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

Roy J. Rhode,
Plaintiff,

v.

**Ona M. Garvin, as General Manager of
Rainbow Casino,**
Defendant.

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Case No.: **CV 00-39**

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether to uphold the termination of a gaming employee. The Court declines to do so since the plaintiff did not receive a pre-termination hearing required by the CONSTITUTION OF THE HO-CHUNK NATION [hereinafter CONSTITUTION], ART. X § 1(a)(8). The Court has consistently interpreted the Due Process Clause of the Ho-Chunk Nation as providing the minimal procedural due process protections of notice and a hearing.

PROCEDURAL HISTORY

The plaintiff, Roy J. Rhode, initiated the current action by filing a *Complaint* with the Court on May 5, 2000. Consequently, the Court drafted a *Summons* accompanied by the above-mentioned *Complaint* on May 5, 2000, and served the documents upon the defendants in

1 accordance with the *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R.Civ. P.*]¹
2 The *Summons* informed the defendants of the right to file an *Answer* within twenty (20) days of
3 the issuance of the *Summons* pursuant to *HCN R. Civ. P.* 5(B). The *Summons* also cautioned the
4 defendants that a *default judgment* could result from failure to file within the prescribed time
5 period.
6

7 The defendants, Ona M. Garvin and F. William Johnson, by and through DOJ Attorney
8 Michael P. Murphy, timely filed the *Defendant's Answer and Notice of Appearance* on May 25,
9 2000, serving such documents on the plaintiff via first class certified mail. The Court
10 accordingly issued *Notice(s) of Hearing*, informing the parties of the date, time and location of
11 the *Scheduling Conference*. On June 8, 2000, the Court convened the *Scheduling Conference*
12 which resulted in the June 14, 2000 *Scheduling Order*. In compliance with the *Order*, the
13 defendants filed the June 15, 2000 *Defendants' Preliminary Witness List*.
14

15 On July 31, 2000, Attorney Joseph L. Young filed a *Notice of Appearance* on behalf of
16 the plaintiff. The defendants later filed the August 18, 2000 *Defendants' Notice and Motion for*
17 *Partial Summary Judgment* and *Defendants' Brief in Support of Motion for Partial Summary*
18 *Judgment*. Subsequently, the defendants filed the September 14, 2000 *Defendants' Notice &*
19 *Motion to Exclude Plaintiff's Witnesses* and *Memorandum in Support of Defendants' Motion to*
20 *Exclude Plaintiff's Witnesses at Trial*. The Court entertained the foregoing *Motions* at the
21 previously scheduled *Pre-Trial Conference*. The following parties appeared at the September
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28 ¹ The *HCN R. Civ. P.* permit the Court to serve the *Complaint* upon 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).

1 15, 2000 *Conference*: Roy Rhode, plaintiff; Attorney Joseph L. Young, plaintiff's counsel; and
2 DOJ Attorney Michael P. Murphy, defendants' counsel.²

3 The Court convened the *Trial* on November 7-8, 2000, and the following parties
4 participated at *Trial*: Roy Rhode, Attorney Joseph L. Young, Ona Garvin, plaintiff and DOJ
5 Attorney Michael P. Murphy. Following the *Trial*, the defendant filed the January 5, 2001
6 *Defendant's Proposed Findings of Fact & Conclusions of Law*. The plaintiff chose not to submit
7 a similar filing. See Court Transcript, CV 00-39 (*Trial*, Nov. 8, 2000) [hereinafter *Court*
8 *Transcript*] at 365.
9
10

11 **APPLICABLE LAW**

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

13 **Article X – Bill of Rights**

14 **Section 1. Bill of Rights.**

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

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

18 **Article XII – Sovereign Immunity**

19 **Section 1. Immunity of Nation from Suit.** The Ho-Chunk Nation shall be immune from suit
20 except to the extent that the Legislature expressly waives its sovereign immunity, and officials or
21 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
22 immune from suit.
23
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26 ² At the *Pre-Trial Conference*, the Court denied the *Motion to Exclude Plaintiff's Witnesses* since the plaintiff
27 previously provided a listing of potential witnesses in his May 5, 2000 *Complaint*. See Attachment 1 at 4. The
28 inclusion of the *Preliminary Witness List* within the *Complaint* did not prejudice the defendants, but rather provided
them greater notice than usual. See Courtroom Log/Minutes, CV 00-39 (*Pre-Trial Conference*, Sept. 15, 2000) at 2.
In addition, the Court granted the *Defendants' Motion for Partial Summary Judgment* based upon the consistent
application of the CONSTITUTION OF THE HO-CHUNK NATION [hereinafter CONSTITUTION], ART. XII. See *id*; see
also *infra*.

