

FILED
IN THE HO-CHUNK NATION
~~TRIAL~~/SUPREME COURT

DEC 08 2003

Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

HOPE B. SMITH,

DECISION

Appellee,

vs.

Case No. SU03-08

HO-CHUNK NATION,

Appellant.

This case comes before the Ho-Chunk Nation Supreme Court on appeal of the Trial Court's Final Judgment in CV 02-42 dated July 31, 2003. This case was heard by Chief Justice Mary Jo Hunter, Associate Justice Mark Butterfield and Associate Justice pro tempore John Wabaunsee, Chief Justice Hunter presiding.

STATEMENT OF THE CASE

This matter came before the Supreme Court via a *Notice of Appeal* filed September 2, 2003. The appellant in this case is the Ho-Chunk Nation despite the listing of Hope B. Smith at the top of the caption. Accompanying the Appellant's *Notice of Appeal* was a simultaneous filing of a *Motion for a Stay* of the Trial Court's *Final Judgment* of July 31, 2003 in the underlying case, CV 02-42. In accordance with *HCN R. App. P. 7(c)*, the appellant filed a cash deposit in the amount of the *Judgment* of \$5,529.49 with the Court in lieu of a bond pending the outcome of the appeal.¹

Due to the fact Justice Lowe's brother was a primary witness in the Trial Court, she recused herself and Justice pro tempore John Wabaunsee was appointed to hear this appeal in her

¹ Despite the award of \$10,000 in damages the appellant has tendered a check in the above amount informing the Courts that the reduced amount is what the check would amount to minus payroll taxes. The purpose of a bond is to assure the prevailing party below that should the appeal be resolved in their favor there will be sufficient funds available to cover the damages awarded. Posting a check of barely over half the damages does not comply with this requirement.

1 absence to preserve the appearance of fairness and impartiality. A *Scheduling Order* was issued
2 and the appeal granted on September 9, 2003. A *Order Granting Stay of the Final Judgment* of
3 the Trial Court in CV 02-42 was issued October 28, 2003. *Oral Argument* was heard on
4 November 7, 2003 at Hamline Law School in St. Paul Minnesota.
5

6 7 **APPLICABLE LAW**

8 9 **ARTICLE III - ORGANIZATION OF THE GOVERNMENT**

10 Section 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by
11 virtue of self-government and democracy.

12 Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be
13 composed of four (4) branches: General Council, Legislature, Executive, and Judiciary.

14 Section 3. Separation of Functions. No branch of the government shall exercise the powers
15 and functions delegated to another branch.

16 Section 4. Supremacy Clause. This Constitution shall be the supreme law over all territory
17 and persons within the jurisdiction of the Ho-Chunk Nation.

18 19 **ARTICLE IV - GENERAL COUNCIL**

20 Section 2. Delegation of Authority. The General Council hereby authorizes the legislative
21 branch to make laws and appropriate funds in accordance with Article VI. The General
22 Council hereby authorizes the judicial branch to interpret and apply the laws and
23 Constitution of the Nation in accordance with Article VII.

24 25 **ARTICLE XII - SOVEREIGN IMMUNITY**

26 Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from
27 suit except to the extent that the Legislature expressly waives its sovereign
28 immunity, and officials and employees of the Ho-Chunk Nation acting within the
scope of their duties or authority shall be immune from suit.

Section 2. Suit Against Officials and Employees. Officials and employees of the Ho-
Chunk Nation who act beyond the scope of their duties or authority shall be subject
to suit in equity only for declaratory and non-monetary injunctive relief in Tribal
Court by persons subject to its jurisdiction for purposes of enforcing rights and duties
established by this constitution or other applicable laws.

1 **HCN Personnel Policies and Procedures Manual**

2 Chapter 12, C. Performance

- 3
- 4 1. Inefficiency, incompetency, or negligence in the performance of duties, including
- 5 failure to perform assigned tasks or training or failure to discharge duties in a
- 6 prompt, competent, and reasonable manner.
- 7
- 8 6. Careless, negligent, or improper use of Tribal property, equipment or funds,
- 9 including unauthorized removal, or use for private purposes, or use involving
- 10 damage or unreasonable risk of damage to property.

