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

**Regina K. Baldwin,**  
Plaintiff,

v.

Case No.: **CV 01-16**

**Ho-Chunk Nation,**  
Defendant.

-and-

**Andrea Estebo,**  
Plaintiff,

v.

Case No.: **CV 01-19**

**Ho-Chunk Nation Home Ownership  
Program, Steve Davis, as Real Estate  
Manager, and Alvin Cloud, as Housing  
Director,**  
Defendants.

-and-

**Carolyn J. Humphrey,**  
Plaintiff,

v.

Case No.: **CV 01-21**

**Ho-Chunk Nation, Alvin Cloud, as Housing  
Director, and Bob Pulley, as Property  
Manager,**  
Defendants.

**ORDER  
(Final Judgment)**

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## INTRODUCTION

The Court must determine whether the defendants properly applied the Ho-Chunk Preference and Layoff Policies. Prior to making this determination, the Court assessed the constitutionality of tribal preference. The below discussion reflects the Court's careful examination of this much debated issue.

## PROCEDURAL HISTORY

The Court recounts the procedural history of the instant case in significant detail in its *Order (Determination of Judicial Deference)*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002). For purposes of this decision, the Court notes that the defendants sought an interlocutory appeal of the aforementioned judgment on January 21, 2002. The Ho-Chunk Nation Supreme Court denied the appeal on February 15, 2002, ruling that the Trial Court properly extended the discovery period for the purpose of seeking legislative history of the Ho-Chunk Preference and Layoff Policies. *Order Denying Appeal*, SU 02-01 (HCN S. Ct., Feb. 15, 2002).

Subsequently, the Trial Court extended the timeframe for submitting such history upon the request of the defendants. *Notice (Deadline for Brs.)*, CV 01-16, -19, -21 (HCN Tr. Ct., Mar. 11, 2002). On March 25, 2002, the defendants, by and through Ho-Chunk Nation Department of Justice Attorney Michael P. Murphy, filed a correspondence and attachments. The defendants could not locate any legislative history, but provided the Court with an earlier version of the Ho-Chunk Preference Policy. The plaintiffs, by and through Attorney William F. Gardner, likewise could not find any legislative history, and informed the Court of this fact in a March 26, 2002 filing.

1 **APPLICABLE LAW**

2  
3 **CONSTITUTION OF THE HO-CHUNK NATION**

4 **Preamble**

5  
6 We the People, pursuant to our inherent sovereignty, in order to form a more perfect  
7 government, secure our rights, advance the general welfare, safeguard our interests, sustain our  
8 culture, promote our traditions and perpetuate our existence, and secure the natural and self-  
evident right to govern ourselves, do ordain and establish this Constitution for the Ho-Chunk  
Nation.

9 **Art. I - Territory and Jurisdiction**

10  
11 **Sec. 1. Territory.** The territory of the Ho-Chunk Nation shall include all lands held by  
12 the Nation or the People, or by the United States for the benefit of the Nation or the People, and  
13 any additional lands acquired by the Nation or by the United States for the benefit of the Nation  
14 or the people, including but not limited to air, water, surface, subsurface, natural resources and  
any interest therein, notwithstanding the issuance of any patent or right-of-way in fee or  
otherwise, by the governments of the United States or the Ho-Chunk Nation, existing or in the  
future.

15  
16 **Sec. 2. Jurisdiction.** The jurisdiction of the Ho-Chunk Nation shall extend to all territory  
17 set forth in Section 1 of this Article and to any and all persons or activities therein, based upon  
the inherent sovereign authority of the Nation and the People or upon Federal law.

18 **Art. V - Legislature**

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

- 20 (a) To make laws, including codes, ordinances, resolutions, and statutes;
- 21
- 22 (b) To establish Executive Departments, and to delegate legislative powers to the Executive  
23 branch to be administered by such Departments, in accordance with the law; any Department  
24 established by the Legislature shall be administered by the Executive; the Legislature reserves  
the power to review any action taken by virtue of such delegated power;
- 25 (f) To set the salaries, terms and conditions of employment for all government personnel;
- 26 (x) To enact any other laws, ordinances, resolutions, and statutes necessary to exercise its  
27 legislative powers delegated by the General Council pursuant to Article III including but not  
28 limited to the foregoing list of powers.

1 Art. VII - Judiciary

2 Sec. 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be  
3 vested in the Judiciary. The Judiciary shall have the power to interpret and apply the  
4 Constitution and laws of the Ho-Chunk Nation.

5 Section 5. Jurisdiction of the Judiciary.

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

11 Art. X - Bill of Rights

12 Sec. 1. Bill of Rights.

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

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

16 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated  
17 Sept. 12, 2000)

18 Introduction

19 General Purposes

[p. 2]

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

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

28 The Ho-Chunk Nation hereby asserts that it has the right to employ the best qualified persons  
available; that the continuation of employment is based on the need for work to be performed,  
availability of revenues, faithful and effective performance, proper personal conduct, and

1 continuing fitness of employment; and that all employees are terminable for cause unless  
2 otherwise specified in writing as a prescribed employment term.

3 \*\*\*\*

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

5 Ch. 1 - Equal Employment Opportunity

6 A. Equal Employment Policy [pp. 3-3a]

7  
8 It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any and all  
9 employees and job applicants on the basis of merit, qualifications, and competence. The  
10 HoChunk [sic] Nation does retain the right to exercise Native American preference in hiring  
11 Native American job applicants. This policy shall otherwise be applied without regard to any  
individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation,  
or physical handicap.

12 **RESOLUTION 02/25/97A** – *The Ho-Chunk Nation does retain the right to exercise Ho-Chunk*  
13 *preference in employment, training, and promotions.*

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

16 \*\*\*\*

17 **1.1 HO-CHUNK PREFERENCE: MOTION** (Ratified June 10, 1998)

18 *Native American Preference has been a federal policy since 1834 which accords hiring*  
19 *preference to Indians. The purpose of this preference is to give Native Americans a greater*  
20 *participation of self-government, to further the Governments [sic] trust obligations, and to*  
21 *reduce the negative effect of having non-Indians administer matters that effect Indian tribal life.*  
22 *More recently, legislation such as the Civil Rights Act (1964) and the Education Amendments of*

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

25 *As a sovereign Nation and a unique cultural group, the HoChunk [sic] Nation had determined*  
26 *that a highly desirable employment characteristic is a knowledge of the HoChunk [sic] culture*  
27 *that can be attained only by membership in the HoChunk [sic] Nation. Further, the Nation*  
28 *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*

1 *minimum, the Nation has determined that some knowledge of Native American culture is a*  
2 *desirable employment characteristic.*

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

- 6 1. *Hoc█k Wazijaci Tribal member*
- 7 2. *Spouse or Parent of Hoc█k Wazijaci Tribal member*
- 8 3. *Native American Tribal member*
- 9 4. *Non-Natives*

10 *This policy shall be applied in recruiting, hiring, promotion, transfers, training, layoffs,*  
11 *compensation, benefits, terminations, and all other privileges, terms and other conditions of*  
12 *employment. The Human Resources/Personnel will communicate the important guidelines and*  
13 *procedures that will be followed in its commitment of HoChunk [sic] Preference.*

#### 14 Ch. 6 - Compensation and Payroll Practices

##### 15 Compensation upon Position Transfer or Reclassification [p. 17]

16 Lateral Transfer: Permanent employees who are transferred from one position to another  
17 position having the same or substantially similar duties and pay range will be compensated at an  
18 unchanged rate. Upon the effective date of the lateral transfer, the employee's annual review  
19 date will be unchanged and the employee will be placed on a ninety (90) day performance  
20 probation without a possible merit increase. Only employees that have worked for the Nation for  
21 over ninety (90) days and have a good current evaluation will be allowed to transfer laterally.  
22 (RESOLUTION 03/23/99G)

#### 23 Ch. 13 - Employment Separation

##### 24 Layoff [p. 52]

25 An employee may be subject to a non-disciplinary, involuntary separation through layoff for  
26 reasons including, but not limited to, lack of funds or work, abolition of position, reorganization,  
27 or the reduction in or elimination of service levels. In such cases, affected employees will be  
28 given a reasonable amount of advance notice as conditions permit.