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

6 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

7 Introduction

8 General Purposes

[p. 2]

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

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

17 The Ho-Chunk Nation hereby asserts that it has the right to employ the best qualified persons
18 available; that the continuation of employment is based on the need for work to be performed,
19 availability of revenues, faithful and effective performance, proper personal conduct, and
20 continuing fitness of employees; and that all employees are terminable for cause unless
21 otherwise specified in writing as a prescribed employment term.

22 *****

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

24 Chapter 6 – Compensation and Payroll Practices

25 HO-CHUNK NATION LEGISLATURE RESOLUTION 8-10-99 C

[p. 22]

26 Comparable Wage – A wage that is within one (1) dollar of the current wage.

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

28 Discipline Policy

[pp. 44-45]

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

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

6 C. Performance [p. 46]

- 7 1. Inefficiency, incompetency, or negligence in the performance of duties, including
8 failure to perform assigned tasks or training or failure to discharge duties in a
9 prompt, competent, and reasonable manner.

10 Types of Discipline

11 D. Discharge for Misconduct [p. 48]

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

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

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

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

- 22 * The degree of severity of the offense
23 * The number, nature, and circumstances of similar past offenses
24 * Employee's length of service
25 * Provocation, if any, contributing to the offense
26 * Previous warnings related to the offense
27 * Consistency of penalty application
28 * Equity and relationship of penalty to offense

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

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

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

3 Administrative Review Process for Non-gaming

[p. 50]

4
5 The burden of proof is on the grievant to show that what he/she is claiming, actually happened.
6 All levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances
7 shall be forwarded to the Personnel Department promptly by the grievant. This proof may
include documentation and witnesses.

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

15 ENTERPRISE EMPLOYEES ONLY

[p. 50a]

16 Matters Covered by Administrative Review System: Eligible employees who have complaints,
17 problems, concerns, or disputes with another employee, the nature of which causes a direct
18 adverse effect upon the aggrieved employee, may initiate an administrative review according to
19 established procedures. Such matters have to do with: specific working conditions, safety,
20 unfair treatment, disciplinary actions (except verbal reprimands), compensation, job
classification, reassignment, any form of alleged discrimination, a claimed violation,
misinterpretation, or inequitable application of these policies and procedures.

21 Hearing Levels for Enterprise:

- 22 4. Terminations are to be grieved in sequence to:

23 Level 1 Supervisor and General/Facility Manager
24 Level 2 Executive Director
25 Level 3 Trial Court

26 The following Administrative Review Process is to be followed in seeking relief for all
27 grievances. The burden of proof is on the grievant to show that what he/she is claiming, actually
28 happened. All grievances will be courtesy copied to the Personnel Department promptly, by the
grievant. This proof may include documentation and witness statements.

1 Level 1. A grievance will be submitted directly to the immediate supervisor and the Personnel
2 Department within five (95) [sic] calendar days of the disciplinary action by the grievant. The
3 supervisor will meet with the General/Facility Manager to discuss and investigate the grievance.
4 Together, the supervisor and the General/Facility Manager will document and sign the response
5 within ten (10) calendar days of receipt. The grievant will be notified of the response by
6 certified mail with a courtesy copy sent to the Personnel Department.

7 Level 2. Within five days after the end of the previous deadline, and [sic] appeal may be filed in
8 writing to the Executive Director or his/her designee. The appeal may be submitted to level 2, if
9 the grievant has not received a response to the grievance or has not reached an acceptable
10 agreement in seeking to the grievance [sic]. The Executive Director has fifteen days for initial
11 review and response. The response shall be sent to the appellant by certified mail with a
12 courtesy copy sent to the Personnel Department.

