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

Ona Garvin,
Plaintiff,

v.

Case No.: **CV 01-78**

Ho-Chunk Nation, Silas Cleveland, in his
individual capacity, and **Dennis Gager,** in his
individual capacity,
Defendants.

**ORDER
(Motion to Dismiss Granted)**

INTRODUCTION

The Court must determine whether to grant the defendants' *Motion to Dismiss* whereby the defendants move to dismiss the plaintiff's cause(s) of action. The plaintiff claims she was subjected to an involuntary termination from her position as the General Manager at Rainbow Casino. The plaintiff names as party defendants, the Ho-Chunk Nation, Silas Cleveland, in his individual capacity, and Dennis Gager, in his individual capacity. The Court has determined to grant the *Motion to Dismiss*. The following discussion covers the relevant legal issues to properly render a decision.

PROCEDURAL HISTORY¹

The plaintiff, Ona Garvin, initiated the current action by filing a *Complaint* with the Court on July 9, 2001. Consequently, the Court issued a *Summons* accompanied by the above-mentioned *Complaint* on July 10, 2001, and delivered the documents by personal service to the defendants' representative, Ho-Chunk Nation Department of Justice (hereinafter DOJ).² The *Summons* informed the defendants of the right to file an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) 5(A)(2). The *Summons* also cautioned the defendants that a *default judgment* could result from failure to file within the prescribed time period.

The defendants, by and through DOJ Attorney Michael P. Murphy, timely filed their *Answer* on July 30, 2001. Subsequently, the Court mailed *Notice(s) of Hearing* to the parties, informing them of the date, time and location of the *Scheduling Conference*. The Court convened the *Scheduling Conference* on August 27, 2001 at 1:30 p.m. CST. The following parties appeared at the *Conference*: Attorney William Gardner, plaintiff's counsel; Ona Garvin, plaintiff; and DOJ Attorney Michael P. Murphy, defendants' counsel. The Court entered the *Scheduling Order* on August 28, 2001, setting forth the timelines and procedures to which the

¹ The presiding judge extends her sincerest apologies and regrets to the parties for the failure of the Court to enter a timely decision in this matter. Each trial judge maintains a duty to "dispose promptly of the business of the court." *HCN Rules of Judicial Ethics*, § 4-1(E); see also *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-05(1) (HCN S. Ct., Apr. 9, 2005) (requiring issuance of final judgments within ninety (90) days following completion of trial level process). In the interests of justice, the Court informs the parties of the availability of seeking mandamus relief from the Ho-Chunk Nation Supreme Court in order to compel action of a trial level judge. See *In re: Casimir T. Ostrowski*, SU 05-01 (HCN S. Ct., Feb. 21, 2005) (citing CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, § 6(a)). This case was originally assigned to former Chief Judge Mark D. Butterfield whose term expired on March 6, 2002. On March 18, 2002, the case was reassigned to former Chief Judge William H. Bossman. Chief Judge Bossman did not take any action on the case during his tenure, and it was reassigned to *pro tempore* Judge Tina F. Gouty-Yellow who also did not take any action on the case during her limited tenure, which expired on December 31, 2005.

²The *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*) permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party either a unit of government or enterprise or an official or employee being sued in their official or individual capacity. *HCN R. Civ. P.* 27(B).

1 parties should adhere prior to trial.

2 On December 6, 2001, the defendants filed a *Motion for Expedited Consideration*. See
3 *HCN R. Civ. P. 19(C)*. Additionally, the defendants filed *Notice & Motion to Extend Deadline*
4 *for Dispositive Motions and to Adjourn all Remaining Deadlines and Defendants' First Set of*
5 *Interrogatories, Requests for Production & Requests for Admission*. *Id.*, Rule 18. In response,
6 the Court entered the December 7, 2001 *Order*. The order informed the parties of the Court's
7 decision to grant the defendants' *Motion*. *Id.*, Rule 42. The order set forth the deadline for
8 dispositive motions, as well as directing the parties that they had ten (10) days after that deadline
9 to contact the Court to reschedule the remainder of items and deadlines.
10

11
12 On January 7, 2002, the defendants filed the *Notice & Motion to Dismiss* and supportive
13 brief. *Id.*, Rule 18. In response, the Court entered the February 25, 2002 *Order (Motion*
14 *Hearing)*. The order informed the parties of the Court's decision to convene a hearing for the
15 purpose of entertaining the motion. The order set forth the date, time and location of the *Motion*
16 *Hearing*, and alerted the plaintiff to her legal rights and obligations in relation to the proceeding.
17 Prior to convening the *Motion Hearing*, the plaintiff filed a timely response entitled, *Plaintiff's*
18 *Response to Defendant's Motion to Dismiss* (hereinafter *Plaintiff's Response*). *Id.*, Rule 19(B).
19 The Court convened the *Motion Hearing* on March 19, 2002 at 10:30 a.m. CDT. The following
20 parties appeared at the *Hearing*: Attorney William Gardner, plaintiff's counsel and DOJ
21 Attorney Michael P. Murphy, defendants' counsel.
22
23

24 **APPLICABLE LAW**

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

26 **Article VII - Judiciary**

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

1
2 (a) The Trial Court shall have original jurisdiction over all cases and controversies,
3 both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and
4 traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its
5 officials and employees, shall be a party. Any such case or controversy arising within the
6 jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other
7 court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of
8 the Nation's sovereign immunity.

