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

Sarina Quarderer,
Petitioner,

v.

Case No.: **CV 10-33**

**Ho-Chunk Casino, Table Games Dep't.,
Amy Kirby, Samantha Day,**
Respondents.

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**ORDER
(Affirming)**

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INTRODUCTION

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The Court must determine whether to uphold the decision of the Grievance Review Board (hereinafter GRB). The finds that the petitioner's due process rights were not violated, and thus, affirms the agency decision due to the presence of substantial evidence to support the decision. The analysis of the Court follows below.

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PROCEDURAL HISTORY

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The petitioner, Sarina Quarderer, by and through Lay Advocate Betsy Falcon, filed her *Petition for Administrative Review of Grievance Review Board Decision* on April 21, 2010. See EMPLOYMENT RELATIONS ACT OF 2004 (hereinafter ERA), 6 HCC § 5.35c; see also *Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 63(A)(1)(a). On April 21, 2010, the Court entered the *Scheduling Order*, setting forth the timelines and procedures to which the parties should adhere during the pendency of the appeal. On April 22, 2010, the respondent timely filed the administrative record. See *HCN R. Civ. P.* 63(D). On behalf of the

1 petitioner, Lay Advocate Betsy Falcon filed a timely correspondence on May 18, 2010, which
2 the Court accepted as her *Initial Brief. Id.*, Rule 63(E).

3 Subsequently, the respondent filed a *Motion for Extension of Time and Notice and Motion*
4 *for Expedited Consideration*, requesting that the Court stay the proceedings to allow the
5 respondent to obtain legal counsel in accordance with a separate court order. *See Ho-Chunk*
6 *Nation v. Ho-Chunk Nation Grievance Review Board & Ginny Stenroos*, CV 10-07 (HCN Tr.
7 Ct., Apr. 26, 2010). On June 23, 2010, the Court granted the respondent's request to stay the
8 current proceedings and for good cause modified the scheduling order. *Order (Granting Stay)*,
9 CV 10-33 (HCN Tr. Ct., June 23, 2010). On July 6, 2010, the respondent entered a *Notice of*
10 *Substitution of Counsel*. Subsequently, the respondent requested an extension of time to file the
11 *Response Brief*, accompanied by a *Motion for Expedited Consideration*. The Court denied the
12 initial request for expedited consideration, prompting the respondent to resubmit the *Motion*.
13 *Order (Denial of Mot. for Expedited Consideration)*, CV 10-33 (HCN Tr. Ct., July 12, 2010).
14 The Court granted the second *Motion* and extended the respondent's timeframe to submit a
15 *Response Brief. Order (Granting Mot. for Expedited Consideration)*, CV 10-33 (HCN Tr. Ct.,
16 July 19, 2010).

17 Due to reoccurring issues in several cases involving the Grievance Review Board and
18 potential conflicts of interest, the Court *sua sponte* stayed the instant case until the Court could
19 make a decision regarding the potential conflicts. *Order (Stay of Proceedings)*, CV 10-33 (HCN
20 Tr. Ct., Aug. 5, 2010). Following the issuance of a decision regarding conflicts of interest
21 involving the Grievance Review Board, the Court issued a *Notice of Hearing* for the instant case.
22 *See also Order (Granting Mot.)*, CV 10-33 (HCN Tr. Ct., Nov. 2, 2010). The Court convened
23 the *Scheduling Conference* on November 30, 2010, and issued a modified *Scheduling Order*. At
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1 the *Conference*, the petitioner requested that the Court entertain oral arguments. The Court
2 granted the request. *Order (Notice of Oral Argument)*, CV 10-33 (HCN Tr. Ct., Dec. 1, 2010).

