

IN THE
HO-CHUNK NATION SUPREME COURT

JUL 27 1999

Willa RedCloud
Clerk of Court/Assistant

LOUELLA A. KELTY,
Appellant,

vs.

OPINION

JONETTE PETTIBONE and
ANN WINNESHIEK, in their official capacities,
Appellees.

SU 99-02

Per Curiam (Before Chief Justice Mary Jo B. Hunter, Associate Justice Rita A. Cleveland and Associate Justice Debra C. Greengrass.)

Appellant Louella A. Kelty appeals from the trial court decision upholding her layoff from the Rainbow Casino.

STATEMENT OF THE FACTS

Louella Kelty had been an employee at Rainbow Casino since 1993. She held the positions of Dealer, Dual Floor and Table Games. On December 1, 1996, Ms. Kelty was assigned at the Table games as a Floor Person/Swing Shift employee.

Jonette Pettibone was the Table Games Manager at the Rainbow Casino. She started at Rainbow on April 26, 1998 after being transferred from the Ho-Chunk Casino. She was assigned to lay off three employees for budget considerations. On June 19, 1998, Ms. Pettibone gave notice to Ms. Kelty that Ms. Kelty would be laid off. The letter indicated that the basis for the lay off was "budgetary cutbacks". The letter did not state that her seniority nor her ability were considered as a basis for Ms. Kelty being selected as one of the people to be laid off.

STATEMENT OF THE CASE

This matter concerns an appeal from a trial court decision upholding the lay off of the Appellant, Louella A. Kelty. Ms. Kelty filed a Notice of Appeal on April 6, 1999. She appealed, *pro se*, from the trial court Judgment dated March 4, 1999 and signed by the Honorable Joan Greendeer-Lee.

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

On April 7, 1999, the Ho-Chunk Nation (hereinafter HCN) Department of Justice filed Appellee's Opposition to Notice of Appeal and Appeal.

On April 12, 1999, this Court accepted the matter for appeal. The Court granted the Appellant's request for an extension of the deadline for the Appellant's Brief. The Court reserved the decision to hear oral argument and to have the Traditional Court provide advice.

The Appellant filed her Trial (sic) Brief on May 3, 1999. The Appellee filed Respondents' (sic) Appeal Brief and Memorandum of Law on May 13, 1999. The Appellant filed an untimely Reply Brief on May 19, 1999 which this Court did not consider in rendering this Opinion.

On May 24, 1999, this Court issued an Order for Oral Argument to be heard on June 5, 1999. On June 5, 1999, the full Court heard oral arguments from the parties.¹ After deliberation, the Court now renders this Opinion.

DECISION

The full Court has decided that this matter is to be reversed and remanded to the trial court for rehearing based upon the recommendations of this Court.

ISSUES

- I. **DID THE APPELLEE DENY THE APPELLANT HER DUE PROCESS RIGHTS WHEN SHE WAS LAID OFF FROM HER POSITION WITH THE RAINBOW CASINO?**

The Ho-Chunk Nation Constitution guarantees that no one shall be deprived "of liberty or property without the due process of law." HCN Const., Art. X, Sec. 1(8). Case law has determined that employment is a property right. [need cite] Furthermore, notice is required as an

¹The Court did not hear advice from the Traditional Court although the Appellant had made such a request. The Court viewed the issues as being questions of law rather than turning on questions of cultural norms.

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

aspect of due process. Simplet, et. al. vs. HCN Dept. of Health, CV95-26 (HCN Tr. Ct., Aug. 29, 1996) The notice must at a minimum give an employee a sufficient understanding of the underlying facts so that the employee may consider whether or not to file a grievance with sufficient knowledge. White v. HCN Dept. of Personnel, CV95-17 (HCN Tr. Ct., Oct. 11, 1996) Thus, an employee within the Ho-Chunk Nation must be given notice with sufficient information to explain the actions in the notice to satisfy the due process requirements within this jurisdiction.

A. Sufficient Notice

The question is whether or not Ms. Kelty was denied that due process. The trial court held that Ms. Kelty was not denied her due process in the layoff process. The reasoning behind that holding is that Ms. Kelty did not declare a question regarding the notice of layoff that she received. Therefore, the trial court holds that there was not a denial because Ms. Kelty did not specify the lack of sufficient notice.

Ms. Kelty did state in her initial complaint that she had been subjected to unfair practices in her layoff. On appeal, she did state that she had been denied due process. This Court will consider the issue raised below as alleging a denial of due process although it may not have been expressly articulated as a lack of sufficient notice.

At oral argument, Ms. Kelty expressed her frustration with the lack of awareness of the basis for her layoff. Her layoff notice only indicated budgetary cuts and did not state that other factors had been considered. Based on her perception, Ms. Kelty assumed that the Ho-Chunk Preference provision had not been applied to her and based her grievance on that assumption.

