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*Willie RedCloud*  
Clerk of Court/Assistant

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IN THE  
HO-CHUNK NATION SUPREME COURT

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Joelene Smith

DECISION

Appellant,

v.

SU-98-03 and SU-98-04

Ho-Chunk Nation and  
Tammy Lang, as Headstart Director  
Appellees.

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Heard before Associate Justices, Debra C. Greengrass, Rita A. Cleveland and Chief Justice  
Mary Jo B. Hunter.

STATEMENT OF THE FACTS

On December 30, 1996 the appellant filed a complaint with the Trial Court according to the  
Administrative Review Process outlined in the HCN Personnel Policies and Procedure Manual  
(September 1995). On April 18, 1997, the parties entered into a Stipulation and Order for Partial  
Settlement. The parties agreed that the plaintiff was wrongfully terminated and should be reinstated  
to a position with the Ho-Chunk Nation (herein after HCN). The parties disagreed as to the plaintiffs  
placement into a comparable position as well as other remedial issues. The parties agreed that the  
Trial Court would decide only upon the remedial issues presented by the parties.

On May 7, 1997, the Trial Court entered its Judgement stating the plaintiff should return to  
work within the Headstart Program, and that the plaintiff receive retro-active annual leave for hours

1 not already cashed-out, and be placed on Administrative leave or similar lay-off status with pay  
2 starting April 17, 1997, until the plaintiff was re-employed.

3 On September 18, 1997, Judge Joan Greendeer-Lee presided over a Status Hearing held on  
4 the HCN's non-compliance with the Order of May 7, 1997. At that time, the Nation was found in  
5 contempt.  
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7 On October 23, 1997, the Trial Court held a hearing to determine whether the HCN met its  
8 obligation in offering suitable employment to Joelene Smith as ordered September 18, 1997. The  
9 Court determined that the HCN had met its obligation.

10 Joelene Smith appealed the October 23, 1997 judgement to this Court, arguing that the Trial  
11 Judge had misinterpreted information presented, and that the Trial Court failed to provide an  
12 opinion on what is "Comparable Employment" after the September 18, 1997 Status Hearing, but  
13 prior to the October 23, 1997 hearing. The Supreme Court accepted the appeal and scheduled Oral  
14 arguments for January 17, 1998.  
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16 The Supreme Court considered the parties arguments made on January 17, 1998 along with  
17 the case file from the Trial Court, written transcripts, and the tape recording of the October 23, 1997  
18 hearing.  
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20 On March 16, 1998, the Supreme Court Reversed and Remanded Joelene Smith, v. Ho-  
21 Chunk Nation and Tammy Lang, as Headstart Director, CV- 96-94. (HCN Tr. Crt, October 31,  
22 1997). In doing so this Court considered (1) whether the Trial Courts failure to render an opinion as  
23 promised on comparable employment constituted an error? And (2) whether or not the HCN Trial  
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1 Court committed an error in its final order entered October 31, 1997? This Court determined that the  
2 Trial Court's failure to render an opinion on comparable employment hindered both the HCN's  
3 ability to offer a comparable job and hindered the Appellant's ability to accept employment offers  
4 made by the HCN. The Supreme Court ordered the Trial Court to re-evaluate its Judgement of  
5 October 31, 1997, and in doing so, make a determination as to what is "comparable employment",  
6 and use that determination to further determine whether or not the appellee met its responsibility to  
7 offer "comparable employment" to Joelene Smith. The Trial Court was to further determine if  
8 Joelene Smith declined and such offers of "comparable employment" without good reason.  
9

10 On April 23, 1998, the Trial Court reconvened a hearing with the parties to make a  
11 determination of the reversed and remanded decision of the Supreme Court. The Trial Court issued  
12 a Judgement on May 1, 1998 whereby the Trial Court found that the HCN had fulfilled its obligation  
13 to Joelene Smith. The Trial Court, at this time, decided to address the issue of enforcing the layoff-  
14 with-pay remedy in a separate order.  
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16 On June 1, 1998, Jolene Smith filed a Notice of Appeal with the HCN Supreme Court. This  
17 matter came before the full HCN Supreme Court by telephonic conference call on Sunday, June 7,  
18 1998. On June 12, 1998, the Supreme Court filed a Scheduling Order, at which time, the appeal was  
19 accepted and oral argument was scheduled.  
20