3 The respondent timely filed a *Response Brief* on December 30, 2011. *HCN R. Civ. P.*
4 63(E). Furthermore, the respondent supplemented the administrative record and provided a copy
5 of the audio recording of the GRB Hearing, which was never submitted with the administrative
6 record. The petitioner failed to file a *Reply Brief*. The Court convened the *Oral Argument*
7 *Hearing* on February 16, 2011 at 1:30 CST. The following parties were in attendance: Heidi
8 Drobnick, Attorney for the respondent; Samantha Day, Ho-Chunk Casino Table Games Shift
9 Manager; Eric Logan, Ho-Chunk Casino Table Games Trainer; and Sarina Quarderer,
10 respondent. The following party failed to appear at the hearing and failed to provide the Court
11 notification of her absence: Lay Advocate Betsy Falcon, representing the petitioner.
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14 At the *Oral Argument Hearing*, the respondent requested additional time to contact her
15 Lay Advocate or obtain new representation. *Oral Argument Hr'g* (LPER, Feb. 16, 2011,
16 01:45:32 CST). The respondent agreed to a continuance. *Id.*, 01:45:56 CST. The Court
17 conditionally granted the petitioner's request. *Id.*, 01:46:18 CST. The Court ordered the
18 petitioner to contact the Court in three (3) weeks, regarding the status of her representation. *Id.*
19 The petitioner failed to provide the Court any written correspondence within the specified
20 timeframe.
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22 **APPLICABLE LAW**

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

24 **Art. VI - Executive**

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

1 (b) The Executive Branch shall be composed of any administrative Departments created by
2 the Legislature, including a Department of the Treasury, Justice, Administration, Housing,
3 Business, Health and Social Services, Education, Labor, and Personnel, and other Departments
4 deemed necessary by the Legislature. Each Department shall include an Executive Director, a
5 Board of Directors, and necessary employees. The Executive Director of the Department of
6 Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
7 the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

8 Art. VII - Judiciary

9 Sec. 6. Powers of the Tribal Court.

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

13 Art. X - Bill of Rights

14 Sec. 1. Bill of Rights.

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

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

18 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

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

20 Subsec. 30. Employee Conduct.

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

23 (18) Inefficiency, incompetency, or negligence in the performance of duties,
24 including failure to perform assigned tasks or training, or failure to discharge duties in a
25 prompt, competent, and reasonable manner.

26 Subsec. 31. Employee Discipline.

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

(2) Termination.

1 Subsec. 33. Administrative Review Process.

2 a. Policy.

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

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

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

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

16 d. Request for a Hearing. An employee must request a hearing within five (5)
17 business days of the date the disciplinary action was taken. At the time the employee requests a
18 hearing, he or she must inform the Department of Personnel if he or she is to be represented by
19 an attorney. If so, the attorney must also file for an appearance with Department of Personnel
20 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 f. Hearing Procedure

23 (1) Review of Record. The Board will convene to review the records
24 submitted to the Board prior to appearance by the grievant and supervisor to present their
25 cases. Staff of the Department of Personnel shall also appear and be available to advise
26 all participants with regard to policy and 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 not be upheld. The employee may call witnesses at
this time. This presentation shall not exceed two hours without the Board's permission.

g. Proceedings of the Board. At the commencement of a hearing before the
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:

(7) At the conclusion of the presentation of testimony and evidence, the Board
will privately deliberate and make a decision within five (5) calendar days. No record of

1 the Board's deliberation will be made. The decision of the Board shall describe the facts
2 of the case and determine whether the facts support a violation of the Employment
Relations Act or applicable Unit Operating Rules.

3 Subsec. 35. Judicial Review.

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

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

11 d. Relief.

12 (1) This limited waiver of sovereign immunity allows the Trial Court to award
13 monetary damages for actual wages established by the employee in an amount not to
exceed \$10,000, subject to applicable taxation.

14 e. Under this limited waiver of sovereign immunity, the Court shall review the
15 Board's decision based upon the record before the Board. Parties may request an opportunity to
16 supplement the record in the Trial Court, either with evidence or statements of their position.
17 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.

