

B. Written Reprimand

This is the first level of formal discipline. The written reprimand is issued by the supervisor with approval of the Department Director, and a copy to the Personnel Office for placement in the employee's personnel file.

C. Suspension

An employee may be suspended from work without pay for up to five working days by authority of the Department Director. Suspensions of a longer duration require approval by the Personnel Director. Under no circumstances will a suspension exceed 10 working days.

Under certain circumstances, it may be necessary to restrict an employee immediately from performing duties at the work site. These circumstances usually involve potential danger to the employee, co-workers or the public, or the employee's inability to discharge assigned duties satisfactorily. Because of the need for immediate action, the decision to suspend an employee is typically the responsibility of the supervisor. In these situations, the following procedure is to be followed:

- * The supervisor taking the action to suspend an employee will immediately notify the Department Director and, as soon as possible, prepare a written statement of action taken and the reasons for such action.

- * The Department Director will prepare, together with the supervisor, the statement of charges and document any supporting evidence.

- * As soon as possible after the initial action, but not later than three working days, the Department Director will prepare written notification to the affected 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.

D. Discharge for Misconduct

Employees should be aware that their employment relationship with the Ho-Chunk Nation is based on the condition of mutual consent to continue the relationship between the employee and the Nation. Therefore, the employee or Nation is free to terminate the employment relationship for misconduct, at any time. Recommendations to discharge an employee are to be made to and authorized by the Department Director.

Examples of misconduct are violations of policies and procedures, absenteeism and tardiness, insubordination, use of intoxicants and drugs.

Initiating Discipline: Considerations and Notice

Supervisory and management personnel should be guided in their consideration of disciplinary matters by the following illustrative, but not exclusive, conditions.

- * The degree of severity of the offense

- * The number, nature, and circumstance of similar past offenses
- * Employee's length of service
- * Provocation, if any, contributing to the offense
- * Previous warnings related to the offense
- * Consistency of penalty application
- * Equity and relationship of penalty to offense

Disciplinary notice to regular employees should, as a general rule, contain the following information:

- * A statement of the disciplinary action to be taken and its effective date
- * A statement of the reason(s) for imposing the discipline and the nature of the violation
- Attachment of any supporting material or evidence where appropriate
- What the worker has to do to improve

HCN Legislative Resolution 6-9-98A

Tribal Court Review:

Judicial review of any appealable claim may proceed to the Ho-Chunk Nation Tribal Court after the Administrative Review Process contained in this Chapter has been exhausted. The Ho-Chunk Nation Rules of Civil Procedure shall govern any judicial review of an eligible administrative grievance shall file a civil action with the Trial Court within thirty (30) days of the final administrative grievance review decision.

Limited Waiver of Sovereign Immunity:

The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the extent that the Court may award monetary damages for actual lost wages and benefits established by the employee in an amount not to exceed \$10,000, subject to applicable taxation. Any monetary award granted under this Chapter shall be paid out of the departmental budget from which the employee grieved. In no event shall the Trial Court grant any monetary award compensating an employee for actual damages other than with respect to lost wages and benefits. The Trial Court specifically shall not grant any monetary award against the Nation or its officials, officers, and employees acting within the scope of their authority on the basis of injury to reputation, defamation, or other similar invasion of privacy claim; nor shall the Trial Court grant any punitive or exemplary damages.

The Trial Court may grant equitable relief mandating that the Ho-Chunk Nation prospectively follow its own laws, and as necessary to remedy any past violations of tribal law. Other equitable remedies shall include, but not be limited to: an order of the Court to the Personnel Department to reassign or reinstate the employee, a removal of negative references from the personnel file, an award of bridged service credit, and a restoration of seniority. Notwithstanding the remedial powers noted in the Resolution, the Court shall not grant any remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing in this Limited Waiver or within the Personnel Policies and Procedures Manual shall be construed to grant a party any legal remedies other than those included in the section.

