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

**Casimir T. Ostrowski,**  
Plaintiff,

v.

Case No.: **CV 02-82**

**Ho-Chunk Nation, HCN Personnel Dept.  
and HCN Casino,**  
Defendants.

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**ORDER  
(Final Judgment)**

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**INTRODUCTION**

15 On February 8, 2005, the Ho-Chunk Nation Trial Court entered an *Order* in this case.  
16 The decision was appealed to the Ho-Chunk Nation Supreme Court. The Supreme Court  
17 remanded the case for a full explanation of the Court's rationale. *Decision*, (HCN S. Ct. SU 05-  
18 03, June 27, 2005) at 5. The Supreme Court found "that Chief Judge Bossman had failed to  
19 properly set forth the standard and document the basis for his determination that the Nation's  
20 accommodations to Plaintiff-Appellant Ostrowski 'caused the cage cashier department to operate  
21 at less than peak efficiency.' *Order*, Finding of fact 9, at 4." *Id.* at 3. Moreover, "the Supreme  
22 Court's review of the trial court record reveals no establishment of a burden of proof as to 'peak  
23 efficiency' nor is there any record of testimony or evidence on the issue of peak efficiency...."  
24 *Id.* at 4. Furthermore, the Supreme Court declared "that there was an omission of the Court to  
25 address the termination of Mr. Ostrowski in terms of citing a specific provision of the *HCN*  
26 *Personnel Policies and Procedures Manual*." *Id.* As a final point, the Supreme Court proceeded

1 to declare that the record did not reflect “any factual basis regarding the law, the standard of  
2 termination, and the burden of proof relating to the Findings of Fact, regarding the  
3 accommodations made to Mr. Ostrowski.” *Id.* On remand, the Court will set forth findings of  
4 fact and legal analysis to fulfill the Supreme Court’s directives.<sup>1</sup>  
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## 6 7 **FINDINGS OF FACT**

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9 1. The plaintiff, Casimir T. Ostrowski, is a non-member, and resides at 326 Oak St., West  
10 Baraboo, Wisconsin 53913. The plaintiff was formerly employed as a cage cashier in cage  
11 operations at Ho-Chunk Casino operated by the Ho-Chunk Nation (hereinafter HCN or Nation).

12 2. The defendant, Nation, is a federally recognized Indian tribe, whose head-quarters are  
13 located on trust lands at W9814 Airport Road, P.O. Box 667, Black River Falls, Wisconsin  
14 54615.  
15

16 3. The defendant, HCN Personnel Department is a HCN executive department, located on  
17 trust lands at the HCN Headquarters, W9814 Airport Road, P. O. Box 667, Black River Falls, WI  
18 54615.  
19

20 4. The defendant, Ho-Chunk Casino, is an enterprise owned and operated by Nation within  
21 the Nation’s Department of Business, located on trust lands at S3214 Highway 12, Baraboo, WI  
22 53913.

23 5. The parties received proper notice of the *Complaint* and *Summons* filed on August 14,  
24 2002.  
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28 <sup>1</sup> While the presiding judge may disagree with the opinion of the previous judge, this Court must follow the directives of the Supreme Court and provide the rationale for the judgment issued by Judge Bossman on February 8, 2005.

1 6. On July 9, 1995, the plaintiff was hired as a cage cashier in the cage operations for Ho-  
2 Chunk Casino.

3 7. The cage cashier's job description, under the sectional heading "duties and  
4 responsibilities," indicates the employee works with an imprest inventory of tokens and/or cash.  
5 Pl.'s Ex. 1. Job description (approved 4/13/99) at 1. The worker must handle currency by  
6 counting, securing, issuing or exchanging. *Id.* at 1.4. The worker must be responsible for cash  
7 shortages overages in accordance with the variance policy. *Id.* at 1.9.

8 8. The cage cashier's job description, under the sectional heading, qualifications, requires  
9 the worker to be able to do infrequent lifting of up to 100 lbs, and primary lifting requirements of  
10 10-25 lbs. on a consistent basis. *Id.* The worker must also be able to walk, stoop, bend and stand  
11 for long periods of time. *Id.* at 11.

12 9. In a medical report, Dr. Kevin Weber reported that on January 16, 1997, the plaintiff  
13 opened a drawer while at work. The drawer came off the track and fell to the floor. The plaintiff  
14 twisted when he tried to hold on to the drawer. In the past medical history part of the report, the  
15 plaintiff was told he had a degenerative disc five (5) years before. In the report, the doctor  
16 indicated it was a pre-existing condition. Pl.'s Ex. 3. Health Care Provider Report, (1/16/97).