21 On May 15, 1998 the Trial Court filed an Order, whereby the Trial Court rendered its  
22 decision on the issue of lay-off-with pay remedy. The Trial Court rescinded its former Order that the  
23 HCN pay the appellant under the layoff-with pay status.  
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1 On June 15, 1998, Joelene Smith filed a Notice of Appeal with the HCN Supreme Court  
2 contesting the Judge's decision to rescind the pay Order entered on May 15, 1998. This matter came  
3 before the full HCN Supreme Court on Saturday June 27, 1998. The matter was accepted for  
4 appeal, the June 1, 1998 and the June 15, 1998 appeals were consolidated, and a Scheduling Order  
5 was filed on June 29, 1998. Oral Argument was scheduled for August 1, 1998. However, due to  
6 personal family emergency and subsequent travel for training by members of the Supreme Court,  
7 Oral Argument was rescheduled for September 12, 1998. Joelene Smith appeared in person and  
8 represented by Lay Advocate, Rick McArthur. Michael Murphy appeared on behalf of the Nation.

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10 In addition to the arguments presented by counsel, the Supreme Court considered the Trial  
11 Court record, the April 23, 1998 Trial Court transcript, the September 12, 1998 Supreme Court  
12 transcript, the Appellant's basis for appeal, the Appellees' Brief in Opposition to the Appeal, and the  
13 Stipulation and Order for Partial Settlement.

#### 14 15 ISSUES

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17 The issues that are brought before this Court arise from two separate appeals. This decision  
18 will address arguments presented in each appeal. From the appeal filed on June 1, 1998 the  
19 appellant argues as follows:

- 20 1. The HCN Trial Court erred in the May 1, 1998, Judgement by stating facts that are  
21 inaccurate in the "Finding of Facts".
- 22 2. The Procedural History of the May 1, 1998, Judgement is unclear, inaccurate and  
23 misleading which in fact further prejudices the Appellants' right to a fair judgement.  
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1 3. The Decision of the May 1, 1998, Judgement ignores the Appellants' right to be  
2 employed by the Ho-Chunk Nation and the Supreme Court Opinion of March 16, 1998.

3 In the appeal filed on June 15, 1998 the appellant argues:

- 4 1) HCN Trial Court erred in the May 15, 1998 Order by Stating facts that are inaccurate and  
5 deciding only on the merits offered by the Appellee and ignoring oral arguments of the  
6 appellant at the April 23, 1998 hearing.  
7  
8 2) The HCN Trial Court erred in the May 15, 1998 Order by stating facts that are inaccurate  
9 in the "Finding of Facts".  
10  
11 3) The Decision of the May 15, 1998, Order ignores the Appellants' right to be employed by  
12 the Ho-Chunk Nation and the Supreme Court Opinions of March 16, 1998.

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14 **ANALYSIS**

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16 **CONCURRING OPINION**  
17 **Mary Jo B. Hunter, Chief Justice**

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19 The definition of harmless error clearly states that a harmless error is "an error that does not  
20 affect a party's substantive rights or the case's outcome." Yet, despite the clear definition, the  
21 Dissent proceeds to find that several matters which DID affect the party's substantive rights or DID  
22 affect the case's outcome are harmless errors. I am unable to reconcile the contradictions with the  
23 dissent's reasoning.

24 The Statement of Facts recites the facts of the case. One fact is worth restating and that is  
25 the fact that the parties entered a Stipulation and Order for Partial Settlement (hereinafter

1 "Stipulation") on April 18, 1997 which was filed with the Court. The Stipulation states in the first  
2 paragraph that "the plaintiff will be awarded \$2,000.00 on the basis that she was wrongfully  
3 terminated and that the discipline is overturned." See paragraph 1, Stipulation, April 18, 1997. The  
4 Stipulation goes on to state that "the parties acknowledge that the plaintiff should be reinstated to  
5 a position with the Ho-Chunk Nation, but disagree as to her placement into a comparable  
6 position..." See paragraph 10, Stipulation, April 18, 1997. The remaining point of contention  
7 between the parties was what constituted "comparable" since the parties agreed that Ms. Smith  
8 should be reinstated. See Appellee's Brief in Opposition to Appeal, page 3, filed September 11,  
9 1998. Based upon the Stipulation, the parties agreed to cancel the trial on the merits of the case.<sup>1</sup>

