

1 Rule 5 (C)(1)(a). The Court Bailiff, Willa RedCloud, effected service upon the defendant, Randall C.
2 Mann, on June 15, 2000.¹ The *Summons* informed the defendant of the right to file an *Answer* within
3 twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(B)*. The *Summons* also
4 cautioned the defendant that a *default judgment* could result from failure to file within the prescribed
5 time period.

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7 Randall C. Mann, by and through DOJ Attorney John S. Swimmer, timely filed the *Defendant's*
8 *Amended Answer and Notice and Motion to Strike Claim* on June 27, 2000, serving such documents on
9 the plaintiff via first class mail.² In response, the Court entered its July 5, 2000 *Order (Motion Hearing)*
10 accompanied by *Notice(s) of Hearing*, informing the parties of the date, time and location of the *Motion*
11 *Hearing/Scheduling Conference*. Prior to the *Hearing/Conference*, the plaintiff filed an amendment to
12 her pleadings on July 7, 2000. The Court convened the *Motion Hearing/Scheduling Conference* on July
13 14, 2000 at 1:00 P.M. CST. The following parties appeared at the *Hearing/Conference*: Dolores A.
14 Greendeer, plaintiff; Lay Advocate Roger B. Littlegeorge,³ plaintiff's counsel; and DOJ Attorney John
15 S. Swimmer, defendant's counsel.⁴

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17 The parties timely filed *Preliminary Witness List(s)* as specified within the July 14, 2000
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19 ¹ The *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*] permit the Court to serve the *Complaint* upon
20 the Ho-Chunk Nation Department of Justice [hereinafter DOJ] when an official or employee is being sued in their official or
individual capacity. *HCN R. Civ. P. 27(B)*.

21 ² The Court does not understand why the defendant captioned his pleading as "*Amended Answer*" since the defendant had
filed no prior *Answer* with the Court.

22 ³ On July 14, 2000, Lay Advocate Roger B. Littlegeorge submitted a *Certificate of Representation* on behalf of the plaintiff.

23 ⁴ The Court, in part, denied the defendant's *Motion to Strike* from the bench as he asserted an irrelevant defense. The
24 defendant argued in the *Motion* that "[t]he Defendant is a sovereign Indian Nation and asserts its sovereign immunity to the
25 Plaintiff's claim seeking a written apology," and "the Trial Court [can] not grant any monetary award against the Nation or its
26 officials, (*sic*) and employees acting within the scope of their authority." *Motion to Strike*, CV 00-50 (June 27, 2000) at 1.
The defendant, however, did not address the situation wherein the official or employee acted outside the scope of their duties
or authority. The defendant acknowledged that the plaintiff's pleadings alleged harassment, *Id.*, but obviously could not
articulate how an official or employee could harass within the scope of their duties or authority. See CONSTITUTION OF THE
HO-CHUNK NATION [hereinafter CONSTITUTION], ART. XII §§ 1, 2; see also Courtroom Log/Minutes, CV 00-50 (*Scheduling*
Conference/Motion Hearing, July 14, 2000) at 4.

1 *Scheduling Order*. The plaintiff then exercised her right to amend her pleadings through the October 19,
2 2000 *Amended Complaint*. The defendant reacted by filing the October 20, 2001 *Defendant's Notice*
3 *and Motion to Extend Discovery Period*, requesting additional time to uncover evidence relevant to a
4 new cause of action asserted by the plaintiff. In response, the Court entered its October 24, 2000 *Order*
5 *(Motion Hearing)* accompanied by *Notice(s) of Hearing*, informing the parties of the date, time and
6 location of the *Motion Hearing*. Prior to convening the *Hearing*, the defendant filed the *Defendant's*
7 *Notice and Motion for Partial Summary Judgment and Motion for Withdrawal* on October 27, 2000.
8 The Court convened the *Motion Hearing* on November 3, 2000 at 1:30 P.M. CST. The following parties
9 appeared at the *Hearing*: Dolores A. Greendeer, plaintiff; Lay Advocate Roger B. Littlegeorge,
10 plaintiff's counsel; and DOJ Attorney John S. Swimmer, defendant's counsel.⁵

