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

Joyce L. Warner,
Plaintiff,

v.

Case No.: **CV 04-72**

**Ho-Chunk Nation; Ona Garvin, Director of
Gaming; James Webster, Department of
Business; individually and in their official
capacity,**
Defendants.

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**ORDER
(Final Judgment)**

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INTRODUCTION

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The Court must determine whether the plaintiff maintained a property interest in her former position, as distinguished from employment in general, which rendered a disciplinary demotion constitutionally impermissible in the absence of minimum procedural due process protection. The Court holds that the HO-CHUNK NATION PERSONNEL POLICIES & PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL) created no such property interest. The Court also holds that the plaintiff failed to adequately rebut the asserted grounds for the demotion. Furthermore, the plaintiff could not have secured an award of money damages without an express waiver of sovereign immunity.

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PROCEDURAL HISTORY

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The Court recounts the procedural history in significant detail within a previous judgment. *Order (Determination upon Remand)*, CV 04-72 (HCN Tr. Ct., Aug. 15, 2008) at 1-3.

1 For purposes of this decision, the Court notes that the plaintiff, Joyce L. Warner, by and through
2 Attorney Timothy Harjo, sought and received an extension of the post-trial briefing schedule.
3 *Order (Granting Continuance)*, CV 04-72 (HCN Tr. Ct., Sept. 17, 2008). Consequently, the
4 parties filed timely legal memoranda on October 10, 2008. *See Mem.*, CV 04-72 (Oct. 13,
5 2008);¹ *Def.' Post-Trial Br.*, CV 04-72 (Oct. 10, 2008). Neither party chose to file a responsive
6 brief on or before October 24, 2008. *Order (Granting Continuance)*.

8 9 **APPLICABLE LAW**

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

11 **Art. V - Legislature**

12 **Sec. 2. Powers of the Legislature.** The Legislature shall have the power:

13 (a) To make laws, including codes, ordinances, resolutions, and statutes;

14 (f) To set the salaries, terms and conditions of employment for all government personnel;

15 **Art. VII - Judiciary**

16 **Sec. 5. Jurisdiction of the Judiciary.**

17 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both
18 criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
19 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
20 officials and employees, shall be a party. Any such case or controversy arising within the
21 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
22 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
23 the Nation's sovereign immunity.

24 **Art. X - Bill of Rights**

25 **Sec. 1. Bill of Rights.**

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27 ¹ The plaintiff submitted her *Memorandum* by facsimile transmission at 2:35 p.m. PDT on Friday, October 10, 2008,
28 which caused administrative staff to file stamp the document as received on Monday, October 13, 2008, since
technically received after business hours at 4:35 p.m. CDT on October 10, 2008. *See Ho-Chunk Nation Rules of
Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 84. The Court nonetheless considered the plaintiff's submission
since it did not explicitly reference the Central Time Zone within its briefing schedule.

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

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

4 Art. XII - Sovereign Immunity

5 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit
6 except to the extent that the Legislature expressly waives its sovereign immunity, and official
7 and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall
8 be immune from suit.

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

14 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated
15 Jan. 22, 2004)

16 Introduction

17 General Purposes: [p. 2]

18 *****

19 The Ho-Chunk Nation hereby asserts that it has the right to employ the best qualified persons
20 available; that the continuation of employment is based on the need for work to be performed,
21 availability of revenues, faithful and effective performance, proper personal conduct, and
22 continuing fitness of employees; and that all employees are terminable for cause unless
23 otherwise specified in writing as a prescribed employment term, with the exception of at-will
24 employees. (RESOLUTION 1/22/04A)

25 *****

26 Ch. 6 - Compensation and Payroll Practices

27 Compensation upon Promotion or Demotion [p. 17]

28 *****

Permanent employees who are demoted to a position with a lower pay rate or range will be
reduced to the rate or range rate in the lower position as follows:

1 Non-disciplinary demotions will be assigned to that pay rate the employee would have achieved
2 in the lower position if the employee's service had been continuous in the lower position based
3 on his or her original permanent hire date, which will be retained. Upon the effective date of
4 demotion, the employee will be assigned a new annual review date and will be placed on a ninety
5 (90) day performance probation with a possible merit increase. Only employees that have
worked for the Nation for over ninety (90) days and have a good current evaluation will be
demoted for non-disciplinary reasons. (RESOLUTION 03/23/99G)

6 Disciplinary demotions will be assigned to the base rate of the new position. Upon the
7 effective date of demotion, the employee will be assigned a new annual review date and will be
8 placed on a ninety (90) day performance probation with a possible merit increase.

