

FILED  
IN THE HO-CHUNK NATION  
TRIAL SUPREME COURT  
AUG 31 2007  
*Jessie Cleland*  
Clerk of Court/Assistant

1 **IN THE HO-CHUNK NATION SUPREME COURT**

2 **JANET FUNMAKER,**

**DECISION**

3 Appellee,

4 vs.

5  
6  
7 **LIBBY FAIRCHILD**, in her capacity  
Executive Director of HCN Dep't as  
8 **PERSONNEL, HCN DEP'T OF**  
9 **PERSONNEL, HCN**

10 Now **TRACY THUNDERCLOUD**,  
in his capacity as acting Executive  
Director of HCN Dep't of Personnel,  
11 **HCN DEP'T OF PERSONNEL,**  
12 **HCN,**

Case No.: SU 07-05  
Trial Ct.: CV 06-61

13 Appellants.

14  
15 This is an appeal of the Ho-Chunk Nation (hereinafter HCN) Trial Court ruling in *Janet*  
16 *Funmaker v. Libby Fairchild, in her capacity as Executive Director of HCN Dep't of Personnel,*  
17 *HCN Dep't of Personnel, and HCN, CV 06-61 (HCN Tr. Ct., Mar., 9, 2007).* This case was  
18 heard by the Court on July 21, 2007, with Chief Justice Hunter, Justice Funmaker and Justice  
19 Greendeer-Lee presiding. Attorney Brian Stevens of the Department of Justice represented the  
20 Appellants, and attorney Mark Goodman represented the Appellee.

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23 **PROCEDURAL HISTORY**

24 On April 18, 2006, the Grievance Review Board (hereinafter GRB) issued its *Decision* in  
25 Janet Funmaker's grievance contesting her suspension and then termination from her job as hotel

1 front desk supervisor at Ho-Chunk Casino, Hotel & Convention Center. *Janet Funmaker v. Judy*  
2 *Whitehorse, in her official capacity as Front Desk Manager, Ho-Chunk Casino, Hotel and*  
3 *Convention Center, Case Nos.: GRB-060-06-T and GRB-050-050S (GRB, Apr. 18, 2006)*  
4 (hereinafter *GRB Decision*). The GRB found that Appellee's suspension was wrongful and that  
5 she was not given due process for her suspension and termination. Consequently, the GRB  
6 instructed the Executive Director of Personnel to grant Appellee the following relief:

- 7 a. Expunge the petitioner's personnel record regarding the suspension;
- 8 b. Grant back pay for the duration of the suspension;
- 9 c. Receive benefits for the duration of the suspension;
- 10 d. Reinstatement to petitioner's former position, or a comparable position within  
the Nation;
- 11 e. Expunge the termination from petitioner's record;
- 12 f. Receive back pay as a result of the termination; and
- 13 g. Receive full benefits as a result of the termination.

14 *Id.* at 15. The then Executive Director of Personnel complied with the *GRB Decision* with the  
15 exception of giving Appellee back pay, which she claimed she lacked the authority to award.  
16 Appellee then filed a *Complaint* with the Trial Court requesting the GRB decision be enforced.  
17 The Trial Court rendered its *Order (Remand)* on March 9, 2007, ruling that the GRB did have  
18 the authority to grant monetary relief and that sovereign immunity did not apply to the GRB.  
19 *Order (Remand)* at 16. Appellants filed a timely appeal with this Court on March 20, 2007.  
20 Briefs were submitted by both parties, and Oral Argument was heard on July 21, 2007. At Oral  
21 Argument, a *Joint Stipulation and Identification of Issues Notice of Substitution of Party*  
22 (hereinafter *Joint Stipulation*) was filed. In the *Joint Stipulation*, the parties agreed to substitute  
23 Tracy Thundercloud, the current Executive Director of the Department of Personnel, for Libby  
24 Fairchild, the former Executive Director of Personnel. *Joint Stipulation* at 2. Additionally, the  
25 parties stipulated to the fact that Appellee was wrongfully terminated and was entitled to up to  
\$10,000 in back pay in accordance with ERA §5.35. *Id.* Consequently, the parties asked the

1 Supreme Court to only clarify the GRB's authority, specifically in regard to whether the GRB is  
2 able to grant monetary damages. *Id.* at 2-3.

