

**NON-REMOVABLE MILLE LACS BAND OF OJIBWE INDIANS
COURT OF APPEALS**

District of Nay-Ah-Shing

IN THE COURT OF APPEALS

No. 2013-AP-01

Mille Lacs Band of Ojibwe Indians,
Appellant

vs.

MEMORANDUM DECISION AND ORDER

Daniel L. Smith,
Appellee

The Mille Lacs Band has appealed to this Court from a January 17, 2013 order of the Court of Central Jurisdiction reversing the November 8, 2012 MLB Grievance Committee decision upholding the termination of Smith for being uninsurable under the Band’s general liability insurance policy. The January 17 order reinstated Smith to his former employment as a maintenance worker¹ and awarded him 10 weeks of back pay. The Band timely appealed that decision, arguing that the lower court improperly narrowed the scope of the review of the Grievance Committee decision to the limited issue of whether the Band had shown the Grievance Committee that Smith was “uninsurable”, when that argument was not made by Smith, and whether Smith was properly subjected to “summary dismissal” rather than progressive sanctions under the MLB Personnel Policies and Procedures. The Band also argues that the lower court went

¹ Smith advised this Court at oral argument that he was reinstated but promptly terminated anew for not being insurable.

overboard in accommodating Smith as a pro se litigant and in so doing violated the Band's rights.

Oral argument was held before this Court² on the 9th day of May 2013 with the Band appearing through its Solicitor General, Todd Matha, and Mr. Smith appearing pro se, as he did before the lower court. This Court has considered the briefs submitted by the Parties and the oral arguments and issues this decision.³

The Band argues that the legal issues resolved by the Grievance Committee should be assessed under a "clear error of law" standard while the other issues should be resolved under an "abuse of discretion" standard. This Court finds that the abuse of discretion standard is the one laid out by Band law. In addition, the Court of Central Jurisdiction has adopted a Court Order, Court Order #41, which similarly at paragraph 9 directs this Court to apply an abuse of discretion standard to assess whether the Grievance Committee's actions should be reversed.

"Abuse of discretion" is the most deferential standard of review as evidenced by the United States Court of Appeals for the Eighth Circuit's perspective in Hernandez-Moran v. Gonzales, 408 F.3d 496 (2005) that "an abuse of discretion occurs if a decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the claimant or distorts important aspects of the claim." The Supreme Court has also said that deference, especially in regards to evidentiary findings,

² Associate Justice Boyd was unable to appear for the oral argument because of illness but he has considered the briefs and joins in this Court's decision.

³ At oral argument Smith suggested that this Court lacked jurisdiction to review the lower court's decision under the Band's administrative grievance policies and procedures. The Court has reviewed those policies and procedures and does not find that appellate court review is restricted.

to the decision made below is the “hallmark of abuse-of-discretion review.” General Elec. Co. v. Joiner, 522 U.S. 136, 137 (1997). The legal issue therefore is whether the lower court erred in finding that the Grievance Committee abused its discretion in upholding Smith’s summary dismissal.

Smith was employed by the Band as a maintenance worker when in September of 2010 he was convicted of Driving While Under the Influence of Alcohol. Although he was not operating a Band vehicle while driving impaired, nor was he on duty, because his job description including driving between the Districts he was required to be insurable through the Band’s general liability and auto insurance policy. Smith was forthright about his conviction with the Band and the then Commissioner of Administration, Sam Moose, opted not to terminate him. However, neither his job description nor his job duties were revised by the then Commissioner. Under the Band’s liability insurance policy in place at the time, an apparently still in place, employees convicted of DUI are not insurable for three years for work-related purposes.

Smith continued to work for two years until the conviction was brought to the attention of the new Commissioner of Administration by the HR Department Safety Risk Manager. The Commissioner then summarily terminated him for being uninsurable. He then filed a grievance claiming that two years had passed since the conviction and that the termination was wrongful. At no time during the grievance proceedings did Smith argue that he was insurable⁴ under the Band’s liability policy. Instead he relied upon the fact that two years had passed and he had worked continuously since the DUI without negative incident. The Grievance Committee upheld his termination finding that he was

⁴ Even before this Court Smith does not contend that the Grievance Committee erred in finding that he was uninsurable due to the DUI conviction.

not insurable and thus was unable to perform his job and was thus properly subject to a summary dismissal. He then appealed to the lower court.

