FILED
IN THE HO-CHUNK NATION
TRIAL COURT
JUN 20 1997
T. Pettibone
Clerk of Court/Assistant

IN THE

HO-CHUNK NATION SUPREME COURT

SANDRA SLIWICKI,

Appellee,

vs. **DECISION**

RAINBOW CASINO,

HO-CHUNK NATION, **SU-96-15**

Appellant,

The Ho-Chunk Nation Supreme Court renders its decision in this employment dispute case. We, the Supreme Court, reverse Judge Mark Butterfield's final *Judgement* dated December 19, 1996. This Court remands back to the Trial Court for further proceedings consistent with this opinion.

This case involves an employee grievance on appeal to the Trial Court. The Appellee, Sandra Sliwicki, was terminated on December 26, 1995 as Marketing Director for Rainbow Casino, an enterprise of the Ho-Chunk Nation. Appellee, according to a Administrative Review Process, grieved Level 1 on December 27, 1995, to Carol Laustrup, General Manager at Rainbow Casino, who affirmed her termination. Appellee's Level 2 grievance was upheld by Andrea Farnco, Enterprise Human Resource Specialist and Barb Blackdeer-Mackenzie, Interim Chief Administrative Officer on January 25, 1996. The Appellee then filed a complaint with the Trial Court on February 16, 1996. The trial was conducted between August 2-7, 1996. The final *Judgement* rendered is now on appeal to the Ho-Chunk Nation Supreme Court.

The case is now before the Supreme Court to address the issues of the Sovereign Immunity waiver and timeliness.

I.

WERE THE APPELLANTS IMMUNE UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY?

The Appellants contend that the Trial Court erred by improperly waiving the sovereign

immunity of the Ho-Chunk Nation from suit. The legal position of tribal sovereign immunity has been well litigated in Federal Indian Law. The established standard is that "a tribe's immunity from suit must be expressly and unequivocally waived by the Congress." *Santa Clara Pueblo v. Martinez, 436 US Sup. Cr. 1670 (1978).*

Similarly, within the Ho-Chunk Nation Constitution, Article XII, Section 1, Immunity of Nation from Suit, the Legislature's have the authority to waive our Nation's sovereign immunity. On March 26, 1996, pursuant to their constitutional authority and Article V, Section 2, (a)(f), enacted a resolution which 'expressly' waived the Nation's sovereign immunity to address employee grievances. Without this 'expressed' waiver such employee grievance cases would otherwise be dismissed based upon the sovereign immunity doctrine.

Resolution 3/26/96-A is an Legislative amendment to the Nation's Personnel Manual waiving immunity from suit on a 'limited' basis. This Resolution expressly requires exhaustion of the Administrative Review Process followed by judicial review. It further LIMITS the judiciary from providing " any remedies other than those included in [that] section".

The Appellants argue that the Trial Court erred in its ruling that employees need not EXHAUST the Administrative Review Process should its efforts seem futile, thus creating the 'futility' exception (Judgement p.12). The Trial Court erred in creating an exception to the resolution where the Legislature have declined to allow. The Nation must abide with the terms set forth in Resolution 3/26/96-A so as not to diminish the importance of sovereign immunity.

II.

DID THE APPELLEE FILE HER GRIEVANCE IN A TIMELY MANNER?

Appellants argue that this employment dispute case is time-barred and should be dismissed. The Appellee's position is that the Trial Court relied on Ho-Chunk Nation Interim Rules of Civil Procedure 3. Judge Butterfield ruled that there was some confusion as to when the Appellee received notice of the January 25, 1996 letter affirming her termination. The Trial Court, in light of the confusion, created an 'exception' which this court rejects. It is unclear as to when the Appellee contacted the Personnel Department regarding how to proceed. The court is aware of the time period during which this case existed. Our Nation was experiencing a transition with the development of

our new Constitution.

The Supreme Court recognizes some confusion as to which Administrative Review Process shall govern this employment dispute case. The Administrative Review Process in the Nation's Personnel Manual was duly adopted on September 14, 1995. The Administrative Review Process for Enterprises (Administrative Directive, Re: Enterprise Administrative Review, October 24, 1995) was not adopted by the Legislatures. On February 13, 1996 Legislature's enacted the Department Personnel Establishment and Organization Act of 1995 (Resolution 2-13-96 B). This resolution would govern the development of a Personnel Review Commission. Resolution 3/26/96-A is an amendment to the Nation's Personnel Manual. To preserve the Nation's Sovereign Immunity, the Appellee must exhaust the Administrative Review Process as outlined in the Personnel Manual (Sept. 14, 1995 edition) and as required in Resolution 3/26/96-A.

The Supreme Court weighs the constitutional authority of the Legislature and individual rights of the tribal employee. Article 10, Section 1. (a)(1), "the Ho-Chunk Nation, in exercising its powers of self government, shall not (,) make or enforce any law prohibiting ... [a tribal member] ... to petition for a redress of grievances." Nor " deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law;" Article X, Section 1, (a)(8). Based on these constitutional provision this court is reluctant to hold Appellee in strict adherence to the time barred issue. The lack of a Personnel Review Commission seated to hear grievances hinder the individual due process rights.

The Supreme Court REMANDS this case back to the Ho-Chunk Nation Trial Court to satisfy the exhaustion requirement in Resolution 3/26/96-A.

Both the Business and Personnel Departments should keep in mind their affirmative duty as outlined in the Nation's Personnel Policies and Procedures Manual, Chapter 12, Administrative Review Process. The Appellee's December 26, 1995 termination letter was a recital of the Personnel Policies and Procedure Manual, verbation. No reasons were given to substantiate each citation. Memos were directed to the Director, Elliot Garvin, to terminate the Appellee for misconduct. What's misconduct? For cause. What's cause?

At the time of Ms. Sliwicki termination, her supervisor, Carol Laustrup was unaware of any

problems with Appellee. Mrs. Laustrup stated she was 'directed' to terminate Ms. Sliwicki by her supervisor, Elliot Garvin. The Appellee was not afforded a prior notice that her job performance was in jeopardy. The verbal warning(s) are not documented and had occurred too remote in time to be considered. She was not afforded the opportunity to confront or answer allegations made against her. No independent documentation was provided that the individuals alleging the claims against Ms. Sliwicki were interviewed.

Adherence to the Nation's Administrative Review Process is both the responsibility of the Appellee and Appellants of the Ho-Chunk Nation.

IT IS SO ORDERED. EGI HESHKEKJENET.

IT IS FURTHER ORDERED

Appellee's Counsel, Mark Goodman's, Motion for fees and costs pursuant to Ho-Chunk Nation Appellate Rule 18, Frivolous Appeal, is DENIED.

Dated this 20th day of June, 1997.

Debra C. Greengrass

Debra C. Greengrass, Associate Justice

Forrest Whiterabbit

Forrest Whiterabbit, Associate Justice

Mary Jo Brooks Hunter

Mary Jo Brooks Hunter, Chief Justice

A true and correct copy of the foregoing was sent to the following parties of record this 20th day of June, 1997.
Mr. Goodman, Mr. Murphy - DOJ

Asst./Clerk T. Pettibone