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

DANIEL YOUNGTHUNDER, SR.,

JUDGMENT

Plaintiff,

v.

**JONETTE PETTIBONE, ANN WINNESHEIK,
ONA GARVIN, RAINBOW CASINO MANAGEMENT,**

Case No.: **CV 98-48**

Defendants.

INTRODUCTION

This action involves an employment dispute and is before the Ho-Chunk Nation Trial Court as a result of the plaintiff's exhaustion of the administrative grievance process detailed in the *Ho-Chunk Nation Policies and Procedures Manual* (hereinafter *Policies and Procedures Manual*). On May 11, 1998, the plaintiff was employed as a Pit Boss by the Rainbow Casino in Nekoosa, Wisconsin. On this date, the plaintiff received a one-day suspension based on excessive absenteeism. The plaintiff argues that the suspension was improper due to the authorization of his absenteeism and late arrivals by various legislation and policies. The plaintiff also argues that his suspension should be overturned due to his supervisor's malfeasance and failure to follow the *Policies and Procedures Manual*.

The defendants counter the plaintiff's arguments by contending that the decision to suspend the plaintiff was within the discretion of the plaintiff's supervisors and is thus beyond the review of this Court. The Court hereby denies the plaintiff's claim and upholds the one-day suspension.

1 **APPLICABLE LAW**

2 **HCN CONST., ART VII, §§ 2, 4, 6,**

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

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

5 Section 5. Jurisdiction of the Judiciary.

- 6 (b) The Trial Court shall have original jurisdiction over all cases and controversies, both
7 criminal and civil, in law or in equity, arising under the Constitution, laws, customs
8 and traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk
9 Nation, or its officials and employees shall be a party. Any such case or controversy
10 arising within the jurisdiction of the Ho-Chunk Nation shall be filed in Trial Court
11 before it is filed in any other court. This grant of jurisdiction by the General Council
12 shall not be construed to be a waiver of the Nation’s sovereign immunity.

13 Section 6. Powers of the Tribal Court.

- 14 (a) The Trial Court shall have the power to make findings of fact and conclusions of
15 law. The Trial Court shall have the power to issue all remedies in law and in equity
16 including injunctive and declaratory relief and all writs including attachment and
17 mandamus.
18 (b) The Trial Court shall have the power to declare the laws of the Ho-Chunk Nation
19 void if such laws are not in agreement with this Constitution.

20 **HCN CONST., ART X § 1(a)(8)**

21 Section 1. Bill of Rights

- 22 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not: . . .
23 (8) deny to any person within its jurisdiction the equal protection of its laws
24 or
25 deprive any person of liberty or property without the due process of law;

26 **HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL**

27 CHAPTER 5

28 Attendance

Employees are expected and required to report to their designated work locations at the prescribed time and manner work activity is to commence. Tardiness, unexcused absence, or failure to report as required may result in disciplinary action. In the event an employee cannot report to work as scheduled, the employee must notify supervisory personnel at least one hour prior for Enterprises and within 15 minutes after the scheduled work shift for programs and

1 administration. In all cases of an employee's absence or tardiness, the employee shall provide
2 supervisory personnel with a valid reason for the absence and, if applicable, the probable
3 duration of absence. If circumstances render the absence duration speculative or unknown, the
absent employee will be required to call supervisory personnel daily to report the status of the
absence.

4 Excessive absenteeism, regardless of reason(s), which renders an employee insufficiently
5 available for work will be evaluated on a case-by-case basis to determine the merits of corrective
action or termination.

6 CHAPTER 8

7 **RESOLUTION 02/17/98A**

8 *Weekends off: Enrolled Members of the HoChunk Nation [sic] will be given the option*
9 *and priority to scheduled weekends off for culture and traditions events, as long as the following criteria*
are met. Supervisory personnel will be directed to comply with this policy.

- 10 1. *The weekend off for this cultural event must be requested at least ten (10) days*
11 *in advance via a Leave Application. Annual or leave without pay must be used*
12 *for the requested weekend off.*

13 **RESOLUTION 6-16-98d**—Approved and Effective June 16, 1998

14 **POLICY STATEMENT**

15 Religious Leave

16 *Due to traditional obligations held by the HoChunk, [sic] People, enrolled tribal*
17 *member employees may occasionally require religious leave from their place of employment.*
18 *Often the demands of family, clan, or tribe require that the HoChunk [sic] people attend to and*
19 *assist in a variety of ceremonies and occasions over a specified number of days. The following*
20 *guidelines reflect the appropriate customary standards for religious leave.*

21 *All enrolled HoChunk [sic] employees are eligible for Religious Leave, although it will be*
22 *Unpaid Leave. An eligible employees must promptly notify their supervisor in writing whenever*
23 *the use of Religious Leave becomes necessary to attend defined events. Eligible employees are*
24 *expected to:*

- 25 1. *Notify their supervisor in writing 48 hours prior to taking Religious Leave;*
26 2. *Advise their supervisor of the specific reasons for taking Religious Leave;*
27 3. *Advise [sic] their supervisor of the duration of the absence;*
28 4. *Advise their supervisor if accumulated annual leave or unpaid leave will be used in*
conjunction with Religious Leave;
5. *Supply their supervisor with a Religious Leave approval note, signed by their Clan*
Leader, or other appropriate leader.

