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**IN THE  
HO-CHUNK NATION TRIAL COURT**

**Sherry Wilson,**  
Plaintiff,

v.

Case No.: **CV 05-43**

**Ho-Chunk Nation Department of  
Personnel,**  
Defendant.

**ORDER  
(Determination upon Remand)**

**INTRODUCTION**

On September 21, 2006, the Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) reversed and remanded a decision that this Court rendered in an employment action. The Supreme Court instructed the Court to conduct further proceedings, which the Court deemed unnecessary since the matter had previously proceeded to trial. The following discussion covers the relevant legal issues necessary to appropriately render a decision on remand.

**PROCEDURAL HISTORY**

The Supreme Court remanded the instant case for proceedings consistent with the appellate decision. *Sherry Wilson v. HCN Dep't of Pers.*, SU 06-01 (HCN S. Ct., Sept. 21, 2006) at 1, 6. The Court already conducted the *Trial* on October 4, 2005, thereby permitting the Court to base its decision upon the standing *Findings of Fact. Order (Final J.)*, CV 05-43 (HCN Tr. Ct., Jan. 4, 2006) at 9-11. The Court enters this decision in a timely manner pursuant to *In the*

1 *Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1) (HCN S. Ct., Apr. 9, 2005).

2  
3 **APPLICABLE LAW**

4  
5 **CONSTITUTION OF THE HO-CHUNK NATION**

6 **Article VII - Judiciary**

7  
8 **Sec. 6. Powers of the Tribal Court.**

9 (a) The Trial Court shall have the power to make findings of fact and conclusions of law.  
10 The Trial Court shall have the power to issue all remedies in law and in equity including  
injunctive and declaratory relief and all writs including attachment and mandamus.

11 **Article X - Bill of Rights**

12 **Sec. 1. Bill of Rights.**

13  
14 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

15 (8) deny to any person within its jurisdiction the equal protection of its laws or  
16 deprive any person of liberty or property without the due process of law;

17 **Article XII - Sovereign Immunity**

18 **Sec. 1. Immunity of Nation from Suit.** The Ho-Chunk Nation shall be immune from suit  
19 except to the extent that the Legislature expressly waives its sovereign immunity, and officials or  
20 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be  
immune from suit.

21 **Sec. 2. Suit Against Officials and Employees.** Officials and employees of the Ho-Chunk  
22 Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only  
23 for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its  
jurisdiction for purposes of enforcing rights and duties established by this constitution or other  
24 applicable laws.

25 **EMPLOYMENT RELATIONS ACTION OF 2004, 6 HCC § 5**

26 **Subsec. 18. Annual and Sick Leave.**

27 c. **Transfer of Leave Time.** Employees may transfer leave hours to another  
28 employee who is eligible to use accrued leave hours. This policy does not apply to an employee

1 who has given notice of resignation or an employee being separated because of lay-off or  
2 termination.

3 (1) To be eligible to receive these hours an employee must meet the following  
4 criteria:

5 (a) Have forty (40) or less hours of accrued leave hours.

6 (b) Not receiving any other type of pay (i.e., Short Term Disability,  
7 Worker's Compensation, etc).

8 (c) Approval of his or her supervisor.

9 (2) To be eligible to transfer hours, the donating employee must meet the  
10 following criteria:

11 (a) Execute a voluntary option of consent with signature and a specific  
12 amount of hours donated/transferred.

13 (b) Maintain a minimum balance of 24 hours in his or her respective  
14 donating leave account.

15 (c) Approval of his or her supervisor, where applicable.

16 (3) This policy is strictly voluntary and no employee shall be required to  
17 transfer accrued leave time.

18 (4) In the event that an employee decides to transfer his/her accrued leave  
19 time, such leave time shall not be recovered and the employee will be eligible to utilize  
20 only hours that he/she has remaining and thereafter accumulates.

21 (5) Any leave transferred that violates this policy shall result in the transferred  
22 leave being revoked from the receiving employee.

23 Subsec. 29. General Hours of Work and Attendance.

24 e. Abandonment of Employment. An employee who is absent from his or her  
25 assigned work location without authorized leave for three (3) consecutive days or five (5) days in  
26 a twelve (12) month period shall be considered absent without authorized leave, and as having  
27 abandoned his or her employment. The employee shall be automatically terminated, unless the  
28 employee can provide the Nation with acceptable and verifiable evidence of extenuating  
circumstances justifying the absence(s).

Subsec. 33. Grievances.

a. Employees may seek administrative and judicial review only for alleged  
discrimination and harassment.

1 d. Candidates for employment may file a complaint with the Department of  
2 Personnel regarding the interview and selection process and may elect to file a complaint directly  
3 with the Grievance Review Board.

4 Subsec. 34. Administrative Review Process.

5 a. Policy.

6 (2) Employees are entitled to grieve suspensions or terminations to the Board.  
7 The Board will be selected from a set pool of employees and supervisors with grievance  
8 training, who will review a case and determine whether to uphold the discipline.

9 (3) Following a Board decision, the employee shall have the right to file an  
10 appeal with the Ho-Chunk Nation Trial Court (Court).

11 Subsec. 35 Judicial Review.

12 a. Waiver of Sovereign Immunity. Pursuant to Article XII of the Constitution of the  
13 Ho-Chunk Nation, the Ho-Chunk Nation Legislature expressly waives the sovereign immunity of  
14 the Ho-Chunk Nation in the limited manner described herein. This waiver shall be strictly  
15 construed.

16 b. There is no judicial review of employee evaluations or disciplinary actions that do  
17 not immediately result in suspension or termination.

