisdiction of a court, the Rule of Necessity requires the disqualified judge or judges to hear the case. The Court specifically held that --

> The true rule unquestionably is that whenever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it might be.

United States v. Will, 499 U.S. at 214, citing Philadelphia v. Fox, 64 Pa. 169, at 185 (1870).

This rule is an ancient one which has its roots in English common law as far back as 1430. United States v. Will, 499 U.S. at 213. See also Dimes v. Grand Junction Casualty Co., 10 Eng. Rep. 301, at 313 (1852); Frank, "Disqualification of Judges," 56 Yale L.J. 605, at 609-610 (1947). It has been cited repeatedly throughout the century by both state and federal courts. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954); Ulson v. Cory, 609 P.2d 991, at 994 (Ca. 1980); Schwab v. Ariyoshi, 555 P.2d 1329 (Ha. 1976); Dacey v. Connecticut Bar Assn., 368 A.2d 125 (Conn. 1976); Atkins v. United States, supra.; Pilla v. American Bar Assn., supra.; Brinkley v. Hussig, 83 F.2d 351 (10th Cir. 1936); Salisbury v. Housing Authority of City of Newport, 615 F.Supp. 1433 (D.C. Ky. 1985). And it has been invoked repeatedly by the United States Supreme Court as well. United States v. Will, supra.; Evans v. Gore, supra.; Miles v. Graham, 268 U.S. 501 (1925); O'Malley v. Woodrough, 307 U.S. 277 (1939).

The common sense underpinnings of the Rule are perhaps best stated by the Minnesota Supreme Court in State ex rel. Gardner v. Holm, supra, where the Court held that the necessities of the case will overcome disqualification. The Court specifically stated that--

. . . we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case in which he is directly or indirectly interested [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of the courts may not be abdicated even on the grounds of interest when there is no other court that can act.

Holm, 62 N.W.2d at 53-54 (1954).

V.

In the present case the same holding must apply. Though there may exist sufficient grounds to disqualify the Judges--or there may not--the Court concludes that the Rule of Necessity imposes a duty on the Court to consider and decide this case. The Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court likely is the only tribunal with jurisdiction over this suit. So, the Appellant's motion, if granted, would destroy the jurisdiction of the only tribunal which could hear and decide this suit.[4] That is, the Ordinance requires that cases be heard by a Judge appointed pursuant to its provisions, and that a three-judge panel of the full court sit for appeals. The Ordinance alone controls the appointment, recall, and replacement of Tribal Court Judges, and it neither provides for reassignment of cases involving disqualified Judges, nor the appointment of substitute Judges. Rules 32(a) and (b) likewise provide no mechanism by which arguably disqualified judges might be replaced. So, if the Judges are disqualified, the Court could not fulfill the requirements of the Ordinance, and the

[4] This Court inquired of both counsel as to whether there is another forum with jurisdiction over this matter. Counsel for the Appellant did not provide an answer. Transcript, p.21, l.15 - p.22, l.20. Counsel for the Commission argued that the answer is a "resounding no". Transcript, p.35, l.15 - p.36, l.6. The Court agrees with Counsel for the Commission. Certainly there is no state court with jurisdiction over this matter. Further, there is no basis for federal court jurisdiction over such an inherently tribal matter.

Appellant would be without a forum which has jurisdiction to consider his claim. This result is unacceptable. See, United States v. Will, 499 U.S. 200, at 214 (1980); Brinkley v. Hussig, 83 F.2d 351, at 357 (10th Cir. 1936); State ex rel. Holm v. Gardner, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954); State ex rel. Null v. Polley, 34 S.D. 565, at 570, 138 N.W. 300, at 302 (1912); Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469 (1918); State ex rel. Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915). The Constitutional rights which Appellant's attorney vigorously asserts must include the right to a forum. Yet the Appellant's own motion, if granted, would deny him such a forum.

Appellant's Counsel contends that the Court could appoint substitute Judges by exercising its equitable powers granted under Section II of the Ordinance. However, the Ordinance clearly vests the Council with appointment authority--not the Court. The Court only can make appointments if the Council has failed to act for three months. If the Court were to exercise its equitable jurisdiction in the manner urged by the Appellant it would, in effect, be amending the Community's Ordinance and thereby usurping the Council's authority both to appoint judges and vote on amendments to its laws. This Court is unconvinced that its equitable powers grant it such authority, and is unwilling to exercise its equitable jurisdiction in such a fashion.

