

**ROSEBUD SUPREME COURT
ROSEBUD SIOUX TRIBE
ROSEBUD, SOUTH DAKOTA**

In the matter of the Application of Rose Cordier for a Writ of Mandamus,)	
)	
Rosebud Sioux Tribe and William Kindle,)	Memorandum Opinion and Order
Respondents/Appellants)	
)	
v.)	
)	Appeal #CA-97-05
Rose Cordier,)	
Petitioner/Appellee)	
)	

Per Curiam (Justices Greaves, Pommersheim, and Zephier)

I. Introduction

Rose Cordier, Petitioner-Appellee, was hired by the Rosebud Sioux Tribe, Respondent-Appellant, as a grants writer for the Tribe in July 1993. Ms. Cordier was subsequently terminated by written notice of William Kindle, (then) President of the Rosebud Sioux Tribe, in December of the same year.

In accordance with the personnel policies of the Rosebud Sioux Tribe, Ms. Cordier filed a grievance with the Tribal Grievance Committee. A hearing was held in January 1994 and a decision was issued later that month that while not ordering reinstatement recommended that she be placed under the supervision of the Vice-President's office. This 'recommendation' was clarified in March 1994 when the Grievance Committee specifically ordered reinstatement of Ms. Cordier. The Grievance Committee made no finding relative to back pay or other compensation.

The Respondents failed to comply with the decision of the Grievance Committee and Ms. Cordier subsequently filed an action in tribal court seeking a writ of mandamus requiring Respondents to comply with the decision of the Grievance Committee relative to reinstatement, as well as to make an award of back pay. This action was heard by Special Judge Stanley Whiting and in December 1994 he granted the writ of mandamus relative to reinstatement but refused to make findings on the issue of back pay stating that “Because the briefs of the parties have not addressed these issues (i.e. back pay, mitigation of damages and sovereign immunity), the Court, at this point will only enter the writ of mandamus requiring reinstatement of Cordier to her position as grants writer for the Rosebud Sioux Tribe.” (Memorandum Opinion at 19) (parenthetical added).

Respondents appealed the decision to the Rosebud Supreme Court which upheld the trial court’s decision on reinstatement and the unavailability of the defense of sovereign immunity, but remanded the case to the trial court for a specific hearing on the issues of sovereign immunity in the context of back pay and back pay itself. On remand the case was heard by Special Judge Jane Colhoff. In her May, 1997 decision Judge Colhoff made no specific finding relative to sovereign immunity¹ but did award Ms. Cordier back pay in the amount of \$41,392.00, restored 428 hours of annual leave to be paid at the rate of \$10.25/hr., and restored 214 hours of sick leave.

Respondents filed a timely Notice of Appeal. The Notice of Appeal did not contest the reinstatement but only the award of back pay. The appeal was properly briefed by both parties. The Court heard oral argument on August 7, 1998.

II. Issues

¹ Judge Colhoff apparently thought that this Court’s previous finding on sovereign immunity relative to reinstatement was also applicable in the context of back pay. This was manifestly incorrect. This Court specifically stated: “Since the request for back pay was made in the original complaint, the parties and the Court should have addressed the issue including such issues as mitigation of damages, sovereign immunity, etc.” Memorandum Opinion at 6 (emphasis added).

Although numerous issues were raised by the parties, there is a single dispositive issue and that is whether the Rosebud Sioux Tribe expressly waived its sovereign immunity to permit a financial award of back pay to be assessed against it.

III. Discussion

Sovereign Immunity

It is an axiomatic proposition in the field of Indian law that tribes possess as an attribute of their inherent sovereignty the protection of sovereign immunity. This basic precept was recently reaffirmed by the United States Supreme Court in the case of *Kiowa Tribe v. Manufacturing Technologies Inc.*, 188 S. Ct. 1700 (1998).² See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940), Felix Cohen, Handbook of Federal Indian Law 324-28 (1982 ed.)

Tribal sovereign immunity can be waived by either Congress or the tribe itself, but any such waiver must be express rather than implied. See e.g. *Santa Clara Pueblo v. Martinez*, *supra*, *Merrion v. Jucarilla Apache Tribe*, 617 F.2d 537 (6th Cir. 1980); *Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 613 (9th Cir. 1985); *American Indian Agriculture Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), See also *LeCompte v. Jewett*, 12 Ind. L. Rep. 6025 (1985). See generally Frank Pommersheim and Terry Pechota, "Tribal Immunity, Tribal Courts and the Federal System: Emerging Contours and Frontiers," 31 S.D. L. Rev. 553 (1986).

² It may be worth pointing out in this regard that the United States Supreme Court itself apparently has some doubts about the wisdom of widespread tribal sovereign immunity but realized that this was a question for Congress not the court. The Court appeared to invite congressional attention when it said: "There are reasons to doubt the wisdom of perpetuating the doctrine. . . In our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-government." *Id.* at 1704.

