



**THE MILLE LACS BAND OF**  
**OJIBWE INDIANS**

*Office of the Solicitor General*

**SOLICITOR'S OPINION 24-02**

**INTRODUCTION**

On March 7, 2002, the Band Assembly formally requested a Solicitor General's Opinion ("Opinion") according to 3 MLBSA § 29 to interpret the question whether an interim appointment of an executive officer is subject to confirmation by Band Assembly. This request requires an interpretation of the appointment power provided in Band Statute 4 MLBSA § 6 (b).

**QUESTIONS PRESENTED**

Does the Commissioner of Administration have authority to appoint the Assistant Commissioner of Administration as the interim Commissioner of Community Development, and the Deputy Assistant as the interim Assistant Commissioner of Administration?

If so, are interim appointments for executive officers subject to confirmation by the Band Assembly?

**DISCUSSION**

**A). Has the Commissioner of Administration appointed an executive officer?**

Title 4 MLBSA § 4 defines executive officers as: "The executive officers shall consist of the Chief Executive, Commissioner of Administration, Assistant Commissioner of Administration, Commissioner of Natural Resources, Commissioner of Education, Commissioner of Corporate Affairs, and Commissioner of Human Services." Thus the two positions are executive officers as defined by Band Statute.

On March 5, 2002, the Chief Executive sent a letter to Band Assembly asking to "transfer" two individuals to interim executive office positions for approximately three months.<sup>1</sup> The letter addressed to Herb Weyaus, Secretary Treasurer stated:

It has been determined that the process of posting, interviewing, nominating and ratifying a new candidate for commissioner of community development will take approximately three months.

Since there is a need for a Commissioner of Community Development at the current time, I am requesting to transfer

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<sup>1</sup> The Assistant Solicitor General, John Swimmer was given a copy of the letter by Sylvia Villebrun, Band Assembly Parliamentarian.

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Christine Costello from Assistant Commissioner of Administration to Commissioner of Community Development; and Tracy Sam from Deputy Assistant to Assistant Commissioner of Administration until a new commissioner can be nominated and ratified.

I would also request to make this transition effective Monday, March 11, 2002. Please let me know at your earliest convenience if this transfer is acceptable to the Band Assembly.

Enclosed with the Opinion request, the Band Assembly included an interoffice memorandum from the Commissioner of Administration, dated the March 7, 2002. The memorandum addressed to all staff stated:

As most of you are aware, we have been in the process of trying to fill the position of Commissioner of Community Development. While we have been attempting to fill that position our Assistant Commissioner of Administration has been taking on that responsibility along with her own duties as Assistant Commissioner, which is a lot of responsibility for one person.

As a temporary arrangement, beginning on March 11, 2002 Assistant Commissioner, Christine Costello will become Interim Commissioner of Community Development and Deputy Assistant, Tracy Sam, will take over her duties as Assistant Commissioner of Administration.

In the meantime we will continue our search for a Commissioner of Community Development.

As stated in memorandum the Commissioner of Administration sent the interoffice memorandum on March 7, 2002 to provide staff with notice that Christine Costello, currently the Assistant Commissioner of Administration, was being assigned as the interim Commissioner of Community Development and that Deputy Assistant Tracy Sam was temporarily assuming duties as Assistant Commissioner of Administration. The memorandum states nothing about an "appointment" of any individual but rather noted the positions as a "temporary arrangement." The Band Assembly has neither confirmed or denied the "transfer" or interim appointments as requested by Chief Executive. Instead, the Band Assembly solicited this Opinion.

Here, the timing of the events is illustrative. The Chief Executive sent her "transfer" request to Band Assembly on or about March 5, 2002. The memorandum from the Commissioner of Administration was not posted until March 7, 2002. Logically, it seems that the interoffice memorandum simply provided the staff notice of the personnel changes. Albeit perhaps the interoffice memorandum was premature since the Band Assembly has not acted to either confirm or deny the interim appointments or "transfer." Given the context and the timing of the letters, the Chief Executive probably made the interim appointments. In all likelihood, the Commissioner of Administration appears to have only notified the staff of the changes.

Under Band Statute 4 MLBSA § 6, the Commissioner of Administration cannot unilaterally appoint either the Commissioner of Administration as the interim Commissioner of Community Development or the Deputy Assistant as the interim Assistant Commissioner of Administration without the express consent of the Chief Executive. Previously, express consent has been given to a Commissioner through a Commissioner's Order.<sup>2</sup> Only the Chief Executive can appoint executive officers. Title 4 MLBSA § 6 (b) states: "The Chief Executive shall have the following authority in exercising executive powers of Band government: To appoint wherever authorized by Band Statute, executive officers, judges, heads of commissions, boards or authorities, legal and financial counsel and to make appointments to fill any vacancy in any office as authorized by Band Statute and subject to confirmation by the Band Assembly."

