SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA COURT OF APPEALS

SYLLABUS BY THE COURT

Jacob Molitor v. Sac and Fox Tribe of the Mississippi in Iowa

APP-2023-0002 (AA-2022-0001) Decided June 13, 2024.

Jacob Molitor ("employee") was appointed as Chief of Police for the Meskwaki Nation Police Department. A contract between the employee and the Tribe governed the employment relationship. The employee was notified by letter of the termination of his position with cause by the Tribal Council one day after his termination. The contract between the employee and the Tribe included a provision detailing that the employee would be entitled to severance pay if terminated without notice. The employee did not receive severance pay. The employee attempted to appeal the termination to the Employee Appeals Commission, but was denied the opportunity. Subsequently, the employee filed a claim for reinstatement in Tribal Court, alleging wrongful termination and breach of contract. The Tribe filed a Motion to Dismiss, which was denied by the Trial Court. A discretionary appeal ensued, where the Tribe argued that the court did not have subject matter jurisdiction to adjudicate the dispute and, alternatively, that the doctrine of sovereign immunity barred the suit. The Court of Appeals issued a decision regarding these two arguments and further addressed the requirement of due process in employee termination matters.

I.

Subject matter jurisdiction exists if a given court has the power to hear the specific claim brought before it, i.e., a petitioning party has convincingly asserted a violation of law: constitu-

tional, statutory, or traditional. In an employment dispute, the Tribal Court possesses subject matter jurisdiction by virtue of section 5-4101(d) of the Dispute Resolution Code and section 9-1310 of the Employment and Labor Code. The latter code states clearly and unequivocally that the court is empowered to adjudicate claims for reinstatement or other violations of the pertinent chapter.

II.

A sovereign governmental entity, including a tribe, can raise a defense of sovereign immunity from suit. A sovereign, however, may waive such immunity, rendering the doctrine inoperable as a valid defense. The Employment and Labor Code provides a limited waiver of sovereign immunity, indicating that "certain individuals" may file "certain claims" under section 9-1102. A plain reading of this section confirms that an employee, even an officer of the Tribe, falls within the "certain persons" requirement. Additionally, claims for wrongful termination and reinstatement are permissible claims under section 1-1307. In this case, the employee filed a claim for reinstatement alleging wrongful termination and breach of contract, thereby satisfying the "certain claims" requirement.

III.

In conjunction with a termination of employment, the Indian Civil Rights Act requires the Tribe to give due process to an employee who has a property interest in his or her continued employment with the Tribe. An employee gains a property interest in continued employment if either a contract, employee handbook, or tribal statute restricts the Tribe from terminating employment without good cause to do so. At a minimum, the tribal employer must meet with an employee prior to final approval of a termination decision, which is known as a pre-deprivation hearing. The supervisor or designee who conducts the hearing must maintain discretionary authority to approve or disapprove a contemplated termination; otherwise, the hearing would have questionable value.

Essentially, an employee must receive a meaningful ability to address any allegations of illegality, impropriety, or misconduct prior to the employer finalizing termination. Consequently, an employee must receive adequate notice of the pre-deprivation hearing. The hearing may remain relatively informal, but the level of formality must increase if post-deprivation review is delayed, limited, or unavailable. An assurance of due process, in this respect, guards against making mistaken decisions and avoiding inappropriate loss of employment, including associated benefits.

In this case, the employee's contract generally provided that the Tribe could terminate him with cause. The contract alternatively allowed the Tribe to terminate without cause, but, in such a situation, the Tribe would need to pay severance. That did not happen, rendering this alternative method of employment separation irrelevant here.

Quite simply, the employee was entitled to procedural due process, but he had no pre-deprivation hearing. He likewise had no post-deprivation administrative review. Therefore, the Tribe deprived him of a property interest, i.e., a continuation of employment, without affording him due process of law. As a result, the Tribe breached its contractual obligation, and the defendant is entitled to reinstatement to his prior position or its equivalent.

Trial Court Case AA-2022-0001 is affirmed.

Entering judgment for employee.

