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

**Patricia A. Lowe-Ennis and Cash Systems,  
Inc.,**

Petitioners,

v.

Case Nos.: **CV 04-06-07**

**Ho-Chunk Nation Tribal Employment  
Rights Ordinance Commission,**

Respondent.

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**ORDER  
(Reversing and Remanding)**

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**INTRODUCTION**

16 The Court must determine whether to uphold the adjudicative decision of the Ho-Chunk  
17 Nation Tribal Rights Ordinance Commission (hereinafter TERO Commission). Regrettably, the  
18 TERO Commission failed to adhere to the clear dictates of the TERO, thereby necessitating a  
19 reversal of the decision and order and a remand to the executive agency. The analysis and  
20 holding of the Court follows below.  
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**PROCEDURAL HISTORY**

25 The Court recounts the procedural history in significant detail within the text of its May  
26 5, 2004 *Order (Setting Briefing Schedule)* in which the Court also scheduled *Oral Argument*.<sup>1</sup>  
27 For purposes of this decision, the Court notes that the respondent, TERO Commission, filed the  
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1 exhibits accepted at its November 24, 2003 *Hearing* on May 26, 2004.<sup>2</sup> The petitioner, Cash  
2 Systems, Inc. (hereinafter Cash Systems), by and through Attorneys Vanya S. Hogen and Colette  
3 Routel, filed its *Initial Brief* on July 6, 2004. The petitioner, Patricia A. Lowe-Ennis, by and  
4 through Attorney Mark L. Goodman, filed her *Brief* on July 7, 2004.

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6 On August 20, 2004, the respondent submitted its *Response to Plaintiffs' Initial Briefs*,<sup>3</sup>  
7 and the petitioners each filed reply briefs. Ms. Lowe-Ennis filed the *Reply to Brief of*  
8 *Respondent Ho-Chunk Nation T.E.R.O. Commission* on September 9, 2004, and Cash Systems  
9 filed its *Reply Brief of Plaintiff Cash Systems, Inc.* on September 20, 2004. The Court convened  
10 *Oral Argument* on October 5, 2004 at 1:30 p.m. CDT. The following parties appeared at *Oral*  
11 *Argument*: Attorney Mark L. Goodman, petitioner's counsel; Attorney Colette Routel,  
12 petitioner's counsel; and Ho-Chunk Nation Department of Justice (hereinafter DOJ) Attorney  
13 Michael P. Murphy, respondent's counsel.<sup>4</sup>  
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20 <sup>1</sup> The parties later mutually agreed to revise the scheduling order by extending some of the filing deadlines.  
*Stipulation to Amend Scheduling Order*, CV 04-06-07 (July 26, 2004).

21 <sup>2</sup> The administrative record consisted of twenty-five (25) exhibits, totaling 163 pages of documentary evidence. The  
respondent earlier filed its two (2) page December 12, 2003 *Decision Order* [*sic*] and 274 page hearing transcript.  
*Answer of TERO Comm'n*, CV 04-07 (Feb. 16, 2004), Attach. A-B.

22 <sup>3</sup> After the initiation of these consolidated appeals, the Ho-Chunk Nation Supreme Court (hereinafter Supreme  
Court) preliminarily adopted *Ho-Chunk Nation Rules of Civil Procedure*, Rule 63 entitled, *Judicial Review of*  
23 *Administrative Adjudications*, in which the parties are designated as petitioner(s) and respondent(s). Final approval,  
including potential modifications, should occur in or around February 2006.

24 <sup>4</sup> The presiding judge extends his sincerest apologies 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*  
25 *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  
26 trial level process). Former Chief Judge William H. Bossman failed in this regard by not issuing a judgment prior to  
the expiration of his legislative appointment on July 1, 2005. In the interests of justice, the Court informs the parties  
27 of the availability of seeking mandamus relief from the 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-  
28 CHUNK NATION (hereinafter CONSTITUTION), ART. VII, § 6(a)).

1 **APPLICABLE LAW**

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

4 **Art. III - Organization of the Government**

5 Sec. 3. Separation of Functions. No branch of government shall exercise the powers and  
6 functions delegated to another branch.

7 **Art. IV - General Council**

8 Sec. 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant  
9 all inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk  
10 Nation are entitled to participate in General Council.

11 Sec. 2. Delegation of Authority. The General Council hereby authorizes the legislative  
12 branch to make laws and appropriate funds in accordance with Article V. The General Council  
13 hereby authorizes the executive branch to enforce the laws and administer funds in accordance  
14 with Article VI. The General Council hereby authorizes the judicial branch to interpret and  
15 apply the laws and Constitution of the Nation in accordance with Article VII.

16 **Article V - Legislature**

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

- 18 (a) To make laws, including codes, ordinances, resolutions, and statutes;
- 19 (b) To establish Executive Departments, and to delegate legislative powers to the Executive  
20 branch to be administered by such Departments, in accordance with the law; any Department  
21 established by the Legislature shall be administered by the Executive; the Legislature reserves  
22 the power to review any action taken by virtue of such delegated power;

23 **Article VI - Executive**

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

- 25 (d) To administer all Departments, boards, and committees created by the Legislature;
- 26 (l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary to  
27 exercise all powers delegated by the General Council and the Legislature, including but not  
28 limited to the foregoing list of powers.

1 Article VII - Judiciary

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

5 Sec. 5. Jurisdiction of the Judiciary.

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

13 Sec. 6. Powers of the Tribal Court.

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

17 Sec. 7. Powers of the Supreme Court.

18 (b) The Supreme Court shall have the power to establish written rules for the  
19 Judiciary, including qualifications to practice before the Ho-Chunk courts, provided such rules  
20 are consistent with the laws of the Ho-Chunk Nation.

