

1
2
3
4
5
6
7
8

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

Daniel M. Brown,
Plaintiff,

v.

Case Nos.: **CV 04-38-40**

**James Webster, Ho-Chunk Nation
Executive Director of Business,**
Defendant.

9
10
11
12

**ORDER
(Final Judgment)**

13
14
15
16
17
18
19
20
21

INTRODUCTION

The Court must principally determine whether to reverse the defendant's decision to terminate the plaintiff's employment. The Court holds in favor of the plaintiff due to an infringement upon his constitutional right of free speech. However, the Court upholds the defendant's actions in relation to a suspension and annual performance evaluation since the plaintiff either failed to satisfy his burden of proof or establish a statutory violation. The analysis of the Court follows below.

22
23
24
25
26
27
28

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail in its previous judgment. *Order (Denying Def.'s Mot. to Dismiss & Denying Pl.'s Mot. for Leave of Court)*, CV 04-38-40 (HCN Tr. Ct., Nov. 8, 2004) at 1-2. For purposes of this decision, the Court notes that the plaintiff appealed the above-cited interlocutory judgment on December 7, 2005. The Ho-Chunk

1 Nation Supreme Court rejected the interlocutory appeal on January 31, 2005, indicating that
2 "[t]he Trial Court is well within its right to deny an untimely motion . . . filed past the deadline
3 for filing such motions." *Denial Order*, SU 04-09 (HCN S. Ct., Jan. 31, 2005) at 2. Prior to the
4 appellate filing, the Court continued to adhere to the July 22, 2004 *Scheduling Order* entered in
5 these consolidated cases and convened *Trial* on November 9, 2004 at 9:00 a.m. CST. The
6 following parties appeared at the *Trial*: Daniel M. Brown, plaintiff; James T. Webster,
7 defendant; and Ho-Chunk Nation Department of Justice (hereinafter DOJ) Attorney Michael P.
8 Murphy, defendant's counsel.¹

11 APPLICABLE LAW

12 CONSTITUTION OF THE HO-CHUNK NATION

13 Article III - Organization of the Government

14
15 Sec. 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by
16 virtue of self-government and democracy.

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

20 Article IV - General Council

21 Sec. 2. Delegation of Authority. The General Council hereby authorizes the legislative
22 branch to make laws and appropriate funds in accordance with Article V. The General Council
23 hereby authorizes the executive branch to enforce the laws and administer funds in accordance
24 with Article VI. The General Council hereby authorizes the judicial branch to interpret and
25 apply the laws and Constitution of the Nation in accordance with Article VII.

26 ¹ The presiding judge extends his sincerest apologies to the parties for the failure of the Court to enter a timely
27 decision in this matter. Each trial judge maintains a duty to "dispose promptly of the business of the court." *HCN*
28 *Rules of Judicial Ethics*, § 4-1(E); see also *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1)
(HCN S. Ct., Apr. 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of
trial level process). Former Chief Judge William H. Bossman failed in this regard by not issuing a judgment prior to
the expiration of his legislative appointment on July 1, 2005. In the interests of justice, the Court informs the parties
of the availability of seeking mandamus relief from the Ho-Chunk Nation Supreme Court in order to compel action
of a trial level judge. See *In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21, 2005) (citing CONSTITUTION
OF THE HO-CHUNK NATION, ART. VII, § 6(a)).

1
2 Sec. 3. Powers Retained by the General Council.

3 (a) The General Council retains the power to set policy for the Nation.

4 (f) Actions by the General Council shall be binding.

5 Article VII - Judiciary

6 Sec. 5. Jurisdiction of the Judiciary.

7
8 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
9 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
10 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
11 officials and employees, shall be a party. Any such case or controversy arising within the
12 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
13 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
14 the Nation's sovereign immunity.

13 Sec. 6. Powers of the Tribal Court.

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

16 Art. X - Bill of Rights

17 Sec. 1. Bill of Rights.

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

19
20 (1) make or enforce any law prohibiting the free exercise of religion, or
21 abridging the freedom of speech, or of the press, or the right of the people peaceably to
22 assemble and to petition for a redress of grievances;

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

24 Art. XII - Sovereign Immunity

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

1 DEPARTMENT OF BUSINESS ESTABLISHMENT AND ORGANIZATION ACT OF 2001,
2 1 HCC § 3

3 Sec. 5. Internal Organization.

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

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

9 Ch. 6 - Compensation and Payroll Practices

10 Salary and Wage Adjustments/Merit/Cost of Living Increases [pp. 16-17]

11 In addition to the Nation's periodic revision of pay rates or ranges resulting from prevailing wage
12 studies and other influential considerations, the Nation is committed to the principle of
13 compensatory recognition of employees who demonstrate meritorious performance. These merit
14 increases in base compensation will be determined directly in conjunction with, and at prescribed
15 times of, each regular employee's performance evaluation based on predetermined performance
16 standards [*sic*] levels. An overall performance evaluation rating of satisfactory/average does not
17 qualify for merit increase consideration. While such a rating is acceptable for retention of an
18 employee's services, it is not meritorious in the sense of compensatory advancement.

19 To be eligible for a merit increase, an employee must have an overall performance rating of
20 above average, with at least one categorical rating of excellent/outstanding, and no categorical
21 ratings of unacceptable. Percentage of merit increases will be determined in accordance with the
22 Nation's classification and compensation plan. In no event will an employee receive greater than
23 a four percent (4%) merit increase on any given evaluation. (RESOLUTION 09/12/00B)

24 Ch. 7 - Conditions of Employment

25 Publicity/News Releases [p. 27]

26 No Tribal employee shall use his or her position to present themselves as a representative of the
27 Nation, or communicate with the news media on behalf of the HoChunk [*sic*] Nation enterprises
28 or programs unless so authorized or directed in writing by the HoChunk [*sic*] Nation or its
delegated representative.

Ch. 9 - Performance Evaluation and Promotion

Performance Policy and Standards [p. 49]

1
2 It is the policy of the HoChunk [*sic*] Nation that regular reports be made as to the competence,
3 efficiency, adaptation, conduct, merit, and other job related performance conditions of its
4 employees. In order to accomplish a meaningful performance evaluation system upon which the
5 Nation can continuously monitor the effectiveness of its operations, it will be the responsibility
6 of the Personnel Director to determine performance standards, methods, and procedures, and to
7 assume overall responsibility of all supervisory and management personnel to provide reasonable
8 training of employees; to assign, direct, control, and review the work of subordinate employees;
9 to make efforts to assist employees in correcting deficiencies; and to evaluate employees
10 objectively for their performance during the evaluation period.

8 Annual Performance Evaluations

9 Each employee will receive an annual performance evaluation on the anniversary date of the
10 current position held.

11 Supervisors shall complete an annual evaluation for each employee up to 10 days prior to the
12 employees [*sic*] annual review date. In turn, the evaluation will be discussed with the employee
13 on or before his/her review date.

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

14 Off-Duty Conduct and Employment

[p. 55]

15 The HoChunk [*sic*] Nation regards the off-duty activities of employees to be their own personal
16 matter rather than that of the Nation. However, certain types of off-duty activities by employees
17 represent the potential of a material business concern to the Nation, and for that reason the
18 following is established with the intent to specify conditions and guide employees.

19 A. Employees who engage in, or are associated with illegal, immoral, or inimical conduct,
20 the nature which adversely affects the HoChunk [*sic*] Nation, or their own ability or credibility to
21 carry out their employment responsibilities, may be subject to disciplinary action including
22 termination.

22 Discipline Policy

[pp.56-57]

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

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

28 B. Behavior

[pp. 57-58]

1
2 1. Willful or negligent violation of the Personnel Policies and Procedures, unit
operating rules, or related directives.