10 The Stipulation also set forth a number of issues which would be briefed for the trial court to  
11 allow for the court's determination. Five issues were left for the trial court's determination. They  
12 were: (1) the reinstatement of plaintiff into a comparable position; (2) whether to award the plaintiff  
13 the annual leave she had as of the date of termination; (3) whether the plaintiff should receive  
14 litigation expenses as a remedy; (4) whether the plaintiff may be placed into a laid-off-with-pay  
15 status until she is placed into a comparable position with the Nation and (5) any other issues or  
16 considerations the parties wish to bring to the court's attention in crafting a remedy in this case. See  
17 page 3 of Stipulation, April 18, 1997.<sup>2</sup>

18 The parties agreed that the Court would decide the remedial issues presented by the parties.  
19 See page 4 of Stipulation, April 18, 1997. Furthermore, the parties reviewed, agreed and signed the  
20 terms of the Stipulation. The Stipulation was approved as a Court Order by the Honorable Joan  
21 Greendeer-Lee on April 18, 1997. The Order read "Any breach of this stipulation will be considered  
22 a breach of the Court Order." See page 5 of Stipulation, April 18, 1997. Thus, the underlying issues  
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24 <sup>1</sup>It does not appear from the record that any testimony was taken from Ms. Smith as to her  
25 agreement to dismiss the trial based upon the Stipulation. Such testimony would have been helpful  
26 for this Court.

1 of this case were stated specifically within the Stipulation.

2 At the oral argument on the initial appeal of this case (SU97-06), the attorneys for the parties  
3 indicated to this Court that they expected a definition of "comparable employment" in the October  
4 31, 1997 Judgement of the lower court. Due to the issues presented, this Court reversed the decision  
5 on that point without affirming the lower court's decision about the insurance and lay-off with pay  
6 matters. It appears that the underlying question about comparable employment plagued this case on  
7 remand which resulted in the two cases on appeal.

8 The question becomes: I. Did the lower court's interpretation of certain matters constitute  
9 harmless error? That is, did the misstatement as to the amount of money paid Ms. Smith constitute  
10 an error which either affected her substantive rights or affected the outcome of the case? II. Next,  
11 did the trial court's finding that "[D]uring the October 23, 1997 Hearing, advocate McArthur offered  
12 no reasons as to why his client did not accept the first job offer..." affect Joelene Smith's substantive  
13 rights or affect the outcome of her case? III. And, finally, did the trial court affect Ms. Smith's  
14 substantive rights or affect the outcome of the case by finding "that the October 23, 1997 Hearing,  
15 (sic) and subsequent Order only dealt with removing the contempt placed on the Nation"?

16 This opinion will address each of those questions individually.

17  
18 I. DID THE LOWER COURT'S INTERPRETATION OF CERTAIN MATTERS CONSTITUTE  
19 HARMLESS ERROR? DID THE MISSTATEMENT AS TO THE AMOUNT OF MONEY PAID  
20 MS. SMITH CONSTITUTE AN ERROR WHICH EITHER AFFECTED HER SUBSTANTIVE  
21 RIGHTS OR AFFECTED THE OUTCOME OF THE CASE?  
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23 That finding, as to the amount of money paid to Ms. Smith, indicated the amount which was  
24 paid the plaintiff pursuant to the Settlement. Although this fact would not have affected Ms. Smith's  
25 substantive rights, it is unclear as to how this fact affected the outcome of the case. Why was an

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1 Erratum Order issued? When a court issues such an order, it is an indication that some type of error  
2 has occurred.

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4 II. DID THE TRIAL COURT'S FINDING THAT "DURING THE OCTOBER 23, 1997  
5 HEARING, ADVOCATE MCARTHUR OFFERED NO REASONS AS TO WHY HIS CLIENT  
6 DID NOT ACCEPT THE FIRST JOB OFFER" AFFECT JOELENE SMITH'S SUBSTANTIVE  
7 RIGHTS OR AFFECT THE OUTCOME OF HER CASE?

