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

Margaret G. Garvin,
Plaintiff,

v.

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

Donald Greengrass,
Defendant.

-and-

Margaret G. Garvin,
Plaintiff,

v.

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

Ho-Chunk Nation and Donald Greengrass
in his official capacity,
Defendants.

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**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether to grant the remaining requests for relief surviving the earlier *Order (Ruling on Dispositive Motions)*. The parties have independently resolved a portion of the dispute as it relates to the amount of backpay. The Court shall proceed to address issues concerning procedural due process, equitable relief and standing. The Court grants partial relief to the plaintiff, and the legal analyses for this decision follows below.

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PROCEDURAL HISTORY

The Court recounts the procedural history of the instant case in significant detail in its *Order (Ruling on Dispositive Motions)*, CV 00-10, 38 (HCN Tr. Ct., Mar. 9, 2001). For purposes of this decision, the Court notes that it mailed *Notice(s) of Hearing* on March 28, 2001, informing the parties of the date, time and location of the *Evidentiary Hearing*. The Court convened the *Hearing* on May 10, 2001 at 1:30 P.M. CST. The following parties appeared at the *Evidentiary Hearing*: Margaret G. Garvin, plaintiff; Attorney William F. Gardner, plaintiff's counsel; Donald Greengrass, defendant; and Ho-Chunk Nation Department of Justice Attorney Michael P. Murphy, defendants' counsel. Following the *Hearing*, the defendants filed the June 8, 2001 *Post-Hearing Brief of Defendant Ho-Chunk Nation and Donald Greengrass* [hereinafter *Post Hearing Brief*]. The plaintiff chose not to submit a similar filing. *See Evidentiary Hearing* (Log of Proceedings Electronically Recorded [hereinafter *LPER*] at 1, May 10, 2001, 01:53:41 CST).

On November 9, 2001, the Court convened a teleconference to discuss the procedural posture of the case with the parties. Additionally, the Court intended to seek an update of the settlement discussions between the parties. *See Id.* at 1, 01:52:20 CST. Attorneys William F. Gardner and Michael P. Murphy participated in the teleconference.

1 **APPLICABLE LAW**

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

4 **Article VII – Judiciary**

5 **Sec. 5 Jurisdiction of the Judiciary.**

6
7 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
8 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
9 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
10 officials and employees, shall be a party. Any such case or controversy arising within the
11 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
12 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
13 the Nation’s sovereign immunity.

14 **Section 6. Powers of the Tribal 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
17 injunctive and declaratory relief and all writs including attachment and mandamus.

18 **Article X – Bill of Rights**

19 **Section 1. Bill of Rights.**

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

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

23 **Article XII – Sovereign Immunity**

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

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

1 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

2 Introduction

3 General Purposes [p. 2]

4
5 These policies are issued as the official directive of the obligations of the HoChunk (*sic*) Nation
6 and the employees to each other and to the public. They are to ensure consistent personnel
7 practices designed to utilize to (*sic*) the human resources of the Nation in the achievement of the
8 desired goals and objectives.

9 Chapter 6 – Compensation and Payroll Practices

10 HO-CHUNK NATION LEGISLATURE RESOLUTION 8-10-99 C [p. 22]

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

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

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

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

- 18 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working
19 days of the action. The Supervisor has an affirmative duty to try and resolve the problem.
20 The Supervisor has five (5) days to respond to the grievance. She/He must meet with the
21 person and document the decision.
- 22 2. If there is no relief or response within five (5) days after the end of the time period of the
23 first step, grieve in writing, on the required form, to the department director or enterprise
24 manager and the Personnel Department. The manager or director has an affirmative duty
25 to try and resolve the problem, and has ten (10) days to respond. If the grievance cannot
26 be resolved, go to step 3. Manager will talk with involved people and document the
27 decision.
- 28 3. Within ten (10) days of the decision or notice of decision at level 2, appeal in writing to
the appropriate Administrator and Personnel Department. The appropriate Administrator
has fifteen (15) days for initial review and response. Administrator (*sic*) will investigate,
document & inform Grievant.

