

MAR 16 2010

T. P. [Signature]
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

Karen Litscher,
Appellee,

vs.

**Ho-Chunk Nation Grievance Review
Board, and Andrea Estebo, in her official
capacity,**

Appellants.

DECISION

Case No.: SU 09-03

Trial Court No. CV 08-80¹

This matter came before the full Court for oral argument on December 12, 2009. Heard before Associate Justices Dennis Funmaker, Joan Greendeer-Lee and Chief Justice Mary Jo Hunter. Alysia E. LaCounte appeared for the Appellants and Mark L. Goodman appeared for the Appellee.

FACTS

Appellee Karen Litscher filed a Petition for Administrative Review of Grievance Review Board (GRB) Decision on November 18, 2008. The Trial Court reversed and remanded the agency decision due to a supervisorial failure to afford Litscher meaningful and minimal pre-deprivation procedural due process. On May 4, 2009, the lower court held that the termination at issue was arbitrary and capricious. The Court remanded the case to the GRB "to issue for an (sic) award of actual wages lost from the date of termination until her date of hire with her current employer, calculated by her hourly wage of \$11.64 at the time of her termination on

¹ Appellant GRB's attorney listed Trial Court Nos. CV07-09 and CV07-100 on the Notice of Intent to Appeal. The Court notes that the Order that is being appealed lists the number stated here.

1 December 1, 2007 as mitigated by petitioner's subsequent employment." (Trial Court Order pp.
2 19-20)

3 The GRB filed an appeal on July 1, 2009. The appeal was timely filed.
4

5 The Appellee Karen Litscher was employed as a lifeguard at the Ho-Chunk Nation's
6 House of Wellness until December 1, 2006 when she was terminated for misconduct. The
7 Appellee filed an employee grievance which was heard before the Ho-Chunk Nation Grievance
8 Review Board (GRB) on November 20, 2007. The GRB granted her relief in part and denied her
9 relief in part. The GRB awarded her monetary damages of \$3,500.00. The GRB denied her
10 request for reinstatement and for the expunging of negative references from her personnel file.
11 The Trial Court reversed and remanded this decision to the GRB. On remand, the GRB reversed
12 its decision to award Ms. Litscher the amount of \$3,500.00. She appealed that decision to the
13 Trial Court. On appeal, the Trial Court issued the May 4, 2009 Order (Reversal and Remand)
14 which is now before this Court.
15

16 STANDARD OF REVIEW

17 The standard of review applied by this Court in reviewing a Trial Court Order of an
18 administrative review is articulated in *Sharon Williams v. HCN Insurance Review Commission*,
19 SU08-01 (HCN S. Ct., Oct. 29, 2008). This Court has held that an abuse of discretion standard
20 applies.
21

22 ISSUES ON APPEAL²

- 23 I. The Trial Court abused its discretion in ordering the GRB to make an award in
24 excess of the \$10,000.00 cap set forth in the Employee Relations Act (ERA).
25

² Issues stated by the appellant on the Notice of Intent to appeal filed July 1, 2009.

- 1 II. The Trial Court abused its discretion in overturning the GRB's decision that a
2 minimal due process violation did not merit an award of damages when no law
3 exists indicating that compensation is mandated.
4
5 III. The Trial Court abused its discretion in making factual findings as to the method
6 of calculating damages to be awarded.
7
8 IV. The Trial Court abused its discretion by failing to set forth the law upon which it
9 based its award calculation of damages and the administrative record evidence.
10
11 V. The Trial Court abused its discretion by finding the GRB's decision was arbitrary
12 and capricious and against the substantial weight of the evidence and fails to cite
13 to any information within the Administrative Record which supports its
14 evidentiary determination.

14 DISCUSSION

15 I.

16 The Trial Court abused its discretion in ordering the GRB to make an award that violated
17 the ERA.
18

19 The ERA states that the Ho-Chunk Nation's "limited waiver of sovereign immunity
20 allows the Trial Court to award monetary damages for actual wages established by the employee
21 in an amount not to exceed \$10,000." 6 HCC Sec 5., Chap. V, 35 Judicial Review.

