

1 The petitioner next filed a timely *Initial Brief* on August 11, 2008.¹ *Id.*, Rule 63(E). The
2 respondent filed a timely *Response Brief* on September 10, 2008. *Id.* The petitioner filed his
3 timely *Reply Brief* on September 19, 2008. *Id.* Neither party requested the ability to present oral
4 argument, prompting the Court to determine the matter on the documentary materials. *Id.*, Rule
5 63(G); *Scheduling Order* at 3.
6

7 8 **APPLICABLE LAW**

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

10 **Art. V - Legislature**

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

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

16 **Art. VI - Executive**

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

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

23 **Art. VII - Judiciary**

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

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

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¹ The petitioner does not seek administrative review of the agency decision as it relates to the claim of harassment.
Pet. at 3; *see also Initial Br.* at 7.

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

3 Subsec. 5. Rules and Procedures.

4 c. The Judiciary shall have exclusive authority and responsibility to employ
5 personnel and to establish written rules and procedures governing the use and operation of the
6 Courts.

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

10 DEPARTMENT OF PERSONNEL ESTABLISHMENT AND ORGANIZATION ACT OF
11 2001, 1 HCC § 10

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

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

14 b. Ensure adherence to consistent policies and procedures.

15 c. Promulgate employee handbooks with pertinent personnel policies and
16 procedures.

17 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

18 Ch. 1 - General Provisions

19 Subsec. 4. Responsibilities.

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

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

25 Subsec. 30. Employee Conduct.

26 e. Unacceptable Conduct. The following employee acts, activities, or behavior that
27 are unacceptable conduct.

28 (11) Conduct that interferes with the management of Tribal operations.

1 Subsec. 31. Employee Discipline.

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

6 (2) Termination.

7 Subsec. 33. Administrative Review Process.

8 a. Policy.

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

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

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

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

20 d. Request for a Hearing. An employee must request a hearing within five (5)
21 business days of the date the disciplinary action was taken. At the time the employee requests a
22 hearing, he or she must inform the Department of Personnel if he or she is to be represented by
23 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.

24 e. Witnesses and Evidence.

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

1 f. Hearing Procedure.

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

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

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

14 Subsec. 35. Judicial Review.

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

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

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

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

1 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
2 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
3 conclusions or make additional findings or conclusions, amending the judgment accordingly.
4 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
5 time for initiating an appeal commences upon entry of the amended judgment. If the Court
6 denies a motion filed under this Rule, the time for initiating appeal from the judgment
7 commences when the Court denies the motion on the record or when an order denying the
8 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
9 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
10 order denying the motion, the motion is considered denied. The time for initiating the appeal
11 from judgment commences in accordance with the *Rules of Appellate Procedure*.

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

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

18 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
19 party made within a reasonable time for the following reasons: (1) newly discovered evidence
20 which could not reasonably have been discovered in time to request a new trial; (2) fraud,
21 misrepresentation or serious misconduct of another party to the action; (3) good cause if the
22 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not
23 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
24 released, discharged or is without effect due to a judgment earlier in time.

23 Rule 61. Appeals.

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

1 Rule 63. Judicial Review of Administrative Adjudication.

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

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

6 a. EMPLOYMENT RELATIONS ACT OF 2004

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

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

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

23 (G) At the discretion of the Court, the Court may require an oral argument. The Court shall
24 decide the order of the presentation, the length of time each party is permitted for their
25 presentation, the issues to be addressed in oral argument, and such other matters as may be
26 necessary. An order entitled, *Notice of Oral Argument*, shall include all such matters and shall be
27 served on all parties at least ten (10) calendar days prior to the date set for argument.

28 **FINDINGS OF FACT²**

1. The petitioner, Janet M. Funmaker, is an enrolled member of the Ho-Chunk Nation,
Tribal ID# 439A000558, and maintains a mailing address of P.O. Box 273, Mauston, WI 53948.