IN THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA TRIBAL COURT
COURT OF APPEALS

Jacob Molitor, Appellee, v. Sac & Fox Tribe of the Mississippi in Iowa, Appellant.	Case No(s).: AA-2022-0001 APP-2023-0002 **DECISION**

INTRODUCTION

Appellant Sac and Fox Tribe of the Mississippi in Iowa (hereinafter "appellant"), by and through Assistant Attorney General Vannessa Larson,[1] appeals an order denying a motion to dismiss issued on February 10, 2023.[2] The Court must determine whether it possesses subject matter jurisdiction in an employment dispute involving an appointed employee and concludes it does possess the requisite subject matter jurisdiction. The Court must also determine whether the doctrine of sovereign immunity bars suit where an appointed employee is terminated. On this issue, the Court determines there is a limited waiver of sovereign immunity. Finally, in its comprehensive review of the matter, the Court also examined an underlying and dispositive issue regarding due process owed to

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[1] Appellant's original counsel, Chief Deputy Attorney General Canterbury, filed a motion to withdraw appearance on January 11, 2024. Assistant Attorney General Larson filed an appearance on behalf of the appellant on January 11, 2024.

[2] During the pendency of this case, the Chief Justice of the Court of Appeals position was vacant for a substantial period of time delaying resolution of this matter. *See* Order (Denying Mot.; Revised Sched. Order), APP-2023-0002, at 1 (SF App. Ct. Jan. 3, 2024).

an appointed employee.[3] Employees, including appointed employees, must be afforded due process upon termination, and when that due process is denied, the employee must be provided the statutory remedy, which in this case requires reinstatement to the exact or an equivalent position.

FACTUAL AND PROCEDURAL HISTORY

Appellee Jacob Molitor (hereinafter "appellee") was appointed Chief of Police for the Meskwaki Nation Police Department in May 2019. Subsequently, he and the Tribe entered into an employment agreement. The agreement included a provision that

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[3] The record, including all filings and the recording of the Motion to Dismiss hearing, demonstrates an issue regarding due process. Whether appellee received due process was not addressed in the filings by appellant who raised arguments regarding subject matter jurisdiction and sovereign immunity; indeed, whether the appellee received due process is an argument of the appellee and it would not be the position of appellant to raise this claim, nor would appellee be required to raise this issue in response to the arguments made by appellant on appeal. However, even in response to the appellant's arguments on appeal, appellee's response brief indicates the issue, stating: "Following my termination, I was not afforded basic rights required by the Tribe to appeal my termination." Resp. Br., APP-2024-0002, at 4 (Feb. 29, 2024). Further argument is included on page 6 of appellee's Response Brief. There was also detailed questioning by the Court on this issue during oral argument. *Tr. of H'rg: Jacob Molitor v. Sac & Fox Tr. of the Miss. in Iowa* (hereinafter "*Hearing Transcript*") at 17-20; 22-23; 31-32, April 10, 2024. Therefore, the record fully demonstrates the issue must be resolved. Notably, this Court has previously stated:

> [E]ven if this Court had considered some aspects of this case on its own motion, the Court notes that this practice is hardly unusual or prohibited – many other tribal and American courts retain the inherent authority to regularly consider issues sua sponte. *See e.g., Pearce ex. Rel., General Council v. Nuckolls*, 6 Okla. Trib. 181 (Absentee Shawnee 1999); *Kerchee v. Kerchee,* 2 Okla. Trib. 132 (Comanche CIA 1990); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (noting district courts have inherent power to grant summary judgment sua sponte). A court must be able to consider issues sua sponte to insure [sic] just outcomes as the result. Otherwise, the result in cases might turn on the quality of a party's legal counsel, and not on what would be just or right. With the ability to consider issues sua sponte, if a lawyer did not phrase a legal argument in precisely the right way, a party may be deprived of its rights based on a technical, legal reading of the pleadings.

Calvin Johnson v. Sac & Fox Tr. of the Miss., APP-2005-0001, at 2 (SF App. Ct. April 19, 2006).

As in the Johnson case, the issue of due process addressed by this Court is presented squarely in the record and during oral argument.

prohibited terminating appellee without cause, unless he was awarded severance pay.[4] In August 2022, appellee was notified he was being demoted due to his handling of multiple excessive force incidents within the department. In response, appellee indicated he would appeal a demotion and the Tribal Council terminated him for cause. *Op. & Order*, AA-2022-0001, at 2 (SF Tr. Ct. Feb. 10, 2023). Appellee attempted to appeal his termination to the Employee Appeals Committee, but his appeal was denied; the reasoning provided was that his claim was not subject to review by the Employee Appeals Committee as it was solely within the purview of Tribal Council due to the nature of the Chief of Police position as an appointed position. *Id.*

