

1 The petitioner next filed a request for an extension in order to obtain an attorney on
2 February 9, 2009, which the Court granted. Thus, the Court entered its *Amended Scheduling*
3 *Order* on February 12, 2009. On February 24, 2009, Attorney James Ritland filed a
4 correspondence with the Court indicating that he would be representing the petitioner, and also
5 requested an extension. On February 26, 2009, the Court entered another *Amended Scheduling*
6 *Order*. On March 27, 2009, the petitioner filed a timely *Initial Brief*. *Id.*, Rule 63(E). The
7 petitioner also requested *Motion for Leave to Amend Complaint* and the *Amended Complaint*.¹
8 The respondent filed a *Motion for Extension of Time* on April 27, 2009, due to the fact that the
9 attorney was hospitalized. The petitioner filed a correspondence indicating that he did not object
10 on the same date. Nonetheless, the respondent's filed the *Response Brief* on April 29, 2009. *Id.*
11 The petitioner failed to file a *Reply Brief* on May 7, 2009 or any date thereafter. *Id.* Neither
12 party requested the ability to present oral argument, prompting the Court to determine the matter
13 on the documentary materials. *Id.*, Rule 63(G); *Scheduling Order* at 3.

14 **APPLICABLE LAW**

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

16 **Art. V - Legislature**

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

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

22 **Art. VI - Executive**

23 ¹ The petitioner indicates that “in the interest of judicial economy to allow the pleading to be amended at this time
24 since a dismissal at this time on the grounds of tribal immunity would not prevent a refiling [*sic*] of the Petitioner’s
25 claim naming an individual . . .” *Motion for Leave to Amend Complaint*. (HCN Tr. Ct., Mar. 27, 2009) at 1. The
26 Court notes that the respondents did not challenge this amendment, and therefore the Court grants such request.

1
2 Sec. 1. Composition of the Executive.

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

10 Art. VII - Judiciary

11 Sec. 7. Powers of the Supreme Court.

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

15 HO-CHUNK NATION JUDICIARY ESTABLISHMENT AND ORGANIZATION ACT, 1
16 HCC § 1

17 Subsec. 5. Rules and Procedures.

18 c. The Judiciary shall have exclusive authority and responsibility to employ
19 personnel and to establish written rules and procedures governing the use and operation of the
20 Courts.

21 d. All matters shall be tried in accordance with the Ho-Chunk Rules of Procedures
22 and the Ho-Chunk Rules of Evidence which shall be written and published by the Supreme Court
23 and made available to the public.

24 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

25 Ch. 1 - General Provisions

26 Subsec. 4. Responsibilities.

27 a. Department of Personnel. The *Department of Personnel Establishment and*
28 *Organization Act* (1 HCC § 10) delegates to the Executive Director of the Department of
Personnel the functions and authority to implement, manage, enforce, and promulgate[,] i.e.,]
create, establish, publish, make known and carry out the policies within this Act.

Subsec. 31. Employee Discipline.

1 a. Depending on the nature of the circumstances of an incident, discipline will
2 normally be progressive and should bear a reasonable relationship to the violation. Based on the
3 severity of the employee conduct, progressive discipline may not be applicable. Supervisors
4 imposing discipline shall afford Due Process to the employee prior to suspending or terminating
5 any employee. Types of discipline include:

(2) Termination.

6 Subsec. 33. Administrative Review Process.

7 a. Policy.

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

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

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

18 c. Notification of Disciplinary Action. At the time an employee is notified of
19 disciplinary action, the employee shall be advised of his or her right to a hearing before the
20 Grievance Review Board.

21 d. Request for a Hearing. An employee must request a hearing within five (5)
22 business days of the date the disciplinary action was taken. At the time the employee requests a
23 hearing, he or she must inform the Department of Personnel if he or she is to be represented by
24 an attorney. If so, the attorney must also file for an appearance with Department of Personnel
25 within five (5) days of the date the employee requested a hearing. Failure to request the hearing
26 within this time frame will result in the forfeiture of a hearing by the Board.

