HOOPA VALLEY COURT OF APPEALS

HOOPA VALLEY INDIAN HOUSING AUTHORITY v. GERSTNER

No. C-92-035 (Hoopa Ct. App., Sept. 27, 1993)

Summary

The Hoopa Valley Court of Appeals affirms the trial court's ruling upholding the Tribal Employment Rights Ordinance Commission's reinstatement decision in a wrongful termination of employment action, and remands to the trial court for a determination of amounts owed to the respondent.

Full Text

Before COOCHISE, Chief Justice, HOSTNIK and ROE, Associate Justices

HOSTNIK, Associate Justice

Opinion and Order

This case involves an appeal from an employment termination. Plaintiff/respondent was the director of the Hoopa Valley Indian Housing Authority. The appeal comes before this court for clarification of the appropriate procedures to be used in employment termination proceedings.

I. Procedural History and Background

By letter dated May 27, 1992, the appellant, Hoopa Valley Indian Housing Authority Board of Commissioners (HVIHA), suspended the respondent Lila Gerstner, executive director of HVIHA, for various alleged violations of HVIHA policy. On June 2, 1992, appellant HVIHA rescinded the thirty (30) day suspension, and suspended respondent with pay, but only until June 19, 1992.

On the following day appellant mailed a notice of termination to respondent by certified mail. The notice of termination advised respondent that she had

> the right to appeal this dismissal action by requesting a hearing before the Board of Commissioners pursuant to HVIHA Administrative Policy Section 11.0(G), and, to the extent it is determined applicable to this action and still valid policy and not in conflict with the Tribal Employment Rights Ordinance (TERO), the Tribal Personnel Policies and Procedures Manual, Chapter VIII, Section 8.2, and the TERO...Note: If you elect to file a grievance on this action your formal notice of request for a hearing by the Board of Commissioners must be received at the HVIHA Administrative Office within ten (10) work days of your receipt of this Notice of Termination.

June 3, 1992 letter to Lila Gerstner from John E. Robbins, Jr., Chairman, HVIHA. Respondent filed a timely notice of appeal. On June 18, 1992, appellant HVIHA notified respondent of the hearing date and time, and provided respondent with an explanation of how the hearing would be conducted —a record would be made and respondent had a right to make a separate record; strict rules of evidence would not apply; hearsay would be admissible under certain circumstances; respondent could call witnesses and introduce documentary evidence. Prior to the hearing, respondent submitted a discovery request to HVIHA. Almost all of the requested documents were provided.

Respondent's grievance hearing was held on July 9, 1992. Respondent did not learn until the beginning of the grievance hearing that appellant would not call witnesses to support the charges against respondent, but rather would rely on the statements contained in the June 3, 1992 notice of termination.

Documentary evidence supporting appellant's decision to terminate respondent was introduced at the hearing. Respondent was allowed to call witnesses, but did not do so. Respondent addressed the grounds for termination, offered her own testimony and questioned the commissioners in attendance. The commissioners and counsel questioned the respondent. A record of the hearing was transcribed and became part of the TERO Commission's record.

Closing argument was submitted in writing by respondent after the hearing. The HVIHA issued its decision on August

7, 1992, upholding their original decision to suspend and terminate respondent.

Respondent appealed her termination to the TERO Commission. The Commission stated that it conducted an investigation although no investigative findings were introduced. On November 12, 13, and 30, 1992, the TERO Commission conducted a hearing on respondent's appeal. The transcript of that hearing is a part of the record on appeal.

On December 15, 1992, the TERO Commission issued a decision reinstating the respondent to the position of executive director. On December 31, 1992, the appellant appealed to the Hoopa Valley Tribal Court.

On March 30, 1993, appellant advised the tribal court of a recently discovered tribal ordinance upon which appellant intended to move for dismissal for lack of jurisdiction. Appellant was granted leave to amend its pleadings and filed a supplemental challenge to the court's jurisdiction based upon Tribal Ordinance 3-79 which allegedly classified the respondent as an exempt employee working in an exempt service position. Respondent filed a reply brief. Both parties agreed that the court could treat appellant's motion as a motion to dismiss and for summary judgment, and respondent's opposition as a cross motion for summary judgment.

On June 9, 1993, the tribal court issued its ruling, which upheld the TERO Commission's reinstatement decision. This appeal to the Hoopa Valley Tribal Court of Appeals followed.

