

MAR 1 0 1998

*Wilson RedCloud*  
Clerk of Court

IN THE

**HO-CHUNK NATION SUPREME COURT**

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**Jolene Smith**  
Appellant,

v

**DECISION**

**Ho-Chunk Nation**  
and **Tammy Lang, as Head Start Director,**  
Appellee

**Case No.: SU 97-06**

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This matter came before the HCN Supreme Court, on appeal of Order dated October 31, 1997. On December 30, 1996 the appellant filed a complaint with the Trial Court according to the Administrative Review Process outlined in the HCN Personnel Policies and Procedure Manual (September 1995). On May 7, 1997, the Trial Court entered a Judgement stating that the plaintiff return to work within the Headstart Program, receive retro-active annual leave for hours not already cashed-out and be placed on Administrative leave or a similar lay-off status with pay starting April 17, 1997, until the plaintiff is re-employed. On September 18, 1997, Judge Joan Greendeer-Lee presided over a Status Hearing held on the HCN's non-compliance with the Order of May 7, 1997. At that time, the Nation was found in contempt. On October 23, 1997, a hearing was held to determine whether the HCN met its obligation in offering suitable employment as ordered September 18, 1997. The Court determined that the HCN had met its obligation by written Order entered September 31, 1997. Jolene Smith appealed to this Court, arguing the Trial Judge misinterpreted information presented to the Court on September 23, 1997 and that the Trial Court failed to render an opinion upon "Comparable Employment" after the September 18, 1997 Status Hearing. The Supreme Court accepted the appeal and

appeal and scheduled oral arguments on January 17, 1998. Jolene Smith was represented by Rick McArthur, Lay Advocate.<sup>1</sup> Michael Murphy appeared on behalf of the Nation.

The Supreme Court has considered the oral arguments made on January 17, 1998, the case file from the Trial Court, written transcripts and the taped recording from the October 23, 1997 hearing. The court will look at the HCN constitutional provision of the Powers of Trial Court, Article VII, Section 6(a), Kingsley v. HCN : Personnel Department, PRC-93-026, HCN Trial Court, April 9, 1996 and Simplot, et.al. v. HCN Health Dept., CV96-05 (Tr. Ct. August 29, 1996). Based upon this Court's considerations, the HCN Supreme Court applies Rule 16 (a) of the HCN Rules of Appellate Procedure and hereby renders this decision.

It is the opinion of this Court that an injustice toward the appellant has occurred due to the error<sup>o</sup> of the Trial Court. Therefore, this court **Reverses and Remands** the decision back to the Trial Court for further proceedings consistent with this opinion.

### **ARGUMENTS**

#### **1. WHETHER THE TRIAL COURT'S FAILURE TO RENDER AN OPINION AS PROMISED ON COMPARABLE EMPLOYMENT CONSTITUTED AN ERROR?**

At oral argument, both the appellant and the appellee expressed concerns regarding the Trial Court's failure to render the promised opinion on the appellant's employment status. Both parties, the Appellant and the Appellee, made statements that they did expect the opinion, which would have helped them considerably in determining what would be comparable employment for the appellant. The reluctance by the appellant to accept a position offered by the appellee is a direct result of the Trial Court's failure to submit an opinion on comparable employment. It was

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<sup>1</sup>Although representing the appellant, supporting documents were signed and filed by the appellant. In the future, the Supreme Court will not accept documents unless filed by the representing advocate.

evident that both parties had differing opinions of what a comparable position was and expected the Trial Court to issue an opinion on the definition of comparable employment, as promised in the contempt order signed by Judge Joan Greendeer-Lee on September 18, 1997. Both parties looked to case law, Kingsley v. Ho-Chunk Nation, PRC 93-026, (HCN Tr. Ct. April 10, 1996) and Simplot, et.al. V. HCN Health Dept., CV95-26 &27, CV96-05 (Tr. Ct. August 29, 1996) as providing possible definitions of comparable employment. The combination of the two cases defines comparable employment as equal pay and similar job duties. In Simplot, et.al. v. HCN Health Dept., CV95-26 &27, CV96-05 (Tr. Ct. August 29, 1996) the court determined similar job duties as comparable.<sup>2</sup> Whereas, in Kingsley v. Ho-Chunk Nation, PRC 93-026, (HCN Tr. Ct. April 10, 1996), the court determined equal pay as comparable.<sup>3</sup> In the present case, Advocate McArthur suggests that comparable is a range within the wage rate that will provide his client the opportunity to advance to the level of pay enjoyed by the appellant prior to the wrongful termination. The appellee suggests that comparable is equal pay.

