

No. A06-804

STATE OF MINNESOTA
IN SUPREME COURT

Buddie Greene,

Appellant,

vs.

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

Respondents.

**RESPONDENT COMMISSIONER'S BRIEF,
ADDENDUM AND APPENDIX**

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LEGAL ISSUE

Is the challenged classification in Minnesota Statutes section 256J.645, subdivision 4, which requires certain tribal members on public assistance to obtain employment services exclusively through a participating tribe, rationally related to Minnesota's legitimate purpose in furthering tribal self-government and sovereignty, thus satisfying the Equal Protection Clauses of the federal and state constitutions?

Decision below:

The Minnesota Court of Appeals affirmed the order of the Commissioner of Human Services. The court found that the law comported with equal protection principles because the challenged classification was political in nature and rationally related to the "legitimate state interest in protecting and promoting tribal sovereignty." *Greene v. Comm'r of the Minn. Dep't of Human Servs.*, 733 N.W.2d 490, 497 (Minn. Ct. App. 2007).

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).

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

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

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 reducing the Minnesota Family Investment Program (“MFIP”) benefits of Appellant Buddie Greene. Greene’s cash benefit was reduced by thirty percent for failing to participate in employment services, a mandatory requirement for receiving state aid. At a fair hearing that she requested, Greene, a member of the Minnesota Chippewa Tribe (“MCT” or “the Tribe”), admitted that she did not attend the required employment service overview or develop an employment plan with the Tribe. She did not explain the reasons for her refusal to work with the Tribe other than asserting that she preferred to use Aitkin County’s employment services.

Appeals Referee Catherine Moore recommended that the sanction be reversed. That recommendation was rejected by the Commissioner, however, and the Commissioner’s designee issued an amended order upholding the sanction.

Greene appealed the Commissioner’s decision to the Aitkin County District Court. On February 21, 2006, after hearing cross motions for summary judgment, the Honorable John R. Leitner issued an order affirming the Commissioner’s decision and rejecting Greene’s equal protection claims. Appellant’s Appendix (“A. App.”) at A-28, A-32 - 34.

Greene appealed, specifically challenging the district court’s order only on equal protection grounds. The Minnesota Court of Appeals, Crippen, J., Willis, J., and Randall, J., presiding, affirmed the Commissioner’s decision. *Greene*, 733 N.W.2d at 492 (Randall, J., dissenting). It found that Minnesota Statutes section 256J.645,

subdivision 4 (2006) comports with the Equal Protection Clauses of the United States and Minnesota Constitutions. *Id.* at 496-97. This appeal followed.

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.¹ 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 (2006).

Persons seeking assistance through MFIP apply for benefits through the county social service agency in the county where they live. *See* Minn. Stat. § 256J.09, subd. 1 (2006). 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 (2006). One such

¹ Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") in August 1996. PRWORA amended Title IV-A of the Social Security Act. It eliminated the Aid to Families with Dependent Children ("AFDC") program and established the Temporary Assistance to Needy Families ("TANF") block grants, which provide cash assistance to states to aid low income families with children. MFIP is Minnesota's TANF program. Minn. Stat. §§ 256J.01, subd. 2; 256J.02, subd. 1 (2006).

requirement is participation in employment and training services, which are described in Minnesota Statutes sections 256J.49–.62 (2006). *See* Minn. Stat. § 256J.55 (2006).

“[D]esigned to assist participants in obtaining and retaining employment,” Minn. Stat. § 256J.49, subd. 3 (2006), these services include assessments of the person’s ability to obtain employment, creation of an employment plan, and the provision of practical items to support work efforts, such as child care, transportation, clothing for interview or for work and energy assistance. *See* Minn. Stat. §§ 256J.515, 256J.521 (2006); Respondent Commissioner’s Addendum (“R. Add.”) at 5-6. Counties may opt to provide these services or to contract with a public, private or nonprofit agency.² Minn. Stat. § 256J.49, subd. 4 (2006).

MFIP participants who fail to comply with employment service requirements may be sanctioned and lose MFIP benefits, absent a showing of good cause. *See* Minn. Stat. §§ 256J.46, subd. 1; 256J.57, subd. 1 (2006). Section 256J.57 gives thirteen examples of good cause, excusing, for example, failure to comply with requirements when the participant is ill or injured, lacks appropriate child care or lacks suitable employment. Minn. Stat. § 256J.57, subd. 1.

² MFIP generally requires counties to make available to participants two service providers, but this requirement is excused when the provision of alternative employment training services would result in financial hardship for the county or when the county uses specified work force centers. *See* Minn. Stat. § 256J.50, subs. 8, 9 (2006).

II. DESCRIPTION AND BACKGROUND OF SECTION 256J.645, THE “INDIAN TRIBE MFIP EMPLOYMENT SERVICES” PROVISION.

When the Legislature enacted the current statewide version of the Minnesota Family Investment Program in 1997, it included a section entitled “Indian Tribe MFIP Employment Services,” section 256J.645. 1997 Minn. Laws, ch. 85, art. 1, § 51, 572-74. Under this section, the Commissioner of Human Services has the authority to “enter into agreements with federally recognized Indian tribes with a reservation in the state to provide MFIP employment services to members of the Indian tribe. . . .”³ Minn. Stat. § 256J.645 (2006); R. Add. at 1. The section explicitly gives the Commissioner authority to enter into an agreement with a “consortium of Indian tribes” providing that the governing body of each tribe in the consortium complies with relevant requirements. *Id.*

This grant of authority was not a new concept but simply ensured that the Commissioner could continue, under MFIP, a practice of contracting with Indian tribes willing to provide employment services to their members. As far back as 1989, the Legislature granted the Commissioner the authority to enter into agreements with “any federally recognized Indian tribe with a reservation in the state to provide employment and training programs . . . to members of the Indian tribe receiving AFDC [Aid to Families with Dependent Children].” Minn. Stat. § 256.736, subd. 18 (1990), *repealed* by 1997 Minn. Laws, ch. 85, art. 1 § 74(b); R. Add. at 3.

³ “Indian tribe” is defined as “a tribe, band, nation, or other federally recognized group or community of Indians.” Minn. Stat. § 256J.645 (2006).