3 3. Engaging in a conflict of interest activity.

4
5 4. Conduct that discredits the employee or the Nation, or willful misrepresentation
of the Nation.

6
7 8. Discourteous treatment of the public or other employees, including harassing,
coercing, threatening, or intimidating others.

8 9. Conduct that interferes with the management of the Tribal operations.

9
10 13. Any act or conduct that is discriminatory in nature toward another person's race,
11 creed, color, national origin, sex (including sexual harassment), age, religious beliefs or political
affiliations.

12 14. Creating a disturbance among fellow employees which would result in an adverse
13 effect on morale, productivity, and/or the maintenance of proper discipline.

14 17. Making false, malicious, or unfounded statements against co-workers,
15 supervisors, subordinates, or government officials which tend to damage the reputation or
undermine the authority of those concerned.

16 C. Performance [pp. 58-59]

17 2. Refusal or inability to improve job performance in accordance with written or
18 verbal direction after a reasonable trial period.

19 8. Misuse of authority of position for personal gain.

20
21 10. Any other actions considered inappropriate, or detrimental to employee working
environment.

22 Types of Discipline [pp. 59-60]

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

26 B. Written Reprimand
27
28

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

3 C. Suspension
4

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

7 D. Discharge for Misconduct
8

9 Employees should be aware that their employment relationship with the Ho-Chunk Nation is
10 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
11 for misconduct, at any time. Recommendations to discharge an employee are to be made to and
authorized by the Department Director.

12 Examples of misconduct are violations of policies and procedures, absenteeism and tardiness,
13 insubordination, use of intoxicants and drugs.

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

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

- 17 * The degree and severity of the offense
- 18 * The number, nature, and circumstances of similar past offenses
- 19 * Employee's length of service
- 20 * Provocation, if any, contributing to the offense
- 21 * Previous warnings related to the offense
- 22 * Consistency of penalty application
- 23 * Equity and relationship of penalty to offense

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

27 **ENTERPRISE EMPLOYEES ONLY** [p. 62]

28 **Matters covered by Administrative Review System:** Eligible employees who have
complaints, problems, concerns, or disputes with another employee, the nature of which causes a
direct adverse effect upon the aggrieved employee, may initiate an administrative review
according to established procedures. Such matters must have to do with: specific working
conditions, safety, unfair treatment, disciplinary actions (except verbal reprimands),

1 compensation, job classification, reassignment, any form of alleged discrimination, a claimed
2 violation, misinterpretation, or inequitable application of these policies and procedures.

3 **Hearing Levels for Enterprise:**

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

5 2. Performance Evaluations and written reprimands are to be grieved in sequence to:

6 Level 1 Supervisor and General/Facility Manager
7 Level 2 Executive Director

8 Tribal Court Review: [p. 63]

9 Judicial Review of any appealable claim may proceed to the HoChunk [sic] Nation Tribal Court
10 after the Administrative Review Process contained in this Chapter has been exhausted. The
11 HoChunk [sic] Nation Rules of Civil Procedure shall govern any judicial review of an eligible
12 administrative grievance shall [sic] file a civil action with the Trial Court within thirty (30) days
13 of the final administrative grievance review decision.

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

15 Subsec. 7. Definitions. Whenever the following terms are used in this Act, they shall have
16 the meanings indicated.

17 i. Comparable Wage. A wage that is up to 15% of the current wage or previous
18 wage, unless otherwise authorized in writing.

19 Subsec. 35 Judicial Review.

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

24 d. Relief.

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

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

- 1 (a) an order of the Court to the Executive Director of the Department
2 of Personnel to reassign or reinstate the employee;
- 3 (b) the removal of negative references from the employee's personnel
4 file;
- 5 (c) the award of bridged service credit; and
- 6 (d) the restoration of the employee's seniority.

7 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

8 Rule 53. Relief Available.

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

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

15 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
16 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
17 must be based on an error or irregularity that prevented a party from receiving a fair trial or a
18 substantial legal error that 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 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 the appeal
28 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*
26 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
27 must be based upon new information that has come to the party's attention that, if true, could
28 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 upon entry of the modified judgment. If the Court denies a motion filed under this

1 Rule, the time for initiating an appeal from the judgment commences when the Court denies the
2 motion on the record or when an order denying the motion is entered, whichever occurs first. If
3 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
4 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.

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

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

12 Rule 61. Appeals.

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

17 **FINDINGS OF FACT**

- 18
- 19 1. The parties received proper notice of the November 9, 2004 *Trial*.
 - 20 2. The plaintiff, Daniel M. Brown, is an enrolled member of the Ho-Chunk Nation, Tribal
21 ID# 439A000239, and resides at 314 Fourth Street, Baraboo, WI 53913. *Compl.* at 1. The
22 plaintiff was formerly employed as Executive Manager at DeJope Bingo & Entertainment
23 (hereinafter DeJope), a division within the Ho-Chunk Nation Department of Business
24 (hereinafter Business Department), located on trust lands at 4002 Evan Acres Road, Madison,
25 WI 53718. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c;
26 http://www.ho-chunknation.com/government/executive/org_chart.htm (last visited Mar. 13,
27
28

1 2006) (on file with Bus. Dep't). The plaintiff's duties included providing assistance with the
2 anticipated DeJope conversion and Tomah gaming site development projects. Pl.'s Ex. 2.

3
4 3. The defendant, James T. Webster, was formerly employed as the Executive Director of
5 the Business Department, a Ho-Chunk Nation (hereinafter HCN or Nation) executive
6 department, located on trust lands at the HCN Headquarters, W9814 Airport Road, P.O. Box
7 667, Black River Falls, WI 54615. See CONSTITUTION OF THE HO-CHUNK NATION (hereinafter
8 CONSTITUTION), ART. VI, § 1(b).

9
10 4. The defendant began his employment with the Nation on or about September 22, 2003.
11 *Trial* (LPER at 37, Nov. 9, 2004, 11:28:11 CST).

12 5. The defendant based the plaintiff's annual evaluation on his three-month interaction with
13 the plaintiff and did not consult with any previous supervisor(s) of the plaintiff. *Id.* at 14,
14 09:45:14 CST. The defendant gave the plaintiff an overall score of thirteen (13), which did not
15 entitle the plaintiff to a merit increase. Pl.'s Ex. 2.

16
17 6. The defendant presented the annual evaluation to the plaintiff on March 19, 2004,
18 although the review deadline was March 2, 2004. LPER at 15, 09:50:58 CST. The defendant
19 drafted the evaluation prior to the March 15, 2004 discussion regarding the plaintiff's media
20 interaction. *Id.* at 23, 10:36:42 CST.

21
22 7. The plaintiff lacked an immediate supervisor at the time of the annual evaluation since
23 the former Director of Gaming, Sandra M. Plawman, resigned following a verbal exchange with
24 the plaintiff, in which he allegedly threatened the livelihood and financial well-being of Ms.
25 Plawman due to a business decision regarding general manager reassignments. *Id.* at 46,
26 12:57:48 CST. The plaintiff contradicts this assertion. *Id.* at 65, 02:15:38 CST.

1 8. The defendant contended that the HO-CHUNK NATION PERSONNEL POLICIES AND
2 PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL) does not require conferring with past
3 supervisors of an employee before preparing an annual evaluation. *Id.* at 47, 1:02:00 CST.
4

5 9. The defendant summarized the grounds for the plaintiff's suspension within the first
6 paragraph of his February 20, 2004 five-day suspension notice, stating as follows: "This action
7 is being taken to address your non-compliance with my requests for weekly reports and daily
8 itineraries." Pl.'s Ex. 1 at 1.