It is the opinion of this Court, that the differing opinions and the failure of the Trial Court to submit an opinion on comparable employment, has caused an injustice toward the appellant. Therefore, it is the decision of this court to **Reverse and Remand** the decision of the Trial Court dated October 31, 1997.

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<sup>2</sup> Simplot, et.al. V. HCN Health Dept., CV95-26 &27, CV96-05 (Tr. Ct. August 29, 1996) is distinguishable in that their positions were abolished, however, failure to follow proper procedures for reorganization and layoff was a determining factor in the decision to reinstate the affected employees to comparable positions based on their seniority, thus allowing them to displace employees with lessor seniority.

<sup>3</sup>Kingsley v. Ho-Chunk Nation, PRC 93-026, (HCN Tr. Ct. April 10, 1996), appears to be more on target with the present case in that the employee was wrongfully terminated. The court determined that the Ho-Chunk Nation Personnel Departments interpretation of equal wages is reasonable.

**2. WHETHER OR NOT THE HCN TRIAL COURT COMMITTED AN ERROR  
IN ITS FINAL ORDER ENTERED OCTOBER 31, 1997?**

At oral argument, the appellant argued that the Trial Court abused its discretion in the final order entered October 31, 1997. Citing to Findings of Fact #9 of the final order, Judge Joan Greendeer-Lee states that "the appellant was willing to accept a part-time position with the HCN and was willing to accept a position paying \$8.00 per hour", (Final Order, Finding of Fact #9 at page 3). Advocate McArthur argued that his client did not say that. Upon review of the tape recording of the October 23, 1997 hearing, this Court noted that Judge Joan Greendeer-Lee asked Advocate McArthur "from September 17 on, what positions did your client believe were comparable jobs, positions with the HCN?" Advocate McArthur responded by reading a list of position titles and wage rates which were posted by the HCN Personnel Department. In so doing, Advocate McArthur stated that his client was willing to "do even a part-time Supreme Court Clerk Position".<sup>4</sup> Advocate McArthur stated other positions which his client is qualified for and other positions which were available at \$8.00 an hour. At the invitation of Judge Joan Greendeer-Lee, Advocate McArthur took a ten minute break to confer with his client to determine which positions his client considered comparable positions. Upon return, Advocate McArthur identified positions his client considered comparable. At this point, Advocate McArthur briefly commented that a position paying \$8.00 - \$10.00 is acceptable as it provides room for advancement. Advocate McArthur also stated that his client would accept a position that pays \$8.00 per hour, if the court (meaning the trial judge) determined those positions to be comparable employment" (emphasis added). (Tape 1, Side A).

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<sup>4</sup>The beginning rate of pay for this position is \$10.00 with flexible hours up to 32 hours per week.

In the Order (Declaration of Suitable Offers), Judge Joan Greendeer-Lee, in Findings of Fact #6, found that the appellant refused a position in the Education Department, as a Secretary, that was offered at \$9.67 per hour. Counsel for the HCN stated at oral argument that the appellee did not offer the job at \$9.67 an hour, but within the wage range of \$7.00 up to \$9.67 per hour (emphasis added). This Court finds that the misinterpretation of these facts had caused an injustice toward the appellant. It is clear to this Court that the appellant has a desire to re-enter the HCN workforce, however, due to the misinterpretation of the facts by the Trial Court, the appellant has lost all possibilities of having justice served for the wrongful termination by the appellee. Therefore, this court **Reverses and Remands** the decision back to the Trial Court.

### **CONCLUSION**

It is the opinion of this Court, that the differing opinions and the failure of the Trial Court to submit an opinion on comparable employment has caused an injustice toward the appellant. Therefore, the Trial Court needs to re-evaluate its decision of October 31, 1997. This Court feels that the appellant raised valid points in support of their position to postpone acceptance of the two positions offered by the appellee. The Trial Court needs to render a decision that is in conformity with established case law. In so doing, determine what is a "comparable position". Based upon that determination, the Trial Court must then determine whether or not the appellee has in fact met its responsibility to offer "comparable employment" and if the appellant, without good reason, declined such offers of "comparable positions", if any.

Therefore, it is the decision of the Supreme Court to **Reverse and Remand** the decision of the Trial Court dated October 31, 1997.

**IT IS SO ORDERED. EGI HESHKEKJENET**

Dated this 17TH day of March, 1998.

Rita A. Cleveland

Rita A. Cleveland, Associate Justice  
Ho-Chunk Nation Supreme Court

Mary Jo Brooks Hunter

Mary Jo Brooks Hunter, Chief Justice  
Ho-Chunk Nation Supreme Court

Debra C. Greengrass

Debra C. Greengrass, Associate Justice  
Ho-Chunk Nation Supreme Court