

OCT 8 1996

T. Pettibone
Clerk of Court/Assistant

In the
Ho-Chunk Nation Supreme Court

Ho-Chunk Nation Casino, HCN

Case No.: SU96-04

Appellant,

(Trial CV95-19)

vs.

Lewis Frogg,

DECISION

Appellee,

This case before the Ho-Chunk Nation Supreme Court is an appeal of Judge Butterfield's *Order* dated June 27, 1996. On March 15, 1996, a *Judgement* was entered in this employees' grievance appeal. In reviewing the initial *Judgement* and subsequent *Order* the Supreme Court found several inconsistencies. The Supreme Court, hereby, reverses Judge Butterfield's *Order* dated June 27, 1996.

The issue is whether the Trial Court erred in its decision granting Mr. Frogg a 4% pay increase based upon a retroactive performance evaluation. The Appellee, Lewis Frogg, was terminated from his employment and filed a grievance according to the PERSONNEL POLICIES AND PROCEDURES MANUAL. Mr. Frogg, exhausted the Administrative Review Process and appealed to the Trial Court. The Appellee failed to meet his burden of proof as to his termination. The remaining issue, Mr. Frogg claims, pertains to the Performance Evaluation.

The Appellant's brief poses four (4) questions to the Supreme Court

I. The Trial Court did not have the proper subject matter jurisdiction to enter an Order concerning the suitability of Mr. Frogg's retroactive Performance Evaluation.

The Supreme Court agrees with Appellant that the Trial Court did not have proper jurisdiction.

The March 15, 1996 *Judgement* states:

"...this portion of the decision is remanded to the Business Department to render a performance evaluation and file a report of the same within thirty (30) days. If the performance is unsatisfactory to the grievant (Mr. Frogg), his rights to grieve that action should they exist, remain as before and he may bring

1 that issue back to Court after exhausting his administrative
2 remedies.” (*Judgement* p.8, line 8)

3 The Trial Court was correct, in part, as to the applicable law. Judge Butterfield afforded Mr.
4 Frogg the opportunity to grieve the retroactive performance evaluation according to the PERSONNEL
5 POLICIES AND PROCEDURES MANUAL. Judge Butterfield, erred in assuming Mr. Frogg was dissatisfied
6 with the evaluation and rendered the June 27, 1996 *Order*, presently on appeal. According to the
7 PERSONNEL POLICIES AND PROCEDURES MANUAL (September 14, 1995 Edition), Chapter 12 p. 49,
8 Performance Evaluations are to be grieved in sequence to the employee’s Supervisor, Department Head,
9 and to the Appropriate Department Administrator. It was Mr. Frogg’s right to grieve any objections to
10 the retroactive performance evaluation. This was not done. Mr. Frogg had exhausted the Administrative
11 Review Process as to his termination but not as to the retroactive Performance Evaluation. Therefore,
12 the Trial Court did not have proper jurisdiction since that portion of Judge Butterfield’s *Order* was
13 remanded back to the Business Department.

14 **II. Whether the Trial Court’s March 15, 1996 *Judgement* improperly waived the Nation’s**
15 **Sovereign Immunity?**

16 Appellant’s *Notice of Appeal*, dated July 9, 1996, states “...hereby appeal to the HCN Supreme
17 Court from the *Order* entered in this action on the 26th day of June, 1996, by the HCN Trial Court.”
18 The Sovereign Immunity is an issue of the March 15, 1996 *Judgement* and not of the Trial Courts June
19 27, 1996 *Order*.

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21 **III. Whether the Trial Court has improperly exercised Legislative and Executive functions?**

22 Judge Butterfield in reviewing the retroactive performance evaluation on Lewis Frogg incorrectly
23 made determinations delegated Legislative or Executive functions. See HCN CONSTITUTION ART. III,
24 § 3.

