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U.S. DISTRICT COURT  
SUPREME COURT  
GENERAL BLDG, COURT CLERK

**Appellee.**

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**Case No. SC 2015-07**

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## I. BACKGROUND

Following are the pertinent documents and issues that should be addressed in a regular briefing schedule herein pursuant to SC Rule 60. Appellees erroneously claim that the issues of the District Court's jurisdiction over Article claims and damages have been addressed in a prior appeal, thus leaving this Court without subject matter jurisdiction. Even if they had been addressed by this Court, the Agency provides no authority for denying this Court subject matter jurisdiction. These documents show that this Court has not addressed the issues of the District Court's jurisdiction over Article XII claims and damages, and the Court has subject matter jurisdiction

### Unger's District Court Petition- March, 2014

Unger's Complaint had five causes of action as noted by this Court:

1. Violation of Cherokee Nation Constitutional right of Due Process (Article XII claim)
2. Violation of 51 CNCA 1001
3. Violation of the Act (Cherokee Nation Comprehensive Care Agency Organic Act)
4. Violation of Agency Policy
5. Declaratory Judgment

The Agency answered the First Cause of Action (Article XII). Unger's Complaint- Second Cause of Action, "The Agency violated 51 CNCA 1011 for terminating Unger without cause and without progressive discipline"<sup>1</sup> was the subject of the first appeal. *See* Compl. at par. 12.

### District Court Order- June 26, 2015

The District Court held:

- 1) No employee, who having served in a position at least one (1) year, shall be removed from employment of the Cherokee Nation except for cause, and only

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<sup>1</sup> 51 CNCA 1011 (2016), mandates the Cherokee Nation and its instrumentalities to give employees a written notice of appeal. Written notice of appeal advises her of how and when to appeal.

after being afforded pre-termination due process. See Cherokee Nation Constitution (2003), Article (sic) See Also *In re: Appeal of McAlvain*, SC-12-02; *In re: Appeal of Ragsdale*, SC-12-04; *In re: Appeal of Rusco*, SC-12-02; and *In re: Appeal of Dreadfulwater*, SC-12-06.

2) The Plaintiff is entitled to all protections provided employees of the Cherokee Nation under the Constitution.

### **Conclusion**

...

The CNCA (Agency) answered Count I of the Plaintiff's Complaint which shall survive this Order but all other counts are hereby dismissed.

### First Appeal- July 13, 2015

The issue in Unger's first appeal was:

The central issue on appeal is the District Court erred by holding that the Agency is not an *entity or corporation* of the Cherokee Nation pursuant LA-03-10, 51 CNCA 4 (A), and Agency employees no have protections under the EAPA. The Agency is a part of the Executive Branch, a Cherokee Nation government agency, and a wholly owned entity of the Cherokee Nation. LA 3-05 (4), the Agency's organic act provides that the Agency was established within the Executive Branch of the Cherokee Nation's government for the purpose of providing health and human services.

See Petition in Error July 7, 2015, Exhibit "C". The Agency did not counter appeal the District Court asserting jurisdiction over Unger's Count 1, -Article XII claim (District Court June 29, 2015 Order- "The Plaintiff is entitled to all protections provided employees of the Cherokee Nation under the Constitution").

This Court framed the issue in the first appeal as:

Whether the Agency's employees are protected by the Employee Appeals Procedure Act ("EAPA") 51 CNCA 1001 et al. Therefore, the dismissal as to the Third, Fourth and Fifth causes of action and the denial of the Motion for Summary Judgment will stand and not be addressed by this Court. *Opinion* at page 2.

This Court held:

While the Court agrees with the ultimate outcome of the trial court in regards to the sustaining of the Motion to Dismiss the Appellant's Second Cause of Action, the Court does not agree with the rationale within which it was reached. The Second Cause of action should be dismissed for the *sole reason* that

the Cherokee Nation District Court does not have jurisdiction in an appeal brought pursuant to the procedures set forth in 51 CNCA section 1001 et. eq. (Emphasis added.)

This being the only issue on appeal, the dismissal of causes of action three (3), four (4) and five (5) will stand, as will the denial of the Motion for summary judgment. The Court is making no opinions regarding those issues since they have not been brought before the Court of appeal.  
March 20, 2017 *Opinion* at pages 3 and 4.

This Court did not address whether the District Court had original jurisdiction over Count 1- Constitution Article XII claim or the damages a wrongful discharged employee was entitled as redress.