II. Tribal Grievance Procedures

The parties have brought to the court's attention various potential procedures by which Ms. Gerstner could appeal the Board of Commissioners' decision to terminate her. The HVIHA in its letter of termination advised Ms. Gerstner that she had the right to appeal her dismissal in the following ways:

1. Under HVIHA Administrative Policy § 11.0(G);
2. Tribal Personnel Policies and Procedures Manual, ch. VIII, § 8.2; and
3. Under the Tribal Employment Rights Ordinance.

The housing authority was unclear as to which of these procedures were available to Ms. Gerstner at the time of her termination.

A. HVIHA Administrative Grievance Procedures

In 1978, the HVIHA adopted an administrative policy which gave employees the right to request a hearing before the Board of Commissioners for the housing authority:

> 11.2 Personnel Actions
>
> ....
>
> G. An employee has a right to request a hearing before the Board of Commissioners. Any grievance request received in writing by the Board will be acted upon within 10 days.

Hoopa Valley Indian Housing Authority Administrative Policy, adopted March 23, 1978, § 11.2(G). The same administrative policy states that tribal administrative policies will be adhered to when they are not directly in conflict with the housing authority's administrative policies:

> 3.4 *Scope of Policies*: In the event certain policies of [sic] procedures are not specifically described in this Administrative Policy, the Hoopa Tribal Administrative Policies will be adhered to. (A copy of which is on file at the Housing Authority Office).

Hoopa Valley Indian Housing Authority Administrative Policy, adopted March 23, 1978, § 3.4. No Hoopa Tribal Administrative Policies, as referred to in section 3.4 above, have been brought to our attention. Therefore, the court presumes that any such tribal administrative policies are not applicable to the controversy before us.

B. Ordinance 3-79

Various other procedures were brought to our attention as potentially applicable. Ordinance No. 3-79 was adopted on October 18, 1979. This ordinance is directly applicable because one of its purposes is to provide appeal procedures concerning dismissal of persons from tribal employment. Ordinance No. 3-79, § 2.91(1). However, Ordinance No. 3-79 was rescinded on October 6, 1983 by that portion of Resolution No. 83-134 which states:

> BE IT FURTHER RESOLVED: That previous Tribal personnel policies and procedures adopted under authority of Ordinance No. 3-79 dated October 18, 1979 are hereby rescinded in their entirety.

Resolution No. 83-134, approved October 6, 1983. In view of the language utilized to rescind Ordinance No. 3-79, this court finds that no part of Ordinance No. 3-79, as originally adopted or as subsequently amended, survives after passage of Resolution No. 83-134.

C. Tribal Personnel Policies and Procedures

It appears clear that it was the intent of Resolution No. 83-134 to replace the Personnel Manual adopted by Ordinance No. 3-79 with the Tribal Personnel Policies and Procedures, which was adopted in a different section of Resolution No. 83-134. Those Tribal Personnel Policies and Procedures have been amended and are still in effect, the version in effect being last amended on May 25, 1990.

The purpose and objectives of the Tribal Personnel Policies and Procedures include the objective of establishing procedures to provide employees with the means of appealing disciplinary actions. Personnel Policies and Procedures of Hoopa Valley Business Council (hereinafter cited as Tribal Personnel Policies), § 1.2(h), as revised May 25, 1990. The policies provide specific provisions with respect to the grounds for, and procedures related to, termination of employees. Tribal Personnel Policies, §§ 13.14(d) and 8.1(d). Finally, a specific grievance procedure is set forth in section 8.2 of the Tribal Personnel Policies.

D. Tribal Employments Rights Ordinance

On April 19, 1990, the Hoopa Valley Tribe adopted Ordinance No. 2-80, as amended (hereinafter cited as Amended Ordinance 2-80). That ordinance specifically adopted a revised Tribal Employment Rights Ordinance (hereinafter TERO), and codified it as Title 13 of the Law and Order Code of the Hoopa Valley Tribe. The ordinance further provided:

> BE IT FURTHER RESOLVED THAT: All matters arising under this Title shall be regulated, administered, and adjudicated exclusively under the procedures set forth herein, and shall not be subject to any different or concurrent procedures set forth in the Personnel Policies of the Tribe, in the Appellate Review Procedure approved by Resolution No. 83-147 of November 22, 1983, or in any other Tribal law or policy that might otherwise be applicable in the absence of this clause.

