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

Marie WhiteEagle,
Plaintiff,

v.

Case No.: **CV 01-52**

**Ho-Chunk Nation and Ho-Chunk Nation
Wisconsin Dells Head Start Program,**
Defendants.

**ORDER
(Granting Defendants' *Motion to Dismiss*)**

INTRODUCTION

The Court must determine whether to dismiss the plaintiff's cause of action for failure to file in a timely manner. The limited waiver of sovereign immunity set forth in HO-CHUNK NATION LEGISLATURE RESOLUTION [hereinafter HCN LEG. RES] 6-9-98A requires a non-gaming grievant to file within thirty (30) days of the final Administrative Review Process decision. *See* HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL [hereinafter PERSONNEL MANUAL], Chpt. 12, p. 50b; *see also* HO-CHUNK NATION STATUTE OF LIMITATIONS § 103(b). The plaintiff filed her *Complaint* forty (40) days late, and therefore the Ho-Chunk Nation's sovereign immunity bars her suit.

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PROCEDURAL HISTORY

The plaintiff, Marie WhiteEagle, initiated the current action by filing a *Complaint* with the Court on April 25, 2001.¹ Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on April 30, 2001, and delivered the documents by certified mail to the defendants' representative, Ho-Chunk Nation Department of Justice [hereinafter DOJ].² An agent of the defendant signed for the certified mailing on May 1, 2001 as indicated on the Domestic Return Receipt. The *Summons* informed the defendant of the right to file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to *HCN R. Civ. P.* 5(B). The *Summons* also cautioned the defendant that a *default judgment* could result from failure to file within the prescribed time period.

The defendant, by and through DOJ Attorney Michael P. Murphy, timely filed the *Defendants' Answer* on May 21, 2001, serving such documents on the plaintiff via first class certified mail. The Court convened a *Scheduling Conference* on June 11, 2001 at 1:30 P. M. CST. The following parties appeared at the *Conference*: Attorney P. Scott Hassett, plaintiff's counsel,³ and DOJ Attorney Sheila D. Corbine, defendants' counsel.

On July 11, 2001, the defendants filed the *Defendants' Notice and Motion to Dismiss* along with the *Defendants' Brief in Support of Motion to Dismiss* [hereinafter *Defendants' Brief*] in accordance with *HCN R. Civ. P.* 18. In response, the Court entered its *Order (Motion*

¹ The *Complaint* incorrectly bears the file stamp date of April 30, 2001 although the plaintiff had earlier complied with the filing requirements stated in the *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*], Rules 3-4. Administrative staff should have file stamped the *Complaint* on April 25, 2001 despite the failure of the plaintiff to provide service of process costs. See *Notice of Deficiency*, Apr. 25, 2001.

² The *HCN R. Civ. P.* permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party a unit of government or enterprise. *HCN R. Civ. P.* 27(B).

³ Attorney P. Scott Hassett appeared *pro hac vice* as permitted by *HCN R. Civ. P.* 16(B).

1 *Hearing*) on July 23, 2001 accompanied by *Notice(s) of Hearing*, informing the parties of the
2 date, time and location of the *Motion Hearing*. The plaintiff filed a timely response through the
3 August 17, 2001 *Plaintiff's Brief in Opposition to Motion to Dismiss* [hereinafter *Plaintiff's*
4 *Response*]. See *HCN R. Civ. P. 19(A)*. The Court convened a *Motion Hearing* on August 21,
5 2001 at 1:30 P.M. CST. The following parties appeared at the *Hearing*: Marie WhiteEagle,
6 plaintiff; Attorney P. Scott Hassett, plaintiff's counsel; and DOJ Attorney Michael P. Murphy,
7 defendants' counsel. Prior to the *Motion Hearing*, the Court directed staff to prepare *Affidavit(s)*
8 in relation to an apparent clerical mistake or inadvertence.
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11 **APPLICABLE LAW**

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

13 **Chpt. 12. Employment Conduct, Discipline, and Administrative Review.**

14 Administrative Review Process for Non-gaming

15 [p. 50]

16 The burden of proof is on the grievant to show that what he/she is claiming, actually happened.
17 All levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances
18 shall be forwarded to the Personnel Department promptly by the grievant. This proof may
19 include documentation and witnesses.
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- 21 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working
22 days of the action. The Supervisor has an affirmative duty to try and resolve the problem.
23 The Supervisor has five (5) days to respond to the grievance. She/He must meet with the
24 person and document the decision.
- 25 2. If there is no relief or response within five (5) days after the end of the time period of the
26 first step, grieve in writing, on the required form, to the department director or enterprise
27 manager and the Personnel Department. The manager or director has an affirmative duty
28 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.