The Agency argued before the District Court that Unger's Prayer for relief items 2-7 should be stricken; however, *the Agency never raised that issue on appeal*. See Cherokee Nation Comprehensive Care Agency's Response to Petition in Error (August 17, 2015). The parties did not brief the issue, and in the first appeal, this Court never addressed the issue of remedies for an Article XII claim.

District Court Order on Remand- August 16, 2018

The District Court held,

8) That the Courts have recognized a cause of action for a violation of the Cherokee Nation Constitution, Article XII. However, pursuant to Supreme Court's *Opinion* previously filed in this case, this Court lacks jurisdiction to hear such cause as the procedures set out in the EAPA were not followed.

See August 16, 2018 Order at pg. 2.

The District Court did not identify the procedures Unger failed to follow. The District Court's Order seems inconsistent because this Court affirmed the dismissal of Count 2- EAPA cause of action for not filing it in the Employees Appeal Board ("EAB") pursuant to the EAPA, but the District Court dismissed Count 1- Article XII for not following EAPA procedures presumably for not filing in the EAB. There is no legal requirement that Article XII claims be

filed in the EAB. It should be noted that the District Court on remand *never* ruled on the issue of Article XII damages.<sup>2</sup>

#### Second Appeal- September 27, 2018

Before this Court in Unger's Second Petition in Error are the issues that the District Court erred by:

1. Dismissing Unger's Complaint and Count 1 holding that the District Court does not have jurisdiction over Article XII constitutional claims for denial of pretermination due process because she did not following EAPA procedures.
2. Dismissing attendant claims for Article XII redress including reinstatement, back wages less mitigation and attorney fees.
3. Denial of due process by the District Court *sua sponte* dismissing Count 1 without notice to Unger.

See Second Petition in Error, Exhibit C.

#### Agency's Motion to Dismiss- September 25, 2018

Rather than comply with SC Rule 60 appellate briefing schedule, the Agency moved this Court for dismissal of the appeal on grounds that this Court has no subject matter jurisdiction.

This Court should deny the Agency's Motion to Dismiss and order it to comply with SC Rule 60 briefing schedule and address its arguments in its Answer Brief.

## **II. ARGUMENT**

This Court has subject matter jurisdiction over Unger's appeal from the District Court.

### **Proposition One: The District Court has original jurisdiction over Article XII claims.**

This Court has heard a number of District Court Article XII appeals. By reviewing the above pleadings and orders, it is clear that this Court did not address whether the District

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<sup>2</sup> In its August 16, 2018 Order at pg. 2, the District Court recited the Agency's argument but never made a finding or ruling about Article XII damages:

5) Defendant argues in its *Motion to Strike Plaintiff's* that, "As this Court clearly articulated in the previous Order, Plaintiff Unger's causes of action 2-5 and *prayers for relief 2-7 seeking monetary damages* are no longer justiciable and the remedies sought are barred by sovereign immunity.

Court has original jurisdiction to review Unger's Article XII wrongful discharge claims and the damages mandated for redress. The Agency has wholly failed to show where this Court addressed those issues in its March 20, 2017 *Opinion*. In the first appeal, this Court only addressed whether the District Court had jurisdiction over EAPA statutory claims pursuant to 51 CNCA 1001 et seq. (Count 2).

In its *Opinion*, this Court did not address whether the EAPA's substantive provisions applied to Unger. Cherokee Nation Business ("CNB") argues that the EAPA's procedure provisions do not apply to the Nation's instrumentalities, but substantive provisions do.<sup>3</sup>

This Court's *Opinion* in *Unger's* first appeal is consistent with the proposition that CNB and the Agency are not subject to the EAPA procedural provisions for Article XII claims. The issue of procedural vs. substantial EAPA provisions applicable to Unger is justiciable.

In its June 26, 2015 Order, the District Court asserted jurisdiction and acknowledged that Unger was "entitled to all protections provided employees of the Cherokee Nation under the Constitution." The Agency did not appeal the District Court's ruling as to the viability of Unger's Article XII claim. In the first appeal, there was no need to request this Court to reconsider the legitimacy of Unger's Article XII claims as argued by the Agency because she prevailed on that issue. In fact, the Agency answered Count 1- Unger's Article XII claim and did not object to the District Court's jurisdiction. *See Answer to First Cause of Action, Unger v. CNCCA*, CV 2016-94 (March 27, 2014) and Cherokee Nation Comprehensive Agency's

