

1 the respondent, Larry V. Garvin, by and through Ho-Chunk Nation Department of Justice
2 (hereinafter DOJ) Attorney Brian T. Stevens, filed the September 20, 2006 *Motion to Extend*
3 *Record & Briefing Schedule, Determination of Costs & Expedited Consideration*, which
4 represented the request of both parties. The Court accordingly entered its *Order to Change*
5 *Schedule* on September 25, 2006. *See Scheduling Order* at 1; *see also HCN R. Civ. P. 42*.

7 The respondent subsequently submitted the administrative record on October 9, 2006.¹
8 *See HCN R. Civ. P. 63(D)*. The petitioner reacted by filing the *Initial Brief & Addendum* on
9 October 24, 2006. *Id.*, Rule 63(E). The respondent filed a timely *Response Brief* on November
10 21, 2006. *Id.* The petitioner filed his timely *Reply Brief* on December 5, 2006. *Id.*

12 The Court, in its discretion, issued *Notice(s) of Hearing* on December 11, 2006,
13 informing the parties of the date, time and location of the *Oral Argument Hearing*. *Id.*, Rule
14 63(G). The Court convened the *Hearing* on December 12, 2006 at 1:30 p.m. CST. The
15 following parties appeared at the *Oral Argument Hearing*: Attorney Mark L. Goodman,
16 petitioner's counsel, and Attorney Brian T. Stevens, respondent's counsel.

18 **APPLICABLE LAW**

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

22 **Art. VI - Executive**

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

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

28 ¹ The GRB maintains an inaudible recording of the August 4, 2006 grievance hearing, rendering the creation of a transcript impossible. Regardless, the petitioner voiced no objection to the lack of a transcript.

1 Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of
2 the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

3 Art. VII - Judiciary

4 Sec. 6. Powers of the Tribal Court.

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

8 Art. X - Bill of Rights

9 Sec. 1. Bill of Rights.

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

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

13 EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5

14 Ch. 1 - General Provisions

15 Subsec. 6. Employee Rights.

16 e. Sexual Harassment.

17 (1) Purpose. The purpose of the Ho-Chunk Nation sexual harassment policy
18 is to:

19 (a) Prohibit sexual harassment in the workplace.

20 (2) Policy. Sexual harassment by or of supervisors, employees, or non-
21 employees is strictly prohibited and will be investigated for possible disciplinary action.

22 (a) No employee shall be subjected to unsolicited and/or unwelcome
23 sexual overtures or conduct, either verbal or physical.

24 (b) Sexual harassment will be treated as misconduct with appropriate
25 disciplinary sanctions, up to and including termination.

26 (d) The Department of Personnel shall promulgate guidelines and
27 procedures for the reporting and complaint handling procedures within the
28 Nation.

1 (e) An employee who believes that he or she has been subjected to
2 unwelcome sexual conduct or that there exists an objectively hostile work
3 environment has a duty to report the situation. Such report shall be made directly
to the Department of Personnel.

4 (f) All reports, including both formal and informal, of sexual and
5 other unlawful harassment will be promptly, actively, and confidentially
6 investigated by the Department of Personnel.

7 (3) Prohibited Conduct.

8 (a) Unwelcome sexual advances, requests for sexual favors, and other
9 verbal or physical conduct of a sexual nature constitutes prohibited sexual
harassment when at least one of the following criteria is met.

10 3. Such conduct has the purpose or effect of reasonably
11 interfering with an individual's work performance or creating an
12 intimidating, hostile, or offensive work environment.

13 (b) Examples of prohibited conduct, include, but are not limited to:

- 14 1. Unwelcome sexually suggestive comments or sounds.
- 15 2. Unwelcome sexual flirtation.
- 16 3. Unwelcome touching.
- 17 4. Unwelcome advances or propositions.

18 (4) Penalties.

19 (a) Where an investigation concludes that an employee has committed
20 an act of sexual harassment, that employee must attend Employee Assistance
21 Program (EAP) counseling, disciplined [*sic*] by a minimum three (3) day
22 suspension, and may be subject to further disciplinary action up to and including
23 termination.

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

25 Subsec. 31. Employee Discipline.

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

(1) Suspension.