1 RESOLUTION 6-9-98A

2 Tribal Court Review:

[p. 50b]

3
4 *Judicial Review of any appealable claim may proceed to the HoChunk (sic) Nation Tribal Court*
5 *after the Administrative Review Process contained in this Chapter has been exhausted. The*
6 *HoChunk (sic) Nation Rules of Civil Procedure shall govern any judicial review of an eligible*
7 *administrative grievance shall (sic) file a civil action with the Trial Court within thirty (30) days*
8 *of the final administrative grievance review decision.*

7 Limited Waiver of Sovereign Immunity

[pp. 50b-51]

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

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

21 Employee Rights

[p. 51]

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

24 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

25 Rule 3. Complaints.

26
27 (A) General. A civil action begins by filing a written *Complaint* with the clerk of court. The
28 *Complaint* shall contain short, plain statements of the grounds upon which the Court's
jurisdiction depends; the facts and circumstances giving rise to the action[;] and a demand for
any and all relief the party wants awarded. Relief should include, but is not limited to the dollar

1 amount that the party is requesting. The *Complaint* must contain the full names, addresses and
2 telephone numbers of all parties and any counsel and shall be signed by the filing party and
his/her counsel, if any. The Court shall have jurisdiction from the time the *Complaint* is filed.

3
4 Rule 53. Relief Available.

5 Except in a *Default Judgement*, the Court is not limited to the relief requested in the pleading and
6 may give any relief the evidence makes appropriate. The Court may only order such relief to the
7 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
8 conclusions of law shall be made by the Court in support of all final judgements.

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

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

13 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
14 later than ten (10) calendar days after entry of judgement, the Court may amend its findings or
conclusions or make additional findings or conclusions, amending the judgement accordingly.
15 The motion may be made with a motion for a new trial. If the Court amends the judgement, the
time for initiating an appeal commences upon entry of the amended judgement. If the Court
16 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 record or when an order denying the
17 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
18 the motion, the motion is considered denied. The time for initiating an appeal from judgement
commences in accordance with the Rules of Appellate Procedure.

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

21 (D) Grounds for Relief. The Court may grant relief from judgements or orders on motion of a
22 party made within a reasonable time for the following reasons: (1) newly discovered evidence
23 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
24 requesting party was not personally served in accordance with Rule 5(c)(1)(a) or (b); did not
25 have proper service and did not appear in the action; or (4) the judgement has been satisfied,
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*

1 *Procedure, specifically Rules of Appellate Procedure, Rule 7, Right of Appeal. All subsequent*
2 *actions of a final Judgement or Trial Court Order must follow the HCN Rules of Appellate*
3 *Procedure.*

4 **FINDINGS OF FACT**

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- 7 1. The parties received proper notice of the May 10, 2001 *Evidentiary Hearing*.
- 8 2. The Court incorporates by reference the *Findings of Fact* enumerated in the *Order*
9 *(Ruling on Dispositive Motions)* at 16-20.¹ At the *Evidentiary Hearing*, the defendants presented
10 no new evidence capable of contradicting the previous factual rendition. For example, the
11 defendant, Donald Greengrass, additionally testified that he:
- 12 a. informed the plaintiff, Margaret G. Garvin; the Ho-Chunk Nation Department of
13 Personnel [hereinafter Personnel Department]; and the Ho-Chunk Nation Payroll
14 Department [hereinafter Payroll Department], through submission of a time sheet, that
15 the plaintiff should receive backpay arising from the Level I suspension reversal;
16 *Evidentiary Hearing, (LPER at 2-3, May 10, 2001, 02:13:48 CST).*
- 17 b. could not recall whether he offered any explanation to the plaintiff concerning her
18 February 15, 2000 termination; *Id.* at 4, 02:21:04 CST.
- 19 c. believed that he asked the plaintiff to leave the office after she appeared to finish
20 reading the termination paperwork; *Id.* at 4-5, 02:21:17 CST.
- 21 d. did not request the presence of security personnel to escort the plaintiff from Ho-
22 Chunk Nation Headquarters, but to witness the termination despite the presence of two
23 (2) other individuals in attendance. *Id.* at 5, 02:23:03 CST.
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28 ¹ The Court derived these earlier *Findings of Fact* by construing the revealed facts in the light most favorable to the non-moving party, the plaintiff. *Loa Porter v. Chloris A. Lowe, Jr.*, CV 95-23 (HCN Tr. Ct., Mar. 1, 1996) at 1

