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

Stewart A. Miller,
Plaintiff,

v.

Case No.: **CV 99-22**

**Ho-Chunk Nation, Ho-Chunk Nation
Legislature, Jacob Lonetree, Clarence
Pettibone, Robert Mudd, Elliot Garvin,
Wade Blackdeer, Dallas White Wing, Kevin
Greengrass, Gerald Cleveland, Sr., Robert
Funmaker, Jr., Karen Martin, and Sharyn
Whiterabbit,**
Defendants.

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether to grant the relief requested by the plaintiff. The plaintiff requests both declaratory and monetary relief against the defendants. The plaintiff claims that the defendants acted outside the scope of their authority in suspending the plaintiff. The following discussion covers the relevant legal issues to properly render a decision.

PROCEDURAL HISTORY

The Court reflects the procedural history of this long-standing matter within the Findings of Fact. For the purposes of this section, the Court notes that the plaintiff filed a letter requesting expedited consideration on March 1, 2005, addressed to former Chief Judge William H.

1 Bossman, stating that the plaintiff had a court case in Jackson County regarding attorney's fees
2 in this matter.

3 The presiding judge wishes to extend her sincerest apologies and regrets to the parties for
4 the failure of the Court to enter a timely decision in this matter. Each trial judge maintains a duty
5 to "dispose promptly of the business of the court." *HCN Rules of Judicial Ethics*, § 4-1(E); *see*
6 *also In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1) (HCN S. Ct., Apr.
7 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of
8 trial level process). In the interests of justice, the Court informs the parties of the availability of
9 seeking mandamus relief from the Ho-Chunk Nation Supreme Court in order to compel action of
10 a trial level judge. *See In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21, 2005)
11 (citing CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, § 6(a)).¹
12
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14

15 APPLICABLE LAW

16 CONSTITUTION, ART. XII, § 1, 2

17 Section 1. Immunity of Nation from Suit.

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

20 Section 2. Suit Against Officials and Employees.

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

25 _____
26 ¹ This case was originally assigned to former Chief Judge Mark D. Butterfield. On or about April 13, 1999, the
27 Legislature appointed Attorney Rebecca Weise as a judge *pro tempore*, who subsequently presided over the August
28 19, 1999 *Trial*. On January 21, 2002, former Chief Judge Butterfield requested a new *pro tempore* judge due to the
lack of activity. On January 28, 2003, the case was reassigned to former Chief Judge William H. Bossman. Chief
Judge Bossman did not take any action on the case during his tenure, and it was reassigned to *pro tempore* Associate
Judge Tina F. Gouty-Yellow who also did not take any action on the case during her limited tenure, which expired
on December 31, 2005.

1 Section 2. Powers of the Legislature.

2 The Legislature shall have the power:

- 3 (a) to make laws, including codes, ordinances, resolutions, and statutes;
- 4 (b) To establish Executive Departments, and to delegate legislative powers to the Executive
5 branch to be administered by such Departments, in accordance with the law; any
6 Department established by the Legislature shall be administered by the Executive; the
7 Legislature reserves the power to review any action taken by virtue of such delegated
8 power;
- 9 (c) To constitute a Board of Directors for each Department, except the President shall name
10 the Executive Director, subject to confirmation by the Legislature;
- 11 (d) To authorize expenditures by law and appropriate funds to the various Departments in an
12 annual budget;
- 13 (e) To raise revenue, including the power to levy and collect taxes and license fees;
- 14 (f) To set the salaries, terms and conditions of employment for all governmental personnel;
- 15 (g) To set its own procedures, select its officers, and to enact laws governing attendance of
16 its members, including penalties for absences;
- 17 (h) To enact all laws prohibiting and regulating conduct, and imposing penalties upon all
18 persons within the jurisdiction of the Nation;
- 19 (i) To negotiate and enter into treaties, compacts, contracts, and agreements with other
20 governments, organizations, or individuals;
- 21 (j) To authorize and appropriate funds to employ legal counsel in accordance with applicable
22 law;
- 23 (k) To acquire or purchase lands for the benefit of the Nation and its members;
- 24 (l) To enact laws to manage, lease, permit, or otherwise deal with the Nation's lands,
25 interests in lands or other assets;
- 26 (m) To enact laws to prevent the sale, disposition, or encumbrance of Ho-Chunk lands, or
27 other Ho-Chunk assets;
- 28 (n) To purchase under condemnation proceedings any lands within the jurisdiction of the Ho-
Chunk Nation;