1 3. Within ten (10) days of the decision or notice of decision at level 2, appeal in writing to
2 the appropriate Administrator and Personnel Department. The appropriate Administrator
3 has fifteen (15) days for initial review and response. Administrator (sic) will investigate,
document & inform Grievant.

4 RESOLUTION 6-9-98A

5 Tribal Court Review: [p. 50b]

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

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

11 *The HoChunk (sic) Nation hereby expressly provides a limited waiver of sovereign immunity to*
12 *the extent that the Court may award monetary damages for actual lost wages and benefits*
13 *established by the employee in an amount not to exceed \$10,000 subject to applicable taxation.*
14 *Any monetary award granted under this Chapter shall be paid out of the departmental budget*
15 *form which the employee grieved. In no event shall the Trial Court grant any monetary award*
16 *compensating an employee for actual damages other than with respect to lost wages and*
17 *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.

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

24 Chpt. 14. Definitions.

25 Appropriate Administrator: The person that the department director reports to.
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1 STATUTE OF LIMITATIONS AND COMMENCEMENT OF CLAIMS

2 Sec. 1.03. Statute of Limitations.

3 (b) All employment actions must be filed in the HCN Trial Court within 30 calendar
4 days of the final decision of the Administrative Review process or the date such
5 decision would have been due because of a failure to respond by the appropriate
6 supervisor or director. If the injured employee does not initiate and timely file a
7 complaint in the Trial Court, such a claim and all claims arising from the incident
8 shall be forever barred.

8 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

9 Rule 3. Complaints.

10 (A) General. A civil action begins by filing a written *Complaint* with the clerk of court. The
11 *Complaint* shall contain short, plain statements of the grounds upon which the court's
12 jurisdiction depends; the facts and circumstances giving rise to the action, and a demand for any
13 and all relief the party wants awarded. Relief should include, but is not limited to the dollar
14 amount that the party is requesting. The *Complaint* must contain the full names, addresses and
15 telephone numbers of all parties and any counsel and shall be signed by the filing party and
16 his/her counsel, if any. The court shall have jurisdiction from the time the *Complaint* is filed.

15 (B) Administrative Review. A *Complaint* which is an appeal from a final administrative
16 decision of the Ho-Chunk Nation must be filed within thirty (30) calendar days of the date of
17 such decision, unless another time limit is provided for by the Legislature.

17 Rule 4. Filing Fees.

18 (A) Fee. The filing fee for a *Complaint* in the Trial Court of the Ho-Chunk Nation Judiciary
19 shall be thirty-five dollars (\$35.00 U.S.). The fee shall be waived for petitions filed by the Ho-
20 Chunk Nation. The fee may be waived at the court's discretion, for parties who are unable to
21 pay the fee.

22 Rule 5. Notice of Service of Process.

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

1 Rule 16. Signature of Parties and Counsel; Special Appearances.

2 (B) Counsel not admitted to practice before the Ho-Chunk Nation Courts may be permitted to
3 appear on behalf of a client by *Special Appearance* in an action. In order to be permitted to
4 make a special appearance, counsel must file a motion to allow the special appearance; a
5 proposed *Order*; and an affidavit containing the oath or affirmation for admission to practice,
6 stating that they are admitted to practice in another state, federal or tribal jurisdiction, and stating
7 they have been in actual practice for two or more years. They must also submit a processing fee
8 for the special appearance of \$35.00.

7 Rule 18. Types of Motions.

8 *Motions* are requests directed to the Court and must be in writing except for those made at trial.
9 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
10 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
11 shall contain or be supported by a legal memorandum, which states the issues and legal basis
12 relied on by the moving party.