1 (a) Under no circumstances will a suspension exceed ten (10) working
2 days.

3 (b) It may be necessary to restrict an employee immediately from
4 performing duties at the work site. These circumstances usually involve potential
5 danger to the employee, co-workers or the public, or the employee's inability to
6 discharge the assigned duties satisfactorily. In these situations, the following
7 procedure is to be followed:

8 1. Once the employee is suspended, the supervisor taking the
9 action to suspend an employee will immediately notify the Executive
10 Director and prepare a written statement of action taken and the reason for
11 such action.

12 2. The Executive Director will prepare, together with the
13 supervisor, the statement of charges and document any supporting
14 evidence.

15 3. As soon as possible after the initial action, the Executive
16 Director will prepare written notification to the affected employee.

17 (d) All suspensions shall be unpaid. No employee may be disciplined
18 by issuance of a suspension with pay.

19 (e) A suspended employee who has been vindicated of any
20 wrongdoing shall be compensated for lost wages and benefits.

21 (2) Termination.

22 Subsec. 33. Administrative Review Process.

23 a. Policy.

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

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

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

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

4 d. Request for a Hearing. An employee must request a hearing within five (5)
5 business days of the date the disciplinary action was taken. At the time the employee requests a
6 hearing, he or she must inform the Department of Personnel if he or she is to be represented by
7 an attorney. If so, the attorney must also file for an appearance with Department of Personnel
8 within five (5) days of the date the employee requested a hearing. Failure to request the hearing
9 within this time frame will result in the forfeiture of a hearing by the Board.

10 f. Hearing Procedure

11 (1) Review of Record. The Board will convene to review the records
12 submitted to the Board prior to appearance by the grievant and supervisor to present their
13 cases. Staff of the Department of Personnel shall also appear and be available to advise
14 all participants with regard to policy and procedure.

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

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

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

27 Subsec. 35. Judicial Review.

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

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

d. Relief.

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

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

9 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

10 Rule 42. Scheduling Conference.

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

14 Rule 57. Entry and Filing of Judgment.

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

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

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

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

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

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

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

15 Rule 63. Judicial Review of Administrative Adjudication.

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

19 2. The following laws provide for filing within forty-five (45) days:

20 a. GAMING ORDINANCE

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

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

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

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

11 **FINDINGS OF FACT²**

- 12 1. The parties received proper notice of the December 12, 2006 *Oral Argument Hearing*.
- 13 2. The petitioner, Willard A. Lonetree, is an enrolled member of the Ho-Chunk Nation,
14 Tribal ID# 439A003241, and resides at 114 Whitlock Street, Apt. 1, Wisconsin Dells, WI 53965.
15 The petitioner was employed as the Language Division Manager at *Hocąk Wazija Hacı*
16 Language Division, a division within the Ho-Chunk Nation Department of Heritage Preservation
17 (hereinafter Heritage Preservation Department), located at N4845 Highway 58, Mauston, WI
18 53948. See DEP'T OF HERITAGE PRES. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 6.5c;
19 http://www.ho-chunknation.com/government/executive/org_chart.htm (last visited Mar. 2, 2007)
20 (on file with Heritage Pres. Dep't). The Heritage Preservation Department is an executive
21 department with principal offices located on trust lands at Ho-Chunk Nation Headquarters,
22 W9814 Airport Road, P.O. Box 667, Black River Falls, WI. See CONSTITUTION OF THE HO-

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27 ² The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally
28 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 CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b). The Ho-Chunk Nation (hereinafter
2 HCN or Nation) is a federally recognized Indian tribe. *See* 70 Fed. Reg. 71194 (Nov. 25, 2005).

3 3. The respondent, Larry V. Garvin, is an enrolled member of the Ho-Chunk Nation, Tribal
4 ID# 439A000947, is employed as Executive Director of the Heritage Preservation Department,
5 and acted as the petitioner's supervisor.³
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7 4. On March 3, 2006, the petitioner received a ten-day suspension, but the petitioner did not
8 offer suspension documentation to the GRB. *In re the Matter of: Willard Lonetree v. Larry*
9 *Garvin*, GRB-201-06-S/T (GRB, Aug. 4, 2006) (hereinafter *Decision*) at 2.⁴
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11 5. On March 8, 2006, the petitioner received a termination letter composed on March 7,
12 2006, by certified mail. *Id.*

13 6. The respondent did not require the petitioner to attend EAP counseling. *Id.*; *see also*
14 ERA, § 5.6e(4)(a).

