No. A06-804

STATE OF MINNESOTA

IN COURT OF APPEALS

Buddie Greene,

Appellant,

vs.

Commissioner of the Minnesota Department of Human Services,
and Aitkin County Health and Human Services,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

FRANK BIBEAU, ESQ.
Attorney at Law
Atty. Reg. No. 0306460

51124 County Road 118
Deer River, Minnesota 56636
Telephone: (218) 760-1258
Facsimile: (218) 246-8843

ATTORNEY FOR APPELLANT

MIKE HATCH
Attorney General
State of Minnesota

MARGARET H. CHUTICH
Assistant Attorney General
Atty. Reg. No. 0157880

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
Telephone: (651) 296-2418
Facsimile: (651) 297-4139

THOMAS F. MURTHA IV
Aitkin County Attorney
Atty. Reg. No. 0287386
217 Second Street NW, Room 231
Aitkin, Minnesota 56431
Telephone: (218) 927-7347

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

LEGAL ISSUE 1

STATEMENT OF THE CASE 2

FACTS 3

I. BACKGROUND OF THE MINNESOTA FAMILY INVESTMENT PROGRAM. 3

II. STATE AND TRIBAL AGREEMENTS CONCERNING THE MFIP PROGRAM. 4

III. BACKGROUND OF GREENE'S CHALLENGE. 7

SCOPE OF REVIEW 10

ARGUMENT 11

I. SECTION 256J.645 DOES NOT VIOLATE THE FEDERAL EQUAL PROTECTION CLAUSE BECAUSE THE CLASSIFICATION OF CERTAIN TRIBAL MEMBERS CONTAINED IN THE STATUTE IS RATIONALLY RELATED TO THE STATE'S LEGITIMATE INTEREST IN PROMOTING INTER-GOVERNMENTAL AGREEMENTS AND TRIBAL SELF-GOVERNMENT. 11

A. A Rational Basis Review Is Appropriate To Test The Statute's Tribal Classification 12

B. Application Of The Rational Basis Test Shows That Section 256J.645 Is Rationally Related To A Legitimate State Interest 19

II. GREENE'S EQUAL PROTECTION CLAIM ALSO FAILS UNDER THE MINNESOTA CONSTITUTION. 22

III. GREENE'S ASSERTION THAT THE COMMISSIONER'S DECISION IS AFFECTED BY OTHER ERROR OF LAW IS WITHOUT MERIT. 25

CONCLUSION 26

APPENDIX

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City of Cleburne Living Center, Inc.,
473 U.S. 432, 105 S. Ct. 3249 (1985) 23

City of New Orleans v. Dukes,
427 U.S. 297, 96 S. Ct. 2513 (1976) 1, 12

Fisher v. District Court,
424 U.S. 382, 96 S. Ct. 943 (1976) 16

Livingston v. Ewing,
601 F.2d 1110 (10th Cir. 1979) 14, 17, 19

Morton v. Mancari,
417 U.S. 535, 94 S. Ct. 2474 (1974) ..... *passim*

New York ex re. Cutler v. Dibble,
62 U.S. 366 (1858) 14

Peyote Way Church of God, Inc. v. Thornburgh,
922 F.2d 1210 (5th Cir. 1991) 14

Plyler v. Doe,
457 U.S. 202, 102 S. Ct. 2382 (1982) 12

St. Paul Intertribal Housing Bd. v. Reynolds,
564 F. Supp. 1408 (1983) 14, 16

Strate v. A-1 Contractors,
520 U.S. 438, 117 S. Ct. 1404 (1997) 24

United States v. Antelope,
430 U.S. 641, 97 S. Ct. 1395 (1977) 13, 14

Washington v. Confederated Bands and Tribes of Yakima Indian Nation,
439 U.S. 463, 99 S. Ct. 740 (1979) 14

STATE CASES

Boutin v. LaFleur,
591 N.W.2d 711 (Minn. 1999) 11

In re Estate of Turner,
391 N.W.2d 767 (Minn. 1986) 23

In re Haggerty,
448 N.W.2d 363 (Minn. 1989) 11

In re Kindt,
542 N.W.2d 391 (Minn. Ct. App. 1996) 10

Johnson v. Minn. Dep't of Human Servs.,
565 N.W.2d 453 (Minn. Ct. App. 1997) 10

Krueth v. Indep. Sch. Dist. No. 38,
496 N.W.2d 829 (Minn. Ct. App. 1993),
rev. denied (Minn. April 20, 1993) ..... *passim*

Malabed v. North Slope Borough,
70 P.3d 416 (Ak. 2003) 17, 18

Mammenga v. State Dep't of Human Servs.,
442 N.W.2d 786 (Minn. 1989) 10

Markwardt v. State Water Res. Bd.,
254 N.W.2d 371 (Minn. 1977) 10

Scott v. Minneapolis Police Relief Ass'n, Inc.
615 N.W.2d 66 (Minn. 2000) 22

State v. Merrill,
450 N.W.2d 318 (Minn. 1990) 11

State v. Russell,
477 N.W.2d 886 (Minn. 1991) 1, 23, 25

FEDERAL CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. Amend. XIV, § 1 12