FINDINGS OF FACT

1. Cheryl Smith is a 37 year-old Ho-Chunk Nation tribal member. She lives in Wisconsin Rapids.
2. The Nation employed Ms. Smith at the Ho-Chunk Nation's Rainbow Casino in Nekoosa, Wisconsin from August 17, 1992 until her discharge in December 1998.
3. Ms. Smith was employed as a Pit Boss. She held that position from 1994 to December 1998. A Pit Boss supervises Black Jack Dealers and is in turn supervised by Shift Supervisors who answer to the Director of Table Games. Ms. Smith's immediate shift supervisor was George Merritt and sometimes Richard Walker. Mr. Merritt worked with Cheryl Smith for two and one half years prior to her termination.
4. Ms. Smith worked for the Ho-Chunk Nation in various capacities since before her graduation from High School in 1980. Ms. Smith received merit increases at her job at the Rainbow Casino every year until 1998.
5. Ms. Smith was disciplined via a verbal warning for the first time on June 25, 1998 for absenteeism. The June 25, 1998 discipline cited Ms. Smith for being tardy six times (one unauthorized) and excessive absenteeism (eight total, three unauthorized). Exh. 2.
6. Ms. Smith received a five-day suspension on June 26, 1998 for allegedly falsifying a doctor's excuse. Exh. 3. During the grievance process the suspension was reduced to a one-day suspension. Exh. 4.
7. Ms. Smith was accused of falsifying her doctor's excuse for June 12, 1998 by changing a "12" to a "17." The attendance record showed that Ms. Smith arrived on time June 17, 1998 and worked the whole shift. She denied altering the doctor's excuse. *Stipulated Exh. A.* shows that the doctor's office in question informed Ms. Smith's supervisor, Jonette Pettibone, that the

- excuse had not been altered. Tr. 15; Tr. 125. Ms. Pettibone agreed that it was wrong to sign the disciplinary action form based on the accusation of falsifying the doctor's excuse.
8. The defendant agreed that Ms. Smith did not falsify the doctor's excuse, but only reduced the suspension and refused to remove the disciplinary action from her personnel record.
 9. The normal course of progressive discipline is to give an employee a verbal warning, then a written warning, then progressively severe suspensions from one, to three, to five days, followed by termination. Tr. 52. Tr. 137. *See also PPM Ch. 12*
 10. On August 7, 1998, Ms. Smith was disciplined via written warning for attendance problems. She did not dispute this discipline.
 11. In October 1998, Ms. Smith began having water problems at her rural home. Her well was getting possible infiltration from the septic system including possible urine. Ms. Smith was advised to drill a new well by Haupt Well Drilling. The Smith home had a loss of water pressure.
 12. Ms. Smith requested leave from her direct supervisor George Merritt, a shift supervisor, on November 3, 1998 for the entire week without pay. She explained that the well driller wanted someone at the house all the time so that he could gain access to the house without delay. Mr. Merritt did not disagree but said he would have to clear it with Jonette Pettibone. After speaking with Ms. Pettibone, Mr. Merritt granted Cheryl Smith November 4th off without pay, and stated she would have to provide documentation to get approval for the rest of the week off. No time limit was set when she had to turn in the documentation. It was expected that Ms. Smith would get a letter from Haupt Well Drilling explaining the time they spent drilling the well as documentation of the absences.

13. The well drilling began on November 4, 1998. Ms. Smith took November 4, 1998 off. During the drilling operation, the Smith house had no water pressure.
14. Ms. Smith was unable to shower or have water on Thursday, November 5, 1998. She did not attend work but did call in and notified Rainbow that she would not be in.
15. Ms. Smith attended work on Friday, November 6, 1998. She was able to shower at a friend's house. On Saturday, November 7, 1998, Ms. Smith was tardy to work due to having to take a shower at a friend's house.
16. On November 10, 1998, Ms. Smith returned to work and was suspended for three days for absenteeism. She was specifically cited for being absent on November 5, 1998 and tardy on November 7, 1998. Richard Walker, one of Ms. Smith's supervisors, suspended her. *See Exh. 6.* Mr. Walker did not give Ms. Smith the opportunity to provide written documentation of her absence. Tr. 71.
17. Ms. Smith properly and timely grieved this suspension.
18. Ms. Smith ultimately secured a written letter from Haupt Well Drilling dated November 4, 1998. *See Stipulated Exh. D.*
19. The well was completed November 17th, 1998 but the water wasn't potable until November 19, 1998. *See Exh. F & G. Letter from Haupt Well Drilling dated February 22, 1999.*
20. Cheryl Smith was presented with a "Work Agreement" on November 10, 1998 which would require her to meet standards of attending work for six months. She refused to sign the "Work Agreement." *See Exh. 6 p. 3; Tr. 27, 60.* She was allowed to return to work without signing the "Work Agreement."

