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

**Regina K. Baldwin,**  
Plaintiff,

v.

Case No.: **CV 01-16**

**Ho-Chunk Nation,**  
Defendant.

-and-

**Andrea Estebo,**  
Plaintiff,

v.

Case No.: **CV 01-19**

**Ho-Chunk Nation Home Ownership  
Program, Steve Davis, as Real Estate  
Manager, and Alvin Cloud, as Housing  
Director,**  
Defendants.

-and-

**Carolyn J. Humphrey,**  
Plaintiff,

v.

Case No.: **CV 01-21**

**Ho-Chunk Nation, Alvin Cloud, as Housing  
Director, and Bob Pulley, as Property  
Manager,**  
Defendants.

**ORDER  
(Determination of Judicial Deference)**

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## INTRODUCTION

The Court must determine whether to defer to an interpretation of the Ho-Chunk Preference Policy offered by the Ho-Chunk Nation Department of Personnel [hereinafter Personnel Department] as evidenced through its application in layoffs affected in December 2000. The Court finds that the interpretation warrants no deference due to its clear departure from an earlier recognized interpretation. A thorough analysis of the issue follows below.

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## PROCEDURAL HISTORY

On April 18, 2001, the Court consolidated the three (3) separate actions pursuant to the *Ho-Chunk Nation Rules of Civil Procedure*, Rule 47(A). See *Motion Hearing* (Log of Proceedings Electronically Recorded [hereinafter *LPER*] at 1, Apr. 18, 2001, 03:16:30 P.M. CST). Thereafter, the Court entered its April 20, 2001 *Scheduling Order*, establishing the timeline for the consolidated cases. On April 23, 2001, the plaintiffs submitted their *Motion Seeking Release of Monies Representing Accumulated Annual Leave*. The parties eventually resolved the issues raised in this *Motion* as acknowledged through the June 12, 2001 *Stipulation and Order for Release of Accumulated Annual Leave Monies*.

Previously on June 11, 2001, the defendants filed the *Motion to Change Schedule*. The Court responded by entering the June 12, 2001 *Order (Granting Motion to Amend Scheduling Order)*, reflecting the agreement of the parties. The Court ultimately proceeded to hold *Trial* on August 16-17, 28, 2001. The following parties appeared during the *Trial*: Regina Baldwin, Andrea Estebo, and Carolyn J. Humphrey, plaintiffs; Attorney William F. Gardner, plaintiffs'

1 counsel; Alvin Cloud, Steve Davis, and Bob Pulley, defendants; and Ho-Chunk Nation  
2 Department of Justice [hereinafter DOJ] Attorney Michael P. Murphy.

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5 **APPLICABLE LAW**

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

8 **Art. V – Legislature**

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

10 (a) To make laws, including codes, ordinances, resolutions, and statutes;

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

15 **Art. VII – Judiciary**

16 **Sec. 4. Powers of the Judiciary.** The judicial power of the Ho-Chunk Nation shall be  
17 vested in the Judiciary. The Judiciary shall have the power to interpret and apply the  
18 Constitution and laws of the Ho-Chunk Nation.

19 **HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL**

20 **Introduction**

21 **General Purposes** [p. 2]

22 These policies are issued as the official directive of the obligations of the HoChunk [sic] Nation  
23 and the employees to each other and to the public. They are to ensure consistent personnel  
24 practices designed to utilize to [sic] the human resources of the Nation in the achievement of the  
25 desired goals and objectives.

26 This system provides means to recruit, select, develop, and maintain an effective and responsible  
27 work force. It shall include policies for employee hiring and advancement, training and career  
28 development, job classification, salary administration, retirement, fringe benefits, discipline,  
discharge, and other related activities.

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2 It is the responsibility of the employer and employees to abide by these policies and procedures.

3 Chpt. 1. Equal Employment Opportunity.

4 A. Equal Employment Policy

[p. 3-4]

5 It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any and all  
6 employees and job applicants on the basis of merit, qualifications, and competence. The  
7 HoChunk [sic] Nation does retain the right to exercise Native American preference in hiring  
8 Native American job applicants. This policy shall otherwise be applied without regard to any  
9 individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation,  
10 or physical handicap.

11 **RESOLUTION 02/25/97A** – *The Ho-Chunk Nation does retain the right to exercise Ho-Chunk  
12 preference in employment, training, and promotions.*

13 It shall be the responsibility of the employer and employees to abide by and carry out the  
14 Nation's equal employment policy and the Federal Equal Employment Opportunity Act.

15 **1.1 HO-CHUNK PREFERENCE: MOTION** (Ratified June 10, 1998)

16 *Native American Preference has been a federal policy since 1834 which accords hiring  
17 preference to Indians. The purpose of this preference is to give Native Americans a greater  
18 participation of self-government, to further the Governments [sic] trust obligations, and to  
19 reduce the negative effect of having non-Indians administer matters that effect Indian tribal life.  
20 More recently, legislation such as the Civil Rights Act (1964) and the Education Amendments of  
21 1972 (passed after the Equal Employment Opportunity) have continued to specifically provide  
22 for preferential hiring of Native Americans by Indian tribes.*

23 *The HoChunk [sic] Nation exists to serve the needs of the HoChunk [sic] people. As an  
24 employer, the Nation seeks to employ individuals who possess the skills, abilities, and  
25 background to meet the employment needs of the Nation.*

26 *As a sovereign Nation and a unique cultural group, the HoChunk [sic] Nation had determined  
27 that a highly desirable employment characteristic is a knowledge of the HoChunk [sic] culture  
28 that can be attained only by membership in the HoChunk [sic] Nation. Further, the Nation  
recognizes a unique, shared culture of Native American Indians and had determines [sic] as a  
desirable employment characteristic, is status as a member of other Native American tribes. At  
minimum, the Nation has determined that some knowledge of Native American culture is a  
desirable employment characteristic.*

*The HoChunk [sic] Nation is an equal employment opportunity employer and follows non-  
discriminatory policies and procedures in personnel decisions: however, the Nation maintains  
the right to exercise HoChunk [sic] preference, prioritized as:*

- 1 1. *Hoc□k Wazijaci Tribal member*
- 2 2. *Spouse or Parent of Hoc□k Wazijaci Tribal member*
- 3 3. *Native American Tribal member*
- 4 4. *Non-Natives*

4 *This policy shall be applied in recruiting, hiring, promotion, transfers, training, layoffs,*  
5 *compensation, benefits, terminations, and all other privileges, terms and other conditions of*  
6 *employment. The Human Resources/Personnel will communicate the important guidelines and*  
7 *procedures that will be followed in its commitment of HoChunk [sic] Preference.*

7 Chpt. 12. Employment Conduct, Discipline, and Administrative Review.

8 Hearing Levels for Non-gaming [p. 49-50]

9 Probationary or Limited Term Employees may not grieve on any matters.

- 10 1. Verbal warnings may not be grieved, but employees may add written response to  
11 their personnel file.
- 12 2. Performance Evaluations and written reprimands are to be grieved in sequence to:  
13
  - 14 1. Supervisor
  - 15 2. Executive Director
  - 16 3. Appropriate Department Administrator
- 17 3. Suspensions are grieved in sequence to:  
18
  - 19 1. Supervisor
  - 20 2. Executive Director
  - 21 3. Appropriate Department Administrator
  - 22 4. ~~Personnel Committee~~
- 23 4. Terminations in sequence to:  
24
  - 25 1. Supervisor
  - 26 2. Department Head
  - 27 3. Appropriate Department Administrator
  - 28 4. Trial Court/~~Personnel Grievance Commission~~

25 Administrative Review Process for Non-gaming [p. 50]

26 The burden of proof is on the grievant to show that what he/she is claiming, actually happened.  
27 All levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances  
28 shall be forwarded to the Personnel Department promptly by the grievant. This proof may  
include documentation and witnesses.

