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

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**Louella A. Kelty,**  
Plaintiff,

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v.

Case No.: **CV 98-49**

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**Jonette Pettibone and Ann Winneshiek,**  
Defendants.

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**ORDER  
(Determination Upon Remand)**

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**INTRODUCTION**

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On July 27, 1999, the Ho-Chunk Nation Supreme Court (hereinafter Supreme Court) reversed and remanded a decision that this Court rendered in an employment action. The Supreme Court remanded the instant case for proceedings consistent with the appellate decision. The following discussion covers the relevant legal issues to properly render a decision on remand.

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**PROCEDURAL HISTORY**

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The Court recounts the procedural history of the instant case in significant detail in its *Judgment*, CV 98-49 (HCN Tr. Ct., Mar. 4, 1999). For purposes of this decision, the Court notes that the plaintiff appealed the aforementioned judgment on April 6, 1999. The Supreme Court accepted the appeal on April 12, 1999. *Scheduling Order*, SU 99-02 (HCN Sup. Ct., Apr. 12,

1 1999). Subsequently, the Supreme Court issued a July 27, 1999 *Opinion* instructing the Court to  
2 render a decision on remand.<sup>1</sup>

### 3 4 **APPLICABLE LAW**

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6 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (Updated July 10, 1998)

7 Ch. 1 - Equal Employment Opportunity [p. 3]

#### 8 9 A. Equal Employment Policy

10 It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any  
11 and all employees and job applicants on the basis of merit, qualifications, and competence. The  
12 Ho-Chunk Nation does retain the right to exercise Native American preference in hiring Native  
13 American job applicants. This policy shall otherwise be applied without regard to any  
14 individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation,  
15 or physical handicap.

#### 16 17 1.1 HO-CHUNK PREFERENCE: MOTION (Ratified July 10, 1998)

18 *Native American Preference has been a federal policy since 1834 which accords hiring  
19 preference to Indians. The purpose of this preference is to give Native Americans a greater  
20 participation of self-government, to further the Governments [sic] trust obligations, and to  
21 reduce the negative effect of having non-Indians administer matters that effect Indian tribal life.  
22 More recently, legislation such as the Civil Rights Act (1964) and the Education Amendments of  
23 1972 (passed after the Equal Employment Opportunity) have continued to specifically provide  
24 for preferential hiring of Native Americans by Indian tribes.*

25 *The HoChunk [sic] Nation exists to serve the needs of the HoChunk [sic] people. As an  
26 employer, the Nation seeks to employ individuals who possess the skills, abilities, and  
27 background to meet the employment needs of the Nation.*

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28 <sup>1</sup> The presiding judge extends his sincerest apologies to the parties for the failure of the Court to enter a timely  
29 decision in this matter. Each trial judge maintains a duty to "dispose promptly of the business of the court." *HCN*  
30 *Rules of Judicial Ethics*, § 4-1(E); see also *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1)  
31 (HCN S. Ct., Apr. 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of  
32 trial level process). Former Chief Judge William H. Bossman utterly failed in this regard by not issuing a judgment  
33 prior to the expiration of his legislative appointment on July 1, 2005. In the interests of justice, the Court informs  
34 the parties of the availability of seeking mandamus relief from the Ho-Chunk Nation Supreme Court in order to  
35 compel action of a trial level judge. See *In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21, 2005) (citing  
36 CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, § 6(a)). Judge Joan F. Greendeer-Lee issued a *Scheduling*  
37 *Order* on October 7, 1998, and entered a *Judgment* on March 4, 1999. On July 27, 1999, the Supreme Court  
38 reversed and remanded the case; it was reassigned to Chief Judge Mark D. Butterfield. Judge Butterfield did not  
39 take any action on the case during his tenure, and it was reassigned to Chief Judge William Bossman who also did  
40 not take any action on the case during his tenure.

1 As a sovereign Nation and a unique cultural group, the HoChunk [sic] Nation had determined  
2 that a highly desirable employment characteristic is a knowledge of the HoChunk [sic] culture  
3 that can be attained only by membership in the HoChunk [sic] Nation. Further, the Nation  
4 recognizes a unique, shared culture of Native American Indians and had determines [sic] as a  
5 desirable employment characteristic, is status as a member of other Native American tribes. At  
6 minimum, the Nation has determined that some knowledge of Native American culture is a  
7 desirable employment characteristic.

8 The HoChunk [sic] Nation is an equal employment opportunity employer and follows non-  
9 discriminatory policies and procedures in personnel decisions: however, the Nation maintains  
10 the right to exercise HoChunk [sic] preference, prioritized as:

- 11 1. Hocak Wazijaci Tribal member
- 12 2. Spouse or Parent of Hocak Wazijaci Tribal member
- 13 3. Native American Tribal member
- 14 4. Non-Natives

15 This policy shall be applied in recruiting, hiring, promotion, transfers, training, layoffs,  
16 compensation, benefits, terminations, and all other privileges, terms and other conditions of  
17 employment. The Human Resources/Personnel will communicate the important guidelines and  
18 procedures that will be followed in its commitment of HoChunk [sic] Preference.