25 The Legislature shall have the power, pursuant to ART.V,§ 2(f), “to set the salaries, terms and
26 conditions of employment for all government Personnel. The PERSONNEL POLICIES AND PROCEDURES
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1 MANUAL, duly enacted by the Legislature of HCN, outlines those terms and conditions particularly,
2 Chapter 6, 9, & 12; Compensation and Payroll Practices and Matters covered by the Administrative
3 Review Process and the Performance Evaluations at issue.

4 The Executive Branch shall be composed of any Administrative Departments created by the
5 Legislature includes a Department of Personnel according to ART.VI, §1(6) of HCN Constitution.
6 Appellee cites Chapter Nine of the Personnel Policies and Procedures Manual pertaining to the
7 Personnel Director having responsibility of all supervisory and management personnel... and to evaluate
8 employees objectively for their performance during the evaluation period.

9 Judge Butterfield *Order* overlooked the March 15, 1996 *Judgement* remanding the retroactive
10 performance evaluation back to the Business Department. The courts analysis of the evaluation did not
11 follow the terms and conditions set forth in the PERSONNEL POLICIES AND PROCEDURES MANUAL. By
12 assessing a score of 21 entitled for merit increase deviated from the standard set by the Legislature.

13 Likewise, the Trial Court in assuming the immediate Supervisor role by assessing the 21 points
14 entitled to merit increase was incorrect. The department submitted their report and any objections to its
15 content should be made by Appellee.

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17 **IV. The Trial Court incorrectly determined that Mr. Frogg's score of 21 entitled him to a merit**
18 **increase.**

19 The merit increase determination is a supervisory responsibility based upon the employee's
20 performance evaluation. According to the PERSONNEL POLICIES AND PROCEDURES MANUAL, Chapter
21 6, Pg. 15:

22 "To be eligible for merit increase, employees must minimally have an overall
23 performance rating above satisfactory, with at least one (1) categorical
24 rating of excellent/outstanding, and no categories rated below satisfactory.
Percentage of merit increase will be determined in accordance with the
classification and compensation plan."

25 The retroactive performance evaluation forwarded to the Court by the Business Department
26 reflects a numerical score of 15. A numerical score of 13 to 21 indicate "Average" and 22 to 27

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1 indicates "Above Average." The Appellee's score was within the average range.

2 The Court in assessing an additional six (6) points to Mr. Frogg's score did not entitle Appellee
3 to a merit increase. Mr. Frogg received an evaluation score of 15. Any objections to the content of the
4 retroactive performance evaluation should be exhausted through the Administrative Review Process.

5 The Court took a factual report and interjected a hypothetical determination. The hypothetical
6 score of 21 does not meet the 'above satisfactory rating.' Likewise, the hypothetical score of 22 would
7 not entitle any employee to a merit increase unless the three (3) other criteria are present.

8 Therefore, the retroactive performance evaluation submitted on July 10, 1995 did not meet the
9 four (4) criteria to warrant a merit increase according to the PERSONNEL POLICIES & PROCEDURES
10 MANUAL(Sept. 14, 1995 Edition). The Supreme Courts reversal of Judge Butterfield 's Order does not
11 preclude Mr. Frogg from exercising his right to grieve the retroactive performance evaluation according
12 to the PERSONNEL POLICIES AND PROCEDURES MANUAL.

13 IT IS SO ORDERED this 7th day of October 1996 at the Ho-Chunk Nation Supreme Court, Black
14 River Falls, WI., within the sovereign lands of the Ho-Chunk Nation.

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Debra C. Greenman
Debra C. Greenman
Associate Justice

Forrest Whiterabbit
Forrest Whiterabbit
Associate Justice

Mary Jo Ebbels Hunter
Mary Jo Ebbels Hunter
Chief Justice

A true and correct copy of the foregoing was
sent to the following parties of record this

8 day of Oct., 1996.
Mr. Frogg, Mr. Murphy, DOJ

Asst. ~~Clerk~~ T. Pettibone