- 1 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working  
2 days of the action. The Supervisor has an affirmative duty to try and resolve the problem.  
3 The Supervisor has five (5) days to respond to the grievance. She/He must meet with the  
4 person and document the decision.
- 5 2. If there is no relief or response within five (5) days after the end of the time period of the  
6 first step, grieve in writing, on the required form, to the department director or enterprise  
7 manager and the Personnel Department. The manager or director has an affirmative duty  
8 to try and resolve the problem, and has ten (10) days to respond. If the grievance cannot  
9 be resolved, go to step 3. Manager will talk with involved people and document the  
10 decision.
- 11 3. Within ten (10) days of the decision or notice of decision at level 2, appeal in writing to  
12 the appropriate Administrator and Personnel Department. The appropriate Administrator  
13 has fifteen (15) days for initial review and response. Administrator [*sic*] will investigate,  
14 document & inform Grievant.
- 15 4. Within ten (10) days of decision or notice [of] decision at level 3, appeal in writing to the  
16 Personnel Review Commission. The fourth step is the only appeal step. The Personnel  
17 Review Commission has forty-five (45) days for review and response.

18 In determining whether to hear an appeal, the Personnel Review Commission may review the  
19 merits of the case including: any pertinent information in the employee file; discussion with  
20 appropriate Administrator as to method of investigation conducted at that level; manner of  
21 grievance handling at prior steps. After reviewing such matters, the Personnel Review  
22 Commission has a right to make a determination without holding a hearing. In such cases where  
23 the evidence does not support a hearing by the Personnel Review Commission, the Personnel  
24 Review Commission will notify the Appellant of its decision.

25 ENTERPRISE EMPLOYEES ONLY [p. 50b]

26 In determining whether to hear an appeal, the Trial Court may review the merits of the case  
27 including; [*sic*] any pertinent information in the employee file; discussion with Executive  
28 Director as to method of investigation conducted at that level; manner of grievance handling at  
prior steps. After reviewing such matters, the Trial Court has a right to reach a decision or to  
take action without holding a hearing. In such cases where the evidence does not support a  
hearing by the Trial Court, the Trial Court will notify the appellant of its decision.

Chpt. 13. Employment Separation.

Layoff [p. 52]

An employee may be subject to a non-disciplinary, involuntary separation through layoff for  
reasons including, but not limited to, lack of funds or work, abolition of position, reorganization,  
or the reduction in or elimination of service levels. In such cases, affected employees will be  
given a reasonable amount of advance notice as conditions permit.

1 When layoff is to be achieved, the Department Director will prepare a layoff plan which must be  
2 approved by the appropriate Administrator. The plan will:

3 A. identify the number of layoff positions by classification;

4 B. identify incumbents to be laid off through consideration of both ability and seniority.

5 Whenever it becomes necessary in the sole opinion of the Nation to reduce the work force  
6 through layoffs, the Nation will endeavor to provide affected employees with at least ten  
7 working days notice. In each class of position, employees shall be laid off according to  
8 employee status in the following order: Limited term, initial probationary, seasonal, permanent  
part-time, permanent full-time.

9 Chpt. 14. Definitions.

10 Discharge: Involuntary separation or termination of employment.

11 Layoff: Involuntary separation from employment for nondisciplinary reasons including, but not  
12 limited to, lack of funds or work, abolition of position, reorganization, or the reduction or  
13 elimination in service levels.

14 Native American Preference: Preference given to members of any recognized Indian Tribe now  
15 under federal jurisdiction.

16 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

17 Rule 47. Consolidation and Separation of Action.

18 (A) Consolidation. When actions involving a common question of law or fact are pending before  
19 the Court, the Court may order a joint hearing or trial of any or all the matters in issue in the  
20 actions; the Court may order all the actions consolidated; and the Court may make such orders  
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

21  
22 **RELEVANT LAW**

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25 WISCONSIN WINNEBAGO PERSONNEL REVIEW COMMISSION ORDINANCE

26 Sec. 1. Establishment.

27 The Wisconsin Winnebago Tribe vests in the Wisconsin Winnebago Personnel Review  
28 Commission (WWPRC) its inherent judicial authority, as set forth in this Ordinance. The tenure  
of the WWPRC shall extend to that date at which the Tribe establishes a Tribal Court.



1 contained in the HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL  
2 [hereinafter PERSONNEL MANUAL]. *Louella A. Kelty v. Jonnette Pettibone et al.*, CV 98-49  
3 (HCN Tr. Ct., Mar. 4, 1999).

4  
5 3. The Court determined that the Ho-Chunk Nation provided a reasonable interpretation of  
6 the applicable law, indicating that the layoff plan represented the culmination of discussions with  
7 the Personnel Department. *Id.* at 9-10, 14. The Ho-Chunk Nation portrayed the application of  
8 the Ho-Chunk Preference Policy in the following manner: “once employees are ranked  
9 according to ‘ability and seniority’ any ties are resolved in favor of those qualifying for [Ho-  
10 Chunk preference] should the Nation elect to exercise this right.” *Id.* at 7. The Court  
11 acknowledged that “[w]hen the Legislature’s intent is open to interpretation, the question of what  
12 that intent is [is] best left to be worked out between the expertise of the agency and the guidance  
13 of the Legislature. If the agency’s interpretation of an ambiguous ordinance is reasonable, but  
14 not what the Legislature intended, let the Legislature correct the situation.” *Id.* at 8.

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17 4. On July 27, 1999, the Supreme Court of the Ho-Chunk Nation [hereinafter HCN  
18 Supreme Court] reversed and remanded the Court’s decision, but did not address the holding  
19 dealing with the application of the Ho-Chunk Preference Policy in a layoff situation. *Louella A.*  
20 *Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., July 27, 1999) at 5. The HCN Supreme  
21 Court did note that the “trial court may address those issues at the rehearing if the trial judge  
22 deems that as appropriate.” *Id.*

23  
24 5. Former Acting Executive Director of the Personnel Department, James Lambert,  
25 correctly recognized that as of December 15, 2000, Ho-Chunk preference “served as a tie  
26 breaker. If there were two people in the same position for the same amount of time, and one was  
27 a Ho-Chunk and the other was a non-Ho-Chunk, the Ho-Chunk would receive preference and not  
28

1 be laid off.” *Trial* (*LPER* at 21, Aug. 17, 2001, 01:14:31 CST). James Lambert further testified  
2 that the Personnel Department “would inform the departments of how Ho-Chunk preference  
3 would be followed,” but admitted that the Personnel Department maintained no formal written  
4 guidelines concerning its application prior to or during the time period in question. *Id.* at 22,  
5 01:17:49 CST.