27 e. Witnesses and Evidence.

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

f. Hearing Procedure.

1 (3) Employee's Presentation. When the supervisor's presentation has
2 concluded, the employee shall present to the Board the reasons why he or she believes
3 that the disciplinary action should be upheld. The employee may call witnesses at this
time. This presentation shall not exceed two hours without the Board's permission.

4 g. Proceedings of the Board. At the commencement of a hearing before the
5 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:

6 (7) At the conclusion of the presentation of testimony and evidence, the Board
7 will privately deliberate and make a decision within five (5) calendar days. No record of
8 the Board's deliberation will be made. The decision of the Board shall describe the facts
9 of the case and determine whether the facts support a violation of the Employment
Relations Act or applicable Unit Operating Rules.

10 Subsec. 35. Judicial Review.

11 a. Waiver of Sovereign Immunity. Pursuant to Article XII of the Constitution of the
12 Ho-Chunk Nation, the Ho-Chunk Nation Legislature expressly waives the sovereign immunity of
13 the Ho-Chunk Nation in the limited manner described herein. This waiver shall be strictly
construed.

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

18 e. Under this limited waiver of sovereign immunity, the Court shall review the
19 Board's decision based upon the record before the Board. Parties may request an opportunity to
20 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
21 set aside or modify a Board decision if it was arbitrary or capricious.

22 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

24 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
25 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
26 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.

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.

1 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
2 time for initiating an appeal commences upon entry of the amended judgment. If the Court
3 denies a motion filed under this Rule, the time for initiating appeal from the judgment
4 commences when the Court denies the motion on the record or when an order denying the
5 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
6 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
7 order denying the motion, the motion is considered denied. The time for initiating the appeal
8 from judgment commences in accordance with the *Rules of Appellate Procedure*.

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

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

23 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
24 party made within a reasonable time for the following reasons: (1) newly discovered evidence
25 which could not reasonably have been discovered in time to request a new trial; (2) fraud,
26 misrepresentation or serious misconduct of another party to the action; (3) good cause if the
27 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not
28 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.

21 Rule 61. Appeals.

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

26 Rule 63. Judicial Review of Administrative Adjudication.

27 (A) Any person aggrieved by a final agency decision may request that the Ho-Chunk Nation
28 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 relied. Conversely, the *Decision* contains five (5) sections, an *Introduction, Proceedings and*
2 *Summary, Decision, Applicable Law, and Right to Appeal.* The GRB does chronologically
3 summarize the testimony presented at the December 18, 2008 hearing over the course of four (4)
4 pages. *GRB Decision* at 1-4. Yet, the GRB attempts to make factual findings even within the
5 quoted decisional section. The GRB, however, is charged with “describ[ing] the facts of the case
6 and determin[ing] whether the facts support a violation of the Employment Relations Act.”
7 ERA, § 5.34g(7).
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10 1. The petitioner, Daniel G. Topping, Jr., is an enrolled member of the Ho-Chunk Nation,
11 Tribal ID# 439A005122, and maintains a mailing address of 155 Rye Bluff Road, #247, Black
12 River Falls, WI 54615. *Administrative Record* at 3. The petitioner was employed as a Counter
13 Server/Cashier at Majestic Pines Casino, a division within the Ho-Chunk Nation Department of
14 Business (hereinafter Business Department), located at W9010 Hwy 54 East, Black River Falls,
15 WI 54615. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c; *Admin.*
16 *Record* at 6. The Business Department is an executive department with principal offices located
17 on trust lands at Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black
18 River Falls, WI. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION),
19 ART. VI, § 1(b). The Ho-Chunk Nation (hereinafter HCN or Nation) is a federally recognized
20 Indian tribe. *See* 73 Fed. Reg. 18533 (Apr. 4, 2008).
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23 2. The respondent, GRB, is a statutorily established entity for the purpose of hearing certain
24 employment grievances, and is primarily comprised of randomly selected members who receive
25 training facilitated by the HCN Department of Personnel (hereinafter Personnel Department).
26 ERA, § 5.34a(1-2); *see also Janet Funmaker v. Libby Fairchild, in her capacity as Executive*
27 *Dir. of HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the
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1 GRB is “an agency within the Department of Personnel”). The respondent, Food & Beverage
2 Supervisor Georgette Martin, was the supervising employee of the petitioner, who subsequently
3 terminated the petitioner.

