



1 hearing, which the GRB delivered on September 9, 2008. The Court enters this decision in a  
2 timely manner pursuant to *In the Matter of Timely Issuance of Decisions*, ADMIN. RULE 04-09-  
3 05(1) (HCN S. Ct., Apr. 9, 2005).

## 4 5 **APPLICABLE LAW**

### 6 7 **CONSTITUTION OF THE HO-CHUNK NATION**

#### 8 9 **Art. III - Organization of the Government**

10 **Sec. 3. Separation of Functions.** No branch of the government shall exercise the powers  
11 and functions delegated to another branch.

#### 12 **Art. IV - General Council**

13 **Sec. 2. Delegation of Authority.** The General Council hereby authorizes the legislative  
14 branch to make laws and appropriate funds in accordance with Article V. The General Council  
15 hereby authorizes the executive branch to enforce the laws and administer funds in accordance  
16 with Article VI. The General Council hereby authorizes the judicial branch to interpret and  
17 apply the laws and Constitution of the Nation in accordance with Article VII.

#### 18 **Art. V - Legislature**

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

- 20 (a) To make laws, including codes, ordinances, resolutions, and statutes;
- 21 (b) To establish Executive Departments, and to delegate legislative powers to the Executive  
22 branch to be administered by such Departments, in accordance with the law; any Department  
23 established by the Legislature shall be administered by the Executive; the Legislature reserves  
24 the power to review any action taken by virtue of such delegated power;
- 25 (f) To set the salaries, terms and conditions of employment for all governmental personnel;

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

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

28 (b) The Executive Branch shall be composed of any administrative Departments created by  
the Legislature, including a Department of the Treasury, Justice, Administration, Housing,  
Business, Health and Social Services, Education, Labor, and Personnel, and other Departments  
deemed necessary by the Legislature. Each Department shall include an Executive Director, a

1 Board of Directors, and necessary employees. The Executive Director of the Department of  
2 Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of  
the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

3  
4 Art. VII - Judiciary

5 Sec. 5. Jurisdiction of the Judiciary.

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

11 Sec. 6. Powers of the Tribal Court.

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

14 Sec. 7. Powers of the Supreme Court.

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

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

20 Sec. 14. Right to Appeal. Any party to a civil action, or a defendant in a criminal action,  
21 who is dissatisfied with the judgment or verdict may appeal to the Supreme Court. All appeals  
22 before the Supreme Court shall be heard by the full Court.

23 Art. X - Bill of Rights

24 Sec. 1. Bill of Rights.

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

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

1 Art. XII - Sovereign Immunity

2 Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit  
3 except to the extent that the Legislature expressly waives its sovereign immunity, and officials  
4 and employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall  
be immune from suit.

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

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

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

10 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

11 Ch. I - General Provisions

12 Subsec. 3. Declaration of Policy.

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

17 Subsec. 5. Employment Clause.

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

21 Subsec. 6. Employee Rights.

22 d. Harassment.

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

26 Ch. IV - Employee Benefits

27 Subsec. 27. Unpaid Leave of Absence. An employee with more than twelve (12) months of  
28 continuous services [*sic*] full time service may be eligible for an Unpaid Leave of Absence for a

1 period not to exceed three (3) months. All requests must be approved by the Department of  
2 Personnel.

3 a. An Unpaid Leave of Absence may be granted for the following reasons:

4 (1) Continued illness or personal reasons, which extend in time beyond  
5 available annual, sick, or FML. During an Unpaid Leave of Absence for medical  
6 reasons, health benefits will continue for up to ninety (90) days;

7 (2) Advanced training, higher education, or research, which will increase  
8 employability and job skills that are in the best interests of the Ho-Chunk Nation.  
9 Employees will be responsible for maintaining or discontinuing any employment related  
10 discretionary insurance benefits with the Nation.

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

12 Subsec. 29. General Hours of Work and Attendance.

13 e. Abandonment of Employment. An employee who is absent from his or her  
14 assigned work location without authorized leave for three (3) consecutive days or five (5) days in  
15 a twelve (12) month period shall be considered absent without authorized leave, and as having  
16 abandoned his or her employment. The employee shall be automatically terminated, unless the  
17 employee can provide the Nation with acceptable and verifiable evidence of extenuating  
18 circumstances justifying the absence(s).

19 Subsec. 30. Employee Conduct.

20 e. The following employee acts, activities, or behavior that are unacceptable  
21 conduct.

22 (1) Improper or unauthorized use of paid or unpaid leave.

23 (2) Being absent without authorized leave or repeated unauthorized late  
24 arrival or early departure from work.

25 Subsec. 31. Employee Discipline.

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

(2) Termination.

1 Subsec. 33. Grievances.

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

4 Subsec. 34. Administrative Review Process.

5 a. Policy.

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

10 e. Witnesses and Evidence.

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

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

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

20 f. Hearing Procedure.

21 (4) Questions.

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

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

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

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

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

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

20 Subsec. 35. Judicial Review.

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

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

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

1 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

2 Rule 63. Judicial Review of Administrative Adjudication.

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

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

7 a. EMPLOYMENT RELATIONS ACT OF 2004

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

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

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

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

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

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

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

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

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

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

## 8 HO-CHUNK NATION RULES OF APPELLATE PROCEDURE

### 9 Rule 9. Filing Fees and Costs.

10 a. The filing fee for an appeal shall be in accordance with the schedule of fees.

### 11 Rule 11. Time for Filing and Service of Notice of Appeal.

12 a. A written *Notice of Appeal* from a decision of the Trial Court must be filed with  
13 the Clerk of Court within sixty (60) calendar days of the date of the final judgment or order. The  
14 *Notice of Appeal* shall identify the party(ies) making the appeal by name and address, and shall  
15 identify the final judgment or order being appealed by name and case number.

16 b. The party filing the appeal must file a short statement of the reason or grounds for  
17 the appeal. The statement should include complete procedural and factual summary of the  
18 proceedings below.

19 c. Copies of the *Notice of Appeal* shall be served upon all parties to the action by the  
20 Appellant. *Proof of Service* shall be promptly filed with the Court.