9
10 Sec. 6. Powers of the Tribal Court.

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

14 Art. XII - Sovereign Immunity

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

20 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL (updated
21 March 30, 2001)

22 Introduction

23 General Purposes [p. 2]

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

28 Ch. 6 – Compensation and Payroll Practices

Compensation upon Promotion or Demotion [p. 16]

Permanent employees who are demoted to a position with a lower pay rate or range will be
reduced to the rate or range rate in the lower position as follows:

Disciplinary demotions will be assigned to the base rate of the new position. Upon the
effective date of demotion, the employee will be assigned a new annual review date and
will be placed on a ninety (90) day performance probation with a possible merit increase.

Ch. 9 – Performance Evaluation and Promotion

1
2 Annual Performance Evaluations

[p. 46-47]

3 Each employee will receive an annual performance evaluation on the anniversary date of the
4 current position held.

5 Supervisors shall complete an annual evaluation for each employee up to 10 days prior to the
6 employees annual review date. In turn, the evaluation will be discussed with the employee on or
before his/her review date.

7 An employee who has not received an annual evaluation within 30 days after his/her scheduled
8 annual review date shall be granted a 4% merit pay increase, not to surpass the maximum rate of
his/her pay range, if the following criterion have been met:

- 9 1. The employee has had no disciplinary action placed in his/her personnel file since the
10 previous evaluation due date;
- 11 2. The employee's previous evaluation met the criteria for a merit increase. If the employee
12 has not received an evaluation since working for the Nation, assuming the employment
13 has been continuous, it will automatically be assumed that the employee has met the
evaluation criteria to receive a merit increase;
- 14 3. The employee is not currently on a temporary reassignment, any type of leave of absence,
15 layoff or other event that would affect the employee's annual review date;
- 16 4. The Nation has not imposed any temporary across-the-board payroll restrictions that
17 would suspend merit increases for all employees.

18 If the criterion is met, paperwork will be generated, signed and processed by the Personnel
19 Department granting the employee a pay increase effective the date that the employee's annual
20 review was due. However, the supervisor will still be responsible for completing an evaluation
for the employee. The result of the late evaluation will have no bearing on the automatic
21 increase that the employee had already received.

22 Any supervisor who fails to prepare and provide the employee with an evaluation within one
23 month of the annual review date shall have his/her personnel file duly noted of this infraction by
the Personnel Department. Upon the second and each subsequent infraction, the supervisor shall
24 be subject to disciplinary action through his/her immediate supervisor, and will be denied a merit
increase at the supervisor's next evaluation for failure to complete required job tasks.
25 (RESOLUTION 03/09/01O)

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

27 Discipline Policy

[p.53]

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

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

8 C. Performance [p. 55]

9 1. Inefficiency, incompetency, or negligence in the performance of duties, including
10 failure to perform assigned tasks or training or failure to discharge duties in a prompt, competent,
11 and reasonable manner.

12 Initiating Discipline: Considerations and Notice [p. 57]

13 Supervisory and management personnel should be guided in their consideration of disciplinary
14 matters by the following illustrative, but not exclusive, conditions.

- 15 * The degree and severity of the offense
- 16 * The number, nature, and circumstance of similar past offenses
- 17 * Employee's length of service
- 18 * Provocation, if any, contributing to the offense
- 19 * Previous warnings related to the offense
- 20 * Consistency of penalty application
- 21 * Equity and relationship of penalty to offense

22 Disciplinary notice to regular employees should, as a general rule, contain the following
23 information:

- 24 * A statement of the disciplinary action to be taken and its effective date
- 25 * A statement of the reason(s) for imposing the discipline and the nature of the violation
- 26 * Attachment of any supporting material or evidence where appropriate
- 27 * What the worker has to do to improve

28 ENTERPRISE EMPLOYEES ONLY [p. 59-60]

Matters covered by Administrative Review System: Eligible employees who have complaints,
problems, concerns, or disputes with another employee, the nature of which causes a direct
adverse effect upon the aggrieved employee, may initiate an administrative review according to
established procedures. Such matters have to do with: specific working conditions, safety, unfair
treatment, disciplinary actions (except verbal reprimands), compensation, job classification,
reassignment, any form of alleged discrimination, a claimed violation, misinterpretation, or
inequitable application of these policies and procedures.

1 Hearing Levels for Enterprise:

2 Probationary or Limited Term Employees may [sic] not grieve on any matters.

- 3 1. Verbal warnings may not be grieved, but the employee may add a written response to
4 their personnel file.
- 5 2. Performance Evaluations and written reprimands are to be grieved in sequence to:
6 Level 1 Supervisor and General/Facility Manager
7 Level 2 Executive Director
- 8 4. Terminations are to be grieved in sequence to:
9 Level 1 Supervisor and General/Facility Manager
10 Level 2 Executive Director
11 Level 3 Trial Court

12 The following Administrative Review Process is to be followed in seeking relief for all
13 grievances. The burden of proof is on the grievant to show that what he/she is claiming, actually
14 happened. All grievances will be courtesy copied to the Personnel Department promptly, by the
15 grievant. This proof may include documentation and witness statements.