15 7. The petitioner timely grieved the suspension and termination to the GRB on March 9,
16 2006. *Decision* at 1; *see also* ERA, § 5.34d.
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18 8. On August 4, 2006, the GRB conducted a hearing.⁵ *Decision* at 2.

19 8. A female employee (hereinafter victim) that worked with the petitioner complained of
20 acts of unwelcome sexual conduct, resulting in the performance of an investigation by the
21 Personnel Department. *Decision* at 2-3; *see also* ERA, § 5.6e(2)(e-f).
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24 ³ The petitioner failed to designate the GRB as a party respondent, but the Court recognizes that the petitioner seeks
25 judicial review of a GRB decision. Previously, the Court *sua sponte* joined an administrative agency in an
26 administrative review action due to the agency's understandable non-participation. *Patricia A. Lowe-Ennis v. Cash*
27 *Systems, Inc.*, CV 06-41 (HCN Tr. Ct., Nov. 8, 2006). In the instant case, the GRB, and its legal counsel, willingly
28 participated in the administrative review, but the Court will likely propose an amendment to *HCN R. Civ. P.* 63 to
clearly require the naming of the administrative agency as a respondent. The GRB is a statutorily established entity
for the purpose of hearing certain employment grievances, and is comprised of randomly selected members who
receive training facilitated by the HCN Department of Personnel (hereinafter Personnel Department). ERA, §
5.34a(1-2).

⁴ The ERA requires the GRB to issue a decision within five (5) calendar days of the hearing. ERA, § 5.34g(7).

1 9. The victim testified that the unwelcome sexual conduct continued and increased in
2 frequency over the course of approximately eighteen (18) months. *Decision* at 2. In particular,
3 the victim indicated that the petitioner gave her a daily "crack on the butt" preceding his
4 termination. The victim also stated that the petitioner repeatedly rubbed her neck, shoulders and
5 back. The victim noted that she informed the petitioner that his actions were unwelcome.
6 *Decision* at 3.

8 10. The petitioner opted to refrain from testifying at the hearing, but petitioner's counsel
9 conceded that the petitioner engaged in the above-referenced conduct. *Id.*

11 11. The GRB found "that the [petitioner] was afforded due process," but "that the process
12 utilized could have been better." *Id.* at 4. Specifically, the GRB determined that "[d]ue process
13 was afforded to the [petitioner] as part of the investigation that was conducted" because "the
14 investigator did speak with the [petitioner] about the allegations." *Id.*

15 12. Prior to termination, the petitioner earned \$22.30 per hour in his role as Language
16 Division Manager. *HCN Employee Summ. Form.* 107 working days elapsed between the
17 petitioner's date of termination and the GRB hearing. *HCN Employee Status Change Notice.*

20 DECISION

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22 The Court thoroughly examined the origin of administrative agency review and
23 associated standards of review within a prior case. *Regina K. Baldwin et al. v. Ho-Chunk Nation*
24 *et al.*, CV 01-16, -19, -21 (HCN Tr. Ct., Jan. 9, 2002) at 12-26. The Court directs the parties to
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⁵ The ERA does not establish a timeframe in which the GRB must convene a hearing after receiving a grievance. In this instance, 148 days elapsed before the hearing.

1 that decision for a comprehensive discussion.⁶ For purposes of this case, the Court reproduces
2 the portion of the discussion dealing with formal on the record adjudication.