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13 The parties agreed to convert the *Trial* to a *Motion Hearing* at the November 21, 2000 *Pre-Trial*
14 *Conference*. Courtroom Log/Minutes, CV 00-50 (*Pre-Trial Conference*, Nov. 21, 2000) at 2. The Court
15 required the plaintiff to respond to the pending *Motion for Summary Judgment* at least one (1) day
16 before the scheduled *Hearing*. *Id.* at 3. On November 30, 2000, the plaintiff filed the *Plaintiff's Brief in*
17 *Support to Deny Motion for Summary Judgment*. The Court convened the *Motion Hearing* on December
18 1, 2000 at 9:00 A.M. CST. The following parties appeared at the *Hearing*: Dolores A. Greendeer,
19 plaintiff; Lay Advocate Roger B. Littlegeorge, plaintiff's counsel; Randall C. Mann, defendant; and
20 DOJ Attorney John S. Swimmer, defendant's counsel. Following the *Motion Hearing*, the defendant
21 filed the December 8, 2000 *Affidavit of Ona Garvin* and December 15, 2000 *Post Trial Brief*. *See*
22 Courtroom Log/Minutes, CV 00-50 (*Motion Hearing*, Dec. 1, 2000) at 17-18.

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26 ⁵ The Court declined to entertain arguments on the October 27, 2000 *Motion for Summary Judgment* due to its submission just
27 prior to the previously scheduled *Motion Hearing*, deferring the issue until a later date. Courtroom Log/Minutes, CV 00-50

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2 **APPLICABLE LAW**
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4 **CONSTITUTION OF THE HO-CHUNK NATION**

5 Article VII – Judiciary
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7 Section 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be vested in
8 the Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the
9 Ho-Chunk Nation.

9 Section 5. Jurisdiction of the Judiciary.

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

14 Section 6. Powers of the Trial Court.

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

18 Article XII – Sovereign Immunity

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

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

26 (*Motion Hearing*, Nov. 3, 2000) at 1, 2. The Court did grant the *Motion to Extend the Discovery Period* in light of the mutual
27 agreement of the parties. *Id.* at 2; *see also Amended Scheduling Order*, CV 00-50 (HCN Tr. Ct., Nov. 6, 2000).

1 HO-CHUNK NATION JUDICIARY ACT OF 1995

2 Section 5. Subpoenas.

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4 Any judge of the trial court and, if authority is delegated by the chief judge of the trial court,
5 then the clerk of court shall have the authority to issue subpoenas to compel the attendance of witnesses
6 or the production of documents or things. The failure to comply with a subpoena shall subject the
7 person not complying to the contempt power of the court. A person present in court may be required by
8 the court to testify in the same manner as if a subpoena were issued.

7 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

8 Introduction

9
10 General Purposes [p. 2]

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

14 This system provides means to recruit, select, develop, and maintain an effective and responsible work
15 force. It shall include policies for employee hiring and advancement, training and career development,
16 job classification, salary administration, retirement, fringe benefits, discipline, discharge, and other
17 related activities.

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17 It is the responsibility of the employer and employees to abide by these policies and procedures.

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

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20 Personal Appearance Standards [p. 43]

21 Employees are expected to dress in a manner consistent with the nature of work performed. If there are
22 questions as to what constitutes proper attire, employees should consult with supervisory personnel.
23 Employees who are inappropriately dressed, in the opinion of supervisory personnel, may be sent home
24 and required to return to work in acceptable attire. Under this circumstance, employees will not be paid
25 for the time away from work.

25 HO-CHUNK NATION LEGISLATURE RESOLUTION 6-9-98A [pp. 50b-51]

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1 NOW, THEREFORE BE IT RESOLVED, that the Ho-Chunk Nation Legislature pursuant to its
2 constitutional authority, hereby amends the Ho-Chunk Nation Personnel Policies and Procedures by
3 inserting the following language to Chapter 12 (Employee Conduct, Discipline, and Administrative
4 Review) following the Administrative Review Process section:

4 Tribal Court Review

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

8 Limited Waiver of Sovereign Immunity

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

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

20 HO-CHUNK RULES OF CIVIL PROCEDURE

21 Rule 5. Notice of Service of Process.

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

1 (C) *Methods of Service of Process.*

2 (1) Personal Service. The required papers are delivered to the party in person by the bailiff, or
3 when authorized by the Court, a law enforcement officer from any jurisdiction, or any other
4 person not a party to the action who is eighteen (18) years of age or older. Personal service is
required for the initiation of actions in the following:

5 (a) Relief requested is over \$5,000.00, excluding the enforcement of foreign child
6 support orders; or

7 Rule 27. The Nation as a Party.

8 (B) Civil Actions. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is named as
9 a party, the *Complaint*, in the case of an official or employee being sued, should indicate whether the
10 official or employee is being sued in his or her individual capacity. Service can be made on the Ho-
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.

11 Rule 55. Summary Judgement

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

15 Rule 58. Amendment to or Relief from Judgement or Order.

16 (A) Relief from Judgement. A *Motion to Amend* or for relief from judgement, including a request for a
17 new trial shall be made within ten (10) calendar days of the filing of judgement. The *Motion* must be
18 based on an error or irregularity which prevented a party from receiving a fair trial or a substantial legal
error which affected the outcome of the action.

19 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not later than
20 ten (10) calendar days after entry of judgement, the Court may amend its findings or conclusions or
21 make additional findings or conclusions, amending the judgement accordingly. The motion may be
22 made with a motion for a new trial. If the Court amends the judgement, the time for initiating an appeal
23 commences upon entry of the amended judgement. If the Court denies a motion filed under this rule, the
time for initiating an appeal from the judgement commences when the Court denies the motion on the
24 record or when an order denying the motion is entered, whichever occurs first. If within thirty (30) days
after the entry of judgement, the Court does not decide a motion under this Rule or the judge does not
sign an order denying the motion, the motion is considered denied. The time for initiating an appeal
from judgement commences in accordance with the Rules of Appellate Procedure.

25 (C) Erratum Order or Reissuance of Judgement. Clerical errors in a court record, including the
Judgement or *Order*, may be corrected by the Court at any time.

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1 (D) Grounds for Relief. The Court may grant relief from judgements or orders on motion of a party
2 made within a reasonable time for the following reasons: (1) newly discovered evidence which could not
3 reasonably have been discovered in time to request a new trial; or (2) fraud, misrepresentation or serious
4 misconduct of another party to the action; or (3) good cause if the requesting party was not personally
5 served in accordance with Rule 5(c)(1)(a) or (b); did not have proper service and did not appear in the
6 action; or (4) the judgement has been satisfied, released, discharged or is without effect due to a
7 judgement earlier in time.

8 Rule 61. Appeals.

9 Any *final Judgement* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme
10 Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure*, specifically
11 *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent actions of a *final Judgement* or
12 Trial Court *Order* must follow the HCN *Rules of Appellate Procedure*.

13 **FINDINGS OF FACT**

- 14 1. The parties received proper notice of the December 1, 2000 *Motion Hearing*.
- 15 2. The plaintiff, Dolores A. Greendeer, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
16 439A001010, and during the period in question worked as a Slot Shift Supervisor at Rainbow Casino.
- 17 3. The defendant, Randall C. Mann, worked as the Assistant General Manager of Rainbow Casino
18 during the period in question.
- 19 4. On June 9, 1997, then General Manager of Rainbow Casino, Godfrey Parraz, implemented the
20 following relevant dress code provision as derived from the HO-CHUNK NATION PERSONNEL POLICIES
21 AND PROCEDURES MANNUAL [hereinafter PERSONNEL MANUAL] personal appearance standards:
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23 Administrative and Supervisory personnel's appearance is of the utmost
24 importance, and are expected to dress in a business like fashion. *Dress* shorts
25 or culottes may be worn no shorter that (*sic*) 2 inches above the knee.
26 Dresses or skirts must not be shorter that (*sic*) 1 inch above the knee.

27 *Complaint*, CV 00-50 (June 14, 2000) Attachment #2. The defendant did not dispute the continuing

1 validity of the foregoing provision. *See* Courtroom Log/Minutes (*Motion Hearing*, Dec. 1, 2000) at 7.