Appellee, proceeding *pro se*, then filed a Claim for Reinstatement with the Meskwaki Tribal Court. Pro Se Pet. Form, AA-2022-0001 (Sept. 26, 2022). The Claim for Reinstatement included supplemental documentation entitled "Jacob Molitor – Wrongful Termination Appeal" and listed the various alleged violations under the title of the supplemental document, including "Breach of Written Contract, Violation of Title 9 of Tribal Code Section 9-1304 and 9-1307(b), Violation of Tribal Policies, Retaliation, and Contradictions, [and] Attempted Demotion to HR with no reason." *Id.*, attach. A at 1. All subsequent briefs filed by appellee included this title with multiple violations listed. Appellant, by and through Tribal Chief Deputy Attorney General Joshua Canterbury, filed a motion to dismiss appellee's claim, arguing that the Trial Court lacked subject matter jurisdiction and, alternatively, that appellant is immune from suit under the doctrine of sovereign immunity. The Trial Court convened oral argument on the motion to dismiss on January 12, 2023, and issued a decision denying the motion to

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[4] *See* MNPD Employee Agreement § 3.2.

dismiss on February 10, 2023. This appeal ensued.[5] The parties filed timely briefs, and oral argument convened virtually on April 10, 2024, Chief Justice Tricia A. Zunker, Associate Justice Pro Tempore Chad M. Gordon, and Associate Justice Pro Tempore Todd R. Matha, presiding.

ISSUES

(1) Whether the Court has subject matter jurisdiction in an employment dispute between an appointed employee and the Tribe;

(2) Whether the suit is barred by the doctrine of sovereign immunity; and

(3) Whether an employee is entitled to receive due process upon termination from an appointed position.

STANDARD OF REVIEW

The Court reviews *de novo* the Trial Court's legal conclusions, including subject matter jurisdiction and the doctrine of sovereign immunity. *Sac & Fox Tr. of the Miss. in Iowa v. Attorney's Process & Investigation Servs., Inc.*, APP-2008-02-124, at 7 (SF App. Ct. Dec. 23, 2008) (citing *Mallet v. Bowersox*, 160 F. 3d 456, 459 (8th Cir. 1998)). In employing *de novo* review, the Court reviews the matter anew without any deference to the lower court's decisions, though the Court may still refer to the lower court's factual record and review findings of fact for clear error where necessary. *Id.* (citing Sac & Fox Tr. R. App. P. A-7); Fed. R. Civ. P. 52(a)(6). This appeal presents questions of law, and therefore *de novo* review is required.

[5] The Court of Appeals accepted this discretionary appeal pursuant to section 5-4401(b)(1).

DECISION

I. The Tribal Court possesses subject matter jurisdiction under section 5-4101(d) of the DISPUTE RESOLUTION CODE and section 9-1310 of the EMPLOYMENT AND LABOR CODE.

The DISPUTE RESOLUTION CODE addresses jurisdiction of the Tribal Court, stating in part:

> The Trial Court shall not have jurisdiction over any cause of action brought against the Tribe or any of its agencies, departments or enterprises, including the officers, agents and employees of the Tribe in their capacity as such, ***unless such jurisdiction is unequivocally and expressly granted by the laws of the Tribe*** . . . .

Section 5-4101(d) (emphasis added).

Chapter 3 of the EMPLOYMENT AND LABOR CODE governs claims for adverse employment actions, which includes claims for reinstatement arising out of terminations in violation of Tribal law or terminations in breach of contract. *See* SAC & FOX TR. OF MISS. CODE § 9-1307. Section 9-1310, entitled "Jurisdiction of the Tribal Court," states: "The Trial Court of the Tribal Court ***shall have*** subject matter jurisdiction over any claim for reinstatement or other claim of a violation in this chapter." (emphasis added). This provision is unequivocal, and the court is empowered to adjudicate the matter as expressly granted by this law. Appellee raised claims for reinstatement due to wrongful termination and breach of employment contract, both of which are addressed in this chapter. *See* SAC & FOX TR. OF MISS. CODE § 9-1307(a)-(b). Appellee's status as an appointed employee whose contract served as the basis of the employment relationship does not nullify subject matter jurisdiction in this matter. Furthermore, appellee did attempt to exhaust available administrative remedies and timely appealed to the Employee Appeal Committee; however, he was denied the opportunity to appeal to the

committee and subsequently brought suit in Tribal Court. *See* SAC & FOX TR. OF MISS. CODE §§ 9-1308; 9-1309.