16 1. A grievance will be submitted directly to the immediate supervisor and the Personnel
17 Department within five (5) calendar days of the disciplinary action by the grievant. The
18 supervisor will meet with the General/Facility Manager to discuss and investigate the grievance.
19 Together, the supervisor and the General/Facility Manager will document and sign the response
20 within ten (10) calendar days of receipt. The grievant will be notified of the response by
21 certified mail with a courtesy copy sent to the Personnel Department.

22 2. Within five days after the end of the previous deadline, and [sic] appeal may be filed in
23 writing to the Executive Director or his/her designee. The appeal may be submitted to level 2, if
24 the grievant has not received a response to the grievance or has not reached an acceptable
25 agreement in seeking [sic] to the grievance. The Executive Director has fifteen days for initial
26 review and response. The response shall be sent to the appellant by certified mail with a
27 courtesy copy sent to the Personnel Department.

28 Tribal Court Review:

[p. 60]

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

Limited Waiver of Sovereign Immunity:

[p. 61]

The HoChunk [sic] Nation hereby expressly provides a limited waiver of sovereign immunity to
the extent that the Court may award monetary damages for actual lost wages and benefits
established by the employee in an amount not to exceed \$10,000, subject to applicable taxation.

1 Any monetary award granted under this Chapter shall be paid out of the departmental budget
2 from which the employee grieved. In no event shall the Trial Court grant any monetary award
3 compensating an employee for actual damages other than with respect to lost wages and benefits.
4 The Trial Court specifically shall not grant any monetary award against the Nation or its
5 officials, officers, and employees acting within the scope of their authority on the basis of injury
6 to reputation, defamation, or other similar invasion of privacy claim; nor shall the Trial Court
7 grant any punitive or exemplary damages.

8 The Trial Court may grant equitable relief mandating that the HoChunk [sic] Nation
9 prospectively follow its own laws, and as necessary to remedy any past violations of tribal law.
10 Other equitable remedies shall include, but not be limited to: an order of the Court to the
11 Personnel Department to reassign or reinstate the employee, a removal of negative references
12 from the personnel file, an award of bridged service credit, and a restoration of seniority.
13 Notwithstanding the remedial powers noted in the Resolution, the Court shall not grant any
14 remedies that are inconsistent with the laws of the HoChunk [sic] Nation. Nothing in this
15 Limited Waiver or within the Personnel Policies and Procedures Manual shall be construed to
16 grant a party any legal remedies other than those included in the section. (RESOLUTION
17 06/09/98A)

18 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

19 Rule 5. Notice of Service of Process.

20 (A) Definitions.

21 (2) Summons - The official notice to the party informing him/her that he/she is identified
22 as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar days (See
23 HCN R. Civ. P. 6) and that a *Default Judgment* may be entered against them if they do not file an
24 *Answer* in the prescribed time. It shall also include the name and location of the Court, the case
25 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.

26 Rule 18. Types of Motions.

27 *Motions* are requests directed to the Court and must be in writing except those made at trial.
28 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
shall contain or be supported by a legal memorandum, which states the issues and legal basis
relied on by the moving party. The *Motions* referenced within these rules shall not be considered
exhaustive of the *Motions* available to the litigants.

29 Rule 19. Filing and Responding to Motions.

30 (B) Responses. A *Response* to a written *Motion* must be filed at least one (1) day before the
31 hearing. If no hearing is scheduled, the *Response* must be filed with the Court and served on the
32 other parties within ten (10) calendar days of the date the *Motion* was filed. The party filing the
33 *Motion* must file any *Reply* within three (3) calendar days.

1
2 Rule 27. The Nation as a Party.

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

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

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

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

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

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

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

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

5 Rule 61. Appeals.

6 The parties retain the right to file a timely post judgment motion with this Court in accordance
7 with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order*. Otherwise, “[a]ny
8 final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The *Appeal*
9 must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically
10 *Rules of Appellate Procedure, Rule 7, Right of Appeal.*” *HCN R. Civ. P. 61*. The appellant
11 “shall within sixty (60) calendar days after the day such judgment or order was rendered, file
with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or order, together with a
12 filing fee as stated in the appendix or schedule of fees” *HCN R. App. P. 7(b)(1)*. “All
13 subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN R. App. P.*].”
14 *HCN R. Civ. P. 61*.

15 **FINDINGS OF FACT**

- 16 1. The parties received proper notice of the March 19, 2002 *Motion Hearing*.
- 17 2. The plaintiff, Ona Garvin, is an enrolled member of the Ho-Chunk Nation, Tribal ID#
18 439A002668, and resides at 3706 Hwy X, Pittsville, WI 54466. The plaintiff was employed as
19 the Retail Manager within the Ho-Chunk Nation Department of Business (hereinafter Business
20 Department), located on trust lands at W9814 Airport Road, Black River Falls, WI 54615. *See*
21 DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c; [http://www.ho-](http://www.ho-chunknation.com/government/executive/org_chart.htm)
22 [chunknation.com/government/executive/org_chart.htm](http://www.ho-chunknation.com/government/executive/org_chart.htm) (last visited Sept. 6, 2006) (on file with
23 Bus. Dep't).
- 24 3. The defendant, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
25 Indian tribe with principal offices located on trust lands at the HCN Headquarters, W9814
26 Airport Road, P.O. Box 667, Black River Falls, WI. *See* 70 Fed. Reg. 71194 (Nov. 25, 2005).
27 The defendant, Silas Cleveland, was the former Executive Director of the Business Department.
28

1 Mr. Cleveland is an enrolled member of the Ho-Chunk Nation, Tribal ID#439A003056. The
2 defendant, Dennis Gager, was the former Director of Gaming within the Business Department.