18 c. Judicial review of a grievance involving suspension, termination, discrimination,  
19 or harassment may proceed to the Ho-Chunk Nation Trial Court only after the Administrative  
20 Review Process has been exhausted through the Grievance Review Board. An employee may  
21 appeal a Board decision to the Trial Court within thirty (30) calendar days of when the Board  
22 decision is served by mail.

23 d. Relief.

24 (1) This limited waiver of sovereign immunity allows the Trial Court to award  
25 monetary damages for actual wages established by the employee in an amount not to  
26 exceed \$10,000, subject to applicable taxation.

27 (2) The Trial Court may grant equitable relief mandating that the Ho-Chunk  
28 Nation prospectively follow its own law, and as necessary to directly remedy past  
violations of the Nation's laws. Other equitable remedies shall only include:

(a) an order of the Court to the Executive Director of the Department  
of Personnel to reassign or reinstate the employee;

(b) the removal of negative references from the employee's personnel  
file;

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(c) the award of bridged service credit; and

(d) the restoration of the employee’s seniority.

(3) Notwithstanding the remedial powers noted above, the Court shall not grant any remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing in this limited waiver or within this Act shall be construed to grant a party any legal remedies other than those included in this section.

e. Under this limited waiver of sovereign immunity, the Court shall review the Board’s decision based upon the record before the Board. Parties may request an opportunity to supplement the record in the Trial Court, either with evidence or statements of their position. The Trial Court shall not exercise *de novo* review of Board decisions. The Trial Court may only set aside or modify a Board decision if it was arbitrary and capricious.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 2. Liberal Construction.

These rules shall be liberally construed to secure a just and speedy determination of every action.

Rule 3. Complaints.

General. A civil action begins by one of the following procedures:

(A) filing a written *Complaint* with the Clerk of Court and paying the appropriate fees. The *Complaint* shall contain short, plain statements of the grounds upon which the Court’s jurisdiction depends, the facts and circumstances giving rise to the action, and a demand for any and all relief that the party is seeking. Relief should include, but is not limited to, the dollar amount that the party is requesting. The *Complaint* must contain the full names and addresses of all parties and any counsel, as well as a telephone number at which the complainant may be contacted. The *Complaint* shall be signed by the filing party or his/her counsel, if any.

Rule 6. Answering a Complaint or Citation.

(A) Answering a Complaint. A party against whom a *Complaint* has been made shall have twenty (20) calendar days from the date the *Summons* is issued, or from the last date of service by publication, to file an Answer with the Clerk of Court. The *Answer* shall use short plain statements to admit, admit in part, or deny each statement in the *Complaint*, assert any and all claims against other parties arising from the same facts or circumstances as the *Complaint* and state any defenses to the *Complaint*. The *Complaint* must contain the full names of all parties and any counsel. The *Answer* must be signed by the party or his or her counsel and contain their full names and addresses, as well as a telephone number at which they may be contacted. An *Answer* shall be served on other parties and may be served by mail. A *Certificate of Service* shall be filed as required by Rule 5(B).

1 Rule 14. Caption.

2 The first line of the pleading shall identify the Court where the action is filed. The names of the  
3 parties to the action, with the complaining party placed on the left side of the first page beginning  
4 on the next line. The title of the pleading (*e.g., Complaint, Citation, Petition, Answer*) and the  
5 case number shall be placed on the right side of the first page, next to the list of parties. Parties  
shall always be listed in the same order as in the *Complaint*.

6 Rule 15. Attachments.

7 Attachments to pleadings must be specifically identified and referenced to in the pleading and  
8 conform to the rules for pleading.

9 Rule 21. Amendments to Pleadings.

10 Parties may amend a *Complaint* or *Answer* one time without leave of the Court prior to the filing  
11 of a responsive pleading, or if no responsive pleading is permitted, at any time within twenty  
12 (20) days of the original filing date. Subsequent amendments to *Complaints* or *Answers* may  
13 only be made upon leave of the Court and a showing of good cause, or with the consent of the  
14 opposing party. All amendments to the *Complaint* or *Answer* must be filed at least thirty (30)  
15 calendar days prior to trial or as otherwise directed by the Court. When an *Amended Complaint*  
or *Answer* is filed, the opposing party shall have ten (10) calendar days, or the time remaining in  
their original response period, whichever is greater, in which to file an amended responsive  
pleading.

16 Rule 24. Substituting, Intervening and Joining Parties.

17 If a party becomes incompetent or transfers his/her interest or separates from some official  
18 capacity, another party may be substituted as justice requires. A party with an interest in an  
19 action may intervene and be treated in all respects as a named party to the action. To the greatest  
20 extent possible, all persons with an interest will be joined in an action if relief cannot be  
21 accorded among the current parties without that person, or the absent person's ability to protect  
22 their interests is impeded unless they are a party. Failure to join a party over whom the Court has  
no jurisdiction will not require dismissal of the action unless it would be impossible to reach a  
just result without the absent party. The Court will determine only the rights or liabilities of  
those who are a party to the action or eligible for relief as part of a class certified under Rule 9.

23 Rule 27. The Nation as a Party.

24  
25 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is  
26 named as a party, the Complaint should identify the unit of government, enterprise or name of  
27 the official or employee involved. The Complaint, in the case of an official or employee being  
28 sued, should indicate whether an official or employee is being sued in his or her individual or  
official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will  
be considered proper unless otherwise indicated by these rules, successive rules of the Court or  
Ho-Chunk Nation Law.

1 Rule 58. Amendment to or Relief from Judgment or Order.

2 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request  
3 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*  
4 must be based on an error or irregularity that prevented a party from receiving a fair trial or a  
substantial legal error that affected the outcome of the action.