12 Rule 19. Filing and Responding to Motions.

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

18 Rule 27. The Nation as a Party.

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

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

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

(B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
later than ten (10) calendar days after entry of judgement, the Court may amend its findings or

1 conclusions or make additional findings or conclusions, amending the judgement accordingly.
2 The motion may be made with a motion for a new trial. If the Court amends the judgement, the
3 time for initiating an appeal commences upon entry of the amended judgement. If the Court
4 denies a motion filed under this rule, the time for initiating an appeal from the judgement
5 commences when the Court denies the motion on the record or when an order denying the
6 motion is entered, whichever occurs first. If within thirty (30) days after the entry of judgement,
7 the Court does not decide a motion under this Rule or the judge does not sign an order denying
8 the motion, the motion is considered denied. The time for initiating an appeal from judgement
9 commences in accordance with the Rules of Appellate Procedure.

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

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

14 Rule 61. Appeals.

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

20 FINDINGS OF FACT

- 21 1. The parties received proper notice of the August 21, 2001 *Motion Hearing*.
- 22 2. On January 8, 2001, the defendant terminated the plaintiff from her position as Head Start
23 Center Director/Lead Teacher. *See Defendants' Answer*, Ex. A: *Ho-Chunk Nation Employee*
24 *Status Change Notice*.
- 25 3. On January 10, 2001, the plaintiff filed her Level 1 administrative grievance. *Id.*, Ex. B
26 *Employee Grievance Form*. The plaintiff timely filed her Level 1 grievance, filing such
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1 grievance “within five (5) working days of the action.” PERSONNEL MANUAL, Chpt. 12, p. 50.

2 4. The plaintiff’s supervisor, Christine Raven Kerry, responded to the Level 1 grievance,
3 but failed to date the response. *Defendants’ Answer*, Ex. B: *Response to Grievance Submitted*
4 *by Marie WhiteEagle*. Christine Raven Kerry later indicated on the *Employee Grievance Form*
5 (Level 2) that she responded to the January 10, 2001 Level 1 grievance on January 9, 2001. *Id.*,
6 Ex. C: *Employee Grievance Form*, p. 2.

8 5. Due to the lack of an ascertainable response date, the Court refers to the timelines set
9 forth in the Administrative Review Process section of the PERSONNEL MANUAL. As noted above,
10 the plaintiff must file a Level 1 grievance “within five (5) working days of the action.”
11 PERSONNEL MANUAL, Chpt. 12, p. 50. The supervisor then “has five (5) days to respond to the
12 grievance.”⁴ *Id.* If no response is forthcoming, then the grievant must file a Level 2 grievance
13 “within five (5) days after the end of the *time period* of the first step.”⁵ *Id.* (emphasis added).

14 Accordingly, the Court calculates the relevant time period as follows:

15	Termination	January 8, 2001
16	Level 1 grievance-filing deadline	January 15, 2001
17	Level 1 response deadline	January 20, 2001
18	Level 2 grievance-filing deadline	January 25, 2001

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24 ⁴ The Court interprets the reference to “days” as calendar days since the Ho-Chunk Nation Legislature [hereinafter
25 Legislature] explicitly used the term “working days” previously, but omitted such explicit reference throughout the
26 remainder of the Administrative Review Process section.

27 ⁵ The Court has repeatedly identified the many ambiguous phrases and provisions in the Administrative Review
28 Process sections utilized for gaming and non-gaming employees to the DOJ. *See e.g., Amelia Pike v. Majestic Pines*
Casino, CV 99-108, *Motion Hearing/Scheduling Conference*, Courtroom Log/Minutes at 3-5 (Feb. 7, 2000). The
Court recommends that the Legislature amend these sections to provide clarity for both employees and employers
(*e.g.*, time references and service of process issues), striking obsolete language and conforming the Administrative
Review Process sections with subsequent legislation. Otherwise, the Court shall continue to liberally interpret the
sections in favor of plaintiffs who have been denied a property right and have reasonably attempted to follow the
grievance steps.