The lower court found that the Grievance Committee erred in two regards. First, the Court faulted the Grievance Committee for finding that Smith was not insurable even though Smith acknowledged this before the Grievance Committee, before the lower court, and indeed even in this Court. The lower court found that his admission of uninsurability was not proof of the issue because he was merely parroting what his supervisor and Commissioner told him. The difficulty this Court has with this legal analysis is that Smith never requested a grievance on the issue of his insurability, but only on the issue of whether the Band should have been permitted to terminate him two years after his DUI when a new Commissioner of Administration learned of the old DUI conviction. Even when a litigant appears pro se it is not the province of the Court in an appeal from a grievance committee decision to create on appeal an argument that was not presented to the Grievance Committee. The lower court is limited to a review of the grievance presented to the lower court. The Band had no reason to submit proof of the insurability issue to the Grievance Committee because Smith never argued that he was insurable. Therefore, to fault the Band for not providing proof of this issue was in error and an abuse of discretion.

The lower court also found that the Grievance Committee failed to properly explain what the grounds for the termination of Smith was and to explain why the progressive discipline of employees, rather than summary dismissal, was not more appropriate. The Band did not point the lower court to any specific provision of the Band's Employment Policies and Procedures prohibiting an employee from being

convicted of DUI during the tenure of employment. The Band did not argue, however, that this conviction constituted work-related misconduct. If it had this Court may be inclined to agree with the lower court that the Band failed to demonstrate why the progressive discipline was not more appropriate. The conviction, coupled with the Band's general liability insurance policy, produced a situation where Smith was no longer able to perform his job as described in his job description. Of course, the previous Commissioner may have been able to change the job descriptions to eliminate the travel between Districts, but there is nothing in the record to indicate that this happened. Instead, it appears that the former Commissioner was willing to overlook part of the job description to permit Smith to stay employed. When this was brought to the new Commissioner's attention he took action.

There was no progressive discipline that the Band could have imposed upon Smith to enable him to retain his position. A reprimand, suspension without pay, or other form of discipline would not have remedied the fact that he had been convicted of a DUI and his employer's insurance carrier deemed him uninsurable for three years. Had he been operating vehicle during work hours and injured a person or Band property, the Band's insurance would not have covered that situation and the Band would potentially have been liable for the event.

When an employee is unable to perform his job, because of his own conduct, the employer may take action without demonstrating that the particular reason an employee is no longer able to perform his job is listed as misconduct under the Band's policies and procedures. For example, if any individual employed by the Band has a requirement of having a license to perform the job (doctor, nurse, lawyer, gaming employee) and the

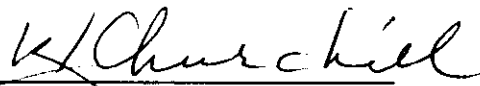
employee commits some misconduct outside the work context that renders his license unavailable for a certain period of time the Band should be able to take action, including summary dismissal, if the person cannot perform the job he was hired for. For example if a key gaming license employee lost that license for failure to pay child support for example, the Band should not have to demonstrate that in its policies and procedures it lists "failure to pay child support" as a ground for discipline in order to take action.

This Court is very concerned about setting a precedent that the Band cannot take action against employees who become uninsurable because of their own misconduct unless the Band has listed every possible act that could result in discipline in its policies and procedures. By holding the Band and Grievance Committee to that standard this Court concludes that the lower court erred.

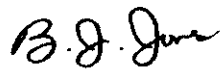
WHEREFORE IT IS HEREBY

ORDERED, ADJUDGED, AND DECREED that the lower court's decision dated January 17, 2013 is reversed and the decision of the Grievance Committee upholding the summary dismissal of Smith is affirmed.

So ordered this 20th day of May 2013.



Rayna Churchill
Chief Justice



BJ Jones
Special Magistrate



Brenda Moose
Associate Judge

ATTEST: WMA
Clerk of Courts