Under MFIP, if Indian tribes choose to enter into such an agreement with the State, they must satisfy the following requirements and safeguards:

- (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; R. Add. at 1. 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 (2006).

The MFIP 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); R. Add. at 1. Subdivision four is virtually identical to language first enacted by the Legislature in 1989 concerning employment and training programs operated by Indian tribes for those members on AFDC.⁴ See 1989 Minn. Laws, ch. 282, art. 5, § 34, *codified at* Minn. Stat. § 256.736, subd. 18(1) (1990), *repealed by* 1997 Minn. Laws, ch. 85, art. 1, § 74(b). The effect of this provision is at the heart of this dispute.

III. The STATE AND TRIBAL AGREEMENT CONCERNING THE MFIP PROGRAM.

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 (“grant contract”) authorized by section 256J.645. A. App. at 6. Representing that it was “duly qualified and willing to perform the services set forth herein,” the Tribe agreed to provide MFIP employment services for specified public assistance recipients “enrolled or eligible for enrollment in the Minnesota Chippewa Tribe” for fiscal year 2004/2005. *Id.*

In mandatory language consistent with the statute, the Minnesota Chippewa Tribe agreed to provide MFIP employment services 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:

⁴ Subdivision 18(1) provided: “Indian tribe members receiving AFDC and residing in the service area of an Indian tribe operating employment and training services under an agreement with the commissioner must be referred by county agencies in the service area to the Indian tribe for employment and training services.” R. Add. at 3.

- 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 A-6 - A-7, ¶ I.C.1. (emphasis added). The service delivery area for the Minnesota Chippewa Tribe includes Aitkin County. *Id.* at A-7, ¶ 2. No provision in the agreement allows the Minnesota Chippewa Tribe to refuse to serve eligible tribal members once they are referred to the Tribe for MFIP employment services.⁵ *See generally* A. App. at A-5 - A-16.

IV. BACKGROUND OF GREENE'S CHALLENGE.

This dispute arose when Greene applied for MFIP benefits in July 2004.⁶ She resided in Aitkin County with her father, Dale Greene, and her minor child. Respondent Commissioner's Appendix ("R. App.") at 56.

As part of the application process, Greene signed a Tribal/Reservation Membership form that showed that she was enrolled in the Minnesota Chippewa Tribe, through the Leech Lake Band of Ojibwe. A. App. at A-1. The form clearly explained its

⁵ The agreement does allow the Tribe to subcontract with employment service providers or to become an employment services provider itself. A. App. at A-7, ¶ 7. MCT has chosen to become an employment services provider. R. Add. at 5-6.

⁶ Because Greene was over eighteen-years-old and did not hold a high school diploma or G.E.D when she applied, *see* A. App. at A-2, Respondent Commissioner's Appendix at 56, she was required to participate in employment services to receive MFIP benefits. *See* Minn. Stat. § 256J.54 (2006).

purpose, noting that it gives a county agency data “it needs to decide where you can get MFIP Employment Services,” and noted that members of “some Indian Tribes or Bands can get services from a Tribal program.”⁷ *Id.* The form further made clear that persons “do not have to give this data,” but cautioned that if one did not give the information one “cannot get MFIP Employment Services from a Tribal program.” *Id.*

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, the county referred Greene to the Minnesota Chippewa Tribe for employment services. *See* A. App. at A-2, A-3. Greene asked the Minnesota Chippewa Tribe for a referral to a county employment service provider. *Id.* at A-3. The Minnesota Chippewa Tribe declined, stating that it “is mandated to provide you service and cannot refer you elsewhere.” *Id.*

Greene did not attend the required employment service overview; nor did she develop an employment plan with the Minnesota Chippewa Tribe. R. App. at 44-45. Accordingly, on December 18, 2004, the Minnesota Chippewa Tribe determined that Greene was non-compliant. R. App. at 54. On December 20, 2004, the Tribe informed Aitkin County of Greene’s non-compliance and requested that the county impose a sanction. *Id.*

⁷ The Commissioner represents that he has separate MFIP employment service agreements under section 256J.645 with the MCT, the Leech Lake Band of Ojibwe, the White Earth Band of Chippewa, the Red Lake Nation and the Mille Lacs Band of Ojibwe Indians.

By written notice dated that same day, the county alerted Greene that beginning January 1, 2005, her MFIP grant would be reduced from \$675 to \$473 because she had “not cooperated with Employment Services requirements to attend an overview.” *Id.* at 52. The notice contained a caption that clearly stated:

*****IMPORTANT APPEAL RIGHTS! READ THIS NOW!

If you don't agree with the action taken on your case, you can appeal. To keep your benefits until the appeal, you must appeal:

*Within 10 days or

*Before the first day of the month when the action takes place.

Id. at 53.

On January 3, 2005, Greene appealed, stating that she “would like to use state services.” *Id.* at 51. Greene's appeal did not meet the time deadline to enable her to keep her full benefits during the appeal and they were reduced by thirty percent as required by state law. Minn. Stat. § 256J.46, subd. 1. Represented by counsel, Greene subsequently appeared at an administrative hearing on her appeal. R. App. at 28.

At the hearing, she 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. *Id.* at 44-45. 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 45.

Apart from stating a preference for state services, Greene never explained 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 47. At no time did Greene state that she would be burdened by the requirement to use the tribal services or complain that this mandate forced her to travel seventy miles away to obtain not only employment services but employment.⁸ 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 47-48.

Appeals Referee Catherine Moore initially recommended that Greene be allowed to access county employment services, A. App. at A-24-25, but the Commissioner’s delegee, Kenneth M. Mentz, notified the parties that the Commissioner intended to adopt an Order differing from the recommendation. *Id.* at A-21. The Commissioner solicited and received comments from Greene’s counsel and Aitkin County on a proposed amended order and he also received a letter from a department policy analyst before issuing a decision. R. App. at 26-27.

On May 5, 2005, the Commissioner issued “Amended Conclusions and Amended Order” upholding the sanction. *Id.* at 24. The Commissioner found 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

⁸ Had Greene presented or developed issues of hardship, the Commissioner represents that he would have offered evidence to show that tribal service employees travel to meet tribal participants, that MFIP recipients may look for work anywhere they choose, and that Aitkin County has a work-seeking facility operated by the Northeastern Minnesota Office of Job Training that is open to any person looking for a job. See www.jobtrainingmn.org/about/location.

