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IN THE

HO-CHUNK NATION TRIAL COURT

**PARMENTON DECORAH, ORDER (GRANTING PRELIMINARY
INJUNCTION)**

Plaintiff,

v.

**HCN LEGISLATURE and,
HCN DEPT. OF PERSONNEL**

Case No.: **CV 99-08**

Defendants.

Appearances: Mark Goodman for Parmenton Decorah, William Boulware for HCN Legislature and HCN Dept. of Personnel. A *Complaint* was filed on January 26, 1999, followed by a *Petition for a Temporary Restraining Order and/or Injunction* filed on Feb 4, 1999. An *Answer* was filed on February 12, 1999. A *Brief in Opposition to the Petition for a TRO and/or Injunction* was filed February 15, 1999 and Plaintiff filed a *Reply Brief* on February 23, 1999. A *Hearing* in this case was held on March 8, 1999 at the Ho-Chunk Nation Court House at Black River Falls, WI. This case is now ready for a decision.

INTRODUCTION

This is a employment termination case with Constitutional overtones. The plaintiff was the Executive Administrative Officer [EAO] serving directly under President Jacob LoneTree. He was discharged because he was a felon and the Legislature passed a ban on the employment of felons in unclassified service for the Executive, Legislative and Judicial branches of government of the Ho-Chunk Nation. *See* HCN Leg. Res. 12-29-98C. The President continued to desire the services of the plaintiff but could no longer pay him after two Legislators informed the President that they would not allow their names on any payroll check to the plaintiff. He was then discharged. The

1 plaintiff now brings this case to Court requesting an injunction and reinstatement. The plaintiff
2 claims that HCN Legislative Res. 12-29-98C is either an *ex post facto* law or a bill of attainder and
3 as such is constitutionally prohibited pursuant the HCN Constitution bill of rights. The defendant
4 claims that the resolution is not a criminal law so it can be neither a bill of attainder nor an *ex post*
5 *facto* law. The defendant further argues that the Resolution was not meant to be retroactive and
6 therefore the plaintiff was not harmed by it and has no standing to sue.

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APPLICABLE LAW

9

10 HCN CONSTITUTION

11 ARTICLE III - ORGANIZATION OF THE GOVERNMENT

12 Section 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by
virtue of self-government and democracy.

13 Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be
14 composed of four (4) branches: General Council, Legislature, Executive, and Judiciary.

15 Section 3. Separation of Functions. No branch of the government shall exercise the powers
or functions delegated to another branch.

16 Section 4. Supremacy Clause. This Constitution shall be the supreme law over the territory
17 and within the jurisdiction of the Ho-Chunk Nation.

18 ART V. LEGISLATURE

19 Section 2. Powers of the Legislature. The Legislature shall have the power:

- 20 (a) To make laws, including codes, ordinances, resolutions, and statutes;
- 21 (c) To constitute a Board of Directors for each Department, except the President shall name the
Executive Director, subject to confirmation by the Legislature;
- 22 (f) To set the salaries, terms and conditions of employment for all government personnel;
- 23 (x) To enact any other laws, ordinances, resolutions, and statutes necessary to exercise its
24 legislative powers delegated by the General Council pursuant to Article III including but
not limited to the foregoing list of powers

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1 **ARTICLE X - BILL OF RIGHTS**

2 Section 1. Bill of Rights.

3 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

4 (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

5 (9) pass any bill of attainder or ex post facto law;

6 **ARTICLE XII - SOVEREIGN IMMUNITY**

7 Section 1. Immunity of Nation from Suit. 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.

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

12 **HCN LEGISLATIVE RESOLUTION 12-29-98C**

13 **WHEREAS**, on November 1, 1994, the Secretary of the Interior approved a new Constitution for the Ho-Chunk Nation, formerly known as the Wisconsin Winnebago Business Committee; and

14 **WHEREAS**, The Ho-Chunk Nation (“Nation”) is a federally recognized Indian Tribe, organized pursuant to the Indian Reorganization Act of 1934; and

15 **WHEREAS**, the Legislature (“Legislature”) of the Ho-Chunk nation is the duly constituted governing body of the Ho-Chunk Nation (“HCN”) pursuant to the Constitution of the Ho-Chunk Nation; and

16 **WHEREAS**, HCN Const. Article V, Section 2(a) enables the Nation, through the Legislature, to make laws, including codes, ordinances, resolutions, and statutes; and

17 **WHEREAS**, HCN Const. Article V, Section 2(f) enables the Nation, through the Legislature, to set the salaries, terms and conditions of employment for all governmental personnel; and,

18 **WHEREAS**, the Nation, through the duly elected governing body of the Legislature is hereby promoting consistency and certainty in its employment practices for all individuals providing services to the nation, including unclassified employees; and,

19 **WHEREAS**, the updated HCN Personnel Policies and Procedures approved on July 10, 1998 gives no clear or concise minimum standard or qualifications of individuals who are hired as unclassified employees, or appointed, to perform services for the President, the Legislature, or a Judge; and,

1 **WHEREAS**, any person(s) performing services for and to the President, a Legislator, or a Judge is
2 privy to, and has access to information and resources which are entrusted to the care of those
3 individuals who have gained the utmost respect and confidence of the membership of the Nation by
4 having been elected or appointed to perform the functions and duties of their respective offices, and
5 are entrusted not to misuse such information and resources; and,