26 Defined Events:

- 27 1. **Medicine Dances:** *The HoChunk [sic] people are divided into five (5) respective*

1 groups in the Medicine Lodge. The Medicine Dance consists of eight (8) days at one
2 time respectively from Sunday to the following Monday. Part of the Medicine Lodge
3 includes a Medicine Feast, which takes an additional two (2) days for a Memorial
4 Meeting is three (3) days which would be approved of by the leader of that respected
5 group. All enrolled employees of the Nation required to work at a Medicine Dance
6 may receive Religious Leave for those days that are regularly scheduled work days.

7
8 2. **Feast Lodge:** The customary time is three (3) to five (5) days in accordance with the
9 HoChunk [sic] clan way of life. In an emergency case where a person is leaving for
10 or returning from service in the armed forces there should be three (3) days of
11 emergency leave for such occasions. In the Native American Church, the intent of
12 this policy is to also respect all similar meetings which conducted any day of the
13 week consisting of two (2) days.

14 3. **Scalp Dances:** The Scalp Dance will require five (5) days of leave for the four (4)
15 days and four (4) nights of a Scalp Dance. If it is split into 2 days and 2 nights, it
16 will require 3 days of leave for each session.

17 4. **Doctoring:** Most Indian Medicine Men require four (4) days and nights of
18 continuous doctoring, so the appropriate allocated time would be five (5) days of
19 Religious Leave. All enrolled employees of the Nation required to work at a
20 doctoring event may receive Religious Leave for those days that are regularly
21 scheduled work days.

22 All HoChunk [sic] religious people must support their own beliefs. Individuals must pay
23 for all of their own expenses and use their own home or religious grounds. Abuse of this
24 policy may result in denials.

25 **RESOLUTION 4/28/98 A**

26 *Ho-Chunk Nation's Family Medical Leave: The Executive Branch of the Ho-Chunk Nation shall
27 administer the Nation's unpaid leave policy which will afford employees up to 12 weeks of
28 unpaid, job-protected leave to "eligible" employees for certain family and medical reasons
Employees are eligible if they have*

worked for the nation for at least 12 months, which can include a sum of separate periods of
employment; AND have worked at least 1,250 hours for the Nation during the 12 months prior to the
start of the FML.

All accumulated sick time will be used before employees may use unpaid leave during the Family
Medical Leave. FML will run concurrent with Short Term Disability, Workman Compensation, and 90-
day leave of absence, provided the reason for the absence is due to a qualifying serious illness or injury.
An employee's seniority will not be discounted for the period an employee is on FML. An employee on
FML will have their initial, performance, or annual evaluation postponed by the number of days the
employee is on FML. An employee who fails to report promptly for work at the expiration of the
requested FML, will reconsidered to have voluntary resigned.

1 Leave Entitlements

2 Unpaid leave for the Ho-Chunk Nation’s Family Medical Leave purposes will be granted
3 For any of the following reasons:

- 4 • for the birth of a son or daughter, and to care for the newborn child;
5 • for the placement with the employee of a child for adoption or foster care, and to care for the
6 newly placed child;
7 • to care for an immediate family member (spouse, child, or parent – but not a parent “in-law”)
8 with a serious health conditions; and
9 • when the employee is unable to work because of a serious health condition.

7 Leave to care for a newborn child or for a newly placed child must conclude within 12 months after the
8 birth or placement. Spouses employed by the Nation may be limited to a combined total of 12 work
9 weeks of the Ho-Chunk Nation’s family Medical Leave for the following reasons:

- 10 • *birth and care of a child;*
11 • *for the placement of a child for adoption or foster care, and to care for the newly placed*
12 *child; and*
13 • *to care for an employee’s parent who has a serious health condition.*

13 Serious Health Condition

14 *Serious health condition” [sic] means an illness, injury, impairment, or physical or mental*
15 *condition that involves:*