18 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

19 Rule 42. Scheduling Conference.

20 *Scheduling Order.* The Court may enter a scheduling order on the Court's own motion or on the
21 motion of a party. The *Scheduling Order* may be modified by motion of a party upon [a]
22 showing of good cause or by leave of the Court.

23 Rule 57. Entry and Filing of Judgment.

24 All judgments must be signed by the presiding Judge. All signed judgments shall be deemed
25 complete and entered for all purposes after the signed judgment is filed with the Clerk. A copy of
26 the entered judgment shall be mailed to each party within two (2) calendar days of filing. The
27 time for taking an appeal shall begin running from the date the judgment is filed with the Clerk.
Interest on a money judgment shall accrue from the date the judgment is filed with the Clerk at a
set rate by the Legislature or at five percent (5%) per year if no rate is set.

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

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

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

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

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

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

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 (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, Sarina Quarderer, resides at S2869 Decorah Rd., #1331, Baraboo, WI
24 53913. The petitioner was employed as a Table Games Dealer at the Ho-Chunk Casino, located
25 at S2845 White Eagle Road, Baraboo, WI 53913.

26 2. The respondent, Ho-Chunk Casino Hotel & Convention Center, is a division within the
27 Ho-Chunk Nation Department of Business, located on trust lands at S3214 Highway 12,
28 Baraboo, WI, 53913. *See* DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, § 3(5)(c);
(Organizational Chart on file with HCN Department of Business).

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

1 3. Following an investigation, on October 11, 2010, Table Games Shift Supervisor
2 Samantha Day, met with the petitioner to discuss an incident that occurred on August 19, 2009.
3 *Id.* at 2-3.

4 4. Subsequent to the meeting, the respondent decided to terminate the petitioner from
5 employment and due to the severity of her actions progressive discipline was not implemented.
6
7 *Admin. Record* at 48.

8 5. The petitioner was terminated from her employment on November 8, 2009. *GRB*
9 *Decision* at 3.

10 6. The petitioner timely filed her grievance on November 13, 2010, to contest the
11 termination. *Admin. Record* at 17.

12 7. On March 17, 2010, the GRB conducted a *Grievance Review Hearing* in accordance with
13 the ERA, §5.34f. *Grievance Review Board Decision* (hereinafter *GRB Decision*), Case No.:
14 128.09T at 1; *see also GRB Audio Transcript*.

15 8. The Court incorporates by reference *Facts and Findings* 2-12, as determined by the GRB.
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17 *Id.* at 2-3.

18 9. Upon administrative review, the petitioner asserted several due process arguments:

19 a. First, that she her employer did not give her proper due process, since she did not
20 have “notice and a Real [sic] chance to present . . . her side of the story.” *Initial Br.* at 1.

21 i. During her pre-deprivation hearing, the supervisor should have informed
22 her of the disciplinary action that would be taken. *Id.* at 1.

23 ii. The supervisor should have allowed her to view all of the evidence against
24 her, including the video tape that displays the petitioner’s misconduct. *Id.* at 3.

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1 "meaningful opportunity to be heard before their property can be taken away."⁴ *Gary Lonetree,*
2 *Sr. v. John Holst, as Slot Dir., et al*, CV 97-127 (HCN Tr. Ct., Sept. 24, 1998) at 10 (citing
3 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)), *aff'd*, SU 98-07 (HCN S. Ct., Apr. 29, 1999)
4 (emphasis added).

