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

**Guy Fredrick Beebe,**  
Plaintiff,

v.

Case No.: **CV 04-34**

**Ho-Chunk Nation,**  
Defendant.

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**ORDER  
(Final Judgment)**

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**INTRODUCTION**

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The Court must determine whether to uphold the plaintiff's termination for the alleged revelation of the nature and contents of a confidential meeting. Despite the Court's continuous and consistent interpretations of the Due Process Clause of the CONSTITUTION OF THE HO-CHUNK NATION, ART. X, § 1(a)(8), the plaintiff did not receive a pre-termination hearing. Therefore, the Court declines to uphold the plaintiff's termination and awards the plaintiff appropriate relief.

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**PROCEDURAL HISTORY**

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The plaintiff, Guy F. Beebe, initiated the current action by filing the *Complaint* with the Court on April 23, 2004. Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on April 23, 2004, and delivered the documents by personal service to the

1 defendant's representative, Ho-Chunk Nation Department of Justice (hereinafter DOJ).<sup>1</sup> The  
2 *Summons* informed the defendant of the right to file an *Answer* within twenty (20) days of the  
3 issuance of the *Summons* pursuant to *HCN R. Civ. P. 5(A)(2)*. The *Summons* also cautioned the  
4 defendant that a *default judgment* could result from failure to file within the prescribed time  
5 period.  
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7 The defendant, by and through DOJ Attorney Michael P. Murphy, timely filed its *Answer*  
8 on May 13, 2004. The Court set a *Scheduling Conference* for June 29, 2004 at 1:30 p.m. CDT,  
9 and delivered *Notice(s) of Hearing* to the parties on May 19, 2004. The following party  
10 appeared at the *Conference*: DOJ Attorney Michael P. Murphy, defendant's counsel. The  
11 plaintiff failed to appear at the *Conference*, and did not inform the Court of an inability to attend  
12 the proceeding. The Court granted the plaintiff three (3) weeks to reschedule the *Scheduling*  
13 *Conference*. *Order (Permission to Reschedule) CV 04-34 (HCN Tr. Ct., July 9, 2004)* at 1.  
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15 The Court reconvened the *Scheduling Conference* on August 23, 2004 at 2:30 p.m. CDT.  
16 The following parties appeared at the *Conference*: Guy F. Beebe, plaintiff, and DOJ Attorney  
17 Michael P. Murphy, defendant's counsel. The Court entered the *Scheduling Order* on August  
18 23, 2004, setting forth the timelines and procedures to which the parties should adhere prior to  
19 trial. The Court convened the regularly scheduled *Pre-Trial Conference* on November 2, 2004 at  
20 9:00 a.m. CST. The following party appeared at the *Conference*: DOJ Attorney Michael P.  
21 Murphy, defendant's counsel. The plaintiff failed to appear, again without informing the Court  
22 of an inability to attend the proceeding.  
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24 On November 17, 2004, the regularly scheduled *Trial* date, the following parties  
25 appeared before the Court: Guy F. Beebe, plaintiff, and DOJ Attorney Michael P. Murphy,  
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<sup>1</sup> The *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

1 defendant's counsel. The Court granted the defendant's request to postpone the *Trial* pursuant to  
2 *HCN R. Civ. P. 45*, in light of the plaintiff's nonappearance at the *Pre-Trial Conference*. See  
3 *Pre-Trial Conference* (Log of Proceedings Electronically Recorded ("LPER") at 1, Nov. 17,  
4 2004, 09:05:50 CST). At this proceeding, the plaintiff requested that the Court allow him to  
5 amend his witness list, citing the postponement of the *Trial* as one potential basis. *Id.* at 2,  
6 09:10:43, 9:17:36 CST. The Court denied the plaintiff's request.<sup>2</sup> *Id.*, 09:11:58, 09:24:37 CST.