19 Ch. 12 – Employment Conduct, Discipline, and Administrative Review [p. 50b]

20 Limited Waiver of Sovereign Immunity:

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

Ch. 14 - Definitions [pp. 56-57]

Native American Preference: Preference given to members of any recognized Indian Tribe now  
under federal jurisdiction.

## HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

1 must be based on an error or irregularity which prevented a party from receiving a fair trial or a  
2 substantial legal error which affected the outcome of the action.

3 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not  
4 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or  
5 conclusions or make additional findings or conclusions, amending the judgment accordingly.  
6 The motion may be made with a motion for a new trial. If the Court amends the judgment, the  
7 time for initiating an appeal commences upon entry of the amended judgment. If the Court  
8 denies a motion filed under this rule, the time for initiating an appeal from the judgment  
9 commences when the Court denies the motion on the record or when an order denying the  
10 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such  
11 motion, and the Court does not decide a motion under this Rule or the judge does not sign an  
12 order denying the motion, the motion is considered denied. The time for initiating an appeal from  
13 judgment commences in accordance with the Rules of Appellate Procedure.

14 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*  
15 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*  
16 must be based upon new information that has come to the party's attention that, if true, could  
17 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
18 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal  
19 commences when the Court denies the motion on the record or when an order denying the  
20 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of  
21 such motion, and the Court does not decide the motion or the judge does not sign an order  
22 denying the motion, the motion is considered denied. The time for initiating an appeal from  
23 judgment commences in accordance with the Rules of Appellate Procedure.

24 (D) Erratum Order or Reissuance of Judgment. Clerical errors in a court record, including the  
25 *Judgment* or *Order*, may be corrected by the Court at any time.

26 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a  
27 party made within a reasonable time for the following reasons: (1) newly discovered evidence  
28 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,  
misrepresentation or serious misconduct of another party to the action; or (3) good cause if the  
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.

#### 29 Rule 61. Appeals.

30 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation  
31 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*  
32 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent  
33 actions of a final *Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*  
34 *Procedure*.

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**FINDINGS OF FACT**

1. The Court incorporates by reference *Finding of Fact* 1-18 enumerated in a previous decision. *J.* at 4-6.
2. The plaintiff questioned the retention of eight (8), non-Indian floor persons. See Defs.’ Ex. E.
3. The defendants stated that of the eight persons named only six (6) are non-Indian floor persons. *Def’s.’ Tr. Br.*, p. 7, ll 1-2.
4. The plaintiff appealed the final decision on April 6, 1999.
5. On remand, the Supreme Court left open the application of the Ho-Chunk preference provision.

**DECISION**

The Supreme Court declared that on remand the Court may address the issue as to the application of the Ho-Chunk Preference Provision and whether Native American Preference could be applied to the case at hand. The Court addressed a similar issue in *Baldwin v. Ho-Chunk Nation, et al.*, CV 04-16, -19, -21 (HCN Tr. Ct., Oct. 3, 2003), which essentially questioned the Court’s reasoning in *Kelty I*. Under the Ho-Chunk Preference Provision, the plaintiff was entitled to preference. The discussion below provides clarification.

**I. DOES THE HO-CHUNK PREFERENCE POLICY REQUIRE THE RETENTION OF NATIVE AMERICAN EMPLOYEES IN A LAYOFF SITUATION?**

1           The Ho-Chunk Nation (hereinafter HCN or Nation) has voluntarily chosen to further  
2 similar interests identified by the United States Supreme Court (hereinafter U.S. Supreme Court)  
3 in *Morton v. Mancari*. The *Mancari* Court upheld a statutory “Indian preference” for hiring by  
4 the Bureau of Indian Affairs. The Court held that the preference dealt primarily with the federal  
5 government’s legitimate interest in its special relationship with the Indian tribes and that the  
6 preference established in the statute in question was reasonably related to that governmental  
7 interest. *Morton v. Mancari*, 417 U.S. 535, 554 (1974). Further, in a footnote, the Court added,  
8 “[t]he preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it  
9 applies only to members of ‘federally recognized’ tribes. This operates to exclude many  
10 individuals who are racially classified as ‘Indians.’ In this sense, the preference is political  
11 rather than racial in nature.” 417 U.S. at 552-553 n.24.

12           Under Ho-Chunk preference, the Nation “recognizes a unique, shared culture of Native  
13 American Indians and had determines [sic] as a desirable employment characteristic, is [sic]  
14 status as a member of other Native American Tribes.” HO-CHUNK NATION PERSONNEL POLICIES  
15 AND PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL), Ch. 1, § 1.1. Under Chapter 14  
16 of the PERSONNEL MANUAL, “Native American Preference” is defined as “preference given to  
17 members of *any recognized Indian Tribe now under federal jurisdiction*.” *Id.*, Ch. 14 at 57  
18 (emphasis added). The Nation limits Native American preference to federally recognized tribal  
19 members, thus upholding the political preference. The HCN Legislature has chosen to extend  
20 this special treatment to the members of each federally recognized tribe, rather than enter into  
21 individual compacts with each affected Nation. The Court must now apply its interpretation of  
22 the law to the facts and circumstances of the instant case.