6  
7 6. Concerning the Layoff Policy, James Lambert admitted that “[m]ost of the people look at  
8 seniority more heavily” than ability although the PERSONNEL MANUAL “doesn’t specify which  
9 one should be weighed heavier.” *Id.* at 21, 01:15:43 CST.

10  
11 7. Supervisory and other staff within the Ho-Chunk Nation Department of Housing  
12 [hereinafter Housing Department]<sup>1</sup> expressed varying views on the proper application of the Ho-  
13 Chunk Preference Policy in the context of a layoff. HPW Heavy Equipment Engineer  
14 Operations Manager, Garrett Blackdeer, explained that “if the Ho-Chunk’s got [*sic*] the  
15 capability of doing the work, then fine, he or she could take the position.” *Trial* (*LPER* at 36,  
16 Aug. 16, 2001, 03:16:13 CST). Property Management Property Manager, Robert Pulley, related  
17 that he analyzed Ho-Chunk preference and seniority within each class of position as  
18 distinguished from an employee’s status within the overarching Housing Department. *Trial*  
19 (*LPER* at 12, Aug. 17, 2001, 11:09:37 CST). HPW Executive Administrative Assistant, Rosalie  
20 Thunder, recounted an occasion when the Personnel Department intervened for the purpose of  
21 retaining an employee, HOP Residential Services Counselor, Verdie Kivimaki, based on her  
22 level of seniority with the Ho-Chunk Nation and not within the occupied class of position. *Id.* at  
23 30, 02:46:03 CST.

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28 <sup>1</sup> The Housing Department is comprised of four (4) branches: Home Ownership Program [hereinafter HOP],  
Property Management, Community Housing (Housing & Public Works) [hereinafter HPW] and Utilities. The  
Executive Director of Housing exercises oversight of all the branches of the Housing Department. The Ho-Chunk

1 8. Former Executive Director of Housing, Alvin Cloud, provided the initial approval of the  
2 layoff plan in issue. Mr. Cloud noted that “[e]verything that was done was directly in contact  
3 with [Former Executive Director of Personnel,] Shirley [Lonetree].” *Id.* at 39, 04:32:55 CST.  
4 Mr. Cloud further noted that seniority was calculated by division and class of position. *Id.* at 40,  
5 04:49:07 CST. Summarizing the layoff, Mr. Cloud expressed that it “was done by seniority, Ho-  
6 Chunk preference, and if I would have laid Ho-Chunks off, they would have hanged [*sic*] me  
7 from the nearest tree. That’s nothing new.” *Id.* at 39, 04:33:42 CST.  
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## 11 DECISION

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13 The Court performs a two-part inquiry when confronted with a contested agency  
14 interpretation and its application to a set of facts. *See Kelty*, CV 98-49 at 7-12. The inquiry  
15 begins by establishing whether the Ho-Chunk Nation Legislature [hereinafter Legislature] has  
16 granted the agency the authority to interpret the law in question. In this instance, the PERSONNEL  
17 MANUAL directs “[t]he Human Resources/Personnel [to] communicate the important guidelines  
18 and procedures that will be followed in its commitment to HoChunk [*sic*] Preference.”  
19 PERSONNEL MANUAL, Ch. 1 at 3a. The type of delegation involved consequently guides the  
20 Court’s manner of review as to the interpretation proffered by the agency. Thereafter, the Court  
21 examines the application of the resulting interpretation to the pertinent factual situation. The fact  
22 that the Personnel Department did not publish any written guidelines and procedures requires the  
23 Court to explore both parts of the inquiry since the interpretation only becomes apparent through  
24 the application.  
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Nation Housing Authority exists as a separate entity unaffected by the current causes of action.

1                   **I. Does the Personnel Department’s interpretation of the Ho-**  
2                   **Chunk Preference Policy in the context of a layoff deserve**  
3                   **judicial deference?**

4                   Prior to addressing the issue at hand, the Court deems that a thorough analysis of United  
5 States Supreme Court [hereinafter U.S. Supreme Court] case law, as it relates to judicial review  
6 of agency action, will provide the proper framework for discussion. In 1944, the U.S. Supreme  
7 Court needed to determine the amount of deference it would afford to the lower courts’  
8 application of interpretive bulletins and informal rulings issued by the Administrator of the FAIR  
9 LABOR STANDARDS ACT. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The appellants  
10 disputed the automatic extension of these prior administrative interpretations as it resulted in a  
11 denial of compensation for periods of “inactive duty” spent by firefighters remaining overnight  
12 at the stationhouse. *Id.* at 135-39. The U.S. Supreme Court examined several factors before  
13 arriving at its conclusion. Principally, the Justices recognized that the Administrator “ha[d]  
14 accumulated a considerable experience in the problems of ascertaining working time in  
15 employment involving periods of inactivity and a knowledge of the customs prevailing in  
16 reference to their solution.” *Id.* at 138. The Court also emphasized the degree of consistency in  
17 the interpretations, culminating in the authoritative position taken by the Administrator in the  
18 *amicus curiae* brief. *Id.* at 138-39.

19                   Noting that while “[t]here is no statutory provision as to what, if any, deference courts  
20 should pay to the Administrator’s conclusions[,]” the Court extended a degree of respect to the  
21 interpretations since “the Administrator’s policies are made in pursuance of official duty, based  
22 upon more specialized experience and broader investigations and information than is likely to  
23 come to a judge in a particular case.” *Id.* at 139. In conjunction with this finding, the U.S.  
24 Supreme Court articulated its position on informal agency interpretations of statutory provisions  
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1 which the agency administered, and the amount of deference a court should give such  
2 declarations.

3 We consider that the rulings, interpretations and opinions of the  
4 Administrator under the Act, while not controlling upon the courts by  
5 reason of their authority, do constitute a body of experience and informed  
6 judgment to which courts and litigants may properly resort for guidance.  
7 The weight of such a judgment in a particular case will depend upon the  
8 thoroughness evident in its consideration, the validity of its reasoning, its  
consistency with earlier and later pronouncements, and all those factors  
which give it power to persuade, if lacking power to control.

9 *Id.* at 140.