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

Types of Discipline

[pp. 59-60]

11 Depending on the nature of circumstance of an incident, discipline will normally be progressive
12 and bear a reasonable relationship to the violation. The types of discipline that may occur are as
follows in general order of increasing formality and seriousness:

A. Verbal Reprimand

14 A verbal statement by the supervisor to an employee, usually pointing out an unsatisfactory
15 element of job performance, is intended to be corrective or cautionary. A verbal reprimand
16 informally defines the area of needed improvement, sets up goals for the achievement of
17 improvement, and informs the employee that failure to improve may result in more serious
actions. The supervisor shall record the date and content of the reprimand. The record shall be
18 placed in the employee's personnel file.

B. Written Reprimand

20 This is the first level of formal discipline. The written reprimand is issued by the supervisor with
21 approval of the Department Director, and a copy to the Personnel Office for placement in the
employee's personnel file.

C. Suspension

23 An employee may be suspended from work without pay for up to five working days by authority
24 of the Department Director. Suspensions of a longer duration require approval by the Personnel
25 Director. Under no circumstances will a suspension exceed 10 working days.

D. Discharge for Misconduct

27 Employees should be aware that their employment relationship with the Ho-Chunk Nation is
28 based on the condition of mutual consent to continue the relationship between the employee and
the Nation. Therefore, the employee or Nation is free to terminate the employment relationship

1 for misconduct, at any time. Recommendations to discharge an employee are to be made to and
2 authorized by the Department Director.

3 Initiating Discipline: Considerations and Notice

[p. 60]

4 Supervisory and management personnel should be guided in their consideration of disciplinary
5 matters by the following illustrative, but not exclusive, conditions.

- 6 * The degree of severity of the offense
- 7 * The number, nature, and circumstance of similar past offenses
- 8 * Employee's length of service
- 9 * Provocation, if any, contributing to the offense
- 10 * Previous warnings related to the offense
- 11 * Consistency of penalty application
- 12 * Equity and relationship of penalty to offense

13 Disciplinary notice to regular employees should, as a general rule, contain the following
14 information:

- 15 * A statement of the disciplinary action to be taken and its effective date
- 16 * A statement of the reason(s) for imposing the discipline and the nature of the violation
- 17 * Attachment of any supporting material or evidence where appropriate
- 18 * What the worker has to do to improve

19 Service of disciplinary notice will be deemed to have been made upon personal presentation, or
20 by depositing the notice, postage prepaid, in the U.S. mail, addressed to the employee's last
21 known address on file.

22 **ENTERPRISE EMPLOYEES ONLY**

[p. 62]

23 **Matters covered by Administrative Review System:** Eligible employees who have
24 complaints, problems, concerns, or disputes with another employee, the nature of which causes a
25 direct adverse effect upon the aggrieved employee, may initiate an administrative review
26 according to established procedures. Such matters have to do with: specific working conditions,
27 safety, unfair treatment, disciplinary actions (except verbal reprimands), compensation, job
28 classification, reassignment, any form of alleged discrimination, a claimed violation,
misinterpretation, or inequitable application of these policies and procedures.

Hearing Levels for Enterprise:

[pp. 62-63]

Probationary or Limited Term Employees may *[sic]* not grieve on any matters.

1. Verbal warnings may not be grieved, but the employee may add a written response to their personnel file.
2. Performance Evaluations and written reprimands are to be grieved in sequence to:

2 Demoted: A change in employment status resulting in:

- 3 1. movement from one position to another that requires fewer minimum qualifications and
4 is assigned a lower pay range; or
5 2. movement from one pay step to a lower pay step within the same salary range assigned to
6 a particular position.

7 Discharge: Involuntary separation or termination of employment.

8 Suspension: The temporary removal of an employee from service, without pay, for disciplinary
9 reasons and for a specified period of time.