8 The Court convened *Trial* on January 4, 2005 at 9:00 a.m. CST. The following parties  
9 appeared at *Trial*: Guy F. Beebe, plaintiff, and DOJ Attorney Michael P. Murphy, defendant's  
10 counsel. After the presentation of evidence by both parties, the parties indicated their  
11 willingness to attempt to settle the matter. The Court accordingly afforded the parties a period of  
12 two (2) weeks within which to reach a settlement agreement. *Trial* (LPER at 43, Jan. 4, 2005,  
13 14:29:03 CST). On January 20, 2005, the defendant filed correspondence with the Court,  
14 indicating the parties' "inability to settle the case." *Filing of Def.*, CV 04-34 (Jan. 20, 2005).

## 20 APPLICABLE LAW

23 an official or employee being sued in their official or individual capacity. *HCN R. Civ. P. 27(B)*.

24 <sup>2</sup>The Court explained that the *Scheduling Order* provides deadlines for submitting witness lists. Under *HCN R. Civ.*  
25 *P. 42*, a party must show good cause in order to modify the *Scheduling Order*. That a party did not pursue discovery  
26 as one should have or did not attempt to diligently litigate their cause of action does not represent good cause. *Id.* at  
27 5, 09:26:46 CST. In addition, despite the fact that the *Scheduling Order* provided that parties were to file final  
28 witness lists "ten (10) days before trial, or by October 22, 2004," the Court has consistently held that the date certain  
trumps the ten (10) day alternative within the provision. *Scheduling Order*, CV 04-34 (HCN Tr. Ct., Aug. 23, 2004)  
at 2; LPER at 5, 09:24:37 CST. To interpret the provision otherwise would render the provision nonsensical, since  
the Court does not intend that the *Scheduling Order* provide two (2) alternative deadlines. *Id.* Furthermore, the  
postponement of the *Trial* was a direct result of the failure of the plaintiff to appear at the *Pre-Trial Conference*. To  
allow the plaintiff to amend his witness list for the simple fact that *Trial* had been postponed would be, in essence, to  
reward the plaintiff for failing to adhere to the established timeframe.

1 CONSTITUTION OF THE HO-CHUNK NATION

2 Article VII – Judiciary

3 Section 5 Jurisdiction of the Judiciary.

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

12 Section 6. Powers of the Tribal Court.

13 (a) The Trial Court shall have the power to make findings of fact and conclusions of law. The  
14 Trial Court shall have the power to issue all remedies in law and in equity including injunctive  
15 and declaratory relief and all writs including attachment and mandamus.

16 Article X – Bill of Rights

17 Section 1. Bill of Rights

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

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

21 Article XII – Sovereign Immunity

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

26 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated  
27 Jan. 28, 2004)

28 Introduction

General Purposes [p. 2]

These policies are issued as the official directive of the obligations of the HoChunk (*sic*) Nation  
and the employees to each other and to the public. They are to ensure consistent personnel

1 practices designed to utilize to (*sic*) the human resources of the Nation in the achievement of the  
2 desired goals and objectives.

3 Ch. 12 – Employment Conduct, Discipline, and Administrative Review

4 Security and Confidentiality

[pp. 54-55]

5 It is the policy of the HoChunk [*sic*] Nation to maintain strict control over entrance to the  
6 premises, access to work locations and records, computer information, and cash or other items of  
7 monetary value. Employees who are assigned keys, given special access, or assigned job  
8 responsibilities in connection with safety, security, or confidentiality of such records, material,  
9 equipment, or items of monetary or business value will be required to use sound judgment and  
discretion in carrying out their duties, and will be held accountable for any wrongdoing or acts of  
indiscretion.

10 Information about the HoChunk [*sic*] Nation, its customers, clients, suppliers, or employees  
11 should not be divulged to anyone other than persons who have a right to know, or are authorized  
12 to receive such information. When in doubt as to whether certain information is or is not  
confidential, prudence dictates that no disclosure be provided without first clearly establishing  
13 that such disclosure has been authorized by appropriate supervisory or management personnel.

14 This basic policy of caution and discretion in handling of confidential information extends to  
both external and internal disclosure.

15 Confidential information obtained as a result of employment with the HoChunk [*sic*] Nation is  
16 not to be used by an employee for the purpose of furthering any private interest, or as a means of  
17 making personal gains. Use or disclosure of such information can result in civil or criminal  
penalties, both for the individuals involved and for the Nation.

