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

Duane Arendt,
Plaintiff,

v.

Case No.: **CV 10-83**

**Angela Ward, Department of Education,
and Department of Treasury,**
Defendants.

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**ORDER
(Granting Motion to Dismiss)**

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INTRODUCTION

14 The Court must determine whether to grant the defendants' motion to dismiss. The
15 plaintiff's request for monetary relief is barred by tribal sovereign immunity from suit, which
16 cannot be circumvented under the guise of requesting equitable remedies. The analysis of the
17 Court follows below.

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PROCEDURAL HISTORY

21 The plaintiff, Duane J. Arendt, by and through Attorney James C. Ritland, initiated the
22 current action by filing a *Complaint* with the Court on September 17, 2010. Consequently, the
23 Court issued a *Summons* accompanied by the above-mentioned *Complaint* on September 17,
24 2010, and served the documents upon the defendants' representative, Ho-Chunk Nation
25 Department of Justice (hereinafter DOJ),¹ by personal service. *See HCN R. Civ. P. 5(A)(1),*

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¹ The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*. Parties can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-2722 or (800) 434-4070 or

1 (C)(1). The *Summons* informed the defendants of the right to file an *Answer* within twenty (20)
2 days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(A)(2), 6(A)*. The *Summons*
3 also cautioned the defendants that a *default judgment* could result from failure to file within the
4 prescribed time period.
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6 On October 6, 2010, the defendants prematurely filed a dispositive motion, which the
7 Court declined to consider absent a further filing. *Id.*, Rule 19(A) (permitting the filing of a
8 motion “with any pleading or at any time after their first pleading has been filed”). The
9 defendants, by and through Attorney Heidi A. Drobnick, rectified the deficiency on October 7,
10 2010, by submitting the *Amended Motion to Dismiss & Answer*, including a supportive legal
11 memorandum. *Id.*, Rule 18. The plaintiff filed a timely *Response to Motion to Dismiss* on
12 October 13, 2010. *Id.*, Rule 19(B).
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14 The Court issued *Notice(s) of Hearing* on October 20, 2010, to inform the parties of the
15 date, time and location of a *Scheduling Conference*. Prior to the *Conference*, the defendants filed
16 an untimely October 22, 2010 reply. *Id.* Thereafter, the plaintiff submitted an *Amended*
17 *Complaint* accompanied by a *Motion for Leave to Amend Complaint*.² *Id.*, Rule 21. The Court
18 convened the *Scheduling Conference* on November 3, 2010 at 2:30 p.m. CDT. The following
19 parties appeared at the *Conference*: Duane J. Arendt, plaintiff; Attorney James C. Ritland,
20 plaintiff’s counsel; Angela K. Ward, defendant; and Attorney Heidi A. Drobnick, defendants’
21 counsel. The Court entered the *Scheduling Order* on November 3, 2010, setting forth the
22 timelines and procedures to which the parties should adhere prior to trial.
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27 visiting the judicial website at www.ho-chunknation.com/?PageID=123.

28 ² At the *Scheduling Conference*, the Court accepted the plaintiff’s amended pleading and established a deadline for
response. *Scheduling Conference* (LPER, Nov. 3, 2010, 02:43:55 CDT).

1 On November 15, 2010, the defendants filed an amended responsive pleading and
2 *Second Amended Motion to Dismiss*, including *Written Motion Arguments & Supplement to*
3 *Defendants' Memorandum in Support of Motion to Dismiss in Response to Plaintiff's Amended*
4 *Complaint* (hereinafter *Supplemental Memorandum*). *Id.*, Rule 18. The Court convened the
5 *Motion Hearing* on November 16, 2010 at 9:00 a.m. CST, having earlier afforded notice of the
6 proceeding. *Scheduling Order* at 7. The following parties appeared at the *Conference*: Attorney
7 James C. Ritland, plaintiff's counsel; Angela K. Ward, defendant;³ and Attorney Heidi A.
8 Drobnick, defendants' counsel.
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11 APPLICABLE LAW