1 II. DID RAINBOW CASINO PERMISSIBLY LAYOFF THE  
2 PLAINTIFF BASED UPON THE HO-CHUNK PREFERENCE  
3 POLICY?

4 The plaintiff argued that her supervisors inappropriately applied Ho-Chunk preference  
5 during the floor person layoffs. She asserted that the preference "mandated that others be laid  
6 off rather than her," because preference should supersede ability and seniority. *J.* at 7. The  
7 defendants disagreed, arguing that Ho-Chunk preference served only as "a discretionary tie  
8 breaker." *Id.* Furthermore, in *Kelty I*, the Court concurred with the Nation's officials as a matter  
9 of deference to the administrative agency. *Id.* at 7-9.

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11 As time passed, the Court grappled with similar issues. In *Baldwin*, the Court noted that  
12 *Kelty I* represented a "judicial sanctioning of an arbitrary business practice." *Baldwin.* at 16.  
13 Further stating, the PERSONNEL MANUAL "exists to foster consistency and continuity, not  
14 uncertainty and instability." *Id.* The *Baldwin* Court openly criticized *Kelty I* due to its  
15 acceptance of the Nation's position that it maintained discretion to apply preference. The Court  
16 strongly disagreed, noting that the *Kelty* Court's interpretive approach

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18 proved nonsensical when examined in conjunction with the next full sentence  
19 appearing in the Ho-Chunk Preference Policy, that being: "[t]his policy *shall be*  
20 *applied* in . . . layoffs . . . and all other privileges, terms and other conditions of  
21 employment." PERS. MANUAL, Ch. 1, § 1.1 at 3a (emphasis added). An  
22 administrative agency cannot plausibly argue that it applied the preference policy  
23 by deciding not to apply the preference policy. The Legislature has implemented  
24 a mandate, and has not crafted any exceptions to that mandate. The Court cannot  
25 interpret the preference policy in any other manner."

26 *Id.* at 25-26. The application of tribal preference is not discretionary. The Ho-Chunk Preference  
27 Policy "shall be applied in . . . layoffs," and, therefore, must supersede other considerations.  
28 PERS. MANUAL, Ch. 1, § 1.1. The plaintiff alleged a misapplication of preference in determining  
the floor person layoff.<sup>2</sup> She questioned the retention of eight (8), non-Indian floor persons. See

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<sup>2</sup> Under the PERSONAL MANUAL, the plaintiff argued that she should have received preference over other Native

1 Defs.' Ex. E. The defendants stated that of the eight persons named only six (6) are non-Indian  
2 floor persons. *Defs.' Tr. Br.*, p. 7, ll. 1-2. Clearly, the Nation's retention of those employees, in  
3 lieu of the plaintiff, under the PERSONAL MANUAL, was inappropriate.

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5 **BASED UPON THE FOREGOING**, the Court overturns the plaintiff's termination and  
6 consequently awards relief as deemed appropriate by the Court. *See HCN R. Civ. P. 53*. The  
7 Court directs the Ho-Chunk Nation Department of Treasury to deduct \$10,000.00 from the  
8 Department of Business budget, and issue a check for such amount, subject to applicable  
9 taxation, to the plaintiff within a period of thirty (30) days. The Court enters the maximum  
10 statutory amount as compensation for actual lost wages.<sup>3</sup> *See PERS. MANUAL*, Ch. 12 at 50. The  
11 Court further directs the Ho-Chunk Nation Department of Personnel to reinstate the plaintiff to a  
12 position with a comparable wage. The Personnel Department shall contact the plaintiff within a  
13 period of fourteen (14) days from the entry of this judgment to establish the timeline in relation  
14 to reinstatement.<sup>4</sup> Finally, the Court orders the Personnel Department to remove negative  
15 references from the plaintiff's personnel file, award the plaintiff bridged service credit, and  
16 restore the plaintiff's seniority.

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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 Ho-Chunk  
22 Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*  
23 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of  
24 Appeal." *HCN R. Civ. P. 61*. The appellant "shall within sixty (60) calendar days after the day  
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27 American Tribal members and non-Indians, as she was a parent of a Hock Wazijaci Tribal Member. However, the  
28 Court specifically reserves this issue for another occasion, and the Court need not address such question in this  
judgment.

<sup>3</sup> At an hourly wage of \$15.34, the plaintiff sustained \$10,000.00 in damages within seventeen (17) weeks of the  
plaintiff's layoff, which elapsed shortly after the October 6, 1998 *Scheduling Conference*.



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such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.).” *HCN R. App. P. 7(b)(1)*. “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN R. App. P.*]” *HCN R. Civ. P. 61*.

**IT IS SO ORDERED** this 16th day of December 2005, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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Honorable Todd R. Matha<sup>5</sup>  
Chief Trial Court Judge

<sup>4</sup> If the plaintiff maintains current employment with the Nation, then this provision of relief proves moot.  
<sup>5</sup> The Court appreciates the assistance of Staff Attorney Amanda Rockman Cornelius in the preparation of this opinion.