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

Sherry Fitzpatrick,
Plaintiff,

v.

Case No.: **CV 04-82**

**Ho-Chunk Nation, Ho-Chunk Nation
Business Department, Ho-Chunk Nation
Department of Personnel, Majestic Pines
Bingo & Casino, Mary Whitegull, Jonette
Pettibone, Ida Carrier and James Webster,**
Defendants.

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether to grant the plaintiff's request for relief. The Court holds that the defendants did not afford the plaintiff minimum procedural due process in connection with her discharge from employment. Therefore, the Court reverses the plaintiff's termination and awards appropriate relief. The analysis and holding of the Court follows below.

PROCEDURAL HISTORY

The plaintiff, Sherry M. Fitzpatrick, by and through Attorney Mark L. Goodman, initiated the current action by filing the *Complaint* with the Court on August 25, 2004. Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on September 13, 2004, and delivered the documents by personal service to the defendants'

1 representative, Ho-Chunk Nation Department of Justice (hereinafter DOJ).¹ The *Summons*
2 informed the defendants of the right to file an *Answer* within twenty (20) days of the issuance of
3 the *Summons* pursuant to *HCN R. Civ. P. 5(A)(2)*. The *Summons* also cautioned the defendants
4 that a *default judgment* could result from failure to file within the prescribed time period.
5

6 The defendants, by and through DOJ Attorney Wendi A. Huling, filed its *Answer* on
7 October 4, 2004. In response, the Court mailed *Notice(s) of Hearing* to the parties on October
8 14, 2004, informing them of the date, time and location of the *Scheduling Conference*. The
9 Court convened the *Conference* on November 23, 2004 at 10:00 a.m. CST. The following
10 parties appeared at the *Scheduling Conference*: Attorney Mark L. Goodman, plaintiff's counsel,
11 and DOJ Attorney Wendi A. Huling, defendants' counsel. The Court entered the *Scheduling*
12 *Order* on December 2, 2004, setting forth the timelines and procedures to which the parties
13 should adhere prior to trial.²
14

15 On February 17, 2005, the plaintiff filed the *Motion in Limine*. The defendants filed the
16 timely *Motion in Objection to Plaintiff's Motion in Limine* and accompanying legal
17 memorandum on February 24, 2005. See *HCN R. Civ. P. 19(B)*. The Court convened the *Pre-*
18 *Trial Conference* on February 25, 2005 at 1:30 p.m. CST, at which time the Court entertained
19 arguments on the pending motion.³ The following parties appeared at the *Conference*: Attorney
20
21

22
23 ¹ The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the
24 *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or
an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

25 ² The parties later mutually agreed to revise the scheduling order by postponing trial on three (3) occasions. Defs.'
26 correspondence, CV 04-82 (Sept. 6, 2005); *Stipulation & Mot. to Reschedule Trial Date*, CV 04-82 (Sept. 1, 2005);
Pl.'s correspondence, CV 04-82 (Mar. 4, 2005).

27 ³ The Court denied the *Motion in Limine* from the bench and briefly memorializes its decision within this footnote.
28 *Pre-Trial Conf.* (LPER, Feb. 25, 2005, 01:34:40 CST). Basically, courts recognize that litigants file motions *in*
limine in an effort to secure an exceptional form of relief, *i.e.*, withholding tangential evidence from a jury so as to
avoid undue prejudice. The purpose of such a motion is diminished when the Court conducts a bench trial, and the
fact-finder has already viewed the documents in question. *Mot. in Limine*, Attach. 1-2. Moreover, the Court has
previously ruled that grievance response decisions within the Administrative Review Process serve to bind the
employer. *Margaret G. Garvin v. Donald Greengrass et al.*, CV 00-10, -38 (HCN Tr. Ct., Nov. 16, 2001) at 12-14.