21 HO-CHUNK NATION TRIBAL EMPLOYMENT RIGHTS ORDINANCE

22 Article I - Declaration of Policy

23 Sec. 1. Findings.

24 (a) The Legislature of the Ho-Chunk Nation ("Legislature") finds that:

25 (1) whereas it is the public policy of the Ho-Chunk Nation to foster  
26 employment opportunities for its members and other Indian people; and,

27 (2) whereas it is the public policy of the Ho-Chunk Nation to protect the  
28 economic and societal interests of its members and other Indians by taking measures to  
eliminate employment discrimination against Indian people; and,

(3) whereas it the intent and purpose of this Ordinance to promote the  
employment and training of Indians, consistent with the Indian Hiring Preference  
requirements of Title VII of the Civil Rights Acts of 1964 (42 U.S.C. § 2000c-2(i)) as

1 applied to any Indian, business or enterprise “on or near” an Indian reservation, and the  
2 Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 *et seq.*) which  
3 requires preference be given to Indians, Indian-owned economic enterprises and Indian  
4 organizations in the administration and award of all federal contracts, subcontracts, or  
5 grants for the benefit of Indians;

6 Article IV - Definition of Terms

7 Sec. 1. Key Terms.

8 (f) "CORE CREW" - shall be defined as a regular, permanent employee of a  
9 contractor or subcontractor in a supervisory or other key position who performs a critical  
10 function such that the employer would likely face serious financial damage or loss if that task  
11 were assigned to a person who had not previously worked for the contractor or subcontractor.

12 (g) "COVERED EMPLOYER" - shall mean and include any person or entity that  
13 employs at least one employee at a job-site located on land owned by the Ho-Chunk Nation or  
14 whose employment contract for the benefit of land owned by the Ho-Chunk Nation is in the sum  
15 of one thousand dollars (\$1,000.00) or more.

16 (k) "EMPLOYEE" - shall mean and include any currently working employee, any  
17 applicant for employment, and any employee whose work has ceased as a consequence of any  
18 current labor dispute or as a result of unfair labor practices and who has secured any regular  
19 alternative and substantially equivalent employment. However, the term shall not mean and  
20 include any individual employed in the domestic services with any family or person at his/her  
21 home, or any individual employed by any other person who is not an “employer” under the  
22 definition contained in this chapter.

23 (l) "EMPLOYEE ON LAND OWNED BY THE HO-CHUNK NATION" - shall  
24 mean and include any employee who engages in or renders employment related services in  
25 excess of ten (10) hours per payroll quarter at a job site located on land owned by the Ho-Chunk  
26 Nation, but does not include periodic deliveries of goods unless the employer maintains a  
27 permanent facility on Ho-Chunk land.

28 (m) "EMPLOYER" - shall mean and include, but not limited to, any person,  
partnership, corporation, or other entity who engages in commerce through compensated agents  
or servants, or who is hired pursuant to a contract for services for the benefit of the Ho-Chunk  
Nation, at a site located on land owned by the Ho-Chunk Nation; however, the term shall not  
include the Ho-Chunk Nation Government, the United States Government or any wholly owned  
government corporation, or any State or political sub-division thereof, but shall include any  
independent contractors and sub-contractors hired by these governmental units.

(n) "ENTITY" - shall mean and include any person, partnership, corporation, joint  
venture, government, governmental enterprise or any other natural or artificial person or  
organization.

1 (z) "PERSON" - shall mean and include both natural persons and artificial persons,  
2 including but not limited to, corporations, partnerships, joint ventures, sole proprietorships,  
3 associations, unions, trusts, trustees, and agents.

4 (dd) "VENDOR" - shall mean any outside provider of goods or services, excluding  
5 Ho-Chunk owned businesses. This definition also excludes the vending of "crafts": by Ho-  
6 Chunk members or non-member Indians on land held in trust or owned by the Ho-Chunk Nation.

## 7 Article V - Applicability

8 This Ordinance shall apply on or near all lands presently owned, acquired in the future by the  
9 Ho-Chunk Nation, including but not limited, to land held in trust by the Federal Government for  
10 the Ho-Chunk Nation or on behalf of its enrolled tribal members, as authorized by Article I,  
11 Section 1 and Section 2 of the Constitution of the Ho-Chunk Nation.

## 12 Article VI - Scope of Indian Preference

### 13 Sec. 1. Enrolled Members.

14 All covered employers shall grant preference to enrolled members of the Ho-Chunk Nation over  
15 Non-Indians and Non-member Indians in hiring, promotion, training, lay-offs and all other  
16 elements of employment.

## 17 Article VII - Indian Preference Certification

### 18 Sec. 1. Purpose.

19 (a) Employment, contracting, subcontracting and training opportunities shall be  
20 structured to provide for the hiring of qualified Ho-Chunk members and other Indians, thereby  
21 improving the economic opportunities for tribal members and other Indians living on or near  
22 land owned by the Ho-Chunk Nation.

## 23 Article VIII - Permit Fees

### 24 Sec. 1. Bid Permit.

25 (a) Every covered employer, including all subcontractors but not Certified Indian-  
26 owned firms shall pay a bid permit filing fee based upon the total bid price.

27 (2) For bids in excess of ten thousand dollars (\$10,000.00), the bid permit-  
28 filing fee shall be two hundred fifty dollars (\$250.00).

(b) The bid permit fee shall be submitted to TERO by the successful bidder prior to  
award of the contract.

1 Sec. 3. Vendors, Suppliers, Contractors.

2 (a) Every vendor, supplier or business contractor other than a construction contractor,  
3 with one (1) or more employees working on land owned by the Ho-Chunk Nation, shall obtain a  
4 work permit. The fee for the permit shall be two percent (2%) of the employer's quarterly  
employee gross payroll for the employees working on Ho-Chunk land.

5 (d) It shall be the responsibility of all covered employers to pay the required fee.

6 (e) The employer on a quarterly basis shall pay the fee within thirty (30) days after  
7 the end of each quarter, unless the TERO Director approves an alternate payment method.

8 Sec. 4. Collection.

9 (a) The TERO Director shall be responsible for collections of all permit fees.

10 (b) The TERO Director shall issue a formal notice by registered mail to the covered  
11 employer indicating the specific amount due for payment of the permits, and the date of  
12 payment. The notice shall be mailed to the employer's principal place of business.