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.” *Id.*

Appellant appealed to Aitkin County District Court.⁹ On February 21, 2006, the Honorable John R. Leitner issued an Order and Memorandum affirming Greene’s sanction. A. App. at A-28. 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 A-31. In addition, the court rejected arguments based on preemption and tribal sovereignty. *Id.* at A-31 - 32. Finally, it specifically found that the statute met equal protection requirements under the state and federal constitutions. *Id.* at A-34. The right to travel issue was never raised in district court. *See generally id.* at A-28 – 34.

The Court of Appeals, Crippen, J., Willis, J., and Randall, J., presiding, affirmed the district court’s equal protection holding and the Commissioner’s decision. *Greene*, 733 N.W.2d at 492 (Randall, J., dissenting). In particular, the court found that, under the controlling case of *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474 (1974), American Indian classifications are “not racial but political” when they are limited to members of

⁹ Respondent claims in her brief that even after the appeal to district court, Aitkin County “continued to financially coerce Appellant,” citing a June 7, 2005 letter from county social workers to her in support. App. Br. at 6. Yet the last paragraph of the letter makes clear that the Aitkin County workers were merely trying to answer Greene’s “questions as to how your involvement with Employment Services will effect (sic) your appeal.” A. App. at A-4. The workers carefully advised Greene, “As I told you yesterday, you will need to contact your attorney regarding any issues about the appeal.” *Id.*

federally recognized tribes, making a rational basis test appropriate. *Greene*, 733 N.W.2d at 495. The majority easily found such a rational basis, stating that the statute was passed “to provide the MCT with a greater responsibility for self-government.” *Id.* at 496. The court noted that the statute enables “federally recognized Indian tribes that so choose . . . to assume ongoing interactions with their own members to ensure that tribal members receive employment services in the best and most effective way possible. This supports the legitimate state interest of protecting and promoting tribal sovereignty.” *Id.*

Similarly, the majority rejected Greene’s claim that the statute violates the Minnesota Constitution. *Id.* at 497. Recognizing that the federal government has a “unique” obligation to American Indians, the court nevertheless found that 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.* at 497, quoting *Krueth v. Indep. Sch. Dist. No. 38*, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993) (internal quotation omitted). Greene’s petition to this Court sought review solely on the equal protection issue.

ARGUMENT

I. SUMMARY OF THE ARGUMENT.

Greene contends that section 256J.645, subdivision four, as interpreted by the Commissioner and applied by Aitkin County, and the contract, violate the Equal Protection Clauses of the state and federal constitutions because she is being treated differently from other non-Indian citizens. She also notes that members of other tribes

and 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. Greene cannot satisfy her very heavy burden of demonstrating beyond a reasonable doubt that this statute is unconstitutional for the following reasons.

As a threshold matter, the plain language of section 256J.645, subdivision four, shows that the Commissioner correctly interpreted the provision as requiring that counties refer tribal members of consenting tribes to the tribes for employment services. By using mandatory language, the Minnesota Legislature intended that, when a tribe agreed to provide such employment services, those tribal services would supplant county efforts for all identified tribal members living within the tribe's service area. Even if the Court should find that the disputed language is somehow ambiguous, the Commissioner's interpretation should be given great weight, particularly when the Commissioner has interpreted almost identical language in an earlier welfare law in a consistent fashion.

Contrary to Greene's claim, a rational basis is the appropriate standard by which to test the statute's challenged classification under equal protection principles. No fundamental right is implicated here. Greene's recently asserted "right to travel" lacks merit and no constitutional right to welfare benefits exists.

Nor can Greene show that she is a member of a suspect class. Under the controlling case of *Morton v. Mancari*, American Indian classifications are not racial but political when they are limited to members of federally recognized tribes, making a rational basis test appropriate. This standard applies when testing *state* law classifications of Indian tribes and their members as well.

Greene's assertion that *Mancari* applies only when a benefit or preference is conferred upon individual Indians is without merit factually or legally. Viewed from the perspective of the tribe, its employment service workers and its members in general, the legislation confers tangible benefits and furthers the congressional policy of tribal sovereignty and self-government. Moreover, even when federal legislation disadvantages individual Indians, the Supreme Court applies a rational basis test to find that differential treatment of tribal members and non-Indians does not violate the Equal Protection Clause. As a practical matter, this mandatory referral leaves Greene in a situation similar to other Minnesotans receiving MFIP benefits, who must submit to obligatory employment services and cannot choose which county provides them with those services.

Applying the rational basis tests of the state and federal constitutions, this Court may properly find that section 256J.645, subdivision four, comports with equal protection principles. The law draws on legitimate political distinctions that are rationally related to the state's interest in promoting intergovernmental agreements and encouraging tribal self-government and sovereignty. The classification enables federally recognized Indian tribes that so choose to "assume ongoing interactions with their own members to ensure that tribal members receive employment services in the best and most effective way possible." *Greene*, 733 N.W.2d at 496.

II. SCOPE OF REVIEW.

Judicial review of the Commissioner of Human Services' decision is governed by Minnesota Statutes section 14.69 (2006). Under this standard, the Court determines whether the agency's decision is:

- a) in violation of constitutional provisions; or
- b) in excess of the statutory authority or jurisdiction of the agency; or
- c) made upon unlawful procedure; or
- d) affected by other error of law; or
- e) unsupported by substantial evidence in view of the entire record as submitted; or
- f) arbitrary or capricious.

Minn. Stat. § 14.69 (2006).

Greene's challenge to the constitutionality of section 256J.645, subdivision 4, presents a pure question of law. Where the language of a statute is unambiguous, its proper interpretation is a question of law that this Court reviews *de novo*. *Boutin v. LaFleur*, 591 N.W.2d 711, 714 (Minn. 1999). When the meaning of a statute is doubtful, however, "courts should give great weight to a construction placed upon it by the Department charged with its administration." *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 792 (Minn. 1989) (quoting *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn.1979)).

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) (citation omitted) (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)). As shown below, Greene cannot meet that very heavy burden here.

