IN THE
HO-CHUNK NATION TRIAL COURT

Darren L. Brinegar, Petitioner, v. **Ho-Chunk Nation Grievance Review Board,** Respondent.	Case No.: **CV 08-50**

ORDER
(Final Judgment)

INTRODUCTION

The Court must determine whether to grant the petitioner's request for relief. The Court declines to do so since the Court has previously dealt with a nearly identical fact scenario, whereby this Court upheld the *Decision* of the GRB. *Kristin K. WhiteEagle v. HCN Grievance Review Bd.*, CV 08-17 (HCN Tr. Ct., Apr. 22, 2009). The analysis of the Court follows below.

PROCEDURAL HISTORY

The petitioner, Darren L. Brinegar, by and through Attorney Mark L. Goodman, filed his *Petition for Administrative Review* (hereinafter *Petition*) on August 26, 2008. *See* EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA), 6 HCC § 5.35c; *see also Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 63(A)(1)(a). On August 26, 2008, the Court entered the *Scheduling Order*, setting forth the timelines and procedures to which the parties should adhere during the pendency of the appeal. The respondent submitted the administrative record on September 4, 2008 *See HCN R. Civ. P.* 63(D). In response to the *Scheduling Order*, the

petitioner submitted a *Motion for Status Conference and Modification of Scheduling Order* on September 10, 2008. The Court granted that request and accordingly issued *Notice(s) of Hearing* on September 24, 2008, informing the parties of the date, time, and location of the *Status Hearing*. The *Hearing* was rescheduled several times. On October 24, 2008, the respondent submitted a compact disc recording of the July 30, 2008 *GRB Hearing*.

The petitioner next filed a timely *Initial Brief* on December 4, 2008. *See* ERA, § 5.35e; *HCN R. Civ. P.* 63(D)(1). The respondent failed to timely respond, and on January 5, 2009 filed a *Respondent's Notice and Motion to Extend Time to Respond to Petitioner's Initial Brief*. *See HCN R. Civ. P.* 63(E). The Court granted that request. Again, the respondent failed to timely respond. In response, the petitioner filed a timely *Reply Brief* on January 27, 2009. The petitioner requested that the Court entertain oral arguments within the *Reply Brief*. The Court, within its discretion, granted the petitioner's request for *Oral Arguments* in the May 6, 2009 *Order (Notice of Oral Argument)*. The *Order* informed the parties of the date, time, and location of the *Argument*. In response, the petitioner filed a *Motion for Postponed Oral Argument & Supplement the Administrative Record* on May 29, 2009. On June 9, 2009, the respondent filed *Respondent's Response to Motion to Supplement Administrative Record*. In response to the *Motion to Postpone Oral Argument*, the Court issued *Notice(s) of Hearing* on June 4, 2009, to address the *Motions*. Subsequently, petitioner filed a *Supplement to its Motion to Supplement Administrative Record* on June 25, 2009. The Court convened the *Status Hearing* on July 6, 2009 at 1:30 p.m. CDT. The following parties appeared at the *Hearing*: Attorney Mark L. Goodman, petitioner's counsel; Darren Brinegar, petitioner; and Ho-Chunk Nation Department of Justice (hereinafter DOJ) Attorney Alysia E. LaCounte, respondent's counsel.

The Court granted petitioner's *Motion* to supplement the administrative record. On July 9, 2009, the petitioner submitted a *List of Exhibits to Supplement Administrative Record*. Additionally, upon request of the Court following the July 6, 2009, *Hearing*, the petitioner subsequently filed his timely *Initial Brief & Appendix* (hereinafter *Initial Brief II*) on August 20, 2009. The respondent filed its untimely responsive pleading on September 8, 2009.