- 16 • *any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay)*
17 *in a hospital, hospice, or residential medical care facility; or*
18 • *a period of incapacity requiring absence of more than three calendar days from work,*
19 *school, or other regular daily activities that also involves continuing treatment by (or under*
20 *the supervision of) a health care provider; or*
21 • *any period of incapacity (or treatment therefor) due to a chronic serious health condition*
22 *(e.g., asthma, diabetes, epilepsy, etc.); or*
23 • *a period of incapacity that is permanent or long-term due to a condition for which treatment*
24 *may not be effective (e.g. Alzheimer’s, stroke, terminal diseases, etc.); or*
25 • *any absences to receive multiple treatments (including any period of recovery therefrom) by,*
26 *or on referral by, a health care provider for a condition that likely would result in incapacity*
27 *of more than three consecutive days if left untreated (e.g., chemotherapy, physical therapy,*
28 *dialysis, etc . . .).*

24 *Ailments that do not ordinarily constitute serious health conditions for the purpose of FML include*
25 *colds, earaches, headaches other than migraines, stomach upsets, and routine dental problems.*

26 Intermittent/Reduced Scheduled Leave

27 *The FML permits employees to take leave on a [sic] intermittent basis or to work reduced*

1 *schedule under certain circumstances.*

- 2 • *Intermittent/reduced schedule leave may be taken when medically necessary to care for a*
- 3 *seriously ill family member, of [sic] because of the employee's serious health condition.*
- 4 • *Intermittent/reduced schedule leave may be taken to care for a newborn or newly place*
- 5 *adopted or foster care child only with the employer's approval.*

6 *Employees needing intermittent/reduced scheduled leave for foreseeable medical treatment must*

7 *work with the Nation to schedule leave so as not to unduly disrupt the Nation's operations,*

8 *subject to the approval of the employee's health care provider. In such cases, the Nation may*

9 *transfer the employee temporarily to an alternative job with equivalent pay and benefits that*

10 *accommodates recurring periods of leave better than the employee's regular job.*

11 *If the employee does not provide advance leave notice and medical certification, the leave may*

12 *be denied.*

13 CHAPTER 12

14 Types of Discipline

15 Depending on the nature of [sic] circumstance of an incident, discipline will normally be progressive

16 and bear a reasonable relationship to the violation. The types of discipline that may occur are as follows

17 in general order of increasing formality and :

18 C. Suspension

19 An employee may be suspended from work without pay for up to five working days by

20 authority of the Department Director. Suspensions of a longer duration require approval

21 by the Personnel Director. Under no circumstances will a suspension exceed 10 working

22 days.

23 Under certain circumstances, it may be necessary to restrict an employee immediately

24 from performing duties at the work site. These circumstances usually involve potential

25 danger to the employee, co-workers or the public, or the employee's inability to

26 discharge assigned duties satisfactorily. Because of the need for immediate action, the

27 decision to suspend an employee is typically the responsibility of the supervisor. In

28 these situations, the following procedure is to be followed:

- 29 * The supervisor taking the action to suspend an employee will immediately notify
- 30 the Department Director and, as soon as possible, prepare a written statement of
- 31 action taken and the reasons for such action.
- 32 * The Department Director will prepare, together with the supervisor, the
- 33 statement of charges and document any supporting evidence.
- 34 * As soon as possible after the initial action, but not later than three working days,
- 35 the Department Director will prepare written notification to the affected

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employees.

In no event will the use of paid time be allowed during a period of suspension without pay. Should a paid holiday occur during a period of suspension without pay, the suspension period will be extended by the number of holidays occurring during the suspension period.

BLACKJACK DEPARTMENT
ATTENDANCE POINT SYSTEM

In accordance with the Ho-Chunk Nations [sic] Policy and Procedures “employees are expected and required to report to their designated work locations at the prescribed time and manner work activity is to commence. Tardiness, unexcused absence, or failure to report as required may result in disciplinary action.” The Nations [sic] Policies and Procedures outlines a system of progressive discipline for dealing with violations of the policies. However, the policies do not outline as to how supervisors are to evaluate or assess violations to assign a [sic] equitable and fair judgment and corrective action. The individual enterprises and departments within the enterprise have been charged with the responsibility of establishing how the guidelines of the policies and procedures are followed and carried through in regard to attendance with the exception of a few areas. These are [sic]

ATTENDANCE

In the event an employee cannot report to work as scheduled, the employee must notify supervisory personnel at least one (1) hour to their scheduled work shift. [sic] In all cases of an employees [sic] absence or tardiness, the employee shall provide supervisory personnel with a valid reason for the absence and, if applicable, the probable duration of absence. If circumstances render the absence duration speculative or unknown, the absent employee will be required to call supervisory personnel daily to report the status of the absence.

Excessive absenteeism, regardless of reasons(s), which renders the employee insufficiently available for work will be evaluated on a case-by-case basis to determine the morits [sic] of corrective action of termination [sic].