5 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not  
6 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or  
7 conclusions or make additional findings or conclusions, amending the judgment accordingly.  
8 The motion may be made with a motion for a new trial. If the Court amends the judgment, the  
9 time for initiating an appeal commences upon entry of the amended judgment. If the Court  
10 denies a motion filed under this Rule, the time for initiating appeal from the judgment  
11 commences when the Court denies the motion on the record or when an order denying the  
12 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such  
13 motion, and the Court does not decide a motion under this Rule or the judge does not sign an  
14 order denying the motion, the motion is considered denied. The time for initiating the appeal  
15 from judgment commences in accordance with the *Rules of Appellate Procedure*.

16 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*  
17 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*  
18 must be based upon new information that has come to the party's attention that, if true, could  
19 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
20 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal  
21 commences upon entry of the modified judgment. If the Court denies a motion filed under this  
22 Rule, the time for initiating an appeal from the judgment commences when the Court denies the  
23 motion on the record or when an order denying the motion is entered, whichever occurs first. If  
24 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the  
25 motion or the judge does not sign an order denying the motion, the motion is considered denied.  
26 The time for initiating an appeal from judgment commences in accordance with the *Rules of*  
27 *Appellate Procedure*.

28 (D) Erratum Order or Re-issuance of Judgment. Clerical errors in a Court record, including the  
*Judgment or Order*, may be corrected by the Court at any time.

(E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a  
party made within a reasonable time for the following reasons: (1) newly discovered evidence  
which could not reasonably have been discovered in time to request a new trial; (2) fraud,  
misrepresentation or serious misconduct of another party to the action; (3) good cause if the  
requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not  
have proper service and did not appear in the action; or (4) the judgment has been satisfied,  
released, discharged or is without effect due to a judgment earlier in time.

1 Rule 61. Appeals.

2 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The  
3 *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate*  
4 *Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court  
5 *Order* must follow the *Rules of Appellate Procedure*.

6 HO-CHUNK NATION RULES OF JUDICIAL ETHICS

7 Sec. 1-1. Judges and Justices.

8 This code applies to the following persons; anyone, whether or not a lawyer, who is an officer of  
9 the Ho-Chunk Nation tribal judicial system and is performing judicial functions as a judge or  
10 justice for the purpose of this code. All judges and justices must comply with this code. All  
11 judges and justices also includes those whom they may appoint on a part time basis; a temporary  
12 basis such as a pro tempore or a Traditional Court clan leader.

13 Sec. 4-1. Standards.

14 D. A tribal court judge or justice should maintain order in the court. He or she should not  
15 interfere in proceedings except where necessary to protect the rights of the parties. A tribal court  
16 judge or justice should not take an advocate role. Similarly, a judge or justice should rely on  
17 only those procedures prescribed by the laws and customs of the Tribe.

18 **FINDINGS OF FACT**

19 1. The Court incorporates by reference the *Findings of Fact* enumerated in its previous  
20 decision. *Order (Final J.)* at 9-11.

21 2. The caption on the initial pleading appears in the identical manner stated above. *Compl.*,  
22 CV 05-43 (May 19, 2005); *see also Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN*  
23 *R. Civ. P.*), Rules 3(A), 14, 27(B).

24 3. The plaintiff references attachments, although not "specifically identified," within the  
25 following parts of the initial pleading: *Summary of the incident and circumstances* and *Request*  
26 *for Relief*. *Compl.* at 2-3; *see also HCN R. Civ. P.* 15.

28

1 4. Within an attachment bearing the heading, *Summary of the incident and circumstances*,  
2 the plaintiff indicates that after "receiv[ing] a letter from [her] former supervisor advising [her]  
3 of [her] termination from employment . . . [she] served a grievance to dispute [her] termination  
4 upon [her] former supervisor, HoChunk [sic] Casino Marketing Director Dan Sine, HoChunk  
5 [sic] Casino Human Resources and the Ho-Chunk Nation Department of Personnel." *Compl.*,  
6 Attach. 1 at 1. The plaintiff proceeds to set forth three (3) separate causes of action:  
7

8 a. an allegation of "negligence by HoChunk [sic] Casino in failing to transfer annual  
9 leave . . . after proper procedure was followed by two employees attempting to donate time;"  
10

11 b. an allegation of "negligence by my former supervisor Dan Sine in that termination  
12 letter failed to advise . . . of . . . right to a hearing before the Grievance Review Board;" and,

13 c. an allegation of "negligence in the failure of the HoChunk [sic] Casino Human  
14 Resources to consider any possibility other than termination." *Id.*

15 5. The plaintiff identified several individuals within the pleading attachment entitled,  
16 *Grievance*, which does not represent a document prepared in conjunction with the pleading, but  
17 served as the initial filing in the Administrative Review Process. *Id.*, Attach. 2; *see also*  
18 EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA), 6 HCC § 5.34a(2).  
19

20 6. The plaintiff filed no amended pleading, as a matter of right, before the filing of a  
21 responsive pleading. *HCN R. Civ. P.* 21.  
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23 7. The defendant's responsive pleading includes the following defense: "[t]he Plaintiff fails  
24 to state a claim for which relief can be granted relative to her claim of negligence by former  
25 supervisor Dan Sine, because Dan Sine and the Ho-Chunk Casino are not named as Defendants  
26 in this action." *Def.'s Answer*, CV 05-43 (June 9, 2005) at 5; *see also HCN R. Civ. P.* 6(A).  
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1 8. At the *Scheduling Conference*, the Court informed the parties that the judicial staff  
2 attorneys could provide procedural assistance, but could not serve as advocates due to the nature  
3 of their employment status. The Court also informed the parties that the substantive case law of  
4 the Judiciary was located in the library of *Wa Ehi Hocira. Scheduling Conference* (LPER, July  
5 13, 2005, 09:21:04 CDT).  
6

7 9. The parties acknowledged that the plaintiff's claims would likely simultaneously proceed  
8 to and/or through the Grievance Review Board. *Id.*, 09:23:32 CDT; *see also* Def.'s Ex. M.  
9

10 10. The plaintiff filed no amended pleading, as permitted by the Court, prior to the mutually  
11 agreed upon deadline for amendments to pleadings. *Scheduling Order*, CV 05-43 (HCN Tr. Ct.,  
12 July 13, 2006) at 4; *see also HCN R. Civ. P. 21*.

