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

**Marilyn LaMere,**  
Petitioner,

v.

Case No.: **CV 08-84**

**Ho-Chunk Nation, Ho-Chunk Nation  
Casino Table Games Dept., and Amy Kirby,**  
Respondents.

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**ORDER  
(Affirming)**

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**INTRODUCTION**

15 The Court must determine whether to uphold the decision of the Grievance Review  
16 Board (hereinafter GRB). The Court affirms the agency decision due to the presence of  
17 substantial evidence to support the decision, and the decision was not arbitrary and capricious.  
18 The analysis of the Court follows below, including the ramifications of this judgment.

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**PROCEDURAL HISTORY**

22 The petitioner, Marilyn LaMere, filed her *Petition for Administrative Review* (hereinafter  
23 *Petition*) on November 21, 2008. See EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA),  
24 6 HCC § 5.35c; see also *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ.*  
25 *P.*), Rule 63(A)(1)(a). On November 26, 2008, the Court entered the *Scheduling Order*, setting  
26 forth the timelines and procedures to which the parties should adhere during the pendency of the  
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1 appeal. In response, the respondents submitted the administrative record on December 5, 2008.  
2 *See HCN R. Civ. P. 63(D).*

3 The Court entered an amended *Scheduling Order* on January 26, 2009. The petitioner  
4 next filed a timely *Initial Brief* on February 23, 2009. *Id.*, Rule 63(E). The respondent filed a  
5 timely *Response Brief* on March 25, 2009. *Id.* The petitioner requested an extension to file its  
6 reply on April 2, 2009. The petitioner filed her timely *Reply Brief* on April 6, 2009. *Id.* The  
7 petitioner requested that an *Oral Argument* be held at the discretion of the Court. Rule 63(G). On  
8 May 28, 2009, a *Notice of Hearing* was mailed to the parties, informing them of the date and  
9 time of the *Oral Argument Hearing*. On June 18, 2009 at 10:00 CDT, the Court convened the  
10 *Oral Argument Hearing*. The following parties were in attendance: Department of Justice  
11 (hereinafter DOJ) Attorney Wendi Huling, on behalf of the Ho-Chunk Nation (hereinafter HCN),  
12 HCN Table Games Department, and Amy Kirby; Attorney JoAnn Jones, on behalf of the  
13 petitioner; and Marilyn LaMere, petitioner.  
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## 17 **APPLICABLE LAW**

### 18 19 **CONSTITUTION OF THE HO-CHUNK NATION**

#### 20 **Art. V - Legislature**

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

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

#### 26 **Art. VI - Executive**

27 **Sec. 1. Composition of the Executive.**  
28

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

8 Art. VII - Judiciary

9 Sec. 7. Powers of the Supreme Court.

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

13 HO-CHUNK NATION JUDICIARY ESTABLISHMENT AND ORGANIZATION ACT, 1  
14 HCC § 1

15 Subsec. 5. Rules and Procedures.

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

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

22 DEPARTMENT OF PERSONNEL ESTABLISHMENT AND ORGANIZATION ACT OF  
23 2001, 1 HCC § 10

24 Subsec. 4. Functions. The Department of Personnel shall:

25 a. Manage the implementation of personnel codes and regulations.

26 b. Ensure adherence to consistent policies and procedures.

27 c. Promulgate employee handbooks with pertinent personnel policies and  
28 procedures.

EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

Ch. 1 - General Provisions

Subsec. 4. Responsibilities.

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

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

5 Subsec. 31. Employee Discipline.

6  
7 a. Depending on the nature of the circumstances of an incident, discipline will  
8 normally be progressive and should bear a reasonable relationship to the violation. Based on the  
9 severity of the employee conduct, progressive discipline may not be applicable. Supervisors  
10 imposing discipline shall afford Due Process to the employee prior to suspending or terminating  
11 any employee. Types of discipline include:

10 (1) Suspension.

11 Subsec. 33 Grievances

12  
13 a. Employees may seek administrative and judicial review only for alleged  
14 discrimination and harassment.

15 Subsec. 34. Administrative Review Process.

16 a. Policy.