25 U.S.C. § 450e(b) (2004) 22

25 U.S.C. §§ 461 *et seq.* (2004) 22

25 U.S.C. §§ 1301 *et seq.* 26

42 U.S.C. § 2000e-2(i) (2004) 22, 24

STATE CONSTITUTION, STATUTES AND RULES

Minn. Const. art. I, § 2 22

Minn. Stat. § 13.46 (2004) 4

Minn. Stat. § 14.69 (2004) 10

Minn. Stat. § 126.501 (2004) 15

Minn. Stat. § 256.01, subd. 14b (Supp. 2005) 19

Minn. Stat. § 256.045 (2004) 10

Minn. Stat. § 256J.09 (2004) 3, 4

Minn. Stat. § 256J.28 (2004) 3

Minn. Stat. § 256J.315 (2004) 20, 21

Minn. Stat. § 256J.34 (2004) 3

Minn. Stat. § 256J.35 (2004) 3

Minn. Stat. § 256J.46 (2004) 4

Minn. Stat. § 256J.49 (2004) 6

Minn. Stat. §§ 256J.49-.521 (2004) 6

Minn. Stat. §§ 256J.49-.62 (2004) 4

Minn. Stat. § 256J.515 (2004) 6

Minn. Stat. § 256J.55 (2004) 2, 4

Minn. Stat. § 256J.561 (2004) 2

Minn. Stat. § 256J.57 (2004) 4, 8

Minn. Stat. § 256J.626 (2004) 5, 21

Minn. Stat. § 256J.645 (2004) ..... *passim*

Minn. Stat. § 260.771 (2004) 20

Minn. Stat. § 471.59 (2004) 20

Minn. Stat. § 626.90 (2004) 19

Minn. Stat. § 626.94 (2004) 19

OTHER AUTHORITIES

Cohen, Felix S.,
Cohen's Handbook of Federal Indian Law, § 4.01[1][b] (2005 ed.) 24

Cohen, Felix S.,
Cohen's Handbook of Federal Indian Law, § 14.03[2][b][iii] (2005 ed.) 15

Cohen, Felix S.,
Cohen's Handbook of Federal Indian Law, § 14.03[2][b][iv] (2005 ed.) 26

1 Rotunda, Ronald D., Noak, John E.,
Treatise on Constitutional Law: Substance and Procedure § 4.2
(2d ed. 1992) 13

LEGAL ISSUE

Did the district court correctly find that Minnesota Statutes section 256J.645, subdivision 4, which requires certain members of the Minnesota Chippewa Tribe who receive public assistance to obtain employment services solely through the Tribe, satisfies the Equal Protection Clauses of the federal and state constitutions as the challenged classification is rationally related to Minnesota's legitimate purpose in authorizing inter-governmental agreements that further tribal self-governance?

Decision below:

The Aitkin County District Court affirmed the Commissioner's order.

Apposite Authority:

City of New Orleans v. Dukes, 427 U.S. 297, 96 S. Ct. 2513 (1976).

Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974).

State v. Russell, 477 N.W.2d 886 (Minn. 1991).

Krueth v. Indep. Sch. Dist. No. 38, 496 N.W.2d 829 (Minn. Ct. App. 1993).

STATEMENT OF THE CASE

This appeal arises from an amended order of the Commissioner of Human Services dated May 5, 2005, upholding a sanction imposed by Aitkin County upon the Minnesota Family Investment Program ("MFIP") benefits of Appellant Buddie Greene. On December 20, 2004, Greene's MFIP benefit was reduced by thirty percent as a sanction for failing to participate in employment services, a mandatory requirement for receiving benefits. *See* Affidavit of Cynthia B. Jahnke dated July 19, 2005 ("Jahnke Aff.), Ex. 3; Minn. Stat. §§ 256J.55, 256J.561 (2004). Greene, a member of the Minnesota Chippewa Tribe, refused to participate in employment services provided by the Tribe. Appellant's Appendix ("A. App.") at 11.[1]

Greene requested and received a fair hearing in which she was represented by counsel. Respondents' Appendix ("R. App.") at 1. Appeals Referee Catherine Moore issued a recommendation on March 31, 2005. Decision of State Agency on Appeal, Docket No. 83019, at 4. That recommendation was not fully accepted by the Commissioner, however, and the Commissioner's designee issued Amended Conclusions and Amended Order on May 5, 2005. Amended Conclusions and Amended Order dated May 5, 2005.

---

[1] Page references to Appellant's Appendix are to consecutively numbered pages of the documents included therein. Please note, however, that this consecutive numbering does not match the beginning numbers contained in Appellant's Appendix table of contents. The one blank page in the Appendix (in the grant contract) was not included as a numbered page.

Greene appealed the Commissioner's decision to the Aitkin County District Court and moved for a temporary injunction. By Findings, Order and Memorandum dated August 18, 2005, the Court denied Greene's motion. Greene and the Department of Human Services then moved for summary judgment. The Honorable John R. Leitner considered the parties' memoranda and heard oral argument on December 6, 2005. A. App. at 9. On February 21, 2006, the district court issued an order affirming the agency decision and rejecting Greene's equal protection claims. *Id.* at 9, 14-15. Appellant served and filed her notice of appeal to this Court on April 24, 2006. A. App. at 2.

FACTS

I. BACKGROUND OF THE MINNESOTA FAMILY INVESTMENT PROGRAM.

The Minnesota Family Investment Program, or MFIP, is the state's welfare reform program for low-income families with children. MFIP helps families move to economic stability by expecting parents to work and supporting their efforts in working. Minnesota Department of Human Services Website at *http://www.dhs.state.mn.us/main/groups/economic_support/documents/pub/dhs_id_004112.hcsp*. MFIP helps families by providing cash and food assistance. Minn. Stat. §§ 256J.28; 256J.34-35 (2004).