When layoff is to be achieved, the Department Director will prepare a layoff plan which must be  
approved by the appropriate Administrator. The plan will:

- 29 A. identify the number of layoff positions by classification;
- 30 B. identify incumbents to be laid off through consideration of both ability and seniority.

\*\*\*\*

1 Whenever it becomes necessary in the sole opinion of the Nation to reduce the work force  
2 through layoffs, the Nation will endeavor to provide affected employees with at least ten  
3 working days notice. In each class of position, employees shall be laid off according to  
4 employee status in the following order: Limited term, initial probationary, seasonal, permanent  
part-time, permanent full-time.

5 Ch. 14 - Definitions

[pp. 56-57]

6 Layoff: Involuntary separation from employment for nondisciplinary reasons including, but not  
7 limited to, lack of funds or work, abolition of position, reorganization, or the reduction or  
8 elimination in service levels.

9 Native American Preference: Preference given to members of any recognized Indian Tribe now  
10 under federal jurisdiction.

11 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

12 Rule 31. Required Disclosures.

13 (5) judicial notice shall be taken of and required disclosures shall be made of official  
14 documents, public documents, documents subject to public inspection, document and materials  
15 of non-executive session, governmental minutes and recordings of a governmental body pursuant  
to the HCN OPEN MEETINGS ACT OF 1996.

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

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

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

28 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for  
Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*

1 must be based upon new information that has come to the party's attention that, if true, could  
2 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
3 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal  
4 commences when the Court denies the motion on the record or when an order denying the  
5 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of  
6 such motion, and the Court does not decide the motion or the judge does not sign an order  
7 denying the motion, the motion is considered denied. The time for initiating an appeal from  
8 judgment commences in accordance with the Rules of Appellate Procedure.

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

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

18 Rule 61. Appeals.

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

24 **RELEVANT LAW**

25 WISCONSIN WINNEBAGO PERSONNEL POLICIES AND PROCEDURES (approved 1981)

26 Ch. 2 - Non-Discrimination

27 A. Policy

[p. 3]

28 The WWBC does not discriminate because of race; creed; age; sex; color; national origin;  
religion; union; political affiliation; or handicap; in its procedures of employment, upgrading,  
demotion, lateral reassignment, rate of pay or other compensation, selection for training or any  
other benefit, except that preference will be given to Winnebago and other American Indian  
applicants to the extent permitted by law.

1 UNITED STATES CODE

2 Tit. 25 - Indians

3 Ch. 14 - Miscellaneous: Protection of Indians and Conservation of Resources

4 Sec. 472. Standards for Indians appointed to Indian Office.

5  
6 The Secretary of the Interior is directed to establish standards of health, age, character,  
7 experience, knowledge, and ability for Indians who may be appointed, without regard to civil-  
8 service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the  
9 administration of functions or services affecting any Indian tribe. Such qualified Indians shall  
10 hereafter have the preference to appointment to vacancies in any such positions.

11 Sec. 472a. Indian preference laws applicable to Bureau of Indian Affairs and Indian Health  
12 Service positions.

13 (a) Establishment of retention categories for purposes of reduction-in-force procedures. For  
14 purposes of applying reduction-in-force procedures under subsection (a) of section 3502 of title  
15 5, United States Code, with respect to positions within the Bureau of Indian Affairs and the  
16 Indian Health Service, the competitive and excepted service retention registers shall be  
17 combined, and any employee entitled to Indian preference who is within a retention category  
18 established under regulations prescribed under such subsection to provide due effect to military  
19 preference shall be entitled to be retained in preference to other employees not entitled to Indian  
20 preference who are within such retention category.

21 (b) Reassignment of employees other than to positions in higher grades; authority to make  
22 determinations respecting.

23 (1) The Indian preference laws shall not apply in the case of any reassignment within the  
24 Bureau of Indian Affairs or within the Indian Health Service (other than to a position in a higher  
25 grade) of an employee not entitled to Indian preference if it is determined that under the  
26 circumstances such reassignment is necessary--

27 (A) to assure the health or safety of the employee or of any member of the  
28 employee's household;

(B) in the course of a reduction in force; or

(C) because the employee's working relationship with a tribe has so deteriorated  
that the employee cannot provide effective service for such tribe or the Federal  
Government.

(2) The authority to make any determination under subparagraph (A), (B), or (C) of  
paragraph (1) is vested in the Secretary of the Interior with respect to the Bureau of Indian  
Affairs and the Secretary of Health and Human Services with respect to the Indian Health

1 Service, and, notwithstanding any other provision of law, the Secretary involved may not  
2 delegate such authority to any individual other than an Under Secretary or Assistant Secretary of  
the respective department.

3 (c) Waiver of applicability in personnel actions; scope, procedures, etc.  
4

5 (1) Notwithstanding any provision of the Indian preference laws, such laws shall not  
6 apply in the case of any personnel action respecting an applicant or employee not entitled to  
7 Indian preference if each tribal organization concerned grants, in writing, a waiver of the  
application of such laws with respect to such personnel action.

8 (2) The provisions of section 8336(j) of title 5, United States Code (as added by the  
9 preceding section of this Act), shall not apply to any individual who has accepted a waiver with  
10 respect to a personnel action pursuant to paragraph (1) of this subsection or to section 1131(f) of  
the Education Amendments of 1978 (25 U.S.C. 2011(f); 92 Stat. 2324).

11 (d) Placement of non-Indian employees in other Federal positions; assistance of Office of  
12 Personnel Management; cooperation of other Federal agencies; reporting requirements. The  
13 Office of Personnel Management shall provide all appropriate assistance to the Bureau of Indian  
14 Affairs and the Indian Health Service in placing non-Indian employees of such agencies in other  
Federal positions. All other Federal agencies shall cooperate to the fullest extent possible in such  
placement efforts.

15 (e) Definitions. For purposes of this section--

16 (1) The term "tribal organization" means--

17 (A) the recognized governing body of any Indian tribe, band, nation, pueblo, or  
18 other organized community, including a Native village (as defined in section 3(c) of the  
19 Alaska Native Claims Settlement Act (43 U.S.C. 1602(c); 85 Stat. 688)); or

20 (B) in connection with any personnel action referred to in subsection (c)(1) of this  
21 section, any legally established organization of Indians which is controlled, sanctioned, or  
22 chartered by a governing body referred to in subparagraph (A) of this paragraph and  
which has been delegated by such governing body the authority to grant a waiver under  
such subsection with respect to such personnel action.

