

1 See HCN R. Civ. P. 63. On May 15, 2009, the respondent filed a *Motion to Dismiss With*
2 *Prejudice*, as the petitioner had not filed an initial brief. On May 19, 2009, the petitioner filed a
3 *Motion for Extension of Time to File Petitioner's Brief*, as there had been some discrepancy on
4 where the respondents mailed the Administrative Record. Subsequently, the Court scheduled a
5 *Status Hearing* for 10:00 a.m. CDT on June 19, 2009. At the *Hearing* the Court dismissed the
6 respondents' motion while granting the petitioner's motion. On July 16, 2009, the petitioner
7 submitted a *Brief In Support Of Appeal*. See HCN R. Civ. P. 63(E). The respondent filed a timely
8 *Response Brief* on August 17, 2009. *Id.* Neither party requested the ability to present oral
9 argument, prompting the Court to determine the matter on the documentary materials. *Id.*, Rule
10 63(G); *Scheduling Order* at 3.
11
12

13 **APPLICABLE LAW**

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

15 **Art. VI - Executive**

16 **Sec. 1. Composition of the Executive.**

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

24 **Art. VII - Judiciary**

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

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

1 Art. X – Bill of Rights

2 Sec. 1. Bill of Rights.

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

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

6 STATUTE OF LIMITATIONS & COMMENCEMENT OF CLAIMS ACT, 2 HCC § 14

7 Subsec. 4. Civil Action and Time Limitation. Civil actions may be commenced only within
8 the periods as prescribed here:

9 e. All employment actions must be filed in the Trial Court within 30 calendar days
10 of the final administrative grievance review decision by the Grievance Review Board.

11 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

12 Subsec. 31. Employee Discipline.

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

18 (1) Suspension.

19 (a) Under no circumstances will a suspension exceed ten (10) working days.

20 (b) It may be necessary to restrict an employee immediately from performing
21 duties at the work site. These circumstances usually involve potential danger to the
22 employee, co-workers or the public, or the employee's inability to discharge assigned
23 duties satisfactorily. In these situations, the following procedure is to be followed:

24 1 Once the employee is suspended, the supervisor taking the action to
25 suspend an employee will immediately notify the Executive Director and
26 prepare a written statement of action taken and the reasons for such action.

27 2 The Executive Director will prepare, together with the supervisor, the
28 statement of charges and document any supporting evidence.

3 As soon as possible after the initial action, the Executive Director will
prepare written notification to the affected employee.

(c) In no event will the use of paid time be allowed during a period of suspension
without pay. Should a paid holiday occur during a period of suspension without pay, the

1 suspension period shall be extended by the number of holidays occurring during the
2 suspension period.

3 (d) All suspensions shall be unpaid. No employee may be disciplined by issuance
4 of a suspension with pay.

5 (e) A suspended employee who has been vindicated of any wrongdoing shall be
6 compensated for lost wages and benefits.

7 b. The supervisor shall notify the Department of Personnel of all disciplinary actions.

8 Subsec. 34. Administrative Review Process.

9 a. Policy.

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

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

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

20 (4) Employees electing to appeal to the Board and to the Court may do so freely and
21 without fear of reprisal. This policy and procedure shall be the exclusive remedy for
22 employment review of a disciplinary action.

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

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

f. Hearing Procedure.

(1) Review of Record. The Board will convene to review the records submitted to the
Board prior to appearance by the grievant and supervisor to present their cases. Staff of the

1 Department of Personnel shall also appear and be available to advise all participants with regard
2 to policy and procedure.

3 (2) Supervisor's Presentation. The supervisor or his or her representative shall present to
4 the Board the reasons why management believes that the disciplinary action should be upheld.
5 The supervisor or representative may call witnesses at this time. This presentation shall not
6 exceed two hours without the Board's permission.

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

11 (4) Questions.

12 (a) Both parties shall have the right to ask questions of any witnesses.

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

17 g. Proceedings of the Board. At the commencement of a hearing before the Grievance
18 Board of Review, the Department of Personnel will discuss with the Board their responsibilities
19 and obligations including, but not limited to, the following:

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

25 h. Scope of Authority and Limited Waiver of Sovereign Immunity. The decision of the Board
26 shall direct a remedy or remedies consistent with the findings of the Board, enforceable by the
27 Executive Director of Personnel, subject to the following considerations and limitations:

28 1. Employees bear the burden of proof to show by a preponderance of the evidence
that they have been subject to improper disciplinary action, harassment, or discrimination.

Subsec. 35. Judicial Review.

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.