III. AS A THRESHOLD MATTER, THE COMMISSIONER CORRECTLY INTERPRETED SECTION 256J.645, SUBDIVISION FOUR, AS REQUIRING COUNTIES TO DIRECT TRIBAL MEMBERS RECEIVING MFIP BENEFITS AND LIVING IN THE PARTICIPATING TRIBE'S SERVICE AREA TO THEIR TRIBE FOR EXCLUSIVE EMPLOYMENT SERVICES.

Before the Court of Appeals, Appellant did not clearly challenge the Commissioner's *interpretation* of section 256J.645, subdivision four or the corresponding employment services contract with the Minnesota Chippewa Tribe.¹⁰ Rather, she challenged the classification in the law itself; as her brief concedes, the "only legal issue or question Appellant presented to the Court of Appeals" involved whether she was "protected against racially discriminatory laws by a heightened scrutiny review under the Equal Protection clauses." App. Br. at 25.

Despite this focus below, she now chastises the court of appeals for erroneously "interpreting the contract and statute." App. Br. at 10. She also now directly asserts that she "does *not* challenge the classification in . . . [section] 256J.645," but attacks "Respondent County's established practice of denying her employment services."¹¹ *Id.* at 11-12 (emphasis added).

Appellant's claim that "nothing in the law or contract allows Respondent County to deny anyone who is otherwise eligible such services," *id.* at 12, is belied by the plain

¹⁰ Appellant had raised the interpretation issue directly before the Commissioner and district court. A. App. at A-30 - 31.

¹¹ Appellant arguably waived the issue of statutory interpretation by not clearly addressing it before the court of appeals or in her petition to this Court. *See Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Given the Court's general practice, however, of avoiding a constitutional ruling if another basis exists on which a case can be decided, *see, e.g., In re Senty-Haugen*, 583 N.W.2d 266, 269, n.3 (Minn. 1998), Respondent will address it here.

language of the statute itself. Courts construe statutory “words and phrases according to the rules of grammar and according to their common and approved usage.” Minn. Stat. § 645.08(1) (2006). Furthermore, the object of all statutory interpretation is to ascertain and to give effect to the Legislature’s intent, Minn. Stat. § 645.16 (2006), and a statute’s plain language is the touchstone of legislative intent.

Located in a section of the Minnesota Family Investment Program entitled “Indian tribe MFIP employment services,” subdivision four makes clear that it is a mandatory provision. After meticulously defining the “Indian tribal members” to which it pertains, subdivision four clearly states that these tribal members “*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). As defined by law, “[m]ust’ is mandatory.” Minn. Stat. § 645.44, subd. 15(a) (2006). “Refer” commonly means “1. To direct to a source for help or information . . . 2. To assign . . . to. 3. To assign to or regard as belonging within a particular kind or class. . . .” *The American Heritage Dictionary* 1038 (2d College Ed. 1985).

Thus, the plain meaning of this subdivision shows that it mandates that counties direct or assign certain tribal members to participating tribes “for employment services.” By using such mandatory language, the Legislature intended that, when a tribe agreed to

provide such employment services, these tribal services would supplant county efforts for all identified tribal members living within the Tribe's service area.¹²

Where the language of a statute, according to its common and approved usage, is unambiguous, its plain meaning controls. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). In such circumstances, statutory construction is not permitted. *Id.*

Nothing in the statute's mandate suggests that counties may provide employment services for identified tribal members who are eligible for tribal services after it has initially directed those members to the Tribe. If the Legislature had intended for tribal MFIP employment services to work that way, it would have stated so. This provision should not be interpreted to allow such a result when the plain language does not contemplate it. *See Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 681 (Minn. 2004) (stating that courts will not "supply words that the legislature either purposely omitted or inadvertently left out").

¹² Similarly, the contract between the Commissioner and the MCT makes clear that the statute's mandatory referral provision will be enforced. The contract specifies that the MCT "*shall* provide Tribal program services" to all who meet the precise conditions set out by the statute and contract (MFIP recipients enrolled in or eligible for enrollment in the MCT who reside in a certain area). A. App. at A-6 (emphasis added). Under the contract, the term "Tribal Program" refers to the "MFIP employment services program provided by the Reservation." *Id.* Like the statute, the contract uses the mandatory term "shall" to obligate the Tribe, once it has agreed to do so, to provide employment services to all identified members within a certain geographic area. *See* Minn. Stat. § 645.44, subd. 16 (2006) (defining "shall" as mandatory). Likewise, the duties the State undertakes include "*requiring* county agencies to implement the method of referring appropriate recipients to the RESERVATION's Tribal program" A. App. at A-8 (emphasis added).

Even if the Court finds that this statutory section is capable of two or more reasonable interpretations, it should “give great weight to a construction placed upon it by the Department charged with its administration.” *Mammenga*, 442 N.W.2d at 792 (quoting *Krumm v. R.A. Nadeau Co.*, 276 N.W.2d 641, 644 (Minn. 1979)); see also Minn. Stat. § 645.16(8) (2006) (stating that when “words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . administrative interpretations of the statute”).

Where an agency is administering an ambiguous statute, the only question for the reviewing court is whether the agency’s interpretation is based on a permissible construction of the statute -- not whether it is the only interpretation or whether it conforms to the court’s own interpretation. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801 (1965) (“To sustain the Commissioner’s application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.”) (citation omitted). See also *Martin v. City of Rochester*, 642 N.W.2d 1, 21 (Minn. 2002) (adopting *Chevron* analytical framework but declining to defer to agency interpretation when the challenged statutes were not ambiguous).

In addition, while the challenged statutory language is not overly technical, the Commissioner’s interpretation seems particularly entitled to weight here where it is one of long-standing application. See *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375

(Minn. 1996) (stating that agency's construction of a statute may be entitled to some weight when the statutory language is technical and the interpretation is long-standing); *Minnesota Microwave, Inc. v. Public Service Comm'n*, 291 Minn. 241, 245, 190 N.W.2d 661, 665 (Minn. 1971) (same). Here, a published Bulletin shows that the Commissioner has interpreted this statutory language in a consistent manner since shortly after it was first enacted by the Legislature in 1989.

