

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

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3 **Margaret G. Garvin,**

4 Plaintiff,

5 v.

6 **Donald Greengrass,**

7 Defendant.

Case No.: **CV 00-10**

8 -and-

9 **Margaret G. Garvin,**

10 Plaintiff,

11 v.

12 **Ho-Chunk Nation , and**  
13 **Donald Greengrass in his official and individual capacity,**  
14 **and Evans Littlegeorge in his individual capacity,**

15 Defendants.

Case No.: **CV 00-38**

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16 **ORDER**  
17 **(Ruling on Dispositive Motions)**

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20 **INTRODUCTION**  
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22 The Court must determine whether to grant any of the three (3) pending dispositive motions in  
23 the instant case. The Court dismisses the action(s) against the defendants, Donald Greengrass and Evans  
24 Littlegeorge, in their individual capacities, but requires a further evidentiary hearing and/or legal  
25 argument on the unresolved issues noted herein. The Court shall reschedule the *Trial* with the  
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1 remaining affected parties.

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3 **PROCEDURAL HISTORY**  
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5 The plaintiff, Margaret G. Garvin, initiated Case No.: CV 00-10 by filing a *Complaint* with the  
6 Court on January 25, 2000. Consequently, the Court issued a *Summons* accompanied by the above-  
7 mentioned *Complaint* on January 25, 2000, and delivered the documents by certified mail to the  
8 defendant's representative, Ho-Chunk Nation Department of Justice [hereinafter DOJ].<sup>1</sup> An agent of the  
9 defendant signed for the certified mailing on January 26, 2000 as indicated on the Domestic Return  
10 Receipt. The *Summons* informed the defendant of the right to file an *Answer* within twenty (20) days of  
11 the issuance of the *Summons* pursuant to the *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter  
12 *HCN R. Civ. P.*], Rule 5(B). The *Summons* also cautioned the defendant that a *default judgment* could  
13 result from failure to file within the prescribed time period.  
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16 The defendant, by and through DOJ Attorney John S. Swimmer, timely filed the *Defendant's*  
17 *Answer* on February 11, 2000, serving such documents on the plaintiff via first class mail. On March 2,  
18 2000, the defendant submitted a *Notice of Substitution of Counsel*, identifying Attorney Michael P.  
19 Murphy as the attorney of record, and the *Defendant's Amended Answer*. Attorney William F. Gardner  
20 filed a *Notice of Retainer and Entry of Appearance* on the plaintiff's behalf on March 6, 2000.  
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22 The Court convened a *Scheduling Conference* on March 8, 2000 at 10:00 A. M. CST. The  
23 following parties appeared at the *Conference*: Attorney William F. Gardner and Attorney Michael P.  
24 Murphy. Subsequently, the Court received the *Defendant's Notice & Motion to Amend the Scheduling*

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26 <sup>1</sup> The *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*] permit the Court to serve the *Complaint* upon  
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1 *Order and Extend the Deadline for Dispositive Motions* accompanied by the *Defendant's Notice &*  
2 *Motion for Expedited Consideration* on May 18, 2000. The defendant submitted a *Stipulation* executed  
3 by the parties on May 18, 2000 in support of the foregoing motions, and the plaintiff later submitted the  
4 *Plaintiff's Response to Motion to Amend Scheduling Order and Extend the Deadline for Dispositive*  
5 *Motions and Motion for Expedited Consideration* on May 23, 2000, expressing agreement with the  
6 defendant's requests.  
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8 In order to preserve filing rights, the defendant filed the *Defendant's Notice & Motion to Dismiss*  
9 accompanied by the *Defendant's Brief in Support of Motion to Dismiss* on May 19, 2000.<sup>2</sup> Shortly  
10 thereafter, the Court entered its May 22, 2000 *Order Granting Extension of Time*. The plaintiff  
11 submitted the June 1, 2000 *Motion for Summary Judgment* accompanied by the *Memorandum in*  
12 *Support of Motion for Summary Judgment* within the extended timeframe. On June 7, 2000, the plaintiff  
13 filed the *Response to Defendant's Motion to Dismiss*.<sup>3</sup> Likewise, the defendant filed the *Defendant's*  
14 *Reply (sic) to Plaintiff's Motion for Summary Judgment* on June 12, 2000. In conformity with *HCN R.*  
15 *Civ. P. 19 (A)*, the defendant and plaintiff submitted reply briefs respectively on June 12 and June 15,  
16 2000.  
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19 On June 21, 2000, the Court directed the Assistant Clerk of Court to mail *Notice(s) of Hearing*,  
20 informing the parties of the date, time and location of the *Motion Hearing*. The Court convened a  
21 *Motion Hearing* on July 12, 2000 at 11:00 A. M. CST. The following parties appeared at the *Hearing*:  
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23 the DOJ when an official or employee is being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

24 <sup>2</sup> The defendant expressed his intention to request a future hearing on the *Motion to Dismiss* by stating, "Defendant will not  
25 request a hearing on this motion *yet*. When it *does become necessary*, the Defendant *will contact* the Clerk of Court and  
26 opposing counsel for scheduling." *Defendant's Notice & Motion to Dismiss*, May 19, 2000, pp. 1-2 (emphasis added).

27 <sup>3</sup> In the absence of a supplementary filing by the defendant, the plaintiff reasonably attempted to comply with the response  
deadline set forth in *HCN R. Civ. P. 19(A)* by filing the *Response to Defendant's Motion to Dismiss* within ten (10) days of  
the dispositive motion deadline of June 1, 2000. *See Id.*, p. 1.

1 Attorney William F. Gardner and Attorney Michael P. Murphy. The parties mutually recognized the  
2 potential presence of material issues of fact at the *Hearing*, rendering the plaintiff's summary judgment  
3 motion inappropriate. *See HCN R. Civ. P. 55*. The Court, however, withheld ruling on the *Defendant's*  
4 *Motion to Dismiss* at the *Motion Hearing*.

5 The plaintiff, Margaret G. Garvin, initiated the companion case by filing a *Complaint* with the  
6 Court on April 21, 2000. Consequently, the Court issued a *Summons* accompanied by the above-  
7 mentioned *Complaint* on April 21, 2000, and delivered the documents by certified mail to the  
8 defendants' representative, DOJ. An agent of the defendants signed for the certified mailing on April  
9 25, 2000 as indicated on the Domestic Return Receipt. The *Summons* informed the defendants of the  
10 right to file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to the *HCN R.*  
11 *Civ. P. 5(B)*. The *Summons* also cautioned the defendants that a *default judgment* could result from  
12 failure to file within the prescribed time period.

13 The defendant, Evans Littlegeorge, in his individual capacity, by and through Attorney Mark L.  
14 Goodman, filed the *Motion for a More Definite Statement* on May 10, 2000, serving such documents on  
15 the plaintiff and DOJ via first class mail. The Court responded by entering the May 23, 2000 *Order*  
16 (*Granting Motion for a More Definite Statement*), requiring the plaintiff to file an amended complaint  
17 within ten (10) days. Consequently, the plaintiff filed the *Amended Complaint* on June 2, 2000 followed  
18 by the defendant's June 19, 2000 *Answer* accompanied by the *Motion to Dismiss*.

19 The defendants, Ho-Chunk Nation and Donald Greengrass, in his official capacity, by and  
20 through DOJ Attorney Michael P. Murphy, timely filed the *Defendants' Answer* on May 11, 2000,  
21 serving such documents on the plaintiff via first class mail. On the same day, the defendant, Donald  
22 Greengrass, in his individual capacity, by and through Lay Advocate Rick McArthur, filed the *Answer*,  
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1 serving such documents on the plaintiff via first class mail. Lay Advocate McArthur later submitted the  
2 June 22, 2000 *Answer to Amended Complaint* as permitted by the Court in its *Order (Granting Motion*  
3 *for a More Definite Statement)*. The *Motion to Dismiss* accompanied such filing. Attorney Murphy  
4 filed the *Defendants' Amended Answer* on June 22, 2000.

