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IN THE

HO-CHUNK NATION TRIAL COURT

**LONNIE SIMPLOT, LINDA SEVERSON,
AND CAROL RAVET,**

JUDGMENT

Plaintiffs,

v.

**HO-CHUNK NATION DEPARTMENT
OF HEALTH,**

Case Nos.: **CV 95-26**
CV 95-27
CV 96-05

Defendant.

The plaintiffs are jointly represented in this consolidated matter by Attorney Gerald Laabs. The defendant, Ho-Chunk Nation Department of Health, was represented by Attorney Michael Murphy, who no longer works for the Nation.

INTRODUCTION

This is an employment law dispute with a long history. This matter came before the Court on allegations that the defendant had wrongfully terminated the plaintiffs, denied them access to an effective grievance process, and unlawfully discriminated against them on the basis of race. At this point, the Court has disposed of all issues save two - the question of sovereign immunity and the question of discrimination.

Plaintiffs Linda Severson and Lonnie Simplot filed their *Complaints* on December 20, 1995. The defendant filed its *Answer* to their *Complaints* on January 16, 1996. Plaintiff Carol J. Ravet filed her *Complaint* on January 29, 1996. The defendant did not file an *Answer* to Ms. Ravet's *Complaint*.

The plaintiffs initiated a *Motion for Consolidation* of the three cases on April 19, 1996, which was subsequently granted on May 30, 1996. The Court consolidated the three cases - *Severson v. Ho-Chunk Nation Department of Health*, CV-95-27, *Simplot v. Ho-Chunk Nation Department of Health*, CV-95-26, and *Ravet v. Ho-Chunk Nation Department of Health*, CV-96-05 - to effect judicial efficiency and conservation of resources.

1 Plaintiffs submitted a *Motion for Summary Judgement* on July 1, 1996. Defendant filed no
2 response to the *Motion for Summary Judgement*. The Court heard oral arguments on the *Motion for*
3 *Summary Judgement* on July 3, 1996. The plaintiff's *Motion for Summary Judgement* regarding liability
4 was granted as there was no issue of material fact. *Simplot et. al., v. HCN Dept. of Health*, CV95-26
5 (HCN Tr. Ct., Aug. 29, 1996). The Court held that there was no dispute that the layoff is a grievable
6 matter, that the plaintiffs were not afforded the opportunity to displace a less senior employee, that the
7 plaintiffs were denied notice of such opportunity, that the plaintiffs were denied access to the
8 Administrative Review Process, and the defendant's action(s) violated the PERSONNEL PROCEDURES,
9 Chapter 13, p. 56 (edition 3-1-95).

10 To effect justice and provide for an informed ruling, the Court then bifurcated the case into a
11 remedy and liability phase. The Court heard arguments on a proper remedy on July 18, 1996, having
12 previously found liability for the violations of the HCN PERSONNEL POLICY AND PROCEDURES
13 [hereinafter PERSONNEL PROCEDURES] on July 3, 1996. The Court further bifurcated the hearing on July
14 18, 1996, by reconsidering and rescheduling all legal arguments to the Court dealing with allegations of
15 discrimination. The Court had previously found that the plaintiff had made a *prima facie* case of racial
16 discrimination. *See Simplot et. al., v. HCN Dept of Health*, CV95-26 at 3 (HCN Tr. Ct., Aug. 29, 1996),
17 referring to oral pronouncement from March 22, 1996 *Hearing*. The Court has taken under advisement
18 the oral arguments of counsel and issues this *Order*. In the August 29, 1996 *Order*, the Court found that
19 the defendant had not followed the layoff provisions within the HCN PERSONNEL POLICIES AND
20 PROCEDURES Manual. The Court granted the plaintiffs reinstatement and \$2,000 in damages, reaching
21 the limits of relief the Court can grant in an employment grievance against the Nation under HCN LEG.
22 RES. 3/26/96-A.¹

23 _____
24 ¹In the August 29, 1996 *Order*, the Court also ordered that the plaintiffs be reinstated to the level of seniority they

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would have been at but for the layoff. In addition, the sick leave time that the plaintiffs would have accrued had they not been laid off was to be restored. Though there have been numerous instances of contempt by the defendant in this case, it has not been specifically alleged in the many briefs filed by the plaintiffs that this sick leave time was not reinstated.

1 The plaintiffs' alleged that their layoff was motivated by a discriminatory purpose in violation of
2 the Indian Health Service Contract language. It is the IHS Contract, not the PERSONNEL POLICIES AND
3 PROCEDURES, that is the basis for the plaintiffs' discrimination claim. The Court now considers whether
4 sovereign immunity bars this suit and, if not, whether plaintiff has presented sufficient evidence to prove
5 racial discrimination.

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FINDINGS OF FACT

8 1. Plaintiffs are non-Indian employees of the Ho-Chunk Nation Department of Health.

9 2. Plaintiffs were employed by the Ho-Chunk Nation Department of Health and Social Services
10 pursuant to a component of the U.S. Dept. of Health and Social Services, which provides funding
11 through an Indian Health Service (IHS) contract with the Ho-Chunk Nation Department of Health.

12 3. The plaintiffs held IHS-funded positions within the HCN Department of Health.