13 HO-CHUNK NATION LEGISLATURE RESOLUTION 6-9-98A

[pp. 50b-51]

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

18 Tribal Court Review

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

24 Limited Waiver of Sovereign Immunity

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

The Trial Court may grant equitable relief mandating that the Ho-Chunk Nation prospectively
follow its own laws, and as necessary to remedy any past violations of tribal law. Other
equitable remedies shall include, but not be limited to: an order of the Court to the Personnel
Department to reassign or reinstate the employee, a removal of negative references from
personnel files, an award of bridged service credit, and a restoration of seniority.
Notwithstanding the remedial powers noted in this Resolution, the Court shall not grant any

1 remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing in this Limited
2 Waiver or within the Personnel Policies and Procedures Manual shall be construed to grant a
3 party any legal remedies other than those included in this section.

4 Employee Rights

[p. 51]

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

7 HO-CHUNK NATION APPROPRIATIONS AND BUDGET PROCESS ACT, 2 HCC § 4

8 Sec. 4 (4). Definitions.

9 e. "Fiscal Year" means the period beginning on July 1 of any particular calendar year to
10 June 30 of the following calendar year unless a different period is designated by the Legislature.

11 HO-CHUNK RULES OF CIVIL PROCEDURE

12 Rule 5. Notice of Service of Process.

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

19 Rule 27. The Nation as a Party.

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

26 Rule 53. Relief Available.

27 Except in a *Default Judgement*, the Court is not limited to the relief requested in the pleading and
28 may give any relief the evidence makes appropriate. The Court may only order such relief to the
extent allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs,
including filing fees, costs of service and discovery, jury and witness costs. Findings of fact and
conclusions of law shall be made by the Court in support of all final judgements.

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

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

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

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

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

26 Rule 61. Appeals.

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

FINDINGS OF FACT

1. The parties received proper notice of the November 7-8, 2000 *Trial*.

1 2. The plaintiff, Roy J. Rhode, was formerly employed as the Chief Financial Officer at
2 Rainbow Casino located in Nekoosa, WI. The plaintiff worked at Rainbow Casino for nearly
3 seven (7) years prior to his termination on March 23, 2000. *Court Transcript* at 11, 15; *see also*
4 Plaintiff's Ex. 1. The plaintiff held three (3) positions during this timeframe, Chief Accountant,
5 Chief Financial Officer and General Manager, and participated in or oversaw the budgeting
6 process during each year of employment. *Court Transcript* at 15-17.
7

8 3. The defendant, Ona M. Garvin, was formerly employed as the General Manager of
9 Rainbow Casino, and held such position for over two (2) years prior to the termination of the
10 plaintiff.³ *Id.* at 253.
11

12 4. The fiscal year of the Ho-Chunk Nation begins on July 1 of each calendar year and ends
13 on June 30 of the following calendar year. *See* 2 HCC § 4(4)(e).
14

15 5. The plaintiff did not deviate from the method and procedure he used in preparing the
16 annual budget projection during five (5) prior fiscal terms. *Court Transcript* at 13-14. For the
17 2000-01 budget projection, like its predecessors, the plaintiff collectively relied on win per
18 machine, patron count and the resulting win per guest in making his calculations. *Id.* at 47, 56-
19 58, 60, 209. When preparing the 1999-2000 budget, former Executive Director of Business Lou
20 Reywinkle directed the plaintiff to offer an objective and realistic projection, and the plaintiff
21 continued to abide by this direction. *Id.* 47-48.
22

23 6. The plaintiff submitted monthly financial reports to the defendant without further
24 personal explanation, but the defendant never required him to do so. *Id.* at 267-68.
25

26 7. The plaintiff provided basic directives to the department directors and subsequently met
27 with each individually to address their respective concerns. *Id.* at 14, 58, 61, 130, 152, 159, 211-
28

³ At *Trial*, the plaintiff moved to strike F. William Johnson as a named defendant in the suit, and defendant's

1 12, 348-49. The defendant implemented this practice after assuming the position of General
2 Manager. *Id.* at 264-65. These sessions yielded cost containment efforts as reflected in the
3 March 16, 2000 budget. *Id.* at 42-43, 131-32, 161.

4
5 8. Ultimately, the plaintiff projected a decrease in 2000-01 revenue due to a largely
6 unchecked decline in patronage since March 1999. *Id.* at 48, 62, 294; *see also* Defendant's Ex.
7 E.