Persons seeking assistance through the MFIP program apply for benefits through the county social service agency in the county where the person lives. *See* Minn. Stat. § 256J.09, subd. 1 (2004). The county agency processes the application to determine the applicant's eligibility, approves or denies the application, informs the

applicant of the decision, and then issues benefits when eligibility is established. *See* Minn. Stat. § 256J.09, subd. 5.

Once eligibility is established, MFIP program participants must comply with ongoing program requirements. *See* Minn. Stat. § 256J.46, subd. 1 (2004). One such requirement is participation in employment and training services, which are described in Minnesota Statutes sections 256J.49–.62 (2004). *See* Minn. Stat. § 256J.55. MFIP participants who fail to comply with employment service requirements may be sanctioned and lose MFIP benefits under Minnesota Statutes, section 256J.46, absent a showing of good cause under Minnesota Statutes section 256J.57 (2004). *See* Minn. Stat. § 256J.46, subd. 1.

II. STATE AND TRIBAL AGREEMENTS CONCERNING THE MFIP PROGRAM.

Since July 1, 1997, the Commissioner of Human Services has had the authority to "enter into agreements with federally recognized Indian tribes [including a consortium of Indian tribes] with a reservation in the state to provide MFIP employment services to members of the Indian tribe." Minn. Stat. § 256J.645 (2004). If Indian tribes choose to enter into such an agreement with the State, they must undertake the following:

> (1) agree to fulfill the responsibilities provided under the employment services component of MFIP regarding operation of MFIP employment services, as designated by the commissioner;
>
> (2) operate its employment services program within a geographic service area not to exceed the counties within which a border of the reservation falls;
>
> (3) operate its program in conformity with section 13.46 and any applicable federal regulations in the use of data about MFIP recipients;

> (4) coordinate operation of its program with the county agency, Workforce Investment Act programs, and other support services or employment-related programs in the counties in which the tribal unit's program operates;
>
> (5) provide financial and program participant activity record keeping and reporting in the manner and using the forms and procedures specified by the commissioner and permit inspection of its program and records by representatives of the state; and
>
> (6) have the Indian tribe's employment service provider certified by the commissioner of employment and economic development, or approved by the county.

Minn. Stat. § 256J.645, subd. 2.

Indian tribes opting to enter into such an agreement with the State directly receive state funding at the same levels and under the same conditions as counties that provide these services. *See* Minn. Stat. §§ 256J.645, subd. 3, and 256J.626 (2004). The statute further provides that Indian tribal members "receiving MFIP benefits and residing in the service area of an Indian tribe operating employment services under an agreement with the commissioner *must be referred* by county agencies in the service area to the Indian tribe for employment services." Minn. Stat. § 256J.645, subd. 4 (emphasis added). The effect of this latter provision is at the heart of this dispute.

Citing their "shared interest in the delivery of employment services to members of the Minnesota Chippewa Tribe," the Commissioner and the Tribe entered into an agreement for the Tribe to provide MFIP employment services for specified public assistance recipients who are of Indian descent for fiscal year 2004/2005 ("grant

contract"). A. App. at 86. The Minnesota Chippewa Tribe represented that it is "duly qualified and willing to perform the services set forth herein."[2] *Id.*

In language consistent with the statute, the Minnesota Chippewa Tribe agreed to provide its tribal MFIP employment services program to eligible tribal members. The agreement states in relevant part:

> [Minnesota Chippewa Tribe] *shall provide* [MFIP employment services] to persons who are eligible for such services and who meet all of the following conditions:
>
> a. The person is enrolled or eligible for enrollment in the Minnesota Chippewa Tribe. The Minnesota Chippewa Tribe consists of six reservations: Bois Forte, Fond du Lac, Grand Portage, White Earth, Leech Lake, and Mille Lacs Reservations; and
>
> b. The person is a recipient of MFIP, or any successor to that program, and
>
> c. The person resides within the Tribal [MFIP employment] program's service delivery area.

A. App. at 86-87, ¶ I.C.1. (emphasis added). The service delivery area for the Minnesota Chippewa Tribe includes Aitkin County. *See id.* at 87, ¶ I.C.2. No provision in the agreement allows the Minnesota Chippewa Tribe to refer eligible tribal members to the county social service agency for MFIP employment services. *See generally* A. App. at 86-96.

---

[2] These employment services include "programs, activities and services that are designed to assist participants in obtaining and retaining employment." Minn. Stat. § 256J.49,, subd. 3 (2004). They include assessments of the person's ability to obtain employment, Minn. Stat. § 256J.49-.521, creation of an employment plan, *id.*, and the provision of practical items like child care, transportation, clothing for interviews or for work, and energy assistance. *See* Minn. Stat. §§ 256J.49 and 256J.515; R. App. at 24-25 (information from the Tribal Employment Program of the Minnesota Chippewa Tribe). The latter is a publicly available document.

