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

Patricia A. Lowe-Ennis,
Petitioner,

v.

Case No.: **CV 06-41**

**Cash Systems, Inc. and TERO
Commission,**
Respondents.

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must determine whether to uphold the adjudicative decision on remand of the Ho-Chunk Nation Tribal Employment Rights Ordinance Commission (hereinafter Commission). The Court upholds the findings of the Commission on all relevant points. The analysis and holding of the Court follows below.

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail within a previous judgment. *Order (Reversing & Remanding)*, CV 04-06-07 (HCN Tr. Ct., Feb. 7, 2006). For purposes of this decision, the Court notes that the Commission issued its *Reverse & Remand Order* on April 27, 2006. The petitioner, Patricia A. Lowe-Ennis, by and through Attorney Mark L. Goodman, filed her *Notice of Appeal* on May 26, 2006. *See* TRIBAL EMPLOYMENT RIGHTS ORDINANCE (hereinafter TERO or Ordinance), ART. XXV, § 2(a); *see also* Ho-Chunk Nation *Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 63(A)(1)(c).

1 On May 26, 2006, the Court entered the *Scheduling Order*, setting forth the timelines and
2 procedures to which the parties should adhere during the pendency of the appeal. The petitioner
3 subsequently filed her *Brief of Petitioner* on June 26, 2006. See *HCN R. Civ. P.* 63(E). The
4 respondent, Cash Systems, Inc. (hereinafter CSI), by and through Attorney Colette R. Routel,
5 filed a timely *Brief of Respondent* on July 25, 2006. *Id.* The parties strictly adhered to the
6 briefing schedule.
7

8 On November 8, 2006, the Court issued an *Order (Requiring Joinder of Party)*, joining
9 the Commission in the suit, due to the petitioner's failure to list the Commission as a party. On
10 December 1, 2006, the petitioner filed an *Amended Complaint* with the Court. The Commission,
11 by and through Attorney Michael P. Murphy, submitted a request for an extension of time to file
12 on December 11, 2006; then filed its *Response* on December 13, 2006. The petitioner filed her
13 *Reply to the Commission's Response* on December 26, 2006.
14

15 The Court, in its discretion, issued *Notice(s) of Hearing* on January 25, 2007, informing
16 the parties of the date, time and location of the *Oral Argument Hearing*. *Id.* The Court convened
17 the *Hearing* on February 21, 2007 at 1:00 p.m. CST. The following parties appeared at the *Oral*
18 *Argument Hearing*: Attorney Mark L. Goodman, petitioner's counsel; Attorney Colette R.
19 Routel, counsel for CSI; and Attorney Michael P. Murphy, counsel for the Commission.
20

21 **APPLICABLE LAW**

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

23 **Art. X - Bill of Rights**

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

25 (8) deny to any person within its jurisdiction the equal protection of its laws
26 or deprive any person of liberty or property without the due process of law;
27
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1 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES (am. Feb. 19, 2003)

2 Introduction – General Purposes [p. 2]

3 These policies are issued as the official directive of the obligations of the Ho-Chunk Nation and
4 the employees to each other and to the public. They are to ensure consistent personnel practices
5 designed to utilize to [sic] the human resources of the Nation in the achievement of the desired
6 goals and objectives.

7 Chapter 12 – Employment Conduct, Discipline, and Administrative Review

8 Discipline Policy. [p. 55]

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

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

16 B. Behavior [p. 56]

17 8. Discourteous treatment of the public or other employees, including harassing, coercing,
18 threatening, or intimidating others.

19 HO-CHUNK NATION TRIBAL EMPLOYMENT RIGHTS ORDINANCE

20 Article XV – Compliance Plan.

21 Sec. 1. Submission of Acceptable Plan.

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

26 Article X - Lay Offs, Involuntary Terminations.

27 Sec. 2. Involuntary Termination.

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

1 Article XIX - Harassment

2 Sec. 1. Prohibited Activities.

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

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

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

16 Article XXII - Tribal Employment Rights Commission

17 Sec. 6. Authority of the Commission.

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

20 Article XXIV - Sanctions

21 Sec. 1. Imposition of Sanctions.

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

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

27 Art. XXV - Appeals Procedure

28 Sec. 1. Right of Appeal.

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

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

1 Sec. 2. Procedures for Appeal.

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

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

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

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

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

14 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

15 Rule 53. Relief Available.

16 Except in a *Default Judgment*, the Court is not limited to the relief requested in the pleading and
17 may give any relief it deems appropriate. The Court may only order such relief to the extent
18 allowed by the Ho-Chunk Nation enactments. The Court may order any party to pay costs,
19 including attorney's fees, filing fees, costs of service and discovery, jury and witness costs.
20 Findings of fact and conclusions of law shall be made by the Court in support of all final
21 judgments.

