

STATE OF MAINE

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Inter-Departmental Memorandum Date November 10, 1982

to Patricia E. Ryan, Executive Director

Dept. Maine Human Rights Commission

from John E. Carnes, Esq., Legal Advisor

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Subject Question: Does the Maine Human Rights Commission have Jurisdiction over the Penobscot Nation When the Tribe is Acting in its Capacity as a Governmental Employer?

I. ANALYSIS

It is a well established principle of law that, in the absence of Congressional authorization, states do not have jurisdiction over Indian affairs arising on tribal reservations. By enacting the Maine Indian Claims Settlement Act of 1980, Congress consented to such jurisdiction by the State, limited only by the provisions of the Maine Implementing Act, 30 M.R.S.A. §6201 et seq.

Section 6206(1) of the Maine Implementing Act states in relevant part:

"Except as otherwise provided in this Act, the...Penobscot Nation, within (its) Indian territo(y),...shall be subject to all the... liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including...tribal government...shall not be subject to regulation by the State."

Traditionally, the power of a tribe to determine and define its own form of government has included:

"...the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of acts done in the name of the tribe." F. Cohen, Handbook of Federal Indian Law, 126.

The question is: is hiring, firing and the establishment of terms and conditions of employment, etc., an integral component of the right to self-government, or is there a qualitative difference between the establishment of a form of government and the operation of it?

Congress, which has plenary power over the Indian tribes, when it enacted the Civil Rights Act of 1964 (see section 701(b)), specifically excluded Indian tribes from the definition of "employer". This special exclusion was in recognition of the tribes' unique and historic relationship with the federal government. F.E.P. Man. 411:203.

In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §1301 et seq. The Act is intended to provide some protection for the individual from arbitrary action by his tribe. For example, Section 1302 of the Act, Constitutional Rights, states:

"No Indian tribe in exercising powers of self-government shall -
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law,..."

Because of the need to protect the cultural identity of the Indian tribes as well as the civil rights of individual tribal members, the concepts of equal protection and due process are not applied under the Indian Civil Rights Act in complete conformity with federal court interpretations under the U.S. Constitution. In Janis v. Wilson, 385 F. Supp. 1143 (D.C.S.D. 1974), the Court expressed the modified nature of the Indian "bill of rights" thusly:

"The scope of individual rights contained in the (Indian Civil Rights Act) is to be determined by balancing them against the legitimate interests of the tribe in maintaining the traditional values of their unique governmental and cultural identity."

Considering the unique development of civil rights principles as they affect Indian tribes, it is unlikely that Congress, the Penobscot Nation and the State of Maine intended to subject the tribe to the provisions of the Maine Human Rights Act, which were, of course, modeled after Title VII. Congress has a long history of supporting the concept of tribal self-government and specifically excluded Indian tribes from the provisions of Title VII. And there is no significant evidence that the State intended that the power over "tribal government," which was specifically reserved to the tribe, be limited with regard to the employment of tribal members by the tribal government.

II. CONCLUSION

It is my opinion that the parties to the Maine Implementing Act intended that a tribal member who wished to make a charge of discrimination against the Penobscot Nation would pursue his rights under the Indian Civil Rights Act, i.e., that the reservation of power over "tribal government" precludes the Maine Human Rights Commission from monitoring that government's employment practices.