13 11. No procedural rule exists that requires a defendant to seek a dismissal on the basis of a  
14 failure to name a necessary party through the motion process.  
15

16 12. At *Trial*, the plaintiff presented no testimony or evidence regarding a failure of Mr. Sine  
17 to inform the plaintiff of the Administrative Review Process. *See Kenneth L. Twin v. Douglas*  
18 *Greengrass, Exec. Dir. of Admin.*, CV 03-88 (HCN Tr. Ct., May 24, 2004) at 16 n.9 (denying a  
19 constitutional basis for providing such notice).  
20

21 13. At *Trial*, the plaintiff commented: "[i]n this case, my supervisor was more than willing  
22 to sign the [transfer of annual leave] form . . . ." *Trial* (LPER at 21, Oct. 4, 2005, 10:22:24  
23 CDT).  
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## 25 DECISION

26  
27 The Supreme Court recently announced and imposed a liberal pleading requirement for  
28 *pro se* litigants previously absent in either this or any other jurisdiction. The Supreme Court

1 starts by confirming that "[t]he appellant named the HCN Dept. of Personnel as the sole  
2 defendant in this mater . . . ." *Decision* at 2. The Supreme Court, however, continues to indicate  
3 that the plaintiff "attached a separate sheet to her *Complaint* Titled [*sic*] 'Cause of Action' which .  
4 . . specifically mentioned the Ho-Chunk Casino Marketing Director Dan Sine." *Id.*; *see also*  
5 *supra* p. 8-9. Importantly, the Supreme Court does not find that the plaintiff's act of  
6 "mentioning" the official in a pleading attachment constituted naming Mr. Sine as a party  
7 defendant, but the Supreme Court "disagree[d] with the . . . dismiss[al] on technical grounds,"  
8 *i.e.*, a failure to name a necessary party. *Decision* at 3.

11 The Supreme Court later concedes that "[t]he appellant named the sovereign and not  
12 someone acting outside the scope of their authority . . . ." *Id.* at 4 (citing CONSTITUTION OF THE  
13 HO-CHUNK NATION (hereinafter CONSTITUTION), ART. XII, §§ 1-2). Regardless, at this point, the  
14 Supreme Court criticizes the Court for failing to liberally interpret the applicable procedural  
15 rules "to secure a just . . . determination of every action." *Id.* (quoting *HCN R. Civ. P. 2*). The  
16 Supreme Court, for the first time, then concludes:

18 [t]he Trial Court failed to communicate to the *pro se* litigant in this matter  
19 that it could dismiss the *Complaint* unless they [*sic*] formally amended the  
20 *Complaint* to incorporate its substance. A cursory review of the  
21 attachments to the *Complaint* detail that the appellant named a party, Dan  
22 Sine, whose actions were questioned as being potentially outside the scope  
23 of his authority. Had the Trial Court advised the *pro se* litigant that  
24 dismissal was likely unless she added a party who was amenable to suit  
and she adamantly refused to so amend her pleadings coupled with no  
plausible reading of the *Complaint* of any party acting outside the scope of  
their authority, this Court might inclined [*sic*] to uphold the Trial Court's  
determination.

25 *Id.* at 5. The Supreme Court then proceeds to quote a wholly irrelevant federal rule, without  
26 equivalent in this jurisdiction, entitled, *Amendments to Conform to the Evidence*, which concerns  
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1 "issues not raised by the pleadings" and not the naming or joinder of parties.<sup>1</sup> *Id.* at 6 (quoting  
2 FED. R. CIV. P. 15(b)). The Supreme Court concludes by noting that "[t]he pleading caption *may*  
3 *be amended* to conform to the actual findings in the case including those officials who were  
4 alleged by the appellant to have acted outside the scope of their authority." *Id.* (emphasis added).  
5  
6 The Supreme Court does not clearly state whether it bases this directive upon this Court's  
7 perceived need to liberally construe the *HCN R. Civ. P.* or FED R. CIV. P. 15(b). The Court will  
8 presume against the latter proposition since contrary to sound reason.

9  
10 The Court is instructed in the *HCN R. Civ. P.* to "liberally construe[ the rules] to secure a  
11 just . . . determination of every action." *HCN R. Civ. P.* 2. The seemingly applicable rules on  
12 the naming of parties appear, in relevant part, as follows:

13 The *Complaint* must contain the full names and addresses of all parties and  
14 any counsel . . . . *HCN R. Civ. P.* 3(A).

15 The . . . pleading shall identify the . . . names of the parties to the action . .  
16 . . *HCN R. Civ. P.* 14.

17 The Complaint, in the case of an official or employee being sued, should  
18 indicate whether an official or employee is being sued in his or her  
individual or official capacity. *HCN R. Civ. P.* 27(B).