1 Mark L. Goodman, plaintiff's counsel, and DOJ Attorney Wendi A. Huling, defendants' counsel.

2 Each party submitted exhibit lists for use at trial. The plaintiff filed the *Plaintiff's List of*
3 *Exhibits* on August 30, 2005, and the defendants filed the *Defendants' Exhibit List* on September
4 1, 2005. The Court convened *Trial* on October 19, 2005 at 9:00 a.m. CDT. The following
5 parties appeared at *Trial*: Sherry M. Fitzpatrick, plaintiff; Attorney Mark L. Goodman, plaintiff's
6 counsel; Jonette R. Pettibone, defendant; and DOJ Attorney Wendi A. Huling, defendants'
7 counsel.
8

9 10 **APPLICABLE LAW**

11 12 **CONSTITUTION OF THE HO-CHUNK NATION**

13 **Article VI - Executive**

14 **Sec. 1. Composition of the Executive.**

15
16 (b) The Executive Branch shall be composed of any administrative Departments created by
17 the Legislature, including a Department of the Treasury, Justice, Administration, Housing,
18 Business, Health and Social Services, Education, Labor, and Personnel, and other Departments
19 deemed necessary by the Legislature. Each Department shall include an Executive Director, a
20 Board of Directors, and necessary employees. The Executive Director of the Department of
Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
the Department of the Treasury shall be called the Treasurer of the Ho-Chunk Nation.

21 **Article X - Bill of Rights**

22 **Sec. 1. Bill of Rights.**

23 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:
24
25

26 Otherwise, the Administrative Review Process would prove an exercise in futility. *See* HO-CHUNK NATION
27 PERSONNEL POLICIES & PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL), Ch. 12 at 62-63. The Level 2
28 response does not resemble a settlement agreement, whereby the plaintiff stood to lose the granted relief in the event
she chose to appeal the unresolved concerns. *Mot. in Limine*, Attach. 2 at 1. As a consequence of the Court's
decision, the defendants acknowledged the limited scope of trial, but nonetheless contended that they could justify
the termination through presentation of "demonstrative evidence" concerning the remaining grounds for the
plaintiff's discharge. *Pre-Trial Conf.* (LPER, Feb. 25, 2005, 01:38:02 CST); *see also Mot. in Limine*, Attach. 2 at 1.

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

3 DEPARTMENT OF BUSINESS ESTABLISHMENT AND ORGANIZATION ACT OF 2001,
4 1 HCC § 3

5 Sec. 5. Internal Organization.

6 c. The Department shall maintain a current Organizational Chart. The
7 Organizational Chart shall accompany its annual budget submission and any budget
8 modifications during the fiscal year in accordance with the Nation's *Appropriations and Budget
9 Process Act.*

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

11 Ch. 8 - Benefits, Leaves, and Holidays

12 Ho-Chunk Nation's Family Medical Leave: [p. 41]

13 The Executive Branch of the Ho-Chunk Nation shall administer the Nation's unpaid leave policy
14 which will afford employees up to 12 weeks of unpaid, job protected leave to "eligible"
15 employees for certain family and medical reasons. Employees are eligible if they have:

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

17 Discipline Policy [pp. 56-57]

18 The intent of this policy is to openly communicate the Tribal standards of conduct, particularly
19 conduct considered undesirable, to all employees as a means of avoiding their occurrence.

20 The illustrations of unacceptable conduct cited below are to provide specific and exemplary
21 reasons for initiating disciplinary action, and to alert employees to the more commonplace types
22 of employment conduct violations. No attempt has been made here to establish a complete list.
23 Should there arise instances of unacceptable conduct not included in the following list, the
24 Nation may initiate disciplinary action in accordance with policies and procedures.

23 C. Performance [p. 58]

24 1. Inefficiency, incompetency, or negligence in the performance of duties, including
25 failure to perform assigned tasks or training or failure to discharge duties in a prompt, competent,
26 and reasonable manner.

1 Types of Discipline

2 Depending on the nature of circumstance [*sic*] of an incident, discipline will normally be
3 progressive and bear a reasonable relationship to the violation. The types of discipline that may
4 occur are follows in general order of increasing formality and seriousness:

5 Initiating Discipline: Considerations and Notice [p. 60]

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

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

15 ENTERPRISE EMPLOYEES ONLY [p. 63]

16 The following Administrative Review Process is to be followed in seeking relief for all
17 grievances. The burden of proof is on the grievant to show that what he/she is claiming, actually
18 happened. All grievances will be courtesy copied to the Personnel Department promptly, by the
19 grievant. This proof may include documentation and witness statements.

20 1. A grievance will be submitted directly to the immediate supervisor and the Personnel
21 Department within five (5) calendar days of the disciplinary action by the grievant. The
22 supervisor will meet with the General/Facility Manager to discuss and investigate the grievance.
23 Together, the supervisor and the General/Facility Manager will document and sign the response
24 within ten (10) calendar days of receipt. The grievant will be notified of the response by
25 certified mail with a courtesy copy sent to the Personnel Department.