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

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

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

1 order denying the motion, the motion is considered denied. The time for initiating an appeal from
2 judgment commences in accordance with the *Rules of Appellate Procedure*.

3 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
4 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
5 must be based upon new information that has come to the party's attention that, if true, could
6 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
7 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
8 commences upon entry of the modified judgment. If the Court denies a motion filed under this
9 Rule, the time for initiating an appeal from the judgment commences when the Court denies the
10 motion on the record or when an order denying the motion is entered, whichever occurs first. If
11 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
12 motion or the Judge does not sign an order denying the motion, the motion is considered denied.
13 The time for initiating an appeal from judgment commences in accordance with the *Rules of*
14 *Appellate Procedure*.

15 (D) Erratum Order or Re-issuance of Judgment. Clerical errors in a court record, including the
16 *Judgment* or *Order*, may be corrected by the Court at any time.

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

24 Rule 61. Appeals.

25 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The
26 *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate*
27 *Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court
28 *Order* must follow the *Rules of Appellate Procedure*.

29 Rule 63. Judicial Review of Administrative Adjudication.

30 (A) Any person aggrieved by a final agency decision may request that the Ho-Chunk Nation
31 Trial Court review such decision by filing a *Petition for Administrative Review* with the Court
32 within thirty (30) calendar days of such decision, unless otherwise provided.

33 1. The following laws provide for filing within thirty (30) days:

34 c. HO-CHUNK NATION TRIBAL EMPLOYMENT RIGHTS ORDINANCE

35 (E) Within thirty (30) calendar days of filing the *Petition for Administrative Review*, the
36 petitioner shall file a written brief, an *Initial Brief*, unless the petitioner has sought an evidentiary
37 modification pursuant to *HCN R. Civ. P. 63(D)(1)(a-b)*. The respondent shall have thirty (30)
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1 calendar days after filing of the brief within which to file a *Response Brief*. After filing of
2 respondent's *Response Brief*, the petitioner may file the *Reply Brief* within ten (10) calendar
3 days.

4 (G) At the discretion of the Court, the Court may require an oral argument. The Court shall
5 decide the order of the presentation, the length of time each party is permitted for their
6 presentation, the issues to be addressed in oral argument, and such other matters as may be
7 necessary. An order entitled, *Notice of Oral Argument*, shall include all such matters and shall be
8 served on all parties at least ten (10) calendar days prior to the date set for argument.

9 (I) The Court shall not set aside or modify any agency decision, unless it finds the decision was
10 arbitrary and capricious, unsupported by substantial evidence or contrary to law

11 **FINDINGS OF FACT¹**

12 1. The Court incorporates by reference *Findings of Fact* 2-4 from its previous judgment.
13 *Order (Reversing and Remanding)* at 15.

14 2. The parties received proper notice of the February 21, 2007 *Oral Argument Hearing*.

15 3. The petitioner's original employment application with CSI, signed on June 7, 2003, states
16 in relevant part: "I also acknowledge that my employment may be terminated, or any offer or
17 acceptance of employment withdrawn, at any time, with or without cause, and with or without
18 prior notice at the option of the company or myself." TERO Ex. 5. In addition, CSI clearly states
19 in its employee handbook that all employment contracts are at will. *Reverse & Remand Order*
20 (TERO Comm'n, Apr. 27, 2006) at 9.

21 4. On July 23, 2003, the respondent received a letter from CSI, instructing her to sign an
22 *Employment Agreement* by July 31, 2003. *Id.* at 4.