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

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

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

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

30 d. Request for a Hearing. An employee must request a hearing within five (5)  
31 business days of the date the disciplinary action was taken. At the time the employee requests a

1 hearing, he or she must inform the Department of Personnel if he or she is to be represented by  
2 an attorney. If so, the attorney must also file for an appearance with Department of Personnel  
3 within five (5) days of the date the employee requested a hearing. Failure to request the hearing  
4 within this time frame will result in the forfeiture of a hearing by the Board.

5 e. Witnesses and Evidence.

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

10 f. Hearing Procedure.

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

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

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

23 Subsec. 35. Judicial Review.

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

28 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.

1 The Trial Court shall not exercise *de novo* review of Board decisions. The Trial Court may only  
2 set aside or modify a Board decision if it was arbitrary or capricious.

3 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

5 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request  
6 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*  
7 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.

8 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not  
9 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or  
10 conclusions or make additional findings or conclusions, amending the judgment accordingly.  
11 The motion may be made with a motion for a new trial. If the Court amends the judgment, the  
12 time for initiating an appeal commences upon entry of the amended judgment. If the Court  
13 denies a motion filed under this Rule, the time for initiating appeal from the judgment  
14 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  
15 motion, and the Court does not decide a motion under this Rule or the judge does not sign an  
16 order denying the motion, the motion is considered denied. The time for initiating the appeal  
17 from judgment commences in accordance with the *Rules of Appellate Procedure*.

18 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*  
19 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*  
20 must be based upon new information that has come to the party's attention that, if true, could  
21 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
22 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  
23 Rule, the time for initiating an appeal from the judgment commences when the Court denies the  
24 motion on the record or when an order denying the motion is entered, whichever occurs first. If  
25 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the  
26 motion or the judge does not sign an order denying the motion, the motion is considered denied.  
27 The time for initiating an appeal from judgment commences in accordance with the *Rules of*  
28 *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

1 have proper service and did not appear in the action; or (4) the judgment has been satisfied,  
2 released, discharged or is without effect due to a judgment earlier in time.

3 Rule 61. Appeals.

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

8 Rule 63. Judicial Review of Administrative Adjudication.

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

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

13 a. EMPLOYMENT RELATIONS ACT OF 2004

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

21 (D) The commission or board, designated as the respondent, must transmit the administrative  
22 record to the Court within fifteen (15) days after receipt of the *Petition for Administrative*  
23 *Review*. The administrative record shall constitute the sole evidentiary record for judicial review  
24 of the agency decision . . . .

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

(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<sup>1</sup>

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3 1. The petitioner, Marilyn LaMere, is an enrolled member of the Ho-Chunk Nation, Tribal  
4 ID # 439A001350, and she maintains a mailing address of 75 Pilgrim Drive, Wisconsin Dells,  
5 WI 53965. The petitioner is employed as a Casino/Table Games Dealer at Ho-Chunk Casino,  
6 Hotel & Convention Center, a division within the Ho-Chunk Nation Department of Business  
7 (hereinafter Business Department), located at S3214 Highway 12, Baraboo, WI 53913. *See*  
8 DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c.  
9

10 2. The Business Department is an executive department with principal offices located on trust  
11 lands at Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls,  
12 WI. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b).  
13

14 3. The Ho-Chunk Nation (hereinafter HCN or Nation) is a federally recognized Indian tribe.  
15 *See* 73 Fed. Reg. 18533 (Apr. 4, 2008).

16 4. Ho-Chunk Casino, Hotel & Convention Center, Table Games Department, employs Ms.  
17 Amy Kirby as a supervisor, specifically a supervisor of Ms. LaMere.

18 5. On May 19, 2008, the petitioner was suspended without pay for one (1) day due to  
19 violations of the EMPLOYMENT RELATIONS ACT. *Administrative Record*, GRB-056-08-H (GRB,  
20 Oct. 22, 2008) at 61.  
21

22 6. One June 6, 2008, the petitioner timely filed a grievance containing a charge of  
23 harassment, to the GRB. *In the Matter of Marilyn LaMere v. Table Games Department, Amy*  
24 *Kirby et. al*, GRB-056-08-H (GRB Sep. 9, 2008) at 1 (hereinafter *Decision I*); *see also* ERA, §  
25 5.34d. The petitioner requested “[The] report . . . [be] expunged from [her] file . . . , [the] day of  
26

27 <sup>1</sup> The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally  
28 refrains from making independent factual findings. ERA, § 5.35e. Unless otherwise clearly indicated, the below  
findings of fact constitute relevant findings of the administrative agency for purposes of this judgment as articulated  
within the administrative decision.

