

IN THE SUPREME COURT OF THE CHEROKEE NATION

IN THE MATTER OF THE APPEAL OF)

TAMSYE DREADFULWATER,)

CASE No. SC-12-06

OPINION

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

EMPLOYEE ADMINISTRATIVE APPEAL 12-01

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Before:

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

Majority Opinion Filed By:

Justice Troy Wayne Poteete

Concurring:

Darrell Dowty Chief Justice
James G. Wilcoxon, Justice
John C. Garrett, Justice

2014 JUN 10 AM 9:09
CHEROKEE NATION
SUPREME COURT
KENDALL BIRD, COURT CLERK

FILED

Case History

Tamsye Dreadfulwater was employed by the Cherokee Nation in its accounting and financial department for 18 years beginning as a General Office Worker in 1987. She held the position of Senior Director of Finance when she was terminated on Jan 27, 2012 without notice, and escorted out of the Cherokee Nation offices.

Dreadfulwater was dismissed pursuant to a reorganization plan approved by Principal Chief Baker and Treasurer Lacy Horn dated the previous day. The Reorganization plan eliminated the duties of Sr. Director of Finance and assigned those duties to a Comptroller.

Dreadfulwater timely filed an appeal with the Employee Appeals Board (hereafter the EAB). The EAB dismissed her appeal saying it has no jurisdiction because her termination was characterized as a layoff/ reorganization. The EAB refused to allow Dreadfulwater to present witnesses or examine sponsors or authors of documents attached to the Cherokee Nations Motion to Dismiss. Dreadfulwater appealed this decision to the Supreme Court. The Supreme Court remanded the decision to the EAB with an order requiring that Findings of Fact and Conclusions of Law be made. The EAB heard testimony and witnesses and made a finding of fact that she was placed on layoff status pursuant to a restructuring reorganization plan, and again dismissed her appeal.

The EAB did not determine if Dreadfulwater's claim that the reorganization/restructuring was a pretext, but rather determined that it was without jurisdiction to pursue the case further because her termination was characterized as a lay-off. No determination was made as to whether there was a lack of work or funds which necessitated the termination. It is from that dismissal that Dreadfulwater appeals.

Issue

We are asked to determine whether a tenured employee may be denied the due process provisions provided by **EMPLOYEE ADMINISTRATIVE PROCEDURES ACT AS AMENDED**, **51 CNCA 1001-1033**, when the termination of their employment is characterized and labeled as a “Layoff”/ reorganization.

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**.

The questions before us are of statutory construction; whether the Employee Administrative Appeals Board (hereafter EAB) erred in its interpretations of the “**EMPLOYEE ADMINISTRATIVE PROCEDURES ACT AS AMENDED**”, Title **51 CNCA 1014 and 1004(13)**.

Discussion of Issue # 1

The language of Legislative Act 12-96 “the “**EMPLOYEE ADMINISTRATIVE PROCEDURES ACT AS AMENDED**”, **51 CNCA 1004. (13)** , defines “termination of employment” as *the involuntary severance of an employee from CN employment, including a decision to not renew a contract with an employee, provided that such term shall not include a temporary or permanent layoff for lack of funds or work.*

The EAB has construed this language to mean that it had no jurisdiction to hear an appeal from an employee who has been *placed on layoff status due to restructuring/reorganization*. The

EAB has erroneously determined that mere characterization of a termination of employment as a “*layoff*” due to the restructuring/reorganization, by the Cherokee Nation deprives the employee of the benefits of the Employment Procedures Act. The EAB stated that:

“Appellant was ***placed*** on layoff status January 26, 2012, all evidence presented is consistent and supports that the appellant’s employment ceased due to the restructuring/reorganization of the Dept. of Finance. Consequently, appellant’s cessation of employment does not fall under the statutory definition of termination as contemplated in the act.” *Emphasis added*

The EAB’s finding of fact simply states that “*Witnesses from HR testified that the basis for appellant’s cessation of employment from the CN was based on a “layoff” due to the restructuring/reorganization of the Finance Dept.*” The EAB did not make a determination as to whether the layoff was due to lack of funds or work, but rather erroneously determined that it was without jurisdiction.

The appellant’s pleadings have consistently alleged that her termination of employment was not a layoff for lack of funds or work, but rather a pretext for a political firing.

Where 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. CNE, LLC v. McInerney, SC-10-01, McAlvain v. CN,EAB, SC-2012-02.

In order that the legislative intent of the Act not be thwarted, it is necessary that the EAB make determinations, not as to how the CN has characterized a termination, but rather whether a termination is actually and in in reality a layoff due to lack of work or funds.

. Title 51 CNCA 1017 (C) states:

“*Opportunity shall be afforded all parties to respond and present evidence an argument on all issues involved*”. *Emphasis added.*

The intent of the Act was that employees would have a quick and efficient remedy for arbitrary termination. **51 CNCA 1003**. Under the EAB's construction of the statute, simple classification by Cherokee Nation administration of a termination as a "*layoff*" due to restructuring/reorganization deprives employee of the protections the Act is intended to provide.

The EAB also erred in not allowing Dreadfulwater to present evidence on all the issues in accordance with the statute. This case clearly illustrates both the wisdom of the statutory requirement that all issues be heard, and the mischief that entails when it is ignored.

Dreadfulwater implemented her case in January 2012, twenty eight months ago, and has yet to be allowed to present all her evidence to support her contention that her termination was not a layoff for lack of work or funds.

IT IS THEREFORE ORDERED that the Decision of the EAB dated Nov 30th, 2012 granting the Nations Motion to Dismiss for Lack of Jurisdiction is hereby **VACATED**.

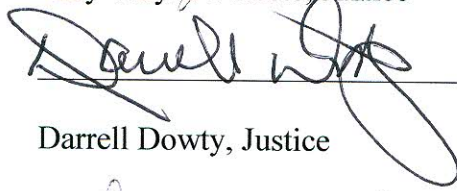
The matter of whether Appellants termination was actually a "layoff" or whether the termination is a subterfuge for a political firing is remanded to the EAB with instruction to allow Dreadfulwater to present evidence on all the issues, to conduct further proceedings as necessary and to make findings 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 Ninety (90) days from the date of the filing of this order.

IT IS SO ORDERED this 9th day of June 2014.

By:


Troy Wayne Poteete, Justice


Darrell Dowty, Justice


James G. Wilcoxon, Justice



John C. Garrett, Justice

Certificate of Mailing

I, Kendall Bird, certify that on the 10th day of June, 2014, I mailed and/or faxed a true copy of the above and foregoing to the following:

Chad Smith, chad@chadsmith.com

Chrissi Nimmo, chrissi-nimmo@cherokee.org


Kendall Bird, Court Clerk