13 Sec. 5. Delinquent Fees.

14 (a) The TERO Director shall send a notice to an employer who fails to pay the  
15 required work permit fee or whose permit fees are delinquent. The notice shall be sent registered  
16 mail to the employer's principal place of business.

17 (b) If the fees are not paid within five (5) working days after the notice is mailed to  
18 the covered employer, the TERO Director shall file a formal charge of non-compliance, shall  
19 schedule a hearing before the Commission, and shall inform the employer of the date and  
20 location of the hearing.

21 (c) Interest shall accrue at the prime rate on any unpaid fees, including the balance of  
22 fees to be paid under installment method.

23 Art. X - Lay-offs, Involuntary Terminations

24 Sec. 2. Involuntary Terminations.

25 (a) An enrolled Ho-Chunk member shall not be involuntarily terminated or  
26 encouraged to volunteer for termination due to decreased work load if a Non-Indian or Non-  
member Indian remains employed in the same job position, classification or other position for  
which the enrolled member possesses the threshold qualifications.

27 (d) Nothing in this section shall preclude an employer for [*sic*] terminating a Ho-  
28 Chunk member or any other employee from being laid off for cause.

1 Article XI - Re-employment

2 Sec. 1. Re-employment List.

3 (a) The names of enrolled Ho-Chunk employees who are laid-off or involuntarily  
4 terminated shall be placed on a re-employment list which states the position held by the enrolled  
5 member at the time of lay-off or involuntary termination.

6 Article XII - Publication of Ordinance and Forms

7 Sec. 2. Manner of Publication, Bid Information.

8 (a) Copies of this Ordinance and any rules, regulations or guidelines adopted by the  
9 Commission including any required forms shall be made available upon request to all covered  
10 employers, governmental agencies, wholly owned government corporations and private  
11 individuals and entities, intending to undertake projects at sites located on land owned by the Ho-  
12 Chunk Nation.

13 (b) The Commission shall take whatever action is deemed appropriate and necessary  
14 to ensure that all bid announcements comply with the standard bid policy and satisfy all  
15 applicable requirements of this Ordinance, and any rules, regulations or guidelines adopted by  
16 the Commission.

17 Article XIII - Confidentiality and Reporting Requirements

18 Sec. 1. Covered Employers.

19 (a) Upon request a covered employer shall submit to the TERO Program Office such  
20 information determined by the staff necessary to ensure compliance with TERO requirements.  
21 The TERO Program shall furnish all report forms to all covered employers. A covered employer  
22 may refuse to submit any information or documentation which it can demonstrate must remain  
23 confidential for valid business purposes.

24 Article XIV - On-site Inspections

25 Sec. 1. Periodic Inspections.

26 (a) The TERO Director shall have the right to conduct on-site inspections during the  
27 normal business hours to monitor compliance with the requirements of this Ordinance and any  
28 rules, regulations, guidelines or orders adopted by the Commission.

(b) The TERO Director shall have the right to contact any contractor, sub-contractor  
or employee working on the site so long as such contact does not unreasonably interfere with  
business operations.

1 Article XV - Compliance Plan

2 Sec. 1. Submission of Acceptable Plan.

3 (a) A covered employer who intends to do business at a site located on or near land  
4 owned by the Ho-Chunk Nation shall not commence the conduct of business until the employer  
5 has submitted an approved Compliance Plan with the TERO Program.

6 (b) The Compliance Plan shall include information relative to the time frame for  
7 completion of all registration forms, payroll report forms and any other documents required by  
8 the TERO to ensure that the employer will satisfy the requirements of this Ordinance, or any  
9 rules, regulations or guidelines adopted by the Commission.

9 Article XIX - Harassment

10 Sec. 1. Prohibited Activities.

11 (a) Harassment, intimidation or retaliation against any member of the TERO  
12 Program, any member of the Commission, or any employee referred by the TERO program, by  
13 any representative or agent of a covered employer, contractor, subcontractor, employee, or  
14 certified Indian-owned firm is strictly prohibited. If any person shall be found to have engaged  
15 in any prohibited conduct or activities, the TERO Director shall send a formal written warning to  
16 the covered employer or entity, with a full description of the nature of the alleged harassment,  
17 intimidation, and/or retaliation.

18 (b) If prohibited conduct or activities continue after a formal warning has been issued  
19 by the TERO Director, a formal hearing before the TERO Commission shall be scheduled. Such  
20 hearings shall be conducted in accordance with the rules of procedure for hearings prescribed in  
21 this Ordinance.

22 (c) The Commission may impose sanctions in accordance with Article XXIV of this  
23 Ordinance if it determines that such employer violated the prohibition against such conduct.

24 Article XXI - Tribal Employment Rights Office

25 Sec. 3. TERO Program; Staff Duties and Responsibilities.

26 (a) The staff of the TERO Program shall implement the day-to-day operations of the  
27 program, under the supervision and direction of the TERO Director, as herein set forth:

28 (1) To adopt a plan for dissemination of this Ordinance and any rules,  
regulations and guidelines adopted by the Commission, to all covered employers and to  
all governmental entities providing grants or entering into contracts for work to be  
performed at job-sites located on or near existing lands owned by the Ho-Chunk Nation;

1 (4) To ensure compliance by covered employers with any and all reporting  
2 requirements as prescribed by this Ordinance, and any rules, regulations or guidelines  
3 established by the Commission;

4 (6) To inspect any and all non-privileged information set forth in any records  
5 maintained by any covered employer for the purpose of ensuring continued compliance  
6 with the requirements of this Ordinance and any rules, regulations or guidelines set by the  
7 Commission;

8 (7) To conduct on-site inspections at any time during the actual business  
9 activities of any covered employer for purpose of monitoring compliance with the  
10 requirements set forth in this Ordinance, or any rules, regulations or guidelines  
11 established by the Commission and to speak with any contractor, subcontractor, employer  
12 or employee on the job site, unless such conduct unreasonably interferes with the  
13 operation of business;

14 (12) To require each covered employer to submit an acceptable Compliance  
15 plan before a covered employer may commence work on or near land owned by the Ho-  
16 Chunk Nation;

17 (16) To initiate a hearing before the Commission for a violation of any  
18 provision of the Ordinance, or any rules, regulations or guidelines adopted by the  
19 Commission;

20 Article XXII - Tribal Employment Rights Commission

21 Sec. 6. Authority of the Commission.

22 (a) The Commission shall be vested with the jurisdiction and authority to carry out  
23 the provisions of this Ordinance, in accordance with the policy of Indian Preference in  
24 employment and in contracting, as established by the Ho-Chunk Nation Legislature. The  
25 Commission shall be free from interference from any branch of the Ho-Chunk Nation  
26 government in carrying out their duties under this Ordinance.