II. There is a limited waiver of sovereign immunity under Section 9-1102 of the EMPLOYMENT AND LABOR CODE.

The doctrine of sovereign immunity operates as a total bar to recovery and allows a sovereign, here, the Tribe, to assert a defense that it is immune from suit. In some situations, a sovereign may waive its sovereign immunity, meaning the suit is not barred and the sovereign cannot raise a valid immunity defense. In the instant matter, appellant asserts this suit is barred by the doctrine of sovereign immunity and should be dismissed. The ramification, should this argument prevail, would preclude the employee from maintaining suit against its sovereign employer, even where the employee has a valid claim. This cannot be the original intent of the Tribal Council in enacting this legislation when reviewing the plain language of the applicable code. The pertinent provision of the EMPLOYMENT AND LABOR CODE states:

Sec. 9-1102. Sovereign Immunity.

> Nothing in this Article shall be construed as limiting, waiving or abrogating the sovereignty or the sovereign immunity of the Tribe of any of its agencies, departments, officials or employees. ***Notwithstanding the foregoing, certain individuals*** may file ***certain claims*** against the Tribe, pursuant to the provisions of Chapter 3 of this Article. (emphasis added).

"Certain individuals" and "certain claims" are identified subsequently in the Code. Under section 9-1301, "employee" means an employee of the Tribe and includes an officer of the Tribe. Section 9-1101 has an exhaustive definition for "Officer of the Tribe" including, but not limited to: "Any person elected or appointed to Office for the Tribe of

any of its commissions, boards, departments, agencies, or economic enterprises."[6] SAC & FOX TR. OF MISS. CODE § 9-1101(a)(3). Here, appellee was appointed to the position of Chief of Police by the Tribal Council and is an "Officer of the Tribe."

Furthermore, the claims included in the EMPLOYMENT AND LABOR CODE include claim for wrongful termination and claim for reinstatement. SAC & FOX TR. OF MISS. CODE § 9-1307. Appellee filed a Claim for Reinstatement addressing wrongful termination as well as breach of contract. Therefore, the "certain claims" requirement of section 9-1102 is also met. Because appellee qualifies as an officer of the Tribe bringing a claim for reinstatement arising out of an alleged wrongful termination and breach of contract, the requirements of "certain persons" and "certain claims" are met, and there is a limited waiver of sovereign immunity. Therefore, the Trial Court correctly denied the motion to dismiss.[7]

Appellant argues that a suit against the Tribe in this instance would open the floodgates of litigation and render the concept of sovereign immunity meaningless. *Hearing Transcript* at 14-15. To the contrary, to not allow suit where the Tribe has

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[6] The definition of "Officer of the Tribe" also contains other applicable categories, including "[a]ny law enforcement officer or peace officer of the Tribe" and "[a]ny . . . employee of the Tribe, whether elected, appointed or otherwise employed." SAC & FOX TR. OF MISS. CODE § 9-1101(a)(4), (6).

[7] Within this issue, appellant also raised a subargument regarding the standard applied to pro se litigants, contending that the Trial Court created a new doctrine employing a different standard to pro se litigants than litigants represented by counsel when it cited case precedent in the order denying the motion to dismiss. *See* Tr. Br. in Supp. of Notice of Appeal, APP-2023-0002, at 13-14, (Jan. 31, 2024). A court may employ discretion in how much latitude it affords a pro se litigant, such as relaxing rigid requirements for pleadings filed by a pro se litigant. Here, the quoted language stated "The Appellate Court has explained that the Court must construe pro se pleadings 'liberally and [hold them] to a less stringent standard than formal pleadings drafted by lawyers.'" Op. & Order, AA-2022-0001, at 7-8 (Feb. 10, 2023) (quoting *Sac & Fox Tribe of the Mississippi in Iowa v. Young Bear,* APP-2009-0001, at 5 (SF App. Ct. Sept. 19, 2009)). But a court cannot employ one legal standard for a pro se litigant and another legal standard for a represented party. The Trial Court was not applying different legal standards to the parties in its order and for that reason, this Court refrains from addressing this assertion further.

selectively and explicitly waived its immunity would be anathema to the Tribe's innate ability and right to govern itself. Nothing in the Court's opinion would allow third parties unfettered access to sue the Tribe where the Tribe has not provided an explicit waiver. The Tribe cannot provide a comprehensive mechanism to adjudicate employee disputes, along with a limited waiver of its sovereign immunity and selection of arbitral tribunal, only to then not respect and recognize such decision-making when it becomes politically expedient to do so. Rather than representing a fissure in the revered bedrock of tribal sovereignty, acknowledging and respecting the Tribe's decision to carve a limited waiver of that sovereignty serves to strengthen and not limit the reservoir of the Tribe's inherent governing power.