For example, on December 30, 1994, the Department of Human Services and the Minnesota Department of Economic Security issued Instructional Bulletin #94-9B to "remind[] county human service agencies to refer certain American Indians to Tribal or Reservation JOBS/Project STRIDE programs . . . based on Tribe/Reservation membership and county of residence." R. Add. at 7.¹³ The Bulletin stressed that the "county agency *must refer* all caretakers who are identified as being enrolled or eligible for enrollment in . . . one of the six Reservations affiliated with MCT to the Tribal/Reservation JOBS/Project STRIDE program . . ." *Id.* at 11 (emphasis added). Further, it noted that "County agencies must inform caretakers being referred that employment and training services for them *must be provided by the Tribal/Reservation*

¹³ This Bulletin is a publicly available and official document of an administrative agency of which the Court may take judicial notice. *Referral of America Indians Receiving Aid To Families With Dependent Children (AFDC) Or Minnesota Family Investment Program (MFIP) Case Management To Tribal Or Reservation Job Opportunities And Basic Skills (JOBS)/Project STRIDE Programs In Northern Minnesota*, Instructional Bulletin #94-9B, (Minnesota Dep't of Human Services, December 30, 1994). Available in the Minnesota Attorney General Library. See *In re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) (considering statistical report of the Department of Human Services that had not been introduced at the trial court level).

JOBS/Project STRIDE program or MFIP case management program.” Id. at 12 (emphasis added). The Commissioner’s longstanding interpretation, fully consistent with the plain terms of the statute, should be given deference here.

Moreover, the Legislature, by essentially reenacting the mandatory language of the 1989 subdivision requiring referral of tribal members to participating tribal programs when it created statewide MFIP in 1997, impliedly approved the Commissioner’s interpretation. *See Bremer v. Comm’r of Taxation*, 246 Minn. 446, 453, 75 N.W.2d 470, 474 (Minn. 1956). Had the Legislature not approved of this administrative construction and the well-established practice of referring identified tribal members to their participating Tribes, it could have easily altered this mandatory language when enacting MFIP.

Applying these principles here, given the mandatory language of subdivision four, the Commissioner’s conclusion that the law requires designated tribal members to receive employment services only through their participating Tribe is a permissible and reasonable construction of the statute. The Commissioner’s interpretation should be upheld.

IV. SECTION 256J.645, SUBDIVISION FOUR, COMPORTS WITH THE EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS BECAUSE ITS CLASSIFICATION OF TRIBAL MEMBERS IS RATIONALLY RELATED TO THE STATE’S LEGITIMATE INTEREST IN PROMOTING INTER-GOVERNMENTAL AGREEMENTS AND TRIBAL SELF-GOVERNMENT.

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. Article one, section two of the Minnesota Constitution

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.

This Court has stated that these 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). See also *Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S. Ct. 1028, 1032 (1963). 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.” *Scott*, 615 N.W.2d at 74.

Thus, a statute is “presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985)). This Court has recognized that the rational basis test “is always a relatively easy test to meet for those who seek to uphold the validity of a statutory classification.” *Blue Earth County Welfare Dep’t v. Cabellero*, 302 Minn. 329, 342, 225 N.W.2d 373, 381 (Minn. 1974). Particularly in the area of social welfare, if the classification has “some ‘reasonable basis,’” it does not offend the Constitution simply because it is “imperfect” or “results in some inequality.” *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161 (1970) (quotation omitted). Only when a classification limits a fundamental right or involves a suspect class does strict scrutiny require that the classification be

narrowly tailored to a compelling governmental purpose. *Cleburne Living Cnt.*, 473 U.S. at 440, 105 S. Ct. at 3254.

This Court has developed “two formulations for the rational basis test.” *State v. Garcia*, 683 N.W.2d 294, 298 (Minn. 2004). The first formulation is the federal standard, which analyzes whether the legislation “has a legitimate purpose and whether it was reasonable to believe that the use of the challenged classification would promote that purpose.” *Id.* The second, known as 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). Under this version of the rational basis test, the Court has “required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” *Garcia*, 683 N.W.2d at 299 (quotation omitted). As shown below, the challenged statute complies with either formulation of the rational basis test.

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

1. Section 256J.645 burdens no fundamental rights.

As the Court of Appeals properly found, Greene made “no assertion that her ‘freedom of choice’ argument implicates a fundamental right.” *Greene*, 733 N.W.2d at 495, n.1. The United State Supreme Court and this Court have consistently held that

no constitutional right to welfare benefits exists.¹⁴ *Dandridge v. Williams*, 397 U.S. at 484-85, 90 S. Ct. at 1161-62; *Mitchell v. Steffen*, 504 N.W.2d 198, 203 (Minn. 1993).

In her brief to this Court, Appellant, for the very first time, tries to invoke strict scrutiny by claiming that “mandating that Appellant use only tribal employment services penalizes her for exercising her fundamental right to travel” App. Br. at 18. As argued in a separate motion, the Commissioner believes that this argument was waived by Greene and may not first be raised here. *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989); *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Even if the Court chooses to examine the merits of this claim, however, it must be summarily rejected. The right to travel, which includes the right to migrate, “touches on the fundamental right of *interstate* movement. . . .” *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S. Ct. 1322, 1333 (1969) (emphasis added), *overruled in part on other grounds* by *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 1359-60 (1974). “The right to travel is implicated when a statute *actually deters* such travel, when *impeding* travel is its primary objective, or when it uses any *classification* which serves to *penalize* the exercise of that right.” *Mitchell v. Steffen*, 504 N.W.2d at 200 (citing *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903, 106 S. Ct. 2317, 2320 (1986)). Greene has made no

¹⁴ The lack of a fundamental right distinguishes this case from *Brown v. Board of Education*, a case that the dissent in *Greene* found controlling. See 733 N.W.2d at 499. Finding the right of public education to be “perhaps the most important function of state and local governments,” the Court held that segregation solely by race was inherently unequal and harmful, because it denoted the inferiority of black children. 347 U.S. 483, 493-94, 74 S. Ct. 686, 691-92 (1954). Appellant Greene has demonstrated no similar right here or harm.

showing that subdivision four actually deters migration or that its primary objective is to impede travel.