It is the responsibility of each employee at Rainbow to work their scheduled hours and be ready for work at their assigned starting time. There are circumstances that may prevent an employee from working as scheduled and the following point system is intended to minimized [sic]work disruption and employee inconveniences by controlling the frequency of such circumstances.

The implementation and use of the point system is to assure that the gaming operation functions smoothly and in an orderly fashion to maintain a professional casino atmosphere for customers and guests. These are not punitive measures against employee, [sic] as casino hours and schedules allow ample time for employees to take care of personal matters.

VIOLATION **POINTS ASSESSED**

1	EXCUSED ABSENCE	0
2	UNEXCUSED ABSENCE/CALL	1
	UNAUTHORIZED ABSENCE	3.5
3	LATE CALL/NO SHOW	2
4	LATE FOR WORK	1
	CALLING IN, LATE ARRIVAL	5
5	UNEXCUSED EARLY OUT	5

	<u>ACCUMULATED POINTS</u>	<u>DISCIPLINARY STEPS</u>
6		
7	2	Verbal Reprimand
8	3.5	Written Reprimand
9	5	One (1) – Three (3) Day Suspension W/Referral to E.A.P
10	6	Five (5) Day Suspension
11	7	Ten (10) Day Suspension W/Recommendation for Termination

DEFINITIONS

13 **Excused Absences:** Verifiable absences for any of the following reasons will not be considered in
 14 determining action under the point system;

- 15 1. Pre-approved absence, i.e. previously scheduled vacation days, leave of absences, funeral
- 16 2. Death in immediate family
- 17 3. Absence due to employee or immediate family members illness
- 18 4. Hospital confinement of employee or immediate family member(s)
- 19 5. Court appearance, jury or witness duty
- 20 6. Work incurred injury

21 *NOTE Employees absent for three (3) or more days due to illness or injury must provide a satisfactory
 22 doctor’s statement.

23 **Unexcused absences / call(s):** Failure to work as scheduled for one (1) or more scheduled shifts with a
 24 call to supervisory personnel as to reason for absence on a daily basis [sic]

25 **Unauthorized Absence:** In accordance with Ho-Chunk Nation Policy and Procedure pg. 12
 26 UNAUTHOIZED ABSENCES, “An employee who is absent from his/her assigned work location
 27 schedule without official leave notice or approval from supervisory personnel. [sic]

*NOTE Points that are assessed as a result of Unauthorized [sic] absence remain on line for one
 28 calendar year without possibility of credit reduction.

Late Call / No Show: A call to supervisory personnel indicating a late arrival to work without reporting

1 to scheduled work shift [sic]

2 **Late for work:** Reporting to work one minute after their scheduled punch-in time and punching in
3 before properly attired as required.

4 **Calling in, late arrival:** Notification to supervisory personnel at least one hour prior to start of your
5 shift that you will be late for your scheduled shift [sic]

6 **Unexcused early out:** Failure to work the entire scheduled shift for reasons that are determined
7 unexcused. At the discretion of the Shift Supervisor [sic]

8 Points are accumulated on a continuous basis for attendance infractions listed on page 2.
9 However, employees can also earn credited points to improve employees attendance record. [sic] One
10 (1) point will be earned/credited for every calendar month without any point accumulating infraction. If
11 not scheduled the entire period, a point may not be earned. One (1) credit removes one point from
12 record used to determine disciplinary action with the exception of NC/NS. Credits may not be banked
13 or otherwise accumulated.

14 Under the point system we have attempted to establish a complete list to cover all types of
15 attendance violations. However, at times situation will arise that are not covered by this policy or there
16 will be extenuating circumstances. In these cases they will be addressed on a case by basis [sic] by the
17 Black Jack Manager.

18 CALL IN PROCEDURES REQUIRE THAT THE EMPLOYEE CALL IN AT LEAST ONE
19 HOUR PRIOR TO THE START OF THEIR SHIFT. WHEN CALLING IN, THE EMPLOYEE MUST
20 TALK TO ANY OF THE SHIFT SUPERVISORS. THE NUMBER TO CALL IS 866-4560 ext. 312 or
21 250. GIVE YOUR NAME, PHONE NUMBER, SHIFT, REASON FOR ABSENCE OR LATENESS.
22 IF PERSONAL CONTACT IS MADE ASK THE NAME OF THE PERSON YOU ARE TALKING
23 TO.

