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Stockbridge-Munsee
Tribal Court of Appeals
State of Wisconsin County of Shawano


TRIBAL COURT CLERK

Jeffery L. Pecore

Appellant,

vs.

) Case: 2003-AA-0001

Stockbridge-Munsee Community
Human Resources Director and Interview
Panel,
Alpha Crepeau
Leah Miller
Lloyd Young

) Appellate Court Opinion

Appellees

Opinion

Before Appellate Justices David D. Raasch, Todd Matha and Stephan Grochowski.

*Per Curium***Introduction**

This Court must determine whether to uphold the decision of the Stockbridge-Munsee Tribal Trial Court ("Trial Court"). The Stockbridge-Munsee Tribal Court of Appeals ("Court") reviews the underlying decision *de novo* since the appeal presents primarily issues of law. The analysis and holding of the Court follows below.

Procedural History

On January 24, 2003, the Stockbridge-Munsee Tribe ("Tribe") posted an employment position for superintendent of the Tribe's golf course. The Petitioner applied for the position and

20 received an interview,¹ but was not selected for the position that was offered to a non-Indian. On
21 April 15, 2003, the Tribe sent the Petitioner a written notice that he was not selected for the job.
22 On April 23, 2003, the Petitioner filed a request for a tribal court review of that hiring decision.

23 The Tribe moved the Trial Court for a summary judgment. Although a response was
24 filed by the Petitioner in opposition to summary judgment, the Trial Court found that summary
25 judgment was proper because there were no disputed material facts, nor any allegations of new
26 evidence in the case.

27 On February 6, 2005, the Honorable Kimberly Vele issued a memorandum opinion
28 upholding the Tribe's decision not to hire the Petitioner for the position that was posted for
29 superintendent of the Tribe's golf course. On February 23, 2005, the Petitioner filed a notice of
30 appeal of the Trial Court's decision. This case comes before the Court on the Petitioner's appeal
31 of the memorandum opinion. The Court accepted the appeal, has reviewed all of the filings in
32 this case and has exercised its discretion to issue this opinion based on the record.²

33 Jurisdiction

34 Section 23 of the Stockbridge-Munsee Tribal Court Rules of Procedure grants this Court
35 the jurisdiction to review the case at hand. The Court, having been granted jurisdiction to review
36 the final judgment of the Trial Court, now proceeds to review that final judgment and issue its
37 opinion.

38 Scope of Review

39 Section 23 (I) of the Stockbridge-Munsee Tribal Court Rules of Procedure limits the
40 Court's review stating. "The Court may only hear appeals concerning matters of law."

41 Summary of Issues

42 The Appellant raises four issues on appeal.

¹ The tribal preference information form indicates the Petitioner is an enrolled member of the Stockbridge-Munsee Tribe, Enrollment No. 000967.

² Stockbridge-Munsee Tribal Court Rules of Procedure, § 23 (K) states: "At the discretion of the appellate body, to aid it in reaching a wise decision or to avoid injustice to the parties, an oral hearing on the appeal of matters of law may be ordered."

1. Did Mr. Pecore's Affidavit in Opposition to Motion for Summary Judgment present an issue of material fact that requires a trial in this matter?
2. Did the Tribe improperly apply the job description in its decision not to hire the Appellant?
3. Did the Tribe base its decision not to hire the Appellant on relevant and established facts?
4. Did the Trial Court err when deciding that the Appellant did not meet the qualifications of the posted position?

Pertinent Facts

The Trial Court issued a summary judgment decision in this case so the facts found by the Trial Court were determined from the pleadings and not from oral testimony. Therefore, this Court must rely on those same facts found in the pleadings and determine if there was any error concerning the application of law. In the Respondent's Brief and Motion for Summary Judgment filed with the Trial Court on August 28, 2003, the Respondent sets forth the following facts.