3 Executive agencies may engage in formal on the record adjudication, resulting in the
4 promulgation of rules through the formation of a body of case precedent. *See, e.g., Dickinson v.*
5 *Zurko*, 527 U.S. 150 (1999); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998);
6 *Bowman Transp. v. Ark.-Best Freight Sys.*, 419 U.S. 281 (1974). In reviewing adjudicative
7 rulemaking, as well as other forms of agency action, courts begin by recognizing that Congress
8 intended the Administrative Procedure Act (hereinafter APA) to "establish[] a scheme of
9 'reasoned decisionmaking.'"⁷ *Allentown*, 522 U.S. at 374 (quoting *Motor Vehicle Mfrs. Ass'n of*
10 *U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). Courts then perform a two-
11 tiered analysis, determining whether the adjudicative rule satisfies a substantial evidence
12 standard, and, if so, whether the rule escapes a designation of arbitrary and capricious.⁸

13 The two (2) inquiries represent "separate standards." *Bowman*, 419 U.S. at 284 (quoting
14 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971)). Consequently, a court
15 "may properly conclude[] that, though an agency's finding may be supported by substantial
16 evidence, . . . it may nonetheless reflect an arbitrary and capricious action." *Bowman*, 419 U.S.
17 at 284. In such an event, the Court would afford no deference to the adjudicative rule of the
18 agency precisely because the rule could not withstand the more deferential arbitrary and
19 capricious standard.
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25 ⁶ The full text of *Baldwin* appears at www.ho-chunknation.com/government/judicial/case_index2.htm.

26 ⁷ The HCN Legislature has incorporated the acknowledged federal standards within certain legislation. *See, e.g.,*
27 GAMING ORDINANCE, § 1101(c)(v); compare 5 U.S.C. § 706.

28 ⁸ The ERA directs that "[t]he Trial Court may only set aside or modify a Board decision if it was arbitrary and
capricious." ERA, § 5.35e; *but cf.* AMENDED & RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION
(hereinafter GAMING ORDINANCE), § 1101(c)(v). Nonetheless, the Court shall continue to engage in the two-tiered
analysis due to the inseparable components of the inquiry. Furthermore, some federal courts have denoted a
convergence of the standards, making any analytical distinction unattainable. *See, e.g., Aircraft Owners & Pilots*
Ass'n v. FAA, 600 F.2d 965, 971 n.28 (D.C. Cir. 1979) (describing the distinction as "largely semantic"). This Court

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

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

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

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

2 In this regard,

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

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

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14 To reiterate, a court must determine whether the challenged administrative action rests
15 upon substantial evidence and escapes a characterization of arbitrary and capricious.
16 Furthermore, the need for reasoned decision-making and the consistent application of resulting
17 decisions underlie and overarch the statutorily based analysis. The Court would typically
18 endeavor to perform this inquiry in relation to the administrative decision at issue, but the Court
19 instead rests its decision on constitutional grounds.
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21 As noted above, the ERA attempts to limit the appellate role "to set[ting] aside or
22 modify[ing] a Board decision if it was arbitrary and capricious." ERA, § 5.35e. The ERA does
23 not articulate the Court's ability to set aside an agency decision that proves "contrary to law."
24 *Compare* GAMING ORDINANCE, § 1101(c)(v). Such a seemingly broad recognition of judicial
25 authority, however, does not invite or permit a *de novo* review in the context of a typical
26 administrative review. That is to say, a court cannot bypass the obviously deferential standards
27 of review when it perceives an isolated question of law. Rather, a court may only set aside an
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1 agency action as contrary to law when the agency clearly acts outside the parameters of its
2 legislatively delegated authority. For example, this Court would not need to defer to a GRB
3 decision that claimed to determine an enrollment issue under the guise of a Ho-Chunk preference
4 grievance. Such a decision would certainly be struck down as contrary to law regardless of
5 whether the HCN Legislature incorporated this provision in the standard of review paragraph.
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7 Nowhere is this judicial authority more obvious than when a court encounters an
8 administrative agency's efforts to interpret and apply constitutional principles. "[C]onstitutional
9 questions obviously are unsuited to resolution in administrative hearing procedures and,
10 therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*,
11 430 U.S. 99, 109 (1977).⁹ The HCN Legislature lacks the ability to confer constitutional
12 adjudication authority upon an executive administrative agency, and the ERA does not purport to
13 do so. Any such attempt would prove inconsistent with the theoretical and legal underpinnings
14 of administrative power. *See Baldwin*, CV 01-16, -19, -21 (HCN Tr. Ct., Oct. 3, 2003) at 15 n.5.
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16 The Court accordingly proceeds to independently assess whether the respondent afforded
17 the petitioner pre-deprivation minimal procedural due process. *See* CONST., ART. X, § 1(a)(8).
18 The ERA provides that "[s]upervisors imposing discipline shall afford Due Process to the
19 employee prior to suspending or terminating any employee."¹⁰ ERA, § 5.31a. The Court,
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23 ⁹ The following federal circuit court assessments reinforce this unassailable premise. "[A]s a general rule, an
24 administrative agency is not competent to determine constitutional issues." *Petruska v. Gannon Univ.*, 462 U.S.
25 294, 308 (3rd Cir. 2006). "To be sure, administrative agencies . . . cannot resolve constitutional issues. Instead, the
26 premise of administrative exhaustion requirements for petitioners with constitutional claims is that agencies may be
27 able to otherwise address petitioners' objections, allowing the courts to avoid unnecessary constitutional decisions."
28 *Am. Coalition for Competitive Trade v. Clinton*, 128 F.3d 761, 766 n.6 (D.C. Cir. 1997). "[A] reviewing court owes
no deference to the agency's pronouncement on a constitutional question." *Lead Indus. Assoc., Inc. v. EPA*, 647
F.2d 1130, 1173-74 (D.C. Cir. 1980).