23 (2) The term "Indian preference laws" means section 12 of the Act of June 18, 1934 (25  
24 U.S.C. 472; 48 Stat. 986) or any other provision of law granting a preference to Indians in  
25 promotions and other personnel actions.

26 (3) The term "Bureau of Indian Affairs" means (A) the Bureau of Indian Affairs and (B)  
27 all other organizational units in the Department of the Interior directly and primarily related to  
28 providing services to Indians and in which positions are filled in accordance with the Indian  
preference laws.

1 Tit. 42 - The Public Health and Welfare

2 Ch. 21 - Civil Rights: Equal Employment Opportunities

3 Sec. 2000e. Definitions.

4 For the purposes of this title --

5  
6 (b) The term "employer" means a person engaged in an industry affecting commerce who has  
7 fifteen or more employees for each working day in each of twenty or more calendar weeks in the  
8 current or preceding calendar year, and any agent of such a person, but such term does not  
9 include (1) the United States, a corporation wholly owned by the Government of the United  
10 States, an Indian tribe, or any department or agency of the District of Columbia subject by statute  
11 to procedures of the competitive service (as defined in section 2102 of title 5 of the United States  
12 Code), or (2) a bona fide private membership club (other than a labor organization) which is  
13 exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 except that  
14 during the first year after the date of enactment of the Equal Employment Opportunity Act of  
15 1972, persons having fewer than twenty-five employees (and their agents) shall not be  
16 considered employers.

13 Sec. 2000e-2. Unlawful employment practices.

14 (i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in  
15 this title shall apply to any business or enterprise on or near an Indian reservation with respect to  
16 any publicly announced employment practice of such business or enterprise under which a  
17 preferential treatment is given to any individual because he is an Indian living on or near a  
18 reservation.

19 **FINDINGS OF FACT**

20  
21 1. The Court incorporates by reference the findings of fact enumerated in its earlier  
22 decision. *Order (Determination of Judicial Deference)* at 8-11.

23 2. The plaintiff, Carolyn J. Humphrey, accepted the position of Assistant Property Manager  
24 on May 5, 1997. Defs.' Ex. N. She began her employment with the Ho-Chunk Nation  
25 (hereinafter Nation) on June 6, 1994, working continuously within the Property Management  
26 division of the Ho-Chunk Nation Department of Housing (hereinafter Housing Department).  
27  
28 *Trial* (LPER at 5, Aug. 16, 2001, 10:24:24 CDT).

1 3. Ms. Humphrey is a non-Indian and claims Mexican and Puerto Rican ancestry. *Id.* at 9,  
2 10:59:24 CDT. Ms. Humphrey appears to allege possible sexual harassment and/or  
3 discrimination on the basis of nationality in her pleading. *Compl.*, Attach. 6 (Level 1 Grievance).  
4 She, however, later discounted such allegations, deeming them irrelevant to her layoff and  
5 focusing instead upon the seeming failure to properly consider seniority and performance. LPER  
6 at 10, 12, Aug. 16, 2001, 11:07:45, 11:42:36 CDT.  
7

8 4. Property Management eliminated the job classification of Assistant Property Manager on  
9 or about December 15, 2000, and reassigned some of the duties of the position to the Special  
10 Projects Bookkeeper. *Id.* at 7, 32, 10:45:33, 02:37:04 CDT. Dawn R. Wessels started work in  
11 the position of Special Projects Bookkeeper on December 20, 2000. *Id.* at 30, 02:28:40 CDT.  
12 Ms. Wessels received a non-disciplinary demotion option approximately one (1) week prior to  
13 her scheduled layoff from her Residential Services Counselor position in the Home Ownership  
14 Program (hereinafter HOP) division of the Housing Department. *Id.* at 29, 02:26:36 CDT. She  
15 began employment with the Nation on June 19, 2000, as a Residential Services Counselor. *Id.* at  
16 28, 02:19:21 CDT. As a result of the non-disciplinary demotion, Ms. Wessels earned \$2.08 less  
17 per hour.<sup>1</sup> Defs.' Ex. T at 2. Ms. Wessels is an enrolled member of the Nation, Tribal ID#  
18 439A001331.  
19  
20  
21

22 5. The plaintiff, Andrea L. Estebo, accepted the position of Residential Services Counselor  
23 on October 4, 1999. Defs.' Ex. N. This represented her first job in HOP. LPER at 14, Aug. 16,  
24 2001, 01:06:32 CDT. She began her employment with the Nation in 1991. *Id.*, 01:04:51 CDT.

25 6. Ms. Estebo is an enrolled member of the Nation, Tribal ID# 439A000818. Ms. Estebo  
26 alleged discrimination on the basis of her pregnancy, and objected to the seeming improper  
27

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28 <sup>1</sup> Ms. Wessels' starting salary in the Special Projects Bookkeeper position equaled that of Ms. Humphrey's salary at

1 application of Ho-Chunk preference and consideration of seniority. *Compl.*, Attach 2 (Level 1  
2 Grievance).

3  
4 7. The plaintiff, Regina K. Baldwin, accepted the position of Residential Services Counselor  
5 on December 13, 1999. Defs' Ex. N. She began her employment with the Nation on October 6,  
6 1998, working continuously within HOP. LPER at 46, Aug. 16, 2001, 04:03:03 CDT.

7 8. Ms. Baldwin is a non-Indian, but the mother of an enrolled member of the Nation, Thaine  
8 H. Littlejohn, Tribal ID# 439A006546. *Id.*, 04:02:08 CDT. Ms. Baldwin alleged an improper  
9 application of Ho-Chunk preference and consideration of seniority. *Compl.*, Attach 12 (Level 1  
10 Grievance).

11  
12 9. HOP retained one (1) Residential Services Counselor position after December 15, 2000,  
13 as held by Verdie Kivimaki. Ms. Kivimaki performed elder advocate responsibilities in this  
14 position, distinguishing her from the plaintiffs, but no separate job description existed within  
15 HOP. LPER at 20, Aug. 16, 2001, 01:32:30 CDT. Ms. Kivimaki accepted the position of  
16 Residential Services Counselor on October 12, 1998.<sup>2</sup> Defs.' Ex. A2. This represented her first  
17 job in HOP. *Id.* She began her employment with the Nation on December 1, 1992. *Id.* Ms.  
18 Kivimaki is an enrolled member of the Nation, Tribal ID# 439A000769.

19  
20 10. On December 15, 2000, each plaintiff received a layoff from her respective position  
21 within the Housing Department. Defs.' Ex. P-R. The layoffs occurred as a result of budgetary  
22 cutbacks. *Id.*; *see also* HO-CHUNK NATION PERSONNEL POLICIES & PROCEDURES MANUAL  
23 (hereinafter PERSONNEL MANUAL), Ch. 13 at 52.

24  
25  
26  
27 the time of the layoff. Defs.' Ex. M at 2.

28 <sup>2</sup> Ms. Kivimaki took a voluntary layoff on or about February 11, 2000. Defs.' Ex. A2. She received a recall to her  
position in or around Fall 2000, and, therefore, served within the position and division longer than any other  
Residential Services Counselor. LPER at 17, Aug. 16, 2001, 01:19:18 CDT.