5 On June 29, 2000, the Court directed the Assistant Clerk of Court to mail *Amended Notice(s) of*  
6 *Hearing*, informing the parties of the date, time and location of the *Motion Hearing/Scheduling*  
7 *Conference*. The Court convened a *Motion Hearing/Scheduling Conference* on July 21, 2000 at 9:30  
8 A.M. CST. The following parties appeared at the *Hearing/Conference*: Attorney William F. Gardner,  
9 Attorney Michael P. Murphy, Attorney Mark L. Goodman, Evans Littlegeorge and Lay Advocate Rick  
10 McArthur.<sup>4</sup> Prior to the *Hearing/Conference*, the plaintiff timely filed *Plaintiff's Response to*  
11 *Defendants' Motion to Dismiss* in accordance with *HCNR. Civ. P. 19(A)*. The plaintiff filed the *Motion*  
12 *to Consolidate* on the day of the *Motion Hearing/Scheduling Conference*.  
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15 The Court entered its *Scheduling Order* on July 21, 2000, and subsequently granted the  
16 consolidation on September 26, 2000 pursuant to *HCNR. Civ. P. 28(B)*. In the *Order (Granting Motion*  
17 *to Consolidate)*, the Court decided to utilize the July 21, 2000 *Scheduling Order* for the consolidated  
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19 <sup>4</sup> The Court denied both *Motion(s) to Dismiss* at the July 21, 2000 *Motion Hearing/Scheduling Conference*. Defendant  
20 Littlegeorge testified that he forwarded interoffice memorandum to Defendant Greengrass at the latter individual's request  
21 concerning a completed investigation by Ho-Chunk Nation Management Information Systems of a December 10, 2000  
22 incident involving improper internet usage. Defendant Littlegeorge presented Exhibits A and B to corroborate this account of  
23 the relevant facts. However, Exhibits A and B reference unacceptable conduct, *see generally* HO-CHUNK NATION PERSONNEL  
24 POLICIES AND PROCEDURES MANUAL [hereinafter PERSONNEL MANUAL], Ch. 12, pp. 44-47, not connected to the internet  
25 incident which by the defendant's own testimony occurred on or around November 29 or 30, 2000. *See* Courtroom  
26 Log/Minutes (July 21, 2000) p. 11. The Court denied the June 19, 2000 *Motion to Dismiss* due to the inherent contradictions  
27 in the defendant's presentation. Defendant Greengrass criticized the plaintiff's inability to articulate specific facts capable of  
evidencing acts performed outside of the defendant's official capacity. The Court found the defendant's motion premature  
since the plaintiff had not received the opportunity to unearth particular facts through discovery. "In appraising the  
sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to  
state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would  
entitle [her] to relief." *Loa Porter v. Chloris A. Lowe, Jr.*, CV 95-23 (HCN Tr. Ct., Mar. 1, 1996) p. 1 *quoting Conley v.*  
*Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the Court denied the June 22, 2000 *Motion to Dismiss*.

1 actions. On November 1, 2000, the plaintiff submitted the *Stipulation & Order to Amend Scheduling*  
2 *Order* on behalf of all the parties. In response, the Court entered its November 1, 2000 *Order*  
3 *(Extension of Motion Deadlines)* as permitted by *HCN R. Civ. P. 42*.

4 Each defendant filed a dispositive motion on the extended deadline as follows: *Donald*  
5 *Greengrass's Notice and Motion of Dismissal* (Nov. 13, 2000); *Defendants' Notice and Motion to*  
6 *Dismiss* accompanied by the *Brief in Support of Motion to Dismiss for Def. Ho-Chunk Nation and Def.*  
7 *Greengrass in his Official Capacity* (Nov. 13, 2000); and *Motion for Summary Judgment* (Nov. 13,  
8 2000). Consequently, the Court directed the Assistant Clerk of Court to mail *Notice(s) of Hearing* on  
9 November 30, 2000, informing the parties of the date, time and location of the *Motion Hearing*. The  
10 plaintiff offered three (3) responses to the foregoing dispositive motions in accordance with *HCN R. Civ.*  
11 *P. 19(A)*. Thereafter, the defendant filed the *Reply to Plaintiff's Response to Evans Littlegeorge (sic)*  
12 *Summary Judgment* on December 11, 2000.

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15 The Court convened a *Motion Hearing* on December 11, 2000 at 9:00 A.M. CST. The following  
16 parties appeared at the *Hearing*: Attorney William F. Gardner, Attorney Michael P. Murphy, Attorney  
17 Mark L. Goodman, Evans Littlegeorge and Lay Advocate Rick McArthur. Due to extended deliberation  
18 upon the pending dispositive motions, the Court entered its January 22, 2001 *Order (Postponing Trial)*.

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21 **APPLICABLE LAW**

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23 **CONSTITUTION OF THE HO-CHUNK NATION**

24 **Article VII – Judiciary**  
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1 Section 6. Powers of the Tribal Court.

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

5 Article X – Bill of Rights

6 Section 1. Bill of Rights.

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

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

10 Article XII – Sovereign Immunity

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

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

18 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

19 Introduction

20 General Purposes

[p. 2]

21 These policies are issued as the official directive of the obligations of the HoChunk (*sic*) Nation and the  
22 employees to each other and to the public. They are to ensure consistent personnel practices designed to  
utilize to (*sic*) the human resources of the Nation in the achievement of the desired goals and objectives.

23 \* \* \* \*

24 The Ho-Chunk Nation hereby asserts that it has the right to employ the best qualified persons available;  
25 that the continuation of employment is based on the need for work to be performed, availability of  
26 revenues, faithful and effective performance, proper personal conduct, and continuing fitness of

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1 employees; and that all employees are terminable for cause unless otherwise specified in writing as a  
2 prescribed employment term.

### 3 Chapter 3 – Selection, Orientation, Probation

#### 4 KINDS OF EMPLOYMENT

[p. 5]

##### 5 Initial Probationary Employees:

6 New or rehired employees who serve a prescribed period of close supervision and evaluation in  
7 order to assess their ability and adaptation. Nonexempt employees are eligible for overtime.  
8 Exempt employees are eligible for compensation for up to 45 hours regular pay per week.

##### 8 Permanent Full-time Employees:

9 Employees who regularly work a minimum of 32 hours per week on a continuous basis  
10 following satisfactory completion of a probationary period.

##### 10 Limited Term Employees:

11 Employees holding jobs of limited or specific duration arising our (*sic*) of special projects,  
12 position vacancy pending appointment, the absence of a position incumbent, abnormal work loads,  
13 emergencies, “on call” at the enterprises, or other reasons established by the Nation. Limited Term  
14 Employees may work either full- or part-time work schedules, but will not be eligible to use the  
15 Administrative Review Procedure to file formal grievances except in matters pertaining to alleged  
16 discrimination or unfair treatment. Limitation of LTE status is 1 month or 160 hours per year, unless a  
17 one time only 30-day extension is approved by the Division Director and the Personnel Director. Non-  
18 exempt Limited Term Employees will be eligible to earn overtime. Exempt LTE’s are eligible for  
19 compensation for up [to] 45 hours regular pay per week. LTE’s are not eligible for health insurance  
20 programs.