1 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

7 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
8 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
9 conclusions or make additional findings or conclusions, amending the judgment accordingly.
10 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
11 time for initiating an appeal commences upon entry of the amended judgment. If the Court
12 denies a motion filed under this Rule, the time for initiating appeal from the judgment
13 commences when the Court denies the motion on the record or when an order denying the
14 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
23 commences upon entry of the modified judgment. If the Court denies a motion filed under this
24 Rule, the time for initiating an appeal from the judgment commences when the Court denies the
25 motion on the record or when an order denying the motion is entered, whichever occurs first. If
26 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the
27 motion or the judge does not sign an order denying the motion, the motion is considered denied.
28 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.

1 Rule 61. Appeals.

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

6 Rule 63. Judicial Review of Administrative Adjudication.

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

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

11 a. EMPLOYMENT RELATIONS ACT OF 2004

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

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

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

28 (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.

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

(J) The Court maintains discretion to grant continuances upon a showing of good cause.

1 (L) Either party may appeal the Trial Court’s decision to the Supreme Court.
2

3 **FINDINGS OF FACT¹**

4 1. The petitioner, Kyle M. Funmaker, is employed as a Bookkeeping Supervisor with the
5 Ho-Chunk Nation Department of Treasury (hereinafter Treasury Department), located on trust
6 lands at S2845 White Eagle Road, Baraboo, WI 53913. The Treasury Department is an
7 executive department with principal offices located on trust lands at Ho-Chunk Nation
8 Headquarters, W9814 Airport Rd., Black River Falls, WI 54615. *See* CONSTITUTION OF THE HO-
9 CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b) The Ho-Chunk Nation (hereinafter
10 HCN or Nation) is a federally recognized Indian tribe. *See* 74 Fed. Reg. 40218 (Aug. 11, 2009).
11
12

13 2. The respondent, GRB, is an “agency within the [Ho-Chunk Nation] Department of
14 Personnel,” an executive department with principal offices located at HCN Headquarters. *Janet*
15 *Funmaker v. Libby Fairchild, in her capacity as Executive Dir. at HCN Dep’t of Pers., et al.*, SU
16 07-05 (HCN S. Ct., Aug. 31, 2007) at 4; *see also* CONST., ART. VI § 1(b).
17

18 4. On November 13, 2008, the petitioner filed a grievance with the HCN Personnel
19 Department “following a determination of Accounts Payable (AP) Division of the Treasury
20 Department to suspend Ms. Kyle Funmaker.” *Decision*, GRB-113.08S (GRB, Feb. 17, 2008)
21 (hereinafter *Decision*) at 1; *see also* ERA, § 5.34d.
22

23 5. On February 11, 2009, the GRB conducted a hearing. *Id.* at 1.
24
25
26

27 ¹ The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally
28 refrains from making independent factual findings. EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA), 6
HCC § 5.35e; *but see Wayne Falcon v. GRB*, SU 08-04 (February 6, 2009) at 14. Unless otherwise clearly indicated,
the below findings of fact constitute relevant findings of the administrative agency for purposes of this judgment as
articulated within the administrative decision. The Court shall only propose alternative findings of fact in the event
that the agency’s factual rendition is not supported by substantial evidence. *See infra* pp. 14-15.

1 6. The GRB dismissed the charges relating to the alleged absence of progressive discipline
2 and lack of due process, after the Personnel Department’s motion for summary judgment.² *Id.* at

3 5.

4
5 7. Neither the Treasury Department nor its supervisors or officials provided a presentation
6 before the GRB. *See* ERA § 5.34f(2).

7 8. The GRB failed to include any discernible findings of fact in its decision.

8
9 **DECISION**

10 In deciding to remand the instant case to the GRB the Court focuses on three (3) aspects
11 of the *Decision* which were deficient. First, the GRB failed to utilize proper procedure in
12 conducting the *Hearing*. Also, the GRB incorrectly used summary judgment in the *Hearing*.
13 Finally, the GRB failed to include findings of fact. While the Court notes that it could have
14 remanded the instant case to the GRB for any of the aforementioned deficiencies the Court finds
15 it necessary to discuss all three in an effort to minimize further problems with GRB decisions.
16

17
18 The GRB failed to follow the explicit dictates of the ERA pertaining to the procedure of
19 GRB hearings. The ERA explicitly sets forth the proper procedure for GRB hearings as follows:

20 f. Hearing Procedure.

