

1 **APPLICABLE LAW**

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

3 **Art. V - Legislature**

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

5 (a) To make laws, including codes, ordinances, resolutions, and statutes;

6 **Art. VII - Judiciary**

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

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

15 **Sec. 6. Powers of the Tribal Court.**

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

19 **Sec. 7. Powers of the Supreme Court.**

20 (a) The Supreme Court shall have the power to interpret the Constitution and laws of the Ho-
21 Chunk Nation and to make conclusions of law. The Supreme Court shall not have the power to
22 make findings of fact except as provided by enactment of the Legislature.

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

19 **EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5**

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

21 **Subsec. 29. General Hours of Work and Attendance.**

22 e. **Abandonment of Employment.** An employee who is absent from his or her
assigned work location without authorized leave for three (3) consecutive days or five (5) days in

1 a twelve (12) month period shall be considered absent without authorized leave, and as having
2 abandoned his or her employment. The employee shall be automatically terminated, unless the
3 employee can provide the Nation with acceptable and verifiable evidence of extenuating
4 circumstances justifying the absence(s).

5
6 Subsec. 33. Grievances.

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

9
10 Subsec. 34. Administrative Review Process.

11 a. Policy.

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

17 e. Witnesses and Evidence.

18 (1) Ten (10) days prior to the hearing, the employee and supervisor shall each
19 provide the Department of Personnel with a list of all witnesses they intend to call at the
20 hearing. They shall also present copies of any documentary evidence that they would
21 like to submit to the Board.

22 (2) Both parties may amend or supplement their original witness list and/or
submit additional documentary evidence within five (5) days after receiving the other
party's list of witnesses and evidence.

(3) Time limitations. Failure to abide by any of the above time requirements
will prohibit the non-compliant party from introducing documentary evidence or
presenting witnesses to the Board. For the purposes of this section, "days" shall be
calculated using business days. Exceptions to any of the above time frames must be
approved by the Executive Director, Department of Personnel.

f. Hearing Procedure.

(4) Questions.

(b) The Board members may ask questions of either party and may
call for any additional information as they deem necessary in reaching a decision.
If it requires information that is not readily available, the Board may accept into
the record such additional information or choose to suspend the meeting and
reconvene when the information is available.

1 g. Proceedings of the Board. At the commencement of a hearing before the
2 Grievance Board of Review [*sic*], the Department of Personnel will discuss with the Board their
responsibilities and obligations including, but not limited to, the following:

3 (3) The Board may ask questions of either party and request additional
4 evidence at any time.

5 (4) The Board may instruct the parties that it has heard sufficient information
6 to make a recommendation, or that the information being offered is not relevant. Aside
7 from relevancy issues, formal rules of evidence do not apply. The Board has the
authority to extend/waive time limitations if it believes that the information offered is
relevant and probative of the issues presented as defined below.

8 (5) The Board shall be responsible to make all relevancy determinations
9 throughout the meeting. In making these determinations, the Board shall consider
10 whether the proposed evidence (either witness testimony or documentary evidence)
relates to the disciplinary action and whether it will affect the Board's recommendation.
Only witnesses who have had direct involvement in the incident leading to the
disciplinary action will be allowed to participate and all questions asked should directly
relate to said disciplinary action.

11 Subsec. 35. Judicial Review.

12 c. Judicial review of a grievance involving suspension, termination, discrimination,
13 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
14 appeal a Board decision to the Trial Court within thirty (30) calendar days of when the Board
decision is served by mail.

15 e. Under this limited waiver of sovereign immunity, the Court shall review the
16 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.
17 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.

18 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

19 Rule 63. Judicial Review of Administrative Adjudication.

20 (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
21 within thirty (30) calendar days of such decision, unless otherwise provided.

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

1 a. EMPLOYMENT RELATIONS ACT OF 2004

2 (B) The *Petition for Administrative Review* shall identify the petitioner making the request by
3 name and address. The *Petition for Administrative Review* must also contain a concise statement
4 of the basis for the review, i.e., reason or grounds for the appeal, including a request to
5 supplement the evidentiary record pursuant to *HCN R. Civ. P.* 63(D)(1)(a-b), if applicable. The
6 statement should include the complete procedural history of the proceedings below. The
7 petitioner must attach a copy of the final administrative decision to the *Petition for
Administrative Review*.

6 (D) The commission or board, designated as the respondent, must transmit the administrative
7 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
8 of the agency decision, unless the petitioner avails him or herself of the following exception:

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

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

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

13 (E) Within thirty (30) calendar days of filing the *Petition for Administrative Review*, the
14 petitioner shall file a written brief, an *Initial Brief* The respondent shall have thirty (30)
15 calendar days after filing of the brief in which to file a *Response Brief*. After filing of
16 respondent's *Response Brief*, the petitioner may file the *Reply Brief* within ten (10) calendar
17 days.

16 1. If the petitioner alleges one of the conditions stated in *HCN R. Civ. P.* 63(D)(1)(a-
17 b), then the Court shall convene a hearing to determine whether to include supplemental
18 evidence in the administrative record. The Court shall announce the briefing schedule, which
19 shall resemble the schedule set forth in *HCN R. Civ. P.* 63(E), in a written decision after the
20 hearing.

18 (H) The Court shall decide all cases upon the administrative record, briefs, memoranda and
19 statements filed plus the oral argument, if heard.

