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INITIAL

CHOCTAW SUPREME COURT

**IN THE SUPREME COURT
OF THE MISSISSIPPI BAND
OF CHOCTAW INDIANS**

S.C. 2002-02

Wanda Sharp ,)
Plaintiff-Appellant)
)
v.)
)
Mississippi Band of)
Choctaw Indians,)
Defendant-Appellee)

**OPINION
AND
ORDER**

Appearances: John R. Mooney, Esq., for the Plaintiff-Appellant, Wanda Sharp, and
Melissa Carlton, Assistant Attorney General, for the Defendant-Appellee
Mississippi Band of Choctaw Indians.

Before: Carey N. Vicenti, C.J., Acting, Roseanna Tubby Nickey, A.J., Acting, and
Frank R. Pommersheim, A.J.
Per Curiam

This case comes before this Court on an appeal filed from and Order of Dismissal
entered by the Trial Court in the above-captioned cause. This Court reviewed the briefs
submitted by the parties and heard oral argument. Having fully considered the arguments of
the parties this Court hereby reverses the decision of the Trial Court and remands this case for
further proceedings consistent with this Opinion and Order.

I. Statement of the Facts

The Appellant, Wanda Sharp, was employed by the Mississippi Band of Choctaw
Indians in the position of Program Director of the Social Service Program, which is within a
division of the Department of Family and Community Services. Because of an unexpected
vacancy in the Director's position within the Department, the Appellant was appointed as
Acting Director. After an unspecified amount of time had passed, but for reasons which do not
appear in the record of the Trial Court, Ms. Sharp was terminated on November 3, 1998, from
her position as Acting Director of the Department and as Program Director of the Social

Service Program.

The Mississippi Band of Choctaw Indians, at the time of Ms. Sharp's termination, provided to its employees, and those persons who may have been disciplined in or terminated from employment, a grievance procedure set forth in the Administrative Personnel Policy. That grievance procedure provided four steps to be followed, each step consisting of a specific level of appeal. The Appellant alleges that she complied with the first three of such steps. In February of 2000, however, the Appellant received a letter from Richard Isaac, Chairman of the Tribal Council Human Resource Committee, stating that no further hearings would be allowed in her grievance.

The Appellant filed a complaint in this case on November 1, 2000, alleging "retaliatory and wrongful discharge, breach of contract, misrepresentation, tortious breach of contract and violation of the duty of good faith and fair dealing". Complaint at 2. Appellant sought extensive relief including, but not limited to, job reinstatement, back pay, actual and compensatory damages in the amount of \$1,500,000, punitive damages in the amount of \$5,000,000 and "all such other and further relief as may be necessary and to which he (sic) is otherwise entitled. Complaint at 11-13. In response to this complaint, the Tribe raised the defense of sovereign immunity, as set forth in the Choctaw Tribal Code, Sections 1-2-6 (2) and 1-5-4.

On May 16, 2002,¹ the Trial Court entered a ruling stating:

The Tribe correctly stated that [sections 1-2-6(2), 1-5-4 and 25-1-1]... provide the Tribe sovereign immunity from unconsented civil lawsuits. However, regarding certain tort claims the Tribe has unequivocally expressed its limited waiver of sovereign immunity. Examination of the pleadings and arguments advanced in this cause, as well as examination of the resolutions and ordinances passed and

¹ This Order was actually dated April 23, 2002, though it was not filed, and thus, not made official, until May 16, 2002.

It is important to note that this three-page Order Granting Motion to Dismiss was not entered after a full fact-finding hearing was performed. Accordingly, we do not have the benefit of specific findings effect in considering this appeal.

approved by the Tribe's Tribal Council, fails to yield any unequivocal expression of the Tribe's waiver of sovereign immunity regarding the torts claimed by Sharp. Accordingly, it is the finding of this Court that Sharp has not asserted a claim which falls within a category of tort to which the Tribe has waived its sovereign immunity.