In response to issues raised within both the petitioner's and respondent's briefs, the Court instructed the Clerk of Court to schedule a *Hearing*. After the Clerk of Court contacted the parties, the Court issued *Notice(s) of Hearing* on January 6, 2010, informing the parties of the date, time, and location for *Oral Arguments*. *Id*., Rule 63(G). The Court convened *Oral Arguments* on January 19, 2010 at 1:30 p.m. CDT. The following parties appeared at the *Arguments*: DOJ Attorney Alysia LaCounte, respondent's counsel; Attorney Mark L. Goodman, petitioner's counsel; and David Brinegar, petitioner.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Art. VI - Executive

Sec. 1. Composition of the Executive.

(b) The Executive Branch shall be composed of any administrative Departments created by the Legislature, including a Department of the Treasury, Justice, Administration, Housing, Business, Health and Social Services, Education, Labor, and Personnel, and other Departments deemed necessary by the Legislature. Each Department shall include an Executive Director, a Board of Directors, and necessary employees. The Executive Director of the Department of Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

Art. X - Bill of Rights

Sec. 1. Bill of Rights.

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

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

EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

Ch. 1 - General Provisions

Subsec. 3. Declaration of Policy.

a. This Employment Relations Act is the official employment law of the Ho-Chunk Nation. It supersedes the Nation's Personnel Policies and Procedures Manual and all policies, rules, and regulations enacted by Legislative resolutions pertaining to the employment law of the Nation.

Subsec. 5. Employment Clause.

a. Equal Employment Opportunity. With the exception of Ho-Chunk Preference in Employment as set forth in paragraph (b), below, it will be a violation of this Act to discriminate based on an individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation, or disability.

Subsec. 6. Employee Rights.

d. Harassment.

(1) Harassment (both overt and subtle) is a form of employee misconduct that both demeans another person and undermines the integrity of the employment relationship by creating an unreasonably intimidating, hostile, and objectively offensive working environment.

Ch. II - Definitions

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

o. Employee. Any individual employed by the Ho-Chunk Nation, regardless of the source of funds by which the employee is paid. The term "employee" shall include any person elected or appointed. The Nation further classifies its employees as follows:

(1) At -Will Employee. An employee who is subject to termination with or without cause or notice. The employee also has the right to leave at any time for any or no reason or notice. At-will employees include Executive Managers of the Nation's Gaming Facilities and Managers of the non-gaming revenue generating facilities. The At-Will Employee classification will be stated on the employee's job description.

ss. Separation.

(2) Resignation. Voluntary separation from employment in either "good standing" or "not in good standing."

(3) Termination. Involuntary separation from employment not in good standing.

Ch. III - Employment Policies

Subsec. 10. Employee Separation Policy.

b. Resignation. An employee voluntarily wishing to leave employment with the Ho-Chunk Nation in good standing must file a written resignation with the immediate supervisor at least two (2) weeks prior to the effective date, stating specific reason(s) for the resignation. The employee's resignation shall be promptly forwarded through the Executive Director to the Department of Personnel.

Ch. V - Work Rules & Employee Conduct, Discipline, & Administrative Review

Subsec. 30. Employee Conduct.

e. Unacceptable Conduct. The following employee acts, activities, or behavior that are unacceptable conduct.

(20) Employees may not engage in coercion, nor be subject to coercive tactics that constitute a deprivation of legally protected rights.

Subsec. 33. Grievances.

a. Employees may seek administrative and judicial review only for alleged discrimination and harassment.

Subsec. 34. Administrative Review Process.

a. Policy.

(1) The Department of Personnel will take all reasonable steps to investigate any incident, which has resulted in disciplinary action. It is the policy of the Ho-Chunk Nation to afford all eligible employees who have been subject to suspension or termination a means of having the circumstances of such disciplinary action reviewed by an impartial and objective Grievance Review Board (Board).

(2) Employees are entitled to grieve suspensions or terminations to the Board. The Board will be selected from a set pool of employees and supervisors with grievance training, who will review a case and determine whether to uphold the discipline.

(3) Following a Board decision, the employee shall have the right to file an appeal with the Ho-Chunk Nation Trial Court (Court).