26 2. Within five days after the end of the previous deadline, and [*sic*] appeal may be filed in
27 writing to the Executive Director or his/her designee. The appeal may be submitted to level 2, if
28 the grievant has not received a response to the grievance or has not reached an acceptable
agreement in seeking [*sic*] to the grievance. The Executive Director has fifteen days for initial
review and response. The response shall be sent to the appellant by certified mail with a
courtesy copy sent to the Personnel Department.

29 Limited Waiver of Sovereign Immunity [p. 64]

30 The HoChunk [*sic*] Nation hereby expressly provides a limited waiver of sovereign immunity to
the extent that the Court may award monetary damages for actual lost wages and benefits
established by the employee in an amount not to exceed \$10,000, subject to applicable taxation.
Any monetary award granted under this Chapter shall be paid out of the departmental budget

1 from which the employee grieved. In no event shall the Trial Court grant any monetary award
2 compensating an employee for actual damages other than with respect to lost wages and benefits.
3 The Trial Court specifically shall not grant any monetary award against the Nation or its
4 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.

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

12 Ch. 14 - Definitions

[p. 69]

13 Comparable Wage - A wage that is within one (1) dollar of the current wage. (RESOLUTION
14 08/10/99C)

15 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

16 Rule 5. Notice of Service of Process.

17 (A) Definitions.

18 (2) Summons - The official notice to the party informing him/her that he/she is identified
19 as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (See
20 HCN R. Civ. P. 6) and that a *Default Judgment* may be entered against them if they do not file an
21 *Answer* in the prescribed time. It shall also include the name and location of the Court, the case
number, and the names of the parties. The *Summons* shall be issued by the Clerk of Court and
shall be served with a copy of the filed *Complaint* attached.

22 Rule 19. Filing and Responding to Motions.

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 Rule 27. The Nation as a Party.

28 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
named as a party, the *Complaint* should identify the unit of government, enterprise or name of

1 the official or employee involved. The *Complaint*, in the case of an official or employee being
2 sued, should indicate whether the official or employee is being sued in his or her individual or
3 official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will
4 be considered proper unless otherwise indicated by these rules, successive rules of the Ho-Chunk
5 Nation Court, or Ho-Chunk Nation Law.

6 Rule 53. Relief Available.

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

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

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

18 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
19 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
20 conclusions or make additional findings or conclusions, amending the judgment accordingly.
21 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
22 time for initiating an appeal commences upon entry of the amended judgment. If the Court
23 denies a motion filed under this rule, the time for initiating an appeal from the judgment
24 commences when the Court denies the motion on the record or when an order denying the
25 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
26 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
27 order denying the motion, the motion is considered denied. The time for initiating an appeal from
28 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
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) 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 Reissuance 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; or (2) fraud,
6 misrepresentation or serious misconduct of another party to the action; or (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.

10 Rule 61. Appeals.

11 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation
12 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
13 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent
14 actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*
15 *Procedure*.

16 FEDERAL RULES OF EVIDENCE⁴

17 Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

18 The following are not excluded by the hearsay rule, even though the declarant is available as a
19 witness:

20 (8) Public records and reports. Records, reports, statements, or data compilations, in
21 any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or
22 (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to
23 report, excluding, however, in criminal cases matters observed by police officers and other law
24 enforcement personnel, or (C) in civil actions and proceedings and against the Government in
25 criminal cases, factual findings resulting from an investigation made pursuant to authority
26 granted by law, unless the sources of information or other circumstances indicate lack of
27 trustworthiness.

28 **FINDINGS OF FACT**

1. The parties received proper notice of the October 19, 2005 *Trial*.

⁴ The Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) adopted the FEDERAL RULES OF EVIDENCE
(hereinafter FED. R. EVID.) for usage in all tribal judicial proceedings. *In re Adoption of Fed. R. Evid.* (HCN S. Ct.,
June 5, 1999).