1 suspension, reimbursed . . . , with tokens, [paid] by Management . . . , compensation for Memorial  
2 Day weekend . . . , and Amy Kirby transferred to a position she can handle.” *Ho-Chunk Nation*  
3 *Grievance Form* at 1.

4 7. On September 9, 2008, the GRB conducted a hearing to determine whether the GRB  
5 should overturn a previous July 24, 2008 decision dismissing the case, and to determine whether  
6 or not the case should proceed to a full hearing. *Decision I* at 1.

8 8. The GRB determined that the previous July 24, 2008 ruling, dismissing the case due to  
9 Ms. LaMere’s failure to appear should be overturned and rescheduled the Grievance Case for a  
10 full GRB hearing. *Id* at 2. The administrative hearing concerning the alleged harassment  
11 occurred on October 22, 2008.

13 9. The GRB held that a majority of Ms. LaMere’s testimony focused on her dissatisfaction  
14 with management. *In the Matter of Marilyn LaMere v. Table Games Department, Amy Kirby,*  
15 *GRB-056-08-H (GRB, October 22, 2008)* at 6 (hereinafter *Decision II*).

16 11. Although, she indicated that she was dissatisfied, she did not reveal an “unreasonably  
17 intimidating, hostile, and objectively offensive working environment.” *Id.*

19 12. Ms. LaMere spoke regarding two (2) incidents, which she spoke to management  
20 regarding their inability to perform their jobs. One incident transpired at Bronco Billy’s tavern,  
21 and it was initiated by Ms. LaMere responding to perceived inadequacies of her supervisor. *Id.*  
22 at 3; *Admin. Record* at 27-39. The other incident transpired at the workplace, in a hallway,  
23 whereby Ms. LaMere poignantly explained to a presumably new supervisor that she is a veteran  
24 employee who needed little supervision. *Id.* at 2; *Admin. Record* at 70-76.

26 14. The GRB held that Ms. LaMere failed to meet the burden of proof. *Id.*

1  
2 **DECISION**

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

10 Executive agencies may engage in formal on the record adjudication, resulting in the  
11 promulgation of rules through the formation of a body of case precedent. *See, e.g., Dickinson v.*  
12 *Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998);  
13 *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing adjudicative  
14 rulemaking, as well as other forms of agency action, courts begin by recognizing that Congress  
15 intended the Administrative Procedure Act to "establish[ ] a scheme of 'reasoned  
16 decisionmaking.'"<sup>3</sup> *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*  
17 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered  
18 analysis, determining whether the adjudicative rule satisfies a substantial evidence standard, and,  
19 if so, whether the rule escapes a designation of arbitrary and capricious.<sup>4</sup>  
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23 \_\_\_\_\_  
24 <sup>2</sup> The full text of *Baldwin* appears at [www.ho-chunknation.com/?PageID=156](http://www.ho-chunknation.com/?PageID=156).

25 <sup>3</sup> The HCN Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g.,*  
26 GAMING ORDINANCE, § 1101(c)(v); *compare* 5 U.S.C. § 706.

27 <sup>4</sup> The ERA directs that "[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and  
28 capricious." ERA, § 5.35e; *but cf.* AMENDED & RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION  
(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 The two (2) inquiries represent "'separate standards.'" *Bowman*, 419 U.S. at 284 (quoting  
2 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently, a court  
3 "may properly conclude[ ] that, though an agency's finding may be supported by substantial  
4 evidence, . . . it may nonetheless reflect an arbitrary and capricious action." *Bowman*, 419 U.S.  
5 at 284. In such an event, the Court would afford no deference to the adjudicative rule of the  
6 agency precisely because the rule could not withstand the more deferential arbitrary and  
7 capricious standard.  
8

9 The substantial evidence standard has no application beyond the review of "record-based  
10 factual conclusion[s]," and only in unusual circumstances will agency action surviving a  
11 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In  
12 performing the second-tier of analysis, arbitrary and capricious review,  
13

14 [a] reviewing court must "consider whether the decision was based on a  
15 consideration of the relevant factors and whether there has been a clear  
16 error of judgment. . . . Although this inquiry into the facts is to be  
17 searching and careful, the ultimate standard of review is a narrow one.  
18 The court is not empowered to substitute its judgment for that of the  
19 agency." The agency must articulate a "rational connection between the  
20 facts found and the choice made." While [a court] may not supply a  
21 reasoned basis for the agency's action that the agency itself has not given,  
22 [a court] will uphold a decision of less than ideal clarity if the agency's  
23 path may reasonably be discerned.