18 Discipline Policy

[pp. 56-57]

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

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

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26 B. Behavior

[pp. 57-58]

- 27 1. Willful or negligent violation of the Personnel Policies and Procedures, unit  
28 operating rules, or related directives.

- 1           6.     Knowingly falsifying, removal, or destruction of information related to  
2                     employment, payroll, or work-related records or reports.
- 3           9.     Conduct that interferes with the management of Tribal operations.
- 4           11.    Unauthorized removal or use of any Tribal property, or that of its clients,  
5                     customers, or agents.

6     C. Performance [p. 58]

- 7           6.     Careless, negligent, or improper use of Tribal property, equipment or funds,  
8                     including unauthorized removal, or use for private purposes, or use involving  
9                     damage or unreasonable risk of damage to property.
- 10          7.     Unauthorized release of confidential information or official records.

11     Types of Discipline [p. 59]

12     D. Discharge for Misconduct

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

18           Examples of misconduct are violations of policies and procedures, absenteeism and  
19           tardiness, insubordination, use of intoxicants and drugs.

20     Administrative Review Process for Non-gaming [p. 61]

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

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

1 decision.

2 Tribal Court Review [p. 63]

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

6 Employee Rights [p. 64]

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

9 EMPLOYMENT RELATIONS ACTION OF 2004, 6 HCC § 5

10 Subsec. 7 Definitions. Whenever the following terms are used in this Act, they shall have  
11 the meanings indicated.

12 i. Comparable Wage. A wage that is up to 15% of the current wage or previous wage, unless  
13 otherwise authorized in writing.

14 Subsec. 35 Judicial Review.

15 a. Waiver of Sovereign Immunity. Pursuant to Article XII of the Constitution of the Ho-  
16 Chunk Nation, the Ho-Chunk Nation Legislature expressly waives the sovereign immunity of the  
17 Ho-Chunk Nation in the limited manner described herein. This waiver shall be strictly  
18 construed.

18 d. Relief.

19 (1) This limited waiver of sovereign immunity allows the Trial Court to award  
20 monetary damages for actual wages established by the employee in an amount not to exceed  
21 \$10,000, subject to applicable taxation.

22 (2) The Trial Court may grant equitable relief mandating that the Ho-Chunk Nation  
23 prospectively follow its own law, and as necessary to directly remedy past violations of the  
24 Nation's laws. Other equitable remedies shall only include:

24 (a) an order of the Court to the Executive Director of the Department of  
25 Personnel to reassign or reinstate the employee;

26 (b) the removal of negative references from the employee's personnel file;

27 (c) the award of bridged service credit; and

28 (d) the restoration of the employee's seniority.

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2 (3) Notwithstanding the remedial powers noted above, the Court shall not grant any  
3 remedies that are inconsistent with the laws of the Ho-Chunk Nation. Nothing in this limited  
4 waiver or within this Act shall be construed to grant a party any legal remedies other than those  
5 included in this section.

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HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 5. Notice of Service of Process.

(A) Definitions.

(2) Summons - The official notice to the party informing him/her that he/she is identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (See HCN R. Civ. P. 6) and that a *Default Judgment* may be entered against them if they do not file an *Answer* in the prescribed 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.

Rule 27. The Nation as a Party.

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

Rule 42. Scheduling Conference.

Scheduling Order. The Court may enter a Scheduling Order on the Court's own motion or on the motion of a party. The Scheduling Order may be modified by motion of a party upon a showing of good cause or by leave of the Court.

Rule 45. Postponement.

The Court may postpone a trial upon the request of a party, upon agreement of all parties, or at the Court's discretion for good cause and on such terms as the Court deems just.

Rule 53. Relief Available.

Except in a *Default Judgment*, the Court is not limited to the relief requested in the pleading and may give any relief it deems appropriate. The Court may only order such relief to the extent allowed by Ho-Chunk Nation enactments. The Court may order any party to pay costs,

1 including attorney's fees, filing fees, costs of service and discovery, jury and witness costs.  
2 Findings of fact and conclusions of law shall be made by the Court in support of all final  
3 judgments.

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

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

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

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

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

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

41 Rule 61. Appeals.

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

## 6 FINDINGS OF FACT

7 1. The parties received proper notice of the January 4, 2005 *Trial*.