III. BACKGROUND OF GREENE'S CHALLENGE.

When this dispute arose, Greene was an MFIP recipient residing in Aitkin County with her father, Dale Greene. Jahnke Aff., Exs. 1–2. Greene received MFIP benefits for herself and a minor child in the amount of $675 per month. *Id.*, Exs. 3–4. On July 20, 2004, Aitkin County referred Greene to the Minnesota Chippewa Tribe for employment services because Greene was an enrolled member of the Minnesota Chippewa Tribe, was eligible to participate in MFIP, and resided within the tribal MFIP service delivery area of Aitkin County. *See* A. App. at 83 (Ex. 3). Greene asked the Minnesota Chippewa Tribe for a referral to a county employment service provider. *Id.* The Minnesota Chippewa Tribe declined, stating that it "is mandated to provide you service and cannot refer you elsewhere." *Id.* At the time of Greene's referral to Minnesota Chippewa Tribe employment services, Greene was under twenty years of age and did not hold a high school diploma or G.E.D. Jahnke Aff., Ex. 4.

On December 20, 2004, a Minnesota Chippewa Tribe status update indicated that Greene was non-compliant with employment requirements as of December 18, 2004, and it requested that Aitkin County impose a sanction. Jahnke Aff., Ex. 5. Appellant challenged this sanction at an administrative hearing where she was represented by counsel. R. App. at 1.

At that hearing, Greene admitted that she did not attend the required employment service overview and that she did not develop an employment plan with the Minnesota Chippewa Tribe. R. App. at 17-18. She did not articulate any explanation that might qualify for good cause to be excused from work requirements under Minnesota Statutes

section 256J.57, but instead asserted that she "never wanted to go through the Minnesota Chippewa Tribe." *Id.* at 18. Greene never gave any explanation for this refusal to work with the Tribe. In closing, her counsel merely referred to "other reasons" that she "doesn't want to work with the MCT," declining to discuss them at the time. *Id.* at 20. Instead, Greene asserted that the equal protection provisions of both the state and federal constitutions prevent Aitkin County from refusing to provide services because she is an Indian. *Id.* at 21.

Appeals Referee Catherine Moore recommended that Greene be allowed to access county employment services, but the Commissioner's delegee, Kenneth M. Mentz, notified the parties that the Commissioner intended to adopt an Order differing from Referee Moore's recommendation. *See* Affidavit in Support of Motion for Temporary Injunctive Relief dated July 13, 2005, Ex. D. The Commissioner solicited and received comments from Greene and Aitkin County on a proposed amended order and a letter from a policy analyst, upon which the proposed order was based, before the Commissioner issued Amended Conclusions and Amended Order. *Id.* Exs. E, F.

The Commissioner upheld the sanction after finding that "[a] person in [Greene's] circumstances must get employment services through the Minnesota Chippewa Tribe even though Aitkin County pays her cash benefits under the Minnesota Family Investment program. [Greene] refused without good cause to do so, and the county agency properly imposed a reduction in cash payments as a sanction." Amended Conclusions, Amended Order dated May 5, 2005.

Appellant appealed to Aitkin County District Court, claiming that the Commissioner's interpretation of section 256J.645, subdivision 4, erroneously required the mandatory provision of employment services through the Minnesota Chippewa Tribe. She also challenged the state's authority to enact section 256J.645, asserting that it violated tribal sovereignty and was preempted by federal law. Finally, Greene asserted that section 256J.645 violated her right to equal protection.

On February 21, 2006, the court issued an Order and Memorandum affirming the sanctioning of Greene's MFIP benefits. A. App. at 9. The court concluded that, given the mandatory language of section 256J.645, the Commissioner reasonably interpreted the statute as requiring identified members of the Minnesota Chippewa Tribe to receive employment services from the Tribe and not the county agency. *Id.* at 12. In addition, the court rejected the arguments based on preemption and tribal sovereignty. *Id.* at 12-13. It specifically found that the statute met equal protection requirements under the state and federal constitutions as the classification defined in the statute "is compromised of persons who have a natural and reasonable connection to the apparent purpose behind the statute to promote tribal self-government." *Id.* at 15. It thus concluded, "This purpose is one the state can legitimately attempt to achieve and, therefore, the rational basis test under the Minnesota Constitution is also satisfied." *Id.* Greene now challenges only this portion of the district court's order that upholds the Commissioner's Amended Order against her equal protection claim.

SCOPE OF REVIEW

This Court has jurisdiction over this matter under Minnesota Statutes section 256.045, subdivision 9 (2004), and evaluates the Department's decision in light of the record presented to the Department. *In re Kindt*, 542 N.W.2d 391, 398 (Minn. Ct. App. 1996). The scope of the Court's review of the Department's decision is defined by Minnesota Statutes section 14.69 (2004). *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989). The Court may affirm or reverse the Department's decision or "remand the case for further proceedings." Minn. Stat. § 14.69 (2004).

In an appeal like this one, the burden is on the party challenging an administrative decision to prove that the case should be reversed on one of the six grounds set out in section 14.69. *See Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977); *Johnson v. Minn. Dep't of Human Servs.*, 565 N.W.2d 453, 457 (Minn. Ct. App. 1997). Thus, the party challenging the Department's decision must show that it is one of the following:

a) In violation of constitutional provisions;
b) In excess of the statutory authority or jurisdiction of the agency;
c) Made upon unlawful procedure;
d) Affected by other error of law;
e) Unsupported by substantial evidence in view of the entire record as submitted; or
f) Arbitrary or capricious.

Minn. Stat. § 14.69.

In this appeal, Greene focuses solely on her contention that imposition of a sanction for her refusal to receive employment services from the Minnesota Chippewa Tribe violates the Equal Protection Clauses of the federal and state constitutions. *See*

App. Br. at 1. Because this challenge raises a question of law regarding the statute's constitutionality, the Court's review is *de novo*. *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999).