9 10. The defendant contended that the plaintiff missed meetings, training sessions and other
10 appointments, and seldom knew the whereabouts of the plaintiff. LPER at 53, 01:24:23 CST.
11 The defendant justified the processing of the suspension by mail due to an inability to locate the
12 plaintiff. *Id.*, 01:22:22 CST.
13

14 11. The defendant justified the imposition of a five-day suspension upon earlier disciplinary
15 actions, but noted that the plaintiff's work performance while under his supervision constituted
16 the basis for the suspension. *Id.* at 12, 09:40:37 CST. The defendant later noted that he did not
17 employ progressive discipline. *Id.* at 28, 10:56:22 CST.
18

19 12. The defendant believed that one meted out progressive discipline in connection with a
20 single behavioral or performance issue as conveyed by the HCN Department of Personnel
21 (hereinafter Personnel Department). *Id.* at 30, 11:03:49 CST.
22

23 13. The plaintiff asserts that his five-day suspension occurred because of a failure to file
24 timely reports, and describes this employee conduct as a performance issue. He contends that
25 the defendant provided no significant guidance in relation to the scope of his assignments,
26 meeting only on approximately five (5) occasions throughout their working relationship. *Id.* at
27 63, 02:08:30 CST.
28

1 14. The plaintiff asserts that his written reprimand occurred because of purported non-
2 attendance at meetings, and describes this employee conduct as behavioral in nature. He
3 contends that the three (3) meetings in question were either unconfirmed or unscheduled. *Id.* at
4 62, 02:04:21 CST.

5
6 15. The defendant summarized the grounds for the plaintiff's discharge within the first
7 paragraph of his March 22, 2004 termination notice, stating as follows:

8 I am releasing you from employment as Executive Manager. The claims
9 of discrimination, by you and against the Ho-Chunk Nation, have become
10 an issue that is damaging the Nation's reputation, degrading employee
11 morale, discrediting the employees and was a willful misrepresentation of
12 the Nation via a TV interview and newspaper articles. The coincidence
13 that these articles and interview occurred shortly after your Proposal of
14 Severance was rejected leaves room to interpret your actions as a
15 malicious attempt to harm the Ho-Chunk Nation and its citizens.

16 Pl.'s Ex. 3 at 1

17 16. The defendant's supposition becomes concrete two (2) paragraphs later when he
18 concludes that "[t]he sole purpose of th[e] interview was to get back at the Nation for [its] refusal
19 of [the plaintiff's] severance proposal." *Id.* at 2.

20 17. The defendant also depicts the plaintiff's March 7 and 15, 2004 newspaper submissions
21 as attempts "to force the Business Department into negotiating [the defendant's] severance
22 package." Pl.'s Ex. 3 at 2.

23 18. The defendant perceived the plaintiff's media interaction as the direct consequence of
24 denying the plaintiff's severance proposal due to its timing in relation to the DeJope referendum
25 vote on February 17, 2004. LPER at 25, 10:45:41 CST.

26 19. In his severance letter, the plaintiff stated that he intended to convey that he would pursue
27 his cases to the fullest extent within the HCN Judiciary and/or General Council. *Id.* at 62,
28 02:04:21 CST.

1 20. On April 28, 2003, the plaintiff transmitted a four-page memorandum to the HCN
2 Legislature (hereinafter Legislature) regarding his view of the Ho-Chunk Preference Policy and
3 its proposed extension to mandate employment of Ho-Chunk supervisors. In conclusion, the
4 plaintiff stated: "I do not envy the positions of the Legislature, and I respect (although I
5 respectfully disagree with) the ideals of what is being attempted through Tribal preference."
6 *Compl.*, CV 04-38 (May 13, 2004), Attach. 4 at 4.
7

8 21. The defendant viewed the timing of the media coverage on an issue that the plaintiff had
9 advocated beginning in or around 2003, as more than coincidence given the perceived severance
10 package ultimatum and the impending referendum. LPER at 43, 12:48:05 CST.
11

12 22. The defendant viewed the plaintiff's actions as "premeditated," "self-serving," and
13 "retaliatory," thereby requiring the severest form of employee discipline. *Id.* at 48, 01:06:12
14 CST.
15

16 23. The plaintiff explains the timing of his media involvement as the result of a continual
17 barrage of preference-related comments from his former employees at Ho-Chunk Casino, which
18 he recently departed due to supervisory reassignment. *Id.* at 65, 02:15:38 CST.
19

20 24. On March 15, 2005, the defendant confronted the plaintiff regarding his television
21 interview in a meeting at which DOJ employee, Melanie R. Stacy n/k/a Two Bears, was in
22 attendance. *Id.* at 39, 12:35:29 CST. The plaintiff exhibited a general reluctance to answer any
23 questions concerning his intent or aims in relation to the interview. *Id.* at 40, 12:38:05 CST.
24

25 25. The defendant convened the March 15, 2004 meeting to allow the plaintiff the
26 opportunity to adequately justify his actions, which consequently would impact the level of
27 forthcoming discipline, if any. Instead, the plaintiff evaded directly answering any questions.
28 *Id.* at 48, 01:04:32 CST.

1 26. At the March 15, 2005 meeting, the plaintiff expressed to the defendant that he intended
2 to exert pressure upon the Legislature through the media coverage. *Id.* at 51, 01:17:08 CST.

3 27. At the March 15, 2005 meeting, the plaintiff did not disclose the presence of the second
4 print article although certainly aware of its existence at the time. *Id.* at 40, 12:40:10 CST.

5 28. The plaintiff did not seek supervisory approval prior to providing the editorial to the
6 Wisconsin State Journal, which does not include a disclaimer of any kind. *Id.* at 41, 12:42:27
7 CST. Likewise, the second article that appeared in the Baraboo periodical does not include a
8 disclaimer, but rather identifies the interviewee as "an executive manager." *Id.*, 12:44:01 CST
9 (quoting Def.'s Ex. B).
10

11 29. The defendant asserts that he clearly informed each media outlet that he was not
12 providing commentary on behalf of the Nation or in his role as an official of the Nation. *Id.* at
13 59, 01:54:23 CST. The defendant undertook such activities while off duty. *Id.* at 61, 02:00:35
14 CST. The defendant also asserts that his media campaign had no connection with his severance
15 proposal or the denial thereof. *Id.* at 60, 01:57:59 CST.
16

17 30. The defendant recognized that the plaintiff did not indicate within his guest editorial that
18 he purported to speak as an agent of the Nation. *Id.* at 19, 10:05:42 CST. Likewise, the
19 defendant admitted that neither article contained false statements, but merely personal opinion
20 and observations. *Id.*, 10:07:08 CST. The defendant, however, later noted that labeling Ho-
21 Chunk preference as discriminatory represents a false statement. *Id.* at 34, 11:17:48 CST. In
22 summation, the defendant indicated that he "d[id] not know of anywhere where Ho-Chunk policy
23 and procedure would limit a tribal member from expressing their opinion in any format." *Id.*,
24 10:09:24 CDT.
25
26
27
28

1 31. "After much discussion," agents of the Nation persuaded WMTV-NBC15 News to refrain
2 from airing the plaintiff's interview, which he gave "on the eve of the DeJope Casino
3 Referendum." Pl.'s Ex. 3 at 2.

4
5 32. Despite its inclusion as a basis for the plaintiff's termination, the defendant had no
6 independent knowledge concerning the substance of the unaired February 16, 2004 television
7 interview. LPER at 18, 10:04:07 CST.

8 33. The defendant provided the following justification for the termination: "[the] severity of
9 the offense and the damage done to the potential revenues of the Ho-Chunk Nation warranted
10 [the] action. We could not have [the plaintiff] damaging [the Nation's] chances at getting gaming
11 facilities in other locations as an employee. Now that [the plaintiff is] not an employee, [he is]
12 more than free to criticize the Nation in any way." *Id.* at 28, 10:55:45 CST.

