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Amy M. Sneirson
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Memo

Date: August 20, 2012

To: Amy M. Sneirson, Executive Director

From: John P. Gause, Commission Counsel

Re: E12-0207, Elizabeth Rassi v. Federal Program Integrators, LLC

Respondent has requested administrative dismissal by the Executive Director for lack of jurisdiction pursuant to Procedural Rule § 2.02(H)(1). *See* 94-348 C.M.R. ch. 2, § 2.02(H)(1). For the following reasons, I recommend that the complaint be administratively dismissed for that reason.

The complaint alleges a violation of the Maine Human Rights Act ("MHRA"), 5 M.R.S. §§ 4551, et seq., in that Federal Program Integrators, LLC ("FPI"), a federal defense contractor, subjected Complainant, its former Director of Accounting, to retaliation and harassment because of activity protected by the Whistleblowers' Protection Act, 26 M.R.S. §§ 831, et seq. ("WPA"), and because of Complainant's race or color (non-Native). Complainant alleges that she engaged in WPA-protected activity by complaining to FPI officials on numerous occasions that FPI was illegally billing the U.S. Government. In addition, the complaint alleges that Complainant's employment with FPI as was terminated because of Complainant's WPA-protected activity, because

of her non-Native race or color, and in retaliation for her complaining about the unlawful harassment and retaliation.

FPI asserts that the Commission lacks jurisdiction to investigate this complaint because Complainant's employment with FPI was an "internal tribal matter" of the Penobscot Indian Nation under the Act to Implement the Maine Indian Claims Settlement, 30 M.R.S. §§ 6201, et seq. ("Implementing Act"). The Law Court has identified the following questions to be answered when a state law is asserted against the Tribes:

> (1) to what entities does the statute at issue apply; (2) are the Tribes acting in the capacity of such entities; (3) if so, does the Maine Implementing Act expressly prohibit the application of the statute to the Tribes generally; (4) if not, does the Maine Implementing Act prohibit or limit the application of the statute in the circumstances before the court.

Great Northern Paper, Inc. v. Penobscot Nation, 770 A.2d 574, 587 (Me. 2001).

Here, the complaint alleges a violation of the MHRA, which prohibits "unlawful employment discrimination" by an "employer." 5 M.R.S. § 4572(1). "Employer" is defined, in part, as "any person in this State employing any number of employees, whatever the place of employment of the employees, and any person outside this State employing any number of employees whose usual place of employment is in this State. . . ." 5 M.R.S. § 4553(4) (emphasis added). "'Person' includes one or more individuals, partnerships, associations, organizations, corporations, municipal corporations, legal representatives, trustees, trustees in bankruptcy, receivers and other legal representatives, and includes the State and all agencies thereof." 5 M.R.S. § 4553(7). FPI, as a limited liability company, thus falls within the definitional coverage of the MHRA. The Implementing Act, does not expressly prohibit the application of the MHRA to the

Penobscot Nation. Therefore, the question becomes whether the Implementing Act prohibits or limits the application of the MHRA in the circumstances presented. *See Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d at 587.

The "internal tribal matters" of the "Penobscot Nation" are not subject to regulation by the state. 30 M.R.S. § 6206(1).[1] The Implementing Act describes "internal tribal matter" nonexclusively as "including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." 30 M.R.S. § 6206(1). *See Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me. 1983) (list not exclusive). The Law Court has interpreted this list under the *ejusdem generis* rule, meaning "a general term followed by a list of illustrations is ordinarily assumed to embrace only concepts similar to those illustrations." *Id.* at 489 (finding that operating paid beano games for members of the general public was not "embraced within the general term"). In addition, the Law Court has summarized the Implementing Act's relevant legislative history as follows:

> At the time the settlement acts were under consideration, the Attorney General of the State of Maine understood the "internal tribal affairs" exception to have been drafted "in recognition of [the Indians'] unique cultural or historical interest." S.Rep. No. 96-957, 96th Cong., 2d Sess. 50