## 21 DECISION

22 The Supreme Court variously directed this Court to: 1) explain the manner in which it  
23 assessed facts relating to the exhaustion of administrative remedies, *Decision* at 5 n.4; 2) find  
24 additional facts concerning the issue of exhaustion, “if necessary,” *id.*; 3) “engage in the  
25 necessary fact finding” to deduce whether the petitioner received pre-deprivation minimal  
26 procedural due process protection, *id.* at 7; 4) and conduct “further proceedings consistent with  
27 [its] opinion.” *Id.* at 8. The Supreme Court also disputed this Court’s decision to affirm the  
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1 GRB action without employing the statutorily identified standard of review. *Id.* at 4-5. At first  
2 glance, the preceding direction may not appear all that daunting, but a resultant inquiry  
3 implicates several issues of a constitutional dimension. The Court shall separately address these  
4 issues, the resolution of which compels a remand to the administrative agency.  
5

6 **I. Does a petitioner maintain any obligation to identify the**  
7 **“reason or grounds” for her administrative appeal along**  
8 **with a continuing obligation to prosecute the same?**

9 The petitioner, Gale S. White, filed her *Petition for Administrative Review* (hereinafter  
10 *Petition*) on July 13, 2007, choosing to utilize the Court’s available boilerplate pleading form.  
11 The petitioner “request[ed] review of the administrative decision based on January 18, 2007,  
12 Termination from HCN Social Services, as Domestic Abuse Advocate, 6 yrs.”<sup>1</sup> *Pet.* at 1. She  
13 additionally summarized the incident and circumstances as follows: “January 18, 2007,  
14 Termination – Unable to resolve workplace problems, which affected my job performance,  
15 consistently having work hours deducted.” *Id.* at 2. As a consequence, the petitioner requested  
16 the following relief: “Financial Loss – Loss of last paycheck, Compensated \$10,000.00 due to  
17 loss of job.” *Id.* at 3. Regardless of the lack of specificity within the petitioner’s statements, the  
18 *Petition* clearly reveals that the petitioner wished to dispute an alleged termination.  
19

20 Yet, the final administrative decision that the petitioner attached to the initial pleading  
21 does not on its face deal with a separation from employment. *See id.* at 4; *see also HCN R. Civ.*  
22 *P.* 63(B) (requiring that “[t]he petitioner must attach a copy of the final administrative decision  
23 to the *Petition for Administrative Review*.”). The *Introduction* of the underlying decision instead  
24 asserts that the “[g]rievant claims harassment and discrimination.” *In the Matter of: Gail White*  
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27 <sup>1</sup> GRB decisions are undoubtedly based upon underlying employment concerns, *i.e.*, termination, suspension,  
28 discrimination or harassment, but the Court intended that the petitioner rather indicate the basis for the appeal, which  
would comport with the prevailing law and applicable procedural rules. EMPLOYMENT RELATIONS ACT OF 2004  
(hereinafter ERA), 6 HCC § 5.33a, 34a(1), 35(c, e); *Ho-Chunk Nation Rules of Civil Procedure*, Rule 63(B), (I)(1).  
The Court shall supplement its *Petition* to more clearly convey this necessity.

1 v. *Jean Day*, GRB-003-07-D/H (GRB, May 21, 2007) (hereinafter *GRB Decision*) at 1. The  
2 GRB case designation of “D/H” also indicates the type of case presented for administrative  
3 adjudication.

4         The *GRB Decision* continues by referencing the basis for the dispute: “Gail White,  
5 timely filed a Ho-Chunk Nation Grievance form on January 8, 2007, with the Ho-Chunk  
6 Nation’s Department of Personnel after an incident between her supervisor, Jean Day[,] and  
7 herself.” *Id.* However, in response to the petitioner’s discrimination claim, the GRB found that  
8 the “grievant was unable to show any actions by Supervisor Day that would support this claim,”  
9 and in relation to the harassment claim, the GRB adjudged that “the grievant failed to show  
10 Supervisor Day[’s] actions constitute[d] misconduct by creating an unreasonably intimidating  
11 hostile and objectively offensive working environment.” *Id.* at 2. As a result, the GRB  
12 dismissed the discrimination claim outright since the petitioner failed to establish an offense  
13 against a member of a protected class and otherwise simply could “not find harassment.” *Id.*  
14 The *GRB Decision* contains little detail beyond that which is stated above, and, to reiterate, has  
15 nothing to do with an alleged termination.

16         The Court did not immediately react to the obvious disconnect between the *Petition* and  
17 *GRB Decision* by, for instance, dismissing the administrative appeal even though the petitioner  
18 articulated no “basis for the review.” *HCN R. Civ. P.* 63(B). The petitioner quite possibly could  
19 not state the “reason or grounds for the appeal” due to the fact that she was appealing a non-  
20 existent decision. *Id.* Nonetheless, the Court declined to reject the initial pleading in light of its  
21 long-standing practice of “liberally constru[ing] the *Petition* filed by the *pro se* litigant.”<sup>2</sup> *In the*

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27 <sup>2</sup> The Supreme Court does not permit such latitude within its approach to accepting appeals. To begin, the Supreme  
28 Court has not created a boilerplate *Notice of Appeal*, and, therefore, all appellants, represented and *pro se* alike, must  
draft the document, which must include a “short statement of the reason or grounds for the appeal . . . , includ[ing]  
complete procedural and factual summary of the proceedings below.” *Ho-Chunk Nation Rules of Appellate  
Procedure* (hereinafter *HCN R. App. P.*), Rule 11(b). Consequently, numerous appellants have fallen victim to the

1 *Interest of Adult CTF Beneficiary: Selina Littlewolf, DOB 01/29/84 v. HCN Office of Tribal*  
2 *Enrollment, CV 04-70 (HCN Tr. Ct., Aug. 3, 2004) at 4; see also Sherry Wilson v. HCN Dep't of*  
3 *Pers., CV 05-43 (HCN Tr. Ct., Dec. 21, 2006) at 12-16. The Court instead decided to provide*  
4 *the petitioner three (3) further opportunities to enunciate the basis for her administrative appeal,*  
5 *i.e., initial brief and possible reply brief and oral argument. See Scheduling Order, CV 07-54*  
6 *(HCN Tr. Ct., July 17, 2007) at 3.*

8 The petitioner subsequently filed two (2) briefs, but neither party chose to request the  
9 ability to present oral argument. *Id.*; *see also HCN R. Civ. P. 63(H)*. The petitioner also did not  
10 “request[ ] to supplement the evidentiary record.” *Pet.* at 3 (citing *HCN R. Civ. P. 63(D)(1)*).