2 5. On May 4, 2000, the plaintiff reported to her immediate supervisor, Assistant Slot Director Sarah
3 Ortiz, who did not indicate that the plaintiff was inappropriately attired. *Id.* at 11. The plaintiff labored
4 on the bill acceptor project in her office and away from public view until directed to return home by Slot
5 Director Lindley Thompson. *Id.* at 12.

6 6. On May 4, 2000, the plaintiff wore maroon knee length dress shorts, a white short-sleeved shirt,
7 and white tennis shoes. *Id.* at 11; *see also* Defendant's Exhibit A. The plaintiff recounts wearing the
8 same ensemble to work on at least twelve (12) prior occasions. Courtroom Log/Minutes (*Motion*
9 *Hearing*, Dec. 1, 2000) at 12.

10 7. On May 4, 2000, the defendant directed Lindley Thompson to inform the plaintiff that he
11 deemed her inappropriately attired for a supervisor, and that the plaintiff would need to return home to
12 change clothing. *Id.* at 12. The defendant was unaware of the plaintiff's involvement with the bill
13 acceptor project prior to issuing his directive to Lindley Thompson. *Id.* Due to the time of day, the
14 plaintiff could not possibly return to work, thereby losing wages for the remainder of her shift. *Id.* at 2;
15 *see also* PERSONNEL MANUAL, Chpt. 12 at 43.

16 8. The defendant sent the plaintiff home for the same alleged infraction on three (3) prior
17 occasions. Courtroom Log/Minutes (*Motion Hearing*, Dec. 1, 2000) at 3. The plaintiff presented no
18 testimony or documentary evidence elaborating on the particulars of the other instances.

19 9. The defendant testified that "[he] never actually supervised [the plaintiff], [he] just supervised
20 her director," Lindley Thompson. *Id.* at 6.

21 10. On June 7, 2000, then Executive Director of the Department of Business, F. William Johnson,
22 responded to the plaintiff's Level 2 Administrative Grievance, stating in part: "It is also this office's
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1 recommendation that Rainbow Casino develop a specific dress code policy for all employees. This will
2 avoid management’s arbitrary interpretation of what constitutes proper personal appearance standards.”
3 *Complaint*, Attachment #10.

4 11. After commencement of the current action, then General Manager of Rainbow Casino, Ona
5 Garvin, sought to transfer the plaintiff in early July 2000 to a comparable position at Ho-Chunk Casino.
6 Courtroom Log/Minutes (*Motion Hearing*, Dec. 1, 2000) at 7-8, 12-13; *see also Affidavit of Ona*
7 *Garvin*, CV 00-50 (Dec. 8, 2000). The plaintiff declined the transfer. *Affidavit of Ona Garvin* (Dec. 8,
8 2000).

10 12. The plaintiff intimated that the attempt to transfer represented a retaliatory action of the
11 defendant. *Amended Complaint*, CV 00-50 (Oct. 19, 2000) at 2. The plaintiff asserted that the transfer
12 documents bore the signature of the defendant, but no such documents appear within the court record.
13 Courtroom Log/Minutes (*Motion Hearing*, Dec. 1, 2000) at 18.

15 13. The plaintiff did not exercise her opportunity to call the defendant as a witness at the December
16 1, 2000 *Motion Hearing*. *Id.* at 15; *see also* HO-CHUNK NATION JUDICIARY ACT OF 1995 § 5.

22 **DECISION**

24 Both parties requested that the Court determine the instant matter in accordance with *HCN R.*
25 *Civ. P.* 55 since there exists no dispute of material fact. The defendant prevails, in part, due to the
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1 plaintiff's failure to name the appropriate parties in the suit. The plaintiff prevails, in part, on her
2 request for an equitable remedy against the defendant for acting outside the scope of his duties or
3 authority. The Court examines the bases for these holdings below.