8 2. The plaintiff, Guy Fredrick Beebe, is a non-member, and resides at 317 River Street, Apt.  
9 #6, Black River Falls, WI 54615. The plaintiff was employed as a Ho-Chunk Nation  
10 Management Information Systems (hereinafter MIS) Supervisor.

11 3. The defendant, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized  
12 Indian tribe with principal offices located on trust lands at the HCN Headquarters, W9814  
13 Airport Road, P.O. Box 667, Black River Falls, WI.

14 4. At the time of the incidents giving rise to this litigation, Drew Mackenzie served as the  
15 plaintiff's supervisor in his position as Interim MIS Director. *See Trial* (LPER at 2, Jan. 4, 2005,  
16 09:23:41 CST).

17 5. At the time of the incidents giving rise to this litigation, Douglas Greengrass served as the  
18 Executive Director of Administration. *Id.* at 24, 11:28:30 CST.

19 6. On February 25, 2004, members of MIS and the HCN Gaming Commission held a  
20 meeting in response to a memorandum prepared by MIS for the Gaming Commission. The  
21 memorandum noted discrepancies of file versions loaded by Acres Gaming, Inc. (hereinafter  
22 "Acres"), a software vendor, at the various HCN gaming locations during the software  
23 installation. *Compl.*, CV 04-34, Attach. 9 at 1. The plaintiff, Mr. Mackenzie, and Sandy  
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1 Smalley, HCN Gaming Commissioner, all participated in the February 25 meeting. LPER at 10,  
2 10:09:12 CST.

3 7. The February 25 meeting between members of MIS and the Gaming Commission began  
4 with a discussion regarding the confidentiality of the meeting. At that time, Mr. Mackenzie  
5 provided members of the Gaming Commission with an example of the *Oath of Confidentiality*  
6 signed by all MIS employees, including the plaintiff. *Id.* at 11, 10:10:29 CST. Brady Two Bears  
7 signed the copy provided to the Gaming Commission. *Id.*, 10:11:35 CST.

8 8. The plaintiff arrived approximately ten (10) minutes late to the February 25, 2004  
9 meeting. He entered the meeting while participants were passing around the copy of the *Oath of*  
10 *Confidentiality*. *Id.* at 30, 12:53:16; 35, 01:20:10 CST.

11 9. On March 1, 2004, the plaintiff and Ms. Smalley engaged in a conversation, wherein the  
12 plaintiff informed Ms. Smalley that he had contacted Acres regarding issues raised at the  
13 February 25 meeting. *Compl.*, CV 04-34, Attach. 9 at 2, 3 at 1.

14 10. On March 2, 2004, Ms. Smalley, prepared an incident report, documenting the  
15 conversation between herself and the plaintiff. The report indicates that the plaintiff informed  
16 Ms. Smalley that “he spoke with a representative from Acres on February 26<sup>th</sup> and that he ‘tipped  
17 them off’ in regards to our February 25<sup>th</sup> MIS and GC meeting discussion regarding Acres online  
18 system, version discrepancies and GLI approvals.” *Compl.*, CV 04-34, Attach. 3 at 1. Ms.  
19 Smalley provided this report to Mr. Mackenzie on March 2, 2004. LPER at 10, 10:08:27 CST.

20 11. Mr. Mackenzie brought Ms. Smalley’s incident report to his supervisor, Executive  
21 Director Greengrass. Mr. Mackenzie recommended that Mr. Greengrass terminate the plaintiff  
22 for violating the *Oath of Confidentiality* by “tipping off” Acres. *Id.* at 14, 10:23:44 CST.

1 12. The plaintiff testified that he did indeed contact Acres and told the vendor “to follow  
2 what was in their contract and make sure that everything at our facilities was the same and  
3 everything at our facilities was in accordance with the state gaming regulations and had GLI  
4 approval.” *Id.* at 28, 12:35:39 CST.  
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6 13. On March 4, 2004, Mr. Greengrass terminated the plaintiff for allegedly revealing the  
7 nature and contents of a confidential meeting to Acres. *Compl.*, CV 04-34, Attach. 2 at 3.