1 2. The plaintiff, Sherry M. Fitzpatrick, is an enrolled member of the Ho-Chunk Nation,
2 Tribal ID# 439A000923, and resides at 1110 Maplewood Court, Black River Falls, WI 54615.
3 *Compl.* at 1. The plaintiff was employed as a Table Games Dealer at defendant Majestic Pines
4 Bingo & Casino (hereinafter MPC), a division within the Ho-Chunk Nation Department of
5 Business (hereinafter Business Department), located on trust lands at W9010 Highway 54 East,
6 Black River Falls, WI 54615. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC
7 § 3(5)(c); http://www.ho-chunknation.com/government/executive/org_chart.htm (last visited Jan.
8 31, 2006) (on file with Bus. Dep't).

9
10
11 3. The defendant, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
12 Indian tribe with principal offices located on trust lands at HCN Headquarters, W9814 Airport
13 Road, P.O. Box 667, Black River Falls, WI. *See* 70 Fed. Reg. 71194 (Nov. 25, 2005). The
14 defendants, HCN Department of Personnel (hereinafter Personnel Department) and Business
15 Department, are executive departments of the Nation with principal offices also located at HCN
16 Headquarters. *See* CONSTITUTION OF THE HCN (hereinafter CONSTITUTION), ART. VI, § 1(b).
17 The defendant, James T. Webster, formerly served as the Business Department Executive
18 Director. The defendant, Ida G. Carrier, formerly served as MPC General Manager. The
19 defendant, Jonette R. Pettibone, serves as MPC Table Games Director. The defendant, Mary G.
20 Whitegull, serves as a MPC Table Games Pit Boss.

21
22
23 4. On March 31, 2004, the HCN Surveillance Division completed its *Surveillance*
24 *Observation Report Form* in which it described the March 23, 2004 incident that serves as the
25 basis for the instant suit. Defs.' Ex. E at 4.
26
27
28

1 5. On or before March 26, 2004, the plaintiff applied for Family Medical Leave (FML), and
2 on April 13, 2004, the Personnel Department approved the plaintiff's application with an
3 effective date of March 26, 2004. Defs.' Ex. M at 19-21.

4
5 6. On April 22, 2004, the HCN Gaming Commission formally requested further
6 investigation of the incident revealed in the *Surveillance Observation Report Form*, directing its
7 request to MPC Surveillance Director Joseph Buse. Defs.' Ex. D.

8 7. On April 29, 2004, Mr. Buse provided a response to the Commission, noting, in part, that
9 a patron complaint prompted the initial investigation.⁵ In addition, Mr. Buse offered more in
10 depth observations, including:

11
12 a. The patron that benefited from the alleged violations has "no known relationship"
13 with the plaintiff "at this time." Defs.' Ex. E at 1.

14 b. The patron did not follow the plaintiff as she moved to other blackjack tables, but
15 remained at table five. *Id.* at 2.

16 c. The patron gambled \$8,800.00 on March 23, 2004, and won \$1,600.00. *Id.*

17 d. The patron's style of play did not deviate over the span of nearly seven (7) hours
18 regardless of the blackjack dealer. *Id.*

19 e. The plaintiff's "techniques, placement, and payouts were mostly consistent with
20 established procedures, with just a few exceptions. The obvious exceptions being the two
21 payouts on losing hands and the improper placement of double down cards on a hard 12 or
22 higher" *Id.* The response detailed "a few other occasions [where] the [plaintiff] failed to
23
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26 ⁵ The Court sustained the plaintiff's objection to this exhibit on the basis of hearsay. *Trial* (LPER at 16, Oct. 19,
27 2005, 11:18:32 CDT). The defendants attempted to seek admission of the document as a hearsay exception. FED. R.
28 EVID. 803(8). However, the Court ruled that the defendants could not establish the trustworthiness of the exhibit by
and through the testimony of Ms. Pettibone who had never viewed the recording of the incident. Yet, through the
course of the trial, sufficient evidence of trustworthiness arose in subsequent witness examination. The Court made
reference to this fact, but still determined to seal the exhibit within the file due to its containing double hearsay.
LPER at 45, 02:08:29 CDT. The Court derives certain findings of fact from the exhibit, but refrains from including

1 ensure that the player properly tuck his cards under his bet and failed to correct the patron when
2 he exposed his hand to the table." In total, the exceptions "amounted to fewer than 6 occurrences
3 during the entire 6 hours and 45 minutes of play." *Id.*

4
5 f. As a result of the *Surveillance Observation Report Form*, former Table Games
6 Manager Steven E. Garvin "recommended that Sherry be terminated, but was denied by the
7 Human Resources department because she had just gone on family medical leave on or about
8 3/26/04. . . . The termination denial was dated April 2, 2004, and no further action has been
9 taken to date." *Id.* at 3; *see also* Defs.' Ex. J-K.⁶

10
11 Mr. Buse concluded that his "detailed review" did not detect any "new information regarding
12 additional violations of procedures," and noted that the plaintiff "was not interviewed." Defs.'
13 Ex. E at 3.