21. Cheryl Smith then worked from her return from the suspension until December 8, 1998, without incident. On Saturday, December 8, 1998, she called in late at 1:22 p.m. Her shift began at 9:15 a.m. Ms. Smith did not make it to work at all that day.
22. Cheryl Smith returned to work December 9, 1998, and was told she was terminated. *See* Exh. 8. She was informed that she had violated the “Work Agreement” by not calling in one hour before work and not providing a doctor’s excuse for her absence.
23. Ms. Smith grieved her termination. During the Administrative Review Process Ms. Smith was successful in part. Rainbow agreed to rescind the termination and replace it with a five-day suspension. *See* Exh. 10. The “Work Agreement” was found invalid because all the parties did not sign it.
24. Ms. Smith did not agree with the proposed resolution of her grievance because she felt the suspension for “altering” the doctor’s excuse was invalid, and that she had a proper excuse for missing November 5, 1998 for the well drilling. Ms. Smith believed the two suspensions to be invalid and argued that a correct application of progressive discipline would only warrant a short suspension.
25. At the time of her suspension, Cheryl Smith was paid \$18.24 per hour, which amounts to \$729.60 per 40-hour work week.
26. At Rainbow, there are normally two pit bosses on duty per shift. Pit bosses supervise the Black Jack dealers and floor supervisors on the floor of the casino and schedule the dealers’ time.
27. Richard Walker was Cheryl Smith’s Shift Supervisor at Rainbow Casino for one year prior to the termination of Ms. Smith. Mr. Walker felt Ms. Smith’s work performance was satisfactory but that her work attendance was less than satisfactory. Mr. Merritt, who had been Cheryl

- Smith's shift supervisor for two and a half years, also found no fault with her work, only her attendance. Mr. Merritt handled the termination of Ms. Smith.
28. Mr. Walker consulted with the HCN Dept. of Personnel on how to deal with Ms. Smith's absenteeism at the time of the November well problems and they recommended that he impose a "Work Agreement" with Ms. Smith. Its intent was to improve her attendance.
 29. There was a fundamental disagreement between the parties as to their understanding of Ms. Smith's request to take the week off starting November 4, 1998. Mr. Merritt thought that taking the fifth off was approved but not the rest of the time. Ms. Smith thought that the fifth was approved and the other days were conditionally approved so long as she provided the supporting documentation.
 30. Mr. Merritt agreed that Rainbow could not justify the termination based on the unsigned "Work Agreement" after seeing the opinion issued by the HCN Dept. of Justice which stated that unilateral work agreements were not valid because they are not signed by all the parties. Tr. 93. Mr. Merritt only found out about the opinion a month or so before the Trial in July 1999. Nonetheless, he argued that the termination was justified due to excessive absenteeism.
 31. Jonette Pettibone is the Rainbow Director of Table Games where she had worked for 14 months at the time of Trial. Ms. Smith was evaluated in May 1998 and denied an increase in pay. Ms. Pettibone agreed to reevaluate Ms. Smith in a month after the denial to see if any progress had been made regarding absenteeism. She signed off on a re-evaluation in July 1998 which denied a request for a pay increase primarily due to a lack of improvement in absenteeism in the month following the annual review.