19 The Court feels that it liberally construed the applicable rules in this action as it does in every  
20 case, *pro se* or otherwise. The Court does not stringently require a plaintiff to provide an  
21 address of a defendant or any counsel. The Court also does not require a plaintiff to indicate  
22 whether an official or employee is being sued in his or her individual or official capacity since  
23 any such distinction largely presupposes a legal determination as yet not rendered by the Court.  
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27 <sup>1</sup> The Supreme Court alludes to employees within the Ho-Chunk Nation Department of Personnel who may have  
28 provided inaccurate guidance concerning the transfer of annual leave policy. *Decision* at 5-6 (citing *Compl.*, Attach.  
2); *see also* ERA, § 5.18c. To reiterate, the plaintiff did not prepare the *Grievance*, which serves as the present  
equivalent of the former Level 1-3 *Employee Grievance Form(s)*, in conjunction with the pleading. The plaintiff  
instead prepared the *Grievance* for purposes of the Administrative Review Process. *See* ERA, § 5.34. Yet, the  
Supreme Court quite remarkably suggests that the Trial Court infer whether the plaintiff intended to name those

1 The Court, however, requires at a minimum that a plaintiff name a defendant. The above rules  
2 mandate that a plaintiff do so, and the Court has never attempted to intuitively discern whether a  
3 plaintiff intended to designate an individual mentioned in an attachment not prepared in  
4 connection with the instant suit as a defendant, if not simply named in the caption. The Court  
5 proposes that no manner of liberally construing the above rules could logically support such a  
6 conclusion.  
7

8         Regardless, the Supreme Court suggests that a liberal construction of the rules  
9 commands this result when properly acknowledging the *pro se* status of the plaintiff. In another  
10 formal pronouncement, the Supreme Court directs this Court to refrain from assuming "an  
11 advocate role" in litigation. *Ho-Chunk Nation Rules of Judicial Ethics*, § 4-1(D). The ethical  
12 rules do not even mention *pro se* litigation let alone establish a separate standard for those  
13 parties choosing to proceed without assistance of counsel. The Court has nonetheless remarked  
14 on several occasions that it has adopted "a general policy of encouraging and accommodating  
15 pro se representation." *Melinda A. Lee v. Majestic Pines Casino, Mktg. Dep't*, CV 99-91 (HCN  
16 Tr. Ct., Apr. 3, 2000) at 1 (citing *Helen Harden v. ICW/CFS*, CV 99-69 (HCN Tr. Ct., Jan. 4,  
17 2000) at 6).  
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20         The Court has declined to strictly enforce technical pleading and procedural  
21 requirements associated with the motion process when dealing with *pro se* litigants. *See, e.g.*,  
22 *HCN Dep't of Hous., Home Ownership Program v. Mick Boardman d/b/a T & Son's Gen.*  
23 *Contractors*, CV 99-107 (HCN Tr. Ct., Sept. 1, 2000) (permitting *pro se* litigant to subsequently  
24 acknowledge the veracity of a responsive pleading lacking a signature); *Lee*, CV 99-91 (denying  
25 a motion to dismiss for failure to state a claim upon which relief can be granted due to the *pro se*  
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28 individuals "named" in an attachment as parties to her case. *Decision* at 5-6. The authority cited for this proposition  
is *HCN R. Civ. P. 2. Id.* at 5.

1 litigant's ability to amend her pleading prior to the imposed deadline); *Harden*, CV 99-69  
2 (considering the applicability of each post judgment motion despite *pro se* litigant's particular  
3 designation of such motion); *Casey A. Fitzpatrick v. Ho-Chunk Nation*, CV 99-31 (HCN Tr. Ct.,  
4 June 23, 1999) (refusing to require *pro se* litigant to provide a more particular pleading when  
5 facts and circumstances prove reasonably discernible in the initial pleading); *Ho-Chunk Nation*  
6 *v. Tammy Lang*, CV 98-46 (HCN Tr. Ct., Dec. 21, 1998) at 9-10 (denying summary judgment  
7 motion without affording the *pro se* litigant a hearing despite the absence of a written  
8 response);<sup>2</sup> *Jaqueline R. Nichols v. Randy Snowball*, CV 97-167 (HCN Tr. Ct., Apr. 15, 1998) at  
9 3-4 (declining to grant a motion to dismiss against a *pro se* litigant for failure to name an  
10 indispensable party).<sup>3</sup> The Court deems that it has always acknowledged the disadvantages  
11 inherent in a litigant proceeding *pro se* and attempted to provide an appropriate degree of  
12 assistance without traversing into the role of an advocate.<sup>4</sup> Notably, the above examples  
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17 <sup>2</sup> The Court now routinely enters a judgment entitled, *Order (Motion Hearing)*, when a motion is filed against  
18 represented and *pro se* litigants, which informs the non-movant of applicable legal standards and the date, time and  
19 location of a motion hearing. *See, e.g., HCN Hous. & Cmty. Dev. Agency v. Margaret Hoffman*, CV 06-08 (HCN  
20 Tr. Ct., June 2, 2006). The Court has adopted a practice of providing litigants unfamiliar with the motion process  
21 notice and a hearing. *See Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982); *Madyun v. Thompson*, 657 F.2d 868 (7th  
22 Cir. 1981) (deeming summary judgment as counterintuitive to a layperson); *but see Jacobsen v. Filler*, 790 F.2d  
23 1362 (9th Cir. 1985) (contending that a trial court providing a greater degree of assistance to *pro se* litigants  
24 impermissibly discriminates against opposing represented parties and erodes the court's impartiality).