In the case at bar involving termination of a tribal employee, there is clearly no relevant federal statute that waives tribal sovereign immunity. Therefore the issue of the waiver of the tribe's sovereign immunity in the tribal employment context is to be resolved by examining what the Tribe itself has done in this regard. The Rosebud Sioux Tribe has affirmatively recognized its sovereign immunity and created a standard for its waiver:

Except as required by federal law or the Constitution and By-laws of the tribe or specifically waived by resolution or ordinance of the Tribal Council making specific reference to such, the Rosebud Sioux Tribe and its officers and employees shall be immune from suit in any civil action for any liability arising from the performance of their official duties. Ch. 2, Sec 4-2-1 Rosebud Sioux Tribe Law and Order Code.

In the trial court decision of Judge Whiting, he made two related findings on the issue of sovereign immunity: First he found that the "Chairman's failure to reinstate Cordier went beyond the scope of this authority" (Memorandum Opinion at 17-18) and presumably (the opinion is inartful at times) the cloak of sovereign immunity could not cover the 'illegal' action of the Chairman. Second, the fact that Ordinance 86-06, Sec. F made the findings of the Grievance Committee 'binding' upon all parties,³ "unequivocally expressed a waiver of sovereign immunity concerning disciplinary actions against tribal employees." (Memorandum Opinion at 18).

In the first appeal to this Court, it found that the "doctrine of sovereign immunity, however, does not protect an official who has acted outside the scope of his authority" citing *Tennoco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984)

³ Ordinance 86-06, Sec. F states:

"Within ten (10) working days of the closing of a hearing, the Grievance Committee shall render its findings and decisions to all concerned parties in writing. Such decision shall be final and binding upon all concerned parties unless new evidence calls for a new hearing." [Emphasis added].

(Memorandum Opinion at 4). Specifically, this Court found that Ordinance 86-06, Sec. G⁴ “is legislation which specifically limits the Appellant’s power to review Grievance Committee decisions. The Appellants’ review of the Grievance Committee and failure to recognize it are clearly outside the scope of their authority pursuant to Section G, and are not protected by the doctrine of sovereign immunity.” (Memorandum Opinion at 5).

The language of Secs. G and H of Ordinance 86-06 clearly constitutes a waiver of tribal sovereign immunity for purposes of reinstatement, but it can hardly be construed as a waiver of sovereign immunity for purposes of back pay. The words ‘back pay’ do not appear in the ordinance, nor any phrase that could even be remotely considered equivalent to ‘back pay’ or any monetary award whatsoever. The language of the ordinance is clear on its face: it does not authorize any award of back pay.

Counsel for the Appellee spoke vigorously at oral argument that the award of back pay was ‘implicit’ in the ordinance and failure to so find would ‘emasculate the ordinance’. The standard for the waiver of tribal sovereign immunity, as noted above is an ‘express’ or ‘specifically waived’ rather than ‘implied’ standard and counsel’s argument is therefore insufficiently persuasive as a matter of law. As to the ‘emasculatation’ claim, that is a legislative rather than a judicial matter. If the remedy for improper termination of tribal employment is to be extended beyond reinstatement to include back pay or other monetary relief that is a task for the Tribal Council not this Court.

Several other observations are timely made for current and future guidance. The Court realizes that the remedy of reinstatement in this case is for all practical purposes moot because

⁴ Ordinance 86-06, Sec. G states:

“The Tribal Council will not review decisions enacted by the Grievance Committee on any case filed. However, if the decision is not recognized by the parties concerned, the aggrieved may file with the Sec. of Interior or file in Tribal Court whichever the case may be provided all remedies have been exhausted.”


Ms. Cordier - since her termination - has been elected Vice-President of the Rosebud Sioux Tribe and is the first woman to hold that important position. Despite the inability to award back pay, the Court does find that Ms. Cordier is entitled to reimbursement for any annual or sick leave, she may have accrued at the date of her termination in December 1994 in accordance with the relevant policies and procedures in effect at that time. Since the record below is unclear on this point, the case is therefore remanded on this one issue.

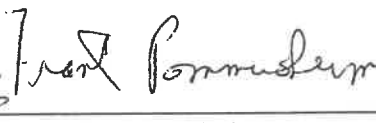
Finally, the Court notes that there is at least one significant issue not raised by the parties in this case and therefore the court reserves judgement on it. The issue is whether an application for a writ of mandamus - usually thought of as extraordinary in nature - can properly include a claim for a money award usually thought of as an ordinary remedy at law.⁵

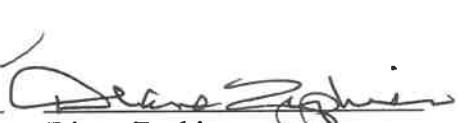
IV. Conclusion

Based on the reasons stated above, the Appellants' appeal is granted and the decision below awarding back pay is reversed and the case is remanded on the narrow issue of annual and sick leave, if any, accrued by, but not paid to, the Appellee at the time of her termination.

IT IS SO ORDERED.


LeRoy Greaves
Associate Justice
ROSEBUD SIOUX TRIBE COURT OF APPEALS


Frank Pommersheim
Associate Justice


Diane Zephier
Associate Justice

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was reviewed and entered on the docket in the case entitled as above by the Court on the 8th day of October, 1998.


L. Dixon 11:16 Am
Clerk of Courts

SEP 22, 1998
Dated

⁵ While mandamus might be used to compel disbursement of a damage or financial award properly awarded to a party, it is an unlikely vehicle for compelling an award of damages in the first instance. See e.g. 52 Am. Jur. 2d 315-822 (1970).