21 (1) Review of Record. The Board will convene to review the records
22 submitted to the Board prior to appearance by the grievant and supervisor
23 to present their cases. Staff of the Department of Personnel shall also

24 ² The Court commented on the usage of progressive discipline, as prescribed in predecessor litigation, in the following manner:

25 [T]he Court notes its disapproval of equating prior and current disciplinary measures as resulting from
26 inefficient, incompetent or negligent performance of duties, PERSONNEL MANUAL, Ch. 12, Part C, No. 1, p. 46,
27 for the purpose of attempting to establish progressive discipline. The focus correctly remains upon whether the past discipline arose from a “similar past offense,” *id.* at 48, and not from actions capable of falling under a general catchall provision.

28 *Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24, 2001) at 20 n.7; *see also Daniel M. Brown v. James Webster, HCN Executive Dir. of Bus.*, CV 04-38-40 (HCN Tr. Ct., May 10, 2006) at 34 (offering further clarification of the permissible application of progressive discipline, disagreeing with employer’s linkage to only “repeated identical instances of unacceptable conduct”).

1 appear and be available to advise all participants with regard to policy and
2 procedure.

3 (2) Supervisor's Presentation. The supervisor or his or her representative
4 shall present to the Board the reasons why management believes that the
5 disciplinary action should be upheld. The supervisor or representative may
6 call witnesses at this time. This presentation shall not exceed two hours
7 without the Board's permission.

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

13 *Id.*, § 5.34f. In the instant case, the GRB required the grievant to present her case first. *Decision*
14 at 2. The intentions of the HCN Legislature are clear. By its use of the word *shall*, the HCN
15 Legislature sought to mandate that the supervisor present their case first. *Id.*, § 5.34f(2-3). By
16 requiring the employee to present her case first, the GRB deprived the grievant of certain rights
17 afforded by the ERA. An employee has a right to a hearing before the GRB. *Id.*, § 5.34c. Since
18 the HCN Legislature provided the procedure for GRB hearings, one can infer that the Legislature
19 intended a hearing that conformed to the mandated procedures. Furthermore, the failure to follow
20 proper procedure denied the plaintiff the right to question the person who suspended her. *Id.*, §
21 5.34f(4)(a). If the Personnel Department had presented their case first, the employee's direct
22 supervisor would surely have testified, thus the employee would have had the right to question
23 her.

24 The GRB also ran afoul by issuing summary judgment in the instant case. Summary
25 judgment is appropriate in cases where there is no genuine issue of material fact and the moving
26 party is entitled to judgment as a matter of law. *See Alexandra Cichowski v. Four Winds Ins.*
27 *Agency, LLC*, CV 01-90 (HCN Tr. Ct., Dec. 15, 2003), *aff'd*, SU 04-01 (HCN S. Ct., Aug. 20,
28 2004) (citing *HCN R. Civ. P.* 55). A fact is material if it has the potential of determining the

1 outcome of the litigation. *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008). The GRB
2 must “view the entire record in the light most hospitable to the party opposing summary
3 judgment, indulging all reasonable inferences in that party’s favor,’ but paying no heed to
4 ‘conclusory allegations, improbable inferences, [or] unsupported speculation.’ If no genuine
5 issue of material fact emerges, then the motion for summary judgment may be granted.”
6 *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).³

8 In the case at bar, the grievant claims that she was not afforded due process. *Decision* at
9 4; *see also* CONST., ART. X, § 1(a)(8); ERA, § 5.31a. She claims that when she entered her
10 supervisor’s office she was handed paperwork and told she was being suspended for the
11 “Christmas Check” incident. *Decision* at 4. On the other hand, the Personnel Director stated, he
12 “doesn’t believe the Grievant demonstrated any clear violation on the part of her supervisors.”
13 *Id.* There was no other testimony. The fact of whether or not the grievant was afforded notice
14 and a meaningful opportunity to be heard is material, as it has the potential to determine the
15 outcome of the litigation. *Maymi*, 515 F.3d at 25. This fact has the potential to determine the
16 outcome since the success of the due process claim rests upon its determination. The existence of
17 a genuine issue of material fact is clear, thus the GRB’s use of summary judgment was improper.

20 Regarding the issue of due process. “constitutional questions obviously are unsuited to
21 resolution in administrative hearing procedures and, therefore, access to the courts is essential to
22 the decision of such questions.” *Willard LoneTree v. Larry Garvin, in his official capacity as*
23 *Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007) at 15, *aff’d*, SU

27 ³ The ERA does not indicate by which rules the GRB is bound, although it is clear that the GRB is not bound by the
28 *Federal Rules of Evidence*. ERA, § 5.34g(4). Nonetheless, by utilizing summary judgment in this instance, the GRB
is assuming a role quasi-judicial in nature. Thus, in an effort to examine the prudence of summary judgment in this
instance, the Court can only look to case law that analyzes court, rather than administrative agency, use of summary
judgment. The Court has adopted the federal standards outlined in the cited First Circuit decisions. *See Peterson v.*
HCN Compliance Div., CV 98-51 (HCN Tr. Ct., June 22, 1999) at 3-4.