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4 **ISSUE PRESENTED**

5 Does the GRB have the authority to grant monetary awards?  
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7  
8 **DECISION**

9 Any analysis of the GRB's authority to issue remedies must start with an examination of  
10 the EMPLOYMENT RELATIONS ACT (hereinafter ERA), the statute which creates the GRB.  
11 Paragraph 34h of the ERA describes the remedial power of the GRB: "The Board shall have the  
12 authority to direct the Executive Director of Personnel to execute the *appropriate remedy*  
13 consistent with the determination of the Board." ERA, 6 HCC §5.34h, (emphasis added).  
14 Appellants must then prove that "appropriate remedy" does not include back pay in order to  
15 prevail. Appellants seek to exclude monetary awards by applying the principle of sovereign  
16 immunity to GRB decisions, since sovereign immunity traditionally protects a nation from  
17 monetary but not equitable relief. The HCN sovereign immunity clause states: "The Ho-Chunk  
18 Nation shall be immune from suit except to the extent that the Legislature expressly waives its  
19 sovereign immunity..." HCN CONST., ART. VII, §1. Appellants put forth two arguments to  
20 support why the GRB's decisions should fall within the sovereign immunity clause: 1. Suits do  
21 not have to occur in a court of law. The GRB adjudicates suits; therefore, sovereign immunity  
22 applies. *Appellant Br.* at 5. And, 2. The power the GRB exerts is not legislative but judicial.  
23 Therefore, the GRB is more like a court, so the disputes that it adjudicates are suits and  
24 sovereign immunity applies. *Id.* The Court rejects both of these contentions.  
25

1 Appellants define a suit in the following manner: “. . . a suit is the proceeding, in whatever  
2 form, before a body capable of resolving the dispute, assigning the rights of parties, and  
3 affording remedies under law.” *Id.* However, Appellants offer no citation for this definition. The  
4 Trial Court does provide citation for its contention that suits can only occur in a court of law.  
5 *Order (Remand)* at 12, n. 5. Additionally, both Black’s and Ballentine’s law dictionaries state  
6 that a suit has to occur in a court of law: “Any proceeding by a party or parties against another in  
7 a court of law.” Black’s Law Dictionary 1448 (7<sup>th</sup> Ed. 1999); “Any proceeding in a court of  
8 justice by which a person pursues therein that remedy which the law affords him.” Ballentine’s  
9 Law Dictionary (3<sup>rd</sup> Ed. 1969). The Court, therefore, rules that a “suit” has to occur in a court of  
10 law.  
11

12 The next question the Court must then decide is whether the GRB can be considered a  
13 court. If the GRB is a court, it adjudicates suits and sovereign immunity would apply. Appellants  
14 state that “[t]he GRB is more similar to a lower court of special jurisdiction, created by  
15 Legislative act, and as authorized in Article VII of the HCN Constitution.” *Appellant Br.* at 5.  
16 However, both the DEPARTMENT OF PERSONNEL ESTABLISHMENT AND ORGANIZATION ACT OF  
17 2001 (hereinafter ESTABLISHMENT ACT) and the ERA directly contradict Appellants’ argument.  
18 The CONSTITUTION states that the Legislature delegates its power to Executive Departments.  
19 HCN CONST., ART. V, §2(b). The Personnel Department is an example of an Executive  
20 Department that is wielding delegated legislative power as ART. V, §2(b) is cited in the authority  
21 section of the ESTABLISHMENT ACT. ESTABLISHMENT ACT, 1 HCC §10.1b. The GRB is an  
22 agency within the Department of Personnel. Several paragraphs within the ERA support this  
23 contention. For example, the paragraph entitled, “Responsibilities,” of the ERA states that “[t]he  
24 *Department of Personnel Establishment and Organization Act of 2001* (1 HCC §10) delegates to  
25

1 the Executive Director of the Department of Personnel the functions and authority to implement,  
2 manage, enforce and promulgate, i.e. create, establish, publish, make known and carry out the  
3 policies within this Act.” ERA, §5.4a. The Department of Personnel is charged with the  
4 responsibility of investigating all incidents resulting in disciplinary action and with creating an  
5 impartial GRB to review such disciplinary actions. ERA, §5.34a. The GRB consists of  
6 employees of the Nation and one legal representative of the Department of Personnel. ERA,  
7 §5.34b(1-2). Finally, a staff member of the Department of Personnel is present at GRB hearings  
8 to “advise all participants with regards to policy and procedure.” ERA §5.34f(1). Because the  
9 GRB is part of the Department of Personnel, it too only has delegated Legislative authority.  
10 Consequently, the GRB cannot be considered a court and has no judicial authority. If it were to  
11 be considered a court, grave separation of powers problems would arise. First, as the Trial Court  
12 correctly notes, the Legislature would be impermissibly delegating authority it does not have,  
13 encroaching upon the Judiciary’s authority. *Order (Remand)* at 12. And second, an Executive  
14 Department does not have the authority to supervise a court, as the Personnel Department does  
15 the GRB.

