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

Janette Smoke,
Plaintiff,

v.

Case No.: **CV 01-97**

**Steve Garvin, in the capacity of Table
Games Manager, Majestic Pines Casino and
Ho-Chunk Nation,**
Defendants.

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether the defendants improperly implemented Unit Operating Rules. The defendants affected such implementation without fulfilling requirements clearly stated in the HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL). The Court accordingly grants a judgment in favor of the plaintiff.

PROCEDURAL HISTORY

The plaintiff, Janette Smoke, initiated the current action by filing a *Complaint* with the Court on August 22, 2001. Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on August 22, 2001, and delivered the documents by personal

1 service to the defendants' representative, Ho-Chunk Nation Department of Justice (hereinafter
2 DOJ).¹ The *Summons* informed the defendants of the right to file an *Answer* within twenty (20)
3 days of the issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(B)*. The *Summons* also
4 cautioned the defendants that a *default judgment* could result from failure to file within the
5 prescribed time period.
6

7 The defendants, by and through DOJ Attorney Wendi A. Huling, timely filed its *Answer*
8 on September 10, 2001. The Court reacted by mailing *Notice(s) of Hearing* to the parties,
9 informing them of the date, time and location of the *Scheduling Conference*. The Court
10 convened the *Scheduling Conference* on October 25, 2001 at 9:30 a.m. CST. The following
11 parties appeared at the *Conference*: Janette Smoke, plaintiff, and DOJ Attorney Wendi A.
12 Huling, defendants' counsel. The Court entered the *Scheduling Order* on October 25, 2001,
13 setting forth the applicable timeline of the instant case.
14

15 On January 31, 2002, the plaintiff requested a postponement of the *Trial*, which the Court
16 granted in its February 4, 2002 *Order (Granting Request to Reschedule)*. Shortly thereafter,
17 Attorney JoAnn Jones filed an *Entry of Appearance* on behalf of the plaintiff, and sought to
18 reschedule the proceeding with the Court and the defendants. The Court convened the second
19 *Scheduling Conference* on March 21, 2002 at 10:00 a.m. CST. The following parties appeared at
20 the *Conference*: Janette Smoke, plaintiff; Attorney JoAnn Jones, plaintiff's counsel; Steve
21 Garvin, defendant; and DOJ Attorney Wendi A. Huling, defendants' counsel. The Court entered
22 the amended *Scheduling Order* on March 21, 2002, setting forth the applicable timeline of the
23 instant case.
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28 ¹The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

1 The plaintiff filed an *Amended Complaint* on May 23, 2002, after receiving the consent of
2 the defendants. The Court convened two (2) days of *Trial* on June 27, 2002 and July 3, 2002,
3 respectively. The Court began each proceeding at 9:00 a.m. CDT. The following parties
4 appeared at the *Trial*: Janette Smoke, plaintiff; Attorney JoAnn Jones, plaintiff's counsel; Steve
5 Garvin, defendant; and DOJ Attorney Wendi A. Huling, defendants' counsel.
6

7 8 **APPLICABLE LAW**

9 10 **CONSTITUTION OF THE HO-CHUNK NATION**

11 **Article V - Legislature**

12 **Sec. 2. Powers of the Legislature.** The Legislature shall have the power:

- 13 (a) To make laws, including codes, ordinances, resolutions, and statutes;
- 14 (b) To establish Executive Departments, and to delegate legislative powers to the Executive
15 branch to be administered by such Departments, in accordance with the law; any Department
16 established by the Legislature shall be administered by the Executive; the Legislature reserves
17 the power to review any action taken by virtue of such delegated power;
- 18 (c) To constitute a Board of Directors for each Department, except the President shall name
19 the Executive Director, subject to confirmation by the Legislature;
- 20 (f) To set the salaries, terms and conditions of employment for all government personnel;

21 **Article VI - Executive**

22 **Sec. 1. Composition of the Executive.**

23 (b) The Executive Branch shall be composed of any administrative Departments created by
24 the Legislature, including a Department of the Treasury, Justice, Administration, Housing,
25 Business, Health and Social Services, Education, Labor, and Personnel, and other Departments
26 deemed necessary by the Legislature. Each Department shall include an Executive Director, a
27 Board of Directors, and necessary employees. The Executive Director of the Department of
28 Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
the Department of the Treasury shall be called the Treasurer of the Ho-Chunk Nation.

1 Sec. 2. Powers of the President. The President shall have the power:

2 (a) To execute and administer the laws of the Ho-Chunk Nation;

3 (d) To administer all Departments, boards, and committees created by the Legislature;

4 (g) To select and hire personnel in accordance with applicable law;

5 (l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary to
6 exercise all powers delegated by the General Council and the Legislature, including but not
7 limited to the foregoing list of powers.