III. An appointed employee must be afforded due process upon termination, which includes notice and the opportunity to be heard.

The tribal constitution does not include an articulation of rights; however, "[n]o Indian tribe in exercising powers of self-government shall . . . deprive any person of liberty or property without due process of law." Indian Civil Rights Act of 1968, Pub. L. No. 90-824, § 202(a)(8), 82 Stat. 73, 77 (current version at 25 U.S.C. § 1302(a)(8) (2018)). Likewise, the tribal code does not contain a due process clause; however, in several sections, it explicitly references the concept or includes its component parts. *See, e.g.*, SAC & FOX TR. OF MISS. CODE § 1-3214 (presuming the provision of "due process of law"); *id.* § 9-1311(g)(2) (requiring administrative appeal process to "afford[ ] notice and a meaningful opportunity to be heard"). Consequently, the Tribal Court maintains authority to determine the contours of due process because "[a]lthough the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal

courts . . . , 'the guarantees are not identical' [to the Bill of Rights] . . . ." *Nevada v. Hicks,* 533 U.S. 353, 384-85 (2001) (Souter, J., concurring) (citations omitted).[8] *But see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978) ("The Indian Civil Rights Act . . . extends to 'any person' within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution.").

Pertaining to due process, the appellee specifically alleged in his initial pleadings that the Tribal Council directly terminated his employment as Chief of Police on September 7, 2022. Yet, appellee did not learn of the termination until the following day. Pl.-Employee Br., AA-2022-0001, attach. A at 5 (Sept. 26, 2022). Tribal Chairperson, Vern M. Jefferson II, directed a letter to the appellee on September 8, 2022, expressing, in its entirety, as follows:

> The Sac & Fox of the Mississippi in Iowa Tribal Council voted at a validly called meeting of the tribal council to terminate your contract for employment as Meskwaki Nation Police Department Chief and to remove you from that position immediately. The termination is for cause as

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[8] In 2006, this Court generally addressed the requirements of due process. *Calvin Johnson v. Sac & Fox Tr. of the Miss.*, APP-2005-0001 (SF App. Ct. Feb. 3, 2006). Regarding procedural due process, the Court indicated that a deprivation of property could not usually occur without "clear and timely notice to the person in question of the claims against them, a hearing before some type of impartial decision maker, and the ability to reasonably controvert the evidence presented." *Id.* at 3. The Court shall elaborate upon these components below. The *Johnson* Court, however, also significantly addressed matters relating to substantive due process and, at times, conflated the two distinguishable inquiries. *See id.* at 5 (citing 16B Am. Jur. 2d Constitutional Law § 965 (1998) (entitled "Persons and Agencies Bound by Substantive Due Process, Generally)).

The controversy arose from a protracted leadership dispute and reactive passage of a statute, which presumed that former tribal council members improperly retained tribal property. In *Johnson*, an alleged failure to return such property, although never subsequently detailed or itemized, resulted in the imposition of an ongoing civil contempt fine in the amount of $1,000.00 per day. *Id.* at 1, 5-6. Unlike this dispute, the *Johnson* case did not derive from an alleged deprivation of an individual property interest. Mr. Johnson did not maintain a protectable interest in tribal property that an employee must typically return to the employer upon severance of employment. Instead, the *Johnson* Court's focus remained on the legitimacy of the statutory presumption and associated consequences. *Id.* at 7-8. Therefore, while *Johnson* proves instructive in its articulation of some basic principles, its analyses and holding do not directly impact a case concerning procedural due process.

> described in sub-section 3.3 (c), (d), (i), and (j) of the contract.[9] If you have any questions please contact the human resources department.

Appeal Form, AA-2022-0001, attach. J at 42 (Sept. 26, 2022) (footnote added).

