

IN THE HO-CHUNK NATION SUPREME COURT

FILED  
IN THE HO-CHUNK NATION  
TRIAL/SUPREME COURT

AUG 04 2008

*ME*  
Clerk of Court/Assistant

GALE S. WHITE,

Appellant,

DECISION

v.

JEAN ANN DAY,

Appellee.

Case No.: SU 08-02

Trial Ct.: CV 07-54

This case comes before the Ho-Chunk Nation Supreme Court on appeal of the Trial Court's *Order (Affirming)* in CV 07-54, dated January 14, 2008. Oral arguments were heard on June 21, 2008, by Chief Justice Mary Jo Hunter, Associate Justice Dennis Funmaker, and Associate Justice Joan Greendeer-Lee. The appellant appeared *pro se*; appellee was represented by attorney Brian Stevens of the HCN Department of Justice.

**FACTS AND PROCEDURAL HISTORY**

The appellant, Gale S. White, is an enrolled member of the Ho-Chunk Nation, and was formerly employed by the HCN Department of Health & Social Services as the Domestic Abuse Advocate. Jean Ann Day is the Division Administrator of Social Services and Ms. White's former supervisor.

Ms. White filed a grievance with the HCN Department of Personnel on January 8, 2007, alleging discrimination and harassment from Ms. Day. Also on January 8, 2007, Ms. White asked for a leave of absence without pay. Despite not receiving approval for this request, Ms. White took a leave of absence. Ms. White was terminated from her

employment on January 17, 2007, for job abandonment under the EMPLOYMENT RELATIONS ACT (ERA)<sup>1</sup>.

The Grievance Review Board (GRB) conducted a hearing on May 15, 2007, in response to Ms. White's grievance alleging discrimination and harassment from Ms. Day. The GRB issued a *Decision* denying Ms. White's requested relief for the alleged harassment and discrimination, finding no evidence to support either claim. Ms. White did not independently grieve her employment termination in a separate action before the GRB.

Ms. White filed her *Petition for Administrative Review* with the Trial Court on July 13, 2007, arguing that her employment termination violated her due process rights. Because neither party requested oral argument, the Trial Court determined the matter on the documentary materials. The Trial Court denied Ms. White's request for relief and affirmed the GRB's *Decision*, finding that Ms. White had failed to exhaust her administrative remedies regarding her termination before appealing the termination to the Trial Court.

Ms. White filed a *Notice of Appeal* with this Court on March 14, 2008, again arguing that her employment termination violated her due process rights. This Court heard oral arguments on the matter on June 21, 2008.

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<sup>1</sup> ERA 6 HCC § 5.29(e) states that "[a]n employee who is absent from his or her assigned work location without authorized leave for three (3) consecutive days or five (5) days in a twelve (12) month period shall be considered absent without authorized leave, and as having abandoned his or her employment. The employee shall be automatically terminated, unless the employee can provide the Nation with acceptable and verifiable evidence of extenuating circumstances justifying the absence(s)."

## ISSUE PRESENTED

1. Did the Trial Court err in affirming the GRB *Decision* based on Ms. White's failure to exhaust her administrative remedies?

## DECISION

Part of the Trial Court's *Order (Affirming)* was based on its interpretation of the administrative exhaustion requirement of the ERA, which is law. This Court reviews questions of law and Constitutional interpretation *de novo*. *Robert A. Mudd v. Ho-Chunk Nation Legislature*, SU 03-02 (HCN S. Ct., Apr. 8, 2003); *Louella Kelty v. Jonette Pettibone, et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999). Any discretionary judgments of the Trial Court or questions of fact will be reviewed under the "abuse of discretion" standard. *Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., March 25, 1997); *Rae Ann Garcia v. Joan Greendeer-Lee, et al.*, SU 03-01 (HCN S. Ct., May 2, 2003); *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8, 2003). Under this highly deferential standard, this Court will uphold the Trial Court's findings "absent a showing that the Trial Court somehow failed to make a necessary finding, ignored the great weight of the evidence, or otherwise abused it's [*sic*] discretion in making findings of fact." *Smith* at 2. To avoid abusing its discretion, the Trial Court must "properly consider all the factors in making a decision to do or not to do an act." *Garcia* at 4.

### **I. The Trial Court erred in affirming the GRB Decision.**

Ms. White did not appeal the GRB *Decision* to the Trial Court. Rather, Ms. White clearly requested review only of her termination, as the Trial Court itself found.