8 14. The plaintiff had no forewarning of the termination received on March 4, 2004. LPER at  
9 30, 12:49:14 CST. The plaintiff explained his March 3<sup>rd</sup> meeting with Mr. Greengrass as  
10 follows:  
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12 I was asked to go to his office. I did so. I walked in, he pushed paper  
13 toward me; and [I] read it and said in astonishment, “I can’t believe that  
14 I’m being fired for this.” He said, “I’m sorry,” and nothing else. I signed  
15 it, and I was escorted out of the building, as if I had been convicted of a  
16 crime.

17 *Id.*, 12:51:19 CST.

18 15. Security personnel were present in Mr. Greengrass’s office at the time of the meeting  
19 between Mr. Greengrass and the plaintiff. Other staff packed up the plaintiff’s belongings while  
20 he was in Mr. Greengrass’s office. *Id.*, 12:51:49 CST.

21 16. On or about March 15, 2005, Mr. Mackenzie upheld the plaintiff’s termination at Level 1  
22 of the Administrative Review Process, performing this function as the plaintiff’s supervisor.  
23 *Compl.*, CV 04-34, Attach. 8 at 1.

24 17. On or about March 25, 2004, Mr. Greengrass upheld the plaintiff’s termination with his  
25 response at Level 2 of the Administrative Review Process, performing this function as the  
26 department director. Def’s. Ex. A.  
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1 18. Mr. Mackenzie could not recall a termination hearing with the plaintiff prior to the  
2 plaintiff's termination. LPER at 8, 09:59:03 CST. Mr. Mackenzie testified, "I don't remember if  
3 one happened at all. I don't...If I had to lean one way or the other, I don't think so. But I don't  
4 remember." *Id.* at 10, 10:06:40 CST.  
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6 19. Mr. Greengrass testified that he could not recall speaking with the plaintiff prior to  
7 terminating him. *Id.* at 24, 11:30:13 CST.

8 20. The plaintiff earned \$20.25 per hour in the position of MIS supervisor prior to his  
9 termination on March 4, 2004. *See Compl.* Attach 5 at 1.  
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11 21. Another individual now holds the position that the plaintiff held at the time of his  
12 termination. LPER at 14, 10:27:13 CST.

13 22. The plaintiff has actively sought other employment since mid-April 2004, both within  
14 and outside of his industry and throughout the country, without success. In the month preceding  
15 trial alone, the plaintiff went on ten (10) interviews. The plaintiff explained the detrimental  
16 effect of prospective employers contacting the Nation for his employment record, only to be  
17 informed that the matter is pending in litigation. *Id.* at 33, 01:08:34 CST.  
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## 20 DECISION

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23 The issue of due process with regard to employment actions has a long history before  
24 both the Trial Court and the Ho-Chunk Nation Supreme Court (hereinafter Supreme Court). The  
25 Supreme Court has recognized two (2) separate components of due process: notice and an  
26 opportunity to be heard. *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., July  
27 27, 1999) at 2-3 ("notice is required as an aspect of due process") (citing *Lonnie Simplot et al. v.*  
28

1 HCN Dep't of Health, CV 95-26 (HCN Tr. Ct., Aug. 29, 1996)); *Debra Knudson v. Ho-Chunk*  
2 *Nation Treas. Dep't*, SU 98-01 (HCN S. Ct., Dec. 1, 1998) at 3-4 (expressing disapproval of a  
3 particular employment practice, wherein the appellant "was not afforded the opportunity to  
4 confront or answer allegations made against her" prior to termination). A recurring history and  
5 explanation of the requirement of an opportunity to be heard appears in the binding precedential  
6 case law of the HCN Courts, and the Court declines to enter into such an explanation at this point  
7 since the previous holdings of the Court are clear. Suffice it to say, the employer can easily  
8 discern a clear-cut rule as to the opportunity to be heard that emerges from the long line of cases  
9 before the Courts; to wit: supervisors fail to afford an employee with due process when they do  
10 not provide the employee with at least a minimal opportunity to be heard before a suspension or  
11 termination.<sup>3</sup> See, e.g., *Gary Lonetree, Sr. v. John Holst, as Slot Dir. et al.*, CV 97-127 (HCN  
12 Tr. Ct., Sept. 24, 1998), *aff'd*, SU 98-07 (HCN S. Ct., Apr. 29, 1999); *Roy J. Rhode v. Ona M.*  
13 *Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24, 2001);  
14 *Margaret G. Garvin v. Donald Greengrass et al.*, CV00-10,-38 (HCN Tr. CT., Mar. 9, 2001).