10 Shortly thereafter, the United States Congress enacted the ADMINISTRATIVE PROCEDURE  
11 ACT OF 1946 [hereinafter APA]. The APA mandated standards that courts would apply in  
12 reviewing agency decisions, defining “agency” in the broadest terms. *See* 5 U.S.C. § 701(1).<sup>2</sup>  
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15 <sup>2</sup> The APA sets forth the following scope of review at 5 U.S.C. § 706:

16 To the extent necessary to decision and when presented, the reviewing court  
17 shall decide all relevant questions of law, interpret constitutional and statutory provisions,  
and determine the meaning or applicability of the terms of an agency action. The  
reviewing court shall –

18 (1) compel agency action unlawfully withheld or unreasonably delayed; and

19 (2) hold unlawful and set aside agency action, findings, and conclusions found  
20 to be –

21 (A) arbitrary, capricious, an abuse of discretion, or otherwise not in  
accordance with law;

22 (B) contrary to constitutional right, power, privilege, or immunity;

23 (C) in excess of statutory jurisdiction, authority, or limitations, or short  
24 of statutory right;

25 (D) without observance of procedure required by law;

26 (E) unsupported by substantial evidence in a case subject to sections  
27 556 and 557 [regarding notice-and-comment rulemaking and formal  
adjudication] of this title or otherwise reviewed on the record of an agency  
28 hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to  
trial de novo by the reviewing court.

1 Congress, however, expressly exempted the issuance of “interpretive rules, general statements of  
2 policy, or rules of agency organization, procedure, or practice” from a substantial evidence  
3 inquiry. *See* 5 U.S.C. §§ 553(b)(A), 706(2)(E). Courts, therefore, needed to ascribe the level of  
4 deference available for these types of agency conclusions.  
5

6 Courts carefully distinguish amongst the varying types of agency action in reviewing  
7 decisions, and a brief discussion of the differing analyses applied shall aid in narrowing the  
8 scope of our present inquiry. First, agencies may engage in formal on the record adjudication,  
9 resulting in the promulgation of rules through the formation of a body of case precedent. *See*  
10 *e.g.*, *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522  
11 U.S. 359 (1998); *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing  
12 adjudicative rulemaking, as well as other forms of agency action, courts begin by recognizing  
13 that Congress intended the APA to “establish[ ] a scheme of ‘reasoned decisionmaking.’”  
14 *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut.*  
15 *Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered analysis, determining  
16 whether the adjudicative rule satisfies a substantial evidence standard, and, if so, whether the rule  
17 escapes a designation of arbitrary and capricious.  
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20 The two inquiries represent “‘separate standards.’” *Bowman*, 419 U.S. at 284 (quoting  
21 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Yet, a court “may  
22 properly conclude[ ] that, though an agency’s finding may be supported by substantial evidence,  
23 . . . it may nonetheless reflect an arbitrary and capricious action.” *Bowman*, 419 U.S. at 284. In  
24 such an event, the Court would afford no deference to the adjudicative rule of the agency  
25  
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28 In making the foregoing determinations, the court shall review the whole record or those  
parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

1 precisely because the rule could not withstand the more deferential arbitrary and capricious  
2 standard.

3           The substantial evidence standard has no application beyond the review of “record-based  
4 factual conclusion[s],” such as adjudicative rules and the next type of agency action discussed,  
5 and only in unusual circumstances will agency action surviving a substantial evidence review  
6 falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In performing the second-tier of  
7 analysis, arbitrary and capricious review,  
8

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

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

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

1           However, as noted above, an adjudicative rule rightfully subjected to the substantial  
2 evidence test must also at its core represent the outcome of a reasoned deliberation. “[T]he  
3 process by which [an agency] reaches [its] result must be logical and rational.” *Allentown*, 522  
4 U.S. at 374. Courts accordingly must insure compliance with the requirement of reasoned  
5 decision-making. In this regard,

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

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

19           Second, agencies may generate record-based factual conclusions through formal notice-  
20 and-comment rulemaking, oftentimes referred to as legislative rulemaking. *See e.g., Bragdon v.*  
21 *Abbott*, 524 U.S. 624 (1998); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).  
22 Like adjudicative rulemaking, Congress must expressly delegate authority to the agency for it to  
23 perform this function. Additionally, the *Chevron* Court focused its attention upon a distinction  
24 relating to the manner of delegation, differentiating between instances where Congress expressly  
25 directs the agency to issue regulations to fill a purposeful gap in the legislation and where  
26 Congress implicitly permits the agency to issue regulations in order to achieve legislative  
27 cohesiveness. *Chevron*, 467 U.S. at 842-44. In either instance, the general delegation allows the  
28

1 agency to engage in legislative rulemaking which the agency performs on the record, and each  
2 triggers the identical level of judicial review as discussed above.

3  
4 Admittedly, *Chevron* serves to frustrate the overall analysis since it appears that the U.S.  
5 Supreme Court dispensed with the substantial evidence test, mentioning the standard nowhere  
6 within its opinion. Rather, the *Chevron* Court probably assumed the existence of substantial  
7 evidence as demonstrated through its detailed description of the regulatory history. *Id.* at 845-  
8 51, 853-59. Although the agency sought to fill an implicit gap, it nonetheless employed notice-  
9 and-comment rulemaking. *Id.* at 853-59. Therefore, the *Chevron* Court applied the well-  
10 established standards utilized in reviewing on the record agency determinations. *See* 5 U.S.C. §  
11 706(2). The U.S. Supreme Court sought to determine the existence of a reasoned decision and  
12 the absence of an arbitrary and capricious action since, as noted above, “[i]n all cases agency  
13 action must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or  
14 otherwise not in accordance with law . . . .’” *Overton Park*, 401 U.S. at 413-14 (*quoting* 5  
15 U.S.C. § 706(2)(A)).

16  
17  
18 In *Chevron*, the agency repeatedly modified the relevant legislative rule over a short  
19 timeframe. The U.S. Supreme Court, however, did not condemn the formal rulemaking process  
20 in light of the inconsistency. *Chevron*, 467 U.S. at 863-64. The flexible approach used by the  
21 agency was “supported by the public record developed in the rulemaking process, as well as by  
22 certain private studies.” *Id.* at 863. After all, Congress expected the agency to grapple with the  
23 Clean Air Act Amendments of 1977: “a lengthy, detailed, technical, complex, and  
24 comprehensive response to a major social issue.” *Id.* at 848.

25  
26 Usually, courts place significant weight upon the consistency of the rulemaking process,  
27 including the uniformity of representative legal opinion. *Bragdon*, 524 U.S. at 642 (“One  
28

1 comprehensive and significant administrative precedent is a 1988 opinion issued by the Office of  
2 Legal Counsel of the Department of Justice . . . .”). *Chevron* represents an anomaly due to the  
3 complexity of the legislative scheme alongside an unstable and ever-changing technical  
4 environment. In *Allentown*, for instance, the lack of consistency doomed the agency action. The  
5 cases, however, differ in that the *Allentown* Court confronted an established evidentiary rule  
6 which the agency failed to consistently apply in practice. *Chevron* simply did not deal with the  
7 inconsistent application of a standing legislative rule.  
8

9  
10 Third, agencies may render informal decisions authorized by law, including informal  
11 legislative rulemaking. See e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29  
12 (1983); *Overton Park*, 401 U.S. 402 (1971). In such cases, courts still review the “whole  
13 record,” but an agency is not required to compile a formal record in the manner discussed above.  
14 See 5 U.S.C. § 706. This fact makes the substantial evidence inquiry wholly inapposite.  
15 “Review under the substantial-evidence test is authorized only when the agency action is taken  
16 pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 . . .  
17 , or when the agency action is based on a public adjudicatory hearing. See 5 U.S.C. §§ 556, 557  
18 . . . .” *Overton Park*, 401 U.S. at 414.  
19