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<sup>3</sup> In *Byrd v CNB*, SC 2016-08 Answer Brief at pg. 20, CNB stated, "See also *Watkins v Cherokee Nation* -1, JAT 02-01 (holding that "[at]t the time the EAPA was enacted, the Council specifically excluded CNE employees from the EAPA's procedural requirements." *See Watkins* at pg. 3. In *Lovett v CNB*, CV 2017-272 -CNB's Response Brief to Issues Raised in Reply Brief, December 5, 2017, CNB stated, "CNB recognizes it is subject to the EAPA; however, CNB is exempt from sections of the EAPA pertaining directly to *procedural requirements* of the *appeals process* by virtue of the definition of "employee" in the EAPA". (Emphasis in original.) *See Response Brief* pages 11 and 12 and Exhibit "A", EARP's Order.

Response to Petition in Error August 17, 2015, wherein the Agency acknowledges answering Count 1.

The Agency unartfully tries to bundle two issues together: 1) the District Court's jurisdiction over Article XII claims, and 2) the remedies afforded to Article XII violations. The Agency continues its desperate argument that if there are no statutory damages (which Unger disputes) for Article XII claims, then the District Court has no jurisdiction to hear those claims. That makes no sense. The highest cause of action is a constitutional one. As this Court held in *Comingdeer v. Cherokee Nation*, SC 2016-07, "where there is a cause of action by Cherokee law, sovereign immunity is waived for the purposes of fulfilling remedies provided by Cherokee law and to hold otherwise would render the law meaningless." To suggest there must be a statutory waiver for a constitutional redress is *non sequitur* and defeats the purpose of Article XII.

Apparently to the Agency, the issue of the District Court's original jurisdiction over Article XII claims is a question of first impression or this Court's March 20, 2017 *Opinion* is not clear. Agency's Counsel, Assistant Attorney General John Young ("Young"), is the same Counsel for the Nation in *Cherokee Nation v. Comingdeer*, SC 2016-07. In his *Comingdeer* Petition in Error, Exhibit "C," Young appealed the District Court's Order holding that it had jurisdiction over an Article XII claim.<sup>4</sup> Where there is a question of law on appeal, this Court has subject matter jurisdiction.

The Agency's argument that since there are no statutory damages for an Article XII claim, the District Court was justified in dismissing Unger's Article XII claim. However, this argument is belied by the Agency's own argument that "Under Cherokee law, the exclusive

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<sup>4</sup> II. Whether a former tenured employee of the Cherokee Nation may bring a claim in the District Court pursuant to Article XII of the Cherokee Nation Constitution without exhausting administrative remedies under the Employee Administrative Procedures Act ("EAPA"), 51 CNCA 1001.

remedies available for successful Article XII claims are reinstatement and back benefits.” See Reply Brief at page 2. Regardless of the extent of remedies, the District Court has jurisdiction over Unger’s Article XII claim and the District Court erred by dismissing her Article XII claim.

This Court should deny the Agency’s Motion to Dismiss and order it to comply with SC Rule 60 briefing schedule and address its arguments in its Answer Brief.

**Proposition Two: The Agency ignores the Constitution Article XII mandate that that “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged”.***

The Agency’s silence is deafening in its Reply Brief on the issue of Article XII’s mandate that “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged”.*

Instead, the Agency reargues that *Watkins v. Cherokee Nation-2*, JAT 02-01 (2004) is good law.<sup>5</sup> The Judicial Appeal Tribunal in *Watkins-2*, “Order of Clarification” explicitly held it interpreted the EAPA effective as of 2004:

Back wages, or back pay, are not contemplated in the statute (EAPA). With no legislative history to support a board reading, it would be inappropriate for the Court to expand the statute through a more liberal reading. Should the Council intend the remedy of back wages or salary to be available to wrongfully terminated employees, the Court will defer to future legislative enactments.