13 4.____Plaintiff Linda Severson is a non-Indian and was employed from December 1987 to November
14 of 1995 as Health Director for the Ho-Chunk Nation. Ms. Severson has a Bachelor of Science in
15 Community Health Education. She was employed by the defendant as the Community Health Director
16 and was compensated at \$35,000 from IHS funding. *See* Reorganization Plan attachment.

17 8. Plaintiff Lonnie Simplot is a non-Indian and was employed from April 1990 to November 1995
18 as the Health Clinic Office Manager. She was compensated at \$40,000 from IHS funding. *See*
19 Reorganization Plan attachment.

20 9. Plaintiff Carol Ravet is a non-Indian with 15 years accounting experience. She was employed
21 with the HCN from October 1990 to November 1995. At the time of her termination, Ms. Ravet held
22 the position of compliance bookkeeper. She was compensated at \$21,800 per year.

23 10. The plaintiffs' salaries were all covered by the 638 contract from IHS to provide Health
24 management services. *See Simplot et. al., v. HCN Dept of Health, CV95-26 (HCN Tr. Ct., Aug. 29,*
25 *1996) at 5, n. 6.*

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1 11. October 31, 1995, the three plaintiffs were laid off from their positions with the HCN
2 Department of Health.

3 12. On October 31, 1995, approximately 15 people were laid off from the Department of Health. Of
4 the 15 people laid off, three (3) were Indian, Jenine Heffner, Bonnie Smith, and Amanda Dinger.

5 13. Of the 15 people laid off, seven (7) were recalled. Four of the seven people recalled were white
6 or non-Indian. Plaintiffs' *Exhibit 4*.

7 14. At the time of the plaintiffs' layoff, the applicable IHS Contract was a Public Law 93-638
8 contract between the Indian Health Service and the Ho-Chunk Nation Tribal Health Services Program.
9 The IHS Contract incorporates 48 C.F.R. § 352.280-4(a), clause 28, providing for non-discrimination
10 against any employee or applicant for employment, and clause 18, providing that the Nation must give
11 notice to the IHS of legal actions started against it.

12 15. The IHS Contract also incorporated FAR 52.233-1 Disputes (Alternate I), which states that the
13 Nation must continue performing services under that contract pending any dispute between the Nation
14 and the IHS.

15 15. On October 31, 1995, Roxanne Price was the Assistant Director of Health and was also
16 performing the duties of the Assistant Director of Social Services. Sandy Martin was the Executive
17 Administrative Officer. Deanna Greendeer was the Executive Director of Personnel. John Steindorf
18 was the Executive Compliance Officer. Chloris Lowe, Jr. was the President of the HCN.

19 16. President Lowe was the supervisor for Ms. Price, Ms. Martin, Ms. Greendeer and Mr. Steindorf.

20 17. The plaintiffs were not terminated for cause related to their employment, as their personnel files
21 indicate the plaintiffs had an "exemplary employment record." *Trial Brief*, p.1 (plaintiffs' *Exhibit B*).

22 18. The directives to implement the layoff came from the Office of the President through John
23 Steindorf. *See Answer to First Set of Interrogatories 7(j); Memorandum from Eileen Decorah to Chloris*
24 *Lowe* dated November 1, 1995.

25 19. Ms. Price, as acting Director, was ordered by John Steindorf, the Executive Compliance Officer,

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1 to implement a reorganization plan in accordance with oral directives of the President. *See Answer to*
2 *Second Set of Interrogatories 1, Answer to First Set of Interrogatories 7(j).*

3 20. The “reorganization plan” or alleged layoff policy was orally ordered by John Steindorf on the
4 instructions of Chloris A. Lowe Jr., President of the Ho-Chunk Nation, and conveyed to the acting
5 Director on October 27, 1995. *See Grievance of Linda Severson (attached to Complaint) at 2, ¶ 2.*

6 21. Plaintiffs received notice of the layoff and subsequent involuntary separation from employment
7 by letter from Roxanne Price on October 31, 1995. The terminations were effective November 13,
8 1995. The letter of termination set forth no plans, explanation of rights, nor explanation of the seniority
9 clause. Plaintiffs’ *Exhibit B*, p. 5.

10 22. The plaintiffs were not informed of their “bumping” rights or taking a demotion in lieu of layoff
11 or replacing a less senior individual.

12 24. The defendant’s workforce in the Department of Health is 60% Indian and 40% non-Indian.

13 25. Jenine Heffner was told by John Steindorf that no Ho-Chunks were to be laid off. Trial
14 Transcript at 33.

15 26. The decision to make the layoffs rested with the then President Chloris A. Lowe, Jr., who did not
16 testify as to the reasons for the layoffs.

17 27. John Steindorf, Roxanne Price and Sandy Martin made recommendations to the President
18 concerning the layoffs. President Lowe, however, made the decisions on the persons and positions to be
19 terminated.

20 28. Plaintiffs appealed the layoff decision, asserting that there was no layoff plan as required by the
21 HCN PERSONNEL PROCEDURES, p. 52 and that the layoffs were not race neutral.

22 29. The defendant employer failed to follow the grievance procedures. Plaintiffs’ *Exhibit B*, p. 7.

23 30. The plaintiffs’ were denied access to the Administrative Review Process.

24 31. The plaintiffs’ attempts to utilize the Administrative Review Process proved futile since the
25 defendant never made any response to the grievance.

