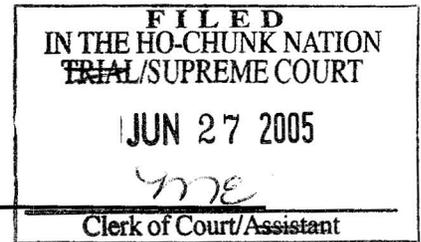


IN THE
HO-CHUNK NATION SUPREME COURT



CASIMIR T. OSTROWSKI,

Appellant,

v.

DECISION
SU05-03

HO-CHUNK NATION, ET AL

Appellees.

This matter came before the full Court ¹on May 14, 2005 for *Oral Argument*. Appearances were made by Attorney Mark Goodman on behalf of the Appellant and by attorney Michael Murphy of the Ho-Chunk Nation Department of Justice on behalf of the Ho-Chunk Nation. This is the second time this matter has come before this Court.²

The record on appeal consisted of Appellant's *Notice of Appeal*, Copy of Trial Court's *Judgement* and *Certificate of Service*, the Appellant's *Brief and Addendum*, exclusive of the attached deposition transcripts per Supreme Court *Order* dated April 28, 2005. The record also included the Appellee's *Notice and Motion for Extension, Motion for Expedited Consideration* and *Certificate of Service*, Appellee's *Response Brief*,

¹ At the initiation of the proceedings there was a disclosure by Chief Justice Hunter that she is the niece of Gloria Whitethunder, the HR director for Ho-Chunk Casino. Neither party objected to the Chief Justice's continued involvement in hearing this matter. Ms. Whitethunder had a limited role in the case and Chief Justice Hunter indicated that she could be fair and impartial on the panel.

² This matter was originally heard by the Supreme Court when a *Writ of Mandamus* was filed by the Appellant in *Ostrowski v. Ho-Chunk Nation*, SU 05-01. In that case Mr. Ostrowski sought the assistance of this Court to direct the Trial Court to issue an opinion in the case that had been pending before the Trial Court for over twenty-two months.

Motion to Strike, Appellee's Response Brief Addendum and Certificate of Service, and the Redacted Appellant's Addendum as prepared by Appellee per order of this Court dated April 28, 2005.

FACTS

The Appellant was hired by the Nation on July 9, 1995 to work as a cage cashier at the Ho-Chunk Casino. He was injured while on duty in 1997. The Interim Personnel Committee approved a job description for case cashier on April 13, 1999.

Following the injury Mr. Ostrowski made worker's compensation claim. The Nation accommodated his return to work. His duties were modified to include a 32 hour work week schedule and he was assigned to the Casino's chip and key window. He continued to work for two and one half years. On June 24, 2002 he was ordered to submit to a medical examination by the Casino. *Trial Record, Ex. 15*. He was determined to be fit for duty as a cashier with a permanent lifting restriction of 45 pounds. *Trial Record, Ex. 16*. The position description for Cage Cashier requires "Infrequent lifting of up to 100 lbs. Primary lifting requirement is 10-30 lbs. on consistent basis." *Trial Record, Ex. 1*.

The Appellant was separated from his employment effective July 1, 2002, via a letter from Shirley Theisen. *Trial Record, Ex. 18*.

At the time this matter was brought in the Trial Court, employment at the Ho-Chunk Casino was governed by the *Ho-Chunk Nation Policies and Procedures Manual*. Since that time, those polices and procedures have been amended.

Appellant sought relief through both Level I and Level II Grievances, both of which were denied. He brought this matter in the HCN Trial Court. He sought an order of reinstatement to his former position or a similarly comparable position at his previous

wage of \$12.69 an hour, and damages, up to the legal maximum of \$10,000 to compensate for wages he has lost commencing July 2, 2002, and until he is reinstated, including any increase he would have received on August 2, 2002, but for his termination, restoration of any accumulation of sick leave and vacation time he lost because of his termination (“Bridge Credit”), an order sealing his Department of Personnel file, and an award of other costs and fees incurred in this action, as well as other and further relief as the court deems just and equitable under the circumstances.

At Trial, which was held on March 14, 2003, the Honorable William Bossman declined to find in favor of the Plaintiff-Appellant. Instead, the Court found that the plaintiff was terminated because he was not qualified under the job description to perform the duties of the job. Trial Court *Decision* at p. 5. Judge Bossman further opined that “the Plaintiff had not met his burden of proof” and granted judgment in favor of the Defendants. Trial Court *Decision* at p.6 Ostrowski appealed that decision. On appeal, Mr. Ostrowski argued that the Trial Court erred as a matter of law due to the over-whelming body of evidence. He further argued that the Trial Court did not provide a basis for the *Judgment* that Ostrowski’s work adversely affected the efficiency and productivity of the cage cashier department.