Nor can she show that the challenged classification here directly penalizes the right to travel. Most of the right to travel cases, as those cited above, deal with state residency requirements that discourage *interstate* migration; Greene cites no authority to show that this right applies to *intrastate* travel. Moreover, even assuming that a right to travel within the state exists, any burden placed upon that right by subdivision four is too attenuated to trigger the heightened scrutiny that Greene seeks.¹⁵ *See Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 720 (Minn. 2007) (concluding that any burden that a section of Worker's Compensation Act placed on worker's right to live where she chooses was too remote to support heightened scrutiny). *See also Bowen v. Gilliard*, 483 U.S. 587, 601-03, 107 S. Ct. 3008, 3017-18 (1987) (declining to apply heightened scrutiny to AFDC amendment that allegedly burdened right of families to determine own living arrangements because legislation only indirectly affected families' choices).

2. Section 256J.645 does not involve a suspect class.

Decisions of the United States Supreme Court make clear that the Court employs a "mere rationality test when scrutinizing tribal classifications because such classifications

¹⁵ The Commissioner objects to the factual assertions made in support of this right to travel argument as being outside the record. App. Br. at 19. No support exists that Appellant was given an "ultimatum, either go seventy (70) miles away to obtain employment (and do business), or have her MFIP benefits sanctioned." *See id.* Nor is there evidence that her "access to the Aitkin community" was restricted. *See id.* For example, the Northeastern Minnesota Office of Job Training operates an office in Aitkin County that is open to any person looking for a job. *See* www.jobtrainingmn.org/about/location.

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). The leading and controlling case is *Morton v. Mancari*.

In *Mancari*, the Court upheld an employment preference for qualified Indians in the Bureau of Indian Affairs (“BIA”) provided by the Indian Reorganization Act. 417 U.S. at 538-39, 94 S. Ct. at 2477. It did so in part because it found that the preference was not racial but political when the preferences apply to members of federally recognized tribes. *Id.* at 553, n.24, 94 S. Ct. at 2484, n.24. The preferences were 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 Constitution, to “legislate on behalf of federally recognized Indian tribes.” *Id.* at 551, 94 S. Ct. at 2483. It noted, “as long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Id.* at 555, 94 S. Ct. at 2485. The Court found that Congress, when enacting the Indian Reorganization Act, had determined that “proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies.” 417 U.S. at 553, 94 S. Ct. at 2484. Thus, the Court concluded that the “employment criterion [was] reasonably designed to further the cause of Indian self-government,” a “legitimate, nonracially based goal.” *Id.* at 554, 94 S. Ct. at 2484.

Similarly, the Minnesota Court of Appeals, following the reasoning of *Morton v. Mancari*, applied the rational basis test to uphold a Minnesota statute against a federal 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). In *Krueth*, non-Indian tenured teachers challenged a law that permitted the Red Lake school district to place tenured teachers on unrequested leaves of absence to retain probationary and less senior American Indian teachers. *Id.* at 831-32.

In finding that the statute comported with equal protection principles, the court relied upon *Mancari* and applied a rational basis test. The *Krueth* 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. The court emphasized that the “classification must be limited to members of federally recognized tribes, not just people of some American Indian ancestry, otherwise strict scrutiny would apply to limit state racial affirmative action preference.” *Id.*

Like in *Mancari* and *Krueth*, a rational basis test applies here because the challenged classification is 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 or their outward appearance. 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. If the

classification were based upon race, it would apply to all those of Indian ancestry regardless of tribal affiliation.

None of the cases that Greene cites in her brief, App. Br. at 9, 21, undercuts application of *Mancari* or supports a finding of racial discrimination here. For example, *Lamb v. Village of Bagley*, is simply inapposite as it deals with employment discrimination based upon race under the State's Human Rights Act, and provides no guidance on constitutional equal protection issues.¹⁶ See 310 N.W.2d 508 (Minn. 1981). Similarly, *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 296 (Ca. 1924), and *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P.2d 92 (Ca. Ct. App. 1954), provide little guidance here as they are factually and legally distinguishable. Neither deals with a classification based upon tribal membership or discusses relevant Fourteenth Amendment analysis in any depth; *Piper* also invokes the now discarded principle of separate but equal in the area of education. See *id.*

3. Because the statutory classification is political, and not racial, and benefits the consenting Tribe and its tribal members as a whole, strict scrutiny is not required.

Green tries to factually distinguish *Mancari* and *Krueth* by asserting that these employment preference cases “were a true benefit to the Indians involved,” whereas this classification “created a hardship” for her. App. Br. at 14-15. Her proposed distinction is valid neither factually nor legally.

¹⁶ *Blaine County v. Moore*, 568 P.2d 1216 (Mont. 1977) also does not involve analysis of the Fourteenth Amendment.

“[T]ribal administration of Social Security Act programs can have significant advantages,” including giving tribes the ability “to tailor the programs to the unique conditions in their communities.” See Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law* § 22.06[2][b] at 1406 (2005 ed.). For example, recognizing “the educational and cultural needs of their populations, tribes administering [Temporary Aid to Needy Families] TANF programs are far more likely than states to count education, training and cultural activities toward mandatory work requirements.” *Id.*

While the MCT is administering a portion of Minnesota’s TANF program – the MFIP employment services – and not a TANF program in its entirety, these advantages are true here as well. Certainly, from the perspective of the Tribe, this statute is a benefit to it and its members as a whole or it presumably would not enter into such exclusive agreements. Upon choosing to contract under the MFIP statute, the Tribe receives federal and state monies to develop and to provide employment services programs for their tribal members receiving MFIP benefits. By hiring tribal employment service workers, the Tribe increases employment on or near its reservation and assumes a greater degree of economic self-government.

In addition, by hiring tribal employment specialists who will assume ongoing interactions with fellow tribal members seeking work, the Tribes seek to lessen any possible negative effect of having non-Indians supervising tribal members. Such interaction among tribal members ensures that tribal members receive employment services in the best and most effective way possible.