4
5 3. In February 2008, the respondent supervisor, Georgette Martin was unaware of his
6 bipolar condition or necessary accommodations. *In the Matter of: Daniel Topping v. Food &*
7 *Beverage Dep’t et al.*, GCN 062.08T (GRB) (hereinafter *GRB Decision*) at 1.

8 4. Nonetheless, the petitioner exhibited behaviors, which led to customer service incidents
9 in the Food and Beverage Department. *Id.* at 2; *Admin. Record* at 29-67. Eventually, he
10 informed his supervisor that he would not take medication because such medication would make
11 him “act like a zombie and affect his sex life.” *GRB Decision* at 2. The petitioner stated that he
12 had been trying for months to get the proper medication, but refused medication that made him a
13 “zombie.” *Id.*

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15 5. The respondent, Georgette Martin, recommended several different attainable jobs, where
16 he would not be working with patrons or in the casino environment, but he was not interested.
17
18 *Id.*

19 6. On June 6, 2008, the petitioner believed that he lost a valuable baseball card, indicated
20 that he notified proper authorities and his insurance, and began questioning coworkers. *Id.* at 2.
21 Although, the card was ultimately on his person, he threatened a coworker’s life. *Id.*; *Admin*
22 *Record* at 12-13. He stated to his coworker that “next time, I’ll fucking kill you.” *Admin Record*
23 at 16, 19-20.

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25 7. The GRB identifies the relevant legal issue, ancillary facts, and conclusion within four
26 (4) brief paragraphs, which the Court restates below:

27
28 The insurances [*sic*] afforded within the procedural guidelines for discipline are
not designed to infringe on the discretion of supervisors when managing their

1 work unit. This means the determination to discharge the employee is not subject
2 to a Board's discretion unless it exceeds their collective finding that the
3 termination in question is 'beyond reason.'

4 The ERA states that Progressive Discipline will 'normally' be applied in
5 circumstances of continued misconduct. When in [*sic*] employee threatens the life
6 of another regardless of whether or not it was done with willful intent, the Board
7 can vanquish [*sic*] any concept of 'normal' behavior and can therefore finds [*sic*]
8 it reasonable that management had considered the same

9 The Grievant's most compelling element of his presentation deals with a
10 condition that he feels prompted him to behave in the matter that led to his
11 termination. Although the Board finds a great weakness in their clinical
12 understanding of his condition, the Grievant's testimony provided only a reason
13 for his behavior, not an excuse. As employees of the Nation, this Board expects
14 that their employer would make reasonable accommodations to fit the needs of
15 their employees. Testimony revealed that genuine attempts in this matter have
16 been made. Regardless, the Board would also expect that any accommodations or
17 considerations must yield to the personal safety of coworkers.

18 To the misfortune of the Grievant and his prospects for relief, the GRB has no
19 grounds for finding in his favor with only the sympathy of circumstance.

20 *GRB Decision at 4.*

21 DECISION

22 The Court thoroughly examined the origin of administrative agency review and
23 associated standards of review within a prior case. *Regina K. Baldwin et al. v. Ho-Chunk Nation*
24 *et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 12-26. The Court directs the parties to
25 that decision for a comprehensive discussion.² For purposes of this case, the Court reproduces
26 the portion of the discussion dealing with formal on the record adjudication.³

27 ² The full text of *Baldwin* appears at www.ho-chunknation.com/government/judicial/case_index2.htm.