*Order (Affirming)* at 9, Finding of Fact ¶ 8. The Trial Court also seems to acknowledge that the GRB *Decision* represents a different cause of action than the one being brought for administrative review; the *Decision* related to Ms. White's harassment and discrimination claims, while the administrative review was brought to challenge her termination. See *Order (Affirming)* at 13. It was thus error for the Trial Court to affirm the GRB *Decision*, which was not brought before it, and which the Trial Court believed represented an entirely different cause of action from the cause actually before it for review.<sup>2</sup>

Even if the GRB *Decision* had been brought to the Trial Court for administrative review, the Trial Court still would have erred in affirming it, because the Court failed to review the GRB *Decision* under the appropriate standard of review. In reviewing an agency decision made under the ERA, the Trial Court may only set aside or modify such a decision if it was "arbitrary and capricious." HCN R. Civ. P. 63(I); *See also* ERA, 6 HCC § 5.35(e). The Trial Court itself acknowledged that it could not perform the required arbitrary and capricious review. See *Order (Affirming)* at 13. It was thus error for the Trial Court to affirm the GRB *Decision* without reviewing it under the arbitrary and capricious standard.

In addition, while the Trial Court explained that it could not grant Ms. White her requested relief because she failed to exhaust her administrative remedies,<sup>3</sup> there is no

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<sup>2</sup> The confusion of the Courts over this and other issues was compounded by the fact that Ms. White appeared *pro se*. Ms. White attempted to retain counsel through the Judicare program, but was unable to find an attorney on Judicare's referral list willing to take on an HCN personnel matter.

<sup>3</sup> Curiously, only three sentences of the Trial Court's 15-page *Order* were devoted to explaining that Ms. White's requested relief was denied because of her failure to exhaust administrative remedies. See *Order (Affirming)* at 13. In contrast, the Trial Court took a full four pages to explain the arbitrary and capricious standard of review for agency decisions, which the Court then admitted it could not use in reviewing this case. *Id.* at 9-13.

explanation as to why the seemingly-unrelated GRB *Decision* about her harassment and discrimination claims must therefore be affirmed. In fact, the only mention of the Trial Court's decision to affirm the GRB *Decision* appears in the very first paragraph of the *Order*, in which the Court states that it "finds that the petitioner failed to exhaust her administrative remedies and accordingly affirms the agency action." *Order (Affirming)* at 1. Without knowing the reasoning behind this action, this Court is unable to determine whether or not the Trial Court properly considered all of the relevant factors in making its decision to affirm. See *Garcia* at 4.

## **II. The Trial Court erred in failing to consider whether Ms. White's due process rights were violated.**

Even if it is true that Ms. White failed to exhaust her administrative remedies,<sup>4</sup> the Trial Court erred in basing its refusal of relief solely on this point. Under *Kenneth Lee Twin v. Toni McDonald, et al.*, SU 05-09 (HCN S. Ct., July 3, 2006), the Trial Court should have first considered whether Ms. White was afforded due process.

In *Twin*, Nation employee Mr. Twin did not timely return from his Family Medical Leave. The Department of Personnel sent Mr. Twin a letter, allowing him two days to return to work or be deemed to have voluntarily resigned. Mr. Twin did not receive this letter until two days *after* the deadline had expired, because it had been sent to the wrong address. Mr. Twin's employment was terminated, having been deemed to

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<sup>4</sup> It is not entirely clear from the record that Ms. White failed to exhaust her administrative remedies regarding her termination. The GRB *Hearing* and *Decision* occurred after Ms. White was terminated, and the *Administrative Record* contains documents relating to her termination. Without additional evidence, such as a transcript of the GRB *Hearing*, it is difficult to assume that the issue of Ms. White's termination was not discussed at the GRB *Hearing*. Clearly, Ms. White is under the impression that she grieved her termination before the GRB. On remand, the Trial Court needs to explain how it weighed the varying facts in determining whether or not Ms. White failed to exhaust her administrative remedies and, if necessary, to make additional findings of fact that would aid the Court in making this determination.

have voluntarily resigned, and he brought his termination to the Trial Court for review. The Trial Court ultimately granted the Nation's *Motion to Dismiss*, finding that Mr. Twin had failed to exhaust his administrative remedies.

