

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

VILLAGE OF HOBART,

Plaintiff-Appellant,

Appeal No. 2010AP000561

vs.

Circuit Court Case No.

2008CV001313

BROWN COUNTY,

Defendant-Respondent.

Appeal from the Brown County Circuit Court
Order on Motion for Reconsideration and Order Granting Summary
Judgment Entered January 19, 2010
The Honorable Marc A. Hammer Presiding
Circuit Court Case No. 2008-CV-1313

BRIEF OF PLAINTIFF-APPELLANT
VILLAGE OF HOBART

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented is whether the Oneida Tribe of Indians of Wisconsin is a public agency entitled to receive 911 calls under Wis. Stat. § 256.35.

Answered yes by the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Village of Hobart believes that oral argument would be helpful and that the Court's decision should be published because the case appears to present issues of first impression in Wisconsin.

STATEMENT OF THE CASE

This is a declaratory judgment action in which the Village of Hobart ("Village" or "Hobart") sought a declaration that an agreement ("Service Agreement") between the Oneida Tribe of Indians of Wisconsin ("Tribe") and Brown County ("County") invalidly provided for certain 911

calls to be transmitted to the Tribe rather than to the Village's police department. (A-App. 122-27; R. 2)

The Village is located in the County and provides emergency call service ("911 service") under Wis. Stat. § 256.35 by a Joint Powers Agreement with the County. (A-App. 101-2; R. 78-9 to 10)¹ The Village has established a joint police department ("Hobart-Lawrence Police") with the Town of Lawrence pursuant to Wis. Stat. § 61.65(1)(a)3. (A-App. 161) Prior to June 30, 2008, 911 calls for law enforcement services originating in the Village were transmitted to the Hobart-Lawrence Police. (R. 61-6 to 8)

On May 29, 2008, the County and the Tribe signed the Service Agreement. (A-App. 110; R. 23-10) The Service Agreement has a term of fifteen years running from June 30, 2008 to October 31, 2023. (A-App. 105; R. 23-5) The

¹ The Town of Hobart referred to in the Joint Powers Agreement has since become the Village of Hobart, and Wis. Stat. § 146.70 has been renumbered as § 256.35.

Service Agreement was amended in September of 2008. (A-App. 120-21; R. 61-3 to 4) Under the Service Agreement, 911 calls for police services within part of the Village are transmitted to the Tribe instead of the Hobart-Lawrence Police. (A-App. 105, 120; R. 23-5, 61-3)

The Village commenced the above-captioned action against the County and the Tribe seeking invalidation of the portions of the Service Agreement providing for 911 calls to be transmitted to the Tribe instead of the Hobart-Lawrence Police. (A-App. 122-27; R. 2) The Tribe was dismissed because it is a sovereign over which the court has no jurisdiction. (R. 17-2 to 5, 44, 49, 50, 51, 52)

The circuit court granted the County's motion for summary judgment, dismissing the complaint and denied the Village's motion for reconsideration. (A-App. 131-157, R. 86, 99) This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW.

Appellate review of the circuit court's grant of summary judgment is *de novo*. *Village of Hobart v. Brown County*, 2005 WI 78, ¶ 18, 281 Wis. 2d 628, 698 N.W.2d 83.

Interpretation of a statute is a question of law which this Court determines without deference to the trial court. *City of Madison v. Donohoo*, 118 Wis. 2d 646, 651, 348 N.W.2d 170 (1984). "The aim of statutory construction is to discern the legislature's intent." *Local 913, AFSCME v. Manitowoc County*, 140 Wis. 2d 476, 480, 410 N.W.2d 641 (Ct. App. 1987). "Legislative intent is primarily deduced from the language the legislature has chosen to use." *State v. Toy*, 125 Wis. 2d 216, 218, 371 N.W.2d 386 (Ct. App. 1985). "Generally, rules of construction are used only to determine the meaning of an ambiguous statute." *Local 913*, 140 Wis. 2d at 480.

II. THE 911 STATUTE REQUIRES EMERGENCY CALLS FOR LAW ENFORCEMENT SERVICES TO BE TRANSMITTED TO THE HOBART-LAWRENCE POLICE DEPARTMENT.

Wis. Stat. § 256.35 establishes the statewide emergency services number, 911. It provides for transmitting calls for emergency services to the “the public safety agencies providing such services.” Wis. Stat. § 256.35(2)(b). In the Village of Hobart, the Hobart-Lawrence Police Department is the public safety agency providing police services pursuant to Wis. Stat. § 61.65.(1)(a)(2). Village of Hobart Code § 1.1000. (A-App. 161) Thus, 911 calls from Hobart for police services are to be transmitted to the Hobart-Lawrence Police.

The Service Agreement between the County and the Tribe requiring certain 911 calls from Hobart to be transmitted to the Tribe instead of the Hobart-Lawrence Police is invalid because nothing in Wis. Stat. § 256.35

authorizes the County to transmit calls to an entity other than the public safety agency providing police services in the Village; and because the Tribe is not a public agency as defined in Wis. Stat. § 256.35(1)(f).