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18 The requirement of a meaningful, pre-discipline opportunity to be heard in order to  
19 satisfy an employee's due process protections is not without justification. A decision-maker can  
20 only reach an accurate conclusion if all sides of the story are known. Moreover, "even where the  
21 facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the  
22 only meaningful opportunity to invoke the discretion of the decision maker is likely to be before  
23 the termination takes effect." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985)  
24 (citations omitted). Essentially, if the Nation, as an employer, is to fulfill the due process rights  
25 guaranteed employees by the HO-CHUNK NATION CONSTITUTION, the employee must have a  
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<sup>3</sup> Considering the repetitive precedent, the Court is left to wonder why a pre-suspension or pre-termination hearing has not explicitly become part of the EMPLOYMENT RELATIONS ACT, 6 HCC § 5.

1 meaningful, pre-discipline, opportunity to be heard. Quite clearly in the case at hand, the  
2 plaintiff received no such opportunity.

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4 The first the plaintiff heard of any potential disciplinary action was when he was asked to  
5 go to Mr. Greengrass's office on March 3, 2005. Mr. Greengrass did not speak to the plaintiff  
6 regarding the alleged breach of confidentiality prior to this time. Mr. Greengrass's asking the  
7 plaintiff to sign his previously prepared termination papers demonstrates the foregone conclusion  
8 to terminate the plaintiff by the time the plaintiff reached Mr. Greengrass's office. While a pre-  
9 termination hearing has no established structure, it must, at a minimum, provide the employee a  
10 "meaningful opportunity to be heard before their property can be taken away." *Lonetree, Sr.*,  
11 CV 97-127 at 10. Arriving in a supervisor's office to find termination papers already prepared,  
12 then to have ones belongings packed up and a security escort out of the building certainly reveals  
13 a lack of intent to have the meeting represent a meaningful opportunity for the plaintiff to explain  
14 himself. In sum, the defendant failed to provide the plaintiff with a pre-termination opportunity  
15 to be heard, thus denying him minimal procedural due process as guaranteed by the  
16 CONSTITUTION, ART. X, § 1(a)(8).

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19 The defendant seemingly urges the Court to proceed to reviewing the merits of the  
20 decision to terminate the plaintiff, regardless of the Court's determination concerning whether  
21 there was a violation of due process. In other words, the defendant requests that the Court  
22 uphold the plaintiff's termination, or at least award less substantial remedies to the plaintiff,  
23 should the Court find sufficient evidence that the plaintiff engaged in a breach of confidentiality,  
24 apart from whether he received a pre-termination hearing. The defendant cites *Gale S. White v.*  
25 *Dep't of Pers., Ho-Chunk Nation CV 95-17* (HCN Tr. Ct., Oct. 11, 1996) to this effect.  
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27 However, the defendant's request ignores the long line of decisions in which the Courts have  
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1 deemed the justification for an employment decision irrelevant when an employee does not  
2 receive due process, including the very case the defendant cites. *See, e.g., Kelty*, SU 99-02 at 2-  
3 5; *Lonetree, Sr.*, CV 97-127 at 12; *Rhode*, CV 00-39 at 19-20; *Garvin*, CV 00-10-38 at 11;  
4 *White*, CV 95-17 at 13.