¹⁰ The Court previously referred to a "for cause" employment provision for the purpose of ascertaining a property
right in employment, which would consequently entitle an employee to procedural due process protections. *See*,
e.g., *Joyce L. Warner v. Ho-Chunk Nation et al.*, CV 04-72 (HCN Tr. Ct., Sept. 11, 2006), *appeal filed*, SU 06-05.
The ERA does not contain a comparable provision, but clearly requires that supervisors afford pre-deprivation
procedural due process. Furthermore, the mere inclusion of statutory grounds for discharge has proven sufficient to

1 however, must determine the sufficiency of the procedural protections offered by the employer.
2 Basically, an employee must receive a "meaningful opportunity to be heard before their property
3 can be taken away."¹¹ *Gary Lonetree, Sr. v. John Holst, as Slot Dir., et al*, CV 97-127 (HCN Tr.
4 Ct., Sept. 24, 1998) at 10 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)), *aff'd*, SU 98-
5 07 (HCN S. Ct., Apr. 29, 1999) (emphasis added).
6

7 Consequently, a pre-deprivation hearing "need only include oral or written notice of the
8 charges, an explanation of the employer's evidence, and an opportunity for the employee to tell
9 his [or her] side of the story."¹² *Gilbert v. Homar*, 520 U.S. 924, 929 (1997). The hearing does
10 not need to resemble a proceeding that one would encounter in civil litigation. *Nowak v. City of*
11 *Calumet City*, No. 86 C 1859, 1987 U.S. Dist. LEXIS 3417, at *3-4 (N.D. Ill. Apr. 27, 1987).
12 "In sum, procedural due process requires neither perfect process nor infinite process. Rather, it
13 mandates a balancing of interests, one of which is the practicality of providing pre-deprivation
14 process at a time and of a type likely to avoid erroneous deprivations."¹³ *Balcerzak v. City of*
15 *Milwaukee*, 980 F. Supp. 983, 989 (E.D. Wis. 1997) (citing *Matthews v. Eldridge*, 424 U.S. 319
16 (1976)).
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22 establish the presence of a property interest in public employment. *Dixon v. Mayor & Council of Wilmington*, 514
23 F. Supp. 250, 253 (D. Del. 1981).

24 ¹¹ The concept of due process equates with the notion of "fundamental fairness," which also claims an origin within
25 *hacak* tradition and custom. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *accord In the Interest of the*
26 *Minor Child: K.E.F.*, SU 97-03 (HCN S. Ct., Oct. 17, 1997) at 5.

27 ¹² An employer does not need to apprise an employee of the entire extent and specifics of the evidence, but instead
28 must reveal the substance of the case against him or her so as to provide the employee the meaningful opportunity to
29 respond. *Walls v. City of Milford*, 938 F. Supp. 1218, 1222-23 (D. Del. 1996). Furthermore, "there is no specific
30 due process requirement that an individual know, prior to a contemplated action hearing, precisely what action is
31 contemplated where there has been prior notice that termination could result" *O'Neill v. Baker*, 210 F.3d 41, 49
32 (1st Cir. 2000).

