

1 ROSEBUD SIOUX TRIBAL COURT )  
ROSEBUD SIOUX RESERVATION ) SS IN TRIBAL COURT  
2 ROSEBUD, SOUTH DAKOTA )

\* Pending \*

4 DOROTHY L. MCLEAN, )  
5 Plaintiff, ) DOCKET NO. CIV 98-119

6 vs. )  
MEMORANDUM OPINION  
AND ORDER OF DISMISSAL

7 ROSEBUD HOUSING AUTHORITY, )  
8 Defendant. )

9 This matter came before the Court on December 2, 1998, for  
10 telephonic hearing on the Defendant's Motion To Dismiss. The  
11 Plaintiff, Dorothy L. McLean, appeared through her counsel,  
Stanley Whiting. The Defendant, Rosebud Housing Authority,  
appeared through its counsel, David Heisterkamp, II.

12 The Court, being familiar with the file and record herein,  
13 including the briefs submitted by both parties, and having heard  
14 oral argument by counsel, found good cause to grant the  
Plaintiff's Motion To Dismiss. The Court's reasoning is set out  
below.

15 PROCEDURAL BACKGROUND

16 Dorothy L. Mclean commenced this action on or about May 8,  
17 1998 by filing her Summons and Complaint and the same being  
delivered to the Process Server.

18 The Rosebud Housing Authority did not file an Answer, but  
19 responded by filing its Motion To Dismiss.

20 The Court Ordered the Defendant to supplement the file and  
21 called for briefs, inviting the Rosebud Sioux Tribal Council as  
Amicus curiae, to present its views on the important question of  
the Tribe's sovereign immunity.

22 The Court has reviewed the briefs submitted by the  
23 Plaintiff, the Defendant, and Amicus, and heard oral argument  
24 presented by counsel. The matter has been submitted for  
determination by the Court.

25 There having been no evidentiary hearing in this matter, the  
26 Court enters no Findings Of Fact. Rather, the Court summarizes  
the averments set out in the Complaint.

27 The Plaintiff, Dorothy L. McLean, (hereinafter, "McLean") is

1 a member of the Rosebud Sioux Tribe who is a resident of the  
2 Rosebud Sioux Indian Reservation. McLean alleges that she was  
3 formerly employed as a paralegal by the Defendant, Rosebud  
4 Housing Authority, (hereinafter "the Housing Authority"). Her  
5 employment was terminated for cause after she raised concerns  
6 over billing practices by the Housing Authority's legal counsel  
7 and improper expenditure of money and money owed by members of  
8 the Board of Directors.

9  
10 McLean asserts that she has exhausted her administrative  
11 remedies through the Housing Authority Personal Policies And  
12 Procedures. However, McLean contends that the members of her  
13 Grievance Board also served on the Housing Authority's Board of  
14 Commissioners in contravention of Rosebud Sioux Tribal Council  
15 Resolution No. 89-154. Thus, the Defendant asserts she was  
16 denied fundamental fairness and due process of law.

17  
18 McLean contends she was wrongfully terminated and seeks  
19 reinstatement to her position as paralegal with the Housing  
20 Authority, with back pay. McLean also seeks actual and punitive  
21 damages for emotional distress and costs, including attorney's  
22 fees.

#### 23 DISCUSSION

24 The Defendant Housing Authority seeks dismissal of this  
25 action on the grounds that it is cloaked with the governmental  
26 immunity of the Rosebud Sioux Tribe and, because it has not  
27 consented to suit, it asserts that this action is barred under  
28 the doctrine of sovereign immunity.

This action for wrongful discharge was commenced against the  
Rosebud Housing Authority, not against the individual members of  
its Board of Commissioners. The distinction is significant.

It has long been held, in actions brought under federal law,  
that the common law doctrine of sovereign immunity applies to  
Indian tribes as it does to other sovereigns. Turner v. United  
States, 248 U.S. 354, 358 (1919). However, because there was no  
"mutuality of concession" by tribes, tribal immunity is not  
coextensive with that of states. Kiowa Tribe of Oklahoma v.  
Manufacturing Technologies, Inc., \_\_\_ U.S. \_\_\_, 118 S.Ct.,  
1700, \_\_\_ (1998). A waiver of the a tribe's sovereign  
immunity "cannot be implied but must be unequivocally expressed."  
Santa Clara Pueblo v. Martinez, 436 U.S. 49, \_\_\_, 98 S.Ct. 1670,  
1677 (citations omitted). Conversely, federal courts have held,  
in actions based on federal law, that the sovereign immunity of  
tribes does not serve as a complete bar to suits against tribal  
employees. Puyallup Tribe, Inc. v. Washington Dept. of Game, 433  
U.S. 165, 171-72 (1977). See also, Ex Parte Young, 209 U.S. 123  
(1908).