Secondarily, the Tribe advanced its argument for dismissal asserting that Sharp failed to exhaust Administrative Remedies...which requires that a written complaint be filed with the tribal Chief setting forth the basis of the petitioner's complaint and the administrative remedies which have been pursued. Sharp did provide an extensive list of her correspondence regarding her employment termination with various parties, including the tribal Chief, but Sharp did not allege her compliance with 1-5-10 (2)(b) C.T.C. in the complaint filed in this cause. Thus this complaint must be dismissed with prejudice.

Order Granting Motion to Dismiss, May 16, 2002, at 2.

This appeal was filed on May 23, 2002.

II. Jurisdiction

A final decision of the Trial Court was entered on May 16, 2002. *See* footnote 1 *supra*.

The Notice of Appeal in this case was filed on May 23, 2002. In accordance with Section 7-1-3

(a) C.T.C. this Court has jurisdiction to hear this case.

III. Discussion

A. Choctaw Tort Claims Act

The Mississippi Band of Choctaw Tort Claims Act set out as Title XXV of the Tribal Code provides a limited waiver of sovereign immunity for a narrow range of tort claims that might be asserted against the Tribe. Appellant's claims for compensatory and punitive damages in the combined amount of \$6,500,000 are rooted solely in her wrongful discharge claim and are essentially contractual in nature. As such, they are expressly barred by § 25-1-2 of the Choctaw Tort Claims Act, which provides in part that the "Tribe, is not now, has never been, and shall not be liable, and is, always has been, and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of an implied or express term or

condition of any warranty or *contract*, including but not limited to liable (sic), slander, defamation, or any other tort, or *any other claim sounding in contract.*" (emphasis added).

B. Administrative Due Process

Plaintiff-Appellant Wanda Sharp claims that the Defendant-Appellee Mississippi Band of Choctaw Indian improperly terminated her employment as Acting Director of Family and Community Services Program and Program Director of the Social Services Program of the Tribe. Upon termination, Ms. Sharp sought relief by timely invoking the employee grievance procedure as established by the Mississippi Band of Choctaw Indians.

At the time of Ms. Sharp's dismissal, this procedure involved a four-step process as set out in the Administrative Personnel Policy of the Mississippi Band of Choctaw Indians (attached hereto as Appendix A). The use of this process by the Appellant broke down at step three. Step three provides:

If the grievance is not resolved in STEP TWO, the employee shall within five (5) working days, request a hearing with the committee designated by the Tribal Council, in writing, submitting the request to the Chair of the committee through the Chief with all written statements or briefs. The committee shall schedule a hearing at the next regularly scheduled meeting of the committee, or may schedule a special meeting for the hearing on the matter. The employee and all other parties concerned shall be given written notice of the date, time, and place of the hearing at least two (2) days prior to the hearing. The Chair of the committee shall preside at the hearing on the grievance or appeal, which shall be held in executive session, with only members of the committee and parties to the grievance or appeal present. Upon conclusion of the hearing, the committee shall reconvene in closed session to discuss the facts and make a decision, and reconvene in executive session to announce its decision. If the employee is not satisfied with the results of this step, the employee may, within two (2) working days, initiate STEP FOUR. Likewise, if the Chief is not satisfied with the results of this step, he may initiate STEP FOUR.²

² Note that the grievance process has since been revised with the 'old' steps three and four being replaced by a new step three. The new step three provides:

If the grievance is not resolved in STEP TWO, the employee shall within five (5) working days, request in writing a hearing with the Tribal Personnel Grievance Panel submitting the request to the Chair of the panel through the Chief with all written

Appellant's written request for a hearing with the Tribal Personnel Grievance Panel was timely requested. Yet despite the mandatory language of the Tribe's Administrative Personnel Policy that the "Panel *shall* schedule a hearing on the matter within fifteen (15) working days" (emphasis added), no hearing was ever scheduled. In fact, Appellant was informed more than a year later that no such hearing would be granted. See letter from Richard Isaac, Chairman of the Tribal Council Human Resources Committee, attached as Appendix B.