11 **DISCUSSION**

12 This is an appeal in an employment case by the employer whose decision to fire the

13 appellee, Hope B. Smith was overturned in the Trial Court below. The grounds for overturning

14 the decision of the Trial Court by the appellant are that the Trial Court failed to apply its theory

15 of the case of negligence, *i.e.*, that Ms. Smith knew or “should have known” of the misconduct of

16 her son Lot Smith II who she did not supervise. While the appellant concedes that the Trial

17 Court examined and determined that Ms. Smith did not know of her son’s improper use of a

18 tribal credit card, the appellant contends the Trial Court should have also determined whether she

19 “should have known” of this improper use.

20 The second ground for appeal is the claim that the Court incorrectly applied the “arbitrary

21 and capricious” analysis in reviewing the termination. *See Appellant’s Brief* at 8. The appellant

22 urges that this Court adopt or reiterate that the Trial Court should review agency decisions under

23 a deferential arbitrary and capricious standard of review to see whether the agency decision

24 below “contains such relevant evidence as a reasonable mind might accept as adequate to support

25 a conclusion *citing Israel v. U.S. Dept. of Agriculture*, 282 F.3d, 521, 526 (7th Cir, 2002). It does

26 not cite to Ho-Chunk case law for this proposition.

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1 Lastly, the appellant argues that the Court violated the Nation's *Limited Waiver of*
2 *Sovereign Immunity*, HCN LEG. RES. 6-9-98A by ordering the appellee's salary be raised by two
3 cents (\$.02) per hour and ordering that the manager responsible for her firing write a written
4 apology. The Court will address each claim of error in turn.

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6 **I. STANDARD OF REVIEW**

7 The facts of this case are not disputed.² In reviewing the Trial Court's finding of facts
8 the Court applies the abuse of discretion standard. *Anna Rae Funmaker v. Katheryn Doornboos*,
9 SU 96-12 (Mar. 25, 1997). This is both because only the Trial Court may make findings of fact
10 pursuant to the HCN CONST. ART. VII. § 6(a) and the fact that the Trial Court has listened to the
11 evidence and viewed the demeanor of the witnesses and assessed their credibility. *Id.* at 2. This
12 standard is highly deferential to the Trial Court and the Supreme Court will uphold such findings
13 absent a showing that the Trial Court somehow failed to make a necessary finding, ignored the
14 great weight of the evidence, or otherwise abused its discretion in making findings of fact.

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16 The Supreme Court recently articulated that it will review the Trial Court's application of
17 discretion in the conduct of the trial under an abuse of discretion standard because the Trial
18 Court is in a better position to judge the myriad of factors in making such decisions such whether
19 it will delay the proceedings, cause undo prejudice to an opposing party, the ability to properly
20 prepare a defense to a new cause of action, etc. *See Rae Anna Garcia v. Joan Greendeer et. Al.*

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24 ² The appellant is very vague about the citation to the facts in the *Appellant's Brief* citing generally, *i.e.*, *See Trial*
25 *testimony of Hope Smith. Appellant's Brief* at 3. This is neither helpful nor a proper use of the record and makes it
26 very difficult for this Court to review the facts the appellant wishes this Court to examine. The HCN Court system
27 uses an advanced digital recording system called FTR Gold and the appellant, appellee, as well as each of the
28 Justices of the Supreme Court can obtain easy access to the electronic record even if the recording is not transcribed.
At the very least, an experienced attorney such as appellant's should cite to the time or place in the record, which
can be pinpointed precisely that this Court should review. It is the appellant's burden to persuade this Court that
some error has occurred and point to exactly where an objection or statement was made in the record. Compare to
Trial Court decision, which give the precise Log Note and Time in the Trial Record. *See Final Judgment*, CV 02-
42 p. 10 (HCN Tr. Ct. July 31, 3003). Thus, even in the absence of the Transcript which was filed on November 5,
2003, two days before oral argument, there is a precise way to cite to the record in any given case.

