

APR 07 2014

[Signature]
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION TRIAL COURT

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**Mary Thunder, Jo Deen Lowe, And Ho-
Chunk Nation Judiciary Branch,
Petitioners,**

**v.
William Collins,
Respondent**

and

**Ho-Chunk Nation Grievance Review
Board, et. al,
Intervener**

Case No.: CV 13-12

DECISION AND ORDER

The petitioners are the Supervisor of Staff of the Ho-Chunk Nation Judiciary and the Chief Judge of Ho-Chunk Nation Trial Court. They were the supervisors of William Collins, the Bailiff/Process Server for the Ho-Chunk Nation Judiciary. The Ho-Chunk Nation Grievance Review Board (GRB) is an administrative entity of the Ho-Chunk Nation (HCN) Department of Personnel. The Petitioners terminated the employment of Mr. Collins. He sought review of his termination to the Grievance Review Board under the HCN's Employment Relations Act. The GRB held that the Petitioners failed to follow the Employment Relations Act and overturned the termination of Mr. Collins. The Ho-Chunk Nation Judiciary appealed. The Chief Judge and the Associate Judge of the Trial Court recused themselves. The Ho-Chunk Nation Legislature appointed the undersigned as *pro tempore* judge for the purposes of this case. After briefing by all parties oral argument was held on March 12, 2014. As set forth below this Court affirms the

1 decision of the Grievance Review Board and remands the matter to the Board to determine the
2 amount of back pay.

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5 **I.**

6 **STANDARD OF REVIEW**

7 This Court has jurisdiction to review the decision of the GRB under the Ho-Chunk
8 Nation's Employee Relations Act ERA 6 HCC 5 § 35 (e) which provides in part:

9 The Trial Court shall not exercise *de novo* review of Board decisions. The Trial Court
10 may only set aside or modify a Board decision if it was arbitrary and capricious.

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13 **II.**

14 **STATEMENT OF FACTS**

15 Briefly summarized the Ho-Chunk Nation Grievance Review Board determined that the
16 Ho-Chunk Nation Judiciary had employed William Collins as a bailiff/process server since
17 March 14, 2011. (Exhibit 9, GRB Hearing, June 25, 2013) According to the job description for
18 his position a "valid drivers license, dependable transportation and proper insurance may be
19 required." (Exhibit 16, GRB Hearing, June 25, 2013) On December 11, 2012 Mr. Collins was
20 convicted of Operating a Motor Vehicle While Intoxicated (2nd Offense) in the Circuit Court of
21 Jackson County. Among the other penalties Mr. Collin's drivers license was suspended for one
22 year. Mr. Collins was able to obtain an occupational license. Part of Mr. Collins' job duties
23 was travel in the State of Wisconsin to serve process. He could operate a vehicle owned by the
24 Ho-Chunk Nation when he was traveling on Ho-Chunk Nation business. On May 4, 2013 a
25 Jackson County Deputy Sheriff arrested Mr. Collins for operating after revocation and failure to
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1 install an ignition interlock device. The failure to install charge was dismissed because an
2 occupational license holder does not need an interlock device. Mr. Collins never informed his
3 supervisor, HCN Judiciary or the HCN Transportation Department of his 2012 conviction or
4 2013 arrest.
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6 On May 9, 2013 Mr. Collin's supervisor learned of his arrest and prior OWI conviction.
7 On May 13, 2013 Chief Judge Lowe and Mary Thunder conducted the due process hearing in
8 accordance with the HCN Employment Relations Act. On May 17, 2013 Mr. Collins was
9 terminated from his position as bailiff/process server. (Exhibit 1, GRB Hearing, June 23, 2013).
10 Mr. Collins filed a timely grievance notice. On June 23, 2013 the Grievance Review Board
11 conducted the hearing. Over 150 pages of documents were submitted to the GRB. In addition
12 Clerk of Courts Mary Thunder, Chief Judge Lowe and Mr. Collins testified. In a twelve-page
13 decision released on July 1, 2013 the Grievance Review Board reversed the decision to terminate
14 Mr. Collins and ordered that Executive Director of Personnel reassign Mr. Collins to a
15 comparable position. In addition the HCN was to pay Mr. Collins his lost wages from May 14,
16 2013 (the effective date of his termination) to June 25, 2013 (the date of the hearing), clear his
17 personnel file of the termination paperwork, award bridge service and reinstate his insurance. A
18 majority of the GRB held that the petitioners failed to follow the 6 ERA HCC § 5 (31) (a) with
19 respect to progressive discipline. The Petitioners learned of Mr. Collins arrest on May 9 and by
20 May 13 had conducted a due process hearing and made the decision to terminate. A majority of
21 the GRB held that Mr. Collins had met his burden of proof and reversed his termination because
22 Chief Judge Lowe and Clerk of Courts Thunder did not consider progressive discipline in
23 making their decision to terminate.
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III.