1. Mr. Pecore was previously employed by the Tribe at the Pine Hills Golf Course as the Greens Superintendent from 1994 through 1999.
2. The Tribe terminated Mr. Pecore's employment as the Green Superintendent on February 4, 2000.
3. Mr. Pecore's termination from employment resulted from Mr. Pecore's gross misconduct that involved Mr. Pecore being convicted of three criminal charges.
4. Mr. Pecore did not appeal his termination from employment.
5. On January 24, 2003, the Tribe posted for the Superintendent position as the Pine Hills Golf Course.
6. The posted Superintendent job description requires that the applicants have maintained a satisfactory work record in all past employment.
7. Mr. Pecore's February 14, 2000 employment termination is "not maintaining a satisfactory work record in all past employment."

Respondent's Br. & Mot. for Summ. J. at page 6 - 7.

On September 13, 2003, the Petitioner filed an Affidavit in Opposition to Motion for Summary Judgment. In the Affidavit, Mr. Pecore provides the following information:

1. Affiant is the petitioner in the above captioned action.
2. Attached hereto as Exhibit A is a true and accurate copy of the position announcement for the golf course superintendent. Said exhibit is incorporated herein by reference.

- 80 3. That Affiant meets all of the qualifications listed on the position
81 announcement for the golf court [sic] superintendent, attached hereto
82 as Exhibit A.
- 83 4. Affiant submitted an application for an employment position of golf
84 course superintendent, dated December 5, 2002. A true and accurate
85 copy of said of [sic] application is attached hereto as Exhibit B and
86 incorporated herein by reference. Attached hereto as Exhibit C is a
87 true and accurate copy of the employee preference compliance report,
88 dated April 9, 2003, for the position of golf course superintendent.
89 Said exhibit is incorporated herein by reference.
- 90 5. That affiant is entitled to an American Indian preference for the job of
91 golf course superintendent.
- 92 6. That Jon Zwirschitz was hired for the position of golf course
93 superintendent. That Jon Zwirschitz is not entitled to any employment
94 preference regarding the position of golf course superintendent.
- 95 7. Pursuant to Section 54.2 of the Employee Preference Policy
96 Ordinance, the affiant, Jeffrey L. Pecore, is entitled to a preference for
97 the position of golf course superintendent. Affiant has the
98 qualifications as stated for the position of golf course superintendent at
99 Pine Hills Golf Course. Affiant meets all qualifications as listed on the
100 superintendent job description. That from October 15, 2001, to
101 January 3, 2002, affiant was hired as a consultant at the Pine Hills Golf
102 Course to restore the greens. Upon information and belief, Jon
103 Zwirschitz also applied for said job. However, the job was offered to
104 the affiant.
- 105 8. That all times that affiant was employed at Pine Hills Golf Course, his
106 work performance was satisfactory.
- 107 9. Attached hereto as Exhibit D and incorporated herein by reference, is a
108 true and accurate copy of a letter of recommendation from Leah J.
109 Miller.
- 110 10. Attached hereto as Exhibit E is a true and accurate copy of a letter
111 dated August 19, 2002, was incorporated herein by reference, outlining
112 Affiant's experience, education, skills and background.
- 113 11. Attached hereto as Exhibit F is a letter of recommendation dated
114 March 12, 2003, from Jack Hietpas. Said exhibit is incorporated
115 herein by reference.
- 116 12. That Affiant makes this affidavit in opposition to defendant's motion
117 for summary judgment.
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119 Aff. in Opp'n to Motion for Summ. J. at page 1-2³.

120 The Petitioner included the referenced exhibits with the Affidavit in Opposition to Motion for
121 Summary Judgment.

³ Affidavit in Opposition to Motion for Summary Judgment filed with the Stockbridge-Munsee Tribal Court on September 22, 2003. Two page document with no page numbers.
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122 **DISCUSSION OF THE ISSUES**

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124 **1. *Did Mr. Pecore's Affidavit in Opposition to Motion for Summary Judgment present an***
125 ***issue of material fact that requires a trial in this matter?***