24 FINDINGS OF FACT

- 25 1. That the plaintiff, Daniel Youngthunder, was employed as a Pit Boss at the Rainbow Casino in
26 Nekoosa, Wisconsin on May 11, 1998, and for at least eight months prior to this date;
- 27 2. That on May 11, 1998, the plaintiff received a one-day suspension based on excessive absenteeism;
- 28 3. That on May 15, 1998, the plaintiff filed a Level One Grievance regarding the suspension issued on
May 11, 1998; that on May 21, 1998, the plaintiff received denial of the Level One Grievance; that
on June 5, 1998 the plaintiff filed a Level Two Grievance regarding the suspension issued on May
15, 1998; that the plaintiff's Level Two Grievance was denied; that on August 9, 1998 the plaintiff

1 filed a Level Three Grievance with this Court;

2 4. That the plaintiff was late to, or absent from, work 25 times between January 1, 1998 and May 11,
3 1998. *See* Defendant's Exhibits D and F; that 14 of the 25 absences were excused and 11 of the 25
4 absences were unexcused. *Id*; that 12 of the 25 absences took place before April 28, 1998. *Id*.

5 5. That 12 of the 14 unexcused absences took place before April 28, 1998, and two of the 14 unexcused
6 absences took place after April 28, 1998.

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8 6. That on December 3, 1997, the plaintiff took placement of a foster child. *See* Plaintiff's Exhibits 5-
9 9;

10 7. That no evidence was presented showing that the plaintiff provided his supervisors with advance
11 notice for leave taken under the FMLA due to placement of the foster child;

12
13 8. That the Family Medical Leave Act was enacted by the Ho-Chunk Nation Legislature on April 28,
14 1998;

15 9. That the plaintiff is an adherent and active practitioner of the "Feast Lodge" or "Old Winnebago"
16 religion; that the practice of the "Feast Lodge" or "Old Winnebago" religion often gives adherents
17 less than 24 hours notice of important ceremonies;

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19 10. That the plaintiff provided evidence of participation in religious activities for only one of the 14
20 unexcused absences; that this evidence regarded participation in a religious activity that took place
21 on April 25, 1998; that the plaintiff provided the Court with evidence of his attendance at a
22 religious event on November 27, 1997; that the plaintiff provided documentation of his participation
23 in a religious event on Mar. 25, 1998, but failed to establish the document's authenticity or
24 reliability by entering it into evidence;

25
26 11. That policies regarding Religious Leave were enacted by the Ho-Chunk Nation Legislature on
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1 February 17, 1998 and June 16, 1998;

2 12. That the defendant testified other employees of Rainbow Casino did not receive disciplinary action
3 for attendance policy violations similar to the plaintiff's; that on cross-examination, the plaintiff
4 admitted incomplete knowledge of disciplinary actions taken against other employees;

5 13. That on May 4, 1998 the plaintiff called work and informed his supervisor that he would be late;
6 that upon receiving this telephone call, the plaintiff's supervisor initiated the paperwork necessary
7 for the imposition of a one-day suspension;
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9 14. That on May 6, 1998, the suspension paperwork was forwarded to the Ho-Chunk Nation Personnel
10 Department, who subsequently approved the suspension and returned the appropriate paperwork to
11 Rainbow Casino on May 7, 1998;

12 15. That the plaintiff was on vacation May 8, 1998 and May 9, 1998;

13 16. That on May 10, 1998, the plaintiff arrived at work an hour late for his shift, and in accordance with
14 departmental policy was sent home for the day;
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16 17. That on May 11, 1998, the plaintiff arrived for work and was given notice of his suspension; that
17 the plaintiff consented to the disciplinary action and left work;
18

19 **PROCEDURAL HISTORY**

20
21 The plaintiff initiated this action after receiving a one-day suspension based on excessive
22 absenteeism. The plaintiff received notice of the suspension on May 11, 1998. On May 15, 1998, the
23 plaintiff timely filed a Level One Grievance in accordance with Chapter 12 of the *Policies and*
24 *Procedures Manual*. On May 21, 1998, the plaintiff received denial of the Level One Grievance. On
25 June 5, 1998, the plaintiff filed a timely Level Two Grievance. The Level Two Grievance was
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1 subsequently denied, and on August 9, 1998, the plaintiff filed the action currently before the Court. The
2 plaintiff's *Complaint* alleges that his one-day suspension for excessive absenteeism was improperly
3 imposed. The plaintiff seeks court costs, back pay for his served suspension, and removal of the
4 disciplinary action from his personnel file. The defendants received notice of this action by certified
5 mail on August 8, 1999, as indicated by their signatures on Domestic Return Receipts. The defendants
6 jointly filed an *Answer* on August 21, 1998, making a general denial of the plaintiff's claims, and further
7 asserting:
8

- 9 (a) That the plaintiff has failed to state a claim upon which relief may be granted
- 10 (b) That the plaintiff has failed to allege any violation of law by the defendant
- 11 (c) That the plaintiff has failed to assert in [sic] any injury in fact caused by the defendants
- 11 (d) That the defendants have acted within the scope of their authority

12 *Defendant's Answer*. On Nov. 25, 1998, the defendants filed a *Motion to Dismiss* based on the claims
13 previously asserted in the Aug. 21, 1999 *Answer*. The Court denied this *Motion* and held a full trial on
14 Jan. 27, 1999.