23 5. The respondent was terminated on July 28, 2003. *Id.*

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26 ¹ The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally
27 refrains from making independent factual findings. TERO, ART. XXV, §2(e); *see also HCN R. Civ. P.* 63(I).
28 Unless otherwise clearly indicated, the below findings of fact constitute relevant findings of the administrative
agency for purposes of this judgment as articulated within the administrative decision. The Court shall only propose
alternative findings of fact in the event that the agency's factual rendition is not supported by substantial evidence.
See infra p. 8.

1 6. On August 11, 2003, the Commission faxed the TERO application to CSI. *Id.*

2 7. CSI filed its TERO application and paid the bid permit fee on August 18, 2003. *Id.*

3 8. The parties agreed to remove the political patronage issue from review by the Court. *Oral*
4 *Argument Hr'g* (LPER at 6, Feb. 21, 2007, 01:20:20 CST).

5 9. The parties agreed to remove the tribal discrimination issue from review by the Court.
6 *Id.*, 01:20:38 CST.

8 DECISION

9
10 The Court thoroughly examined the origin of administrative agency review and
11 associated standards of review within a prior case. *Regina K. Baldwin et al. v. Ho-Chunk Nation*
12 *et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 12-26. The Court directs the parties to
13 that decision for a comprehensive discussion.² For purposes of this case, the Court reproduces
14 the portion of the discussion dealing with formal on-the-record adjudication.

15 Executive agencies may engage in formal on-the-record adjudication, resulting in the
16 promulgation of rules through the formation of a body of case precedent. *See, e.g., Dickinson v.*
17 *Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998);
18 *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing adjudicative
19 rulemaking, as well as other forms of agency action, courts begin by recognizing that Congress
20 intended the Administrative Procedure Act to "establish[] a scheme of 'reasoned
21 decisionmaking.'"³ *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*
22 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered
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27 ² The full text of *Baldwin* appears at [http://www.ho-chunknation.com/government/judicial/opinions/CV%202001/cv01-16_cv01-19_cv01-21%20Order%20\(Deter.%20Jud.%20Defer.\).pdf](http://www.ho-chunknation.com/government/judicial/opinions/CV%202001/cv01-16_cv01-19_cv01-21%20Order%20(Deter.%20Jud.%20Defer.).pdf).

28 ³ The Ho-Chunk Nation Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g., GAMING ORDINANCE*, § 1101(c)(v); *compare* 5 U.S.C. § 706.

1 analysis, determining whether the adjudicative rule satisfies a substantial evidence standard, and,
2 if so, whether the rule escapes a designation of arbitrary and capricious.

3 The two (2) inquiries represent "separate standards." *Bowman*, 419 U.S. at 284 (quoting
4 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently, a court
5 "may properly conclude[] that, though an agency's finding may be supported by substantial
6 evidence, . . . it may nonetheless reflect an arbitrary and capricious action." *Bowman*, 419 U.S.
7 at 284. In such an event, the Court would afford no deference to the adjudicative rule of the
8 agency precisely because the rule could not withstand the more deferential arbitrary and
9 capricious standard.
10

11
12 The substantial evidence standard has no application beyond the review of "record-based
13 factual conclusion[s]," and only in unusual circumstances will agency action surviving a
14 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In
15 performing the second-tier of analysis, arbitrary and capricious review,
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17 [a] reviewing court must "consider whether the decision was based on a
18 consideration of the relevant factors and whether there has been a clear
19 error of judgment. . . . Although this inquiry into the facts is to be
20 searching and careful, the ultimate standard of review is a narrow one.
21 The court is not empowered to substitute its judgment for that of the
22 agency." The agency must articulate a "rational connection between the
23 facts found and the choice made." While [a court] may not supply a
24 reasoned basis for the agency's action that the agency itself has not given,
25 [a court] will uphold a decision of less than ideal clarity if the agency's
26 path may reasonably be discerned.

27 *Bowman*, 419 U.S. at 285-86 (citations omitted).