² The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally refrains from making independent factual findings. ERA, § 5.35e. Unless otherwise clearly indicated, the below findings of fact constitute relevant findings of the administrative agency for purposes of this judgment as articulated

1 The petitioner was employed as a Beverage Supervisor at Ho-Chunk Casino, Hotel &
2 Convention Center, a division within the Ho-Chunk Nation Department of Business (hereinafter
3 Business Department), located at S3214 Highway 12, Baraboo, WI 53913. See DEP'T OF BUS.
4 ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c. The Business Department is an executive
5 department with principal offices located on trust lands at Ho-Chunk Nation Headquarters,
6 W9814 Airport Road, P.O. Box 667, Black River Falls, WI. See CONSTITUTION OF THE HO-
7 CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b). The Ho-Chunk Nation (hereinafter
8 HCN or Nation) is a federally recognized Indian tribe. See 73 Fed. Reg. 18533 (Apr. 4, 2008).

11 2. The respondent, GRB, is a statutorily established entity for the purpose of hearing certain
12 employment grievances, and is primarily comprised of randomly selected members who receive
13 training facilitated by the HCN Department of Personnel (hereinafter Personnel Department).
14 ERA, § 5.34a(1-2); see also *Janet Funmaker v. Libby Fairchild, in her capacity as Executive*
15 *Dir. of HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the
16 GRB is “an agency within the Department of Personnel”).

18 3. The GRB identifies the relevant legal issue, associated facts,³ and conclusion within
19 three (3) brief paragraphs, which the Court restates below:

20 The Board also considered the merits of the evidence and
21 testimony. Materials and testimony provided highlight the crux of conflict
22 whether or not the Grievant disclosed either physically or visually,
23 confidential information alluding to the impending disciplinary action of a
subordinate employee. The materials from the UI [“Unemployment

24 within the administrative decision. The Court shall only propose alternative findings of fact in the event that the
25 agency's factual rendition is not supported by substantial evidence. See *infra* p. 12.

26 ³ The GRB does chronologically summarize the testimony presented at the January 16 and June 4, 2008 hearings
27 over the course of nine (9) pages, but maintains a level of neutrality throughout the narration. *GRB Decision* at 2-
28 10. The GRB never truly attempts to make factual findings even within the quoted decisional section. The GRB,
however, is charged with “describ[ing] the facts of the case and determin[ing] whether the facts support a violation
of the Employment Relations Act.” ERA, § 5.34g(7). Consequently, the GRB may not simply set forth conflicting
evidence without determining factual validity, including credibility of witnesses. See *Patricia A. Lowe-Ennis et al.*
v. HCN TERO Comm'n, CV 04-06-07 (HCN Tr. Ct., Feb. 7, 2006). Only the nature of the instant case serves to
excuse this deficiency. The GRB must more diligently perform its delegated function in the future.

1 Insurance”)] hearing indicate that Mr. [Robert L. Funmaker[, Jr.,
2 petitioner’s supervisor,] provided no proof that the Grievant’s discharge
3 was based on her admission of releasing documentation to [Daniel J.
4 Perez, petitioner’s nephew]. In another portion of that decision, the ALJ
5 writes, “The employee (Grievant) then told her nephew that ‘there are
6 papers for approval of suspending him.’” [citation omitted]. The footnote
7 indicates, “[T]he appeal tribunal considers this an admission against the
8 interest by a party.” [citation omitted].

9 The Board finds that any prevailing argument from either side
10 based on evidence, testimony or credibility may be a pretext to the
11 substantive issue of the grievance, itself. The prudential fact is that the
12 argument does not exonerate the Grievant’s deliberate involvement into
13 the sequential disciplinary process of another supervisor which adversely
14 interrupted and negatively affected tribal operations.

15 Based on a GRB filing that fails to exploit or articulate a wrongful
16 or unlawful cause of action in the termination of the employee, the
17 Grievance Review Board hereby **UPHOLDS** the termination of May 24,
18 2007.