20  
21 The resulting decisions or legislative rules of the agency still must pass muster under the  
22 arbitrary and capricious standard of review. See *id.* at 416; *Motor Vehicle*, 463 U.S. at 41-43.  
23 Concerning the former, an agency’s “decision is entitled to a presumption of regularity. But that  
24 presumption is not to shield [the] action from a thorough, probing, in depth review.” *Overton*  
25 *Park*, 401 U.S. at 415. In *Overton Park*, the U.S. Supreme Court sought to assess whether the  
26 agency decision proved arbitrary and capricious. Due to the absence of a formal record, the  
27 Court conjectured that the district court on remand might have to seek the testimony of  
28

1 administrators involved in the decision. *Id.* at 420. Alternatively, the district court could require  
2 the deciding official to submit the findings upon which he or she relied in making the  
3 determination. The U.S. Supreme Court, however, warned that “[s]uch an explanation will, to  
4 some extent, be a ‘*post hoc* rationalization’ and thus must be viewed critically.” *Id.*

6 Informal legislative rules must survive the same standard of review, and the U.S.  
7 Supreme Court has likewise announced a presumption to guide judicial analysis. Namely, “[i]f  
8 Congress established a presumption from which judicial review should start, that presumption . . .  
9 . . . is . . . *against* changes in current policy that are not justified by the rulemaking record.” *Motor*  
10 *Vehicle*, 463 U.S. at 42 (emphasis in original). Any changes must be the result of reasoned  
11 decision-making, and courts should expect that “an agency must cogently explain why it has  
12 exercised its discretion in a given manner . . . .” *Id.* at 48, 57. An inability of an agency to  
13 justify inconsistency will support a finding of an arbitrary and capricious action.

16 Normally, an agency rule would be arbitrary and capricious if the agency  
17 has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an  
18 explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in  
19 view or the product of agency expertise.

20 *Id.* at 43.

21 Fourth, the U.S. Supreme Court has encountered instances where the agency has offered  
22 subsequent interpretations of its own promulgated legislative rules. *See e.g., Christensen v.*  
23 *Harris County*, 529 U.S. 576 (2000); *Martin v. OSHRC*, 499 U.S. 144 (1991). In these cases,  
24 “[i]t is well established ‘that an agency’s construction of its own regulations is entitled to  
25 substantial deference.’” *Martin*, 499 U.S. at 150 (*quoting Lyng v. Payne*, 476 U.S. 926, 939  
26 (1986)). The level of deference is greatest when ambiguity plagues the underlying legislative  
27 rule, and especially when “applying an agency’s regulation to complex or changing  
28

1 circumstances calls upon the agency’s unique expertise and policymaking prerogatives . . . .”  
2 *Martin*, 499 U.S. at 151; *see also Christensen*, 529 U.S. at 588.

3 The type of deference afforded to an interpretation of a legislative rule is *Skidmore*  
4 deference. *Id.* at 157; *Christensen*, 529 U.S. at 587. A reviewing court properly examines the  
5 several *Skidmore* factors since the interpretation is “not entitled to the same deference as norms  
6 that derive from the exercise of . . . delegated lawmaking powers . . . .” *Martin*, 499 U.S. at 157;  
7 *see supra* at 13. *Skidmore* applies precisely because an agency cannot circumvent APA  
8 procedures through interpretive action, thereby “creat[ing] *de facto* a new regulation.”  
9 *Christensen*, 529 U.S. at 588. In *Christensen*, for example, the U.S. Supreme Court  
10

11  
12 confront[ed] an interpretation contained in an opinion letter, not one  
13 arrived at after, for example, a formal adjudication or notice-and-comment  
14 rulemaking. Interpretations such as those in opinion letters – like  
15 interpretations contained in policy statements, agency manuals, and  
enforcement guidelines, all of which lack the force of law – do not warrant  
*Chevron*-style deference.

16 *Christensen*, 529 U.S. at 587. Furthermore, courts again place great emphasis on the consistent  
17 application of an interpretation, “a factor bearing on the reasonableness of the [agency’s]  
18 position.” *Martin*, 499 U.S. at 157.  
19

20 The foregoing review has erected the distinctions amongst the various forms of agency  
21 action and the manner in which courts assess the validity of each. However, two requirements  
22 underlie each type of judicial review: the need for reasoned decision-making and the consistent  
23 application of resulting decisions. The fact that an agency action falls outside the pale of the  
24 APA does not affect a court’s consideration of these important factors. *See supra*.  
25

26 The Court properly began by summarizing the *Skidmore* decision since it directly relates  
27 to the level of deference afforded to agency interpretations of congressionally enacted  
28 legislation. The facts of the instant case present the identical scenario. The Legislature adopted

1 the Ho-Chunk Preference Policy, and entrusted the Personnel Department “to communicate the  
2 important guidelines and procedures that will be followed in its commitment of HoChunk [*sic*]  
3 Preference.” PERSONNEL MANUAL, Ch. 1 at 3a. This language does not evidence a delegation of  
4 lawmaking authority to the Personnel Department, and the defendants have never alleged as  
5 much.  
6

7         However, one obvious question remains. What does the preceding examination of  
8 federal judicial standards of agency review have to do with an appeal of a Ho-Chunk Nation  
9 employment determination? Arguably nothing, but the Court has consistently analogized to such  
10 standards within its own jurisprudence.<sup>3</sup> And, while the Legislature has not preemptively  
11 adopted any legislation resembling the APA, the Court has properly refrained from unduly  
12 intruding into the sphere of decision-making reserved for the employer based on its expertise  
13 within contexts recognizably outside of judicial competence. Therefore, the Court fittingly looks  
14 to *Skidmore* and its progeny for proper guidance. See e.g., *United States v. Mead Corp.*, 69  
15 U.S.L.W. 4488 (U.S., June 19, 2001); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991);  
16 *Aluminum Co. v. Cent. Lincoln Util. Dist.*, 467 U.S. 380 (1984); *Bureau of Alcohol, Tobacco &*  
17 *Firearms v. FLRA*, 464 U.S. 89 (1983). If the Court applied one of the different standards  
18 enumerated above, then the attempted analogy would prove inherently flawed.  
19  
20  
21

22         Unfortunately, the Court has done just that. The Court first addressed the level of  
23 deference accorded to an agency interpretation of a statute in an appeal of a Ho-Chunk Nation  
24 Gaming Commission [hereinafter Gaming Commission] determination. *Harry Cholka v. Ho-*  
25 *Chunk Gaming Comm’n*, CV 95-07 (HCN Tr. Ct., Feb. 5, 1996). In arriving at its conclusion,  
26

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27 <sup>3</sup> The Legislature also has incorporated the acknowledged federal standards within certain legislation. See  
28 AMENDED AND RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION, § 1101(c)(5) (“The tribal court shall  
not set aside or modify any decision unless it finds that the decision was arbitrary and capricious, unsupported by