28 Typically, however, a court will suspend its review after ascertaining the presence of
substantial evidence. "Substantial evidence is more than a mere scintilla. It means such relevant
evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co. v.*

1 *Labor Bd.*, 305 U.S. 197, 229 (1938). The relevant evidence must retain probative force, and,
2 therefore, "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.*
3 at 230. And, a court must examine the evidence supporting the decision against "the record in its
4 entirety, including the body of evidence opposed to the [agency's] view." *Universal Camera*
5 *Corp. v. Labor Bd.*, 340 U.S. 474, 488 (1951); *see also* 5 U.S.C. § 706.
6

7 Nonetheless, as noted above, an adjudicative rule rightfully subjected to the two-tiered
8 analysis must also at its core represent the outcome of a reasoned deliberation. "[T]he process by
9 which [an agency] reaches [its] result must be logical and rational." *Allentown*, 522 U.S. at 374.
10 Courts accordingly must insure compliance with the requirement of reasoned decision-making.
11

12 In this regard,

13 [i]t is hard to imagine a more violent breach of that requirement than
14 applying a rule of primary conduct or a standard of proof which is in fact
15 different from the rule or standard formally announced. And the
16 consistent repetition of that breach can hardly mend it. . . . The evil of a
17 decision that applies a standard other than the one it enunciates spreads in
18 both directions, preventing both consistent application of the law by
subordinate agency personnel . . . , and effective review of the law by the
courts.

19 *Id.* at 374-75. The inconsistent or contrary application of an adjudicative rule must result in a
20 finding that the agency has failed to support its action by substantial evidence. A court cannot
21 deem subsequent aberrations as simply agency interpretations of the underlying rule. *Id.* at 377-
22 78.
23

24 To reiterate, a court must determine whether the challenged administrative action rests
25 upon substantial evidence and escapes a characterization of arbitrary and capricious.
26 Furthermore, the need for reasoned decision-making and the consistent application of resulting
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1 decisions underlie and overarch the statutorily based analysis. The Court shall now engage in the
2 prevailing standard of review in relation to the case at bar.

3 **I. Does the petitioner state a cognizable claim for harassment**
4 **under applicable law?**

5 The TERO establishes three (3) classes of persons permitted to bring a harassment claim:
6 members, Commission members, and TERO referrals. TERO, ART. XXII, § 6(f). The petitioner
7 is not a member of the Commission, nor was she a TERO referral. The final designation,
8 “member,” is not defined within TERO. In the absence of clear statutory direction, the Ordinance
9 grants the Commission the right to interpret its provisions. *Id.*, ART. XIX, § 1(a). The
10 Commission has adjudged the petitioner not within the protected class required by the
11 harassment provision. *Reverse & Remand Order* at 9. The Commission found since the petitioner
12 was not a TERO referral, she was not within the bounds of the Ordinance, and her harassment
13 claim should be dismissed. Since this decision is not arbitrary and capricious, the Court honors
14 this interpretation.
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17 Furthermore, the Court cannot accept the petitioner’s alternative argument that in the
18 absence of the TERO the HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL
19 (hereinafter PERSONNEL MANUAL) in effect at the time would control. The PERSONNEL MANUAL
20 protects tribal employees against harassment by the Nation and its sub-entities, but does not
21 protect against the actions of outside employers, such as CSI. PERS. MANUAL at 2. Specifically,
22 the “policies are issued as the official directive of the obligation of the Ho-Chunk Nation and the
23 employees to each other and to the public.” *Id.*, Intro. at 2. The petitioner is clearly not an
24 employee of the Nation, and, therefore, the PERSONNEL MANUAL has no application to this cause
25 of action.
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1 Another theory exists that might open the claim of harassment to judicial scrutiny. The
2 Court has in the past honored claims based on traditional notions of a right to privacy and
3 freedom from harassment, such as the right to exclude persons from private property. *Dorothy*
4 *Decorah v. Kim Whitegull*, CV 02-17 (HCN Tr. Ct., Mar. 1, 2002). The Court has additionally
5 recognized a right to freedom from harassment under the traditional theory of respect for elders.
6 *Pauline Mike v. Loylee Mike*, CV 99-42 (HCN Tr. Ct., July 23, 1999). However, custom and
7 tradition was not raised as a basis for jurisdiction in the present case. The petitioner failed to
8 establish whether a customary harassment claim could extend to include the facts and
9 circumstances of her case. The Ho-Chunk Nation Traditional Court has not previously address
10 harassment in those terms.
11

12
13 The petitioner has failed to establish the Court's jurisdiction over her harassment claim
14 under any of the possible applicable bases. She is not covered by the TERO, she is not an
15 employee of the Nation, nor has she asserted a basis for her claim under the customs and
16 traditions of the Nation. Since this Court may not exercise subject matter jurisdiction over the
17 harassment claim under the TERO, PERSONNEL MANUAL, or custom and tradition, these claims
18 must be dismissed.
19