13 Supreme Court’s sometimes strict adherence to its pleading requirement. *Marjerette M. Jadack v. Guy R. Detlefsen,*  
14 *SU 08-03 (HCN S. Ct., Aug. 25, 2008) (denying appeal for failure of pro se non-member appellant to detail basis of*  
15 *appeal within Notice of Appeal); Nicholas J. Kedrowski v. Sharon Whitebear et al., SU 05-12 (HCN S. Ct., Jan. 19,*  
16 *2006) (same as Jadack); Kenneth L. Twin v. Douglas Greengrass et al., SU 04-08 (HCN S. Ct., Dec. 29, 2004) at 3*  
17 *(denying appeal for failure of represented member appellant to allege an error of the fact-finder “with any*  
18 *meaningful specificity” within Notice of Appeal); Maria L. Adamiuk v. Ho-Chunk Casino, SU 04-05 (HCN S. Ct.,*  
19 *Sept. 24, 2004) (same as Jadack); Joseph E. Decorah v. Ho-Chunk Nation et al., SU 03-05 (HCN S. Ct., June 27,*  
20 *2003) (denying appeal for failure of pro se member appellant to allege an error of the fact-finder within Notice of*  
21 *Appeal); In the Interest of Minor Child: P.S., DOB 04/10/87, by Pearl Lightstorming v. HCN Office of Tribal*  
22 *Enrollment, SU 02-07 (HCN S. Ct., Dec. 20, 2002) at 3 (denying appeal for failure of pro se member appellant to*  
23 *detail basis of appeal within Notice of Appeal, which the Court surmises in an independent inquiry after affording*  
24 *appellant the opportunity to correct procedural appellate defects); Gloria J. Visitin v. Douglas Long, as Pres. of Gen.*  
25 *Council, SU 02-04 (HCN S. Ct., Aug. 16, 2002) (denying appeal for failure of pro se member appellant to detail*  
26 *basis of appeal within Notice of Appeal); Judith McLendon v. Ho-Chunk Nation et al., SU 02-03 (HCN S. Ct., July*  
27 *17, 2002) (same as Jadack); Karen Raines v. Ho-Chunk Nation, SU 01-07 (HCN S. Ct., July 25, 2001) (same as*  
28 *Jadack); Deena M. Basina v. William P. Smith, SU 00-08 (HCN S. Ct., July 13, 2000) (same as Visitin); Cheryl*  
*Smith v. Ho-Chunk Nation et al., SU 00-07 (HCN S. Ct., May 26, 2000) (denying appeal for failure of represented*  
*tribal entity appellant to detail basis of appeal within Notice of Appeal); HCN Dep't of Educ. v. Joanne LaMere et*  
*al., SU 99-11 (denying appeal for failure of pro se member appellant to supplement articulated basis of appeal*  
*within ten (10) days after Clerk of Court alerted appellant to the deficiency); Rachel Winneshiek et al. v. John C.*  
*Houghton, Jr., SU 99-66 (HCN S. Ct., Sept. 28, 1999) (denying appeal for failure of pro se member appellant to*  
*supplement articulated basis of appeal within ten (10) days after Court alerted appellant to the deficiency); Brian*  
*Hobart v. Majestic Pines Casino, SU 97-02 (HCN S. Ct., May 28, 1997) (denying appeal for failure of pro se non-*  
*member appellant to detail basis of appeal within Notice of Appeal despite being “afforded ample time to perfect his*  
*appeal request to conform with the Ho-Chunk Nation Rules of Appellate Procedure”); Clifford Riddle v. Ho-Chunk*  
*Nation et al., SI 95-03 (HCN S. Ct., Nov. 1, 1995) (same as Jadack). Curiously, the Supreme Court recently*  
*allowed a represented non-member appellant three (3) separate attempts to supplement his basis for appeal before*  
*accepting the matter. Thomas Quimby v. Ho-Chunk Nation et al., SU 07-08 (HCN S. Ct., May 15, 2008). The*  
*appellant indicated in his initial attempt that the Trial Court’s opinion was simply “incorrect.” Notice of Appeal, SU*  
*07-08 (Apr. 23, 2007) at 2. The Supreme Court consequently denied the appeal after affording the appellant no*  
*notice of his deficiency. Order Denying Appeal, SU 07-08 (HCN S. Ct., May 9, 2007). The appellant then*  
*proceeded to file two (2) amended Notice(s) of Appeal before satisfying the appellate tribunal. Scheduling Order,*  
*SU 07-08 (HCN S. Ct., Dec. 4, 2007).*

1 The petitioner’s initial brief, entitled “*Brief of Petition,*” does not address the *GRB Decision*, but  
2 proceeds to solely dispute the alleged termination. The petitioner states upfront that she is  
3 “[c]hallenging termination[,] January 18, 2007 – No due process.” *Br. of Pet.*, CV 07-54 (Sept.  
4 10, 2007) at 1. In this regard, the petitioner later alleges that “[n]o due process to ever mediate  
5 this work environment I experienced.” *Id.* at 2. The petitioner concludes her initial brief by  
6 reiterating her request for relief: “Expunge termination from Personnel File[;] Leave in Good  
7 standing, \$10,000.00 per violation, all unemployment compensation retro [to] January 18, 2007,  
8 which the HCN Personnel Department did not disbute [*sic*]. Financial loss, all back pay to date  
9 or resolution of this tribal hearing.” *Id.* at 3.

12 The petitioner’s optional reply brief, entitled “*Petitioner’s Response,*” largely continues  
13 in the same vein. However, within the *Statement of Facts* section, the petitioner does present her  
14 opinion that she suffered harassment and discrimination, but she does not describe the manner in  
15 which the GRB erred within its adjudication of these issues. *Petitioner’s Resp.*, CV 07-54 (Oct.  
16 18, 2007) at 1-2. The petitioner expresses a degree of confusion with the legal standards  
17 employed by the GRB,<sup>3</sup> but ultimately relents to its decision as detailed within this excerpt:

19 The Ho-Chunk Nation ERA definition of discrimination and harassment  
20 are defined different [*sic*] than my understanding. Discrimination to me  
21 was unfair, favoritism, and intolerance. My definition of harassment is  
22 defined by irritation and annoyance at work and justifying time and  
23 attendance every week. I explained to [the] GRB and had to agree with  
24 the definition that [the] GRB explained to me what harassment or  
25 discriminated [*sic*] against an employee who is disabled or elder [*sic*]  
26 meant per definition of the ERA.

27 As a pro se litigant, this is difficult to present the unfair treatment I  
28 received from this supervisor for the past eight (8) months and according  
29 to the HCN ERA interpretations or definitions.

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<sup>3</sup> The ERA does not permit discrimination to be perpetrated against an employee, in most instances, on the basis of an immutable characteristic, ERA, § 5.5a, and prohibits acts of harassment that “creat[e] an unreasonably intimidating, hostile, and objectively offensive working environment.” *Id.*, § 5.6d(1).

1 *Id.* at 2.

2         The petitioner’s concession upon these claims, which she does not press further, becomes  
3 all the more apparent when reviewing the next three (3) sections of her reply brief. The  
4 petitioner enumerates three (3) legal claims within her *Statement of Issues*, all of which concern  
5 the alleged termination and failure to afford procedural due process. *Id.* The *Argument* section  
6 likewise focuses solely upon the petitioner’s separation from employment, *id.* at 3, and the  
7 *Conclusion* sets forth a request for relief similar to that contained in the *Petition* and *Brief of*  
8 *Petition.* *Id.* at 4. The petitioner summarizes:

11                 After filing previous grievances on Jean Day, the arbitrary and capricious  
12 behavior continued to treat me unfair. I know I am not doing this legal  
13 response correct [*sic*], and I conclude I did not deserve termination. No  
14 mediation to work at improving a healthy work environment, which I am  
15 and was always willing to do. When are Ho-Chunk Tribal members going  
16 to stop treating each other in this unprofessional manner[?]

17                 My relief sought still stands at all loss [*sic*] wages to date, \$10,000.[00] +,  
18 expunge from my personnel file.

19 *Id.*

20         The Court acknowledges the obvious difficulty the petitioner encountered in drafting  
21 legal documents, but the Court must insist that a petitioner, at an absolute minimum, identify a  
22 perceived administrative error. The Supreme Court requires nothing less when performing its  
23 appellate role. *See supra* note 2. The Court also expects that a petitioner limits his or her cause  
24 of action to a review of the underlying administrative adjudicatory decision, and not some  
25 hypothetical or entirely separate grievance.<sup>4</sup> The applicable law to these disputes requires no  
26 less. ERA, § 5.35c, e; *see also HCN R. Civ. P.* 63(A-B).

