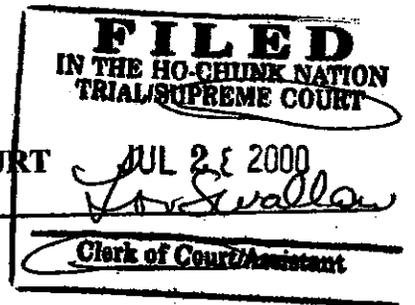


IN THE
HO-CHUNK NATION SUPREME COURT



Daniel Youngthunder, Sr.,
Appellant,

vs.

Jonette Pettibone, Ann Winneshiek,
Ona Garvin, Rainbow Casino Management,
Appellees.

DECISION
Case No. SU00-05

Heard before Associate Justice Rita A. Cleveland, Associate Justice Debra C. Greengrass and Chief Justice Mary Jo B. Hunter, presiding.

This matter came before the full Court on Friday, May 26, 2000 for oral arguments. This case is an appeal of the February 9, 2000 Judgment signed by the Honorable Mark Butterfield of the Ho-Chunk Nation (HCN) Trial Court. The Appellant appeared *pro se* and the Appellees were represented by John Swimmer, Esq. Of the HCN Department of Justice. None of the named Appellees personally appeared.

This case is an employment issue as to Mr. Youngthunder's one day suspension from his position as a Pit Boss at the Rainbow Casino in Nekoosa, Wisconsin. On May 11, 1998, he received a notice of a one day suspension for his lateness on May 4, 1998 (paragraphs 13 and 17, p.11, Judgment, CV98-48, filed February 9, 2000.) Mr. Youngthunder appeals the trial court decision which upheld the suspension. He argues that the suspension violates the HCN Personnel Policies and Procedures Manual as to religious leave. Mr. Youngthunder requested that the HCN Supreme Court consult with the HCN Traditional Court as to that issue. He further argues that the suspension did not comply with the three (3) day notice requirement.

The record reviewed on appeal consisted of the Notice of Appeal, Appellant's Trial (sic) Brief, Appellees' Notice and Motion to Dismiss, Appellees' Notice and Motion to Quash, Appellees' Notice and Motion Extend Time for Filing Reply Brief, Appellees' Brief and Appellant's Brief. This Court has also reviewed the transcript of the May 26, 2000 oral argument on this matter. Based upon all of the above, this Court hereby issues its decision on this matter.

STANDARD OF REVIEW

The Appellees have correctly stated that this Court must review the Trial Court Judgement with an abuse of discretion standard. That is, this Court must review the Trial Courts decision to determine if an error of law was made by the lower court. As defined by Black's Law Dictionary, an "abuse of discretion by [a] trial court is any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to [the] matter submitted." Black's Law Dictionary, 6th ed., West Publishing Co. (1991)

DISCUSSION

I. DID THE TRIAL COURT ERR AS TO WHETHER OR NOT THE HCN RELIGIOUS LEAVE POLICY WAS VIOLATED.

The Appellant requested that this Court consult with the HCN Traditional Court as to this issue. After careful consideration of the matter, this Court denied that request. Since this Court understands the religious leave policy and the basis for it, it is unnecessary for this Court to seek input from the HCN Traditional Court.

Upon reviewing the record, it is the Court's determination that the Trial Court did not err in its application of the Religious Leave policy used by the parties. Therefore, this aspect of the Trial Court's Judgement is affirmed.

II. DID THE TRIAL COURT JUDGE ERR IN HOLDING THAT THE NONCOMPLIANCE OF THE THREE DAY NOTICE REQUIREMENT OF THE SUSPENSION DID NOT RESULT IN ACTUAL HARM OR PREJUDICE TO THE APPELLANT.

The Ho-Chunk Nation Constitution, Article X, Bill of Rights prohibits the Ho-Chunk Nation from “depriv[ing] any person of liberty or property without due process of law.” HCN Const., Art. X, section 1(a)(8).

The Ho-Chunk Nations Policies and Procedures manual requires that, in disciplinary actions involving suspensions, “[a]s soon as possible after the initial actions, but not later than three working days, the Department Director will prepare written notification to the affected employees.” HCN Policies and Procedures Manual, Ch. 12, p. 48 (emphasis added).

The Trial Court reviewed the Personnel Policy Manual section in light of Mr. Youngthunder’s allegations that the notice requirements of this section had not been met. The Trial Court reviewed the time lines surrounding the suspension and found that Mr. Youngthunder was correct in his assertion. (Judgement, lines 3-5, p.17) Judge Butterfield found that the Appellees had violated the Policies and Procedures Manual by providing Mr. Youngthunder with the notice of suspension seven days after its initiation. (Judgement, lines 3-6, p. 17.)

Judge Butterfield did not hold that the violation was sufficient to overturn the one-day suspension however. Rather, Judge Butterfield held that “[F]or, the above violation to result in an annulment of the plaintiff’s suspension, however, the plaintiff must not only show a technical violation for the Policies and Procedures Manual, but must also show that the violation led to some actual harm or prejudice.” (Judgement, lines 6-8, p. 17.)