1 the Court emphasized that “[t]he administrative agency is interpreting a statute that both creates  
2 it and defines its duties . . . .” *Id.* at 5. The Court attached even greater significance to the fact  
3 that the Legislature, f/k/a Wisconsin Winnebago Business Committee [hereinafter WWBC],  
4 entrusted the Gaming Commission with the “authority and responsibility to interpret th[e]  
5 Ordinance and its rules in proceedings before it.” AMENDED AND RESTATED GAMING  
6 ORDINANCE OF THE WISCONSIN WINNEBAGO NATION [hereinafter GAMING ORDINANCE], §  
7 807(h). The Court consequently chose to “defer to the expertise of the agency . . . so long as the  
8 interpretation advanced a reasonable construction of the statute.” *Cholka* at 5.  
9  
10

11 The Court derived its scope of review by reference to and incorporation of principles  
12 established by the U.S. Supreme Court. *Id.* (citing *Chevron*, 467 U.S. 837 (1984)). As indicated  
13 above, the *Chevron* Court performed a reasonableness inquiry when it examined a legislative  
14 rule adopted by an agency possessing only an implicit delegation of authority regarding the issue  
15 addressed by the formal action. *Id.* at 844. “In such a case, a court may not substitute its own  
16 construction of a statutory provision for a reasonable interpretation made by . . . an agency.” *Id.*  
17

18 In *Cholka*, the Gaming Commission reconciled an ambiguous provision of the GAMING  
19 ORDINANCE. *Cholka* at 5-6. The Court seemingly surmised that while the Gaming Commission  
20 possessed the general authority to interpret the GAMING ORDINANCE, the Legislature “ha[d] not  
21 directly addressed the precise question at issue . . . .” *Chevron* at 843. This presumption  
22 permitted the Gaming Commission to determine that an exception to a non-participation clause  
23 did not encompass Primary Management Officials since earlier language distinguished between  
24 this class of individuals and common employees. *Cholka* at 5-6 (citing GAMING ORDINANCE, §  
25 1102). The exception referenced to “[e]mployees of the Nation,” and, therefore, did not  
26  
27

28  
substantial evidence or contrary to law.”).

1 incorporate Mr. Cholka according to the Gaming Commission. *Id.* Abiding by the *Chevron*  
2 analysis, the Court found “that the Commission’s interpretation of a comprehensive ban on  
3 gaming by Primary Management Officials [wa]s reasonable and entitled to deference.” *Cholka*  
4 at 6.

5  
6 Unlike the delegation in question in *Chevron*, the Legislature did not endow the Gaming  
7 Commission with the authority to promulgate legislative rules, but rather the authority to conduct  
8 formal on the record adjudication. To reiterate, the Gaming Commission possesses the  
9 “authority . . . to interpret th[e] Ordinance . . . *in proceedings before it.*” GAMING ORDINANCE, §  
10 807(h) (emphasis added). Therefore, the Gaming Commission may formulate adjudicative rules  
11 as it generates case precedent at successive *Show Cause Hearings*. In *Cholka*, the Gaming  
12 Commission provided the disputed interpretation in just this manner. The directly analogous  
13 federal cases deal with agency adjudication, not notice-and-comment rulemaking like *Chevron*.  
14 In fact, these cases articulate the standards identified by the Legislature for reviewing a Gaming  
15 Commission decision. *See supra*, n. 3.

16  
17  
18 However, the Court was, and continues to be, justified in assessing the reasonableness of  
19 the adjudicative rule, but the inquiry cannot end at this point. *Chevron* does not represent a  
20 departure from precedent or the strictures of the APA. The Court must subject adjudicatory  
21 determinations of the Gaming Commission to the dual standards of substantial evidence and  
22 arbitrary and capricious review as intended by the Legislature. At the same time, the Court  
23 should expect reasoned decision-making and consistency depending on the circumstances.

24  
25 The Court’s importation of *Chevron*-style deference became problematic with its  
26 extension into the area of statutory interpretations offered by the Personnel Department. The  
27 Personnel Department does not possess the authority to perform formal adjudication or engage in  
28

1 legislative rulemaking, and, therefore, the reasoning appropriate in *Cholka* should not have  
2 intruded into this context. *See supra* at 20. Relevant to this decision, the Court earlier  
3 scrutinized an interpretation of the Ho-Chunk Preference Policy proffered by the Personnel  
4 Department. *Kelty*, CV 98-49 at 7-9.

6 In *Kelty*, supervisory staff sought to exercise Ho-Chunk Preference in a layoff situation in  
7 order to determine the appropriate retention of employees. The implementation of the layoff  
8 plan followed discussions with the Personnel Department. Louella Kelty, an enrolled member of  
9 the Lac du Flambeau Band of Lake Superior Chippewa and the mother of an enrolled Ho-Chunk  
10 member, challenged the agency's interpretation of the Ho-Chunk Preference Policy. The Court  
11 responded to the challenge by restating that "[w]hen reviewing an administrative agency's  
12 interpretation of a statute which it is responsible for administering, the Court will give the  
13 agency's interpretation deference as long as the interpretation is reasonable." *Id.* at 7 (*citing*  
14 *Cholka* at 5), *rev'd on other grounds*, SU 99-02 (HCN S. Ct., July 27, 1999).

17 The U.S. Supreme Court has clearly denounced the application of *Chevron* deference in  
18 cases concerning informal agency interpretation of a statute. The U.S. Supreme Court has done  
19 so for constitutional reasons which prove equally, if not more, compelling in our context. First,  
20 agencies pronounce interpretive rulings without congressional delegation to enact legislative  
21 rules. An interpretive ruling receives *Skidmore* deference if Congress did not intend the ruling to  
22 possess the force of law. *Mead*, 69 U.S.L.W. at 4488. "It is fair to assume that Congress  
23 contemplates administrative action with the effect of law when it provides for a relatively formal  
24 administrative procedure tending to foster the fairness and deliberation that should underlie a  
25 pronouncement of such force." *Id.* at 4491; *see also EEOC*, 499 U.S. at 257. Absent such a  
26 delegation, a reviewing court rightfully refrains from acknowledging agency interpretations as  
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1 definitive lest the court permit an “unauthorized assumption by an agency of major policy  
2 decisions properly made by [the legislative branch].” *FLRA*, 464 U.S. at 97 (*quoting Am. Ship*  
3 *Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)). Simply put, administrative agencies do not  
4 have the power to pronounce law without properly and clearly delegated authority to do so.  
5

6 Second, while courts recognize that agencies possess significant practical experience and  
7 knowledge in administering statutory provisions within their purview, reviewing courts cannot  
8 relinquish their constitutional authority of providing conclusive interpretations of the law. *See*  
9 CONSTITUTION OF THE HO-CHUNK NATION, ART. VII, § 4. Once an agency steps outside the  
10 parameters of an express legislative delegation, the agency inevitably traverses into the occupied  
11 sphere of the judiciary. Incursions, however, may occur. An executive agency’s power to  
12 administer obviously incorporates interpretive elements, but the courts retain the ability to  
13 review, and perhaps overturn, agency interpretations.  
14