ARBITRARY AND CAPRICIOUS

Section 35 (e) of the Employee Relations Act as cited above states that this Court may set aside or modify a Grievance Review Board's decision only if it is arbitrary and capricious. The fact that a party may disagree with a decision does not automatically make the decision arbitrary and capricious. This Court has reviewed the documents submitted to the GRB including the transcripts of the due process hearing of May 13, 2014, the recording of the June 23, 2014 hearing and the GRB decision of July 1, 2014. The petitioner's claim that the GRB's decision was flawed in determining 1) that progressive discipline was required before Mr. Collins could be terminated, 2) the GRB failed to make findings of fact to support their decision, and 3) a hearing officer failed to recuse herself. None of these claims support a reversal of the GRB decision.

IV.

THE GRB DECISION IS SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND THE FINDINGS OF FACT SUPPORTS ITS DECISION.

The basic finding that the GRB made was that the decision to terminate was flawed because the petitioners did not use progressive discipline as a condition of termination as required by the ERA. At pages 9 and 10 of the Decision the GRB devotes over 50 lines of single-spaced text to analyze of the facts of Mr. Collins' termination. The GRB weighed the claims of the petitioners and came to the conclusion that there were less onerous remedies

1 available to the petitioners before termination. At the due process hearing on May 13, 2013, Mr.
2 Collins asked the petitioners to consider suspending him, and upon reinstatement, be reassigned,
3 transferred or demoted. It appears that the petitioners considered Mr. Collins conduct to be so
4 egregious that it warranted immediate termination. Mr. Collins was arrested on Saturday, May 4,
5 2013, Clerk of Courts Thunder informed Chief Trial Court Judge Lowe on Thursday, May 9,
6 2013, and the due process hearing was held on Monday, May 13, 2013. Mr. Collins was
7 terminated effective May 14, 2013. There appears to be no consideration of any action other
8 than termination. The ERA provides that "discipline with normally be progressive". 6 HCC § 5
9 (31) (a).

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12 The petitioners argue that the GRB improperly shifted the burden of proof to them The
13 ERA requires that progressive discipline is an element that the employer must consider in
14 making the decision to terminate. The GRB did not shift the burden of proof. The petitioners
15 failed to establish a necessary element of termination. While not denominated a specific finding
16 of fact in the Decision, it is clear that the GRB found that the failure of the petitioner to afford
17 Mr. Collins progressive discipline was an error requiring the reinstatement. The weight of the
18 evidence supports this conclusion. A majority of the GRB determined that Mr. Collins' violation
19 of HCN fleet ordinance and his failure to notify his employers of his 2012 OWI conviction and
20 2013 arrest were not severe enough to justify immediate termination.

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23 Moreover, the GRB analyzed Mr. Collins violation of the rules governing the operation
24 of a tribal vehicle. The HCN Fleet Ordinance provides that persons driving under an
25 occupational license cannot operate a tribally owned vehicle. Mr. Collins testified he had never
26 been informed he could not operate a tribally owned vehicle on an occupational license. The
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1 GRB analyzed the facts of the lack of occupational license and concluded there were less drastic
2 options available to the Petitioners other than termination.

3 In reviewing the GRB decision it is clear that the Board considered all of evidence
4 presented at the hearing. The question that the Board had to answer was whether Mr. Collins'
5 rules violations warranted immediate termination or were there other remedies available. A
6 majority of the board determined that Mr. Collins should not have been terminated. The Ho-
7 Chunk Nation Supreme Court said:

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9 As a reviewing Court in administrative review cases, the Trial Court's
10 only concern should be whether there is substantial evidence in the record
11 to support the agency's decision and whether the agency's decision was
12 reasonable in light of *all* the evidence available to the agency.

13 *Williams v. HCN IRC SU 08-01 (HCN S.Ct. Oct. 29, 2008) at 15-16.* There was substantial
14 evidence to support the decision and the decision was reasonable in light of all the evidence
15 available to the agency.

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17 V.

18 **COMPOSITION OF THE GREIVANCE REVIEW BOARD**
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21 Petitioners claim that the Grievance Review Board was not impartial and objective
22 because one of the members of the GRB had a conflict of interest. After the GRB hearing the
23 Petitioners submitted an affidavit from Clerk of Clerk Thunder that she had learned from a HCN
24 Court staff member that one of the GRB members had a prior romantic relationship with Mr.
25 Collins. The identity of the informant was never disclosed, nor were any of the specifics of the
26 relationship disclosed. This evidence is hearsay. Clerk Thunder's evidence is based on the
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1 unsworn allegations of a third person. This allegation provides no basis to challenge the GRB
2 decision.