12 CONSTITUTION OF THE HO-CHUNK NATION

13 Art. VI - Executive

14 Sec. 1. Composition of the Executive.

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

22 Art. VII - Judiciary

23 Sec. 5. Jurisdiction of the Judiciary.

24 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both
25 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
officials and employees, shall be a party. Any such case or controversy arising within the

27 ³ The Court removed Forrest A. Funmaker as a named defendant since no longer serving in the capacity of
28 Executive Director of the Ho-Chunk Nation Department of Education (hereinafter Education Department). *Mot.*
Hr'g (LPER, Nov. 16, 2010, 09:04:54 CST). The plaintiff can receive no redress from this former employee. *See*
Timothy G. Whiteagle et al. v. Alvin Cloud, Chair of the Gen. Council, in his official capacity, et al., CV 04-04
(HCN Tr. Ct., Aug. 5, 2004) at 22-25, *aff'd*, SU 04-06 (HCN S. Ct., Jan. 3, 2005).

1 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
2 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
3 the Nation's sovereign immunity.

4 Sec. 6. Powers of the Tribal Court.

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

8 Art. XII - Sovereign Immunity

9 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit
10 except to the extent that the Legislature expressly waives its sovereign immunity, and official
11 and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall
12 be immune from suit.

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

18 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

19 Rule 5. Notice of Service of Process.

20 (A) Definitions.

21 (1) Service of Process - The manner in which parties are informed of the *Complaint* or
22 *Citation* and of the opportunity to *Answer*. Personal service is preferred, however, service by
23 registered U.S. mail (return receipt requested) at the person's home or usual place of business or
24 employment are equally acceptable and effective. Other methods of service may be employed
25 when, in the Court's discretion, they are most likely to result in actual notification of the parties.

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

(C) Methods of Service of Process.

1. Personal Service. The required papers are delivered to the party in person by the
bailiff, or when authorized by the Court, a law enforcement officer from any jurisdiction, or any

1 other person not a party to the action who is eighteen (18) years of age or older and of suitable
2 discretion.

3 Rule 6. Answering a Complaint or Citation.

4 (A) Answering a Complaint. A party against whom a *Complaint* has been made shall have
5 twenty (20) calendar days from the date the *Summons* is issued, or from the last date of service
6 by publication, to file an *Answer* with the Clerk of Court. The *Answer* shall use short and plain
7 statements to admit, admit in part, or deny each statement in the *Complaint*, assert any and all
8 claims against other parties arising from the same facts or circumstances as the *Complaint* and
9 state any defenses to the *Complaint*. The *Complaint* must contain the full names of all parties
10 and any counsel. The *Answer* must be signed by the party or his or her counsel and contain their
11 full names and addresses, as well as a telephone number at which they may be contacted. An
12 *Answer* shall be served on other parties and may be served by mail. A *Certificate of Service*
13 shall be filed as required by Rule 5(B).

14 Rule 18. Types of Motions.

15 *Motions* are requests directed to the Court and must be in writing except for those made in Court.
16 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
17 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
18 shall contain or be supported by a legal memorandum, which states the issues and legal basis
19 relied on by the moving party. The *Motions* referenced within these rules shall not be considered
20 exhaustive of the *Motions* available to litigants.

21 Rule 19. Filing and Responding to Motions.

22 (A) Filing. *Motions* may be filed by a party with any pleading or at any time after their first
23 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
24 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*.
25 *Motions for Extension of Time* and *More Definite Statement* may be filed before the initial
26 pleading.

27 Rule 21. Amendments to Pleadings.

28 Parties may amend a *Complaint* or *Answer* one time without leave of the Court prior to the filing
of a responsive pleading, or if no responsive pleading is permitted, at any time within twenty
(20) days of the original filing date. Subsequent amendments to *Complaints* or *Answers* may
only be made upon leave of the Court and a showing of good cause, or with the consent of the
opposing party. All amendments to the *Complaint* or *Answer* must be filed at least thirty (30)
calendar days prior to trial or as otherwise directed by the Court. When an *Amended Complaint*
or *Answer* is filed, the opposing party shall have ten (10) calendar days, or the time remaining in
their original response period, whichever is greater, in which to file an amended responsive
pleading.