19 *In the Matter of: Janet Funmaker v. Food & Beverage Dep’t et al.*, GRB-006-07-D/S/T (GRB,
20 June 4, 2008) (hereinafter *GRB Decision*) at 10-11.⁴

21 4. The administrative hearing concerning the alleged wrongful termination occurred on
22 January 16, 2008,⁵ but the inquiry into alleged harassment did not occur until June 4, 2008.

23 ⁴ Within the introductory section, the GRB “finds that the Grievant failed to provide a cause of action in her
24 grievance regarding her termination.” *GRB Decision* at 1-2. The GRB reiterates this concern immediately before its
25 three-paragraph conclusion, but nonetheless proceeds to the merits of the grievance. *Id.* at 10. The Court
26 appreciates the agency’s perspective, but prevailing law does not appear to allow a dismissal on this basis. A
27 terminated employee has a “right to a hearing before the Grievance Review Board,” ERA, § 5.34c, thereby
28 providing “a means of having the circumstances of such disciplinary action reviewed by an impartial and objective”
fact-finder. *Id.*, § 5.34a(1). Applicable law does not dictate the substantive details of a grievance, but merely
requires a grievant to “request a hearing within five (5) business days of the date the disciplinary action was taken.”
Id., § 5.34d. Thereafter, a grievant has the ability to submit a witness list and copies of potential documentary
evidence to the GRB, *id.*, § 5.34e(1), but a grievant is not required to present “the reasons why he or she believes the
disciplinary action should not be upheld” until the hearing. *Id.*, § 5.34f(3).

In contrast, a petitioner’s initial pleading “must . . . contain a concise statement of the basis for the review,
i.e., reason or grounds for the appeal.” *HCN R. Civ. P.* 63(B). The CONSTITUTION confers authority upon the Ho-
Chunk Nation Supreme Court “to establish written rules for the Judiciary.” CONST., ART. VII, § 7(b); *see also* HCN
JUDICIARY ESTABLISHMENT & ORG. ACT, 1 HCC § 1.5(c-d). Trial Court pleading requirements derive from this
source. Any equivalent administrative grievance requirement must flow from an explicit delegation of legislative
authority to the Personnel Department. *See* CONST., ART. V, § 2(b). The ERA contains a somewhat ambiguous,
albeit broad, delegation, but the cited basis for this delegation does not appear to permit an adoption of
administrative grievance procedures, especially if such procedures would constrict the statutory right to grieve.
ERA, § 5.4a (citing DEP’T OF PERS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 10.4a-c).

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DECISION

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

⁵ The ERA does not establish a timeframe in which the GRB must convene a hearing after receiving a grievance. In this instance, 232 days elapsed between the filing of the May 29, 2007 grievance and the hearing, and an additional 140 days before the issuance of the *GRB Decision*.

⁶ The full text of *Baldwin* appears at www.ho-chunknation.com/government/judicial/case_index2.htm.

⁷ In *Baldwin*, the Court performs an extensive review and critique of the Nation’s administrative law jurisprudence. The Court clearly acknowledges the persuasive, not binding, authority of federal case precedent within the opinion, but proceeds to cautiously dissect the varying standards of review commonly used in administrative law since inattention to detail plagued the Court’s initial foray into this field. *Baldwin*, CV 01-16, -19, -21 at 21. Regardless, the HCN Supreme Court recently found “it improper and extremely troubling that the Trial Court would rely exclusively on U.S. case law in deciding any issue, without first looking to the laws and precedents of *this Nation*.” *Sharon Williams v. HCN Ins. Review Comm’n*, SU 08-01 (HCN S. Ct., Oct. 29, 2008) at 13. The Supreme Court then cites several cases where the Trial Court purportedly employed deferential standards of review in the context of an administrative appeal. *Id.* (citing *Karen Bowman v. HCN Ins. Review Comm’n*, CV 06-02 (HCN Tr. Ct., Jan. 10, 2007); *Dolores Greendeer v. Randall Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001); *Debra Knudson v. HCN Treas. Dep’t*, CV 97-70 (HCN Tr. Ct., Feb. 5, 1998); *Sandra Sliwicki v. Rainbow Casino et al.*, CV 96-10 (HCN Tr. Ct., Dec. 9, 1996); *Gale S. White v. Dep’t of Pers. et al.*, CV 95-17 (HCN Tr. Ct., Oct. 14, 1996)). However, each of these cited decisions likewise rely upon external case law. To a degree, certain decisions may cite prior tribal opinions, which, in turn, cite external case law, but the Court fails to understand how a paraphrased quotation perhaps followed by “citation omitted” would serve to demonstrate a unique tribal pedigree. This Court would regard such a practice as intellectually dishonest, and alternatively choosing to refer to *Black’s Law Dictionary* or other secondary resource for research purposes can prove a haphazard exercise. *See Chloris Lowe, Jr. et al. v. HCN Legislative Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Nov. 1, 2001) at 5 n.3; *id.*, CV 00-104 (HCN Tr. Ct., Mar. 30, 2001) at 7 n.3, 13 n.10.