16 DECISION

17 This case centers on the question of whether the defendants acted properly in suspending the
18 plaintiff for excessive absenteeism. Before this Court can consider the substance of this question,
19 however, it must first determine whether it has the power to review the propriety of the defendant's
20 decision.
21

22 The legislative basis for the imposition of the plaintiff's suspension appears in both Chapter 5 of
23 the *Policies and Procedures Manual* and the Blackjack Department's Attendance Point System. The
24 authority states that "[e]xcessive absenteeism, *regardless of reason(s)*, which renders an employee
25 insufficiently available for work *will be evaluated on a case-by-case basis* to determine the merits of
26 corrective action or termination. *HCN Policies and Procedures Manual*, Ch. 5, p. 11 (emphasis added);
27

1 Blackjack Department Attendance Point System (emphasis added). This Court has previously
2 determined that discretionary personnel decisions are beyond the scope of this Court's review. *Pierre*
3 *Decorah v. Rainbow Casino*, CV 95-8 (HCN Tr. Ct., Mar. 15, 1996). The Legislature's mandate that
4 disciplinary matters based on attendance be handled on a *case-by-case basis* is an implicit delegation of
5 discretionary authority to individual supervisors and departments. Thus, the Court may only review the
6 propriety of the plaintiff's suspension for abuse of discretion.
7

8 There are a number of avenues by which this Court could find that the defendants abused their
9 discretion. First, the Court could find abuse of discretion if the plaintiff is able to demonstrate that he
10 was punished for absenteeism explicitly permitted by the Ho-Chunk Nation Legislature. The plaintiff
11 claimed that a large number of his late arrivals to, and absences from, work were the result of leave
12 allowed under Resolution 4/28/98A, *The Family Medical Leave Act* (hereinafter FMLA); and
13 Resolutions 2/17/98 and 6/16/98, both of which address Religious Leave for adherents of the "Feast
14 Lodge" or "Old Winnebago" religion.
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16 The defendants offered documentary and testimonial evidence showing that the plaintiff was late
17 to, or absent from, work 25 times between Jan. 1, 1998 and May 11, 1998. *See* Defendant's Exhibit F.
18 Of these 25 "attendance violations," 11 were "excused" and 14 were "unexcused." *Id.*; *See also*
19 Defendant's Exhibit D. Of the 14 "unexcused" absences documented by the defendants, 12 took place
20 before the promulgation of the FMLA on April 28, 1998.¹ Thus, the attendance violations the plaintiff
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23 ¹ The two attendance violations that took place between the promulgation of the FMLA and the plaintiff's suspension were
24 both unexcused. At trial, the plaintiff argued that one of these absences was sanctioned by the FMLA's allowance of
25 absenteeism "for the placement with the employee of a child for adoption or foster care, and to care for the newly placed
26 child." *Personnel Policy and Procedures Manual*, Ch. 8, p. 37a. The *Policies and Procedures Manual* provides, however,
27 that requests for leave under the FMLA may be denied if an employee does not provide advance notice. *Id.* at p. 37b.
Although documentary evidence and testimony at trial established that the plaintiff may have been dealing with matters
related to his family's acceptance of a foster placement, there was no evidence that he provided his supervisors with advance
notice. Thus, denial of Family Medical Leave for this day was warranted, and the late arrival would count toward any
disciplinary schedule.

1 claims as exempt from discipline under the FMLA are all deemed as “unexcused.” Under the Blackjack
2 Attendance Point System, the accumulation of these unexcused absences would, if written protocol were
3 followed, result in a recommendation for the plaintiff’s termination. *See* Blackjack Department
4 Attendance Point System. In the instant case, however, the plaintiff was given a reprieve and only
5 received a one-day suspension.