4 **I. Do attachments to the pleadings possess evidentiary value if not**
5 **introduced into evidence in open court?**

6 The Supreme Court of the Ho-Chunk Nation [hereinafter Supreme Court] earlier criticized the
7 Court for retaining exhibits within the court record after a successful objection by the defendant
8 concerning their omission from the evidence on the basis of relevancy. *Louella A. Kelty v. Jonette*
9 *Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., July 27, 1999) at 4-5,
10 fn. 3. The Supreme Court wrote:
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12 Despite that ruling, the trial court judge apparently did not return the exhibits
13 or issue an order to seal them. The exhibits were provided to this Court as
14 part of the record. If items are ruled as excluded, the items should be
15 immediately returned to the party so that they do not remain part of the
record. Or, the trial court should issue an order to seal the documents from
being used further so that they do not become part of the record on appeal.

16 *Id.* The court record and the case file are regarded as the same set of documents. In order to exclude an
17 item from the court record, the Supreme Court acknowledges the need of prevailing on an objection to
18 that effect. In order to successfully attack pleading attachments, an opposing party would logically be
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21 required to assert similar objections or denials to such attachments since those documents would
22 otherwise remain undisturbed in the record.

23 “Documents attached to the complaint are incorporated into it and become part of the pleading
24 itself.” *Int’l Mktg. Ltd. v. Archer-Daniels-Midland Co., Inc.*, 192 F.3d 724, 729 (7th Cir. 1999) *citing*
25 *FED. R. CIV. P. 10(c)*; *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). The Court serves such
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1 documents upon the defendant, resulting in the defendant's awareness of their presence within the court
2 record. In the event that the defendant fails to answer the complaint, the Court presumes the defendant's
3 tacit agreement with the factual allegations contained or incorporated into the complaint. Consequently,
4 "[w]hen a default judgment is entered, facts alleged in the complaint may not be contested." *Black v.*
5 *Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) citing *Thomson v. Wooster*, 114 U.S. 104 (1885). The Court
6 affords identical treatment to factual allegations uncontested within an answer.
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8 In the instant case, the defendant did not object to the attachments to the pleading, and even
9 offered testimony regarding one of the documents. Courtroom Log/Minutes (*Motion Hearing*, Dec. 1,
10 2000) at 7. The Court ultimately relies upon two (2) attachments to the June 14, 2000 *Complaint* within
11 *Findings of Fact*, Nos. 4 and 10, and these and other attachments shall remain within the court record for
12 purposes of appeal. The plaintiff did file an *Amended Complaint*, but this pleading neither abandoned
13 nor superseded any allegations presented within the original *Complaint*. Rather, the plaintiff's Lay
14 Advocate added a single cause of action (*i.e.* retaliatory transfer) and sought to better articulate the
15 remaining causes of action initially set forth by the *pro se* plaintiff. The Court perceives no change in
16 the factual substance of the June 14, 2000 *Complaint*, and the defendant did not deny the factual
17 allegations implicated by and within the relevant attachments. *See Defendant's Amended Answer and*
18 *Notice and Motion to Strike Claim*, CV 00-50 (June 27, 2000) at 1. Therefore, the Court deems that it
19 may consult attachments to the pleadings provided such documents prove relevant and their
20 consideration is not "substantially outweighed by the danger of unfair prejudice [or] confusion of the
21 issues. . . ." FEDERAL RULES OF EVIDENCE [hereinafter FED. R. EVID.], Rule 403.⁶
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26 ⁶ The Supreme Court has adopted the FED. R. EVID. for use in the Ho-Chunk Nation Judiciary Branch. *In re Adoption of*
27 *Federal Rules of Evidence* (HCN S. Ct., June 5, 1999).

1 **II. Did the plaintiff name the appropriate parties to permit a request**
2 **for relief of money damages or reinstatement?**

3 A plaintiff may proceed against the Ho-Chunk Nation or its subentities for monetary damages
4 only if the Ho-Chunk Nation Legislature [hereinafter Legislature] grants an express waiver of sovereign
5 immunity.⁷ CONSTITUTION, ART. XII § 1. As pertains to the instant case, such a waiver exists in the
6 form of HO-CHUNK NATION LEGISLATIVE RESOLUTION 6/9/98A. PERSONNEL MANUAL, Ch. 12 at 50b-
7 51. Otherwise, a plaintiff may proceed against an individual official or employee if such individual
8 acted outside the scope of their duties or authority. CONSTITUTION, ART. XII § 2. The plaintiff,
9 however, would not be entitled to monetary damages, but only declaratory and non-monetary injunctive
10 relief. *Id.*