Subsec. 35. Judicial Review.

c. Judicial review of a grievance involving suspension, termination, discrimination or harassment may proceed to the Ho-Chunk Nation Trial Court only after the Administrative Review Process has been exhausted through the Grievance Review Board. An employee may appeal a Board decision to the Trial Court within thirty (30) calendar days of when the Board decision is served by mail.

e. Under this limited waiver of sovereign immunity, the Court shall review the Board's decision based upon the record before the Board. Parties may request an opportunity to supplement the record in the Trial Court, either with evidence or statements of their position. The Trial Court shall not exercise *de novo* review of Board decisions. The Trial Court may only set aside or modify a Board decision if it was arbitrary or capricious.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

(B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not 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 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 order denying the motion, the motion is considered denied. The time for initiating the appeal from judgment commences in accordance with the *Rules of Appellate Procedure*.

(C) Motion to Modify. After the time period in which to file a *Motion to Amend* of a *Motion for Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion* must be based upon new information that has come to the party's attention that, if true, could have the effect of altering or modifying the judgment. Upon such motion, the Court may modify the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal commences upon entry of the modified 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) calendar days after the filing of such motion, and the Court does not decide the motion or the judge does not sign an order denying the motion, the motion is considered denied. The time for initiating an appeal from judgment commences in accordance with the *Rules of Appellate Procedure*.

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

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

Rule 61. Appeals.

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

Rule 63. Judicial Review of Administrative Adjudication.

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

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

a. EMPLOYMENT RELATIONS ACT OF 2004

(D) The commission or board, designated as the respondent, must transmit the administrative record to the Court within fifteen (15) days after receipt of the *Petition for Administrative Review*. The administrative record shall constitute the sole evidentiary record for judicial review of the agency decision, unless the petitioner avails him or herself of the following exception:

1. The petitioner may request an opportunity to supplement the evidentiary record within an Employee Grievance Review Board appeal, provided that the petitioner demonstrates that the Board:

a. excluded relevant evidence as defined by the *Federal Rules of Evidence*, Rule 401; or

b. failed to consider evidence that could not reasonably have been discovered prior to the Employee Grievance Review Board hearing.

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

(F) The administrative record shall consist of all evidence presented to the agency, including but not limited to:

2. a transcript of the proceedings, which may be in digital or other electronically recorded format, sufficiently clear so that the Court may determine what transpired in the proceedings,

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

FINDINGS OF FACT[1]

1. The petitioner, Darren L Brinegar, is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A000224, and maintains an address of 551 Airport Ave., Wisconsin Rapids, WI 54494. *Pet.* at 1. The petitioner was employed at Rainbow Casino, a division within the Ho-Chunk Nation Department of Business (hereinafter Business Department), located at 949 County Road G, Nekoosa, WI 54457. *Initial Br.* at 1; *see also* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c. The Business Department is an executive department with principal offices located on trust lands at Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls, WI. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter

[1] The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally refrains from making independent factual findings. ERA, § 5.35e. The Court shall not accept the role of fact finder, the GRB is charged with finding facts regardless. The Court shall reiterate the basic, undisputed factual assertions of the parties.

CONSTITUTION), ART. VI, § 1(b). The Ho-Chunk Nation (hereinafter HCN or Nation) is a federally recognized Indian tribe. *See* 73 Fed. Reg. 18533 (Apr. 4, 2008).

2. The respondent, GRB, is a statutorily established entity for the purpose of hearing certain employment grievances, and is primarily comprised of randomly selected members who receive training facilitated by the HCN Department of Personnel (hereinafter Personnel Department). ERA, § 5.34a(1-2); *see also Janet Funmaker v. Libby Fairchild, in her capacity as Executive Dir. of HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the GRB is "an agency within the Department of Personnel").