10 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

11 Rule 42. Scheduling Conference.

12 *Scheduling Order.* The Court may enter a scheduling order on the Court's own motion or on the
13 motion of a party. The *Scheduling Order* may be modified by motion of a party upon showing
14 of good cause or by leave of the Court.

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

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

20 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
21 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
22 conclusions or make additional findings or conclusions, amending the judgment accordingly.
23 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
24 time for initiating an appeal commences upon entry of the amended judgment. If the Court
25 denies a motion filed under this Rule, the time for initiating appeal from the judgment
26 commences when the Court denies the motion on the record or when an order denying the
27 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
28 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*.

(C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
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
the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal

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

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

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

17 Rule 61. Appeals.

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

22 Rule 84. Business Hours.

23 The Court is open from 8:00 a.m. to 4:30 p.m. Monday through Friday, with the exception of
24 legal holidays, closings due to inclement weather, or other unforeseen circumstances. For a
25 document to be timely filed, it must be received and stamped by the Clerk of Court no later than
26 4:30 p.m. on or before the due date.

27 **FINDINGS OF FACT**

28 1. The Court incorporates by reference *Findings of Fact* 1-8 enumerated in a prior decision.
29 *Order (Determination upon Remand)* at 7-8.

30 2. In the initial pleading, the plaintiff recounts the events surrounding her May 23, 2004
31 demotion as follows:

32 Cindy Spring, the Administrative Assistant at DeJope Bingo, called to let
33 me know that Ona Garvin, Interim Director of Gaming had called and

1 asked that I return her call. On 05-20-04 at 10:58 A.M., I returned Ona
2 Garvin's call. . . . I was on sick leave from May 13, 2004 through May
3 21, 2004.

4 Ona Garvin stated that a management decision had been made to move me
5 from DeJope Bingo as Executive General Manager to Ho-Chunk Bingo as
6 Gaming Hall Manager under Robert Mudd, General Manager of Ho-
7 Chunk Casino effective Sunday, May 23, 2004. This management
8 decision was a demotion for me from Executive General Manager to
9 Gaming Hall Manager. No information was given to me why I was being
10 moved. . . .

11 As of this date, I have not received any status changes, memos, letters or
12 formal written forms in regard to my demotion. I would like to know why
13 I have not received any written documentation.

14 *Compl.*, CV 04-72 (July 20, 2004), Attach. 1 at 2, 4; *see also Defs.' Answers to Pl.'s First Set of*
15 *Interrogs.*, CV 04-72 (Nov. 28, 2007) at 3.²

16 3. The defendants responded in part: "At no time did the Defendants wrongfully demote the
17 Plaintiff. . . . The plaintiff was demoted properly according to HCN POLICIES AND PROCEDURES
18 MANUAL, Ch. 6, Pg. 16, Non-disciplinary demotions. Effective on May 23, 2003, the Plaintiff
19 was non-disciplinarily demoted from Executive Manager of DeJope Bingo to Gaming Hall
20 Manager of Ho-Chunk Casino and Bingo." *Defs.' Answer*, CV 04-72 (Sept. 1, 2004) at 2.

21 4. Upon remand, the Court determined to re-establish each scheduling timeframe, including
22 the discovery period, as if the plaintiff had filed a new case. *Scheduling Order*, CV 04-72 (HCN
23 Tr. Ct., Sept. 20, 2007). This action reflected the wishes of the parties. *Order (Determination*
24 *upon Remand)* at 2 n.2. The plaintiff subsequently sought and received several modifications to
25 the *Scheduling Order*. *Id.* at 2-3; *see also Scheduling Order* at 1 (citing *HCN R. Civ. P.* 42).

26
27 ² In a subsequent amended pleading, the plaintiff discards this version of the facts, alleging that "[w]ithout warning
28 or notice, the Defendant [*sic*] was demoted from her position as Executive Director of De Jope [*sic*] Bingo and
Gaming Center on April [*sic*] 23, 2004" *Pl.'s First Am. Compl.*, CV 04-72 (Jan. 18, 2005) at 2. The plaintiff
reiterated this account within a later dispositive motion. *Br. in Supp. of Mot. for Summ. J.*, CV 04-72 (Nov. 23,
2005) at 2; *but see Mem.* at 14.