DECISION

This matter is remanded to the Trial Court for further action consistent with this Order. The Supreme Court finds that in reviewing the Appellate record, that Chief Judge Bossman has failed to properly set forth the standard and document the basis for his determination that the Nation’s accommodations to Plaintiff-Appellant Ostrowski “caused the casino cage cashier department to operate at less than peak efficiency.” *Order, Finding of fact 9*, at p. 4. There is no statement that this is a standard that an

employee must meet. If Mr. Ostrowski is to be let go for failing to meet a standard, it is a critical component of due process that there be adequate notice to the employee. The Trial Court decision in this matter does not permit the Supreme Court nor the litigants to know the applicable standard, nothing to indicate which party bears the burden of proof, and whether that burden was met .

This Court's review of the trial court record reveals no establishment of a burden of proof as to "peak efficiency" nor is there any record of testimony or evidence on the issue of peak efficiency other than questioning directed by the appellant's legal counsel.

This Court's review of the Trial Court decision reveals that there is an omission of that Court to address the termination of Mr. Ostrowski in terms of citing an specific provision of the *HCN Personnel Policies and Procedures Manual*. Factual support for the conclusions reached in its decision is lacking. Likewise the record does not reflect any factual basis in the Trial Court *Judgment* regarding the law, the standard of termination, and the burden of proof relating to the Findings of Fact, ¶11, regarding accommodations made to Mr. Ostrowski.

It is a minimum expectation of this Court that the Trial Court shall support its *Judgment* on the findings of fact and conclusions of law in a form that permits the litigants, other Courts, including this Appellate Court, and the public to be informed as to the basis for the *Judgment*. At the most basic level, it is common sense that a Judge hired to render decisions would do so in a fashion that complies with principles of justice, fairness and due process and those factors be included in a written *Judgment*.

While there is no case law which requires legal analysis or the inclusion of a section in the *Judgment* which explains the basis for the decision of the Judge, it is incumbent upon the Trial Court to provide a minimum analysis to allow the Supreme

Court and the parties to know the reason and basis for the *Judgment*. Such a practice will help assure that the interests of justice are served. It would further the ability of the parties to determine whether to bring an appeal, assist the education of litigants, and the public regarding the applicable standards, and burden of proof. The practice clarifies the law so that the Court's expectations are better known for the future. Further, the failure of the Trial Court to adequately address these issues forces this Court to take the extreme position of ordering this case remanded for a full explanation of the Court's rationale.

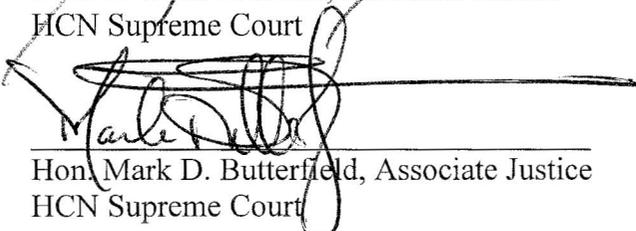
It is also the *Order* of this Court that the Appellate filing fees of Thirty Five Dollars (\$35.00) paid by Mr. Ostrowski in this matter be refunded. The basis for this extraordinary action is that the Trial Court response to the *Writ of Mandamus* action in *Ostrowski v. Ho-Chunk Nation*, SU 05-01 was so minimal as to raise the necessity for this Court to review this matter.

EGI HESKEKJET.

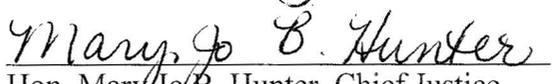
Dated this 25 day of June 2005.



Hon. Jo Deen B. Lowe, Associate Justice
HCN Supreme Court



Hon. Mark D. Butterfield, Associate Justice
HCN Supreme Court



Hon. Mary Jo B. Hunter, Chief Justice
HCN Supreme Court

CERTIFICATE OF SERVICE

I, Mary K. Endthoff, 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. SU05-03, upon all persons listed below:

By United States Postal Service:

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Date: June 27, 2005



Mary K. Endthoff
HCN Supreme Court Clerk

