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

Dallas White Wing,
Plaintiff,

v.

Case No.: **CV 04-99**

**Ho-Chunk Nation General Council,
through Alvin Cloud, in his official capacity
as Acting Chair of the General Council;
Judy Whitehorse-Hillmer, in her official
capacity as Secretary of the General
Council; and the Ho-Chunk Legislature
through Wade Blackdeer, Myrna
Thompson, Christine Romano, Gerald
Cleveland, Sharon Whiterabbit, Kathyleen
Lonetree Whiterabbit, John Dall, Tracy
Thundercloud, Elliott Garvin, and Clarence
Pettibone, in their official capacities as
Legislators; and the Ho-Chunk Nation
Election Board through Mary Ellen Dumas,
in her official capacity as Chair of the
Election Board,**
Defendants.

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**ORDER
(Denying Motion to Amend Complaint)**

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INTRODUCTION

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On October 23, 2004, the Ho-Chunk Nation General Council enacted General Council Resolution 25 providing for the removal of the plaintiff from his office as a member of the Ho-Chunk Nation Legislature.¹ On November 18, 2004, the Court issued its *Preliminary Injunction*. On January 31, 2005, the plaintiff filed the *Motion to Amend the Complaint and the Amended*

1 *Complaint.* Defendants Legislature and Election Board filed a letter in response on February 14,
2 2005. Defendant HCN General Council filed a response on February 15, 2005. The petitioner
3 filed a response to defendant HCN General Council on February 16th, 2005. Based upon the
4 record, the Court denies the *Motion to Amend the Complaint.*
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7 **APPLICABLE LAW**

8 **CONSTITUTION OF THE HO-CHUNK NATION**

9 **ARTICLE III - ORGANIZATION OF THE GOVERNMENT**

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11 Section 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by virtue of
12 self-government and democracy.

13 Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be
14 composed of four (4) branches: General Council, Legislature, Executive, and Judiciary.

15 Section 3. Separation of Functions. No branch of the government shall exercise the powers and
16 functions delegated to another branch.

17 Section 4. Supremacy Clause. This Constitution shall be the supreme law over all territory and
18 persons within the jurisdiction of the Ho-Chunk Nation.

19 **ARTICLE IV - GENERAL COUNCIL**

20 Section 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant all
21 inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk Nation
22 are entitled to participate in General Council.

23 Section 2. Delegation of Authority. The General Council hereby authorizes the legislative branch
24 to make laws and appropriate funds in accordance with Article VI. The General Council hereby
25 authorizes the judicial branch to interpret and apply the laws and Constitution of the Nation in
26 accordance with Article VII.

27 Section 3. Powers Retained by the General Council.

- 28 a. The General Council retains the power to set policy for the Nation.

¹ The number designation, "25" is the chronological number assigned to the resolution as it appears in the October 27, 2004 edition of the *Hocak Worak*.

- 1 b. The General Council retains the power to review and reverse actions of the
2 Legislature except those enumerated in Section 4 of this Article. The General Council
3 shall return such reversals to the Legislature for reconsideration consistent with the
4 action of the General Council. The General Council retains the power to review and
5 reverse decisions of the Judiciary which interpret actions of the Legislature. The
6 General Council does not retain the power to review and reverse decisions of the
7 Judiciary which interpret this Constitution.
8 c. The General Council retains the power to propose amendments in accordance with
9 Article XIII, including those which reverse decisions of the Judiciary interpreting this
10 Constitution.
11 d. The General Council retains the power to establish its own procedures in accordance
12 with this Constitution.
13 e. The General Council retains the power to call a Special Election.
14 f. Actions by the General Council shall be binding.

15 Section 4. Excepted Powers. The General Council does not retain the power to review actions
16 relating to the hiring or firing of personnel.

17 Section 5. Annual Meetings. The People shall meet in General Council at least one time each
18 year, which shall be called by the President, and at other times as provided in Section 6 of this
19 Article. Notice shall be provided by the President for all Annual Meetings of the General
20 Council.

