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

CORNELIUS DECORAH,

ORDER (Dismissal Granted)

Plaintiff,

v.

**WADE BLACKDEER, CLARENCE PETTIBONE,
& HO-CHUNK LEGISLATURE,**

Defendants.

Case No.: **CV 98-55**

On October 14, 1998, Sheila Corbine, Counsel representing the defendants, filed a *Motion to Dismiss* the above-named action. The plaintiff failed to answer the *Motion*. Based on the *Defendant's Brief in Support of Motion to Dismiss*, the Court is prepared to answer the defendant's request.

APPLICABLE LAW

HO-CHUNK NATION CONSTITUTION

ART. I SEC. 2 Jurisdiction. The jurisdiction of the Ho-Chunk Nation shall extend to all territory set forth in Section 1 of this Article and to any and all persons or activities therein, based upon the inherent sovereign authority of the Nation and the People or upon Federal law.

ART. V SEC. 2 Powers of the Legislature.

(a) To make laws, including codes, ordinances, resolutions, and statutes;

(d) To authorize expenditures by law and appropriate funds to the various Departments in an annual budget;

(f) To set the salaries, terms and conditions of employment for all government personnel;

(x) To enact any other laws, ordinances, resolutions, and statutes necessary to exercise its legislative powers delegated by the General Council pursuant to Article III including but not limited to the foregoing list of powers;

ART. VII SEC. 4 The judicial power of the Ho-Chunk Nation shall be vested in the Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the Ho-Chunk Nation.

ART. VII SEC. 5 The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and 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 jurisdiction of the Ho-Chunk Nation shall be filed in Trial Court before it is filed in any other court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of the Nation's sovereign immunity.

ART. XII SEC. 1 The Ho-Chunk Nation shall be immune from suit except to the extent that the

1 Legislature expressly waives its sovereign immunity, and officials and employees of the Ho-Chunk
2 nation acting within the scope of their duties or authority shall be immune from suit.

3 HO-CHUNK RULES OF CIVIL PROCEDURE

4 Rule 8.

5 Whenever a party or parties have a right to be heard by the Trial Court, a party may request to appear
6 before the Traditional Court on matters related to custom and tradition of the Ho-Chunk Nation. The
7 party or parties involved in the dispute *must voluntarily consent* to appear before the Traditional Court.
8 A party or parties which bring an action before the Trial Court may elect to appear before the Traditional
9 Court at any time. *Both parties must consent* to appear before the Traditional Court. Upon a motion of
10 the Court or by a party, the Trial Court may request the assistance from the Traditional Court on matters
11 relating to custom and tradition of the Nation, pursuant to the HCN JUDICIARY ACT OF 1995, § 11.

12 Emphasis added.

13 APPROPRIATION AND BUDGET PROCESS ACT, HCC 96-002

14 Ch.1, Sec. 102.

15 The Purpose of this Act is to provide the Ho-Chunk Nation branches of government guidance in
16 preparing the budgets and to insure fiscal responsibility and integrity within the Nation. The President is
17 charged with submitting proposed budgets to the Legislature according to law in order to receive
18 uninterrupted funding. The Legislature may not fund programs if it determines that such funding would
19 result in duplication of existing programs and services to the
20 Ho-Chunk Nation members.

21 Ch. 1, Sec. 103.

22 To the extent that this Act conflicts with the Nation's Financial Procedures Manual or any other law of
23 the Nation, this Act shall supersede such procedures or law.

24 PERSONNEL POLICIES AND PROCEDURES MANUAL, HCC 96-002

25 Ch. 11, Layoff

26 An employee may be subject to a non-disciplinary, involuntary separation through layoff for reasons
27 including, but not limited to, lack of funds or work, abolition of position, reorganization, or the
28 reduction in or elimination of service levels.

FINDINGS OF FACT

1. The plaintiff, Cornelius Decorah, is an enrolled member of the Ho-Chunk Nation.

2. The defendants, Wade Blackdeer and Clarence Pettibone, are elected officers or legislators of the
Ho-Chunk Nation Legislature. The Legislature, the other named defendant, is a branch of the Ho-Chunk
Nation government.