13
14 34. In addition, the defendant criticizes the plaintiff's unauthorized portrayal as both "a
15 twisted version of the Ho-Chunk Nation's preference in hiring its own individual members" and
16 "false." *Id.* Furthermore, the defendant claimed that the second article "paint[ed] a picture of
17 Ho-Chunks with no work ethic[]." Pl.'s Ex. 3 at 2.

18
19 35. In the March 16, 2004 Baraboo News Republic article, the reporter attributes the
20 following comments to the plaintiff:

21
22 Many Ho-Chunk Nation members are willing to learn the work and make
23 something of the opportunity a job with the Ho-Chunk Nation offers them
24 Some of them make it into management.

25
26 However, others don't have a very good work ethic and become problems
27 when they miss work and don't take the job seriously Sometimes
28 tribal members who are unwilling to take their jobs seriously call on
leaders within the Ho-Chunk government to pressure [me] to give them
their jobs back

1 Def.'s Ex. B at 1. The plaintiff contends that "there are substantial numbers of Ho-Chunk people
2 who agree with his concerns," but "[m]any of them don't feel comfortable speaking out." *Id.* at
3
4 2. Consequently, the plaintiff asserted that "it's his role to call attention to the issue, to stir things
5 up and try to make some change" *Id.*

6 36. President George R. Lewis, Jr.'s response appeared within the article in which he
7 articulates that "the policy is an important part of the effort to employ and train tribal members to
8 promote self-sufficiency[,]" and characterizes the implementation of Ho-Chunk preference as "a
9 legal right." *Id.* at 1-2.

10
11 37. The plaintiff prefaces his March 7, 2004 Wisconsin State Journal guest column with the
12 following observations:

13 A major problem festers at the Ho-Chunk Nation casinos: Racial
14 discrimination.

15 The current Ho-Chunk Nation government continually creates "Ho-Chunk
16 preference" policies that discriminate against non-tribal employees at the
17 casinos. This is a problem for a wide variety of reasons, not the least of
18 which is that there is a clear difference between the attitudes of most tribal
19 people toward mainstream society and those demonstrated by the Ho-
20 Chunk Nation's unfortunate leadership.

21 Def.'s Ex. A.

22 38. The plaintiff admitted that his editorial piece contained some assertions based upon
23 hearsay rather than established or personally known facts, *i.e.*, regarding the termination of non-
24 Indian employees within their probationary periods. LPER at 67, 02:26:22 CST (citing Def.'s
25 Ex. A).

26 39. The editorial piece appeared in the Wisconsin State Journal after the referendum vote. *Id.*
27 at 44, 12:51:39 CST.

28

1 40. The plaintiff revealed his intention of utilizing the media within a written submission to
2 the General Council, entitled "*Information for the 2004 General Council.*" The plaintiff writes:
3 "I took th[e] issue [of expanded Ho-Chunk preference] to the mainstream media because of my
4 love and concern for the future health of the Ho-Chunk Nation." Def.'s Ex. C at 70. He later
5 continues: "I went to the mainstream media in an effort to pressure the HCN Legislature to
6 rescind such policy through public shame and scrutiny. Doing so within the Ho-Chunk Nation's
7 avenues was a waste of time." *Id.* Despite expanded preference initiatives arising from the
8 General Council, the plaintiff asserts that "[r]esolutions are passed by the General Council and
9 the [P]resident and the Legislature ignore them." *Id.*; *see also* GEN. COUNCIL RES. 10-11-03U
10 (requiring "that all supervisors, managers, and directors positions within the Ho-Chunk Nation . .
11 . be occupied by Ho-Chunk Nation enrolled members").
12

13
14 41. The defendant delivered the preceding disciplinary measures to the plaintiff by
15 alternative methods, never personally providing the disciplinary paperwork to the plaintiff. *Id.* at
16 35, 11:22:19 CST.
17

18 42. Neither party presented the Court with any constitutional history regarding the freedom
19 of speech clause. *See* CONST., ART. X, § 1(a)(1).
20

21 DECISION

22
23 The Court begins by stating that the plaintiff's failure to name an institutional defendant
24 as a party eliminates the possibility of receiving money damages. *Id.*, ART. XII, § 2; *see also*
25 *Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct.,
26 Aug. 24, 2001) at 14-16. The plaintiff, however, remains eligible to receive equitable remedies
27 in the form of declaratory and injunctive relief, provided that he prevails on his causes of action.
28

1 See *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8, 2003) at 10-11 (citing
2 CONST., ART. VII, § 6(a)); see also HO-CHUNK NATION PERSONNEL POLICIES & PROCEDURES
3 MANUAL (hereinafter PERSONNEL MANUAL), Ch. 12 at 64. The mere fact that the Court
4 exercises subject matter jurisdiction over the disputes does not evidence a waiver of sovereign
5 immunity. CONST., ART. VII, § 5(a).

7 The Court consolidated three (3) independent causes of action in the instant case, which
8 principally concentrates on an alleged abridgement of the plaintiff's right of free speech. The
9 Court shall resolve the subsidiary claims raised in connection with the annual evaluation and
10 suspension after it focuses upon the constitutional claim, which represents a case of first
11 impression in this jurisdiction. Prior to addressing the freedom of speech issue, the Court
12 acknowledges that the constitutional drafters formed the freedom of speech clause against a
13 backdrop of federal law, recognizing that this First Amendment right carried an intrinsic and
14 well-understood meaning.² CONST., ART. X, § 1(a)(1). The Court has made similar
15 unremarkable and indisputable observations in the past. See, e.g., *Ronald K. Kirkwood v.*
16 *Francis Decorah, in his official capacity as Dir. of HCN Hous. Dep't, et al.*, CV 04-33 (HCN Tr.
17 Ct., Feb. 11, 2005) at 16-17 (identifying the origin of the equity/law distinction in the case and
18 controversy clause); *Chloris Lowe, Jr. v. HCN Legislative Members Elliot Garvin et al.*, CV 00-
19 104 (HCN Tr. Ct., Mar. 30, 2001) at 4 (identifying the origin of the tribal one-person/one-vote
20 principle); *Parmenton Decorah v. HCN Legislature et al.*, CV 99-08 (HCN Tr. Ct., July 1, 1999)
21 at 8 (identifying the origin of the *ex post facto* and bill of attainder clauses). The parties have
22 presented no evidence to justify an alternative analysis.

23
24
25
26
27
28
I. DID THE DEFENDANT DISCHARGE THE PLAINTIFF IN
VIOLATION OF HIS CONSTITUTIONALLY PROTECTED
RIGHT OF FREEDOM OF SPEECH?

² "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

1
2 In the seminal case of *New York Times v. Sullivan*, the United States Supreme Court
3 (hereinafter U.S. Supreme Court) reiterated the following bedrock principles:

4 The general proposition that freedom of expression upon public questions
5 is secured by the First Amendment has long been settled by our decisions.
6 The constitutional safeguard, we have said, "was fashioned to assure
7 unfettered interchange of ideas for the bringing about of political and
8 social change desired by the people." *Roth v. United States*, 354 U.S. 476,
9 484 (1957). "The maintenance of the opportunity for political discussion
10 to the end that government may be responsive to the will of the people and
11 that changes may be obtained by lawful means, an opportunity essential to
12 the security of the [Nation], is a fundamental principle of our
13 constitutional system." *Stromberg v. California*, 283 U.S. 359, 369
14 (1931). "It is a prized American privilege to speak one's mind, although
15 not always with perfect good taste, on all public institutions," *Bridges v.*
16 *California*, 314 U.S. 252, 270 (1941), and this opportunity is to be
17 afforded for "vigorous advocacy" no less than "abstract discussion."
18 *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963).