6 **WHEREAS**, pursuant to the HCN Const. Article IX, Section 7 any person serving as President,
7 Legislator, or member of the Judiciary, who is convicted of a felony while in office, shall be
8 removed from office and such office shall be deemed vacant; and,

9 **WHEREAS**, a mandatory removal from an elected or appointed office upon a felony conviction is a
10 directive to safeguard the interest of the Nation and the respective governmental office be they
11 Executive, Legislative, or Judicial, from the occupation, encroachment, or influence of, or by, any
12 person who has involved himself or herself in conduct adjudged criminal and felonious; and,

13 **WHEREAS**, there currently exists no requirement for a formal background check for individuals
14 performing services, i.e., contractual, for the President, the Legislature, or members of the Judiciary:
15 and,

16 **WHEREAS**, the Legislature believes any person performing services for an elected office and
17 having access to proprietary information of the Nation and resources entrusted to those offices who
18 may be involved in felonious conduct, or have some history of involvement of such conduct, may be
19 a threat to the interest and well-being of the Nation; and,

20 **NOW THEREFORE BE IT RESOLVED**, that the President, Legislator, or Judge of the Nation
21 shall not appoint or hire an individual as part of his/her staff until the individual has first provided
22 the necessary information and releases to complete a thorough personal background check; and,

23 **BE IT FURTHER RESOLVED** that no person is allowed to perform any services for the offices of
24 the President, Legislature, or Judiciary who has been convicted of a felony unless pardoned; and,

25 **BE IT FURTHER RESOLVED**, this resolution is enacted as an official protection for the Ho-
26 Chunk Nation as a political government, for the People of the Ho-Chunk Nation, and for the
27 Nation's assets and resources so that a minimum standard and qualification is in place to deter
28 convicted felons from performing services for the Nation as unclassified employees; and,

BE IT FURTHER RESOLVED, that this resolution shall have an immediate effect on all presently
employed or appointed and hired person(s) who perform services, including contractual, to the
Nation under the offices of the President, the Legislature, or the Judiciary.

FINDINGS OF FACT

1. Parmenton Decorah is a member of the Ho-Chunk Nation.
2. The Ho-Chunk Nation is a federally recognized Indian Tribe organized under the Indian Reorganization Act. 25 U.S.C. 476. The offices of the President of the Ho-Chunk Nation, his Executive Administrative Officer and the offices of the HCN Legislature are all located on lands

1 held in trust by the United States for the Ho-Chunk Nation in Jackson Co. Wisconsin.

2 3. Mr. Decorah had been previously convicted for accepting a bribe as a government official
3 when he was a member of the Wisconsin Winnebago Business Committee, the predecessor to the
4 present Ho-Chunk Nation Legislature. *See U.S. v. Decorah*, 46 F.2d 27 (7th Cir. 1995). This was a
5 federal conviction. Parmenton Decorah served one year in prison and served three years probation
6 for this conviction. Tr. at 26. He has not been pardoned for this offense.

7 4. Mr. Decorah was hired by President Jacob Lonetree as his Executive Administrative Officer
8 from July 20, 1998 to January 8, 1999. Tr. at 21. The Executive Administrative Officer is a member
9 of the President's staff and coordinates Executive Directors who are members of the President's
10 cabinet. *See Sine v. Lonetree*, CV 97-143 (HCN Tr. Ct. Aug. 3, 1998). He was paid \$21.65 per
11 hour as Executive Administrative Officer. Tr. at 29. Exs. 2 & 3. This amounts to an annual salary
12 of \$45,000.

13 5. Cabinet Officers or Executive Directors must be confirmed by the HCN Legislature. They
14 serve at the will of the President and may be fired by him/her without cause. *See Sine v. Lonetree*,
15 CV 97-143 (HCN Tr. Ct. Aug. 3, 1998).

16 6. The resolution in question passed by a majority vote of 9 for 0 against and 0 abstaining on
17 December 29, 1998. Dallas Whitewing, HCN Legislator for Area III testified that he was out of the
18 room through much of the discussion of HCN LEG. RES. 12-29-98C and did not vote, but was
19 nonetheless counted as a vote in favor of the resolution.

20 7. Mr. Whitewing was not in favor of the resolution and felt it singled out Mr. Decorah for
21 further punishment. He had not heard anything adverse about Parmenton's performance and did not
22 feel he was a threat to the Nation.

23 8. Parmenton Decorah continued to work as Executive Administrative Officer until two
24 Legislators informed the President that they would no longer allow their names to be put on checks
25 paying Mr. Decorah's salary. Ex. 1. President Lonetree then informed Parmenton that he could not
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1 expect him to work for nothing but that he would continue to let him work while this was resolved in
2 Court. Tr. at 33.

3 9. Mr. Lonetree informed Parmenton Decorah that he did not have signature authority and he
4 had no way to make sure he got paid if the Legislators refused to have their names put on payroll
5 checks. Ex. 4.

6 10. Mr. Decorah was paid all of his annual leave so far accumulated and two weeks severance
7 pay. Tr. at 28.