8 DEPARTMENT OF PERSONNEL ESTABLISHMENT AND ORGANIZATION ACT OF
9 1995

10 Sec. 3. Mission.

11 (a) It is the mission of the Ho-Chunk Nation Department of Personnel to ensure that
12 consistent practices and policies which utilize, protect and develop the human resources of the
13 Ho-Chunk Nation are applied in all enterprises and departments. The Department will also
14 provide timely, equitable and high-quality service to support the enterprises' and departments'
15 missions. The Department will promote Ho-Chunk hiring preference in accordance with the
16 sovereign rights of the Nation. In addition to processing and maintaining accurate employment
17 and employee data, the Department will oversee employee insurance, provide employee
18 assistance, and manage the implementation of personnel codes and regulations.

19 Sec. 4. Executive Director and Board.

20 (a) The Department of Personnel shall consist of one Executive Director, a Board of
21 Directors, and such divisions and offices as shall be necessary for the execution of the mission
22 and mandates of the Department.

23 (g) The Board of Directors shall serve in an advisory capacity, providing legal,
24 administrative, and cultural recommendations to the Executive Director. The Board shall also
25 serve as the "Personnel Committee." The Board shall record all its major decisions and the
26 Executive Director will take them under advisement. The Board shall not be a policy-making
27 body.

28 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated
29 Mar. 30, 2001)

30 Introduction

31 General Purposes:

[p. 2]

1 These policies are issued as the official directive of the obligations of the HoChunk [sic] Nation
2 and the employees to each other and to the public. They are to ensure consistent personnel
3 practices designed to utilize to [sic] the human resources of the Nation in the achievement of the
4 desired goals and objectives.

4 *****

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

6 Unit Operating Rules: [p. 2]

7
8 Each separate and identifiable department, division, or work unit of the Nation may develop,
9 implement, and revise as necessary such procedures and rules pertaining to unique operational
10 requirements and their effect upon unit employees as are needed for efficient and effective
11 performance of the unit. Such procedures and rules should not conflict with these policies and
12 procedures, or amendments thereto, and must therefore be approved by the Personnel Committee
13 prior to implementation. Where conflict may arise, the policies and procedures contained in this
14 manual will prevail.

13 Chapter 1 - Equal Employment Opportunity

14 A. Equal Employment Policy. [p. 3]

15 It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any and all
16 employees and job applicants on the basis of merit, qualifications, and competence. The
17 HoChunk [sic] Nation does retain the right to exercise Native American preference in hiring
18 Native American job applicants. This policy shall otherwise be applied without regard to any
19 individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation,
20 or physical handicap.

19 The Ho-Chunk Nation does retain the right to exercise Ho-Chunk preference in employment,
20 training, and promotions. (RESOLUTION 02/25/97A)

21 It shall be the responsibility of the employer and employees to abide by and carry out the
22 Nation's equal employment policy and the Federal Equal Employment Opportunity Act.

23 C. Ho-Chunk Preference. [pp. 3-4]

24 Native American Preference has been a federal policy since 1834 which accords hiring
25 preference to Indians. The purpose of this preference is to give Native Americans a greater
26 participation of self-government, to further the Governments [sic] trust obligations, and to reduce
27 the negative effect of having non-Indians administer matters that effect Indian tribal life. More
28 recently, legislation such as the Civil Rights Act (1964) and the Education Amendments of 1972
(passed after the Equal Employment Opportunity) have continued to specifically provide for
preferential hiring of Native Americans by Indian tribes.

1 The HoChunk [sic] Nation exists to serve the needs of the HoChunk [sic] people. As an
2 employer, the Nation seeks to employ individuals who possess the skills, abilities, and
background to meet the employment needs of the Nation.

3
4 As a sovereign Nation and a unique cultural group, the HoChunk [sic] Nation had determined
5 that a highly desirable employment characteristic is a knowledge of the HoChunk [sic] culture
6 that can be attained only by membership in the HoChunk [sic] Nation. Further, the Nation
7 recognizes a unique, shared culture of Native American Indians and had determines [sic] as a
desirable employment characteristic, is status as a member of other Native American tribes. At
8 minimum, the Nation has determined that some knowledge of Native American culture is a
desirable employment characteristic.

9 The HoChunk [sic] Nation is an equal employment opportunity employer and follows non-
10 discriminatory policies and procedures in personnel decisions: however, the Nation maintains
the right to exercise HoChunk [sic] preference, prioritized as:

- 11 1. Hoc□k Wazijaci Tribal member
- 12 2. Spouse or Parent of Hoc□k Wazijaci Tribal member
- 13 3. Native American Tribal member
- 14 4. Non-Natives

15 This policy shall be applied in recruiting, hiring, promotion, transfers, training, layoffs,
16 compensation, benefits, terminations, and all other privileges, terms and other conditions of
employment. The Human Resources/Personnel will communicate the important guidelines and
17 procedures that will be followed in its commitment of HoChunk [sic] Preference. (MOTION
RATIFIED 06/10/98)

18 Chapter 5 - Hours, Meals, and Rest Periods

19 Services. [p. 11]

20 B. Work Schedules: Will be established for each employee by supervisory personnel who
21 may change such schedules based on the needs and requirements of work unit operations.
22 Supervisory personnel may also require an employee to work an unscheduled day in place of a
23 scheduled day within the same work week, in which case the unscheduled day worked shall be
treated as a modified work schedule and not be subject to overtime compensation on the basis of
a changed work day.