This Court reversed the Trial Court's dismissal, finding that the Trial Court should have first determined whether Mr. Twin's due process rights were violated. Because Nation employees have a property interest in their employment,<sup>5</sup> the Nation cannot deprive them of this property without due process. *See* HCN CONSTITUTION, Art. X, § 1(A)(8). Due process requires that an employee receive timely and adequate notice of a change in their employment status and an opportunity to be heard *before* they are terminated. *Louella Kelty v. Jonette Pettibone, et al.*, SU 99-02 at 2-3 (HCN S. Ct., July 27, 1999) ("notice is a required aspect of due process"); *Debra Knudson v. Ho-Chunk Nation Treasury Dep't*, SU 98-01 at 3-4 (HCN S. Ct., Dec. 1, 1998) (disapproved that appellant "was not afforded an opportunity to confront or answer allegations made against her" prior to termination).

In *Twin*, this Court found that when these due process requirements are violated, the Nation cannot use an employee's failure to exhaust administrative remedies as a defense. Because Mr. Twin did not receive advance notice that he would be terminated, he did not have an opportunity to be heard prior to his termination, which was a violation of his due process rights. The late notice also effectively barred Mr. Twin from accessing the post-termination Administrative Review Process, since he was not given adequate time to prepare his case within the five-day limit imposed by the ERA.<sup>6</sup> This Court held

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<sup>5</sup> *Lonnie Simplot, et al. v. HCN Dept. of Health*, CV 95-26, -27, 96-05 (HCN Tr. Ct., Aug. 29, 1996).

<sup>6</sup> ERA 6 HCC § 5.34(d) states that "[a]n employee must request a hearing within five (5) business days of the date the disciplinary action was taken."

that Mr. Twin should not have been required to exhaust his administrative remedies, especially when he was effectively barred from doing so by the violation of his due process rights. This Court remanded the case to allow Mr. Twin to initiate the Administrative Review Process within ten days.

In the instant case, as in *Twin*, we find that the Trial Court erred in failing to consider whether Ms. White was denied due process. If Ms. White's due process rights were violated, then her failure to exhaust administrative remedies would be irrelevant. Ordinarily, this Court would review the issue of whether due process had been violated *de novo*, as we did in *Twin*. However, because the Trial Court engaged in so little fact finding in the case below, the record as provided is inadequate for this Court to make such a determination.<sup>7</sup> On remand, the Trial Court should engage in the necessary fact finding to determine whether Ms. White was afforded due process prior to her termination.

### **III. It was improper for the Trial Court to make a determination on the merits of Ms. White's termination.**

Finally, this Court wishes to note its concern over the Trial Court's dicta, found near the end of its *Order*, which states that, "[e]ven if properly presented, the Court would still have ruled against the petitioner." *Order (Affirming)*, at 13. The Trial Court based this conclusion solely on Ms. White's purported failure to meet the ERA's procedural requirements. However, any determination of the merits of a case, even in

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<sup>7</sup> The *Administrative Record* makes up nearly the whole of the record provided to this Court. If, as the Trial Court asserts, the GRB *Decision* represented a different cause of action from the termination now being appealed, then it would follow that the *Administrative Record* would pertain only to that cause of action, and would thus be inadequate regarding Ms. White's termination and the due process afforded to her.

dicta, requires a balanced analysis of all the facts, under the correct standard of review. In making its determination on the merits of Ms. White's termination, the Trial Court failed to consider whether Ms. White was afforded her constitutionally mandated due process rights, and failed to explain what standard of review it applied in its balancing of the relevant facts.

The danger of making such comments is that, if the Trial Court finds on remand that it may properly proceed to the merits of the case, the Trial Court has given the impression that it has pre-judged the matter, without having heard or weighed all of the evidence. In the future, should the Trial Court feel the need to comment in dicta on the merits of a case, we urge the Court to do so only after a balanced consideration of all the relevant evidence under the correct standard of review.

### CONCLUSION

For the foregoing reasons, we find that the Trial Court erred in affirming the GRB *Decision* based on the assumption that Ms. White failed to exhaust her administrative remedies. This Court therefore reverses the Trial Court's *Order (Affirming)* and remands the matter to the Trial Court for further proceedings consistent with this opinion.

**EGI HESKEKJENET.** Dated this 4<sup>th</sup> day of August, 2008.

Mary Jo B. Hunter

Hon. Mary Jo Hunter  
HCN Supreme Court Chief Justice

Dennis M. Funmaker

Hon. Dennis M. Funmaker  
HCN Supreme Court Associate Justice

Joan Greendeer-Lee

Hon. Joan Greendeer-Lee  
HCN Supreme Court Associate Justice