3 4. The defendants failed to provide the plaintiff a required annual performance evaluation.
4
5 *See Defs.’ Answer, Attach. B.*

6 5. On Monday, April 30, 2001, the plaintiff received a non-disciplinary³ demotion as
7 ordered by Executive Director Cleveland, thereby transferring the plaintiff from Rainbow Casino
8 to the position of Retail Manager within the Business Department. The demotion resulted in the
9 plaintiff’s reduction in gross hourly wages from \$29.60 to \$18.72. *Id.*, Attach. A. The plaintiff
10 suggested the demotional transfer. *Defs.’ Br. in Supp. of Defs.’ Mot. to Dismiss* at 5-6; *Pl.’s*
11 *Resp. to Interrogs.* 8-10; *Pl.’s Resp. to Defs.’ Mot. To Dismiss* at 2-3.

12 6. The defendants assert that plaintiff was primarily responsible and accountable for the
13 poor performance of the Rainbow Casino. The poor performance prompted the defendants to
14 attempt to terminate the plaintiff, prior to her demotional transfer. *See Defs.’ Answer* at 2.

15 7. After the defendants declared that they were going to release the plaintiff from her
16 employment, the plaintiff “forced them to give [her] a job and [she] forced them to withdraw the
17 termination.” *See Defs.’ Br. in Supp. of Mot. to Dismiss, Attach. D* at 3.

18 8. On Tuesday, May 4, 2001, the plaintiff submitted her Level 1 grievance to former
19 Director Gager and the HCN Department of Personnel (hereinafter Personnel Department).
20 *Compl.*, Attach. A;⁴ *see also* HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES
21 MANUAL (hereinafter PERSONNEL MANUAL), Ch. 12 at 60 (requiring submission of Level 1
22

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25
26 ³ The plaintiff’s *Ho-Chunk Nation Employee Position Transfer Request* form, submitted as Exhibit A with the
27 *Defendants’ Answer*, states that this was a “non-disciplinary demotion.” However, the defendants admit that the
28 plaintiff was to be terminated within the *Defendants’ Answer*. *Defs.’ Answer* at 1-2. Therefore, it appears that the
contemplated termination was based upon a poor performance evaluation, which would have led to a termination
and thus a disciplinary action, and that the demotional transfer would have been a disciplinary action as well.

⁴ The Level 1 grievance bears a Business Department and Personnel Department stamp indicating receipt on Friday,

1 grievance "to the immediate supervisor and the Personnel Department within five (5) calendar
2 days of the disciplinary action"). The plaintiff submitted a timely Level 1 grievance. *Id.*

3
4 9. On May 7, 2001, the plaintiff's supervisor, Director Gager, responded to the Level 1
5 grievance. *Compl.*, Attach C. at 2; *see also* PERS. MANUAL, Ch. 12 at 60 (requiring that "the
6 supervisor and the General/Facility Manager . . . document and sign the response within ten (10)
7 calendar days of receipt"). The Level 1 grievance response was due on or before Monday, May
8 19, 2001.

9
10 10. The PERSONNEL MANUAL directs a grievant to submit a Level 2 grievance "within five
11 days after the end of the previous deadline" even "if the grievant has not received a response to
12 the grievance." *Id.*, Ch. 12 at 60. Therefore, the plaintiff needed to file her Level 2 grievance
13 with the Executive Director on or before Thursday, May 24, 2001.⁵

14
15 11. On Thursday, May 24, 2001, the plaintiff submitted her Level 2 grievance to Executive
16 Director Cleveland and the Personnel Department. *Compl.*, Attach. C.⁶

17
18 12. The plaintiff submitted a timely Level 2 grievance. The plaintiff reasonably attempted to
19 follow the Administrative Review Process. *See Marie White Eagle v. Ho-Chunk Nation et al.*,
20 CV 01-52 (HCN Tr. Ct., Sept. 21, 2001) at 8 n.5.

21
22 13. On Thursday, June 7, 2001, the Ho-Chunk Nation Office of the President, Executive
23 Administrative Officer Preston Thompson provided a timely Level 2 response. *Defs.' Answer*,

24
25
26 May 4, 2001, which falls within the statutory timeframe.

27 ⁵ The PERSONNEL MANUAL does not clearly identify "the end of the previous deadline" since while it appears to
28 contemplate a grievant's action upon administrative non-responsiveness, the Level 1 respondents are not seemingly
required to ensure a grievant's receipt of the Level 1 response within the ten (10) day period. PERS. MANUAL, Ch.
12 at 63. The administration need only "document and sign the response" within this timeframe. *Id.*

⁶ The Level 2 grievance bears a Personnel Department stamp indicating receipt on Thursday, May 24, 2001, which
falls within the statutory timeframe.

1 *Ex. B;*⁷ *see also* PERS. MANUAL, Ch. 12 at 63 (allowing "fifteen days for initial review and
2 response").