- 1 (o) To enact laws to regulate and zone any lands within the jurisdiction of the Ho-Chunk
Nation;
- 2 (p) To enact laws to create and regulate a system of property including but not limited to use,
3 title, deed, estate, inheritance, transfer, conveyance, and devise;
- 4 (q) To issue charters of incorporation, to charter corporations and other organizations for
5 economic or other purposes, and to regulate their activities;
- 6 (r) To protect and foster Ho-Chunk religious freedom, culture, language, and traditions;
- 7 (s) To promote public health, education, charity, and such other services as may contribute to
8 the social advancement of the members of the Ho-Chunk Nation;
- 9 (t) To enact laws governing law enforcement on lands within the jurisdiction of the Nation;
- 10 (u) To enact laws to regulate domestic relations of persons within the jurisdiction of the
11 Nation;
- 12 (v) To establish and maintain headquarters for the Ho-Chunk Nation;
- 13 (w) To enact laws to regulate hunting, fishing, trapping, recreation and all other related
14 activities on lands within the Nation's jurisdiction;
- 15 (x) To enact any other laws, ordinances, resolutions, and statutes necessary to exercise its
16 legislative powers delegated by the General Council pursuant to Article III including but
17 not limited to the forgoing list of powers.

18 ART. IX, § 3

19 Section 3. Legislative Removal of Legislators.

20 The Legislature may remove a member of the Legislature for good cause. Any member of the
21 Legislature subject to removal shall be informed of the charges, be given adequate notice of the
22 impending removal action, and given an opportunity to prepare and present a defense including
23 presenting witnesses and other evidence. An affirmative vote of three-fourths ($\frac{3}{4}$) of the entire
Legislature shall be required for all Legislative removal actions under this Section. The
Legislator subject to removal shall not vote.

24 ART. X, § 1(a)(8)

25 Section 1. Bill of Rights.

26 8. The Ho-Chunk Nation, in exercising its powers of self-government, shall not:
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

27 CODE OF ETHICS ACT, ADOPTED 01/27/99

28 Section 3: Standards of Conduct

1 § 3.09: Elected and appointed officials and unclassified employees of the Nation shall not
2 threaten or intimidate any employee of the Nation in reprisal for the employee acting within the
scope of the employee's official duties and authority.

3 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (Mar. 31, 1999)

4 Ch. 12 - Employment Conduct, Discipline, and Administrative Review

5 Administrative Review Process for Non-gaming [p. 50]

6 The burden of proof is on the grievant to show that what he/she is claiming, actually happened.
7 All levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances
8 shall be forwarded to the Personnel Department promptly by the grievant. This proof may
include documentation and witnesses.

- 9 1. Grieve in writing to the Supervisor and the Personnel Department within five (5)
10 working days of the action. The Supervisor has an affirmative duty to try and resolve the
11 problem. The Supervisor has five (5) days to respond to the grievance. She/He must meet
with the person and document the decision.

12 Limited Waiver of Sovereign Immunity [p. 50b]

13 The HoChunk [sic] Nation hereby expressly provides a limited waiver of sovereign immunity to
14 the extent that the Court may award monetary damages for actual lost wages and benefits
15 established by the employee in an amount not to exceed \$10,000, subject to applicable taxation.
16 Any monetary award granted under this Chapter shall be paid out of the departmental budget
17 from which the employee grieved. In no event shall the Trial Court grant any monetary award
18 compensating an employee for actual damages other than with respect to lost wages and benefits.
19 The Trial Court specifically shall not grant any monetary award against the Nation or its
officials, officers, and employees acting within the scope of their authority on the basis of injury
to reputation, defamation, or other similar invasion of privacy claim; nor shall the Trial Court
grant any punitive or exemplary damages.

20 The Trial Court may grant equitable relief mandating that the HoChunk [sic] Nation
21 prospectively follow its own laws, and as necessary to remedy any past violations of tribal law.
22 Other equitable remedies shall include, but not be limited to: an order of the Court to the
23 Personnel Department to reassign or reinstate the employee, a removal of negative references
24 from the personnel file, an award of bridged service credit, and a restoration of seniority.
25 Notwithstanding the remedial powers noted in the Resolution, the Court shall not grant any
26 remedies that are inconsistent with the laws of the HoChunk [sic] Nation. Nothing in this
27 Limited Waiver or within the Personnel Policies and Procedures Manual shall be construed to
28 grant a party any legal remedies other than those included in the section. (RESOLUTION
06/09/98A)

HO-CHUNK NATION RULES OF CIVIL PROCEDURE (OLD VERSION)

Rule 37. Protective Orders.