17         Several practical problems would result if the GRB did not have the authority to grant  
18 monetary awards as well. The Trial Court poses a hypothetical scenario illustrating the problems  
19 that could occur if the GRB could not award back pay in which those who succeed at the GRB  
20 would not be allowed back pay but those who lost at the GRB could be granted back pay when  
21 they appealed to the Trial Court. *Order (Remand)* at 14. Appellants counter by alleging the Trial  
22 Court erred in its hypothetical scenario and propose their own procedural interpretation of the  
23 ERA. Before comparing the Trial Court’s and Appellants’ differing proposals, the Court notes  
24 the Appellants’ misuse of the legal term, “error,” in Appellants’ brief to prevent future similar  
25

1 mistakes. The word, "error," should not be used when the attorney merely disagreed with a  
2 court's interpretation of the law. Questions of law are reviewed *de novo*, requiring no error for  
3 the Supreme Court to reverse a Trial Court decision. Error is primarily associated with findings  
4 of fact that are found erroneous under a clearly erroneous standard, *United States v. United*  
5 *States Gypsum CO.*, 333 U.S. 364, 395 (1948), or when the Trial Court abuses its discretion, *Rae*  
6 *Anna Garcia vs. Joan Greendeer-Lee, Loa Porter, Hattie Walker and Greg Garvin as Officials*  
7 *of the HCN; HCN Personnel Dep't and HCN Health and Human Services Dep't*, SU 03-01  
8 (HCN S. Ct., Apr. 30, 2003) at 3-4. In this case, the hypothetical example posed by the Trial  
9 Court was dicta and cannot be considered error.

11 Futhermore, Appellants never explain why they consider the Trial Court's hypothetical  
12 example to be error. Appellants seem to suggest that the Trial Court erred by ruling that the  
13 hypothetical procedure it discussed was the only possible procedure, which has no basis in the  
14 ERA. *Appellant Br.* at 9. First, the Trial Court does not have to address every possible  
15 interpretation of the ERA, especially when it is posing a hypothetical example. Second, the Trial  
16 Court's proposed procedure is entirely plausible. The ERA allows for an appeal to the Trial  
17 Court. ERA, §5.34a(3). The word, "appeal," generally assumes that a party is seeking reversal of  
18 a lower court or agency's decision. Therefore, following a strict interpretation of the ERA, a  
19 person who prevailed at the GRB could not appeal to the Trial Court because they would not be  
20 seeking a reversal. A more liberal interpretation of the ERA may allow for those who prevail at  
21 the GRB to then go to the Trial Court for a determination of their back pay, as Appellants  
22 suggest. However, such a procedure would be highly impractical. This Court agrees with the  
23 Trial Court that one of the presumed purposes of establishing the GRB was to limit the number  
24 of employment cases in the court system. *Order (Remand)* at 13. If Appellants' proposed

1 procedure were followed, every grievance involving a suspension or termination would have to  
2 go to the Trial Court. Additionally, calculating back pay requires no expertise that a Trial Court  
3 may have but the GRB would not. It would be a waste of judicial resources to have the GRB  
4 finds the facts of wage rate plus days missed due to a suspension or termination but then go to  
5 the Trial Court simply to do the math. A procedure such as this would needlessly postpone the  
6 restitution that those who have been wrongly suspended or terminated deserved.

7  
8 The Trial Court's and Appellants' proposed procedures highlight the possible problems  
9 that could occur if a court is overzealous in its interpreting of statutes. Here, the statute is  
10 unambiguous. The ERA states that the GRB has the authority to grant any "appropriate remedy."  
11 ERA, §5.34h. Appellants are correct in that the Legislature probably never intended for the GRB  
12 to be able to grant limitless monetary awards, especially given that there is a monetary cap on the  
13 Trial Court's ability to grant monetary awards. However, it is not the Court's job to fix drafting  
14 mistakes in Legislation. The Trial Court was correct to not read into the statute a procedure not  
15 directly stated, as Appellant would have this court do. These problems are best resolved by the  
16 Legislature who makes the law. Consequently, the Court strongly urges the Legislature to  
17 reexamine the ERA and, if they so choose, amend it to include a monetary cap for the GRB.