22 The Trial Court ordered on remand that the GRB "to issue for an award of actual wages
23 lost from the date of termination until her date of hire with her current employer, calculated by
24 her hourly wage of \$11.64 at the time of her termination on December 1, 2006 up to the time of
25 her hearing before the GRB on November 20, 2007." CV 08-80 Order (Reverse & Remand),

1 May 4, 2009. Although the parties did not provide the actual calculation of the amount, it is
2 obvious that the amount ordered at the rate of pay is over the limit of \$10,000.00. A rough
3 calculation of that rate pay for that time period of about 51 weeks totals approximately
4 \$23,580.00. The ERA prohibits an award beyond \$10,000.00. The Trial Court erred in ruling in
5 a manner that is violation of the ERA. The GRB was following the law of the ERA in not
6 awarding an amount in excess of the limit. Based upon that error, the Trial Court's decision is
7 reversed.

8
9 II.

10 The Trial Court abused its discretion in overturning the GRB's decision that a minimal
11 due process violation did not merit an award of damages when no law exists indicating that
12 compensation is mandated.

13
14 The GRB's award of \$3,500.00 was found to be arbitrary and capricious by the Trial
15 court in an earlier Order (Partial Affirmance and Remand) filed on September 22, 2008. That
16 Order ruled that the award was to be reconsidered by the GRB on remand. *Id.* at CV 07-99-100,
17 lines 19-24, p. 19 of 20. The matter was remanded to the GRB.

18 In accordance with that ruling, the GRB overturned and withdrew the award of
19 \$3,500.00, because the GRB could not relate the amount to any specific claim. Decision, GRB-
20 333.06T (GRB, Nov. 3, 2008) at 4, lines 3-7. The Trial Court substituted its own view and
21 opined that "the GRB fails to understand its own authority under the ERA toward monetary
22 damages." CV 08-80, Order (Reversal & Remand) p. 18, lines 12-13. The Trial Court went on
23 to characterize the GRB's Decision on remand as a failure to afford the petitioner her due
24 process rights. Yet, the earlier Trial Court Order had stated that "the GRB shall articulate the
25 nature and scope of the due process violations, and the basis for the award of the damages in the

1 decision.” Id at p. 19, lines 23-24. When the GRB holds that the award should be withdrawn,
2 presumably due to an inability to articulate the violations, the Trial Court substitutes its own
3 view of what should have occurred by the GRB and makes a *de novo* review in violation of the
4 ERA.

5
6 The GRB’s decision cannot be both arbitrary and capricious for making the award as well
7 as for withdrawing it! The GRB was following the Trial Court’s directive that the GRB is not
8 authorized by the HCN Legislature to address constitutional issues. The Trial Court erred in its
9 review of the GRB decision to withdraw the award. The Trial Court’s Order is reversed.

10 III.

11 The Trial Court abused its discretion in making factual findings as to the method of
12 calculating damages to be awarded.
13

14 The ERA expressly states that “the Trial Court shall not exercise *de novo* review of Board
15 decisions.” 6 HCC sec. 5.35e. Despite the clear language of the ERA, the Trial Court sought to
16 revise the GRB decision based on the Trial Court’s interpretation of the facts and evidence. By
17 substituting the Trial court’s view for that of the GRB, the Trial Court is conducting a *de novo*
18 review. The Trial Court’s Order is reversed.

19 IV.

20
21 The Trial Court abused its discretion by failing to set forth the law upon which it based its
22 award calculation of damages and the administrative record evidence.

23 Because this Court is reversing the Trial Court’s Order on other grounds, this issue was
24 not reached.
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V.

The Trial Court abused its discretion by finding the GRB's decision was arbitrary and capricious and against the substantial weight of the evidence and fails to cite to any information within the Administrative Record which supports its evidentiary determination.

Because the Court is reversing the Trial Court's Order on other grounds, this issue is not being addressed.

CONCLUSION

The Trial Court Order (Reversal and Remand) dated May 4, 2009 is reversed. The Decision of the GRB issued on November 3, 2009 stands.

EGI HESKEKJET. Dated this 16th day of March 2010.

Per Curiam.

Mary Jo B. Hunter
Hon. Mary Jo Hunter

FILED
IN THE HO-CHUNK NATION
TRIAL SUPREME COURT

MAR 16 2010

T. Pettibone
Clerk of Court/Assistant

CERTIFICATE OF SERVICE

I, Tari Pettibone, Clerk of the Ho-Chunk Nation Supreme Court, do hereby certify that on the date set forth below, I served a true and correct copy of the DECISION in Case No. SU 09-03, upon all persons listed below:

By United States Postal Service:

**Attorney Mark Goodman
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**Attorney Alysia E. LaCounte
HCN Department of Justice
P.O. Box 667
Black River Falls, WI 54615**

Dated: March 16, 2010

Tari Pettibone

Tari Pettibone, Clerk
Ho-Chunk Nation Supreme Court