1 3. The defendant, Donald Greengrass, cited no legal authority establishing the process by
2 which a successful grievant may request backpay from the Ho-Chunk Nation or a timeframe for
3 proper receipt of backpay.
4

5 4. The plaintiff offered only an inference that the sealed suspension documents retained in
6 her personnel record detrimentally impacted her attempts to gain subsequent employment. *Id.* at
7 11, 03:09:13 CST. The plaintiff presented no legal argument concerning whether she could
8 assert a deprivation of occupational liberty claim at either the *Evidentiary Hearing* or within a
9 subsequent legal brief.
10

11 5. When summoned to Ho-Chunk Nation Headquarters on February 15, 2000, Donald
12 Greengrass declined to inform the plaintiff of the purpose of the meeting upon her inquiry. *Id.* at
13 8, 02:47:35 CST.

14 6. The plaintiff recalls “no conversation at all” after Donald Greengrass presented her the
15 termination documents, apart from being asked to gather her belongings once she signed the
16 *Disciplinary Action Form*. *Id.* at 9, 02:50:06 CST.
17

18 7. The Court, in part, convened the *Evidentiary Hearing* to determine “whether Donald
19 Greengrass, Executive Director of Administration, or President Jacob Lonetree met and/or spoke
20 with the plaintiff as required in Levels I and II of the Administrative Review Process.” *Order*
21 *(Ruling on Dispositive Motions)* at 29. The defendant, Donald Greengrass, testified that he made
22 no attempt to meet with the plaintiff prior to issuing his Level I response. *Evidentiary Hearing,*
23 *(LPER at 5-6, May 10, 2001; 02:27:25 CST)*. The defendant also did not attempt to contact the
24 plaintiff’s counsel, Attorney William F. Gardner, prior to issuing the Level I response although
25 he recognized that the HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL
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(citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

1 [hereinafter PERSONNEL MANUAL] did not prohibit retention of counsel during the grievance
2 process. *Id.* at 7, 02:40:45 CST. The defendants submitted no evidence concerning whether
3 former President Jacob Lonetree corresponded with the plaintiff during the Administrative
4 Review Process, and the plaintiff indicated that the Office of the President did not contact her for
5 the purpose of discussing the Level II grievance. *Id.* at 10, 02:57:33 CST.

7 8. The plaintiff testified that she consistently received the maximum merit increase of four
8 percent (4%) throughout her period of continual employment with the Ho-Chunk Nation since
9 1994. *Id.* at 14, 03:32:13 CST. In fact, the plaintiff failed to qualify for a merit increase upon
10 her ninety (90) day evaluation in the Table Games Department of Ho-Chunk Casino on August
11 8, 1994. *See Brief in Support of Motion to Dismiss for Defendant Ho-Chunk Nation and*
12 *Defendant Greengrass in his Official Capacity*, CV 00-10, 38 (Nov. 13, 2000), Ex. A, attach. G.

14 9. The plaintiff earned an amount of \$13.17 per hour in the position of Executive
15 Administrative Assistant in the Ho-Chunk Nation Department of Administration [hereinafter
16 Administration Department] prior to her termination on February 15, 2000. *See Defendants' Ex.*
17 *F.*

19 10. The plaintiff mitigated damages by securing employment as a Blackjack Dealer at
20 Majestic Pines Casino on March 6, 2000.

22 11. On November 9, 2001, the parties agreed that the Court could enter a final judgment in
23 the consolidated cases with the understanding that if the Court determined that the plaintiff did
24 not receive due process in her termination, the Court should limit an award of money damages to
25 \$8,000.00 as already decided by the parties. *See Teleconference*, (LPER, Nov. 9, 2001, 01:30:00
26 CST).

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DECISION

Three (3) distinct issues remain within the instant case. The Court intends to discuss each issue separately while recognizing the relative interconnectedness between the latter two (2). The Court performs this review as if the matter had proceeded to *Trial* since the parties acknowledged a full disclosure of the facts and conclusion of legal argument.

