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CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CLERK

IN THE SUPREME COURT OF THE CHEROKEE NATION

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

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Case No. SC-12-05

OPINION

**APPEAL FROM THE EMPLOYEE APEALS BOARD
OF THE CHEROKEE NATION
TAHLEQUAH, OKLAHOMA**

EMPLOYEE ADMINISTRATIVE APPEAL 12-002RMD

**SAMMYE RUSCO
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Before:

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

**Majority Opinion Filed By:
Concurring:**

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

Case History

Sammye Rusco was employed as the Director of Communications of the Cherokee Nation for the previous nine years when, on October 19th, 2011, without prior notice, she was placed on administrative leave; relieved of all job duties and other accoutrements of employment; and escorted from the Cherokee Nation headquarters by an armed Marshall. Ms. Rusco remained in the limbo status of being on paid "administrative leave" until January 6th, 2012. On January 5th, 2012 she received a letter stating that her position was being eliminated due to restructuring/reorganization and that she was being placed on layoff status, effective the next day. Her benefits and salary ceased effective 5:00 p.m. Jan. 6th, 2012.

Rusco filed her Notice of Appeal of Termination of Decision with the Cherokee Nation Human Resources Office on Jan, 9th, 2012, three days after receiving the notice of termination.

The Cherokee Nation Employee Appeals Board (hereafter **EAB**) bi-furcated the issue of jurisdiction and issues concerning the merits of the case over Rusco's objection; heard issues concerning jurisdiction; and subsequently dismissed Rusco's appeal on grounds it had no jurisdiction in matters where a layoff has occurred because of a restructure/reorganization. Rusco appealed contending that the claim of reorganization was a subterfuge for a political firing. This Court vacated that dismissal and remanded the case for further findings of fact concerning the issue of the validity of the Nation's claim that the termination was indeed pursuant to reorganization.

On remand the EAB heard limited 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. The EAB made findings of fact which supported the Nations position that the Appellant's employment was terminated pursuant to a layoff due to reorganization. The EAB entered conclusions of law supporting the proposition that the loss of employment pursuant to a layoff is outside the jurisdiction of the Board as set out in 51 CNCA sec. 1004(13). The EAB then, for the second time, sustained the Nations Motion to Dismiss for Lack of Jurisdiction.

Rusco appealed that determination. The record available for this Court to review was very limited. However, based on that limited record, and the Order of the EAB dismissing Appellant's appeal for the second time, we determined that the EAB failed to give meaningful consideration to the Appellant's claims that she was wrongfully terminated, and her claims that the grounds for her separation from employment were a subterfuge. We determined that the EAB had again dismissed the case based on lack of jurisdiction. Accordingly we remanded the case to the EAB with instructions to hear evidence on the issues, to conduct further proceedings as necessary, and to make findings of fact and conclusions of law as to whether Appellants termination was actually a "layoff" or whether the termination is a subterfuge for a political firing.

On remand Rusco argued that she was denied pre-termination due process and continued to argue that her "layoff" was a pretext for a political firing.

The EAB conducted hearings and made findings of fact and conclusions of law. The EAB granted Judgment to the Cherokee Nation against Rusco. In support of its determination the EAB determined that as a matter of law:

(5) *“What constitutes pre-termination due process is fact driven and could be as complex as a full, pre-termination administrative hearing or as simple as being informed of the reason for termination and an opportunity to “give your side of the story”.*

The EAB determined as a matter of fact that:

(9) *In the present case the Appellant has little interest in a pre-termination due process hearing, as there were no stigmatizing allegations of wrongdoing or misbehavior, no assertions of poor performance, and no personal complaints against the Appellant.*

(10) *To require the Nation to have a pre-termination due process hearing just to allow Appellant to address the financial status of the Nation (the ‘cause’ for the separation of employment) would be useless and unmanageable. Appellant has been afforded ample due process in this forum to present her allegations and supporting evidence regarding the question whether the elimination of her position was legitimate or a subterfuge.*

Rusco appeals from this determination on two grounds.

- (1) She alleges that the EAB erred in determining that she was given due process as required by the CN Constitution
- (2) She alleges that the EAB erred in determining that her termination was a valid business decision.

Issues

Two issues are before us:

1. We are asked to determine whether the Cherokee Nation Constitutional requirement that an employee be given pre-termination due process is met when an employee receives notice of termination one day and the termination is put into effect the next day.
2. We are asked to determine whether the **EAB** determination that Rusco's layoff was not a pretext or subterfuge was clearly erroneous in view of the evidence in the record.

Standard of Review

This Court has jurisdiction in this matter pursuant to **Article XII 1999 Constitution of the Cherokee Nation** and **Title 51 Cherokee Nation Code Annotated, 1025**.

The scope of our review is set out in **51 CNCA 1028(A)(1-5)** which provides that the JAT (now Supreme Court) may set aside, modify, reverse, and remand, orders of the **EAB**, if the Court determines that an employee's rights have been prejudiced because the decision is (1) in violation of constitutional provisions, or (5) clearly erroneous in view of the reliable, material, probative and substantial competent evidence.