21 Section 6. Special Meetings. Special Meetings of the General Council shall be called by the
22 President upon petition by twenty (20) percent of the eligible voters, or upon written request of a
23 majority of the Legislature, or when deemed necessary by the President. Notice shall be provided
24 by the President for all Special Meetings of the General Council.

25 Section 7. Procedures. Twenty (20) percent of the eligible voters of the Nation present in General
26 Council shall constitute a quorum. Each action of the General Council shall require the presence
27 of a quorum. The President shall call all Annual and Special General Council Meetings, except
28 those meetings called pursuant to Article IX, Section 2. When a quorum is attained, the General
Council shall elect either the President or another person to conduct the meeting. A secretary
shall be appointed to record the minutes of all General Council meetings, including any votes
taken. The secretary shall transmit the minutes of General Council meetings to the Legislature.

ARTICLE VII – JUDICIARY

Section 5. Jurisdiction of the Judiciary.

- a. The Trial Court shall have original jurisdiction over all cases and controversies, both
criminal and civil, in law or in equity, arising under the Constitution, laws, customs

1 and traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk
2 Nation, or its officials and employees, shall be a party. Any such case or controversy
3 arising within the jurisdiction of the Ho-Chunk Nation shall be filed in Trial Court
4 before it is filed in any other court. This grant of jurisdiction by the General Council
5 shall not be construed to be a waiver of the Nation's sovereign immunity.

6 Section 6. Powers of the Tribal Court.

- 7 a. The Trial Court shall have the power to make findings of fact and conclusions of law.
8 The Trial Court shall have the power to issue all remedies in law and in equity
9 including injunctive and declaratory relief and all writs including attachment and
10 mandamus.
- 11 b. The Trial Court shall have the power to declare the laws of the Ho-Chunk Nation
12 void if such laws are not in agreement with this Constitution.

13 ARTICLE VIII - ELECTIONS

14 Section 2. Special Elections. Special Elections shall be held when called for by the General
15 Council, the Legislature, or by this Constitution or appropriate ordinances. In all Special
16 Elections, notice shall be provided to the voters.

17 ARTICLE IX - REMOVAL, RECALL AND VACANCIES

18 Section 1. General Council Removal of Legislators. The General Council may remove any
19 member of the Legislature for malfeasance. No vote by the General Council to remove a member
20 of the Legislature shall take place before such Legislator has been given reasonable notice of the
21 impending action and has had a reasonable opportunity to be heard.

22 ARTICLE X - BILL OF RIGHTS

23 Section 1. Bill of Rights.

- 24 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:
- 25 (1) make or enforce any law prohibiting the free exercise of religion, or abridging the
26 freedom of speech, or of the press, or the right of the people peaceably to assemble
27 and to petition for a redress of grievances;
- 28 (8) deny to any person within its jurisdiction the equal protection of its laws or deprive
any person of liberty or property without the due process of law;
- (9) pass any bill of attainder or ex post facto law;

ARTICLE XII - SOVEREIGN IMMUNITY

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

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

9 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

10 Rule 18. Types of Motions.

11 *Motions* are requests directed to the Court and must be in writing except for those made at trial.
12 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
13 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
14 shall contain or be supported by a legal memorandum, which states the issues and legal basis
15 relied on by the moving party. The *Motions* referenced within these rules shall not be considered
16 exhaustive of the *Motions* available to litigants.

17 Rule 19. Filing and Responding to Motions.

18 (A) Filing. *Motions* may be filed by a party with any pleading or at any time after their first
19 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
20 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*.
21 *Motions for Extension of Time* and *More Definite Statement* may be filed before the initial
22 pleading.

23 (B) Responses. A *Response* to a written *Motion* must be filed at least one (1) day before the
24 hearing. If no hearing is scheduled, the *Response* must be filed with the Court and served on the
25 other parties within ten (10) calendar days of the date the *Motion* was filed. The party filing the
26 *Motion* must file any *Reply* within three (3) calendar days.