24 Chapter 7 - Conditions of Employment

25 Double Employment. [p. 24]

26 Employees may hold a second job within the Nation, provided it is part time, twenty (20) hours,
27 subject to certain restrictions listed below:
28

1 1. The HoChunk [*sic*] Nation requires that the second job must not adversely affect the
2 employees [*sic*] full-time job performance and ability to fulfill job responsibilities.

3 2. Upon requesting permission to seek or accept a second job, employees are cautioned to
4 consider the demands that such additional employment will create. A second job will not be
5 considered an excuse for poor job performance, absenteeism, tardiness, leaving early, refusal to
6 travel, or refusal to work overtime or different hours. Should the second job cause or contribute
to any of these situations, such employment must be discontinued and if necessary, normal
disciplinary procedures will be followed up to and including termination.

7 Chapter 12 - Employment Conduct, Discipline, and Administrative Review

8 Limited Waiver of Sovereign Immunity. [p. 61]

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 from 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 benefits.
15 The Trial Court specifically shall not grant any monetary award against the Nation or its
16 officials, officers, and employees acting within the scope of their authority on the basis of injury
17 to reputation, defamation, or other similar invasion of privacy claim; nor shall the Trial Court
18 grant any punitive or exemplary damages.

19 The Trial Court may grant equitable relief mandating that the HoChunk [*sic*] Nation
20 prospectively follow its own laws, and as necessary to remedy any past violations of tribal law.
21 Other equitable remedies shall include, but not be limited to: an order of the Court to the
22 Personnel Department to reassign or reinstate the employee, a removal of negative references
from the personnel file, an award of bridged service credit, and a restoration of seniority.
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. (RESOLUTION
06/09/98A)

23 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (adopted Feb. 22, 1997)

24 Rule 5. Notice of Service of Process.

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

1 Rule 27. The Nation as a Party.

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

8 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (amended Apr. 13, 2002)

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

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

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

25 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
26 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
27 must be based upon new information that has come to the party's attention that, if true, could
28 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
commences when the Court denies the motion on the record or when an order denying the
motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of
such motion, and the Court does not decide the motion or the judge does not sign an order
denying the motion, the motion is considered denied. The time for initiating an appeal from
judgment commences in accordance with the Rules of Appellate Procedure.

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

(E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
party made within a reasonable time for the following reasons: (1) newly discovered evidence

1 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
2 misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
3 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii); did not
4 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
5 released, discharged or is without effect due to a judgment earlier in time.

6 Rule 61. Appeals.

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

12 **FINDINGS OF FACT**

13 1. The plaintiff, Janette Smoke, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
14 439A000441, and is employed as a Floor Supervisor within the Majestic Pines Casino Table
15 Games Department (hereinafter Table Games). The plaintiff has continuously worked for the
16 Ho-Chunk Nation for a period of time exceeding eleven (11) years, transferring to Table Games
17 nearly four (4) years ago from Ho-Chunk Casino. *Trial* (LPER at 4, June 27, 2002, 09:33:54
18 CDT).

19 2. The defendant, Steve E. Garvin, is an enrolled member of the Ho-Chunk Nation, Tribal
20 ID# 439A000954, and is employed as Table Games Manager. Majestic Pines Casino
21 (hereinafter MPC) is a division within the Ho-Chunk Nation Department of Business and located
22 on trust lands at W9010 Highway 54 East, Black River Falls, WI. DEP'T OF BUS.
23 ESTABLISHMENT & ORG. ACT OF 1995, § 5(a-b). The defendant, Ho-Chunk Nation, is a federally
24 recognized Indian tribe with principal offices located at the Ho-Chunk Nation Headquarters,
25 W9814 Airport Road, P.O. Box 667, Black River Falls, WI.
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1 3. On or about December 3, 2000, Table Games implemented the *Procedures for Schedule*
2 *Ranking System* (hereinafter *Ranking System*). See Pl.'s Ex. 4, 15. The *Ranking System* tracks
3 employee attendance and participation through two (2) six-month intervals per calendar year.
4 See Pl.'s Ex. 15 at 4. Consequently, Table Games had completed three (3) intervals at the time of
5 *Trial*. The plaintiff filed her July 2, 2001 Level 1 Grievance following the assignment of work
6 schedules based on the first interval rankings posting. Pl.'s Ex. 1-4.
7