25 <sup>3</sup> Former Associate Judge Joan F. Greendeer-Lee revealed her apprehension as follows: "[t]he dilemma this Court is  
26 confronted with is an argument that a *pro se* litigant, who has little or no knowledge of the law, is unable to gain  
27 equitable relief because she failed to identify the proper party to a suit." *Id.* at 3. The defendant argued that the *pro*  
28 *se* plaintiff failed to name the Ho-Chunk Nation, which proved an indispensable party, not merely necessary, due to  
the absence of a waiver of sovereign immunity. The defendant's argument, however, was flawed, and the Court's  
reliance upon it, misplaced, since the plaintiff only sought equitable relief and named the appropriate defendant. *See*  
CONST., ART. XII, § 2. Ultimately, the Court dismissed the action on alternative grounds, making the *pro se*  
discussion not only incorrect but irrelevant.

<sup>4</sup> The United States Supreme Court (hereinafter U.S. Supreme Court) has long recognized, "[a]s must generally be  
the case, [that] the trial judge [cannot] effectively discharge the roles of both judge and . . . counsel." *Carnley v.*  
*Cochran*, 369 U.S. 506, 510 (1962). The U.S. Supreme Court delivered such remarks against a recognition that  
"[e]ven the intelligent and educated lay[person] has small and sometimes no skill in the science of law . . . . If that  
be true of [people] of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble  
intellect." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Other federal courts have echoed this basic sentiment. For  
example, the Seventh Circuit has expressed that "the best lay[person] is likely to try a case more ineptly than the  
worst lawyer." *United States v. Pavich*, 568 F.2d 33, 39 (7th Cir. 1978).

1 demonstrate a consistent judicial philosophy and interpretation of procedures not contingent  
2 upon a consideration of *pro se* status.

3         The general principle that a trial court should liberally construe *pro se* pleadings in the  
4 federal court system derives largely, if not wholly, from the U.S. Supreme Court's interaction  
5 with *pro se* litigants in criminal and civil rights cases. Criminal litigants are afforded more  
6 latitude due to the fact that significant liberty interests are often at stake. Furthermore, prisoners  
7 typically lack resources available to the general public, *i.e.*, sustainable income and freedom of  
8 access to legal materials. On the other hand, civil rights pleadings receive liberal construction  
9 due to the remedial purposes underlying the legislation.  
10

11         The *Haines* rule, which has gradually infiltrated civil cases in general, derived from an  
12 action initiated under the *Civil Rights Act of 1871*, and instructs that "the allegations of the *pro*  
13 *se* complaint" be held "to less stringent standards than formal pleadings drafted by lawyers."  
14 *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Mitchell v. Inman*, 682 F.2d 886 (11th Cir.  
15 1982). That being said, the Seventh Circuit has summarized the permissible reach of the rule as  
16 follows:  
17

18                 [a]lthough civil litigants who represent themselves ("pro se") benefit from  
19 various procedural protections not otherwise afforded to the ordinary  
20 attorney-represented litigant, *e.g.*, *Haines v. Kerner*, 404 U.S. 520 (1972)  
21 (requiring liberal construction of pro se litigant pleadings); *Timms v.*  
22 *Frank*, 953 F.2d 281, 283-84 (7th Cir. 1992) (extending rule of *Lewis v.*  
23 *Faulkner*, 689 F.2d 100 (7th Cir. 1982), *cert. denied sub nom. Timms v.*  
24 *Coughlin*, 504 U.S. 957 (1992), requiring all pro se litigants receive notice  
25 of summary judgment procedures before court may grant judgment against  
26 them), pro se litigants are not entitled to a general dispensation from the  
27 rules of procedure or court imposed deadlines. *Jourdan v. Jabe*, 951 F.2d  
28 108, 110 (6th Cir. 1991); *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th  
Cir. 1985).

1 *Jones v. Phipps*, 39 F.3d 158, 163 (7th Cir. 1994) (parallel citations omitted).<sup>5</sup> The Tenth  
2 Circuit, likewise, joins its sister court in arriving at the same conclusion, stating:

3 [t]he hazards which beset a lay[person] when he [or she] seeks to represent  
4 himself [or herself] are obvious. He [or she] who proceeds *pro se* with full  
5 knowledge and understanding of the risks does so with no greater rights  
6 than a litigant represented by a lawyer, and the trial court is under no  
7 obligation to become an "advocate" for or to assist and guide the *pro se*  
8 lay[person] through the trial thicket.

9 *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977) (citations omitted).

10 The Court remains vigilant in its efforts to offer an acceptable degree of guidance to *pro*  
11 *se* litigants. The Court remains mindful that "the Ho-Chunk Court System was specifically  
12 designed to be more open to people representing themselves," but the Court has achieved this  
13 openness through an equitable application of the rules to all parties. *Lang*, CV 98-46 at 9. The  
14 Supreme Court now appears to require that the Court abandon this practice in favor of more  
15 direct assistance to *pro se* litigants. This directive appears all the more troubling since it directly  
16 conflicts with ten (10) years of case law, including binding precedent, without any discussion  
17 explaining or justifying the grounds for the departure.

18 In early-1997, former President Chloris A. Lowe, Jr., with assistance of counsel, filed an  
19 initial pleading and motion for a temporary restraining order, seeking an injunction against an  
20 allegedly improper removal from his office by the Ho-Chunk Nation General Council. *Chloris*  
21 *A. Lowe, Jr. v. Ho-Chunk Nation et al.*, CV 97-12 (HCN Tr. Ct., Mar. 21, 1997), *aff'd*, SU 97-01  
22 (HCN S. Ct., June 12, 1997). Within the pleading, and not an attachment, the plaintiff noted  
23 "[t]hat the appointment of [Vice President Byron C.] Thundercloud as Acting President is a  
24 direct violation of the Ho-Chunk Constitution and said Acting President has no lawful authority  
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<sup>5</sup> To reiterate, the Court already affords the allowable protections to *pro se* litigants. *Supra* pp. 13-14.