1 For good cause, the Court on its own motion or at the request of any party or witness, may make
2 an Order to protect a party or other person for undue annoyance, embarrassment, oppression or
undue burden or expense.

3 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (Feb. 11, 2006 revision)

4 Rule 53. Relief Available.

5 Except in a *Default Judgment*, the Court is not limited to the relief requested in the pleading and
6 may give any relief it deems appropriate. The Court may only order such relief to the extent
7 allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs,
8 including attorney's fees, filing fees, costs of service and discovery, jury and witness costs.
9 Findings of fact and conclusions of law shall be made by the Court in support of all final
judgments.

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

11 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
12 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
13 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.

14 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
15 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
16 conclusions or make additional findings or conclusions, amending the judgment accordingly.
17 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
18 time for initiating an appeal commences upon entry of the amended judgment. If the Court
19 denies a motion filed under this Rule, the time for initiating appeal from the judgment
20 commences when the Court denies the motion on the record or when an order denying the
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 the appeal
from judgment commences in accordance with the *Rules of Appellate Procedure*.

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

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

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

8 Rule 61. Appeals.

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

13 **FINDINGS OF FACT**

14
15 1. On September 13, 1995 President Chloris A. Lowe, Jr. signed *Presidential Executive*
16 *Order*, 09-13-95(1). This order released the tribal newsletter from governmental censorship and
17 reinforced the newsletter's role in disseminating the truth. See Defs.' Ex. C.

18
19 2. On March 4, 1999, the plaintiff, Stewart A. Miller, went to the office of Berna
20 Bigthunder, Editor of the *Hocak Worak* newsletter. The plaintiff demanded that an allegedly
21 libelous letter concerning real estate dealings not be published in the newsletter. The plaintiff
22 demanded a copy of the letter and threatened to call his attorney if Ms. Bigthunder published the
23 letter. See Defs.' Ex. B. The plaintiff allegedly made threatening or defamatory comments to
24 Ms. Bigthunder. *Trial Tr.* at 71. Ms. Bigthunder alleged a violation of the CODE OF ETHICS ACT,
25 §3.
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1 3. On March 15, 1999, the plaintiff received the legislative agenda for the March 16
2 meeting. The agenda noted that the Ho-Chunk Nation Legislature (hereinafter Legislature) would
3 be investigating the “Bigthunder Incident.”

4 4. At the Legislative Meeting, Legislator Dallas R. White Wing made a motion to suspend
5 the plaintiff without pay effective immediately until an investigation was completed concerning
6 allegations of violations of various laws, and indicated that the investigation was to be completed
7 by March 30, 1999. The motion carried 10-0-0. See Def.’s Ex. E.

9 5. On March 16, 1999, the Legislature effected the suspension without pay of the plaintiff
10 from his elected seat as District V Legislator. The Legislature based its suspension decision on
11 the aforementioned incident. Def.’s Ex. F.

13 6. The investigation of the *Bigthunder Incident* was to be completed on or before March 30,
14 1999. *Id.*

15 7. On March 25, 1999, the plaintiff filed a *Complaint* against the Legislature and named
16 individual legislators.

18 8. The same day, the plaintiff filed a *Motion for Temporary Restraining Order*, asking the
19 Court to prohibit the defendants from keeping him from performing his duties as Legislator. The
20 plaintiff also filed a *Motion for Expedited Consideration of the Restraining Order. Mot. for*
21 *Temp. Restraining Order* (Mar. 25, 1999).

22 9. On March 30, 1999, the investigation into the *Bigthunder Incident* was completed. The
23 Legislature decided to proceed with the removal actions of the plaintiff. The plaintiff remained
24 on suspension until his *Removal Hearing* on April 16, 1999.

26 10. On April 1, 1999, the plaintiff filed his Level 1 grievance with Vice President Clarence P.
27 Pettibone. There exists no evidence in the record he received any response. See Defs.’ Ex. L.
28

1 11. On April 8, 1999, the plaintiff filed his Level 2 grievance with the Legislature. There
2 exists no evidence in the record he received any response. See Def.'s Ex. L.

