

FOREST COUNTY POTAWATOMI TRIBAL COURT

**ROBERT ALLOWAY ON BEHALF OF
ALIVIYAH ALLOWAY-JEFFERSON, A MINOR,
ROSALITTA MUNOZ,
MARCOS MUNOZ and
ANTHONY ALLOWAY,
Plaintiffs**

FILED

DEC 14 2017

Forest County Potawatomi
Tribal Court

v.

**FOREST COUNTY POTAWATOMI
EXECUTIVE COUNCIL, HAROLD
FRANK, JAMES CRAWFORD JR.,
LORNA SHAWANO,
NATHANIEL GILPIN,
HARTFORD SHEGONEE and
RICHARD GOUGE,
Respondents.**

**CASE NO.
15-CV-70**

DECISION AND ORDER

INTRODUCTION

This case arises out of Respondents' failure and subsequent refusal to pay Plaintiffs three missed per capita payments after they were approved for enrollment at a General Council meeting on May 9, 2015. The General Council's 1997 directive leaves little doubt that individuals are entitled to receive per capita payments immediately upon their approval for enrollment. Plaintiffs followed the dispute resolution process under the Gaming Revenue Allocation Ordinance (GRAO) and the Executive Council denied their request for payment of the missed per capita income. Both sides have moved for summary judgment. The Court finds that the material facts are not in dispute.

After considering arguments from both sides, the Court finds the Executive Council decision to refuse payment is not consistent with law. As explained below, the Court rules in favor of Plaintiffs.

FACTUAL BACKGROUND AND FINDINGS OF FACT

The minutes of the November 8, 1997, General Council meeting contains the following entry:

Virginia Jacobson motions that upon approvals of applicants for enrollment by the General Council that they be eligible immediately for per capita benefits and that the budget be adjusted accordingly effective from this day forward. Seconded by Dennis Shepard. Vote: 59 For, 0 Opposed, and 7 Abstaining. Motion Carried.

November 8, 2017 General Council minutes

Despite its plain language, this directive has not always been followed. In fact, per Respondents' counsel at oral argument, it has rarely been followed. To both parties' knowledge no tribal member has ever brought a claim seeking to recover these missed payments. Evidence in the record shows that as few as one payment and as many as nine have been missed by newly enrolled tribal members due to the lag time between General Council action and payments being issued. (Exh. A to Hanson Affidavit).

Since 1982 there have been approximately 30 General Council actions approving individuals for enrollment. The May 9, 2015 enrollment was the second largest in 30 years, exceeded only by the enrollment of over 100 individuals in 1983.

The Enrollment Department and Enrollment Committee experienced some instability in early 2015. On February 11, 2015, the Tribe's Enrollment Department Director, who had almost 20 years of experience in that department, left employment with the Tribe. The Department's only other employee had been on leave since September 18, 2014 and was no longer employed by the Tribe as of May 13, 2015. The Enrollment Department Director position was filled on May 11, 2015. On May 26, 2015 three Enrollment Committee members resigned leaving the committee without a quorum and therefore, presumably, unable to conduct business.

Shortly after the May 9, 2015 enrollment, the list of enrollees was unnecessarily sent to the Bureau of Indian Affairs (BIA) pursuant to historical practice. However, unbeknownst to the new Enrollment Department Staff this practice had ceased and the BIA no longer reviewed prospective members. Eventually, the Enrollment Department learned that the BIA would not perform a review or report back to the Tribe.

The Plaintiffs did not receive per capita payments due to them on May 20, June 3, and June 17, 2015. The enrollment process moved forward and the Plaintiffs began receiving regular per capita payments on July 1, 2015.

Following the General Council approval of individuals for enrollment there are several administrative steps that occur before a person begins receiving per capita payments:

1. The General Council Secretary notifies the Enrollment Department that the General Council has approved new members and provides the Enrollment Department with a list of the names of approved members.
2. The Enrollment Department confirms statistical and personal information of the individuals.
3. Enrollment numbers are assigned.
4. The Finance Department must perform a financial analysis to assure that per capita payments stay within the limitations established by the Gaming Revenue Allocation Ordinance.
5. The Finance Department determines the correct per capita amount, prepares checks and makes distributions.

In accordance with GRAO, the amount of per capita paid to each individual tribal member is determined as follows: 1) Determine the annual net gaming revenue available to the Tribe for expenditure; 2) divide that number by two and 3) divide the resulting number by the number of enrolled tribal members.