27 <sup>4</sup> The Supreme Court previously rejected an appellant’s attempt to consolidate two (2) appeals because one cause of  
28 action remained within the Trial Court. The Court explained its decision as follows: “Although the HCN Supreme  
Court would have original jurisdiction as the appellate court in both matters this Court will not exercise jurisdiction  
in CV 01-25 until a final judgment has been entered and the matter is ripe for appeal.” *Aleksandra Cichowski v.*  
*Four Winds Ins. Agency, LLC*, SU 04-01 (HCN S. Ct., Aug. 20, 2004) at 2. This Court agrees with the Supreme

1           Within the *Decision*, the Supreme Court recognizes that “Ms. White did not appeal the  
2 GRB *Decision* to the Trial Court. Rather, Ms. White clearly requested review only of her  
3 termination, as the Trial Court itself found.” *Decision* at 3. The Supreme Court, however,  
4 disagrees with this Court’s decision “to affirm the GRB *Decision*, which was not brought before  
5 it.” *Id.* at 4. The Supreme Court concludes that “[e]ven if the GRB *Decision* had been brought  
6 to the Trial Court for administrative review, the Trial Court still would have erred in affirming it,  
7 because the Court failed to review the GRB *Decision* under the appropriate standard of review.”  
8 *Id.* (citing ERA, § 5.35e; *HCN R. Civ. P.* 63(I)(1)).

9  
10           On March 9, 2007, this Court entered final rulings in its first administrative appeals under  
11 the recently adopted procedural structure. *Willard LoneTree v. Larry Garvin, in his official*  
12 *capacity as Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007); *Janet*  
13 *Funmaker v. Libby Fairchild, in her capacity as Executive Dir. of HCN Dep’t of Pers.*, CV 06-61  
14 (HCN Tr. Ct., Mar. 9, 2007). The present cause of action seemed to represent only the fifth  
15 administrative appeal of a GRB adjudicatory decision. Every other appeal related directly to a  
16 final administrative adjudicatory opinion, which the petitioners attached to their respective initial  
17 pleadings. *See HCN R. Civ. P.* 63(B). The Court was confronted with a peculiar circumstance in  
18 the case at bar. The petitioner attached the *GRB Decision* with the apparent intent of  
19 demonstrating agency error, but then proceeded to seek judicial review of a different cause of  
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25 Court’s resolution of the matter, but respectfully disagrees with the Court’s ripeness designation. The appellant’s  
26 asserted cause of action became ripe on February 19, 2001, when terminated from employment, three and a half  
27 (3½) years prior to the appellate decision. *Aleksandra Cichowski v. Ho-Chunk Hotel & Convention Ctr.*, CV 01-25  
28 (HCN Tr. Ct., May 30, 2006) at 9. “Finality, *not ripeness*, is the doctrine governing appeals from district court to  
court of appeals.” *United States v. Jose*, 519 U.S. 54, 57 (1996) (emphasis added). More broadly, “the exhaustion  
requirement generally refers to administrative and judicial procedures by which an injured party may seek review of  
an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.”  
*Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985).  
Ironically, the latter *Cichowski* decision rested upon a failure to exhaust administrative remedies.

1 action. The Court perceived an absolute failure to fulfill the burden to prosecute,<sup>5</sup> but, whereas a  
2 typical civil case would generate a dispositive motion, the appellate briefing schedule does not  
3 contemplate a motion process. As a consequence, the Court affirmed the underlying decision  
4 without further comment. The Court shall now look to Supreme Court case law for guidance in  
5 addressing this and future similar cases.  
6

7 The Court deems that it must simply deny review of the *GRB Decision*. The Supreme  
8 Court certainly cannot expect this Court to perform deferential review of an administrative  
9 adjudicatory decision when a petitioner fails to state the basis for the appeal within the initial  
10 pleading and subsequent brief(s). This requirement was modeled specifically upon the parallel  
11 appellate rule, which requires the appellant to “file a short statement of the reason or grounds for  
12 the appeal.” *HCN R. App. P.* 11(b). The relevant civil rule directs the petitioner to make “a  
13 concise statement of the basis for review, i.e., reason or grounds for appeal.” *HCN R. Civ. P.*  
14 63(B). A petitioner cannot merely attach a final administrative decision and refrain from  
15 essentially doing anything more. Otherwise, the pleading and briefing components become  
16 completely useless despite constituting the entire case in an administrative appeal. *See HCN R.*  
17 *Civ. P.* 63(B), (E).  
18  
19

20 The Court acknowledges that denying review represents a harsh result, but the Supreme  
21 Court has routinely employed this device throughout its history. As reflected above, the  
22 Supreme Court commonly denies a *Notice of Appeal* if the appellant fails to articulate a legal  
23 basis for the appeal.<sup>6</sup> *Supra* note 2. This substantive ground for denial finds its justification  
24  
25

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26 <sup>5</sup> See, e.g., *Joshua F. Smith, Sr. v. Adam Estes et al.*, CV 03-08 (HCN Tr. Ct., Dec. 18, 2003) at 13; *Leigh Stephen et*  
27 *al. v. Ho-Chunk Nation*, CV 97-141 (HCN Tr. Ct., Oct. 26, 1998) at 5; *Edward Fronk v. Ho-Chunk Tours*, CV 96-11  
(HCN Tr. Ct., June 19, 1996) at 1.

28 <sup>6</sup> The Court can discern no reason why some appellants are afforded additional time to supplement their *Notice(s) of*  
*Appeal* whereas others are subjected to summary dismissal. See *Quimby*, SU 07-08; *LaMere*, SU 99-11;  
*Winneshiek*, SU 99-66; *Hobart*, SU 97-02. Likewise, the Court cannot speculate why only a single appellant,  
Rachel Winneshiek, during the history of the Judiciary was deserving of specific instruction to modify her *Notice of*

1 within the constitutional division of authority amongst the two (2) courts. CONST., ART. VII, §§  
2 6(a), 7(a). The Supreme Court also has denied *Notice(s) of Appeal* for failure to adhere to  
3 strictly procedural requirements, *e.g.*, untimely filing,<sup>7</sup> absence of filing fee,<sup>8</sup> and deficient  
4 service of process.<sup>9</sup> As a result, this Court is relatively confident that its chosen manner of  
5 dealing with administrative appeals that lack an articulated legal basis will withstand possible  
6 appellate scrutiny.<sup>10</sup>

7  
8  
9 *Appeal* in the form of a judicial order. *Winneshiek*, SU 99-06 (HCN S. Ct., Sept. 10, 1999) (providing ten (10) days  
10 to supplement basis of appeal).

