

1 In response, the respondents submitted the administrative record on July 21, 2008. *See HCN R.*
2 *Civ. P. 63(D).*

3 The petitioner next filed a timely *Initial Brief* on August 14, 2008. *Id.*, Rule 63(E). The
4 respondent filed a timely *Response Brief* on September 15, 2008. *Id.* The petitioner filed her
5 timely *Reply Brief* on September 25, 2008. *Id.* Neither party requested the ability to present oral
6 argument, prompting the Court to determine the matter on the documentary materials. *Id.*, Rule
7 63(G); *Scheduling Order* at 3.
8

9 10 **APPLICABLE LAW**

11 12 **CONSTITUTION OF THE HO-CHUNK NATION**

13 **Art. V - Legislature**

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

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

19 **Art. VI - Executive**

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

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

28 **Art. VII - Judiciary**

Sec. 7. Powers of the Supreme Court.

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

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

6 Subsec. 5. Rules and Procedures.

7 c. The Judiciary shall have exclusive authority and responsibility to employ
8 personnel and to establish written rules and procedures governing the use and operation of the
9 Courts.

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

13 DEPARTMENT OF PERSONNEL ESTABLISHMENT AND ORGANIZATION ACT OF
14 2001, 1 HCC § 10

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

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

17 b. Ensure adherence to consistent policies and procedures.

18 c. Promulgate employee handbooks with pertinent personnel policies and
19 procedures.

20 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

21 Ch. 1 - General Provisions

22 Subsec. 4. Responsibilities.

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

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

28 Subsec. 31. Employee Discipline.

a. Depending on the nature of the circumstances of an incident, discipline will
normally be progressive and should bear a reasonable relationship to the violation. Based on the

1 severity of the employee conduct, progressive discipline may not be applicable. Supervisors
2 imposing discipline shall afford Due Process to the employee prior to suspending or terminating
any employee. Types of discipline include:

3 (2) Termination.

4
5 Subsec. 33. Administrative Review Process.

6 a. Policy.

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

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

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

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

17 d. Request for a Hearing. An employee must request a hearing within five (5)
18 business days of the date the disciplinary action was taken. At the time the employee requests a
19 hearing, he or she must inform the Department of Personnel if he or she is to be represented by
20 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
21 within this time frame will result in the forfeiture of a hearing by the Board.

22 e. Witnesses and Evidence.

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

26 f. Hearing Procedure.

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

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

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

8 Subsec. 35. Judicial Review.

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

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

17 e. Under this limited waiver of sovereign immunity, the Court shall review the
18 Board's decision based upon the record before the Board. Parties may request an opportunity to
19 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.

19 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

24 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
25 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
26 conclusions or make additional findings or conclusions, amending the judgment accordingly.
27 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
28 time for initiating an appeal commences upon entry of the amended judgment. If the Court
denies a motion filed under this Rule, the time for initiating appeal from the judgment
commences when the Court denies the motion on the record or when an order denying the

1 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
2 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
3 order denying the motion, the motion is considered denied. The time for initiating the appeal
from judgment commences in accordance with the *Rules of Appellate Procedure*.

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

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

16 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
17 party made within a reasonable time for the following reasons: (1) newly discovered evidence
18 which could not reasonably have been discovered in time to request a new trial; (2) fraud,
19 misrepresentation or serious misconduct of another party to the action; (3) good cause if the
20 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not
21 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
22 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*.

28 Rule 63. Judicial Review of Administrative Adjudication.

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

1. The following laws provide for filing within thirty (30) days:
 - a. EMPLOYMENT RELATIONS ACT OF 2004

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

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

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

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

22 FINDINGS OF FACT¹

23 1. The petitioner, Tracy Cole, is a non-member, and she maintains a mailing address of 850
24 Plum Street, #A102, Reedsburg, WI 53959. The petitioner was employed as a Food & Beverage
25 Bartender at Ho-Chunk Casino, Hotel & Convention Center, a division within the Ho-Chunk
26 Nation Department of Business (hereinafter Business Department), located at S3214 Highway
27 12, Baraboo, WI 53913. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC §
28 3.5c. The Business Department is an executive department with principal offices located on trust
lands at Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls,

¹ 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 within the administrative decision.