27 (C) Motions for Expedited Consideration. Any *Motion* which requires action within five (5)
28 calendar days shall be accompanied by a *Motion for Expedited Consideration*. The *Motion for*
Expedited Consideration shall state the reasons why the Accompanying *Motion* should be heard
prior to the normal time period, and what efforts the party has made to resolve the issue with the
opposing party prior to filing the *Motion for Expedited Consideration*.

Rule 20. Hearings on Motions.

The Court may grant a hearing on a *Motion* at its own discretion or at the request of a party. A
party requesting a hearing must (a) schedule the hearing with the Court and (b) deliver or mail
notice of the hearing to other parties at least five (5) calendar days prior to the hearing. If the trial
is scheduled to begin within the time allowed for a hearing, all responses shall be made by the
time scheduled for commencement of the trial. *Motions* made within fourteen (14) calendar days

1 of trial may be dismissed and costs and fees assessed against the moving party if the Court finds
2 no good cause exists for failing to file the *Motion* more than fourteen (14) calendar days in
advance of the trial.

3 Rule 21. Amendment to Pleadings

4 Parties may amend a *Complaint or Answer* one time without leave of the Court prior to the filing
5 of a responsive pleading, or if no responsive pleading is permitted, at any time within twenty
6 (20) days of the original filing date. Subsequent amendments to *Complaints* or *Answers* may
7 only be made upon leave of the Court and a showing of good cause, or with the consent of the
8 opposing party. All amendments to the *Complaint* or *Answer* must be filed at least thirty (30)
9 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.

10 Rule 27. The Nation as a Party.

11 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
12 named as a party, the *Complaint* should identify the unit of government, enterprise or name of
13 the official or employee involved. The *Complaint*, in the case of an official or employee being
14 sued, should indicate whether the official or employee is being sued in his or her individual or
15 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 Ho-Chunk
Nation Court, or Ho-Chunk Nation Law.

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

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

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

27 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
28 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
must be based upon new information that has come to the party's attention that, if true, could
have the effect of altering or modifying the judgment. Upon such motion, the Court may modify

1 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
2 commences upon entry of the modified judgment. If the Court denies a motion filed under this
3 rule, the time for initiating an appeal from the judgment commences when the Court denies the
4 motion on the record or when an order denying the motion is entered, whichever occurs first. If
5 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
6 motion or the judge does not sign an order denying the motion, the motion is considered denied.
7 The time for initiating an appeal from judgment commences in accordance with the Rules of
8 Appellate Procedure.

9 (D) Erratum Order or Reissuance of Judgment. Clerical errors in a Court record, including the
10 *Judgment* or *Order*, may be corrected by the Court at any time.

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

18 Rule 60. Emergency Order, Temporary Restraining Order and Ex parte Temporary Restraining
19 Order.

20 (A) Emergency Order. The Court may enter an *Emergency Order* without a hearing if it appears
21 from the *Complaint*, affidavits and sworn testimony that irreparable harm will result without the
22 *Order*. The *Order* will expire in thirty (30) calendar days unless extended by the Court for good
23 cause. A hearing on the matters contained in the *Order* will be held prior to its expiration. The
24 removal of a child from its residence by the Department of Social Services or equivalent agency
25 and the imminent destruction of records or property essential to the case are examples of matters
26 which may require an *Emergency Order*.

27 (B) Temporary Restraining Order. When it appears from a party's pleading that a party is entitled
28 to judgment and any part thereof consists in restraining some act, the commission or continuance
of which during the litigation would injure the party, or when during the litigation it shall appear
that a party is doing or threatens or is about to do, or is procuring or suffering some act to be
done in violation of the rights of another party and tending to render the judgment ineffectual, a
temporary injunction may be granted to restrain such act.

(C) Procedure. The application for an injunction or restraining order made to the Court shall not
be heard except upon notice to such other persons as may be defendants in the action unless the
Court is of the opinion that irreparable loss or damage will result to the applicant unless a
temporary restraining order is granted.

