

DEC - 1 1998

*Willa RedCloud*  
Clerk of Court/Assistant

IN THE  
HO-CHUNK NATION SUPREME COURT

Debra Knudson,  
Appellant,

vs.

DECISION

SU 98-01

Ho-Chunk Nation Treasury Department,  
Appellee.

(Per Curiam, Decided by Chief Justice Mary Jo Hunter, Associate Justice Debra C. Greengrass and Justice Pro Tempore Rebecca Weise.)

STATEMENT OF THE CASE

This case comes before the Ho-Chunk Nation Supreme Court (herein HCN) on appeal of a Trial Court's Final Judgement dated February 5, 1998. The Appellant was terminated from employment, at the HCN Treasury Department, on March 24, 1997 for mishandling the February 1, 1997 Per Capita check distribution. Appellant grieved the termination exhausting the Administrative Review Process as outlined in the HCN Personnel Policies and Procedures Manual (Sept. 14, 1995). The complaint was filed with the HCN Trial Court on May 7, 1997. Judge Greendeer-Lee presided over the trial on September 29 and 30, 1997. The HCN Supreme Court reviewed the supporting briefs, the trial court record, the transcripts, applicable law and precedent case law. It is the decision of the HCN Supreme Court to **AFFIRM** in part and **REVERSE** in part, the Final Judgment of February 5, 1998, and remand this case back to the trial court for final disposition.

## STATEMENT OF FACTS

The Appellant was terminated on March 24, 1997 from the HCN (formerly known as the Wisconsin Winnebago Business Committee) Treasury Department. During the Appellants' three and half years service with the HCN, she had maintained 'above average' performance evaluations. The Appellant had no history of being reprimanded nor disciplined prior to her termination.

The Appellant was responsible for the processing of the Nations' per capita checks for delivery to eligible tribal members. This project functioned without written unit operating rules or procedure. The Appellant had handled several of these per capita projects for three and half years, without incident until late January 1997.

In mid-February 1997, the Treasury Department discovered that numerous per capita checks were not processed for delivery. The HCN Office of the President, instructed the Finance Director, Mille Decorah, to conduct an investigation to determine why 433 tribal members did not receive their per capita checks in a timely manner. Although Ms. Decorah never obtained direct evidence that the Appellant actually misplaced the per capita checks, Ms. Knudson was held accountable because she was in charge of the per capita project.

## ISSUES FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED AS A QUESTION OF LAW IN CONCLUDING THAT THE NOTICE OF TERMINATION OF APPELLANT'S EMPLOYMENT WAS SUFFICIENT.

According to the HCN Personnel Policies and Procedures Manual (herein Personnel Policies), Employee Rights Clause, employees have the right to hear the charges, evidence and witnesses against him, and the right to cross examine.

According to precedent case law, a Notice of Termination should, at a minimum, inform the aggrieved employee of what they did wrong so that they might defend their side in the grievance process. See Sandra Sliwicki vs. Rainbow Casino, HCN, CV 96-10 (HCN Tr. Ct., Dec. 9, 1996).

Ms. Sliwicki was not afforded the opportunity to confront or answer allegations made against her. Similarly, an investigation was conducted without the aggrieved employees' knowledge or input. The information obtained was not provided to the employee terminated, making it difficult for that employee to defend oneself in the grievance process. Ms. Sliwicki, during the Administrative Review Process, had a difficult time trying to provide a defense when she had no knowledge of the basis for her termination. In Sliwicki, the Notice of Termination was defective.

In Gale White v. HCN Personnel, CV 95-17, Department of Personnel, (HCN Tr. Ct., Oct. 11, 1996), the trial court stated, at a minimum, the notice given to the employee must give them a sufficient understanding of the facts behind the discipline imposed so they can consider whether to grieve or not. The notice must also state reasons for imposing the discipline and nature of the violation. In the present case, the notice does cite to the applicable provisions in the Personnel Policies. The notice included a description of the violations, the related facts which informed the Appellant their reason for the termination. The Notice of Termination informed Ms. Knudson that she failed to verify that 433 per capita checks were mailed. Therefore, the Notice of Termination was sufficient.