1 Rule 27. The Nation as a Party.

2 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
3 named as a party, the *Complaint* should identify the unit of government, enterprise or name of
4 the official or employee involved. The *Complaint*, in the case of an official or employee being
5 sued, should indicate whether the official or employee is being sued in his or her individual or
6 official capacity. Service can be made on the Ho-Chunk Nation Department of Justice and will
be considered proper unless otherwise indicated by these rules, successive rules of the Ho-Chunk
Nation Court, or Ho-Chunk Nation Law.

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

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

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

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

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

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

6 Rule 61. Appeals.

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

11 **FINDINGS OF FACT**

12 1. The parties received proper notice of the November 16, 2010 *Motion Hearing*.

13 2. The plaintiff, Duane J. Arendt, is a non-member, and resides at 4378 Lynn Hill, Nekoosa,
14 WI 54457. *Compl.* at 1. The plaintiff is a teacher formerly employed by the Education
15 Department. *Resp. to Mot. to Dismiss*, Attach. 1 (hereinafter *Employment Agreement*).

17 3. The defendant, Ho-Chunk Nation Department of Treasury, is an executive department of
18 the Ho-Chunk Nation (hereinafter HCN or Nation), a federally recognized Indian tribe, with
19 principal offices located on trust lands at HCN Headquarters, W9814 Airport Road, Black River
20 Falls, WI 54615. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION),
21 ART. VI, § 1(b); *see also* 75 Fed. Reg. 60810 (Oct. 1, 2010). The defendant, Education
22 Department, is an executive department of the Nation with principal offices at HCN
23 Headquarters. The defendant, Angela K. Ward, is the Executive Director of the Education
24 Department.
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1 4. On December 22, 2009, HCN President Wilfrid Cleveland executed a contract between
2 the Education Department and the plaintiff. *Employment Agreement* at 5. The contract term
3 extended until June 27, 2010. *Id.* at 3.

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5 5. The contract includes the following relevant provisions:

6 a. Compensation. The Nation agrees to compensate Teacher for the
7 services specified in this Agreement as follows: Teacher shall receive as
8 base compensation an amount equal to \$49,500 annually, for the duration
9 of this agreement, paid weekly with benefits outlined in Exhibit B attached
10 hereto and incorporated herein by reference.

11 b. Termination for Cause by Nation. This Agreement may terminate
12 immediately for cause upon Teacher's violation of the Nation's Drug and
13 Controlled Substance Policy. Should teacher be found to no longer carry a
14 valid teaching license, the Nation may terminate this Agreement
15 immediately.

16 c. Choice of Law. This Agreement shall be construed under the laws
17 of the Ho-Chunk Nation. The undersigned agrees that the Ho-Chunk
18 Nation Trial Court of the Ho-Chunk Nation in Black River Falls,
19 Wisconsin shall have exclusive jurisdiction over any claim or controversy
20 arising hereunder. The undersigned does hereby consent to the subject
21 matter and personal jurisdiction of said Court over any such dispute
22 arising pursuant to this Agreement and any and all subsequent additions,
23 appendixes, addends or any other amendment to this Agreement.

24 d. Non-Waiver of Sovereign Immunity. Nothing contained in this
25 Agreement or any amendment hereinafter shall in any manner be
26 construed or deemed to be a waiver of the sovereign immunity of the
27 Nation.

28 *Id.* at 3-4 (alphabetical designations modified).