#### 17 Purpose of Probationary Period

[p. 6]

18 The probationary period is an intricate part and extension of the employee selection process during  
19 which the employee will be considered in training and under careful observation and evaluation by  
20 supervisory personnel. This period will be utilized to train and evaluate the employee’s effective  
21 adjustment to work tasks, conduct, observance of rules, attendance and job responsibilities, and to  
22 provide for the release of any probationary employee whose performance does not meet required  
23 standards of job progress or adaptation.

#### 23 Length of Probationary Period

[pp. 6-7]

24 Employees will serve a 90-day probationary period, during which time their job progress will be  
25 formally evaluated by the standards established for their areas of job responsibility.

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1 During Probation

[p. 7]

2 Initial probationary employees are not eligible for some benefits paid for or sponsored by the Nation.  
3 Upon successful completion of the probationary period, employees are considered permanent employees  
4 of the Nation and become eligible for the benefits described herein provided they satisfy the terms and  
5 conditions of the various benefits programs.

6 If, at the conclusion of the employee's probationary period, the employee's performance and  
7 employment conditions have been satisfactory, a retention recommendation is to be made to the  
8 Director, on or before the expiration of the employee's probationary period.

9 Such a recommendation will be accompanied by the complete, final probationary performance  
10 evaluation according to standards developed by the Personnel Department and status change. Upon  
11 approval of the Department Director, the employee shall be advanced to permanent employment status  
12 and eligible for those benefits to permanent employees.

13 Release of New Probationary

14 Employment may be terminated at the will and discretion of the Nation at any time during the  
15 probationary period should such termination be regarded as necessary and appropriate by either the  
16 employee or the Nation. In such cases of probationary release from service to the Nation, formal  
17 advance notice by the Nation is not required.

18 Without notice to the contrary, probationary employees who complete the initial 90 day probation  
19 period, (*sic*) shall automatically become permanent employees. Merit increases shall be processed only  
20 after completion of and receipt of the performance evaluation and status change form.

21 Chapter 5 – Hours, Meals, and Rest Periods

22 Unauthorized Absences

[p. 11]

23 An employee who is absent from his or her assigned work location or schedule without official leave  
24 notice/approval from supervisory personnel for 2 consecutive days or 3 days in a year shall be  
25 considered absent without authorized leave. In such cases, the Nation shall regard the job as abandoned  
26 and the employee automatically terminated, unless the employee can provide the Nation with acceptable  
27 and verifiable evidence of extenuating circumstances.

Chapter 6 – Compensation and Payroll Practices

**RESOLUTION 12/15/98 A**

[p. 15a]

*Non-disciplinary demotions will be assigned to that pay rate the employee would have achieved in the  
lower position if the employee's service had been continuous in the lower position based on his or her*

1 original permanent hire date, which will be retained. Upon the effective date of demotion, the employee  
2 will be assigned a new annual review date and will be placed on a ninety (90) day performance  
3 probation with a possible merit increase. ~~Only employees that have worked for the Nation for over one~~  
4 ~~(1) year and have a good current evaluation will be demoted for non-disciplinary reasons.~~  
**RESOLUTION 3/23/99 G** Only employees that have worked for the Nation for over ninety (90) days  
and have a good current evaluation will be demoted for non-disciplinary reasons.

5 Chapter 8 – Benefits, Leaves, and Holidays

6 General Provisions and Applications [p. 27]

7 Policies, provisions, and procedures that govern the Nation’s benefit program will apply to all  
8 permanent employees, whether exempt or nonexempt status, unless otherwise provided in a particular  
9 benefit plan. While some benefits may earn credit during an employee’s probationary period, eligibility  
10 in many cases will not occur until employees obtain permanent status, or other conditions of  
employment specified herein or contained in the benefit policy/plan booklets.

11 B. Annual Leave [p. 29]

12 An employee’s eligibility to use accrued vacation is based on the employee’s original date of  
13 employment. Initial probationary employees are not eligible to take vacation, but will be given credit  
14 for accrued vacation hours once permanent status is achieved retroactively to their date of employment.  
Limited term employees are not eligible to earn vacation.

15 C. Sick Leave [p. 31]

16 Eligibility: Employees begin to accrue sick leave credit on the date of hire. Initial probationary  
17 employees are not eligible to use sick leave, but will be given credit for accrued sick leave hours once  
18 permanent employment status is achieved retroactively to the month in which credit began to accrue.  
19 Initial probationary employee absences due to illness or non-work related injury will have their pay  
adjusted to reflect an unpaid absence. Limited term employees will not earn sick time.

20 Chapter 12 – Employment Conduct, Discipline, and Administrative Review

21 Discipline Policy [pp. 44-45]

22 The intent of this policy is to openly communicate the Tribal standards of conduct, particularly conduct  
23 considered undesirable, to all employees as a means of avoiding their occurrence.

24 The illustrations of unacceptable conduct cited below are to provide specific and exemplary reasons for  
25 initiating disciplinary action, and to alert employees to the more commonplace types of employment  
26 conduct violations. No attempt has been made here to establish a complete list. Should there arise  
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1 instances of unacceptable conduct not included in the following list, the Nation may initiate disciplinary  
2 action in accordance with policies and procedures.

3 B. Behavior [p. 46]

- 4 17. Making false, malicious, or unfounded statements against co-workers, supervisors,  
5 subordinates, or government officials which tend to damage the reputation or undermine  
6 the authority of those concerned.

6 Types of Discipline

7 C. Suspension [pp. 47-48]

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

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

- 15 \* The supervisor taking the action to suspend an employee will immediately notify the  
16 Department Director and, as soon as possible, prepare a written statement of action taken  
17 and the reasons for such action.
- 17 \* The Department Director will prepare, together with the supervisor, the statement of  
18 charges and document any supporting evidence.
- 19 \* As soon as possible after the initial action, but not later than three working days, the  
20 Department Director will prepare written notification to the affected employee.

21 D. Discharge for Misconduct [p. 48]

22 Employees should be aware that their employment relationship with the HoChunk (*sic*) Nation is  
23 based on the condition of mutual consent to continue the relationship between the employee and  
24 the Nation. Therefore, the employee or Nation is free to terminate the employment relationship  
25 for misconduct, at any time. Recommendations to discharge an employee are to be made to and  
26 authorized by the Department Director.

1 Examples of misconduct are violations of the policies and procedures, absenteeism and  
2 tardiness, insubordination, [and] use of intoxicants and drugs.

3 Initiating Discipline: Consideration and Notice [pp. 48-49]

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

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

9 Service of disciplinary notice will be deemed to have been made upon personal presentation, or by  
10 depositing the notice, postage prepaid, in the U.S. mail, addressed to the employee's last known address  
11 on file.

12 Hearing Levels for Non-gaming [p. 49]

13 Probationary or Limited Term Employees may not grieve on any matters.

14 Administrative Review Process for Non-gaming [p. 50]

15 The burden of proof is on the grievant to show that what he/she is claiming, actually happened. All  
16 levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances shall be  
17 forwarded to the Personnel Department promptly by the grievant. This proof may include  
18 documentation and witnesses.

- 19 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working days  
20 of the action. The Supervisor has an affirmative duty to try and resolve the problem. The  
21 Supervisor has five (5) days to respond to the grievance. She/He must meet with the person and  
22 document the decision.
- 23 2. If there is no relief or response within five (5) days after the end of the time period of the first  
24 step, grieve in writing, on the required form, to the department director or enterprise manager  
25 and the Personnel Department. The manager or director has an affirmative duty to try and  
26 resolve the problem, and has ten (10) days to respond. If the grievance cannot be resolved, go to  
27 step 3. Manager will talk with involved people and document the decision.