The Appellant also challenges the 'Notice' as violating her due process rights. Appellant was denied relevant documentation in determining her termination. Here, the Finance Director, Mille Decorah was instructed, by the HCN Office of the President, to conduct an investigation into the mishandling of 433 per capita checks. This investigative material was not initially provided to

the Appellant. As outlined in the Personnel Policies, Chapter 12, p.51, Employee Rights:

“Employees have the right . . . to hear the charges, evidence and witnesses against him, and the right to cross examine”. Here is where the Treasury Department deviated from the guidelines in the Personnel Policies.

In Sliwicki, the trial court held that, when the discipline is termination without prior discipline, it is clearly appropriate to attach the supporting material or evidence. The Supreme Court rendered a decision in that case but was silent as to the issue of whether it is required or when appropriate to attach material or evidence to the disciplinary notice. When the documentation weighs heavily on a supervisor’s decision to terminate an employee, with no prior disciplinary action, it is *most appropriate* to attach material to substantiate such a drastic action. The Finance Director did provide that information, as attachments, in a memo to Tammy Dobson to terminate the Appellant. Supervisor Dobson prepared the Notice of Termination and for whatever reason failed to pass that specific information onto the Appellant. Fortunately, the safeguard here is judicial review after the Administrative Review Process has been exhausted, as outlined in the Personnel Policies. In all fairness, it is the responsibility of supervisors to provide the necessary information to inform the employee as to the departments’ reasoning. Employees must have the same information that the supervisor relied on to terminate, as in the present case, so they can fairly represent themselves during the Administrative Review Process. This practice infringes upon due process rights and should be avoided.

As to the ‘abbreviated’ notice, the Appellant became too emotionally upset to stay and hear the Notice of Termination in its entirety. This Court understands the physical condition of the Appellant and how such a disciplinary action can be upsetting. It is this Court’s determination that

whether the Appellant remained to hear the entire Notice or not, her rights are preserved in Level I of the Administrative Review Process for Non-gaming employees', as outlined in the Personnel Policies, Ch. 12, p. 50.

**II. WHETHER THE TRIAL COURT'S FINDING THAT APPELLANT FAILED TO DISCHARGE HER DUTIES IN A PROMPT, COMPETENT, AND REASONABLE MANNER IS CLEARLY ERRONEOUS.**

The Appellees' held the Appellant responsible for the mishandling of the February 1, 1997 per capita check distribution. According to Tammy Dobson, Appellant's supervisor, she recruited the Appellant to help since Dobson was short on bookkeepers (Judgment p.5). The Appellant resumed the task of having the checks' signature embossed, stuffed into envelopes, post marked and transported to the US Post Office. Ms. Knudson operated her duties the best she could without written procedures. Unfortunately, 433 of those checks did not make it to the post office for delivery. The department became concerned when numerous tribal members called the Treasury Department inquiring about the nondelivery of their checks.

In the Trial Court's Judgment, at p.12, "Most convincing was the fact that regardless of training as a certified public account, one could readily compare the MIS registers to the postal meter log and conclude that 433 checks were not metered during the designated time period in late January." This comparison is what a reasonable person would normally have done. Unfortunately this comparison was not part of the standard unwritten operating procedure.

The Supreme Court is mindful that the Treasury Department had several other major projects, W2, 1099's and regular payroll, to process under the same time constraints. This can be a chaotic time within the Treasury Department to process several major projects. In the Treasury

Department's effort to get the per capita checks processed for delivery may have gotten complacent absent a verification process upon which to rely.

**III. WHETHER THE TRIAL COURT'S FINDING THAT APPELLANT WILLFULLY OR NEGLIGENTLY VIOLATED UNIT OPERATING RULES OR RELATED DIRECTIVES IS CLEARLY ERRONEOUS.**

Both parties stipulated that no written rules existed for the per capita check distribution (Judgment p.12). Both parties also had knowledge of the Per Capita Distribution Ordinance which directs the Treasury Department to distribute the checks by the first of each quarterly distribution, being in February, May, August and November of each year. See Amended Per Capita Distribution Ordinance, Resolution 10/04/96-A.