19 *New York Times*, 376 U.S. 254, 269 (1964). The U.S. Supreme Court confirmed in the context
20 of a libel suit that "debate on public issues should be uninhibited, robust, and wide-open, and that
21 it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government
22 and public officials." *Id.* at 270.

23 Courts must offer a great degree of protection to those espousing political opinion.

24 "To persuade others to [one's] point of view, the pleader, as we know, at
25 times, resorts to exaggeration, to vilification of [individuals] who have
26 been, or are, prominent in . . . state, and even to false statement. But the
27 people of this nation have ordained in light of history, that, in spite of the
28 probability of excesses and abuses, these liberties are, in the long view,
essential to enlightened opinion and right conduct on the part of the
citizens of a democracy."

Id. at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)). The protection afforded
by the free speech clause serves to level the playing field. "'[T]he censorial power is in the
people over the Government, and not in the Government over the people.' It would give public
servants an unjustified preference over the public they serve, if critics of official conduct did not

1 have a fair equivalent of the immunity granted to the officials themselves." *Id.* at 282-83
2 (quoting 4 ANNALS OF CONGRESS 934 (1794) (statement of Rep. James Madison)).

3
4 The above sentiments, however, reflect the degree to which the free speech clause
5 safeguards political comments of individual citizens. The protection extended to a government
6 employee's criticism of the government has greater restrictions. "[T]he State has interests as an
7 employer in regulating the speech of its employees that differ significantly from those it
8 possesses in connection with regulation of the speech of the citizenry in general." *Pickering v.*
9 *Bd. of Educ.*, 391 U.S. 563, 568 (1968). Therefore, the U.S. Supreme Court advocated an
10 examination that balanced the states interests as employer against the free speech interests of the
11 employee. In *Pickering*, the Court regarded the employee's contributions to an ongoing public
12 debate incapable of either "imped[ing] the . . . proper performance of his daily duties in the
13 [workplace] or . . . interfere[ing] with the regular operation of the [workplace] generally." *Id.* at
14 572-73. The U.S. Supreme Court found "the fact of employment . . . only tangentially and
15 insubstantially involved in the subject matter of the public communication," and accordingly
16 conferred citizen status upon the employee. *Id.* at 574.

17
18
19 In a footnote, the U.S. Supreme Court conjectured:

20
21 It is possible to conceive of some positions in public employment in which
22 the need for confidentiality is so great that even completely correct public
23 statements might furnish a permissible ground for dismissal. Likewise,
24 positions in public employment in which the relationship between the
25 superior and subordinate is of such a personal and intimate nature that
26 certain forms of public criticism of the superior by the subordinate would
27 seriously undermine the effectiveness of the working relationship between
28 them can also be imagined.

26 *Id.* at 570 n.3. *Pickering* did not present such a situation, and the Court declined to comment on
27 how it would resolve its own hypothetical.

1 Regardless, the U.S. Supreme Court did erect the basic framework for addressing a
2 government employee's charge that his or her employment was detrimentally impacted as a result
3 of the employee's public statements.³ First, the employee must properly allege that his or her
4 public speech merits constitutional protection, *i.e.*, does the speech implicate a matter of public
5 concern? Second, the employee must show that the speech constituted a substantial or
6 motivating factor upon which the employer based its discipline. If so, the employee has raised a
7 rebuttable presumption of a constitutional infringement, and the employer must demonstrate "by
8 a preponderance of the evidence that it would have reached the same decision . . . in the absence
9 of the protected conduct." *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

12 Yet, despite the more searching inquiry in governmental employee free speech cases, the
13 U.S. Supreme Court continues to make sacrosanct constitutional pronouncements in this context.

14 For instance, the government

15 may not deny a benefit to a person on a basis that infringes his
16 constitutionally protected interests -- especially, his interest in freedom of
17 speech. For if the government could deny a benefit to a person because of
18 his constitutionally protected speech . . . , his exercise of th[is] freedom[]
19 would in effect be penalized and inhibited. This would allow the
20 government to "produce a result which [it] could not command directly."
21 Such interference with constitutional rights is impermissible.

22 *Branti v. Finkel*, 445 U.S. 507, 515 (1980) (quoting *Speiser v. Randall*, 357 U.S. 513, 526
23 (1958)). The U.S. Supreme Court nonetheless recognizes that certain positions, policymaking or
24 not, require an affinity of political belief between employee and employer if political dissonance
25 would foster ineffective performance in the governmental position. *Id.* at 518.

27 ³ A different framework exists when considering the free speech protection afforded to private comments between
28 the employee and the governmental employer. Whereas a court largely focuses on the content of the speech in a
public setting, the finder of fact must also focus upon the time, manner and place of private statements. *Givhan v.*
W. Line Consol. Sch. Dist., 439 U.S. 410, 415 (1979); *see also Connick v. Myers*, 461 U.S. 138, 152-53 (1983).

1 The U.S. Supreme Court thoroughly reexamined the *Pickering* analysis nearly two (2)
2 decades later. In *Connick*, as in *Branti*, the Court began by expounding general propositions.

3 The First Amendment "was fashioned to assure unfettered interchange of
4 ideas for the bringing about of political and social changes desired by the
5 people." Speech "concerning public affairs is more than self-expression; it
6 is the essence of self-government." Accordingly, the Court has frequently
7 reaffirmed that speech on public issues occupies the "highest rung of the
8 hierarchy of First Amendment values," and is entitled to special
9 protection.

10 *Connick*, 461 U.S. at 145 (citations omitted). From this point, the U.S. Supreme Court continued
11 to hold

12 that when a public employee speaks not as a citizen upon matters of public
13 concern, but instead as an employee upon matters only of personal
14 interest, absent the most unusual circumstances, a . . . court is not the
15 appropriate forum in which to review the wisdom of a personnel decision
16 taken by a public agency allegedly in reaction to the employee's behavior.

17 *Id.* at 147.

18 However, when employee speech concerns a matter of public concern, "[t]he *Pickering*
19 balance requires full consideration of the government's interest in the effective and efficient
20 fulfillment of its responsibilities to the public." *Id.* at 150. A court must balance the
21 government's interest in staving off a "disruption of the [workplace] and the destruction of
22 working relationships" against the employee's free speech interest. *Id.* at 152. This balance will
23 tip further in the direction of the employee when "the employee's speech more substantially
24 involve[s] matters of public concern," requiring that the employer likely present "a stronger
25 showing." *Id.*

26 More recently, the U.S. Supreme Court confirmed that it has "never set forth a general
27 test to determine when a procedural safeguard is required by the First Amendment." *Waters v.*
28 *Churchill*, 511 U.S. 661, 671 (1994). Consequently, courts must engage in a case-by-case

1 inquiry "at least until some workable general rule emerges." *Id.* The U.S. Supreme Court does
2 announce guiding statements when engaging in this manner of review. In *Waters*, the Court
3 postulated that "though a private person is perfectly free to uninhibitedly and robustly criticize a
4 state governor's legislative program, we have never suggested that the Constitution bars the
5 governor from firing a high-ranking deputy for doing the same thing." *Id.* at 672. Statements
6 such as this form the starting point for the balancing test.
7

8 No easy manner of examination exists for government employee free speech cases.

9
10 Government employees are often in the best position to know what ails the
11 agencies for which they work; public debate may gain much from their
12 informed opinions. And a government employee, like any citizen, may
13 have a strong, legitimate interest in speaking out on public matters. In
14 many such situations the government may have to make a substantial
15 showing that the speech is, in fact, likely to be disruptive before it may be
16 punished.