**RESOLUTION 6-9-98A**

Tribal Court Review: [p. 50b]

*Judicial Review of any appealable claim may proceed to the HoChunk (sic) Nation Tribal Court after  
the Administrative Review Process contained in this Chapter has been exhausted. The HoChunk (sic)*

1 *Nation Rules of Civil Procedure shall govern any judicial review of an eligible administrative grievance*  
2 *shall (sic) file a civil action with the Trial Court within thirty (30) days of the final administrative*  
3 *grievance review decision.*

3 Limited Waiver of Sovereign Immunity [pp. 50b-51]

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

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

21 Employee Rights [p. 51]

22 *Employee's (sic) have the right to be represented by legal counsel or some other person, the right to hear*  
23 *the charges, evidence and witnesses against him, and the right to cross examine (sic).*

24 Chapter 13 – Employment Separation

25 Layoff [p. 52]

26 *Whenever it becomes necessary in the sole opinion of the Nation to reduce the work force through*  
27 *layoffs, the Nation will endeavor to provide affected employees with at least ten working days notice.*  
28 *In each class of position, employees shall be laid off according to employee status in the following*  
29 *order: Limited term, initial probationary, seasonal, permanent part-time, permanent full-time.*

30 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

31 Rule 5. Notice of Service of Process.

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1 (B) *Summons*. The *Summons* is the official notice to the party informing him/her that he/she is  
2 identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days  
3 (See, *HCNR. Civ. P. 6*) and that a *Default Judgement* may be entered against them if they do not file an  
4 *Answer* in the limited time. It shall also include the name and location of the Court, the case number,  
and the names of the parties. The *Summons* shall be issued by the Clerk of Court and shall be served  
with a copy of the filed complaint attached.

5 Rule 19. Filing and Responding to Motions.

6 (A) Motion. *Motions* may be filed by a party with any pleading or at any time after their first pleading  
7 has been filed. A copy of all written *Motions* shall be delivered or mailed to other parties at least five  
8 (5) calendar days before the time specified for a hearing on the *Motion*. A *Response* to a written *Motion*  
9 must be filed at least one day before the hearing. If no hearing is scheduled, the *Response* must be filed  
with the Court and served on the other parties within ten (10) calendar days of the date the *Motion* was  
filed. The party filing the *Motion* must file any *Reply* within three (3) calendar days.

10 Rule 27. The Nation as a Party.

11 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is named as  
12 a party, the *Complaint*, in the case of an official or employee being sued, should indicate whether the  
13 official or employee is being sued in his or her individual capacity. Service can be made on the Ho-  
14 Chunk Nation Department of Justice and will be considered proper unless otherwise indicated by these  
rules, successive rules of the Ho-Chunk Nation Court, or Ho-Chunk Nation Law.

15 Rule 28. Joining, Consolidating, and Separating Claims.

16 (B) Consolidation of Claims. The Court, on its own *Motion* or upon *Motion* of a party, may order a  
17 joint hearing or trial of any and all claims in an action and of multiple actions to avoid unnecessary costs  
18 or delay. The Court may also separate claims in an action for the convenience of the Court and to avoid  
19 prejudice or delay.

20 Rule 42. Scheduling Conference.

21 Scheduling Order. The Court may enter a scheduling order on the Court's own motion or on the motion  
22 of a party. The Scheduling Order may be modified by motion of a party upon a showing of good cause  
or by leave of the Court.

23 Rule 55. Summary Judgement.

24 Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary Judgement* on  
25 any or all of the issues presented in the action. The Court will render summary judgement in favor of  
26 the moving party if there is no genuine issue as to material fact and the moving party is entitled to  
27

1 judgement as a matter of law.

2  
3 **FINDING OF FACTS**  
4

5 1. The parties received proper notice of the July 12 and December 11, 2000 *Motion Hearing(s)*.

6  
7 2. The defendant initially moved to dismiss CV 00-10 on the basis that the plaintiff lacked a  
8 protectible property interest in her personnel file, thereby eliminating a concrete case or controversy.

9 *Defendant's Brief in Support of Motion to Dismiss*, p. 3, lines 12-19 and p. 4, line 5-8; *see also*  
10 Courtroom Log/Minutes (July 12, 2000) pp. 2, 9. The defendant amended his motion by additionally  
11 claiming that the CONSTITUTION OF THE HO-CHUNK NATION [hereinafter CONSTITUTION], ART. XII  
12 barred the Court from awarding monetary damages. *Brief in Support of Motion to Dismiss for Def. Ho-*  
13 *Chunk Nation and Def. Greengrass in his Official Capacity* [hereinafter *HCN Brief in Support*], p. 7,  
14 lines 20-23; *see also* Courtroom Log/Minutes (Dec. 11, 2000) p. 5.  
15  
16

17 3. The plaintiff requested that the Court grant a monetary award for lost wages and equitable relief  
18 in the form of an expungement from the personnel file and a mandate that the defendant refrain from  
19 certain unacceptable conduct. *Complaint* (Jan. 25, 2000) p. 2, lines 12-14; *see also* PERSONNEL  
20 MANUAL, Ch. 12, Part B, No. 8, p. 46.  
21

22 4. The defendants, Ho-Chunk Nation and Donald Greengrass, in his official capacity, moved to  
23 dismiss CV 00-38 on the basis that the defendants never terminated the plaintiff, foreclosing her ability  
24 to grieve under the Administrative Review Process. *HCN Brief in Support*, p. 5, lines 12-13; *see also*  
25 Courtroom Log/Minutes (Dec. 11, 2000) pp. 16-17. Alternatively, the defendants maintain that even if  
26  
27

1 the Court finds a termination, the plaintiff did not possess the ability to grieve as a probationary  
2 employee. *Id.*, p. 6, lines 15-17, 23-24; *see also* Courtroom Log/Minutes (Dec. 11, 2000) p. 10.

3 5. The plaintiff requested that the Court grant a monetary award for lost wages and benefits,  
4 including reasonable attorney's fees and costs, and equitable relief in the form of reinstatement against  
5 the defendants, Ho-Chunk Nation and Donald Greengrass, in his official capacity. *Amended Complaint*  
6 (June 2, 2000) p. 6, lines 17-22.

7  
8 6. The plaintiff requested that the Court grant a monetary award for punitive damages on the basis  
9 of injury to reputation and/or defamation, including reasonable attorney's fees and costs, against the  
10 defendants, Donald Greengrass and Evans Littlegeorge, in their individual capacities. *Amended*  
11 *Complaint* (June 2, 2000) p. 6, lines 22-24 and p. 7, lines 1-2.

12  
13 7. The plaintiff has maintained a relatively steady working relationship with the Ho-Chunk Nation  
14 since beginning employment as a Planning Department Secretary on September 14, 1987. The plaintiff  
15 held uninterrupted permanent employment status, apart from a maternity leave (May 18 – August 12,  
16 1998), from March 7, 1994 until the incidents in question in these consolidated cases. *HCN Brief in*  
17 *Support*, Exhibit G: Ho-Chunk Nation Employee Summary Form.

18  
19 8. On December 13, 1999, the plaintiff's voluntary, non-disciplinary demotion from the  
20 Department of Veterans Affairs [hereinafter Veterans Affairs] to the Department of Administration  
21 [hereinafter Administration] became effective. *HCN Brief in Support*, Exhibit D: Ho-Chunk Nation  
22 Employee Status Change Notice; *see also Defendants' Amended Answer* (June 22, 2000) p. 2, lines 1-3.