3
4 14. The Office of the President in its Level 2 Response granted the plaintiff retroactive
5 payment that she would have received since January 19, 2001, up to the last hours she worked as
6 General Manager, assuming a four percent (4%) merit increase and based upon the hours she
7 actually worked. *Defs.' Answer, Attach. B, see also* PERS. MANUAL, Ch. 19 (providing such
8 retroactive payment when performance evaluations are not provided on time).

9
10 15. The plaintiff contends that this retroactive payment was offered, but she did not accept it.
11 *Pl.'s Answers to Defs.' First Set of Interrogs., Reqs. for Produc. & Reqs. for Admis.* at 4, no. 20.

12 16. On July 9, 2001, the plaintiff filed her initial pleading. *Compl.*

13 17. On March 19, 2002, a hearing was conducted on the *Defendants' Motion to Dismiss. Mot.*
14 *Hr'g* (LPER Mar. 19, 2002, 10:32:29 CDT).

15 16 17 DECISION

18 The plaintiff filed a *Complaint* in which she claimed involuntary termination, unfair
19 treatment, failure to provide a timely evaluation, and loss of compensation. The defendants
20 countered by filing a *Motion to Dismiss*. The Court conducted a *Motion Hearing* on March 19,
21 2002. The Court accordingly analyzes the defendants' reasons for seeking a dismissal below.

22 23 24 I. WAS THE PLAINTIFF'S CAUSE OF ACTION FILED IN A 25 TIMELY MANNER?

26
27
28

⁷ The Level 2 response bears a Personnel Department stamp indicating receipt on Friday, June 8, 2001, which falls within the statutory timeframe.

1 The defendants claim that the plaintiff did not file her *Complaint* within the time
2 provided by law. The applicable provisions are found in the PERSONNEL MANUAL and in HO-
3 CHUNK NATION STATUTE OF LIMITATIONS (hereinafter STATUTE OF LIMITATIONS) § 1.03 (b).
4 The STATUTE OF LIMITATIONS provides that an employment action must be filed “within 30
5 calendar days of the final decision of the Administrative Review process or the date such
6 decision would have been due because of a failure to respond by the appropriate supervisor of
7 director.” In this case, the timeline of the grievance process was as follows:
8

9		
10	April 30, 2001	Date of action for which the plaintiff wished to file a grievance.
11	May 4, 2001	Date the plaintiff filed her Level I grievance.
12	May 10, 2001	Date the defendant responded to the Level I grievance.
13	May 24, 2001	Date the plaintiff filed her Level II grievance.
14	June 8, 2001	Date the defendant’s response to the Level II grievance was due. 15 (15 days after the filing of the Level II grievance.)
16	June 8, 2001	Date the defendant filed a response to the Level II grievance.
17	July 8, 2001	Deadline for filing action in Trial Court. (30 days after the date the 18 final decision of the Administrative Review process would have been due.)
19	July 9, 2001	July 8, 2001 fell on a Sunday. The <i>Complaint</i> was therefore due 20 on July 9, 2001.
21	July 9, 2001	Date the plaintiff filed her <i>Complaint</i> in the Trial Court.

22 Unfortunately, the *Complaint* was not file stamped. It is Court procedure to place a file
23 stamp in the upper right hand corner of all pleadings, which documents the date of filing. The
24 *Summons(es)* were however file stamped with the date of July 10, 2001, the same day a receipt
25 was made out for service of process. The defendants contend that the *Complaint* was likewise
26 filed on July 10, 2001, and thus one day late. However, there is a second receipt that was made
27 out to the plaintiff’s attorney. This receipt indicates payment for filing that was received by the
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1 Court on July 9, 2001. *Pl.'s Resp. to Defs.' Mot. To Dismiss*, Attach. 1. In addition, the *File Log*
2 *Book* in the Trial Court's Administrative Office states that the date of filing was July 9, 2001.
3 Despite the *Complaint* lacking a file stamp, the Court holds that the plaintiff timely filed on July
4 9, 2001. Therefore, the Court does not grant the defendants' *Motion to Dismiss* based upon the
5 issue of timeliness. Since the plaintiff has timely filed all of the grievances and pleadings, she
6 may seek an award of monetary damages through the limited waiver of sovereign immunity
7 under the PERSONNEL MANUAL. However, the Court must first inquire that the Nation's officials
8 acted outside the scope of their authority in violation of the Nation's laws.
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11 12 **II. DID THE NATION'S OFFICIALS ACT OUTSIDE THEIR** 13 **SCOPE OF AUTHORITY?**

14 The CONSTITUTION states, "[t]he Ho-Chunk Nation shall be immune from suit except to
15 the extent that the Legislature expressly waives its sovereign immunity, and officials and
16 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be
17 immune from suit." CONST., ART. XII, § 1. The Nation permits suit against officials or
18 employees of the Nation who act beyond the scope of their authority, but only in equity. *Id.*, § 2.
19 Therefore, a suit may be brought for declaratory and non-monetary injunctive relief. *Id.*;
20 *Timothy G. Whiteagle et al. v. Alvin Cloud, Chairman of the Gen. Council of Oct. 11, 2003, in*
21 *his official capacity, et al.*, SU 04-06 (HCN S. Ct., Jan. 3, 2005) at 6. The *Complaint* must set
22 forth whether the official or employee is being sued in his/her official or individual capacity.
23 *HCN R. Civ. P. 27(B)*. The Judiciary relies on *Ex Parte Young*⁸ as a model when interpreting
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28 ⁸ The United States Supreme Court held that "[i]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Ex Parte Young*, 209 U.S. 123, 155-