1 WI. See CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b).
2 The Ho-Chunk Nation (hereinafter HCN or Nation) is a federally recognized Indian tribe. See 73
3 Fed. Reg. 18533 (Apr. 4, 2008).

4
5 2. The respondent, GRB, is a statutorily established entity for the purpose of hearing certain
6 employment grievances, and is primarily comprised of selected members who receive training
7 facilitated by the HCN Department of Personnel (hereinafter Personnel Department). ERA, §
8 5.34a(1-2); see also *Janet Funmaker v. Libby Fairchild, in her capacity as Executive Dir. of*
9 *HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the GRB
10 is “an agency within the Department of Personnel”).
11

12 3. On December 12, 2007, the petitioner told her supervisor that she had to leave early to
13 tend to her child. *In re the Matter of: Tracy Cole v. Food & Beverage Dep't et al*, GRB-155-07-
14 T (GRB, Mar. 26, 2007) at 3 (hereinafter *Decision I*).

15
16 4. Petitioner was led to believe that she would be fired if she left early under the auspices of
17 job abandonment. *Id.*

18 5. The petitioner timely grieved the termination to the GRB on December 18, 2007.
19 *Decision I* at 1; see also ERA, § 5.34d. The petitioner requested “all lost wages/vacation
20 time/sick leave/reinstate my employment as if I never left.” *Ho-Chunk Nation Grievance Form*
21 at 1.
22

23 6. On March 26, 2008, the GRB conducted a hearing. *Decision I* at 2.

24 7. The GRB determined that Food & Beverage Manager, Robert Funmaker concealed the
25 act of termination by administratively cloaking documentation to portray a voluntary resignation.
26 *Id* at 1.
27
28

1 8. The GRB granted the petitioner the following relief and directed the Executive Director
2 of Personnel to issue the following:

3 A. Reinstatement or Reassignment to comparable² position of employment
4 with the Ho-Chunk Nation reflecting the start date of September 9, 2007 executed
5 by the following terms:

6 B. Back pay from date of separation from employment (December 12, 2007)

7 The GRB maintains the authority to issue such monetary relief in accordance SU
8 07-05 (HCN S. Ct., Aug. 31, 2007) *Janet Funmaker v. Libby Fairchild, in her*
9 *capacity as Executive Director of HCN Dep't of Pers. et al.* The GRB calculates
such relief as follows:

10 The employee's former rate of pay (\$8.00/hr) times 8 hours for each day lost
11 (based on a 40hr/wk fulltime schedule). This applies to any granted request for
12 lost wages minus any encumbrances imposed by the Nation, any unemployment
13 compensation paid by the Nation or any calculated wage differential from the
former rate of pay to the implementation of such relief granted by the Board.

14 C. Leave accrual benefits as follows:

15 1. The Grievant is entitled to the weekly credit accrual of Annual Leave at
16 the rate of 1.85 hrs/week reflective of the December 9, 2007 transition from
probationary to permanent status less any time utilized.

17 2. The Grievant is entitled to the weekly credit accrual of Sick Leave at
18 the rate of .92 hrs/week reflective of the December 9, 2007 transition from
19 probationary to permanent status less any time utilized.

20 D. Unmitigated insurance benefits as follows:

21 Reinstatement of entitled insurance benefits retroactive to December 9, 2007 in
22 accordance with the Nation's insurance plan.

23 *Decision I* at 2.

24 9. The administrative hearing concerning the alleged wrongful termination occurred on
25 March 26, 2008.

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28 ² In order for the position to meet the "comparable" definition as per the ERA, the Grievant's wages must be
modified to reflect a minimum base wage of \$6.80/hr, which is "15% of the current wage or previous wage (6 HCC
§ 5 Employment Relations Act (7)(i)).

1 10. The GRB held an additional hearing on June 17, 2008 because the Food & Beverage
2 Manager, Robert Funmaker submitted a request to the Executive Director of Personnel seeking
3 reconsideration of that decision since he was not available for the March 26, 2008 hearing. *In re*
4 *the Matter of: Tracy Cole v. Food & Beverage Dep't et al*, GRB-155-07-T Administrative
5 Review (GRB, June 17, 2008) at 1 (hereinafter *Decision II*).

8 DECISION

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

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

⁴ The HCN Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g.,* GAMING ORDINANCE, § 1101(c)(v); *compare* 5 U.S.C. § 706.