How can the Appellant knowingly violate the unit operating rules that do not exist? According to testimony of Deborah Knudson, of Tammy Dobson and of Mille Decorah the verification process was an after thought. This verification process was not part of the standard unwritten operating procedure upon which the Treasury Department relied. Ms. Knudson worked with the per capita distribution project for three and half years without incident and would be considered knowledgeable of the project. Unfortunately, the Treasury Department decided to deviate from the standard unwritten operating procedure and sort the checks by zip code, for the first time, in January 1997. The record shows that this is the first time the department decided to do this which created more check handling and the potential for such a mistake to occur.

**IV. WHETHER THE TRIAL COURT'S FINDING THAT THE APPELLANT ENGAGED IN CONDUCT THAT DISCREDITED HERSELF OR THE HCN IS CLEARLY ERRONEOUS.**

The Trial Court based its finding upon three (3) assertions. First, that this incident created a financial hardship for 433 tribal members who failed to receive their per capita check on February 1, 1997, as stated in the judgment p. 13. The Supreme Court understands the hardship that this mishap caused those 433 tribal members who were affected. Tribal members have a degree of certainty that their per capita check will arrive on time. A degree of assurance because nothing like this has happened in the past. Unfortunately, when 433 tribal members did not receive their checks on February 1, 1997, questions were asked and answers wanted. Now, the Treasury Department had to answer to the 433 tribal members as to what went wrong.

The second assertion, the trial court claims an alleged blemish between the HCN and the United States Post Office. This assertion was unsubstantiated by the evidence and testimony. Therefore, the Supreme Court decides this claim to be unfounded.

Third, the trial court was correct that this incident did create a blemish on the Department of the Treasury. The Treasury Department's function is to oversee the funds of the Ho-Chunk Nation. During the three plus years that the Appellant worked on this project, the Appellant had attempted to get written procedures implemented. During the past three plus years, no incident of this magnitude had ever occurred. The Court asks, how could a department of bookkeepers, accountants and certified public accountants overlook the simple task of verifying that all the checks had been metered and delivered to the post office? Unfortunately, it took an added process, which deviated from the standard unwritten operating procedure, to realize that not all of the checks were distributed. This discredited both Ms. Knudson, and the Treasury Department. Ms. Knudson who

oversaw the Per Capita Check Distribution project and the Treasury Department for not developing safeguards to protect a 7.2 million dollar project.

V. WHETHER THE TRIAL COURT ERRED AS A QUESTION OF LAW IN CREATING AN "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW IN WEIGHING THE APPELLEE'S DECISION TO TERMINATE THE EMPLOYMENT OF THE APPELLANT.

The Trial Court determined that "(t)his standard simply questions whether or not an agency's action or decision is reasonable and is supported by substantial evidence (Judgment at p. 14)". The trial court also relied on ". . . administrative agencies of the Nation must make reasonable determinations based on substantial evidence" (Sandra Sliwicki v. Rainbow Casino & HCN, CV 96-10, P.19). The evidence must support the decision to terminate.

The first prong to this standard, is the agency's decision to terminate the Appellant reasonable, in light of the evidence. The Treasury Department terminated the Appellant for not verifying that 433 per capita checks were processed. No written procedure existed. It wasn't until after this incident occurred, did the Treasury Department, understand the seriousness of implementing written procedures. Unfortunately, it resulted in the termination of the Appellant.

The Finance Director conducted an investigation into the mishandling of the 433 per capita checks. The Appellee obtained incident reports from the Appellant and several other Treasury employees. The Appellant and her supervisor, Tammy Dobson, were "unable to determine who may have inadvertently missed giving the checks to the plaintiff to be taken to the post office" (Judgment p.8). The other reports singled out the Appellant as failing to verify the MIS check ledger with the postage meter log. The trial court ruled that the Appellant, Dobson and Decorah, all testified that the per capita registers from MIS were not used to cross-reference with the actual checks. The meter

log was primarily used to charge various departments for postage used. According to testimony this meter log was sloppy and less than professional. Instead, the MIS registers were simply filed in a folder (Judgement at p. 5). According to the Finance Director, "the idea of validating the mailed checks by comparing the MIS registers to the postage meter rose during the investigation", Id. at 7.