3 12. On April 12, 1999, the defendants filed their *Answer* to the *Complaint*, and also filed a
4 *Motion to Dismiss*, asserting the bar of sovereign immunity. *Answer & Mot. to Dismiss* (April
5 12, 1999).

6 13. On or around April 13, 1999, the case was reassigned from Chief Judge Mark D.
7 Butterfield to Pro Tempore Associate Judge Rebecca Weise.

8 14. On the same date, a letter was sent to the plaintiff requesting that he appear before the
9 Legislature on April 16, 1999. The letter also gave the plaintiff notice of his right to present
10 witnesses, evidence and/or a defense to the enumerated charges at the *Removal Hearing*. The
11 letter additionally apprised the plaintiff of the charges levied against him. See Defs.' Ex. 12.
12

13 15. The Legislature conducted the plaintiff's *Removal Hearing* on April 16, 1999. The
14 plaintiff was not removed, and served the balance of his term following his reinstatement.
15

16 16. The plaintiff received back pay for the suspension period from April 1-16 following his
17 reinstatement, but failed to receive compensation for the period from March 16-30. *Trial Tr.* at
18 56-57.
19

20 17. The plaintiff failed to retain his seat in the Legislature following the 1999 General
21 Election.

22 18. On April 28, 1999, the defendants filed a *Motion to Dismiss*, asserting a failure to state a
23 claim upon which relief may be granted. *Def.'s Notice & Mot. to Dismiss for Failure to State a*
24 *Claim Upon Which Relief Can Be Granted* (Apr. 28, 1999).
25

26 19. The following day, the defendants filed a *Motion for Recusal*, asking for the removal of
27 former Chief Judge Mark D. Butterfield from the case. *Def.'s Mot. for Recusal* (Apr. 29, 1999).
28

1 20. May 6, 1999, the parties stipulated to the removal of former Legislator Jacob LoneTree as
2 a defendant in the present action. *Stipulation & Order for Dismissal* (May 6, 1999).

3 21. On May 18, 1999, the plaintiff filed an *Amended Complaint* with the Trial Court, seeking
4 a declaratory judgment, fees, and costs. *Am. Compl.* (May 18, 1999).

5 22. On June 7, 1999, the defendants filed an *Answer* to the plaintiff's *Amended Complaint*.
6 *Def.'s Answer to Am. Compl.*, (June 7, 1999).

7 23. On July 27, 1999, the defendants filed a *Motion to Consolidate* the plaintiff's actions
8 against Clarence P. Pettibone and against the legislative representatives. *Def.'s Notice & Mot. for*
9 *Consolidation*, CV99-22, -37 (July 27, 1999). The case was so consolidated.

10 24. On July 30, 1999, the defendants filed a *Motion to Strike Pleadings* from the plaintiff's
11 *Amended Complaint*. *Def.'s Notice & Mot. to Strike Pleadings*, CV 99-22, -37 (July 30, 1999).

12 25. On the same date, the defendants filed a *Notice and Motion to Dismiss* and a *Brief in*
13 *Support of Motion to Dismiss*, asserting the bar of sovereign immunity. *Def.'s Notice & Mot. to*
14 *Dismiss*, CV99-22 (July 30, 1999).

15 26. On August 6, 1999, the plaintiff filed a second *Amended Complaint* seeking declaratory
16 and monetary relief, and asking for the removal of all negative inferences from his personnel file.

17 27. On August 30, 1999, the Court entered a thirty (30) day stay of *Trial*, pending the
18 outcome of the defendants' request to the Supreme Court to consider an appeal. *Order*, (Aug.
19 30, 1999).

20 28. September 15, 1999, the Supreme Court denied the defendants' interlocutory appeal.
21 *Order Denying Appeal*, SU99-08 (Sept. 15, 1999).

22 29. On September 20, 1999, the defendants filed a *Motion for Protective Order*, requesting
23 all information contained within executive session be kept under seal. See Ho-Chunk Nation
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1 Rules of Civil Procedure (hereinafter HCN R. Civ. P.), Rule 37. Additionally, the defendants
2 sought to close the courtroom during any proceedings referring to the information relayed during
3 such executive sessions.

4 30. On September 29, 1999, the defendants filed a *Motion in Limine* with the Court, moving
5 to waive Executive Session confidentiality. *Notice of Mot. & Mot. in Limine*, (Sept. 29, 1999).