20 **II. Does the Commission's imposition of fees against CSI**
21 **withstand appellate review?**

22 The original premise of CSI's TERO fine was linked to a presumption that CSI received
23 the TERO registration twenty-five (25) days prior to the filing date. *Reverse & Remand Order* at
24 10. This determination was regrettably reached without reviewing the original hearing transcript.
25 The Commission has since reviewed the hearing transcripts and altered the dates of CSI's
26 noncompliance, and adjusted the imposed fine accordingly. *Id.* Additionally, the language of the
27 Ordinance itself makes the imposition of any such fines for non-compliance purely discretionary
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1 on the part of the Commission. TERO, ART. XXIV, §1(a)(1). The petitioner could conceivably
2 claim that the Commission imposed fines in an inequitable manner, *i.e.*, in violation of equal
3 protection principles. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter
4 CONSTITUTION), ART. X, § 1(a)(8). The petitioner, however, made no such claim and presented
5 no evidence to support an arbitrary application of the Commission’s power amongst different
6 vendors. Since the decision of the Commission had a rational basis in the record, and since all
7 such fines are discretionary, the Court upholds the decision of the Commission.
8

9 Moreover, CSI claimed a lack of knowledge of the TERO, and as a result remained
10 unaware of how to come into compliance with its dictates. The respondents provided the below
11 reasons for this lack of knowledge. First, CSI had previously given only technical assistance to
12 clients, not employees, which would not have brought it under the purview of the statute.
13 Second, CSI claims that the nature of the Ordinance was in question by the Nation itself, which
14 was unsure at the time of the inception of the contract whether TERO applied to construction
15 contracts, or also to gaming contracts. *Tr. TERO Comm’n Hr’g* at 232-233. CSI claims when
16 they were made aware that their contract fell within the intended scope of the Ordinance, they
17 immediately took steps to come into compliance with TERO. *Id* at 16.
18
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20 In the early twentieth century, the United States Supreme Court established precedent
21 that citizens of the United States are charged with constructive knowledge of the Nation’s laws.
22 “It has been held from the earliest days, in both Federal and state courts, that a mistake of law,
23 pure and simple, without the addition of any circumstances of fraud or misrepresentation,
24 constitutes no basis for relief at law or in equity” *Utermehle v. Norment*, 197 U.S. 40, 30-31
25 (1905). The Seventh Circuit similarly concluded in 1998: “[i]gnorance of a statute is generally
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1 no defense even to a criminal prosecution, and it is never a defense in a civil case.” *Torres v.*
2 *INS*, 144 F.3d 472, 474 (7th Cir. 1998).

3 The jurisprudence of the Ho-Chunk Nation Supreme Court has been divided on the issue
4 of charging members, let alone non-members, with constructive knowledge of the Nation’s laws.
5 In *Whiteeagle*, the Supreme Court followed federal court precedent in imputing constructive
6 knowledge of the law. The Court charged Ms. Whiteeagle with constructive knowledge of the
7 PERSONNEL MANUAL regarding timelines within the Administrative Review Process. The
8 Supreme Court noted “[a]s an employee and member of the HCN, the Appellee bears the
9 responsibility of knowing the governing laws of the Nation.” *Marie Whiteeagle v. Wis. Dells*
10 *Head Start et al.*, SU 01-14 (HCN S. Ct., Nov. 27, 2001) at 1. Since Ms. Whiteeagle failed to
11 strictly adhere to the timelines of administrative grievances, the Supreme Court denied her
12 appeal.
13

14
15 Five (5) years later, however, in an employment action by Mr. Kenneth L. Twin, the
16 Supreme Court leaned the opposite way, finding employees of the Nation were not imputed with
17 knowledge of all tribal laws. “This Court is not yet prepared to assert that all employees must
18 know all laws of the Nation, but it is inclined to adopt this broad line of thought where a
19 supervisory position is involved.” *Kenneth L. Twin v. Toni McDonald*, SU 05-09 (HCN S. Ct.,
20 June 30, 2006) at 15 (citing *Susan Bosgraff v. HCN Sec. Dep’t.*, CV 01-01 (HCN Tr. Ct., Aug. 6,
21 2001) at 9). Until the Supreme Court reaches a consensus within its own jurisprudence on this
22 sensitive issue, the Trial Court shall not apply the doctrine of constructive knowledge against
23 others.
24
25