This letter clearly indicated from the Tribe's point of view that the grievance process was at an end. It, therefore, appears somewhat disingenuous for the Tribe to now claim that the Appellant, Ms. Sharp, failed to exhaust her administrative remedies because she did *not* subsequently file for a Step Four hearing after the Tribe refused to grant her a mandatory Step Three hearing before its Tribal Council's own Tribal Personnel Grievance Panel.

There is no necessity that a grievance procedure be provided in the first instance, but having admirably decided to do so, the Tribe is bound by its own policies and procedures. The failure of the Tribe to grant a mandatory Step Three grievance hearing is therefore a denial of procedural due process as required by the due process guarantees recognized in the Mississippi Band of Choctaw Indians Constitution at Art. X, Sec. 1 (h), as well as the Indian Civil Rights Act at 25 U.S.C. Sec. 1302 (8).

It seems that the trial court did not fully appreciate the requirements of due process and rested its dismissal of the Appellant's claim on the overarching doctrine of sovereign immunity.

statements or briefs. The panel shall schedule a hearing in the matter within fifteen (15) working days. The grievant and all other parties concerned shall be given written notice of the date, time, and place of the hearing at least two (2) business days prior to the hearing. The Chair of the Panel shall preside at the hearing on the grievance or appeal, which shall be held in executive session, with only members of the Panel and parties to the grievance or appeal present. The decision of the Panel is final.

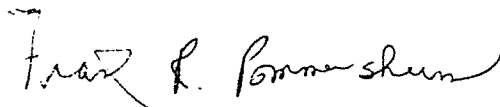
These changes went into effect October 8, 2002, and therefore were *not* applicable at the time of the grievance in this matter.

This was, at best, premature. The necessary order of things is to, first, provide the mandatory due process. Then, once that is complete, and *if the* Plaintiff-Employee prevails, then it must be decided what remedy, if any, is available and whether that remedy is enforceable in light of any claim of Tribal sovereign immunity.

IV. Conclusion

For all of the above-stated reasons, the decision of the Trial Court is affirmed as to its dismissal of any claim under the Choctaw Tort Claims Act, but reversed and remanded as to its finding that there was a failure to exhaust administrative remedies.

IT IS SO ORDERED.



Frank R. Pommersheim, Assoc. Justice
For the Court

Date: August 30, 2004

cumulated from fiscal year to fiscal year.

C. Performance Reviews

All new employees, except Education Contract Employees and employees specified in Chapter III, section H, will serve a three month probationary period beginning on their first working day to determine whether or not they fully satisfy requirements of the job. Supervisors will carefully monitor performance during this time, and will provide regular performance feedback every 30 days to the new person. If requirements are not met satisfactorily, the new employee will be forewarned in writing and given a reasonable time to correct explicitly-defined deficiencies. If satisfactory improvement does not result, the employee may be terminated without further notice during or at the end of the probationary period.

Each supervisor will conduct at least one written performance review annually of each supervised staff member using documented forms for this purpose. The objective of these reviews is to assist employees in their career development and to improve overall effectiveness of Tribal operations. The review will be shown to employees in draft form and discussed with them. At the same time the supervisor and employee will review and, if necessary, revise the employee's job description.

Subsequent changes in the performance review may be agreed upon before a final record is made. If agreement cannot be reached, the employee may prepare a separate statement for records as appropriate. All performance reviews will be signed by both parties, indicating that they have communicated on the subject matter even though they may not have agreed. The Chief will approve each written review before it is placed in the employee's permanent personnel file. Employees will also be given a copy of the final document. Performance reviews will be required of any employee promoted from within prior to the completion of three months in that new position.

D. Grievance

Any employee, except those on probation and temporary employees, terminated from employment due to reduction in force, terminated from employment due to unsatisfactory performance, terminated from employment due to misconduct, demoted for cause, suspended for any reason by the Chief, sexually harassed, or subject to a civil rights violation shall have the right to file a grievance on the action. The grievant shall have the right to file written statements or briefs prior to the hearing in support of his or her position. The employee shall have the right to be represented by anyone of his or her choice, including an attorney at no expense to the Tribe. The grievant shall have the right to present witnesses on his behalf and to cross-examine Tribal staff or witnesses preferred by the Tribal administration.

