

FILED

IN THE SUPREME COURT OF THE CHEROKEE NATION

2013 NOV 18 PM 2: 30

**IN THE MATTER OF THE APPEAL OF
SAMMYE RUSCO,**

Appellant,

**CHEROKEE NATION EMPLOYEE,
APPEALS BOARD,**

Appellee.

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CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CLERK

**Case No. SC-2012-05
(EAB No. 12-02-RMD)**

OPINION

**Appeal from Employee Appeals Board of the Cherokee Nation
Case No. 12-02-RMD**

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Attorney for Appellee

Before:

**Darrell Dowty., Chief Justice
James G. Wilcoxon, Justice
Troy Wayne Poteete, Justice
John C. Garrett, Justice**

Opinion By:

Chief Justice Dowty

Concurring:

Justices Wilcoxon, Garrett and Poteete

This is an appeal of the action of the Cherokee Nation Employee Appeals Board (hereinafter EAB) dismissing the complaint of the Employee/Appellant, Sammye Rusco for lack of Jurisdiction by written order filed August 28, 2012. This Court by

written Order filed May 7, 2012, has previously remanded this matter to the EAB on Appellant's appeal of the Board's previous dismissal for lack of jurisdiction orally entered on March 26, 2012 and filed on April 24, 2012. The Appellant was denied the opportunity to put on evidence at the hearing producing the order of dismissal regarding her allegations that she had been terminated as Cherokee Nation Director of Communications for reasons other than cause. In the Order Remanding, this Court referenced its Order of Remand in the Appeal of McAlvain, SC-12-2 wherein this Court framed the issues before the EAB as follows:

"The Appellant Employee raised the issue that she was terminated for reasons other than cause. Article XII of the 1999 Cherokee Nation Constitution sets forth, 'No employee, who having served in a position at least one year, shall be removed from the employment of the Cherokee Nation except for cause.' (emphasis added)

The Cherokee Nation in response to the Appellant/Employee's Notice of Appeal alleges that the Appellant/Employee was on 'layoff status' because her position had been eliminated due to a restructuring/reorganization of Health Services. Thus, the factual issues joined can only be resolved by evidence.

The Employee Appeals Board shall upon rendering decision in these proceedings make fact findings and set forth their conclusions of law, LA 12-96 1020(A)(2)."

The EAB Order of Dismissal was then vacated and the matter was remanded to the EAB for further consideration consistent with this Court's Order.

The EAB then responded by receiving further evidence regarding the Nation's Motion to Dismiss. The EAB found that the Nation had met its burden for the purposes of the Motion to Dismiss and issued its written Order filed August 28, 2012, making findings of fact which supported the Nation's position that the Appellant's employment was pursuant to a layoff due to reorganization. The Board further entered conclusions of law supporting the proposition that the loss of employment pursuant to layoff is

outside the jurisdiction of the Board pursuant to 51 CNCA §1004(13). The Board then, for the second time, sustained the Nation's Motion to Dismiss for Lack of Jurisdiction.

The EAB briefly mentioned in its Order that "Appellant does allege that the "layoff" was improper", however, the Court made no findings of fact regarding the Appellant's evidence.

This Court has jurisdiction of this matter pursuant to Article XII, 1999 Constitution of the Cherokee Nation and 51 CNCA, §1025. The scope of our review is as defined at 51 CNCA, §1028.

This action was brought before the EAB by the Appellant alleging that she was "terminated" from her employment for reasons other than cause and that the purported layoff and reorganization were a subterfuge. Although the record provided to this Court indicates that the Appellant presented evidence regarding the hearing on the Nation's Motion to Dismiss, unfortunately, the audio CD of the proceedings delivered to the Court was not of sufficient quality to be transcribed and there is no other record available. Therefore, this Court must review the evidence as shown by the written record and the Order of the EAB.

Based upon this limited review and the Order of the EAB dismissing Appellant's appeal for the second time, we find that the EAB has not given meaningful consideration to the Appellant's claims that she was wrongfully terminated and that the grounds for her separation from employment were a subterfuge. Instead, the EAB has stood on the proposition that because the Nation declared the separation and placement of Appellant on "layoff status" to be justified as an elimination of the Rusco's

position due to a reorganization. Accordingly, the EAB has again dismissed against the Appellant relying upon 51 C.N.C.A. §104(13).