1 11. Former Housing Department Executive Director, Alvin Cloud, considered the following  
2 factors in making layoff determinations:

- 3           ▪ Anticipated lack of funding to Elder Furniture Program
- 4           ▪ Anticipated lack of funding to Elder Alternative Housing Program
- 5           ▪ Elder Housing maintains priority, and given budget restraints  
6           minimizes the services to non-elders
- 6           ▪ Work demand decreasing with budget restraints
- 7           ▪ Current Workload
- 7           ▪ Ho-Chunk Preference by position
- 8           ▪ Length in position and by division
- 8           ▪ Work performance and attendance
- 9           ▪ Budget restraints affecting each division within the Housing  
10           Department

11 Defs.' Ex. C5.

12 12. The Ho-Chunk Nation Department of Personnel (hereinafter Personnel Department)  
13 provided an overview of its functions and responsibilities to the Ho-Chunk Nation General  
14 Council at its November 16, 2002 Annual Meeting.<sup>3</sup> 2001/2002 HCN GEN. COUNCIL ANNUAL  
15 REPORT, at 14. The Personnel Department cited as a major accomplishment of 2001-02 its  
16 "[m]onitor[ing of]the selection process to identify the effectiveness of the Ho-Chunk Preference  
17 Policy." *Id.* The Personnel Department then cited as a goal for 2002-03 the task of "defin[ing]  
18 and improv[ing] the process for applying [the] Ho-Chunk Preference Policy during hiring and  
19 promotion." *Id.*

20  
21  
22  
23 **DECISION**

24  
25 The Court must grapple with difficult issues in the instant case amidst claims of  
26 discrimination and manipulation of layoff policies. The Court also must exercise its  
27  
28

1 constitutional obligation of interpretation and application of the law without the benefit of any  
2 consistent articulation of the relevant policies by the Executive Branch.<sup>4</sup> *See Order*  
3 *(Determination of Judicial Deference)*; *see also* CONSTITUTION OF THE HO-CHUNK NATION  
4 (hereinafter CONSTITUTION), ART. VII, § 4. The Court consequently affords no deference to the  
5 Personnel and Housing Departments' determinations in rendering this opinion.<sup>5</sup> Furthermore, no  
6 legislative history exists to guide the analysis.  
7

8 I. DOES THE HO-CHUNK PREFERENCE POLICY REQUIRE  
9 THE RETENTION OF HO-CHUNK EMPLOYEES IN A  
10 LAYOFF SITUATION?

11 In 1999, a laid off employee argued that her supervisors misapplied Ho-Chunk  
12 preference. *Louella A. Kelty v. Jonette Pettibone et al.*, CV 98-49 (HCN Tr. Ct., Mar. 4, 1999).  
13 Ms. Kelty contended that the preference should act as the "foremost criterion, prior to  
14 considering ability and seniority." *Id.* at 7. Ms. Kelty's supervisors disagreed, arguing that Ho-  
15 Chunk preference served only as "a discretionary tie breaker." *Id.* The Court ultimately  
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18 <sup>3</sup> The Court shall take judicial notice of "official documents, public documents, [and] documents subject to public inspection."  
*HCN R. Civ. P.* 31(A)(5).

19 <sup>4</sup> During the litigation, the Ho-Chunk Nation Department of Personnel (hereinafter Personnel Department) identified  
20 its recent accomplishments and future objectives. The resulting annual summation further exemplified the  
21 inconsistent enforcement of the Ho-Chunk Preference Policy. The Personnel Department commended itself on  
22 tracking the effective implementation of Ho-Chunk preference as a component part of the selection process, but then  
23 noted that it would "define . . . the process for applying Ho-Chunk [p]reference" in the future. 2001/2002 HCN  
24 GEN. COUNCIL ANNUAL REPORT, at 14. The obvious question becomes: how can the agency monitor the  
25 effectiveness of a process that lacks any definition? The Court shall resolve this lingering problem within this  
26 judgment.

27 <sup>5</sup> With respect to judicial deference, the Court adequately addressed the reasons why it differentiates between Ho-  
28 Chunk Nation Gaming Commission determinations and the Executive Department determinations made in the case  
at bar. *Order (Determination of Judicial Deference)*. The Court declines to reiterate the entire discussion here, but  
offers this final observation. The CONSTITUTION imparts the duty to interpret law to the Judiciary, and the duty to  
create law to the Legislature. CONST., ARTS. V, § 2(a), VI, § 4. The Legislature, however, may delegate its  
constitutional functions to the Executive or a legislative sub-agency. *Id.*, ART. V, § 2(b, x). The Legislature has  
performed this delegation in regards to the Gaming Commission, and the Commission promulgates legislative rules  
through on-the-record adjudication. AMENDED AND RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION,  
§807(h). Therefore, when the Court defers to a Gaming Commission interpretation, it is not surrendering its  
constitutional obligation to interpret the law. Rather, the Court defers to the resulting legislative rule, which, in  
terms of a simplistic analogy, is comparable to an amendment to a statute's definitional section. The same rationale  
does not hold true when examining informal "guidelines and procedures." PERS. MANUAL, Ch. 1 at 3a. The  
Personnel Department is not performing a legislative function, and its advice fails to even persuade when given

1 concurred with the Nation's officials as a matter of deference to the administrative agency. *Id.* at  
2 7-9.

3 Typically, "the [T]rial [C]ourt should try to remain consistent in its decisions . . . ," but,  
4 in this instance, the Court maintains fundamental objections to its earlier application of  
5 administrative deference. *Jacob LoneTree et al. v. Robert Funmaker, Jr. et al.*, SU 00-16 (HCN  
6 Tr. Ct., Mar. 16, 2001) at 4; *see also supra* p. 15 n.5. However, the *Kelty* Court also seemed  
7 independently persuaded by the Nation's statutory interpretation argument. The Court agreed  
8 with the contention that the decision to utilize Ho-Chunk preference resided with the Nation,  
9 "and therefore c[ould] be exercised or waived at the discretion of the Nation." *Id.* at 8.  
10

11  
12 If exercised, the Court noted its concern "that to construe the preference as a tie breaker  
13 w[ould] render it meaningless because as a practical matter a difference could always be found to  
14 distinguish one worker as more capable than another worker[,] thereby obviating the need to  
15 resort to the preference." *Id.* Regardless, the Court deemed this potentially troublesome result as  
16 an inevitable consequence of preserving business discretion. *Id.* The *Kelty* Court accepted "that  
17 the Nation's policy [was] to apply the two prongs (seniority and ability) and should a tie occur,  
18 then the preference [would be] applied." *Id.* at 11.  
19

20 Quite simply, the *Kelty* decision represents a judicial sanctioning of an arbitrary business  
21 practice. The law exists to foster consistency and continuity, not uncertainty and instability. The  
22 PERSONNEL MANUAL's stated purpose is "to ensure consistent personnel practices," but the Court  
23 permitted the Executive to wield Ho-Chunk preference in any manner it chose depending on the  
24 circumstances. PERS. MANUAL, Intro. at 2. The Court allowed the Executive to disregard Ho-  
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verbally on a case-by-case basis.

1 Chunk preference entirely or only require its usage in an impossible employment scenario: when  
2 confronted with the otherwise absolute equality of two (2) individuals vying for a single position.