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1 32. The defendant failed to deny the allegations in Linda Severson's *Complaint*, paragraphs
2 3,4,6,7,8, and 11 stating only that they were not specific enough. The Court found that they were
3 sufficiently specific for defendant to determine the facts alleged and to deny or admit them. *Severson et*
4 *al.*, (HCN Tr. Ct., Aug. 29, 1996).

5 33. Plaintiffs Linda Severson and Lonnie Simplot have since been re-employed by the Nation within
6 the Department of Health.

7 34. The Court awarded the full relief to the plaintiff Carol J. Ravet on the additional ground that
8 defendant defaulted by failing to file a timely *Answer*. See *Footnote 4, infra*.

9 35. The defendant's agents took the position that the plaintiffs were to find employment with the
10 HCN and apply for those positions rather than the defendant recalling the plaintiff as provided in the
11 PERSONNEL POLICIES AND PROCEDURES.

12 36. The plaintiff Linda Severson has suffered \$14,729 in lost salary from the October 1995 to June
13 1996 and an additional \$8,840 in lost salary since the trial held in October 1996.

14 37. The plaintiff Lonnie Simplot has suffered \$14,651 in lost salary from October 1995 to June 1996,
15 and an additional \$3,566.44 in lost wages since the October 1996 trial.

16 38. The plaintiff Carol Ravet has suffered \$6,224 in lost salary from October 1995 to June 1996, and
17 an additional \$2,220 in lost wages since the October 1996 trial.

18 39. The plaintiff Severson has also lost benefits amounting to \$2,213.23 in annual leave or 130.19
19 hours at \$17 per hour since November 13, 1995, and sick leave of 43.24 hours at \$17 per hour.²

20 40. The plaintiff Simplot has also lost benefits amounting to \$2,189.80 in annual leave or 108.03
21 hours at \$16.82 per hour since November 13, 1995 to August 12, 1996, and sick leave of 35.88 hours for
22 the same period.³ Ms. Simplot had to purchase medical insurance during this period that cost \$77.59/bi-

23 _____
24 ²The Court understands this claim to be hours of leave the plaintiff Severson would have earned during the period of
the layoff.

25 ³The Court understands this claim to be hours of leave the plaintiff Simplot would have earned during the period of
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1 weekly since January 1, 1996.

2 41. The plaintiff Ravet has also lost benefits amounting to \$1,367 in annual leave or 130.19 hours at
3 \$10.50 per hour since November 1995, and sick leave of 43.24 hours at \$10.50 per hour.⁴ Ms. Ravet
4 also incurred dental expenses in the amount of \$145, and health/optical costs in the amount of \$1,880.

5 42. The plaintiff Severson claims damages in the amount of \$26,517.31.

6 43. The plaintiff Simplot claims damages in the amount of \$22,252.18.

7 44. The plaintiff Ravet claims damages in the amount of \$13,130.02.

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APPLICABLE LAW

10 HO-CHUNK NATION CONSTITUTION, ART. III

11 § 1. Sovereignty. The Ho-Chunk Nation possess inherent sovereign powers by virtue of self-government
12 and democracy.

13 HO-CHUNK NATION CONSTITUTION, ART. VII

14 § 5. Jurisdiction of the Judiciary.

15 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both criminal
16 and civil, in law or in equity, arising under the Constitution, laws, customs, and traditions of the
17 Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its officials and
18 employees, shall be a party. Any such case or controversy arising within the jurisdiction of the
19 Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other court. This grant
20 of jurisdiction by the General Council shall not be construed to be a waiver of the Nation's
21 sovereign immunity.

22 §6. Powers of the Trial Court.

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

26 The HO-CHUNK NATION CONSTITUTION, ART. X

27 § 1. Bill of Rights.

28 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not: (8) deny to

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the layoff.

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31 ⁴The Court understands this claim to be hours of leave the plaintiff Ravet would have earned during the period of the
32 layoff.

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1 any person within its jurisdiction the equal protection of its laws or deprive any person of liberty
or property without the due process of law;

2 HO-CHUNK NATION CONSTITUTION, ART. XII

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

5 § 2. Suit Against Officials and Employees. Officials and employees of the Ho-Chunk Nation who act
6 beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory and
non-monetary 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.

7 HCN PERSONNEL POLICIES AND PROCEDURES, HCN Legislature *Resolution No. 2/15/96C*
Chapter 1. Equal Employment Opportunity.

8 (A) Equal Employment Policy. It is the Nation's policy to employ, retain, promote, terminate,
9 and otherwise treat any and all employees and job applicants on the basis of merit,
qualifications, and competence. The Ho-Chunk Nation does retain the right to exercise Native
10 American preference in hiring Native American job applicants. This policy shall otherwise be
applied without regard to any individual's sex, race, religion, national origin, pregnancy, age,
11 marital status, sexual orientation, or physical handicap.

12 It shall be the responsibility of the employer and employees to abide by and carry out the
Nation's equal employment policy and the FEDERAL EQUAL EMPLOYMENT OPPORTUNITY ACT.

13 HCN PERSONNEL POLICIES AND PROCEDURES, HCN Legislature *Resolution No. 3/26/96-A*
Chapter 12, Limited Waiver of Sovereign Immunity

14 The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the
15 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. Any
16 monetary awards granted under this Chapter shall be paid out of the departmental budget from
which the employee grieved. Nothing in this Policies and Procedures shall be construed to grant
17 a party any remedies other than those included in this section.