In addition, Minnesota statutes are presumed constitutional and a court's "power to declare a statute unconstitutional should be exercised with extreme caution and *only when absolutely necessary*." *In re Haggerty,* 448 N.W.2d 363, 364 (Minn. 1989) (emphasis added). A party challenging a statute must satisfy the "very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Boutin*, 591 N.W.2d at 714 (quoting *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990)).

ARGUMENT

I. SECTION 256J.645 DOES NOT VIOLATE THE FEDERAL EQUAL PROTECTION CLAUSE BECAUSE THE CLASSIFICATION OF CERTAIN TRIBAL MEMBERS CONTAINED IN THE STATUTE IS RATIONALLY RELATED TO THE STATE'S LEGITIMATE INTEREST IN PROMOTING INTER-GOVERNMENTAL AGREEMENTS AND TRIBAL SELF-GOVERNMENT.

Appellant argues that section 256J.645, as interpreted by the Commissioner, discriminates against her as she is being treated differently from other non-Indian citizens. She also notes that members of other tribes and the members of the Minnesota Chippewa Tribe who live outside the Tribe's service area are able to receive employment services through a county agency, while she is not. Her claim of discrimination should be rejected under both the federal and state constitutions because the law draws on legitimate political and geographical distinctions that are rationally related to the state's interest in promoting intergovernmental agreements and encouraging tribal

self-government, and in ensuring that American Indians receive the best possible support in receiving welfare benefits.

The Equal Protection Clause of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Equal Protection Clause generally requires that persons similarly situated be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 2394 (1982). Unless a legislative classification infringes on a fundamental right or discriminates on the basis of a suspect class such as race, national origin, or gender, a law is constitutional if it bears a rational relation to a legitimate state interest. *City of New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S. Ct. 2513, 2516-17 (1976).

A. A Rational Basis Review Is Appropriate To Test The Statute's Tribal Classification.

Heightened scrutiny is not warranted here because the statutory classification established in Minnesota Statutes section 256J.645 draws distinctions based upon political status and not race. The statute authorizes the State to enter into agreements only with "federally recognized Indian tribes with a reservation in the state" to provide MFIP employment services to "Indian tribal members . . . residing in the service area" of the Indian tribe. Minn. Stat. § 256J.645, subds. 1 and 4. It does not apply to American Indians in general based upon race. In fact, the classification excludes Indians who are not members of a participating tribe or who do not live in the participating tribe's service area.

Decisions of the United States Supreme Court make clear that the Court employs a "mere rationality test when scrutinizing tribal classifications because such classifications are viewed as political rather than racial." 1 Ronald D. Rotunda, John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 4.2 (2d ed. 1992). In *Morton v. Mancari,* for example, the Court upheld an employment preference for qualified Indians in the Bureau of Indian Affairs ("BIA"). 417 U.S. 535, 94 S. Ct. 2474 (1974). It did so in part because it found that the preference was granted to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554, 94 S. Ct. at 2484. The Court also acknowledged the "plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551, 94 S. Ct. at 2483.

Even when federal legislation *disadvantaged* individual Indians, the Supreme Court applied a rational basis test to find that differential treatment of Indians and non-Indians did not violate the Equal Protection Clause. *See, e.g., United States v. Antelope,* 430 U.S. 641, 97 S. Ct. 1395 (1977) (federal murder statutes subjecting American Indians to the exclusive jurisdiction of the federal courts for prosecution survived equal protection challenge under rational basis test). In *Antelope,* the Court stressed that Indian tribes are viewed as separate political bodies having the capacity to advocate for and govern their own members. 430 U.S. at 645, 97 S. Ct. at 1398. The

Court stated:

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . .; they are a separate people possessing the power of regulating their internal and social relations . . . . Legislation with respect to these "unique aggregations" has repeatedly been sustained by this Court against claims of unlawful racial discrimination.

Id. (quotations omitted).

Greene appears to contend that a higher level of scrutiny is required here because this classification was enacted by Minnesota, and not by the federal government, which has a unique obligation to American Indians that a state does not. App. Br. at 14, 20. But the United States Supreme Court held long ago that the federal relationship with tribes does *not* prevent states from enacting protective laws that do not infringe upon federal rights. *New York ex re. Cutler v. Dibble,* 62 U.S. 366, 371 (1858).

Indeed, numerous courts, using a rational basis standard, have upheld *state* law classifications singling out Indian tribes and their members. *See, e.g., Washington v. Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 99 S. Ct. 740 (1979) (state law establishing jurisdiction over reservation lands survived equal protection challenge under rational basis test); *Peyote Way Church of God, Inc. v. Thornburgh,* 922 F.2d 1210, 1219-20 (5th Cir. 1991) (upholding state law beneficial to tribal Native Americans under *Mancari's* equal protection analysis); *Livingston v. Ewing,* 601 F.2d 1110, 1115 (10th Cir. 1979) (applying rational basis test to uphold an ordinance of Santa Fe, New Mexico, creating an Indian preference); *St. Paul Intertribal Housing Bd. v. Reynolds,* 564 F. Supp. 1408, 1412-13 (1983) (applying rational basis test to

uphold a Minnesota statute authorizing a state agency to distribute federal funds for urban American Indian housing programs).

Thus, where state laws promote tribal self–governance, benefit tribal members, or implement or reflect federal laws, courts have generally upheld these measures. Application of the more relaxed equal protection standard "makes sense in light of Congress's power to suppress state laws that stray too far from federal policy aims." Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 14.03[2][b][iii] at 932-33 (2005 ed.).