27 (e) The Commission shall have the authority to conduct formal hearings, to issue  
28 notices and to subpoena witnesses and documents in accordance with the hearing procedures set  
forth in this Ordinance, and any rules, regulations or guidelines adopted hereunder.

(f) The Commission shall have the authority to interpret this Ordinance and any rule,  
regulations or guidelines adopted hereunder and its determination shall be final.

(g) The Commission shall have the authority to grant any relief necessary including,  
but not limited to, the imposition of monetary sanctions, as prescribed in this Ordinance in  
Article XXIV and any rules, regulations or guidelines adopted by the Commission.

1 (h) The Commission shall have the authority to require a covered employer to take  
2 whatever corrective action deemed necessary for such employer to comply with requirements in  
3 this ordinance and any rules, regulations or guidelines adopted by the Commission.

4 (i) The Commission shall have the authority to take such actions and engage in such  
5 other activities consistent with the intent and purpose of this Ordinance and any rules,  
6 regulations or guidelines to achieve the objective in the policy of Indian Preference.

## 6 Article XXIII - Complaint and Hearing Procedure

### 7 Sec. 1. Complaint.

8 (a) Any interested person including, but not limited to, employees, contractors,  
9 subcontractors, covered employers and the TERO staff may file a written complaint with the  
10 TERO alleging that a covered Employer has violated this Ordinance or any rules, regulations or  
11 guidelines promulgated by the Commission.

12 (c) The complainant need not demonstrate that personal harm has been suffered as a  
13 result of the alleged non-compliance.

### 14 Sec. 3. Notice of Hearing.

15 (a) The Commission shall provide written notice of the hearing to the person against  
16 whom the allegation has been made, including the complainant, the TERO and all other  
17 identified person, at least seven (7) days prior to the date set for the hearing. The notice shall be  
18 sent by certified mail or personally served upon the parties if the mailing address is unknown.  
19 The notice shall state the date, time and place of the hearing. In addition, such notice shall  
20 advise each party of:

- 21 (1) The nature of the hearing; and
- 22 (2) The right to be present and participate in the hearing; and
- 23 (3) The right to present witnesses, documents and records; and
- 24 (4) The right to cross-examine witnesses; and

25 (b) The Commission shall post notice of any meeting or hearing in a prominent  
26 noticeable place in the Ho-Chunk Nation Executive Office no less than forty-eight (48) hours  
27 prior to the meeting or hearing, unless an emergency requires shorten notice and shall publish, if  
28 feasible, such notice in the Ho-Chunk Nation newspaper or newsletter, or in such other  
newspaper serving the relevant community. The notice shall state the date, time and place of the  
hearing.

1 Sec. 5. Hearing Guidelines.

2 (a) The Chairperson of the Commission or a member appointed by the Chairperson  
3 shall preside over all hearings and shall call the proceedings to order, control the presentation of  
4 evidence, the appearance of witnesses and the order of proceedings.

5 Sec. 7. Burden of Proof.

6 (a) The party alleging violation(s) of the Ordinance, or any rule, regulation or  
7 guideline adopted by the Commission shall carry the initial burden of establishing a prima facie  
8 case. If the Commission finds a prima facie case has been established, the burden to rebut the  
9 charge shall shift to the charged person or entity.

9 (b) Any matter in dispute must be proven by a preponderance of evidence.

10 Sec. 8. Subpoenas.

11 (a) The Commission shall have the power and discretion to subpoena identified  
12 person(s) and tangible documents on its own initiative or at the request of any person notified of  
13 a hearing. Subpoenas may be issued only to compel a person to appear at a hearing before the  
14 Commission to give oral testimony or to produce tangible documents or records.

15 Sec. 9. Rules of Evidence and Testimony.

16 (a) The Commission shall not be bound by formal rules of evidence. The  
17 Commission shall admit all testimony having reasonable probative value, but shall exclude  
18 immaterial, irrelevant or unduly repetitious testimony. The Commission shall give effect to the  
19 rules of privilege unless such privilege is waived. Basic principles of relevancy, materiality and  
20 probative force shall govern the proof of all questions of fact. An objection to evidentiary offers  
21 and offers of proof of evidence not admitted may be made and shall be noted in the record.

22 (c) Any party shall have the right to present testimonial evidence on their own behalf,  
23 to call witnesses to testify and to cross-examine witnesses called by any other party. The  
24 Commission shall exercise its discretion to limit the testimony of witnesses if such testimony is  
25 argumentative and repetitive.

26 (e) Documentary evidence may be received in the form of authenticated copies or  
27 excerpts, if the original document is not readily available. Upon request, parties shall be given an  
28 opportunity to compare the copy to the original.

(f) Each party shall be afforded adequate opportunity to rebut or offer countervailing  
evidence in support of their positions.

1 Sec. 10. Record of Hearing.

2 (a) All testimonial and documentary evidence offered at the hearing by any party or  
3 by the Commission itself shall be duly offered and made a part of the record in the case.

4 (b) The Commission shall prepare a written transcript of the major points covered in  
5 the hearing.

6 Sec. 11. Decision and Order.

7 (a) The Decision and Order of the Commission shall set forth the factual findings and  
8 legal basis for the decision. The Commission shall render all factual and legal determinations by  
9 a majority vote of the Commission.

