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**IN THE
HO-CHUNK NATION TRIAL COURT**

CHERYL K. SMITH, **MOTION TO DISMISS (Granted)**

Plaintiff,

v.

RAINBOW CASINO, Case No.: **CV 98-65**

Defendant.

Appearances: Paul Millis for Cheryl K. Smith, Sheila Corbine for Rainbow Casino. A Hearing in this case was held on Jan 25, 1999 at the Ho-Chunk Nation Court House at Black River Falls, WI.

Procedural History

This is an employment dispute. The employee was a pit boss at Rainbow Casino a wholly owned enterprise of the Ho-Chunk Nation. She is grieving a one-day suspension meted out by her supervisor for allegedly altering a doctor's excuse. The incident occurred sometime between June 12 and June 17, 1998. She was disciplined June 26, 1998. She filed her Level I grievance June 30, 1998. She was dissatisfied with the response and filed her Level II grievance July 14, 1998. She never received a response from the Ho-Chunk Nation Department of Business and then filed a letter dated August 10 with the Trial Court on August 12, 1998 attempting to appeal the Level II grievance. She did not pay the filing and services fees until December 11, 1998. The defendants immediately moved to dismiss this action for failure to timely file the *Complaint*.

Applicable Law

HCN PERSONNEL POLICIES AND PROCEDURES MANUAL.
p. 50a

- 3. Suspensions are to be grieved in sequence to:
 - Level 1 Supervisor and General/Facility Manager
 - Level 2 Executive Director
 - Level 3 Trial Court

1 The following Administrative Review Process is to be followed in seeking relief for all grievances. The
2 burden of proof is on the grievant to show that what he/she is claiming, actually happened. All
3 grievances will be courtesy copied to the Personnel Department promptly by the grievant. This proof
may include documentation and witness statements.

4 **Level 1.** A grievance will be submitted directly to the immediate supervisor and the Personnel
5 Department within five (95) [sic] calendar days of the disciplinary action by the grievant. The
6 supervisor will meet with the General/Facility Manager to discuss and investigate the grievance.
Together, the supervisor and the General/Facility Manager will document and sign the response within
ten (10) calendar days of receipt. The grievant will be notified of the response by certified mail with a
courtesy copy sent to the Personnel Department.

7 **Level 2.** Within five days after the end of the previous deadline, and [sic] appeal may be filed in
8 writing to the Executive Director or his/her designee. The appeal may be submitted to level 2, if the
9 grievant has not received a response to the grievance or has not reached an acceptable agreement in
10 seeking [sic] to the grievance. The Executive Director has fifteen days for initial review and response.
The response shall be sent to the appellant by certified mail with a courtesy copy sent to the Personnel
Department.

11 **Level 3.** Within five (5) days after the end of the previous deadline, an appeal may be filed in
12 writing to the Trial Court. The Trial Court had [sic] forty-five days for review. The grievant will
receive a letter informing them of their preliminary hearing date, time, and place.

13 PPM p. 50 b

14 In determining whether to hear an appeal, the Trial Court may review the merits of the case including;
15 any pertinent information in the employee file; discussion with [sic] Executive Director as to method of
16 investigation conducted at that level; manner of grievance handling at prior steps. After reviewing such
17 matters, the Trial Court has a right to reach a decision or to take action without holding a hearing. In
such cases where the evidence does not support a hearing by the Trial Court, the Trial Court will notify
the appellant of its decision

18 **HCN LEGISLATIVE RESOLUTION 3-26-96-A**

19 Tribal Court Review

20 a review of an employee grievance may proceed to the Ho-Chunk Nation Trial Court after the
21 Administrative Review Process contained in this Chapter has been exhausted. The *Ho-Chunk Nation
Rules of Civil Procedure* shall govern any judicial review of an employee grievance except for the ten
(10) day filing requirement contained in the Nation=s Personnel Policies and Procedures.

22 Limited Waiver of Sovereign Immunity

23 The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the extent
24 that the Court may award a maximum of \$2,000 to any one employee. Other remedies shall include an
order of the Court to the Personnel Department to reassign the employee. Any monetary awards granted
25 under this Chapter shall be paid out of the departmental budget from which the employee grieved.
Nothing in this Policies and Procedures shall be construed to grant a party any remedies other than those
26 included in this section.

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2 **BE IT FURTHER RESOLVED THAT** the remedies provided herein shall have retroactive effect to
3 all cases filed in Trial Court since June 1, 1995 and that nothing herein prohibits employees who have
4 had cases dismissed on sovereign immunity grounds from filing a request for reconsideration with the
5 Trial Court. However, those cases in which the statute of limitations would have tolled under the
6 Nation=s Personnel Review Commission Ordinance shall not be entitled to relief.