28 ³ In *Baldwin*, the Court performs an extensive review and critique of the Nation's administrative law jurisprudence. The Court clearly acknowledges the persuasive, not binding, authority of federal case precedent within the opinion, but proceeds to cautiously dissect the varying standards of review commonly used in administrative law since inattention to detail plagued the Court's initial foray into this field. *Baldwin*, CV 01-16, -19, -21 at 21. Regardless, the HCN Supreme Court recently found "it improper and extremely troubling that the Trial Court would rely exclusively on U.S. case law in deciding any issue, without first looking to the laws and precedents of *this* Nation." *Sharon Williams v. HCN Ins. Review Comm'n*, SU 08-01 (HCN S. Ct., Oct. 29, 2008) at 13. The Supreme Court

1 Executive agencies may engage in formal on the record adjudication, resulting in the
2 promulgation of rules through the formation of a body of case precedent. *See, e.g., Dickinson v.*
3 *Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998);
4 *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing adjudicative
5 rulemaking, as well as other forms of agency action, courts begin by recognizing that Congress
6 intended the Administrative Procedure Act to “establish[] a scheme of ‘reasoned
7 decisionmaking.’”⁴ *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
8 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered
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13 then cites several cases where the Trial Court purportedly employed deferential standards of review in the context of
14 an administrative appeal. *Id.* (citing *Karen Bowman v. HCN Ins. Review Comm’n*, CV 06-02 (HCN Tr. Ct., Jan. 10,
15 2007); *Dolores Greendeer v. Randall Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001); *Debra Knudson v. HCN Treas.*
16 *Dep’t*, CV 97-70 (HCN Tr. Ct., Feb. 5, 1998); *Sandra Sliwicki v. Rainbow Casino et al.*, CV 96-10 (HCN Tr. Ct.,
17 Dec. 9, 1996); *Gale S. White v. Dep’t of Pers. et al.*, CV 95-17 (HCN Tr. Ct., Oct. 14, 1996)). However, each of
18 these cited decisions likewise rely upon external case law. To a degree, certain decisions may cite prior tribal
19 opinions, which, in turn, cite external case law, but the Court fails to understand how a paraphrased quotation
20 perhaps followed by “citation omitted” would serve to demonstrate a unique tribal pedigree. This Court would
21 regard such a practice as intellectually dishonest, and alternatively choosing to refer to *Black’s Law Dictionary* or
22 other secondary resource for research purposes can prove a haphazard exercise. *See Chloris Lowe, Jr. et al. v. HCN*
23 *Legislative Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Nov. 1, 2001) at 5 n.3; *id.*, CV 00-104 (HCN Tr.
24 Ct., Mar. 30, 2001) at 7 n.3, 13 n.10.

25 Furthermore, in late-2003, the Supreme Court withdrew its approval of using deferential standards to
26 review employment grievances that had proceeded through the predecessor Administrative Review Process, thereby
27 rendering prior misguided opinions bad case law. *Compare Hope B. Smith v. Ho-Chunk Nation*, SU 03-08 (HCN S.
28 Ct., Dec. 8, 2003) at 9-10, with *Debra Knudson v. HCN Treasury Dep’t*, SU 98-01 (HCN S. Ct., Dec. 1, 1998) at 8-
9. Neither *Sliwicki* nor *White* applied such deferential standards of review (*Sliwicki*, in fact, concerns only
procedural due process), and, consequently, while these opinions retain a degree of authoritativeness, they are also
irrelevant to our present inquiry. The Court nonetheless strongly advocates fostering a robust tribal jurisprudence
not beholden to federal or state authority. Yet, the HCN Legislature has chosen to incorporate statutory terminology
and standards with well-known meanings in foreign contexts within the ERA, and opting to turn a blind eye to
decades of well-developed, persuasive case law seems somewhat unwise. In particular, the legislative adoption of a
deferential standard of review for usage in administrative employment appeals has no apparent rooting in tribal
tradition and custom. *See* ERA, § 5.35e. The ERA, however, does contain a wealth of culturally based provisions,
e.g. the *Wąkšik Wošga* leave policy. *Id.*, § 5.21. In this sense, the ERA represents a syncretic approach to law-
making. In contrast, the Court respectfully questions the Supreme Court’s whole scale adoption of evidentiary and
ethical rules in 1999 and 1996, respectively, if it believes “that the Ho-Chunk Nation’s common law, tribal laws, and
customs should always take precedence over the laws of the United States.” *Williams*, SU 08-01 (HCN S. Ct., Oct.
29, 2008); *see also In re Adoption of Fed. R. Evid.* (HCN S. Ct., June 5, 1999); *In Re Adoption of Rules of Prof’l*
Conduct for Att’ys (HCN S. Ct., Aug. 31, 1996).