23  
24 9. On December 21, 1999, the defendant, Donald Greengrass, authorized a suspension of the  
25 plaintiff for a period of three (3) working days. *Memorandum in Support of Motion for Summary*  
26 *Judgment* (June 1, 2000) Exhibit 1: Disciplinary Action Form; *see also Defendant's Brief in Support of*

27

1 *Motion to Dismiss* (May 19, 2000) p. 2, lines 1-4.

2 10. On December 28, 1999, the plaintiff grieved the three (3) day suspension to her supervisor,  
3 Donald Greengrass, Executive Director of Administration. The plaintiff sought, in part, relief in the  
4 form of “[e]xpungement of record, receive backpay and receive accrued leave (sick and annual).”

5 *Memorandum in Support of Motion for Summary Judgment* (June 1, 2000) Exhibit 3: Employee  
6 Grievance Form and attachment; *see also Defendant’s Brief in Support of Motion to Dismiss* (May 19,  
7 2000) p. 2, lines 5-7.

9 11. On January 4, 2000, the defendant, Donald Greengrass, provided a resolution to the Level 1  
10 Grievance, awarding the following:

- 11 1. You will receive your back pay for the following days:  
12 December, 29 Wednesday – 8 hours  
13 December, 30, Thursday – 4 hours and Holiday 4 hours  
14 December 31, Friday – 8 hours Holiday for the New Years  
15 January 3, 2000, Monday – 8 hours and  
16 January 4, Tuesday – 4 hours.
- 17 2. The sick and annual leave will be accrued.
- 18 3. The record will be sealed in your file.

19 *Defendant’s Brief in Support of Motion to Dismiss* (May 19, 2000) Exhibit A: Memo regarding Level I  
20 Grievance.

21 12. The plaintiff chose not to provide the foregoing memo to the Ho-Chunk Nation Payroll  
22 Department for appropriate action, deciding to await the outcome of the instant case(s). *Donald*  
23 *Greengrass’s Notice and Motion of Dismissal* (Nov. 13, 2000) Attachment 1: Deposition of Margaret  
24 Grace Garvin [hereinafter Deposition of Plaintiff], p. 62, lines 5-25 and p. 63, lines 1-7.

25 13. On February 15, 2000, Donald Greengrass, Executive Director of Administration, authorized the  
26 immediately effective termination of the plaintiff from her position of Executive Administrative  
27

1 Assistant, noting the occurrence of such discipline “within [the] 90 day Probation.” *Defendants’*  
2 *Amended Answer* (June 22, 2000) Exhibit G: Ho-Chunk Nation Employee Status Change Notice  
3 [hereinafter Status Change Notice]. Donald Greengrass purported to “release[ ] [the plaintiff] from  
4 employment for cause under Ho Chunk (*sic*) Nation Policies and Procedures Chapter 12.” *Defendants’*  
5 *Amended Answer*, Exhibit G: Memorandum regarding Release from employment; *see also Defendants’*  
6 *Amended Answer*, p. 3, lines 5-6, 16-17.  
7

8 14. On February 15, 2000, Donald Greengrass required the plaintiff to depart a family funeral in  
9 order to return to Ho-Chunk Nation Headquarters in Black River Falls, WI whereupon Mr. Greengrass,  
10 in the presence of Evans Littlegeorge, Executive Director of Veterans Affairs; Sandy Martin, Director,  
11 Division of Executive Facilities; and Amy Littlegeorge, Security Officer, presented termination papers  
12 to the plaintiff, directed the plaintiff to pack-up her belongings and arranged for security personnel to  
13 escort the plaintiff from the premises. Deposition of Plaintiff, p. 27, lines 6-25 and p. 28, lines 1-14.  
14 The defendants, Ho-Chunk Nation and Donald Greengrass, in his official capacity, describe the event as  
15 follows: “The plaintiff was served with a termination letter, supporting papers, and a Request to  
16 Terminate form. The plaintiff was then asked to pack up her desk and she was escorted from the  
17 building.” *HCN Brief in Support*, p. 4, lines 4-6; *see also Courtroom Log/Minutes* (Dec. 11, 2000) p.  
18 16.  
19  
20

21 15. On February 15, 2000, “there was not a lengthy explanation or discussion about the reasons for  
22 the termination.” *Courtroom Log/Minutes* (Dec. 11, 2000) p. 17. The plaintiff was not afforded  
23 anything resembling a hearing. “[A]t that time when she was given the paperwork, it’s not like she was  
24 asked, ‘OK, what’s your response.’ She was simply handed the papers, and her ability . . . to respond,  
25 she exercised that through the grievance process.” *Id.*  
26  
27

1 16. On February 17, 2000, Donald Greengrass telephoned the plaintiff at home and left one or more  
2 messages on her answering machine, requesting that she return to work on February 18, 2000 since the  
3 termination proved ineffective. *Defendants' Amended Answer* (June 22, 2000) p. 3, lines 20-24; *see also*  
4 Courtroom Log/Minutes (Dec. 11, 2000) p. 16 and Deposition of Plaintiff, p. 37, lines 24-25 and p. 38,  
5 lines 1-3.

6  
7 17. On February 28, 2000, Donald Greengrass drafted his response to the plaintiff's February 21,  
8 2000 Level 1 Grievance, indicating in closing, "the termination is still in effect." *Response to*  
9 *Defendant (sic) Ho-Chunk Nation and Donald Greengrass (in his official capacity) Motion to Dismiss*  
10 (Dec. 8, 2000) Exhibit 1: Response to Grievance. The defendant offered justifications for the  
11 termination throughout his response. *Id.* Likewise, the defendants, Ho-Chunk Nation and Donald  
12 Greengrass, in his official capacity, at times, "admit the plaintiff was terminated by Defendant  
13 Greengrass on February 15, 2000." *Defendants' Amended Answer* (June 22, 2000) p. 3, lines 3-4; *see*  
14 *also e.g.* Deposition of Plaintiff, p. 25, line 11, p. 27, line 4 and p. 30, line 25.

15  
16 18. The plaintiff's personnel file does not substantiate the termination, but instead notes a  
17 demotional transfer to Majestic Pines Casino as a Blackjack Dealer on March 6, 2000 despite the  
18 plaintiff's absence from work for thirteen (13) consecutive working days (Feb. 16 – March 3, 2000).  
19 *HCN Brief in Support*, Exhibit G: Ho-Chunk Nation Employee Summary Form.

20  
21 19. Prior to February 15, 2000, Donald Greengrass issued no verbal or written reprimands to the  
22 plaintiff.<sup>5</sup> Deposition of Plaintiff, p. 32, lines 6-16 and p. 34, lines 5-6.

23  
24 20. The deadline for amendments to the pleadings was November 3, 2000. *Scheduling Order* (HCN

25 \_\_\_\_\_  
26 <sup>5</sup> A record of a verbal reprimand or copy of a written reprimand will appear in an employee's personnel file. PERSONNEL  
27 MANUAL, Ch. 12, Parts A and B, p. 47.