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

25 Typically, however, a court will suspend its review after ascertaining the presence of  
26 substantial evidence. "Substantial evidence is more than a mere scintilla. It means such relevant  
27 evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co. v.*  
28 *Labor Bd.*, 305 U.S. 197, 229 (1938). The relevant evidence must retain probative force, and,  
therefore, "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.*  
at 230. And, a court must examine the evidence supporting the decision against "the record in its

1 entirety, including the body of evidence opposed to the [agency's] view." *Universal Camera*  
2 *Corp. v. Labor Bd.*, 340 U.S. 474, 488 (1951); *see also* 5 U.S.C. § 706.

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

8 In this regard,

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

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

21           To reiterate, a court must determine whether the challenged administrative action rests  
22 upon substantial evidence and escapes a characterization of arbitrary and capricious.  
23 Furthermore, the need for reasoned decision-making and the consistent application of resulting  
24 decisions underlie and overarch the statutorily based analysis. Apart from this predominate  
25 approach to agency review, instances exist when a court must designate an administrative  
26 decision as either contrary to law or otherwise not deserving of deferential treatment.

27           As noted above, the ERA attempts to limit the appellate role "to set[ting] aside or  
28 modify[ing] a Board decision if it was arbitrary and capricious." ERA, § 5.35e. The ERA does

1 not articulate the Court's ability to set aside an agency decision that proves "contrary to law."  
2 *Compare* GAMING ORDINANCE, § 1101(c)(v). Such a seemingly broad recognition of judicial  
3 authority, however, does not invite or permit a *de novo* review in the context of a typical  
4 administrative review. That is to say, a court cannot bypass the obviously deferential standards  
5 of review when it perceives an isolated question of law. Rather, a court may only set aside an  
6 agency action as contrary to law when the agency clearly acts outside the parameters of its  
7 legislatively delegated authority. For example, this Court would not need to defer to a GRB  
8 decision that claimed to determine an enrollment issue under the guise of a Ho-Chunk preference  
9 grievance. Such a decision would certainly be struck down as contrary to law regardless of  
10 whether the HCN Legislature incorporated this provision in the standard of review paragraph.  
11  
12 *See Lonetree*, SU 07-04 at 4 (noting appellate agreement with this premise).

14       Nowhere is this judicial authority more obvious than when a court encounters an  
15 administrative agency's efforts to interpret and apply constitutional principles. "[C]onstitutional  
16 questions obviously are unsuited to resolution in administrative hearing procedures and,  
17 therefore, access to the courts is essential to the decision of such questions." *Califano v.*  
18 *Sanders*, 430 U.S. 99, 109 (1977)<sup>5</sup> The HCN Legislature lacks the ability to confer  
19 constitutional adjudication authority upon an executive administrative agency, and the ERA does  
20 not purport to do so. *Lonetree*, SU 07-04 at 4-6. Any such attempt would prove inconsistent  
21  
22  
23

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24  
25 <sup>5</sup> 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*  
27 *Univ.*, 462 U.S. 294, 308 (3rd Cir. 2006). "To be sure, administrative agencies . . . cannot resolve  
28 constitutional issues. Instead, the 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 with the theoretical and legal underpinnings of administrative power. *See Baldwin*, CV 01-16, -  
2 19, -21 (HCN Tr. Ct., Oct. 3, 2003) at 15 n.5.