18 TITLE 48 CODE OF FEDERAL REGULATIONS, 48 C.F.R. § 352.280-4(a), clause 28(a)

19 The Contractor will not discriminate against any employee or applicant for employment because
of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that
20 applicants are employed, and that employees are treated during employment, without regard to
their race, creed, color, or national origin. Such action shall include, but not be limited to the
21 following: Employment, upgrading, demotion, or transfer; recruitment or recruitment
advertising; layoff or termination; rates of pay or other forms of compensation; and selection for
training, including apprenticeship.

22 TITLE 48 CODE OF FEDERAL REGULATIONS, 48 C.F.R. § 352.280-4(a), clause 28 (f).

23 In the event of the contractor's non-compliance with the Equal Opportunity clause of this
contract or with any of the said rules, regulations or orders, this contract may be canceled,
24 terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for
further Government contracts in accordance with procedure authorized by Executive Order No.
25 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked
as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or

1 order of the Secretary of Labor, or as otherwise provided by law.

2 TITLE 48 CODE OF FEDERAL REGULATIONS, 48 C.F.R. § 352.280-4(a), clause 18

3 The Contractor shall give the Contracting Officer immediate notice in writing of (a) any action,
4 including any proceeding before an administrative agency, filed against the Contractor arising
5 out of the performance of the this contract, including, but not limited to, the performance under
6 any subcontract hereunder; and (b) any claim against the Contractor the cost and expense of
7 which is allowable under the clause entitled "Allowable Cost," except as otherwise directed by
8 the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer
9 copies of all pertinent papers received by the Contractor with respect to such action or claim.
10 To the extent not in conflict with any applicable policy of insurance, the Contractor may, with
11 the Contracting Officer's approval, settle any such action or claim. If required by the
12 Contracting Officer, the Contractor shall (a) effect an assignment and subrogation in favor of
13 the Government of all the Contractor's rights and claims (except those against the Government)
14 arising out of any such action or claim against the Contractor; and (b) authorize representatives
15 of the Government to settle or defend any such action or claim and to represent the Contractor
16 in, or take charge of, any action. If the settlement or defense of an action or claim is undertaken
17 by the Government, the Contractor shall furnish all reasonable assistance in effecting a
18 settlement or asserting a defense. Where an action against the Contractor is not covered by a
19 policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed
20 with the defense of the action in good faith. The Government shall not be liable for the expense
21 of defending any action or for any cost resulting from the loss thereof to the extent that the
22 Contractor would have been compensated by insurance which was required by law or regulation
23 or by written direction of the Contracting Officer, but which the Contractor failed to secure
24 through its own fault or negligence.

25 In any event, unless otherwise expressly provided in this contract, the Contractor shall not be
26 reimbursed or indemnified by the Government for any liability loss, cost or expense, which the
27 Contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or
28 to real or personal property of any third parties as may accrue during, or arise from, the
performance of this contract.

17 TITLE 48 CODE OF FEDERAL REGULATIONS, 48 C.F.R. § 52.233-1 (cited as FAR 52.233-1 by plaintiffs)

18 As prescribed in 33.215, insert the following clause: Disputes

19 (a) This contract is subject to the Contract Disputes Act of 1978, as amended 41 U.S.C. § 610-
20 613.

21 (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be
22 resolved under this clause.

23 (c) Claim, as used in this clause, means a written demand or written assertion by one of the
24 contracting parties seeking, as a matter of right, the payment of money in a sum certain, the
25 adjustment or interpretation of contract terms, or other relief arising under or relating to this
26 contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that
27 can be resolved under a contract clause that provides for the relief sought by the claimant.

28 However, a written demand or written assertion by the Contractor seeking the payment of money
exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph
(d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute
when submitted is not a claim under the Act. The submission and certification requirements of
this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable
time.

(d)(1) A claim by the Contractor shall be subject to a written decision by the Contracting Officer.

1 (2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this
clause when submitting any claim --
2 (A) Exceeding \$100,000; or
(B) Regardless of the amount claimed, when using --
3 (1) Arbitration conducted pursuant to 5 U.S.C. § 575-580; or
(2) Any other alternative means of dispute resolution (ADR) technique that the agency elects to
4 handle in accordance with the Administrative Dispute Resolution Act (ADRA).
(ii) The certification requirement does not apply to issues in controversy that have not been
5 submitted as all or part of a claim.
(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that
6 the supporting data are accurate and complete to the best of my knowledge and belief; that the
amount requested accurately reflects the contract adjustment for which the Contractor believes
7 the Government is liable; and that I am duly authorized to certify the claim on behalf of the
Contractor."
8 (3) The certification may be executed by any person duly authorized to bind the Contractor with
respect to the claim.
9 (e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in
writing by the Contractor, render a decision within 60 days of the request. For Contractor-
10 certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim
or notify the Contractor of the date by which the decision will be made.
11 (f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit
as provided in the Act.
12 (g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the
Government is presented to the Contractor, the parties, by mutual consent, may agree to use
13 ADR. If the Contractor refuses an offer for alternatives dispute resolution, the Contractor shall
inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the
14 request. When using arbitration conducted pursuant to 5 U.S.C. § 575-580, or when using any
other ADR technique that the agency elects to handle in accordance with the ADRA, any claim,
15 regardless of amount, shall be accompanied by the certification described in subparagraph
(d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.
16 (h) The Government shall pay interest on the amount found due and unpaid from (1) the date that
the Contracting Officer receives the claim (certified, if required); or (2) the date that payment
17 otherwise would be due, if that date is later, until the date of payment. With regard to claims
having defective certifications, as defined in (FAR) 48 C.F.R. § 33.210, interest shall be paid
18 from the date that the Contracting Officer initially receives the claim. Simple interest on claims
shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is
19 applicable to the period during which the Contracting Officer receives the claim and then the rate
applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of
20 the claim.
(I) The Contractor shall proceed diligently with performance of this contract, pending final
21 resolution of any request for relief, claim, appeal, or action arising under the contract, and
comply with any decision of the Contracting Officer.