[1] Complainant does not dispute that the activities of a separately organized legal entity from the Penobscot Nation may fall within the "internal tribal matters" exception in 30 M.R.S. § 6206(1). *See Francis v. Pleasant Point Passamaquoddy Housing Authority*, 740 A.2d 575, 577-578 (Me. 1999). Here, the close relationship between FPI and the Penobscot Nation makes the "internal tribal matters" exception applicable. *See Francis v. Dana*-Cummings, 962 A.2d 944, 949, n.5 (Me. 2008) (applying the exception to the Pleasant Point Passamaquoddy Housing Authority and its Executive Director). FPI is owned by Penobscot Indian Nation Enterprises ("PINE"). PINE is a holding company chartered pursuant to the Indian Reorganization Act, 25 U.S.C. § 477 ("IRA"). The IRA is designed to encourage non-Indian businesses to engage in commerce with Indian tribes by, in part, allowing the incorporation of a tribal business so that tribes are on an equal footing with other corporations. *See Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 920 (6th Cir. 2009) (citing *Parker Drilling Co. v. Metlakatla Indian Cmty.,* 451 F.Supp. 1127, 1137 (D.Alaska 1978)). The "incorporated tribe" that is created through the IRA, while a separate legal entity, may be considered "an arm of the tribe" for purposes of tribal sovereign immunity. *Id.* at 921.

> (1980). The House Report stated that the settlement acts would protect the Indians against "acculturation" "by providing for tribal governments ... which control all such internal matters." H.Rep. No. 96-1353, 96th Cong., 2d Sess. 17 (1980), U.S.Code Cong. & Admin.News, p. 3793. Counsel to the Penobscot Nation told a Maine legislative committee that he understood the settlement acts to accommodate "the Tribe's legitimate interest in managing their internal affairs, in exercising tribal powers in certain areas of particular cultural importance ...." Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 25 (1980). And the committee itself reported that the exception to full state jurisdiction over Indians was provided "in recognition of traditional Indian practices." Report of the Joint Select Committee on Indian Land Claims 1 (1980). *See also* Transcript of March 28, 1980 Public Hearing before the Joint Select Committee on Indian Land Claims, 7 (statement of Sen. Collins: "there are some exceptions [to full state jurisdiction] which recognize historical Indian concerns").

Id. at 490.

The one reported decision to address whether employment by the Penobscot Nation is an "internal tribal matter" is *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709-710 (1st Cir. 1999). The United States Court of Appeals for the First Circuit held in *Fellencer* that the Penobscot Nation's employment of a community health nurse, who alleged that she was fired because of her race and national origin, was an "internal tribal matter" not subject to the MHRA. *Id.* at 713. In so holding, the First Circuit considered essentially five factors: (1) the effect on non-tribal members; (2) whether the issue related to lands acquired by the Penobscot Nation with federal funds or the Nation's ability to regulate its natural resources; (3) the interest of the State of Maine; (4) prior legal understandings; and (5) the nature of the employment position involved. *See id.* at 709-713.[2]

In finding an "internal tribal matter," the First Circuit noted that the community health nurse was the only non-tribal member who was immediately impacted by her

[2] The Law Court utilizes these factors as well. *See Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574, 588-589 (Me. 2001).

termination; although lands and natural resources were not at issue, the case involved the Nation's human resources and its judgment that a different community health nurse would better serve the health of tribal members; the State of Maine was not attempting to apply its law to the Nation's employment decision; the statutory provisions in Title VII of the Civil Rights Act of 1964 and the Indian Civil Rights Act of 1968 reflect Congress' historical understanding that employment discrimination claims against Indian tribes should be heard in Indian courts; and federal law included a preference that the community health nurse position would be filled by Indians. *See id.* at 710-713.

In 1984, the Commission sought an opinion from the Maine Attorney General whether the Penobscot Nation's employment of its "Director of Employment" was within the Commission's jurisdiction. The Attorney General responded that "the employment decisions of the Penobscot Nation, when acting in its capacity as a tribal governmental employer, are not subject to regulation by the State, and, therefore, do not fall within the jurisdiction of the Maine Human Rights Commission." Op. Atty. Gen. 84-22, 1984 WL 248968 (Me. A.G.). The Attorney General stated:

> It is this Department's Opinion that the authority of the Penobscot Nation to control "tribal government" free of regulation by the State, necessarily includes within it the power to decide who will be an employee of the tribal government. It seems obvious that it is an integral component of tribal self-government to determine who will become an employee within the governmental structure of the Penobscot Nation. The legislative mandate that State regulation is not to extend to matters of tribal government would become illusory if the Penobscot Nation, when acting in its capacity as a tribal governmental employer, is subject to the jurisdiction of the Maine Human Rights Commission. Subjecting employment decisions of the Penobscot Nation to the jurisdiction of the Maine Human Rights Commission would create a serious potential of State interference with the internal affairs of the tribal government, a result clearly not intended by the Maine Indian Settlement Act.