18 Finally, the problematic nature of the *Joint Stipulation* must be addressed. In the *Joint*  
19 *Stipulation*, the parties agreed to limit the back pay according to ERA §5.35. *Joint Stipulation* at  
20 2. The Court finds the unorthodox tactic used by the parties to be largely ineffectual. Stipulating  
21 to using a law that the Trial Court specifically ruled did not apply carries little to no weight with  
22 the Court. Clearly, if the Court owes no deference to the Trial Court's interpretations of the law,  
23 no deference will be given to the parties' agreement about the law either. The *Joint Stipulation*  
24 seems to imply that because the parties never asked the Trial Court to determine whether or not  
25

1 the GRB could award more than \$10,000, the Supreme Court should not address this issue and  
2 only decide whether the GRB can award monetary damages. *Joint Stipulation* at 2-3. However,  
3 the Trial Court's ruling that the GRB can award more than \$10,000 is directly correlated to the  
4 issue of determining the GRB's remedial authority. Because Appellants made the sovereign  
5 immunity claim at the Trial Court level, the Trial Court explained why sovereign immunity did  
6 not apply and, therefore, why the \$10,000 limited waiver of sovereign immunity did not apply.  
7 Therefore, the Trial Court's and now this Court's decision to address why the \$10,000 limit did  
8 not apply to the GRB was both necessary and appropriate.

9  
10 The most troubling aspect of the *Joint Stipulation*, though, is the fact that Appellee  
11 agreed to number four, which states: "The parties stipulate that Appellee, Janet Funmaker was  
12 wrongfully terminated and is entitled to back pay not to exceed \$10,000 as per Rule 35 of the  
13 ERA." *Joint Stipulation* at 2.<sup>1</sup> Why the Appellee would agree to limit her back pay to \$18,000  
14 less than what she actually lost is baffling to the Court.<sup>2</sup> If it could be construed that Appellee did  
15 not understand the *Joint Stipulation*, the Court may have been willing to overlook the bad  
16 lawyering and rule the *Joint Stipulation* as void since the agreed \$10,000 limit is based on an  
17 inapplicable law. However, the Appellee understood the *Joint Stipulation* well enough to cross  
18 out the other two paragraphs of the *Joint Stipulation* that called for overturning the Trial Court  
19 decision. *Joint Stipulation* at 2, 3. Additionally, Appellee made no effort to argue her case in her  
20 brief, characterizing the Appellants' argument as "esoteric" and just stating that she wanted her  
21 money that she was entitled to. *Appellee Br.* at 3. The Court sympathizes that multiple appeals of  
22

23  
24 <sup>1</sup> The Court also notes that Appellants incorrectly referred to "rules" in the ERA instead of sections. For example, in  
25 ERA, §5.35a, the "5" is the section, the "35" is the subsection, and the "a" is the paragraph. See LEGISLATIVE  
ORGANIZATION ACT OF 2001, 2 HCC §11.35.

<sup>2</sup> \$17,000 is an unofficial figure found in the *Complaint* filed by the Appellee at the Trial Court. The Appellee  
claimed she lost \$27, 040 in wages from her termination and \$1,040 from her suspension. *Compl.* at 3.

1 a case can be time consuming, but that is no excuse for essentially refusing to make any legal  
2 arguments on your behalf, especially when so great a sum is at stake.

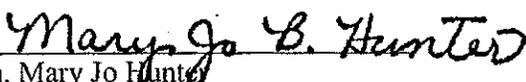
3  
4 **CONCLUSION**

5 Based on the foregoing, the Court affirms the Trial Court's decision in *Funmaker v.*  
6 *Libby Fairchild, et al.*, CV 06-61 (HCN Tr. Ct., Mar. 9, 2007). The Court remands back to the  
7 GRB to find facts necessary to determine the back pay entitled to the Appellee. If the back pay is  
8 greater than \$10,000, the GRB should only award \$10,000 as per the *Joint Stipulation*. The Court  
9 further reminds the GRB that these facts should have been found and stated in the original  
10 *Decision*. When reviewing administrative decisions, the Trial Court plays the role of an appellate  
11 court and is not charged with finding facts. The GRB, with its greater expertise and familiarity, is  
12 the appropriate body to find facts.  
13

14  
15 **IT IS SO ORDERED. EGI HESKEKJENET.**

16 Per Curiam.

17  
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19   
20 Hon. Dennis M. Funmaker  
HCN Supreme Court Associate Justice<sup>3</sup>

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22  
23   
24 Hon. Mary Jo Hunter  
HCN Supreme Court Chief Justice

25  
<sup>3</sup> The Court takes this opportunity to thank law clerk, Kate Lindsay, for her assistance with this *Decision*.