11 <sup>7</sup> The Supreme Court created the appellate timeframe pursuant to its authority to promulgate procedural rules for the  
12 Judicial Branch. CONST., ART. VII, § 7(b); *see also HCN R. App. P.* 11(a). As such, the timeliness of an appellate  
13 filing does not readily have a substantive underpinning. In contrast, Trial Court filing deadlines reflect statute of  
14 limitations considerations. *See* STATUTE OF LIMITATIONS & COMMENCEMENT OF CLAIMS ACT, 2 HCC § 14.4e; *see*  
15 *also generally Kenneth L. Twin v. Douglas Greengrass, Executive Dir. of Admin.*, CV 03-88 (HCN Tr. Ct., Oct. 7,  
16 2004) at 6-9. In employment matters, timeliness of filing also determines whether a petitioner can avail him or  
17 herself of the limited waiver of sovereign immunity. *See* ERA, § 5.35a, c; *see also* CONST., ART. XII, § 1. Despite  
18 its procedural foundation, the Supreme Court has strictly enforced the appellate filing deadline. *Veronica L. Wilber*  
19 *v. Ho-Chunk Nation*, SU 04-02 (HCN S. Ct., Apr. 14, 2004) (denying appeal since *pro se* member appellant filed  
20 *Notice of Appeal* one (1) day late, and, in any event, failed to detail basis of appeal); *HCN Hous. Auth. v. Tyrone*  
21 *Swallow et al.*, SU 01-16 (HCN S. Ct., Dec. 19, 2001) (denying appeal since *pro se* member appellant filed *Notice of*  
22 *Appeal* eight (8) days late); *Marie WhiteEagle v. Wis. Dells Head Start et al.*, SU 01-14 (HCN S. Ct., Nov. 27, 2001)  
23 (denying appeal since represented member appellant filed *Notice of Appeal* one (1) day late); *HCN Legislature v.*  
24 *HCN Gen. Council et al.*, SU 01-09 (HCN S. Ct., Aug. 22, 2001) (denying appeal since represented tribal entity  
25 appellant filed *Notice of Appeal* one (1) day late); *HCN Dep't of Hous., Prop. Mgmt. Div. v. Charles C. Brown et al.*,  
26 SU 00-11 (HCN S. Ct., Aug. 18, 2000) (denying appeal since *pro se* member appellant filed *Notice of Appeal* eleven  
27 (11) days late).

28 <sup>8</sup> The Supreme Court has announced a fee structure for the Judiciary pursuant to its authority to issue written rules  
for the court system. CONST., ART. VII, § 7(b); *see also HCN R. App. P.* 9(a). The Court has insisted upon the  
inclusion of the filing fee with the *Notice of Appeal*. *Leigh Stephen et al. v. Ho-Chunk Nation*, SU 99-01 (HCN S.  
Ct., Mar. 23, 1999) (denying appeal for failure of represented non-member appellant to submit timely filing fee,  
which could not be rectified by subsequent payment after informed of deficiency).

<sup>9</sup> The Supreme Court has constructed appellate service of process requirements pursuant to its authority to  
promulgate procedural rules for the Judicial Branch. CONST., ART. VII, § 7(b); *see also HCN R. App. P.* 11(c). The  
Court has consistently rejected timely filed *Notice(s) of Appeal* upon the grounds that the appellant merely failed to  
serve the named appellee(s) with a copy of the same. *Wisconsin v. Henry White Thunder*, SU 01-05 (HCN S. Ct.,  
Dec. 8, 2001) (denying appeal for failure of *pro se* member appellant to provide documentation of proper service of  
process after alerted to the deficiency); *Nina Garvin v. Carol Laustrup et al.*, SU 99-04 (HCN S. Ct., July 7, 1999)  
(denying appeal for failure of *pro se* member appellant to perform timely service of process, which could not be  
rectified by subsequent service after informed of deficiency).

<sup>10</sup> A Trial Court litigant possesses a constitutional right to “appeal to the Supreme Court,” CONST., ART. VII, § 14,  
as compared to an opportunity to file an initial case or controversy “in Trial Court before . . . any other court.” *Id.*, §  
5(a). An individual cannot possess a right to file a cause of action with the Trial Court since a plaintiff/petitioner  
must first allege, at a minimum, the presence of subject matter jurisdiction. *Id.*; *see also Julie Schultz v. Robert*  
*Funmaker et al.*, CV 08-26 (HCN Tr. Ct., Nov. 19, 2008) at 9 n.5. The CONSTITUTION, therefore, pronounces a  
priority as it relates to civil filings and expresses a right as it relates to appellate filings. Yet, although an  
unsuccessful litigant maintains a right to appeal his or her case, the Supreme Court has stated that “[a]ppeals are not  
automatically a matter of right but are within the Court’s discretion. The *HCN R. App. P.* provide the guidelines as  
to how parties file an appeal.” *Wilbur*, SU 04-02 at 2. Consequently, the Trial Court must be capable of similarly

1 To reiterate, the petitioner brought suit upon the *GRB Decision*, which she attached to her  
2 *Petition*. The petitioner, however, completely failed to state within the initial pleading or any  
3 subsequent filing the basis for the administrative appeal, *i.e.*, the “reason or grounds for appeal.”  
4 *HCN R. Civ. P.* 63(B). The Court accordingly denies the petitioner’s appeal inasmuch as it ever  
5 concerned the administrative grievance relating to discrimination and harassment.  
6

7 **II. Does an ancillary discussion of the petitioner’s separation from**  
8 **employment at the GRB hearing serve to consolidate two (2)**  
9 **separate incidents without a formal undertaking of any kind?**

10 The Supreme Court inquired in a footnote whether the GRB may have possibly expanded  
11 its administrative inquiry to incorporate the petitioner’s separation from employment. Due to the  
12 absence of a transcript, the Supreme Court found “it . . . difficult to assume that the issue of Ms.  
13 White’s termination was not discussed at the GRB hearing.” *Decision* at 5 n.4. Without relating  
14 the potential significance of any such discussion, the Court observed that “[c]learly, Ms White is  
15 under the impression that she grieved her termination before the GRB.” *Id.* Consequently, the  
16 Supreme Court directed the Trial Court to more closely examine its conclusion that Ms. White  
17 failed to exhaust her administrative remedies in conjunction with her alleged termination. *Id.*  
18

19 To begin, the Court does not believe that ancillary discussion of an issue before an  
20 administrative agency constitutes an adjudication of a separately grievable matter. Moreover, a  
21 grievant’s belief to the contrary should possess no legal import if detached from any affirmative  
22 steps to consolidate two (2) more separate causes of action. Nonetheless, the following  
23 exchanges occurred at the May 15, 2007 GRB hearing.  
24

25  
26 1) The petitioner conjectured: “Well, I have a question, and, that is:  
27 When did I become this horrible employee that deserved termination?”

28 denying an administrative appeal due to a petitioner’s failure to adhere to procedural requisites. As explained by the  
appellate justices: “This Court, despite its infancy, must require those who come into our court system to follow  
our rules and requirements.” *Stephen*, SU 99-01 at 3.

1 GRB Hr'g R. 003-07-D/H (CD 1, 25:40). The petitioner posed this  
2 rhetorical question in isolation, and represents the only mention of the  
3 alleged termination by the petitioner within her initial presentation.

4 2) GRB Chair Rick McArthur prefaced the supervisor's presentation  
5 with an instruction. "You've heard what Gayle's side of the case is. Now  
6 is your time to present that she was terminated not for harassment or  
7 discrimination; she's alleging harassment and discrimination." *Id.* (CD 2,  
8 12:46). Apart from the above quote, the GRB had not previously  
9 entertained the issue of an alleged termination.