126 This Court has carefully reviewed the documents filed in this case and finds that the
127 Affidavit in Opposition for Summary Judgment did not contain any new material facts that
128 would have created a disputed issue. The only hint of a new fact was the assertion that Mr.
129 Pecore was hired as a consultant, between October 15, 2001 and January 3, 2002 at the Pine Hills
130 Golf Course, to restore the greens. However, the Appellant does not affirmatively provide any
131 foundation as to how this assertion creates a new material fact that needs to be tried. The Trial
132 Court did not err in making the determination that there were no disputed issues of material fact.
133 Based on this Court's review of the filings, we agree with the Trial Court that the only dispute
134 concerned a matter of law regarding the proper application of the hiring preference policy.
135 Summary judgment was appropriate in this case.

136 **2. *Did the Tribe improperly apply the job description in its decision not to hire Mr.***
137 ***Pecore?***

138 The Trial Court found that the Tribe did not err in its decision to decline hiring the
139 Appellant. This Court agrees with the analysis of the Trial Court in that the qualifications for a
140 job position must be "job related" and that the position applied for as Superintendent would
141 include responsibilities such as supervising and training of staff, budget management, etc., and
142 that "*past management and oversight experience would be essential indicators of future ability to*
143 *perform the supervisory functions required for the position.*" Trial Court Decision at 5 (emphasis
144 added). The Trial Court found that "there seems little doubt that the basic qualifications of the
145 position were reasonably related to the job and not intended to be a barrier to employment." Id.
146 at 5. The Appellant does not dispute the fact that he was criminally convicted and fired for
147 misconduct from this same position previously. Therefore, this Court must agree with the Trial
148 Court's determination that the Tribe did not err when it included prior work history as a
149 qualification for this position.

150 **3. *Did the Tribe base its decision not to hire the Appellant on relevant and established***
151 ***facts?***

152 The Trial Court found, and this Court agrees, that there are no disputed facts in this case.
153 Although the Appellant could have appealed his prior termination for misconduct, he did not.

Also, the Appellant could have disputed that his prior termination should not be part of the job qualifications that the Tribe incorporates in its hiring practices, but he did not. Therefore the Tribe did not err, and the Trial Court's findings on this issue are correct.

4. Did the Trial Court err when deciding that the Appellant did not meet the qualifications of the posted position?

The Tribe has set forth the purpose for its hiring preference policy as follows:

Purpose: Optimum employment in the Stockbridge-Munsee Community for Tribal members, as well as those who live in the Community as spouses or direct descendants, is a critical element to building self-sufficiency, sovereignty and an economy that combats poverty and social ills, and assures that the Stockbridge-Munsee Community receives the maximum benefits generated by its entities and enterprises.

The purpose of this ordinance therefore is to provide maximum employment opportunity and preference in hiring and lay-offs, to the people of the Stockbridge-Munsee Community.

Employee Preference Policy Ordinance, Ch. 54.

In reviewing the purpose of the Employee Preference Policy Ordinance, as referenced in the Trial Court's decision, this Court finds that although the main thrust is to provide optimum employment for Tribal Members, it is also intended to assure that the Tribe receives the maximum benefits generated by its entities and enterprises. This would indicate that the Tribe reserves discretion to create job descriptions that assure that the entire community benefits from having qualified employees. Therefore, the Tribe did not improperly act in creating the job description for the position of Superintendent of the Pine Hills Golf Course, which included the qualification that applicants "[m]ust have demonstrated ability to maintain satisfactory working record in any prior or current employment." Position Description Qualifications at 16. Furthermore, the Tribe did not improperly act in considering the Appellant's past work history when making its decision not to hire him for the posted position. There was no error in the Trial Court's decision.

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Conclusion

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This Court affirms the Trial Court's decision issued on February 6, 2005.

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Dated this 15th day of March, 2006

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Stockbridge-Munsee Tribal Court of Appeals

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David D. Raasch

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David D. Raasch

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Todd Matha

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Todd Matha

3/10/06

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Stephan M. Grochowski

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Stephan Grochowski

3/3/06