6
7 In addition to the plaintiff’s claims regarding the FMLA, the plaintiff also asserted that a number
8 of the attendance violations were allowed under legislative resolutions sanctioning “Religious Leave”
9 for participation in traditional Ho-Chunk activities. The plaintiff, however, provided evidence of
10 participation in religious activities for only one of the 14 “unexcused absences.”² This, in combination
11 with the plaintiff’s failure to establish any sanctioned leave under the FMLA, leaves 13 “unexcused
12 absences” remaining on the plaintiff’s attendance record. This number is more than sufficient to support
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23 ² The plaintiff provided reliable testimonial evidence that he attended a religious event on April 25, 1998. The plaintiff also
24 attempted to bolster his claims with documents addressing his attendance at religious events on November 29, 1997 and
25 March 25, 1998. As to the first of these dates, Plaintiff’s Exhibit 3 confirms his attendance at a religious event. This
26 evidence, however, is rendered moot by the fact that the first Religious Leave Policy was enacted on February 17, 1998, more
27 than three months after the religious event. As to the second date, the plaintiff included with his *Complaint* documentation
similar to that provided for the religious event on November 27, 1997. This documentation, however, did not effect the
Court’s decision because: One, it was never entered into evidence, thus leaving the Court with no knowledge of its
authenticity or reliability; and two, the date for which the second “note” was provided is considered an “excused absence” by
the defendant. *See* Defendant’s Exhibit F.

1 the defendant's actions.³ Thus, the one-day suspension imposed on the plaintiff did not constitute an
2 abuse of discretion.

3 In addition to claiming that his absences were legislatively excused, the plaintiff also challenged
4 his suspension through an allegation that he was victimized by inequitable application of the disciplinary
5 process. The Court again reviews this claim under an abuse of discretion standard. Under *Nettie*
6 *Kingsley v. Ho-Chunk Nation Department of Personnel*, PRC 93-026 (PRC, 04/10/96) the plaintiff bears
7 the burden of showing unfair treatment. Although some testimony at trial did imply that the plaintiff
8 was treated inequitably, the Court received no direct evidence of inequitable treatment and must
9 therefore deny this prong of the plaintiff's challenge.
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11 The plaintiff's third and final reviewable challenge to his suspension is the claim that he was not
12 notified of the disciplinary action in conformity with the *Policies and Procedures Manual*. This claim
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16 ³ Although the particulars of the Ho-Chunk Nation's Religious Leave Policy do not factor directly into this decision, the Court
17 feels it must comment on its provision that requires employees to "[n]otify their supervisor in writing 48 hours prior to taking
18 Religious Leave." During trial, ample testimony was given to the fact that it is very common to have less than 24 hours
19 notice of important religious ceremonies. The 48 hour notice provision thus seems contrary to the overall purpose of the
20 legislation as stated in the introductory paragraph:

21 Due to traditional obligations held by the HoChunk [sic] People, enrolled tribal member employees may
22 occasionally require religious leave from their place of employment. Often the demands of family, clan, or
23 tribe require that the HoChunk [sic] People attend to and assist in a variety of ceremonies and occasions
24 over a specified number of days. The following guidelines reflect the appropriate customary standards for
25 religious leave.

26 PERSONNEL POLICY AND PROCEDURES MANUAL, Ch. 8 p.35a. Although it is neither appropriate nor allowable for the Court to
27 contradict explicit legislative directives, it is appropriate and allowable for the Court to urge the Legislature to reexamine a
28 particular piece of legislation to correct a perceived deficiency. The Court takes this opportunity to makes such a plea to the
29 Ho-Chunk Nation Legislature in regards to the discrepancy between the reality of religious practices and the notice provision
30 of the Religious Leave Policy.

31 The Court also feels it necessary to comment on an additional piece of evidence offered at trial. The plaintiff
32 provided documentary evidence, and testimony was given by one of the defendants, that on at least one occasion the plaintiff
33 was denied Religious Leave despite following mandated procedures. The plaintiff was denied the leave in part because a
34 fellow employee had previously requested concurrent Annual Leave (vacation time). See Plaintiff's Exhibit 2. The Religious
35 Leave Policy only addresses denials of leave in the context of "abuse of [the] policy." The defendants offered no evidence
36 that the plaintiff had "abused" Religious Leave, thus making the denial based on a conflict with another employee's annual
37 leave improper.
38

1 is within this Court's power of review because it is based on the due process clause of *the Ho-Chunk*
2 *Nation Constitution* rather than the defendant's discretionary decision to suspend. The plaintiff
3 specifically claims that the defendants violated the *Policy and Procedures Manual's* requirement that
4 "[a]s soon as possible after the initial action, *but not later than three working days*, the Department
5 Director will prepare written notification to the affected employees." *Policies and Procedures Manual*,
6 Ch. 12, p. 48 (emphasis added).
7

8 In assessing this claim, the Court must first determine the meaning of the provision. The
9 defendants argue that it merely requires Department Directors to finish drafting an employee notification
10 within three days of the initial disciplinary action. They claim there is no requirement that the
11 notification actually be delivered to the affected employees. The Court finds this interpretation
12 somewhat specious. A requirement of preparation with no concomitant requirement of delivery (either
13 explicit or implicit) would be pointless; a Department Director could draft an employee notification
14 within the required time period but then let it linger indefinitely on their desk.
15