¹³ An erroneous deprivation can result in several serious consequences to the employee that may only be effectively
33 prevented through minimal procedural due process. *See Margaret G. Garvin v. Donald Greengrass et al.*, CV 00-
34 10, -38 (HCN Tr. Ct., Mar. 9, 2001) at 27-28.

1 The employee's right to provide a meaningful response to the charges levied against him
2 or her presumes the presence of an individual possessing discretion to determine the appropriate
3 level of discipline. In fact, the Court has previously held the following:

4 a supervisor who neither maintains discretion to reverse or postpone a
5 termination decision cannot provide an employee a meaningful
6 opportunity to be heard. A pre-termination hearing is not a mere
7 technicality and cannot be reduced to a façade. The hearing's underlying
8 purposes, which all hinge upon the employer's discretion, cannot be
9 accomplished if the result of the hearing is a foregone conclusion. The
employer cannot use pre-termination hearings to simply process
paperwork.

10 *Sherry Fitzpatrick v. Ho-Chunk Nation et al.*, CV 04-82 (HCN Tr. Ct., Feb. 20, 2006) at 16
11 (citation omitted).¹⁴ Otherwise, the meaningful right to be heard would indeed be rendered a
12 meaningless constitutional entitlement.

13
14 In the case at bar, the respondent contends that the Personnel Department investigator
15 afforded the petitioner minimal procedural due process by virtue of her questioning the petitioner
16 during the course of the investigation. The investigator, however, does not occupy the role of a
17 supervisor and likely never contemplated needing to provide the petitioner his due process rights.
18 The investigator's involvement is triggered by the report of unwelcome sexual conduct, and the
19 investigator does not act pursuant to any delegation of authority from the reporter's supervisory
20 hierarchy. ERA, § 5.6e(2)(e-f). Moreover, the pre-deprivation hearing must occur at the
21 conclusion of the investigation so that the employer may correctly inform the employee of the
22 substance of the evidence. Such a hearing cannot occur in conjunction with or in the midst of an
23 ongoing investigation.
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27 ¹⁴ "The Court has never required the employer to refrain from completing a *Disciplinary Action Form*, including
28 obtaining required signatures, until after it conducts a pre-termination hearing" *Fitzpatrick*, CV 04-82 at 15
(citing *Garvin*, CV 00-10, -38 (HCN Tr. Ct., Nov. 16, 2001) at 10); *accord O'Neill*, 210 F.3d at 49 (finding "no
constitutional infirmity because the planned termination was subject to revision if [the employee] was able to contest
the validity of the grounds for termination").

1 By necessity, the investigation and pre-deprivation hearing are distinct occurrences. Even
2 when a single individual occupies the roles of investigator and pre-deprivation hearing officer,
3 courts have held that due process cannot be afforded during the course of the investigation. *See,*
4 *e.g., Cotnoir v. Univ. of Me.,* 35 F.3d 6, 11 (1st Cir. 1994); *Kendall v. Bd. of Educ.,* 627 F.2d 1, 5
5 (6th Cir. 1980). The justifications and bases for the two undertakings are completely dissimilar.
6
7 The Personnel Department does not engage in an investigation for the primary purpose of
8 entertaining the alleged perpetrator's perspective or plea for leniency or consideration of
9 extenuating circumstances, and certainly not for purposes of weighing a critique of the
10 investigation itself.