8 11. The Judicial branch currently has one position, the Staff attorney which would fit the
9 definition of contract employee. The Legislative branch likely has three positions and the Executive
10 branch has more than two such positions including the Executive Administrative Officer and
11 Executive Programs Officer.

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DECISION

14 In this case the plaintiff requests an injunction declaring that HCN LEGISLATIVE
15 RESOLUTION. 12-29-98C was either an *ex post facto* law or a bill of attainder prohibited by the HCN
16 CONST. ART X and reinstating the plaintiff to his former position as Executive Administrative
17 Officer for the President. Mr. Decorah also alleges that he has been deprived of equal protection of
18 the laws and was denied due process of the law. In order to prevail, the plaintiff must show that he
19 meets the standard for injunctions first laid out by this Court in *Warner v. Ho-Chunk Election Bd.*,
20 CV 95-03 (HCN Tr. Ct., July 3, 1995), *Thundercloud v. Ho-Chunk Election Bd.*, CV 95-16 (HCN
21 Tr. Ct. Aug. 28, 1995) *cited with approval* in *Coalition for Fair Government II v. Lowe and*
22 *Whiterabbit*, SU 96-02 at 7 (HCN S. Ct. July 1, 1996). That standard requires that the plaintiff make
23 the following showing: 1. That there is no adequate remedy at law; 2. That they have a reasonable
24 likelihood of success on the merits; 3. That threat of harm to the party seeking the injunction
25 outweighs the harm caused by the injunction; and 4. That the public interest weighs in favor of

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1 granting the injunction. The Court should also be mindful that an injunction is a remedy not to be
2 issued lightly.

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4 **I.NO ADEQUATE REMEDY AT LAW**

5 This prong of the test requires that the Court examine whether the plaintiff's harm can be
6 compensated by money damages. In this case it would seem that the plaintiff who has been
7 terminated from employment would be a classic case of where a monetary compensation would
8 make him whole. The problem with this initial conclusion is that the defendant has interposed the
9 defense of immunity to suit in this case. *See Answer* at 3. Though the *Answer* does not specifically
10 invoke sovereign immunity as it should, since the defendant is a part of the government of the Ho-
11 Chunk Nation, the Court must consider the assertion of "immunity" under the circumstances to be an
12 assertion of sovereign immunity, though it could be an assertion of qualified immunity.

13 The defendants in this case are divisions of the Ho-Chunk Nation. The first is the HCN
14 Legislature, which is the governing body representative of the people. The second is a department
15 of the Executive branch. Both are divisions of the government of the Ho-Chunk Nation and as such
16 may invoke the protection of the sovereign immunity of the Tribe. In a recent case, this Court
17 dismissed a case on sovereign immunity grounds because the only party named was the HCN
18 Legislature. *See Miller v. HCN Legislature*, CV 99-18 (HCN Tr. Ct. Mar. 25, 1999); *See also Lowe*
19 *v. Ho Chunk Nation HCN Legislature and HCN General Council*, CV 97-12 (HCN Tr. Ct. Mar. 21,
20 1996) *aff'd Lowe v. Ho-Chunk Nation, Ho-Chunk Nation Legislature and Ho-Chunk Nation General*
21 *Council*, SU 97-01 (HCN S. Ct. June 13, 1997). There the HCN Supreme Court stated that the
22 "Ho-Chunk Legislature is the same as the Ho-Chunk Nation for the purposes of [sovereign
23 immunity]." *Id.* at 3.

24 Therefore, pursuant to the HCN Cont. Art. XII, 2 it would appear that only parties such as
25 the defendants could possibly be sued for acting beyond the scope of their authority . . . only for

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1 declaratory and non-monetary injunctive relief. Unless the plaintiff can show an express waiver of
2 the Nation's sovereign immunity, he may not recover monetary damages. Thus, by the invocation of
3 the defense of "immunity" which the Court interprets as sovereign immunity, the plaintiff would not
4 be entitled to monetary damages and therefore satisfies the first prong of the injunction test that there
5 be no adequate remedy at law.

6

7 **II. REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS**

8 The second prong of the preliminary injunction standard requires that the plaintiff
9 demonstrate a reasonable likelihood of success on the merits of his case. Here the plaintiff raises
10 four attacks on the legality of HCN LEGISLATIVE RESOLUTION 12-29-98C. The first is that the
11 resolution in question constitutes an *ex post facto* law. The second is that the resolution is a bill of
12 attainder. The third and fourth attacks on the resolution are that the resolution violated the plaintiff's
13 rights to due process and equal protection.

14

15 **A. Is HCN Legislative Resolution 12-29-98C an Ex Post Facto Law?**

16 The HCN CONSTITUTION explicitly and emphatically forbids the Nation from passing *ex*
17 *post facto* laws. HCN CONST. ART. X, (1)(A)(9). This is a given. To pass an *ex post facto* law
18 would be an unconstitutional act and therefore beyond the authority of the HCN Legislature to do.
19 The Court would then have the authority to declare any such law a violation of the HCN
20 Constitution and enjoin its enforcement. *See* HCN CONST. ART. VIII, 6(b).