Indeed, following the reasoning of *Morton v. Mancari,* this Court applied the rational basis test to uphold a Minnesota statute against an equal protection challenge. *Krueth v. Indep. Sch. Dist. No. 38,* 496 N.W.2d 829, 837 (Minn. Ct. App. 1993), *rev. denied* (Minn. April 20, 1993). At issue in *Krueth* was Minnesota's American Indian Education Act of 1988, codified in relevant part at Minnesota Statutes, section 126.501, which permitted the Red Lake school district to adopt an American Indian teacher retention policy. *See Krueth,* 496 N.W.2d at 831-32. The policy allowed the school district to place tenured teachers on unrequested leaves of absence to retain probationary and less senior American Indian teachers. *See id.* at 832. Teachers placed on unrequested leaves of absence challenged the policy under the Equal Protection Clause of the federal Constitution.

In upholding the statute under the rational basis test, this Court noted that "*Mancari* found the American Indian classifications were not racial but political since they were limited to members of federally recognized tribes." *Id.* at 837. It also held that

the "special trust relationship," or "trust doctrine" that exists between American Indian and the federal governments "also applies to state action." *Id.* at 836. "State action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes." *Id.* (quoting *St. Paul Intertribal Housing Bd.*, 564 F. Supp. at 1412).

Green tries to factually distinguish the employment preference cases by contrasting the effects on the individual Indians involved there to the financial harm that she suffers if she refuses to use the mandatory tribal services. App. Br. at 18. Such a focus is misplaced, however.

Whether analyzed as a "preference" or a "detriment," disparate legal treatment is justified by a reasonable difference in circumstances. In *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S. Ct. 943, 948 (1976), for example, the Supreme Court found that even though its holding results "in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."

The same rationale holds true here. The different treatment of Greene, because she is member of the Minnesota Chippewa Tribe living in a specified service area, from that of non-Indians and members of other tribes, bears a rational relationship to the achievement of a valid governmental objective: authorizing agreements between the State and Indian tribes that assist the tribes in expanding their commitments to their own citizens, benefiting the class of which Greene is a member.

Greene also relies heavily on the *Malabed* decision to try to avoid application of *Krueth*, *Livingston* and other cases upholding *state* laws against an equal protection challenge.[3] *See Malabed v. North Slope Borough,* 70 P.3d 416 (Ak. 2003). In *Malabed,* the Alaska Supreme Court found that a borough's ordinance that granted a broad hiring preference favoring Native Americans violated the Equal Protection Clause of the Alaska Constitution. *Id.* at 427-28.

Malabed is distinguishable factually and legally, however. First, *Malabed* is inapposite as it turns on specifics of Alaskan law, decided under Alaska's "more stringent" three-part equal protection standard that provides "greater protection to individual rights" than the Fourteenth Amendment.[4] *Id.* at 420. The Court also noted that the Alaskan Constitution did not grant any trust-like interest in legislating for the benefit of Native Americans, specifically finding that "the only provision of the Alaska Constitution that addresses the state's relations with Alaska Natives . . . effectively disavows any state authority comparable to the federal government's protective powers." *Id.* at 422. Neither of these key features of Alaskan law apply here.

---

[3] Greene also argues that the data privacy notice on Tribal/Reservation Membership form is the "most obvious equal protection deception" because the form does not state that members of some Indian Tribes or Bands must get services from a Tribal program. App. Br. at 12. The data privacy notice itself refutes her arguments as it explicitly states that completing the form is voluntary: "You do not have to give this data. If you do not give this data, you cannot get MFIP Employment Services from a Tribal program." A. App. at 80 (Ex. 1).

[4] Under the Alaskan test, the Court determines "the weight of the individual interest impaired by the classification;" "examine[s] the importance of the purposes underlying the government's action;" and "evaluate[s] the means employed to further those goals to determine the closeness of the means-to-end fit." 70 P.3d at 421.

Second, the preference at issue in *Malabed* was enacted by a *borough*, and not by the state. The *Malabed* Court believed that since the borough is "a political subdivision of Alaska, its legitimate sphere of municipal interest lies in governing for all of its people; preferring the economic interests of one class of its citizens at the expense of others is not a legitimate municipal interest. . . ." *Id.* at 426-27.

Tellingly, the *Malabed* Court made clear that it was not suggesting that all state legislation pertaining to "Alaska Natives or tribal governments should be assumed to establish suspect classifications presumptively barred by equal protection." *Id.* at 426. In fact, the Court specifically stated:

> To the contrary, we think that the state has considerable latitude in dealing with recognized tribes as to matters of intersecting governmental concern when the state's actions rationally promote legitimate mutual governmental or proprietary interests.

Id. at 427, n.51.

The court then described "political classifications that meet these criteria," citing a statute that allows the Department of Health and Social Services the ability to enter into agreements with Alaska Native villages concerning the care and custody of Native children. *Id.* It approved this legislative provision as it "relates to inter-governmental interaction and is designed to further Native self-governance by involving Native governments in custody determinations of their own members." *Id.* Thus, a close reading of *Malabed* actually provides support for the legitimacy of this Minnesota statute as the provision relates to inter-governmental interaction designed to further Indian

self-governance by involving Indian tribes in providing critical employment services in a culturally appropriate way to their own members.

B. Application Of The Rational Basis Test Shows That Section 256J.645 Is Rationally Related To A Legitimate State Interest.