Furthermore, under Band Statute executive officers have enumerated powers and duties. One of the enumerated duties is to perform duties as delegated by the Chief Executive: "A Commissioner can perform any duties lawfully assigned by the Chief Executive." 4 MLBSA § 7 (k). Contextually, looking at the Chief Executive's March 5, 2002 letter, the Commissioner of Administration did not make the appointments but subsequently provided staff with notice of the "temporary arrangement" or transfer of individuals as requested by Chief Executive to the Band Assembly. The Chief Executive apparently made the interim transfer appointments for the Commissioner of Administration and Commissioner of Community Development. In this case, there was not a Commissioner's Order or Executive Order delegating appointment authority. The most logical inference is that Commissioner of Administration's memorandum only provided notice of the staff changes. In this instance, the Commissioner of Administration appears to be acting in concert with and on behalf of the Chief Executive by providing notice of the staff changes in compliance with his lawful duty under 4 MLBSA § 7(k), which provides the Commissioner of Administration the authority "to perform any duties as may be lawfully assigned by the Chief Executive." Such an act would not infringe on the appointment power expressly reserved for the Chief Executive. Therefore, the Commissioner of Administration's act of posting notice of the staff change was merely an exercise of a delegated duty. This duty comports with his authority to perform duties lawfully assigned by the Chief Executive.

**B). Are interim appointments by the Chief Executive subject to confirmation by Band Assembly?**

It is with this question in mind that the proposed appointments must be scrutinized. The Chief Executive temporarily appointed Assistant Commissioner Christine Costello as the Interim Commissioner of Community Development and Deputy Assistant, Tracy Sam as Assistant Commissioner of Administration for an interim period until a new commissioner can be nominated and notified.

Under the Mille Lacs Band statutory scheme, the executive and legislative powers are balanced to provide for a separation of powers. "To accomplish a fair and just exercise of

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<sup>2</sup> See generally, Commissioner's Order 79-96 (Appointing George Weber as Acting Commissioner of Education pursuant to 4 MLBSA § 10(f) "the Chief Executive has delegated the day-to-day supervisory responsibility for other Commissioners to the Commissioner of Administration and because a vacancy existed and would remain until the Chief Executive nominates and the Band Assembly confirms, and Commissioners Order 40-91 (A Commissioner's Order to employ Karen Ekstrom as Assistant Commissioner of Administration).

authorities conferred by the people in the Constitution, the authorities of government shall be balanced by dividing such authorities so that no one person or governmental entity shall have absolute power.” 2 MLBSA § 5. The Band Statutes appointment scheme consists of a two part process, appointment under 4 MLBSA § 6 (b), and confirmation under 3 MLBSA § 2 (c).<sup>3</sup>

Under the executive appointment power in 4 MLBSA § 6 (b), the Chief Executive appoints a Commissioner. The Chief Executive has the authority, “to appoint wherever authorized by Band Statutes, executive officers . . . and to make an appointments to fill any vacancy in any office as authorized by Band Statute subject to confirmation by Band Assembly.” 4 MLBSA § 6 (b). The statutory scheme recognizes that from time to time commissioner absences will need to be addressed on an interim or temporary basis to keep the government operational. Recognizing that the absence of a Commissioner may create a hardship on the operations of the Executive branch, the Band Statutes allow the Commissioner of Administration authority “to act in the absence of any other commissioner.” 4 MLBSA § 10 (a); In addition, Band law allows for a delegation of authority to the Assistant Commissioner of Administration. The Commissioner of Administration shall have the following authority: “To delegate to the Assistant Commissioner of Administration any of the authority contained herein or in 4 MLBSA § 7 during the absence of the Commissioner of Administration or other executive officer. See 4 MLBSA § 10(g).”

Band Statutes, however, make no provision for interim appointments. Neither do the Band Statutes expressly prohibit interim appointments or transfers, nor do Band Statutes refer to interim appointments. Historically there is a history of interim appointments under the present and former Executive branch administrations.<sup>4</sup> The interim appointment issue has not been interpreted by the Court of Central Jurisdiction thus the issue remains unresolved.

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<sup>3</sup> 3 MLBSA § 2 reads: Legislative power. It shall be the authority and duty of the Legislative Branch to enact laws which regulate internal and external affairs of the Mille Lacs Bands in order to promote the general welfare of the people. The Band Assembly shall have power: (c) To conform appointments of the Chief Executive, which are by law required to be with the advice and consent of Band Assembly.