The question before is one of constitutional interpretation and of statutory construction; whether the Employee Administrative Appeals Board erred in its

interpretations of the Cherokee Nation Constitution Article XII and “EMPLOYEE ADMINISTRATIVE PROCEDURES ACT AS AMENDED”, Title 51 CNCA.

Discussion of Issue

Article XII of the Cherokee Nation Constitution provides that:

No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause, and only after being afforded pre-termination due process. Provided, the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.

In order to illustrate what is contemplated in the due process clause both the Cherokee Nation and Rusco quote Chief Justice Dowty’s statements from the *Transcripts of the Cherokee Nation Constitutional Convention, Vol. 8 pp. 83-95*, relative to the provision for pre-termination due process. Justice Dowty stated:

“An employee should have a right to due process in the termination proceedings. It encompasses two thoughts.

---First, the employee must have notice of the allegations for which the employee is being terminated.

----And the second aspect of due process is that they must have a full and fair hearing of the grievance.” (emphasis added)

We concur with the parties hereto that this language from the Constitutional Convention transcript sets out succinctly the two basic elements of pre-termination due process required by the Cherokee Nation Constitution.

On Jan. 5th, 2012 Sammye Rusco received an Employee Action Notice (EAN) by certified mail, stating that she would be terminated effective 5 p.m., the very next day, Jan. 6th, 2012. The Cherokee Nation contends that this time frame provided Rusco

adequate notice under the requirements of Article XII. The Cherokee Nations Answer Brief stated:

"From the moment Rusco received the certified letter, until 5 p.m. on Friday January 6, 2012, Rusco could have contacted the Cherokee Nation to discuss her opposition to the restructuring/reorganization of the Government Relations Department. Rusco did not do that. Instead, Rusco chose to contact her lawyer and file an appeal with the EAB on Jan. 9th, 2012. Whatever the reason for the litigation strategy chosen by Rusco, it is clear that Rusco had an opportunity to respond to the layoff letter prior to its taking effect, but Rusco elected not to do so and has since fully litigated her claim before the EAB." (paragraph 2 page 4-Cherokee Nation Answer Brief)

We do not agree that the Article XII pre-termination due process requirement that Rusco be given notice of her termination of employment was met by a letter received the day before said termination became effective. We do not agree that she forfeited her right to a full and fair pre-termination hearing because she failed to contact the Cherokee Nation within twenty four hours. Such time frames are inconsistent with the provisions for due process afforded employees terminated for some sort of misconduct.

Our decision in *McAlvain*, SC-12-02, made clear that the Constitutional requirement for pre-termination due process is not at all diminished when a termination of employment is based upon restructure/reorganization. We stated there and reiterate here:


"An employee who wishes to challenge the legitimacy of a layoff is entitled to no less pre-termination due process than the employee terminated for misconduct."

Because Rusco was not afforded pre-termination due process we do not reach the second issue set forth herein.

The EAB Order dated is hereby vacated, and the case is Remanded to the EAB to carry out the provisions of this Order and to determine issues and amounts of back pay, attorney's fees, and costs before the EAB and this Court, with due regard to the Employee's duty to mitigate.


The provisions of Title 51 CNCA, Sec. 1004(13) which are inconsistent with this Opinion are declared to be unconstitutional.

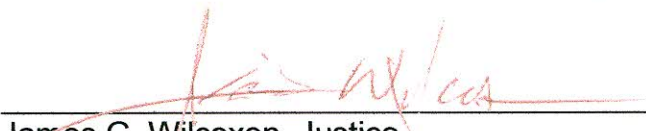
IT IS SO ORDERED this 11th day of ^{December}~~November~~ 2014.

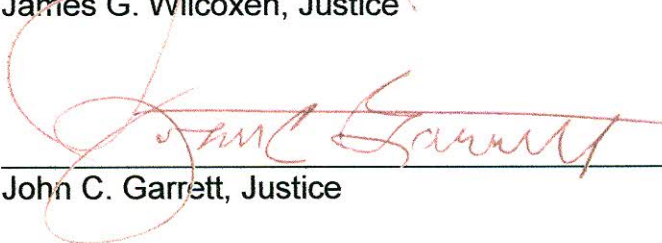


Troy Wayne Potseele, Justice

Concurring:



Darrell Dowty, Chief Justice

James G. Wilcoxon, Justice


John C. Garrett, Justice

CERTIFICATION OF MAILING

I certify that a true and correct copy of the foregoing document, Order Remanding to Employee Appeals Board, was mailed and/or transmitted via facsimile on this 11th day of ~~November~~ December, 2014 to the following:

Chad Smith,
Robert Garcia,
Employee Appeals Board,

chad@chadsmith.com
robert-garcia@cherokee.org
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Kendall Bird, Court Clerk