1 Tr. Ct., July 21, 2000) p. 1; *see also Order (Granting Motion to Consolidate)* (HCN Tr. Ct., Sept. 26,  
2 2000).

## 3 4 **DECISION**

### 5 6 7 **I**

8  
9 The defendants, Ho-Chunk Nation and Donald Greengrass, in his official capacity, have asserted  
10 a factual/substantive attack against the underlying foundation of subject matter jurisdiction in the June 2,  
11 2000 *Amended Complaint*. *See Karen Raines v. Ho-Chunk Nation*, CV 99-32 (HCN Tr. Ct., Aug. 4,  
12 1999) pp. 7-9; *see also HCN Brief in Support*, pp. 2-3. The Court accordingly “look[s] beyond the  
13 jurisdictional allegations [of] the complaint and view[s] whatever evidence has been submitted on the  
14 issue to determine whether in fact subject matter jurisdiction exists.” *Raines* at 8 *quoting Grafon Corp.*  
15 *v. Hausermann*, 602 F.2d 781, 783 (7<sup>th</sup> Cir. 1979). The preceding *Findings of Fact* and the below  
16 examination follow this analytical approach.  
17

#### 18 19 **A. Did Donald Greengrass, Executive Director of Administration, 20 terminate the plaintiff from her position as Executive Administrative Assistant on February 15, 2000?**

21 On February 15, 2000, Donald Greengrass presented the plaintiff with a Status Change Notice,  
22 imposing the immediately effective discipline of termination; a Request for Approval to  
23 Suspend/Terminate: Administration/Programs/Non-Gaming [hereinafter Termination Request], seeking  
24 an immediately effective termination; a memorandum regarding the release from employment; and  
25 supportive memoranda from Evans Littlegeorge. The defendants contend that since the Status Change  
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1 Notice requires an authorizing signature from Black River Falls Personnel, the lack thereof negates the  
2 attempted termination. Likewise, the Termination Request requires approval by the Ho-Chunk Nation  
3 Department of Personnel, and Donald Greengrass failed to secure the necessary review and compliance  
4 verification. The Court, however, finds this argument unpersuasive and immaterial.

5         The PERSONNEL MANUAL imparts sole authorization to terminate to the supervising Department  
6 Director. PERSONNEL MANUAL, Ch. 12, Part D, p. 48. The Ho-Chunk Nation Legislature [hereinafter  
7 Legislature] required approval of the Personnel Director for suspensions exceeding five (5) working  
8 days, but expressed no such requirement in the context of terminations. *Id.*, Part C, p. 47. The Court  
9 does not wish to conjecture on the reason(s) behind this decision, noting only the lack of ambiguity in  
10 the relevant language.  
11

12         Also, a reasonable person could not misinterpret the actions of Donald Greengrass on February  
13 15, 2000. Rather insensitively, Mr. Greengrass directed the plaintiff to depart a family funeral and  
14 return to Ho-Chunk Nation Headquarters for the sole purpose of termination. The plaintiff arrived in the  
15 Administration Department where she received the aforementioned documents in the presence of  
16 supervisory staff and Security Officer Amy Littlegeorge. Ms. Littlegeorge then escorted the plaintiff  
17 from the building after the plaintiff compiled her personal belongings. Following the discharge, the  
18 defendants repeatedly referred to it as such, upholding “the termination” in the Level I Grievance  
19 response and “admit[ting] the plaintiff was terminated” within the *Defendants’ Amended Answer*.  
20

21         Furthermore, the Court characterizes the argument that the plaintiff seemingly remained  
22 employed up to and through her “demotional transfer” to Majestic Pines Casino as contrived. The  
23 plaintiff remained unemployed or absent from work for a period of thirteen (13) consecutive working  
24 days after her discharge from the position of Executive Administrative Assistant. If the Court accepted  
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1 the defendants' contention that the plaintiff's termination proved ineffective, then the defendants had a  
2 mandatory obligation to automatically terminate the plaintiff for missing two (2) consecutive working  
3 days without authorized leave. *Id.*, Ch. 5, p. 11. This subsequent termination never occurred because  
4 the plaintiff was discharged on February 15, 2000.

5  
6 **B. Did the plaintiff lack the ability to grieve her termination**  
7 **through the Administrative Review System due to her continuing**  
8 **probationary status as a voluntary, non-disciplinary demotional**  
9 **employee?**

10 The defendants selectively cite precedent for endorsement of the argument that probationary  
11 employees, initial or permanent, may not initiate an administrative grievance. The defendants direct the  
12 Court to a 1999 decision wherein Chief Judge Mark Butterfield granted an uncontested *Motion for*  
13 *Summary Judgment. Nina Garvin v. Carol Laustrup, Ho-Chunk Casino*, CV 98-54 (HCN Tr. Ct., Apr.  
14 28, 1999). In the *Discussion*, the Court paraphrased the prohibitory language of the PERSONNEL  
15 MANUAL, finding that a promotional probationary employee "is ineligible to grieve any matter." *Id.*, pp.  
16 2-3; *see also* PERSONNEL MANUAL, Ch. 12, p. 49.

17 The defendants neglected to cite a 1997 decision penned by then Associate Judge Joan  
18 Greendeer-Lee despite Attorney Michael P. Murphy serving as legal counsel in that case as well. *Gloria*  
19 *Visintin v. Ho-Chunk Nation and Office of the President*, CV 97-29 (HCN Tr. Ct., June 19, 1997). The  
20 Court firmly held "that a promotional probationary employee is entitled to grieve under the  
21 Administrative Review Process if they held a permanent position prior to their promotion." *Id.*, p. 5.  
22 Judge Greendeer-Lee emphasized the clear distinctions pervading the PERSONNEL MANUAL with  
23 regards to Limited Term, initial probationary and permanent employees. *Id.*, p. 4. The Court found  
24 particularly disconcerting the defendant's implausible position that "a permanent employee loses all due  
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1 process protections by accepting a promotion.” *Id.*, p. 5, fn. 2. The Court remarked that the Legislature  
2 failed to expressly extend the grievance prohibition to include promotional probationary employees. *Id.*  
3 Ultimately, the defendants, by and through Attorney Murphy, settled the action prior to trial.

4 The PERSONNEL MANUAL purports to “ensure consistent personnel practices,” yet the defendants  
5 urge that the Court treat permanent employees of the Nation in an inconsistent manner. PERSONNEL  
6 MANUAL, *Introduction*, p. 2. The Legislature clearly distinguishes the different kinds of employment at  
7 the outset of the PERSONNEL MANUAL, e.g. initial probationary, permanent full-time and Limited Term  
8 Employees. *Id.*, Ch. 3, p. 5. An initial probationary employee serves a ninety (90) day probationary  
9 period in which supervisory staff train the individual and formally evaluate his/her overall job  
10 performance. *Id.*, Ch. 3, p. 6. An initial probationary employee remains ineligible for certain  
11 employment benefits, but upon successful completion of the probationary period, “the employee shall be  
12 advanced to permanent employment status and eligible for those benefits to permanent employees.” *Id.*,  
13 Ch. 3, p. 7.

14  
15  
16 Once a permanent employee, the employee becomes terminable only for cause, e.g. misconduct.<sup>6</sup>  
17 *Id.*, *Introduction*, p. 2 and Ch. 12, p. 48. In contrast, an initial probationary employee “may be  
18 terminated at the will and discretion of the Nation at any time during the probationary period should  
19 such termination be regarded as necessary and appropriate.” *Id.*, Ch. 3, p. 7. Also, permanent  
20 employees may use annual and sick leave unlike their initial probationary counterparts. *Id.*, Ch. 8, Part  
21 B, p. 29 and Part C, p. 31. Furthermore, initial probationary employees receive differing treatment in  
22 relation to layoffs. The Ho-Chunk Nation conducts layoffs by releasing employees in the following  
23  
24

25 \_\_\_\_\_  
26 <sup>6</sup> In the instant case, Donald Greengrass purported to terminate the plaintiff for cause as noted in the Memorandum  
27 regarding Release from employment.

1 order: Limited Term, initial probationary, seasonal, permanent part-time, and permanent full-time. *Id.*,  
2 Ch. 13, p. 52.