I. Did the defendants afford the plaintiff minimal procedural due process protections as guaranteed by the CONSTITUTION OF THE HO-CHUNK NATION [hereinafter CONSTITUTION], ART. X, § 1(a)(8) in relation to her termination?

The Court earlier discussed the hearing component of procedural due process. *See Order (Ruling on Dispositive Motions)* at 26-29. Essentially, an employee must receive a “meaningful opportunity to be heard before their property can be taken away.” *Id.* at 26 (*quoting Gary Lonetree, Sr. v. John Holst, as Slot Dir. et al*, CV 97-127 (HCN Tr. Ct., Sept. 24, 1998) at 10, *aff’d* SU 98-07 (HCN S. Ct., Apr. 29, 1999)). The plaintiff did not receive anything resembling a *meaningful* opportunity to be heard.

On February 15, 2000, the defendant, Donald Greengrass, required the plaintiff to depart a family funeral in order to return to Ho-Chunk Nation Headquarters. The defendant would not reveal the exact purpose of the session, only stating that it would involve her employment. Once within the Administration Department, the defendant offered no explanation of the charges and did not ask the plaintiff if she wished to respond. The only direction the defendant gave to the plaintiff occurred once the plaintiff finished reading the completed termination paperwork. At that time, the defendant directed the plaintiff to gather her belongings from the office.

These facts do not reveal an “opportunity to confront or answer allegations . . . ,” but an expedited attempt to execute a foregone conclusion. *Debra Knudson v. Ho-Chunk Nation*

1 *Treasury Dep't*, SU 98-01 (HCN S. Ct., Dec. 1, 1998) at 3. Still, even if the Court accepted that
2 the February 15 session partially satisfied the requirement for a pre-termination hearing, the
3 appropriate administrators completely failed to adhere to their “affirmative dut[ies]” to discuss
4 the filed grievance with the plaintiff following the termination. PERSONNEL MANUAL, Ch. 12 at
5 50. The defendants seem to intimate that the plaintiff’s retention of an attorney somehow
6 impeded or prevented these mandatory discussions, yet the PERSONNEL MANUAL acknowledges
7 “the right to be represented by legal counsel” *Id.* at 51. Therefore, the plaintiff clearly has
8 been deprived of the procedural due process protection of a hearing guaranteed to her by the
9 CONSTITUTION.
10

11
12 The Court accordingly directs its attention to the issue of available relief. The Court
13 grants certain retroactive, legal relief requested by the plaintiff. The Court accordingly directs
14 the Administration Department to “award [the plaintiff] monetary damages for *actual* lost wages
15 and benefits.” HCN LEGISLATURE RESOLUTION 6-9-98A (emphasis added). As noted above, the
16 parties have preempted the Court’s entrance of a specific dollar figure since the parties have
17 agreed to a monetary damage amount of \$8,000.00. However, the Court shall note that a
18 calculation of backpay should not presume the accumulation of merit increases during the time
19 period away from work.
20

21
22 The limited waiver of sovereign immunity permits the Court to award “actual lost
23 wages,” and, therefore, the Court cannot speculate upon whether an employee *would have*
24 *received* merit increases but for the improper termination. *Id.* In the instant case, the plaintiff
25 had not always received merit increases at scheduled intervals despite her testimony to the
26 contrary. Moreover, the Court does not typically weigh the substantive factors supporting a
27 termination in a case decided on due process grounds. In such cases, assuming the awarding of
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1 merit increases proves highly dubious given the nature of the employment relationship at the
2 point of separation.

3 The Court also grants certain prospective, equitable relief requested by the plaintiff and
4 other relief as deemed appropriate by the Court. *See Ho-Chunk Nation Rules of Civil Procedure*
5 [hereinafter *HCN R. Civ. P.*], Rule 53. The Court accordingly directs the Personnel Department
6 to reinstate the plaintiff to a position with a comparable wage, *see PERSONNEL MANUAL*, Ch. 6 at
7 22; remove negative references from the plaintiff's personnel file; award bridged service credit;
8 and restore seniority. *See Id.* at 51. The Personnel Department shall contact the plaintiff within
9 a period of fourteen (14) calendar days from the entry of this *Order* to establish a timeline in
10 relation to reinstatement.
11

12
13 **II. Does the plaintiff retain the ability to receive unpaid backpay**
14 **for an overturned three (3) day suspension by means of a**
15 **favorable Level I resolution within the Administrative Review**
16 **Process?**

17 On January 4, 2000, the defendant, Donald Greengrass, granted the plaintiff's request for
18 backpay within his Level I grievance response. Specifically, the defendant declared, "You will
19 receive your back pay" *Defendant's Brief in Support of Motion to Dismiss*, CV 00-10 (May
20 19, 2000), Ex. A. The defendant did not indicate whether the plaintiff needed to take any
21 affirmative steps to receive this relief. Yet, the defendant never received any such payment.