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9 The Trial Court apparently relied upon this finding to determine that "the defendant has  
10 fulfilled its obligation to the plaintiff." See line 14, page 8 of the May 1, 1998 Judgment. The Trial  
11 Court makes a leap in her analysis which affected the substantive rights of Joelene Smith as well as  
12 affected the outcome of the case. That is NOT harmless error. The conclusion adopted by the trial  
13 court relied on a misinterpretation of Mr. McArthur's statements. Such an error is reversible.

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15 III. DID THE TRIAL COURT AFFECT MS. SMITH'S SUBSTANTIVE RIGHTS OR AFFECT  
16 THE OUTCOME OF THE CASE BY FINDING 'THAT THE OCTOBER 23, 1997 HEARING,  
17 AND SUBSEQUENT ORDER ONLY DEALT WITH REMOVING THE CONTEMPT PLACED  
18 ON THE NATION'?

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20 At Oral Argument on the earlier appeal, both the Appellant's Lay Advocate and the  
21 Appellee's attorney, Michael Murphy indicated to this Court they were under the belief that the trial  
22 court would be issuing an Opinion defining "comparable employment" for them. (See SU97-06  
23 Transcript, pgs. 12-20.) Both parties indicated that the matter would have been resolved if the Trial  
24 Court had provided them perimeters as to what would constitute "comparable employment". That is  
25 the role of the decisionmaker when issues are in dispute. The parties had agreed upon a settlement  
26 which included a return to a comparable position. Since they could not agree on what the term

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1 meant, it was incumbent upon the trial judge to define the term for the parties PRIOR to assessing  
2 compliance or non-compliance. Thus, the trial court did affect Ms. Smith's substantive rights and  
3 the outcome of the case. That is reversible error in this writer's opinion.

4 CONCLUSION

5 This matter needs to come to an end. An individual's life has been seriously affected by the  
6 inability of the trial court to properly define a legal term for the parties and to enforce a Stipulated  
7 Agreement. This matter must be REVERSED and REMANDED for findings on what constitutes  
8 "comparable employment" in this case. Based upon that definition, the trial court must then, and  
9 only AFTER making such a determination, determine if the Appellant was provided an offer of  
10 "comparable employment" under the terms of the Settlement Agreement. It is not the duty of this  
11 Court to re-examine the facts to reassess the case. Rather, we must assess the case as to whether or  
12 not the trial court properly applied the law. In this case, the trial court failed to perform the  
13 constitutionally mandated responsibility to make correct findings and conclusions of law.

14 Concurring Opinion of the Chief Justice.

15 Dated this 7th day of June 1999.

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19 Mary Jo B. Hunter  
20 Mary Jo B. Hunter, Chief Justice  
21 HCN Supreme Court

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CONCURRING OPINION

Debra C. Greengrass, Associate Justice

This Supreme Court Justice recognizes that the basis for the Appellant's appeal in SU-98-03 and SU-98-04 are similar in context.

Appeal of SU-98-03:

**I. The HCN Trial Court erred in the May 1, 1998 Judgement by stating facts that are inaccurate in the "Findings of Facts".**

The Appellant contends that in their Notice of Appeal that the Trial Court erred in its statement of the facts, Fact # 6, challenging the amounts stated were inaccurate. In the May 1, 1998 Judgement the Appellant claimed errors were committed that discredited the reliability of the judgement. On May 7, 1998, the Appellee filed a Motion to Amend the Judgement of May 1, 1998, to clarify the Court's misstatement of the Court's prior Contempt Order of September 18, 1997. Appellee cited to the misstated facts by the Trial Court as claimed by the Appellant. Thus, the Trial Court issued an *Erratum* order on May 7, 1998 to amend the inconsistent factual information. The discrepancy was rectified and does not constitute reversible error.