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DECISION

I. INTRODUCTION

1 Having previously held that the Nation violated the PPM and granted each defendant
2 reinstatement and \$2,000 in damages, only two issues remain for decision in this case. First, whether
3 sovereign immunity bars the plaintiffs' claim for further relief. Second, should the plaintiffs clear the bar
4 of sovereign immunity, whether the Nation discriminated against the plaintiffs on the basis of race.

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6 **II. SOVEREIGN IMMUNITY**

7 Each of the three sovereigns in the American federal system possess some level of sovereign
8 immunity. What many commentators sometimes gloss over is the fact that both the States and the
9 Federal Government possess sovereign immunity. Suit is permitted against them only because their
10 legislative bodies have occasionally lifted the sovereign immunity bar by passing enabling legislation.
11 However, even when governments pass legislation allowing certain entities or parties to sue them, it is
12 not uncommon to impose strict limits on how they may do so. *See* Wis. Stat. § 775.10 (“The State may
13 be made a party defendant in any action for a declaration of interests . . . but no judgment for the
14 recovery of money or personal property or cost shall be rendered in any such action against the State.”);
15 Wis. Stat. §§ 893.70, 893.82 (entity suing government must give notice of claim within 120 days of
16 incident). The United States has passed the FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 1346, a FEDERAL
17 CONTRACT DISPUTES ACT, 28 U.S.C. § 1491, as well as other statutes that permit citizens and those
18 aggrieved to sue the United States and the States in federal court. *E.g.* 42 U.S.C. § 1983.

19 Indian tribes also possess the common law immunity from suit traditionally enjoyed by sovereign
20 powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Kiowa Tribe of Oklahoma v.*
21 *Manufacturing Tech, Inc.*, ___ U.S. ___ (1998), 25 INDIAN L. REP. 1026, 1028 (May 1998); *Puyallup Tribe*
22 *v. Washington Department of Game*, 433 U.S. 165, 172-73 (1977); *C&B Invs. v. Wisconsin Winnebago*
23 *Health Dep't.*, 198 Wis.2d 105, 542 N.W.2d 168 (Wis. Ct. App. 1995).⁵ Indian tribes enjoy immunity

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⁵The Wisconsin Winnebago Nation is the predecessor name of the present Ho-Chunk Nation.

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1 because they are sovereigns predating the Constitution, and because immunity is thought necessary to
2 promote the federal policies of tribal self-determination, economic development, and cultural autonomy.
3 *See American Indian Agr. Credit v. Stand Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

4 Most Tribes must, of necessity, enter the world of commerce by engaging in for profit business,
5 yet the Supreme Court seems to indicate that by doing so, in its opinion, they are not entitled to the same
6 protections that other governments enjoy absent their own self-imposed waivers of liability. *See Kiowa*
7 *Tribe of Oklahoma*, ___ U.S. ___ (1998), 25 INDIAN L. REP. at 1027-1028. The truth is that a sizable
8 judgment against a tribe could devastate it financially, leaving little money to deliver much needed
9 services which are increasingly subject to cuts by State and Federal agencies. This dilemma, so poorly
10 understood by the United States Supreme Court, underscores the need for a careful analysis of the basis
11 for sovereign immunity. In making this careful analysis, it is important to keep in mind that a tribe's
12 sovereign immunity may only be waived through either congressional authorization or tribal consent.
13 *See Kiowa Tribe of Oklahoma*, ___ U.S. ___ (1998), 25 INDIAN L. REP. at 1028.

14 A waiver of sovereign immunity cannot be implied but must be unequivocally expressed,
15 although at least two courts have questioned, without so holding, whether waivers by tribes themselves
16 should be held to such a high standard. *See American Indian Agr. Credit*, 780 F.2d at 1376-79 (Court
17 stated that while the policy behind lowering the standard to which tribal waivers are held is appealing,
18 *stare decisis* and the long history of precedent supporting the requirement of clear and explicit tribal
19 waivers prevented such a holding); *see also Kiowa*, 25 INDIAN L. REP. at 1027-1028. However, courts
20 generally still impose more stringent standards on determining whether a waiver has been made and, if
21 so, how to construe it. *Miller v. Coyhis*, 877 F. Supp. 1262 (E.D. Wis. 1995) (a tribe's consent to suit
22 "must be strictly construed and applied," *citing Namakogan Development Company v. Bois Forte*
23 *Reservation Housing Authority*, 517 F.2d 508, 509 (8th Cir. 1975); *see also Pan American Co. v. Sycuan*
24 *Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (court employed "strong presumption" in
25 favor of tribal sovereign immunity). *See also C & B Investments v. Ho-Chunk Department of Health*,

1 *f/k/a Wisconsin Winnebago Health Board and Ho-Chunk Nation, f/k/a Wisconsin Winnebago Business*
2 *Committee*, CV 96-06 at 7-9 (HCN Tr. Ct., Nov. 21, 1996), *aff'd* (HCN S. Ct., Jan. 20, 1997).