6. On or about January 22, 2010, the plaintiff alleged that former Executive Director Forrest
A. Funmaker terminated him without cause in violation of the *Employment Agreement*. *Compl.*
at 2; *see also Defs.' Rule 31 Required Disclosures*, CV 10-83 (Nov. 15, 2010), Attach. D. The
plaintiff requested relief in the amount of "\$20,944.00 plus attorneys fees, costs and other
damages" due to a loss of wages. *Id.* at 1-3. The plaintiff specifically requests that the

1 defendants adhere to the above-cited Compensation provision of the *Employment Agreement*,
2 which the plaintiff characterizes as an equitable remedy, *i.e.*, specific performance. *Am. Compl.*
3 at 2; *see also Mot. Hr'g* (LPER, 09:23:19 CST).
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5 7. The plaintiff filed his initial pleading after conclusion of the contract term.
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7 DECISION

8 The parties noted “consent to the subject matter and personal jurisdiction of [the] Court
9 over any . . . dispute arising pursuant to th[e] Agreement.” *Employment Agreement* at 4.
10 Regarding personal jurisdiction, “[b]ecause the requirement of personal jurisdiction represents
11 first of all an individual right, it can, like other such rights, be waived.” *Ins. Corp. of Ir. v.*
12 *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Conversely, “subject-matter
13 jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.”
14 *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see also Sadat v. Mertes*, 615 F.2d 1176, 1188
15 (7th Cir. 1980) (“jurisdiction otherwise lacking cannot be conferred by consent, collusion,
16 laches, waiver, or estoppel”). And, the presence of “personal jurisdiction alone does not confer
17 subject matter jurisdiction” upon the Court.⁴ *Ho-Chunk Nation v. Harry Steindorf et al.*, SU 00-
18 04 (HCN S. Ct., Sept. 29, 2000) at 4.
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22 Essentially, a court may exercise subject matter jurisdiction over a cause of action if
23 constitutionally or statutorily empowered to hear such cases in general. *Cotton*, 535 U.S. at 630.
24 “Jurisdiction of the subject-matter, is power to adjudge concerning the general question involved,
25 and is not dependent upon the state of facts which may appear in a particular case, arising, or
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⁴ At best, the Court could construe the above provision as a pledge that the Nation would not raise a defense of lack of subject matter jurisdiction, which did not occur here. *Am. Mot. to Dismiss & Answer* at 2.

1 which is claimed to have arisen, under that general question.”⁵ *Hunt v. Hunt*, 72 N.Y. 217, 229
2 (N.Y. 1878). The constitutional case and controversy clause erects the metes and bounds of this
3 Court’s subject matter jurisdiction.⁶ *Steindorf*, SU 00-04 at 3 (citing CONST., ART. VII, § 5(a)).
4 Yet, the constitutional framers proceeded to clarify that “[t]his grant of jurisdiction by the
5 General Council shall not be construed to be a waiver of the Nation’s sovereign immunity,”
6 thereby distinguishing the two (2) doctrines.⁷ CONST., ART. VII, § 5(a).

8 In this regard, the defense of sovereign immunity from suit resembles many other
9 defenses that could impact a court’s ability to reach the merits of a given case. These defenses,
10 however, are waivable. *See, e.g., Kenneth L. Twin v. Douglas Greengrass, Executive Dir. of*
11 *Admin.*, CV 03-88 (HCN Tr. Ct., Oct. 7, 2004) at 8, *appeal denied*, SU 04-08 (HCN S. Ct., Dec.
12 29, 2004) (commenting that a statute of limitation provides an affirmative defense subject to
13 waiver). To be sure, a successful defense may prove dispositive and suspend further
14 consideration of a matter, but such defenses do not constitute attacks upon a court’s subject
15 matter jurisdiction. Of particular relevance, our Supreme Court has concluded that “[w]here a
16 party fails to assert a defense of sovereign immunity in a case, such a defense is waived.”
17 *Sharon Williams v. HCN Ins. Review Comm’n*, SU 08-01 (HCN S. Ct., Oct. 29, 2008) at 16
18 (citing *Louella A. Kelty v. Jonette Pettibone et al.*, CV 98-49 (HCN Tr. Ct., Feb. 22, 2006)).

19 So, while sovereign immunity assuredly differs from subject matter jurisdiction, the
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23 ⁵ Even more precisely, “[j]urisdiction in courts is the power and authority to declare the law. The very word, in its
24 origin, imports as much; it is derived from *juris* and *dico*--I speak by the law.” *Mills v. Commonwealth*, 13 Pa. 627,
630 (Pa. 1850).