8 9. On March 17 and 22, 2000, the plaintiff attended meetings with the administration,
9 including former Executive Director F. William Johnson and the defendant, where he received
10 specific orders to modify the budget in conjunction with the Nation's attempt to standardize
11 casino operations. *Court Transcript* at 42-43, 45-46. The plaintiff exercised no discretion in
12 making these modifications as incorporated into the March 23, 2000 budget projection, thereby
13 negating any need to hold follow-up meetings with department directors at Rainbow Casino. *Id.*
14 at 44.

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17 10. The defendant never disciplined the plaintiff concerning his competency in preparing the
18 budget projections. *Id.* at 31. Furthermore, the defendant never alerted the plaintiff either
19 verbally or in writing of any misgivings she had in relation to the budget preparation. *Id.* at 32.

20
21 11. The defendant met several times with the plaintiff to discuss the budget, but the
22 defendant only suggested lowering expenses after the March 2000 meetings with former
23 Executive Director F. William Johnson where the plaintiff revealed a reduction in revenue. *Id.* at
24 227-28.

25
26 12. The defendant provided no supporting documentation in the form of attachments with the
27 plaintiff's termination letter. *Id.* at 31-32, 63; *see also* Plaintiff's Ex. 1. The plaintiff personally

28

counsel voiced no objection to this request. *Id.* at 115, 191.

1 received his termination letter from security guards on March 24, 2000 and later received a copy
2 through delivery by certified mail. *Court Transcript* at 28, 63, 286-87.

3
4 13. The plaintiff had no forewarning of the discipline received on March 24, 2000, and “was
5 totally shocked” when handed the termination letter. *Id.* at 63-64, 348. The defendant did not
6 discuss the impending discipline with the plaintiff prior to his discharge. *Id.* at 112, 336.

7 14. The defendant testified that she founded the termination upon

8 the months of preparation of the budgets, the directives given to meet with
9 Directors and Managers in regard to the budget, and then we attended the
10 March -- I believe it's March 17th budget hearing at the Executive
11 Building, and I didn't receive that budget until I got there, and I had said
12 this from the beginning when I started working at Rainbow that I
13 depended upon Directors' expertise, that I believed that they should have
14 told me regarding what all of the intricacies of the budget were, and we
15 went up to the Legislature, and I had received this sometime ago, and
16 there still was no change in regard to what was being submitted.

17 *Id.* at 289-90. The defendant took specific issue with the projected decrease in revenue despite
18 knowing about this projection during the period of December 1999 through the submission of the
19 March 16, 2000 budget. *Id.* at 291, 303-04, 334; *see also* Defendant's Ex. at 1. The defendant,
20 however, never required the plaintiff to offer a personal explanation, insisting instead that she
21 “would have liked to have [had] that explained” *Court Transcript* at 291.

22 15. The March 23, 2000 termination letter reads, in part:

23 Effective today at 4:30 p.m. your employment with Rainbow Casino is
24 terminated due to inadequate performance of the duties of Chief Financial
25 Officer and in violation of personnel procedures, Chapter 12, Employment
26 Conduct, page 46, C. Performance, item 1. This decision is based upon
27 the budgets submitted by you to me, the Executive Office of the Business
28 Department and to the Finance Subcommittee of the Ho-Chunk Nation
Legislature.

Plaintiff's Ex. 1. The defendant reiterated at *Trial* that while she considered “prior conduct”, she
based her decision to terminate “upon the budgets and upon the way that they were -- they were

1 submitted and not explained fully.” *Court Transcript* at 308-09, 337. This conduct exemplified
2 inefficient, incompetent and negligent job performance from the perspective of the defendant.
3 *Id.* at 308-310; *see also* HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL
4 [hereinafter PERSONNEL MANUAL], Ch. 12, Part C, No. 1, p. 46.

6 16. The plaintiff received a written warning from the defendant on March 18, 1999 resulting
7 from a failure to properly address an employment disturbance under his direct supervision.
8 *Court Transcript* at 32-33; *see also* Defendant’s Ex. X. The defendant generally regarded the
9 treatment of personnel matters within the Finance Department as troubling, but recognized that
10 “[t]he numbers, of course, were always right on.” *Court Transcript* at 271-73.