22 The defendant clearly possessed the authority to grant the award of backpay. The
23 *PERSONNEL MANUAL* imposes "an affirmative duty" upon the Supervisor "to try and resolve the
24 problem" at Level I. *PERSONNEL MANUAL*, Ch. 12 at 50. Also, the defendant cited no legal
25 process that the plaintiff needed to follow in order to receive the backpay award. Despite these
26 facts, the defendant claims that the Ho-Chunk Nation's sovereign immunity from suit bars the
27 Court from awarding money damages in this circumstance since the plaintiff failed to name the
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1 Ho-Chunk Nation as a party to the suit. *See* CONSTITUTION, ART. XII. The Court disagrees with
2 this proposition since the defendant has already obligated the Ho-Chunk Nation to pay the
3 amount *not in dispute*.

4
5 The plaintiff named an official of the Ho-Chunk Nation as a party to the action, thereby
6 enabling an award of equitable relief. *See id.*, ART. XII, § 2. The defendant, in essence, refuses
7 to honor his resolution of the plaintiff's grievance. No authority exists for this subsequent
8 inaction. The defendant obligated the Ho-Chunk Nation to pay an amount commensurate with
9 three (3) days of wages, and the plaintiff should reasonably expect that a resolution offered
10 within the Administrative Review Process is binding upon the parties.

11
12 This case differs entirely from contractual disputes that the Court occasionally presides
13 over. No dispute exists. The defendant, however, contends that the plaintiff "reject[ed] the
14 payment offer in the Administrative Grievance Process only to try and obtain the same relief
15 later in Court." *Post Hearing Brief* at 4. Apart from this statement making little sense, the
16 defendant purported to derive this contention from the Court's *Findings of Fact*. Yet, the Court
17 only found that the plaintiff did not provide the Level I response to the Payroll Department. The
18 Court did not speculate as to whether this constituted a responsibility of the plaintiff in the first
19 instance, and, as noted above, no law appears to control the subject.

20
21
22 The defendant clearly agreed to award the plaintiff three (3) days of backpay. The
23 plaintiff only presented an identical claim to the Court since she had not yet received this relief.
24 In an unrelated case, former DOJ Attorney Michael Wacker quickly reacted to a similar
25 allegation by a plaintiff that she did not receive a monetary award granted during the
26 Administrative Grievance Process in the following manner: "I was under the impression based
27 on [the Level II response] that she did, and I can see that that happens." *Lori Koster v. Majestic*
28

1 *Pines Hotel et al.*, CV 00-103 (*LPER* at 6, Mar. 8, 2001; 09:43:20 CST). The parties
2 consequently agreed to dismiss the action. *See id.*, (HCN Tr. Ct., Apr. 10, 2001).

3
4 The Ho-Chunk Nation Legislature intended that the PERSONNEL MANUAL “ensure
5 consistent personnel practices” PERSONNEL MANUAL, Intro. at 2. The defendant now urges
6 the Court to set aside a particular grievance resolution on the basis that the plaintiff interrupted a
7 repayment process that does not exist. Nothing prevented the Payroll Department from issuing
8 the plaintiff’s backpay award, and the lack of any settled procedure may account for the
9 oversight. The Court accordingly grants the plaintiff declaratory and injunctive relief, requiring
10 the defendant, or his successor in interest, to comply with the grievance resolution which serves
11 to bind the Ho-Chunk Nation. The defendant argues that the Court may not enter such equitable
12 relief since not specifically requested within the *Complaint*. However, the *HCN R. Civ. P.* do not
13 require a plaintiff to assert legal theories in the pleading. *See HCN R. Civ. P. 3(A)*; *see also*
14 *Casey A. Fitzpatrick v. Ho-Chunk Nation*, CV 99-31 (HCN Tr. Ct., June 25, 1999). The
15 plaintiff’s request for backpay suffices in that the *HCN R. Civ. P.* do not require more.
16
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18 **III. Does the plaintiff retain the ability to seek an expungement of**
19 **documents in her personnel file related to an overturned**
20 **suspension if the associated Level I resolution granted partial**
21 **relief in the form of an award of backpay, accrued annual and**
22 **sick leave, and sealing of documents?**