3. At the time of the incidents giving arise to this controversy, the plaintiff was a Computer

1 Purchasing Agent in the Management Information System Department [hereinafter MIS].

2 4. On or about May 21, 1998, Defendant Blackdeer motioned the Legislature-Finance committee to
3 approve the MIS Administrative Budget for fiscal year (FY)98-99, after one Purchasing Agent line item
4 was deleted by this committee. Defendant Pettibone seconded the motion.

5 5. On or about May 26, 1998, the Legislature approved the MIS Administrative Budget for FY 98-99.

6 6. From July 13, 1998 through July 30, 1998, Brady TwoBears, the MIS Director, and Elisa Smith,
7 the MIS Supervisor, met with the plaintiff and Jill Pettibone, both Purchasing Agents in the MIS at the
8 time, about the eliminated position. (See Defendant's Exhibit A.)

9 7. On or about July 30, 1998, Brady TwoBears and Elisa Smith wrote the Lay-Off Notification to the
10 plaintiff indicating that they granted the plaintiff's voluntary layoff starting August 3, 1998 and they
11 would pay the plaintiff two weeks severance pay. (See Defendant's Exhibit B.)

12 8. On or about September 28, 1998, the plaintiff filed the *Complaint* in the HCN Tribal Court
13 requesting in the *Complaint* to be heard before the HCN Traditional Court.

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DECISION

16 The defendant requested that this claim be dismissed because the defendants clearly acted within
17 their scope of authority because the issue is a nonjusticiable political question. The defendant also
18 asserts that the plaintiff failed to exhaust the administrative remedies available to him. The plaintiff did
19 not respond to the defendant's motion.

20 I. Request to be Heard Before the Traditional Court.

21 The plaintiff, through Advocate Rick McArthur, requested to be heard before the HCN Traditional
22 Court. Pursuant to *HCN R. Civ. P.* 8, the party or parties involved in the dispute must voluntarily
23 consent to appear before the Traditional Court. In general, the parties file a *Consent to Traditional*
24 *Court Jurisdiction* form with the HCN Traditional Court stating they are consenting to Traditional Court
25 review. No such action has been recorded in this case at this time. A statement written in a *Complaint*

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1 filed with the HCN Trial Court does not constitute a consensual request to be heard before the HCN
2 Traditional Court.

3 **II. Immunity from Suit Exists.**

4 Based on the *Complaint* filed, the plaintiff alleged that the named defendants, the Legislature and
5 specifically Wade Blackdeer and Clarence Pettibone, violated the preference policy when the
6 defendants passed a motion in a Legislative meeting approving the MIS Budget that eliminated the
7 plaintiff's position. The plaintiff said that as a result of the actions by the defendants, the defendants are
8 depriving the plaintiff of liberty without the due process of law and violating the plaintiff's right to equal
9 protection. The defendants argue that there was no violation of the law and they are immune from suit
10 because they were acting within the scope of their authority. The defendant suggested that this Court
11 contemplate this issue on the bases that it is a nonjusticiable political question.

12 The defendant cited *Baker v. Carr*, 369 U.S. 186 (1962), which set forth factors to determine a
13 non-justiciable political question exists. The U.S. Supreme Court identified the factors as: a)
14 commitment to another branch; b) lack of standards; c) unsuitable policy determination; d) lack of
15 respect for other branches; e) political decision already made; and f) multiple pronouncements. *Id.* at
16 217. The defendant argued that the factors of commitment to another branch, lack of standards and lack
17 of respect for other branches qualify this issue as a non-justiciable question. It is for this reason, the
18 defendants argue, that this claim should be dismissed.

19 Clearly, the defendants' argument that this issue is a non-justiciable question emphasizes the
20 importance of recognizing and respecting the separation of powers clause defined in the HO-CHUNK
21 NATION CONSTITUTION. Should this Court assert judicial review of this issue, it would usurp the duty
22 and authority delegated to the Legislative by our constitution. Furthermore, this Court lacks judicially
23 discoverable and manageable standards to resolve this issue. Finally, should this Court assert judicial
24 review, it would not be able to undertake an independent resolution without expressing a lack of respect
25 due co-ordinate branch of government, i.e., the Legislative body. The defendants persuasive arguments

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1 for suggesting this Court adopt the factors for determining an issue is nonjusticiable political question
2 are reasonable.