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6 The defendant's reliance on *White* is misplaced. In *White*, the plaintiff initially received a  
7 suspension for ten (10) days without pay, pending an investigation of her alleged violation of the  
8 HCN PERSONNEL POLICIES AND PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL).  
9 *White*, CV 95-17 at 4. While serving her suspension, the plaintiff grieved the action and  
10 received a response from her immediate supervisor. *Id.* at 5. Once her suspension expired, the  
11 defendant terminated the plaintiff for her violations of the PERSONNEL MANUAL. *Id.* at 6. The  
12 plaintiff filed suit in Trial Court, appealing both her suspension and subsequent termination. The  
13 Court overturned the suspension as violating due process since the plaintiff did not receive  
14 adequate notice prior to her suspension. *Id.* at 13-15. However, the Court upheld the plaintiff's  
15 termination, finding that the defendant's decision to terminate the plaintiff was supported by  
16 substantial evidence and was not unreasonable.<sup>4</sup> *Id.* at 16-19. The Court accordingly awarded  
17 the plaintiff lost wages and benefits solely for the time that the plaintiff was suspended. The  
18 defendant apparently asks the Court to fashion a similar remedy in the case at hand, should the  
19 Court find that the grounds for terminating the plaintiff were sufficient.  
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23 However, the case at hand is fundamentally different than that in *White*. In *White*, the  
24 plaintiff's termination was presumably constitutionally sound, despite the current defendant's  
25 arguments otherwise, leading the Court to proceed to reviewing the justification for the  
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27 <sup>4</sup> The Supreme Court later overturned the flawed standard of review used by the Court in *White*, among other cases.  
28 *See Hope B. Smith v. Ho-Chunk Nation*, SU 03-10 (HCN S. Ct., Dec. 8, 2003) at 9. In *Smith*, the Supreme held that  
the Court is not required to grant deference to employment decisions made by supervisors within the Ho-Chunk  
Nation. The Supreme Court found that the review process under the PERSONNEL MANUAL lacked any of the indicia  
that would warrant granting deference to such decisions. *Id.*

1 termination. The *White* Court explicitly noted the adequacy of the notice of the termination. *Id.*  
2 at 19. Furthermore, there was a ten-day timeframe during the plaintiff's suspension, prior to her  
3 termination, within which the plaintiff had an opportunity to be heard. During this time, the  
4 plaintiff had the ability to explain her position concerning the alleged wrongdoing to her  
5 supervisor via both a face-to-face meeting as well as a grievance regarding the justification for  
6 the suspension,<sup>5</sup> the same justification for her subsequent termination.<sup>6</sup> *Id.* at 5; *Compl.*, CV 95-  
7 17, Attach. 11. In the plaintiff's situation, however, there was no initial suspension during which  
8 any sort of investigation or communication between the parties took place. In fact, there was no  
9 opportunity of any kind for the plaintiff to offer an explanation prior to his termination.  
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12 Furthermore, in *White* the Court did not fashion relief in the manner the defendant is now  
13 suggesting that this Court adopt. In *White*, the Court awarded monetary relief for the  
14 unconstitutional suspension only, not for any lack of due process as to the termination. The  
15 current defendant is arguing that the *White* Court fashioned some sort of middle ground of relief  
16 of awarding money damages but not awarding the defendant reinstatement because the  
17 termination lacked due process but was otherwise justified. That simply was not the basis for the  
18 relief granted by the Court. The termination was sound, but the suspension was not and the  
19 Court awarded relief accordingly. Because *White* is factually dissimilar from the case at hand  
20 and because the defendant's assessment of *White* is inaccurate, the Court finds no need to  
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25 <sup>5</sup> A pre-termination hearing has no established structure and the opportunity need only be minimal. *Rhode*, CV 00-  
26 39 at 18. Therefore, these opportunities afforded the plaintiff in *White* satisfy the due process requirement of an  
27 opportunity to be heard.

28 <sup>6</sup> The Court also finds it peculiar that the defendant cites *White* for an additional reason. The defendant seems to  
argue that *White* demonstrates that the merits of a disciplinary action, if sound, can either reduce the plaintiff's relief  
or uphold the disciplinary action, apart from constitutional concerns. However, *White* itself contradicts this  
argument. In *White*, the underlying basis for the suspension was the same as that for the termination. Therefore, the  
*White* Court would have had to either uphold the plaintiff's suspension or reduce her relief as to her suspension, if  
*White* stood for the defendant's argued proposition.

1 proceed to addressing the justification for the plaintiff's termination nor apply the defendant's  
2 interpretation of the relief awarded in *White*.