3 No “magic words,” *e.g.* “waive” or “sovereign immunity,” are necessary for a tribe to explicitly
4 waive its immunity. *See Sokaogan Gaming Enterprise Corporation v. Tushie-Montgomery Associates,*
5 *Inc.*, 86 F.3d 656 (7th Cir. 1996). A waiver of sovereign immunity can be broad or limited to a
6 particular subject, court, or lawsuit. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.
7 1980), *aff'd*, 455 U.S. 130 (1982); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th
8 Cir. 1992). No distinction has been drawn between on and off reservation activities, or commercial and
9 governmental activities, in considering tribal sovereign immunity. *See Kiowa*, __ U.S. __ (1998), 25
10 INDIAN L. REP. at 1027.

11 General contract language cannot waive a tribe’s sovereign immunity. *C&B Invs.*, 198 Wis.2d at
12 112. *See also C & B Investments v. Ho-Chunk Department of Health, f/k/a Wisconsin Winnebago Health*
13 *Board and Ho-Chunk Nation, f/k/a Wisconsin Winnebago Business Committee*, CV 96-06 at 7-9 (HCN
14 Tr. Ct., Nov. 21, 1996), *aff'd* (HCN S. Ct., Jan. 20, 1997). Clauses explicitly agreeing to arbitrate
15 disputes **and** to enforce the arbitration in a court, **contained in the main contracting document** (as
16 opposed to incorporated by reference), have been held to be clear and explicit waivers of sovereign
17 immunity.⁶ *Sokaogan*, 86 F.3d at 656.

18 The plaintiffs assert that the Nation waived its sovereign immunity in three ways: first, by
19 discriminating against the plaintiffs, an unlawful act which falls outside the shield of sovereign
20 immunity; second, by agreeing to specific clauses in a contract that allegedly clearly and explicitly
21 waive the Nation’s immunity; and third, by the limited waiver of sovereign immunity passed by the
22 HCN Legislature in HCN LEG. RES. 3/26/96-A. The Court notes that there has been no assertion that
23 Congress has acted to waive the sovereign immunity of the Nation, and will therefore only discuss

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25 ⁶This Court has not adopted this standard and disclaims any reliance on *Sokaogan*’s rationale.

1 whether the Nation itself has clearly and unequivocally waived its sovereign immunity.

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3 **A. Did the Nation Waive its Sovereign Immunity Through the Alleged Discrimination?**

4 As a general rule of law in most jurisdictions, sovereign immunity bars suits against a
5 government and its agents, when acting within the scope of their authority. *Ex Parte Young*, 209 U.S.
6 123 (1908). Agents, be they officials or employees, act outside the scope of their authority when they
7 break the law and are therefore not protected by sovereign immunity. *Seminole Tribe of Florida v.*
8 *Florida et al.*, 517 U.S. 44 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). The
9 United States Supreme Court has held that sovereign immunity will not bar a suit against an official
10 when the plaintiff names the official as the defendant, proves the official acted outside his or her scope
11 of authority, and the suit seeks only declaratory and/or injunctive relief. *Ex Parte Young*, 209 U.S. 123
12 (1908); *Seminole Tribe of Florida v. Florida et al.*, 517 U.S. 44 (1996); *Idaho v. Coeur d'Alene Tribe of*
13 *Idaho*, 521 U.S. 261 (1997).

14 The Ho-Chunk Nation Constitution provides for a similar framework in HCN CONST. ART. XII,
15 § 2. In interpreting this framework, the Nation's Courts have turned to *Ex Parte Young* and cases
16 interpreting it. The Nation's case law has held that a plaintiff may avoid the bar of sovereign immunity
17 if they name a particular official as the defendant; prove that the named official acted outside their
18 scope of authority, *i.e.*, beyond the realm of their discretion; and seek only declaratory and injunctive
19 relief.

20 The plaintiffs argue that the Nation's officials waived the Nation's immunity when they acted
21 outside the scope of their authority in discriminating on the basis of race. This argument attempts to
22 avoid the bar of sovereign immunity contained in HCN CONST. ART. XII § 1. However, plaintiff's
23 *Complaint* fails to adequately pursue this avenue. First, in order to avoid the bar of sovereign immunity
24 imposed by HCN CONST. ART. XII, § 2, the plaintiff must normally name the officials against whom the
25 plaintiff is seeking equitable relief. Second, officials enjoy the protection of the sovereign's immunity
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1 so long as they act *within* the scope of their authority. When those officials, individually, act outside the
2 scope of their authority, they *go beyond the protection the Nation's immunity affords their acts* and are
3 subject to prospective equitable relief such as a declaratory injunction. *See* HCN CONST. ART. XII, § 2.
4 It is self-evident that the Nation and its officials cannot act in an illegal manner and to do so is to act
5 *ultra vires*. An act which is illegal due to a violation of the HCN CONSTITUTION or in violation of the
6 Nation's laws is null and void.