Amended Ordinance 2-80, p. 2. The resolution quoted above specifies that all matters arising under TERO *shall* be adjudicated exclusively under the TERO Ordinance, and *shall not* be subject to any different or concurrent procedures set forth in the Tribal Personnel Policies previously discussed. It is clear from the language of this resolution that Title 13 exclu-

sively governs all matters which arise under that title. This interpretation is supported by the language of Title 13 itself:

> Consistent with the third "Resolved" clause of this Ordinance [that portion quoted immediately above], the procedures set forth in this title shall supersede any and all other procedures set forth in the Tribe's Personnel Policies and Procedures or in the Appellate Review Procedure approved in Resolution 83-147 with respect to any matter regulated hereby.

Amended Ordinance 2-80, § 13.3.1.

Under Title 13 the TERO Commission is established. One of its purposes is to provide:

> exclusive and independent investigation and administrative review of personnel actions and grievances arising under the Personnel Policies and Procedures of the Hoopa Valley Tribe...or other Council enactments regulating employment practices of the Tribe or its entities...or other employers or contractors within the Reservation.

Amended Ordinance 2-80, § 13.3.1. There is no dispute in this action that the Hoopa Valley Intertribal Housing Authority (hereinafter HVIHA) is an entity of the tribe, and is therefore subject to the provisions of Title 13. Therefore, the procedures to be utilized by employees in appealing disciplinary decisions is governed by Title 13.

An issue arises as to whether the HVIHA administrative grievance procedure survives the broad exclusive powers of the TERO Commission to adopt and implement grievance procedures. Under section 13.3.2(C) the TERO Commission has the power to:

> hold hearings on and determine any matter under its authority, including but not limited to...any adjudicatory hearing regarding violations of the provisions of this Ordinance or of any other general tribal law or specific departmental employee grievance procedure....

Amended Ordinance 2-80, § 13.3.2(C). Since this section permits adjudicatory hearings concerning violations of specific departmental employee grievance procedures, this section implies that departmental grievance procedures are authorized, and are to be followed by the agency adopting such procedures. Therefore, the HVIHA Administrative Grievance Procedures survive, and complement the procedures provided under Title 13 of TERO. This interpretation is also mandated by the principles of statutory construction which require us to construe both procedures together to the extent that no conflict exists. *Hartford Fire Insurance Co. v. Macri*, 4 Cal. 4th 318, 14 Cal. Rptr. 2d 813, 842 P.2d 112, 116 (1992); *Sheimo v. Bengston*, 64 Wash. App. 545, 825 P.2d 343, 346 (1992). If a conflict does exist, it is clear that the provisions of TERO will control.

It should be noted that the TERO hearing procedures have been further defined by Resolution No. 91-71A, adopted on May 30, 1991 (hereinafter Resolution 91-71A). The purpose of that resolution is:

> to establish clear and uniform procedures for handling complaints and other matters before the Tribal Employment Rights Office Commission. These procedures are intended to be guidelines for the TERO Commission and interested individuals and shall be subject to the provisions of the overriding authority of the Tribal Employment Rights Ordinance.

Resolution 91-71A, article I. The language of that purpose section is intended to cover all hearings that may arise before the TERO Commission. This includes employee grievance hearings, as well as TERO enforcement on the Hoopa Valley Reservation.

III. Application of Procedures to Termination of Agency Director

A. Jurisdiction/Standing

The HVIHA has argued this court has no jurisdiction to hear this matter because Ms. Gerstner was in a position which was exempt under the personnel policies of the tribe, and therefore had no right to appeal her termination. This argument was based primarily on the provisions of Ordinance No. 3-79, which defined "exempt employee" as including heads of tribal departments. Ordinance No. 3-79, § 2.93(2)(d). However, as noted above the provisions of Ordinance No. 3-79 were rescinded in their entirety in 1983, and did not exist after that point.

The Tribal Personnel Policies and Procedures which replaced Ordinance No. 3-79 contain a more restrictive definition of exempt employees. It specifically does not include heads of tribal departments as exempt employees. A separate section does state "Department Directors and Managers are considered exempt employees" but this relates solely to the definition of exempt employees for purposes of overtime and compensatory time for hours worked over 40 hours per week. Tribal Personnel Policies, § 4.4(1)

We are also bound by the mandate of TERO that any ambiguities are to be resolved in favor of a right of an employee to file a grievance and obtain judicial review. Amended Ordinance 2-80, § 13.12.1.