17 10. Following the injury, the plaintiff made a worker's compensation claim. The Nation  
18 accommodated his return to work. His duties were modified to a thirty two (32) hour schedule  
19 with ten (10) minute breaks every hour, and the plaintiff was assigned to the casino cage  
20 department chip and key window.

21 11. On June 25, 1999, the plaintiff suffered another work related injury.

22 12. In a memorandum dated December 28, 1999, Dr. Russell Gelfsman, for workman's  
23 compensation representatives Crawford & Co., reported the plaintiff had reached the end of  
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1 healing as of that date. In addition, the plaintiff's permanent disability rating was zero (0). Pl.'s  
2 Ex. 7.

3  
4 13. On April 26, 2000, the plaintiff entered into a Non- Disciplinary Discussion Agenda with  
5 representatives of the employer. This document outlined certain restrictions and accommodations  
6 for the plaintiff to follow: an attempt to comply with physician's orders. Pl.'s Ex. 10.

7 14. HCN law addresses the issue of fitness for duty as follows:

8  
9 When there is question as to whether an employee is physically capable of  
10 performing their job duties, they may be referred to a contracted provider  
11 for an evaluation sufficient to ensure that the employee's return to work  
will be without undue health hazard or accident risk to the employee or  
others.

12 OCCUPATIONAL SAFETY AND HEALTH PROGRAM ACT, 6 HCC § 8 at 3.

13 15. On June 24, 2002, the plaintiff was ordered to submit to a "fitness for duty" examination  
14 to be conducted by Dr. Eric Newgent. Pl.'s Ex. 15.

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16 16. In a memorandum dated June 27, 2002, to Gloria WhiteThunder, Human Resources  
17 Director, Dr. Eric Newgent states that:

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19 Mr. Ostrowski can not perform all of his essential job functions  
20 without accommodations. His job description states that he must  
21 infrequently lift 100 lbs, which he cannot do. The primary lifting  
22 requirement of 10-25 lbs., on a consistent basis may be a problem  
also, even though it falls within his restrictions. Specifically, I  
don't think he can do the continuous lifting, bending and twisting  
with the heavy bags. The current job assignment on the Chip &  
Key Window seems to meet the necessary accommodations.

23 Plaintiff's Exh. 16 at 1.

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25 17. Under the HCN PERSONNEL POLICIES AND PROCEDURES MANUAL, (hereinafter HCN PERS.  
26 MANUAL).The General Purposes Section provides the following:

27  
28 Ho-Chunk Nation hereby asserts it has the right to employ the best  
qualified persons available; that the continuation of employment is  
based on the need for work to be performed, availability of

1 revenues, faithful and effective performance, proper personal  
2 conduct, and continuing fitness of employees; and that all  
3 employees are terminable for cause....

4 Pers. Manual, Intro. at 2.

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6 18. The HCN Personnel Manual's Medical Examinations Section, provides that "[it] is the  
7 policy of the Ho-Chunk Nation to employ persons who have physical and mental health  
8 consistent with the requirements of the positions to be filled, and to assure that all employees  
9 have a standard of health that will contribute to safe, health, and efficient performance of work."

10 *Id.*, Ch. 7 at 24.

11  
12 19. On June 29, 2002, Shirley Theisen, Cage Supervisor, notified the plaintiff by letter that  
13 "according to your doctor's review, it has been determined that you have reached 'your end of  
14 healing.' Your doctor's statements note that you are not able to perform all of your essential job  
15 functions without special accommodations." Compl., Attach. 2 at 1. Therefore, Ms. Thiesen  
16 terminated the plaintiff's employment as cage cashier because he was physically unable to do the  
17 work for which he was hired  
18

## 19 **APPLICABLE LAW**

### 20 **CONSTITUTION OF THE HO-CHUNK NATION**

#### 21 **Art. VII - Judiciary**

##### 22 **Sec. 5. Jurisdiction of the Judiciary.**

23  
24 (a) The Trial Court shall have original jurisdiction over all cases and controversies,  
25 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and  
26 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its  
27 officials and employees, shall be a party. Any such case or controversy arising within the  
28 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other

1 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of  
2 the Nation's sovereign immunity.

