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Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

MILLIE DECORAH, as Finance Director
of the Ho-Chunk Nation
and SANDY MARTIN, as Personnel Director,
Appellants,

vs.

JOAN WHITEWATER,
Appellee.

OPINION
Case No. SU98-02

PER CURIAM (Before Chief Justice Mary Jo Brooks Hunter and Associate Justice Debra C. Greengrass and Justice Pro Tempore Rebecca Weise)

Procedural History

This matter was last before the full Court on February 24, 1998, based upon the Notice of Appeal filed by Michael P. Murphy, Ho-Chunk Nation Department of Justice, as well as Appellant's Motion for Waiver of Deposit/Bond Requirement filed February 16, 1998. The matter was accepted for appeal and a bond of \$13,000.00 was required. The Judgement dated January 20, 1998 by the Honorable Mark Butterfield was stayed during the pendency of this appeal. The Appellants, Millie Decorah and Sandy Martin, filed an Appellants' Brief on February 25, 1998.

On March 13, 1998, Justice Rita A. Cleveland disclosed to the parties that she had participated in a discussion with Appellants' counsel, Michael Murphy, concerning the wages of Ms. Whitewater, the Appellee. Although neither party filed a Motion for Recusal, Justice Cleveland chose to recuse herself from this matter. This Court issued a Recusal Order on April 6, 1998 and requested the Legislature to appoint a Justice Pro Tempore. On May 5, 1998, the Ho-Chunk Nation Legislature appointed Rebecca Weise as Justice Pro Tempore.

The Appellee sought an extension to file a reply brief which was granted by this Court. On March 19, 1998, the Appellee, Joan Whitewater, filed Appellee's Brief which sought oral argument. Oral argument was scheduled for August 1, 1998. Due to unforeseen circumstances,

the Court had to cancel the oral arguments on that date and rescheduled the matter for oral argument on September 12, 1998. Oral arguments were heard by this Court on September 12, 1998. At that time, this Court took the matter under advisement. The Court now renders the following Opinion and Order.

Facts of the Case

Joan Whitewater was employed as a Bookkeeper for the Ho-Chunk Nation Department of Treasury from February 8, 1993 to March 5, 1995. She started with a wage rate of \$8.00 per hour which increased to \$14.00 per hour. From March 6, 1995 to September 4, 1996, Ms. Whitewater was employed as a Disbursements Supervisor with a wage rate of \$14.56 per hour.

On September 5, 1996, Ms. Whitewater was demoted to Bookkeeper with a decrease in wage to \$12.48 per hour. The demotion was due to structural reorganization and budget reduction within the Department of Treasury. Ms. Whitewater's wage rate was decreased again on the same day to \$11.39 per hour when it was determined that the earlier wage rate of \$12.48 was above the calculated Class and Compensation maximum allowable for her Bookkeeper position. Based on the Class and Compensation scale, the Bookkeeper position's wage was limited to \$11.39 per hour as the maximum amount.

On September 16, 1997, Ms. Whitewater's wage rate was readjusted again. Her wage rate was reduced to \$9.78 per hour based on calculations from Sandy Martin who was the Executive Director of Personnel. Due to a three year period of separation from employment with the Ho-Chunk Nation which ended on March 15, 1993, Ms. Whitewater's date of hire was different than initially calculated. Ms. Whitewater earned \$9.78 per hour until October 11, 1996 when she was laid off from employment with the Ho-Chunk Nation Treasury Department.

On December 16, 1996, Ms. Whitewater filed a Complaint with the Trial Court requesting the removal of negative reference from her personnel file, equal employment, bridged services, court costs and two thousand dollars (\$2,000.00) in damages. Ms. Whitewater alleged wrongful demotion and wrongful termination in violation of the Ho-Chunk Nation Policies and Procedures Manual.

On February 17, 1997, Ms. Whitewater was reinstated as a General Ledger Accountant with the Majestic Pines Casino where she earns a wage rate of \$10.17 per hour.

On May 20, 1997, the Trial Court approved a Stipulation and Order for Partial Settlement in which Ms. Whitewater was awarded \$2,000.00 and negative references in her personnel file were ordered to be removed. The parties were unable to agree on a comparable wage for the settlement. The parties agreed to leave the issue of comparable wage rate to the Trial Court's determination. The parties submitted Post-Stipulation Briefs as to the issue of comparable wage for Ms. Whitewater.

On August 8, 1997, the Trial Court issued a Notice of Additional Fact Finding to obtain more information concerning the employment history of Ms. Whitewater with the Ho-Chunk Nation. On September 16, 1997, the parties entered into a Stipulation. The parties again disagreed as to the amount of a comparable wage rate. On January 20, 1998, the Honorable Mark Butterfield issued a Judgement which awarded Ms. Whitewater a wage rate of \$12.43 per hour retroactive to October 11, 1996 which was the date that she was laid off from employment.

On February 25, 1998, the Defendants below appealed the Judgement to this Court. On appeal, three arguments were made to the Court. They were: (1) Article XII, Section 2 of the HCN Constitution expressly prohibits the Tribal Court from awarding monetary relief in suits against officials and employees of the Nation; (2) The Trial Court does not have authority to decide whether an executive branch administrator's discretionary decision is a violation of law, when the person is afforded such discretion by statute and (3) In light of the Trial Court's errors of law, the correct comparable wage for the appellee is \$11.39 per hour, effective from the day of judgement forward, not retroactively.