The grievance procedure will be followed in filing grievances:

immediate supervisor, and every effort shall be made to resolve the matter at this point. When the grievance or appeal is against the immediate supervisor, the action shall be initiated directly with the department director. If the employee is not satisfied with the results of this step the employee may, within two (2) working days, initiate STEP TWO.

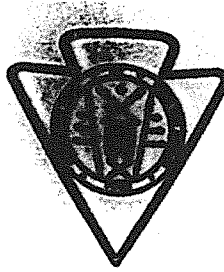
2. STEP TWO: If other action is necessary, the employee shall submit in writing a request for hearing to the Chief describing the grievance or appeal. A hearing shall be scheduled within five (5) working days of the date of the request, with all parties and documentation present. The personnel officer shall conduct the hearing, and shall make every effort to resolve the grievance or appeal.

3. STEP THREE: If the grievance is not resolved in STEP TWO, the employee shall within five (5) working days, request a hearing with the committee designated by the Tribal Council, in writing, submitting the request to the Chair of the committee through the Chief with all written statements or briefs. The committee shall schedule a hearing at the next regularly scheduled meeting of the committee, or may schedule a special meeting for the hearing on the matter, depending on the nature of the matter. The employee and all other parties concerned shall be given written notice of the date, time, and place of the hearing at least two (2) days prior to the hearing. The Chair of the committee shall preside at the hearing on the grievance or appeal, which shall be held in executive session, with only members of the committee and parties to the grievance or appeal present. Upon the conclusion of the hearing, the committee shall reconvene in closed session to discuss the facts and make a decision, and reconvene in executive session to announce its decision. If the employee is not satisfied with the results of this step, the employee may, within two (2) working days, initiate STEP FOUR. Likewise, if the Chief is not satisfied with the results of this step, he may initiate STEP FOUR.

4. STEP FOUR: If the grievance is not resolved in STEP THREE, the employee shall within two (2) working days, request in writing a hearing with the Tribal Council, submitting the request to the Tribal Chief. The Tribal Council at its next regular or special called meeting shall review the written record of the grievance. The Chief shall preside at the meeting which shall be held in executive session. Neither the grievant nor the supervisor recommending the action shall be present. While in executive session the Tribal Council will review the facts and make a final decision. The decision will be delivered in writing by the Chief within two (2) working days.

E. Confidentiality: All aspects of all grievances or appeals shall be confidential, and shall be discussed with only the parties concerned with the grievance or appeal, and members of the committee. Breaches of confidentiality shall be treated with appropriate disciplinary action.

MISSISSIPPI BAND OF CHOCTAW INDIANS



OFFICE OF CHOCTAW TRIBAL COUNCIL
POST OFFICE BOX 6010
PHILADELPHIA, MISSISSIPPI 39330
TELEPHONE (601) 656-5251
FAX (601) 656-5765

CERTIFIED - RETURN RECEIPT REQUESTED

Mrs. Wanda C. Sharp
P. O. Box 87
Sebastopol, MS 39359

Dear Mrs. Sharp:

We received your letter of January 27, 2000 regarding a grievance hearing request on your employment termination with the Mississippi Band of Choctaw Indians.

In reviewing the record and your file, it has come to my attention that the termination action was done through a tribal council resolution; thus the final stage of the grievance procedure was followed. I am in no position to re-open the case due to this resolution.

If you have any further questions, you may discuss the issues with our tribal attorney general office.

Sincerely Yours,

Richard Isaac, Chairman
Tribal Council Human Resource
Committee

cc: Chief Phillip Martin
Tribal Council Members & File
Attorney General - MBCI

"Appendix B"

'CHOCTAW SELF-DETERMINATION'

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received 2/14/2000