<sup>4</sup> See Executive Orders 138-02 (Executive Order Appointing Samuel Moose as Acting Commissioner of Health and Human Services), Executive Order 136-00 (Executive Order Extending the Appointment of Joshua Jay Kanassataga as Solicitor General), Executive Order 135-00 (Extending the Appointment of Joshua Jay Kanassataga as acting Solicitor General), Executive Order 134-00 (Extending the Appointment of Joshua Jay Kanassataga as acting Solicitor General), Executive Order 133-00 (Extending the Appointment of Joshua Jay Kanassataga as acting Solicitor General), Executive Order 130-00 (Appointing Joshua Jay Kanassataga as acting Solicitor General), Executive Order 128-00 (Appointing Todd M. Roen Acting Solicitor General), Executive Order 124-99 (Appointing Wendy Helgemo Acting Solicitor General), Executive Order 123-98 (Appointing Lester Morris Acting Commissioner of Community Development), Executive Order 120-97 (Appointing George Weber Acting Commissioner of Education), Executive Order 117-96 (Appointing Paul Mans as Acting Commissioner of Corporate Affairs), Executive Order 113-96 (Appointing George Weber as Acting Commissioner of Education), Executive Order 114-95 (Appointing Lester Morris Acting Commissioner of Administration), Executive Order 112-94 (Temporarily Assigning the Commissioner of Administration to Grand Casino Hinckley and Appointing an Interim Commissioner of Administration), Executive Order 110-93 (Appointing Caroline Kormmann Acting Chief Financial Officer), Executive Order 107-93 (Appointing George Weber Acting Commissioner of Education), Executive Order 105-92 (Appointing Bill Schaaf as Temporary Executive Director of the Housing Authority), Executive Order 054 (Appointing Raymond Kegg Acting Corporate Commissioner), Executive Order 051 (To Accept the Resignation of Joseph Nayquonabe, Commissioner of Human Services and to Appoint an Acting Commissioner of Human Services), Executive Order 011 (Authorizes a Ninety Day Re-assignment for the Assistant Commissioner of Education Affairs and Provides for the Authority of an Assistant Superintendent During this Period).

The Solicitor General is required to liberally construe the appointment power of the Chief under 4 MLBSA § 26, and the confirmation of the appointments by Band Assembly under 3 MLBSA § 29. Under 4 MLBSA § 26, “The Solicitor General and the Court of Central Jurisdiction shall liberally construe the provisions of this title [Title 4, Executive Branch authority] so as to provide for achievement of the purposes thereof.” Likewise the Solicitor General shall liberally construe the provision of Title 3 confirmation with the advice and consent of Band Assembly. “The Solicitor General or the Exterior Legal Counsel and the Court of Central Jurisdiction, whichever is applicable, shall liberally construe the provisions of this title, or of 2 MLBSA Chapter 1, so as to provide for the full force and effect of the purposes therein stated.” See 3 MLBSA § 29. Therefore, as stated in Band Statutes we must liberally construe the plain meaning of Band Statutes to resolve this question.

Under the plain meaning rule, the plain meaning of a statute is conclusive, except in the rare case in which the literal application of the statute will produce a result at odds with the intention of the drafters. In the Matter of: The Interpretation of the Solicitor General, 15 OSG 92 at 6. The relevant Band Statute states: “The Chief Executive has the authority to appoint executive officers, and to make appointments to fill any vacancy in any office as authorized by Band Statute subject to the confirmation by the Band Assembly.” See 4 MLBSA § 6. Clearly the positions in dispute are executive officers under Band Statute.

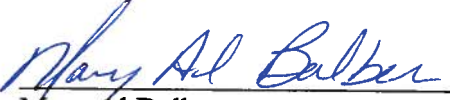
Executive officers perform a vital function for the efficiency of Band Government. Even the temporary loss of a Commissioner could affect the executive administration of the Band and the ability of the Chief Executive to perform her daily functions on behalf of the Band. Indeed the Commissioner of Administration stated in his March 7, 2002 memorandum, that one person assuming the duty of two Commissioners is a lot of responsibility for one person.

However, this effect on the Executive branch is balanced against the statutorily provided right of Band Assembly to confirm executive appointments. The legislative confirmation power is enumerated in 3 MLBSA § 2 (c): “To confirm appointments of the Chief Executive, which are by law required to be with the advice and consent of Band Assembly.” The plain meaning of the statute is that appointments of executive officers by the Chief Executive, interim or otherwise, require the advice and consent of Band Assembly. The confirmation requirement is an express enumerated right given to the Band Assembly. Therefore, by Statute absent a provision in Band Statute allowing for an exemption, interim appointments are subject to the confirmation requirement of 3 MLBSA § 2(c), “to be with the advice and consent of Band Assembly.”

### CONCLUSION

Therefore, an interim appointment by the Chief Executive is subject to confirmation by Band Assembly.

Dated this 26<sup>th</sup> day of March, 2002.

  
Mary Al Balber  
Solicitor General