10 3) A female GRB member later inquired: "So, when did you receive .  
11 . . . her leave paper?" *Id.* (CD 3, 04:48). Respondent Day answered as  
12 follows: "She didn't even come to talk to me about it, at all . . . . And, so,  
13 that's why, eventually, it came to . . . termination because of no-call, no  
14 showing up for work [inaudible] and abandonment of employment." *Id.*  
15 (CD 3, 5:45).

16 4) Two (2) GRB members, including GRB Supervisor Jeff Barrix,  
17 subsequently inquired about the petitioner's request for Unpaid Leave of  
18 Absence and the apparent failure of the petitioner to secure a required  
19 approval of the request. *Id.* (CD 3, 14:40). This inquiry culminated in the  
20 following exchange:

21 GRB Supervisor Barrix: "So at that time you just  
22 decided to go on leave?"

23 Pet'r: "Yes."

24 Barrix: "Without it being resolved?"

25 Pet'r "Yeah."

26 *Id.* (CD 3, 18:56).

27 5) GRB Chair McArthur concluded the hearing by asking the  
28 petitioner to "summarize everything and make the points that [she]  
th[ought would] show that there was harassment or discrimination?" *Id.*  
(CD 3, 19:20). Concerning the alleged termination in particular, the  
petitioner conceded: "Yes, I did abandon my job, but there were a lot of  
circumstances that brought it to that." *Id.* (CD 3, 25:53).

6) Respondent Day summarized the testimony concerning the alleged  
termination in the following manner: "I guess the biggest point I do have  
right now is Gayle did admit that she abandoned her job. She did not  
come in for three consecutive days, which is in the ERA, which is job

1 abandonment, which . . . you do not need progressive discipline on that.”  
2 *Id.* (CD 3, 38:03).

3 The GRB, therefore, clearly did discuss the petitioner’s separation from employment, but  
4 only in the context of the pending discrimination and harassment grievance. The petitioner  
5 seemingly viewed the failure to approve the Unpaid Leave of Absence request as a final instance  
6 of discrimination or harassment, but, as stated above, the GRB ultimately found no merit in the  
7 petitioner’s allegations of discrimination and harassment. The GRB clearly did not discuss the  
8 actual abandonment or the consequences of the job abandonment. The petitioner did not allege  
9 an absence of procedural due process at or prior to the GRB hearing, and the GRB conducted no  
10 examination of the procedures employed by the respondent in processing the separation from  
11 employment. As a result, the *GRB Decision* does not reference the petitioner’s alleged  
12 termination in any way, shape or form.<sup>11</sup>

13  
14  
15 The GRB could have entirely refrained from mentioning the alleged termination, and  
16 restrained parties from making related comments. Nonetheless, these slight deviations do not  
17 detract from the obvious scope of the administrative hearing, especially in light of the content of  
18 the January 8, 2007 *HCN Grievance Form*, which alleges only discrimination or harassment.  
19 The Supreme Court noted that the “*Administrative Record* contains documents relating to [the]  
20 termination,” but, as revealed in the GRB hearing, the respondent provided all exhibits. GRB  
21 Hr’g R. 003-07-D/H (CD 1, 27:52). The petitioner presented no documentation relating to her  
22 alleged termination within her discrimination and harassment case. *See* ERA, § 5.34e(1-2).  
23

24  
25 Yet, the Court does lack certain information that does not appear within the  
26 administrative record, and directs the GRB to provide thorough responses to the below questions.  
27

28 <sup>11</sup> To eliminate future misunderstandings, the GRB should explicitly limit its administrative inquiry to those facts and circumstances necessary to rendering an opinion on the actual grievance(s) properly submitted before it, and also instruct parties to limit presentations to relevant evidentiary matters. *See* ERA, § 5.34g(4-5).

1 The Court declines to simply supplement the evidentiary record as though it sat as the original  
2 finder of fact. The Court provides the reasoning for this declination within the next section.

3 1) Did the petitioner subsequently file an *HCN Grievance Form* regarding her  
4 separation from employment? If so, what resulted from this filing?

6 2) Did the petitioner formally request in writing to consolidate a claim of an alleged  
7 termination with the discrimination/harassment case prior to the May 15, 2007 GRB hearing?

8 3) Did the petitioner verbally request to consolidate a claim of an alleged termination  
9 with the discrimination/harassment case prior to the May 15, 2007 GRB hearing?

11 4) Did administrative personnel within the Personnel Department inform the  
12 petitioner, in writing or otherwise, that the GRB would address her alleged termination at its  
13 May 15, 2007 hearing?

14 5) Did administrative personnel within the Personnel Department inform the  
15 petitioner, in writing or otherwise, that the pending status of her discrimination/harassment case  
16 rendered unnecessary the filing of a separate *HCN Grievance Form* regarding her separation  
17 from employment?

19 **III. Does the Court maintain authority to ascertain facts not**  
20 **previously found by the GRB within its quasi-judicatory**  
21 **role?**

22 The Supreme Court began the substantive component of its opinion with a recitation of  
23 its adopted standards of review, which it presumably intended to use when weighing the several  
24 issues posed upon appeal. The Supreme Court first notes that it “reviews questions of law . . . *de*  
25 *novo*.” *Decision* at 3 (citing *Robert A. Mudd v. HCN Legislature*, SU 03-02 (HCN S. Ct., Apr. 8,  
26 2003); *Louella Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999)).<sup>12</sup> The  
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<sup>12</sup> In *Mudd*, the Supreme Court similarly indicates that “[o]n questions of law . . . [it] applies the *de novo* standard of review,” citing the *Kelty* decision as authority for this statement. *Mudd*, SU 03-02 at 4. In *Kelty*, however, the Court

1 Court next asserts that “[a]ny discretionary judgments of the Trial Court or questions of fact will  
2 be reviewed under the ‘abuse of discretion’ standard.”<sup>13</sup> *Id.* (citing *Smith*, SU 03-08; *Rae Anna*

3  
4  
5 makes no mention of the *de novo* standard, but instead responds to the appellee’s motion for reconsideration, which  
6 she presumably filed, in part, due to the absence of any articulated standard of review within the underlying  
7 appellate decision. *See Kelty*, SU 99-02 (HCN S. Ct., July 27, 1999); *see also Hope B. Smith v. Ho-Chunk Nation*,  
8 SU 03-03 (HCN S. Ct., Dec. 8, 2003) at 5 n.3 (clarifying that *Kelty* “did not articulate this standard but instead  
9 resolved a question on how whether to grant a *Motion to Reconsider*”). The *Kelty* Court chastises the appellee for  
10 presenting a “Motion [that] advances that the Supreme Court ‘can only reverse for abuse of discretion or a clear  
11 error’ but does not provide any legal basis for that statement.” *Kelty*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2.  
12 The Court then responds to the appellee’s contention as follows: “This Court is not bound by federal or state laws as  
13 to standards of review. If counsel was referring to standards set by this Court, it would have been helpful to have  
14 been provided authority for the proposition.” *Id.* The Supreme Court does not set forth why such an explanation  
15 was necessary given that it had applied no other standards of appellate review within its then brief four (4) year  
16 history. In fact, the Supreme Court continued to use an abuse of discretion standard for reviewing questions of law  
17 until the sudden unexplained, albeit correct, reversal in *Mudd*. *See, e.g., Daniel Youngthunder, Sr. v. Jonette*  
18 *Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2 (“The Appellees have correctly stated that this Court  
19 must review the Trial Court Judgment with an abuse of discretion standard. That is, this Court must review the Trial  
20 Courts [*sic*] decision to determine if an error of law was made by the lower court.”).