3 Sec. 6. Powers of the Tribal Court.

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

7 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (Updated  
8 June 07,2002)

9 INTRODUCTION

10 General Purposes: [p. 2]

11 This system provides means to recruit, select, develop, and maintain an effective and responsible  
12 work force. It shall include policies for employee hiring and advancement, training and career  
13 development, job classification, salary administration, retirement, fringe benefits, discipline,  
14 discharge, and other related activities.

15 The Ho-Chunk Nation hereby asserts that it has the right to employ the best qualified persons  
16 available; that the continuation of employment is based on the need for work to be performed,  
17 availability of revenues, faithful and effective performance, proper personal conduct, and  
18 continuing fitness of employees (emphasis added); and that all employees are terminable for  
19 cause unless otherwise specified in writing as a prescribed employment term.

20 Chapter 7

21 Medical Examinations [p. 24]

22 It is the policy of the HoChunk Nation to employ persons who have physical and mental health  
23 consistent with the requirements of the positions to be filled, and to assure that all employee have  
24 a standard of health that will contribute to safe, health, and efficient performance of work.

25 Chapter 12 – EMPLOYMENT CONDUCT, DISCIPLINE, AND ADMINISTRATIVE REVIEW

26 General Conduct of Employees [p. 52]

27 An obligation rests with every employee of the HoChunk Nation to render honest, efficient, and  
28 courteous performance of duties. Employees will therefore be responsible and held accountable  
for adhering to all Tribal policies, rules, directives, and procedures prescribed by the Nation  
through supervisory or management personnel.

1 Discipline Policy

[p. 54]

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

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

8 C. Performance

[p. 46]

- 9 1. Inefficiency, incompetency, or negligence in the performance of duties, including  
10 failure to perform assigned tasks or training or failure to discharge duties in a  
11 prompt, competent, and reasonable manner.
- 12 2. Refusal or inability to improve job performance in accordance with written or  
13 verbal direction after a reasonable trial period.

13 D. Discharge for Misconduct

[p. 48]

14 Employees should be aware that their employment relationship with the HoChunk Nation is  
15 based on the condition of mutual consent to continue the relationship between the employee  
16 and the Nation. Therefore, the employee or Nation is free to terminate the employment  
17 relationship for misconduct, at any time. Recommendations to discharge an employee are to  
18 be made to and authorized by the Department Director.

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

21 **DECISION**

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23 This Court must provide the rationale for *the Judgment (For Defendants)* issued on  
24 February 9, 2005, by former Chief Trial Court Judge William Bossman.<sup>2</sup>

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28 <sup>2</sup> The Chief Judge has since departed the Ho-Chunk Nation Judiciary, leaving no notes to the file nor any references  
to law. The presiding judge will attempt to provide the rationale for the Court's decision.

1 First, this Court must address the fact that the Supreme Court found “ that the Chief  
2 Judge failed to properly set forth the standard and document the basis for his determination that  
3 the Nation’s accommodations to the plaintiff caused the casino cage cashier department to  
4 operate at less than peak efficiency. *Order. Finding of fact*, at p. 4.” *Decision* at 3. Cage  
5 Supervisor Theisen prepared the *Ho-Chunk Casino Disciplinary Action form* to terminate the  
6 plaintiff. At paragraph 4, she declared that the plaintiff’s “inability to perform the usual job  
7 duties of a cage cashier diminishes the effectiveness of cage operations and prevents this  
8 department from operating at peak efficiency and realizing its full potential.” Def.’s Ex. F.

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11 The *Complaint* contends that the defendants were estopped from discharging the plaintiff  
12 and contending he was unfit for duty. *Compl.* at 3. The Nation was not estopped from  
13 discharging the plaintiff. First of all, the Nation has the right to employ the best qualified  
14 persons available, and continuation of employment is based on the need for work to be  
15 performed, which includes among other criteria “the continuing fitness of employees; and that all  
16 employees are terminable for cause.” PER. MANUAL, INTRO. at 2. Moreover, “[i]t is the policy of  
17 the Ho-Chunk Nation to employ persons who have physical and mental health consistent with  
18 the requirements of the positions to be filled, and to assure that all employees have a standard of  
19 health that will contribute to safe, health, and efficient performance of work.” *Id.*, Ch. 7 at 24.  
20  
21 (emphasis added). This aspect of continuing fitness for the requirement of the job was the basis  
22 for the Court’s decision. As previously stated, “the Court finds that the plaintiff was terminated  
23 because he was not qualified under the job description to perform the duties of the job. He was  
24 physically unable to perform the essential aspects of the work for which he was hired. J. (For  
25 Defs.), CV 02-82, (HCN Tr. Ct., Feb. 8, 2005) at 5.  
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1 A new hire, prior to starting their employment with the Nation, is required to attend an  
2 orientation session; at that time the employee is given a PERSONNEL MANUAL as part of  
3 orientation for the job. The plaintiff was fully aware how to apply for worker's compensation  
4 benefits and adhere to the grievance procedure. It can only be assumed that he knew of the  
5 policies of the Nation regarding employee fitness requirements. He also knew about the duties  
6 and requirements of the job given that he applied for the cage cashier position at the Casino. For  
7 this reason, he had notice of the health standard and health requirement to keep his job.  
8