In support of this position, the Trial Court cites the case of Edward Creapeau v. Ho-Chunk Nation - Rainbow Casino, PRC 95-009 (HCN Tr. Ct., March 13, 1996.) This Court has reviewed the Creapeau case and finds it distinguishable from the case before us. In Creapeau, the employee had two no call/no show incidents. The second incident occurred on February 11, 1995. The employee, Edward Creapeau, was not scheduled to work for the next three days of February 12, 13 and 14, 1995. He returned to work on February 15, 1995. On February 17, 1995, Mr. Creapeau was verbally notified that he would receive five days suspension for excessive absenteeism. It was to begin on February 18, 1995. Mr. Creapeau refused to sign the Disciplinary Action form. The notice was sent to Mr. Creapeau by certified mail.

In Mr. Youngthunder's situation, the record indicates that according to Mr. Youngthunder's testimony, his last day at work was May 9th. The employee attendance records offered by Appellees are in conflict. One chart indicates that he was on vacation on May 9th but another chart does not indicate a vacation day. (Plaintiff's Exhibit 4 and Defendant's Exhibit E, page 4.)

Mr. Lenny Cloud testified below that he sent Mr. Youngthunder home on May 10th and that Mr. Cloud forgot to serve Mr. Youngthunder with the notice on that day. Mr. Cloud testified that he did serve the notice on May 11th. Such service was not within the three working day requirement.

The Trial Court found that the suspension was for an incident of lateness on May 4. The trial court record is not clear as to whether Mr. Youngthunder did not work on May 9th. He did work on May 10th and was given notice by certified mail on May 11th. The Trial Court correctly

held that the notice was not given within three working days.¹

The HCN Personnel Policies and Procedures Manual states:

“Service of disciplinary notice will be deemed to have been made upon personal presentation, or by depositing the notice, postage prepaid, in the U.S. mail, addressed to the employee’s last known address on file.” HCN Personnel Policies and Procedures Manual, Ch. 12, Initiating Discipline: Consideration and Notice, p. 49.

Unlike Mr. Creapeau, Daniel Youngthunder did not receive verbal notice within the three working days. Nor did he receive any notice by regular or certified mail. Rather, he was allowed to return to work and actually work part of May 10th without being provided any information about the upcoming suspension.

This Court views the Creapeau case is factually distinguishable from this matter. Furthermore, it is not evident to this Court that Creapeau enunciates a test which requires that a violation of the Policies and Procedures Manual must lead to some actual harm or prejudice. The Court’s reading of Creapeau takes the language in the Judgement at its face. Creapeau states “[I]t is the disciplinary action which Mr. Creapeau is harmed by and it is the disciplinary action that triggers notice.” Creapeau at p. 5. Thus, the disciplinary action itself is the harm. Mr. Youngthunder suffered that harm without the benefit of a notice within three working days.

This Court holds that the Trial Court Judge Mark Butterfield abused his discretion in holding that the violation of Mr. Youngthunder’s rights did not lead to actual harm. It is not

¹ This court is unaware of whether “working days” is defined as the actual working days of the employee to be disciplined or the working days of the employer. Since the definition was not raised as an issue, this court will not address that point. It is also not clear if the day of the incident is counted within the three days or not. The lack of specifics in the HCN Personnel Policies and Procedures Manual creates a situation ripe for inconsistent application. See PPM, Ch. 5, p. 10.

merely a technical violation but a disregard of the rights of an employee.² To quote Creapeau,

“The Ho-Chunk Nation has adopted a comprehensive set of employment guidelines. The Personnel Procedures (sic) provides for rights of individuals employed by the Nation, as well as, imposes duties and obligations on those employed by the Nation. Upon the enactment of such laws, including the Personnel Procedures (sic), the Nation and those functioning in official capacities representing the Nation or its interest have an affirmative duty to apply, enforce and follow legislatively enacted laws.” Creapeau at p. 6.

This Court wholeheartedly agrees that both the employee and employer must follow the laws of this Nation. In that regard, the employer must strictly comply with the notice requirements of the HCN Policies and Procedures Manual to prevent harming the employee rather than disciplining.

Based on the foregoing, this matter is reversed. The Trial Court Judge abused his discretion as indicated above. The matter is remanded to the trial court to re-examine the factual underpinnings of this case as it affects the law cited and to provide the appropriate relief to Mr. Youngthunder.

² This Court is aware that Mr. Youngthunder's attendance was not within the required norms. This Court does not condone Mr. Youngthunder's attendance and recognizes that most operations are unable to operate at maximum efficiency when employees do not report as scheduled, and may prove to be detrimental to employee morale in the workplace, Nevertheless, this Court cannot uphold disciplinary actions which are improper.

CONCLUSION

This matter is reversed and remanded to the trial court for rehearing.

EGI HESKEKJET.

Dated this ____ day of July 2000.

By the Court.

Rita A. Cleveland

Hon. Rita Cleveland
Associate Justice

Debra C. Greengrass

Hon. Debra Greengrass
Associate Justice

Mary Jo B. Hunter

Hon. Mary Jo B. Hunter
Chief Justice
Ho-Chunk Nation Supreme Court