8 4. Former Executive Director of the Ho-Chunk Nation Department of Business, Silas
9 Cleveland, testified that he fostered the idea of implementing a uniform ranking system within
10 the casinos operated by the Ho-Chunk Nation. *Trial* (LPER at 8, July 3, 2002, 09:49:37 CDT).
11 Mr. Cleveland intended that the uniform ranking system assist in producing and rewarding
12 efficient, productive and courteous Table Games staff. *Id.* at 9, 09:56:02 CDT. Mr. Cleveland
13 indicated that he vested authority to the defendant to develop a ranking system. *Id.* at 10,
14 09:58:44 CDT.
15

16 5. Mr. Cleveland did not intend that the uniform ranking system function as an indicator of
17 good attendance, but as a method to evaluate and reward performance. *Id.* at 10, 10:01:59 CDT.
18 Mr. Cleveland hoped the implementation of the uniform ranking system would coincide with the
19 adoption of a new tip distribution system, whereby dealers would retain individual tips instead of
20 collectively sharing in tip revenue. Hypothetically, employees would compete for high volume
21 days in order to enhance their income generating possibilities. However, the new tip distribution
22 system never came to fruition. *Id.* at 11, 10:06:39 CDT.
23

24 6. MPC Pit Boss Ken Wilson developed the *Ranking System*, drawing upon his past work
25 experience with Wal-Mart Stores, Inc. and a similar system utilized by the nationwide retailer.
26 *Id.* at 24, 12:49:56 CDT. Mr. Wilson denied receiving any directive from Mr. Cleveland to
27
28

1 create the *Ranking System*. Once developed, Mr. Wilson presented the *Ranking System* to the
2 defendant, but not for the purpose of seeking approval. *Id.* at 25, 12:50:56 CDT. Mr. Wilson did
3 not recognize a need to seek formal approval of the *Ranking System*. *Id.*, 12:53:38 CDT.
4

5 7. The defendant submitted the *Ranking System* to former MPC General Manager, Ida
6 Carrier, but received no formal approval. Ms. Carrier seemingly acquiesced to the
7 implementation of the *Ranking System*. *Trial* (LPER at 53-54, June 27, 2002, 04:29:41 CDT).
8 The defendant did not submit the *Ranking System* to the Ho-Chunk Nation Department of
9 Personnel Board of Directors (hereinafter PBOD). *Id.* at 46, 03:39:33 CDT.
10

11 8. The defendant revised the *Ranking System* after the first interval and subsequent
12 intervals. *Id.* at 46, 03:44:14 CDT. MPC General Manager Rita Cleveland approved the
13 *Ranking System* following the first revision. *Id.* at 53-54, 04:29:41 CDT. The defendant "was
14 comfortable with [his] development of [the *Ranking System*] and forwarding them to [his]
15 General Manager[s] for their review." *Id.* at 53, 04:27:42 CDT.
16

17 9. Upon the defendant's request, Ms. Cleveland submitted the *Ranking System* to PBOD.
18 *Trial* (LPER at 30, July 3, 2002, 01:21:11 CDT). She understood that the defendant devised the
19 *Ranking System*. *Id.* at 31, 01:28:57 CDT. Ms. Cleveland "sent them to the PBOD as a courtesy,
20 so that they could take a look at them to make sure that the *Ranking System* did not conflict with
21 any part of the PERSONNEL [MANUAL. She] did not send them there for the purpose of being
22 approved." *Id.*, 01:26:31 CDT.
23

24 10. Ms. Cleveland recognized the existing requirement of gaining PBOD approval of Unit
25 Operating Rules, but believed that the *Ranking System* did not constitute Unit Operating Rules.
26 *Id.*, 01:27:35 CDT; *see also* PERS. MANUAL, Intro. at 2. Instead, Ms. Cleveland considered the
27 *Ranking System* to be a discretionary scheduling mechanism. *Id.* at 29, 01:14:12 CDT; *see also*
28

1 PERS. MANUAL, Ch. 5, § B at 11. Ms. Cleveland remarked that the only distinction between a
2 Unit Operating Rule and a scheduling mechanism is the mere fact that the former assumes
3 written form. *Id.* at 30, 01:18:45 CDT.
4

5 11. Nonetheless, Ms. Cleveland acknowledged the obligation of PBOD to ensure the absence
6 of conflict between the *Ranking System* and the PERSONNEL MANUAL. *Id.* at 30, 01:21:46 CDT.