The parties agree that no written operating rules existed. Ms. Decorah chided Ms. Knudson for not seeing that written procedures were developed. Is it not the responsibility of the supervisors to write policies and procedures, not bookkeepers, as was the Appellants' position prior to her promotion to an accountant. The record does show that the Appellant had attempted to get written procedures implemented with little response from her supervisors (Id. pg.7). The Treasury Department relies upon the written language within the Personnel Policies to terminate the Appellant absent a written policy governing the Per Capita Check Distribution. Therefore, the Appellee's decision to terminate the Appellant was unreasonable.

The second prong to this standard is the decision supported by substantial evidence? The documentation stated that the Appellant was responsible for the project. No evidence was presented to substantiate that it was in fact the Appellants' fault. Appellee claims that the Appellant failed to verify that the amount of checks metered were the same checks' listed on the MIS ledger. An important process that did not exist prior to February 1, 1997. A process that was an after thought, according to testimony of Ms. Knudson, of Tammy Dobson and of Mille Decorah. This is not substantial evidence to support the decision to terminate Ms. Knudson.

**VI. WHETHER THE TRIAL COURT'S FINDING THAT THE APPELLEE'S TERMINATION OF EMPLOYMENT WAS REASONABLE IS CLEARLY ERRONEOUS.**

The termination of the Appellant was unreasonable. Ms. Knudson was unaware that her job performance was in jeopardy. The termination should bear a reasonable relationship to the violation based on the whole record.

According to the HCN Personnel Policies and Procedure Manual (Sept. 14, 1995), discipline will normally be progressive and bear a reasonable relationship to the violation. Verbal notices usually points out an unsatisfactory job performance and is intended to be corrective. Verbal notices put the employee on notice that what they did or did not do can be rectified. A written reprimand is the first level of formal discipline. After the verbal notice goes uncorrected, the supervisor can progress to the formal written warning that the employees' job performance is in jeopardy. The second level of discipline will be suspension. An employee who had previous written notice that their job performance is unsatisfactory and continues to deviate from policy will be subject to suspension for a limited time. The third and final level would be termination. The Personnel Policies also guide the supervisory and management personnel in their consideration of disciplinary actions. Management should take into consideration the severity of the offense, past offenses, length of service and previous warnings.

Ms. Knudson had no previous warnings or indication that her job performance was less than average. Ms. Knudson had been employed with the HCN Treasury Department and for three and half years had received 'above average' performance evaluations. The Treasury Department's decision to terminate Ms. Knudson is not consistent with the progressive disciplinary process of the Personnel Policies.

This decision is not to diminish the financial hardship that 433 tribal members experienced in February 1997, but to put on 'Notice' the Department of the Treasury employees who are in charge of our Nation's funds. The department is in need of written procedures to assure the Ho-Chunk Nation that such a mishap would not occur again.

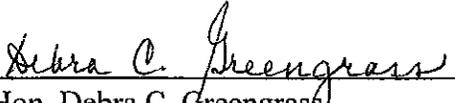
The Supreme Court compares Legislative Resolution 3/26/96A and Resolution 6/09/898A, as to the maximum allowable award. Resolution 3/26/96A allows the trial court to award an aggrieved employee a monetary amount of \$2000.00. In Resolution 06-09-98A the trial court can award an employee a monetary amount not to exceed \$10,000.00. Unfortunately, the resolution states, "remedies provided herein shall not have retroactive effect and shall not apply to civil actions filed . . . before July 1, 1998". See HCN Legislature Resolution 06-09-98A. Therefore, the Appellant is entitled to the maximum amount of \$ 2000.00.

The Supreme Court **REMANDS** this case back to the Trial Court for final disposition consistent with our decision.

EGI HESHKEKJENET.

Dated this 1st day of December, 1998.

Per Curiam.

  
Hon. Debra C. Greengrass  
Associate Justice  
HCN Supreme Court

## 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-98-01 (CV-97-70), by the United States Postal Service, upon all persons listed below:

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*Willa RedCloud*

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Willa RedCloud, Clerk of Court  
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