3. The employer gave the petitioner an ultimatum to either resign or be terminated. *In the Matter of: Darren Brinegar v. Dep't of Business et al.*, GCN 051.08DH (GRB, July 30, 2008) at 1 (hereinafter *Decision*).[2]

4. The petitioner voluntarily resigned for "financial reasons" indicating that "his insurance would continue until the end of the month, receive two (2) weeks of severance pay, and the Nation would not challenge his claim for unemployment compensation." *Id.* at 2.

5. The petitioner timely filed his *Grievance Filing Form*, designating "discrimination" and "harassment" as the type of grievance for which he was seeking relief. *Id*. at 1-2.

6. The petitioner stated that he did not receive due process of law. *Id.* at 1.

7. The grievance did not contain any elements of harassment or discrimination, but rather issues regarding due process of law. *Id*. at 2.

[2] At the hearing, the petitioner indicated that he was an executive manager and an at-will employee. *In the Matter of: Darren Brinegar v. Dep't of Business et al.*, GCN 051.08DH (GRB, July 30, 2008) at 06:19; 06:29.

SUPPLEMENTAL FINDINGS[3]

8. The petitioner presented two (2) employment agreements, May 23, 2005 *Employment Agreement Between the Ho-Chunk Nation and DeJope Bingo General Manager Darren Brinegar* (hereinafter Contract I) and October 12, 2005 *Employment Agreement Between the Ho-Chunk Nation and Rainbow Casino General Manager Darren Brinegar* (hereinafter Contract II), which were executed by Ona Garvin and George Lewis, respectively.

9. The latter agreement states that "[t]he term commences as of . . . (the "Effective Date") and continues for a period of one-year. This Agreement shall terminate without further act by either party on . . . , unless renegotiated and executed by HCN and the Employee." *Petitioner's Supplement*, Ex. C.

10. On or around October 7, 2005, the petitioner received a correspondence indicating that "[e]ffective October 9, 2005, [the petitioner] will be permanently reassigned to the position of Executive Manager . . . at Rainbow Casino." *Id.*, Ex. D.

11. The Personnel Department received *Status Change Notices* on October 14, 2005, November 8, 2006, and May 12, 2008, indicating that the petitioner's job title was Executive Manager. *Id.*, Ex. E, H.

12. According to the *Internal Gaming Transfer Request*, the petitioner was an executive manager. *Id.*, Ex. F.

[3] The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally refrains from making independent factual findings. ERA, § 5.35e. The petitioner supplemented the *Administrative Record* to include information regarding the petitioner's employment status.

13. The HCN Legislature deemed that "all current and future employees under the title Executive Manager-Casino will be at-will employees." *Petitioner's Supplement,* Ex. K (LEG. RES. 12/17/03B).

DECISION

The parties stated that the employer gave the petitioner an ultimatum to either resign or be terminated. *Decision* at 1. The employee chose to resign. *Id.* He ultimately timely appealed under the guise of harassment and discrimination, indicating that he did not receive due process. *Id.* at 1-2. After holding a dismissal hearing, the GRB indicated that voluntary resignations do not qualify for a full grievance hearing. *Id.* at 1. Nonetheless, the GRB later states that "[t]he Board is not empowered to determine . . . if placing an ultimatum before an employee to resign or be terminated is against the law." *Id.* at 4. The Court disagrees.

The Court previously expounded on the topic of constructive discharge in the employment context within a prior case. *Kristin K. WhiteEagle v. Ho-Chunk Nation Grievance Review Board,* CV 08-17 (HCN Tr. Ct., Apr. 22, 2009) at 10-16. The Court directs the parties to that decision for a comprehensive discussion. For the purposes of this case, the Court reproduces the relevant portions of the aforementioned case. In 2001, the Court adopted a test for tortious constructive discharge. If a plaintiff asserted such a defense, the Court would require that he or she adequately demonstrate:

> (1) the actions and conditions that caused the employee to resign were violative of [fundamental] public policy;
>
> (2) these actions and conditions were so intolerable or aggravated at the time of the employee's resignation that a reasonable person in the employee's position would have resigned; and

> (3) facts and circumstances showing that the employer had actual . . . knowledge of the intolerable actions and conditions and of their impact on the employee and could have remedied the situation.