9 Moreover, the plaintiff was hired on July 7, 1995, as a cage cashier. The cage cashier job  
10 description duties and responsibilities include[d] that the employee must work with an imprest  
11 inventory of tokens and/or cash. Also, the worker handle[d] currency by counting, securing,  
12 issuing or exchanging [it]. Further, the worker [was] responsible for cash shortages overages in  
13 accordance with the variance policy. In addition to these duties, there are six other duties and  
14 responsibilities listed in the job description. Defs.' Ex. F. However, the plaintiff was not able to  
15 fulfill these duties and responsibilities according to testimony provided by one of his supervisors,  
16 Debra Hudzinski. *Trial* (LPER at 13, 08/06/03, 10:25:04 CDT). She believed that he could not  
17 meet the primary lifting requirements on the job description. *Id.*, 10:25:45 CDT. Ms. Hudzinski  
18 also testified that he would not be able to walk, bend, stoop, stand for long periods of time. *Id.*,  
19 10:26:11 CDT. When asked what the plaintiff could not do, Ms. Hudzinski testified that the  
20 plaintiff did not work patron or employee windows and lift coin bags like other cage cashiers.  
21 *Id.* at 15, 10:34:31 and 10:34:40 CDT. Further, she said that "the plaintiff did not exchange  
22 currency or [do] coin exchanges and that he did not have variances to worry about." *Id.*, 10:35:24  
23 CDT. When asked if the plaintiff complained of physical pain during the time accommodations  
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1 were made, Ms. Hudzinski said that “even with the accommodations he still had complaints.”  
2 *Id.*, 10:33:23 CDT.

3  
4 The plaintiff could not meet the requisite health standard to perform the job for which he  
5 was hired, even though he was given accommodations for two and a half (2 1/2) years beyond the  
6 “end of his healing” period. As stated in a memorandum to HR Director, Gloria WhiteThunder,  
7 Dr. Eric Newgent corroborates Ms. Hudzinski’s testimony and states that

8 Mr. Ostrowski can not perform all of his essential job functions  
9 without accommodations. His job description states that he must  
10 infrequently lift 100 lbs, which he cannot do. The primary lifting  
11 requirement of 10-25 lbs., on a consistent basis may be a problem  
12 also, even though it falls within his restrictions. Specifically, I  
don’t think he can do the continuous lifting, bending and twisting  
with the heavy bags. The current job assignment on the Chip &  
Key Window seems to meet the necessary accommodations.

13 Pl.’s Ex. 16 at 2.

14  
15 Even though Dr. Newgent stated in his report that the plaintiff worked with current  
16 restriction for many years and had done well, he was referring to the job assignment at the Chip  
17 and Key window accommodation. The plaintiff was hired for as cage cashier to work all the  
18 windows and not just the chip and key window. There were many job requirements the plaintiff  
19 was not performing. Meanwhile, more than 178 workers were working on a rotating schedule at  
20 twenty (20) windows. LPER at 27, 11:54:28 CDT. The plaintiff was not and other workers were  
21 becoming resentful. Furthermore, other workers needed to cover for the plaintiff when he was  
22 taking his ten (10) minute break (another accommodation) every hour. It is common sense that  
23 “peak efficiency” means that all employees would be performing all of their duties according to  
24 their job descriptions and fulfilling the desired goals and objectives of the cage department. If  
25 not, the department is working at a diminished capacity. Even with the accommodations, the  
26 plaintiff could not perform assigned tasks for the original job description and, therefore, was not  
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1 working to his full capacity. The plaintiff did not show by a preponderance of evidence that he  
2 could satisfy the physical requirements of his job.