Moreover, from the perspective of tribal employment service workers, the legislation confers a classic benefit or preference just as in *Mancari* or *Krueth* -- the ability for these tribal workers, rather than county workers, to provide employment services to identified tribal members in the service area. These benefits to the Tribes and individual members resulting from the classification are valid and are not undercut -- or transformed into race-based discrimination -- by one member's assertion that the tribal preference works a hardship on her.¹⁷

Here, Greene relies upon unsupported assertions and inferences to try to show hardship, but the factual record contains no showing of any "special harm" to her. *Greene*, 733 N.W.2d at 496. To be sure, Greene cannot choose to be served by Aitkin County, rather than the MCT, but her situation is similar to other Minnesota citizens receiving MFIP benefits. Under MFIP, persons must submit to obligatory employment services and they cannot choose which county provides those services. For example, a person in Aitkin County is not entitled to use Carlton County's services even though that person may live much closer to the Carlton County service site.

Even if viewed as a disadvantage to Greene, however, the United States Supreme Court has upheld, applying the rational basis test, the denial of benefits to an individual Indian where Indian interests in self-government were advanced. *See Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S. Ct. 943, 948 (1976). In *Fisher*, the Supreme Court

¹⁷ The record contains no indication whether any other MCT member besides Greene, since the time the pertinent language was enacted in 1989, considers exclusive tribal employment services to be a disadvantage.

held that members of the Northern Cheyenne Tribe could be denied access to Montana State courts concerning an adoption proceeding arising on their reservation. *Id.* at 389-90, 96 S. Ct. at 948. The Court found that a tribal ordinance conferring jurisdiction in tribal court over tribal matters was authorized by the Indian Reorganization Act of 1934 and consistent with the overriding federal policy of encouraging self-government. *Id.* at 387, 390, 96 S. Ct. at 946, 948.

Unlike in *Mancari*, the Indian plaintiffs in *Fisher* were explicitly *denied* a benefit or privilege available to non-Indians, access to the Montana judicial system. Rejecting a claim of racial discrimination, the Court found that the exclusive jurisdiction of the Tribal Court does not “derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.” *Id.* at 390, 96 S. Ct. at 948.

The Court recognized that its holding results “in denying an Indian plaintiff a forum to which a non-Indian has access” *Id.* at 390-91, 96 S. Ct. at 948. It explained, however, that “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.” *Id.*

Similarly, in *United States v. Antelope*, the Supreme Court stated that the principles reaffirmed in *Mancari* and *Fisher* show that federal regulation of Indian affairs is not based upon impermissible racial classifications. 430 U.S. 641, 646, 97 S. Ct. 1395, 1399 (1977). “Rather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” *Id.*

In *Antelope*, two enrolled members of the Coeur d'Alene Tribe were convicted in federal court for first-degree murder under the felony-murder provisions of the federal enclave murder statute, made applicable to Indians by the Major Crimes Act. *Id.* at 642-43, 97 S. Ct. at 1397. Defendants contended that application of the federal statutes created an invidious racial classification because a non-Indian charged with the same offense would have been subject only to Idaho law, where premeditation and deliberation must be shown. *Id.* at 643-44, 97 S. Ct. at 1397-98. The Court rejected their contention, finding that respondents "were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Id.* at 646, 97 S. Ct. at 1399. Even though the result undeniably disadvantaged these tribal members, the Court concluded that the federal criminal statutes were not based upon impermissible racial classifications. *Id.* at 647, 97 S. Ct. at 1399.

The same rationale holds true here. Like the tribal ordinance in *Fisher* and the federal statute in *Antelope*, the statutory classification here, even if viewed as a disadvantage to Greene, should be affirmed under a rational basis test because it advances interests of tribal self-government.

4. The *Mancari* rational basis standard applies when testing state law classifications of Indian tribes and their members.

Even though this classification was enacted by Minnesota, and not by the federal government, the rational basis test is the appropriate standard. Indeed, numerous courts, using a rational basis standard, have upheld state law classifications singling out Indian tribes and their members. *Washington v. Confederated Bands and Tribes of Yakima*

Indian Nation, 439 U.S. 463, 500-02, 99 S. Ct. 740, 761-62 (1979) (upholding state law establishing jurisdiction over reservation lands 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).

Likewise, in upholding a Minnesota statute seeking to retain American Indian teachers, the court in *Krueth* explained that the “special trust relationship,” or “trust doctrine” that exists between American Indians and the federal governments “also applies to state action.” *Krueth*, 496 N.W.2d. 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).¹⁸

¹⁸ See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673, n.20, 99 S. Ct. 3055, 3068, n.20 (1979) (upholding state agency regulations protecting Indian treaty fishing rights against equal protection challenge by noting that the special status of Indians “justifies special treatment on their behalf when rationally related to the *Government's* ‘unique obligation toward the Indians’”) (emphasis added; quotation omitted). By referring to a general obligation of the “government,” “the statement logically implies that the trust relationship extends to the states.” Larry Leventhal, *American Indians -- The Trust Responsibility: An Overview*, 8 *Hamline Law Review* 625, 658 (1985).

Whether or not characterized as falling under the trust doctrine or merely being consistent with it, where state laws promote tribal self-governance, benefit tribal members, or implement or reflect federal laws, courts have generally upheld these measures under the more relaxed standard of review of *Mancari*. See Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 14.03[2][b][iii] at 932-33 (2005 ed.). Application of the rational basis standard “makes sense in light of Congress’s power to suppress state laws that stray too far from federal policy aims.” *Id.*

Here, Minnesota’s statute is fully compatible with relevant federal Indian law and goals. The Supreme Court has recognized the importance of tribal sovereignty “and the congressional goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S. Ct. 1083, 1092 (1987) (citations omitted). In particular, Minnesota’s statute is very similar to the Indian Self-Determination and Education Assistance Act, which authorizes tribes to contract with the federal government to administer programs formerly carried out by government that support the delivery of services to Indians.¹⁹ See 25 U.S.C. § 450f(a)(1) (2006). It also mandates that employment preferences be given to Indians in connection with the administration of contracts and that tribal preference laws “shall govern” concerning the

¹⁹ The congressional declarations of policy in the Indian Self-Determination and Education Assistance Act describe the federal government’s commitment to “the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 450a(b) (2006).

administration of any self-determination contract. 25 U.S.C. § 450e(b)(1), (c). Because this classification reflects federal law²⁰ and federal employment goals for Indians, application of the rational basis test is sound.