Maureen Arnett et al. v. HCN Dep't of Admin., CV 00-60, -65 (HCN Tr. Ct., Jan. 8, 2001) at 16 (quoting *Brady v. Elixir Industries*, 196 Cal. App. 3d 1299, 1306 (Cal. Ct. App. 1987) (citing *Turner v. Anheuser Busch, Inc.*, 7 Cal. 4th 1238, 1244-45 (Cal. 1994)).

A "constructive discharge is not in itself a cause of action, although it is routinely alleged as a separate count in complaints for wrongful discharge. Rather, constructive discharge is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Id.* at 13 (quoting *Vagts v. Perry Drug Stores*, 204 Mich. App. 481, 487 (Mich. Ct. App. 1994)). Consequently, the Court concluded that a tribal plaintiff could assert such a defense by reference to a former statutory definition of "discharge," which constituted an "*involuntary* separation or termination of employment." *Id.* at 14 (quoting PERS. MANUAL, Ch. 14 at 55 (updated Mar. 31, 1999) (emphasis added)).

In the *WhiteEagle* case, the Court did not have an opportunity to determine whether a constructive discharge defense remains available under the ERA, and declined to directly address the issue within its decision. *WhiteEagle* at 11-12. At that time, the Court was capable of resolving the matter without unduly intruding into the reserved role of the administrative agency. Nonetheless, the Court recognized that the GRB must make this determination as a matter of first impression within a future administrative case. *Id.* at 12. Yet, the GRB seemingly declined to do so within the present case.

Similar to the *WhiteEagle* case, the Court feels capable of resolving the instant matter without unduly intruding into the reserved role of the administrative agency. The ERA explains

that an at-will "employee . . . is subject to termination with or without cause or notice,"[4] and "include[s] Executive Managers of the Nation's Gaming Facilities." ERA, § 5.7o(1). Expanding on this concept, the Court previously explained that "'either the employer or the employee may terminate the relationship at any time for any reason, or even no reason[,] and that the position is held for an unspecified amount of time.'" *Dan M. Sine v. Jacob Lonetree, as Pres. of the Ho-Chunk Nation*, CV 97-143 (HCN Tr. Ct., Aug. 3, 1998) at 6 (quoting *Joan Whitewater v. Millie Decorah, as Fin. Dir., et al.*, CV 96-88 (HCN Tr. Ct., Jan. 20, 1998) at 4). Therefore, "[i]t follows that there is no right to grieve because a grievance is a procedure whereby a party can challenge the basis of the decision to terminate an employee as unsubstantiated in law or in fact. If no reason need be given, it seems illogical to give someone a right to challenge . . . ." *Id.* at 8.

A supervisor has no obligation "to engage in the disciplinary process, which is set in place to ensure the rights of the employee" in relation to an at-will employee's separation from employment because the individual maintains no property interest in his or her continued employment. *Id.* at 2. The Court appropriately resolves this constitutional issue since the HCN Legislature lacks the ability to confer constitutional adjudication authority upon an executive administrative agency. *LoneTree*, SU 07-04 at 4-6.

The petitioner stated at the *Dismissal Hearing* that he was an executive manager and an at-will employee. *See supra note 2*. Nonetheless, the petitioner supplemented the administrative record in order to promote an argument that the petitioner may have been a "for cause"

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[4] A statutory designation of "for cause" employment entitles an individual to minimum pre-deprivation procedural due process protection, but an at-will employee conversely lacks a property interest in his or her employment, thereby negating any claim to such protection. *Willard LoneTree v. Larry Garvin, in his official capacity as Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007) at 15 n.10, *aff'd*, SU 07-04 (HCN S. Ct., Oct. 6, 2007); *see also* CONST., ART. X, § 1(a)(8). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . ." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Parmenton Decorah v. HCN Legislature et al.*, CV 99-08 (HCN Tr. Ct., July 1, 1999) at 16; *Sine*, CV 97-143 at 7.