The Council enacted new law in 2010 - the Back Pay Act.<sup>6</sup> There is legislative history to support the proposition that Unger is entitled to reinstatement, back pay and attorney’s fees. At

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<sup>5</sup> Oddly, the Agency cites in its Reply Brief, Unger’s Opening Brief which was stricken by the Court. It makes no sense to argue the merits of an argument of stricken brief on a Motion to Dismiss, since the merits of an appeal are not at issue on a Motion to Dismiss. See Reply Brief at page 2. Also Mr. Young “calls into question Appellant’s Counsel’s duty of candor to this tribunal.” Mr. Young suggest Appellant’s Counsel inconsistently argued the lack of precedent of *Watkins*. See Reply Brief at page 2. However, it is clear Appellant’s Counsel argued that *Watkins* held, “under the 2003 Constitution, restated the law providing tenured Cherokee Nation employees an Article XII due process cause of action for wrongful termination.” Appellant’s Counsel strongly stands behind that argument and it is true today. However, Appellant’s Counsel also strongly argues that *Watkins* limitation on Article XII damages has been superseded by the 2003 Constitution and the Back Wages Act. The right of an Article XII cause of action and the additional 2003 Constitutional provision for “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged” are clearly two separate issues. There is no inconsistency or lack of candor to properly argue that *Watkins* affirmed the District Court’s original jurisdiction over an Article XII claim, but it has been constitutionally superseded on the issue of redress or damages.*

the Cherokee Nation Tribal Council Rules Committee meeting on December 15, 2009, Councilman Bill John Baker sponsored the Back Pay Act, LA 03-10 and gave the intent of the Act.<sup>7</sup> Baker told the Committee:

Right now, if an employee believed they are wrongfully terminated they can appeal it in the appeals process and they go through it and they don't like that and then they go the district court. Well, the problem is if they do go to district court and they are deemed they were wrongfully terminated which our constitution is pretty specific on that if you have been here a year that it is only for cause. The problem is they can't get an attorney. Because the Cherokee nation at this point in time the only thing you can win in district court is your job back and back wages. Well too many times they go around town to get an attorney because they have been wronged and the attorney says no the Cherokee Nation does not pay attorney fees. So there is nothing in it for the attorney so the attorney is not going to represent them. And I just think that even an indigent criminal gets an attorney appointed for them. And I am just saying if we wrongfully terminate an employee and they win then their attorney fees ought to be at least available to be paid. And it's just adding one sentence of cost and attorney fees associated with it. And it is a matter of fairness and that's it.

The Back Pay Act passed by a vote of 16-1. It is clear from the legislative history; wrongfully discharged employees who prevail in the district court with their Article XII claim are entitled to reinstatement, back wages and attorney's fees. Therefore, *Watkins-2* (02-01) 2004, has been not only superseded by Article XII, but also the Back Pay Act.

Whether or not *Watkins* is good law is not the question on which a Motion to Dismiss may be decided. The existence of such an argument supports Unger's proposition that this Court has jurisdiction to interpret the law in question and to hear her second appeal on the merits.

This Court should deny the Agency's Motion to Dismiss and order it to comply with SC Rule 60 briefing schedule and address its arguments in its Answer Brief.

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<sup>6</sup> "An Act Relating to Employees of the Cherokee Nation or its Wholly Owned Corporations; Termination (sic) Appeals Procedures and Employee Back Pay Act of 2005; Providing For Severability And Declaring An Emergency," LA-03-10," January 10, 2010.

<sup>6</sup> Section 4. Definitions, subsection A.

<sup>7</sup><https://cherokee.legistar.com/MeetingDetail.aspx?ID=87392&GUID=0B178135-2E53-4408-B141-EFDB93C4373D&Options=ID|Text|&Search=> video at minute 52.

**Proposition Three: Since the effective date of the 2003 Constitution, no court has addressed damages provided by Article XII.**

The Agency continues to be confused as to the difference between a Motion to Dismiss and arguments on the merits in an appeal. It argues the Back Pay Act does not apply to Unger. That is an argument on the merits not whether this court has subject matter jurisdiction. Even the Agency argues that under *Watkins*, Unger is entitled to reinstatement and lost benefits for a prevailing Article XII claim; therefore, it was wrong for the District Court to dismiss her Article XII claim on grounds she has no statutory remedies for redress.

Regardless, since the Back Pay Act's enactment in 2010, this Court has not interpreted its application.

The Back Pay Act extended its *remedies* to an employee “[w]ho has been directly employed by the *Cherokee Nation or its entities* and corporations on a regular full-time basis for at least one continuous year immediately prior to termination of employment. . . .”<sup>8</sup> According to Bill John Baker, by enacting the Back Pay Act, the Council ensured wrongfully terminated employees who prevailed on Article XII claims in the District Court would be entitled to reinstatement, back pay and attorney’s fees. The EAPA’s purpose was to expedite employees’ wrongful discharge claims and not to deprive them of remedies for their Article XII rights. Unger argues that the Back Pay Act legislatively superseded *Watkins* and ensured statutory remedies for Unger. The Agency says it does not. That issue alone creates subject matter jurisdiction for this court and a justiciable issue that should be addressed in the Rule 60 briefing schedule - not in an ad hoc Motion to Dismiss.