10 (c) If the Commission finds that this Ordinance or any rules, regulations or guidelines  
11 adopted by the Commission have been violated, sanctions may be imposed against the employer,  
12 including but not limited to, requiring specific corrective actions to remedy any harm resulting  
13 from the non-compliance.

14 Article XXIV - Sanctions

15 Sec. 1. Imposition of Sanctions.

16 (a) The Commission may impose any of the following sanctions or a combination  
17 thereof, upon determination that a covered employer has failed to comply with this Ordinance, or  
18 any rules, regulation and guidelines adopted by the Commission.

19 (1) Levy a civil monetary fine to a maximum of one thousand dollars (\$1,000)  
20 per violation with each day of non-compliance as a separate violation; and

21 (4) Order monetary or other relief necessary to compensate the Ho-Chunk  
22 Nation or any worker(s) referred by the TERO for damages resulting from the non-  
23 compliance; and

24 (5) Require termination from employment of any individual(s) hired in  
25 contravention of any TERO requirements relative to Indian Preference in the selection  
26 and hiring of qualified Indian employees; and

27 (7) Order re-employment, promotion, and/or training by the covered employer  
28 of an Indian individual(s) adversely affected by the non-compliance with any TERO  
requirements relative to Indian Preference in employment opportunities; and

(8) Award back pay by the covered employer to any Indian individual(s)  
adversely affected by the non-compliance with the Indian Preference in employment  
requirements; and

1 (9) Require that a covered employer changes its policies, procedures and/or  
2 business practices to comply with any TERO requirement; and

3 (10) Order such other relief as the Commission determines is just and proper  
4 based upon the circumstance.

5 Art. XXV - Appeals Procedure

6 Sec. 1. Right of Appeal.

7 (a) Any party aggrieved by a decision of the Commission has a right to appeal the  
8 decision.

9 (b) All appeals shall be brought in the Trial Court of the Ho-Chunk Nation, pursuant  
10 to the Ho-Chunk Rule of Civil Procedure.

11 Sec. 2. Procedures for Appeal.

12 (a) Notice of Appeal shall be filed within thirty (30) days after the issuance of  
13 decision and order of the Commission. The Notice of Appeal shall contain a short and concise  
14 statement of the reason for the appeal

15 (b) Upon receiving the Notice of Appeal, the Commission shall have ten (10) days to  
16 prepare and transmit a record of its hearing and decision to the Trial Court.

17 (c) All decisions and orders of the Commission shall be in full force and effect during  
18 the pendency of an appeal, absent injunctive relief from the court.

19 (d) Proper deference shall be given to the administrative expertise of the Commission  
20 and to its determination of credibility.

21 (e) The Court shall not set aside or modify the official actions of the Commission  
22 unless it finds the actions to be arbitrary and capricious, unsupported by substantial evidence or  
23 contrary to law.

24 Article XXVIII - Coverage and Effectiveness

25 (a) This Ordinance shall be applicable to all covered employers as defined in this  
26 Ordinance, whether such person is doing business at a site located on or near land owned by the  
27 Ho-Chunk Nation at the time or subsequent to the effective date of this Ordinance.

28 (b) This Ordinance shall be in full force and effect as of the date of the formal  
approval and enactment by the Ho-Chunk Legislature

(c) This Ordinance shall apply to all contracts entered into after the Ho-Chunk  
Legislature passes the Ordinance. All contracts entered into prior to the effective date of this

1 Ordinance shall continue to be governed by the previous TERO Ordinance until such time as the  
2 contract is up for renewal, at which time the contract shall be governed under this current  
3 Ordinance.

#### 4 **FINDINGS OF FACT**

5  
6 1. The parties received proper notice of the October 5, 2004 *Oral Argument*.

7 2. The petitioner, Patricia A. Lowe-Ennis, is an enrolled member of the Ho-Chunk Nation,  
8 Tribal ID# 439A005881, and resides at N1275 Timm Road, Lyndon Station, WI 53944. The  
9 plaintiff was employed as a regional manager of Cash Systems.  
10

11 3. The petitioner, Cash Systems, is a publicly traded company in the cash transaction  
12 processing industry dedicated solely to gaming entities with principal offices located at 3201  
13 West County Road 42, Suite 106, Burnsville, MN55306. Cash Systems entered into a *Service*  
14 *Provider Agreement* with the Ho-Chunk Nation, a federally recognized Indian tribe, on May 1,  
15 2003. *TERO Comm'n Hr'g*, Ex. 6 at 11.  
16

17 3. The respondent, TERO Commission, is an executive administrative agency created by the  
18 Ho-Chunk Nation Legislature (hereinafter Legislature) pursuant to its constitutional authority.  
19 *See* CONST., ART. V, § 2(a-b); *see also* TERO, ART. XXII.  
20

21 4. On November 24, 2003, the respondent conducted a hearing in response to a complaint  
22 filed by Ms. Lowe-Ennis.<sup>5</sup> TERO, ART. XXIII, §§ 1(a), 2(c); *see also Am. Compl.*, 01-003 (Aug.  
23 27, 2003).

24 5. On December 12, 2003, the respondent entered its *Decision Order [sic]*,<sup>6</sup> which granted  
25 partial relief to the complainant. *Decision Order*, 01-003 (TERO Comm'n, Dec. 12, 2003); *see*  
26

27  
28 <sup>5</sup> The TERO confers standing upon "[a]ny interested person" to initiate an administrative action. TERO, ART. XXIII, § 1(a, c).

<sup>6</sup> The ordinance identifies the TERO Commission's final administrative judgment as the decision and order. TERO, ART. XXIII, § 11.

1 also TERO, ART. XXIV. The complainant, Ms. Lowe-Ennis, presented the following causes of  
2 action within her *Amended Complaint*, and the respondent addressed these contentions as noted  
3 below.<sup>7</sup>

4  
5 a. "Cash Systems engaged in harassment and intimidation of Lowe-Ennis, as that  
6 term [*sic*] is defined by Article XIX of the TERO Ordinance" by "ordering Lowe-Ennis not to  
7 have future contact with members of the Ho-Chunk Nation Legislature." *Am. Compl.* at 3, para.  
8 27.