26 **III. Did CSI need to provide the petitioner with minimum**
27 **procedural due process prior to her discharge?**
28

1 Since the petitioner is an employee of a private corporation, CSI, any action taken by CSI
2 would not immediately implicate constitutional due process considerations. *See* CONST., ART. X,
3 1(a)(8) (curtailing governmental action). The Ho-Chunk Nation Legislature did not intend that
4 TERO elevate all private employers subject to its provisions to the status of arms of the Nation's
5 government. Since actions by private entities are not encompassed within the purview of the
6 CONSTITUTION, the only way that procedural due process considerations would attach under the
7 CONSTITUTION is if the Nation's government acted in complicity with the private actor.

9 For such complicity to occur, the employer would need to seek pre-approval for the
10 termination from the Commission. Otherwise, the Commission is not sufficiently involved in the
11 actions of the private employer to invoke constitutional protections. The Court has developed a
12 wealth of case law pertaining to procedural due process requirements. *See, e.g., Willard Lonetree*
13 *v. Larry Garvin*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007); *Gary Lonetree, Sr. v. John Holst, as*
14 *Slot Dir., et al.*, CV 97-127 (HCN Tr. Ct., Sept. 24, 1998). However, even under the PERSONNEL
15 MANUAL,
16

17 [t]he Ho-Chunk Nation . . . asserts that it has the right to employ
18 the best qualified persons available: that the continuation of
19 employment is based on the need for work to be performed,
20 availability of revenues, faithful and effective performance, proper
21 personal conduct, and continuing fitness of employees; and that *all*
22 *employees are terminable for cause unless otherwise specified in*
23 *writing as a prescribed employment term.*

24 PERS. MANUAL, Intro. at 2 (emphasis added). In this case, the terms of the petitioner's
25 employment were clearly altered in writing to reflect an at will relationship.

26 While it appears as if the TERO provision imparts a for cause designation to tribal
27 employees, the provision in question is both poorly worded and vague. TERO, ART. X, § 2(d).
28 Nowhere within the TERO does the Legislature restrict freedom of contract, or even discuss at

1 will employment. The Commission believes the petitioner’s employment is at will, and prior to
2 extending a work permit to CSI, the Commission was obligated to review corporate information
3 pertaining to TERO compliance, logically including CSI’s policy of at will employment. *Id.*,
4 ART. XV, § 1(b). If the Commission found the company policy to be contrary to the
5 requirements of the Ordinance, it was free to deny the permit or mandate that CSI alter its hiring
6 policies. The Commission, however, took no such action. Similarly, under the former
7 PERSONNEL MANUAL, the ability to contract could presumably be delegated to an Executive
8 Director to provide for at will employment of a tribal member. Redress of such a decision would
9 lie with the delegating entity or individual, to ask “why am I at will, and the other employees of
10 the Nation are not?” Such redress, whether to the Legislative or Executive Branch, is political,
11 not judicial.
12

13
14 Due to the vagaries in the act, the Court finds it nearly impossible to determine whether
15 the actions of the Commission deserve an arbitrary and capricious designation. If an individual
16 perceives that the Commission’s actions serve to circumvent the Ordinance, their remedy must
17 be political, not judicial. While some limited Equal Protection argument might exist, the
18 petitioner failed to raise this point to either the Commission or the Court, and the Court thereby
19 declines to review this matter. As a result, the Court likewise upholds the decision of the
20 Commission to sustain the petitioner’s termination.
21

22 The parties retain the right to file a timely post judgment motion with this Court in
23 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
24 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
25 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
26 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
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Ho-Chunk Nation Court System
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61. The appellant “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 filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P. 7(b)(1)*. “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN R. App. P.*].” *HCN R. Civ. P. 61*.

IT IS SO ORDERED this 8th day of June 2007, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Todd R. Matha⁴
Chief Trial Court Judge

⁴ The Court appreciates the assistance of Law Clerk Jennifer L. Tilden in the preparation and drafting of this order.