21 The Court must examine whether HCN Legislative Resolution 12-29-98C is an *ex post*
22 *facto* law. This is defined as "a law passed after the occurrence of a fact or commission of an act,
23 which retrospectively changes the legal consequences or relations of such fact or deed." BLACK'S
24 LAW DICTIONARY, p. 521 (5th Ed. 1979). The basic principle behind the prohibition of *ex post facto*
25 laws is that of due process, specifically notice. In other words, one should have the ability to know

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1 that one is breaking the law prior to doing something that might be sanctioned.

2 Once again the Court turns to federal precedence for guidance on this issue. The reason for
3 doing this is that the HCN CONSTITUTION incorporated the Indian Civil Rights Act in its Bill of
4 Rights which, in turn, is based on the Bill of Rights in the U.S. CONSTITUTION. This includes the
5 ban on *ex post facto* laws. The HCN CONSTITUTION was enacted in 1994 and was passed in the
6 context of settled federal law on the construction of the *ex post facto* clause.

7 Under federal precedent an *ex post facto* provision of the U.S. CONSTITUTION ART. I, 9
8 forbids Congress from enacting any law which “imposes a punishment for an act which was not
9 punishable at the time it was committed, or imposes additional punishment to that then prescribed.”
10 *Dehainaut v. Pena*, 32 F.3d 1066, 1073 (7th Cir. 1994) quoting *Inglese v. United State Parole*
11 *Com’n*, 768 F2d 932, 934 (7th Cir. 1985) (citations omitted). It can also be a law that changes the
12 rules of evidence by which less or different testimony is sufficient to convict than was then required.
13 *Cummings v. Missouri*, 71 U.S. 277, 326 (1866).

14 It has been held that the ban on *ex post facto* laws is only applicable to criminal laws. *See*
15 *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952) (deportation not a criminal sanction).
16 However, this decision failed to reconcile the application of *ex post facto* holdings striking down
17 clearly civil penalties for failing to swear an oath that the applicants for a license as a priest or
18 lawyer had never supported the Confederate cause. *Cummings v. Missouri*, 4 Wall 277, *Ex parte*
19 *Garland*, 4 Wall. 333 (1866). The *Harisiades* Court also did not even mention the slightly earlier
20 case *U.S. v. Lovett*, 328 U.S. 303 (1946) which found a Congressional Act barring payment of
21 salaries to certain individuals to be a punishment of the most severe type. The act was stricken as a
22 violation of both the *ex post facto* and bill of attainder clauses.

23 The precedents of the U.S. Supreme Court then are mixed. The cases generally only apply
24 *ex post facto* restrictions in criminal cases. *See Weaver v. Graham*, 450 U.S. 24 (1981) (application
25 of restrictions on good time credit held to increase punishment after sentencing and violates *ex post*
26

1 *facto* restriction). This is the classic case of making something criminal after the fact so that those
2 charged would never have an opportunity to conform their behavior to the newly enacted law. Laws
3 such as those in *Cummings* and *Garland* have be found to violate the *ex post facto* ban by imposing
4 civil penalties so severe such as permanent banishment from ones chosen profession that the penalty
5 is criminal in nature. *Ex post facto* restriction has been held not to apply in deportation cases.
6 *Schellong v. U.S. Immigration and Naturalization Service*, 805 F.2d 655 (7th Cir. 1986); *Flemming*
7 *v. Nestor*, 363 U.S. 603 (1960) (Social Security benefits of persons deported for communist Party
8 membership can be denied under law enacted after deportation).

9 The Court finds that *U.S. v. Lovett*, 328 U.S. 303 (1946) clearly prohibits Congress from
10 singling out persons they find unpopular and refusing to pay them any further salary. In *Lovett*
11 individuals thought to be subversive communist sympathizers were specifically named in the Act.
12 The *Lovett* case is clearly analogous here. The HCN Legislature singled out a small class of people
13 and enacted a law, which on its face is neutral in application.

14 However, the Legislature combined this with a specific ban on paying the plaintiff. *See Ex.*
15 1. Wade Blackdeer and Robert Funmaker stated in clear and unequivocal terms that the Dept of
16 Treasury, which is part of the executive branch, was not to use their names for payroll checks for
17 Mr. Decorah any further.¹ They stated their understanding of 12-29-98C was that “Parmenton
18 Decorah’s criminal record makes him ineligible for employment with the Nation.”² Counsel for the

19 _____
20 ¹It is questionable that the Legislature properly has signature authority under the HCN CONSTITUTION. Signing
21 checks is almost always an executive function. The Legislature is entitled to authorize and appropriate funds under HCN
22 CONST. ART. V, 2(J). This generally means to state in legislation that funds may be spent for certain purposes, i.e., authorized;
and to state in legislation how much money may be spent for particular purposes, i.e., to appropriate funds. The actual
spending of the authorized and appropriated funds is usually an executive act. This issue was not raised in the *Complaint* and
so will not be decided here.

23 ²Part of this statement is clearly erroneous. The ban enacted only applied to limited positions of trust. As plaintiff
24 pointed out both at oral argument and in briefing, felons are eligible for employment in gaming enterprises after being
25 screened by the Compliance Department, Gaming Commission and are individually granted a Felony Waiver by the
Legislature pursuant to the Ho-Chunk Nation State of Wisconsin Gaming Compact. Felons are also eligible for non-gaming
positions unless restricted by other legislation such as that for child care, social and youth workers.