9 1a. Respondent's factual findings on this issue: none.

10 1b. Respondent's legal basis for its decision: none.

11  
12 b. "Cash Systems engaged in harassment and intimidation of Lowe-Ennis, as those  
13 terms are defined by Article XIX of the TERO Ordinance" by "withholding Lowe-Ennis' salary."  
14 *Am. Compl.* at 3, para. 28.

15 1a. Respondent's factual findings on this issue: none.

16 1b. Respondent's legal basis for its decision: none.

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18 c. "Cash Systems violated Article X of the TERO Ordinance" by "demanding that  
19 Lowe-Ennis either sign an employment agreement or resign." *Am. Compl.* at 3, para. 29.

20 1a. Respondent's factual findings on this issue: none.

21 1b. Respondent's legal basis for its decision: none.

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23 d. "Cash Systems violated Article X of the TERO Ordinance because Lowe-Ennis  
24 was terminated without cause." *Am. Compl.* at 3, para. 30.

25 1a. Respondent's factual findings on this issue: none.

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<sup>7</sup> The respondent has an obligation to "set forth the factual findings and legal basis for [its] decision" within the resulting decision and order. TERO, ART. XXIII, § 11(b).

1           1b. Respondent's legal basis for its decision: "can not intervene on a 'Core  
2 Crew Member' employment termination decision that is exempt from the TERO Commission's  
3 authority." *Decision Order* at 1 (citing TERO, ART. IV, § 1(f)).<sup>8</sup>

4           e. "Cash Systems violated Article XXI of the TERO Ordinance" by "requiring that a  
5 certain Tribal member be assigned work." *Am. Compl.* at 3, para. 31.

6           1a. Respondent's factual findings on this issue: none.

7           1b. Respondent's legal basis for its decision: none.

8           f. "Cash Systems has engaged in employment discrimination against a Ho-Chunk  
9 Tribal member," Ms. Lowe-Ennis. *Am. Compl.* at 4, para. 32.

10           1a. Respondent's factual findings on this issue: none.

11           1b. Respondent's legal basis for its decision: none.

12           g. "Cash Systems never paid a permit fee as required by the Ordinance before it  
13 began doing business with the Nation on June 5, 2003." *Am. Compl.* at 4, para. 36.

14           1a. Respondent's factual findings on this issue: 1) "Cash Systems[,] Inc.  
15 received the application for TERO registration and TERO compliance plan on August 8,  
16 [20]03;" 2) "Cash Systems[,] Inc. did not return required application and compliance plan until  
17 August 28, [20]03;" 3) "Cash Systems[,] Inc. did sign a valid contract with the Ho-Chunk Nation  
18 and did agree to abide by all laws of the Ho-Chunk Nation, which includes the TERO  
19 Ordinance;" 4) "Cash Systems, Inc. may or may not have been notified of the existence of the  
20 TERO Ordinance during the process of negotiation of a contract . . . ;"<sup>9</sup> and 5) "acceptance of the  
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26 \_\_\_\_\_  
27 <sup>8</sup> The respondent did not expressly establish whether Ms. Lowe-Ennis constituted a "regular, permanent employee . .  
28 . in a supervisory or other key position who performs a critical function such that the employer would likely face  
serious financial damage or loss if that task were assigned to a person who had not previously worked for the  
contractor." TERO, ART. IV, § 1(f).

<sup>9</sup> Obviously, this factual finding proves of little value since the respondent declined to draw a conclusion.

1 work force . . . at each of the Ho-Chunk Nation's gaming facilities left the Defendant with  
2 personnel who were knowledgeable of the TERO Ordinance." *Decision Order* at 1-2.

3 1b. Respondent's legal basis for its decision: "Cash Systems[,] Inc. has . . .  
4 been non-compliant in its contract with the Ho-Chunk Nation," and it cannot "plead ignorance to  
5 the Ho-Chunk Nation's TERO Ordinance." *Id.*

7 h. "No certified Indian-owned firms and no not-certified [*sic*] Indian-owned firms  
8 were given an opportunity to bid on the contract that eventually was awarded to Cash Systems,"  
9 and this "circumvent[ed] the Ordinance's . . . policy requiring preference be given to Indians,  
10 Indian-owned economic enterprises and Indian organizations." *Am. Compl.* at 4, paras. 37-38.

12 1a. Respondent's factual findings on this issue: none.

13 1b. Respondent's legal basis for its decision: "Cash Systems[,] Inc. did sign a  
14 valid contract with the Ho-Chunk Nation . . . ." *Decision Order* at 1.

15 6. Regarding Ms. Lowe-Ennis's personal request for relief, the respondent declared, without  
16 any analysis, that it could not "rule on the Plaintiff's re-instatement, back pay or any bonuses."  
17 *Id.* Presumably, the respondent reached this decision due to its seemingly unfounded conclusion  
18 that Ms. Lowe-Ennis was a core crew member.<sup>10</sup> The respondent imposed the following  
19 sanction upon Cash Systems: "a monetary fine of Two-Hundred and Fifty dollars/no cents  
20 (\$250.00) per day for the 20 days, August 8-28, 2003 in which [Cash Systems] was in non-  
21 compliance." *Id.* at 2. The respondent made no mention of the alleged unlawful hire of another  
22 tribal member within its *Decision Order*. *See Am. Compl.* at 4, para. 43.

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28 <sup>10</sup> The respondent subsequently ignored the stated basis for its determination, instead focusing upon statutory language that seems to suggest that an employee may only grieve an involuntary termination resulting from a "decreased workload," which did not occur in the instant case. *Def.'s Resp. to Pls.' Initial Briefs* at 7-8 (citing TERO, ART. X, § 2(a)).