1 these rules. In doing so the Court finds that a plaintiff may avoid the bar of sovereign immunity
2 if an official is named as a defendant, it is proven that the official acted outside his/her scope of
3 authority, and the plaintiff seeks only declaratory or injunctive relief. *Lonnie Simplot et al. v.*
4 *Dep't of Health*, CV 95-26-27, 96-05 (HCN Tr. Ct., Aug. 13, 1999) at 13.

6 In the instant case, the plaintiff claims that the individually named defendants acted
7 outside the scope of their authority. Specifically, the plaintiff asserts “that the individual
8 defendant’s [sic] authoritative inaction, coupled with an official failure to evaluate promptly (and
9 ultimately upon fair and reasonable grounds), led to an arbitrary dismissal of the plaintiff from
10 her General Manager position.” *Pl.’s Resp. to Defs.’ Mot. to Dismiss*, at 4; *see also* LPER at
11 10:55:57 CDT. With regards to the claim of authoritative inaction, the Court adheres strictly to
12 the CONSTITUTION, specifically Article III’s separation of functions clause. “No branch of the
13 government shall exercise the powers or functions delegated to another branch.” CONST., ART.
14 III, §3. The Court is bestowed with the power of making findings of fact and conclusions of law
15 based upon the evidence brought forth. *Id.*, ART. VI, §6. “Before this Court will overturn an
16 agency’s decision, a clear error in judgment unsupported by the whole record must exist; the
17 Court will not substitute its own judgment for a reasonable action, decision, or interpretation
18 made by an agency of the Nation.” *Debra Knudson v. HCN Treasury Dep’t*, CV 97-70 (HCN
19 Tr. Ct., Feb. 5, 1998) at 16; *see also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837,
20 843-44 (1984); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The
21 Court is thus not in the position to question the business decisions of those who have been
22 bequeathed with the power to make such decisions. *See, e.g., Knudson*, CV 97-70 at 15-16
23 (stating “[i]n practice, this Court recognizes that a high degree of deference should exist so that
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56 (1908).

1 agencies, who by nature are more experienced and educated to perform their specific tasks, are
2 not second-guessed by the Nation's judiciary”).

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4 The defendants contend that they made a business decision based upon a financial loss
5 suffered by Rainbow Casino. *See Defs.' Answer* at 2. The plaintiff has provided no evidence to
6 establish that this decision to perform a demotional transfer was motivated by anything other
7 than the desire to ensure financial success. The Judiciary has continually recognized the
8 principle that a plaintiff maintains the burden to prosecute his or her case. The equally well-
9 founded burden of production accompanies this basic principle. In order to satisfy one's burden
10 of production, a plaintiff must present such evidence as necessary to meet the requisite burden of
11 proof in a civil matter: preponderance of the evidence. *See, e.g., Joseph D. Ermenc v. HCN*
12 *Whitetail Crossing*, CV 01-88 (HCN Tr. Ct., Sept. 11, 2003) at 6. The plaintiff has not met this
13 burden. She has not provided any evidence to substantiate her claim that the defendants based
14 their decision on hearsay, lies, or personal bias, or that she has suffered unfair treatment. Thus, it
15 does not appear that the defendants acted beyond the scope of their authority in making this
16 business decision.

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19 With regards to the plaintiff's claim that the defendants failed to perform a timely annual
20 performance evaluation, the Court finds that although the defendants should have had this
21 infraction duly noted in their personnel files, ultimately the Court lacks the authority to review
22 such infraction. The PERSONNEL MANUAL does not allow for supervisors to have any discretion
23 in terms of when to administer an annual evaluation. Instead, it mandates that supervisors are to
24 provide employees with yearly performance evaluations up to ten (10) days prior to the annual
25 review date (anniversary date of current position held) and within thirty (30) days of such date.
26 PERS. MANUAL, Ch. 9 at 46. Although the defendants appear to have acted beyond their
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1 authority, it is the PERSONNEL MANUAL that provides the sole relief for such a violation as
2 discussed below.

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7 **III. SHOULD THE PLAINTIFF'S CLAIMS REGARDING HER**
8 **LATE ANNUAL EVALUATION BE DISMISSED?**

9 If an employee has not received an annual evaluation within thirty (30) days after his/her
10 scheduled annual review date; the PERSONNEL MANUAL requires that the employee be granted a
11 four percent (4%) merit pay increase so long as certain criteria are met. *Id.* The supervisor will
12 in turn have this infraction noted in his/her personnel file. *Id.* at 47. The plaintiff's annual
13 review date was January 19, 2001. *See Defs.' Answer, Attach. B.* However, she did not receive
14 her review until April 30, 2001. *Id.* Thus, the evaluation did not occur within the mandatory
15 thirty (30) days.