It is clear Ms. Gerstner was not an exempt employee at the time this matter arose. Therefore, this court has jurisdiction under the various ordinances addressed to review her termination by the HVIHA. Ms. Gerstner was the subject of the disciplinary action and as such clearly had standing to pursue her grievance rights. This matter is properly before the court.

B. Agency Hearing

It is the established policy of the Hoopa Valley Tribe that before employee grievances escalate into formal proceedings, informal resolution should be attempted. This policy is incorporated in provisions requiring written evaluations at least annually, requiring unsatisfactory job performance to be documented, requiring counselling on specific areas of poor job performance to have occurred prior to termination or demotion (*see* Tribal Personnel Policies, § 8.1) and requiring the TERO Commission to seek an informal resolution prior to instituting formal procedures (Resolution 91-71A, § VI(a)). These policies are implemented by TERO's informal policy of requiring agencies to resolve employee disputes at the agency level before the TERO Commission will conduct a hearing on the matter.

In most cases this is appropriate. Most cases involve employees disciplined by the executive director or agency head. The informal conference between the executive director, or the immediate supervisor, and the affected employee will preserve the working relationship of the affected individuals, and will correct the problem quickly, if informal resolution is achieved.

However, if that informal resolution is not achieved, or if the employee waives the opportunity to informally resolve the personnel dispute, the employee should have the right to a hearing before an independent arbiter at the agency level. For agencies governed by Board of Trustees or Board of Directors, it is appropriate to have a hearing before that Board. This serves several purposes.

First, the hearing before the Board forces the agency head to provide justification for the disciplinary action. Formal

discipline is a serious matter. A basis for the action must be shown to exist.

Second, that procedure allows a decision on the disciplinary action to be made by an arbiter who was not involved in the disciplinary decision. The administrative policies of the HVIHA implicitly recognize this in delegating disciplinary authority to the executive director. *See* Hoopa Valley Indian Housing Authority Administrative Policy, adopted March 23, 1978, § 11.2(b).

Third, having an administrative hearing before the agency Board is also consistent with the TERO Commission's policy of being an overall enforcement mechanism, rather than a day-to-day super-personnel agency, second-guessing agency disciplinary decisions.

Finally, this procedure also protects the authority of tribal boards and commissions to hire, fire, and discipline their own employees on a day-to-day basis without interference by the TERO Commission.

Once the employee exercises his or her right to appeal the disciplinary decision before the agency Board, either party would have a right to review of that Board's decision by the TERO Commission. *See* Amended Ordinance 2-80, §§ 13.3.1(B), 13.3.2(C), 13.9.4.

C. Discipline of Agency Head

The process outlined above is not, however, appropriate when the head of the agency is the target of the discipline. In that situation, it is the Board of Directors or Board of Trustees of the agency that conducts the investigation leading to the disciplinary action. The Board is also the formal supervisor which imposes the discipline. A hearing before that same board is not a hearing before an independent arbiter. That Board is acting not only as the accuser, but also the decision maker; it acts both as prosecutor and judge. Such a procedure is fundamentally flawed.

Therefore, a different procedure needs to be employed when agency heads or executive directors are being disciplined. Since an independent hearing cannot occur before the Board, an exception must be made to the general rule that employees are entitled to a hearing before the agency Board. The independent arbiter in appeals from discipline of agency heads should be the next level of review, which would be review by the TERO Commission.

This protects not only the employee, but also protects the agency. Such a procedure does not place the agency in the difficult position of being forced to prove it is unbiased. This may be an impossible task, no matter how unbiased that agency Board may be. The Board is essentially forced into a position where to prove it is unbiased it must reverse its decision to discipline the employee. Otherwise the employee could claim that bias does exist.

A Board stuck in this situation cannot manage the agency effectively, nor can it manage its executive director in situations where disciplinary problems truly do exist. Requiring a hearing before the Board essentially removes the Board's power to discipline its agency head because of the appearance of unfairness that results. Therefore, removing hearing responsibilities from the Board in cases of discipline involving the agency head is in the agency's best interest.

IV. Hearing Rights

The procedures discussed above, as set forth in the various ordinances applicable to this action, do not describe what rights an employee has at the hearing which is to occur either before the agency Board or the TERO Commission.