1 analysis, determining whether the adjudicative rule satisfies a substantial evidence standard, and,
2 if so, whether the rule escapes a designation of arbitrary and capricious.⁵

3 The two (2) inquiries represent "separate standards." *Bowman*, 419 U.S. at 284 (quoting
4 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently, a court
5 "may properly conclude[] that, though an agency's finding may be supported by substantial
6 evidence, . . . it may nonetheless reflect an arbitrary and capricious action." *Bowman*, 419 U.S.
7 at 284. In such an event, the Court would afford no deference to the adjudicative rule of the
8 agency precisely because the rule could not withstand the more deferential arbitrary and
9 capricious standard.
10

11 The substantial evidence standard has no application beyond the review of "record-based
12 factual conclusion[s]," and only in unusual circumstances will agency action surviving a
13 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In
14 performing the second-tier of analysis, arbitrary and capricious review,
15

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

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

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

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

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

25 *Id.* at 374-75. The inconsistent or contrary application of an adjudicative rule must result in a
26 finding that the agency has failed to support its action by substantial evidence. A court cannot
27 deem subsequent aberrations as simply agency interpretations of the underlying rule. *Id.* at 377-
28 78.

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

1 Furthermore, the need for reasoned decision-making and the consistent application of resulting
2 decisions underlie and overarch the statutorily based analysis. Apart from this predominate
3 approach to agency review, instances exist when a court must designate an administrative
4 decision as either contrary to law or otherwise not deserving of deferential treatment.
5

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

1 430 U.S. 99, 109 (1977).⁶ The HCN Legislature lacks the ability to confer constitutional
2 adjudication authority upon an executive administrative agency, and the ERA does not purport to
3 do so. Any such attempt would prove inconsistent with the theoretical and legal underpinnings
4 of administrative power. *See Baldwin*, CV 01-16, -19, -21 (HCN Tr. Ct., Oct. 3, 2003) at 15 n.5.

5
6 In the instant matter, the GRB “must determine the classification status of Ms. Tracy
7 Cole’s separation from employment and further determine if such separation was executed in a
8 lawful manner preserving the rights of employees.” *Decision I* at 1. The GRB determined that
9 “no evidence or testimony rendered by supervisory management support that Ms. Cole had
10 ‘voluntary’ [*sic*] separated her employment through a verbal resignation. *Id* at 1. Food &
11 Beverage Manager, Robert Funmaker submitted a request to the Executive Director of Personnel
12 seeking reconsideration of that decision since he was not available for the March 26, 2008
13 hearing. *Decision II* at 1. However, the GRB found that the

14
15 [t]estimony rendered on appeal may have highlighted the expressed intent to
16 discipline the employee however this notion was modified by individuals aside
17 from the Grievant to reflect her departure as a verbal resignation. The utter
18 confusion and inconsistencies between management and the Department of
19 Personal came at the expense of the rights of the Grievant therefore motivating
20 the Board to provide a remedy. This remedy is provided in the March 26, 2008
21 decision and remains in effect and unmodified.

22 *Id.* at 5.

23 The petitioner filed a *Petition for Administrative Review* because “[t]he G.R.B. did not
24 take into consideration the amount of money I was making when I was fired, and did not include
25 holiday pay or my Christmas bonus, so I’m asking for modification of back pay and enforcement

26
27 ⁶ The following federal circuit court assessments reinforce this unassailable premise. “[A]s a general rule, an
28 administrative agency is not competent to determine constitutional issues.” *Petruska v. Gannon Univ.*, 462 U.S.
294, 308 (3rd Cir. 2006). “To be sure, administrative agencies . . . cannot resolve constitutional issues. Instead, the
premise of administrative exhaustion requirements for petitioners with constitutional claims is that agencies may be
able to otherwise address petitioners’ objections, allowing the courts to avoid unnecessary constitutional decisions.”
Am. Coalition for Competitive Trade v. Clinton, 128 F.3d 761, 766 n.6 (D.C. Cir. 1997). “[A] reviewing court owes

1 of the decision.” *Pet.* at 1. Furthermore, within the *Initial Brief* and *Reply Brief*, the petitioner
2 does not state that either *Decision I* or *Decision II* lacked consideration of relevant factors,
3 represented a clear error of judgment, or was arbitrary and capricious. However, the petitioner
4 requested an averaged pay check which included her tips, holiday pay, a Christmas bonus, and a
5 Monday through Friday bartending job with the hours of 9:30 a.m. to 6:00 p.m. Presumably, the
6 GRB would not be able to assess what type of fictional tips that the petitioner may have made,
7 and cannot be reliant on past tips to project future tips. The record is silent with regards to her
8 tips, holiday pay, a Christmas bonus, and a Monday through Friday bartending job. In all
9 probability, such requests were not granted because they were not brought to the GRB’s
10 attention. If the petitioner does not request such relief through the grievance process, then the
11 GRB will not grant such requests without any inferences.