1 defendant argued that 12-29-98C was **NOT** retroactive in application and therefore President
2 Lonetree's agreement to separate Mr. Decorah was not required by the act. Given the acts of the
3 Legislature to the contrary to effectuate Parmenton Decorah's departure, the Court cannot agree with
4 that construction of 12-29-98C.

5 By acting as it did, the Legislature applied 12-29-98C to affect the constructive discharge
6 of the plaintiff. This made an act, prospective in nature, retroactive in application. This ban on
7 employing felons in the sensitive posts *in the future* is an otherwise permissible act of the
8 Legislature to achieve a legitimate end. It safeguards the Nation against a person found to have
9 committed criminal acts and who the Nation might rightly fear may pose a threat to the financial
10 security and political integrity of Tribal institutions. However, applying it to the plaintiff takes away
11 his means of making a living which was not prohibited at the time he began work. This is just like
12 the plaintiffs in *Lovett*. Based on the above reasons the Court finds that the plaintiff has a reasonable
13 likelihood of success on the claim that as applied to Parmenton Decorah HCN Leg. Resolution 12-
14 29-98C is an *ex post facto* law.

15 This does not mean that the Court agrees that employing a person such as the plaintiff in a
16 high position of trust just steps away from the President is a good idea. After all, Parmenton
17 Decorah was convicted of a felony for accepting bribes as a Tribal Council member. He clearly
18 violated his oath of office to the Nation as a former Business Committee member and betrayed the
19 trust of the Winnebago people. Parmenton Decorah has made no public acts of contrition or
20 introduced any information showing he asked the people to forgive him. Nor is there any
21 information that the Court may take judicial notice of which show acknowledgment of his
22 responsibility for accepting bribes.

23 On the other hand Parmenton Decorah has served his time in a federal penitentiary and also
24 finished his probationary period. He has served his time for the crime he was convicted of. Hiring
25 a felon such as Parmenton Decorah may be an imprudent or unwise act by President Lone Tree, but
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1 it was not illegal at the time he hired Mr. Decorah, It is thus up to the political and not the judicial
2 process to correct, in whatever way the Ho-Chunk public sees fit.

3

4 **B. Is HCN Legislative Resolution 12-29-98C a Bill of Attainder?**

5 The Court must next examine whether HCN Legislative Resolution 12-29-98C is a bill of
6 attainder. According to BLACK'S LAW DICTIONARY a bill of attainder is:

7 Such special acts of the legislature as inflict capital punishments upon persons supposed to
8 be guilty of high offenses, such as treason and felony, without any conviction in the
9 ordinary courts of judicial proceedings. If an act inflicts a milder degree of punishment
that death, it is called a "bill of pains and penalties," but both are included in the
prohibition in the Constitution Art. I. Sec. 9.

10 *Id.* Attainder - Bills of Attainder, p. 116 (5th Ed. 1979).

11 The United States Supreme Court has held that, "A bill of attainder is a legislative act
12 which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 4 Wall 277, 323, (1866)
13 *cited with approval* in *U.S. v. Lovett*, 328 U.S. 303 (1946). It stated further "that legislative acts, no
14 matter what their form, that apply either to named individuals or to easily ascertainable members of
15 a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder
16 prohibited by the Constitution." *Id.* at 315.

17 In *U.S. v. Lovett*, the Supreme Court struck down an Act of Congress which specifically
18 named three individuals who were barred from receiving any further pay unless they were
19 reappointed to office with the advice and consent of the Senate. They were thus barred from their
20 present government job because they couldn't get paid and from future government jobs because
21 Congress required that the three individuals pass Congressional muster first, when Congress had just
22 found them guilty of subversive activity. The Act of Congress was prohibited because the effect was
23 to inflict punishment without a judicial trial.

24 Under this analysis the Court must find that three conditions exist: 1). The persons subject
25 to the bill of attainder must be named or to easily ascertainable members of a group; 2). The bill

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1 must inflict punishment: 3). There must be a legislative determination of guilt without a trial.

2
3 **1. Is Parmenton Decorah a Person Easily Ascertainable as a Member of a Targeted Group?**

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5 In this case, the persons are not named but are clearly defined as felons not pardoned who
6 work under contract in the Executive, Legislative or Judicial branches of government. The number
7 of such positions subject to this restriction was not definitively established at the hearing in this
8 matter. However, the class of positions is admittedly small. It is known that the Judicial branch
9 only has one job that would have to be screened, i.e., the staff attorney. The Legislative branch
10 similarly would have a small number of employees subject to such a prohibition, the three
11 Legislative counsel positions, who are likely already screened by the Bar Associations where they
12 practice law. The Executive branch would likely have the largest number of positions subject to
13 such screening but again the number would be rather small. The only known felon then working in
14 such a position is the plaintiff. For the purposes of this analysis the Court accepts that the plaintiff
15 has shown that he is a member of an easily ascertainable group.