The Indian Civil Rights Act prohibits Indian tribes from depriving any person of property without due process of law. 26 U.S.C. § 1302(8). The meaning of "due process" under the Indian Civil Rights Act has been construed to be the same as the meaning of "due process" under the federal Constitution of the United States. *Red Fox v. Red Fox*, 564 F.2d 361, 364 [4 Indian L. Rep. C-23] (9th Cir. 1977). The United States Supreme Court in construing federal constitutional rights, has held that due process applies to discharge from public employment. *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L.Ed. 692 (1956).

Even though the decisions of federal, state, or other tribal courts are not controlling in this court, such decisions can be used as guidance in helping us address these issues. *See Ames v. Hoopa Valley Tribal Council & Hoopa Valley Department of Public Safety*, Case No. C-90-026 [21 Indian L. Rep. 6039] (Nov. 14, 1991) (Chief Justice Irvin concurring). The analysis employed by the U.S. Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970) is particularly helpful.

The *Goldberg* Court dealt with whether a recipient of welfare benefits was entitled to a due process hearing prior to termination of benefits for alleged ineligibility. The *Goldberg* Court determined that minimal due process rights included timely and adequate notice detailing the reasons for the governmental action, and an effective opportunity to defend by confronting any adverse witnesses, and by presenting arguments and evidence orally. *Goldberg v. Kelly*, *supra*, 397 U.S. at 267-68.

In the context of this case, we agree that continued employment with the Hoopa Valley Tribe and/or tribal entities is an important property interest, to which due process rights attach. Therefore, before an employee can be terminated from employment, that employee must be granted minimal due process rights.

Although we decide that due process rights must be granted to employees, including the right to a hearing before an impartial arbiter, that does not necessarily mean that formal trial and court procedures should apply. However, there are certain minimal rights of employees that should be protected in order to have a meaningful opportunity to be heard. Those rights include: (1) adequate notice, (2) a hearing decision by independent arbiter, (3) an initial burden of proof imposed on the employer, and (4) the right to confront and cross-examine those witnesses used against the employee.

Notice

In order to constitute adequate notice, the notice must clearly advise the employee of his or her rights to appeal the employer's disciplinary decision. It is questionable whether the notice provided to Ms. Gerstner met this standard. However, we need not address that issue because Ms. Gerstner did not object to the notice given and is deemed to have waived any defect as to notice when she proceeded to hearing before the HVIHA Board of Commissioners, and again before the TERO Commission. In addition, Ms. Gerstner has failed to show that she has suffered any prejudice due to any inadequacies which might have existed in the initial notice provided to her.

Independent Arbiter

The importance of the independent arbiter is addressed above. The decision maker's conclusion must rest solely on the evidence produced at the due process hearing. This is why a board or commission, who is the direct supervisor of an executive director, and who conducts an investigation into disciplinary action against that director, cannot be an impartial arbiter. The potential is too great that the Board may

base its decision in part upon investigative facts, not produced at the due process hearing.

Even if such investigative facts do not form a portion of the decision maker's conclusion, the appearance of unfairness is too high to be permissible. As noted by the *Goldberg* Court, an impartial decision maker is essential to having a fair hearing. *Goldberg v. Kelly*, *supra*, 397 U.S. at 271. Without an impartial decision maker, the process is fatally flawed.

As part of this right, it is required that a record be made of the proceedings before the independent arbiter. Since this is the hearing level at which the evidence is produced, a record is essential for later review by the TERO Commission or tribal court. This will help insure that the arbiter's decision is based on the evidence produced at that hearing.

Burden of Proof

In most contexts, the burden of proving the initial allegations is upon the party who makes the allegations. In the context of a termination from employment, it is the employer who is alleging that the employee's conduct justifies termination. Therefore, the employer should have the initial burden of proving that termination is justified.

An initial showing must be made by the employer of the basis for and the facts supporting the disciplinary action. This, again, is an element of fundamental fairness that must be a part of the termination process. The employee is entitled to know the employer's basis for the termination decision. In part, this comes in the termination letter which precedes the hearing, but there are frequently additional facts that are made known at the hearing which an employer uses to justify the termination decision.