7 **HCN LEGISLATIVE RESOLUTION 6-9-98A**

8 Tribal Court Review

9 Judicial review of any appealable claim may proceed to the Ho-Chunk Nation Tribal Court after the
10 Administrative Review Process contained in this Chapter has been exhausted. The Ho-Chunk Nation
11 Rules of Civil Procedure shall govern any judicial review of an eligible administrative grievance shall
12 file a civil action with the Trial Court within (30) days of the final administrative grievance review
13 decision.

14 Limited Waiver of Sovereign Immunity

15 The Ho-Chunk Nation hereby expressly provide a limited waiver of sovereign immunity to the extent
16 that the Court may award monetary damages for actual lost wages and benefits established by the
17 employee in an amount not to exceed \$10,000, subject to applicable taxation. Any monetary awards
18 granted under this Chapter shall be paid out of the departmental budget from which the employee
19 grieved. In no event shall the Trial Court grant any monetary award compensating an employee for
20 actual damages other than with respect to lost wages and benefits. The Trial Court specifically shall not
21 grant any monetary award against the Nation or its official, officers, and employees acting within the
22 scope of their authority on the basis of injury to reputation, defamation, or other similar invasion of
23 privacy claim, nor shall the Trial Court grant any punitive or exemplary damages.

24 The Trial Court may grant equitable relief mandating that the Ho-Chunk Nation prospectively follow its
25 own laws, and as necessary to remedy any past violations of tribal law. Other equitable remedies shall
26 include, but not be limited to, an order of the Court to the Personnel Department to reassign or reinstate
27 the employee, a removal of negative references from personnel files, an award of bridged service credit,
28 and a restoration of seniority. Notwithstanding the remedial powers noted in this Resolution, the Court
shall not grant any remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing in this
Limited Waiver or within the Personnel Policies and Procedures Manual shall be construed to grant a
party any legal remedies other than those included in this section.

29 **AND BE IT FURTHER RESOLVED THAT**, this amendment shall take effect as of July 1, 1998, thus
30 providing the Nation=s officials, officers, employee, and the Courts adequate notice of this amended
31 legislation. The remedies provided herein shall not have a retroactive effect and shall not apply to civil
32 actions filed by grieving employees in the Administrative Review Process before July 1, 1998. Civil
33 actions filed before July 1, 1998 shall be controlled by the original Resolution 3-26-98A[sic], enacted on
34 March 26, 1996. Employee grievances already filed within the Administrative Review Process before
35 July 1, 1998 shall also be governed by the original resolution 3-25-98A[sic].

36 **Findings of Fact**

37 1. Ms. Cheryl K. Smith was an employee of the Rainbow Casino, a wholly owned enterprise
38 of the Ho-Chunk Nation entirely located on the trust lands of the Ho-Chunk Nation near Nekoosa,

1 Wisconsin.

2 2. Ms. Smith=s position was one of pit boss, a supervisory position in the Table Games
3 Department.

4 3. Ms. Smith=s grievance concerned how she was treated for an absence due to a cold, and
5 the doctor=s excuse she produced to substantiate it, on or about the time period of June 12-17, 1998.

6 4. Ms. Smith filed a Level I grievance on June 30, 1998, after having been disciplined on
7 June 26, 1998 with a five-day suspension. This was timely filed within the five day grievance period.

8 5. On July 10, 1998 Ms. Smith was offered a conditional settlement of her grievance which
9 she refused. It is unknown when she actually received the grievance response. Although she initialed
10 the response, those initials were not dated. The five-day suspension was reduced to one day as a result
11 of her grievance but the discipline was not expunged from her record. Her personnel record still reflects
12 a finding of altering a doctor=s excuse.

13 6. In a Level II grievance dated July 14, 1998, Ms. Smith filed an appeal of her grievance
14 from the Casino to the Executive Director of the Department of Business. It is unknown when the Level
15 II grievance was received. It was conceded that this grievance was timely filed.

16 7. It is further conceded that Ms. Smith never received a response to the Level II grievance
17 from anyone at the Department of Business. Generally the Executive Director has 15 days to respond to
18 a grievance. *See* HCN LEG. RES. 3-26-96A. If the Executive Director does not respond the grievant is
19 given an additional five (5) days to file in the Trial Court. When this time period begins to run is
20 problematic and in practice difficult to calculate with certainty.

21 8. By a letter dated August 10, 1998, Ms. Smith filed her appeal from the Administrative
22 Review Process to the Trial Court. This letter was received by the Trial Court on August 12, 1998.
23 However Ms. Smith did not pay any filing or services fees at the time of filing, nor did she request a
24 waiver of the payment of fees due to lack of resources.

