IN THE

HO-CHUNK NATION TRIAL COURT

Joelene Smith,	**ORDER (Declaration of Suitable Offers)**
Plaintiff,	
v.	
Tammy Lang & Ho-Chunk Nation,	
Defendant.	Case No. **CV96-94**

INTRODUCTION

On October 20, 1997, the defendant filed a *Notice and Motion for Order Declaring Suitable Offer of Employment* to the Ho-Chunk Nation Trial Court. The defendant requested this Court to establish criteria detailing the elements of a suitable offer as the defendant met its burden to offer the plaintiff two comparable positions in satisfaction of the contempt charge against the defendant was to force the defendant to comply with the original Court *Order*. This particular pleading offered after the September 18, 1997 decision by this Court finding the defendant in contempt for failure to offer the plaintiff a comparable position and to pay the plaintiff until she was re-employed with the Nation.

APPLICABLE LAW

HCN CONSTITUTION ART., VII § 6(a)

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

HCN CONSTITUTION ART., XII § 1.

> The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and officials or employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit.

HCN LEGISLATIVE RESOLUTION 3-26-96A,

> A review of an employee grievance by the Ho-Chunk Trial Court after the Administrative Review Process contained in the Chapter 12, of the PERSONNEL POLICIES AND PROCEDURES MANUAL has been exhausted.

The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the extent that the Court may award a maximum of $2,000.00 to any one employee. Other remedies shall include an order of the court to the Personnel Department to reassign the employee.

FINDINGS OF FACT

1. On September 18, 1997, counsel for the defendant admitted that its client, the Ho-Chunk Nation, was unwilling to comply with the May 7, 1997 *Judgment*, directing the Nation to re-employ the plaintiff, and, until the plaintiff was reinstated into a position with the Nation, ordering the Nation to pay the plaintiff while she remained on lay-off status and to reinstate the plaintiff's health insurance benefits with the Nation.

2. On September 18, 1997, the Court ordered that the defendant reinstate the health insurance to the plaintiff or face a $10.00/per day charge.

3. On September 18, 1997, the Court ordered that the defendant pay the plaintiff at her former wage of $11.25 an hour until the plaintiff was reinstated to employment status with the Nation or face a $10.00/per day charge.

4. On September 19, 1997, the WPS Health Insurance wrote a letter to the Nation's Insurance Department indicating that Ms. Smith's family coverage was reinstated as of 11/1/96 with no lapse in coverage.

5. On September 26, 1997, Ms. Joelene Smith signed a "Receipt and Acknowledgment *Notice"* indicating that she received a check for $6,030.00 minus appropriate wage deductions. The attached "Other Pay/Leave Adjustments" sheet indicated that the amount of $6,030.00 included hours through September 30, 1997.

6. After the September 18, 1997 *Hearing*, Ms. Smith was offered a position in the Education Department as a Secretary at $9.67 per hour; Ms. Smith refused the offer.

7. After the September 18, 1997 *Hearing* and the offer of the Department of Education position, Ms. Smith was offered a position in the Treasury Department as a Data Entry Clerk at $10.00 per hour; Ms. Smith refused the offer.

8. During the October 23, 1997 *Hearing,* advocate for the plaintiff, Rick McArthur, stated that his client was in financial trouble and desperately needed a job and that his client was having trouble with the health insurance coverage and meeting mortgage bills.

9. During the October 23, 1997 *Hearing,* advocate McArthur stated that his client was willing to accept a part-time position with the Ho-Chunk Nation and that his client was willing to accept a position paying $8.00 per hour. Mr. McArthur identified those positions considered comparable by his client: Employment Assistant Program Specialist at $9.00 per hour, Lands Supervisor posted at $12.50 per hour, Legislative Secretary at $8.00 per hour, Administrative Assistant at $8.00 per hour, and all executive administrative positions.

10. During the October 23, 1997 *Hearing,* advocate McArthur offered no reasons as to why his client did not accept the first job offer. He indicated that his client declined the second job offer because there was no guarantee his client would receive the $10.00 an hour pay rate with the contingency of a budget modification.

DECISION

This Court was asked to determine when the defendant met its burden of offering a suitable position to the plaintiff. The defendant argued that the Court's contempt *Order* was no longer having the same effect--convincing the Nation to comply with the original May 7, 1997 Court *Order*-- since the defendant had made two job offers, yet the plaintiff refused both. The defendant further argued that with the existing *Contempt Order,* the plaintiff can choose to work or not work yet still gain pay from the Nation.

In *Nettie Kingsley v. HCN Personnel Dept.*, PRC 93-026, (HCN Tr. Ct. April 10, 1996), the plaintiff had already accepted a position but wanted a position of both equal responsibility and pay as her former position. In *Kingsley*, the Court found the grievant accepted a position of comparable pay and such position placement was considered comparable employment position. During this proceeding,

the Court felt that the parties were not communicating with one another which resulted in the plaintiff's apparent lack of cooperation and rejection of job offers by the Nation. Advocate for the plaintiff argued the hardship currently being endured by her household was so great, his client just wanted a job. The Advocate stated that his client was willing to accept a job paying $8.00 per hour or part-time employment. The advocate named specific positions posted after September 18, 1997 that his client felt were comparable positions. The defendant admitted that he was not sure that the plaintiff would consider a position paying $8.00 an hour. However, the proceeding reverted back to the original question of when the defendant had met its burden of offering suitable employment.

In *Simplot, et. al. v. HCN Health Dept.* CV95-26 & 27, CV96-05 (Tr. Ct. August 29, 1996), the Court determined that it can only make the party whole by restoring the party to a rightful place of employment position within the HCN. *Id.* at 24. The duty to make a party whole terminates when that party declines to accept an offer of a position with the HCN. Following *Simplot*, the Court has determined the defendant has met its burden of offering suitable employment. This Court was not convinced by the plaintiff's reasoning for refusing the defendant's two job offers. The record shows that the plaintiff was offered two positions with the Nation at pay greater than $8.00 per hour. Both offered positions were for full-time employment, not part-time positions. This showing indicated that the plaintiff was offered positions, but she was unwilling to settle with the same terms. By the close of the proceeding, the plaintiff not only wanted a position with pay greater than $8.00 per hour but also wanted the defendant to pay for attorney and litigation fees. This Court will not grant such a request for additional reward of attorney and litigation fees. In *Simplot*, the Court could only make the grievant whole by making the offer of employment available. In this case, the intention of the contempt charges against the Nation was to force the Nation to cooperate with the injured party and make her whole. The defendant has satisfied the *Contempt Order*. This Court now finds that the plaintiff is unwilling to work out a settlement for a comparable position. The plaintiff said she will take a position paying $8.00 an hour, but did not accept a position paying $9.67 an hour. This Court finds that the defendant has

fulfilled its obligation to the plaintiff. The *Contempt Order* is null and void from the date of entry of this judgment.

IT IS SO ORDERED this 31st day of October 1997 at the Ho-Chunk Nation Court in Black River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

_____
Hon. Joan Greendeer-Lee, Associate Judge
Ho-Chunk Nation Trial Court