6 31. On October 27, 1999, the Court granted the *Protective Order and Motion in Limine*.
7 *Order (Granting Protective Order & Mot. in Limine)* (Oct. 27, 1999).

8 32. On January 28, 2003, the case was reassigned from *Pro Tempore* Associate Judge
9 Rebecca Weise to former Chief Judge William H. Bossman. *Order Reassigning Case*, (Jan. 28,
10 2003).

11 33. On February 3, 2003, the Court entered an order allowing the parties time to request a
12 new *Pro tempore* judge and a new trial, following the failure of the *Pro tem* judge to take any
13 action on the case. *Order (Allowing Parties Time to Request New Pro tem Judge & New Trial)*,
14 (Feb. 3, 2003). However, the plaintiff consented to have Chief Judge Bossman resolve the
15 matter.
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19 34. Following Chief Judge Bossman's departure, the Court reassigned the case to *Pro*
20 *Tempore* Associate Judge Tina F. Gouty-Yellow on July 12, 2005. *Reassignment Order*, (July
21 12, 2005).

22 35. Following Associate Judge Gouty-Yellow's departure, the Court reassigned the case to
23 Associate Judge Amanda L. Rockman. *Reassignment Order*, (Aug. 28, 2006).
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26 **DECISION**
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1 The plaintiff claimed the actions of the Legislature were arbitrary and capricious, beyond
2 the scope of power of the Legislature, and violated his right to due process of law. The plaintiff
3 sought declaratory and monetary relief. The defendants asserted that the plaintiff failed to grieve
4 his suspension through the proper channels, or, alternatively, the Nation and its officials were
5 immune from suit under the doctrine of sovereign immunity.
6

7

8 **I. Did the Legislature waive the Ho-Chunk Nation's sovereign immunity?**

9 The Supreme Court of the United States has ruled in actions against Indian tribes, a
10 waiver of sovereign immunity must be clear and unequivocal. *Santa Clara Pueblo v. Martinez*,
11 436 U.S. 49, 58 (1978); *see also Puyallup Tribe v. Wash. Dep't of Game*, 433 U.S. 165, 172-73
12 (1977); *United States v. U. S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *Turner v.*
13 *United States*, 428 U.S. 354, 358 (1919). This Court has heard and decided a long line of cases
14 challenging actions by the Legislature. *See* CONSTITUTION OF THE HO-CHUNK NATION
15 (hereinafter CONSTITUTION), ART. XII, § 1; *see also Chloris A. Lowe, Jr. v. HCN Legislature et*
16 *al.*, CV 97-12 (HCN Tr. Ct., Mar. 21, 1997) at 14, *aff'd*, SU 97-01 (HCN S. Ct., June 12, 1997).
17 The plaintiff named as party defendants, the Ho-Chunk Nation, the Ho-Chunk Nation
18 Legislature, as well as individual legislators. *Am. Compl.*, CV 99-22 (Aug. 6, 1999). The
19 CONSTITUTION states, “[t]he Ho-Chunk Nation shall be immune from suit except to the extent
20 that the Legislature expressly waives its sovereign immunity, and officials and employees of the
21 Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit.”
22 CONST., ART. XII, § 1. The plaintiff’s successive pleadings do not contain a reference to a
23 mandated express waiver of sovereign immunity from the Legislature. *See, e.g., Decorah v.*
24 *Rainbow Casino*, CV 95-18 (HCN Tr. Ct., Mar. 18, 1996). The defendants have the right to
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1 assert the defense of sovereign immunity from suit absent an express legislative waiver.² CONST.,
2 ART. XII, § 1; *see also* *Lowe, Jr.*, CV 97-12 at 14.

3 Rather, the plaintiff relies on “the exception to the sovereign immunity bar” that
4 individual legislators acted beyond the scope of their authority. *Lowe, Jr.*, CV 97-12 at 15;
5 CONST., ART. XII, § 2. In this instance, a suit in equity for “declaratory and non-monetary
6 injunctive relief in Tribal Court” allows the plaintiff to have the Court institute corrective actions
7 against the named defendants. *Id.* The plaintiff must show affirmatively that the legislators who
8 took the action against him acted outside the scope of their authority. CONST., ART. XII, § 2.