1 SU 03-01 (April 30, 2003). The proper standard for review of an exercise of discretion is for the
2 appellant to show that the Trial Court somehow abused its discretion. *Id.* at 6.

3 The standard of review in this case is whether or not the Trial Court properly applied the
4 law to the facts in this case. In determining whether the Trial Court properly applied the law to
5 the facts in this case the Supreme Court looks to see whether the Trial Court abused its discretion
6 in doing so. *In the Interest of Minor Child C.Y.B., DOB 5/04/92 by Charles Brown v. HCN*
7 *Office of Enrollment, SU-03-03 (May 30, 2003).* However, this is not as clear as it seems
8 because the appellant is urging this Court to find that the Court failed to properly apply the law
9 properly in this case. Basically, the appellant is stating that the Trial Court misinterpreted the
10 law.
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13 The Supreme Court reviews questions of statutory and Constitutional interpretation de
14 novo. *See Mudd. HCN Legislature, at 4, SU-03-02 (Apr. 8, 2003) citing Louella Kelty v. Jonette*
15 *Pettibone et. Al., SU 99-02 (Sept. 24, 1999).*³ The proper standard of review for an interpretation
16 of law is the de novo standard.
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18 **II. Did The Trial Court Misintepret the Negligence Standard in the HCN Personnel**
19 **Policies And Procedures Manual in Determining this Case?**

20 The facts in the case are not disputed. In relevant part the Trial Court found that Ms.
21 Hope Smith was the Wisconsin Rapid's Branch Office Coordinator and was the mother of Lot
22 Smith II, the Wisconsin Rapids maintenance worker. However, do to concerns regarding
23 nepotism, she was never the direct supervisor of her son Lot Smith II. Those duties were
24 assigned to another person, first to Elaine Nakai within the Wisconsin Rapids Branch Office and
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27 ³ A review of the *Kelty* decision reveals that it did not articulate this standard but instead resolved a question on how
28 whether to grant a *Motion to Reconsider*. However, since the *Mudd* case revolved essentially around a
Constitutional interpretation, this standard is squarely supported by the HCN CONSTITUTION which makes the HCN
Supreme Court's decision's final and its interpretations of the HCN CONSTITUTION unreviewable by the HCN
General Council. SEE HCN CONST. ART. VII, § 7(c) & Art. IV. §3(b).

1 later to a Sandy Martin, a supervisor in Black River Falls for the HCN Department of
2 Administration in order to prevent the awkward situation of Ms. Smith having to supervise her
3 own son.

4 Nevertheless, Ms. Smith did have interactions with her son who was in charge of the
5 Wisconsin Rapids Branch office vehicle, which was a truck used for maintenance. The truck
6 presumably required gas for its normal use and the Tribal credit card was kept in the truck for its
7 use. Ms. Smith did not hold the credit card but instead the credit card was kept in the truck. In
8 late June 2001 Mr. Lot Smith was laid off and was no longer an HCN employee. Not until
9 October 2001 did the HCN Treasury Department inform the head of the HCN Department of
10 Administration of some irregularities in the use of the credit card and ask that it investigate. As a
11 result of this investigation, the Executive Director of the Department of Administration
12 determined that there had been misuse of the credit card by Ms. Smith's son and further
13 investigated Ms. Smith's role as Wisconsin Rapids Branch Office Coordinator in vouchering the
14 payments for the credit card used by the Area maintenance worker.
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16 It was established by the Trial Court that the Branch Office Coordinator did not actually
17 know of the misuse of the credit card by her son. It was also established that she had no
18 accounting responsibilities in her job description and was not required to have any accounting
19 experience to hold the job. It was further clarified that neither of Lot Smith II's supervisors,
20 Elaine Nakai or Sandy Martin, discovered the misuse on their own.
21