21 <sup>13</sup> As noted above, the Supreme Court “is not bound by federal or state laws as to standards of review.” *Kelty*, SU  
22 99-02 at 2. Nevertheless, the Court has chosen to incorporate the three (3) commonly recognized appellate  
23 standards within its decisions at various points. “For purposes of standard of review, decisions by judges are  
24 traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact  
25 (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).” *Pierce v. Underwood*,  
26 487 U.S. 552, 558 (1988). Regrettably, the adopted standards do not always correspond with their commonly  
27 associated legal contexts within tribal appellate case law. For instance, the Supreme Court continues to scrutinize  
28 findings of fact by employing an abuse of discretion standard. The Court sanctioned this particular usage in the  
following manner: “In other jurisdictions, a review by an appellate court of a trial court’s findings of fact is made  
under an abuse of discretion standard. That is, was the finding of the trial judge as to a certain fact so untenable that  
the trial judge abused his or her discretion.” *Funmaker*, SU 96-12 at 2. The Supreme Court cites no external  
authority for this supposition, quite possibly because none is readily available. In Wisconsin, for example, the  
appellate courts examine findings of fact under a clearly erroneous standard of review. *Steinbach v. Green Lake*  
*Sanitary Dist.*, 715 N.W.2d 195, 209 (Wis. 2006).

The Supreme Court later offered a definition of “abuse of discretion,” *i.e.*, “any unreasonable,  
unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter  
submitted.” *Youngthunder, Sr.*, SU 00-05 at 2 (quoting BLACK’S LAW DICTIONARY 11 (6th ed. 1990)). *Black’s Law*  
*Dictionary* lifted this definition from an Oklahoma Court of Criminal Appeals decision in which the court  
appropriately examined a matter committed to the discretion of the trial judge, namely “[t]he granting and denying  
of permission to withdraw a plea of guilty and substitute a plea of not guilty.” *Harvey v. State*, 458 P.2d 336, 338  
(Okla. Crim. App. 1969) (citation omitted). State of Oklahoma appellate courts, incidentally, also examine findings  
of fact under a clearly erroneous standard of review. *Franks v. Tyler*, 531 P.2d 1067, 1069 (Okla. Ct. App. 1974)  
(citing *Bd. of County Comm’rs of Tulsa County v. Lloyd, Okla.*, 322 P.2d 406, 407 (Okla. 1958)).

Adding to the confusion, the Supreme Court has previously stated the appropriate standard for reviewing  
findings of fact. *See, e.g., Coalition for a Fair Gov’t v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN Tr. Ct., July 1,  
2006) at 8 (observing that “[t]he appellants have not demonstrated clear error with respect to the factual findings”).  
The most recent expression of this standard of review appeared in a 2002 concurrence. *Lightstorming*, SU 02-07 at  
5 (Butterfield, J., concurring). In *Lowe*, the Supreme Court principally examined the Trial Court’s entrance of a  
preliminary injunction under an abuse of discretion standard. The Court reasoned that “this is not a review of the  
merits of any of the parties [*sic*] claims, since they have not had the opportunity to be fully presented to the trial  
court.” *Id.* at 7. In this regard, the analysis of the *Lowe* Court coincided with that of the United States Supreme  
Court. *See George Lewis v. HCN Election Bd. et al.*, CV 06-109 (HCN Tr. Ct., Dec. 5, 2006) at 16, *rev’d*, SU 06-07  
(HCN S. Ct., Mar. 6, 2007) (citing *Brown v. Chote*, 411 U.S. 452, 457 (1973)). The Supreme Court later reversed

1 *Garcia v. Joan Greendeer-Lee et al.*, SU 03-01 (HCN S. Ct., May 2, 2003); *Anna Rae Funmaker*  
2 *v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., Mar. 25, 1997)). While the Court respectfully  
3 objects to the current standard of review applied to findings of fact, *supra* note 12, it insists that  
4 no deferential standard of review should apply within the present context. Quite simply, the  
5 Court did not independently find facts when conducting the administrative appeal. *Order*  
6 *(Affirming)*, CV 07-54 (HCN Tr. Ct., Jan. 14, 2008) at 7 n.3.

8 Admittedly, the Court did deduce that “[t]he petitioner never independently grieved her  
9 alleged termination before the GRB,” but this finding merely reflects an obvious truth within the  
10 administrative record. *Id.* at 9. The petitioner sought review of an administrative decision,  
11 which, on its face, has nothing to do with a separation from employment. Within the instant  
12 case, the petitioner, at best, may have concurrently, but not independently, grieved the alleged  
13 termination, and the GRB shall resolve this issue upon remand. The Court contends that the  
14 above assertion is no more a finding of fact than the Supreme Court’s observation that “Ms.  
15 White clearly requested review only of her termination.” *Decision* at 3; *see also* CONST., ART.  
16 VII, § 7(a).

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22 its position without explanation, selecting instead to subject the granting of a preliminary injunction to *de novo*  
23 review. *Lewis*, SU 06-07 at 3.

24 A preliminary injunction is an example of equitable relief, and is, by definition, committed to the discretion  
25 of the court. *See* CONST., ART. VII, § 6(a); *see also generally* *Ronald K. Kirkwood v. Francis Decorah, in his*  
26 *official capacity as Dir. of HCN Hous. Dep’t, et al.*, CV 04-33 (HCN Tr. Ct., Feb. 11, 2005) at 14-17 (analyzing the  
27 historical distinction between actions at law and equity). An appellate court typically analyzes relief afforded by a  
28 trial court acting as a court in equity or pursuant to a discretionary conferral under an abuse of discretion standard.  
The Supreme Court presently seems to partially acknowledge the theoretical underpinning of this standard of review  
despite its refusal to consistently utilize this highly deferential approach. *Decision* at 3. As a final note, in  
Wisconsin, the judiciary has modified the traditional terminology while retaining the substance of this standard.  
“We use the phrase *erroneous exercise of discretion* in place of *abuse of discretion*, a phrase which we have used in  
numerous prior cases to describe a circuit court’s error in reaching a decision involving discretion. . . . We have  
come to believe that the term *abuse of discretion* carries unjustified negative connotations.” *Brookfield v.*  
*Milwaukee Metro. Sewerage Dist.*, 491 N.W.2d 484, 493 (Wis. 1992).