3 A non-disciplinary demotional employee serving his/her probationary period retains permanent  
4 employment status. *Supra; see also Id.*, Ch. 6, p. 15a. As noted above, the PERSONNEL MANUAL affords  
5 different benefits to permanent employees, but then appears to provide a subset of permanent employees  
6 no protection for these benefits by denying probationary employees the ability to grieve on any matters.  
7 *Id.*, Ch. 12, p. 49. In *Visintin*, the Court did not deem that the Legislature intended to encompass  
8 permanent probationary employees within this prohibition, and the Court now re-embraces this analysis.  
9 To do otherwise would deprive some permanent employees of a right due only to the inarticulate use of  
10 general terminology, thereby sanctioning inconsistent treatment of permanent employees. Moreover,  
11 the provision in question proves erroneous on its face. The Legislature earlier extends the right to grieve  
12 “matters pertaining to alleged discrimination or unfair treatment” to Limited Term Employees while  
13 later divesting this group of any such recourse. *Id.*, Ch. 3, p. 5.

16 The Court determines that the plaintiff had the right to grieve her February 15, 2000 discharge  
17 through the Administrative Review System. This holding, however, does not address the appropriate  
18 degree of pre or post-termination procedural due process. As a permanent employee, the plaintiff held a  
19 protectible property interest in her employment regardless of whether the Court recognized her ability to  
20 file a grievance.

22 **C. Did the defendants afford the plaintiff minimal procedural due**  
23 **process protections as guaranteed by the CONSTITUTION, ART. X**  
24 **§ 1(a)(8) in relation to her termination?**

25 The Ho-Chunk Nation Supreme Court [hereinafter Supreme Court] has determined that a  
26 permanent employee maintains a property right in their continued employment, affirming this Court’s  
27

1 line of due process cases.<sup>7</sup> *Louella A. Kelty v. Jonette Pettibone and Ann Winneshiek, in their official*  
2 *capacities*, SU 99-02 (HCN S. Ct., July 27, 1999) p. 2. The Supreme Court recognized the necessity of  
3 providing sufficient notice to the employee whenever the Ho-Chunk Nation intends to detrimentally  
4 affect this property right. *Id.*, p. 3; *see also Debra Knudson v. Ho-Chunk Nation Treasury Department*,  
5 SU 98-01 (HCN S. Ct., Dec. 1, 1998) pp. 3-4. Specifically, “[n]otice must at a minimum give an  
6 employee a sufficient understanding of the underlying facts so that the employee may consider whether  
7 or not to file a grievance with sufficient knowledge.” *Kelty*, SU 99-02, p. 3 *citing White*, CV 95-17, p.  
8 13; *see also PERSONNEL MANUAL*, Ch. 12, p. 48. The Supreme Court indicated that an insufficient  
9 notice is tantamount to no notice, and therefore violative of procedural due process. *Kelty*, SU 99-02, p.  
10 4.  
11

12  
13 The Supreme Court also identified specific provisions in the PERSONNEL MANUAL which prove  
14 capable of fulfilling the procedural due process requirement of a hearing, the indispensable analogue to  
15 notice. *Knudson*, SU 98-01, pp. 2, 4-5; *see also Cleveland Board of Education v. Loudermill*, 470 U.S.  
16 532, 542 (1985) (pre-termination notice and opportunity for a hearing represent the essential principles  
17 of procedural due process). The Legislature assures aggrieved employees “the right to hear the charges,  
18 evidence and witnesses against him[/her], and the right to cross examine (*sic*).” PERSONNEL MANUAL,  
19

20 \_\_\_\_\_  
21 <sup>7</sup> The Court confronted and established the requirements of procedural due process in the following decisions: *Gary*  
22 *Lonetree, Sr. v. John Holst, as Slot Director, and Ho-Chunk Casino Slot Dept.*, CV 97-127 (HCN Tr. Ct., Sept. 24, 1998) pp.  
23 7-11 *aff'd Gary Lonetree, Sr. v. John Holst, as Slot Director, and Ho-Chunk Casino Slot Department*, SU 98-07 (HCN S. Ct.,  
24 Apr. 29, 1999); *Vincent Cadotte v. Tris Yellowcloud, Director of Compliance*, CV 97-145 (HCN Tr. Ct., Apr. 24, 1998) pp. 6-  
25 10; *Joan Whitewater v. Millie Decorah, as Finance Director, and Sandy Martin, as Personnel Director*, CV 96-88 (HCN Tr.  
26 Ct., Jan. 20, 1998) pp. 4-6 *aff'd Millie Decorah, as Finance Director of the Ho-Chunk Nation, and Sandy Martin, as*  
27 *Personnel Director v. Joan Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998); *Sandra Sliwicki v. Rainbow Casino, Ho-*  
*Chunk Nation*, CV 96-10 (HCN Tr. Ct., Dec. 9, 1996) pp. 12-18 *rev'd on other grounds Sandra Sliwicki v. Rainbow Casino,*  
*Ho-Chunk Nation*, SU 96-15 (HCN S. Ct., July 20, 1997); *Gale S. White v. Department of Personnel, Ho-Chunk Nation*, CV  
95-17 (HCN Tr. Ct., Oct. 14, 1996) pp. 11-15; *Lonnie Simplot, Linda Severson and Carol J. Ravet v. Ho-Chunk Nation*  
*Department of Health*, CV 95-26, 27 and 96-05 (HCN Tr. Ct., Aug. 29, 1996) pp. 15-19.

1 Ch. 12, p. 51. Consequently, the Supreme Court noted its disapproval of a particular employment  
2 practice, wherein the appellant “was not afforded the opportunity to confront or answer allegations made  
3 against her” prior to termination. *Knudson*, SU 98-01, p. 3.

4 In *Knudson*, the Supreme Court deemed the appellant’s understandable early departure from the  
5 informal pre-termination hearing as harmless since “her rights [were] preserved in Level I of the  
6 Administrative Review Process for Non-gaming employees’ (*sic*), as outlined in the Personnel Policies,  
7 Ch. 12, p. 50.” *Knudson*, SU 98-01, pp. 4-5. At Level I, an employee’s supervisor “has an affirmative  
8 duty to try and resolve the problem,” and is required to “meet with the person and document the  
9 decision.” PERSONNEL MANUAL, Ch. 12, p. 50. Thereafter, the department director or enterprise  
10 manager likewise “has an affirmative duty to try and resolve the problem,” and is required to “talk with  
11 involved people and document the decision” at Level II. *Id.* The grievant bears the burden of proof  
12 throughout the Administrative Review Process, and may attempt to satisfy such burden through  
13 “documentation and witnesses.” *Id.* These significant post-termination protections serve to  
14 correspondingly decrease the formality of the pre-termination hearing. *See Cleveland*, 470 U.S. at 545  
15 and 547, fn. 12.