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

1 Executive agencies may engage in formal on the record adjudication, resulting in the
2 promulgation of rules through the formation of a body of case precedent. *See, e.g., Dickinson v.*
3 *Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998);
4 *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing adjudicative
5 rulemaking, as well as other forms of agency action, courts begin by recognizing that Congress
6 intended the Administrative Procedure Act to “establish[] a scheme of ‘reasoned
7 decisionmaking.’”⁸ *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
8 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered
9 analysis, determining whether the adjudicative rule satisfies a substantial evidence standard, and,
10 if so, whether the rule escapes a designation of arbitrary and capricious.⁹
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12 The two (2) inquiries represent “‘separate standards.’” *Bowman*, 419 U.S. at 284
13 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently,
14 a court “may properly conclude[] that, though an agency’s finding may be supported by
15 substantial evidence, . . . it may nonetheless reflect an arbitrary and capricious action.” *Bowman*,
16 419 U.S. at 284. In such an event, the Court would afford no deference to the adjudicative rule
17 of the agency precisely because the rule could not withstand the more deferential arbitrary and
18 capricious standard.
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23 29, 2008); *see also In re Adoption of Fed. R. Evid.* (HCN S. Ct., June 5, 1999); *In Re Adoption of Rules of Prof'l*
24 *Conduct for Att’ys* (HCN S. Ct., Aug. 31, 1996).

25 ⁸ The HCN Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g.,*
26 GAMING ORDINANCE, § 1101(c)(v); *compare* 5 U.S.C. § 706.

27 ⁹ The ERA directs that “[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and
28 capricious.” ERA, § 5.35e; *but cf.* AMENDED & RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION
(hereinafter GAMING ORDINANCE), § 1101(c)(v). Nonetheless, the Court shall continue to engage in the two-tiered
analysis due to the inseparable components of the inquiry. Furthermore, some federal courts have denoted a
convergence of the standards, making any analytical distinction unattainable. *See, e.g., Aircraft Owners & Pilots*
Ass’n v. FAA, 600 F.2d 965, 971 n.28 (D.C. Cir. 1979) (describing the distinction as “largely semantic”). This Court
disagrees with this assessment, at least in the context of formal on the record adjudication, but it reveals the
interrelatedness of the two standards.

1 The substantial evidence standard has no application beyond the review of “record-based
2 factual conclusion[s],” and only in unusual circumstances will agency action surviving a
3 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In
4 performing the second-tier of analysis, arbitrary and capricious review,
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6 [a] reviewing court must “consider whether the decision was based on a
7 consideration of the relevant factors and whether there has been a clear
8 error of judgment. . . . Although this inquiry into the facts is to be
9 searching and careful, the ultimate standard of review is a narrow one.
10 The court is not empowered to substitute its judgment for that of the
11 agency.” The agency must articulate a “rational connection between the
12 facts found and the choice made.” While [a court] may not supply a
13 reasoned basis for the agency’s action that the agency itself has not given,
14 [a court] will uphold a decision of less than ideal clarity if the agency’s
15 path may reasonably be discerned.