employee. *Petitioner's Br.* (Aug. 20, 2009) at 1. However, nearly all of the supplemental information provides that the petitioner was an executive manager, and thus an at-will employee. For instance, on or around October 7, 2005, the petitioner received a correspondence indicating that "[e]ffective October 9, 2005, [the petitioner] will be permanently reassigned to the position of Executive Manager . . . at Rainbow Casino." *Petitioner's Supplement,* Ex. D. The Personnel Department received *Status Change Notices* on October 14, 2005, November 8, 2006, and May 12, 2008, indicating that the petitioner's job title was Executive Manager. *Id.*, Ex. E, H. According to the *Internal Gaming Transfer Request*, the petitioner was an executive manager. *Id.*, Ex. F. The HCN Legislature deemed that "all current and future employees under the title Executive Manager-Casino will be at-will employees." LEG. RES. 12/17/03B.

However, the petitioner presented Contracts I and II, which were executed by Ona Garvin and George Lewis, respectively. These agreements were outside of the GRB's scope of review and authority, as the GRB could not determine their validity; the aforementioned contractual disputes are solely within the jurisdiction of the court. *See Contract I* (May 23, 2005); *Contract II* (Dec. 12, 2005). The Court notes that the respondent rightfully questions the validity of the contract by questioning whether Ms. Garvin or Mr. Lewis had the authority to lawfully enter into a contract, which would bind the Nation. *See HCN Treasury Dep't, et al. v. Corvettes on the Isthmus and Brian Newlun*, SU 07-03 (HCN S. Ct., Nov. 19, 2007). Assuming *arguendo* that these contracts were validly entered into by the parties and the petitioner held this belief, then he presumably would not have filed a grievance with the GRB, but rather proceeded to the Court. *See Contract I* (May 23, 2005); *Contract II* (Dec. 12, 2005). On the other hand, both contracts had limited one (1) year applicability. The agreements state that "[t]he term commences as of . . . (the "Effective Date") and continues for a period of one-year. This Agreement shall terminate

without further act by either party on . . . , unless renegotiated and executed by HCN and the Employee." *Petitioner's Supplement,* Ex. C. The petitioner tendered his resignation nearly three (3) years post-agreement. The Court finds that any potential contractual claims are tenuous.

Yet, "the concept of constructive discharge is recognized as an exception to the employment-at-will doctrine." *WhiteEagle* at 13 (citing *Strozinsky*, 237 Wis. 2d at 39-40). However, a distinction exists in constructive discharge jurisprudence: "an employee must independently prove a breach of contract *or* tort in connection with employment termination . . . ."[5] *Turner*, 7 Cal. 4th at 1251 (emphasis added). The present case must involve the latter identified species of constructive discharge earlier acknowledged by the Court. An at-will employee, by definition, exercises his or her duties in the absence of a contractual arrangement. "The nature of the plaintiff's at-will employment, authorizing termination for any reason, is incompatible with plaintiff's claim that his employer could not discharge him by subjecting him to intolerable conditions" in the absence of establishing a violation of a fundamental public policy.[6] *Starzynski v. Capital Pub. Radio, Inc.*, 88 Cal. App. 4th 33, 41 (Cal. Ct. App. 2001).

The Supreme Court of California explained the justification underlying the public policy exception to at-will employment. Briefly, "an employer has no right to terminate employment