The Court notes in passing that the Rule of Necessity has been invoked to overcome disqualification of judges even where their "interest" was pecuniary. Counsel for the Appellant asserted that such an interest is "remote and indirect" and therefore inapposite to the present situation. Transcript, p.18, ll. 21-24. The Court does not share counsel's opinion that a Judge's pecuniary interest in the outcome of a case over which he or she presides is remote or indirect. To the contrary the Court finds that a pecuniary interest on the part of a Judge creates direct and

actual bias. The situation alleged to exist in the present case represents a much more indirect and tenuous interest on the part of the Judges, and is based on alleged rather than actual bias. If the Rule of Necessity overcomes disqualification based on direct financial interest, it surely overcomes disqualification here.

For the foregoing reasons, the Appellant's motion to remove the Judges is denied.

VI.

The Appellant also has moved the Court for an order disqualifying counsel for the Commission. This Court has no authority to interpret the Minnesota Rules of Professional Conduct or Canons of Ethics. The Appellant offers no law which purports to grant tribal courts that authority. There is none. Rather, that authority is left to the Minnesota Lawyers Board of Professional Responsibility, the Minnesota Supreme Court, and the attorney's own conscience.

The preamble to the Rules of Professional Conduct sets out the scope and the spirit of the rules. The Committee notes that

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies . . . the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

A motion to disqualify attorneys based on alleged violations of the Rules is not proper. The clear language in the preamble to the Rules warns against such use, and this Court will not entertain such use. If the Appellant feels a violation of the Rules has taken place the proper body with which to file a complaint is the Lawyer's Board and not a trial court--be it tribal,

state, or federal. Accordingly, the Appellant's motion to disqualify counsel for the Commission is denied.

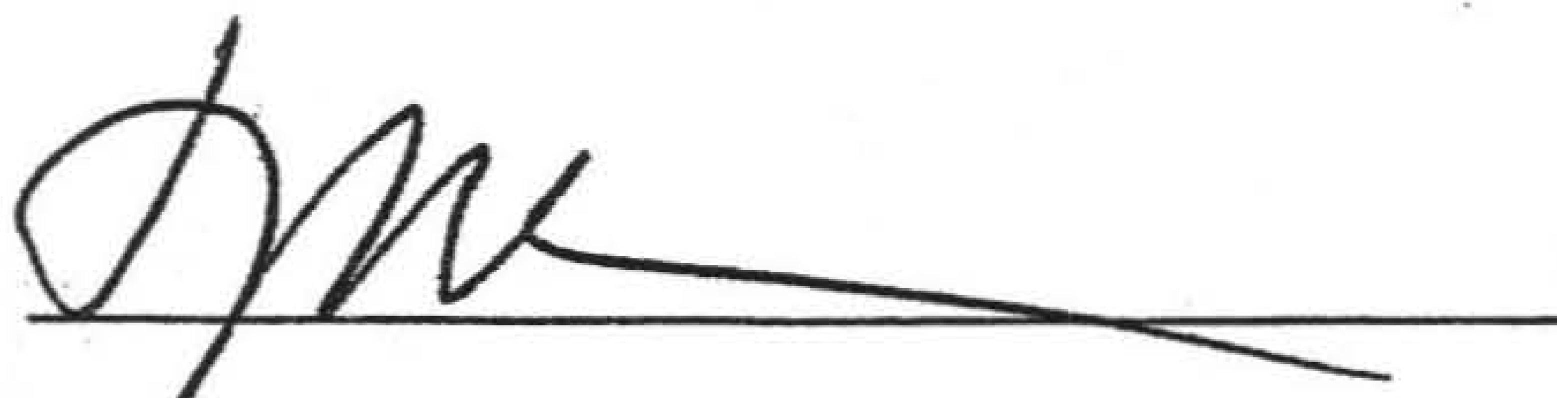
The Court finds the Appellant's alleged Rules violations are tenuous; the appearance of the Commission's counsel before this tribunal certainly is not "brazen" conduct. To suggest that their appearance in this case assists the Court in violating the Rules of Judicial Conduct strains credibility. The Court cautions the parties to use restraint in their factual and legal allegations as that conduct also is governed by the Rules of Professional Conduct. See Rules 3.1, 3.3, 3.4 and comments thereto.

Finally, the Court notes in passing that Mr. Hoover, counsel for the Appellant, stated in argument that he felt self-conscious in making the arguments in this, his first appearance before this tribunal. This Court is indeed in its infancy as compared to the status of similar institutions in our society. This fact, however, should not inhibit any counsel from making any and all arguments supported by law or facts. This Community, similar to hundreds of Indian nations across the land, has only recently begun the process of developing its governmental institutions, including, and especially, its court. The development of the court and other governmental institutions has been accomplished through the good faith and committed efforts of all members of the Community, and is a great source of pride to the Community as a whole.