1 5. Regarding the disciplinary motivation for the demotion, the plaintiff asserts that “[n]ot
2 until November of 2008, some four years later did the Defendant’s provide any reason or
3 explanation for Plaintiff’s employment status from Executive Manager of DeJope [*sic*] Bingo to
4 Bingo Hall Manager at Rainbow Casino.” *Mem.* at 14 (citing *Def.’s Answers to Pl.’s First Set of*
5 *Interrogs.* at 2-4). On November 28, 2007, the defendants offered the following clarification for
6 the first time:
7

8 George Lewis, former President, and James Webster, former Executive
9 Director of Business, were the decision makers [*sic*] regarding Ms.
10 Warner’s various transfers which included her demotion from the
11 Executive Manager of DeJope Gaming. The decision was made on May
12 19, 2004 and executed commencing on May 19, 2004 and continued until
13 May 23, 2004 when it became effective. . . . Ms. Warner was asked to
14 present a budget for the facility at a meeting on March 23 and 24, 2004.
15 During the meeting it became readily apparent that someone other than
16 Joyce Warner had prepared the budget and that Ms. Warner was unaware
17 of its contents or how it worked. Ms. Warner did not appropriately handle
18 administrative matters. . . . The plaintiff was demoted for inadequate
19 performance as an administrator.

20 *Def.’s Answers to Pl.’s First Set of Interrogs.* at 2-4. Shortly thereafter, former Executive
21 Director Webster supplemented the above response, stating:
22

23 In addition to the lack of knowledge regarding ongoing finances of DeJope
24 [*sic*], the facility was physically deteriorating and wasn’t being properly
25 cared for or maintained. Joyce had no plans for improving the situation
26 nor did she notify the Executive Director of Business or anyone in the
27 business department that the financial and physical conditions of DeJope
28 needed immediate attention.

The Director of Gaming informed me that Joyce’s secretary was responsible for what work was done at DeJope and if that person wasn’t there to help Joyce, then Joyce would not be able to do the job. Joyce took the philosophy of surrounding yourself with good people to the extreme. Joyce’s performance at the budget review meeting is indicative of her management capabilities for a facility as large as DeJope.

I felt the Nation’s best financial interest would be served by allowing Joyce to use her experience and focus her attentions strictly on a bingo venue.

1 *Def's.' Supplemental Answers to Pl.'s First Set of Interrogs.*, CV 04-72 (Nov. 30, 2007).

2 6. Despite the foregoing responses, the plaintiff sought no extension of the discovery period
3 for purposes of exchanging further interrogatories or scheduling depositions.
4

5 7. The plaintiff addressed the charge that she failed to “notify the Executive Director of
6 Business . . . that the financial and physical conditions of DeJope needed immediate attention,”
7 *id.*, claiming that she described these deficiencies in detail within an initial report delivered to
8 defendant Webster. *Trial* (LPER at 48, May 15, 2008, 02:31:14 CDT). The plaintiff, however,
9 submitted no such report into evidence.
10

11 8. Each of the plaintiff’s witnesses that testified about the reasons for the demotion joined in
12 the above characterization. *Id.* at 29, 33, 35, 42, 43, 11:39:21, 11:51:07, 12:01:55, 12:34:02,
13 12:34:36 CST. At best, former Executive Administrative Assistant Cindy M. Whitehorse merely
14 testified that she “assisted” the plaintiff with budget preparation. *Id.* at 21, 11:13:52 CST.
15

16 9. Supervisory staff promoted the plaintiff on November 3, 2003, in hopes that her
17 managerial style would improve financial and personnel conditions at DeJope Bingo. *Id.* at 42,
18 12:33:22 CST; *see also* Trial Ex. A at 1. After six (6) months, supervisory staff demoted the
19 plaintiff since each individual perceived a lack of tangible improvement attributable to the
20 plaintiff’s actions.
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22 10. Processing the plaintiff’s demotion as a non-disciplinary measure enabled the plaintiff to
23 receive the “pay rate [she] would have achieved in the lower position if the [her] service had
24 been continuous in the lower position based on . . . her original permanent hire date.” PERS.
25 MANUAL, Ch. 6 at 17. Otherwise, the plaintiff would have received “the base rate of the new
26 position.” *Id.*
27
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1 11. The plaintiff incorporated the earlier pleadings into her most recent amended pleading.
2 *Pl.'s Second Am. Compl.*, CV 04-72 (Nov. 30, 2007) at 4, 6. The defendants have repeatedly
3 asserted the defense of sovereign immunity since the first responsive pleading. *Defs.' Answer* at
4 3.
5