17 *Id.* at 674 (citations omitted).⁴ Conversely, the government bears a responsibility of effectively
18 discharging its duties and obligations pursuant to applicable law(s).

19
20 When someone who is paid a salary so that [he or] she will contribute to
21 an agency's effective operation begins to do or say things that detract from
22 the agency's effective operation, the government employer must have
23 some power to restrain [him or] her. The reason the governor may, in the
24 example given above, fire the deputy is not that this dismissal would
25 somehow be narrowly tailored to a compelling government interest. It is
26 that the governor and the governor's staff have a job to do, and the
27 governor justifiably feels that a quieter subordinate would allow them to
28 do this job more effectively.

23 ⁴ As indicated above, the U.S. Supreme Court created a baseline inquiry whereby the government employer must
24 rebut a presumption of an unconstitutional infringement by a preponderance of the evidence. *Supra* pp. 21-22. This
25 level of the inquiry assumes the existence of constitutionally protected speech and contemporaneous employee
26 discipline. The occasional requirement that the government employer present a substantial showing to counter the
27 contention that the employee is engaged in a constitutional exercise of his or her right to free speech does not alter
28 this evidentiary standard. The need for such a showing relates to the first prong of the three-prong test for
determining the existence of an unconstitutionally retaliatory employment decision. Speech that does not touch
upon a matter of public concern does not enjoy constitutional protection in the government workplace. Employee
speech that does satisfy this basic condition may enjoy constitutional protection, provided that the employer's
interests in effectiveness and efficiency do not outweigh the type of speech at issue. Employee discourse on
increasingly significant matters of public concern requires a greater justification by the government to preclude a
judicial determination that such speech is constitutionally protected. This first prong analysis represents the
Pickering balancing test. See *Kokkinis v. Ivkovich*, 185 F.3d 840, 843-44 (7th Cir. 1999).

1
2 *Id.* at 675.

3 After expressing the competing interests, the U.S. Supreme Court announced the key to
4 its government employment free speech analysis, namely:

5 The government's interest in achieving its goals as effectively and
6 efficiently as possible is elevated from a relatively subordinate interest
7 when it acts as sovereign to a significant one when it acts as employer.
8 The government cannot restrict the speech of the public at large just in the
9 name of efficiency. But where the government is employing someone for
the very purpose of effectively achieving its goals, such restrictions may
well be appropriate.

10 *Id.* Admittedly, this "key" does not go very far to illuminate and resolve government employee
11 free speech cases, but the only other direct guidance offered in *Waters* appeared in the following
12 statement: "We think employer decisionmaking will not be unduly burdened by having courts
13 look to the facts as the employer *reasonably* found them to be." *Id.* at 677. This marginal
14 assistance only becomes relevant if the employer could not reasonably ascertain the content of
15 the employee's statements.
16

17 The Seventh Circuit Court of Appeals has scrutinized the foregoing case law and its
18 progeny and has identified "several factors that should be considered when balancing the
19 employee's [free speech] interests against the government's interest in providing services
20 efficiently." *Kokkinis*, 185 F.3d at 845. Yet again, a court must balance somewhat vague factors
21 rather than apply bright line rules in its *Pickering* analysis. The factors are as follows:
22

23 (1) whether the statement would create problems in maintaining discipline
24 by immediate supervisors or harmony among co-workers; (2) whether the
25 employment relationship is one in which personal loyalty and confidence
26 are necessary; (3) whether the speech impeded the employee's ability to
27 perform [his or] her daily responsibilities; (4) the time, place, and manner
28 of the speech; (5) the context in which the underlying dispute arose; (6)
whether the matter was one on which debate was vital to informed
decisionmaking; and (7) whether the speaker should be regarded as a
member of the general public.

1
2 *Id.*

3 **A. Does the plaintiff's speech deserve constitutional protection**
4 **when examined in the context of his status as a former**
5 **government employee?**

6 Prior to considering the above factors, a court must begin by inquiring whether the
7 speech dealt with a matter of public concern, and "[a] personal aspect contained within the
8 motive of the speaker does not necessarily remove the speech from the scope of public concern."
9 *Marshall v. Porter County Plan Comm'n*, 32 F.3d 1215, 1219 (7th Cir. 1994). In relation to the
10 instant case, "[w]hether public officials are operating the government ethically and legally is a
11 quintessential issue of public concern." *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000).
12 Every branch of the Ho-Chunk government has addressed the issue of Ho-Chunk preference in
13 relation to the scope of such policy. The Court inescapably concludes that internal or external
14 discussion of Ho-Chunk preference represents a matter of public concern. The Court next needs
15 to determine whether countervailing interests of the government employer vest constitutional
16 protection away from the plaintiff's statements to the media.

17
18 To begin, the speech at issue would receive constitutional protection if articulated by a
19 non-employee tribal member. Furthermore, the speech would readily receive constitutional
20 protection if uttered by an employee who worked outside of the Nation's Business Department
21 hierarchy. The plaintiff, however, offered public comments critical of the Nation's business
22 practices on the eve of a referendum concerning a gaming expansion over which the plaintiff
23 bore professional responsibility. These circumstances present both a difficult and close case to
24 resolve.

25
26
27 The Court shall weigh each of the factors identified by the Seventh Circuit Court of
28 Appeals in the performance of the *Pickering* balance test. "With respect to the first two factors, .

1 . . a government employer is allowed to consider 'the potential disruptiveness' of the employee's
2 speech." *Kokkinis*, 185 F.3d at 845 (quoting *Waters*, 511 U.S. at 680). As to the first factor, the
3 Court must determine whether the speech at issue had the potential to create administrative
4 disciplinary problems or disharmony amongst the workforce. The plaintiff did not direct his
5 comments at his supervisors or anyone within the hierarchical structure of the Executive Branch.
6 The plaintiff instead leveled his criticism of the expanded Ho-Chunk Preference Policy at the
7 Legislative Branch. No evidence exists to show that the plaintiff's speech could cause
8 disruptiveness within the workplace. Rather, had the plaintiff's media interaction served to derail
9 the casino referendum, or been perceived as a contributing factor, then the tribal community, and
10 not simply his co-workers, would have potentially reacted against the plaintiff. However, this
11 *Pickering* factor does not attempt to gauge community reaction to the voice of a dissenter.
12 Political speech, if persuasive and effective, should elicit a community response. In publicly
13 commenting on the efficacy of a law, the plaintiff placed himself in the guise of a member of the
14 public. Finally, no evidence exists to demonstrate that the speech further exacerbated the parties'
15 admittedly strained working relationship. To be sure, the defendant likely viewed the plaintiff's
16 behavior as counterproductive and perhaps disloyal, but these sentiments concern the next factor.