1 07-04 (HCN S. Ct., Oct. 8, 2007) (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).⁴ The
2 HCN Legislature lacks the ability to confer constitutional adjudication authority upon an
3 executive administrative agency, and the ERA does not purport to do so. Any such attempt
4 would prove inconsistent with the theoretical and legal underpinnings of administrative power.
5
6 *See Regina K. Baldwin et al. v. Ho-Chunk Nation et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Oct. 3,
7 2003) at 15 n.5.⁵

8 The Court would normally proceed to independently assess whether the respondent
9 afforded the grievant pre-deprivation minimal procedural due process. *See* CONST., ART. X, §
10 1(a)(8). The Court, however, cannot do this as there is a lack of a complete administrative
11 proceeding. In essence we only have one side of the story, the grievant's. If the Court were to
12 assess the due process question at this juncture, the grievant would prevail as there is no
13 testimony to contradict her assertions.⁶ Nevertheless, the Court seeks to make an informed
14 inquiry as to the presence, or lack thereof, of minimal pre-deprivation procedural due process.
15
16

17 ⁴ The following federal circuit court assessments reinforce this unassailable premise. “[A]s a general rule, an
18 administrative agency is not competent to determine constitutional issues.” *Petruska v. Gannon Univ.*, 462 U.S.
19 294, 308 (3rd Cir. 2006). “To be sure, administrative agencies . . . cannot resolve constitutional issues. Instead, the
20 premise of administrative exhaustion requirements for petitioners with constitutional claims is that agencies may be
21 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).

22 ⁵ The Court acknowledges the HCN Supreme Court’s criticism of the Court’s seeming over-reliance upon external
23 case law rather than tribal case law. The Court has addressed this concern in a previous decision. *See Janet*
Funmaker v. GRB, CV 08-37 (HCN Tr. Ct., Dec. 19, 2008) at 10 n.7.

24 ⁶ The Court notes that the Administrative Record did include an *HCN Due Process Form* (hereinafter *Form*). *Admin.*
Record at 38. The Court finds the *Form* unpersuasive. The Court has previously determined that an employee is
25 entitled to a pre-deprivation hearing. *See Gary Lonetree, Sr. v. John Holst, as Slot Dir., et al.*, CV 97-127 (HCN Tr.
26 Ct., Sept. 24, 1998) at 10, *aff’d*, SU 98-07 (HCN S. Ct., Apr. 28, 1999) (citing *Armstrong v. Manzo*, 380 U.S. 545,
552 (1965)); *Summer Dawn Dick v. Jonnette Pettibone*, CV 08-47 (HCN Tr. Ct., Jan. 26, 2009) at 10; *Sherry*
Fitzpatrick v. Ho-Chunk Nation et al., CV 04-82 (HCN Tr. Ct., Feb. 20, 2006) at 16. The *Form* provided in the
27 Administrative Record provides virtually no insight as to what occurred in the alleged meeting. All the *Form*
28 requires is that the supervisor fill in the blanks with as little information as possible. Nowhere can the Court
ascertain what was said by the parties at the meeting. Furthermore, the individuals who hold supervisory positions
within the Ho-Chunk Nation know that the *Form* must be filled out in order to show that they provided the
employee with due process. Upon examination of the *Form* provided in the Administrative Record, it would seem
that any minimalistic attempt at completing the *Form* will unequivocally prove that an employee has been afforded
due process. It is contrary to the notion of “fundamental fairness,” which has roots within *hocqk* tradition and

1 Furthermore, the GRB neglects to make concrete findings of fact in its decisions. The
2 GRB has been admonished by the Court on two (2) recent occasions regarding this matter. *See*
3 *Kenneth Lee Twin v. GRB*, CV 08-79, -83 (HCN Tr. Ct., Sept. 3, 2009) at 16-17; *Funmaker*, CV
4 08-37 at 8 n.3. In the instant case, the GRB does chronologically summarize the testimony
5 presented at the February 11, 2008 hearings over the course of three (3) pages, but maintains a
6 level of neutrality throughout the narration. *Decision* at 2-4. The GRB never truly attempts to
7 make factual findings even within the quoted decisional section. The GRB, however, is charged
8 with “describ[ing] the facts of the case and determin[ing] whether the facts support a violation of
9 the Employment Relations Act.” ERA, § 5.34g(7). Consequently, the GRB may not simply set
10 forth conflicting evidence without determining factual validity, including credibility of
11 witnesses. *See Patricia A. Lowe-Ennis et al. v. HCN TERO Comm’n*, CV 04-06-07 (HCN Tr.
12 Ct., Feb. 7, 2006). The GRB makes no effort to explain why it did not believe the grievant’s
13 assertion of a lack of procedural due process in the absence of contradictory testimony.