7 PBOD did not respond to the submission, but Ms. Cleveland simply regarded this as a tacit
8 approval. *Id.*, 01:22:01 CDT. Ms. Cleveland testified that each MPC department maintains Unit
9 Operating Rules, but no such rules have ever received PBOD approval. *Id.* at 32, 01:35:08 CDT.
10

11 12. Contrary to Ms. Cleveland's assessment, Ho-Chunk Nation Department of Personnel
12 (hereinafter Personnel Department), Personnel Manager James Lambert clearly stated that the
13 *Ranking System* constituted Unit Operating Rules. *Trial* (LPER at 42, June 27, 2002, 02:53:18
14 CDT). However, Mr. Lambert indicated that PBOD has not approved the *Ranking System*, and
15 remained unaware as to whether any other casino ranking system received approval. *Id.* at 41,
16 02:51:07 CDT.
17

18 13. Mr. Lambert explained that PBOD declines approving Unit Operating Rules since it
19 perceives a conflict between the PERSONNEL MANUAL and the DEPARTMENT OF PERSONNEL
20 ESTABLISHMENT AND ORGANIZATION ACT OF 1995 (hereinafter PERSONNEL ORGANIZATION
21 ACT). *Id.* at 42, 02:54:09 CDT; *see also* PERS. ORG. ACT, § 4(g). PBOD wishes to avoid
22 assuming a policy-making role, and, therefore, PBOD typically returns Unit Operating Rules to
23 the sender, indicating that it has no authority to grant approval. *Id.* at 43, 03:01:14 CDT.
24

25 14. Mr. Lambert revealed that the Ho-Chunk Nation Legislature (hereinafter Legislature)
26 intended to remedy the perceived conflict, but, at this point, he could not say who possessed
27 authority to approve Unit Operating Rules. *Id.*, 02:59:43 CDT. Mr. Lambert only suggested that
28

1 the department director could approve Unit Operating Rules absent any other clear delegation.
2 *Id.*, 03:02:14 CDT. In the meantime, PBOD declines to even note potential conflicts between
3 Unit Operating Rules and the PERSONNEL MANUAL. *Id.*, 03:05:17 CDT.

4
5 15. Former Executive Director of the Ho-Chunk Nation Department of Business, Timothy
6 Dooley,² recognized that there "must be hundreds and hundreds of [unapproved] operating rules
7 in existence," but determined not to perform a "review unless a conflict would arise." *Id.* at 37,
8 02:20:24 CDT. Mr. Dooley further recognized that each casino could implement substantively
9 different Unit Operating Rules within similar department structures. *Id.* at 40, 02:40:51 CDT.
10 He remarked, "[a]t this point, we are not ready for any kind of uniformity" in the casino ranking
11 systems. *Id.*, 02:41:31 CDT.

12
13 16. Concerning the usage of preference, Mr. Dooley noted, "[i]n my opinion, Ho-Chunk
14 preference and how it should be applied is a work in progress at this point." *Id.* at 39, 02:33:44
15 CDT. Mr. Dooley sat on an informal advisory board comprised of officials from the Office of
16 the President and three (3) executive departments. The board was attempting to establish the
17 manner in which Ho-Chunk preference applied in four (4) distinct areas: hiring, disciplinary
18 actions, promotions and leave requests. The Personnel Department favored employing Ho-
19 Chunk preference solely in relation to hiring, but Mr. Dooley felt that "[i]t [was] not clear to
20 anybody at this point what should [*sic*] Ho-Chunk preference apply to out of those four
21 scenarios." *Id.*, 02:35:00 CDT.

22
23
24 17. Legislative Counsel, Attorney William A. Boulware, Jr., offered some insight into the
25 historical interaction of the Legislature and PBOD. Attorney Boulware explained that PBOD
26 generally referred Unit Operating Rules to the Legislature, deferring to a legislative desire to
27

28

² Mr. Dooley succeeded Mr. Cleveland in this position.

1 review executive rules. *Trial* (LPER at 6, July 3, 2002, 09:33:59 CDT). Although not required,
2 "historically, [the] Legislature has always wanted to have its hand on some of those issues to be
3 aware of them, and ultimately approve them." *Id.*, 09:36:49 CDT.

4
5 18. More recently, the Legislature has recognized that it should refrain from approving Unit
6 Operating Rules. *Id.*, 09:37:01 CDT. Attorney Boulware commented that "[t]he problem is that
7 the Legislature itself has been very proactive in wanting to review all policies, even though their
8 responsibility is to promulgate statutes, acts and laws; allowing the Executive Branch to
9 promulgate policies interpreting those laws." *Id.*, 09:38:06 CDT.

10
11 19. In summation, Attorney Boulware noted the following:

12 [a]ny department or unit director has the ability to promulgate . . . internal
13 operating rules for that unit or department, but they ultimately, according
14 to the statute, which has not been . . . changed to my knowledge, would
15 still have to go to PBOD for approval. As a supervisor of Table Games, I
16 couldn't promulgate a rule interpreting a statute, and not present it to
17 PBOD and the Personnel Director so that they are aware of those
18 interpretations, because the rules have to be consistent, and if there's a rule
19 being promulgated that is in conflict with the employment laws
20 themselves, it wouldn't be a valid rule.