3  
4 The defendants now request the continued discretion to apply Ho-Chunk preference in  
5 yet another manner or manners. The Court cannot grant this request without offending the tribal  
6 Equal Protection Clause. CONST., ART. X, § 1(a)(8). The execution of law must not vary from  
7 one context to another based upon a mere difference in administration. For this reason and for  
8 those stated above, the Court proceeds to examine the issue of tribal preference and its proper  
9 application to the case at bar.  
10

11 The United States Supreme Court (hereinafter U.S. Supreme Court) addressed the issue  
12 of Indian preference as it related to the former promotion policy within the Bureau of Indian  
13 Affairs (hereinafter BIA). *Morton v. Mancari*, 417 U.S. 535 (1974); *see also* 25 U.S.C. § 472  
14 (2003) (originally enacted as the Indian Reorganization Act of 1934, ch. 576, § 12, 48 Stat. 986).  
15 The case largely focused on the relationship of Indian nations to the federal government, but  
16 some of the observations and principles announced in the decision bear directly on the instant  
17 matter. For example, the *Mancari* Court commented upon the tribal exemption from the Equal  
18 Employment Opportunity Act of 1964. *See* 42 U.S.C. §§ 2000e(b), 2000e-2(i) (2003) (originally  
19 enacted as the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 253, 255). The Court stated the  
20 following:  
21  
22

[t]hese 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters *concerning tribal . . . employment*. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of *tribal . . . employment* did not constitute racial discrimination of the type otherwise proscribed.

1 *Mancari*, 417 U.S. at 548 (emphasis added).<sup>6</sup>

2 In other words, "Indian tribes and businesses operating on or near Indian reservations are  
3 excluded from the employment discrimination prohibitions of Title VII." *Wardle v. Ute Indian*  
4 *Tribe*, 623 F.2d 670, 672 (10th Cir. 1980) (Tribe terminated non-Indian Chief of Police since one  
5 or more tribal members could receive training to qualify for the position.) The author of the  
6 tribal employment exemption, Sen. Karl E. Mundt (Rep.-S.D.), clearly articulated that the  
7 amendment "w[ould] assure . . . American Indians of the continued right to protect and promote  
8 their own interests and benefit from Indian preference programs now in operation or later to be  
9 instituted." 110 CONG. REC. 13,702 (1964). Congress could legislate in such a manner since the  
10 Indian "preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial'  
11 preference[,]" but a political preference extended to members of federally recognized Indian  
12 tribes. *Mancari*, 417 U.S. at 553 & n.24.

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16 Due its political nature, the U.S. Supreme Court upheld the preference after subjecting it  
17 to deferential rational basis scrutiny. *Id.* at 554. Congress fully appreciated that the preference  
18 would produce employment disadvantages for non-Indians, but so long as the congressional

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21 <sup>6</sup> The Court may only exercise subject matter jurisdiction over cases and controversies that arise "under the Constitution, laws,  
22 customs and traditions of the Ho-Chunk Nation." CONST. ART. VII, § 5(a); *see also Ho-Chunk Nation v. Harry Steindorf et al.*,  
23 CV 99-82 (HCN Tr. Ct., Feb. 11, 2000), *aff'd*, SU 00-04 (HCN S. Ct., Sept. 29, 2000). The Court appropriately discusses the  
24 Equal Employment Opportunity Act since the PERSONNEL MANUAL incorporates this federal legislation by reference. PERS.  
25 MANUAL, Ch. 1, § A at 3. The Court offers the following commentary regarding the interplay of federal law with tribal  
26 governmental actions for the benefit of the parties. To begin, the U.S. Supreme Court has acknowledged that the federal Bill of  
27 Rights, including the Equal Protection and Due Process Clauses, does not serve as a limitation on tribal powers. *Santa Clara*  
28 *Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (citing *Talton v. Mayes*, 163 U.S. 376 (1896)). In recognition of this fact, Congress  
enacted the Indian Civil Rights Act of 1968 (hereinafter ICRA) to extend similar protections to Indian Country. *See* 25 U.S.C. §§  
1301-1303 (2003) (Pub.L. 90-284, 82 Stat. 77-78). Congress, however, did not create a mechanism for seeking redress of alleged  
ICRA violations in federal court, apart from *habeas corpus* relief. *Santa Clara Pueblo*, 436 U.S. at 59; *see also* 25 U.S.C. §  
1303. Congress instead intended that tribal forums hear and decide ICRA concerns in an effort to promote Indian self-  
governance. *Santa Clara Pueblo*, 436 U.S. at 62. This underlying purpose also explains why Congress "selectively incorporated  
and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of  
tribal governments." *Id.* For instance, the equal protection provision within ICRA "differs from the [federal] constitutional Equal  
Protection Clause in that it guarantees 'the equal protection of *its* [the tribe's] laws, ' rather than of '*the* laws.'" *Id.* at 63 (emphasis  
in original) (quoting U.S. CONST. amend. XIV, § 1; 25 U.S.C. § 1302(8)). The tribal CONSTITUTION incorporates the ICRA  
provisions, and, therefore, the Court will not make further reference to the federal legislation. *See e.g.*, CONST., ART. X, §  
1(a)(8).

1 policy served the legitimate goal of furthering tribal self-governance, the preference would  
2 withstand judicial examination. *Id.* at 544, 555. Most notably for our purposes, preference  
3 would only apply if the Indian employee satisfied the standing job qualifications in the first  
4 instance. *Id.* at 537-38 (quoting 25 U.S.C. § 472). And, application of preference would result  
5 in the selection of the Indian employee.<sup>7</sup> *Mancari*, 417 U.S. at 553 n.24.

7 Immediately prior to *Mancari*, the BIA presented similar semantic arguments to those  
8 urged in *Kelty* before one federal appellate court. *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir.  
9 1974). The BIA, in essence, argued that it retained business discretion to employ Indian  
10 preference by virtue of the Secretary of the Interior's ability to grant exceptions. The appellate  
11 division rebuffed this position, concurring with the trial court's assessment that "the controlling  
12 statute does not say the "Indians . . . may have preference". It says: ". . . qualified Indians shall  
13 hereafter have . . . preference", and 'if Congress had intended to write discretionary power into  
14 the language of Sec. 472 it would have done so expressly.'" *Id.* at 501. The BIA presented a  
15 related argument that focused on the verb "to prefer," but the appellate court again rejected the  
16 BIA's interpretation.<sup>8</sup>

19 In oral argument[,] appellants' counsel suggested that the word  
20 "preference" connoted "a choice" according to some dictionary definition

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22 <sup>7</sup> At the time of the *Mancari* decision, the BIA preference applied only to initial hiring and promotion decisions, and  
23 the Secretary of the Interior retained some discretion to authorize individual exceptions. *Mancari*, 417 U.S. at 538.  
24 Congress subsequently "made evident that the Indian Preference Act extend[ed] not only to the filling of vacancies  
25 but also to the retention of Indian employees in the face of a reduction in force." *Mescalero Apache Tribe v.*  
*Rhoades*, 804 F. Supp. 251, 257-58 (D.N.M. 1992) (citing 25 U.S.C. § 472a (2003) (originally enacted as the Act of  
Dec. 5, 1979, Pub.L. 96-135, 93 Stat. 1057)). In addition, Congress severely curtailed the ability of the Secretary of  
the Interior to grant exceptions to the preference requirement. 25 U.S.C. § 472a(b-c).