Second, Appellant contends she was prejudiced by the Trial Court's Finding of Fact # 8. That the Trial Advocate, Rick McArthur, provided no reason, to the Court, as to why his client did not accept a job offered by the Appellee. The Trial Court's statement in Fact #8 prejudiced the Appellant's right to be treated fairly. The option to accept a job offer was granted to the Appellant

1 in the Trial Court's September 18, 1997 Judgment

2 Third, Appellant appeals Finding of Fact # 10, that pertains to the April 23, 1998 Hearing to  
3 address the Supreme Court's decision, on remand. That during the April hearing, reference was  
4 made pertaining to the October 23, 1997 Hearing which dealt with removing the contempt placed on  
5 the Nation. In referring to the transcript of that April 23, 1998 Hearing, Mr. Murphy refers to  
6 October 31<sup>st</sup> Decision that was in the HCN favor. (see Transcript, p.7, line 17-21). In the October  
7 31, 1997 Order, Finding of Fact at 8,9, and 10 also referred to the October 23, 1997 Hearing, from  
8 which the Trial Court issued its subsequent Order. Although, there are noted inconsistencies  
9 throughout this case, it is no basis for Reversal, at this point.  
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12  
13 **II. The Procedural History of the May 1, 1998 Judgment is unclear, inaccurate and**  
14 **misleading which in fact prejudices the Appellant's right to a fair judgement**

15 First, the misstated amount within line 3 on page 6, the Appellant is referring to is  
16 "\$8,925.00, plus health insurance coverage retroactive since November 1, 1996." This misstated  
17 amount did not weigh heavily on the Trial Court's determination of the case. The issue, is the Nation  
18 in Contempt of the Trial Court's Judgment of May 7, 1997.  
19

20 The Appellant's second argument, is that the Trial Court failed to render a decision as to the  
21 *Motion to Dismiss* with or without prejudice. The *Motion to Dismiss* refers to the present motion  
22 before the Court, the *Motion for Order Declaring Suitable Offer of Employment*, which was denied.  
23 The basis for the Appellee's motion for dismissal was based on "since the parties now understand  
24 the wishes of employment by the plaintiff, the parties could work together. The plaintiff concurred  
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1 with this statement. The defendant then moved to dismiss the Motion without prejudice. The  
2 plaintiff objected. . . .” (Jgmt 6). The May 1, 1998 Judgment is the Court’s ruling on Remand from  
3 the HCN Supreme Court. The Court’s *Order (Relief)* was filed May 15, 1998.

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5 Third, Appellant states that The Trial Court made a statement that was unclear and already  
6 decided by the Supreme Court. “The Court concluded to make a decision on the Motion . . . , thus  
7 declaring that the defendant was no longer found in Contempt Order and gave the parties notice to  
8 try to settle before the Court’s decision” (Jgmt p 6). The *Motion to Dismiss the Motion for Order*  
9 *Suitable Offer of Employment* was denied. The Court’s forthcoming decision on Suitable Offers was  
10 issued on May 15, 1998.

11  
12 The Trial Court, then erred, declaring that the Nation was no longer held in contempt. The  
13 Trial Court ignored the *Stipulation* signed by the parties and approved as a Court Order on April 18,  
14 1997. In the *Stipulation*, at item #10, “The parties acknowledge that the plaintiff should be  
15 reinstated to position within the Ho-Chunk Nation, but disagree as to her placement in to a  
16 comparable position as well as other remedial issues” (emphasis added). First, the Nation had an  
17 obligation to reinstate the wrongfully terminated employee. Second, the Trial Court had an  
18 obligation to render a judgment as to what constitutes a comparable position, in the context of this  
19 case, and other remedial issues.

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21 In the context of the present, a *Stipulation and Order*, distinguishes it from Kingsley, in that  
22 it has a signed agreement of wrongful termination. Further, in Kingsley, a gaming license  
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1 differentiates it from this case. Likewise, the recent Smith v. Cloud and Rainbow Bingo, SU 97-04  
2 (HCN S. Ct. Jan. 8, 1998), was an employment grievance case that did not have an underlying  
3 *Stipulation and Order*. The issue for the Trial Court is what constitutes a 'comparable position', in  
4 the context of this case?