Id. at 2

Following the First Circuit's decision in *Fellencer* and the Attorney General's opinion, the Commission has consistently—but not automatically—dismissed complaints alleging employment discrimination by the Penobscot Nation and its subsidiaries. *See, e.g.*, Executive Director decisions attached to FPI's June 13, 2012 request for administrative dismissal.

Here, viewing the complaint in light of the *Fellencer* and *Stilphen* considerations, Complainant's employment by FPI was an "internal tribal matter." *First*, Complainant asserts that she was the only non-Native employee of FPI, and there is no indication that non-Native individuals were impacted by her employment. *Second*, the case involves FPI's human resources and its judgment that a different Director of Accounting would better serve its interests. Allowing FPI to regulate its own employees recognizes its legitimate interest in managing its internal affairs and protects against the acculturation of the Tribe. *Cf. Penobscot Nation v. Stilphen*, 461 A.2d at 489 (citing legislative history). *Third*, although the prevention of WPA retaliation and unlawful MHRA discrimination are certainly of strong interest to the State of Maine, the Commission has consistently recognized that employment by the Penobscot Nation is an "internal tribal matter." Moreover, although Complainant "blew the whistle" concerning FPI's alleged illegal conduct vis-à-vis the *federal* government, she does not identify additional *State* interests at stake other than the alleged MHRA/WPA violations, such as, for example, if she had reported illegal billing practices relating to State funds. *Fourth*, in terms of prior legal understandings, the conclusion here is consistent with the Commission's longstanding view, as well as *Fellencer* and the 1984 Attorney General's opinion.

With respect to the fifth factor—the particular employment position at issue—this case is distinguishable from *Fellencer*, where federal law allowed a preference for Indians for the community health nurse position. *See Id.* at 710-713. The First Circuit found this preference significant because it "distinguishes the Nation's community nurse position from any position in a regular municipal government. Clearly, Maine municipalities cannot employ similar preferences." *Penobscot Nation v. Fellencer*, 164 F.3d at 713 (citation omitted). Here, by contrast, as is required by its participation in the Small Business Administration Section 8(a) Program, FPI has included in its Articles of Organization a waiver of sovereign immunity and a "sue and be sued" provision for all matters relating to the Section 8(a) program. FPI is thus federally prohibited from engaging in certain employment discrimination, including on the grounds of race, color, or national origin. *See* 42 U.S.C. § 2000d; 13 C.F.R. § 112.4. In fact, FPI appears to have followed this mandate by adopting personnel polices that prohibit these and other forms of employment discrimination; expressing a commitment to compliance with the federal Americans with Disabilities Act; and stating that harassment "violates Federal Law" if it involves discriminatory treatment based on various protected classes.

The fact that FPI has voluntarily surrendered some of its otherwise exclusive control over its employment relationships by participating in the Section 8(a) Program, however, does not mean that it has surrendered entirely the internal nature of those relationships. FPI has only assented to limited external control of those relationships by

the federal government; it has not consented to any control over them by the State.[3] FPI's request for dismissal here is an example of FPI continuing to assert the "internal" nature of its employment relationships in relation to the State.

The fact that FPI is a limited liability company, generally subject to Maine law, also does not mean that its employment relationships cannot be "internal tribal matters." FPI's Articles of Organization establish it as a domestic limited liability company under 31 M.R.S., Chapter 21, the Maine Limited Liability Company Act ("MLLCA"), which provides that "[t]he law of this State governs . . . [t]he internal affairs of a limited liability company." 31 M.R.S. § 1506(1) (emphasis added). This does not mean that FPI's employment relationships are subject to the MHRA. Rather, reading the MLLCA and the Implementing Act together, the internal affairs of an LLC are subject to State law *other than* the "internal tribal matters" of the Penobscot Nation and the Passamaquoddy Tribe. *Cf. Montana v. Blackfeet Tribe of Indians*,105 S.Ct. 2399, 2403 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

Because the allegations in the complaint involve an "internal tribal matter," the complaint should be administratively dismissed for lack of jurisdiction.

[3]In fact, FPI could never make an "internal tribal matter" subject to State law under the Implementing Act. An "internal tribal matter" deprives a court (and an administrative agency) of subject matter jurisdiction. *See Francis v. Dana-Cummings*, 2008 ME 184, ¶ 12, 962 A.2d 944, 947 (Me. 2008). Subject matter jurisdiction cannot be conferred simply by the consent of a party. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,102 S.Ct. 2099, 2104 (1982).