26 <sup>8</sup> Congress directed the Secretary of the Interior "to establish standards of health, age, character, experience,  
27 knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various  
28 positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting  
any Indian tribe." 25 U.S.C. § 472 (emphasis added). When reviewing the promulgated standards, the *Freeman*  
court did not afford them the deference due to notice-and-comment rulemaking. The court applied *Skidmore*  
deference, which directly equates with this Court's treatment of the Personnel Department's informal interpretations  
of the Ho-Chunk Preference Policy. *Freeman*, 499 F.2d at 502 n.21 (quoting *Skidmore v. Swift & Co.*, 323 U.S.  
134, 140 (1944); see also *Order (Determination of Judicial Deference)*).

1 or rulings in other context[s]. It was implied that this "choice" was to be  
2 made by the Commissioner [of Indian Affairs]. We reject this play on  
3 words, and return to the clear meaning of the Act in context with its  
4 purpose, history and wording -- qualified Indians, not the Commissioner,  
5 have a right to the preference in appointments to vacancies. The statute  
6 makes the choice.

7 *Id.* at 502.

8 The preceding discussion reveals that Congress has effectively insulated tribal preference  
9 programs from the dictates of the Equal Employment Opportunity Act. Therefore, the Court  
10 must review the Ho-Chunk Preference Policy under the tribal Equal Protection Clause to  
11 determine whether the level of protection afforded to tribal members constitutes an actionable  
12 equal protection violation. The *Mancari* decision forecloses the argument that tribal preference  
13 represents unlawful racial discrimination. An argument exists, however, which suggests that  
14 tribal preference may constitute national origin discrimination. The following analysis dispels  
15 that suggestion, and actually fortifies the implementation of tribal preference.

16 The proscription against discriminating on the basis of national origin does not  
17 necessarily encompass discrimination on the basis of citizenship or alienage. *See Espinoza v.*  
18 *Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973). For example, a public employer may refuse to hire  
19 a non-citizen, who happens to be Mexican, but the same employer may not deny employment to  
20 individuals based upon their Mexican ancestry. *Id.* This framework dramatically differs in the  
21 context of federal employment, as opposed to state or private employment, due primarily to the  
22 fact that the federal Constitution imparts plenary authority to the federal, and not state,  
23 government over matters relating to immigration and naturalization. *See Hampton v. Mow Sun*  
24 *Wong*, 426 U.S. 88, 95 (1976); *see also Natallia Tyschanka v. Ho-Chunk Nation*, CV 02-51  
25 (HCN Tr. Ct., May 15, 2003). The Court shall examine this context in order to draw an analogy  
26 to the tribal context.  
27  
28

1 The United States Civil Service Commission erected a bar against employing non-  
2 citizens in federal positions. *Mow Sun Wong*, 426 U.S. at 90 n.1. A group of Chinese citizens  
3 subsequently challenged this regulation as violative of the equal protection component of the  
4 Due Process Clause of the Fifth Amendment.<sup>9</sup> *Id.* at 98-100. At the outset, the U.S. Supreme  
5 Court recognized the federal government's control over immigration and naturalization,  
6 including the "power to exclude or expel aliens," and regarded the usage of such authority as  
7 political in nature.<sup>10</sup> *Id.* at 101 n.21. The Court proceeded to describe the affected class and the  
8 level of the harm perpetrated upon that class.  
9

10  
11 The U.S. Supreme Court portrayed resident aliens as a "discrete and insular minority"  
12 that was "already subject to disadvantages not shared by the remainder of the community." *Id.* at  
13 102 & n.22. The regulation targeted this class of individuals, rendering them "ineligib[le] for  
14 employment in a major sector of the economy;" a sector that produced approximately 300,000  
15 available jobs each year. *Id.* at 92, 102. The U. S. Supreme Court equated this "wholesale  
16 deprivation of employment opportunities" as a "deprivation of an interest in liberty," so as to  
17 subject the regulation to judicial scrutiny under the Due Process Clause. *Id.* at 102, 115.  
18

19 The U.S. Supreme Court performed its analysis by employing a rational basis level of  
20 review, and declared the regulation unconstitutional principally due to it originating from a  
21 limited delegation of rulemaking authority. *Id.* at 103, 116-17. The holding, however, proves  
22 largely irrelevant to our examination. More importantly, the U.S. Supreme Court speculated  
23 twice that the regulation would have survived if directly imposed by either Congress or the  
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26 <sup>9</sup> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST.  
27 amend. V; *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (By means of the reverse incorporation doctrine, the  
substantive protections of the Fourteenth Amendment extend to actions of the federal government.)

28 <sup>10</sup> Courts should practice restraint and deference when adjudging disputes that appear to raise political questions.  
*See e.g., Chloris Lowe, Jr. et al. v. Ho-Chunk Nation Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN  
Tr. Ct., Nov. 3, 2000) at 10.

1 President pursuant to their above-stated constitutional powers. *Id.* at 114, 116. The Court even  
2 conjectured that "administrative convenience m[ight] provide a rational basis for the general  
3 rule." *Id.* at 115.

4  
5 In response to the *Mow Sun Wong* ruling, President Gerald R. Ford issued Executive  
6 Order No. 11935 on September 2, 1976, reinstating the ban against the employment of resident  
7 aliens in the federal service. *See Mow Sun Wong v. Campbell*, 626 F.2d 739, 741 (9th Cir.  
8 1980), *cert. denied*, 450 U.S. 959 (1981). A letter accompanied the Executive Order in which  
9 President Ford's "primary justification . . . appear[ed] to be the maintenance of the status quo."  
10 *Id.* at 744. The government also cited several constitutional and statutory bases capable of  
11 sustaining the Executive Order, each relating to the President's authority to conduct foreign  
12 affairs and oversee immigration and naturalization. *Id.* at 742-43.

13  
14 The Ninth Circuit acknowledged the need to apply a more relaxed standard of review,  
15 and accordingly indicated that it "would accept any suggested interest that might rationally be  
16 served by the rule as one that the rule was intended to promote." *Id.* at 745 n.12 (citing *Mow Sun*  
17 *Wong*, 426 U.S. at 103). Ultimately, the Ninth Circuit did not identify a specific justification as  
18 singularly capable of supporting the Executive Order, but suggested that one or more of the  
19 proffered interests secured its constitutionality. *Mow Sun Wong*, 626 F.2d at 743. The reasoning  
20 of these federal alienage cases may also influence the constitutional review of the Ho-Chunk  
21 Preference Policy.  
22

23  
24 As noted above, Congress has removed tribal preference in tribal employment from the  
25 reach of Title VII. However, the mere fact that Ho-Chunk preference falls outside the ambit of  
26 the Equal Employment Opportunity Act does not safeguard it from constitutional attack.  
27

28 The exception does not create a hiring program; it does not mandate that  
any preference be granted; it does not require any particular action or

1 specify negative consequences for any inaction; and it does not purport to  
2 endorse -- nor does it imply endorsement of -- any particular preference by  
3 any particular employer in any particular location. Hence, although the  
4 703(i) exception undoubtedly reflects Congress's strong desire to  
5 encourage preferences under the exception's specified circumstances, its  
6 mechanism is fundamentally passive: instead of actively creating  
7 employer interests, it presupposes that those interests already exist or will  
8 be offered elsewhere.<sup>11</sup>

9 *Malabed v. North Slope Borough*, 70 P.3d 416, 424 (Alaska 2003). The legitimate interests that  
10 justify the Ho-Chunk Preference Policy derive from the Nation's sovereign status.