1 to act or perform functions in that capacity."<sup>6</sup> *Compl.*, CV 97-12 (Jan. 20, 1997) at 2. Yet, the  
2 plaintiff failed to specifically name former Vice President Thundercloud as a party defendant.

3 The Court, former Chief Judge Mark D. Butterfield presiding, determined that the  
4 plaintiff's failure proved fatal to his cause of action. Following a preliminary injunction hearing,  
5 the Court entered its decision and denied the plaintiff's request for relief because the named  
6 governmental defendants enjoyed sovereign immunity from suit. *Lowe*, CV 97-12 at 13-14; *but*  
7 *see Gail White v. Dep't of Pers. et al.*, CV 95-17 (HCN Tr. Ct., Mar. 18, 1996). Curiously, the  
8 Court notes the following:  
9

10  
11 [o]ne exception to the sovereign immunity bar is where officials of the Ho-  
12 Chunk Nation act beyond the scope of their authority. *See* HCN  
13 CONSTITUTION ART. XII, § 2. If they do so, they may be subject to suit in  
14 equity for declaratory and non-monetary injunctive relief in Tribal Court  
15 by persons subject to its jurisdiction for purposes of enforcing rights and  
16 duties established by the constitution or other applicable laws. *Id.* Mr.  
17 Lowe alleges that the Legislature replaced him with an acting President  
18 who is less than 35 years old and is ineligible to hold the office of  
19 President. *See Complaint* at ¶ 8. This construed in the light most  
20 favorable to Mr. Lowe is an allegation of some action by an official in  
21 excess of their authority. Mr. Lowe's suit, as to this aspect of his case,  
22 would get past the bar of sovereign immunity if he specified the  
23 individuals who allegedly acted outside of their authority. *The problem is*  
24 *he does not name them and they are not defendants in this suit.*

25 *Id.* at 14 (emphasis added).

26 On appeal, the Supreme Court expressly acknowledged the charge against former Vice  
27 President Thundercloud, but upheld the dismissal of the action. *Lowe*, SU 97-01 at 1. The  
28 Supreme Court simply concluded that "Appellant Lowe did not sue any individuals for acting  
outside of the scope of their authority," and citing the procedural rule regarding the naming of  
governmental parties, explained that "[t]he record is clear that the Complaint filed in this section

1 did not comply with the requirements of HCN R. Civ. P. Rule 27(B)." *Id.* at 3 n.1. The Supreme  
2 Court later revisited its holding, declaring:

3 [i]t is necessary for the courts to know which individuals are being sued so  
4 that the trier of fact may assess whether or not that specific individual has  
5 acted outside the scope of their authority or not. *Suits based upon the*  
6 *legal argument that someone has acted outside of their authority*  
*specifically name the individual(s).*

7 *Id.* at 4 (citations omitted) (emphasis added).

8 In the instant case, "[t]he record is [also] clear that the Complaint did not comply with the  
9 requirements of HCN R. Civ. P. Rule 27(B)." *Id.* at 3 n.1 (emphasis added). Regardless, the  
10 Supreme Court deems that while plaintiff Lowe's case should have been dismissed at a motion  
11 hearing, plaintiff Wilson's case should survive trial.<sup>7</sup> The only "meaningful" distinction: the  
12 former plaintiff had legal representation and the latter did not.<sup>8</sup>

14 Unfortunately, the Court has never deemed this distinction meaningful after *Lowe*, and its  
15 reliance upon this precedent governed the result in the case at bar and other similar cases. The  
16 U.S. Supreme Court has confirmed that a litigant "does not have a constitutional right to receive  
17 personal instruction from the trial judge on courtroom procedure. Nor does the Constitution  
18 require judges to take over chores for a *pro se* [litigant] that would normally be attended to by  
19 trained counsel as a matter of course." *McKaskle v. Wiggins*, 465 U.S. 168, 183-84 (1984). The  
20 Ninth Circuit is in full accord: "*pro se* litigants in the ordinary civil case should not be treated  
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24 <sup>6</sup> The Court maintains constitutional authority to grant injunctive relief, and a deposed President would logically  
25 seek such relief against a President *pro tempore* in these instances. CONST., ARTS. VII, § 6(a), XII, § 2; *see also*  
*George Lewis v. HCN Election Bd. et al.*, CV 06-109 (HCN Tr. Ct., Dec. 5, 2006), *appeal filed*, SU 06-07.

26 <sup>7</sup> A plaintiff bears the burden of proof at trial, and, *pro se* or otherwise, would not typically be entitled to any  
27 presumptions on his or her behalf. *See, e.g., Joseph D. Ermenc v. HCN Whitetail Crossing*, CV 01-88 (HCN Tr. Ct.,  
28 Sept. 11, 2003) at 6. Alternatively, a Court will usually grant favorable inferences to a non-movant in relation to the  
content of his or her pleading at a motion hearing. *Lowe*, CV 97-12 at 14; *see also Hughes v. Rowe*, 449 U.S. 5, 10  
(1980).

<sup>8</sup> One may argue that a represented party maintains potential recourse against his or her counsel for malpractice, but  
any such redress would not adequately compensate a party for being deprived of a ruling on the merits, especially if  
the plaintiff sought only equitable relief.

1 more favorably than parties with attorneys of record. . . . it is not for the trial court to inject itself  
2 into the adversary process on behalf of one class of litigant." *Jacobsen*, 790 F.2d at 1364-65.