5
6 Consequently, a pre-deprivation hearing "need only include oral or written notice of the
7 charges, an explanation of the employer's evidence, and an opportunity for the employee to tell
8 his [or her] side of the story." *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). The hearing does
9 not need to resemble a proceeding that one would encounter in civil litigation. *Nowak v. City of*
10 *Calumet City*, No. 86 C 1859, 1987 U.S. Dist. LEXIS 3417, at *3-4 (N.D. Ill. Apr. 27, 1987).
11 "In sum, procedural due process requires neither perfect process nor infinite process. Rather, it
12 mandates a balancing of interests, one of which is the practicality of providing pre-deprivation
13 process at a time and of a type likely to avoid erroneous deprivations."⁵ *Balcerzak v. City of*
14 *Milwaukee*, 980 F. Supp. 983, 989 (E.D. Wis. 1997) (citing *Matthews v. Eldridge*, 424 U.S. 319
15 (1976)).
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18 The employee's right to provide a meaningful response to the charges levied against him
19 or her presumes the presence of an individual possessing discretion to determine the appropriate
20 level of discipline. In fact, the Court has previously held the following:

21 a supervisor who neither maintains discretion to reverse or postpone a
22 termination decision cannot provide an employee a meaningful
23 opportunity to be heard. A pre-termination hearing is not a mere
24 technicality and cannot be reduced to a façade. The hearing's underlying
25 purposes, which all hinge upon the employer's discretion, cannot be
accomplished if the result of the hearing is a foregone conclusion. The

26 ⁴ The concept of due process equates with the notion of "fundamental fairness," which also claims an origin within
27 *hocaq* tradition and custom. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *accord In the Interest of the*
Minor Child: K.E.F., SU 97-03 (HCN S. Ct., Oct. 17, 1997) at 5.

28 ⁵ An erroneous deprivation can result in several serious consequences to the employee that may only be effectively
prevented through minimal procedural due process. *See Margaret G. Garvin v. Donald Greengrass et al.*, CV 00-
10, -38 (HCN Tr. Ct., Mar. 9, 2001) at 27-28.

1 employer cannot use pre-termination hearings to simply process
2 paperwork.

3 *Sherry Fitzpatrick v. Ho-Chunk Nation et al.*, CV 04-82 (HCN Tr. Ct., Feb. 20, 2006) at 16
4 (citation omitted). Otherwise, the meaningful right to be heard would indeed be rendered a
5 meaningless constitutional entitlement. Furthermore, the Court previously noted, “[a]n employer
6 does not need to apprise an employee of the entire extent and specifics of the evidence, but
7 instead must reveal the substance of the case against him or her so as to provide the employee the
8 meaningful opportunity to respond. *Walls v. City of Milford*, 938 F. Supp. 1218, 1222-23 (D.
9 Del. 1996). Therefore, in an employment context, procedural due process requires oral or written
10 notification of the nature of the case against the employee and an opportunity for the employee to
11 tell his or her side of the story.
12

13 The petitioner attempts to argue that she did not receive due process since the supervisor
14 did not put her on notice that she would be terminated as a result of the incident, occurring on
15 August 19, 2009. *Initial Br.* at 1. The petitioner incorrectly assumes that procedural due process
16 requirements at a pre-deprivation hearing are the same as the requirements during a judicial
17 hearing. To clarify, the nature of those requirements will vary depending on the venue in which
18 they are employed. Generally in a court of law, parties must receive advance written notice of
19 any case filed against them (i.e. *Notice and Summons*), and the court must also afford parties the
20 opportunity to be heard (i.e. offer a *Response* and/or a hearings). As previously stated, in an
21 employment context, an employee must be informed of the “substance of the case against him or
22 her so as to provide the employee the meaningful opportunity to respond. *Id.*; see also *Lonetree*,
23 CV 97-127 at 10.
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27 This standard does not require that an employer notify an employee of the potential
28 disciplinary actions that will result from the pre-deprivation hearing. The purpose of the hearing

1 is to put the employee on notice that previous actions of the employee may be subject to
2 discipline and to simply provide them with an opportunity to tell their side of the story. *See*
3 *Fitzpatrick*, CV 04-82 at 16. To conclude otherwise would run afoul of previous judicial
4 determinations. *See Id.* at 16. In the instant case, upon completion of an investigation, the
5 supervisor informed the petitioner of claims made against her. *GRB Decision* at 3. At the
6 meeting with her supervisor, the petitioner was able to tell her side of the story. *Id.*; *see also*
7 *Admin. Record* at 74-75. It is apparent that this meeting fulfilled all of the aforementioned
8 requirements of a meaningful opportunity to be heard.