Appellee further indicated that he "was not provided an opportunity to be heard before, during, or after the process. . . . [and] was not included in any of the discussions with the Tribal Council to provide information."[10] Pl.-Employee Br., attach. A at 7. Concerning post-deprivation procedure, appellee asserted: "H[uman] R[esources] Director Daniel Campbell stated that they were not accepting [an] appeal because the decision was made by the Tribal Council."[11] Pro Se Pet. Form, AA-2022-0001, attach. A

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[9] The cited contractual subparts appear in a subsection that broadly defines "cause" as: "any material breach of Employee's obligations under this Agreement, or material breach of a duty owed by Employee to Employer arising as a consequence of Employee's actions as a police officer," MNPD Employee Agreement § 3.3(c); "willful misconduct or gross negligence of Employee in connection with the performance of his duties, or failure to comply with any rules, regulations, policies, or directions governing law enforcement or as may be reasonably established from time to time by Employer," *id.* § 3.3(d); "failure to full perform all duties and meet all responsibilities required under the terms of this Agreement, or otherwise incident to the position of a MNPD police officer," *id.* § 3.3(i); or "[a] violation of either the Meskwaki Nation Police Department Policies and Procedures Operations Manual or the Sac and Fox Tribe of the Mississippi in Iowa Employee Handbook." *Id.* § 3.3(j).

[10] As set forth in the underlying dispositive motion:

> By voting on the removal at a validly called Tribal Council meeting, the Tribal Council has made clear that they do not desire nor trust the Petitioner in that position any longer. It would be improper and counter to the Tribal Code to overrule the decision of the Tribal Council to remove the Petitioner as Chief of Police and force them to accept the Petitioner back into said position.

Mot. to Dismiss, AA-2022-0001, at 4 (Oct. 6, 2022); *see also* Tribe's First Br. in Supp. of its Mot. to Dismiss, AA-2022-0001, at 2 (Nov. 21, 2022) ("The Tribe can find no case law where the Court has ruled on the ability or inability of any party other than the Tribal Council to determine who may serve in positions such as Chief of Police . . . ."). The Tribe ultimately contends that "[t]he ability to remove any individual from this important position who is not acting in what the Tribe believes is their best interest is essential to the right to self-determination, self-governance, and sovereignty of the Tribe." *Id.* at 5. Therefore, in this respect, "[t]he Tribe does not concede any breach of contract occurred." Tribe's Br. in Supp. of Notice of Appeal, APP-2023-0002, at 17 n.1 (Jan. 31, 2024).

[11] *But see* Sac & Fox Tr. Employee Handbook § XI(C)(1) ("The Level 1 appeal *must* be filed in writing with the Human Resources Department within five (5) working days of the adverse employment action." (emphasis added)). "[I]f a terminated employee has filed a Level 1 appeal and is not satisfied with the outcome, the employee may be eligible to file a Claim for Reinstatement with the Tribal Court. . . , refer[ring] to Title 9, Article I, Chapter 3 of the Tribal Code . . . ." *Id.* § XI(C)(2)(a).

at 3 (Sept. 26, 2022).[12] Appellant confirmed that the appellee was precluded from receiving administrative review of his claim. Op. & Order, AA-2022-0001, at 6 n.3 (SF Tr. Ct. Feb. 10, 2023).

The Tribal Code permits resort to external authority for guidance in the absence of relevant tribal law. SAC & FOX TR. OF MISS. CODE §§ 1-2101(b), 5-4302(b). The Court regards such authority as possessing persuasive, rather than binding, character depending upon the circumstances. The Court accordingly reviews federal case law for the purpose of elucidating relevant procedural due process principles.

As a preliminary matter, "[a] government employee is entitled to procedural due process only when he [or she] has been deprived of a . . . protected property or liberty interest."[13] *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)). In relation to the former interest, "[a] person must have a legitimate claim of entitlement to his or her employment to have a property interest in it." *Id.* (citing *Roth*, 408 U.S. at 577). And,

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[12] *See* Sac & Fox Tr. R. Civ. P. C-5(b)(ii) (requiring "[a] short, plain statement of the claim showing that the pleader is entitled to relief."); *cf. Doe v. Ellis*, 309 N.W.2d 375, 377 (Wis. Ct. App. 1981) ("[A] plaintiff is bound by the facts alleged in the complaint, not by the legal theory which underlies those facts." (citing *Attoe v. Madison Prof'l Policeman's Assoc.*, 255 N.W.2d 489, 492 (Wis. 1977))); *see also Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, No. 02-C-0553-C, 2003 WL 23272379, at *1 (W.D. Wis. July 14, 2003) ("[P]laintiffs need not plead legal theories in a complaint . . . ." (citing *Bennett v. Schmidt*, 153 F.3d 518 (7th Cir. 1998))), *aff'd*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005).