9
10 However, the CONSTITUTION, to reiterate, renders this a difficult proposition. The
11 CONSTITUTION states that the Legislature shall have the power to set “its own procedures, select
12 its officers, and to enact laws governing its attendance of its members, including penalties for
13 absences.” CONST., ART. V, § 2(g). Therefore, the Legislature has the power to set its own
14 procedures governing its members’ attendance. Within the CONSTITUTION, the Legislature has
15 twenty-four (24) constitutionally enumerated powers. CONST., ART. V, § 2. Thus the faith of Ho-
16 Chunk Nation citizens and members in the Legislature is dependent on, among other policy
17 concerns, the Legislature’s integrity and its individual legislators acting as committed public
18 servants within such political body. In this instance, the individual legislators acted as a political
19 body, and they suspended the plaintiff pending the outcome of an investigation.³ *See* Def.’s Ex.
20 E. The Executive Session Meeting Minutes indicated that Legislator Dallas R. White Wing made
21 a motion to suspend the plaintiff without pay effective immediately until an investigation was
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26 ² The plaintiff may have attempted to utilize the former Administrative Review Process. This possibility remains
27 unclear because the plaintiff submitted his April 1, 1999 level 1 “grievance as the result of his suspension that
28 commenced March 16, 1999.” Def. Ex. L at 2. Regardless, the plaintiff certainly filed a late grievance, thereby
eliminating recourse to the limited waiver of sovereign immunity. See PERSONNEL MANUAL, Ch. 12 at 50b.

³ The plaintiff also argued that the defendants did not follow the CODE OF ETHICS ACT. However, this argument is
flawed since the CODE OF ETHICS ACT does not contain a waiver of sovereign immunity.

1 completed concerning allegations of violations of various laws, and indicated that the
2 investigation was to be completed by March 30, 1999. *Id.* The motion carried 10-0-0. *Id.*

3 The plaintiff has seemingly failed to substantiate his burden of proof that the named
4 officials of the Legislature acted outside the scope of their authority when the Legislature
5 suspended him pending investigation of the *Bigthunder Incident*. The Legislature reacted to Ms.
6 Bigthunder's complaint against the plaintiff, and suspended him during the pendency of the
7 investigation into the alleged incident. The plaintiff was afforded a removal hearing to face the
8 charges levied against him on April 16, 1999. CONST., ART. V, § 3.

9
10 Upon the conclusion of the investigation, the plaintiff was reinstated to his position on
11 the Legislature. There exists no evidence on the record that the individual members of the
12 Legislature acted outside the scope of the authority granted to them by the CONSTITUTION as it
13 relates to internal legislative procedures. Therefore, the plaintiff may not receive any equitable
14 relief on this ground. However, this conclusion does not end the inquiry. The Legislature, as an
15 entity of the Ho-Chunk Nation, still has the duty to abide by the constitutional mandates of due
16 process as articulated within CONSTITUTION, ARTICLE X, § 1(a)(8).
17
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19
20 **II. Was the plaintiff afforded minimal, procedural due process protections**
21 **as guaranteed by the CONSTITUTION, ARTICLE X, § 1(a)(8) in relation to the**
22 **plaintiff's March 16, 1999 suspension?**

23 The Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) recognized that the
24 Ho-Chunk Nation cannot detrimentally affect the property right of employment without
25 providing sufficient notice to the employee. *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-
26 02 (HCN S. Ct., July 27, 1999) at 3; *see also Debra Knudson v. HCN Treas. Dep't*, SU 98-01
27 (HCN S. Ct., Dec. 1, 1998) at 3-4. "Notice must at a minimum give an employee a sufficient
28

1 understanding of the underlying facts so that the employee may consider whether or not to file a
2 grievance with sufficient knowledge.” *Kelty*, SU 99-02 at 4. The Supreme Court indicated that an
3 insufficient notice is tantamount to no notice, and therefore violative of procedural due process.