B. Application Of The Federal And Minnesota Rational Basis Tests Shows That A Reasonable Connection Exists Between The Actual Effect Of Section 256J.645 And The Legitimate State Interest Of Promoting Tribal Self-Government And Sovereignty.

Because section 256J.645 “supports the legitimate state interest of protecting and promoting tribal sovereignty,” *Greene*, 733 N.W.2d at 496, as well as the interrelated goals of self-government and self-sufficiency, it satisfies the key federal requirement that it have a legitimate purpose, and the third prong of the Minnesota rational basis test. 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 (2006) (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 (2006) (discussing law enforcement powers of the

²⁰ In addition to the Indian Self-Determination Act, 25 U.S.C. § 450e(b) (2006), discussed above, the classification is consistent with the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (2006) (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) (2006) (exempting from the Act’s coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations).

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 (2006) (discussing Indian conservation 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 (2006) (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”).

In addition, the purpose of the statute is absolutely consistent with the key accepted federal goals of tribal sovereignty, tribal self-government, self-sufficiency and economic development, and with federal legislation, particularly the Indian Self-Determination and Education Assistance Act.²¹ By acknowledging that tribal members may have unique cultural needs,²² this legislation allows federally recognized Indian tribes that so choose to develop and to provide employment services programs that fulfill the MFIP requirements for their tribal members, providing the benefits discussed above on pages 30 and 31. 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 that are tailored to their needs and effective.

²¹ Nothing in this Court’s recent decision of *State v. Jones*, 729 N.W.2d 1 (Minn. 2007), undermines the legitimacy of the statute’s goals.

²² 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 (2006). Thus, the Legislature clearly contemplated that tribal members seeking work may face different challenges than non-Indians.

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. First, without such a provision, tribes may have been reluctant to establish the necessary administrative infrastructure to run the employment services programs. The referral enables tribes to know that they will have sufficient numbers of tribal MFIP recipients and the funds to enable them to hire tribal employment counselors and to run a successful program. Second, if the referral were not mandatory, counties may have been reluctant to assist the tribes in exercising greater control over the destinies of tribal members on MFIP.²³ Third, a mandatory referral 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). Finally, a mandatory referral makes it less likely that MFIP program participants -- who are all *required* to seek employment as a condition of receiving public help -- could evade or undercut this requirement by

²³ 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.*

changing employment service providers frequently. Thus, a rational basis exists for the requirement that the county referrals be mandatory.

Section 256J.645 comports with the first and second prongs of the Minnesota rational basis test as the distinctions in the classification are genuine and substantial and related to the law's purpose. Here, the law "seeks to further the MCT's self-governance of tribal members for the benefit of its members." *Greene*, 733 N.W.2d at 497. By limiting subdivision four's reach to members of a participating tribe and not to all members of federally recognized tribes,²⁴ the Legislature ensured that persons referred for Indian tribal employment services are persons for whom the consenting Indian tribe has accepted responsibility.

When the Minnesota Chippewa Tribe voluntarily entered into the employment services contract with the State, it 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 Cohen, supra*, § 4.01[1][b] at 210; *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.

²⁴ Of course, nothing prevents other federally recognized Indian tribes that have a reservation in Minnesota from similarly contracting with the State, and some Tribes have chosen to do so.

Similarly, the geographical distinction, between members of the Minnesota Chippewa Tribe who live in the Tribe's designated service area, and those who do not, makes sense. Allowing Minnesota Chippewa Tribe members to participate when they reside outside of the Tribe's service delivery area would undoubtedly strain the ability of the Tribe to provide the necessary, concrete employment assistance that the statute and contract contemplate.

Moreover, the concept of a tribal service area that extends somewhat beyond the bounds of a reservation itself is well-accepted in federal law.²⁵ For example, the social services and financial assistance programs of the Bureau of Indian Affairs have not been exclusively confined to the physical boundaries of the reservation but have been interpreted to apply to Indians "on or near" the reservation. *See Morton v. Ruiz*, 415 U.S. 199, 238, 94 S. Ct. 1055, 1076 (1974) (finding that under Snyder Act, Congress did not intend to exclude from general assistance Papago Indians living near the Papago Reservation). BIA service areas can include both reservations and other geographic areas, and tribes may petition the Secretary to amend their service areas. *See* 25 C.F.R. §§ 20.100, 20.201 (2006). *See also* 42 U.S.C. § 2000e-2(i) (2006) (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"). Thus, any geographical distinctions made in the statute are not arbitrary.

²⁵ Here, section 256J.645, subdivision 2, specifically limits the reach of the geographic service area to "counties within which a border of the reservation falls."

Jefferson v. Commissioner of Revenue is not to the contrary. 631 N.W.2d 391 (2001). In *Jefferson*, this Court rejected a claim that the state's decision to tax Indians who lived off the reservation was based on race, noting that the taxing decision was, instead, based upon residency. *Id.* at 397. As in *Jefferson*, the Commissioner is not singling out Greene based upon whether she is an Indian; rather, she is referred to the Minnesota Chippewa Tribe for employment services precisely because she is an identified tribal member who resides in a specific area, the tribal service area.

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

V. GREENE CANNOT INVOKE THE CONSTITUTION OF THE MINNESOTA CHIPPEWA TRIBE AND THE INDIAN CIVIL RIGHTS ACT IN THIS PROCEEDING.

Greene attempts to invoke the Constitution of the Minnesota Chippewa Tribe and the Indian Civil Rights Act to challenge the actions of the MCT in contracting with the State. App. Br. at 29-31. If Greene believes that the Minnesota Chippewa Tribe, by voluntarily entering into an employment services contract with the State, has improperly deprived her of rights protected by these authorities, she should direct her concerns to the

proper forum. In civil cases, tribal courts have exclusive jurisdiction to enforce the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.* (2006), and are in the best position to evaluate claims under their own Constitutions. *See Cohen, supra*, § 14.03[2][b][iv] at 934. 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.

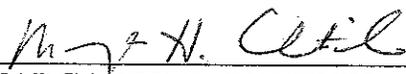
CONCLUSION

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

Dated: October 23, 2007.

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