22 What is disputed is the claim that the Trial Court should have examined whether or not
23 Ms. Smith should be held to the standard in negligence theory that she "should have known" of
24 the misuse. The appellant further concedes that the HCN Legislature did not define negligence
25 in the *Personnel Policy and Procedures Manual*. [hereinafter PPM]. Therefore, it argues that the
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1 Trial Court erred by adopting a standard not clearly enunciated by the HCN Legislature. In a
2 sense the appellant is stating that the Trial Court should uphold the interpretation of the PPM by
3 a supervisor when that supervisor is making an *ad hoc* determination as to whether negligence
4 occurred.

5 The appellant, in arguing that the law was not properly applied, does so by urging an
6 interpretation of the law, which is not clear on its face and thus misstates what the law is. The
7 impracticality of this approach is demonstrated by the appellant's own argument on appeal. The
8 appellant urges both that the appellee should have exercised ordinary care in vouchering up the
9 credit card payment and the "should have known" standard of care when really this is the same
10 standard. If a person exercises the ordinary care that a reasonable person in the same set of
11 circumstance would have done, then according to negligence theory they "should have known"
12 of the credit card abuse. The negligence occurs by not discovering the obvious that a person in
13 the same set of circumstances would have. However, the appellant does not clearly articulate
14 what standard of care Ms. Smith violated.

17 The appellant was not able to convince the Trial Court that some clear standard of care
18 had been violated. In reviewing the transcript and documents what becomes evident is that there
19 was no clear standard that a person in Ms. Hope Smith's position was to follow. The Trial Court
20 had all of the information before it of what training Ms. Smith had been given, her job
21 responsibilities and knowledge of any credit card usage policy, or lack of same.

23 Ms. Smith's direct supervisor did not catch the use of the credit card on weekends and in
24 locations far removed from Wisconsin Rapids such as Hudson, WI, or for the purchase of diesel
25 gas, a type of gas presumably not used by the Branch office truck.⁴ Without being Lot's Smith
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28 ⁴ Although in the record, these are not in the Trial Court findings of fact. As the omission of these issues was not urged as error, this court declines to address them.

1 II's supervisor Hope Smith was supposed to know that he could not have charged gas on the
2 weekend when his actual supervisor conceded that he sometimes worked weekends. It is hard
3 for this Court to see how the Trial Court committed any type of error in resolving these factual
4 inferences. Indeed, it was only by careful review by the Executive Director of the Dept. of
5 Administration after having been alerted by the HCN Dept of Treasury that uncovered the
6 improper credit card use. Indeed, it appears the Executive Director of Administration created
7 two spreadsheets to uncover the pattern of credit card misuse by Lot Smith II.
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9 Using the definition of negligence as defined by the appellant, that a person in the same
10 set of circumstances using ordinary and accustomed practices to review the use of the credit card,
11 does not reach the result the appellant urges. For such a person would not necessarily have
12 discovered the misuse. The appellant pointed out below that some of the misuse occurred on a
13 weekend, yet the supervisor conceded that sometimes Lot Smith did work on the weekend
14 making a gasoline charge on the weekend less suspicious.⁵ This is what the Trial Court
15 concluded after assessing the credibility and demeanor of all the witnesses and resolving the
16 factual assertions as made by the parties.
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19 This is not to say that the misuse did not occur, rather it means that even using the
20 standard of care urged by the appellant that a reasonable person in the appellee's position using
21 ordinary review procedures should have caught the discrepancies was not accepted by the Trial
22 Court. The Supreme Court cannot find that such conclusions are against the weight of the
23 evidence or are otherwise erroneous.
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⁵ See *Hope Smith v. Ho-Chunk Nation*, CV 02-42, pp 8-9 Finding of Fact #8. (HCN Tr. Ct. July 31, 2003)