⁴ The HCN 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.⁵

3 The two (2) inquiries represent “separate standards.” *Bowman*, 419 U.S. at 284
4 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently,
5 a court “may properly conclude[] that, though an agency’s finding may be supported by
6 substantial evidence, . . . it may nonetheless reflect an arbitrary and capricious action.” *Bowman*,
7 419 U.S. at 284. In such an event, the Court would afford no deference to the adjudicative rule
8 of the agency precisely because the rule could not withstand the more deferential arbitrary and
9 capricious standard.
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11 The substantial evidence standard has no application beyond the review of “record-based
12 factual conclusion[s],” and only in unusual circumstances will agency action surviving a
13 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In
14 performing the second-tier of analysis, arbitrary and capricious review,
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16 [a] reviewing court must “consider whether the decision was based on a
17 consideration of the relevant factors and whether there has been a clear error of
18 judgment. . . . Although this inquiry into the facts is to be searching and careful,
19 the ultimate standard of review is a narrow one. The court is not empowered to
20 substitute its judgment for that of the agency.” The agency must articulate a
21 “rational connection between the facts found and the choice made.” While [a
22 court] may not supply a reasoned basis for the agency’s action that the agency
itself has not given, [a court] will uphold a decision of less than ideal clarity if the
agency’s path may reasonably be discerned.

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

24
25 _____
26 ⁵ The ERA directs that “[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and
27 capricious.” ERA, § 5.35e; *but cf.* AMENDED & RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION
28 (hereinafter GAMING ORDINANCE), § 1101(c)(v). Nonetheless, the Court shall continue to engage in the two-tiered
analysis due to the inseparable components of the inquiry. Furthermore, some federal courts have denoted a
convergence of the standards, making any analytical distinction unattainable. *See, e.g., Aircraft Owners & Pilots
Ass'n v. FAA*, 600 F.2d 965, 971 n.28 (D.C. Cir. 1979) (describing the distinction as “largely semantic”). This Court
disagrees with this assessment, at least in the context of formal on the record adjudication, but it reveals the
interrelatedness of the two standards.

1 Typically, however, a court will suspend its review after ascertaining the presence of
2 substantial evidence. “Substantial evidence is more than a mere scintilla. It means such relevant
3 evidence as a reasonable mind might accept as adequate to support a conclusion.” *Edison Co. v.*
4 *Labor Bd.*, 305 U.S. 197, 229 (1938). The relevant evidence must retain probative force, and,
5 therefore, “[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.”
6 *Id.* at 230. And, a court must examine the evidence supporting the decision against “the record
7 in its entirety, including the body of evidence opposed to the [agency’s] view.” *Universal*
8 *Camera Corp. v. Labor Bd.*, 340 U.S. 474, 488 (1951); *see also* 5 U.S.C. § 706.

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

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

24 *Id.* at 374-75. The inconsistent or contrary application of an adjudicative rule must result in a
25 finding that the agency has failed to support its action by substantial evidence. A court cannot
26 deem subsequent aberrations as simply agency interpretations of the underlying rule. *Id.* at 377-
27 78.

28 To reiterate, a court must determine whether the challenged administrative action rests
upon substantial evidence and escapes a characterization of arbitrary and capricious.