[13] On June 6, 2019, the plaintiff entered into an employment contract for a term that would "continu[e] until terminated pursuant to the terms contained within th[e] agreement." MNPD Employee Agreement § 2. The Tribe could "not terminate . . . employment without cause and prior notice, unless [it] pa[id] Employee severance." *Id.* § 3.2. Alternatively, if terminated for cause, *id.* § 3.3, such "termination may be appealable . . . as set forth in the Sac & Fox of the Mississippi in Iowa Employee Handbook." *Id.* § 3.6; *see also supra* note 11.

"this interest [can] arise[ ] from contractual . . . limitations on the employer's ability to terminate an employee." *Id.* (citing *Bishop v. Wood*, 426 U.S. 341, 344 (1976)).

"When such a property interest exists, the employee is entitled to a hearing or some related form of due process before being deprived of the interest." *Id.* (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). Of particular concern here, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 899-900 (citing *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976)). The requisite degree of pre-deprivation procedural due process depends on several factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Zinermon v. Burch, 494 U.S. 113, 127 (1990) (quoting *Matthews*, 424 U.S. at 335). The second factor warrants "[a]n assessment of the adequacy of predeprivation procedures[, which] depends on the availability of meaningful postdeprivation procedures." *Winegar*, 20 F.3d at 901 (citing, in part, *Loudermill*, 470 U.S. at 546); *cf. Eldridge-Murphy v. Clark Cnty. Sch. Dist.,* No. 2:13-cv-02175-JCM-GWF, 2015 WL 22416, at *7 (D. Nev. Jan. 15, 2015) ("The minimum due process discussed in Loudermill . . . is not sufficient, however, when the employee has no post-deprivation rights.").

Importantly, "[d]ue process requires that, prior to termination, an employee be given the chance to tell [his or] her side of the story, and that the agency be willing to listen. Otherwise, the 'opportunity to respond' required by *Loudermill* is no opportunity

at all." *Ryan v. Ill. Dep't of Children & Family Servs.*, 185 F.3d 751, 762 (7th Cir. 1999) (quoting *Loudermill*, 470 U.S. at 542); *see also Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987) ("Due process of law does not allow the [government] to deprive an individual of property whe[n it] has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard."); *Matthews v. Harney Cnty., Or., Sch. Dist. No. 4,* 819 F.2d 889, 893-94 (9th Cir. 1987) (citing *Kirksey* proposition with approval); *Wagner v. City of Memphis,* 971 F. Supp. 308, 318-19 (W.D. Tenn. 1997) (confirming that "the concerns and goals of the pre-termination hearing as set forth in *Loudermill* have not been met" when the hearing result is predetermined). In this case, the appellee received no pre-deprivation procedural due process, relating to a pre-termination hearing; was denied meaningful and timely post-deprivation procedural due process; and did not obtain final consideration of his claim until seventeen months after the deprivation occurred.[14]

This Court would typically, but not necessarily, remand an issue unaddressed by the Trial Court in an interim or final decision. SAC & FOX TR. OF MISS. CODE § 5-4403. However, no factual dispute connected to this Court's examination of due process exists, and this Court can assuredly render final determinations of law.[15] In this instance, the

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[14] The extent and manner of due process required in the context of a property deprivation, e.g., termination of employment, predominantly focuses upon the procedure contemporaneously available at the time of the loss. Subsequent judicial review must comport with principles of due process, but mainly as an independent consideration. *See In re Stevinson*, 194 B.R. 509, 512 (D. Col. 1996) ("All that is necessary for a trial procedure to satisfy due process is to provide the parties with fair notice and an opportunity to submit their evidence to an impartial arbiter."). Regardless, the appellant also argues that the appellee is neither entitled to nor should receive judicial review.

[15] As noted above, the appellee clearly identified the absence of procedural protections surrounding his termination, and the appellant essentially confirmed this contention. *Supra* note 9. The Trial Court did not examine this issue since the appellant effectively limited judicial review by filing a motion to dismiss in lieu of an answer. Sac & Fox Tr. R. Civ. P. C-7(c).

Court encounters an egregious violation of procedural due process, which demands granting reinstatement of the appellee. *Id.* § 9-1307(b).