6 DECISION

7

8 The Court afforded the parties an opportunity to brief the issues relevant to the Court's
9 resolution of this case. The principal issue under consideration is one of first impression. The
10 Court has never determined whether an employee must receive procedural due process protection
11 in relation to a demotion. Likewise, the Court has never considered whether the limited waiver
12 of sovereign immunity enables a demoted employee to receive lost wages. The Court shall
13 address each identified issue in turn.
14

15 I. Does an employee maintain a property interest in his or her 16 position in addition to the recognized property interest in 17 employment?

18 The Court has previously provided a discussion relating to procedural due process, and,
19 therefore, refers the parties to that jurisprudential examination. *Order (Denying Pl.'s Mot. for*
20 *Summ. J.)*, CV 04-72 (HCN Tr. Ct., Sept. 11, 2006) at 14-17. For present purposes, the Court
21 will simply reiterate the universally accepted proposition that “property interests, of course, are
22 not created by the Constitution. Rather, they are created and their dimensions are defined by
23 existing rules or understandings that stem from an independent source” *Id.* at 16 (quoting
24 *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The plaintiff acknowledged this common
25 understanding within her post-trial analysis of procedural due process. *Mem.* at 6 (citing *Roth*,
26 408 U.S. at 577). The plaintiff then proceeds to assert that she “need only show that [the] Ho-
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1 Chunk Nation Constitution and the Personnel Policy Manual combine to create *an entitlement to*
2 *continued employment.*” *Id.* (emphasis added).

3
4 In this regard, the plaintiff somewhat confusingly concludes that the “Ho-Chunk Nation
5 personnel manual containing . . . the procedure for demoting employees, together with the
6 Nation’s rules of conduct, entitled her to continued employment in her position . . . and created
7 an implied contract for demotion only for just cause and in accordance with the procedure
8 specified in the manual.” *Id.* at 8. The “procedure” that the plaintiff references appears within
9 the non-disciplinary demotion provision, and does not constitute a procedure, but rather the
10 conditions necessary for processing such a demotion. PERS. MANUAL, Ch. 6 at 17. The plaintiff
11 nonetheless argues that the requirements “that the employee . . . be[] employed for at least 90
12 days; and have a good current evaluation . . . restricts an employer from demoting an employee
13 for a non-disciplinary reason without protecting the employee’s property rights, such as her
14 earnings, reputation and work history.” *Mem.* at 11 (citing *id.*).

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17 The plaintiff, however, does not explain how these minimal conditions either protect
18 “earnings, reputation and work history” or how these “factors underlying the necessity of a pre-
19 termination hearing” have become recognized property rights. *Margaret G. Garvin v. Donald*
20 *Greengrass et al.*, CV 00-10, -38 (HCN Tr. Ct., Mar. 9, 2001) at 27. In *Garvin*, the Court set
21 forth several accepted rationales for affording pre-deprivation minimal procedural due process in
22 the context of a termination, but one must still possess a property interest to engage in a due
23 process analysis. *Id.* at 27-28. The plaintiff seemingly insists on self-identifying property
24 interests as opposed to identifying the statutory bases for the same. She “confuses the mere loss
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1 of something of value (such as wages) with injury to a property interest (such as the right to earn
2 wages).”³ *Diaz v. Gates*, 420 F.3d 897, 900 n.1 (9th Cir. 2005).

3
4 Moreover, the plaintiff does not explain why she focuses upon the non-disciplinary
5 demotion provision when the Court has determined that the defendants performed a disciplinary
6 demotion. *Order (Determination upon Remand)* at 8. The Court can only speculate that the
7 plaintiff attempts to cling to the two (2) conditions appearing in the non-disciplinary provision
8 since neither provision requires the presence of “good cause” for its execution. PERS. MANUAL,
9 Ch. 6 at 17. As earlier stated, “[t]he Nation could arguably demote an employee for a
10 disciplinary reason or no reason at all.” *Order (Determination upon Remand)* at 10. Quite
11 simply, no convincing argument exists supporting a property interest in one’s position under the
12 PERSONNEL MANUAL.
13