16 **2. Does HCN Leg. Resolution 12-29-98C Inflict Punishment on the Plaintiff?**

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18 As to the second prong, whether the bill inflicts punishment is a closer question. In a
19 relatively recent case the Seventh Circuit found that the permanent bar on federal employment by
20 former PATCO air traffic controllers did not constitute “punishment” within the meaning of a bill of
21 attainder because the measure sought to achieve legitimate and non-punitive ends and was not the
22 product of punitive intent. *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994). The Seventh
23 Circuit relied on language from the Supreme Court that there is no punishment within the meaning
24 of a bill of attainder when the restriction is due to a “relevant incident to a regulation of a present
25 situation,” such as the proper qualification of a profession. *Deveau v. Braisted*, 363 U.S. 114, 160
26 (1960). It is a bill of attainder when the legislative aim was to punish an individual for past activity.

1 *Id.*

2 In *Deveau v. Braisted* the Supreme Court held that a New York statute that barred ex-
3 felons from holding office in a union on the waterfront of New York was not a bill of attainder. It
4 reached this conclusion because the strong legislative history of both New York and Congress had
5 extensively documented labor and other criminal abuses on the New York waterfront at the time.
6 Thus, the ban on the employment of ex-felons in labor unions subject to the Waterfront Commission
7 Act was held to advance a legitimate interest in combating local crime infesting that industry. *Id.* At
8 154-155. That restriction, which could be viewed as punitive in that it disqualified ex-felons from
9 holding union office,³ was held to be a relevant incident to a regulation of a present situation.

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³ Notably the Court did not disqualify felons from working on the waterfront, but rather banned them from holding office in a union, which did the hiring and regulated labor availability on the waterfront. The ex felons were not punished by removing their ability to make a living but only their ability to hold offices of trust within the union.

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1 In *Dehainaut v. Pena*, the Seventh Circuit found that the burden was on the plaintiffs to show that
2 there was unmistakable evidence of punitive intent by the Legislature in passing the alleged bill of
3 attainder. It stated that Courts should look only to the terms of the act and “to the intent expressed
4 by members of [the Legislature] who voted its passage and to the existence or non existence of
5 legitimate explanations for its apparent effect.” *Id.* at 1073. In *Dehainaut* there was not even a
6 reasonable inference that the OPM had intended to punish the air traffic controllers.⁴

7 Applying that question here, the Court finds no clear evidence of Legislative intent to
8 punish. The only witness to the passage of the act called at the hearing, HCN Legislator Dallas
9 Whitewing, testified that he was out of the room at the time the HCN LEGISLATIVE RESOLUTION 12-
10 29-98C was discussed. He did not know what the sponsor sought to achieve other than what was
11 expressed on the face of the resolution itself. The tape of the Legislative meeting was not
12 subpoenaed or introduced into evidence and the sponsor of the measure was not called as a witness.
13 Surprisingly, not even the minutes of the Legislative meeting were attached as exhibits. The Court
14 must hold in light of this dearth of evidence that the plaintiff has failed to prove that there was a
15 clear intent to punish him by the passage of HCN LEGISLATIVE RESOLUTION 12-29-98C.

16 On the contrary, the wording of the resolution makes a straightforward case that the HCN
17 Constitution bars felons from holding Executive, Legislative and Judicial office. *See* HCN CONST.
18 ART. VI. 3; ART. V. 7: & ART. VII §8(A), (B), (C). It further extends this ban on employment of
19 felons in positions of trust to a small class of employees in positions of influence and trust to protect
20 the interest and well being of the Nation and to protect the Nation’s assets and resources from loss
21 and threat of loss from potential theft, embezzlement, bribery, kickbacks, unauthorized disclosure of

22 _____
23 ⁴ However, a critical but unmentioned fact in *Dehainaut* was that the air traffic controllers barred from employment
24 were already out of a job by President Reagan's act of firing them. Thus, the extension on the ban on employment did *not*
25 take away something they had, i.e., employment, but prevented their return to a profession they wished to return to.

1 proprietary information or other misuse or malfeasance. The resolution states:

2 **WHEREAS**, the Legislature believes any person performing services for an elected office
3 and having access to proprietary information of the Nation and resources entrusted to those
4 offices who may be involved in felonious conduct, or have some history of involvement of
5 such conduct, *may be a threat to the interest and well-being of the Nation*; and, . . .

6 **BE IT FURTHER RESOLVED**, this resolution is enacted as an *official protection for the
7 Ho-Chunk Nation as a political government, for the People of the Ho-Chunk Nation, and
8 for the Nation's assets and resources* so that a minimum standard and qualification is in
9 place to deter convicted felons from performing services for the Nation as unclassified
10 employees;

11 HCN Legislative Resolution 12-29-98C. (Emphasis added). Although there were hints at the
12 hearing that the purpose of the Resolution was punitive, there was no direct evidence of punitive
13 intent by the Legislature or individual Legislators. The purpose of the HCN Legislative Resolution
14 12-29-98C appears to be legitimate concerns to regulate prospectively, i.e., bar felons from future
15 employment. This is a legislative act which seeks to further legitimate and non-punitive aims of
16 protecting the Nation's assets from potential future loss from persons who as a class have been
17 proven through the judicial process to have committed a serious crime.