1 **DECISION**

2  
3 The CONSTITUTION demarcates the spheres occupied by the co-equal branches of  
4 government. The General Council, *i.e.*, the People, delegated distinct powers to each branch,  
5 while retaining certain powers itself. CONST., ART. IV, §§ 1-2. However, these spheres of  
6 authority are not preserved inviolate, and an incursion by one branch into the sphere of another  
7 may permissibly occur without posing a constitutional problem. *See Regina K. Baldwin et al. v.*  
8 *Ho-Chunk Nation et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 25. For example, the  
9 Executive Branch, acting through the President, may promulgate Executive Orders that carry the  
10 force of law within his or her administration. *See, e.g., David Abangan v. HCN Dep't of Bus.*,  
11 CV 01-08 (HCN Tr. Ct., July 16, 2003) at 20-22, *but cf.*, CONST. ART. V, § 2(a). The Executive  
12 Branch, acting through the DOJ, may issue Attorney General Opinions that offer interpretations  
13 of the law, which serve to guide the administration. *See, e.g., Timothy G. Whiteagle et al. v.*  
14 *Alvin Cloud, Chair of the Gen. Council*, CV 04-04 (HCN Tr. Ct., Aug. 5, 2004) at 17 n.9, *aff'd*,  
15 SU 04-06 (HCN S. Ct., Jan. 3, 2005), *but cf.*, CONST. ART. VII, § 4. The Legislative Branch may  
16 enact laws that contain quasi-procedural rules. *See, e.g., Ho-Chunk Nation v. Bank of Am., N.A.*,  
17 CV 02-93 (HCN Tr. Ct., Jan. 30, 2006) at 25-27, 31; *Bonnie Smith v. Ho-Chunk Nation Gaming*  
18 *Comm'n*, CV 01-02 (HCN Tr. Ct., Feb. 27, 2001), *aff'd*, SU 01-02 (HCN S. Ct., June 15, 2001),  
19 *but cf.*, CONST. ART. VII, § 7(b). The Judicial Branch, acting through the Ho-Chunk Nation  
20 Traditional Court, may articulate binding law in the form of *hocqk* tradition and custom. *See,*  
21 *e.g., Dorothy G. Decorah v. Kim L. Whitegull*, CV 02-17 (HCN Tr. Ct., Mar. 1, 2002) at 5-6; *Ho-*  
22 *Chunk Nation v. Ross Olsen*, CV 99-81(HCN Tr. Ct., Sept. 18, 2000) at 13-14, *but cf.*, CONST.  
23 ART. V, § 2(a).  
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1 In contrast to the above examples, the instant case involves one branch's delegation of  
2 authority to another, which at first glance seems to intrude into the province of a third branch.  
3 Nonetheless, the delegation of authority does not offend the separation of powers principle, and  
4 equates with the federal administrative agency model. CONST., ART. III, § 3; *see also generally*  
5 *Baldwin*, CV 01-16, -19, -21 at 13-18, 21-23. The CONSTITUTION imparts the duty to interpret  
6 law to the Judiciary, and the duty to create law to the Legislature. CONST., ARTS. V, § 2(a), VI, §  
7 4. The Legislature, however, may delegate its constitutional functions to the Executive Branch  
8 or a legislative sub-agency. *Id.*, ART. V, § 2(b, x). The Legislature has performed this  
9 delegation in regards to the TERO Commission, and the Commission promulgates legislative  
10 rules through formal on-the-record adjudication. TERO, ART. XXII, § 6(e-f). Therefore, when  
11 the Court defers to a TERO Commission interpretation, it is not surrendering its constitutional  
12 obligation to interpret the law. Rather, the Court defers to the resulting legislative rule, which, in  
13 terms of a simplistic analogy, is comparable to an amendment to a statute's definitional section.  
14

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17 The parties correctly acknowledge the Court's standards of review of agency action, and  
18 the Court will not repeat the analysis here. *See Baldwin*, CV 01-16, -19, -21 at 13-18, 21-23.  
19 The Legislature has pronounced that "[t]he Court shall not set aside or modify the official actions  
20 of the Commission unless it finds the actions to be arbitrary and capricious, unsupported by  
21 substantial evidence or contrary to law." TERO, ART. XXV, § 2(e). The Court is committed to  
22 applying this manner of deferential review to any TERO Commission decision and order, but,  
23 first, the Commission must satisfy its statutory obligations. The Court cannot defer to an agency  
24 adjudicative decision that fails to include basic statutorily required components. TERO, ART.  
25 XXIII, § 11(b). While the Court remains cognizant of its obligation to "examine the evidence  
26 supporting the decision against 'the record in its entirety, including the body of evidence opposed  
27  
28

1 to the [agency's] view," *Baldwin*, CV 01-16, -19, -21 at 15 (quoting *Universal Camera Corp. v.*  
2 *Labor Bd.*, 340 U.S. 474, 488 (1951)), "[t]he agency must articulate a 'rational connection  
3 between the facts found and the choice made.'" *Id.* (quoting *Bowman Transp. v. Ark.-Best*  
4 *Freight Sys.*, 419 U.S. 281, 285 (1974)). In large part, the Court remains entirely unaware of the  
5 agency's view.  
6

7 As indicated in the *Findings of Fact*, the TERO Commission completely failed to address  
8 the majority of the complainant's issues within its *Decision Order*.<sup>11</sup> As a result, the petitioners  
9 have advocated conflicting factual accounts to the Court due to the dearth of agency factual  
10 findings. *See, e.g., Reply of Pl. Cash Systems* at 1-10; *Reply to Br. of Resp't TERO Comm'n* at 4-  
11 13. The Commission must perform credibility determinations as the fact-finder. The Court shall  
12 not perform the functions of the administrative agency regardless of the degree of difficulty  
13 inherent in a given case.  
14