14 The Ho-Chunk Nation Supreme Court has asserted that “[t]hrough the binding precedent
15 of HCN case law it is clear that supervisors fail to afford an employee with due process when
16 they do not provide the employee with at least a minimal opportunity to be heard before a
17 suspension or termination.” *Kenneth L. Twin v. Toni McDonald et al.*, SU 05-09 (HCN S. Ct.,
18 July 3, 2006) at 7. This case precedent all derives from a single pronouncement in the
19 introductory paragraphs of the former PERSONNEL MANUAL, namely: “all employees are
20 terminable for cause unless otherwise specified in writing as a prescribed employment term . . .
21
22

23
24 ³ The Court earlier conjectured that an employee might conceivably hold a liberty interest in connection with one’s
25 personnel record, but the plaintiff makes no concise argument in the case at bar for recognizing this type of interest.
26 *Garvin*, CV 00-10, -38 at 29-30. Instead, the plaintiff continues to simply presume the results of a legal argument
27 without making a measured argument in the first instance. And, in doing so, the plaintiff claims that the “denial of a
28 pre-demotion hearing . . . adversely affected a *cognizable property interest in her continued employment* under HCN
law.” *Mem.* at 16 (emphasis added). Regarding liberty interests, the Ninth Circuit Court of Appeals noted that
“accusations against an employee do not implicate a constitutional liberty interest unless they seriously damage [her]
community standing and associations or foreclose [her] freedom to pursue other employment.” *Wheaton v. Webb-
Petett*, 931 F.2d 613, 617 (9th Cir. 1991). Ms. Warner has not even attempted to present such a case, and since the
demotion was processed as a non-disciplinary measure, she would likely prove unable to make the necessary
showing.

1 .” PERS. MANUAL, Intro. at 2. The PERSONNEL MANUAL defines “discharge” as an “involuntary
2 separation or termination of employment.” *Id.*, Ch. 14 at 69. Likewise, “suspension” is defined
3 as a “temporary removal of an employee from service.” *Id.* at 72.
4

5 Conversely, the plaintiff’s demotion did not sever the employment relationship with the
6 Nation. The plaintiff’s employment continued without interruption. A demotion involves a
7 “change in employment status,” which may result in “movement from one position to another.”
8 *Id.* at 69. Therefore, the plaintiff’s repeated arguments that the demotion impacted her
9 “continued employment” are neither accurate nor apt. *Supra* p. 13, note 3; *see also Ross v.*
10 *Clayton County*, 173 F.3d 1305, 1307 (holding “that an employee may have a property interest in
11 his rank in addition to a property interest in continued employment itself”).
12

13 Existing federal case law, albeit minimal, lends further credence to this outcome.

14 The same analysis applied to determine the existence of a property right in
15 employment is utilized to determine if there is a property right in a
16 particular employment status. Procedural detail in a statute or regulation,
17 standing alone, is not sufficient to establish a protected property interest in
18 an employment benefit. However, if the statute or regulation places
19 substantive restrictions on the discretion to demote an employee, such as
providing that discipline may only be imposed for cause, then a property
interest is created.

20 *Hennigh v. Shawnee*, 155 F.3d 1249, 1254 (10th Cir. 1998) (citation omitted) (acknowledging
21 that a collective bargaining agreement, contracted pursuant to state legislation, required the
22 presence of “good cause” in the context of a demotion); *accord Sonnleitner v. York*, 304 F.3d
23 704, 711 (7th Cir. 2002); *Williams v. Kentucky*, 24 F.3d 1526, 1538 (6th Cir. 1994); *Sowers v.*
24 *Robertson*, 737 F.2d 622, 624 (7th Cir. 1984); *Shawgo v. Spradlin*, 701 F.2d 470, 476 (5th Cir.
25 1983). Each of the above-cited cases found the presence of a property interest in one’s position,
26 but the underlying terms and conditions of employment each required that good cause justify a
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1 demotion. The PERSONNEL MANUAL contains no such good cause provision in relation to a
2 demotion, disciplinary or non-disciplinary. PERS. MANUAL, Ch. 6 at 17.