12 17. On May 21, 1999, the defendant evaluated the plaintiff’s job performance, noting that
13 “[f]inancial reports, budget preparation and financial analysis is done upon request and in the
14 time frame needed.” Defendant’s Ex. BB. The defendant also recognized “Roy has good results
15 with financial reports, budget preparation.” *Id.* The defendant, however, did indicate the need
16 for improvement in other areas, including oversight of personnel. *Id.*

18 18. Following the plaintiff’s termination, the allocation for complimentary coupons in the
19 Table Games Department was reduced in the amount of \$20,000.00 without any notice to the
20 Department Director, Jonette Pettibone. *Court Transcript* at 133-34. Interim or Acting Chief
21 Financial Officer John Thornburg acknowledged making specific changes to the Marketing
22 budget after the departure of the plaintiff. *Id.* at 219, 344-45; *see also* Defendant’s Ex. E.

24 19. On April 7, 2000, the defendant responded to the plaintiff’s March 29, 2000 Level I
25 Grievance, elaborating upon several previously unannounced factors allegedly underlying the
26 plaintiff’s termination. Defendant’s Exhibit T; *see also Court Transcript* at 320-21, 335.

1 20. On June 23, 2000, the Rainbow Casino Financial Department generated the amended
2 2000-01 budget projection, indicating an increase in slot revenue, as compared with the March
3 23, 2001 budget, in the amount of \$4,085,659.00 and an increase in table games win in the
4 amount of \$265,179.00. Defendant's Ex. B and E; *see also Court Transcript* at 346-47.
5 Additionally, the June 23, 2000 budget provided an increase in total operating expenses in the
6 amount of \$1,156,630.00 and a decrease in marketing expenses in the amount of \$1,211,392.00
7 from its March 23, 2000 predecessor. *Id.*
8
9
10

11 DECISION

12

13 The Court intends to borrow heavily from opinions rendered in two recent cases dealing
14 with substantially similar issues confronted in the instant case. The discussion appearing in Part
15 I, and relevant to a ruling announced at the *Pre-Trial Conference*, is extracted from the final
16 decision in *Dolores Greendeer v. Randall Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001). The
17 discussion appearing in Part II is extracted from a decision in the pending consolidated cases of
18 *Margaret G. Garvin v. Ho-Chunk Nation and Donald Greengrass*, CV 00-10, 38 (HCN Tr. Ct.,
19 March 9, 2001).
20
21

22 I. Did the plaintiff name the appropriate party to permit a 23 request for relief of money damages in the form of actual 24 lost wages and benefits?

25 A plaintiff may proceed against the Ho-Chunk Nation or its subentities for monetary
26 damages only if the Ho-Chunk Nation Legislature [hereinafter Legislature] grants an express
27 waiver of sovereign immunity.⁴ CONSTITUTION, ART. XII § 1. As pertains to the instant case,
28

⁴ However, in *Joan Marie Whitewater, Dean Allen Whitewater, Kathleen Lynn Whitewater, Kenneth Lee*

1 such a waiver exists in the form of HO-CHUNK NATION LEGISLATIVE RESOLUTION 6/9/98A.
2 PERSONNEL MANUAL, Ch. 12, pp. 50b-51. Otherwise, a plaintiff may proceed against an
3 individual official or employee if such individual acted outside the scope of their duties or
4 authority. CONSTITUTION, ART. XII § 2. The plaintiff, however, would not be entitled to
5 monetary damages, but only declaratory and non-monetary injunctive relief. *Id.*
6

7 The Supreme Court of the Ho-Chunk Nation [hereinafter Supreme Court] confirmed the
8 foregoing analysis, declaring that “[t]he language of the Ho-Chunk Nation Constitution is clear.”
9 *Millie Decorah, as Fin. Dir. of the Ho-Chunk Nation, and Sandy Martin, as Pers. Dir. v. Joan*
10 *Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998) at 4. The Supreme Court continued by
11 stating as follows:
12

13 The Tribal Court may only award equitable relief where officials of the
14 Ho-Chunk Nation act beyond the scope of their duties. Equitable relief
15 is defined as “relief sought in a court with equity powers as, for
16 example, in the case of one seeking an injunction or specific
17 performance *instead of money damages.*” Black’s Law Dictionary,
18 abridged 6th ed., (emphasis added). The definition of equitable relief
19 is defined as nonmonetary relief.

