

Although the written record shows the Juvenile Court denied Appellant's Motion to Dismiss as not in the best interests of the child, the Order does not make specific findings for this conclusion of law. We would need to review the oral record of the proceeding in order to determine if there is sufficient evidence on the record to support this conclusion of law. Since there is no oral record, it must be remanded to make an oral record.

For the reasons stated above we VACATE the Order of Disposition entered below, and REMAND for another hearing, at which the Juvenile Court is directed to make either written or oral findings regarding the denial of Appellant's Motion to Dismiss with regard to the best interests of the child.

IT IS SO ORDERED.

FINLEY, Tobias, Appellant,

v.

CTSC, TILLMAN & ANDREWS. Appellants.

Case No. AP05-008, 4 CTCR 25

8 CCAR 38

[R. John Sloan Jr., appearing for Appellant
Bruce Didesch, appearing for Appellees
Trial Court case number AD-2004-25004]

Argued November 18, 2005. Decided March 6, 2006.

Before Chief Justice Anita Dupris, Justice Dave Bonga and Justice Dennis L. Nelson.

Appeal of order denying appeal of termination of employment. The denial was based on the administrative law court's finding, following a preliminary hearing, that although Finley was a seasonal employee receiving benefits associated with employment exceeding ninety days, he was nevertheless a probationary employee. Senior staff interpreted company policy to not allow probationary employees the right to appeal termination of their employment. We find Finley was a seasonal employee having a reasonable expectation of continued employment and hold he was entitled to appeal. Reversed and remanded.

Court to correct the affected orders herein in line with *In Re A.S., supra*.

Nelson, J., for the panel.

INTRODUCTION

The relevant facts in this matter are not challenged. Tobias Finley is an enrolled member of the Colville Confederated Tribes first employed by Colville Tribal Services Corporation (CTSC) on April 18, 2003. He was employed on several projects in different capacities working as a laborer, cement finisher, and foreman/carpenter. Each time Finley was assigned to a project requiring a different skill his employment classification. During this time of continuous employment he received good performance evaluations and no disciplinary action was taken against him. He was temporarily laid off on October 22, 2004 and recalled by CTSC for ten days in January 2005, laid off again, and then re-hired on January 27. He was terminated by CTSC on April 20 for allegedly violating company policies. CTSC considered Finley a seasonal employee at the time he was terminated.

Finley was informed by CTSC's Chief Executive Officer, Paul Tillman, and by its Human Resources Director, Lois Pakootas, of his right to appeal his termination to the Administrative Law Court. Tillman testified at an appeal hearing that Finley, although a seasonal employee, was in a probationary status thus not eligible to appeal his termination.

The Administrative Law Court found Finley to be a seasonal employee on probationary status. Because of his probationary status that the Court held he had no right to appeal his termination.

ISSUE ON APPEAL

The Notice of Appeal states the issue on appeal is whether Finley has the right to appeal the termination of his employment to the tribal Administrative Court. Re-phrased, we view the issue as whether the administrative law court denied Finley due process of law by denying him a hearing regarding the termination of his employment.

STANDARD OF REVIEW

This matter concerns issues of law and fact. Combined questions of law and fact are reviewed under the non-deferential *de novo* standard when the administration of justice favors the Court of Appeals. “Clearly erroneous” review is used in such questions when the administration of justice favors the Trial Court. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995). In this instance, the questions herein hinge on the reliance on Colville Tribal Enterprises Corporation Employee Policy Manual (Manual) as the guiding law for the parties. We find that the administration of justice favors this Court in that a critical question is whether the Appellant should go through another “initial review” period after becoming a seasonal employee, which is more a question of law.

DISCUSSION

The Colville Tribal Civil Rights Act, CTC 1-5-2(h) states in pertinent part: “The Confederated Tribes of the Colville Reservation in exercising powers of self government shall not... (h) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” This is nearly identical with the Indian Civil Rights Act.¹⁷

Finley contends the termination of his employment was an unlawful taking of his property by the Tribes without due process of law. It is well established that a reasonable expectation of continued employment may be a property interest and thus entitled to the protection of due process procedures. See *Roth v. Board of Regents*, 408 U.S. 564 (1972), and its progeny. We must first determine whether Finley has an interest protected by due process of law and, if so, what process is due. *LaCourse v. CCT*, 1 CCAR 2, 5, 1 CTCR 5 (1982) (“Only the Tribe can elucidate the meaning of these generic concepts [of due process and equal protection]...”) *Bliek v. Palmer*, 102 F.2d 1472 (8th Cir. 1997).

The right to continued expectation of employment is secured by “existing rules or understandings. A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support (a) claim of entitlement to the benefit and that may (be) invoke(d) at hearing.” *Perry v. Sinderman*, 408 U.S. 593, 601 (1972). We adopt this rule of law as guidance in this matter.

¹⁷ 25 U.S.C. 1302(8) states: “No Indian Tribe exercising powers of self government shall ... (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”

A. Employment status

Whether Finley has a protected interest in his continued employment is determined by his employment status at the time of his termination and the “rules and mutually explicit understandings” which may bolster his claim. The employees of CTSC are categorized as either full time, part time, temporary, on call, contract, emergency hire, or seasonal.

The two employment categories germane to this matter are “temporary” and “seasonal.” As noted, a temporary employee is one who is hired for less than ninety days. Should the period of employment exceed ninety days, the employee automatically moves into the seasonal category. Temporary employees accrue no benefits and, by definition, have no expectation of continued employment. Seasonal employees accrue benefits such as health and disability insurance, participation in 401(k) retirement plans, and paid leave. Finley, a seasonal employee, was employed continuously by CTEC for over eighteen months and subsequently laid off and re-hired.

All employees, no matter how classified, are either exempt (ineligible for overtime compensation) or non-exempt (eligible for overtime compensation and whose duties meet criteria set by the Tribes or the federal wage and hour laws). It is because of the federal wage and hour laws that an employee’s transfer to a new job classification is memorialized by a payroll information/job change sheet.

CTSC contends Finley lost his status as a seasonal employee each time he transferred to a new wage classification. It further argues he began each new wage classification as a temporary employee in a probationary status. Despite this, and despite later testifying that newly hired temporary employees do not have the right to appeal termination, both Tillman and Pakootas informed Finley he had the right to appeal.

Tillman testified that all employees have the right to appeal disciplinary actions, including termination. According to Tillman, however, probationary employees, while having the right to appeal “in house” do not have the right to appeal to the Administrative Law Court. Ms. Pakootas interpreted the Policy and Procedures Manual in the same manner as Tillman. She explained she had written a letter to Finley stating

he had the right to appeal to the Administrative Law Court, but that she had only done so because she thought the matter would be resolved before going that far.

Following the preliminary hearing, the Administrative Law Court, held that Finley was a seasonal employee at the time of his termination, but that he did not have the right to appeal because he was terminated during the probationary period following his being recalled on January 27, 2005.

B. Expectation of continued employment

We find it significant that seasonal employees transferring into another job classification do not lose the benefits accrued following their initial probationary period. Finley had worked continuously for eighteen months, was laid off for two months, recalled and laid off again, and recalled for the last time in on January 27, 2005. His benefits immediately began to accrue each time he was recalled. That is, he was not required to complete the probationary period before his benefits began to accrue. CTSC was unable to explain how or why Finley would continue to receive benefits such as FTO, 401(k) contributions, and health insurance, but would lose the right to appeal his termination during the probationary period following his recall.

Equally significant, the Manual provides that should an employee believe he has been disciplined or terminated unfairly, he may appeal the adverse action to the General Manager of the enterprise. Should the employee disagree with the General Manager's decision, he may appeal further to the Corporate Director of Human Resources. Should that decision be adverse, the employee may make a final appeal to the Colville Tribal Administrative Court. *See* Manual, Chapter XI(C)(3) - Discipline: Suspensions/Terminations/Appeals.

We conclude from Finley's record of employment that he had a reasonable expectation of continued employment - a protected property right. This is evidenced by the duration of his continuous employment, the timely recalls after lay offs, his increased responsibility on some projects, his good performance evaluations, the lack of disciplinary action, and the accrual of benefits.

We further conclude, as did the trial court, that the Manual is confusing and ambiguous. Statutory construction principles mandate that ambiguous documents be construed against the drafter. Any ambiguity must favor Finley. Furthermore, the

burden is on the employer, not the employee to make clear to the employee what his status and what his rights are. *See, Schmolke v. Ho-Chunk Casino*, 29 ILR 6012 (2001).

Section XI of the Manual does not deny a seasonal, non-probationary, employee the right to an appeal. The Administrative Law Court erred in finding that Section VI.J.1 of the Manual states "all employees" have an initial review period; it states all "new employees" have an initial review period. Finley is not a new employee. Finley has a right to hearing on his appeal whether his termination was warranted.

CONCLUSION

Accordingly, the Order Denying Appeal is REVERSED and the case is REMANDED for a hearing on the merits of Finley's termination from employment with CTSC.

IT IS SO ORDERED.

Steve MARCHAND, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP05-016, 4 CTCR 26

8 CCAR 43

[Elizabeth Fry, spokesperson for Appellant.

Joni Bray, Office of Prosecutor, spokesperson for Appellee.

Trial Court Case Number CR-2005-28170]

Argued March 17, 2006. Decided April 26, 2006.

Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Howard E. Stewart.

Dupris, CJ

SUMMARY

The Defendant, Steve Marchand (Marchand) is charged by Criminal Complaint for Battery, Assault and Reckless Endangerment, with a Domestic Violence