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6 **III. The Decision of the May 1, 1998 Judgment ignores the Appellants' right to be employed**  
7 **by the HCN and the Supreme Court Opinion of March 16, 1998.**

8 The Appellant is correct. The Trial Court's May 1, 1998 *Judgment* failed to address the  
9 Appellant's reemployment status. Ultimately, the Trial Court released the HCN from the Contempt  
10 for complying with the May 7, 1997 *Judgment*. Actually, the Nation failed to comply with the May  
11 7, 1997 Judgment to reemploy the Appellant. The May 7, 1997 *Judgment* ordered, first,: "Since the  
12 HCN Head Start program has a position of similar duties and responsibilities with the same or  
13 similar pay rate available, this Court believes it reasonable that the plaintiff return to work within the  
14 Head Start Program, a division of the HCN Education Department." (Jgmt p 6).

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17 Second, that the Nation place the plaintiff "on administrative leave or a similar lay-off status  
18 with pay from the period starting April 17, 1997 until the plaintiff is reemployed (sic)"(Jgmt p 7).  
19 Third, per the *Stipulation*, item #9, that the Nation provides the "appropriate health insurance  
20 coverage from the Nation's insurance plan retroactive to the date of her termination (October 28,  
21 1996)."

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24 On September 18, 1997, the Trial Court found the HCN was in Contempt for not complying  
25 with the terms of the *Stipulation* or *Judgment*. The Nation was required by the *Stipulation*, to

1 provide "appropriate health insurance coverage form the Nation," (Jgmt 1). The HCN did not  
2 reinstate the Appellant into "position specifically within the Nation's Head Start Program," (Jgmt 1).  
3 Until placed into a comparable position, "the plaintiff would be on a layoff-with-pay status . . . until  
4 such time as the Nation offered her a position and she accepted" (emphasis added, see Jgmt p 2).  
5

6 The Trial Court sanctioned the Nation each day it failed to provide compensation or  
7 insurance coverage. The Court then failed to acknowledge the Appellant's right to be reinstated  
8 within the Head Start Program, as the Court ordered May 7, 1997. The Nation also had that  
9 obligation to reinstate the Appellant into a comparable position. Unfortunately, the Nation took it  
10 upon themselves not to offer the new position in Head Start to the Appellant (emphasis added).  
11

12 According to the Affidavit of Michael Murphy, filed September 19, 1997, at Item 8:  
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14 "Upon information and belief, one of the reasons given to me for not offering Joelene a position  
15 in the Education Department was that it would have detrimental effect on other employee's  
16 morale in the Department. Also, I was told that the other Departmental employees apparently  
had a difficult time working with her in the past."

17 The Nation added an insult to an already injured party. The Nation's reasoning for not offering the  
18 Appellant the job was a blatant disregard to the Ho-Chunk Nation and the Ho-Chunk Nation Judicial  
19 System. It was not for the Education Department and Counsel for the HCN to determine it was  
20 detrimental for morale. They defied a Trial Court Order for the appellant to fill the new position in  
21 Head Start. It violates Article X, Sec. 1, Bill of Rights, (a), The Ho-Chunk Nation, in exercising its  
22 powers of self-government shall not: (8) deny to any person within its jurisdiction the equal  
23 protection of its laws or deprive any person of liberty or property without the due process of law.  
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1 Should the Education Department have a discipline problem with one or more of its employees, then  
2 the Education Department, by law, shall refer to the HCN Personnel Policies and Procedure Manual.

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4 SU98-04: Appeal of the Trial Court's Order (Relief) of May 15, 1998.

5 **I. The HCN Trial Court erred in the May 15, 1998 Order by stating facts that are**  
6 **inaccurate and deciding only on the merits offered by the Appellee and ignoring oral**  
7 **arguments of the Appellant at the April 23, 1998 hearing.**

8 This case is distinctly different, that an employee was wrongfully terminate, than other  
9 employment case before the HCN Trial Court. The HCN took responsibility and entered into a  
10 *Stipulation and Order for Partial Settlement*, admitting the fault for the wrongful termination of the  
11 Appellant.