15 The only issue receiving a slight analysis concerned Cash System's failure to pay  
16 appropriate fees. TERO, ART. VIII, §§ 1(a)(2), 3(a). The TERO Commission concluded that  
17 Cash Systems could not plead ignorance of the law.<sup>12</sup> *Decision Order* at 1-2. Yet, the TERO  
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20 <sup>11</sup> As noted above, the TERO Commission appeared to dispense with a number of issues by simply identifying Ms.  
21 Lowe-Ennis as a core crew member without any of the necessary accompanying analysis. Cash Systems later  
22 adopted the Commission's argument that it could terminate Ms. Lowe-Ennis without cause because the TERO did  
23 not elevate tribal employees beyond an at-will status. *Reply Br. of Pl. Cash Systems* at 12-17. The Court  
24 preliminarily finds this reasoning unpersuasive. The argument ignores the provision, which states: "Nothing in this  
25 Section shall preclude an employer for [*sic*] terminating a Ho-Chunk member . . . from being laid off for cause."  
26 TERO, ART. X, § 2(d). To be sure, the drafting of this provision leaves much to be desired. Still, the TERO  
27 accordingly views a termination for cause as disassociated and separate from Article X, and its interplay with the re-  
28 employment list. *Id.*, ART. XI, § 1(a). To deem otherwise would permit covered employers to render the preference  
provisions toothless and eviscerate a significant purpose of the TERO. *Id.*, ARTS. I, § 1(a)(1-3), VI, § 1, VII, § 1(a).  
A similar "for cause" provision within the former HO-CHUNK NATION PERSONNEL POLICIES & PROCEDURES  
MANUAL served as the foundation for recognizing a property right in tribal employment and the consequent judicial  
development of its procedural due process jurisprudence. *Lonnie Simplot et al. v. Ho-Chunk Nation Dep't of Health*,  
CV 95-26-27, 96-05 (HCN Tr. Ct., Aug. 29, 1996) at 17-19.

<sup>12</sup> In other civil actions, the Court charges litigants with constructive knowledge of the Nation's laws. *See Susan*  
*Bosgraff v. HCN Sec. Dep't.*, CV 01-01 (HCN Tr. Ct., Aug. 6, 2001) at 9 (citing *Jean Day et al. v. Pers. Dep't.*, CV  
96-15 (HCN Tr. Ct., Aug. 21, 1996) at 3, 6). Furthermore, the Supreme Court subsequently recognized this  
principle. *Marie WhiteEagle v. Wisconsin Dells Head Start et al.*, SU 01-14 (HCN S. Ct., Nov. 27, 2001) at 2  
(agreeing that a plaintiff "bears the responsibility of knowing the governing laws of the Nation."). In the case at bar,

1 Commission based its fine assessment upon dates that appear nowhere within the evidentiary  
2 record, and it later recognized this error.<sup>13</sup> *Reply Br. of Pl. Cash Systems* at 24; *Def.'s Resp. to*  
3 *Pls.' Initial Briefs* at 16. This represents a stark example of arbitrary agency action; the  
4 determination bears no rational relationship to known facts.  
5

6 **BASED UPON THE FOREGOING**, the Court reverses the *Decision Order* and  
7 remands the instant case to the TERO Commission with directions to fulfill its statutory  
8 obligations. In doing so, the Commission must examine whether the complainant presented a  
9 *prima facie* case on each independent cause of action, and, if not, the reasons why she failed to  
10 meet this initial burden.<sup>14</sup> TERO, ART. XXIII, § 7(a). The Commission must similarly examine  
11 the other stages within the established burden of proof. *Id.*, 1(a-b). The resulting amended  
12 decision and order must contain relevant findings of fact and a discussion concerning how those  
13 facts, in conjunction with applicable law, form the legal bases of the Commission's  
14 determinations on the identified causes of action.<sup>15</sup> The Court requests that the Commission  
15 inform it of the timeframe in which it believes it can accomplish adherence with this judgment.  
16  
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18 The Commission shall file such notice within fifteen (15) days of the issuance of this decision.  
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21  
22 Cash Systems voluntarily agreed to the incorporation of governing law clauses within its contractual agreements.  
23 *TERO Comm'n Hr'g*, Ex. 6 at 7, 15.

24 <sup>13</sup> The TERO Commission seemed to justify the amount of its sanction upon the complicit actions of other entities/  
25 individuals. *Compare* TERO, ARTS. VIII, §§ 1(a)(2), (b), 3(a, d-e), XII, § 2(a), XV, § 1(a-b), *with* ARTS. VIII, §§  
26 4(a-b), 5(a-b), XII, § 2(b), XIII, § 1(a), XIV, § 1(a-b), XXI, § 3(a)(1, 4, 6-7, 12, 16), XXII, § 6(a). If so, the  
27 Commission never expressly stated as much. In the context of employment cases, the Supreme Court has broadly  
28 recognized that "[a]dherence to the Nation's [laws] is both the responsibility of the [employee and employer,]" but  
has never dictated the consequences of a failure by the employer. *Sandra Sliwicki v. Ho-Chunk Nation: Rainbow  
Casino et al.*, SU 96-15 (HCN S. Ct., June 20, 1997) at 4 (criticizing the absence of timely employer responses  
within the Administrative Grievance Process).

<sup>14</sup> The Court previously reversed and remanded an administrative agency appeal since the agency improperly shifted  
the burden of establishing a *prima facie* case. *Ralph H. Babcock et al. v. HCN Gaming Comm'n*, CV 01-87, -96  
(HCN Tr. Ct., Jan. 14, 2002).

<sup>15</sup> The Court also directs the TERO Commission to explain its decision to deny Cash System's discovery request.  
*Initial Br. of Pl. Cash Systems* at 8-10. The TERO provides parties the "right to present witnesses, documents, and  
records." TERO, ART. XXIII, § 3(a)(3); *see also id.*, ARTS. XXII, § 6(e), XXIII, §§ 5(a), 8(a), 9(a, e-f).



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**IT IS SO ORDERED** this 7<sup>th</sup> day of February 2006, 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  
Chief Trial Court Judge

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Nonetheless, the Court doubts whether Cash Systems can legitimately claim that it does not meet the broad definitions of "covered employer" and "vendor." *Id.*, ART. IV, § 1(g, m-n, z, dd).