

JAN 08 1998

T. Pettibone
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

CAROL J. SMITH
Appellee,

vs.

**RAINBOW BINGO and
BERNICE CLOUD, as an
employee of the Ho-Chunk Nation**
Appellant,

DECISION

SU-97-04

The Ho-Chunk Supreme Court hereby renders this decision in this employee grievance case on appeal from the Trial Court. We, the Supreme Court, reverse in part and affirm in part, Judge Joan Greendeer-Lee's Final Judgement dated, July 24, 1997.

On October 2, 1996, Appellee filed a Complaint with the Trial Court according to the Administrative Review Process outlined in the Ho-Chunk Nation Personnel Policies and Procedure Manual (September 1995). Judge Joan Greendeer-Lee presided over the court trial on February 18 and 19, and March 11, 1997. The Supreme Court reviewed the case file, supporting briefs and scheduled oral arguments on November 22, 1997. The Supreme Court looks to the HCN Constitutional provisions of Immunity of Nation from Suit, Article XII, Section I, the Powers of the Legislative Article V, Section 2(a) and Powers of Trial Court, Article VII, Section 6(a). Carol Smith, Appellee, appeared on her own behalf and was represented by Dennis Funmaker, Lay Advocate. Michael Murphy appeared on behalf of the Ho-Chunk Nation.

The Supreme Court will address the frivolous appeal issue and whether the Trial Court's Judgement went beyond the scope of Legislative Resolution 3/26/96-A.

WHETHER OR NOT APPEAL IS FRIVOLOUS PURSUANT TO RULE 18 OF THE HO-CHUNK NATION RULES OF APPELLATE PROCEDURE.

The Supreme Court reviewed Rule 18 of the Ho-Chunk Nation Rules of Appellate Procedure related to Frivolous Appeals. This Court views "frivolous appeals" as one presenting no legal argument or question. The Appellee asserts that Appellant's appeal of Final Judgement, dated July 24, 1997, is without merit. The Appellants argue that the Trial Court's decision was not within the scope of Resolution 3/26/96-A. The Supreme Court determines Appellant's appeal does present a legal argument and to be meritorious.

In this employee grievance against the Nation, the Legislature has the constitutional authority to waive Immunity of Nation from Suit, Ho-Chunk Nation Constitution, Article XII, Section I. The established legal standard of a tribe's sovereign immunity is that, "a tribe's immunity from suit must be expressly and unequivocally waived by Congress". Santa Clara Pueblo vs. Martinez, 436 U.S. Sup. Ct. 1670 (1978). Sandra Sliwicki vs. Rainbow Casino, Ho-Chunk Nation SU-96-15 HCN Sup. Ct. (June 20, 1997). Therefore, Immunity of Nation from Suit, can only be waived by an act of the HCN Legislature.

In exercising their legislative functions, the HCN Legislature enacted Resolution 3/26/96-A, to address employee grievance suits. Without this expressed waiver of immunity such employee suits will be dismissed. This Legislative Resolution has "limited" the Trial Court to granting only two remedies, which are, the award of Two Thousand Dollars (\$2,000.00) maximum judgement and ordering the Personnel Department to reassign the employee.

On November 22, 1997 during oral arguments, Dennis Funmaker, Lay Advocate for Appellee, made reference to remedies granted in Francis P. Rave, Sr. v. HCN Gaming Commission, CV-96-33. (April 23, 1997).¹ The HCN Gaming Ordinance, amended Resolution 2/20/96-B, will govern employee gaming licenses. Resolution 3/26/96-A will govern this case before the Supreme Court.

The Supreme Court reviews the matter of costs and fees argued by Appellee, by referring to the Federal Practice and Procedure - Jurisdiction and related Matters, Section 3920 - 4033, at 3984, (emphasis added).

“.....the imposition of such sanctions is highly unusual and some courts have imposed them only upon a clear showing of bad faith on the part of the appellant in pursuing a frivolous appeal.”

This Court denies Appellee's argument that the present case is frivolous in nature, that costs and fees, pursuant to Ho-Chunk Nation Rules of Appellate Procedure Rule 18 be denied.

II

WHETHER OR NOT THE TRIAL COURT'S AWARD OF TWO THOUSAND DOLLARS (\$2,000.00) WAS UNREASONABLE.