4 *Id.*

5 The defendants in the instant case did not afford the plaintiff his minimal procedural due
6 process protections. The plaintiff received the legislative agenda on the afternoon of Monday,
7 March 15, 2006. The agenda stated that the Legislature would be reviewing the “Berna
8 BigThunder incident report.” Tr. at 46, ¶ 13. The plaintiff was neither informed a hearing would
9 take place on the matter, nor any disciplinary action would be taken against him.
10

11
12
13 **A. Is the plaintiff entitled to equitable or legal relief and/or attorneys fees
14 and costs in relation to the his March 16, 1999 suspension?**

15 In 2003, the Supreme Court upheld the removal of negative references from an
16 employee’s personnel file. *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8,
17 2003) at 10. The Court noted “such forward-looking relief is well within the powers enumerated
18 in the CONSTITUTION ART. VII, § 6(a). ‘The Trial Court shall have the power to issue all
19 remedies in law and in equity including injunctive and declaratory relief and all writs including
20 attachment and mandamus.’” *Id.* This Court has regularly permitted such relief. *See generally,*
21 *Joan Whitewater v. Millie Decorah et al.*, CV 96-88 (Jan. 20, 1998). Under the auspices of due
22 process, the Court grants the relief sought by the plaintiff, and directs the Ho-Chunk Nation
23 Department of Personnel to remove all negative references connected to the basis of these
24 proceedings from the plaintiff’s file.
25

26
27 The plaintiff has requested that the Court grant him back pay for the duration of his
28 suspension pending the investigation of the *Bigthunder Incident*. The Court has the right to

1 award back pay against the Nation to successful petitioners, provided again that the Legislature
2 has expressly waived the Nation's sovereign immunity from suit. See *Smith*, SU03-08 at 10. The
3 Supreme Court in *Smith* noted the doctrine of sovereign immunity existed to protect the Ho-
4 Chunk Nation Government from continuous suits for damages, not to deprive claimants from
5 equitable remedies. *Id.*; see also CONST., ART. XII, § 1-2. The Court has awarded appropriate
6 relief above, but the finding of a due process violation does not, and cannot, serve as a substitute
7 for a legislative waiver.
8

9 The plaintiff has asked the Court to grant him attorney's fees relating to this case. The
10 firm of Skolos & Millis, S.C. has filed for a total of \$3,048.95 in costs and fees relating to this
11 action; \$2,964.95 in attorney billing and filing fees of \$84.00. The Court may grant attorneys
12 fees and costs as deemed appropriate. HCN R. Civ. P. 53. The Court previously confronted the
13 question of an award of fees against the Nation for unreasonable or unconstitutional actions.
14 *Chloris Lowe, Jr. v. Ho-Chunk Nation Legislature Members, et al.*, CV 00-104 (HCN Tr. Ct.,
15 Mar. 22, 2004). In *Lowe*, the Court ruled except in limited cases, the American Rule should
16 apply to all attorney fees cases until the Supreme Court or Legislature definitively indicate
17 otherwise, and declined to grant fees. Under the American Rule, parties generally bear the burden
18 of costs and fees associated with bringing legal action. As a result, the Court declines to award
19 attorneys fees in this matter. Likewise, the Court declines to grant litigation costs, *i.e.*, mailing
20 and filing fees, as a matter of basic fairness. See *Kristen K. White Eagle v. Ho-Chunk Casino et*
21 *al.*, CV 04-97 (HCN Tr. Ct., Oct. 4, 2005). The Court distinguishes its recent decision to award
22 attorneys fees by noting the parties in the present case have no specifically stipulated to the
23 award of fees or costs. *Ho-Chunk Nation Legislature v. George Lewis*, CV 07-73 (HCN Tr. Ct.,
24 Nov. 06, 2006).
25
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28

1 **IN SUMMATION**, the Court cannot award the plaintiff any monetary relief despite a
2 denial of due process since a) no waiver of sovereign immunity exists or b) the plaintiff failed to
3 adhere to the terms of the limited waiver of sovereign immunity within the former PERSONNEL
4 MANUAL. The Court, however, possesses the authority to grant equitable relief for the violation
5 of due process. The Court accordingly enjoins the named individual defendants to remove the
6 negative inferences from the plaintiff's personnel file.
7

8 The parties retain the right to file a timely post judgment motion with this Court in
9 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
10 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
11 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
12 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
13 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
14 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
15 order, together with a filing fee as stated in the appendix or schedule of fees” *HCN R. App. P.*
16 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
17 *R. App. P.*].” *HCN R. Civ. P.* 61.
18
19

20 **IT IS SO ORDERED** this 9th day of November 2006, by the Ho-Chunk Nation Trial
21 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
22

23 _____
24 Honorable Amanda L. Rockman⁴
25 Associate Trial Court Judge
26
27
28 _____

⁴The Court appreciates the assistance of Staff Attorney Jennifer L. Tilden in the preparation of this opinion.