14 The petitioner’s *Ho-Chunk Nation Grievance Form* requested “all lost wages/vacation
15 time/sick leave/reinstate my employment as if I never left.” The GRB awarded the petitioner the
16 equitable relief requested. The GRB granted a reinstatement or reassignment to a comparable
17 position, back pay from the date of separation from employment, leave accrual benefits, and
18 unmitigated insurance. *Decision I* at 2. The Court is not the appropriate forum to amend her
19 request to include more possibilities for relief. Otherwise such process would allow potential
20 petitioners to subvert the GRB decision process, and allow for greater relief than was originally
21 requested.

24 The Court previously acknowledged that it was “ill-equipped to substitute its opinion for
25 certain discretionary decisions of the employer,” despite having no legal obligation to defer the
26 supervisory determinations. *Sherry Fitzpatrick v. Ho-Chunk Nation et al.*, CV 04-82 (HCN Tr.

28 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 Ct., Feb. 20, 2006) at 14. The Supreme Court recognizes that “[w]hen reviewing administrative
2 decisions, the Trial Court plays the role of an appellate court and is not charged with finding facts.
3 The GRB, with its greater expertise and familiarity, is the appropriate body to find facts.” *Funmaker*,
4 SU 07-05 at 9; *see also* ERA, § 5.34a(2). The GRB deemed Food & Beverage Manager, Robert
5 Funmaker’s disciplinary action of termination, under the guise of voluntary resignation, as
6 unreasonable in light of the established facts, and the Court shall not upset this determination.
7

8 **BASED UPON THE FOREGOING**, the Court upholds *Decision I* and *Decision II*, and
9 reiterates the relief section in *Decision I* directing the Executive Director of Personnel to issue the
10 following:

11 1. Reinstatement or Reassignment to comparable⁷ position of employment
12 with the Ho-Chunk Nation reflecting the start date of September 9, 2007 executed
13 by the following terms:

14 2. Back pay from date of separation from employment (December 12, 2007)

15 The GRB maintains the authority to issue such monetary relief in accordance SU
16 07-05 (HCN S. Ct., Aug. 31, 2007) *Janet Funmaker v. Libby Fairchild, in her*
17 *capacity as Executive Director of HCN Dep’t of Pers. et al.* The GRB calculates
such relief as follows:

18 The employee’s former rate of pay (\$8.00/hr) times 8 hours for each day lost
19 (based on a 40hr/wk fulltime schedule). This applies to any granted request for
20 lost wages minus any encumbrances imposed by the Nation, any unemployment
21 compensation paid by the Nation or any calculated wage differential from the
former rate of pay to the implementation of such relief granted by the Board.

22 3. Leave accrual benefits as follows:

23 a. The Grievant is entitled to the weekly credit accrual of Annual Leave at the rate
24 of 1.85 hrs/week reflective of the December 9, 2007 transition from probationary
to permanent status less any time utilized.

25 b. The Grievant is entitled to the weekly credit accrual of Sick Leave at the rate of
26 .92 hrs/week reflective of the December 9, 2007 transition from probationary to
27 permanent status less any time utilized.

28 ⁷ In order for the position to meet the “comparable” definition as per the ERA, the Grievant’s wages must be
modified to reflect a minimum base wage of \$6.80/hr, which is “15% of the current wage or previous wage (6 HCC
§ 5 Employment Relations Act (7)(i)).

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4. Unmitigated insurance benefits as follows:

Reinstatement of entitled insurance benefits retroactive to December 9, 2007 in accordance with the Nation’s insurance plan.

Decision I at 2.

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

IT IS SO ORDERED this 23rd day of December 2008, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

Honorable Amanda L. Rockman
Associate Trial Court Judge

Ho-Chunk Nation Court System
P.O. Box 70
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