

MAR 25 1997

*T. Pettibone*  
Clerk of Court/Assistant

IN THE  
HO-CHUNK NATION SUPREME COURT

---

ANNA RAE FUNMAKIER,  
Appellant,

v.

KATHRYN DOORNBOS,  
Ho-Chunk Nation,  
Appellee.

DECISION  
Case No. SU96-12

---

This matter having come before the full Court on Friday, March 21, 1997 by a telephonic hearing, based upon the trial records, briefs and pleadings of the parties, the Court issues this decision. The Court **AFFIRMS** the Judgment filed on November 22, 1996 and signed by the Honorable Joan Greendecr-Lee, Associate Judge of the Ho-Chunk Nation Trial Court.

The Court bases its decision on the following reasons. First, it is Appellant's assertion that the trial court erred in holding "that there was no violation of law by the defendant." The Appellant argued that "a failure to follow the procedures set forth in the Personnel Procedure Manual is a violation of law." Appellant does not provide this Court with a legal basis upon which to adopt that argument.

The trial court made several findings of fact in its decision on this matter. Based upon those findings, the trial court applied the law of the Ho-Chunk Nation. Actually, the trial court attempted to apply the law but did not find an applicable law as to appellant's argument below as to the manner in which the defendant selected the Director of the Historic Preservation Department. (Judgment CV96-02 and CV96-03, November 22, 1996 at page 6.)

The trial court made a finding of fact as to defendant's inappropriate application of the Personnel Procedures but did not reach such a conclusion as a matter of law. Therefore, the question for this Court is whether the trial court abused its discretion in finding that the defendant "inappropriately applied the Personnel Procedures."

The Supreme Court of the Ho-Chunk Nation may review a case but cannot make findings of fact. As a matter of law, the Supreme Court may review whether or not the trial court properly, or legally, made the findings. In other jurisdictions, a review by an appellate court of a trial court's findings of fact is made under an abuse of discretion standard. That is, was the finding of the trial judge as to a certain fact so untenable that the trial judge abused his or her discretion. This Court adopts an abuse of discretion standard in reviewing whether or not the trial court properly, or legally, made findings of fact. We hold that the trial court judge did not abuse her discretion in making the findings in the November 22, 1996 Judgment.

This Court cannot easily substitute its judgment for that of the trial judge. The trial judge hears the testimony of the witnesses and views their demeanor. The trial judge presides over the matter and hears the basis for the introduction of the evidence as well as hearing the arguments first hand. This Court in applying that standard, holds that the trial court judge did not abuse her discretion in finding that the defendant "inappropriately applied the personnel Procedures."

As to Appellant's argument that the trial court erred by not providing the Appellant with the rights that she requested, it is necessary to recognize that the Appellant sought injunctive relief in the lower court matter. The trial court applied a four-prong test to determine whether or not an injunction was the proper and suitable remedy for the resolution of the case. In applying the test to the facts of the instant case, the trial court considered several factors in applying the portion of the test, or the third prong, which was whether or not the petitioner (Appellant) has a reasonable likelihood of success based on the merits. It was in the application of that prong that the trial court judge made the finding discussed above as well as where the trial court "finds that the defendant's failure to reply to grievance levels 2 and 3, and failure to follow the Administrative Review Process is a violation of the Personnel Procedures." (Judgment, CV96-02 and CV96-03, November 22, 1996 at page 11.) Later, the trial court "holds that the plaintiff [Appellant] prevails on the merits of the claim regarding procedural violations, but cannot hold the Nation accountable by awarding the plaintiff [Appellant] the desired job." (Id. at page 12.) This Court is sympathetic to the Appellant's perception from the contradictory language that

there had been a violation of law. However, it is important to recognize that the trial court considered the factor of the exhaustion of administrative remedies as one of three factors under the third prong of the test which the trial court was applying to determine if an injunction should be issued. It appears that the trial court did not give much weight to that factor so that it would override the other prongs of the test.

This Court must review whether the trial court erred in denying the injunction based on the application of the four-prong test. Although the application of the factors under the third-prong creates some confusion, it does not rise to the level of an error of law. The trial court judge correctly applied the four-prong test to determine whether or not an injunction was a proper and suitable remedy. Based upon that application, the trial court judge ruled to dismiss the petition for an injunction. We **AFFIRM** the decision of the lower court.

Dated this 24<sup>th</sup> day of March 1997.

IT IS SO ORDERED. EGI HESHKEKJENET.

Debra C. Greengrass  
Debra Greengrass, Associate Justice

Forrest Whiterabbit  
Forrest Whiterabbit, Associate Justice

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

A true and correct copy of the foregoing was sent to the following parties of record this 26<sup>th</sup> day of MAR., 1997.

Mr. Gerald Laabs, Michael Murphy,  
Justices: Debra Greengrass & Forrest Whiterabbit  
Chief Justice: Mary Jo Brooks Hunter  
Asst. Clerk: T. Pettibone