21
22 *Id.*, 09:39:45 CDT.

23 20. The defendant instituted the *Ranking System* for the following stated purposes: a)
24 "afford[ing] employees a 'set' schedule to ease planning of their activities;" b) "encourag[ing]
25 excellent attendance;" c) "promot[ing] proper use of annual leave benefits;" and d) "advocat[ing]
26 for greater teamwork through the use of shift exchanges." Pl.'s Ex. 15 at 1. Table Games
27 employees could accumulate ranking hours by a) "working scheduled hours;" b) using a
28 qualifying amount of Annual Leave hours;" and c) "earning bonus hours." *Id.*

29 21. Concerning annual leave, the defendant initially determined that "it [was] the only leave
30 benefit that has the potential of being added towards the determination of Ranking Hours." *Id.* at

1 2. An employee could receive a ranking hour for each hour of annual leave, but only if the
2 employee took a forty (40) hour increment of annual leave. Therefore, if an employee took
3 annual leave for a single day, the employee could receive no ranking hours for his or her
4 approved leave time. *Id.*; *see also Trial* (LPER at 25-26, July 3, 2002, 12:53:59 CDT). Also, an
5 employee could not receive ranking hours for approved sick leave, *Trial* (LPER at 23, June 27,
6 2002, 12:04:23 CDT, family medical leave, *id.* at 33, 01:42:45 CDT, funeral leave, *id.*, or
7 religious leave. *Id.* at 24, 12:13:44 CDT.

9 22. Concerning bonus hours, the defendant conceded that the procedure for receiving such
10 credit "is very informal, in that, for the most part, it is kind of a first come, first served" basis.
11 *Id.* at 50, 04:09:02 CDT. The defendant eliminated bonus hours from the *Ranking System* after
12 the second interval, and, likewise, reduced the annual leave stipulation to a single day for
13 purposes of receiving ranking hours. *Id.* at 46, 03:44:14 CDT.

14 23. The defendant retained discretion to resolve potential conflicts encountered after
15 implementing the *Ranking System*. In this regard, the defendant made the below observation.

16 [I]t is understood that the Table Games Manager may use any of the
17 following tools to reach a final decision on matters that pertain to the
18 Schedule Ranking System:

- 19 ▪ His own infinite wisdom
- 20 or
- 21 ▪ The always equitable coin toss
- 22 or
- 23 ▪ The much-aligned, yet normally reliable, Magic Eight Ball
- 24 or finally,
- 25 ▪ A quick and decisive game of Rock-Paper-Scissors

26 Pl.'s Ex. 15 at 5.

27 24. The plaintiff asserts three (3) primary objections to the *Ranking System*. First, the
28 plaintiff challenges the lack of Ho-Chunk preference afforded in the selection of work schedules.

1 Pl.'s Ex. 5; *see also* PERS. MANUAL, Ch. 1, § C at 4 ("all other privileges, terms and other
2 conditions of employment"). Second, the plaintiff protests the decision to eliminate the
3 consideration of seniority in the selection of work schedules. Pl.'s Ex. 16 at 2. Third, the
4 plaintiff objects to the lack of uniformity or consistency amongst casino ranking systems. For
5 example, Table Games utilizes a different ranking system than its Ho-Chunk and Rainbow
6 Casino counterparts, which include seniority as a determining factor. *Trial* (LPER at 16, July 3,
7 2002, 11:00:22 CDT).

9 25. Ho-Chunk Casino and Rainbow Casino Table Games Departments share the same
10 ranking system. The alternative ranking system allows employees to "earn Ranking Hours in the
11 following ways:
12

- 13 > Years of service
- 14 > Exhibiting excellent attendance
- 15 > Providing excellent Customer Service
- 16 > Scoring well on your Annual Evaluation
- 17 > Maintaining an Exemplary Service Record
- 18 > Productivity Levels

19 Pl.'s Ex. 21 at 1. The alternative ranking system incorporated a bonus hours calculation, but
20 erected no annual leave restrictions. *Id.* at 2-4.

21 26. The defendant responded to the plaintiff's Level 1 Grievance, emphasizing that the
22 *Ranking System* serves as a mechanism by which he establishes and/or changes "'schedules based
23 on the needs and requirements of work unit operations.'" Pl.'s Ex. 17 (quoting PERS. MANUAL,
24 Ch. 5, § B at 11). Consequently, the defendant afforded the plaintiff none of her requested relief.

25 27. Mr. Cleveland responded to the plaintiff's Level 2 Grievance on August 13, 2001, and
26 upheld the defendant's response as it related to the plaintiff's work schedule. Mr. Cleveland also
27 quoted the above statutory provision, noting that "it is supervisory personnel's discretion to
28 determine work schedules" Pl.'s Ex. 18. However, "[t]o satisfy the requirements of having

1 the Ranking Point System approved by the Personnel Committee³ (*See Attached*); this office will
2 forward the *unit-operating rule* to [the] Department of Personnel." *Id.* (emphasis in original).