16 Another issued faced by the Court in consideration of the plaintiff's claim of insufficient notice
17 is the substantive and factual question of whether the defendants' actions actually violated the notice
18 requirement contained in Chapter 12 of the *Policies and Procedures Manual*. The timeline surrounding
19 the suspension proceeded as follows: On May 4, 1998, the plaintiff called work to inform his supervisor
20 that he would be late. Upon receiving this telephone call, the plaintiff's supervisor initiated the
21 paperwork necessary for the imposition of a one-day suspension. On May 6, 1998, the suspension
22 paperwork was forwarded to the Ho-Chunk Nation Personnel Department who subsequently approved
23 the suspension and returned the appropriate paperwork to Rainbow Casino on May 7, 1998. The
24 plaintiff was on vacation May 8, 1998 and May 9, 1998. On May 10, 1998, the plaintiff arrived at work
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1 an hour late for his shift, and in accordance with departmental policy was sent home for the day.⁴ On
2 May 11, 1998, the plaintiff arrived for work and was given notice of his suspension.

3 As is obvious from the above timeline, the plaintiff is correct in his assertion that the defendants
4 violated the *Policies and Procedures Manual* by providing him notice of the suspension seven days after
5 its initiation. For the above violation to result in an annulment of the plaintiff's suspension, however,
6 the plaintiff must not only show a technical violation of the *Policies and Procedures Manual*, but must
7 also show that the violation led to some actual harm or prejudice. *Edward Creapeau v. Ho-Chunk*
8 *Nation-Rainbow Casino*, PRC 95-009 (HCN Tr. Ct., Mar. 13, 1996). Due Process and notice provisions
9 are present in the Constitution and *Policies and Procedures Manual* in order to provide employees with
10 a fair opportunity to grieve disciplinary actions. *Id.* In the case at bar, the plaintiff possessed the full
11 measures of time and information required by the *Policies and Procedures Manual*, and thus received a
12 fair grievance process. The Court therefore acknowledges the defendant's technical violation of the
13 *Policies and Procedures Manual*, but due to the lack of actual harm or prejudice rejects the plaintiff's
14 attempt to use this as a basis for overturning his suspension.
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18 CONCLUSION

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20 While working as a Pit Boss at Rainbow Casino in Nekoosa, Wisconsin, the plaintiff received a
21 one-day suspension based on excessive absenteeism. The plaintiff believed the suspension to be
22 improper and grieved the disciplinary action through the administrative process mandated by the
23 *Policies and Procedures Manual*. After exhaustion of his administrative remedies, the plaintiff properly
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25 ⁴The plaintiff initially consented to this disciplinary action, but at trial questioned its propriety. The plaintiff claimed that his
26 late arrival was due to a last minute schedule change of which he was not given notice, and that therefore, his supervisor
27 should have allowed him to complete his shift. Despite the parties' dispute about this incident, it does not bear directly on the
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1 brought his claim to this Court, arguing that the suspension was improperly imposed due to the fact that
2 the absences upon which the suspension was based were permitted under the Family Medical Leave Act
3 and legislative Resolutions permitting “Religious Leave.” The plaintiff also argues that his suspension
4 should be overturned due to inequitable application of the disciplinary policy and the defendants’ failure
5 to provide proper notice of the disciplinary measure.

6
7 After careful review and consideration, this Court finds that the substance of the defendants’
8 decision to suspend the plaintiff is discretionary, and thus only reviewable by this Court under an abuse
9 of discretion standard. In examining the defendant’s decision for abuse of discretion, the Court finds
10 that only one of the fourteen “unexcused” absences documented by the defendants was covered under
11 either the Family Medical Leave Act or the resolutions authorizing Religious Leave, thus rendering
12 empty the plaintiff’s claim that his absences were legislatively authorized. Additionally, the Court finds
13 that there is no credible evidence to support the plaintiff’s allegations of an inequitable application of the
14 disciplinary process. Lastly, the Court finds that although the defendants failed to comply with the
15 notice requirements of the *Policy and Procedures Manual*, this violation resulted in no actual harm or
16 prejudice to the plaintiff, thus rendering the infraction non-actionable.

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18 **THEREFORE**, the Court finds for the defendants, and upholds the imposition of the plaintiff’s
19 one-day suspension.
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outcome of this case and the Court sees no need to delve into its murky waters.

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IT IS SO ORDERED this 9th day of February, 2000 from within the sovereign lands of the Ho-

Chunk Nation.

Hon. Mark Butterfield
HCN Chief Trial Judge

* The Court gratefully acknowledges the assistance of Staff Attorney David Neubeck in drafting this *Judgment*.