1 In addressing whether the doctrine of sovereign immunity  
2 acts as a bar to actions brought under tribal law, tribal courts  
3 have not uniformly reached the same result. See, Rave v.  
4 Reynolds, (Winn.Sup.Ct., July 9, 1996), 23 Indian L. Rep. 6150,  
5 6161-64. The statutory laws of tribes differ significantly.  
6 Some tribes statutorily waive their sovereign immunity in  
7 connection with specific types of civil actions brought in tribal  
8 court.<sup>1</sup> With the exception of Rosebud Sioux Tribe and William  
9 Kindle, infra, this Court is unaware of any decisional law  
10 finding an express waiver of the Tribe's sovereign immunity or  
11 the official immunity of its employees or officers in the  
12 statutes of the Rosebud Sioux Tribe. Moreover, this is an  
13 employment appeal, not a dispute between landlord and tenant.

8 Under the statutory law of the Rosebud Sioux Tribe, its  
9 employees and officers are immune from any civil action arising  
10 from the performance of their official duties except as required  
11 by Federal law, the Constitution and Bylaws of the Tribe or when  
12 specifically waived by resolution or ordinance of the Tribal  
13 Council. RST 4-2-1.

11 The Rosebud Housing Authority is a tribal agency established  
12 by tribal ordinance. Rosebud Sioux Tribe Ordinance 76-02. See  
13 also, Dubray v. Rosebud Housing Authority, CIV 83-01  
14 (Rsbd.Sx.Tr.Ct., Feb.1, 1985), 12 Indian L. Rep. 6015. Thus, the  
15 Rosebud Housing Authority, like other Indian housing authorities,  
16 enjoys the governmental immunity of the Rosebud Sioux Tribe from  
17 suit. Dillon v. Yankton Sioux Tribal Housing Authority, \_\_\_ F.2d  
18 \_\_\_ (8th Cir., 1998). Absent an express waiver of the Housing  
19 Authority's immunity from suit, or other applicable authority,  
20 this action must be dismissed.

17 The Plaintiff asserts that the Rosebud Sioux Tribal Council  
18 waived the Housing Authority's sovereign immunity when it enacted  
19 Ordinance 76-02, which provides in pertinent part:

19 The Council hereby gives its irrevocable consent to allowing  
20 the Authority to sue and be sued in its corporate name, upon  
21 any contract, claim or obligation arising out of its  
22 activities under this Ordinance and hereby authorizes the

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22 <sup>1</sup> For example, under the Colville Tribal Civil Rights Act,  
23 the sovereign immunity of the Tribes and its employees is waived  
24 for the limited purpose of seeking declaratory and injunctive  
25 relief for civil rights violations. CTC 56.03; 56.04. However  
26 the waiver only applies to lawsuits brought in the Tribal Court.  
27 Similarly, the Tribes have legislatively waived its sovereign  
28 immunity in actions for damages brought under the Act up to the  
limits of an enforceable insurance policy. CTC 56.08. But see,  
Palmer v. Millard, 23 Indian L. Rep. 6094 (Colv.Ct.App. 1996)

1 authority to agree by contract to waive any immunity from  
2 suit which it might otherwise have; but the Tribe shall not  
3 be liable for the debts or obligations of the Authority  
4 except in so far as expressly authorized by this ordinance.

5 Ordinance 76-02, Article 5, Section 2.

6 In DuBray, supra, a case also involving employer-employee  
7 rights, the Tribal Court rejected the argument that the Tribal  
8 Council, through Ordinance 76-02, waived the Tribe's sovereign  
9 immunity.<sup>2</sup> In construing what appears to be an identical  
10 statutory provision establishing an Indian housing authority, the  
11 Federal Courts have reached the same result. Dillon v. Yankton  
12 Sioux Housing Authority, supra.