15 As discussed above, the amount of deference afforded to an agency’s statutory  
16 interpretation will increase proportionate to the level of complexity of an administrative scheme.  
17 *See supra* at 19-20; *see also Aluminum Co.*, 467 U.S. at 390; *ATF*, 464 U.S. at 97. The degree of  
18 deference, however, shall decrease if the court detects an inconsistent application of the  
19 interpretation. Inconsistency denotes an unreasoned decision-making process, and the  
20 enumerated factors within *Skidmore* flow from these foundational inquiries.  
21

22 In the present case, the Legislature made no delegation of law-making authority. *See*  
23 CONSTITUTION OF THE HO-CHUNK NATION, ART. V, § 2(a-b). The Personnel Department instead  
24 maintains the ability to “communicate . . . guidelines and procedures . . . .” PERSONNEL  
25 MANUAL, Ch. 1 at 3a. In essence, the Legislature has authorized the Personnel Department to  
26 provide interpretive assistance to supervisory personnel. *See Findings of Fact 2-3, 5. The Kelty*  
27  
28

1 decision centered upon the resulting agency interpretation, and the Court once again focuses on  
2 this point.

3           The Personnel Department devised no written “guidelines and procedures” until after the  
4 initiation of this suit. The agency, however, routinely offered its interpretation of the Ho-Chunk  
5 Preference Policy through informal conversations, once again clearly distinguishing the resulting  
6 interpretive guidelines from any form of legislative rulemaking. In *Kelty*, the Court accepted the  
7 informal interpretation of the Personnel Department as argued by its legal representative. The  
8 Court, however, arrived at its decision through inappropriate means. The Court should not have  
9 subjected the interpretation to an analysis reserved for formal on the record rulemaking.  
10

11           Regardless, the HCN Supreme Court did not disturb the Court’s use of the reasonableness  
12 standard, noting only that “the application of the Ho-Chunk Preference provision . . . w[as] not  
13 addressed . . .” for purposes of its decision. *Kelty*, SU 99-02 at 5. Since the HCN Supreme  
14 Court has not directly ruled on the issue, the Court declines to follow the flawed analysis of the  
15 *Kelty* decision. However, the Court must proceed to the second part of the inquiry due to the  
16 absence of any written guidelines or procedures.  
17

18  
19           **II. Does the application of Ho-Chunk preference in the instant**  
20           **case reveal the substantive features of the Personnel**  
21           **Department’s interpretation of the relevant legislative**  
22           **provisions?**

23           The Court recently summarized its jurisprudence in relation to the level of judicial  
24 deference afforded to employment decisions arising out of the Administrative Review Process.  
25 *See Dolores Greendeer v. Randall Mann*, CV 00-50 (HCN Tr. Ct., July 2, 2001) at 15-16.  
26 Simply, the Court shall reverse arbitrary and capricious determinations. *Id.* A decision is not  
27 arbitrary and capricious if “reasonable, in light of the evidence” and “supported by substantial  
28

1 evidence.”<sup>4</sup> *Debra Knudson v. Ho-Chunk Nation Treasury Dep’t*, CV 97-70 (HCN Tr. Ct., Feb.  
2 5, 1998) at 13-16, *rev’d on other grounds and remanded*, SU 98-01 (HCN S. Ct., Dec. 1, 1998)  
3 at 8-9; *see also Gary Lonetree, Sr. v. John Holst, as Slot Dir. et al.*, CV 97-127 (HCN Tr. Ct.,  
4 Sept. 24, 1998) at 12, *aff’d*, SU 98-07 (HCN S. Ct., Apr. 29, 1999).

6 The Court takes this opportunity to identify the apparent flaws in its established standard  
7 of review. Most clearly, the Court has included the substantial evidence inquiry as a component  
8 part of the arbitrary and capricious analysis despite each being separate standards. The resulting  
9 combined standard proves nonsensical since an agency decision based on substantial evidence  
10 can still represent an arbitrary and capricious action. *See supra* at 14. Furthermore, the  
11 substantial evidence standard has absolutely no relevance in the context of the Administrative  
12 Review Process.  
13

14 A grieving employee never receives a formal hearing within the Administrative Review  
15 Process. Rather, the Court has only required that the employer afford a discharged employee a  
16 pre-termination hearing as an assurance of minimal procedural due process. *See e.g. Margaret*  
17 *G. Garvin v. Donald Greengrass et al.*, CV00-10, 38 (HCN Tr. Ct., Nov. 16, 2001) at 10-11; *Roy*  
18 *J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug.  
19 24, 2001) at 16-20; *Margaret G. Garvin v. Donald Greengrass et al.*, CV 00-10-38 (HCN Tr.  
20 Ct., Mar. 9, 2001) at 26-29. However, employees sometimes do not receive their constitutionally  
21 guaranteed pre-termination hearings. *Id.* Even if received, the hearings do not qualify as on the  
22 record formal proceedings. *Garvin*, CV 00-10, 38 (HCN Tr. Ct., Mar. 9, 2001 ) at 27-28. The  
23  
24  
25

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26 <sup>4</sup> Previously, the Court wrote, “The Supreme Court upheld *Knudson* on the basis of applying the two-part inquiry:  
27 whether the decision proved ‘reasonable, in light of the evidence’ and was ‘supported by substantial evidence.’”  
28 *Greendeer* at 16 (citations omitted). The Court meant to convey that the HCN Supreme Court upheld or approved  
the use of the Trial Court standard, but now recognizes its poor choice of terminology. For clarification, the HCN  
Supreme Court reversed and remanded *Knudson*, arriving at a different conclusion after employing the same  
standard.

1 sole indispensable requirement remains that the grievant be “given a chance to tell *his[her] side*  
2 *of the story.*” *Lonetree, Sr.*, CV 97-127 at 10 (emphasis in original).

3  
4 Without an agency-compiled record, the Court cannot perform a substantial evidence  
5 inquiry. In personnel grievance cases, the Court compiles the record through filings and  
6 presentation of evidence at scheduled court proceedings. The Court consequently bases its  
7 determination on the evidence produced by the litigants, evidence which may differ in substance  
8 from that relied upon by the agency. The Court, therefore, shall offer its opinion as to the proper  
9 standard.  
10

11 At best, the Court should review personnel cases by utilizing an uncompromised arbitrary  
12 and capricious standard, but the Court finds no support for this manner of review in the  
13 PERSONNEL MANUAL or the legislative history. As the U.S. Supreme Court noted in *Chevron*,  
14 “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the  
15 agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467  
16 U.S. at 843-44. In our context, the Legislature has consistently directed the judicial body to  
17 conduct a *de novo* review of personnel grievance matters.  
18

19 Prior to the formation of the Ho-Chunk Nation Judiciary, the WWBC vested judicial  
20 authority in the Wisconsin Winnebago Personnel Review Commission [hereinafter WWPRC].  
21 See WWPRC ORDINANCE, §§ 1, 3, cl. 1. The WWBC also established judicial procedures,  
22 including provisions for discovery and presentation of evidence. *Id.*, § 6. Notably, a plaintiff  
23 could file “an amended grievance, reflecting any new evidence obtained through discovery.” *Id.*,  
24 § 6, cl. 4. The allowance of “new evidence” provides a clear indication that the WWBC intended  
25 the grievance proceeding to resemble a pure civil case. This intention becomes even clearer in  
26 light of the litigants’ right to “provide the Commission with any evidence or witnesses they may  
27  
28

1 rely on.” *Id.*, § 6, cl. 7(3)(a)(b). Finally, the WWPRC maintained the “responsibility to develop  
2 facts in the[ ] [grievance] hearings.” *Id.*, § 6, cl. 7(3)(c).