1 6. On January 17, 2001, the plaintiff timely filed her Level 2 administrative grievance. *See*
2 *infra.*; *see also Defendants' Answer, Ex. C: Employee Grievance Form.*

3 7. The department director, former Interim Executive Director of the Department of
4 Education, Walter Funmaker, responded to the Level 2 grievance, but failed to date the response.
5 *Defendants' Answer, Ex. D: Level II Grievance Response.* Walter Funmaker later issued a
6 second response on January 23, 2001. *Plaintiff's Response, Ex. 4: Response to Level II*
7 *Grievance.* Walter Funmaker noted in the second response that he had earlier responded to the
8 Level 2 grievance, a "response dated 1-17-01." *Id.* at 2.

9 8. On February 1, 2001, the plaintiff filed her Level 3 administrative grievance.
10 *Defendants' Answer, Ex. E: Employee Grievance Form.* The plaintiff timely filed her Level 3
11 grievance, filing such grievance "[w]ithin ten (10) days of the decision or notice of decision at
12 level 2."⁶ PERSONNEL MANUAL, Chpt. 12, p. 50.

13 9. On March 2, 2001, the appropriate administrator, former President pro tempore Clarence
14 Pettibone, provided his initial response to the Level 3 grievance. *See Defendants' Brief, Ex. G:*
15 *Response to Level III Grievance; see also PERSONNEL MANUAL, Chpt. 14, p. 54.* Clarence
16 Pettibone filed a late initial response since "[t]he appropriate Administrator has fifteen (15) days
17 for *initial* review and response." *Id.*, Chpt. 12, p. 50 (emphasis added).

18 10. On March 16, 2001, Clarence Pettibone provided his final decision and response to the
19 Level 3 grievance after four (4) meetings with the plaintiff.⁷ *See Plaintiff's Response, Affidavit*
20 *of Marie WhiteEagle* at 2, Ex. 6: *Response to Level III Grievance.*

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⁶ Walter Funmaker filed both of the Level 2 responses in a timely fashion. *See PERSONNEL MANUAL, Chpt. 12, p.*
50 ("The . . . director . . . has ten (10) days to respond."). The Administrative Review Process section provides no
guidance to an employee who receives more than one response. However, an employee would reasonably appeal
the response received later in time, as that document would prove the more comprehensive response.

⁷ The Court notes that the defendants did not even allude to the latest appropriate administrator response in the
Defendants' Brief, and expresses concern at the lack of investigation or potential misstatement of material facts.

1 11. HCN LEG. RES. 6-9-98A allows recourse to the Court “after the Administrative Review
2 Process . . . has been *exhausted*.” PERSONNEL MANUAL, Chpt. 12, p. 50b (emphasis added). A
3 grievant must file his or her *Complaint* “within thirty (30) days of the *final* administrative
4 grievance review decision.” *Id.* (emphasis added). Likewise, the HO-CHUNK NATION STATUTE
5 OF LIMITATIONS requires the filing of the *Complaint* “within 30 calendar days of the *final*
6 *decision* of the Administrative Review process *or the date such decision would have been due*
7 *because of a failure to respond by the appropriate supervisor or director.*”⁸ HO-CHUNK NATION
8 STATUTE OF LIMITATIONS § 1.03(b) (emphasis added).
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11 12. On March 22, 2001, the plaintiff consulted her legal representative and assumed the
12 responsibility of delivering a copy of the *HCN R. Civ. P.* to Attorney P. Scott Hassett for the
13 purpose of alerting Attorney Hassett to the applicable timelines. *See Plaintiff’s Response,*
14 *Affidavit of Marie WhiteEagle* at 2.

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16 13. The Clerk of Court of the Supreme Court of the Ho-Chunk Nation [hereinafter Supreme
17 Court], Tari L. Pettibone, recalls that she initially delivered a copy of the *HCN R. Civ. P.* to the
18 plaintiff “sometime in March of 2001.”⁹ *Affidavit of Service*, Aug. 20, 2001. In contrast, the
19 plaintiff recounted at the *Motion Hearing* that she retrieved the initial copy on or about April 6,
20 2001. *Motion Hearing*, CV 01-52 (Log of Proceedings Electronically Recorded, Aug. 21, 2001;
21 2:13:41) at 4. This statement, however, conflicts with her earlier assertion that “[a]pproximately
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25 ⁸ As noted above, the facts of the instant case have revealed great ambiguity in the relevant legislation. HCN LEG.
26 RES. 6-9-98A and the HO-CHUNK NATION STATUTE OF LIMITATIONS require exhaustion of the Administrative Review
27 Process section sets forth no timeline for when a Level 3 final decision must be entered by the appropriate
28 administrator. Furthermore, one cannot reasonably contend that the grievance process has been exhausted if the
administration continues to respond to a grievance. Also, the fifteen (15) day response deadline applies to initial
decisions, and, therefore, the HO-CHUNK NATION STATUTE OF LIMITATIONS reference to a presumed deadline has no
application whatsoever.