32. Ms. Pettibone testified that it was standard procedure to expect submission of documentation for absenteeism from an employee experiencing absenteeism problems on the day that the employee returned to work. Tr. 108.
33. Ms. Pettibone testified that excessive absenteeism disrupts the operation of the Table Games Department because substitute workers need to be called and it causes morale problems when pit bosses set a poor example for Blackjack Dealers and floor supervisors to follow. These workers then expect similar lenient treatment when they are tardy or absent. Absenteeism by Pit bosses usually requires the supervisor to come down and cover for the absent pit boss, which disrupts supervisor's work schedule.
34. Ms. Pettibone stated that it was policy that an employee would have to provide a doctor's excuse or other documentation upon their return to work *provided* the supervisor made that clear prior to the absence. TR. 129. Ms. Pettibone thought that Cheryl Smith had taken November 4, 1998 off with pay. Ms. Smith actually took the day off without pay.
35. Ms. Pettibone became aware that unsigned work agreements were not valid in January 1999.
36. Cheryl Smith also grieved her discipline regarding the "altered doctor's excuse" in a related case, *Cheryl Smith v. Rainbow Casino*, CV 98-65 (HCN Tr. Ct. Feb. 10, 2000). That case held in favor of the defendant on procedural grounds. *Id.*

DECISION

This case challenges whether progressive discipline was correctly applied to the employee Cheryl Smith. The normal course of progressive discipline is to proceed from verbal warning, to written warning, to suspension (sometimes progressive in duration, i.e., first one day, then three, then five) to termination. In reviewing employment decisions, the Court decides if the decision of the

agency was arbitrary, capricious, or an abuse of discretion, giving deference to the agency's decision. *Gary Lonetree Sr. v. John Holst et al.*, CV 97-127 (HCN Tr. Ct. Sept. 24, 1998) *aff'd*, *Gary Lonetree Sr. v. John Holst as Slot Director et. al.* SU 98-07 (HCN S.Ct. Apr. 29, 1999. The Court will not substitute its own judgment for a reasonable decision made by an enterprise of the Ho-Chunk Nation, which has more expertise in managing its own employees. *Id.*

Ms. Smith was first disciplined for absenteeism via a verbal warning on June 25, 1998. She was next disciplined via a five-day suspension the next day on June 26, 1998. Ms. Smith grieved this suspension and it was reduced in time to a one-day suspension despite acknowledgement later that she did not alter the doctor's excuse as first claimed. This disciplinary action was also appealed in a related case.¹ Ms. Smith was next disciplined on August 7, 1998 via a written warning for attendance problems. This action was not grieved. Ms. Smith was disciplined again via a three-day suspension on November 10, 1998 for absenteeism based on whether she was permitted time off during the prior week. She was later terminated on December 8, 1998 for a no call/no show.

Ms. Smith's principle legal attack on her dismissal is not a denial that she had attendance problems. These she admits in part. She did not grieve the written warning in August, nor did she dispute she was a no call/no show on December 8, 1998. Her legal challenge is based on what she feels was the improper imposition of severe discipline when it was not warranted, and the refusal to remove that discipline from her personnel file. That is at least in part the reason she refused to accept a favorable grievance decision that would have given her job back but kept her on extended probation for six months.

¹ The Court indicated at Trial that it would allow the plaintiff to address this issue if the decision in the June 26, 1998 suspension was decided on a procedural issue, i.e., lack of timely filing. The reason for this is that a case is not *res judicata* when the substantive issue is not decided on the merits. The Court never reached the merits of Ms. Smith's prior case because of the procedural defect. *See* CV 98-65, (HCN Tr. Ct. Feb. 10, 2000.)

In reviewing the record, the Court must agree with Ms. Smith. Progressive discipline is the official policy of the Nation. The progression of discipline given Ms. Smith varied from the schedule set forth in the *Policies and Procedures Manual*. She went from a verbal warning, to a five-day suspension, to a written suspension, to a three-day suspension to a termination. This is not the normal progression of discipline. It is therefore critical to examine the progression of discipline in her case.

The key sticking point is the June 26, 1998 five-day suspension. The severity of which was triggered by the apparent flagrant nature of the initial finding, i.e., that the plaintiff had altered a doctor's excuse in order to get an excused day off. This was later found out to be false and the suspension was reduced from five days to one day. The truth is that the suspension should have been expunged. The stated reason for it, altering a doctor's excuse, was found *to lack any merit*. Ms. Smith had no reason to change a day off from June 12 to June 17 because the records indicated she worked the 17th, and had no reason to get a doctor's excuse for that day. Rainbow management admitted at trial that they knew she did not alter the doctor's excuse. It therefore appears that there was no evidence to support the suspension. Lacking substantial evidence to support it, this decision is an abuse of discretion.