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

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

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

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

9 *Id.* at 374-75. The inconsistent or contrary application of an adjudicative rule must result in a
10 finding that the agency has failed to support its action by substantial evidence. A court cannot
11 deem subsequent aberrations as simply agency interpretations of the underlying rule. *Id.* at 377-
12 78.

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

19 As noted above, the ERA attempts to limit the appellate role “to set[ting] aside or
20 modify[ing] a Board decision if it was arbitrary and capricious.” ERA, § 5.35e. The ERA does
21 not articulate the Court's ability to set aside an agency decision that proves “contrary to law.”
22 *Compare* GAMING ORDINANCE, § 1101(c)(v). Such a seemingly broad recognition of judicial
23 authority, however, does not invite or permit a *de novo* review in the context of a typical
24 administrative review. That is to say, a court cannot bypass the obviously deferential standards
25 of review when it perceives an isolated question of law. Rather, a court may only set aside an
26 agency action as contrary to law when the agency clearly acts outside the parameters of its
27 legislatively delegated authority. For example, this Court would not need to defer to a GRB
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1 decision that claimed to determine an enrollment issue under the guise of a Ho-Chunk preference
2 grievance. Such a decision would certainly be struck down as contrary to law regardless of
3 whether the HCN Legislature incorporated this provision in the standard of review paragraph.
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5 *See Willard LoneTree v. Larry Garvin, in his official capacity as Executive Dir. of HCN*
6 *Heritage Pres.*, SU 07-04 (HCN S. Ct., Oct. 6, 2007) at 4 (noting appellate agreement with this
7 premise).

8 Nowhere is this judicial authority more obvious than when a court encounters an
9 administrative agency's efforts to interpret and apply constitutional principles. “[C]onstitutional
10 questions obviously are unsuited to resolution in administrative hearing procedures and,
11 therefore, access to the courts is essential to the decision of such questions.” *Califano v. Sanders*,
12 430 U.S. 99, 109 (1977).¹⁰ The HCN Legislature lacks the ability to confer constitutional
13 adjudication authority upon an executive administrative agency, and the ERA does not purport to
14 do so. *Lonetree*, SU 07-04 at 4-6. Any such attempt would prove inconsistent with the
15 theoretical and legal underpinnings of administrative power. *See Baldwin*, CV 01-16, -19, -21 at
16 15 n.5.

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18
19 In the instant matter, the GRB frames the central issue in dispute or “the crux of conflict”
20 as follows: “whether or not the Grievant disclosed[,] either physically or visually, confidential
21 information alluding to the impending disciplinary action of a subordinate employee.” *GRB*
22 *Decision* at 10-11. The GRB essentially set out to determine whether it could sustain the
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25 ¹⁰ The following federal circuit court assessments reinforce this unassailable premise. “[A]s a general rule, an
26 administrative agency is not competent to determine constitutional issues.” *Petruska v. Gannon Univ.*, 462 U.S.
27 294, 308 (3rd Cir. 2006). “To be sure, administrative agencies . . . cannot resolve constitutional issues. Instead, the
28 premise of administrative exhaustion requirements for petitioners with constitutional claims is that agencies may be
able to otherwise address petitioners' objections, allowing the courts to avoid unnecessary constitutional decisions.”
Am. Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 766 n.6 (D.C. Cir. 1997). “[A] reviewing court owes
no deference to the agency's pronouncement on a constitutional question.” *Lead Indus. Assoc., Inc. v. EPA*, 647
F.2d 1130, 1173-74 (D.C. Cir. 1980).

1 grounds for the petitioner's discharge, *i.e.*, did "Janet [M. Funmaker] g[i]ve Daniel [J. Perez a]
2 copy of his disciplinary documents?" *HCN Disciplinary Action Form* (May 18, 2007). The
3 petitioner expends great effort arguing that she only verbally revealed the impending disciplinary
4 action to Mr. Perez, and did not present him with a copy of the same. *See Initial Br.* at 1-7, 9-16.
5 The Court regards this as a distinction without a difference, and the GRB seemingly concurs with
6 this assessment. The GRB concluded that the petitioner's protestations "d[id] not exonerate the
7 Grievant's deliberate involvement into the sequential disciplinary process of another supervisor."
8 *GRB Decision* at 11.