Unbeknownst to Ms. Kelty, the layoff plan considered such factors as seniority and ability. According to the Appellee's attorney, Ms. Pettibone, the table games Manager, examined the records, the personnel files and employee evaluations to determine who had the ability and seniority to survive the layoff. That information was not explained to Ms. Kelty until the trial. Since she was unaware of the factors, Ms. Kelty could not possibly have filed her complaint alleging that the notice was insufficient.

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

B. Lack of Notice

As stated above, notice was provided to Ms. Kelty. The notice, however, was insufficient to adequately notify her of why she was being laid off. If an employee is not provided sufficient information to adequately challenge the lay off, it is as if the employee was not given any notice at all. Here, the HCN Personnel Policies and Procedures require that the layoff plans consider both ability and seniority. HCN Personnel Policies and procedures Manual, Ch. 13, Employment Separation, Layoff, p. 52. Where the factors of seniority and ability are used, the employee must be notified of how those factors were utilized specific to them so that they may challenge the layoff if they disagree with the assessment.

In this case, Ms. Kelty was unaware that her absences from work were a factor until she was at the trial. Her last evaluation had rated her as above average and earned her a merit increase. Thus, she was under the belief that her ability was above average. Since absenteeism is a part of the annual review, she apparently was not apprised of the need for improvement in that area.² Because she was unaware of the issues as to her seniority and ability, Ms. Kelty was not given notice of that aspect of the layoff decision.

C. Opportunity to be heard.

Ms. Kelty was unable to defend her position due to lack of sufficient notice. In addition, the trial court judge would not allow her to introduce evidence which Ms. Kelty did think was an aspect of her defense. She attempted to challenge the layoff by introducing a prior grievance which she had filed as an employee. Since she did not have full knowledge of the basis for her layoff, Ms. Kelty made an assumption about why she had been selected for layoff. The trial court judge accepted the objections of the counsel for the Appellee and ruled that exhibits 20-48 would not be allowed to be used during the trial.³ Since the case involved Ms. Kelty's ability

²The record is unclear about her attendance record. Testimony at the trial indicated that she had absentee problems but the record is not clear on that point. If she knew that her attendance was an issue, Ms. Kelty could have provided her complete personnel file to the Court.

³Despite that ruling, the trial court judge apparently did not return the exhibits or issue an order to seal them. The exhibits were provided to this Court as part of the record. If items are ruled as

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

and seniority, it is unclear to this Court why that information was excluded. The relevance of that information was more evident when the counsel for the Appellee attempted to refer this Court to those documents at oral argument. This Court questions why the attorney had earlier objected to that evidence as lacking relevance but wished to utilize that same information on appeal. Given the above, this Court holds that Ms. Kelty's opportunity to be heard was negatively impacted by the insufficient notice discussed previously.

CONCLUSION

This Court holds that this matter must be **REVERSED** and **REMANDED** to the trial court for rehearing. On rehearing, this Court strongly recommends that the exclusion of exhibits 20-48 be reconsidered in light of this decision. Further, the trial court should refine the issues at the scheduling conference to reflect the concerns of this Court. The concerns of Ms. Kelty about the application of the Ho-Chunk Preference provision and the application of the recall provision were not addressed by this Court. The trial court may address those issues at the rehearing if the trial judge deems that as appropriate.

IT IS SO ORDERED. EGI HESHKEKJET.

Per Curiam. Dated this 27th day of July 1999.

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

excluded, the items should be immediately returned to the party so that they do not remain part of the record. Or, the trial court should issue an order to seal the documents from being used further so that they do not become part of the record on appeal.

CERTIFICATE OF SERVICE

I, Willa RedCloud, Clerk of the Ho-Chunk Nation Supreme Court of the Ho-Chunk Nation, do hereby certify that on the date set forth below I served a true and correct copy of the attached paper filed in Case No. SU-99-02 (CV-98-49), by the United States Postal Service, upon all persons listed below:

Ms. Louella A. Kelty
101 Maplewood Court, Apt. 1
Black River Falls, WI 54615

William A. Boulware, Jr.
HCN Dept. Of Justice
P.O. Box 667
Black River Falls, WI 54615

Hon. Debra Greengrass
6200 West Locust Street
Milwaukee, WI 53210

Hon. Mary Jo Brooks Hunter
4 Linder Court
Saint Paul, MN 55106

Hon Rita Cleveland
367 River Street
Black River Falls, WI 54615

Indian Law Reporter
319 McArthur Blvd.
Oakland, CA 94610

Date: 7/27/99



Willa RedCloud, Clerk of Court
Ho-Chunk Nation Supreme Court