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4 Finally, the Petitioners asked to supplement their initial brief by arguing that the GRB
5 was improperly constituted because there was no “designated legal representative of the
6 Department of Personnel” to hear the case. The Petitioners never raised this issue at the time of
7 the hearing. John Weiss is identified on the decision at the “HCN Department of Personnel
8 Representative”. There is no definition of “legal representative” in the ERA. It is not clear
9 whether this person must be a law trained person or simply someone with legal authority to act
10 on behalf of the Department of Personnel.
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12 The motion of the petitioners to supplement their original brief and to raise this issue at
13 this stage of the proceedings is untimely. While the Petitioners claim there appears to be some
14 confusion in the GRB hearing as to whether Tracy Thundercloud or John Weise was the “legal
15 representative”, no formal challenge to the composition of the GRB was made at the time of the
16 hearing. The issue of the lack of a “legal representative” was not made until after the Petitioners
17 original brief was filed. A challenge to the composition of the GRB itself should have been
18 made at the time of the hearing. The matters in the supplemental brief could have been brought
19 at the time of the hearing. This Court denied the motion to supplement the brief in court at the
20 time of the oral argument. The motion was untimely and the argument about the identity of the
21 legal representative was not considered. Nothing in the Petitioner’s claims on the issue of the
22 composition of the GRB affects the underlying correctness of the GRB’s decision.
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VI.

RELIEF

This Court affirms the decision of the Grievance Review Board. The GRB directed the Executive Director of Personnel to:

- 1) Reassign Mr. Collins to a comparable position,
- 2) pay Mr. Collins lost wages from May 14 to June 25, 2013 at his hourly wage of \$13.70 (excluding applicable taxes),
- 3) clear his personnel file of termination paperwork and
- 4) award bridge service and reinstate insurance.

The Ho-Chunk Nation has enacted a limited waiver of sovereign immunity to allow this court to review GRB decisions. ERA 6 HCC 5 § (35)(d) (1) (a) provides:

This limited waiver of sovereign immunity allows the Trial Court to award monetary damages for actual wages established by the employee in an amount not to exceed \$10,000, subject to applicable taxation.

The HCN nation legislature has limited this court's ability to award damages for lost wages in an amount not to exceed \$10,000. Mr. Collins has lost more than \$10,000 in wages, since he could have worked more than 1000 hours since June 25, 2013. It is not his fault that this case has taken over eight months to resolve since Chief Judge Lowe and Clerk of Courts Thunder filed their petition. In *Litscher v. HCN Grievance Review Board, et al, SU 09-03 (S.Ct. March 13, 2010) at pps. 3-4*, the Ho-Chunk Nation Supreme Court reversed a decision of the HCN Trial Court that awarded damages for back wages in excess of \$10,000. This court believes that the back wages exceed \$10,000 but there is nothing in the record to indicate the exact amount of back wages Mr. Collins should be paid. Therefore, this court must remand that portion of the GRB decision

1 awarding Mr. Collins back wages from May 14 to June 25, 2013 keeping in mind that the
2 damage award cannot exceed \$10,000. In all other respects the order of the GRB is affirmed.
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4 **ORDER**

5 It is hereby ordered that the decision of the Grievance Review Board, except for that
6 portion dealing with back wages, is affirmed. This matter is remanded to the Grievance Review
7 Board for the sole purpose of determining damages for back wages consistent with the ERA's
8 limit of \$10,000 in damages for back wages.
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12 **IT IS SO ORDERED** this 7th day of April 2014, by the Ho-Chunk Nation Trial Court
13 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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15 *John Wabaunsee*

16 Honorable John Wabaunsee
17 Pro Tempore Trial Court Judge
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APR 07 2014


Clerk of Court (Assistant)

CERTIFICATE OF SERVICE

I, Martin Roundstone, Records Clerk II of the Ho-Chunk Nation Trial Court, do hereby certify that on the date set forth below, I served a true and correct copy of the **ORDER (Decision and Order)** in **Case No. CV 13-12** upon all persons listed below:

By United States Postal Service, Fax, and Email:

William Gardner
P.O. Box 837
Black River Falls, WI 54615

William Collins
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Black River Falls, WI 54615

Rebecca Chapman
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Shari Locante
P.O. Box 379
Sparta, WI 54656

By inter-office mail:

Dated: April 7th, 2014



Martin Roundstone, Records Clerk II
Ho-Chunk Nation Trial Court

CC: Staff Attorney