III. Did the Trial Court give the Agency Proper Deference in Making the Decision to Terminate Ms. Smith?

1 The appellant urges that the Trial Court give deference to the decision of the agency
2 terminating Ms. Smith citing *Israel v. U.S. Dept. of Agriculture*, 282 F.3d 521, 526 (7th Cir.
3 2002). However, that case does not benefit the appellant. The issue in *Israel* involved the
4 interpretation of matters of the Farm Service Agency's [FSA] administration of the expiration of
5 a contract with a farmer peculiarly within its expertise. The agency in question there, the FSA,
6 was bound by the Code of Federal Regulations [CFR] to make a determination of "shared
7 appreciation" within the agreement with the farmer. Under federal law in *Israel* a review of the
8 FSA's decision must by be done in accordance with the *Administrative Procedures Act* [APA] 5
9 U.S.C. §§ 701-706. *See Id.* at 525. The FSA was charged by statute and regulation to make a
10 legal interpretation, which was upheld by the Courts applying the deferential standard of review.
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13 Here the appellant cites to no Tribal Administrative Procedure Act, no CFR equivalent,
14 or guideline from the HCN Department of Personnel interpreting the PPM regarding the
15 definition of the term negligence. Therefore, what the Courts are left with is the examination of
16 an *ad hoc* interpretation of what negligence is in the PPM by a senior manager. While the Court
17 recognizes that managers within the Ho-Chunk Nation must of necessity make interpretations of
18 the PPM, what the appellant is asking is that this Court grant great deference to such
19 determinations without any of the due process guarantees and review processes extant in the
20 APA or mandated by the CFR. The HCN Supreme Court declines to grant such deference
21 because of the lack of procedural protections which are present in the federal context.
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24 In the past the PPM had some semblance of an Administrative Review Process where
25 grievances were heard by independent fact finders who were not beholding to the supervisors
26 who made the disciplinary decision. *See Wisconsin Winnebago Personnel Review Commission*
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1 *Ordinance.* Indeed, under a prior version of the PPM there was a committee which reviewed
2 grievances. Though this system too had flaws it gave some modicum of assurance, however
3 small, that the review was meaningful. What appellant urges is for the Court to give great
4 deference to the actual actor meting out the discipline without some assurance that of meaningful
5 review.

6 **IV. Did the Trial Court violate the Limited Waiver of Sovereign Immunity in**
7 **Granting the Objected to Relief in its Decision?**

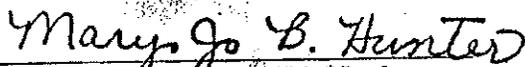
8 The initial place to see whether sovereign immunity has been violated is in the HCN
9 CONSTITUTION. The Constitution, which is the supreme law of the Ho-Chunk Nation, states that
10 the Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature
11 expressly waives its sovereign immunity, and officials and employees of the Ho-Chunk Nation
12 acting within the scope of their duties or authority shall be immune from suit. It further states in
13 HCN CONST. ART. XII, § 2 that, "Officials and employees of the Ho-Chunk Nation who act
14 beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory
15 and non-monetary injunctive relief in Tribal Court by persons subject to its jurisdiction for
16 purposes of enforcing rights and duties established by this constitution or other applicable laws."
17 This establishes both that there is sovereign immunity and that it can be waived.
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20 However, it apparently needs restating that the principle of sovereign immunity exists
21 primarily to protect the public treasury from lawsuits seeking damages. It does not prevent
22 people from suing the HCN government to enforce their rights under the HCN CONSTITUTION.
23 To read it otherwise would gut the HCN CONSTITUTION'S Bill of Rights enumerated in ARTICLE
24 X rendering them virtually meaningless. The appellant contends that the Trial Court violated the
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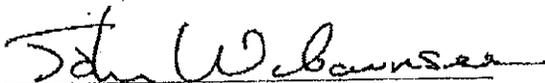
EGI HESKEJET. Dated this 8th day of December 2003.



Hon. Mark D. Butterfield, Associate Justice



Hon. Mary Jo B. Hunter, Chief Justice



Hon. John Wabaunsee, Associate Justice pro tempore
Ho-Chunk Nation Supreme Court