3
4 28. PBOD never subsequently approved the *Ranking System*, but Mr. Cleveland expressed at
5 *Trial* that no approval proved necessary since the *Ranking System* was merely a scheduling
6 mechanism. *Trial* (LPER at 8, July 3, 2002, 09:52:16 CDT). This statement directly contradicts
7 his grievance response.

8
9 29. At the time of *Trial*, the plaintiff used three (3) days of annual leave in order to
10 accommodate working at a second job outside the Ho-Chunk Nation. The plaintiff contends that
11 but for the *Ranking System*, she would have secured a schedule, which would not have conflicted
12 with her secondary employment at Harley-Davidson, Inc. *Trial* (LPER at 17, June 27, 2002,
13 11:05:14 CDT).

14 15 16 **DECISION**

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19 Several of the defendants' witnesses either characterize the *Ranking System* as strictly a
20 scheduling mechanism, and, therefore, not Unit Operating Rules, or concede that the *Ranking*
21 *System* constitutes Unit Operating Rules, but that prior PBOD approval proves unnecessary for a
22 number of reasons. For example, Ms. Cleveland regards the *Ranking System* as a scheduling
23 mechanism, but still understands the necessity of having PBOD ensure the absence of any
24 conflict between the *Ranking System* and the PERSONNEL MANUAL. However, Ms. Cleveland
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³ PBOD has supplanted the Personnel Committee, and, as concerns existing statutory references, PBOD "shall also serve as the 'Personnel Committee.'" PERS. ORG. ACT, § 4(g).

1 does not believe that this task must result in PBOD approval. Yet, she admits that none of the
2 MPC Unit Operating Rules have ever received PBOD approval.

3 The PERSONNEL MANUAL clearly states that Unit Operating Rules "should not conflict
4 with these policies and procedures, or amendments thereto, and must therefore be approved by
5 the Personnel Committee prior to implementation." PERS. MANUAL, Intro. at 2. PBOD approval
6 represents an assurance that the proffered Unit Operating Rules do not conflict with statutory
7 authority, and all must receive approval prior to implementation. One cannot separate the PBOD
8 conflict assessment from ultimate PBOD approval.
9

10 Attorney Boulware appreciates the need to seek PBOD approval of Unit Operating Rules,
11 but only if such rules purport to interpret statutory law. The above-quoted provision does not
12 make this distinction except in the broadest sense, *i.e.*, an administrative rule must have some
13 statutory basis or connection. However, Unit Operating Rules do not necessarily have to
14 interpret a statutory provision in order to conflict with a given provision.
15

16 The defendant insists that the *Ranking System* does not represent Unit Operating Rules.
17 He contends that the *Ranking System* simply serves to better inform his determination of work
18 schedules. Yet, the *Ranking System* accomplishes much more than an assessment of "the needs
19 and requirements of work unit operations." PERS. MANUAL, Ch. 5, § B at 11. In fact, without
20 any measurement of employee ability, the *Ranking System* arguably does not truly focus upon
21 such needs and requirements. The *Ranking System* instead impermissibly delves into other areas,
22 *e.g.*, usage of leave time and classification thereof.
23

24 The Court concurs with the conclusion reached by Mr. Lambert and Mr. Cleveland in his
25 Level 2 Grievance Response. Quite simply, the *Ranking System* requires PBOD approval. The
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1 defendant improperly implemented the *Ranking System* without such approval, and, therefore,
2 remains in violation of the law, namely the PERSONNEL MANUAL.

3
4 The ongoing reluctance of PBOD to exercise its legal obligations may partially explain
5 the failure to secure approval of the *Ranking System*. PBOD apparently perceives an inherent
6 conflict between performing a conflict assessment and abstaining from the pronouncement of
7 policy, but none exists. PBOD would not create policy by initially determining whether a Unit
8 Operating Rule conflicts with the PERSONNEL MANUAL. Rather, the draftsman or proponent of
9 the Unit Operating Rule creates the policy. In exercising its legal obligation, PBOD would not
10 erect policy anymore than the Judiciary would in the performance of its constitutional functions.
11

12 The Court must read the PERSONNEL MANUAL and the PERSONNEL ORGANIZATION ACT in
13 *pari materia*. See *Theresa Lynn Hendrickson v. HCN Office of Tribal Enrollment*, SU 02-06
14 (HCN S. Ct., Mar. 21, 2003) at 2-3, 7-8. In other words, the Court must endeavor to reconcile
15 the two (2) forms of statutory law. This feat proves relatively easy since the PERSONNEL
16 ORGANIZATION ACT mandates that PBOD assume the legal responsibilities of its predecessor, the
17 Ho-Chunk Nation Personnel Committee. PERS. ORG. ACT, § 4(g). PBOD cannot evade those
18 responsibilities until the Legislature entrusts them elsewhere.
19