On May 9, 2015, the General Council approved Plaintiffs' enrollment in the Tribe along with 68 other individuals. The Forest County Potawatomi Tribe pays its members per capita payments every other week. Nevertheless, Plaintiffs did not receive the next three per capita payments (May 20, June 3 and June 17)¹ after May 9, 2015. Plaintiffs informally contacted various tribal employees and officials about the missed payments. However, none ever received the payments.

¹ The new amount of the per capita payment taking into account the members added on May 9, 2015 enrollment was \$2,665.28 bi-weekly before taxes. Pro-rating the first payment for the 11 days from the day of the meeting to May 20, the Court calculates that the missed payments equaled \$7,424.74. (June 30, 2015 letter from Treasurer Richard Gouge)

Plaintiffs are not seeking retroactive payments back to their date of birth or other date when their eligibility for membership could be definitively established. They only seek payments for the time between date of their approval for enrollment by the General Council and when they actually started receiving per capita payments which was on or about July 1, 2015.

On or about June 27, 2015, Plaintiffs grieved to the Executive Council about the missed payments. The Executive Council did not respond directly to Plaintiffs' written complaint.

On July 8, 2015 Plaintiffs started this law suit.

PROCEDURAL HISTORY

The Tribe filed a Motion to Dismiss soon after the case was started. The Court denied that motion and the Tribe filed an interlocutory appeal. The Appellate Court affirmed the denial of the dismissal. The Court then set a scheduling order and both parties filed motions for Summary Judgment.

ANALYSIS

A. Standard of Review

Respondents argue for a deferential standard of review with respect to the Executive Council's decision on Plaintiffs' request for missed payments. The GRAO specifies an appeal to Tribal Court but does not mention what deference, if any, should be given to the Executive Council decision. The Tribe cites federal law as persuasive authority. See e.g. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, (1994) ("We must give substantial deference to an agency's interpretation of its own regulations. ... [T]he agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with regulation.") (Internal quotations and citations omitted.)

The Court questions whether the Executive Council is an "agency" and whether the GRAO is a "regulation." The Executive Council is an arm of the tribal government. The GRAO is a law passed by the General Council. The rationale behind deference is not as compelling when another branch of the government is interpreting law rather than its own regulations.

This matter is more similar to an administrative appeal like the denial of a gaming license or an appeal from an Election Board decision. The latter was the case in *Daniels et al v. Deschinny*, 06-CV-192 (2006). The Trial Court was unconstrained by the lower administrative decision and treated the case as a de novo review where it could take testimony and evidence. The Court noted the matter did not come to it with a complete record of a transcript and administrative record. The Plaintiffs' claim here is similar.

The record at the Executive Council level, such as it is, is minimal. This of course is the Executive Council's own doing. It essentially stonewalled Plaintiffs even though the ordinance permitted the Executive Council to "accept written or oral evidence." Furthermore, like the *Daniels* case, the parties here have supplemented the factual record, making this matter similar to an original action at the trial court level. Neither party objected or otherwise argued that this Court only had appellate jurisdiction which might preclude the further finding of facts. The Court would have been more inclined to grant deference had a more complete record been developed at the lower level.

Therefore, the Court will proceed in the same manner as the *Daniels* case and consider its review as being de novo without any deference owed to the Executive Council.²

B. Merits

The Plaintiffs' argue the plain language of the November 8, 1997 motion settles the case at least as to the question of the merits of the missed payments. The language of the motion is very specific: it states that the individuals are eligible to receive per capita payments immediately "upon approval" for enrollment. It does not say they will receive per cap upon enrollment—it says upon approval, which is what happened on May 9, 2015 at the General Council meeting. Furthermore, the motion says the budget should be adjusted so payments can begin immediately. Even if the language was ambiguous, which the Court finds it is not, the intent of it is unmistakable: newly approved individuals are to start receiving per capita payments right away.

² The Court notes that even with a more deferential standard of review, it would still find the Executive Council's decision erroneous as a matter of law and subject to reversal.

Defendants have several arguments, none of which are persuasive. First, Defendants cite this language in the Gaming Revenue Allocation Ordinance relating to its decision and argue it grants them sufficient discretion to deny payments: “The Executive Council . . . shall review the written submissions and determine whether an allocation/distribution or denial thereof is consistent with the terms and purpose of the Ordinance and Section 11(b)(3) of the Indian Gaming Regulatory Act.” Defendants argue that their decision is “consistent” with the Ordinance and the IGRA and therefore should be upheld. The Court understands the Respondents’ argument. However, Respondents take the argument too far and construe the language too narrowly.

The GRAO language does not permit the Respondents to ignore the rest of the Tribe’s laws when making a decision. The November 1997 General Council directive contains unmistakably clear language that payments are to begin immediately. The GRAO language cited by Respondents does not undo or override the 1997 directive.