In 1978, the Judicial Appeals Tribunal as predecessor to this Court, in interpreting the provisions of Article XII of the Constitution of 1975 which protected employees employed for one year or more, found that the loss of employment due to elimination of a job position was “for cause” as contemplated in the Constitution and that the elimination of the position was pursuant to a “valid business judgment”.¹ The Constitution of 1999 as enacted in 2003, affords the same protection in the same language with the additional protection of “pre-termination due process”. When an allegation is made that the loss of employment was not for cause, the burden is on the Nation to present evidence refuting the allegation.² In this case, the allegation is that the employee was terminated for a reason other than cause and that the “layoff” was a subterfuge. The question of whether the layoff was legitimate or a subterfuge is the heart of the litigation and the Appellant is entitled to present her allegations and supporting evidence, this only after the Nation, in that same forum, has met its burden of showing that the loss of employment was for cause.³ The EAB declined to address this issue and made findings of fact only to support the jurisdictional question pursuant to 51 CNCA, §1004(13). It was clear in the EAB majority’s oral rendition of its decision, that they made no findings as to whether it was a layoff or an improper layoff.

This Court has previously remanded this matter to the EAB, vacating the Order dismissing the action for lack of jurisdiction and framing the issues to be heard. The EAB clearly has jurisdiction to hear evidence on the issue of whether a layoff was

¹ Charley Gourd v. Cherokee Nation, No. 78-1

² CNE, LLC v. McInerney, SC-10-01 at p.8

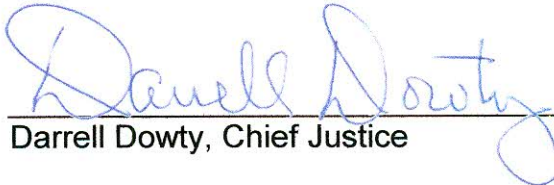
³ McInerney, supra at p. 8

legitimate or a subterfuge. From the record presented, the consideration by the majority of the EAB, for the second time, was limited to the issue of jurisdiction relating to 51 CNCA, §1004(13).

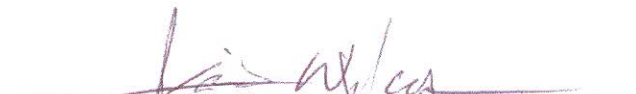
IT IS THEREFORE ORDERED: that the Decision of the Cherokee Nation Employee Appeals Board dated August 28, 2012, granting the Nation's Motion to Dismiss is hereby VACATED and the matter is remanded to the EAB with instructions to conduct further proceedings and to make findings of fact and conclusions of law consistent with this Opinion.

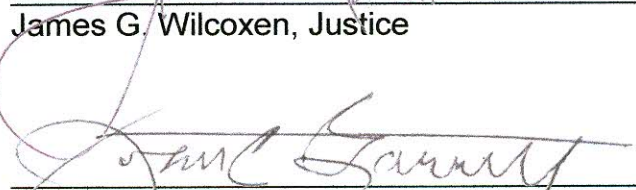
IT IS FURTHER ORDERED that the EAB deliver its order, findings and conclusions as aforesaid, to this Court not more than Sixty (60) days from the date of filing of this Order.

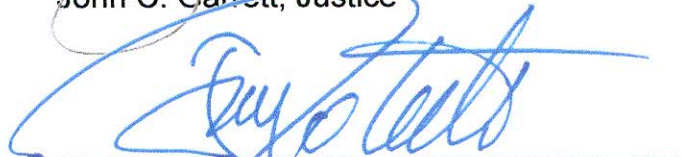
IT IS SO ORDERED.


Darrell Dowty, Chief Justice

Concurring:


James G. Wilcoxon, Justice


John C. Garrett, Justice


Troy Wayne Poteete, Justice

CERTIFICATION OF MAILING

I certify that a true and correct copy of the foregoing document, Dissenting Order, was mailed and/or transmitted via facsimile on this 18th day of November, 2013 to the following:

Chad Smith, chad@chadsmith.com

Robert Garcia, robert-garcia@cherokee.org


Kendall Bird, Court Clerk