This Court should deny the Agency’s Motion to Dismiss and order it to comply with SC Rule 60 briefing schedule and address its arguments in its Answer Brief.

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<sup>8</sup> Section 4. Definitions, subsection A.

**Proposition Four: The Attorney General is disingenuous by arguing the District Court has no jurisdiction over Article XII claims and Unger is not entitled to damages.**

In other cases, the Attorney General has admitted that the District Court has jurisdiction over Article XII claims and successful employees are entitled to 1) reinstatement, 2) back pay, and 3) attorney's fees and costs.

After a series of hearings, multiple briefs, months of delay and conflicting arguments in a series of employment cases filed in the District Court,<sup>9</sup> the Nation, finally admitted to the District Court that the sovereign immunity *does not bar* Appellants' Article XII claims and damages for: 1) reinstatement, 2) back wages and 3) attorney's fees and costs. Before Judge Cripps at the Temporary Injunction hearing of *Crofford v. Baker*, CV 12-533 on February 15, 2013, after questioning by the court, Assistant Attorney General Robert Garcia ("Garcia") representing the Nation stated:

It is the Nation's position, your Honor, that in these termination appeal types of suits there are only really three types of remedies that the Nation has waived sovereign immunity to. One, being for reinstatement. Two, being for back pay. And three, being for attorney fees and costs.<sup>10</sup>

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<sup>9</sup> See *Olaya v. Baker*, CV 2012-40; *Crofford v. Baker*, CV 12-533 and *Miller v. Qualls*, CV 12-604. Each of these cases was filed with the District Court rather than the Employee Appeals Board.

<sup>10</sup> Transcript of Hearing on Cherokee Nation's Motion to Dismiss and the Plaintiffs' Motion for Temporary Injunction before Judge Cripps in *Miller v. Qualls*, CV 2012-604 February 27, 2013.

Appearing were Chad Smith for Plaintiffs and Robert Garcia, Attorney General Office, for Defendants.

The record is a video tape and time sequence of minute and second reference citation. At 5:47

**Judge Cripps:** On behalf of the motion to dismiss, it's Mr. Garcia.

**Robert Garcia:** Thank you, your Honor. We are here today on Cherokee Nation's Motion to Dismiss the Petition filed in this case. At the heart of this matter, essentially we have a termination of employment dispute here. It appears from the Complaint as it was filed, that Plaintiffs are seeking a number of remedies from this court. As they are enumerated in the Complaint, they are seeking reinstatement of employment, general damages, special damages, punitive damages, costs and attorney fees and for a declaratory judgment that Plaintiffs were wrongfully terminated as well as such and other relief as the court would deem proper. It is the Nation's position, your Honor, that in these termination appeal types of suits there *are only really three types of remedies that the Nation has waived sovereign immunity to. One, being for reinstatement. Two, being for back pay. And three, being for attorney fees and costs.* (Emphasis added.)

**Judge Cripps:** While we are right there, the Nation waives sovereign immunity as to reinstatement? If I am understanding correctly?

**Robert Garcia:** Cherokee Nation case law would indicate that the Council has specifically waived those. For those three. I know of no other authority available showing that any other remedy is available in these employment dispute cases.

On April 8, 2014, in her Objection to Motion to Dismiss and Motion for Summary Judgement,<sup>11</sup> Unger cited the above comments by Garcia. Young cannot disavow knowledge of the representations of this office since he is lead counsel in this case.

The long and short of it is that Attorney General's Office has acknowledged that the District Court has jurisdiction over the subject matter for wrongful termination<sup>12</sup>

In its Appellee's Brief in Chief in *Olaya v. Baker*, SC 12-02, the Nation argued:

Much of Appellants' brief attempts to establish that the District Court is a court of general jurisdiction that can exercise jurisdiction over employment claims; the Nation have never disputed that, in fact there may be certain types of employment claims that can only be brought in the District Court. At pg. 16.

The Attorney General's Office as officers of the Court advised the District Court it may assert jurisdiction over employment claims, and successful employees were entitled to reinstatement, back wages and attorney's fees; it is estopped from arguing to the contrary in this case. The Attorney General's Office's candor and credibility is of question when it argues out of both sides of its mouth.<sup>13</sup>

This Court should deny the Agency's Motion to Dismiss and order it to comply with SC Rule 60 briefing schedule and address its arguments in its Answer Brief.