A. The Oneida Tribe Is Not A Public Agency.

The 911 statute provides for transmitting requests for law enforcement services to public safety agencies. Wis. Stat. § 256.35(2)(b).

“Public safety agency” means a functional division of a public agency which provides fire fighting, law enforcement, medical or other emergency services.

Wis. Stat. § 256.35(1)(g).

“Public agency” means any municipality as defined in s. 345.05(1)(c) or any state agency which provides or is authorized by statute to provide fire fighting, law enforcement, ambulance, medical or other emergency services.

Wis. Stat. § 256.35(1)(f).

“Municipality” means any county, city, village, town, school district as enumerated in s. 67.01(5), sewer district, drainage district, commission formed by a contract under s. 66.0301(2), and, without restriction because of failure of enumeration, any other political subdivision of the state.

Wis. Stat. § 345.05(1)(c).

The Tribe is a sovereign nation; it is not a political subdivision of the State of Wisconsin. It is therefore not a public agency and its police department is not a public safety agency.

Because Wis. Stat. § 256.35(2)(b) provides for transmitting requests for law enforcement services to public safety agencies, it does not authorize such calls to be transmitted to the Tribe instead of the Hobart-Lawrence Police.

The County relies on 80 Wis. Op. Att’y Gen. 91 (1991) (OAG 16-91) to argue that it can agree to transmit 911 calls to the Tribe rather than the Hobart-Lawrence Police.

The problems with that argument are that, in addition to being contrary to the plain language of the statute, as noted above, it is inconsistent with other opinions of the Attorney General.

Other Attorney General opinions provide more persuasive and reasoned authority. In 72 Wis. Op. Att’y Gen. 132 (1983) (OAG 36-83), the Attorney General answered the question of “whether the Oneida Indian Tribe is a ‘governmental unit’ within the meaning of section 144.07(4)(a).”² The Attorney General concluded that the Tribe was not, because:

Where the Legislature has recognized tribal government as of the same status as local units of government, it has done so explicitly. *See, e.g.,* sec. 20.002(13), Stats.

Id. at 134. Under such reasoning, had the Legislature intended for Indian Tribes and their subdivisions to be included in the definition of “public agency” for purposes of

² Since renumbered as section 281.43.

the 911 statute, it would have done so explicitly. However, it did not.

Likewise, in Opinion of Wis. Att’y Gen. to Kenneth J. Bukowski, Brown County Corp. Counsel, OAG 45-87, 1987 WL 341128 (Aug 24, 1987), the Attorney General concluded that the Oneida Indian Tribe is not a municipality within the meaning of sections 66.20 to 66.26, the statutes then governing the creation of metropolitan sewerage districts.³

The Attorney General reasoned, as follows:

The context within which municipality is used requires that the governmental unit be a political subdivision of the state. The Oneida Tribe’s governmental status is not affected or determined by state law.

1987 WL 341128, at *5.

The opinion cites 72 Wis. Op. Att’y Gen. 132 (1983) for the proposition, again: “Where the Legislature has recognized tribal government as of the same status as local

³ Since renumbered chapter 200.

units of government, it has done so explicitly.” 1987 WL 341128, at *5. Accordingly, the Tribe is neither a political subdivision of the State, nor a municipality, unless explicitly included in the definition under the law.

Relevant to the case at hand is how the Attorney General then goes on to address section 66.30, which includes Indian Tribes in its definition, and whether the Tribe is a municipality within the meaning of section 66.30 for any purpose other than that contained in section 66.30, or “the establishment of a joint transit commission.” *Id.* The Attorney General states:

The express mention of “federally recognized Indian tribe or band” in section 66.30(1)(b) and its visible absence in section 66.30(1)(a) is strong evidence of legislative intent to not include tribal governments as municipalities for any other purpose. If the Legislature had wanted to include tribes for any other purpose it would have done so when it originally included tribes in section 66.30(1)(b). The above-stated analysis for exclusion of Indian tribal

governments in section 144.07(4)(a) is also applicable here.

Id.

The same reasoning applies to this case. The County argues that because Indian Tribes are included in Wis. Stat. § 59.54, governing joint law enforcement agreements with Tribes, that Tribes must therefore also be included in the definition of public agency under Wis. Stat. § 256.35, the 911 statute. Section 59.54(12) empowers a county to enter into joint law enforcement agreements with Tribes because there is specific reference to tribal entities:

County-tribal law enforcement programs.
Pursuant to adoption of a resolution, a board may enter into an agreement and seek funding under s. 165.90.

Wis. Stat. § 165.90, in turn, provides a detailed statutory mechanism by which a joint program plan is to be funded, and specifically references its application to Tribal entities:

Any county that has one or more federally recognized Indian reservations within or partially within its boundaries may enter into an agreement in accordance with s. 59.54(12) with an Indian tribe located in the county to establish a cooperative county-tribal law enforcement program.