20 Second, the Court must determine whether the plaintiff's statements proved inconsistent
21 with the level of professional and personal loyalty and confidence that his supervisors needed to
22 expect from the plaintiff. The plaintiff perceives that he speaks on behalf of those under, or
23 formerly under, his charge, and claimed that the timing of his comments coincided with an
24 increase in objections from co-workers over the expansion of tribal preference. The plaintiff also
25 perceives that his public statements do not conflict with the best interests of the Nation.
26 Reasonable minds may differ on this perception. President Lewis, for instance, recognized that
27
28

1 "[a]lthough one person may wish to negatively characterize our laws, our Nation has an
2 obligation to provide [the public] with a full picture." Def.s' Ex. B at 2. The Court finds the
3 chief executive's description quite telling in that he simply charges that the plaintiff has
4 "negatively characterize[d] our laws." No evidence exists to suggest that President Lewis
5 viewed the plaintiff as either disloyal or undeserving of his confidence.
6

7 The Executive Branch is constitutionally charged with the enforcement and
8 administration of the laws. CONST., ART. IV, § 2. The Business Department has an obligation to
9 abide by pertinent legislative enactments. The plaintiff's criticism focused upon the propriety of
10 the underlying laws passed by a separate branch of government. The petitioner was not
11 discharged due to any public criticism of the defendant's character, expertise or competence,
12 which would likely not receive constitutional protection. Unlike the above-cited gubernatorial
13 staffer hypothetical, the plaintiff's critique was not aimed at his immediate supervisor, and the
14 defendant presented no colorable claims of potential disruption of the workplace. Fellow
15 employees perhaps disagreed with the plaintiff's assertions, but any such distaste for his
16 comments does not satisfy this factor.⁵
17
18

19 Third, the Court must determine whether the speech impeded the plaintiff's ability to
20 discharge his duties and obligations. No evidence exists to substantiate this factor, and,
21 therefore, the Court shall move on to the next factor. Fourth, the Court must scrutinize the time,
22 place and manner of the speech. "[T]he manner and means of the employee's protestation are
23 key considerations in balancing the employer's and employee's interests under *Pickering*."
24 *Greer*, 212 F.3d at 371. The testimony reveals that the plaintiff drafted his editorial letters in his
25
26

27
28 ⁵ "If a general claim of disharmony could be used by a government to insulate itself from public criticism by its employees, the First Amendment's guarantee that 'employees of governmental entities generally should be able to complain or criticize' in order to promote governmental efficiency would be empty." *Gazarkiewicz v. Town of*

1 private time, and approached the three (3) media outlets after work hours. He also disavowed
2 speaking as an agent of the Nation. In addition, the plaintiff did not seek to publicize his
3 commentary in the press in the first instance. The plaintiff addressed his concerns in writing to
4 the Legislature nearly ten (10) months prior to the casino referendum. The plaintiff, however,
5 regarded this petition to the Legislature as unfruitful.
6

7 The Court will not naïvely assume that the plaintiff did not purposefully time his media
8 interaction. The plaintiff was intimately involved with the proposed expansion of DeJope, and
9 most politically savvy tribal members closely followed the referendum process. Yet, the timing
10 of the speech guaranteed a larger, more attentive audience, and provided a greater degree of
11 leverage in the plaintiff's continuing campaign against the Legislature. Speech should not lose
12 its constitutionally protected status when presented in a manner intended to increase its
13 effectiveness. The plaintiff likely attempted to gain leverage for his political viewpoint by
14 espousing it on the eve of the referendum. Political commentators and critics often deliberately
15 use the electoral process for just this purpose.
16
17

18 At this point, the Court must clearly note that it neither sanctions the plaintiff's method of
19 articulating his opposition to the Nation's preference policy nor his particular viewpoint. While
20 this statement proves largely irrelevant to the present inquiry, the plaintiff's actions may have
21 proven irresponsible if they would have contributed, even partially, to the derailing of the
22 Nation's efforts to secure a better financial future for its members. The plaintiff likely believes
23 that this aim should not automatically override other legitimate concerns, and he maintains the
24 right to hold this viewpoint. Others assuredly share this perspective, but, as concerns preference
25 initiatives, both tribal and other governments employ these programs to elevate and preserve
26 their sovereign status. *See Regina K. Baldwin et al. v. Ho-Chunk Nation et al.*, CV 01-16, -19, -
27
28

Kingsford Heights, 359 F.3d 933, 945 (7th Cir. 2004).

1 21 (HCN Tr. Ct., Oct. 3, 2003). The Nation affords its members preference on the basis of
2 political, and not racial, status, and this ongoing policy is decidedly legal. *See* CONST., ART. III,
3 § 1. In the absence of this distinction, the plaintiff would not have served as a general manager
4 of a tribal casino, and this Court would not exist to hear this dispute. Regardless, the plaintiff
5 may dispute the expanded scope of the Ho-Chunk Preference Policy, and the Court does not
6 deem that the time, place or manner of the plaintiff's speech removed its constitutional
7 protection.⁶

9 Fifth, the Court must examine the context of the underlying dispute. The plaintiff
10 singularly attributes the policy of expanding tribal preference to the Legislature, but in fact the
11 General Council concurred with the expansion by arguably pronouncing it as binding policy. *Id.*,
12 ART. IV, § 3(a, f); *see also* GEN. COUNCIL RES. 10-11-03U. This *Pickering* factor, however, is
13 intended to elucidate whether the speech originates from a distinctly job-related grievance
14 against one's employer, involving a dispute of a decidedly personal nature. The facts of the
15 instant case do not support this type of conclusion.

18 The plaintiff first aired his position with the Legislature on April 28, 2003. The
19 submission of his tribal preference memorandum preceded his first administrative grievances by
20 five (5) months. *See Daniel Brown v. Sandra Plawman*, CV 03-86, 04-01 (HCN Tr. Ct., May
21 25, 2004) (dismissing cases concerning successive general manager reassignments). In addition,
22 the memorandum to the Legislature preceded the hiring of the defendant by nearly six (6)
23 months. The defendant asserts that the plaintiff approached the media in an effort to either
24 retaliate against the Business Department for rejecting his severance proposal or to compel the
25

27 ⁶ At *Trial*, the parties disputed the veracity of the plaintiff's media comments, but the truthfulness of the speech does
28 not influence the *Pickering* analysis. "*Pickering* would be senseless if speech sincerely believed to be true was
absolutely protected. *Pickering* balancing only applies to speech that is true or believed to be true, because
recklessly false speech is unprotected by the First Amendment." *Greer*, 212 F.3d at 373.

1 Business Department to reconsider its decision. The defendant arrives at this interpretation on
2 the basis of a reference in the severance letter that the plaintiff would pursue his cases to the
3 fullest extent. The Court finds the plaintiff's explanation that he intended to convey that he
4 would submit his grievances to the Court and the General Council as more credible since he had
5 already proceeded in this direction. *See, e.g., Compl., CV 03-86* (Dec. 15, 2003). Furthermore,
6 the plaintiff would have logically provided the Business Department with notice of his planned
7 media interaction if intended to serve as leverage for reconsideration of a proposed severance
8 package. The plaintiff leveled a public criticism against legislative policy in the press and at
9 General Council, and not against his supervisor or the Business Department.
10
11

12 Sixth, the Court must determine whether public debate of the expanded preference policy
13 proves crucial to informed decision-making. The General Council discussed the issue in open
14 session, thereby designating it as worthwhile of public debate. The plaintiff's perspective on the
15 issue lends to this debate, and discussion regarding the scope and application of the preference
16 policy will most definitely continue.
17

18 Finally, the Court has already concluded that the plaintiff should occupy the status of a
19 member of the public in connection with his media pronouncements. The speech at issue dealt
20 with a subject that pervades political debate and discussion within the Nation. Tribal election
21 campaigns rarely, if ever, neglect to incorporate platforms on Ho-Chunk preference. Also,
22 discrimination, legal or illegal, forms the basis of a seemingly unending debate in this country.
23 Due to the nature of the plaintiff's speech, the defendant needed to present a substantial showing
24 of potential disruption to the effectiveness and efficiency of the workplace as a result of the
25 plaintiff's utterances. The defendant did not make this showing. Therefore, the Court holds that
26 the plaintiff's speech deserves constitutional protection.
27
28

1 **B. Did the plaintiff's speech represent a substantial or motivating**
2 **factor in relation to his discharge from employment?**

3 The findings of fact clearly reveal that the defendant discharged the plaintiff solely
4 because of his public critique of the expanded tribal preference policy. The defendant presented
5 no other grounds for the plaintiff's termination. The Court accordingly holds that the plaintiff
6 satisfied his evidentiary burden, thereby erecting a rebuttable presumption of a violation of his
7 constitutional right of free speech.
8