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18 This Court originally adopted the analytical framework of the United States Supreme Court for  
19 examining the procedural due process component based, in part, upon the stated position of the Ho-  
20 Chunk Nation Department of Justice. *Simplot et al.*, CV 95-26, 27 and 96-05, pp. 15-16 *quoting*  
21 *Informal Opinion of Attorney General Jo Deen B. Lowe to President Jo Ann Jones* (July 14, 1995); *see*  
22 *also White*, CV 95-17, p. 11. Accordingly, “[t]he procedural demands of due process require at a  
23 minimum that the employee be given notice of the specific incident of misconduct, the nature of the  
24 violation and the right to be heard about it.” *Cadotte*, CV 97-145, p. 8. As noted above, the pre-  
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1 termination hearing has no established substantive or procedural structure. The characteristics of a  
2 hearing will inevitably transform “depending upon the importance of the interests involved and the  
3 nature of the subsequent proceedings.” *Cleveland*, 470 U.S. at 545 quoting *Boddie v. Connecticut*, 401  
4 U.S. 371, 378 (1971); see also *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). The constitutional  
5 guarantee that an employee receive a “meaningful opportunity to be heard before their property can be  
6 taken away” proves the only constant. *Lonetree, Sr.*, CV 97-127, p. 10 citing *Armstrong v. Manzo*, 380  
7 U.S. 545, 552 (1965); see also *Cleveland*, 470 U.S. at 542 (a pre-termination hearing represents a “root  
8 requirement” of procedural due process) and *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972)  
9 (“the right to some kind of prior hearing is paramount”).  
10

11           The Court has noted a few of the factors underlying the necessity of a pre-termination hearing,  
12 namely immediate loss of income and the associated embarrassment and humiliation flowing from  
13 severe employment discipline. *White*, CV 95-17, p. 12. Other factors include: the greater potential for  
14 accuracy in the employment decision, *Cleveland*, 470 U.S. at 543; the expected lapse of time before  
15 securing other employment, *Id.*; the effect a questionable work record has on future employment  
16 possibilities, *Id.*; the inability to fully commit to another employer during the pendency of the  
17 individual’s grievance/case, *Id.*, p. 549 (Marshall, J. concurring); the resulting disruption to an  
18 individual’s personal and economic life, *Id.*; the time needed to ultimately resolve a  
19 grievance/complaint, *Id.*; and the potential inability to collect unemployment compensation due to the  
20 type of employment separation. *Id.* The question then arises, “In order to afford minimal procedural  
21 due process, what should occur during a pre-termination hearing?” In recognition of the post-  
22 termination procedures mandated by the PERSONNEL MANUAL, the Court simply requires that the  
23 employee be “given a chance to tell *his[/her] side of the story.*” *Lonetree, Sr.* CV 97-127; see also  
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1 *Gilbert*, 520 U.S. at 929. This modest requirement, coupled with sufficient notice and adherence to the  
2 Administrative Review Process, does not erect a significant burden for the Ho-Chunk Nation. “It is only  
3 where the government acts improperly that procedural due process is truly burdensome. And that is  
4 precisely when it is most necessary.” *Roth*, 408 U.S. at 591 (Marshall, J. dissenting).

5  
6 In the instant case, the defendants cursorily noted that the plaintiff received no opportunity to  
7 respond on February 15, 2000. The Court has no evidence indicating whether Donald Greengrass,  
8 Executive Director of Administration, or President Jacob Lonetree met and/or spoke with the plaintiff as  
9 required in Levels I and II of the Administrative Review Process. The Court requires further  
10 presentation of evidence on each point, and, therefore, partially denies the defendants’ November 13,  
11 2000 *Motion to Dismiss*. The Court shall not consider the plaintiff’s October 27, 2000 deposition  
12 testimony taken over eight (8) months after the termination as capable of satisfying the hearing  
13 component of constitutional procedural due process.  
14

15 **D. Does the plaintiff retain the ability to receive unpaid backpay for**  
16 **an overturned three (3) day suspension by means of a favorable**  
17 **Level I resolution within the Administrative Review Process?**

18 The plaintiff indicated in her deposition that but for her decision to retain the resolution  
19 memorandum, the Ho-Chunk Nation Payroll Department would have processed the directive to reward  
20 backpay for the relevant period. The defendants have never commented upon this set of circumstances,  
21 but rather have raised the defense of official immunity to deny the claim for monetary relief. *See*  
22 CONSTITUTION, ART. XII § 2. Due to this unresolved issue, the Court partially denies the defendants’  
23 November 13, 2000 *Motion to Dismiss*.  
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**E. Does the plaintiff retain the ability to seek an expungement of documents in her personnel file related to an overturned suspension if the associated Level I resolution granted partial relief in the form of an award of backpay, accrued annual and sick leave, and sealing of documents?**

The defendants argue that the plaintiff cannot base a cause of action solely upon a request for relief since the Executive Director of Administration overturned the underlying suspension. The defendants further contend that the Court may only exercise jurisdiction over personnel cases challenging a standing suspension or discharge, absent the implication of a liberty or property interest. *See* HO-CHUNK NATION LEGISLATIVE RESOLUTION 6/9/98A, PERSONNEL MANUAL, Ch. 12, pp. 50b-51. The argument continues that because the plaintiff clearly holds no liberty or property interest in her personnel file, the January 25, 2000 *Complaint* must be dismissed for lack of subject matter jurisdiction. However, the issue of whether an employee maintains a liberty or property interest in his/her personnel file is anything but clear.

In 1976, United States Supreme Court Justice William J. Brennan raised a concern with the potential impact lodging stigmatizing information in a personnel file has on future employment opportunities, thus hindering an individual's liberty interest in "engag[ing] in any of the common occupations of life." *Roth*, 408 U.S. at 572 quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see *Bishop v. Wood*, 426 U.S. 341, 350-352 (1976) (Brennan, J. dissenting). Federal circuit courts have since expressed diverging opinions on whether the act of publication, giving rise to a deprivation of occupational liberty claim, occurs when an employer deposits information into a personnel file or discloses it to a prospective employer. *See generally* Barman, *The Publication Debate in Deprivation of*

1 *Occupational Liberty Claims*, 47 U. KAN. L. REV. 171 (1998). Due to the absence of discussion on this  
2 point in light of the summary rejection of the claim, the Court partially denies the defendants' November  
3 13, 2000 *Motion to Dismiss*.

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8 The plaintiff requested relief against the defendants, Donald Greengrass and Evans Littlegeorge,  
9 in their individual capacities, in the form of a monetary award for punitive damages on the basis of  
10 injury to reputation and/or defamation, including reasonable attorney's fees and costs. The  
11 CONSTITUTION, however, prohibits the Court from awarding anything but "declaratory and non-  
12 monetary injunctive relief" against officials acting outside the scope of their authority. CONSTITUTION,  
13 ART. XII § 2; *see also Maureen Arnett v. Ho-Chunk Nation Department of Administration*, CV 00-60  
14 (HCN Tr. Ct., Jan. 8, 2001) pp. 11-13. In response, the plaintiff directs the Court to its constitutional  
15 ability "to issue all remedies in law and in equity." *Id.*, ART. VII § 6(a). The Court recognizes the  
16 seeming conflict between the constitutional provisions, but the Court finds that it must perform its duties  
17 within the parameters established by ARTICLE XII in order to "preserve[ ] the internal consistency and  
18 cohesiveness of the document." *Chloris Lowe, Jr. and Stewart J. Miller v. Ho-Chunk Nation*  
19 *Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Dec. 14, 2000) *appeal pending*  
20 *Chloris Lowe, Jr. and Stewart J. Miller v. Ho-Chunk Nation Legislature Members Elliot Garvin et al.*,  
21 SU 00-15 (HCN S. Ct.). Moreover, to accept the plaintiff's position would eviscerate an entire section of  
22 the CONSTITUTION.  
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1           The Court recognizes that the alleged conduct of the defendants may represent unacceptable  
2 behavior as defined by the Legislature, but the plaintiff has failed to request any permissible form of  
3 declaratory and non-monetary injunctive relief. PERSONNEL MANUAL, Ch. 12, Part B, No. 17, p. 46.  
4 The deadline for amendments to the pleadings passed on November 3, 2000. Therefore, the Court  
5 dismisses all causes of action against the defendants articulated in the June 2, 2000 *Amended Complaint*.  
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8           **IT IS SO ORDERED** this 9<sup>th</sup> day of March, 2001 at the Ho-Chunk Nation Trial Court in Black  
9 River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

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12 Hon. Todd R. Matha  
13 HCN Associate Trial Judge  
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