The absence of Tribes as part of the definition of public agency under section 256.35(1)(f) demonstrates the legislative intent to not include tribal governments.

More recently, the Attorney General has addressed the question of whether tribal law enforcement agencies are included within the ambit of Wis. Stat. § 66.0313 which governs mutual assistance requests among law enforcement agencies. Opinion of Wis. Att’y Gen. to Thomas Wiensch, Assistant Corp. Counsel, Oneida County, OAG-8-08, 2008 WL 4452630 (Oct. 1, 2008). Section 66.0313 adopts the definition of law enforcement agency from § 165.83(1)(b) which, like § 345.05(1)(c) adopted by § 256.35(1)(f), refers to subdivisions of the state. The Attorney General determined

that tribal law enforcement agencies are not included within the coverage of § 66.0313.

The language of the above provisions, when construed together, compels the conclusion that a tribal law enforcement agency is not a “law enforcement agency” for mutual assistance purposes under Wis. Stat. § 66.0313. An Indian tribe is neither a state nor a political subdivision of a state. *See Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (quoting F. Cohen, *Handbook of Federal Indian Law* 664-65 (1982)) (“Indian tribes are not states of the union within the meaning of the Constitution...”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 189 (1982) (distinguishing Indian tribes from states and their subdivisions); *Oklahoma Tax Com’n v. Citizen Bank Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.”) Accordingly, a tribal law enforcement agency is not an agency of “the state or a political subdivision of the state” within the meaning of Wis. Stat. § 165.83(1)(b) and thus cannot be deemed a “law enforcement agency” for purposes of Wis. Stat. § 66.0313.

2008 WL 4452630, at *1.

That reasoning is precisely applicable to the present case. Because the Oneida Tribe is not a subdivision of the state, it is neither a law enforcement agency for purposes of Wis. Stat. § 66.0313 nor a public safety agency for purposes of Wis. Stat. § 256.35.

B. The Hobart-Lawrence Police Department is the Public Safety Agency to Which Calls for Law Enforcement Services in Hobart Must Be Transmitted.

Hobart is required to provide police protection services by Wis. Stat. § 61.65(1)(a). Pursuant to Wis. Stat. § 61.65(1)(a)3, Hobart has done so by creating a joint police department with the Town of Lawrence known as the Hobart-Lawrence Police Department. Village of Hobart Code § 1.1000 (A-App. 161)

The Hobart-Lawrence Police Department is a public safety agency as defined in Wis. Stat. § 256.35(1)(g). Because it is the police protection services agency in Hobart

required by Wis. Stat. § 61.65(1)(a), it is the public safety agency to which calls for police services in the Village are to be transmitted under Wis. Stat. § 256.35(2)(b).

The County relies on the Intergovernmental Agreement with the City of De Pere, City of Green Bay and Village of Ashwaubenon (R. 78-5 to 8); the Joint Powers Agreement with Hobart (R. 78-9 to 10); and chapter 36 of the Brown County Code (R. 78-11 to 12) as authority for transmitting 911 calls to the Tribe instead of the Hobart-Lawrence Police. Those documents provide no such authority. They are silent as to determining to whom calls are transmitted, because of the 911 statute already provides that calls for law enforcement service will be transmitted to the public safety agency providing such service. In the Village of Hobart, that is the Hobart-Lawrence Police, not the Tribe.

III. THE SERVICE AGREEMENT IS INCONSISTENT WITH STATUTORY REQUIREMENTS.

The Service Agreement is invalid for failure to comply with statutory requirements. As noted above, the Tribe is not a public agency qualified to receive 911 calls. In addition, the Service Agreement is a fifteen-year agreement contrary to the requirement in Wis. Stat. § 256.35(9)(a) that joint powers agreements be annual.

Wis. Stat. § 256.35(9)(a) also requires joint powers agreements to provide that vehicles dispatched shall render services regardless of whether the vehicle is operating outside its normal jurisdictional boundaries. The Service Agreement includes no such provision, and cannot include any such provision, because Wis. Stat. § 165.92(2) does not permit the Tribe to provide police services beyond the boundaries of the reservation and trust lands.

Finally, in the circuit court, the County argued that the Service Agreement is authorized by the Sheriff's constitutional authority to direct law enforcement. The three problems with that argument are: (1) that the agreement is with the County, not the sheriff; (2) that nothing in the Constitution or the 911 statute gives the sheriff authority to direct 911 calls; and (3) that if the sheriff had such constitutional authority, the Service Agreement would interfere with that authority by directing where 911 calls are to be directed.

CONCLUSION

The Tribe is not a public agency, and its police department is not a public safety agency as those terms are defined in Wis. Stat. § 256.35(1). The Hobart-Lawrence Police Department is the public safety agency to receive 911 calls for law enforcement services in the Village of Hobart. Therefore, the decision of the Brown County Circuit Court

must be reversed. Judgment should be entered declaring the portions of the Service Agreement providing for 911 calls to be transmitted to the Tribe instead of the Hobart-Lawrence Police Department to be invalid.

Dated: May 3, 2010.

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