14
15 8. In or around late-May 2004, Mr. Garvin informed Ms. Pettibone of the incident, and
16 instructed her to resubmit termination paperwork to on-site Human Resources and the Personnel
17 Department following the conclusion of the plaintiff's FML. LPER at 9, 10:18:51 CDT. Ms.
18 Pettibone began employment at MPC on May 23, 2004. *Id.*, 11:26:11 CDT.

19
20 9. On June 20, 2004, the plaintiff's FML expired, thereby removing job protection. Defs.'
21 Ex. M. at 14; *see also* PERS. MANUAL, Ch. 8 at 41.

22
23 10. On June 21, 2004, the defendants discharged the plaintiff on the basis of unacceptable job
24 performance, citing "inefficiency, incompetency, or negligence in the performance of duties,
25 including . . . failure to discharge duties in a . . . competent[] and reasonable manner." Defs.'s

26 the offending portions.

27 ⁶ The *Disciplinary Action Form* executed by Mr. Garvin is identical to the later *Disciplinary Action Form* presented
28 to the plaintiff by Ms. Pettibone with the exception of the signatures and accompanying dates. Defs.' Ex. B, K. In
the supplementary *Performance Review & Disciplinary Action Summary Sheet*, Mr. Garvin states that "Sherry is an
experienced Dealer and normally maintains a high quality of work." Defs.' Ex. K at 2. Yet, "[c]onsidering her
experience and the severity of the infractions, [Mr. Garvin could] only recommend termination." *Id.*

1 Ex. B (quoting PERS. MANUAL, Ch. 12 at 58); *see also* Defs.' Ex. A. In particular, the defendants
2 charged the following:

3
4 According to the attached Surveillance Observation Report Form, received
5 on 4/01/04, Sherry Fitzpatrick committed several severe violations of
6 procedure and incorrectly paid a player. These payments caused a loss of
7 at least \$1,200. On BJ-05 at 7:09 p.m. a patron was dealt an 18 and the
8 dealer (Sherry) had a 19 but paid the player \$200 on a loser. The second
9 occurrence took place at 8:39 p.m., Sherry *appears* to flash the top card to
10 the player on spot five and further violate procedure by tucking the hit
11 card on a hard 12 double down. On the next spot, it *appears* she tries to
12 flash the next card, and violates procedure again by tucking the hit card on
13 a hard 14 double down. The dealer hand busts, and Sherry proceeds to pay
14 \$400 to spot six on an obviously losing card total of 24.

15 Defs.' Ex. B (emphasis added).⁷ The drafter concludes: "As stated in HCN Personnel Policy
16 [*sic*] and Procedures Manual the degree of the offense should be considered in disciplinary
17 matters. As Sherry's actions cost the Nation at least \$1,200 and her blatant disregard for
18 procedure pose [*sic*] a continuing threat to the assets and gaming integrity of the Nation, I can
19 only recommend termination." *Id.* (citing PERS. MANUAL, Ch. 12 at 60).

20 11. On June 21, 2004, Ms. Pettibone presented the termination paperwork to the plaintiff, and
21 informed the plaintiff that she did not prepare the recommendation to terminate. The plaintiff
22 inquired whether Ms. Pettibone was accusing her of stealing or cheating, and Ms. Pettibone
23 responded: "I'm not saying anything; I'm just giving you what was written." LPER at 10,
24 10:22:56 CDT. However, Ms. Pettibone did concur with her predecessor's assessment, although
25 not stated to the plaintiff, yet she "didn't feel [she] had any right to change or alter anything." *Id.*
26 at 22, 11:40:08 CDT. The plaintiff declared that she neither flashed cards nor cheated or stole.
27 *Id.*, 09:54:59, 10:23:04 CDT. She became upset and refused to sign the *Disciplinary Action*
28 *Form. Id.*; *see also* Defs.' Ex. B.