9
10 The petitioner further asserts that she was denied due process prior to her termination, as
11 her supervisor failed to allow her to review the surveillance tape documenting her misconduct.
12 *Initial Br.* at 3. Again, the petitioner misunderstood the meaning of procedural due process in an
13 employment context. The employee must be informed about the nature of the case against him or
14 her. *Lonetree*, CV 97-127 at 10. This standard does not require that an employee be provided an
15 opportunity to review every piece of evidence against her. The petitioner was provided oral
16 notification regarding the nature of her misconduct.⁶ *Admin. Record* at 58. Again, it is apparent
17 that the pre-deprivation meeting fulfilled all of the aforementioned requirements of notice.
18
19 **THEREFORE**, the Court finds that the petitioner was afforded her constitutionally mandated
20 pre-deprivation procedural due process.
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22 Next, the petitioner alleges that she failed to receive a fair opportunity to present her case
23 to the GRB. *Initial Br.* at 1. At a GRB hearing procedural due process requires that the GRB
24 conduct all grievance review hearings in accordance with the ERA. *See* ERA, §5.34f. Unlike the
25 due process requirements of a pre-deprivation hearing, the due process requirements during a
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28 ⁶ The Court notes that the petitioner did receive copies of written reports detailing the contents of the surveillance tapes; however, the Court is unclear as to when these reports were provided to the petitioner. *See Admin. Record* at 157.

1 GRB hearing are clearly stated in the ERA. *See Id.* The Court thoroughly reviewed the two (2)
2 hour GRB hearing and cannot determine where the GRB violated the statutory requirements of
3 the ERA. The GRB fully provided the petitioner opportunity to present her case. In fact, the
4 majority of the two (2) hour hearing was the petitioner’s presentation. In accordance with the
5 ERA, the GRB adequately followed the hearing procedures required under the law. ERA §5.34f.
6 Both parties presented their cases, witnesses, and evidence.
7

8 The petitioner maintains responsibility to establish, by a preponderance of the evidence
9 that the employer violated the ERA. *See* ERA, § 5.34h(1). The petitioner incorrectly asserts that
10 the GRB failed to consider “if the respondents considered any other evidence or actions to take
11 or did take to adequately determine if termination was the only course of action.” *Initial Br.* at 1.
12 The GRB does not record their deliberations, and therefore this accusation cannot be evaluated.
13 ERA, § 5.34g(7). The GRB’s role is to determine whether the employer violated the ERA, based
14 on the evidence presented to them. *Id.* The petitioner simply failed to present any evidence to
15 suggest otherwise. The GRB is not an independent investigator and must only rely on the
16 information presented to them. **THEREFORE**, the Court finds that the petitioner was afforded
17 adequate due process during her GRB hearing.
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20 Turning to the next issue, the Court must determine whether the GRB’s decision to
21 uphold the petitioner’s termination was arbitrary and capricious. Executive agencies may engage
22 in formal on the record adjudication, resulting in the promulgation of rules through the formation
23 of a body of case precedent. *See, e.g., Dickinson v. Zurko*, 527 U.S. 150 (1999); *Allentown Mack*
24 *Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Bowman Transp. v. Ark.-Best Freight Sys.*,
25 419 U.S. 281 (1974). In reviewing adjudicative rulemaking, as well as other forms of agency
26 action, courts begin by confirming the presence of an “established . . . scheme of ‘reasoned
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1 decisionmaking.”⁷ *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*
2 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-tiered
3 analysis, determining whether the adjudicative rule satisfies a substantial evidence standard, and,
4 if so, whether the rule escapes a designation of arbitrary and capricious.⁸