25 ⁶ As reflected in the findings of fact, this case involves a written contract or agreement executed by the Nation,
26 which the Judiciary presumptively regards as an equivalent to statutory law. *HCN Treas. Dep’t et al. v. Corvettes on*
the Isthmus et al., SU 07-03 (HCN S. Ct., Nov. 19, 2007); *Marx Adver. Agency, Inc. v. Ho-Chunk Nation et al.*, SU
27 04-07 (HCN S. Ct., Apr. 29, 2005); *Ho-Chunk Nation v. Bank of Am., N.A.*, SU 03-06 (HCN S. Ct., Sept. 11, 2003);
F. William Johnson v. Ho-Chunk Nation, CV 01-15 (HCN Tr. Ct., June 18, 2003).

28 ⁷ “[S]overeign immunity is a jurisdictional consideration separate from subject matter jurisdiction” *In re*
Prairie Island Dakota Sioux, 21 F.3d 302, 305 (8th Cir. 1994).

1 defendants have nonetheless asserted the associated defense in the present case. *Am. Mot. to*
2 *Dismiss & Answer* at 2 (citing CONST., ART. XII). The relevant constitutional text provides:
3 “[t]he Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature
4 expressly waives its sovereign immunity” CONST., ART. XII, § 1. This immunity extends
5 to the separate branches and sub-entities of the tribe. *Whiteagle*, SU 04-06 at 6; *Chloris A. Lowe,*
6 *Jr. v. Ho-Chunk Nation et al.*, SU 97-01 (HCN S. Ct., June 13, 1997) at 3-4. The Nation has
7 clearly retained its immunity as stated within the contract. *Employment Agreement* at 4.
8 Consequently, the named Executive Branch departments are immune from suit.⁸

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11 The Court’s review, however, is not at an end. The plaintiff also attempts to assert an
12 equitable claim for relief against Executive Director Ward. The Court has long recognized that
13 Article XII also embodies the *Ex Parte Young* doctrine.⁹ *Chloris A. Lowe, Jr. v. HCN*
14 *Legislature et al.*, CV 97-12 (HCN Tr. Ct., Mar. 21, 1997) at 14-18 (citing CONST., ART. XII, §
15 2; *Ex Parte Young*, 209 U.S. 123 (1908)), *aff’d*, SU 97-01 (HCN S. Ct., June 13, 1997).¹⁰ In
16 order to receive relief, a plaintiff must overcome the substantial hurdle of proving that an official
17 or employee acted *ultra vires*, *i.e.*, beyond his or her powers. When successful, a party may
18 obtain a remedy “in the nature of prospective forward relief, not damages to punish the defendant
19 . . . for . . . past wrongs.” *Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S. Ct., Dec. 8,
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24 ⁸ “[S]overeign immunity applies regardless of whether a private plaintiff’s suit is for monetary damages or some
25 other type of relief.” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 765 (2002).

26 ⁹ Federal courts have permitted a direct claim for money damages against an official under limited circumstances.
27 An official would raise a defense of qualified or “good faith” immunity to defeat such a cause of action, and a court
28 would need to assess whether the official’s actions violated a “clearly established” legal duty. *See Harlow v.*
Fitzgerald, 457 U.S. 800, 818-19 (1982). The CONSTITUTION appears to foreclose this type of claim, but, in any event,
the plaintiff does not present a claim for individual liability. “[Q]ualified immunity only immunizes defendants
from monetary damages.” *Williams v. Kentucky*, 24 F.3d 1526, 1541 (6th Cir. 1994); *see also Rivera-Ruiz v.*
Gonzalez-Rivera, 983 F.2d 332, 335 (1st Cir. 1993).

¹⁰ The defendants incorrectly identify a contemporaneous case for this proposition. *Supplemental Mem.* at 4 (citing
Joelene Smith v. Tammy Lang, as Head Start Dir., et al., CV 96-94). The Court did not issue a substantive decision
in the *Smith* case until May 7, 1997.