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17 The Executive Administrative Officer within the Nation's Office of the President
18 acknowledged this in his *Response to Level 2 Grievance*. *Id.* Pursuant to Chapter 9 of the
19 PERSONNEL MANUAL, this officer granted retroactive payment in the amount that the plaintiff
20 would have received between January 19, 2001 and her last hours worked as General Manager at
21 Rainbow, assuming a four percent (4%) merit increase and based on hours actually worked. *Id.*;
22 *see also* PERS. MANUAL, Ch. 9 at 46. However, the plaintiff did not accept this relief. *See Pl.'s*
23 *Answers to Defs.' First Set of Interrogs., Reqs. for Produc. & Reqs. for Admis.* at 4, no. 20. It is
24 not known by the Court why the plaintiff did not accept this relief. One may assume that the
25 plaintiff wished to continue on with her grievance to the Trial Court, and thus refused to take
26 anything offered in fear of being prevented from seeking judicial review, or obtaining certain
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1 types of relief. However, the PERSONNEL MANUAL limits the administrative review for grieving
2 performance evaluations to Level 2 Grievances submitted to the Executive Director. PERS.
3 MANUAL, Ch. 12 at 59. The only grievances that mention the ability to advance to the Trial
4 Court in the PERSONNEL MANUAL are those for suspensions and those for terminations. *Id.* at 60.
5 For these reasons, the Court remands the decision to the Business Department with the
6 expectation that the relief offered during the Level 2 Grievance be reoffered to the plaintiff. *See*
7 *Margaret G. Garvin v. Donald Greengrass et al., Order (Final J.), CV 00-10, -38 (HCN Tr. Ct.,*
8 *Nov. 16, 2001) at 12-14.*

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12 **IV. SHOULD THE PLAINTIFF'S ACTION BE ALLOWED TO**
13 **PROCEED BASED UPON A CLAIM FOR INVOLUNTARY**
14 **TERMINATION?**

15 There has been no evidence provided to the Court that a termination occurred. The
16 defendants admit that it was their intent to terminate the plaintiff's employment because they
17 determined that the plaintiff was primarily responsible and accountable for the poor performance
18 of Rainbow Casino. *See Defs.' Answer* at 2. However, the plaintiff, upon receiving proper
19 notice of her termination by and through her poor performance evaluation, recommended that she
20 be granted a demotional transfer instead. *See Defs.' Br. in Supp. of Mot. to Dismiss, Attach. D* at
21 3.

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23 "The Supreme Court has determined that a permanent employee maintains a property
24 right in their continued employment."⁹ *Louella A. Kelty v. Jonette Pettibone and Ann*

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27 ⁹ The Court confronted and established the requirements of procedural due process in the following decisions: *Gary*
28 *Lonetree, Sr. v. John Holst, as Slot Dir., and Ho-Chunk Casino Slot Dep't*, CV 97-127 (HCN Tr. Ct., Sept. 24,
1998) at 7-11 *aff'd* SU 98-07 (HCN S. Ct., Apr. 29, 1999); *Vincent Cadotte v. Tris Yellowcloud, Dir. of Compliance*,
CV 97-145 (HCN Tr. Ct., Apr. 24, 1998) at 6-10; *Joan Whitewater v. Millie Decorah, as Fin. Dir., and Sandy*
Martin, as Pers. Dir., CV 96-88 (HCN Tr. Ct., Jan. 20, 1998) at 4-6 *aff'd* SU 98-02 (HCN S. Ct., Oct. 26, 1998);
Sandra Sliwicki v. Rainbow Casino, Ho-Chunk Nation, CV 96-10 (HCN Tr. Ct., Dec. 9, 1996) at 12-18 *rev'd on*

1 *Winneshiek, in their official capacities, SU 99-02 (HCN S. Ct., July 27, 1999) at 2; see also*
2 *PERS. MANUAL, Intro., at 2.* As a property right, an employee needs to be afforded minimal due
3 process protections. This Court has consistently found that minimal due process¹⁰ consists of
4 notice and hearing. *Roy J. Rhode v. Ona Garvin, as General Mgr. of Rainbow Casino, CV 00-39*
5 *(HCN Tr. Ct., Aug. 24, 2001) at 1.* Typically, a plaintiff needs to be afforded the opportunity to
6 confront or answer allegations made against him/her. *Debra Knudson v. HCN Treas. Dep't, SU*
7 *98-01 (HCN S. Ct., Dec. 1, 1998) at 3.* At a minimum, the notice should provide the aggrieved
8 employee with what they did wrong so that the employee may defend during the grievance
9 process. *See Sandra Sliwicki v. Rainbow Casino, CV 96-10 (HCN Tr. Ct., December 9, 1996).*

12 In the instant case, the plaintiff was afforded these protections. She was notified during
13 her annual evaluation that she was to be terminated due to her role in the financial problems
14 faced by Rainbow Casino. *Def's.' Br. in Supp. of Def's.' Mot. to Dismiss at 5-6; Pl. Resp. to*
15 *Interrogs. 8-10; Pl.'s Resp. to Def's.' Mot. to Dismiss at 2-3.* Upon receiving this notice, she then
16 had the ability to confront her supervisor. *See Def's.' Br. in Supp. of Mot. to Dismiss, Ex. D at 3.*
17 Her ability to persuade her supervisor to grant a demotional transfer¹¹ rather than a termination is
18 proof that these due process protections are essential in protecting one's interest in property.
19 Therefore, she was granted the minimal due process protections required by a Court.
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24 *other grounds SU 96-15 (HCN S. Ct., July 20, 1997); Gale S. White v. Dep't of Pers., Ho-Chunk Nation, CV 95-17*
25 *(HCN Tr. Ct., Oct. 14, 1996) at 11-15; Lonnie Simplot, Linda Severson and Carol J. Ravet v. Ho-Chunk Nation*
Dep't of Health, CV 95-26, 27 and 96-05 (HCN Tr. Ct., Aug. 29, 1996) at 15-19.