13 The Court also notes that the Rosebud Housing Authority,  
14 Personnel Policies and Procedures, Chapter 7, Section 7, contains  
15 the following provision:

16 The Authority does not consent to suit nor waive its  
17 sovereign immunity with respect to any employee grievance.

18 Thus, it appears to the Court that the Plaintiff has been on  
19 notice long before commencement of this action that the Housing  
20 Authority specifically did not waive its sovereign immunity in  
21 employee grievance matters.

22 The Court finds a recent decision by the Supreme Court of  
23 the Rosebud Sioux Tribe particularly instructive with regard to  
24 the application of the doctrine of sovereign immunity under  
25 Tribal law. In Rosebud Sioux Tribe and William Kindle v. Rose  
26 Cordier, the Court held that the Tribal Court had jurisdiction  
27 over an employment appeal and issued a writ of mandamus to compel  
28 compliance with a decision of the Grievance Committee. In that  
case the Court specifically noted that under Section G of  
Ordinance 86-06, if decisions of the Grievance Committee are not  
recognized, the aggrieved party may seek relief by filing with  
the Secretary of the Interior or file in Tribal Court. The Court  
found Section G to be a clear, unambiguous directive to the  
aggrieved party to file and action in Tribal Court.

The court observed that the doctrine of sovereign immunity  
does not protect an official who has acted outside the scope of  
his authority or beyond his authority. Id. at 4. By reviewing a  
decision of the Grievance Committee and by refusing to recognize

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<sup>2</sup>The Court also adhered to the view expressed by the United  
States Supreme Court in Martinez that enactment of the Indian  
Civil Rights Act, 25 U.S.C. § 1301 et seq., did not abrogate the  
Tribe's sovereign immunity.

1 the decision, the Petitioners acted outside of the scope of their  
2 statutory authority. This is consistent with the view that under  
3 RST 4-2-1, there was a specific tribal statute waiving immunity  
4 of a tribal official for committing an ultra vires act...refusing  
5 to recognize a decision of the Grievance Committee.

6 The instant case is distinguished from Cordier on at least  
7 two important respects. First, in Cordier the action was  
8 commenced against the Rosebud Sioux Tribe and its President  
9 whereas in McLean, the individual employees, officers or members  
10 of the Board of Commissioners were not named in the Complaint.  
11 Secondly, the Policies And Procedures of the Rosebud Housing  
12 Authority do not contain provision corresponding to Section G. of  
13 Ordinance 86-06 allowing for judicial review in the Tribal Court.

#### 14 CORPORATE CHARTER OF THE ROSEBUD SIOUX TRIBE

15 Mclean also asserts that the Tribe's acceptance of the  
16 Indian Reorganization Act and approval of the Corporate Charter  
17 of the Rosebud Sioux Tribe, Article 5, Section i, setting out the  
18 corporate powers of the Rosebud Sioux Tribe, resulted in a waiver  
19 by the Tribe of its sovereign immunity with regard to grievance  
20 procedures and employee rights. The Court disagrees.

21 On November 23, 1935, the Rosebud Sioux Tribe adopted the  
22 Constitution and By-laws of the Rosebud Sioux Tribe in accordance  
23 with Section 16 of the Indian Reorganization Act of June 18,  
24 1934, 48 Stat. 984, as amended by the Act of June 15, 1935,  
25 Public Law No. 147, 74th Congress. The Constitution and By-laws  
26 were approved by the Secretary of the Interior on December 20,  
27 1935.

28 On March 16, 1937, the Rosebud Sioux Tribe ratified the  
Corporate Charter issued by the Secretary of the Interior under  
the Indian Reorganization Act becoming a Federal corporation.  
Paragraph 5 of the Charter provides in pertinent part:

The Tribe subject to any restrictions contained in the  
Constitution and laws of the United States, or in the  
Constitution and By-Laws of said Tribe, shall have the  
following corporate powers, in addition to all powers  
already conferred or guaranteed by the Constitution and By-  
Laws of the Tribe...