1 2003) at 11; *see also Robert A. Mudd v. HCN Legislature: Elliot Garvin et al.*, SU 03-02 (HCN
2 S. Ct., Apr. 8, 2003) at 6 n.2.

3 That being said, “decrees which by their terms [are] prospective in nature [may have] an
4 ancillary effect on the state treasury[,]” and this result represents “a permissible and often an
5 inevitable consequence of the principle announced in *Ex parte Young*.” *Edelman v. Jordan*, 415
6 U.S. 651, 667-68 (1974); *see also Smith*, SU 03-08 at 11 (remarking that a prospective equitable
7 remedy may have a monetary impact such as when the court orders a new election). The
8 plaintiff also attempts to analogize to a Trial Court decision in support of his claim for monetary
9 damages. *Mot. Hr’g* (LPER, 09:23:24 CST) (citing *Ronald K. Kirkwood v. Francis Decorah, in*
10 *his official capacity as Dir. of HCN Hous. Dep’t, et al.*, CV 04-33 (HCN Tr. Ct., July 27, 2006)).
11 In *Kirkwood*, the Court invalidated a legislative resolution that effectively and improperly denied
12 the plaintiff a tribal elder housing grant. The Legislature did not adhere to standing bill process
13 rules when enacting the resolution. *Kirkwood*, CV 04-33 at 9-12. As a result, plaintiff Kirkwood
14 received the grant for which he was otherwise entitled to under the law. *Id.* at 15.

15 The Court possesses constitutional authority “to issue all remedies in law and in equity.”
16 CONST., ART. VI, § 6(a). However, an “[o]fficial[] . . . who act[s] beyond the scope of [he]r
17 duties or authority shall be subject to suit *in equity only* for declaratory and *non-monetary*
18 *injunctive relief . . .*” *Id.*, ART. XII, § 2 (emphasis added). Assuming *arguendo* that the
19 plaintiff can establish an illegal breach of contract, he may only receive an equitable remedy. In
20 each above-cited instance, the Court refrained from granting a retroactive legal remedy, *i.e.*,
21 money damages.¹¹ The Court simply cannot grant the plaintiff’s request for relief. “Typically . . .
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28 ¹¹ “[A] civil action for breach of contract resulting in an award of monetary damages has long been regarded as the quintessential ‘legal’ remedy, in contrast to those remedies yet deemed to be ‘equitable’ in nature” *Kearl v. Rausser*, No. 2:04-CV-00175 BSJ, 2007 U.S. Dist. LEXIS 12875, at *7-8 (D. Utah Feb. 23, 2007); *see also Curtis v. Loether*, 415 U.S. 189, 196 (1974).

1 . . . , specific performance of a contract to pay money was not available in equity. . . . [Similarly,]
2 for restitution to lie in equity, the action generally must seek not to impose personal liability on
3 the defendant, but to restore to the plaintiff particular funds or property in the defendant's
4 possession.” *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, 214 (2002)
5 (referencing vested ownership interests); *cf. Larson v. Domestic & Foreign Corp.*, 337 U.S. 682,
6 698-703 (1949).

8 The Court acknowledges the seemingly harsh result, but the plaintiff was not without an
9 available remedy. The plaintiff could have sought a preliminary injunction during the remainder
10 of the contract term, but, to reiterate, the filing of the initial pleading followed the contract’s
11 established expiration date. Moreover, the HCN Supreme Court has previously joined this
12 assessment. *Marx Adver.*, SU 04-07 at 4, 8-10 (involving a contract with equivalent
13 jurisdictional and sovereign immunity provisions). The Court accordingly grants the defendants’
14 request for dismissal.
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17 The parties retain the right to file a timely post judgment motion with this Court in
18 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
19 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
20 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
21 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
22 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
23 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
24 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*
25 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
26 *R. App. P.*].” *HCN R. Civ. P.* 61.
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Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



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IT IS SO ORDERED this 15th day of February 2011, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Todd R. Matha
Chief Trial Court Judge