3  
4 The WWPRC ORDINANCE instituted a style of review completely dissimilar from a  
5 judicial review performed in accordance with the APA. The WWPRC assessed the facts as  
6 established in the grievance hearing, and not the facts relied upon by the agency. *Compare supra*  
7 at 18-19. Basically, the WWBC constructed a scheme whereby the agency was not entitled to  
8 any deference because the WWPRC and the litigants could freely introduce evidence outside the  
9 record.

10  
11 Litigants in personnel grievance cases continue to introduce evidence outside the record,  
12 and the discovery process provides them the opportunity to do so. In 1995, the Court supplanted  
13 the WWPRC, but the Legislature made no material changes to pertinent sections of the  
14 PERSONNEL MANUAL other than designating the Court as the final step in the grievance process.  
15 PERSONNEL MANUAL, Ch. 12 at 49-50b. Therefore, applying either an arbitrary and capricious or  
16 substantial evidence standard of review is inconsistent with legislative intent.

17  
18 Thankfully, the Court does not have to attempt to apply the muddled standard of review  
19 on this occasion. The Court merely needs to concentrate upon the application of the agency’s  
20 legislative interpretation. This examination uncovers inconsistency and confusion where  
21 consistency and clarity should exist. The *Findings of Fact* reveal a varied application of the Ho-  
22 Chunk Preference and Layoff Policies despite the fact that the defendants conducted the layoffs  
23 in close concert with the Personnel Department. The Personnel Department recognized the  
24 ambiguity within the legislative provisions and the ongoing confusion by employers concerning  
25 the proper balancing of factors, but promulgated no written guidelines or procedures. In at least  
26 one instance, the Personnel Department directed the defendants to deviate from the Layoff  
27  
28

1 Policy, advocating that the defendants calculate seniority based upon overall employment rather  
2 than within a position.

3 In *Kelty*, the DOJ successfully advocated a specific interpretation of the Ho-Chunk  
4 Preference Policy in the context of a layoff. The Court must accept that the proffered  
5 interpretation represented the formal position of the Personnel Department. Otherwise, the DOJ  
6 argued the individual interpretations of the named defendants, but this position is untenable. The  
7 PERSONNEL MANUAL exists to “ensure consistent personnel practices . . . ,” and only  
8 inconsistency can result if interpretations can vary from supervisor to supervisor and  
9 circumstance to circumstance. *Id.*, Intro. at 2.

10 So, although *Kelty* represented the recognized interpretation of the Ho-Chunk Preference  
11 Policy in the context of a layoff, the defendants failed to abide by this interpretation in practice.  
12 The Court remains uncertain whether the deviations result from a failure to adhere to the  
13 interpretation of the Personnel Department or whether the Personnel Department relaxed its  
14 interpretation. The resolution of this question proves largely immaterial since the Court is  
15 convinced that the fault rests in the absence of any written Personnel Department guidelines or  
16 procedures on the subject. Furthermore, DOJ representation of aberrant interpretations would  
17 run contrary to the intent of the Legislature since the Legislature expects the Personnel  
18 Department to erect interpretive guidelines and procedures.

19 The inconsistent application of the Ho-Chunk Preference Policy serves to detract from its  
20 authoritativeness. The Ho-Chunk Preference and Layoff Policies are not lengthy, detailed,  
21 technical or complex, and, therefore, the Court and others should expect consistency in  
22 interpretation. Moreover, individuals entitled to preference should not expect variations in  
23 degree with changes in administration. The lack of consistency undermines any claim of  
24

1 reasoned decision-making, and likewise makes the interpretation particularly vulnerable when  
2 evaluated under *Skidmore*.

3  
4 A decision to afford *Skidmore* deference to the Personnel Department's informal  
5 interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its  
6 reasoning, its consistency with earlier and later pronouncements, and all those factors which give  
7 it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The Court,  
8 however, shall not speculate upon additional unenumerated factors since the above discussion  
9 covers the fundamental considerations present in a *Skidmore* inquiry. If not evident, the  
10 interpretation of the Ho-Chunk Preference Policy in the instant case is not entitled to *Skidmore*  
11 deference, and the Court accordingly must determine how to proceed to final judgment.  
12 Essentially, the Court must develop its own interpretation in the absence of any consensus on the  
13 interpretation of the relevant policies and the interaction between them.  
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16 When performing a *Skidmore* inquiry, the U.S. Supreme Court routinely analyzes  
17 legislative history prior to announcing its decision. *See e.g., Martin*, 499 U.S. at 153; *Aluminum*  
18 *Co.*, 467 U.S. at 396-98; *ATF*, 464 U.S. at 98-102. Likewise, the HCN Supreme Court places  
19 significant importance upon legislative history.

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21 "[A] court will look at legislative history, written and/or oral, as well as  
22 notes, records and other documentation available to interpret meanings."  
23 *JoAnn Jones v. Ho-Chunk Nation Election Board and Chloris Lowe*, CV  
24 95-05 (HCN S. Ct., Aug. 15, 1995) p. 4. However, in the absence of  
25 "legislative history and testimony from the original framers of the HCN  
26 Constitution, the [Court] interprets [a constitutional provision] as to its  
27 plain meaning/intent." *Ho-Chunk Nation Election Board, Ho-Chunk*  
28 *Nation v. Aurelia Lera Hopinkah*, SU 98-08 (HCN S. Ct., April 7, 1999) p.  
4.

29  
30 *Chloris Lowe, Jr. et al. v. Ho-Chunk Nation Legislature Members Elliot Garvin et al.*, CV 00-  
104 (HCN Tr. Ct., Nov. 8, 2000) at 8-9.

1           The Court recognizes that the HCN Supreme Court made its remarks in the context of  
2 constitutional interpretation, but finds the analysis equally persuasive in cases where the Court  
3 must determine the meaning of legislative provisions. Therefore, the Court shall reopen the  
4 period of discovery for the sole purpose of finding legislative history pertinent to the Ho-Chunk  
5 Preference and Layoff Policies. The parties shall recommend a closing date for discovery within  
6 two (2) weeks of the entrance of this judgment. Within one (1) month after discovery, the parties  
7 shall submit briefs, advocating an interpretation of the Ho-Chunk Preference Policy in the  
8 context of a layoff. The parties shall also address the application of such interpretation to the  
9 facts of the instant case.  
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13           **IT IS SO ORDERED** this 9<sup>th</sup> day of January, 2002 by the Ho-Chunk Nation Trial Court  
14 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.  
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18 Honorable Todd R. Matha  
19 Associate Trial Court Judge  
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