In addition, it is important for the arbiter to understand the basis for the disciplinary action, in order to be able to support the agency's decision. The HVIHA's action in this case of merely submitting documents, and attempting to shift the burden of proof to the employee, did not allow an independent arbiter to fully understand the basis for the employer's termination decision.

Once an initial showing is made by the employer of the basis for the termination decision, the burden of proof properly shifts to the employee to show that the facts supporting the decision are untrue, or that the decision is unjustified for other reasons. But it is unfair for the employee to have the initial burden of disproving the allegations, before the allegations themselves are proven by the employer.

Right to Confront and Cross-Examine Witnesses

Personnel decisions leading to termination of employment are primarily factual in nature. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, *supra*, 397 U.S. 269.

In dealing with factual matters, the credibility and veracity of the witnesses and documents submitted into evidence must be determined by the decision maker. Simply because a document is submitted into evidence does not make all statements contained in that document 100 percent true. The basis for the statements may show that the statements were made under duress, or were based upon inaccurate information. The same is true of the testimony of witnesses. Therefore, it is essential that the employee be afforded the opportunity to confront and cross-examine witnesses and evidence.

In this case the housing authority elected to submit into evidence various documents which allegedly supported its decision to terminate Ms. Gerstner. No witnesses were called to authenticate those documents, nor were any witnesses called to provide a foundation for the documents, explain the circumstances under which they were created, or provide an explanation as to how the documents demonstrated conduct so grievous that termination of employment was justified. This denied Ms. Gerstner her right to confront and cross-examine adverse witnesses.

Compelling Appearance of Witnesses

An issue raised by both parties concerning due process hearings conducted before an agency board or commission is the inability of either party to subpoena witnesses and compel them to appear. This impacts the employer's ability to meet its initial burden of proof, and it also impacts the employee's ability to adequately present a defense. However, this is not as problematic as it may first appear.

These actions, being disciplinary in nature, will generally be based upon the employee's performance on the job. Therefore, the large majority of potential witnesses will be other employees of the agency.

An employer clearly has both the ability and the authority to force its own employees to appear at agency hearings, because the employer can discipline those employees for failure to follow a lawful directive of the employer. Therefore, certainly the employer can compel the attendance of witnesses it intends to present at the administrative due process hearing.

The employee, however, is not in a position to force agency employees to attend that hearing. In the interest of fairness, since the independent arbiter is the employer itself, the employee should have the ability to provide a list of agency employee-witnesses he or she requests be compelled to appear and testify. The employer can then use its authority to compel the attendance of those employee witnesses, even though they will be called as witnesses for the disciplined employee.

In certain cases non-agency employees may become important potential witnesses. Non-employee witnesses subject to tribal jurisdiction can be compelled to appear by subpoena obtained from the TERO Commission or from the Hoopa Valley Tribal Court. Since these grievance hearings arise under TERO, the TERO Commission subpoena power can be used to compel attendance of witnesses. Application can be made by either the employer or the employee to the TERO Commission for issuance of a TERO subpoena, pursuant to Amended Ordinance 2-80, § 13.9.3. *See also* Resolution No. 91-71A, § V.

A problem potentially exists with respect to non-agency employee witnesses who are not subject to tribal jurisdiction. Several solutions are possible. First, voluntary attendance could be requested. Second, testimony of such witnesses could be preserved by pre-hearing deposition or video deposition, or even an affidavit. Finally, if necessary, off-reservation legal action to compel attendance could be commenced, perhaps in conjunction with issuance of a tribal court subpoena.

Post-Hearing Procedures

Once the due process hearing has occurred, it is important that the independent arbiter produce a written opinion stating the reasons for the decision, and the evidence relied upon to support that decision. This is important for purposes of later review by either the TERO Commission or the tribal court. This also insures that an impartial decision is rendered based solely on the evidence produced at the due process hearing.

If the due process hearing appears before the agency Board, then the parties can appeal from that decision to the TERO Commission. In that event, the TERO Commission is acting as an administrative appellate review tribunal, since the evidence was produced at a due process hearing before the

agency. There is no need to conduct another evidentiary hearing before the TERO Commission.