⁷ The Court shall not consider the flashing violation allegations, which were based on "insufficient evidence," as

1 12. The defendants answered one of the plaintiff's interrogatories in the following manner:

2 Pl.'s Interrog.: Was the Plaintiff interviewed or given an opportunity
3 provide any information about the allegations made
4 against her in the March 31, 2004, Dept. of Justice
surveillance Observation Report?

5 Defs.' Answer: No.

6 *Defs.' Resp. to Pl.'s First Set of Interrogs. Dated Dec. 30, 2004, CV 04-82 (Jan. 25, 2005) at 9.*

7
8 13. From late-May 2004 to June 21, 2004, Ms. Pettibone made no inquiries of the plaintiff
9 because of her FML status. LPER at 20, 11:34:22 CDT.

10 14. Regardless of Mr. Garvin's predispositions, he still deemed it necessary to hear the
11 plaintiff's side of the story prior to imposing the discipline. *Id.* at 32, 01:16:53 CDT. Mr. Garvin
12 testified that only Ms. Carrier could have compelled Ms. Pettibone to resubmit the termination
13 paperwork. *Id.* at 32, 01:18:25 CDT. Mr. Garvin assumed that Ms. Pettibone would have
14 addressed the proposed discipline directly with the plaintiff prior to its execution. *Id.* at 33,
15 01:19:51 CDT.

16
17 15. On July 30, 2004, Mr. Webster issued his Level 2 response in which he found
18 "insufficient evidence, for the purpose of determining violations of the Ho-Chunk Nation
19 Personnel Policies and Procedures Manual, to conclude that [the plaintiff] w[as] flashing cards to
20 another individual." Pl.'s Ex. 11 at 1. However, Mr. Webster determined that "the surveillance
21 tape also showed the several severe violations that were outlined in the Disciplinary Action
22 form," and the plaintiff's "grievance did not dispute these violations, which alone are grounds for
23 termination." *Id.*

24
25
26 16. As noted above, the plaintiff does not dispute the occurrence of the improper payouts, but
27 attributes it to dealer error or inadvertence. LPER at 8-9, 10:12:25 CDT.

28
support for the plaintiff's termination. *See supra* note 3.

1 17. Ms. Pettibone testified that a \$1,200.00 loss by an entire shift would be deemed
2 excessive, whereas the loss in question resulted between a single dealer and player. *Id.* at 17,
3 11:23:54 CDT. Mr. Garvin testified that management expects dealers to make errors, and
4 inadvertent losses are not unusual. *Id.* at 31, 01:13:14 CDT.
5

6 18. Brent L. Grace, Surveillance Division employee, concluded that a player gains no
7 advantage from a dealer's tucking of cards. *Id.* at 41, 01:58:15 CDT.

8 19. The plaintiff only received two (2) previous disciplinary measures in the form of a verbal
9 and written warning on November 24, 2003 and January 2, 2004, respectively, for attendance.
10 Defs.' Ex. K at 2; *see also* PERS. MANUAL, Ch. 12 at 60.
11

12 20. As of June 21, 2004, the plaintiff earned a wage of \$5.47 per hour, excluding tips. Defs.'
13 Ex. M at 1. The plaintiff testified that she received net earnings in the approximate amount of
14 \$400.00 to \$500.00 per week. The plaintiff is currently employed. LPER at 7, 10:01:26 CDT.
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16 DECISION

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18 The Court conducts a *de novo* review of executive branch determinations made in the
19 context of the Administrative Review Process. *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08
20 (HCN S. Ct., Dec. 8, 2003) at 9-10. However, the Court recognizes that it is ill-equipped to
21 substitute its opinion for certain discretionary decisions of the employer.⁸ The defendants
22 discharged the plaintiff on the basis of "[i]nefficiency, incompetency, or negligence," and,
23 provided that a plaintiff possesses sufficient knowledge of his or her attendant job
24 responsibilities, the Court will generally defer to discretionary employment decisions. PERS.
25 MANUAL, Ch. 12 at 58. For example, the Court possesses no independent knowledge rendering
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⁸ As a general rule, the Supreme Court was "not persuaded by the argument" that executive discretionary decisions were shielded or insulated from judicial scrutiny. *Millie Decorah, as Fin. Dir. of the HCN, et al. v. Joan*

1 it capable of discerning when a reasonably acceptable mistake or inadvertence passes into the
2 realm of incompetence. To be sure, the dividing line, if quantified in monetary loss, may prove
3 somewhat arbitrary, but the employer can presumably distinguish between anticipated human
4 error and intolerable human ineptitude on the basis of experience in the gaming industry, which
5 the Court does not hold.
6