5 The two (2) inquiries represent ““separate standards.”” *Bowman*, 419 U.S. at 284
6 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently,
7 a court “may properly conclude[] that, though an agency’s finding may be supported by
8 substantial evidence, . . . it may nonetheless reflect an arbitrary and capricious action.” *Bowman*,
9 419 U.S. at 284. In such an event, the Court would afford no deference to the adjudicative rule
10 of the agency precisely because the rule could not withstand the more deferential arbitrary and
11 capricious standard.
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14 The substantial evidence standard has no application beyond the review of “record-based
15 factual conclusion[s],” and only in unusual circumstances will agency action surviving a
16 substantial evidence review falter when scrutinized further. *Dickinson*, 527 U.S. at 164. In
17 performing the second-tier of analysis, arbitrary and capricious review,
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19 [a] reviewing court must “consider whether the decision was based on a
20 consideration of the relevant factors and whether there has been a clear
21 error of judgment. . . . Although this inquiry into the facts is to be
22 searching and careful, the ultimate standard of review is a narrow one.
23 The court is not empowered to substitute its judgment for that of the
24 agency.” The agency must articulate a “rational connection between the
25 facts found and the choice made.” While [a court] may not supply a

24 ⁷ The HCN Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g.*,
25 former AMENDED & RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION (hereinafter GAMING ORDINANCE),
§ 1101(c)(v); *compare* 5 U.S.C. § 706.

26 ⁸ The ERA directs that “[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and
27 capricious.” ERA, § 5.35e; *but cf.* GAMING ORDINANCE, § 1101(c)(v). Nonetheless, the Court shall continue to
28 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 reasoned basis for the agency’s action that the agency itself has not given,
2 [a court] will uphold a decision of less than ideal clarity if the agency’s
3 path may reasonably be discerned.

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

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

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

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

27 *Id.* at 374-75. The inconsistent or contrary application of an adjudicative rule must result in a
28 finding that the agency has failed to support its action by substantial evidence. A court cannot

1 deem subsequent aberrations as simply agency interpretations of the underlying rule. *Id.* at 377-
2 78.

3 To reiterate, a court must determine whether the challenged administrative action rests
4 upon substantial evidence and escapes a characterization of arbitrary and capricious.
5 Furthermore, the need for reasoned decision-making and the consistent application of resulting
6 decisions underlie and overarch the statutorily based analysis. In the instant matter, the GRB had
7 to determine whether the disciplinary action imposed on the petitioner was unreasonable and
8 violated the progressive discipline practice. *GRB Decision* at 6.

10 The GRB determined that the petitioner failed to provide any evidence to substantiate
11 that a termination was unreasonable under the circumstances. *GRB Decision* at 6. The ERA
12 explicitly states that “[d]epending on the nature of the circumstances of an incident, discipline will
13 normally be progressive and should bear a reasonable relationship to the violation.” ERA, § 5.31. *Id.*

15 The GRB found:

16 The board simply yields to [the employer’s] deference of management when
17 making a decision within the scope their authority that does not exceed a
18 reasonable measure. The GRB finds the supervisors [*sic*] discretion to impose a
19 termination within reason.

20 *GRB Decision* at 6. The ERA neither mandates the use of progressive discipline, nor provides
21 guidance as to what constitutes progressive discipline.⁹ Based upon the evidence and testimony
22 presented to the GRB,¹⁰ this Court must affirm the GRB’s determination.