1           Consequently, the Supreme Court should generally subject a Trial Court judgment  
2 rendered in an administrative appeal to plenary review. The Seventh Circuit Court of Appeals  
3 expressed the rationale for supporting *de novo* review as follows:

4                     This court owes no deference to the district court's factual findings  
5 because the district judge made none. The fact finder in this case is the  
6 Secretary . . . , and both the district court and this court owe the  
7 *Secretary's* findings deference. In that respect both courts apply the same  
8 standard of review. *See generally Johnson v. Heckler*, 741 F.2d 948, 953  
9 (7th Cir. 1984). This court therefore reviews the district court's  
10 determinations *de novo* as questions of law.

11           *Daviess County Hosp. v. Bowen*, 811 F.2d 338, 342-43 (7th Cir. 1987). In this case, the fact-  
12 finder is the GRB, and the Court, therefore, must direct the agency to address certain outstanding  
13 issues identified by the Supreme Court. *See* ERA, § 5.34e, f(4)(b), g(3-5, 7).

14           The Ho-Chunk Nation Legislature possesses the constitutional authority to promulgate  
15 laws, including those pertaining to employment. CONST., ART. V, § 2(a, f). More importantly,  
16 the Legislature can delegate its powers to an executive administrative agency.<sup>14</sup> *Id.*, ARTS. V, §  
17 2(b), VI, § 1(b). The Court must respect the spheres of authority occupied by the co-equal  
18 branches of government.<sup>15</sup> *Id.*, ARTS, III, § 3, IV, § 2. The Court accordingly directs the GRB to  
19 deduce facts relating to the level of procedural protection afforded to the petitioner in connection  
20 with her separation from employment. The GRB may permissibly find such facts provided that  
21

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22 <sup>14</sup> In this respect, as well as others, the Ho-Chunk governmental structure differs from its federal counterpart. The  
23 United States Congress, for example, cannot constitutionally delegate its legislative powers to the Executive Branch.  
24 ““The . . . distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion  
25 as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in  
26 pursuance of the law.”” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) (citation omitted); *see*  
27 *also Whitman v. Am. Trucking Assoc., Inc.*, 531 U.S. 457, 473-75 (2001). No federal constitutional provision allows  
28 a direct legislative delegation.

<sup>15</sup> The Supreme Court apparently objects to this Court’s perceived elevation of a prudential consideration, *i.e.*,  
exhaustion of administrative remedies, above a potential constitutional deprivation. Specifically, “[i]f Ms. White’s  
due process rights were violated, then her failure to exhaust administrative remedies would be irrelevant.” *Decision*  
at 7; *see also* CONST., ART. X, § 1(a)(8). The exhaustion requirement, however, is not merely a prudential rule of  
the Court, but finds its basis in the constitutional principle of separation of powers. CONST., ART. III, § 3.  
Moreover, the Supreme Court has not similarly loosened or abandoned appellate procedural requirements in view of  
the constitutional, or statutory, nature of interests at stake upon appeal. *See supra* notes 2, 7-9.

1 the Court does not relinquish its authority to “determine the sufficiency of the procedural  
2 protections offered by the employer.”<sup>16</sup> *Willard LoneTree v. Larry Garvin, in his official*  
3 *capacity as Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007) at 16,  
4 *aff’d*, SU 07-04 (HCN S. Ct., Oct. 8, 2007). In this regard, the GRB shall provide thorough  
5 responses to the below questions.  
6

7 1) Did the petitioner receive a copy of the ERA contemporaneous with its enactment  
8 on December 9, 2004, or shortly thereafter?

9 2) Did the petitioner recognize that she needed to secure approval by the Department  
10 of Personnel pursuant to ERA, § 5.27, prior to taking an Unpaid Leave of Absence? If so, did  
11 the petitioner believe that the Department of Personnel approved her October 10, 2007 *HCN*  
12 *Leave Application*?

13 3) Did supervisory personnel, including respondent Day, inform the petitioner prior  
14 to her purportedly taking an Unpaid Leave of Absence that the Department of Personnel had not  
15 approved the request?  
16

17 4) Did the petitioner maintain her current address on file with the Department of  
18 Personnel by providing timely and necessary *Status Change Form(s)*?

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21 <sup>16</sup> The Court previously observed that the due process clause does not, in and of itself, create property interests, but  
22 rather statutory law must create the contours of individual property rights. *Joyce L. Warner v. Ho-Chunk Nation et*  
23 *al.*, CV 04-72 (HCN Tr. Ct., Sept. 11, 2006) at 15-16 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)),  
24 *rev’d on other grounds*, SU 06-05 (HCN S. Ct., June 19, 2007). The ERA “is the official employment law of the  
25 Ho-Chunk Nation,” ERA, § 5.3a, and, consequently, the ERA defines the terms under which an employee maintains  
26 employment. Each prospective employee accepts tribal employment with this understanding. The ERA enumerates  
27 instances of unacceptable conduct for which an employee may receive disciplinary action, including termination.  
28 *E.g., id.*, § 5.30e(1-2). An employee, however, must receive pre-deprivation minimal procedural due process  
protection before the employer may terminate based upon its discretionary assessment of the facts and  
circumstances. *Id.*, § 5.31a(2). No such protection should attach to an instance where an employee is not deprived  
of a property interest by the employer, but instead relinquishes the property interest to the employer. The Court  
asserts that such an instance occurs when an employee abandons employment. *Id.*, § 5.29e. Again, each employee  
accepts employment upon the terms and conditions that the Ho-Chunk Nation Legislature establishes within the  
ERA pursuant to its constitutional authority. CONST., ART. V, § 2(f). The Court deems that a clear distinction  
exists, but the Supreme Court does not join in this assessment. Any further arguments in this regard must be  
presented to the Supreme Court.

1           5) Did the petitioner remain “absent from . . . her assigned work location without  
2 authorized leave for three (3) consecutive days” as stated in ERA, § 5.29e?

3           6) Did respondent Day or another supervisory employee attempt to contact the  
4 petitioner prior to processing the October 17, 2007 *HCN Disciplinary Action Form*? If so, and if  
5 successful, what transpired in the resulting conversation?  
6

7           7) Did respondent Day or another supervisory employee provide the petitioner with  
8 notice and an opportunity to be heard prior to her separation from employment? If not, why?

9           The Court requests that the GRB inform it of the timeframe in which it can accomplish  
10 adherence with this judgment. The GRB shall file such notice within fifteen (15) days of the  
11 issuance of this decision. The Court hopes that neither the appellate tribunal nor the parties  
12 perceive any obstinacy or disrespect within this decision. The breadth and depth of the opinion  
13 should illustrate the Court's legitimate concerns with the issues involved herein.  
14

15           The Court also hopes that this decision serves to emphasize the importance of  
16 confronting and resolving legal issues in a consistent and well-reasoned manner. When invoked,  
17 the Court has even-handedly applied the defense of failing to exhaust administrative remedies.  
18 The *Decision* now casts this practice in doubt.  
19

20  
21           **IT IS SO ORDERED** this 9<sup>th</sup> day of December 2008, by the Ho-Chunk Nation Trial  
22 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.  
23

24  
25  
26 \_\_\_\_\_  
27 Honorable Todd R. Matha  
28 Chief Trial Court Judge

Ho-Chunk Nation Court System  
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