26 ¹⁰ "The Nation secures its right to enforce the progressive disciplinary policy by affording the employees their due
27 process rights to such disciplinary actions. The standard of the progressive disciplinary policy requires than [sic] an
employee only may be terminated for cause, namely good cause that survives the arbitrary and capricious analysis."
Knudson, CV 97-70 at 11.

28 ¹¹ "The Court will note that a disciplinary demotion should be preceded by notice due to its punitive nature. A
plaintiff could presumably contend that an employer erected a pretext for initiating a non-disciplinary demotion, but
the instant plaintiff has not pursued this manner of claim." *See Joyce Warner v. Ho-Chunk Nation et al., CV 04-72*
(HCN Tr. Ct., Sept. 11, 2006) at 17.

1 The plaintiff's *Status Change Notice* and *Position Transfer Request* both indicate that the
2 plaintiff was subjected to a demotional transfer. *See Defs.' Answer*, Attach. A. No proof was
3 submitted that would indicate that a termination ever occurred. The plaintiff cannot simply rely
4 upon assertions made within her *Complaint* and grievances. Instead, she must refer to evidence
5 contained in a variety of forms, including affidavits, business records, discovery responses, etc.
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7 *See, e.g., Joshua F. Smith, Sr. v. Adam Estes et al.*, CV 03-08 (HCN Tr. Ct., Dec. 18, 2003) at
8 13; *Donna L. Peterson v. HCN Compliance Div.*, CV 98-51 (HCN Tr. Ct., June 22, 1999) at 3-4.
9 Therefore, the plaintiff has failed to meet her burden in establishing that an involuntary
10 termination occurred.
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12 With regards to loss of compensation, a prior Supreme Court decision, *Millie Decorah et*
13 *al. v. Joan Whitewater*, SU 98-02 (HCN S. Ct., Oct. 26, 1998), the plaintiff argued that she was
14 subjected to a wrongful termination and a wrongful demotion. *Millie Decorah, as Finance*
15 *Director of the HCN and Sandy Martin, as Personnel Director v. Joan Whitewater*, SU 98-02
16 (HCN S. Ct., Oct. 26, 1998) at 4. The parties had entered into a *Stipulation and Order for*
17 *Partial Settlement*, in which they agreed to allow the Trial Court to determine the comparable
18 wage to be granted to the plaintiff. *Id.* The Trial Court decided to grant retroactive payment
19 from the date of the judgment back to the date that she was laid off. *Id.* However, the Supreme
20 Court determined that because of its retroactive nature, the award constituted a money award. *Id.*
21 As previously noted, suit against an employee is allowed, but only if it is a suit in equity for
22 declaratory and nonmonetary injunctive relief. Therefore, the Supreme Court found the
23 retroactive award to be unconstitutional and reversed the Trial Court's decision. *Id.* at 5. In
24 doing so, the Supreme Court announced that the appropriate wage was \$11.39, the calculated
25 Class and Compensation maximum allowed for the "demoted" position. *Id.* at 3. Furthermore, it
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1 was effective from the day of the judgment prospectively, and not retroactively. *Id.* Pursuant to
2 the PERSONNEL MANUAL, an employee who is demoted is to be assigned to the base rate of the
3 new position, assigned a new annual review date, and be placed on a ninety (90) day
4 performance probation with a possible merit increase. PERS. MANUAL, Ch. 6 at 16; *see also*
5 *supra* n. 2. In the case at hand, the plaintiff should also receive the wage rate set for the position
6 that she was demoted to, and it should be prospective and not retroactive. The plaintiff was
7 demoted to the position of Business Department's Retail Manager, and received \$18.72/hour,
8 with a wage range of \$16.00 - \$23.68 hourly. *Defs.' Answer*, Attach. A. Accordingly, the
9 plaintiff did not enter into an involuntary termination.

12 **BASED UPON THE FOREGOING**, the Court grants the defendants' motion, and
13 dismisses the instant action. The Court accordingly denies the plaintiff any and all relief in
14 connection with her *Complaint*. **HOWEVER**, the Court does expect that the parties to readdress
15 and reevaluate the issue regarding the untimely annual evaluation.

17 The parties retain the right to file a timely post judgment motion with this Court in
18 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
19 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
20 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
21 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
22 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
23 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
24 order, together with a filing fee as stated in the appendix or schedule of fees” *HCN R. App. P.*
25 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
26 *R. App. P.*].” *HCN R. Civ. P.* 61.

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IT IS SO ORDERED this 30th day of October 2006, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Amanda L. Rockman¹²
Associate Trial Court Judge

¹² The Court appreciates the assistance of Staff Attorney Nicole Homer in the preparation of this opinion.