25 9. Ms. Smith actually filed a form *Complaint* in this case on December 11, 1998, and paid
26 the filing fees at that time.

1 10. The defendants were served by Certified Mail on December 11, 1998.

2 11. The defendants by counsel filed a *Motion to Dismiss* on December 29, 1998, alleging that
3 Ms. Smith failed to file in the Trial Court in a timely manner.

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Decision

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This case involves whether a grievant properly invoked the time limits to file an appeal to Tribal Court. Both the plaintiff and the defendant agree that the plaintiff timely filed her Level I and Level II grievances. The defendant argues that she failed to timely file her Level III appeal to the HCN Trial Court even if she filed on August 12, 1998, and also that her failure to pay the filing fee in August meant her case was not effectively filed until December 11, 1998. The defendant argues this also makes the filing untimely.

Though the Court believes the time limit of five days to appeal an adverse decision at Level II to the HCN Trial Court is Constitutionally suspect on procedural due process grounds, that issue has not been raised here.¹ What is fatal to the plaintiff's position is the fact that though she filed her appeal near the deadline on August 12, 1998, she did not correct deficiencies in her filing for nearly four months. Her first letter of appeal is dated August 10, 1998. If received on this date, the Court interpreting all facts in favor of the non-moving party in a *Motion to Dismiss* context, would find the appeal to be timely filed. However, despite being dated August 10, 1998, Ms. Smith's letter was not received until August

¹ Within five (5) days after the end of the previous deadline, an appeal may be filed in writing to the Trial Court. This wording while appearing to be clear actually creates ambiguity, especially where the supervisor at Level II does not respond. The employee, usually untrained in legal technicalities, has no idea if, or when, the supervisor will respond. The supervisor likely will respond, often on the last day, by placing the response in the mail. If this occurs before a three day weekend and is destined to a small rural post office or rural route as is often the case in Western Wisconsin where most tribal members and employees live, there may be but one business day to respond. A five day limit to file a grievance of such major importance to the employee, often devastated by the loss of income that a suspension or termination causes, is too short. There is seldom enough time to consult an attorney or lay advocate to find out whether their dissatisfaction with the Level II response is well founded and should be appealed. This leads to knee jerk and possibly meritless appeals which tie up important judicial and tribal resources.

In practice a five-day deadline is too short a time for a reasonable person to take all the proper steps to file a timely appeal, especially here where the plaintiff is located 55 miles from the Courthouse and has little or no working knowledge of the PERSONNEL POLICIES AND PROCEDURES MANUAL. The Court urges the HCN Legislature to amend the PPM to correct this apparent unfairness to its members and employees. See *HCN R. Civ. P. 3(B)* and *HCN R. App. P. 7(b)(1)*.

1 12, 1998. Again applying the mailbox rule that service is complete upon mailing, the Court would likely
2 interpret Ms. Smith's letter as timely filed.

3 However, there still remained the issue of the unpaid fees. The problem arises because Ms.
4 Smith was sent a deficiency letter by the assistant Clerk of Court on August 13, 1998 informing her that
5 the filing fee and service of process fee were not paid. The Clerk's letter also informed Ms. Smith that
6 the *Complaint* form was not completed. This deficiency was not corrected until December 11, 1998.
7 This is nearly four months after the filing period had passed. The Court can not serve the defendants
8 without a filing fee or a service fee. This meant that the defendants never got notice of the appeal even
9 if it was timely filed with the Court. Thus, a filing in December 11, 1998 regarding an incident that had
10 to be filed in August is untimely.

11 The Court finds that the lack of follow-up by the plaintiff after being sent the deficiency letter on
12 August 13, 1998 was unreasonable under the circumstances and prejudiced the defendant's ability to
13 defend the claim. *See HCN R. Civ. P. 5(H)*("A *Complaint* must be served and proof of service filed with
14 the Court within one hundred and twenty (120) calendar days of filing or it will be considered dismissed
15 without prejudice by the Court with notice provided to the filer"). It also rendered the arguably timely
16 filing untimely, because it was not corrected within a reasonable time, i.e., within 120 days. Therefore,
17 the Court cannot apply equity to deem the *Complaint* timely filed by the application of any relation-back
18 doctrine because four months is simply too long to wait to perfect a filing.

19 This case is hereby dismissed for lack of timely filing.

20 **IT IS SO ORDERED** this February 9, 2000 from within the sovereign lands of the Ho-Chunk
21 Nation.

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25 Hon. Mark Butterfield
26 HCN Chief Trial Judge