Appellant, by and through its Tribal Council, terminated the employment relationship that existed between itself and the appellee, and, in doing so, breached the written contract. *Id.*; *see also* Pl.-Employee's Br., attach. B at 1. Under the contract, the appellant imposed restrictions upon its ability to terminate the appellee. SAC & FOX TR. OF MISS. CODE § 9-1307(b); *see also supra* note 13. Meaning, the appellee was not an at-will employee. That aside, the appellant did reserve an ability to terminate the appellee without cause, including "prior notice," provided that it "pay[ ] Employee severance."[16] MNPD Employment Agreement § 3.2. This did not occur here, and, if it had, the appellee would not have had a valid claim.

Instead, the appellant deemed that cause existed to terminate the appellee, but did not specify the nature of the cause, choosing to merely reference general contractual language.[17] Moreover, the appellant did not grant the appellee an opportunity to address any concerns it had with the appellee's job performance prior to his termination.[18] Then

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[16] In this regard, severance does not represent "a remedy . . . for a breach of the contract"; it is not the "exclusive remedy" for a "violation of the contract." SAC & FOX TR. OF MISS. CODE § 9-1307(b). The payment of severance serves as an alternative method to conclude an employment relationship. The employer does not violate the contract by undertaking this option, any more than an employee would violate the contract by voluntarily resigning after affording proper notice, i.e., three weeks' notification. MNPD Employment Agreement § 3.5.

[17] The appellee was informed of particular misconduct in relation to a subsequently rescinded demotion. Whether the Tribal Council based its action, in whole or in part, on such reasons remains entirely unknown given the deficient notice and lack of a pre-termination hearing. *See, e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 929 (1997) ("[P]retermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his [or her] side of the story." (citing *Loudermill*, 470 U.S. at 546)).

[18] Although awkward and unpleasant, the appellant could have largely avoided this result by simply giving the appellee an ability to express his perspective prior to rendering a final termination decision.

afterward, the appellant foreclosed the appellee's ability to seek administrative review, although contractually assured of such recourse. In sum, the appellee received little to no pre-deprivation procedural due process and any post-deprivation protection, otherwise generally available to employees, was severely restricted. Consequently, the appellant violated the terms of the contract,[19] and the appellee must be granted the available statutory remedy.

CONCLUSION

Tribal sovereignty includes the inherent authority of a tribe to govern itself and a cornerstore of tribal sovereignty is ensuring its laws are upheld. Here, an employee was not provided the basic tenets of due process, which are notice and an opportunity to be heard. For the foregoing reasons, the Court affirms the lower court's decision denying the motion to dismiss. Furthermore, the Court determines appellee was denied due process and shall be reinstated to the exact or an equivalent position in accordance with the statutory remedy.[20] **AFFIRMED. JUDGMENT FOR APPELLEE.**

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[19] As explained by the Ninth Circuit Court of Appeals: "[C]ase law . . . recognizes the "fundamental principle that property interests protected by the due process [clause] may arise from *contract* as well as from the language of a statute." *San Bernardino Physicians' Servs. Med. Grp., Inc. v. San Bernardino Cty.*, 825 F.2d 1404, 1408 (9th Cir. 1987) (citation omitted). Consequently, a due process analysis proves integral whenever a tribal government, i.e., public, employer purportedly terminates an employee for cause.

[20] Section 9-1307 states, "Notwithstanding any other provisions of the laws of the Tribe, an employee is eligible to file a claim for reinstatement of employment with the Tribe following termination . . . if one of more of the following circumstances have occurred." The use of the word "employment" presumes the terminated employee shall be reinstated to the terminated position. However, it is likely the position is filled with a different employee, rendering an unfair result should another individual lose their employment. The EMPLOYEE RIGHTS CODE does not address this issue further, but the Employee Handbook addresses a somewhat similar situation when an employee returns to their employment upon expiration of Family and Medical Leave, stating: "Employees who take Family and Medical Leave are entitled to return to the position they held before taking leave. If business necessity during the leave period required a position to be refilled, the employee will be given a similar position with the same pay and benefits." Sac & Fox Tr. Employee Handbook § VII(D)(2)(e).

IT IS SO ORDERED. Dated this 13th of June 2024.

Hon. Tricia A. Zunker, Chief Justice
Meskwaki Court of Appeals

Hon. Chad M. Gordon, Associate Justice Pro Tempore
Meskwaki Court of Appeals

Hon. Todd R. Matha, Associate Justice Pro Tempore
Meskwaki Court of Appeals