11
12 The Court consequently holds that the respondent failed to provide the petitioner minimal
13 procedural due process prior to his termination.¹⁵ At this juncture, the Court would typically
14 award an aggrieved plaintiff a position with a comparable wage as reflected in the above-cited
15 due process decisions. *See, e.g., Fitzpatrick,* CV 04-82 at 17. The Court formerly granted such
16 relief due largely to its performance of a *de novo* review of a disciplinary measure arising from
17 an informal and flawed administrative review process. *See Hope B. Smith v. Ho-Chunk Nation,*
18 CV 02-42 (HCN Tr. Ct., July 31, 2003), *aff'd*, SU 03-10 (HCN S. Ct., Dec. 8, 2003) (confirming
19 the lack of deference due an independent supervisory employment decision). The Court
20 refrained from remanding the matter to an oftentimes disengaged administrator to consider
21 admittedly *post hoc* justifications from the supervisor that imposed the discipline. *See, e.g.,*
22 *Garvin,* CV 00-10, -38 (HCN Tr. Ct., Nov. 16, 2001) at 8-9 (detailing an unresponsive
23 Administrative Review Process).

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¹⁵ The Court shall not disrupt the GRB finding concerning the perpetration of sexual harassment, especially given the petitioner's failure to defend against the charge of continuous acts of unwelcome sexual conduct.

1 Presently, the GRB constitutes an independent reviewing authority that the Court should
2 strive to promote in its infancy under the ERA. The Court, therefore, shall remand this matter to
3 the GRB with instructions to elicit the testimony of the parties in order to resolve a single issue:
4 whether the respondent would have terminated the petitioner's employment even if he had
5 conducted an appropriate pre-deprivation hearing.¹⁶ *See Kendall*, 627 F.2d at 6; *see also* CONST.,
6 ART. VII, 6(a) (establishing the Court's authority to issue all equitable remedies). Regardless, the
7 Court has determined the presence of a constitutional violation, and the Court cannot leave such
8 violation without a remedy.¹⁷

9
10 The Court accordingly directs the GRB to award the petitioner a minimum monetary
11 judgment in the amount of \$10,000.00, which corresponds with actual lost wages for the elapsed
12 timeframe from when the petitioner should have received a pre-deprivation hearing to when the
13 petitioner appeared before the GRB. ERA, § 5.35d(1); *see also Janet Funmaker v. Libby*
14 *Fairchild, in her capacity as Exec. Dir. of HCN Dep't of Pers., et al.*, CV 06-61 (HCN Tr. Ct.,
15 Mar. 9, 2006). The Court cannot otherwise endorse a construct whereby the employer may
16 infringe an employee's constitutional rights with impunity. "[T]he proper test to apply in the
17 present context is one which . . . protects against the invasion of constitutional rights without
18 commanding undesirable consequences not necessary to the assurance of those rights." *Mt.*
19 *Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). The Court believes that it has devised
20 an appropriate accommodation of the countervailing interests in the present case. The Court
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26 ¹⁶ The GRB need not concern itself with the suspension since the petitioner failed to properly substantiate the
27 surrounding circumstances in the prior hearing. *See supra* p. 10. Neither the GRB nor the Court knows whether the
28 respondent performed an allowable emergency suspension due to an incomplete factual record. ERA, § 5.31a(1)(b).
The United States Supreme Court has "rejected the proposition that 'at a meaningful time and in a meaningful
manner' *always* requires . . . a hearing prior to the initial deprivation of property." *Parratt v. Taylor*, 451 U.S. 527,
540 (1981).

1 requests that the GRB inform it of the timeframe in which it can accomplish adherence with this
2 judgment. The GRB shall file such notice within fifteen (15) days of the issuance of this
3 decision.

4
5 The parties retain the right to file a timely post judgment motion with this Court in
6 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
7 Otherwise, "[t]he time for taking an appeal shall begin from the date the judgment is filed with
8 the [Trial Court] Clerk [of Court]." *HCN R. Civ. P. 57*. Since this decision represents a non-
9 final judgment, "[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a
10 petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days
11 after the entry of such order with proof of service on all other parties to an action." *Ho-Chunk*
12 *Nation Rules of Appellate Procedure, Rule 8*.¹⁸

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14
15 **IT IS SO ORDERED** this 9th day of March 2007, by the Ho-Chunk Nation Trial Court
16 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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20 _____
21 Honorable Todd R. Matha
22 Chief Trial Court Judge

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27 ¹⁷ "As with any infringement of an intangible constitutional right, a [fact-finding court] should be permitted to
28" *Codd v. City of New York*, 429 U.S. 624, 631 n.3 (1977) (Brennan, J., dissenting).

¹⁸ 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.