3
4 Based upon the foregoing, the Court holds that the plaintiff did not maintain a property
5 interest in her position under the former PERSONNEL MANUAL. The Ho-Chunk Nation
6 Legislature (hereinafter Legislature) specifically enabled supervisors to demote an employee
7 without cause. The defendants consequently had no constitutional duty to afford the plaintiff
8 pre-deprivation minimal procedural due process. In this instance, the defendants executed a
9 disciplinary demotion after the plaintiff did not satisfy expectations following her promotion.
10 Nevertheless, the PERSONNEL MANUAL does not require the presence of good cause to support
11 the demotion, and the Court has no authority to deem otherwise lest it assume a legislative
12 function. The Court has no power, explicit or implicit, to set terms and conditions of
13 employment. *See* CONST., ART. V, § 2(a, f).

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15
16 **II. Does the failure to provide a statutorily required disciplinary
17 notice provide the plaintiff with an actionable offense?**

18 The Court has resolved that the defendants masked a non-disciplinary demotion for one
19 of a disciplinary nature. While the plaintiff was not entitled to procedural due process
20 notification, the PERSONNEL MANUAL still requires the provision of disciplinary notice. PERS.
21 MANUAL, Ch. 12 at 60. The Legislature may have intended the notice section to address the
22 formal measures of discipline discussed within Chapter 12 (written reprimand, suspension and
23 discharge), but the Legislature clearly identified the disciplinary character of the demotion at
24 issue here. Furthermore, neither party provided the Court with legislative history capable of
25 further elucidating the disciplinary notice section.
26

27 The section in question instructs that “[d]isciplinary notice to regular employees, should,
28 *as a general rule*, contain [certain] information.” *Id.* (emphasis added). A supervisor, therefore,

1 maintains some discretion regarding the contents of the notice since the directive is phrased in
2 permissive language. However, the notice must be in written form as reflected within the
3 following service provision, which permits service by either “personal presentation” or mailing.
4
5 *Id.* Former Director of Gaming Garvin offered a verbal notification that did not reveal the
6 disciplinary status of the demotion, and the Court accordingly adjudged that “[t]he plaintiff
7 received no notice of the demotion.” *Order (Denying Pl. ’s Mot. for Summ. J.)* at 12.

8 In 2004, the Court permitted a litigant to attack the propriety of a non-disciplinary
9 demotion. *Anna Kauffman v. Dennis Gager, Dir. of Gaming, et al.*, CV 02-49 (HCN Tr. Ct.,
10 Mar. 30, 2004). Ms. Kauffman received a promotion from her immediate supervisor, but the
11 Director of Gaming subsequently overturned the action since he believed that the plaintiff did not
12 meet the minimum qualifications for the job. *Id.* at 14, 18. At trial, the plaintiff presented
13 testimonial accounts from her supervisor, a Personnel Specialist, and the General Manager, all
14 who supported the grounds for the promotion. *Id.* at 10-13, 16, 19. As a result, the Court
15 deemed that the articulated grounds for the demotion proved in error, and awarded the plaintiff a
16 degree of money damages for lost wages.⁴ *Id.* at 20.

19 The Court recognizes that *Kauffman* dealt with a non-disciplinary demotion, but the
20 instant plaintiff likewise could have attacked the justification(s) for the disciplinary demotion.
21 The plaintiff remained largely unable to do so since the defendants provided no rationale until
22 responding to interrogatories four and a half (4½) years later. Yet, the plaintiff did ultimately
23 receive this opportunity, and, at trial, could not elicit the testimony of anyone within the
24 supervisory chain of command who would have decided otherwise. Therefore, regardless of the
25 amount of time between the demotion and the articulated justification thereof, the Court would
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27

28

⁴ The Court raised the possibility that a due process violation might have occurred, but the Court has not had the occasion to analyze this separate issue until the present case. *Kauffman*, CV 02-49 at 18 n.2.

1 have upheld the basis for the defendants' discretionary action. The defendants deprived the
2 plaintiff of a timely notice, which they could have subsequently perfected, thereby removing any
3 grounds for awarding the plaintiff her former position. The plaintiff may have possibly been
4 able to pursue an award of money damages to compensate for the period of time that elapsed
5 before receiving notification, if it were not for one dispositive fact addressed below.