Rainbow management implicitly acknowledged that the June 26, 1998 suspension was wrong in August 1998 by only giving Ms. Smith a written warning, which would be the normal sequence of discipline after her verbal warning on June 25th, 1998. They apparently ignored the suspension and treated it as if it had been removed. The refusal to remove the suspension, which has admittedly no valid supporting rationale, is arbitrary and capricious. It is difficult to support increased progressive discipline when one of the initial steps was improperly assessed. Indeed, the Court must give heightened scrutiny to subsequent steps in Cheryl Smith's progressive discipline precisely because the

defendants acted arbitrarily during the “doctor’s excuse” incident. Therefore, subsequent steps must be critically examined to determine if progressive discipline was properly followed.

One of the key disputes in this case is the three-day suspension of Cheryl Smith for absenteeism on November 10, 1998. This suspension arose out of her absences to take care of a well problem. Ms. Smith was having water problems at her house, which involved septic seepage into her drinking well. Ms. Smith informed her supervisor Mr. Walker of her well problems. She then asked for and was given November 4th off. Later on November 3, 1998, Mr. Walker stated that Ms. Smith also requested November 5th and subsequent days off *if needed* by the well driller. He informed her this would be okay *if she provided documentation*. Critically, Mr. Walker did not say *when* the documentation was to be provided.

Ms. Smith did not work November 5th, 1998. She believed that day was excused so long as she provided documentation. Ms. Smith worked November 6th and 7th although she was tardy on November 7th, 1998. Ms. Smith then had Sunday and Monday November 8th and 9th off. She returned to work on November 10th only to be sent home to serve a three-day suspension for absenteeism November 5th and tardiness on November 7th. Ms. Smith filed a grievance over her suspension and later filed documentation of the well problem. *See* Stipulated Exh. D and Letter dated February 17, 1999.

The Court must evaluate the actions of the employee based on the reasonable person standard, i.e., would a reasonable person in the same or similar circumstances have acted in a similar manner. The Court will examine the actions of management more critically because of its previous arbitrary actions in refusing to expunge the June 26, 1998 suspension. When either the employee or management does not act in a reasonable manner, the Court is left with the impression that their actions are arbitrary, capricious and without justification.

Based on the above reasonable person standard, Ms. Smith had a reasonable belief her absence on November 5th was conditionally excused so long as she provided documentation of her well problem, which she provided, albeit later than Rainbow management expected.² This was the principal reason for a suspension. The Court finds that Rainbow management was arbitrary in suspending Ms. Smith *without asking or allowing for her to provide documentation as previously agreed*. Ms. Pettibone testified that it was policy to require documentation of an absence *if the supervisor made it clear prior to the absence*. That was not done in this case. Ms. Smith's supervisor did not make it clear exactly when the documentation was to be provided. That is fatal to the three day suspension meted out November 10, 1998. Rainbow management was wrong to leave this unclear to Ms. Smith and then penalize her for this lack of clarity. Thus, to penalize Ms. Smith for this would be arbitrary and capricious.

However, a finding that the penalty for the absence on November 5, does not necessarily mean that the penalty for tardiness on November 7, 1998 is arbitrary. A reasonable manager might expect that Ms. Smith's well problems were over when she returned to work on time November 6, 1998. Management would expect her to work as scheduled the next day unless told otherwise. There was no testimony from Ms. Smith that she discussed her ongoing well problems with Mr. Walker, Mr. Merritt, or Ms. Pettibone in order to prepare them for a possible late arrival or absence while the well drilling proceeded. Based on this, Rainbow management was reasonable in expecting Ms. Smith to arrive on time on November 7th, 1998. When she did not arrive marking her tardy as unexcused does not appear to be arbitrary.