(D) Time. The Court may grant such temporary restraining order at any time before a hearing
and determination of the application for an interlocutory injunction. However, such temporary
restraining order shall be effective only for thirty (30) calendar days unless extended after notice
and hearing thereon, or upon written consent of the parties or their attorneys.

1 Rule 61. Appeals.

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

7 Rule 69. Who Is Bound by Judgment.

8 All parties and interested persons who are within the jurisdiction of the Court and who had notice
9 of the case pending before the Court are bound by the judgment whether or not they appeared.

10 **DECISION**

11 The *Motion to Amend the Complaint* was filed on January 31, 2005. The original
12 Complaint was filed on November 1, 2004, with the *Injunction* granted on November 18th, 2005.
13 The defendant, HCN General Council, filed their answer to said *Complaint* on November 22,
14 2004, as did the defendant Legislature and Election Board. The first permissive rule would have
15 allowed the plaintiff to amend the original *Complaint* by November 22, 2004 without leave of
16 the Court. The plaintiff failed to submit his amendment and therefore, this rule does not apply.
17 The second aspect of the Rule 21 would allow, Subsequent amendments to *Complaints* or
18 *Answers* may only be made upon leave of the Court and a showing of good cause, or with the
19 consent of the opposing party. Herein, there is objection from both defendants as stated in their
20 responses as filed with the Court. The Court looks to the only other basis which requires the
21 permission of the court with a showing of good cause.
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24 A number of considerations must be reviewed to find good cause. Timeliness of filing
25 said request is such a consideration. Herein, the plaintiff filed on January 31, 2005. A
26 *Scheduling Conference* occurred on January 6, 2005 at which time this matter was discussed
27 along with other motions. Additionally, defendant Legislature and Election Board discussed
28 filing a *Motion to Dismiss*, along with a due date and a date to argue, i.e., February 2, 2005,

1 along with defendant HCN General Council’s *Motion to Dismiss* and *Motion for Reconsideration*
2 as filed on November 29th, 2004. Defendant Legislature and Election Board filed their *Motion to*
3 *Dismiss* on January 21, 2005. The plaintiff did not file the *Motion to Amend* until January 31,
4 2005, after the defendant Legislature and Election Board had filed their *Motion to Dismiss* and
5 sixty-three (63) days after the permissive deadline of November 29, 2004. The *Motion to Amend*
6 *the Complaint* fails the consideration of timeliness and fairness to all of the parties.

8 The consideration of good cause focuses the Court on an issue that according to Black’s
9 Law Dictionary requires, “a substantial reason amounting in law to a legal excuse for failing to
10 perform an act required by law.” In the case at hand, the plaintiff was not required to file a
11 *Motion to Amend*, he was only required to file said matter in a specified manner. The plaintiff
12 failed to file the motion according to the permissive deadline which then requires the Court to
13 provide leave and a showing of good cause. The plaintiff fails to provide any good cause
14 explanation in this *Motion to Amend*. The only discernable reason is to provide additional facts
15 that were not available at the time of filing of the *Complaint*. The Ho-Chunk Trial Court has
16 permissive rules regarding both complaints and answers and expects additional facts to come
17 forward throughout the proceedings. The Court denies the *Motion to Amend* as good cause does
18 not exist.

21 **RIGHTS OF THE PARTIES**

22 The parties retain the right to file a timely post judgment motion with this Court in
23 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order*.
24 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk
25 Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
26 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
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1 Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within sixty (60) calendar days after the day
2 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
3 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.).”
4 *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must
5 follow the [*HCN R. App. P.*]” *HCN R. Civ. P.* 61.

7 **IT IS SO ORDERED** this 10th day of November 2005, from within the sovereign lands
8 of the Ho-Chunk Nation at Black River Falls, Wisconsin.

11 _____
12 Honorable Tina F. Gouty-Yellow
13 Associate Trial Court Judge