20 *Id.* Therefore, the plaintiff cannot receive an award of monetary damages since he failed to name
21 the Ho-Chunk Nation or one of its subentities as a party to this suit. The plaintiff received
22 forewarning of these consequences through the *Defendant’s Answer*, but chose not to amend his
23 pleadings by the August 18, 2000 deadline as established in the *Scheduling Order*. *See*
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26 *Whitewater, Barbara Ann Engen, Vicki Lee Johnson, Tina Marie Danielski, Gerald Ray Whitewater, and Larry*
27 *Edward Whitewater v. Ho-Chunk Nation Office of Tribal Enrollment and Ho-Chunk Nation Legislature* [hereinafter
28 *Joan Marie Whitewater, et al. v. 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 *Defendant's Answer*, CV 00-39 at 5. The Court accordingly denies the plaintiff's request for
2 actual lost wages and benefits.

3 **II. Did the defendant afford the plaintiff minimal procedural due**
4 **process protections as guaranteed by the CONSTITUTION, ART.**
5 **X § 1(a)(8) in relation to his termination?**

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

18 The Supreme Court also identified specific provisions in the PERSONNEL MANUAL which
19 prove capable of fulfilling the procedural due process requirement of a hearing, the indispensable
20 analogue to notice. *Knudson*, SU 98-01 at 2, 4-5; *see also* *Cleveland Board of Education v.*
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25 ⁵ The Court confronted and established the requirements of procedural due process in the following decisions: *Gary*
26 *Lonetree, Sr. v. John Holst, as Slot Dir., and Ho-Chunk Casino Slot Dep't*, CV 97-127 (HCN Tr. Ct., Sept. 24,
27 1998) at 7-11 *aff'd* SU 98-07 (HCN S. Ct., Apr. 29, 1999); *Vincent Cadotte v. Tris Yellowcloud, Dir. of Compliance*,
28 *CV 97-145* (HCN Tr. Ct., Apr. 24, 1998) at 6-10; *Joan Whitewater v. Millie Decorah, as Fin. Dir., and Sandy*
Martin, as Pers. Dir., CV 96-88 (HCN Tr. Ct., Jan. 20, 1998) at 4-6 *aff'd* 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) at 12-18 *rev'd on*
other grounds SU 96-15 (HCN S. Ct., July 20, 1997); *Gale S. White v. Dep't of Pers., Ho-Chunk Nation*, CV 95-17
(HCN Tr. Ct., Oct. 14, 1996) at 11-15; *Lonnie Simplot, Linda Severson and Carol J. Ravet v. Ho-Chunk Nation*

1 *Loudermill*, 470 U.S. 532, 542 (1985) (pre-termination notice and opportunity for a hearing
2 represent the essential principles of procedural due process). The Legislature assures aggrieved
3 employees “the right to hear the charges, evidence and witnesses against him[her], and the right
4 to cross examine (*sic*).” PERSONNEL MANUAL, Ch. 12, p. 51. Consequently, the Supreme Court
5 noted its disapproval of a particular employment practice, wherein the appellant “was not
6 afforded the opportunity to confront or answer allegations made against her” prior to termination.
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8 *Knudson*, SU 98-01 at 3.

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10 In *Knudson*, the Supreme Court deemed the appellant’s understandable early departure
11 from the informal pre-termination hearing as harmless since “her rights [were] preserved in
12 Level I of the Administrative Review Process for Non-gaming employees’ (*sic*), as outlined in
13 the Personnel Policies, Ch. 12, p. 50.” *Knudson*, SU 98-01 at 4-5. At Level I, an employee’s
14 supervisor “has an affirmative duty to try and resolve the problem,” and is required to “meet with
15 the person and document the decision.” PERSONNEL MANUAL, Ch. 12, p. 50. Thereafter, the
16 department director or enterprise manager likewise “has an affirmative duty to try and resolve
17 the problem,” and is required to “talk with involved people and document the decision” at Level
18 II. *Id.* The grievant bears the burden of proof throughout the Administrative Review Process,
19 and may attempt to satisfy such burden through “documentation and witnesses.” *Id.* These
20 significant post-termination protections serve to correspondingly decrease the formality of the
21 pre-termination hearing. *See Cleveland*, 470 U.S. at 545 and 547, fn. 12.
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24 However, the PERSONNEL MANUAL does not afford gaming employees the Level I and II
25 post-termination hearings granted to their non-gaming counterparts. PERSONNEL MANUAL, Ch.
26 12, p. 50a. This omission elevates the importance of the pre-termination hearing, and, therefore,
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Dep’t of Health, CV 95-26, 27 and 96-05 (HCN Tr. Ct., Aug. 29, 1996) at 15-19.