OPINION

1. ARTICLE XII, SECTION 2 OF THE HO-CHUNK NATION CONSTITUTION EXPRESSLY PROHIBITS THE TRIBAL COURT FROM AWARDING MONETARY RELIEF IN SUITS AGAINST OFFICIALS AND EMPLOYEES OF THE NATION.

The Ho-Chunk Nation Constitution at Article XII, Section 2 states,

“[O]fficials and employees of the Ho-Chunk Nation who act beyond the scope of their duties and authority shall be subject to suit **in equity only for declaratory and nonmonetary 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.” (emphasis added)

This case involves a suit by an employee against two officials of the Ho-Chunk Nation alleging wrongful demotion and wrongful termination in violation of the Ho-Chunk Nation Policies and Procedures Manual. Although the parties entered into a Stipulation and Order for Partial Settlement on May 20, 1997, the parties were unable to agree on a comparable wage to be paid to Ms. Whitewater. The parties agreed that the Trial Court would resolve the issue of a comparable wage rate. Because the issue involves a suit against officials of the Ho-Chunk Nation, appellant argues that the retroactive award of \$12.43 to October 11, 1996 by the Trial Court Chief Judge Mark Butterfield violates the Ho-Chunk Nation Constitution. We agree.

The language of the Ho-Chunk Nation Constitution is clear. The Tribal Court may only award equitable relief where officials of the Ho-Chunk Nation act beyond the scope of their duties. Equitable relief is defined as “relief sought in a court with equity powers as, for example, in the case of one seeking an injunction or specific performance *instead of money damages.*” Black’s Law Dictionary, abridged 6th ed., (emphasis added) The definition of equitable relief is defined as nonmonetary relief.

In this case, the Judgement awarded a retroactive payment of the comparable wage. By awarding the payment as retroactive, the award becomes a monetary award. It is no longer an equitable remedy as the Judgement is one of an award of money rather than a decision on the stipulated agreement to a comparable wage rate. The parties agreed to allow the Trial Court to determine a comparable wage. (Stipulation and Order for Partial Settlement, paragraph 12.)

Nothing in the agreement indicates that the determination would be retroactive.¹ Therefore, the retroactive award from the date of the Judgement back to October 11, 1996 is unconstitutional and is **reversed**.

This Court is not disturbing the prospective award from the date of the Judgement, January 20, 1998, forward as that constitutes a prospective award based on the stipulated written agreement of the parties that they would allow the Trial Court to determine the comparable wage rate. Thus, the Trial Court Judge may order a prospective award that has been agreed upon by the parties without violating the Ho-Chunk Nation Constitution.

2. THE TRIAL COURT DOES NOT HAVE AUTHORITY TO DECIDE WHETHER AN EXECUTIVE BRANCH ADMINISTRATOR'S DISCRETIONARY DECISION IS A VIOLATION OF LAW, WHEN THE PERSON IS AFFORDED SUCH DISCRETION BY STATUTE.

The Court briefly considered this argument but is not persuaded by the argument. Since this Court has accepted the Appellant's assertion as to the constitutional limitations on retroactive awards against officials, this Court will not rule on this argument at this time. Rather, the matter is reversed based upon the reasons stated above.

3. IN LIGHT OF THE TRIAL COURT'S ERRORS OF LAW, THE CORRECT COMPARABLE WAGE FOR THE APPELLEE IS \$11.39 PER HOUR, EFFECTIVE FROM THE DAY OF JUDGEMENT FORWARD, NOT RETROACTIVELY.

The Judgement of the Trial Court states that "[A]n appropriate wage rate of \$12.43 is hereby ordered..." after a reference to the appellee's property interest in her employment. Unfortunately, this Court was unable to discern why that property interest yields to the award of the higher

¹At oral argument, counsel for the Appellee indicated that a discussion had been placed on the record concerning a retroactive award. The record remained open for two weeks to allow the Appellee to provide the Court with the tape or transcript of the discussion. To date, nothing has been submitted by the Appellee. In reviewing the records from the trial court, a statement may have been made by Mr. McArthur at a May 14, 1997 hearing according to the notes of the Clerk; however, nothing indicates that the statement was made as part of an agreement nor did that comment become part of the written agreement by the parties.

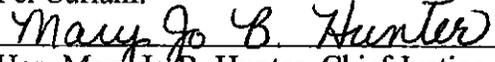
comparable wage of \$12.43 per hour rather than \$11.39.² This Court must review the Trial Court decisions in a constitutional light. Thus, it is necessary to understand the lower court's reasoning where arguments are raised that the Judgment is based on errors of law. For these reasons, the matter is **remanded** to the Trial Court to issue a Judgment which explains the legal basis for the award of \$12.43 per hour rather than \$11.39 per hour. The Trial Court should revise the award within the constitutional limitations stated above as to retroactive awards. Given the length of time that has elapsed while this matter has been on appeal, the Court requests that the Trial Court reissue the Judgment within 45 days from the date of this decision.

REVERSED and REMANDED.

IT IS SO ORDERED. EGI HESHKEKJET.

Dated this 26th day of October 1998.

Per Curiam.



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

²This Court was unable to discern from the record why the amount is \$12.43 rather than \$12.48 which was the amount that the Appellee had earned at one point in her employment.