23 The defendant strongly asserts that the plaintiff may not request an expungement of
24 documents when disconnected from a suspension or termination dispute. The defendant rests his
25 argument on the contention that a plaintiff maintains no property interest in her personnel file.
26 The Court is inclined to agree with the defendant on the latter point, but the Court disagrees with
27 the defendant’s self-imposed limitation upon the issue of standing.
28

1 In determining the presence of a case or controversy, the Court has consulted federal
2 jurisprudence for the purpose of establishing the elements of standing. *See Loa Porter v. Chloris*
3 *Lowe, Jr.*, CV 95-23 (HCN Tr. Ct., Oct. 2, 1996) at 2 (*quoting Valley Forge Christian Coll. v.*
4 *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)), *rev'd on*
5 *other grounds* SU 96-05 (HCN S. Ct., Jan. 10, 1997); *see also* CONSTITUTION, ART. VII, § 5(a).
6 The first element of standing proves relevant to our present inquiry. The Court requires that the
7 plaintiff show that she “personally has suffered some actual or threatened injury as a result of the
8 putatively illegal conduct of the defendant” *Id.*; *see also Libby Fairchild v. Ho-Chunk*
9 *Nation Legislature*, CV 00-55 (HCN Tr. Ct., July 18, 2001) at 8; *Steve B. Funmaker v. JoAnn*
10 *Jones et al.*, CV 97-72 (HCN Tr. Ct., Nov. 26, 1997) at 9. Consequently, the plaintiff cannot
11 access the broad equitable powers of the Court without first satisfying this element of standing.
12 *See* CONSTITUTION, ART. VII, § 6(a).

13
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15
16 The defendant does not characterize his objection to the plaintiff’s cause of action in the
17 terminology associated with standing, but through terminology commonly used in a due process
18 analysis. A deprivation of a property or liberty interest triggers due process protections. *See id.*,
19 ART. X, § 1(a)(8). And, while an illegal deprivation of one’s property interest will constitute an
20 “actual injury,” a plaintiff may receive an injury which does not arise from an affected property
21 or liberty interest. In other words, the Court’s determination of whether a plaintiff satisfies the
22 first element of standing is separable from whether a plaintiff is entitled to minimal procedural
23 due process.

24
25 The Court earlier conjectured as to whether an employee could assert a deprivation of
26 occupational liberty due to an employer lodging stigmatizing information in a personnel file.
27 The Court, however, received no relevant facts or legal argument from the plaintiff. The Court
28

1 refrains from deciding whether it should recognize such a claim, and, if so, in what respect. As
2 concerns the instant case, the Court denies the plaintiff's request for an expungement of
3 documents relating to the suspension due to the failure to substantiate either "an actual or
4 threatened injury" or the extension of this Court's due process jurisprudence.
5

6
7 The parties retain the right to file a timely post judgment motion with this Court in
8 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgement or Order.*
9 Otherwise, "[a]ny *final Judgement or Order* of the Trial Court may be appealed to the Ho-Chunk
10 Nation Supreme Court.² The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
11 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
12 Appeal." *HCN R. Civ. P. 61.* The appellant "shall within thirty (30) calendar days after the day
13 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
14 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.)."
15 *HCN R. App. P. 7(b)(1).* "All subsequent actions of a *final Judgement* or Trial Court *Order* must
16 follow the [*HCN R. App. P.*]" *HCN R. Civ. P. 61.*
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23 ² 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.

1 **IT IS SO ORDERED** this 16th day of November, 2001 by the Ho-Chunk Nation Trial
2 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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6 Honorable Todd R. Matha
7 Associate Trial Court Judge
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