18 The Court is bothered not by the prospective nature of the HCN Legislative Resolution 12-
19 28-98C which guides future conduct, but *by its present application to a person who was presently
20 employed at the time of enactment*. For example, in *Dehainaut*, the former PATCO strikers did not
21 have their job taken away, that had already been lost by their firing by President Reagan. However,
22 without a showing of punitive intent the Court reluctantly finds that the resolution furthers legitimate
23 non-punitive ends and therefore does not constitute a bill of attainder.

24 **3. Was There A Legislative Determination of Guilt Without a Trial?**

25 To complete the analysis, were the Court to reach the question of whether HCN
26 LEGISLATIVE RESOLUTION 12-29-98C inflicts Legislative punishment without a trial, the Court
27 would be forced to find that it does. There is no question that the HCN Legislature proscribed a
28 sanction upon knowledge that an unclassified employee was a felon. For the purposes of this
analysis that fulfills the requirement of a Legislative determination of guilt without a trial.

1 **C. Were the Plaintiff's Due Process Rights Violated?**

2 Plaintiff also attacks HCN LEGISLATIVE RESOLUTION 12-29-98C as a violation of his due
3 process rights. This attack is rather vague in that it does not identify the life, liberty or property
4 interest at stake. For the purposes of this analysis the Court must find that the Legislature deprived
5 the plaintiff of some liberty of property interest without notice and an opportunity to be heard.

6 Plaintiff does not explicitly define whether the plaintiff's position was one subject to the
7 dismissal with cause provision of the HCN PERSONNEL POLICIES AND PROCEDURES MANUAL. This
8 Court has previously held that only those positions for which dismissal may be made only for cause
9 implicate a liberty or property interest requiring due process protection. *See Gale White v. HCN*
10 *Dept. of Personnel*, CV 95-17 (HCN Tr. Ct. Oct. 11, 1996). Probationary employees have no
11 settled expectation of continued employment and may be fired without cause. *See Littlegeorge v.*
12 *Littlegeorge, & Majestic Pines Hotel*, CV 98-67 (HCN Tr. Ct. May 19, 1999). The Court has also
13 held in a corollary case that persons outside this protection of "for cause" discharge such as
14 Executive Directors may be fired without a reason at the President's discretion. *See Sine v. Lone*
15 *Tree*, CV 97-143 (HCN Tr. Ct. Aug. 3, 1998).

16 The reason for the differing protection is that Executive Directors have no settled
17 expectation of continued employment. If the President that employs them is defeated for reelection
18 the Executive Director may be let go because the new President is at liberty to nominate Executive
19 Directors who they trust and have confidence in. Thus, there can be no claim to a liberty or property
20 interest in their jobs and consequently no due process right to notice and an opportunity to be heard
21 before such an employee is dismissed.

22 Although there is a dearth of fact and briefing on this issue, were the Court forced to rule
23 on this issue, based on the present evidence the Court would conclude that an Executive
24 Administrative Officer [EAO] to the President of the Ho-Chunk Nation stands in the same position
25 as an Executive Director. He or she holds their office at the sole discretion of the President whose

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1 loyalty and trust they must enjoy for their continued employment. To hold otherwise would set up
2 the absurd scenario that the next President would have to employ upon good behavior the
3 confidantes and closest advisors of the last President whom the incoming President might have just
4 defeated in an election. Therefore, like the Executive Director, an EAO, has no liberty or property
5 interest in his job and so is not entitled to due process protection.

6

7 **D. Was the Plaintiff Denied Equal Protection?**

8 The last attack on HCN Legislative Resolution 12-29-98C is that it violated the plaintiff's
9 right to equal protection. Plaintiff bases his argument on the fact that convicted felons may be
10 employed in the Nation's gaming enterprises under the HO-CHUNK NATION/STATE OF WISCONSIN
11 GAMING COMPACT OF 1992. Plaintiff's argument is that he is denied equal treatment in the ability to
12 hold a job with the Nation because other felons may be employed in position of trust in the Class III
13 Gaming enterprises of the Nation while HCN LEG. RESOLUTION 12-29-98C denies him the same
14 right.

15 What the plaintiff fails to explain is that the convicted felons who are permitted to obtain a
16 gaming license for Class III gaming enterprises must go through an elaborate and exhaustive process
17 insuring they are not a threat to the Nation. Convicted felons must first be backgrounded by the
18 Compliance Division of the HCN Dept. of Justice, screened and examined for sufficient level of
19 rehabilitation at a hearing before the HCN Gaming Commission before they are again screened and
20 subject to examination at a hearing before the HCN Legislature. Throughout the laborious process,
21 which may take up to a year or more, the applicant may be turned down at any point for failure to
22 show that they have affirmatively dealt with the problems that led to their original conviction. This
23 process puts felons seeking a waiver for a gaming license in a different position than that of the
24 plaintiff.

25 The felony waiver process is an exhaustive one in which the convicted felon must

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1 demonstrate affirmatively that he or she is no longer the criminal who cannot be trusted with the
2 Nation's assets and trade secrets. Parmenton Decorah did not have to go through any such process.
3 He has made no public apology for his past malfeasance to the Ho-Chunk public that is known to the
4 Court. Perhaps he has done this and or further acts of contrition but he did not raise this in his
5 *Complaint* nor was it addressed at the Hearing.