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<sup>11</sup> Objection at page 11.

<sup>12</sup> In *Crofford*, the District Court asserted jurisdiction over Sequoyah High School employees' Article XII claims. See *Crofford Id.* June 26, 2015 Order, and this Court decided their appeal on the merits. See *Id.* SC 15-08 November 22, 2016 *Opinion*. Baker was represented by the Attorney General's Office.

In *Miller v. Qualls*, CV 2012-604, Sequoyah High School employees sued officials of the Cherokee Nation in the District Court who were represented by the Attorney General. The District Court asserted jurisdiction and held the employees had justiciable Article XII claims. See June 30, 2018 *Order*.

<sup>13</sup> Mr. Young's challenge of Appellant's Counsel for lack of candor is hollow and hypocritical. Mr. Young has repeatedly failed to advise this Court and the District Court that the Agency answered the Complaint in this case conceding the District Court had jurisdiction over Unger's Article XII claim, that the Attorney General previously argued the opposite to Mr. Young's arguments herein regarding Article XII damages, that the Agency has never challenged the jurisdiction of the District Court over Article XII claims before his Motion to Dismiss, and that the legislative history of the Back Wages Act as pronounced by now Principal Chief Baker shows the Council's intent (in its legislative history) to allow Unger full damages.

### III. CONCLUSION

This Court has subject matter jurisdiction over Unger's timely filed appeal of the final District Court Order issued on September 13, 2018. The Agency improperly argues the merits of the case in its Motion to Dismiss - those arguments in and of themselves show there are justiciable issues and provides this Court subject matter jurisdiction to review the District Court's erroneous orders on those issues.

The Agency failed to point to one instance in its March 20, 2017 *Opinion* where this Court addressed the District Court's jurisdiction over Article XII claims, the remedies an employee is entitled under the redress provisions of Article XII, or the applicability of the Back Wage Act. The Agency relies on a case for denial of damages that has been superseded by Article XII and the Back Pay Act. In the past, the Attorney General has properly argued to the District Court that successful Article XII employees are entitled to reinstatement, back wages and attorney's fees. With its current 180 degree change in position, the Attorney General conveniently overlooks and fails to candidly advise this Court of its inconsistent and irreconcilable positions before the District Court regarding Article XII jurisdiction and damages.

It is undeniable that over four years ago, when Unger was a *pro se* litigant, she timely and for months desperately sought an appeal of her termination on at least six occasions and neither the Agency nor the Cherokee Nation granted her that appeal hearing. Even this Court has held there are multiple inconsistencies with the EAPA which "make it very difficult for the Court to interpret and apply the provision of title 51 CNCA 1001 et seq." *Opinion*, footnote 2. Finally after months, the Cherokee Nation told her to get an attorney. Why should a *pro se* litigant know how to lodge her appeal if this Court has difficulty interpreting the law? It was the Agency's

duty to advise her how to appeal and the Attorney General's duty to make sure the Nation's laws are complied with, not usurped.

The parties and the courts agree that Unger has an Article XII right to due process and for cause employment. The remaining issue is, "Did the Agency or the Nation give Unger, as she repeatedly requested, a hearing on her wrongful termination and remedies if she prevailed?" The answer is very clearly "No" from the plain language of the Article XII that *the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged*" and EAPA, 51 CNCA 1025 (A) (2), which provides that, "This section *shall not prevent resort to other means of review*, redress, relief or trial de novo, available because of constitutional provisions."

Unger is entitled to pre and post termination due process hearings, where the Agency must show she was terminated for cause. She has been denied those rights. The District Court held that the Plaintiff is "entitled to all protections provided employees of the Cherokee Nation under the Constitution." Even Bill John Baker says prevailing employees on their Article XII claims in the District Court are entitled to reinstatement, back wages and attorney's fees as the legislative reason for the Back Pay Act.

Review of the District Court's Order denying Unger those rights confers this Court with subject matter jurisdiction.

This Court should deny the Agency's Motion to Dismiss and order it to comply with the briefing schedule required by Rule 60.

Respectfully submitted this 21st day of November 2018.

\_\_\_\_\_/ss/  
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**Certificate of Delivery**

I, Chadwick Smith, do hereby certify that on this 21st day of November 2018, I emailed a true and complete copy of the foregoing Motion to the persons listed below:

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