3 In the instant matter, the GRB had to “determine if Ms. LaMere has provided sufficient  
4 evidence to meet her burden of proof to support her claim of harassment as defined in 6 HCC § 5  
5 EMPLOYMENT RELATIONS ACT.” *Decision II* at 1. The GRB determined that “the Grievant failed  
6 to meet her ‘burden of proof’ to suggest harassment as defined by the Nation’s employment  
7 law.” *Id* at 1. Thereby prompting the petitioner to file a *Petition for Administrative Review* based  
8 on “[e]vidence of incorrect legal conclusions . . . [and because] GRB did not provide  
9 documentation (requested by petitioner of the petitioner’s personnel records . . .” *Pet.* at 1.  
10 Within the *Initial Brief* and *Reply Brief*, the petitioner states that *Decision I* was arbitrary and  
11 capricious, but offers no clear explanation as to why the GRB decision is arbitrary and  
12 capricious.  
13

14  
15 The Court is not in the position to make a determination regarding the petitioner’s claim  
16 that the GRB came to an incorrect legal conclusion. The Supreme Court recognizes that “[w]hen  
17 reviewing administrative decisions, the Trial Court plays the role of an appellate court and is not  
18 charged with finding facts. The GRB, with its greater expertise and familiarity, is the appropriate  
19 body to find facts.” *Funmaker*, SU 07-05 at 9; *see also* ERA, § 5.34a(2). Therefore, as previously  
20 decided, the Court is limited to evaluating the record-based, factual conclusions. *Baldwin*, CV 01-  
21 16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 15.  
22

23 Applying the two-tiered analysis to the adjudicative record, this Court must find that the  
24 GRB decision was supported by substantial evidence and not arbitrary and capricious. First, the  
25 *Administrative Records*, contains numerous documents, submitted both by the employer and the  
26 grievant, concerning Ms. LaMere’s behavior and conduct in the workplace. Ms. LaMere failed to  
27 produce any documentation or witness statements to contradict these documented violations and  
28

1 substantiate her claim of harassment. Ms. LaMere claims the GRB failed to address her requests  
2 for documents for the hearing. *Petitioner's Initial Brief* at 4. Under the, EMPLOYMENT  
3 RELATIONS ACT, the GRB is not authorized to order parties to engage in discovery, access to  
4 personnel records is an employee right covered under a different section of the EMPLOYMENT  
5 RELATIONS ACT.<sup>6</sup>

6  
7 Second, the GRB decision was not arbitrary and capricious since the GRB articulated a  
8 “rational connection with between the facts found and the choice made”. *Baldwin*, CV 01-16, -  
9 19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 15. After a full hearing, the GRB found that the  
10 “Grievant’s testimony contained only a miniscule amount of testimony relevant to harassment.”  
11 *Decision II* at 6. Further finding that the Grievant failed to establish that the complaints were  
12 creating an “unreasonably intimidating, hostile, and objectively offensive work environment,”  
13 thereby concluding Ms. LaMere failed to establish the burden of proof standard. *Id.*

14  
15 The Court previously acknowledged that it was “ill-equipped to substitute its opinion for  
16 certain discretionary decisions of the employer,” despite having no legal obligation to defer the  
17 supervisory determinations. *Sherry Fitzpatrick v. Ho-Chunk Nation et al.*, CV 04-82 (HCN Tr.  
18 Ct., Feb. 20, 2006) at 14. The Supreme Court recognizes that “[w]hen reviewing administrative  
19 decisions, the Trial Court plays the role of an appellate court and is not charged with finding facts.  
20 The GRB, with its greater expertise and familiarity, is the appropriate body to find facts.” *Funmaker*,  
21 SU 07-05 at 9; *see also* ERA, § 5.34a(2). The GRB logically reasoned that Ms. LeMere failed to  
22 meet the burden of proof standard and dismissed the case. This Court must affirm the GRB decision  
23 since it is not arbitrary and capricious.  
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27  
28 <sup>6</sup> 6 HCC § 5, Subsection 6. Employee Rights.

a. Access to Employee Information. All employees may review his/her personnel file by submitting a written request to the Department of Personnel.

1 The parties retain the right to file a timely post judgment motion with this Court in  
2 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.  
3 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme  
4 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*  
5 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*  
6 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order  
7 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or  
8 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*  
9 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*  
10 *R. App. P.*].” *HCN R. Civ. P.* 61.

11  
12  
13 **IT IS SO ORDERED** this 18<sup>th</sup> day of September 2009, by the Ho-Chunk Nation Trial  
14 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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18 Honorable Amanda L. Rockman  
19 Associate Trial Court Judge  
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Ho-Chunk Nation Court System  
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