Applying *Morton*, *Krueth* and their principles here shows that this Court may properly find, after a rational basis review, that section 256J.645 comports with the federal Equal Protection Clause.[5] By enacting section 256J.645, the Minnesota Legislature authorized the Commissioner of Human Services to work cooperatively with federally recognized Indian tribes if they agreed to undertake greater responsibility for self–government. This type of tribal-state cooperative agreement is a legitimate state goal as is evidenced by the variety of similar agreements in state laws. *See, e.g.*, Minn. Stat. § 256.01, subd. 14b (Supp. 2005) (enabling Commissioner of Human Services to authorize "projects to test tribal delivery of child welfare services to American Indian children and their parents and custodians living on the reservation"); Minn. Stat. § 626.90 (2004) (discussing law enforcement powers of the Mille Lacs Band of Chippewa Indians and authorizing mutual aid/cooperative agreements between the Band and the Mille Lacs County Sheriff); Minn. Stat. § 626.94 (2004) (discussing Indian conservation

[5] Greene also tries to distinguish *Krueth* and *Livingston* by asserting that no "compelling state government interests" are served by the Tribe "exercising the option of becoming an employment services program provider." App. Br. at 18. *Krueth* and *Livingston* make clear, however, that such a showing is not necessary because strict scrutiny does not apply. *Krueth,* 496 N.W.2d at 837; *Livingston*, 601 F.2d at 1115. Nevertheless, by encouraging intergovernmental agreements that allow participating tribes to best assist their own tribal members in seeking employment, Minnesota's statute advances a valuable state interest on par with the state interests expressed in *Krueth* and *Livingston.*

enforcement authority and authorizing a written cooperative agreement with the commissioner of natural resources under the Joint Powers Act, Minn. Stat. § 471.59); Minn. Stat. § 260.771, subd. 5 (2004) (authorizing the Commissioner of Human Services to enter into agreements with Indian tribes about the "care and custody of Indian children and jurisdiction over child custody proceedings").

By acknowledging that tribal members may have unique cultural needs,[6] this legislation clears the way for federally recognized Indian tribes that so choose to develop and to provide employment services programs that fulfill the MFIP requirements for their tribal members who receive MFIP benefits. Section 256J.645 thus allows tribes that seek such tribal responsibility to assume ongoing interactions with their own members to ensure that tribal members receive employment services in the best and most effective way possible.[7] Put another way, the statute tries to reduce the "negative effect of having non-Indians administer matters that affect Indian tribal life." *See Morton v. Mancari,* 417 U.S. at 542, 94 S. Ct. at 2478.

---

[6] Another provision of the MFIP Program section 256J.315, mandates that county agencies cooperate with tribal government "to ensure that the [MFIP] program meets the special needs of persons living on Indian reservations." Minn. Stat. § 256J.315 (2004). Thus, the Legislature clearly contemplated that tribal members seeking work may face different challenges than non-Indians living off the reservation.

[7] Greene implies, with absolutely no support in the record, that she would have more difficulty accessing tribal employment services than county services. App. Br. at 23. She also implies, again with no factual support, that these services would be substandard when compared to county services. *See id.* at 11. At the fair hearing on this matter, however, Greene declined to specify why she did not want to use the tribal services. R. App. at 20. Had this issue been developed, however, the State would have offered evidence to show that the State and the participating tribes believe that these tribal services are very accessible and better suited for tribal members than corresponding county services.

Moreover, this Court may properly find that the Legislature reasonably believed that, to ensure the success of these agreements concerning tribal employment services and the underlying provision of services by the tribes, the referrals by county agencies to the tribes must be mandatory. Without such a provision, counties may have been reluctant to assist the tribes in exercising greater control over the destinies of tribal members on MFIP.[8] Making the referral mandatory also enables the system of funding to function effectively. *See* Minn. Stat. §§ 256J.645, subd. 3 (directing the Commissioner to provide funding directly to tribes agreeing to provide MFIP employment services) *and* 256J.626 (establishing an MFIP consolidated fund that requires biennial service agreements with counties and tribes and describing base allocations and adjustments to tribes and counties).

In sum, the test to be applied to section 256J.645 is the rational basis test. Under that test, the policy of referring tribal members to their participating tribe for MFIP employment services is rationally related to the State's legitimate purpose in authorizing intergovernmental relationships that promote the shared interest of Minnesota and the tribes in the effective delivery of culturally appropriate employment services to tribal

---

[8] Such a legislative concern is reflected by the MFIP provision mandating that the county agency "must cooperate with tribal governments in the implementation of MFIP . . ." Minn. Stat. § 256J.315. This cooperation "must include . . . the sharing of MFIP duties including initial screening, orientation, assessments, and provision of employment and training services." *Id.* The Legislature further mandated that "The county agency shall encourage tribal governments to assume duties related to MFIP and shall work cooperatively with tribes that have assumed responsibility for a portion of the MFIP program to expand tribal responsibilities, if that expansion is requested by the tribe." *Id.*

members. By allowing government to government agreements, the statute benefits Indian tribal members, promotes tribal self-governance and is fully compatible with relevant federal laws pertaining to Indians.[9]

II. GREENE'S EQUAL PROTECTION CLAIM ALSO FAILS UNDER THE MINNESOTA CONSTITUTION.

Greene claims that section 256J.645 violates the equal protection provision of the Minnesota Constitution. This provision reads in relevant part, "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. The Minnesota Supreme Court has stated that this clause and the federal Equal Protection Clauses have been "analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only 'invidious discrimination' is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted).