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12 The Supreme Court confirmed the foregoing analysis, declaring that “[t]he language of the Ho-
13 Chunk Nation Constitution is clear.” *Millie Decorah, as Fin. Dir. of the Ho-Chunk Nation, and Sandy*
14 *Martin, as Pers. Dir. v. Joan Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 4. The Supreme
15 Court continued by stating as follows:
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17 The Tribal Court may only award equitable relief where officials of the Ho-
18 Chunk Nation act beyond the scope of their duties. Equitable relief is
19 defined as “relief sought in a court with equity powers as, for example, in the
20 case of one seeking an injunction or specific performance *instead of money*
damages.” Black’s Law Dictionary, abridged 6th ed., (emphasis added).
The definition of equitable relief is defined as nonmonetary relief.

21 *Id.* Therefore, the plaintiff cannot receive an award of monetary damages since she failed to name the

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23 ⁷ However, in *Joan Marie Whitewater, Dean Allen Whitewater, Kathleen Lynn Whitewater, Kenneth Lee Whitewater,*
24 *Barbara Ann Engen, Vicki Lee Johnson, Tina Marie Danielski, Gerald Ray Whitewater, and Larry Edward Whitewater v.*
25 *Ho-Chunk Nation Office of Tribal Enrollment and Ho-Chunk Nation Legislature* [hereinafter *Joan Marie Whitewater, et al. v.*
26 *Ho-Chunk Nation Office of Tribal Enrollment, et al.*], Case No.: CV 99-62, the Court awarded past per capita distributions in
the absence of a waiver due to the unconstitutional actions of the defendants that deprived the plaintiffs of those distributions.
See Judgment (HCN Tr. Ct., April 3, 2001) at 30. This *Judgment* has been appealed in *Joan Marie Whitewater, et al. v. Ho-*
Chunk Nation Office of Tribal Enrollment, et al., Case No.: SU 01-06.

1 Ho-Chunk Nation or one of its subentities as a party to this suit. The Court accordingly denies the
2 plaintiff's request for lost wages and mileage reimbursement.

3 The Court denies the plaintiff's request for reinstatement on different grounds. Testimony
4 offered at the December 1, 2000 *Motion Hearing* and evidence contained in the court record clearly
5 indicate that General Manager Ona Garvin initiated the attempted transfer of the plaintiff. The plaintiff,
6 however, has not joined Ona Garvin as a defendant in this suit. Rather, the plaintiff intimates that the
7 attempted transfer represented a retaliatory action by the defendant. The plaintiff alleged that "since the
8 filing of the grievance, [the defendant] had plaintiff transferred to another facility in what *could be*
9 *construed* as retaliatory in nature." *Amended Complaint* at 2 (emphasis added). The plaintiff goes no
10 further to substantiate this allegation other than asserting that the defendant signed the relevant transfer
11 documents. Such documents do not appear in the court record, but their mere presence would not justify
12 a finding of retaliation when only speculation underlies the cause of action. For purposes of this *Order*,
13 the Court cannot grant the equitable injunctive relief of reinstatement against the unnamed official
14 responsible for the attempted transfer.
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18 **III. Does the defendant's instruction to send the plaintiff home for**
19 **the purpose of changing clothing represent an arbitrary and**
20 **capricious employment decision?**

21 The Court first examined the appropriate level of judicial deference for reviewing a decision
22 arising out of the Administrative Review Process in *Gale S. White v. Dep't of Pers., Ho-Chunk Nation*,
23 CV 95-17. The Court simply stated that it "must find whether the decision . . . was supported by
24 substantial evidence and was not unreasonable." *White*, CV 95-17 (HCN Tr. Ct., Oct. 14, 1996) at 17.
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1 Shortly thereafter, the Court reiterated this standard in part, dispensing with the reasonableness inquiry
2 due to an inability of the employer to satisfy the substantial evidence component. *Sandra Sliwicki v.*
3 *Rainbow Casino, Ho-Chunk Nation*, CV 96-10 (HCN S. Ct., Dec. 9, 1996) at 18 *rev'd on other grounds*
4 SU 96-15 (HCN S. Ct., June 20, 1997). The Court then elaborated upon the established inquiry by
5 analogizing to the federal standards utilized for reviewing administrative agency determinations. The
6 core test, however, remained basically unchanged. *See Debra Knudson v. Ho-Chunk Nation Treasury*
7 *Department*, CV 97-70 (HCN Tr. Ct., Feb. 5, 1998) at 13-16. The Court explained:

9 When addressing employment disputes, this Court has held that
10 administrative agencies of the Nation must make reasonable determinations
11 based on substantial evidence. [citations omitted]. In practice, this Court
12 recognizes that a high degree of deference should exist so that agencies, who
13 by nature are more experienced and educated to perform their specific tasks,
14 are not second-guessed by the Nation's judiciary. . . .

15 This deference is translated into a standard of review where the Trial
16 Court must determine whether or not an agency action or decision could be
17 characterized as arbitrary and capricious. This standard simply questions
18 whether or not an agency action or decision is reasonable and supported by
19 substantial evidence. As a long standing element of administrative law,
20 "substantial evidence" has been defined as something "more than a mere
21 scintilla . . . or such relevant evidence as a reasonable mind might accept as
22 adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305
23 U.S. 197, 229 (1938). Before this Court will overturn an agency's decision, a
24 clear error in judgment unsupported by the whole record must exist; the
25 Court will not substitute its own judgment for a reasonable action, decision,
26 or interpretation made by an agency of the Nation. *See Chevron U.S.A. v.*
27 *Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984); *Citizens to Preserve*
Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

28 *Id.* at 13-14. Therefore, the introduction of the arbitrary and capricious language has not affected the
29 underlying analysis. The Supreme Court upheld *Knudson* on the basis of applying the two-part inquiry:
30 whether the decision proved "reasonable, in light of the evidence" and was "supported by substantial
31 evidence." *Knudson*, SU 98-01 (HCN S. Ct., Dec. 1, 1998) at 8-9; *see also Gary Lonetree, Sr. v. John*

1 *Holst, as Slot Dir., and Ho-Chunk Casino Slot Dep't.*, CV 97-127 (HCN Tr. Ct., Sept. 24, 1998) at 12
2 *aff'd* SU 98-07 (HCN S. Ct., April 29, 1999). When reviewing the actions of the defendant, the Court
3 employs this well-defined two-part inquiry.

4 The applicable PERSONNEL POLICIES provision reads, in relevant part: “Employees are expected
5 to dress in a manner consistent with the nature of work performed. If there are questions as to what
6 constitutes proper attire, employees should consult with supervisory personnel. Employees who are
7 inappropriately dressed, in the opinion of supervisory personnel, may be sent home. . . .” PERSONNEL
8 POLICIES, Ch. 12 at 43. In the instant case, the plaintiff consulted with supervisory personnel, Assistant
9 Slot Director Sarah Ortiz – the plaintiff’s immediate supervisor. Rainbow Casino had also adopted a
10 dress code in 1997, and the defendant has offered no evidence to show that subsequent management has
11 rescinded this code. The dress code stated that “*dress* shorts . . . may be worn no shorter than (*sic*) 2
12 inches above the knee.” *Complaint*, Attachment #2. The photograph presented by the defendant
13 demonstrates compliance with this allowance. So, the plaintiff not only consulted with her immediate
14 supervisor, but her manner of dress did not violate the standing dress code.
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17 Furthermore, the plaintiff’s manner of dress was “consistent with the nature of work performed.”
18 PERSONNEL POLICIES, Ch. 12 at 43. The plaintiff worked on the bill acceptor project in her office out of
19 public view on the day in question. The defendant saw the plaintiff in a common area/hallway off the
20 casino floor, and directed Lindley Thompson to send the plaintiff home without an understanding of her
21 duties on that day. The defendant attempts to argue that the nature of work performed is that of a
22 supervisor, but this interpretation would negate the direction to consult with supervisory personnel, and
23 only demonstrates the need for a job specific dress code. The former Executive Director of Business
24 recognized the wisdom in developing such a code so as to “avoid management’s *arbitrary* interpretation
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1 of what constitutes proper personal appearance standards.” *Complaint*, Attachment #10 (emphasis
2 added).