Second, the Respondents’ argument that distributing the payments is not consistent with the Ordinance is unsound. It is entirely consistent with the GRAO that Plaintiffs are entitled to these payments. Respondents argue that nothing in the GRAO dictates the number of days between approval for enrollment, enrollment and payment. This argument is troubling because without the 1997 General Council directive Respondents seem to be suggesting that payments could legally be withheld indefinitely.

Respondents also rely on administrative and logistical challenges rather than the law. Respondents seek forgiveness because the staff shortages and loss of institutional continuity around May 2015 caused delays in the administrative steps needed to enroll and begin paying the approved individuals. These issues amount to excuses. The Tribe certainly had plenty of advance notice that a large number of individuals were potentially going to be enrolled. There is no legal basis for excusing noncompliance.

Third, Respondents argue that the failure to follow the law in past years justifies not following now. The Court disagrees. The law is still valid. No tribal members elected to challenge the missed payments.

Fourth the Respondents warn of dire consequences due to the GRAO’s requirement that no more than 50% of revenues be allocated to per capita payments. In one sense, this is not the Court’s problem. It is certainly possible, from a mathematical

and legal point of view that payments for all members can be adjusted for calendar year 2018 so that the Tribe remains in compliance with Sec. 4.1 of the GRAO. It may not be convenient and it may not be politically popular but it is legally required and it certainly can be accomplished. Furthermore, given the amounts of money involved for these Plaintiffs, the adjustments will be relatively small.

C. Interest on money owed

Plaintiffs request interest on their award as over two years has passed from the time they should have received the payments to this Court's judgment.

The Court believes it is fair and within its power to award interest. This Court is a Court of general civil jurisdiction. (Sec. 3.1 of the Court Code). As such, the Court has equitable and inherent powers to make individuals whole.

The Court therefore awards 12% per annum to each Plaintiff from the time the money was due until the judgment is issued (May 2015 to December 2017). Given that the payments were due to begin with the May 20, 2015 per capita payments, interest of \$2,301.67 is awarded to each Plaintiff.

D. Attorney's Fees

Plaintiffs request an award of attorneys' fees in the amount of \$39,426.25. After all briefing and oral arguments were concluded Respondents, by letter, requested further hearing on this matter. However, the Court finds that this matter is properly before the Court as it was included in Plaintiffs' original Motion for Summary Judgment and therefore Defendants were on proper notice.

The Court's decision to award attorney fees to Plaintiffs is influenced by the way Respondents conducted themselves in this matter. The Court understands and acknowledges that the tradition in this Court and in the United States in general is for each side to bear its own attorney fees. However, the borderline frivolous refusal of the Respondents and unreasonably obstinate decisions at every turn unnecessarily contributed to the length of the litigation without good cause and thus increased Plaintiffs' attorney fees.

Much of this litigation could have been avoided if Respondents:

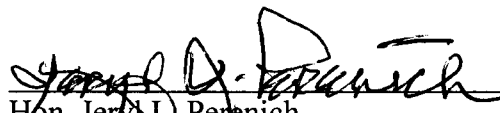
1. Before the May 9, 2015 General Council meeting had been properly prepared to follow and implement the 1997 General Council motion. It is elected officials' job to be aware of and apply the law in place.
2. After the May 9, 2015 General Council meeting, had properly responded to Plaintiffs' written request for the missed payments. Once it was brought to their attention, Respondents' choice was to ignore Plaintiffs request for over a year. It took many months of litigation and a trip to the appellate court before Respondents would respond to Plaintiffs' request and even then only if the Court issued a stay of the proceedings.
3. Had provided more substantive arguments about their refusal to act. The Defendants' arguments can be summarized as follows:
 - a. We weren't ready for the large enrollment.
 - b. No one really follows that law anyway.
 - c. Send it to the General Council.

The Court acknowledges the Respondents certainly have a right to their view of the GRAO and the right to deny and then defend their decision. But much of the length of this litigation could have been avoided and therefore the Court awards \$20,000.00 in attorney fees to Plaintiffs to be paid within 60 days of judgment.

CONCLUSION

Judgment is in favor of the Plaintiffs for the three missed per capita payments. Each plaintiff is entitled to and shall receive payment of \$7,424.74 within 60 days of this judgment plus interest of \$2,301.67.

Plaintiffs are also entitled to reimbursement of attorney fees in the amount of \$20,000.00. This amount shall be paid to Plaintiffs within 60 days of the judgment.



Hon. Jeryll L. Perenich
Dated: December 14, 2017