3 However, this Court is simply convinced that the defendants acted clearly within their authority “to
4 authorize expenditures by law and appropriate funds to the various Departments in an annual budget,”
5 pursuant to Art. V, Sec. 2(d) of the HO-CHUNK CONSTITUTION. The plaintiff even acknowledged in his
6 *Complaint* that the actions by the defendants occurred while approving the MIS Administrative budget
7 for fiscal year 98-99. This Court finds no case in controversy;

8 The plaintiff asserted that the defendants’ act of eliminating his position violated the HCN
9 PERSONNEL POLICIES AND PROCEDURES MANUAL, which promotes tribal preference because the plaintiff
10 was laid off while other employees, not in the protected preference group, were able to continue
11 employment. The defendants countered that not only are their actions authorized by the HO-CHUNK
12 CONSTITUTION, their actions are further defined by the adopted APPROPRIATION AND BUDGET PROCESS
13 ACT. Both, the HCN CONSTITUTION and the APPROPRIATION AND BUDGET PROCESS ACT hold greater
14 weight than the PERSONNEL POLICIES AND PROCEDURES MANUAL. In fact, the APPROPRIATION AND
15 BUDGET PROCESS ACT, CH. 1, SEC. 102, states “the Legislature may not fund programs if its determines
16 that such funding would result in duplication of existing programs and services to the Ho-Chunk Nation
17 members.” The Court comparatively reviewed the laws to determine if one tribal law contradicts or
18 supersedes another in the matter. As cited by the defendant, Ch. 1, sec. 103 of the APPROPRIATION AND
19 BUDGET PROCESS ACT states “To the extent that this Act conflicts with the Nation’s Financial
20 Procedures Manual or any other law of the Nation, this Act shall supersede such procedures or law.”
21 Moreover, the PERSONNEL POLICIES AND PROCEDURES MANUAL, Ch. 11, Layoff states “An employee
22 may be subject to a non-disciplinary, involuntary separation through layoff for reasons including, but not
23 limited to, lack of funds or work, abolition of position, reorganization, or the reduction in or elimination
24 of service levels.” This Court further notes that, in drafting and adopting the PERSONNEL POLICIES AND
25 PROCEDURES MANUAL, the Nation recognized that during budgetary review it may be necessary to

1 layoff employees due to budgetary constraints and so appropriately added the aforementioned clause.
2 This Court finds that the PERSONNEL POLICIES AND PROCEDURES MANUAL, Ch. 11, Layoff does not
3 contradict the APPROPRIATION AND BUDGET PROCESS ACT but acknowledges the administrative
4 budgetary process.

5 Most importantly, the defendants offered evidence that the plaintiff was not deprived of due
6 process. The evidence showed how the Nation met with the plaintiff and another tribal member
7 employee, both Purchasing Agents in the MIS at the time, about the eliminated position. (*See*
8 Defendant's Exhibit A.) Defendant's Exhibit B shows that the Nation granted the plaintiff's request for
9 the voluntary layoff. Since the plaintiff voluntarily requested the layoff, there is no evidence indicative
10 of an involuntary layoff or forceable actions by the Nation or the plaintiff.

11 Finally, the defendant argued that the plaintiff failed to exhaust his administrative remedies. This
12 Court finds no need to discuss the exhaustion of administrative remedies rule since this issue is already
13 dismissed. Therefore, this Court finds in favor the defendants and hereby grants the *Motion to Dismiss*
14 *with Prejudice*.

15 All parties have the right to appeal a final judgment or order of the Trial Court. If either party is
16 dissatisfied with the decision rendered by this Court, they may file a *Notice of Appeal* with the Ho-
17 Chunk Supreme Court within thirty (30) calendar days.

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19 **IT IS SO ORDERED** on this 28th day of October 1998 at the Ho-Chunk Nation Trial Court in
20 Black River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

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Hon. Joan Greendeer-Lee
HCN Associate Trial Court Judge

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