23 ⁹ The Court commented on the usage of progressive discipline, as prescribed in predecessor litigation, in the
24 following manner:

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

28 *Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-39 (HCN Tr. Ct., Aug. 24, 2001) at
20 n.7; *see also Daniel M. Brown v. James Webster, HCN Executive Dir. of Bus.*, CV 04-38-40 (HCN Tr. Ct., May

1 The evidence presented to the GRB demonstrates that the petitioner was terminated due
2 to serious statutory violations, rising to the level of theft. ERA, § 5.30(e)(18). The petitioner
3 argues that a termination was unreasonable and progressive discipline should have been utilized.
4 *Initial Br.* at 1. The petitioner contends that the practice of not dropping tokens and playing them
5 when they wanted was regularly performed by all dealers and that she had not been told she
6 could not do it. *Admin. Record* at 58. The petitioner initially claims that she was unaware of the
7 rule against playing dealer tokens. *Id.* The dealer's procedural manual clearly defines proper
8 dealer betting procedure. *Id.* at 128-129. The petitioner does not dispute that she violated dealer
9 procedure. *Initial Br.* at 2. The petitioner cannot use ignorance as a defense for gross negligence
10 on the job, when she clearly admits to possessing a table games dealer manual that expresses the
11 proper procedures required by table games dealers.
12

13
14 The Supreme Court recognizes that “[w]hen reviewing administrative decisions, the Trial
15 Court plays the role of an appellate court and is not charged with finding facts. The GRB, with
16 its greater expertise and familiarity, is the appropriate body to find facts.”¹¹ *Funmaker*, SU 07-05
17 at 9; *see also* ERA, § 5.34a(2). The GRB deemed the respondent's disciplinary action of
18 termination as reasonable in light of the established facts, and the Court shall not upset this
19 determination. The Court is especially concerned with overturning the decision of the GRB in
20 this instance due to the severity of the ERA violation by the defendant. In light of the evidence
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22

23 10, 2006) at 34 (offering further clarification of the permissible application of progressive discipline, disagreeing
24 with employer's linkage to only “repeated identical instances of unacceptable conduct”). The Court notes that the
25 petitioner in the instant case has a history of “similar past offense[s].” *Id.* Specifically, the petitioner had problems
26 with completing tasks correctly and efficiently. *See Admin. Record* at 34.

27 ¹⁰ The petitioner argues that the GRB erred in admitting a Performance Review and a Performance Improvement
28 Plan into evidence since they were prior discipline and were not relevant. The Court declines to definitively address
the issue, since the GRB ultimately declined to rely on that information to assess whether progressive discipline was
utilized. Specifically, the GRB stated “the burden to prove management failed to execute discipline in a progressive
manner cannot be placed upon the Board when such a claim is absent any merited evidence or testimony.” *GRB
Decision* at 8.

¹¹ Upon administrative review, the Trial Court is responsible for evaluating the actions of the GRB in accordance
with the ERA. As such, a *Petition for Administrative Review* is not a petition for a trial *de novo*.

1 presented to the GRB, there is substantial basis for their determination, and the Court cannot find
2 the decision arbitrary and capricious. **BASED UPON THE FOREGOING**, the Court upholds
3 the *GRB Decision*.

4 The parties retain the right to file a timely post judgment motion with this Court in
5 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
6 Otherwise, "[t]he time for taking an appeal shall begin from the date the judgment is filed with
7 the [Trial Court] Clerk [of Court]." *HCN R. Civ. P. 57*. Since this decision represents a non-
8 final judgment, "[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a
9 petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days
10 after the entry of such order with proof of service on all other parties to an action." *Ho-Chunk*
11 *Nation Rules of Appellate Procedure*, Rule 8.¹²

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14 **IT IS SO ORDERED** this 17th day of May 2011, by the Ho-Chunk Nation Trial Court
15 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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18 _____
19 Honorable Amanda L. Rockman¹³
Interim Chief Trial Court Judge

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27 ¹² Parties can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-2722
or (800) 434-4070 or visiting the judicial website at www.ho-chunknation.com/government/judicial/cons_law.htm.

28 ¹³ The Court would like to thank Law Clerk/Staff Attorney Rebecca L. Maki for her assistance for in the drafting of
this opinion.