6 Furthermore, felony criminals are not a suspect class for equal protection analysis.
7 Therefore, all that is necessary is that the HCN LEGISLATIVE RESOLUTION in question pass a
8 rationale basis test. It must further some legitimate legislative goal. The Court has already found
9 that it does. One of those legitimate goals was "to protect the interest and well being of the Nation
10 and to protect the Nation's assets and resources from loss and threat of loss from potential theft,
11 embezzlement, bribery, kickbacks, unauthorized disclosure of proprietary information or other
12 misuse or malfeasance." *See infra*. Part II. Section B(2).

13 Based on a finding that criminal felons are not a suspect class for equal protection analysis,
14 the Court finds that HCN LEGISLATIVE RESOLUTION 12-29-98C furthers a legitimate ends in its
15 prospective application and does not violate equal protection.

16

17 **III. DOES THE THREAT OF HARM TO THE PLAINTIFF OUTWEIGH THE HARM
18 CAUSED BY THE INJUNCTION?**

18

19 Here the harm to the plaintiff is clear. He has been removed from an important job and has
20 little other means of support. The harm to the Nation is more abstract. It must employ a person that
21 could not be employed if hired today, but who did not commit any crimes while employed for nearly
22 six months. The risk is always there that an ex -felon will re-exhibit the character flaws that caused
23 them to be charged and convicted in the past. However, this can be dealt with by the Legislature in
24 its oversight function pursuant to HCN CONST. ART. V, 2(h)(t) & (x) by enacting laws to regulate or
25 criminalize certain acts by HCN employees and officials such as embezzlement, kickbacks, bribery,

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1 extortion, conversion of public property or funds, disclosure of proprietary information etc.

2 Therefore, the Court finds that the harm to the plaintiff outweighs the harm caused by the
3 injunction to the defendants.

4
5 **IV. DOES THE PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING THE INJUNCTION?**

6 The defendant argues that plaintiff does not meet this prong of the test because in *Deveau*
7 *v. Braisted*, 363 U.S. at 160-161 the Court found that ex-felons would be banned from holding
8 union office because it was a reasonable means for achieving a legitimate legislative end.
9 However, what the defendants failed to point out was the extensive fact finding done by both
10 Congress and the New York Waterfront Commission, a state agency, which detailed the criminal
11 infiltration of unions there which were seriously impacting commerce and leading to lawlessness
12 on the waterfront. It is also important to note that the legislative act in question did not deprive
13 felons of a means of making a living. They could hold jobs and be members of the union;
14 however, they could *not* hold union office and thus monopolize and abuse positions of power in
15 the union. These are critical distinctions which separates this case from the *Deveau* case. Now
16 that the door has been shut to the hiring of felons by the prospective application of HCN
17 LEGISLATIVE RESOLUTION 12-29-98C, there is only Mr. Decorah to be worried about.

18 The defendant also notes an impressive list of statutes which ban felons from serving on
19 grand juries, serving in the military or from holding positions of trust involving criminal conduct.
20 *See Def's Brief in Opposition to Request for Temporary Restraining Order and/or Preliminary*
21 *Injunction* at 11. However after examining these statutes the Court is unable to substantiate the
22 claims that they do what the defendant states, i.e., limit the right of convicted criminals from
23 various activities. Some of these bans have been lifted, such as the ban on enrollment in the
24 military, and others simply don't stand for the proposition cited.

25 The Court simply cannot find a public policy which outweighs the Constitutional ban
26

1 against the passage of *ex post facto* laws. Therefore, the Court finds for the plaintiff on this
2 portion of the preliminary injunction test.

3
4 **CONCLUSION**

5 The Court has closely examined all the claims and defenses raised as to the applicability of
6 HCN LEGISLATIVE RESOLUTION 12-29-98C to Parmenton Decorah, it is found to be an *ex post*
7 *facto* law as applied to him. He has no adequate remedy at law due to the application of
8 sovereign immunity. The Court finds against the plaintiff on three of four attacks he raises against
9 the application of HCN LEG. RESOLUTION 12-29-98C. However, the plaintiff has a reasonable
10 likelihood of success on the merits that HCN LEGISLATIVE RESOLUTION 12-29-98C's application to
11 Parmenton Decorah, acts as a prohibited *ex post facto* law. Further, there is no public policy
12 strongly against granting the injunction. Therefore, the Court hereby grants the requested
13 preliminary injunction.

14 The HCN Dep't of Personnel is hereby ordered to reinstate Mr. Parmenton Decorah to his
15 former post within thirty days.

16 All parties have the right to appeal a final judgement or order of the Trial Court. If either
17 party is dissatisfied with the decision rendered by this Court, they may file a *Notice of Appeal* with
18 the Ho-Chunk Supreme Court within thirty (30) calendar days from the date such final judgement
19 or order is rendered and follow all applicable appellate rules of the HCN Supreme Court.

20
21 **IT IS SO ORDERED** this 1st of July, 1999 from within the sovereign lands of the Ho-
22 Chunk Nation.

23
24
25

Hon. Mark Butterfield
26 HCN Chief Trial Judge