## DISSENT

1  
2 This was an unusual case since the Appellant was arguing against the reasoning of the lower  
3 court decision and not against the Appellee. During the lower court hearing, the Appellee said the  
4 (trial) court should enforce the order because... the court can award monetary relief in cases such as  
5 this one. Or the court could render an advisory opinion. During oral arguments, the Appellee only  
6 wishes for a quick resolution and financial award.  
7

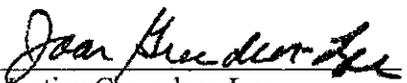
8 I am dissenting from the Court for the reasoning that follows because both the Appellee and  
9 Appellant agreed that the Trial Court has the authority to award monetary relief. The lower court  
10 begins by providing an interesting exercise in legal writing about what constituted a "suit". Further  
11 that only suits and cases of controversy are heard before a court of law. This is not disputed.  
12 However, the trial court did reference that the "term is any proceeding..." Appellant also provided "a  
13 suit is the proceeding..." Though albeit inexperience or lack of thorough research efforts by the  
14 Appellant, I did find that such similarities worthy of further discussion. A further examination of a  
15 proceeding, "a proceeding any procedural means for seeking redress from a tribunal or agency. An  
16 act or step that is part of a larger action. BLACK'S LAW DICTIONARY 1221 (7<sup>TH</sup> ED. 1999). The  
17 proceedings can be criminal, informal, contempt, and administrative. So if this matter can be  
18 considered an administrative proceeding, first the matter is addressed before an agency with the  
19 expertise of the corresponding policies. This step prevents an unnecessary burden to the Judiciary,  
20 yet should the matter remain unresolved, the Judiciary is the next step. I liken the hearings of the  
21 GRB to administrative proceedings.<sup>1</sup>  
22  
23

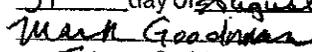
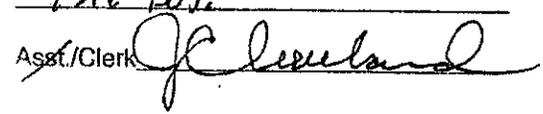
24 The Court regards the actions of the GRB similar to legislative actions, and not in fact  
25 suits...because only the Judiciary is entrusted with such authority to oversee cases and controversies.  
26

27  
28 <sup>1</sup> Administrative Procedure Act of 1946, (60 Stat. 237, 5 U.S.C.A.) governing practice and proceedings before  
federal administrative agencies.

1 I do not believe that one can conclude that the Legislature is impermissibly delegating authority that  
2 encroaches on the Judiciary branch when enabling the GRB. Nor should one have concluded that the  
3 executive branch is supervising a court just because the GRB is an extension of its Personnel  
4 Department. I see the Legislature enacting a board to administer administrative proceedings for  
5 limited purpose of resulting personnel grievances. The Legislature intentionally delineated the  
6 authority of the GRB exactly limited to those duties already in the purview of the Personnel  
7 Department. Those remedies of equity to award merely gave the GRB the discretion to determine  
8 appropriate remedies, since not all grievances are similar in incident. Further the Legislature  
9 specifically cited in the ERA 6 HCC §5.35 the Constitution authority of the Trial Court. Rather than  
10 usurping the authority of the Judiciary, the Legislature kept intact the necessary step of any monetary  
11 remedy to be entrusted to and entered before the Trial Court. For example, the Gaming Ordinance  
12 §821 allows for monetary remedies.  
13

14  
15 Such interpretation does not lend to the intentions by the Legislature to relieve the Trial  
16 Court the burden of resolving controversial personnel matters. I believe the Legislature were mindful  
17 of Constitutional authority, and, liken the monetary awards that should be entered at the Trial Court  
18 similar to those small claim matters also being handled by the Trial Court. If truly attempting to  
19 relieve the Trial Court of the burden of matters before their court, why did the Legislature allow for  
20 the jurisdiction of the Courts to extend to small claims, probate, and divorce matters around the same  
21 time?<sup>2</sup>  
22

23  
24  
25   
26 Hon. Justice Greendeer-Lee  
27 HCN Supreme Court Associate Justice

A true and correct copy of the foregoing was  
sent to the following parties of record this  
31<sup>st</sup> day of August, 2007.  
  
Mark Goodman  
FAK DOT.  
  
Asst./Clerk

28 <sup>2</sup> Eviction Ordinance, 8 HCC Section 3 (2005); HCN Gen. Council Res. 11-19-02(7); Divorce and Custody Ordinance, 4 HCC §9 (2004)