3 The defendant also wants the Court to adopt its view that any individual within the supervisory
4 chain may send an individual home for improper dress. In the instant case, the chain of command would
5 seem to include the Assistant Slot Director, Slot Director, Assistant General Manager, General Manager,
6 and arguably the Executive Director of Business and President of the Ho-Chunk Nation. This broad
7 interpretation does not permit the immediate supervisor to exercise any meaningful discretion, leaves the
8 employee in a state of complete uncertainty in the absence of a clear dress code, and creates the
9 possibility for the types of arbitrary decisions as foreseen by the Executive Director of Business. The
10 plaintiff consulted with supervisory personnel on May 4, 2000, and that supervisor, in light of the
11 plaintiff’s duties, did not direct the plaintiff to return home for the purpose of changing clothes. The
12 plaintiff should be capable of placing some reasonable reliance upon this decision of supervisory
13 personnel. The PERSONNEL POLICIES construct a procedure which the plaintiff adhered to, but the
14 defendant did not. The PERSONNEL POLICIES are intended to “ensure consistent personnel practices,” but
15 in this case the defendant advocates in favor of inconsistency. PERSONNEL POLICIES, Intro. at 2.
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18 Based upon the foregoing, the defendant’s decision was neither reasonable nor supported by
19 substantial evidence, and therefore represents an arbitrary and capricious action. The Court accordingly
20 directs the defendant to extend a written apology to the plaintiff within a period of two (2) weeks from
21 the entrance of this *Order*. This remedy represents an appropriate form of non-monetary equitable
22 relief. *See supra*. However, establishing a single violation of the PERSONNEL POLICIES does not
23 constitute harassment, and the Court makes no finding to that effect.
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26 The parties retain the right to file a timely post judgment motion with this Court in accordance
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1 with *HCN R. Civ. P. 58, Amendment to or Relief from Judgement or Order*. Otherwise, “[a]ny *final*
2 *Judgement or Order* of the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court.⁸ The
3 *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate Procedure* [hereinafter *HCN R. App.*
4 *P.*], specifically [*HCN R. App. P.*], Rule 7, Right of Appeal.” *HCN R. Civ. P. 61*. The appellant “shall
5 within thirty (30) calendar days after the day such judgment or order was rendered, file with the
6 [Supreme Court] Clerk of Court, a Notice of Appeal from such judgment or order, together with a filing
7
8
9 fee of thirty-five dollars (\$35 U.S.)” *HCN R. App. P. 7(b)(1)*. “All subsequent actions of a *final*
10 *Judgement or Trial Court Order* must follow the [*HCN R. App. P.*].” *HCN R. Civ. P. 61*.

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13 **IT IS SO ORDERED** this 2nd day of July, 2001 at the Ho-Chunk Nation Trial Court in Black
14 River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

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17 _____
18 Hon. Todd R. Matha
19 HCN Associate Trial Judge

20 _____
21 ⁸ The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.” *Louella*
22 *A. Kelty v. Jonette Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2.
23 The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard “to determine if an error of law was
24 made by the lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek, Ona Garvin, Rainbow Casino*
25 *Mgmt.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov’t II v. Chloris A. Lowe, Jr. and*
26 *Kathyleen Lone Tree-Whiterabbit*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and *JoAnn Jones v. Ho-Chunk Nation*
27 *Election Bd. and Chloris Lowe*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted the following
definition of abuse of discretion: “any unreasonable, unconscionable and arbitrary action taken without proper consideration
of facts and law pertaining to the matter submitted.” *Youngthunder, Sr.*, SU 00-05 at 2 *quoting* BLACK’S LAW DICTIONARY
11 (6th ed. 1990). Regarding findings of fact, the Supreme Court has required an appellant to “demonstrate[] clear error with
respect to the factual findings of the trial court.” *Coalition II*, SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn*
Doornbos, SU 96-12 (HCN S. Ct., Mar. 25, 1997) at 1-2