11 The U.S. Supreme Court has recognized "that a hallmark of Indian sovereignty is the  
12 power to exclude non-Indians from Indian lands . . . ." *Merrion v. Jicarilla Apache Tribe*, 455  
13 U.S. 130, 141 (1982). Moreover, this "inherent power to exclude nonmembers" is not contingent  
14 upon a reserved treaty right. *Id.* at 159, 161. The Ho-Chunk Nation, therefore, holds an  
15 analogous position to the federal government in relation to its ability to control entrance into its  
16 territory. *See* CONST., ART. I, §§ 1-2.

17 Furthermore, the Nation's power to exclude "necessarily includes the lesser power to  
18 place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S.  
19 at 144. "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the  
20 nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe  
21 may choose to impose." *Id.* at 147. Distinctly at issue in this case are employment conditions  
22 that the Ho-Chunk Nation chose to impose.

23 The Nation first enacted a tribal preference provision in 1981, requiring preference "to  
24 the extent permitted by law." WIS. WINNEBAGO PERS. POLICIES & PROCEDURES, Ch. 2, § A at 3.  
25 The Nation later limited the preference to hiring decisions, but subsequently expanded it to  
26 include the broader categories of employment, training and promotions pursuant to HCN LEG.  
27

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<sup>11</sup> Section 703(i) of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2(i).

1 RES. 02-25-97A. PERS. MANUAL, Ch. 1, § A at 3. At the time of the layoff in question, the tribal  
2 preference extended to "recruiting, hiring, promotion, transfers, training, layoffs, compensation,  
3 benefits, terminations, and all other privileges, terms and other conditions of employment." *Id.*,  
4 § 1.1 at 3a.  
5

6 The Court must view the expansive tribal preference provision through the lens of the  
7 tribal Equal Protection Clause. In doing so, questions of authority do not cloud the Court's  
8 vision as was the case with the U.S. Supreme Court's examination of *Mow Sun Wong*. The  
9 Legislature clearly represents a proper constitutional branch for instituting the Ho-Chunk  
10 Preference Policy. The General Council entrusted the Legislature with the authority "[t]o make  
11 laws, including codes, ordinances, resolutions, and statutes," and "[t]o set the salaries, terms and  
12 conditions of employment for all government personnel." CONST., ART. V, § 2(a, f). When  
13 exercising these powers, the Legislature is cognizant of the immutable goals and aspirations of  
14 the Ho-Chunk People as expressed in the *Preamble*, including the importance of fostering self-  
15 governance: the essence of sovereignty itself. *Id.*, pmb1; *see also* *Lowe, Jr.*, CV 00-104 (HCN  
16 Tr. Ct., Mar. 30, 2001) at 16.  
17  
18

19 Consequently, the Court assesses the status of the non-Ho-Chunk for the purpose of  
20 determining the appropriate level of judicial scrutiny. Unlike the plaintiffs in *Mow Sun Wong*,  
21 non-Ho-Chunks do not constitute a "discrete and insular minority." *Mow Sun Wong*, 426 U.S. at  
22 102 n.22. The Nation also does not withhold significant employment opportunities from non-  
23 Ho-Chunks through implementation of its preference. *Id.* at 102. Tribal preference does not act  
24 as a bar to non-Ho-Chunk employment, and its imposition is contingent upon political affiliation  
25 or association, neither representing a suspect classification.  
26  
27  
28

1           The Court properly uses the rational basis standard of review in deciding whether the Ho-  
2 Chunk Preference Policy violates the tribal Equal Protection Clause. The Court must find that  
3 the Legislature relied upon legitimate considerations rationally related to the intended purpose of  
4 the law in question. The Legislature adopted the PERSONNEL MANUAL pursuant to its lawmaking  
5 power, and intended that it reflect the terms and conditions of employment with the Nation.  
6 PERS. MANUAL, Intro. at 2. The Ho-Chunk Preference Policy, therefore, constitutes a term and  
7 condition of employment, which the Legislature passed in order to promote self-governance. *Id.*,  
8 Ch. 1, § 1.1 at 3. This consideration lies at the core of the Nation's CONSTITUTION and its very  
9 existence. CONST., pmb1. The Court accordingly deems the Ho-Chunk Preference Policy  
10 constitutionally sound, and must articulate its interpretation of the law.

13           The *Kelty* Court seized on the following language in offering its interpretation of tribal  
14 preference: "the Nation *maintains the right* to exercise HoChunk [*sic*] preference . . . ." PERS.  
15 MANUAL, Ch. 1, § 1.1 at 3a (emphasis added). The Court reasoned that the Nation's possession  
16 of the right included the discretionary authority to exercise or not exercise that right. *Kelty*, CV  
17 98-49 at 8. The Court still agrees with this premise, but now holds that passage of the Ho-Chunk  
18 Preference Policy signified the exercising of that right. The above-quoted language merely  
19 denotes that the Nation possesses a right inherent to its sovereignty, *i.e.*, the capacity to place  
20 conditions on an individual's continued presence on tribal lands. *See supra* p. 23.

23           Also, the *Kelty* Court's interpretation proves nonsensical when examined in conjunction  
24 with the next full sentence appearing in the Ho-Chunk Preference Policy, that being: "[t]his  
25 policy *shall be applied* in . . . layoffs . . . and all other privileges, terms and other conditions of  
26 employment." PERS. MANUAL, Ch. 1, § 1.1 at 3a (emphasis added). An administrative agency  
27 cannot plausibly argue that it applied the preference policy by deciding not to apply the  
28

1 preference policy. The Legislature has implemented a mandate, and has not crafted any  
2 exceptions to that mandate. The Court cannot interpret the preference policy in any other  
3 manner.  
4

5 The preference policy earlier states that "the Nation seeks to employ individuals who  
6 possess the skills, abilities, and backgrounds to meet the employment needs of the Nation." *Id.*  
7 at 3. This provision corresponds with and informs the assertion that the Nation "has the right to  
8 employ the best qualified persons available." *Id.*, Intro. at 2. The Nation attempts to ensure the  
9 quality of its workforce through the thoughtful inclusion of qualifications on its job  
10 descriptions.<sup>12</sup> If a tribal member meets or exceeds the stated qualifications of a job, then that  
11 individual shall receive preference over his or her non-Ho-Chunk counterparts, thereby  
12 guaranteeing the Ho-Chunk employment.<sup>13</sup> The Ho-Chunk member actually proves more  
13 qualified for the position since he or she possesses the "highly desirable employment  
14 characteristic" of tribal affiliation. *Id.*, Ch. 1, § 1.1 at 3a.  
15  
16

17 The Court next needs to determine the proper interplay between the Ho-Chunk  
18 Preference and Layoff Policies. A layoff plan must "identify the number of layoff positions by  
19 classification." *Id.*, Ch. 13, § A at 52. Once the department director performs this task, he or she  
20 must "identify incumbents to be laid off through consideration of both ability and seniority." *Id.*  
21 Therefore, the department director must perform this evaluation amongst individuals holding the  
22 same classification, *e.g.*, Residential Services Counselor.  
23  
24  
25

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26 <sup>12</sup> The incorporation of subjective qualifications on a job description renders the qualifications, as a whole,  
27 subjective in nature. *See e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988). The Nation should  
28 strive to utilize objective criteria and tests to the greatest extent possible in order to avoid future litigation.

<sup>13</sup> The Nation can structure job descriptions in an effort to promote a dependable workforce. For example, a job  
description could include as a qualification a prohibition against hiring an individual who either abandoned or  
received a discharge from employment within a certain timeframe of filing an application.