3 The Court believes that significant equal protection concerns are implicated if the  
4 Judiciary adopts a practice whereby it dismisses causes of action against one class of plaintiffs,  
5 but rescues another from the same fate through activist steps. *See* CONST., ART. X, § 1(a)(8). In  
6 the instant case, the plaintiff received notice of her pleading defect. The defendant informed the  
7 plaintiff in its responsive pleading that she "fail[ed] to state a claim for which relief can be  
8 granted relative to her claim of negligence by former supervisor Dan Sine, because Dan Sine . . .  
9 [is] not named as [a] Defendant[ ] in this action." *Def.'s Answer* at 5. The Court cannot discern  
10 any ambiguity in the asserted defense. The defendant essentially provided the plaintiff with clear  
11 guidance as to how to amend her pleading, but the plaintiff chose not to do so prior to the  
12 amendment to pleadings deadline. The defendant's "direction" should not prove counterintuitive  
13 to a layperson, but the Supreme Court nonetheless criticized the Trial Court for neglecting to  
14 further persuade the plaintiff.<sup>9</sup>

15 At this juncture, the Court deems it advisable to quote the directly relevant federal rule  
16 since the Supreme Court has demonstrated a penchant for doing so.

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19  
20 A person who is subject to service of process and whose joinder will not  
21 deprive the court of jurisdiction over the subject matter of the action shall  
22 be joined as a party in the action if (1) in the person's absence complete  
23 relief cannot be accorded among those already parties . . . . If the person  
24 has not been so joined, the court shall order that the person be made a  
25 party.

26 <sup>9</sup> The Supreme Court does not indicate when the Trial Court should assist a *pro se* plaintiff in overcoming the  
27 defenses levied by a presumably represented defendant or if its decision only extends to the defense of a failure to  
28 name a necessary party. The present defendant did not file a motion to dismiss, so the Court only held two (2)  
proceedings prior to trial, the *Scheduling* and *Pre-Trial Conferences*. As a rule, the Court refrains from discussing  
the substantive merits of a case at the scheduling conference, and the applicable rule would not permit an  
amendment to an initial pleading at a pre-trial conference usually held within thirty (30) days of trial. *HCN R. Civ.*  
*P.* 21.

1 FED. R. CIV. P. 19(a). The necessary party rule does not distinguish between *pro se* and  
2 represented litigants, and the Supreme Court has adopted an equivalent rule for use in the Trial  
3 Court. The tribal rule provides: [t]o the greatest extent possible, all persons with an interest will  
4 be joined in an action if relief cannot be accorded among the current parties without that person."

5  
6 *HCN R. Civ. P. 24.*

7 Interestingly, the Supreme Court casts the issue as one concerning amendment to  
8 pleadings as opposed to one of joinder, which would admittedly require a slight amendment, but  
9 appear vastly more appropriate. However, the result in *Lowe* could not be easily justified had the  
10 Court employed federal principles of joinder. Former Vice President Thundercloud, much like  
11 Mr. Sine, would not have proven an indispensable party, and courts typically do not dismiss  
12 causes of action if a necessary party can be joined in an action.<sup>10</sup> The Court, therefore, assumed  
13 that the ruling in *Lowe* focused upon a reluctance to actively assist a plaintiff in presenting a  
14 constitutional claim. The recent Supreme Court decision casts this assumption in doubt.  
15

16  
17 Nevertheless, the Court will abide by appellate instruction and determine whether "[t]he  
18 pleading caption *may be amended* to conform to the actual findings in the case including those  
19 officials who were alleged by the appellant to have acted outside the scope of their authority."  
20 *Decision* at 6. The plaintiff portrayed Mr. Sine as negligent for "fail[ing] to advise . . . of . . .  
21 right to a hearing before the Grievance Review Board." *Compl.*, Attach. 1 at 1. The Court shall  
22 liberally construe the plaintiff's pleading, which legitimately includes this attachment prepared in  
23 conjunction with and incorporated into the *Complaint*. The Court does so in light of the  
24 additional findings of fact.  
25

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28 <sup>10</sup> A dismissal "will only be granted where the party is 'indispensable' (not merely 'necessary') and the party cannot be joined." *United States v. White*, 893 F.Supp. 1423, 1428 (C.D. Cal. 1995) (citing *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992)).

1           The Court cannot reasonably intuit that the plaintiff intended to name Mr. Sine as a party  
2 defendant. First, the Court and the parties understood that the matter could still progress through  
3 the Grievance Review Board, which existed at the time of the *Scheduling Conference*. Second,  
4 the plaintiff did not pursue the allegation of negligence against Mr. Sine at trial in any way,  
5 shape or form. Finally, the plaintiff did not portray Mr. Sine as acting outside the scope of his  
6 authority at trial, but rather that she could expect his willing cooperation.  
7

8           **BASED UPON THE FOREGOING**, the Court holds that the plaintiff did not implicitly  
9 name Mr. Sine as a defendant, and reasserts its dismissal given Supreme Court precedent on the  
10 issue of joinder. The Court hopes that neither the appellate tribunal nor the parties perceive any  
11 obstinacy or disrespect within this decision. The breadth and depth of the opinion should  
12 illustrate the Court's legitimate concerns with the issues involved herein.  
13

14           The parties retain the right to file a timely post judgment motion with this Court in  
15 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
16 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme  
17 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*  
18 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*  
19 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order  
20 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or  
21 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*  
22 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*  
23 *R. App. P.*].” *HCN R. Civ. P.* 61.  
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Ho-Chunk Nation Court System  
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**IT IS SO ORDERED** this 21<sup>st</sup> day of December 2006, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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Honorable Todd R. Matha  
Chief Trial Court Judge