20 The PERSONNEL ORGANIZATION ACT also states that "the mission of the Ho-Chunk
21 Nation Department of Personnel [is] to ensure that consistent practices and policies which utilize,
22 protect and develop the human resources of the Ho-Chunk Nation are applied in all enterprises
23 and departments." *Id.*, § 3(a). The mission statement coincides with the general purpose served
24 by the PERSONNEL MANUAL: "to ensure consistent personnel practices." PERS. MANUAL, Intro.
25 at 2. Consequently, PBOD cannot approve Unit Operating Rules for equivalent departments that
26 contain inconsistent provisions.
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1 The Court recognizes that the Table Games Departments in the Nation's three (3) casinos
2 are dissimilar in some respects, and each may have varying concerns based upon the prevailing
3 marketplaces. However, no obvious reason exists for considering seniority in the ranking system
4 at Ho-Chunk and Rainbow Casinos, but not at MPC. This consideration does not necessarily
5 figure into a calculation of "the needs and requirements of work unit operations." *Id.*, Ch. 5, § B
6 at 11. The inconsistency in the ranking systems cannot survive PBOD examination.

8 PBOD should not favor one set of Unit Operating Rules over another, but should note the
9 inconsistencies and return the rules to the originating parties so that the tribal entities might reach
10 consensus on any outstanding issues. By doing so, PBOD would not only uphold its legal
11 obligation, but also ensure equal treatment of similarly situated individuals within the workplace.
12 PBOD may safely perform the above tasks without becoming a policy-making body.

14 **BASED UPON THE FOREGOING**, the Court holds that the defendants improperly
15 and illegally implemented the *Ranking System*. The Court shall require the defendants to either
16 seek PBOD approval of the *Ranking System* or discontinue the *Ranking System* and any resulting
17 scheduling within a period of two (2) months. The Court erects this deadline so as to provide the
18 defendants adequate time to weigh their options, and will not close the possibility of granting an
19 extension.
20

22 The Court limits its ruling to the facts and circumstances of the instant case, but the
23 Executive Branch would be well-advised to conform its existing practices to the clear dictates of
24 the law. The CONSTITUTION OF THE HO-CHUNK NATION defines the duties and obligations of the
25 Executive and Legislative Branches concerning employment matters. *See* CONST., ARTS. V, § 1,
26 VII, §§ 1-2. The Legislature has properly enacted statutory law governing the implementation of
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1 Unit Operating Rules, and the Executive Branch must comply with such laws until otherwise
2 amended by the Legislature.

3 Regarding the plaintiff's request for monetary relief, the Court declines to grant lost
4 wages for three (3) days of annual leave taken by the plaintiff in order to accommodate working
5 at a second job outside the Nation. The plaintiff has no protectible interest in maintaining double
6 employment. *See* PERS. MANUAL, Ch. 7, §§ 1-2 at 24. As stated on a prior occasion, "[t]he
7 limited waiver of sovereign immunity permits the Court to award 'actual lost wages,' and,
8 therefore, the Court cannot speculate upon whether an employee *would have received . . .*"
9 remuneration apart from back pay arising from an improper loss of tribal employment. *Margaret*
10 *G. Garvin v. Donald Greengrass et al.*, CV 00-10, -38 (HCN Tr. Ct., Nov. 16, 2001) at 11
11 (emphasis in original) (quoting PERS. MANUAL, Ch. 12 at 61). Even without the *Ranking System*,
12 the plaintiff possessed no guarantee that she would have received certain days off.

13 The parties retain the right to file a timely post judgment motion with this Court in
14 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
15 Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk
16 Nation Supreme Court.⁴ The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*

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22 ⁴ The Supreme Court earlier emphasized that it "is not bound by the federal or state laws as to standards of review."
23 *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court,
24 therefore, initially adopted an abuse of discretion standard "to determine if an error of law was made by the lower
25 court." *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also*
26 *Coalition for a Fair Gov't II v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; *JoAnn Jones*
27 *v. HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted the following
28 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)). More recently, the Supreme Court has asserted that "[o]n questions
of law and Constitutional interpretation [it] applies the *de novo* standard of review." *Robert A. Mudd v. HCN*
Legislature et al., SU 03-02 (HCN S. Ct., Apr. 8, 2003) at 4 (citing *Kelty*, SU 99-02). 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 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
2 Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the day
3 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
4 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.).”
5 *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must
6 follow the [*HCN R. App. P.*].” *HCN R. Civ. P.* 61.

8 **IT IS SO ORDERED** this 7th day of May 2003, by the Ho-Chunk Nation Trial Court
9 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

12 _____
13 Honorable Todd R. Matha
14 Associate Trial Court Judge

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