1           The department director may gauge seniority on the basis of time employed with the  
2 Nation, department, division and/or job classification since an assessment of the employee's  
3 dedication and loyalty are at issue, as well as knowledge of and familiarization with the job.  
4 Concerning ability, the focus should remain on the employee's work performance within the job  
5 classification, but will depend upon the circumstances. For example, an employee accepting a  
6 lateral transfer may possess greater ability when viewing the work record within the former  
7 position in which he or she performed "the same or substantially similar duties." *Id.*, Ch. 6 at 17.  
8 In any event, the department director should attempt to ascertain an employee's ability through  
9 objective methods, while the Court recognizes that this may prove difficult in some situations.  
10 *See e.g., Watson*, 487 U.S. at 991-92. Due to the desirability of utilizing objective criteria, the  
11 Court erects a presumption in favor of basing layoff decisions on seniority, which is easily  
12 calculable.  
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14  
15           Obviously, the employer retains some discretion in determining seniority and ability, but  
16 the employer retains no discretion in applying tribal preference. The Ho-Chunk Preference  
17 Policy "shall be applied in . . . layoffs," and, therefore, must supersede other considerations.<sup>14</sup>  
18 PERS. MANUAL, Ch. 1, § 1.1 at 3a. The Court must now apply its interpretation of the law to the  
19 facts and circumstances of the instant case.  
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22                           II.     DID THE HOUSING DEPARTMENT PERMISSIBLY LAYOFF  
23                           THE PLAINTIFFS BASED UPON THE FOREGOING  
24                           ANALYSIS?

25           The Court will address each of the cases in no particular order beginning with the cause  
26 of action alleged by Ms. Humphrey. Ms. Humphrey alleges a misapplication of seniority and  
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28 <sup>14</sup> If the Nation equates efficiency of government and its enterprises with on-the-job experience, it may consider creating several classifications of a single position that an employee could obtain based upon seniority, *e.g.*, Residential Services Counselor I, Residential Services Counselor II, etc.

1 ability in determining her layoff. Specifically, the plaintiff questions the propriety of offering  
2 Ms. Wessels a non-disciplinary demotion to the Special Projects Bookkeeper position; a position  
3 that had not previously existed within Property Management. The Special Projects Bookkeeper  
4 position garnered the same wage as the eliminated Assistant Property Manager position, but  
5 included fewer duties.  
6

7         The rearrangement within Property Management resulted in a net savings to the Housing  
8 Department since Ms. Wessels earned a higher wage in her former position of Residential  
9 Services Counselor. The Court may doubt the wisdom of this business decision, but its  
10 occurrence does not provide a cause of action. The Housing Department conducted a reduction  
11 in force in order to meet an imposed budget ceiling, and the action in question aided in obtaining  
12 that goal. Ms. Humphrey was the sole occupant of the Assistant Property Manager position  
13 within Property Management, and, therefore, once Mr. Cloud selected her position for layoff, the  
14 department director had no obligation to compare Ms. Humphrey's seniority and ability with any  
15 other employee.  
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18         The Court shall next address the cause of action alleged by Ms. Baldwin. Ms. Baldwin  
19 alleges a misapplication of Ho-Chunk preference and seniority in determining her layoff.  
20 Specifically, the plaintiff questions the retention of Ms. Kivimaki in the Residential Services  
21 Counselor position, and the propriety of offering Ms. Wessels a non-disciplinary demotion to the  
22 Special Projects Bookkeeper position.<sup>15</sup> Regarding Ms. Kivimaki's retention, she held the most  
23 senior status in the Residential Services Counselor position, and she received preference over the  
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26 <sup>15</sup> To the extent the plaintiff challenges the status changes of other HOP employees, the Court shall not acknowledge  
27 such challenges since the layoff inquiry focuses solely upon the position occupied by the plaintiff. Therefore, she  
28 may properly question the decision to offer another Residential Services Counselor a non-disciplinary demotion, but  
not other similar decisions within either HOP or the Housing Department. Also, tribal preference would not  
normally extend to a demotion for obvious reasons, but the nature of the demotion at issue sets it apart from the  
normal situation. The BIA similarly retains the option of applying Indian preference to a reassignment to a lower

1 plaintiff because of her membership with the Nation.<sup>16</sup> Concerning Ms. Wessels' demotion, she  
2 likewise received preference over the plaintiff because of her membership with the Nation.

3  
4 Finally, the Court shall address the cause of action alleged by Ms. Estebo. Ms. Estebo  
5 alleges a misapplication of Ho-Chunk preference and seniority in determining her layoff, and  
6 further charges discrimination on the basis of pregnancy. Specifically, the plaintiff questions the  
7 retention of Ms. Kivimaki in the Residential Services Counselor position, and the propriety of  
8 offering Ms. Wessels a non-disciplinary demotion to the Special Projects Bookkeeper position.  
9 The Court dispenses with the first grievance on the same grounds identified above. The second  
10 grievance implicates an issue of a confidential nature relating to ability, and the parties' counsel  
11 earlier requested that the Court separately address this aspect of the case. A supplemental order  
12 shall follow within a short period of time.

13  
14 **BASED UPON THE FOREGOING**, the Court denies the relief sought by the plaintiffs  
15 with the exception of the outstanding issue in Case No. CV 01-19. The parties retain the right to  
16 file a timely post judgment motion with this Court in accordance with *HCN R. Civ. P. 58*.  
17 Amendment to or Relief from Judgment or Order. Otherwise, “[a]ny final *Judgment* or *Order* of  
18 the Trial Court may be appealed to the Ho-Chunk Nation Supreme Court.<sup>17</sup> The *Appeal* must  
19  
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21

22 position in the context of a reduction in force. 25 U.S.C. § 472a(b)(1)(B) ("under the circumstances").

23 <sup>16</sup> The Court expresses no opinion on either the constitutionality of or the proper standard of review for the  
24 remaining preference categories within the Ho-Chunk Preference Policy. This decision is limited to a substantive  
25 examination of tribal member preference.

26 <sup>17</sup> The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”  
27 *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court,  
28 therefore, initially adopted an abuse of discretion standard “to determine if an error of law was made by the lower  
court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also*  
*Coalition for a Fair Gov’t v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; *JoAnn Jones v.*  
*HCN Election Bd. et al.*, 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)). 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,

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1 comply with the Ho-Chunk Nation *Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*],  
2 specifically [*HCN R. App. P.*], Rule 7, Right of Appeal.” *HCN R. Civ. P.* 61. The appellant  
3 “shall within thirty (30) calendar days after the day such judgment or order was rendered, file  
4 with the [Supreme Court] Clerk of Court, a Notice of Appeal from such judgment or order,  
5 together with a filing fee of thirty-five dollars (\$35 U.S.)” *HCN R. App. P.* 7(b)(1). “All  
6 subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN R. App. P.*].”  
7  
8 *HCN R. Civ. P.* 61.

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10  
11 **IT IS SO ORDERED** this 3<sup>rd</sup> day of October 2003, by the Ho-Chunk Nation Trial Court  
12 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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16 Honorable Todd R. Matha  
17 Associate Trial Court Judge  
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27 the Supreme Court has required an appellant to “demonstrate[ ] clear error with respect to the factual findings of the  
28 trial court.” *Coalition* , 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.