7 Plaintiff relies on this Court's decision in *Frogg v. Ho-Chunk Casino, Ho-Chunk Nation CV 95-*
8 *19 (HCN Tr. Ct., Mar. 15, 1996), rev'd on other grounds SU 96-04, (HCN S. Ct., Oct. 8, 1996)* for its
9 assertion that illegal acts of the Nation's employees waived the Nation's sovereign immunity. *Plaintiff's*
10 *Brief*, filed July 18, 1996, p. 3.⁷ In *Frogg*, the plaintiff named the Nation and Ho-Chunk Casino as
11 defendants, failing to specifically name his supervisor as a defendant. The plaintiff claimed that his
12 supervisor violated the PPM when he failed to give him a timely performance evaluation. The Court
13 wrote, "The omission of the grievant's supervisor at the Ho-Chunk Casino to provide the grievant with a
14 timely performance evaluation is contrary to the law of the Nation. *This breach of law puts the*
15 *grievant's supervisor, as an agent of the tribe, and the Ho-Chunk Nation, outside the scope of*
16 *immunity,*" basing its conclusion on HCN CONST. ART. XII, § 2. The Trial Court ordered only
17 prospective injunctive relief in the form of requiring the plaintiff's to issue a performance evaluation
18 which was confined to the issue of Frogg's performance in his first 90 days of employment.⁸ The HCN
19 Supreme Court later considered *Frogg* on appeal but specifically declined to consider the sovereign

20 ⁷The Court notes that subsequent case law requires a plaintiff who alleges that the employee of the Nation has acted
21 outside the scope of their duty to specifically name that individual as a defendant. *See Chloris A. Lowe, Jr. v. Ho-Chunk*
22 *Nation, Ho-Chunk Nation Legislature, and Ho-Chunk Nation General Council, SU 97-01 at 3 (HCN S. Ct., June 13, 1997);*
23 *and Stewart Miller v. Ho-Chunk Nation Legislature, CV 99-18 at 2-3 (HCN Tr. Ct., Mar. 25, 1999)*. As these cases were
filed and decided after the filing of the *Complaints* in the instant case, the Court finds that justice requires that the present
plaintiffs not be held to this then-future standard requiring the naming of the employee.

24 ⁸A correct interpretation of *Frogg*, would limit the Court to granting prospective injunctive relief in the instant case.
25 The Trial Court was reversed in *Frogg* for failing to account for the proper calculation in granting damages for a 4% increase
for adequate performance in the first 90 days.

1 immunity issue. *See Ho-Chunk Nation Casino and Ho-Chunk Nation v. Lewis Frogg*, SU 96-04 at 2
2 (HCN S. Ct., Oct. 8, 1996).

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4 **B. Did the Nation Waive its Sovereign Immunity by Entering into the IHS Contract?**

5 Plaintiff argues that the Nation clearly and explicitly waived its immunity from suit by certain
6 clauses in the Indian Health Service [hereinafter IHS] Contract. On page 54 of the Contract, Section I
7 Paragraph 3 “incorporates the following acquisition clauses by reference with the same force and effect
8 as if they were given in the full text.” The Contract lists Public Health Service Acquisition Regulation
9 [hereinafter “PHSAR”] Clauses 352-280-4 (a) (18) and (28), and FAR 52.233-1 Disputes (Alternate I)
10 as incorporated clauses. PHSAR Clause 352-280-4(a)(28) reads:

11 Subject to the Indian preference in training and employment of Clause 29 during the performance of
12 this contract, the Contractor agrees as follows:

13 (a) The Contractor will not discriminate against any employee or applicant for employment
14 because of race, creed, color, or national origin. The Contractor will take affirmative action to
15 ensure that applicants are employed, and that employees are treated during employment,
16 without regard to their race, creed, color, or national origin. Such action shall include, but not
17 be limited to, the following: . . . layoff or termination; . . .

18 (f) In the event of the Contractor’s non-compliance with the Equal Opportunity clause of this
19 contract . . . this contract may be canceled, terminated , or suspended, in whole or in part, . . .
20 sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of
21 September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, *or as otherwise*
22 *provided by law.* (emphasis added)⁹

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⁹In addition to the remedies permitted in the Tribal Court the plaintiffs also retain any remedies they may have in the
remedy dispute system outlined in the IHS contract, as their wages were paid through IHS contracts. Specifically, 48 C.F.R.
§ 352.280 provides that “the Contractor shall give the Contracting Officer immediate notice in writing of any action filed
against the Contractor arising out of the performance of this contract,” and 48 C.F.R. § 52.233-1 provides that “this contract is
subject to the *Contract Disputes Act of 1978*, as amended 41 U.S.C. § 610-613.” It is unknown to the Court if the IHS was
never notified of this suit involving persons paid through IHS contracts being discriminatorily laid off, contrary to 48 C.F.R. §
352.280-4(a) clause 28(a).

1 Plaintiff specifically points to the phrase, “or as otherwise provided by law” and based on this
2 phrase states, “Surely this means the Court system and it is not limited to any particular Court.”
3 *Plaintiff’s Brief*, filed Nov. 14, 1996, p. 10. The plaintiffs’ argument simply reads too much into such a
4 short, broad, general statement. A searching review of case law reveals no Court which has read similar
5 broad, general contract language as a clear and explicit waiver. In every case where a clear and explicit
6 waiver had been made, the waiver, at a minimum, either plainly created a right to sue or specifically
7 consented to the jurisdiction of an arbitrator and the enforcement of the arbitration in a Court. The
8 language at issue falls short of such waivers. *See, e.g., C & B Investments*, 198 Wis.2d 105, and *C & B*
9 *Investments v. Ho-Chunk Department of Health, f/k/a Wisconsin Winnebago Health Board and Ho-*
10 *Chunk Nation, f/k/a Wisconsin Winnebago Business Committee* (HCN Tr. Ct. Nov. 21, 1996), *aff’d*
11 (HCN S. Ct. Jan. 20, 1997).