1 Furthermore, the need for reasoned decision-making and the consistent application of resulting
2 decisions underlie and overarch the statutorily based analysis. Apart from this predominate
3 approach to agency review, instances exist when a court must designate an administrative
4 decision as either contrary to law or otherwise not deserving of deferential treatment.
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6 As noted above, the ERA attempts to limit the appellate role “to set[ting] aside or
7 modify[ing] a Board decision if it was arbitrary and capricious.” ERA, § 5.35e. The ERA does
8 not articulate the Court's ability to set aside an agency decision that proves “contrary to law.”
9 *Compare* GAMING ORDINANCE, § 1101(c)(v). Such a seemingly broad recognition of judicial
10 authority, however, does not invite or permit a *de novo* review in the context of a typical
11 administrative review. That is to say, a court cannot bypass the obviously deferential standards
12 of review when it perceives an isolated question of law. Rather, a court may only set aside an
13 agency action as contrary to law when the agency clearly acts outside the parameters of its
14 legislatively delegated authority. For example, this Court would not need to defer to a GRB
15 decision that claimed to determine an enrollment issue under the guise of a Ho-Chunk preference
16 grievance. Such a decision would certainly be struck down as contrary to law regardless of
17 whether the HCN Legislature incorporated this provision in the standard of review paragraph.
18 *See Willard LoneTree v. Larry Garvin, in his official capacity as Executive Dir. of HCN*
19 *Heritage Pres.*, SU 07-04 (HCN S. Ct., Oct. 6, 2007) at 4 (noting appellate agreement with this
20 premise).
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24 Nowhere is this judicial authority more obvious than when a court encounters an
25 administrative agency's efforts to interpret and apply constitutional principles. “[C]onstitutional
26 questions obviously are unsuited to resolution in administrative hearing procedures and,
27 therefore, access to the courts is essential to the decision of such questions.” *Califano v. Sanders*,
28

1 430 U.S. 99, 109 (1977).⁶ The HCN Legislature lacks the ability to confer constitutional
2 adjudication authority upon an executive administrative agency, and the ERA does not purport to
3 do so. *Lonetree*, SU 07-04 at 4-6. Any such attempt would prove inconsistent with the
4 theoretical and legal underpinnings of administrative power. *See Baldwin*, CV 01-16, -19, -21 at
5 15 n.5.
6

7 In the instant matter, the GRB “must determine whether or not the supervisory
8 management of F & B adhered to . . . [the] Employment Relations Act [of 2004] (ERA in the
9 termination of Mr. Topping.” *Decision* at 1. The GRB determined that “[b]ased on the
10 information and testimony, the [GRB] affirms the disciplinary process presented met all
11 safeguards afforded to all employees of the Ho-Chunk Nation.” *Id* at 1. The ERA explicitly
12 states that “[d]epending on the nature of the circumstances of an incident, discipline will
13 normally be progressive and should bear a reasonable relationship to the violation.” ERA, 6 HCC
14 § 5.31. The GRB found that the
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17 ERA states that Progressive Discipline will ‘normally’ be applied in
18 circumstances of continued misconduct. When in [*sic*] employee threatens the life
19 of another regardless of whether or not it was done with willful intent, the Board
20 can vanquish [*sic*] any concept of ‘normal’ behavior and can therefore finds it
21 reasonable that management had considered the same

22 *GRB Decision* at 4. On June 6, 2008, the petitioner believed that he lost a valuable baseball card
23 at the workplace. *Id.* at 2. He indicated that he notified proper authorities and his insurance, and
24 began questioning coworkers. *Id.* at 2. Although, the card was ultimately on his person, he

25 ⁶ The following federal circuit court assessments reinforce this unassailable premise. “[A]s a general rule, an
26 administrative agency is not competent to determine constitutional issues.” *Petruska v. Gannon Univ.*, 462 U.S.
27 294, 308 (3rd Cir. 2006). “To be sure, administrative agencies . . . cannot resolve constitutional issues. Instead, the
28 premise of administrative exhaustion requirements for petitioners with constitutional claims is that agencies may be
able to otherwise address petitioners' objections, allowing the courts to avoid unnecessary constitutional decisions.”
Am. Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 766 n.6 (D.C. Cir. 1997). “[A] reviewing court owes
no deference to the agency's pronouncement on a constitutional question.” *Lead Indus. Assoc., Inc. v. EPA*, 647
F.2d 1130, 1173-74 (D.C. Cir. 1980).