To sue and to be sued in courts of competent jurisdiction  
within the United States; but the grant or exercise of such  
power to sue and to be sued shall not be deemed a consent by  
the Tribe or the United States to the levy of any judgment,  
lien or attachment upon the property of the Tribe other than  
income or chattels specifically pledged or assigned; nor  
shall the grant or exercise of such power be deemed or  
construed to be a consent to be sued in respect of any land

1 within the exterior boundaries of the Rosebud Reservation,  
2 or a consent to the alienation, attachment, or encumbrance  
of any such land.

3 Charter, Paragraph 5 (i).

4 The Plaintiff cites no authority in support of her assertion  
5 that the above provision constitutes a waiver of the Tribe's  
6 sovereign immunity in wrongful termination cases brought in the  
7 Tribal Court. The Tribe, in its corporate capacity, may sue or be  
8 sued subject to limitations under Federal law and the Tribe's  
Constitution and By-Laws. The above provision of the Charter  
grants the Tribe authority to consent to suit, but alone is not a  
clear, unequivocal waiver of the Tribe's sovereign immunity under  
Tribal law. Martinez, supra.

9 The authority to "sue or be sued" found in Paragraph 5(i) of  
10 the Corporate Charter of the Rosebud Sioux Tribe led the 8th  
11 Circuit Court of Appeals to conclude that the Tribe had expressly  
12 waived its sovereign immunity. Rosebud Sioux Tribe v. A&P Steel,  
13 Inc., \_\_\_ F.2d \_\_\_, 16 ILR 2157 (1989). In that case the Tribe  
14 commenced a lawsuit in Federal court for contract damages and the  
15 A&P Steel counterclaimed for the balance owed on the retainage  
16 fee. The Court noted:

17 [W]hen a sovereign nation such as an Indian tribe commences  
18 a lawsuit, it waives immunity as to claims of the defendant  
19 which assert matters in recoupment - arising out of the same  
20 transaction or occurrence which is the subject matter of the  
21 government's suit. The counterclaims of the defendant must  
22 seek relief of a similar nature to that sought by the  
23 plaintiff and in an amount not in excess of the plaintiff's  
24 claim. (internal quotations omitted) (citations omitted)

16 ILR at 2158.

19 The above case may be distinguished on several grounds. In  
20 A&P Steel, suit was filed by the Tribe in Federal court, under  
21 Federal law, as a contract action. The instant case was  
22 commenced by McLean against the Rosebud Housing Authority in  
23 Tribal Court under Tribal law. McLean's Complaint does not  
24 present separate claims for relief. Rather, she presents a mixed  
25 claim for reinstatement in her job, restitution for lost wages,  
26 and damages sounding in tort.

27 For the reasons stated above, it is HEREBY ORDERED that this  
28 case is DISMISSED.

29 DATED this 2nd day of December, 1998, and signed this 4<sup>th</sup>  
30 day of May, 1999.

31 MEMORANDUM OPINION AND  
32 ORDER OF DISMISSAL - 6

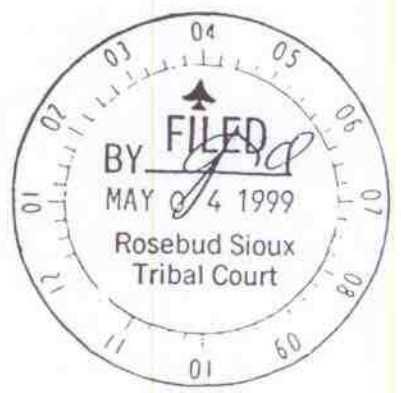
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*Brian H. Collins*  
Brian H. Collins, Associate Judge

ATTEST:

*Lina R. Duville*  
CLERK OF COURTS

MEMORANDUM OPINION AND  
ORDER OF DISMISSAL - 7



IN THE SUPREME COURT  
ROSEBUD SIOUX TRIBAL COURT  
ROSEBUD INDIAN RESERVATION  
ROSEBUD, SOUTH DAKOTA


DOROTHY L. McLEAN,	)	CA 99-01
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	ORDER
	)	
ROSEBUD HOUSING AUTHORITY,	)	
	)	
Defendant/Appellee.	)	


The status of this case having been duly considered by Chief Justice Ramon A. Roubideaux and Patrick Lee, Justice LeRoy Greaves having recused himself, and the parties having agreed after arguments being made by the parties on January 5, 2001, that the parties agreed that oral arguments may be heard and acted upon by the remaining two justices, Chief Justice Ramon A. Roubideaux, and Justice Patrick Lee, and it appearing that there appears to be a conflict of interest in the handling of this employment action raising a question of due process. Further evidence and action should be taken by the lower court and resubmitted, it is hereby

ORDERED, that this case be, and the same is hereby, remanded back to the lower court for further consideration and submitted again after a further record in made.