7 Accordingly, the Court declines to comment on the plaintiff's role in the underlying
8 incident. The Court instead directs its attention to the defendants' level of adherence to known
9 constitutional requirements, which the Court is uniquely qualified to determine. CONST., ART. X,
10 § 1(a)(8). The employer must afford an employee due process prior to termination, and the
11 Judiciary has clearly set forth the requisite minimum procedural due process protections within
12 the case law. *See, e.g., Garvin*, CV 00-10, -38 (HCN Tr. Ct., Mar. 9, 2001) at 25-28. In fact, the
13 Judiciary has likely examined the due process clause in greater depth than any other single
14 constitutional provision.
15

16 Quite simply, an employee must receive a “*meaningful* opportunity to be heard before
17 their property can be taken away.” *Gary Lonetree, Sr. v. John Holst, as Slot Dir., et al*, CV 97-
18 127 (HCN Tr. Ct., Sept. 24, 1998) at 10, *aff'd*, SU 98-07 (HCN S. Ct., Apr. 29, 1999) (emphasis
19 added). The Court has never required the employer to refrain from completing a *Disciplinary*
20 *Action Form*, including obtaining required signatures, until after it conducts a pre-termination
21 hearing, but the result of the hearing cannot be a foregone conclusion. *Garvin*, CV 00-10, -38
22 (HCN Tr. Ct., Nov. 16, 2001) at 10. In the instant case, the supervisor charged with conducting
23 the hearing did not believe that she maintained any discretion in the termination decision. In
24 fact, Ms. Pettibone completely disavowed any involvement in the decision to terminate at the
25 only meeting convened to address the issue with the plaintiff. Ms. Pettibone simply reiterated
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Whitewater, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 5.

1 the previous supervisor's grounds for termination without conducting any follow-up research or
2 making any inquiries of the plaintiff. Moreover, the defendants confirmed in discovery that the
3 plaintiff was never "interviewed or given an opportunity provide any information about the
4 allegations made against her in the March 31, 2004, Dept. of Justice surveillance Observation
5 Report[.]" *Def's.' Resp. to Pl.'s First Set of Interrogs. Dated Dec. 30, 2004, CV 04-82 (Jan. 25,*
6 *2005) at 9.*

8 The Court must conclude that a supervisor who neither maintains discretion to reverse or
9 postpone a termination decision cannot provide an employee a meaningful opportunity to be
10 heard. A pre-termination hearing is not a mere technicality and cannot be reduced to a façade.
11 The hearing's underlying purposes, which all hinge upon the employer's discretion, cannot be
12 accomplished if the result of the hearing is a foregone conclusion. *Garvin, CV 00-10, -38 (HCN*
13 *Tr. Ct., Mar. 9, 2001) at 27-28.* The employer cannot use pre-termination hearings to simply
14 process paperwork.
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17 The Court accordingly holds that the plaintiff's discharge violated well-established
18 standards of due process, and awards appropriate relief. *See HCN R. Civ. P. 53.* The Court
19 directs the HCN Department of Treasury to deduct the amount of \$10,000.00 from the Business
20 Department budget, and issue a check for such amount, subject to applicable taxation, to the
21 plaintiff within a period of thirty (30) days. The Court enters the maximum statutory amount as
22 compensation for actual lost wages, recognizing that the plaintiff attempted to mitigate
23 damages.⁹ *PERS. MANUAL, Ch. 12 at 64.* The Court further directs the HCN Department of
24 Personnel to reinstate the plaintiff to a position with a comparable wage. *Id., Ch. 14 at 69.* The
25 Personnel Department shall contact the plaintiff within a period of fourteen (14) days from the
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⁹ At an approximate hourly wage of \$10.00, which is most likely a low estimation, the plaintiff sustained \$10,000.00

1 entry of this judgment to establish the timeline in relation to reinstatement. Finally, the Court
2 orders the Personnel Department to remove negative references from the plaintiff's personnel
3 file, award bridged service credit, and restore seniority. *Id.*, Ch. 12 at 62.

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

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

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21
22 _____
23 Honorable Todd R. Matha
24 Chief Trial Court Judge
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of damages on or around December 10, 2005, one (1) week after the filing deadline for preliminary witness lists.