9
10 The petitioner admits that "[w]hile Perez was writing his incident report, [she] accessed a
11 copy of [Thomas] Morehouse's Disciplinary Action" from a computer upon which she "had
12 supervisory access." *Initial Br.* at 3. The petitioner further admits:

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14 she told Perez "there were papers for approval of suspending him" and
15 that she was going to include a copy of those papers in an envelope with
16 Perez's incident report and give that to Robert Funmaker so that Mr.
17 Funmaker would know what Perez was talking about in his own incident
report.

18 *Id.* at 12 (quoting *id.*, Attach. 5 at 2). The Court cannot believe that the petitioner honestly urges
19 it to reverse the *GRB Decision* on the argument that a verbal explanation is substantively
20 different from a visual examination. Mr. Funmaker may have inaccurately reported the manner
21 in which the exchange of information occurred, but the petitioner does not dispute that the
22 exchange did in fact occur.

23
24 The petitioner additionally contends that, even assuming the disclosure, she did not
25 "interfere[] with the management of Tribal operations." *HCN Disciplinary Action Form*
26 (quoting ERA, § 5.30e(11)). The petitioner insists that her actions had no practical effect. "The
27 employer conceded Daniel Perez did serve a one-day suspension based on Morehouse's request.
28

1 The parties agreed Perez did not grieve this suspension. What never was answered was how
2 Janet Funmaker’s conduct interfered with tribal operations.” *Initial Br.* at 7. The Court,
3 however, deems that the petitioner improperly focuses upon the absence of detrimental
4 consequences flowing from her actions. The exchange of information itself constitutes the
5 wrongful interference. The Court cannot believe that the petitioner would regard statutorily
6 enumerated instances of “unacceptable conduct” tolerable, and, therefore, unpunishable,
7 provided that no harm arises from the conduct. *See Daniel Brown v. James Webster, as*
8 *Executive Dir. of Bus.*, SU 06-03 (HCN S. Ct., Feb. 9, 2007) (finding employee’s inappropriate
9 speech actionable despite failure to deliver in intended forum). The GRB has not accepted this
10 rationale, and the Court must affirm the underlying decision, especially given the level of
11 deference to be afforded to the agency.¹¹

14 The parties retain the right to file a timely post judgment motion with this Court in
15 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order.*
16 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
17 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
18 *App. P.*], specifically *Rules of Appellate Procedure, Rule 7, Right of Appeal.*” *HCN R. Civ. P.*
19 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order
20 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
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24 ¹¹ The GRB does not address an alleged failure to afford the petitioner minimal pre-deprivation procedural due
25 process protection. The Court likewise declines to conduct a searching examination of this constitutional issue. The
26 petitioner admits that Robert L. Funmaker, Jr. met with her prior to her termination, but disputes the date of the
27 meeting. *Initial Br.* at 4, 16. The petitioner emphasizes Mr. Funmaker’s inability to provide details of the meeting
28 within his testimony before the GRB, but never definitively asserts that Mr. Funmaker did not provide her an
opportunity to be heard. *Id.* at 16. The petitioner remains absolutely silent, and instead insists that “[b]ased on
Robert Funmaker’s untruthfulness, the only conclusion the Court can arrive at is Janet Funmaker was not afforded
Due Process in her termination.” *Id.* at 16-17. Other than a sectional heading, “*Janet Funmaker was not Afforded*
Due Process,” the petitioner never manages to allege specific inadequacies. The Court must insist upon more than a
seemingly unfounded allegation before disrupting the employer’s disciplinary action.

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.
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6 **IT IS SO ORDERED** this 19th day of December 2008, by the Ho-Chunk Nation Trial
7 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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10 _____
11 Honorable Todd R. Matha
12 Chief Trial Court Judge
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Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070