12  
13 The Court, at the April 23, 1998 Hearing requested briefs from the parties to be submitted by  
14 "the 28<sup>th</sup>" (tr. Pg. 62, line 15). The Court erred by stating that it is left to make a determination on  
15 the merits only offered by the defendant. The Trial Court has access to the trial transcripts as  
16 provided to the Supreme Court for review. In so doing, should make a fair and reasonable decision.  
17 Appellant waived her right to a court trial in lieu of the *Stipulation*, that the HCN erred and agreed to  
18 reemploy the Appellant and provide health insurance retroactive to the date of the Appellant's  
19 wrongful termination. The Trial Court awarded the Appellant layoff-with-pay to make her whole. In  
20 the May 15, 1998 *Judgment*, the Court rescinded its prior *Order* as not being within the Smith  
21 decision. Further, that the layoff-with-pay shall cease as of November 1, 1997 to present. This case  
22 is distinct from the Smith, based on the *Stipulation and Order for Partial Settlement*, signed April  
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1 18, 1997. The signed *Stipulation* was entered as a Court Order and is binding on the parties who  
2 signed it. The *Order* granting the Appellant be placed on Administrative leave with pay shall  
3 continue to make the wrongfully terminated employee whole.

4  
5 **II. The HCN Trial Court erred in the May 15, 1998 Order by stating facts that are**  
6 **inaccurate in the "Finding of Facts".**

7 See SU 98-03, enumerated I.

8 **III. The Decision of the May 15, 1998 Order ignores the Appellant's right to be employed**  
9 **by the HCN and the Supreme Court Opinion of March 16, 1998.**

10 See SU 98-03, issue enumerated III.

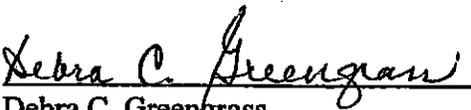
11  
12 **CONCLUSION**

13 The Appellee was wrongfully terminated by the Head Start Program on October 28, 1996.  
14  
15 The *Stipulation* was to be reinstate the Appellant in to a comparable position. It was so approved and  
16 Ordered by the Trial Court on April 18, 1997. The Nation failed to fulfill it obligation to the  
17 Appellant by reinstating her back into the HCN workforce. The parties agreed and disagreed as to  
18 what a comparable position is. The Trial Court failed to direct the parties as to what constitutes a  
19 'comparable position' in the context of this case. Although, the Trial Court was correct  
20 indeterming that the Nation was in Contempt of the *Stipulation*. The Trial Court failed to abide by  
21 the *Stipulation* in making the Appellant whole.

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24 The Trial Court's *Judgment* is hereby **Reversed** and **Remanded** to the Trial Court to render

1 a judgment consistent with the **Stipulation and Order for Partial Settlement**, signed on April 18,  
2 1997. Reinststate Appellant into a comparable position to the one that she held before she was  
3 wrongfully terminated.

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5 IT IS SO ORDERED this 7th day of June 1999.

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7 Debra C. Greengrass,  
8 Associate Justice

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DISSENTING OPINION

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Rita A. Cleveland, Associate Justice

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This case stems from an appeal of the final Judgement of a Contempt Order. The question that this Court has to answer is "Whether the Trial Court properly applied the Laws of the HCN when making the determination that the HCN fulfilled its obligations of the Contempt Order"?

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Both parties in this case agree that the Appellant was wrongfully terminated. Rather than exercising her right to a trial, the parties enter into a Stipulation and Order for Partial Settlement (hereinafter Stipulation).

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The parties agreed on a number of issues, however, the parties disagreed as to the plaintiff's placement into a comparable position as well as other remedial issues. Because of this disagreement, the parties felt that the trials previously scheduled should be cancelled, and agreed to leave this question (remedy) to the Court's determination based upon the current record in this case along with written submission by each party. The parties further agreed that upon receipt of the

1 parties brief the Court would decide only upon the remedial issues presented by the parties (See  
2 Stipulation).

3 On May 7, 1997, the Trial Court entered a Judgement ordering that the plaintiff return to  
4 work within the Head start Program.<sup>2</sup> The Court also ordered that the plaintiff receive retro-active  
5 annual leave for hours not already cashed-out, and be placed on Administrative leave or similar lay-  
6 off status, with the pay starting April 17, 1997, until the plaintiff is re-employed.  
7