⁹ Court staff referred the plaintiff to the Supreme Court Clerk of Court since the plaintiff’s request appeared to
involve a Ho-Chunk Nation bar licensing issue.

1 one week [after the March 22, 2001 meeting she] obtained the court rules and mailed them to
2 Mr. Hassett.” See *Plaintiff’s Response, Affidavit of Marie WhiteEagle* at 2. If the plaintiff
3 obtained the *HCN R. Civ. P.* from the Clerk of Court on April 6, 2001, then she would have
4 waited fifteen (15) days after meeting with her counsel to do so. Therefore, the Court finds Ms.
5 Pettibone’s statements more credible.
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7 14. The *HCN R. Civ. P.* provided to the plaintiff in late March did not include Rule 3 since
8 the Supreme Court Clerk of Court copied every other page. *Affidavit of Service*, Aug. 20, 2001.
9 Ms. Pettibone amended this mistake by preparing a complete copy of the *HCN R. Civ. P.* for
10 pick-up by the plaintiff’s daughter on April 6, 2001. *Id.*
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12 15. On April 25, 2001, the plaintiff filed her *Complaint* forty (40) days after the final
13 administrative review process decision.
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15 16. The plaintiff proceeded through the Administrative Review Process by following the
16 language contained in the PERSONNEL MANUAL. *Motion Hearing (Log of Proceedings*
17 *Electronically Recorded*, Aug. 21, 2001; 2:20:06) at 4.
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19 DECISION

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22 The *Defendants’ Motion to Dismiss* poses a factual/substantive challenge to subject
23 matter jurisdiction. In other words, the jurisdictional defect does not appear on the face of the
24 pleadings. The defendants, however, argue that since the plaintiff failed to comply with the
25 terms of the limited waiver of sovereign immunity, the Court lacks subject matter jurisdiction to
26 hear the matter. HCN LEG. RES. 6-9-98A clearly sets forth the filing timeline for commencing
27 an action in Court.
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1 This Court analyzes motions to dismiss by employing federal standards utilized in
2 reviewing motions brought pursuant to the *Federal Rules of Civil Procedure*. See *Decorah, Jr.*
3 *v. Rainbow Casino*, CV 95-018 (HCN Tr. Ct., March 15, 1996) at 1-2; see also *Raines v. Ho-*
4 *Chunk Nation*, CV 99-32 (HCN Tr. Ct., Aug. 4, 1999) at 7-9. The Court has adopted the
5 standards enunciated in *Capitol Leasing Co. v. FDIC*, 999 F.2d 188 (7th Cir. 1993) for
6 determining the scope of review. When assessing a factual attack, the Seventh Circuit advises
7 district courts to “look beyond the jurisdictional allegations of the complaint and view whatever
8 evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction
9 exists.” *Id.* (quoting *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979)). The
10 ultimate burden of proof remains on the party invoking the subject matter jurisdiction of the
11 Court.
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14 In performing this review of the entire record, the Court construes the revealed facts in
15 the light most favorable to the non-moving party. *Loa Porter v. Chloris A. Lowe, Jr.*, CV 95-23
16 (HCN Tr. Ct., Mar. 1, 1996) at 1 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). “[I]t is
17 well established that, in passing on a motion to dismiss, whether on the ground of lack of
18 jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the
19 complaint should be construed favorably to the pleader.” *Scheuer*, 416 U.S. at 236. The above
20 *Findings of Fact* are representative of this deferential perspective.
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23 The plaintiff incorrectly believed that she had forty-five (45) days after the final
24 administrative decision to file her *Complaint*. The Court can only surmise that this
25 misunderstanding arose from the different timeline previously applicable within the gaming
26 context. See PERSONNEL MANUAL, Chpt. 12, p. 50a. The plaintiff insists that she attempted to
27 provide her counsel with the requisite clarity by obtaining a copy of the *HCN R. Civ. P.* The
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1 Supreme Court Clerk of Court, however, omitted certain pages wherein Rule 3(B) indicates the
2 appropriate thirty (30) day timeline. The argument concludes by seeking to justify the late filing
3 upon the inadvertence of the Judiciary. The Court is not persuaded by the plaintiff's argument.
4