7 **III. Did the PERSONNEL MANUAL provide an aggrieved employee**
8 **the ability to pursue a claim for money damages in the context**
9 **of a disciplinary demotion?**

10 The Court does maintain subject matter jurisdiction over the instant cause of action, but
11 the mere fact that a litigant may file suit does not obviate the Nation's sovereign immunity. *See*
12 *CONST., ART. VII, § 5(a); see also Marlene C. Cloud et al. v. Ho-Chunk Nation et al., CV 06-31*
13 *(HCN Tr. Ct., Aug. 21, 2007)* at 12. The Nation "shall be immune from suit except to the extent
14 that the Legislature expressly waives its sovereign immunity." *Id., ART. XII, § 1.* In this regard,
15 the Legislature has passed a limited waiver of sovereign immunity, which it subsequently
16 incorporated into the PERSONNEL MANUAL. *PERS. MANUAL, Ch. 12 at 63-64 (codifying HCN*
17 *LEG. RES. 06-09-98A at 2).*

19 Within the limited waiver, the Legislature pronounced a condition precedent to availing
20 oneself of the ability to claim money damages. Specifically, "[j]udicial review of any appealable
21 claim may proceed to the Ho-Chunk Nation Tribal Court after the Administrative Review
22 Process in this Chapter has been exhausted." *Id.* (emphasis added). Relevant to this case, a
23 grievance may proceed to Court, provided that it concerns either a suspension or termination.⁵

26 ⁵ The Court has continued to adjudicate other identified grievable matters. *See, e.g., Kauffman, CV 02-49* (alleging
27 unfair reassignment in the form of a demotion); *Regina K. Baldwin et al. v. Ho-Chunk Nation et al., CV 01-16, -19,*
28 *-21 (HCN Tr. Ct., Oct. 3, 2003)* (alleging unfair treatment and discrimination in the context of a layoff); *Liana Bush*
et al. v. Clarence Pettibone, in his official capacity as Vice President of the Ho-Chunk Nation, et al., CV 00-93, -101
(HCN Tr. Ct., Jan. 23, 2001) (alleging unfair compensation determination). The Court has essentially concluded
that these causes of action arose under the laws of the Ho-Chunk Nation, and the Legislature could not unnecessarily

1 *Id.* at 63. The plaintiff had the right to grieve within the Administrative Review System, *id.* at
2 62, but the PERSONNEL MANUAL restricts Trial Court review to only two (2) causes of action. *Id.*
3 at 63.

4
5 The Court consequently cannot entertain a request for lost wages in relation to a
6 demotion. The language of the limited waiver of sovereign immunity is anything but express,
7 which is a constitutional requirement. CONST., ART. XII, § 1. One might then reasonably
8 question the result in *Kauffman* where the Court did award monetary relief. However, in
9 *Kauffman*, the defendant, Rainbow Casino, did not assert the defense of sovereign immunity
10 within its responsive pleading. *Kauffman*, CV 02-49 (June 17, 2002) at 2. The Court deems that
11 the Nation waives this affirmative defense if not pled in an answer. *See Louella A. Kelty v.*
12 *Jonette Pettibone et al.*, CV 98-49 (HCN Tr. Ct., Feb. 22, 2006); *see also Frey v. EPA*, 270 F.3d
13 1129, 1135 (7th Cir. 2001); *Cords v. State*, 62 Wis.2d 42, 46 (Wis. 1974). In the case at bar, the
14 defendants affirmatively pled the defense of sovereign immunity, and, therefore, the plaintiff
15 cannot receive money damages.
16

17
18 The parties retain the right to file a timely post judgment motion with this Court in
19 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
20 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
21 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
22 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
23 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
24 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
25
26

27
28 constrict the subject matter jurisdiction of the Court. *See* CONST., ART. VII, § 5(a). Regardless, the Court has no
authority to modify the waiver of sovereign immunity. The aforementioned cases proceeded against the named
individuals for declaratory and non-monetary injunctive relief with a single exception as discussed below. *Id.*, ART.
XII, § 2.

1 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*
2 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
3 *R. App. P.*].” *HCN R. Civ. P.* 61.
4

5
6 **IT IS SO ORDERED** this 26th day of January 2009, by the Ho-Chunk Nation Trial
7 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
8

9
10 _____
11 Honorable Todd R. Matha
12 Chief Trial Court Judge
13

Ho-Chunk Nation Court System
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