14 The HCN Legislature has pronounced that “[t]he Trial Court shall not exercise *de novo*
15 review of Board decisions. The Trial Court may only set aside or modify a Board decision if it
16 was arbitrary and capricious.”⁷ ERA, § 5.35e. The Court understands it must apply this

17
18
19
20
21 custom, that a simplistic document, with no additional testimony, should trump the oral testimony of an employee.
22 *In the Interest of the Minor Child: K.E.F.*, SU 97-03 (HCN S. Ct., Oct. 17, 1997) at 5. Therefore, the mere
completion of the *Form* cannot serve as a verification of actual due process.

23 ⁷ The ERA directs that “[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and
24 capricious.” ERA, § 5.35e. Nonetheless, the Court shall continue to engage in the two-tiered analysis due to the
25 inseparable components of the inquiry. Furthermore, some federal courts have denoted a convergence of the
26 standards, making any analytical distinction unattainable. *See, e.g., Aircraft Owners & Pilots Ass’n v. FAA*, 600
27 F.2d 965, 971 n.28 (D.C. Cir. 1979) (describing the distinction as “largely semantic”). This Court disagrees with
28 this assessment, at least in the context of formal on the record adjudication, but it reveals the interrelatedness of the
two standards. Moreover, on June 10, 2009, the HCN Legislature adopted a significantly amended version of the
TRIBAL EMPLOYMENT RIGHTS ORDINANCE (“TERO”), which omits any explicit reference to standards of judicial
review, preferring instead to simply note that “[a]ll appeals shall be brought in the Trial Court of the Ho-Chunk
Nation, pursuant to the Ho-Chunk Nation Rules of Civil Procedure.” TERO, 6 HCC § 3.25a(2); *cf.* HO-CHUNK INS.
REVIEW COMM’N ESTABLISHMENT & ORG. ACT, 1 HCC § 13.4 (lacking an articulated standard or external
reference). The *HCN R. Civ. P.* express the standard of review as follows: “The Court shall not set aside or modify
any agency decision, unless it finds that the decision was arbitrary and capricious, unsupported by substantial
evidence or contrary to law” *HCN R. Civ. P.* 63(I).

1 deferential review to any grievance. *Gale S. White v. Jean Ann Day*, SU 08-02 (HCN S. Ct.,
2 Aug. 4, 2008) at 4. The Court, however, cannot perform this function when the GRB has not had
3 a full hearing, nor has it made concrete findings of fact. The Court cannot defer to an agency
4 adjudicative decision that fails to include basic statutorily required components. ERA, § 5.34g.
5 While the Court remains cognizant of its obligation to “examine the evidence supporting the
6 decision against ‘the record in its entirety, including the body of evidence opposed to the
7 [agency’s] view,’” *Baldwin*, CV 01-16, -19, -21 at 15 (quoting *Universal Camera Corp. v. Labor*
8 *Bd.*, 340 U.S. 474, 488 (1951)), “[t]he agency must articulate a ‘rational connection between the
9 facts found and the choice made.’” *Id.* (quoting *Bowman Transp. v. Ark.-Best Freight Sys.*, 419
10 U.S. 281, 285 (1974)). In large part, the Court remains entirely unaware of the agency’s view.
11 The GRB must perform credibility determinations as the fact-finder. It is impossible for the
12 GRB to do this if there is not a full hearing.
13

14
15 **BASED UPON THE FOREGOING**, the Court remands the instant case to the GRB
16 with directions to have a complete hearing conforming to the mandated procedures, followed by
17 a subsequent decision that conforms to its statutory obligations. The Court requests that the GRB
18 inform it of the timeframe in which it can accomplish adherence with this judgment. The GRB
19 shall file such notice within fifteen (15) days of the issuance of this decision.
20

21
22 The parties retain the right to file a timely post judgment motion with this Court in
23 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
24 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
25 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
26 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*
27 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
28 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or

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



1 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*
2 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN*
3 *R. App. P.*].” *HCN R. Civ. P.* 61.

4 **IT IS SO ORDERED** this 24th day of November 2009, by the Ho-Chunk Nation Trial
5 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
6

7
8
9

Honorable Todd R. Matha⁸
Chief Trial Court Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

⁸ The Court appreciates the assistance of Law Clerk Joshua O. Rees in the preparation and drafting of this opinion.