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[5] The terms of employment for a "for cause" employee may be discerned from existing personnel policies, and, therefore, an employer may be capable of violating either an express or implied agreement. *Turner*, 7 Cal. 4th at 1252. For example, the former PERSONNEL MANUAL declared that "[t]hese policies are issued as the official directive of the obligations of the HoChunk [*sic*] Nation and the employees to each other . . . ." PERS. MANUAL, Intro. at 2. Despite this contractual foundation, in *Arnett*, the plaintiff, a "for cause" employee, could not ultimately demonstrate that the employer breached any of its contractual obligations. *Arnett*, CV 00-60 (HCN Tr. Ct., Sept. 25, 2002) at 15-17. Moreover, the plaintiff failed to act as a reasonable person under the circumstances and also failed to provide the employer an opportunity to remedy the alleged intolerable condition(s). *Id.* at 17-21. In the tribal context, contractual and statutory obligations clearly converge, and, to reiterate, a "for cause" employee must additionally receive pre-termination procedural due process. However, "a valid procedural due process claim requires the employer's conduct to have been motivated by a desire to avoid subjecting its actions to the scrutiny of a termination-related hearing." *Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 981 (5th Cir. 1986). No such allegation was present in *Arnett*.

[6] The majority of state courts recognize a public policy exception to the employment-at-will doctrine, including Wisconsin, *see Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 572-73 (Wis. 1983), but several states have declined to coalesce with the majority position. *See, e.g., Murphy v. Am. Home Products Corp.*, 58 N.Y.2d 293 (N.Y. 1983). This Court shall not choose a position, leaving that initial decision to the GRB.

for a reason that contravenes fundamental public policy as expressed in a constitutional or statutory provision.[7] An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee." *Turner*, 7 Cal. 4th at 1252 (citations omitted) (footnote added). More comprehensively,

> at root, the public policy exception rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large; this is the delicate balance which holds such societies together. Accordingly, while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose. . . . Just as the individual employment agreement may not include terms which violate fundamental public policy, so the more general "compensation bargain" cannot encompass conduct, such as sexual or racial discrimination, "obnoxious to the interests of the state and contrary to public policy and sound morality."

Gantt v. Sentry Ins., 1 Cal 4th 1083, 1094-95, 1101 (Cal. 1992) (citations omitted).

When attempting to ascertain a violation of public policy, the Court cannot concentrate upon claims "that concern merely ordinary disputes between employer and employee." *Id.* at 1090. Instead, "the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy must be 'fundamental,' 'substantial' and 'well established' at the time of the discharge." *Id.* (citation omitted). More specifically, "[t]ort claims for wrongful discharge typically arise when an employer retaliates against an employee for '(1) refusing to violate a statute . . . , (2) performing a statutory obligation . . . , (3) exercising a statutory right or privilege . . . , or (4) reporting an alleged violation of a statute of public importance.'" *Turner*, 7 Cal 4th at 1256 (citing *id.* at 1091-92).

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[7] The Court later "acknowledge[d] the fact that fundamental public policy may be enunciated in administrative regulations that serve the [corresponding] statutory objective." *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66, 80 (Cal. 1998).

As stated above, the Court shall not adjudge whether the ERA should be interpreted in such a manner so as to recognize a defense of constructive discharge. Similarly, the Court shall not pre-determine whether the GRB believes it can recognize the aforementioned public policy exception. However, the Court shall presume the existence of each for purposes of addressing the instant action because the petitioner could not prevail in the absence of either. In doing so, the Court does not appropriate the fact-finding role of the GRB. Essentially, "even if [the petitioner] could raise a triable issue of fact as to constructive discharge, his case cannot reach the trier of fact unless he can also show a *wrongful* discharge in violation of fundamental public policy." *Id.* at 1256.

The petitioner was an at-will employee dischargeable for any reason or no reason at all. The petitioner does not contend that his supervisor's actions constituted discrimination or harassment rather the petitioner believed that he was denied due process. The petitioner's supervisor was under no obligation to offer the petitioner anything, and could have instead chosen to immediately terminate him. The Court accordingly must deny the petitioner's request for relief, and shall not remand the case to the GRB for further consideration with instructions.

The parties retain the right to file a timely post judgment motion with this Court in accordance with *HCN R. Civ. P.* 58, Amendment to or Relief from Judgment or Order. Otherwise, "[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal." *HCN R. Civ. P.* 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 19th day of February 2010, 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 Amanda L. Rockman
Associate Trial Court Judge

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070