1 threatened a coworker's life. *Id.*; *Admin Record* at 12-13. The petitioner threatened his
2 coworker's life by stating that "next time, I'll fucking kill you." *Admin Record* at 16, 19-20. In
3 this instance, the GRB found that the discipline levied by the supervisor, a termination, proved
4 commensurate with the violation.
5

6 The petitioner filed a *Petition for Administrative Review* because he felt "the decision
7 was wrong due to the fact that [he] does not feel that the GRB took into consideration that
8 despite my no contest plea the case was dismissed." *Pet.* at 1. Furthermore, within the *Initial*
9 *Brief*, the petitioner does not state that the *Decision* represented a clear error of judgment by
10 lacking substantial evidence or was arbitrary and capricious. However, the petitioner contends
11 that "the employer did not take his mental illness into account." *Initial Br.*, at 2. Yet, the record
12 reflects that the petitioner was bipolar, though he was not medicated because the medication
13 made him act like a "zombie." *GRB Decision* at 2. Furthermore, the petitioner attempted to
14 mitigate his action due to his mental illness, and the GRB stated,
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17 The Grievant's most compelling element of his presentation deals with a
18 condition that he feels prompted him to behave in the matter that led to his
19 termination. Although the Board finds a great weakness in their clinical
20 understanding of his condition, the Grievant's testimony provided only a reason
21 for his behavior, not an excuse. As employees of the Nation, this Board expects
22 that their employer would make reasonable accommodations to fit the needs of
23 their employees. Testimony revealed that genuine attempts in this matter have
24 been made. Regardless, the Board would also expect that any accommodations or
25 considerations must yield to the personal safety of coworkers. . . . To the
26 misfortune of the Grievant and his prospects for relief, the GRB has no grounds
27 for finding in his favor with only the sympathy of circumstance.

28 *GRB Decision* at 4. The employer suggested that the petitioner seek other employment with the
Nation, which would not affect patrons or the casino environment. *Id.* at 2. The GRB affirmed
the actions of the supervisor. The Court shall not deprive the GRB of its discretion to review
supervisory decisions. *Id.*, § 5.34a(1).

1 The Court previously acknowledged that it was “ill-equipped to substitute its opinion for
2 certain discretionary decisions of the employer,” despite having no legal obligation to defer the
3 supervisory determinations. *Sherry Fitzpatrick v. Ho-Chunk Nation et al.*, CV 04-82 (HCN Tr.
4 Ct., Feb. 20, 2006) at 14. The Supreme Court recognizes that “[w]hen reviewing administrative
5 decisions, the Trial Court plays the role of an appellate court and is not charged with finding
6 facts. The GRB, with its greater expertise and familiarity, is the appropriate body to find facts.”
7 *Funmaker*, SU 07-05 at 9; *see also* ERA, § 5.34a(2). The GRB deemed Food & Beverage
8 Manager, Georgette Marin’s disciplinary action of termination, as reasonable in light of the
9 established facts, and the Court shall not upset this determination.
10

11 **BASED UPON THE FOREGOING**, the Court upholds the *GRB Decision*.

12 The parties retain the right to file a timely post judgment motion with this Court in
13 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
14 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
15 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
16 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
17 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
18 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
19 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*
20 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*
21 *R. App. P.*].” *HCN R. Civ. P.* 61.
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Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



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IT IS SO ORDERED this 6th day of August 2009, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Amanda L. Rockman
Associate Trial Court Judge