Dated this 5<sup>th</sup> day of January, 2001.

BY THE COURT

  
Ramon A. Roubideaux  
Chief Justice

  
Patrick Lee  
Associate Justice

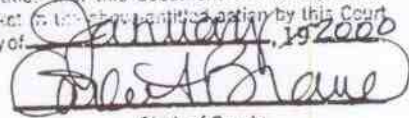
ATTEST:

  
Clerk of Court

(SEAL)

FILED  
in the  
ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 25 day of January, 192001

  
Clerk of Courts

ROSEBUD SIOUX TRIBAL COURT  
ROSEBUD INDIAN RESERVATION  
ROSEBUD, SOUTH DAKOTA

*Pending?*  
*CA 99-01*

DOROTHY L. McLEAN, )  
 )  
Plaintiff/Appellant )  
vs. )  
ROSEBUD HOUSING AUTHORITY, )  
 )  
Defendant/Appellee. )  
 )  
----- )

CIV. #98-119

NOTICE OF APPEAL

Appellant, Dorothy L. McLean, hereby appeals the Memorandum Opinion and Order of Dismissal of the Trial Court in the above captioned case, which was entered by the Court and received by Appellant's counsel on May 6, 1999.

1.

The party taking the appeal is Dorothy L. McLean whose address is P.O. Box 792, Mission, South Dakota 57555 and whose telephone number is (605) 856-2735 and the attorney for Dorothy L. McLean is Stanley E. Whiting of 142 E. Third Street in Winner, South Dakota 57580, telephone number (605) 842-3373.

2.

The Tribal Court Order appealed from was dated May 4, 1999 and served on Appellant's attorney on May 6, 1999. The title of the Court Order is a "Memorandum Opinion and Order of Dismissal" captioned as set out above.

3.

The Defendant/Appellee is Rosebud Housing Authority whose address is P.O. Box 69, Rosebud, South Dakota 57570 and whose telephone number is (605) 747-2203 and the attorney for Rosebud Housing Authority is David Heisterkamp II, 1700 Broadway, Suite #1202, Denver, Colorado 80290, telephone number (303) 832-6511.

4.

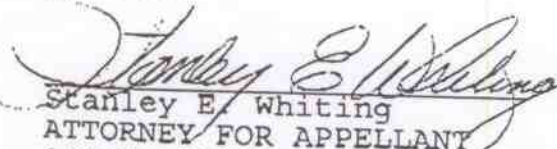
The issues being appealed are as follows:

- A) Whether Appellee enjoyed sovereign immunity regarding the claim made by Appellant.

Page Two

- B) Whether Appellant was denied due process of law and fundamental fairness by the Housing Authority in dismissing Appellant from her employment.
- C) Whether Appellant was denied due process and fundamental fairness by the Grievance Committee which was composed of Housing Authority Board Members in violation of Tribal law.
- D) Whether it was necessary for Appellant to name individual Board Members of the Grievance Committee or the Housing Authority as Defendants when the Grievance Committee and Housing Authority were composed of members in common and when the final letter of dismissal addressed to Appellant came directly from the Housing Authority Board.
- E) Whether the Indian Civil Rights Act guarantees Appellant due process and fundamental fairness prior to dismissal from her employment.
- F) Whether Appellant enjoyed a property right in her employment with Appellee and if such property right existed, is that right protected by due process and fundamental fairness.
- G) Whether the Housing Authority can ignore with impunity ordinances of the Rosebud Sioux Tribe which directed that the Grievance Committee for the Housing Authority not be composed of members of the Housing Authority Board.

Dated this 28th day of May, 1999.

  
Stanley E. Whiting  
ATTORNEY FOR APPELLANT  
142 E. Third Str.  
Winner, SD 57580  
(605) 842-3373

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the person(s) herein next designated, and on the date below shown, by depositing a copy thereof in the United States mail at Winner, South Dakota, postage prepaid, on an envelope addressed to each said addressee, to-wit: