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

enhancement, in violation of CTC §§3-1-4, 3-1-3, 3-1-11, 5-5-54, respectively. The parties initially had a plea agreement, not yet accepted by the Court, but accepted by both parties. The Prosecutor notified Marchand and his Spokesman that she learned new information relevant to the Marchand's actions, including (1) a statement by a witness in a dependency case that Marchand's children were traumatized by his actions; and (2) that the victim objected to the plea agreement terms. With this "new" information the Prosecutor withdrew her plea agreement offer. Marchand sought to have the agreement specifically enforced at the Change Of Plea hearing on December 2, 2005. The Trial Court found, on record, that the Prosecutor's withdrawal of the agreement was proper because of new information. Marchand asked for an Elder's Panel to discuss whether the Prosecutor should be held to the agreement based on a custom of keeping one's word. The Court denied the request, finding that an Elder's Panel was not necessary to decide if there was a custom or tradition regarding keeping one's word.

Marchand filed the Interlocutory Appeal herein on December 9, 2005, pursuant to COACR 6-A[18] and COACR 7-A(b),[19] specifically raising as issues (1) the denial of the Elder's Panel, and (2) denial of his request for specific performance of the plea offer which was withdrawn. The Prosecutor did not file an objection to the Appeal. The Judge submitted a written order on her ruling On December 21, 2005, after the Interlocutory Appeal was granted.[20] For reasons stated below, we deny the Appeal and Remand the case to the Trial Court.

ISSUES

(1) Did the Trial Court err in denying an Elder's Panel to discuss whether the Prosecutor is a tribal leader who should be held to her word? and

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[18]. 6-A. NOTICE OF INTERLOCUTORY APPEAL. (a) A party shall initiate an interlocutory appeal by filing a written Notice of Interlocutory Appeal (NOIA) with the Court of Appeals within five (5) days from the entry of the written order of the Trial Court. The opposing party has five (5) days after receipt of the NOIA in which to file a response with the COA on whether they oppose or agree with the interlocutory appeal. Failure to file this statement may cause the NOIA to be granted by the COA.

[19] 7-A. GROUNDS FOR INTERLOCUTORY APPEAL. (b) The issue presented involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an intermediate appeal from the decision may materially advance the ultimate termination of the litigation...

[20]. Marchand asked the Judge for a written Order on her ruling, but the Trial Judge submitted one only after directed to do so by this Court, after the Interlocutory Appeal was granted. The Interlocutory Appeal may not have been granted in the first place if we had the Trial Court's Order when we first reviewed the case. It is important for the Trial Court to finalize all substantive rulings in writing in order to preserve judicial economy in both Courts.

(2) When may the Prosecutor withdraw a plea agreement after it has been accepted by a defendant?

STANDARD OF REVIEW

The issues raised are issues of law. We review *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR, 2 CTCR 08, 22 ILR 6032(1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059,(1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

De novo review means we look at everything the Trial Judge had to review when she made her decision, and not at any new information. The test is whether there a reasonable basis for the Judge's ruling, based on the facts and law she before her and not whether we have held differently under the same circumstances.

ELDER'S PANEL

Marchand recognizes that in its December 21, 2005 Order, the Trial Court did make a finding of tradition regarding acting honorably and with respect. The Trial Court held:

> "It is common knowledge and an accepted tribal traditional cultural value and belief that one is expected to honor his word. It is one of the many basic teachings and beliefs - central to who we are as Indian people - that when we speak, we speak the truth and we honor our word - our word is our honor. Core values shared by tribal people bind us together as a people and define who we are. These basic values and beliefs include, but are not limited to: a close relationship with the Creator; a respect and reverence for all He has created; honesty; integrity; personal accountability; closeness and love of family and community; humility; and a strong sense of sharing, caring, and cooperation. As Indian people, we shouldn't

> need an Elders' Panel to tell us that those are Colville tribal customs and traditions. These teachings and beliefs should be so deeply imbedded in us and so central to who we are that there is no question that tribal custom and tradition require a person to keep their [*sic*] word." Order from Change of Plea Hearing Denying Request for Elders Panel, (Order) December 21, 2005 at pp 2-3.

Marchand asks us to allow him to ask an Elder's Panel to extend this tradition to include a finding that the Prosecutor is like a traditional "chief," and as such can never withdraw a plea proposal in that tribal "chiefs" did not go back on their words. In *Smith v. CCT*, 4 CCAR 58 (1998), we held a request for an Elder's Panel cannot be a "fishing expedition." The party asking for it has the burden of proof to show, through extrinsic evidence, that there is a genuine custom or tradition question for the Panel to discuss. *Id*. at 61. In this case we have crossed into the "fishing expedition" prohibited in *Smith*.

Marchand argues it is required of a tribal leader ("chief") to follow through on what she has offered. He offers excerpts from anthropological data to support this assertion. The information offered discusses the traits of a good leader, and the role of the leader in guiding his people. It discusses the pacifist traits of the San Poils and the Nespelems. It does not discuss a person like the Prosecutor, so it does not support an assertion that a prosecutor-type person could have existed in our past.

Marchand argues the Prosecutor is like a "whipping man" and "chief" combined. By asserting it without a further showing that the Prosecutor's position would come from such roots is the fishing expedition. Marchand hopes the Elder's Panel would find the modern day Prosecutor is such a leader. It is not the role of an Elder's to decide key facts in a case. It is the role of the Panel to give guidance on what is a custom or tradition (our primary law) when the fact-finder, *i.e.* the Trial Judge, is unsure what such a custom or tradition would be in the given circumstances. Marchand's arguments for an Elder's Panel are too tenuous to meet the *Smith* test.

Reasonable judges may differ. The Trial Judge's Order states adequate findings, based on limited record before it, for denying the Elder's Panel. The Judge's decision is not an abuse of her discretion, nor is it clearly erroneous. For these reasons Marchand has not met his burden.

STANDARDS FOR WITHDRAWING PLEA PROPOSAL

Our Court recognizes broad prosecutorial discretion. *See*, *Mellon v. CCT*, 8 CCAR 01 (2005).[21] The Prosecutor's Office, in drafting plea proposals, has a policy of following Washington State standards in deciding when to withdraw such proposals. Notice of this policy is embodied on the form used by the Prosecutor's Office, stating *State v. Bogart*, 57 Wn.App. 353 (1990) applies. *Bogart* states, citing *State v. Wheeler*, 95 Wn.2d 799, 850 (1981): "Absent a guilty plea or some other detrimental reliance by the defendant, the prosecutor may revoke any plea proposal." *Id*. at p 356.

Marchand does not dispute the controlling rule of law of broad prosecutorial discretion nor the current Prosecutor's Office policy of following State law. It is Marchand's assertion that neither the federal nor the State standard need apply if an Elder's Panel were to find that the Prosecutor, as a "Chief," were required to keep her word, no matter the circumstances. The custom or tradition would override the current standards followed by the Prosecutor.

The question of searching for an applicable custom or tradition has been already been addressed, *supra*. The real question remaining is, are the standards the Prosecutor applies when withdrawing an offered plea proposal, as recognized by the Trial Court, adequate as a matter of law? This is a question of first impression for our Court. Based on the reasoning below we hold that the standards are adequate as a matter of law.

Even though the Trial Judge stated in her Order that she would not address the issue of when a Prosecutor can withdraw an plea proposal issue she did enter findings she considered in analyzing the prosecutor's withdrawal of the guilty plea:

> (1) "The Tribal Prosecutor based her initial decision to enter into the Agreement on incomplete or inaccurate information available to her at the time...";
>
> (2) "As soon as the Prosecutor became aware of new information/allegations, and the fact that the alleged victim was opposed to the Agreement, she advised the Defendant that she was withdrawing her offer."; and

[21]. Both parties discussed *Mellon* in the context of allowing the Prosecutor to withdraw plea proposals. This is not what *Mellon* recognized. *Mellon*, relying on *Wyate v. U.S.*, 470 US 598 (1985) for guidance, stands for the proposition that the Prosecutor's has broad discretion to decide who to prosecute. *Id* at 10. In *Mellon* the Prosecutor withdrew an offered deferred prosecution, not a proposed plea agreement.

(3) "The Defendant did not sign the guilty plea. The Court did not accept the guilty plea. The Plea Bargain Agreement was not offered to the Court, accepted by the Court, nor entered by the Court." Order p 2.

We first look to the standards used by the Prosecutor's Office. As a matter of policy, it has adopted a State standard. That is, the plea proposal is subject to withdrawal up to the time the Court has accepted a defendant's guilty plea, or the defendant has relied on the proposal to his detriment. *Bogart* at 356.[22]

This standard comports with the federal standard as found in *Mabry v. Johnson*, 467 US 504 (1984) in which the Supreme Court held that the Prosecutor has broad discretion to withdraw a plea proposal up to the time the Court has accepted the guilty plea of the defendant. The Supreme Court found no due process violations ("The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here respondent was not deprived of his liberty in any fundamentally unfair way." *id* at 511). The Court went on to say that the effect of not enforcing guilty plea left the defendant in same situation he was before the plea was offered: he is still presumed innocent unless proven otherwise; he still has due process rights to a fair trial; he still does not have to not speak against himself, and so on. The Court found no substantial prejudicial effect to the defendant by not requiring Prosecutor to stand by the agreement. *Id*.

The Trial Judge's assessment follows the general rules announced in both *Bogart* and *Mabry* by accepting the unilateral action of the prosecutor to withdraw the plea before the defendant actually entered it on record and had it accepted by the Court on record. In this case, Marchand had notice that the Prosecutor could withdraw the plea proposal unilaterally. As stated before, our standard of review is not that the answer must be totally right; it must be supportable by the record.

This Court recognizes prosecutorial discretion. (*Mellon*). Our criminal court system is based largely on the westernized system (*e.g.* Arraignments, pleas entered, presumption of innocence, jury trials). It is far from a customary decision-making role as found in our history. Marchand has not met his burden in showing that a tradition or

[22]. Marchand asserts he detrimentally relied on the plea proposal; there are no facts of such a reliance in the record that would support an interlocutory review of the issue. This argument must first be developed before the Trial Court before it can have a final review in this Court. It is not a subject for an interlocutory appeal.

custom should be considered in this arena. Quite the contrary, if the Prosecutor's Office is deprived of its discretion to withdraw plea offers when the circumstances dictate such a decision, it would result in a more burdened judicial system. The safety net for defendant's who should have the agreements enforced is already defined in the standards adopted by the Prosecutor's Office under *Bogart*, in following *Wheeler*: (1) those defendants who have entered a guilty plea in Court; or (2)who have detrimentally relied on the offer. Neither of these circumstances have been shown in this case.

HOLDING AND ORDER

Based on foregoing, we hold (1) the Interlocutory Appeal request for an Elder's Panel to discuss whether the Prosecutor is a "tribal leader" or "chief" is DENIED; and (2) there is no abuse of discretion by the Trial Court in not requiring the Prosecutor to reinstate the plea proposal. This Interlocutory shall be DISMISSED and the matter is REMANDED to the Trial Court for further action consistent with this Opinion.

It is SO ORDERED.

Lisa A. LOUIE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP04-015, 4 CTCR 27

8 CCAR 49

[Leoni Reinbold for Appellant.

Joni Bray, Office of Prosecuting Attorney, for Appellee.

Trial Court Case Number CR-MD-2002-25132]

Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan, and Justice Howard E. Stewart

Dupris, CJ