12 Plaintiff also points to FAR 52.233-1 Disputes (Alternate I) as another source of waiver and
13 states, “This provides that the contractor may commence a suit or appeal. The defendant cannot have
14 immunity on certain issues and not others.” *Plaintiff’s Brief*, filed Nov. 4, 1996. P. 11. FAR 52.233-1
15 Disputes (Alternate I) reads in part: “The Contractor shall proceed diligently with performance of this
16 contract, pending final resolution of any request for relief, claim, appeal, or action arising under the
17 contract, and comply with any decision of the Contracting officer.” This clause places certain
18 responsibilities on the Nation should it seek to negotiate the resolution of a conflict with the IHS, it does
19 not waive sovereign immunity before a neutral third party like a Court or an arbitrator. This language
20 falls far short of the “clear and explicit’ standard.

21 Finally, plaintiff argues that the Nation waived its immunity by PHSAR Clause 352-280-
22 4(a)(18). It reads, “The [Nation] shall give the [IHS] immediate notice in writing of (a) any action . . .
23 filed against the [Nation] arising out of the performance of this contract.” This clause deals with notice
24 to the IHS, not the right of a third party to sue or where a dispute can be resolved. This clause gives IHS
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1 the right to know if and when someone sues the Nation on matters relating to the contract. Once again,
2 the inference the plaintiff asks the Court to make is too far removed from the plain language of the
3 contract language to meet the “clear and explicit” standard.

4 The Court determines that PHSAR Clause 352-280-4(a)(28) falls short of the requirement of a
5 clear and unequivocal waiver that at a minimum creates a right to sue or specifically consents to the
6 jurisdiction of an arbitrator and the enforcement of the arbitration in a court. The Court also determines
7 that FAR 52.233-1 Disputes (Alternate 1) and PHSAR Clause 352-280-4(a)(18) fail to meet the “clear
8 and explicit” standard required for a waiver of sovereign immunity. Therefore, the IHS Contract does
9 not waive the sovereign immunity of the Nation.

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12 **C. Did the Nation Waive its Sovereign Immunity Through HCN LEG. RES. 3/26/96-A?**

13 HCN LEG. RES. 3/26/96-A allows suits brought by an employee, but limits the relief that the
14 Court can grant to \$2,000 in damages and other equitable relief. As this is an employee grievance case,
15 the limited waiver of sovereign immunity, as stated in HCN LEG. RES. 3/26/96-A, does apply. The
16 Legislative Resolution at issue here does act as an explicit and unequivocal waiver of sovereign
17 immunity to this limited extent.

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19 **III. REMEDY**

20 The Nation’s limited waiver of sovereign immunity states that, “the Court may award a
21 maximum of \$2,000 to any one employee,” in addition to reinstatement. A literal reading of this
22 provision leads to the result that the Court may only award a deserving plaintiff up to \$2,000 **total**, plus
23 reinstatement and prospective equitable relief.¹⁰ Given the nature of this provision, in that it is a limited

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25 ¹⁰Certainly there is no doubt these are deserving plaintiffs. See Findings of Fact 42, 43, 44, *infra*. However, the
26 HCN Legislature has limited the amount of relief they can receive and this Court is bound by that determination. The

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1 waiver of sovereign immunity, and must therefore be strictly construed and applied (*see Namokogan*
2 *Development Company v. Bois Forte Reservation Housing Authority*, 517 F.2d 508, 509 (8th Cir.
3 1975)), the Court declines to interpret this provision contrary to this literal reading.

4 The Court also declines to reach the merits of the discrimination claim. This Court has
5 previously given all of the relief the plaintiffs are entitled to under HCN LEG. RES. 3/26/96-A. Each
6 plaintiff has been given \$2,000. Plaintiffs Simplot and Severson were given reinstatement. Plaintiff
7 Ravet was given the option of reinstatement. In other words, there is no further relief this Court can
8 award plaintiffs in addition to what they have already been given pursuant to HCN LEG. RES. 3/26/96-A.
9 Therefore, the Court prudentially declines to reach the merits of the issue, the discrimination claim,
10 when no further remedy is available.

11 CONCLUSION

12 The Court holds that the Nation's sovereign immunity was waived, but only to the extent
13 provided for in HCN LEG. RES. 3/26/96-A. The Court having previously awarded the maximum amount
14 of monetary and equitable relief available, it cannot award any further relief.

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. The *Notice of Appeal* must show service was made upon the opposing party prior
18 to its acceptance for filing by the Clerk of Court and must explain the reason the party appealing
19 believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk Supreme Court
20 must be in conformity with the Ho-Chunk Nation *Rules of Appellate Procedure*.

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22 **IT IS SO ORDERED** this 13th day of August, 1999 at the Ho-Chunk Nation Trial Court in
23 Black River Falls, Wisconsin, from within the sovereign lands of the Ho-Chunk Nation.

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plaintiffs should consider requesting relief for additional damages to the Legislature.

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Hon. Mark Butterfield
3 Chief Trial Court Judge

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