3           **BASED UPON THE FOREGOING**, the Court overturns the plaintiff's termination and  
4 consequently awards a portion of the plaintiff's requested relief and other relief as deemed  
5 appropriate by the Court. *See HCN R. Civ. P. 53*. The plaintiff requested injunctive relief within  
6 his *Complaint* to enjoin the Administration Department from interviewing or hiring an individual  
7 to fill his prior position. This form of injunctive relief necessarily required a preliminary  
8 injunction. *Compl.*, CV 04-34 at 3. The Court previously adopted a four-part test utilized in  
9 evaluating requests for preliminary injunctions, later sanctioned by the Supreme Court. *Joyce*  
10 *Warner et al. v. HCN Election Bd.*, CV 95-03-06, 09-10 (HCN Tr. Ct., July 3, 1995) at 4;  
11 *Coalition for a Fair Gov't II v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996)  
12 at 7.

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15           In order for the Court to address a plaintiff's requested preliminary injunction, the  
16 plaintiff must properly request the injunction, setting forth the standard or alleging facts capable  
17 of satisfying the four-part test. *See, e.g. Robert Mudd v. HCN Legislature et al.*, CV 03-01 (HCN  
18 Tr. Ct., Jan. 17, 2003) at 2 (citing *HCN Election Bd. et al. v. Aurelia Lera Hopinkah*, SU 98-08  
19 (HCN S. Ct. Apr. 7, 1999) at 8-9 and *HCN R. Civ. P. 18, 60(B)*). Specifically, a plaintiff must  
20 assert that there is no adequate remedy at law, that the threatened injury to the plaintiff  
21 outweighs the harm of granting the injunction, that the plaintiff has at least a reasonable  
22 likelihood of prevailing on the merits of their claim, and that the issuance of the injunction serves  
23 the public interest. *Coalition for a Fair Gov't II*, SU 96-02 at 7. While the plaintiff requested  
24 injunctive relief within his pleading, he neglected to articulate the standard and/or allege facts  
25 capable of satisfying the four-part test in his initial pleading nor did he do so in any  
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1 accompanying motion. Accordingly, the Court processed the plaintiff's pleading in the typical  
2 fashion and must now deny the requested injunctive relief.

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4 However, the Court grants other components of the plaintiff's requested relief. The  
5 Court directs the HCN Department of Treasury to deduct \$10,000.00 from the Department of  
6 Administration budget, and issue a check for such amount, subject to applicable taxation, to the  
7 plaintiff within a period of thirty (30) days. The Court enters the maximum statutory amount as  
8 compensation for actual lost wages, recognizing that the plaintiff attempted to mitigate  
9 damages.<sup>7</sup> See EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5.35d(1). The Court further  
10 directs the HCN Department of Personnel to reinstate the plaintiff to a position with a  
11 comparable wage. *Id.* § 5.7i. The Personnel Department shall contact the plaintiff within a  
12 period of fourteen (14) days from the entry of this judgment to establish the timeline in relation  
13 to reinstatement. Finally, the Court orders the Personnel Department to remove negative  
14 references from the plaintiff's personnel file, award the plaintiff bridged service credit, and  
15 restore the plaintiff's seniority. *Id.* § 5.35d(2).  
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18 The parties retain the right to file a timely post judgment motion with this Court in  
19 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
20 Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk  
21 Nation Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*  
22 *Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of  
23 Appeal." *HCN R. Civ. P. 61*. The appellant "shall within thirty (30) calendar days after the day  
24 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of  
25 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.)."  
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<sup>7</sup> At an hourly wage of \$20.25, the plaintiff sustained \$10,000.00 in damages on or about June 1, 2004, more than seven (7) months prior to trial. See *supra Findings of Fact* 12, 19.



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*HCN R. App. P. 7(b)(1)*. “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN R. App. P.*]” *HCN R. Civ. P. 61*.

**IT IS SO ORDERED** this 23<sup>rd</sup> day of March 2005, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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Honorable Todd R. Matha<sup>8</sup>  
Associate Trial Court Judge

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<sup>8</sup> The Court appreciates the assistance of Staff Attorney Jocelyn K. Roy in the preparation and drafting of this opinion.