In reviewing Legislative Resolution 3/26/96-A and Powers of the Trial Court, pursuant to their respective constitutional authority, do not find the monetary award of Two Thousand Dollars (\$2,000.00) unreasonable. Resolution 3/26/96-A provides “that the court may award a maximum of Two Thousand Dollars (\$2,000.00) to any one employee” (emphasis added). The Legislature did not provide a standard by which the Trial Court could apportion the maximum award allowable. It is not this Court's function to set criteria in determining how money judgements should be awarded whether the awardee prevailed

¹The Supreme Court finds it necessary to address Mr. Funmaker's statement as to remedies imposed. Briefly, Francis P. Rave, Sr. v. HCN Gaming Commission, involves a gaming license violation, governed by the HCN Gaming Ordinance, which provides for different remedies than those outlined in Resolution 3/26/96-A. The Trial Court in granting relief, HCN Gaming Ordinance 1101(c)(vii)(b), “is limited to” remanding the Trial Court's determination back to the Commission. The Commission has the authority to grant further relief to the Petitioner, as outlined in the Gaming Ordinance, not the Trial Court.

on one grievance versus two out of ten.² The Supreme Court concludes that the monetary award lies within the discretion of the Trial Court. Therefore, the Trial Court's award of Two Thousand Dollars(\$2,000.00) is affirmed.

The Supreme Court addresses Appellee's interest on money judgement, pursuant to Ho-Chunk Nation Rules of Civil Procedure 57, as a separate matter. The interest on monetary award was not stated in Appellee's relief before the lower court. Nor did the Trial Court order interest in the Final Judgement of July 24, 1997.

III

WHETHER OR NOT THE TRIAL COURT'S JUDGEMENT ORDERING REMOVAL OF WRITTEN REPRIMAND WAS BEYOND THE SCOPE OF THE LEGISLATIVE RESOLUTION 3/26/96-A.

The HCN Sovereign Immunity can only be waived by an act of the HCN Legislature, Article XII, Sec. 2(a). The Legislature has the constitutional authority to preserve our Nation's Immunity from suit. Resolution 3/26/96-A is that 'limited waiver' by which the Nation can be sued. It grants judicial review of employee grievance cases only after the Administrative Review Process has been exhausted. It further states, "Nothing in this Policies and Procedures shall be construed to grant a party any remedies other than those included in [that] section" (emphasis added). That section 'limits' the Trial Court in providing two remedies in such employee grievance. Therefore, the Trial Court ordering the removal of the written reprimand was not a remedy included in Resolution 3/26/96-A.³

Legislative enactments, "expressly waiving immunity", will differ from resolution to ordinances. The remedies allowable in Resolution 3/26/96-A differ greatly from the remedy outlined in the HCN

²The Legislature, in enacting Resolution 3/26/96-A, did not provide a standard by which to calculate awards in instances in the present case. Perhaps that issue lies within a Legislative amendment.

³Perhaps Ms. Smith's recourse would be to address this issue to the Personnel Dept., according to Ho-Chunk Nation Personnel Policies Chapter 12, related to removing reprimands from personnel files. It is unfortunate, that Appellee having prevailed on her claim, can not have that written reprimand removed from her personnel file. The appropriate avenue would be to present this issue before the Legislative body to amend Resolution 3/26/96-A.

Gaming Ordinance. Resolution 3/26/96-A addresses employee grievances, whereas, HCN Gaming Ordinance governs employee gaming licenses. Therefore, the remedy imposed in Francis P. Rave Sr vs. HCN Gaming Ordinance was appropriate but does not apply to the case before the HCN Supreme Court.

The HCN Supreme Court reverses the Trial Court's Final Judgement, in part, as not being within the "limited waiver of Sovereign Immunity" in Legislative Resolution 3/26/96-A.

IT IS SO ORDERED. EGI HESHKEKJENET

Dated this 8th day of January, 1998

Debra C. Greengrass
Hon. Debra Greengrass, Associate Justice
Ho-Chunk Nation Supreme Court

Mary Jo Brooks Hunter
Hon. Mary Jo Brooks Hunter, Chief Justice
Ho-Chunk Nation Supreme Court

Rita A. Cleveland
Hon. Rita Cleveland, Associate Justice
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Hon. Rita Cleveland, Associate Justice
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A true and correct copy of the foregoing was sent to the following parties of record this

9th day of Jan., 1998.
Carol Smith, Dennis Funnaker
Mike Murphy-DOT, Indian Law Reporter

Asst./Clerk T. Pittbone