In addition, unless a constitutional challenge involves a "suspect classification or a fundamental right, *we review the challenge under a rational basis standard under both the state and federal constitutions.*" *Id.* (Emphasis added.) Thus, a statute is "'presumed

---

[9] *See, e.g.,* the Indian Self-Determination Act, 25 U.S.C. § 450e(b) (2004) (requiring tribes to afford preferences to Indians in the administration of contracts to administer programs otherwise carried out by the Departments of Interior and Health and Human Services); the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (2004) (establishing machinery enabling Indian tribes to assume a greater degree of self-government politically and economically); and exemptions to the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2(i) (2004) (exempting from the Act's coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations).

to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" *In re Estate of Turner,* 391 N.W.2d 767, 769 (Minn. 1986) (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985)).

As demonstrated above, this Court in *Krueth* and many federal decisions have already determined that classifications based on membership in an Indian tribe are not suspect. Because the statutory distinction is not racial and is without discriminatory intent, the deferential rational basis standard of review determines the constitutionality of section 256J.645 under the Minnesota Constitution.

The Minnesota rational basis test requires that:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adopted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (quotation omitted).

Section 256J.645 unquestionably meets these standards. Section 256J.645 satisfies the first requirement of the *Russell* test. The provision requires that counties refer "Indian tribal members" who reside in a tribal service area to the participating tribe for employment services. Minn. Stat. § 256J.645, subd. 4. Greene apparently questions the validity of distinctions between Minnesota Chippewa Tribe members and those of other federally recognized tribes, as well as the distinction between Minnesota Chippewa

Tribe members who reside within the Tribe's service area and those who do not. App. Br. at 10, 11, 13. These distinctions are genuine and substantial, however.

In limiting this language to members of a participating tribe and not to all members of federally recognized tribes, the Legislature ensured that persons referred to Indian tribal employment services are persons for whom the Indian tribe that is participating in the agreement has accepted responsibility. Here, the Minnesota Chippewa Tribe voluntarily entered into the employment services contract with the State and in doing so, consented on behalf of its members to be bound by the contract's terms. Tribes have "plenary and exclusive power over their members," but their power over members of other Indian tribes is limited. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law,* § 4.01[1][b] at 210 (2005 ed.); *see also Strate v. A–1 Contractors,* 520 U.S. 438, 445-46, 117 S. Ct. 1404, 1409 (1997) (explaining that "'the inherent sovereign powers of an Indian tribe . . . do not extend to the activities of nonmembers of the tribe'") (quotation omitted). Thus, the distinction between members of the Minnesota Chippewa Tribes and members of different tribes makes complete sense.

Similarly, the geographical distinction, between members of the Minnesota Chippewa Tribe who live in a designated service area and those who do not, makes sense. *Cf.* 42 U.S.C. § 2000e-2(i) (using geographical location when exempting employers "on or near an Indian reservation" from Title VII liability when preferential treatment is given to any "Indian living on or near a reservation"). Allowing Minnesota Chippewa Tribe members to participate when they live far from tribal employment services would

undoubtedly strain the ability of the Tribe to provide the necessary, concrete employment assistance that the statute and contract contemplate.

Section 256J.645 unequivocally satisfies the second requirement of the *Russell* test. The class established by the statute is crafted precisely to ensure that persons referred to Indian tribal services are 1) readily identifiable to counties having responsibility for referral, 2) eligible to receive services from the tribal governments to which they are referred, and 3) acknowledged by the tribal governments to which they will be referred as part of the tribe's service population. This requirement is clearly met.

Finally, section 256J.645 satisfies the third requirement of the *Russell* test. As discussed at length above, both federal and state case law affirms that state laws may legitimately attempt to further intergovernmental relations in matters of intersecting governmental concern — here, the shared interest in delivering culturally appropriate and effective employment services to tribal members so that they may successfully participate in the MFIP program. Accordingly, section 256J.645 must be upheld against an equal protection challenge under the state's Constitution.

III. GREENE'S ASSERTION THAT THE COMMISSIONER'S DECISION IS AFFECTED BY OTHER ERROR OF LAW IS WITHOUT MERIT.

Greene further asserts in passing that the Minnesota Chippewa Tribe, under its own Constitution and the Indian Civil Rights Act, may not, by contracting with the State, extinguish or limit tribal members' constitutional rights. App. Br. at 21 and n.63. If Greene believes that the Minnesota Chippewa Tribe has improperly "sold out" her rights by voluntarily entering into an employment services contract with the State, she should

direct her concerns to Minnesota Chippewa Tribe rather than attacking the State statute that merely authorizes such an agreement. Moreover, in civil cases, tribal courts have exclusive jurisdiction to enforce the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*, and are in the best position to evaluate claims under their own Constitutions. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law,* § 14.03[2][b][iv] at 934 (2005 ed.). Thus, Greene's claims under the Tribe's Constitution or under the Indian Civil Rights Act may not properly be determined by the Commissioner or this Court.

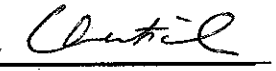
CONCLUSION

For the foregoing reasons, the Commissioner's decision should be affirmed.

Dated: September 22, 2006

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota



MARGARET H. CHUTICH
Assistant Attorney General
Atty. Reg. No. 0157880

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-2418 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENTS

AG: #1666111-v1

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).