The next question is whether suspending her *for a tardy* for three days was a proper application

² It is unknown when the documentation was provided, because Rainbow management did not stamp in the two Letters from Haupt Well Drilling dated November 4, 1998 and February 17, 1999.

of the progressive discipline policy. The Court holds that it was not. Disregarding the arbitrary suspension in July, Ms. Smith was given a verbal warning and then a written warning for absenteeism. The next logical step would be a one-day suspension. Instead, Rainbow management suspended her for three days. This is critical because it is the totality of the progression that led to her termination in December for the next absence. The factors to be considered when initiating discipline include the employee's length of services, previous warnings related to the offense, consistency of the penalty application and equity and relationship of the penalty to the offense. *See* PPM, Ch. 12, p. 48. A major factor in Ms. Smith's favor is her nearly six years at the Casino and nearly eighteen years service with the Nation overall. The Court feels the failure of management to include this factor in the suspension calculations was arbitrary and capricious.

The next step was Cheryl Smith's termination for the no call/no show on December 8, 1998. This would have been proper had the sequence of suspensions been properly assessed. The Court, having previously found that they were *not* properly assessed, must also find that the termination violated the progressive discipline sequence. Instead of being fired, Ms. Smith should have been suspended for more than one day.³ She was a six-year veteran of the Rainbow Casino and had been employed by the Nation since her graduation from High School in 1980. Her length of service was not factored in the suspension. While it is true that she has had attendance problems that appeared to be progressing in severity, if progressive discipline was properly applied, she should not have been terminated.

The Court finds that the three-day suspension and termination of Cheryl Smith violates the progressive discipline policy of the Nation as expressed in the *Personnel Policies and Procedure*

³ The Court cannot determine that the suspension should have been for a set number of days as that is up to the management to determine consistent with their standard policies even though a review of the record in this case indicates the next step is likely a three-day suspension.

Manual and rules in her favor. The Court orders that Ms. Smith be reinstated to her job or restored to a similar job and that she is given the seniority she would have accrued had she not been terminated. Rainbow management is ordered to review the length of suspension on remand and to document the file with the proper length of suspension that would have been leveled for the tardy on November 7th, 1998 and the no show on December 10, 1998.

As to monetary damages, the Court awards Ms. Smith lost pay at the rate of \$18.24 per hour for the two extra days she was suspended. Presuming an eight-hour day, this amounts to \$291.84 for the improper suspension. In addition, the Court also finds Rainbow liable for the improper termination of Ms. Smith. Based on a rate of \$18.24 per hour and a presumed 40 hour work week, which would amount to \$729.60 per week times the amount of time she has been off, the Court may only award a cap of \$10,000. This amount of damages is equal to 13.7 weeks of lost work in Ms. Smith's case. Therefore, the Court grants Ms. Smith damages in the amount of \$10,000 as to the improper termination.

This amounts to \$10,291.84 plus interest from the date of the *Judgement* at the rate of 5% per annum. *See HCN R. Civ. P. 57.*

CONCLUSION

The Court concludes that progressive discipline was not properly followed in this case. The failure to follow progressive discipline invalidates the severe penalties that were imposed. The Court finds that the termination was not warranted and that it violated progressive discipline. The Court orders the reinstatement of the plaintiff, and awards her damages in the amount of \$10,000 on the count of termination plus costs and fees. The Court further awards her \$291.84 for the improper suspension

plus costs and fees. Lastly, the Court remands this case back to Rainbow management for proper assessment of the file and other action consistent with this opinion.

All parties have the right to appeal a final judgment or order of the Trial Court. If either party is dissatisfied with the decision of this Court, they may file a *Notice of Appeal* with the Ho-Chunk Supreme Court within thirty (30) calendar days from the date this Court renders such final judgment or order. The *Notice of Appeal* must show service was made upon the opposing party prior to its acceptance for filing by the Clerk of Court. The *Notice of Appeal* must explain the reason the party appealing believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk Supreme Court must conform to the requirements established by the Ho-Chunk Supreme Court as stated in the Ho-Chunk Nation Rules of Appellate Procedure.

IT IS SO ORDERED this June 19, 2007 from within the sovereign lands of the Ho-Chunk Nation at Black River Falls, WI 54615.

Hon. Mark Butterfield
HCN Chief Trial Judge