1 requires increased formality within such a hearing. The Court does not need to establish the
2 level of formality for purposes of the instant case since the plaintiff received nothing resembling
3 a pre-termination hearing. The Court will note that a failure to effectively address this matter
4 may represent an equal protection problem due to the dissimilar treatment of non-gaming and
5 gaming employees. See CONSTITUTION, ART. X § 1(a)(8).
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7 This Court originally adopted the analytical framework of the United States Supreme
8 Court for examining the procedural due process component based, in part, upon the stated
9 position of the Ho-Chunk Nation Department of Justice. *Simplot et al.*, CV 95-26, 27 and 96-05
10 at 15-16 (quoting *Informal Opinion of Attorney General Jo Deen B. Lowe to President Jo Ann*
11 *Jones* (July 14, 1995)); see also *White*, CV 95-17 at 11. Accordingly, “[t]he procedural demands
12 of due process require at a minimum that the employee be given notice of the specific incident of
13 misconduct, the nature of the violation and the right to be heard about it.” *Cadotte*, CV 97-145
14 at 8. As noted above, the pre-termination hearing has no established substantive or procedural
15 structure. The characteristics of a hearing will inevitably transform “depending upon the
16 importance of the interests involved and the nature of the subsequent proceedings.” *Cleveland*,
17 470 U.S. at 545 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)); see also *Gilbert v.*
18 *Homar*, 520 U.S. 924, 930 (1997). The constitutional guarantee that an employee receive a
19 “meaningful opportunity to be heard before their property can be taken away” proves the only
20 constant. *Lonetree, Sr.*, CV 97-127 at 10 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552
21 (1965)); see also *Cleveland*, 470 U.S. at 542 (a pre-termination hearing represents a “root
22 requirement” of procedural due process) and *Board of Regents v. Roth*, 408 U.S. 564, 569-70
23 (1972) (“the right to some kind of prior hearing is paramount”).
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1 The Court has noted a few of the factors underlying the necessity of a pre-termination
2 hearing, namely immediate loss of income and the associated embarrassment and humiliation
3 flowing from severe employment discipline. *White*, CV 95-17 at 12. Other factors include: the
4 greater potential for accuracy in the employment decision, *Cleveland*, 470 U.S. at 543; the
5 expected lapse of time before securing other employment, *Id.*; the effect a questionable work
6 record has on future employment possibilities, *Id.*; the inability to fully commit to another
7 employer during the pendency of the individual's grievance/case, *Id.*, p. 549 (Marshall, J.
8 concurring); the resulting disruption to an individual's personal and economic life, *Id.*; the time
9 needed to ultimately resolve a grievance/complaint, *Id.*; and the potential inability to collect
10 unemployment compensation due to the type of employment separation. *Id.*

13 Clearly, the defendant in the instant case did not afford the plaintiff his minimal
14 procedural due process protections. The plaintiff expressed shock and disbelief at the level of
15 discipline received for performing the task of budget preparation in the same manner as he had
16 done on numerous prior occasions. The defendant provided the plaintiff no forewarning of the
17 consequences associated with projecting a decreased revenue from the prior fiscal year although
18 she recognized, and presumably appreciated, the possibility of such a projection for
19 approximately three (3) months. Then, once the defendant decided to terminate the plaintiff, she
20 presented him no opportunity to respond prior to the discipline. Rather, the plaintiff received the
21 termination letter on March 24, 2000 when he entered Rainbow Casino; a termination letter
22 which became operable by its own terms at 4:30 P.M. the previous day. The plaintiff related his
23 exasperation with the foregoing events in his *Complaint*, stating "I have worked in the
24 accounting area for the Nation for almost seven years **WITHOUT ANY** infractions whatsoever
25 for lack of performance in the budget preparation area. I've been terminated without notice,
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1 without cause, without consideration, without a chance to discuss anything with Ms. Garvin
2 dealing with her alleged charges.”⁶ *Complaint*, CV 00-39 (May 5, 2000) (emphasis in original);
3 *see also Court Transcript* at 356, 359. For whatever reason, the defendant declined to grant the
4 plaintiff a pre-termination hearing, and this failure represents a denial of procedural due process
5 as guaranteed by the CONSTITUTION, ART. X § 1(a)(8).⁷