9 **C. Does the defendant present sufficient evidence to establish that**
10 **the plaintiff's termination would have occurred in the absence**
11 **of the protected conduct?**

12 The defendant obviously cannot meet this burden in light of the Court's obvious
13 conclusion in the preceding paragraph. Furthermore, any *post hoc* justifications would not
14 suffice to rebut the plaintiff's case. As stated by the Seventh Circuit Court of Appeals, "[t]he
15 question is not whether [the employee] *could have been discharged* for his [or her] job
16 performance, but it is whether he [or she] was in fact discharged for his [or her] job performance.
17 The issue is one of causation, not hypothetical justification." *Gazarkiewicz*, 359 F.3d at 948
18 (citation omitted). Consequently, the Court holds that the plaintiff has prevailed on his charge
19 that the defendant impermissibly terminated his employment in response to his exercising his
20 constitutionally protected right of free speech.
21

22 The defendant sought to justify the plaintiff's discharge on the basis of several
23 proscriptions in the PERSONNEL MANUAL. Pl.'s Ex. 3 at 3 (citing PERS. MANUAL, Chs. 7 at 27,
24 12 at 55-59). The Court has indirectly addressed some of these alleged violations within the
25 above discussion. For example, the Court found that the plaintiff did not act as an agent of the
26 Nation when he communicated with the media. PERS. MANUAL, Chs. 7 at 27. Regarding the
27 remaining alleged violations of policy, the *Pickering* balancing test subsumes these concerns into
28

1 the overall inquiry. More importantly, generalized statutory provisions cannot trump
2 constitutional guarantees. CONST., ART. III, § 4.

3
4 Based upon the foregoing, the Court overturns the plaintiff's termination and awards
5 relief as deemed appropriate by the Court. *Ho-Chunk Nation Rules of Civil Procedure*
6 (hereinafter *HCN R. Civ. P.*), Rule 53. The Court accordingly directs the Personnel Department
7 to reinstate the plaintiff to a position with a comparable wage. EMPLOYMENT RELATIONS ACT OF
8 2004 (hereinafter ERA), 6 HCC § 5.7(i). In the alternative, the Personnel Department shall
9 prospectively increase the plaintiff's present salary to achieve this statutory result, provided that
10 the relevant job description accommodates this salary range. *See* CONST., ART. VII, § 6(a); *Hope*
11 *B. Smith v. Ho-Chunk Nation*, CV 02-42 (HCN Tr. Ct., July 31, 2003), *aff'd*, SU 03-10 (HCN S.
12 Ct., Dec. 8, 2003). The Personnel Department shall contact the plaintiff within a period of
13 fourteen (14) days from the entry of this judgment to establish the timeline in relation to
14 reinstatement. Otherwise, the Personnel Department shall perform the salary adjustment within
15 fourteen (14) days from the entry of this judgment. Finally, the Court orders the Personnel
16 Department to remove negative references from the plaintiff's personnel file, award the plaintiff
17 bridged service credit, and restore the plaintiff's seniority. ERA, § 5.35(d)(2).

18
19
20 II. DID THE DEFENDANT IMPROPERLY SUSPEND THE
21 PLAINTIFF IN VIOLATION OF STATUTORY LAW OR
22 CONSTITUTIONALLY REQUIRED PROCEDURAL DUE
23 PROCESS?

24 A plaintiff must establish the component parts of a cause of action by a preponderance of
25 the evidence. *See, e.g., Joseph D. Ermenc v. HCN Whitetail Crossing*, CV 01-88 (HCN Tr. Ct.,
26 Sept. 11, 2003) at 6. Therefore, when a plaintiff voluntarily decides to present only his or her
27 testimony on a factual issue, the likelihood that the party can meet the applicable burden of proof
28 is severely diminished. In the instant case, the parties essentially offered directly contradictory

1 testimony. Since the Court does not deem the defendant as a witness lacking credibility, the
2 plaintiff did not carry his burden of proof on this cause of action.

3
4 As an aside, the defendant testified that an employer could only progressively discipline
5 an employee for repeated identical instances of unacceptable conduct. See PERS. MANUAL, Ch.
6 12 at 59. The Court, however, has sanctioned progressive discipline on the basis of addressing
7 successive similar past offenses. *Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow*
8 *Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24, 2001) at 20 n.7 (citing *id.* at 60). Nonetheless, the
9 prevailing law notes that "discipline will normally be progressive," thereby allowing deviation
10 from progressive discipline if justified under the circumstances. PERS. MANUAL, Ch. 12 at 59
11 (emphasis added).

12
13 On a related note, the plaintiff equates constitutional due process with adherence to
14 progressive discipline. LPER at 75, 02:49:45 CST. This is not the case. An employer affords
15 minimal procedural due process protection when he or she provides the employee notice and a
16 reasonable opportunity to be heard prior to imposing discipline capable of depriving the
17 employee of a property interest. See, e.g., *Margaret G. Garvin v. Donald Greengrass et al.*, CV
18 00-10, -38 (HCN Tr. Ct., Mar. 9, 2001) at 25-29; see also CONST., ART. X, § 1(a)(8). The
19 defendant testified that he imposed the suspension, in part, due to the plaintiff's failure to attend
20 scheduled events and, in general, because the plaintiff's daily whereabouts remained unknown.
21 Again, the plaintiff refutes this assertion, but did not provide the greater weight of the evidence
22 on this issue. Also, the defendant justified the mailed delivery of the suspension notice upon a
23 purported inability to reasonably locate the plaintiff. The Court accepts this justification for the
24 manner of service employed in this case. The plaintiff's unavailability provoked the disciplinary
25 measure, rendering personal delivery unlikely.
26
27
28

1 III. DID THE DEFENDANT VIOLATE STATUTORY LAW BY
2 PERFORMING THE PLAINTIFF'S ANNUAL PERFORMANCE
3 EVALUATION WITHOUT CONFERRING WITH A FORMER
4 SUPERVISOR?

5 The defendant did not accept his appointment until September 22, 2003, and performed
6 the plaintiff's annual performance evaluation on the basis of a three-month period of interaction.
7 Yet, the PERSONNEL MANUAL does not offer any direction to a supervisor confronted with such a
8 situation. PERS. MANUAL, Chs. 6 at 16-17, 9 at 49. A supervisor is indirectly required "to
9 evaluate employees objectively for their performance during the evaluation period," which
10 arguably refers to the entire twelve-month period. *Id.*, Ch. 9 at 49. However, the PERSONNEL
11 MANUAL does not explicitly impose procedures, leaving this task to the Personnel Director. *Id.*

12 Moreover, the Court has previously discussed the impropriety of incorporating potential
13 merit increases in money judgments. *Garvin*, CV 00-10, -38 (HCN Tr. Ct., Nov. 16, 2001) at
14 11-12. The Court has declined to do so since the Court may only enter a money judgment for
15 actual, not hypothetical, wages. ERA, § 5.35d(1). The plaintiff may not receive a retroactive
16 increase in this case due to the presence of sovereign immunity, but nonetheless the Court will
17 not hypothesize about the merit increase the plaintiff should or could have received, especially
18 since the plaintiff has not demonstrated a clear violation of the Nation's law.

19 The parties retain the right to file a timely post judgment motion with this Court in
20 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
21 Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
22 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
23 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal." *HCN R. Civ. P.*
24 61. The appellant "shall within sixty (60) calendar days after the day such judgment or order
25 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
26
27
28

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 10th day of May 2006, by the Ho-Chunk Nation Trial Court
7 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
8

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

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28