5 As noted in *Finding of Fact* 14, the plaintiff obtained a complete copy of the *HCN R. Civ.*
6 *P.* on April 6, 2001. The plaintiff remained within the thirty (30) day timeframe upon such date,
7 but, regardless, the plaintiff should not have placed primary reliance upon the *HCN R. Civ. P.* in
8 determining the appropriate statute of limitations. *HCN R. Civ. P.* 3(B) merely corresponds with
9 the timeline established by the Legislature. The Judiciary does not possess the power to enact
10 purely substantive law, only procedural rules. See *Bonnie Smith v. Ho-Chunk Nation Gaming*
11 *Comm'n*, CV 01-02 (HCN Tr. Ct., Feb. 14, 2001), *aff'd*, SU 01-02 (HCN S. Ct., June 15, 2001).
12 The plaintiff acknowledged complying with the PERSONNEL MANUAL through the Administrative
13 Review Process, yet the plaintiff and her legal counsel failed to refer to HCN LEG. RES. 6-9-98A
14 contained in the PERSONNEL MANUAL.
15

16
17 Furthermore, the plaintiff is charged with constructive knowledge of the Nation's laws.
18 See *Susan Bosgraff v. Ho-Chunk Nation Sec. Dep't*, CV 01-01 (HCN Tr. Ct., Aug. 6, 2001) at 9
19 (citing *Jean Day, et al. v. Ho-Chunk Nation Pers. Dep't*, CV 96-15 (HCN Tr. Ct., Aug. 21, 1996)
20 at 3, 6). HCN LEG. RES. 6-9-98A and the HO-CHUNK NATION STATUTE OF LIMITATIONS indicate
21 the appropriate filing timeline of thirty (30) days. The plaintiff filed her *Complaint* after the
22 applicable timeline, and, therefore, the Court grants the *Defendants' Motion to Dismiss*.
23

24 The parties retain the right to file a timely post judgment motion with this Court in
25 accordance with *HCN R. Civ. P.* 58, Amendment to or Relief from Judgement or Order.
26 Otherwise, "[a]ny *final Judgement or Order* of the Trial Court may be appealed to the Ho-Chunk
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1 Nation Supreme Court.¹⁰ The *Appeal* must comply with the Ho-Chunk Nation *Rules of*
2 *Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right
3 of Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the
4 day such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a
5 Notice of Appeal from such judgment or order, together with a filing fee of thirty-five dollars
6 (\$35 U.S.)” *HCN R. App. P.* 7(b)(1). “All subsequent actions of a *final Judgement* or Trial
7 Court *Order* must follow the [*HCN R. App. P.*]” *HCN R. Civ. P.* 61.
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11 **IT IS SO ORDERED** this 21st day of September, 2001 by the Ho-Chunk Nation Trial
12 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.¹¹
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15 _____
16 Honorable Todd R. Matha
17 Associate Trial Court Judge
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21 ¹⁰ The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”
22 *Louella A. Kely v. Jonette Pettibone and Ann Winneshiek, in their official capacities*, SU 99-02 (HCN S. Ct., Sept.
23 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard “to determine
24 if an error of law was made by the lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek,*
25 *Ona Garvin, Rainbow Casino Mgmt.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov’t*
26 *II v. Chloris A. Lowe, Jr. and Kathyleen Lone Tree-Whiterabbit*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and
27 *JoAnn Jones v. Ho-Chunk Nation Election Bd. and Chloris Lowe*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The
28 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.

¹¹ The Court shall forward a copy of this *Order* to the Legislature to alert it of the Court’s concerns regarding the
Administrative Review Processes and corresponding statute of limitations.