7 **BASED UPON THE FOREGOING**, the Court grants certain prospective, equitable
8 relief requested by the plaintiff and other relief as deemed appropriate by the Court. *See HCN R.*
9 *Civ. P. 53*. The Court accordingly directs the Ho-Chunk Nation Department of Personnel
10 [hereinafter Personnel Department] to reinstate the plaintiff to a position with a comparable
11 wage, *see PERSONNEL MANUAL*, Ch. 6 at 22, remove negative references from the plaintiff’s
12 personnel file, award bridged service credit, and restore seniority. *See Id.* at 51. The Personnel
13 Department shall contact the plaintiff within a period of fourteen (14) calendar days from the
14 entry of this *Order* to establish a timeline in relation to reinstatement.
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19 ⁶ In closing argument, the defendant contended that a plaintiff must seek to admit their complaint into evidence in
20 order for its contents to hold any evidentiary value. *Court Transcript* at 360. The defendant earlier offered the May
21 5, 2000 *Complaint* to the plaintiff during cross-examination, noting “[i]t’s already part of the record in this case.”
22 *Id.* at 106-07. The Court has recently announced the evidentiary weight given to a complaint and its attachments in
23 this jurisdiction, and the inclusion of the *Complaint* in the court record renders this earlier holding controlling in this
24 matter. *See Mann*, CV 00-50 at 11-13. Furthermore, the Supreme Court has indicated the appropriateness of
25 examining issues of due process if a plaintiff merely alleges unfair employment practices only within their
26 complaint. *Kelty*, SU 99-02 at 3.

27 ⁷ Apart from the specific facts underlying the holding, other factors would mitigate ruling in favor of the defendant.
28 For example, the defendant presented no testimony from a director or supervisor that the plaintiff did not confer with
them in the budgetary process despite this contention being a cornerstone of the defense. Also, the defendant could
have directed the plaintiff to meet with her for the purpose of discussing monthly statements and budgetary
proposals, but the defendant never took this seemingly reasonable action. If the defendant needed to show an
increase in revenue over the past fiscal year, she could have easily informed the plaintiff of this requirement in
December 1999 when he first projected a decrease. The defendant presented no evidence indicating that the plaintiff
either miscalculated previous budget projections or utilized improper accounting principles, and, therefore, greater
interaction would have apparently prevented the termination. Furthermore, the Court notes its disapproval of
equating prior and current disciplinary measures as resulting from inefficient, incompetent or negligent performance
of duties, *PERSONNEL MANUAL*, Ch. 12, Part C, No. 1, p. 46, for the purpose of attempting to establish progressive
discipline. The focus correctly remains upon whether the past discipline arose from a “similar past offense”, *id.* at
48, and not from actions capable of falling under a general catchall provision.

1 The parties retain the right to file a timely post judgment motion with this Court in
2 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgement or Order.
3 Otherwise, “[a]ny *final Judgement or Order* of the Trial Court may be appealed to the Ho-Chunk
4 Nation Supreme Court.⁸ The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
5 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
6 Appeal.” *HCN R. Civ. P. 61*. The appellant “shall within thirty (30) calendar days after the day
7 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
8 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.)”
9 *HCN R. App. P. 7(b)(1)*. “All subsequent actions of a *final Judgement or Trial Court Order* must
10 follow the [*HCN R. App. P.*]” *HCN R. Civ. P. 61*.

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14 **IT IS SO ORDERED** this 24th day of August, 2001 by the Ho-Chunk Nation Trial Court
15 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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19 _____
20 Honorable Todd R. Matha
21 Associate Trial Court Judge
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23 ⁸ The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”
24 *Louella A. Kelty v. Jonette Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., Sept.
25 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard “to determine
26 if an error of law was made by the lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek,*
27 *Ona Garvin, Rainbow Casino Mgmt.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov’t*
28 *II v. Chloris A. Lowe, Jr. and Kathyleen Lone Tree-Whiterabbit*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and
JoAnn Jones v. Ho-Chunk Nation 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.