If an employee subordinate to the agency head is afforded a second due process hearing before the TERO Commission, they would be granted greater rights than an agency head, who has only one opportunity for a due process hearing, that being the hearing before the TERO Commission. In fact, if the same analysis is followed, the executive director of the TERO Commission would not have any opportunity for a due process hearing, since the TERO Commission itself could not act as independent arbiter for its own executive director, and since tribal court review of the TERO Commission's decision is limited to determining whether the Commission's decision is arbitrary, capricious, or not in accordance with law. *See* Resolution No. 91-71A, § VI(f). Such a construction is unreasonable. We see no reason why agency heads should be granted fewer rights than subordinate employees.

Review of a due process hearing conducted by the TERO Commission involving an agency head is conducted by the tribal court under a limited standard of review. Resolution No. 91-71A, § VI(f). Similarly, the scope of review of the TERO Commission should be limited when it reviews due process hearings which are conducted by the agency. In that event the TERO Commission is not conducting a new hearing, but is acting on the same role as the tribal court under Resolution 91-71A, § VI(f).

It should be noted that the TERO Director, in the event of termination, would have the due process hearing conducted in tribal court, since the director reports directly to the TERO Commission. Alternatively the TERO Commission could appoint an independent arbiter to conduct a due process hearing for the TERO Director, pursuant to the authority contained in TERO, § 13.9.4, which permits the TERO Commission to hold such hearings "as may be necessary" to resolve employee grievance matters. Since the TERO Commission could not directly act as an independent arbiter in such a situation, it could appoint an individual hearing officer, or a panel of individuals to serve as independent arbiters, and the TERO Director would then have an opportunity to appeal the decision of that hearing officer or panel directly to tribal court under section 13.10 of Amended Ordinance 2-80.

Resolution No. 91-71A also supports this construction, in permitting hearings under the TERO Ordinance to be conducted by "the Commission or their authorized agent." The individual hearing officer or panel could thereby be designated the "authorized agent" for purposes of conducting a due process hearing in cases involving termination of the TERO Director.

Standard of Review

Once the due process hearing occurs, what is the appropriate standard by which that decision is reviewed? Resolution No. 91-71A was adopted to establish clear and uniform procedures for handling matters before the TERO Commission. A portion of that ordinance specifies the standard to be employed by the tribal court in reviewing Commission decisions. That standard is as follows:

> The Court shall uphold the decision of the Commission unless it is proven that the decision of the Commission is arbitrary, capricious, or not in accordance with law.

Resolution No. 91-71A, § VI(f). This is a limited scope of review, which does not permit a tribal court to conduct an entirely new hearing.

This court has had a prior opportunity to address this issue in *Ames v. Hoopa Valley Tribal Council & Hoopa Valley Department of Public Safety*, No. C-90-026, (Nov. 14, 1991). In that case, Chief Justice Irvin in her concurring opinion reviewed the standard by which United States federal courts hear appeals from agency hearings under the Federal Administrative Procedures Act.

The opinion of Chief Justice Irvin was a concurring opinion, was not specifically adopted by the majority, and therefore is not controlling or binding upon this court. However, the reasoning of that concurring opinion is sound, and this court hereby adopts the substantial evidence test set forth by Chief Justice Irvin in *Ames* as the appropriate standard by which due process hearings are to be reviewed. This includes review not only by the TERO Commission from an agency due process hearing, but review by the tribal court from a due process hearing conducted by the TERO Commission.

This is the standard which was adopted by the trial court in this case. The trial court determined that substantial evidence existed to support the TERO Commission's decision. That standard was appropriate. In reviewing the trial court's decision, this court finds that substantial evidence exists to support the trial court, utilizing the test suggested by Chief Justice Irvin in *Ames*. Therefore, the trial court's decision is hereby affirmed.

Remand for Further Proceedings

The trial court awarded attorneys fees to Ms. Gerstner. The basis for this award was not set forth in the trial court opinion, and no authority has been presented to this court concerning whether such award was appropriate. However, that issue was not contested on appeal.

This matter will therefore be remanded to the trial court for further proceedings consistent with this opinion, and for consideration of whether an award of additional attorneys fees is appropriate.

In addition, Ms. Gerstner is entitled to an award of back pay. The HVIHA Administrative Policies acknowledge that if an employee is suspended without pay or dismissed, and the charges are found to be unwarranted and the employee is retained, the employee is required to be paid for the period of suspension. Hoopa Valley Indian Housing Authority Administrative Policy, adopted March 23, 1978, § 11.2(F). Therefore, upon remand the trial court shall determine the amount of back pay to which Ms. Gerstner is entitled, due to the fact that she was improperly terminated.