This Court will continue its development as time marches on. The development of the Court is aided by the Counselors at Bar aggressively pursuing the advocacy of their respective

clients. This particular motion and its arguments are but one part of this on-going development. The Court would suggest that foregoing these arguments would have been of no assistance to this tribunal, the parties, and, most importantly, the Shakopee people and their government.

Dated: 11/8/97



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SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re Leonard Louis Prescott
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Commission Final Order

Court File No. 041-94

ORDER

The above-entitled matter came on for hearing before the undersigned Judge of Tribal Court on the 29th day of November, 1994, at 2330 Sioux Trial Northwest, in the city of Prior Lake, County of Scott, State of Minnesota, on the Appellant's Motion to Disqualify Counsel for the Gaming Commission and for the recusal and disqualification of the Tribal Court Judges.

Douglas A. Kelly, Esquire, Steven E. Wolter, Esquire and Michael Hoover, Esquire appeared on behalf of the Appellant Leonard Prescott. Andrew Small, Esquire and Steven F. Olson, Esquire, appeared on behalf of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission.

The Court being fully advised of the premises and based on the files, records and evidence herein, as well as the arguments of counsel,

IT IS HEREBY ORDERED,

1. That the Appellant's motion to recuse and disqualify the Tribal Court Judges be, and hereby is, in all things DENIED;

2. That the Appellant's motion to disqualify counsel for the Gaming Commission be, and hereby is, in all things DENIED;

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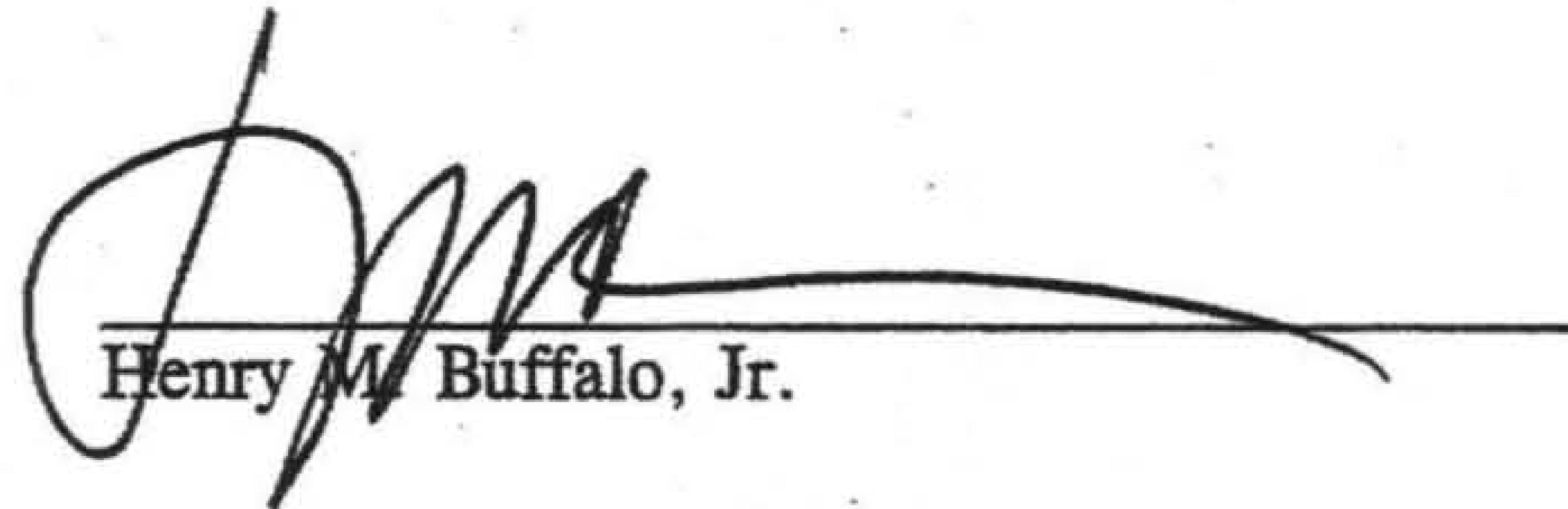
3. That Appellee's motion to deny receipt by the Court of the Affidavit of Rodney M. Haggard be, and hereby is, GRANTED;

4. That this matter be, and hereby is, REMANDED to the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission for further proceedings;

5. That the attached Memorandum of Law be, and hereby is, incorporated into this Order.

Dated: 11/8/94



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