3  
4 According to the Wisconsin Fair Employment Act (WFEA), “that act requires an  
5 employer to prove that even with reasonable accommodations, the employee would not be able  
6 to perform his job responsibilities adequately or that, where reasonable accommodations would  
7 enable the employee to do the job, hardship would be placed on the employer”. *Crystal Lake*  
8 *Cheese Factory v. Labor & Indus. Review Comm.* 264 Wis. 2d 200, 219-20 (Wis. 2003). In this  
9 case, the HCN casino cage operations provided two and half (2 1/2) years of accommodations.  
10 Evidence was presented through Dr. Newgent’s reports that the casino worked with the plaintiff  
11 to fulfill the doctor’s recommendations for the plaintiff to work thirty two (32) hours a week with  
12 ten (10) minute breaks for three (3) years. This added up to 173 annual hours. LPER at 27.  
13 11:48:48 CDT. Further, he did not meet the primary requirements of lifting 10-25 lbs. Instead,  
14 the plaintiff primarily sat at the window and handed out keys and chips. Further, one of his  
15 supervisors testified that even with the accommodations, the plaintiff could not perform the  
16 duties and responsibilities of his original job description. Dr. Newgent agreed with this assertion  
17 within a January 24, 2002, memorandum.

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19  
20 The foregoing conditions created a hardship for the cage operations. No other worker  
21 was allowed extra rest periods and to work only one window with all the accommodations.  
22 Resentment grew from other workers, thereby affecting the morale of the workers. The  
23 testimony from Cage Supervisor Theison indicated that the accommodations kept them from  
24 operating at peak because you had to create a schedule to accommodate only one person among  
25 178 workers. *Id.* at 27, 11:54:13 CDT. She further testified that the workers productivity was  
26 affected because if one is not working at all his responsibilities, and if you have forty (40)  
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1 cashiers at one time, you have thirty-nine (39) employees that are not actually performing their  
2 job duties because they are not performing all the functions of all the windows, thereby  
3 hampering productivity of the department. *Id.* at 28, 11:55:18 CDT.  
4

5 Under the Discipline Policy, the standard of conduct is discussed and what examples of  
6 conduct to avoid for initiating disciplinary action. Examples of employment conduct violations  
7 are included in the Discipline Policy. “Inefficiency... in the performance of duties, including  
8 failure to perform assigned tasks” may be considered unacceptable conduct for the purpose of  
9 initiating disciplinary action. PERS. MANUAL, Ch. 12 at 46. Clearly, the plaintiff could not  
10 perform the duties, thus violating the PERSONNEL MANUAL. The HCN Casino and Cage  
11 Operations personnel followed the proper procedure as outlined in the PERSONNEL MANUAL to  
12 terminate the plaintiff, and they did so within the scope of their authority. The decision was  
13 supported by a factual basis and laws of the Nation.  
14

15 Finally, the Nation provided minimum procedural due process, meaning “the notice  
16 given to the employee must give them sufficient understanding of the facts behind the discipline  
17 and the nature of the violation.” *Debra Knudson v HCN Treas. Dept.*, SU 98-01, (HCN S. Ct.,  
18 Dec. 1, 1998) at 2. (quoting *White v. HCN Pers.* CV95-17, (HCN Tr. Ct. Oct.11, 1996) at 13. In  
19 the present case, the termination form cited the specific facts and violation of policies and  
20 procedures. Defs.’ Ex. F.  
21

22 For the above reasons, the Court reissues a judgment in favor of the defendants.  
23

24 The parties retain the right to file a timely post judgment motion with this Court in  
25 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
26 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme  
27 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R. App.*  
28

1 P.], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.* 61.

2 The appellant “shall within sixty (60) calendar days after the day such judgment or order was  
3 rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or order,  
4 together with a filing fee as stated in the appendix or schedule of fees” *HCN R. App. P.* 7(b)(1).

5 “All subsequent actions of a final *Judgment* or *Trial Court Order* fees” *HCN R. App. P.* 7(b)(1).

6 “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN R. App.*  
7 *P.*].” *HCN R. Civ. P.* 61.  
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11 **IT IS SO ORDERED** this 7<sup>th</sup> day of July 2006, by the Ho-Chunk Nation Trial Court  
12 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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16 Honorable JoAnn Jones<sup>3</sup>  
17 Associate Trial Court Judge  
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<sup>3</sup> On April 4, 2006, Chief Justice Mary Jo B. Hunter elevated the presiding official to the position of Associate Judge by extraordinary appointment. HCN JUDICIARY ESTABLISHMENT & ORG. ACT, 1 HCC § 1.8c.