8 The appellant filed a motion for a Status Hearing due to the Nations non-compliance with the  
9 May 7, 1997 Judgement. On September 18, 1997, the Court found the nation in contempt for non-  
10 compliance with the May 7, 1997 Order. The Nation was found in contempt and was specifically  
11 ordered to re-instate the plaintiff's health insurance and place the Plaintiff on lay-off with pay status  
12 until re-employed.  
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14 On October 23, 1997, the Trial Court held a hearing and determined whether the Nation met  
15 its contempt obligations by reinstating health insurance and compensating the plaintiff on lay off  
16 with pay. Trial Court further determined that the Nation met its obligation by exercising due  
17 diligence in making what job offers were available at the time, however, the Appellant refused the  
18 offers, which denied the Trial Court the opportunity to define comparable employment in the context  
19 of this case. The decision was appealed. This Court reversed and remanded the decision back to  
20 the Trial Court. As ordered on remand, the Trial court re-examined its earlier Judgement,  
21 specifically, HCN case law on comparable employment. The issue of comparable position becomes  
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25 <sup>2</sup> The appellant decided that returning to the Head start program was not a suitable remedy due to the fact that she  
26 already received the unemployment compensation benefits that she is normally paid during the summer months when  
27 the Head start program is closed.

1 the major point of contention in this case due to the Judge offering to submit an opinion on what  
2 comparable employment is, which is more than the stipulation asked of her. Case law precedent  
3 holds that to determine whether a position is comparable, the facts need to be presented to the court.  
4 In the Nettie Kingsley v. HCN Personnel Dept., PRC 93-026, (HCN tr. Ct. April 10, 1996) case,  
5 Kingsley was placed in a position which Kingsley later felt was not comparable. Kingsley presented  
6 the facts to the Trial Court, questioning whether her job placement was comparable. The position  
7 previously held by Ms. Kingsley now required a gaming license. Ms. Kingsley refused to apply for  
8 a gaming license; consequently, the Court determined that like wages constituted comparable  
9 employment. To make such a determination with out the facts or without a codified rule from the  
10 Legislature, the Trial Court would find itself in a position of legislating. Dissatisfied with the Trial  
11 Courts May 1, 1998 Judgement on the contempt order and the May 15, 1998 Judgement on the  
12 remedy issues, the appellant appealed to this Court. The appeal was based on 1) Judge Greendeer-  
13 Lee inaccurately stating amounts in the Finding of Facts. 2) The unclear, inaccurate and misleading  
14 procedural history, which the Appellant felt, prejudiced her right to a fair judgement. And 3) the  
15 Judgement ignores the Appellants' right to be employed by the Ho-Chunk Nation and the Supreme  
16 Court Opinion of March 16, 1998.

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20 The appeal did not dispute the final decision of the Trial Court, but disputed the inaccuracies  
21 in the facts, the procedural history of the case, and the claim that the Trial Court ignored the  
22 Appellants right to be employed as well as the Supreme Courts opinion of March 16, 1998. The  
23 Trial Court did not ignore the Appellant's right to be employed by the HCN, in fact, the contempt  
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1 order provided opportunities for the Appellant to be offered employment, however, the Appellant  
2 declined the job offers<sup>2</sup>. Furthermore, in the May 15, 1998 Judgement, the Trial Court recognizes  
3 the Nations obligation to employ the Appellant. The Appellant has failed to provide arguments in  
4 support of the basis for the appeal.

5  
6 Resolution 3/26/96A was a law at the time the parties entered into the Stipulation; therefore,  
7 the remedies should have been fashioned in compliance with this law. Resolution 3/26/96A limits  
8 the remedial power of the Trial Court in employment cases to (1) an award of up to \$2000 and/or (2)  
9 an order to reinstate the aggrieved employee. The Trial Court performed its responsibility in  
10 properly applying the laws of the HCN.

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12 Based on the above reasoning, I respectfully dissent from that of the majority opinion.

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14 DATED THIS 7<sup>th</sup> DAY OF JUNE 1999.

15  
16 Rita A. Cleveland  
17 Rita A. Cleveland, Associate Justice

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20 2 In Simplot, et. Al. V. HCN Health Dept., CV 95-26 & 27, CV 96-05 (Tr. Ct. August 29, 1996), the Court determined  
21 that it can only make the party whole by restoring the party to rightful place of employment position within the HCN. *Id*  
22 AT 24. The duty to make a party whole terminates when that party declines to accept an offer of a position with the  
23 HCN.