20 (I) The Court shall not set aside or modify any agency decision, unless it finds that the decision
21 was arbitrary and capricious, unsupported by substantial evidence or contrary to law, with the
22 following exception:

22 1. The EMPLOYMENT RELATIONS ACT OF 2004 mandates that the Court may only set
aside or modify a Board decision if it was arbitrary and capricious.

1 **DECISION**

2 The Supreme Court concluded that the Court failed to properly discern whether the GRB
3 acted within accordance of the EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA). The
4 Supreme Court further determined that the Court incorrectly adopted the position that it could
5 not address the matter since the GRB dismissed the case. *Decision* at 4. The Supreme Court
6 directed this Court to remand the case to the GRB for a hearing, which shall include testimony of
7 “witnesses who had direct involvement in the incident.” *Id.* at 4-5.

8 Although it may appear to the Supreme Court that the Court has “meandered off on a trail
9 for a red herring,” the Court remains perplexed by the Supreme Court’s interpretation of the Trial
10 Court’s actions. *Id.* at 5. Thorough review of the Court’s decision illustrates that the Court
11 examined whether the GRB acted in accordance with the ERA. *Order (Affirming)*, CV 08-45
12 (HCN Tr. Ct., Sep. 4, 2009) at 8-14. The GRB opted to dismiss due to the nature of the claim and
13 its lack of apparent statutory authority.

14 The Supreme Court declared that the GRB incorrectly relied on testimony provided by
15 the personnel specialist, Rick McArthur. *Decision* at 4-5. The Supreme Court stated that the
16 GRB should have required the testimony of Ms. Brinegar’s immediate supervisor and that Mr.
17 McArthur was prohibited from testifying since he was not “directly involved” in the termination.
18 *Id.* at 4. As to the latter, Mr. McArthur’s presence at the grievance hearing was not that of a
19 witness. Mr. McArthur offered information regarding the petitioner’s personnel file; such
20 information would be allowable and admissible in Court under the FEDERAL RULES OF
21 EVIDENCE, Rule 803(8). However, the GRB is not bound by the FEDERAL RULES OF EVIDENCE,
22 and it would seem peculiar that the GRB would have a heightened standard compared to the
Court. As a personnel specialist, Mr. McArthur was defending personnel disciplinary actions.

1 See ERA, 6 HCC § 5.34f(2) (“the supervisor *or* his or her representative shall present to the
2 Board the reasons why management believes that the disciplinary action should be upheld.”)
3 (emphasis added).

4 The Supreme Court indicated that the “GRB should have required that the supervisor(s)
5 who had ‘direct involvement in the incident’ appear and testify at the hearing. It would seem
6 obvious that management should send their witnesses to defend their actions where an
7 employee asserts that the immediate supervisor informed the employee to return on a date”
8 *Decision* at 4. However, the Court believes that is neither “obvious,” nor the GRB’s role to
9 require individuals to testify and/or appear. The GRB does not carry such a burden. Under the
10 ERA, the employee bears the burden of proving, by a preponderance of the evidence, that she
11 was subjected to improper disciplinary action, harassment, or discrimination. ERA, 6 HCC §
12 5.34h(1). Furthermore, “the employee and the supervisor shall each provide the Department of
13 Personnel with a list of witnesses they intend to call at the hearing.” *Id.*, § 5.34e(1). In
14 accordance with the ERA, it is the employee who bears the burden of calling forth witnesses, not
15 the GRB. Ms. Brinegar could have called her immediate supervisor as a witness. It appeared that
16 neither party chose to call any witnesses during their presentations to the Board. *See Decision*,
17 GRB-060.08T (GRB, July 30, 2008) at 1.

18 Additionally, the *Decision* seemingly establishes that the GRB is to follow a distinct
19 review process. Whereas the Trial Court cannot entertain a case without first establishing both
20 subject matter jurisdiction and personal jurisdiction, it appears that the GRB has a duty to
21 entertain any grievance coming before it, regardless of whether statutory authority exists.
22 Alternatively, the Supreme Court may be suggesting that the GRB must classify a voluntary
resignation as a termination for purposes of review. Within the ERA, the Legislature defined

1 termination as: “Involuntary separation from employment not in good standing.” ERA, §
2 5.7ss(3). The Supreme Court has the authority to clarify and interpret the meaning statutes,
3 including definitions. Nonetheless, it is beyond the scope of either court’s authority for either
4 court to supplement a statute in such a way as to not only expand the definition of termination,
5 but also expand the statutory jurisdiction of the GRB by expanding the definition of termination.
6 If the Legislature intended for the GRB to hear cases involving voluntary terminations, they
7 would have expressed so in the ERA. Perhaps the Supreme Court is insinuating that the GRB
8 may need to determine the legitimacy of a voluntary action, *i.e.*, voluntary resignation, before it
9 can determine whether or not such action is able to be grieved. Nonetheless, the Supreme Court
10 decision mandates that when a grievance is brought before the GRB, then the Board must
11 comply with statutory procedure even when the initial grievance establishes that the grievance is
12 outside the scope of GRB authority.

13 In accordance with the Supreme Court’s remand to remand, the Trial Court remands to
14 the GRB for an additional hearing. The GRB must conduct the hearing in accordance with the
15 ERA, and must hold an additional hearing “to determine whether or not Cheryl Brinegar
16 voluntarily resigned AFTER listening to the testimony of the supervisors involved in the incident
17 as required by the ERA.” *Decision* at 5.

18 **IT IS SO ORDERED** this 18th day of May 2010, by the Ho-Chunk Nation Trial Court
19 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

20 _____
21 Honorable Amanda L. Rockman
22 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

