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

**Daniel Topping,
Petitioner,**

v.

Case No.: CV 10-107

**Georgette Mart and Ho-Chunk Nation
Food & Beverage,
Respondents,**

and

**Ho-Chunk Nation Grievance Review Board,
Intervenor.**

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**ORDER
(Granting Motion to Dismiss)**

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INTRODUCTION

17 The Court must determine whether to grant the intervenor's *Grievance Review Board*
18 *Motion to Dismiss Petition for Administrative Review*. The Court hereby grants the intervenor's
19 motion to dismiss as the petitioner filed an untimely *Petition for Administrative Review*. The
20 analysis of the Court follows below.

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PROCEDURAL HISTORY

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24 The Court issued its first dispositive decision on the matter on August 6, 2009, in an
25 order affirming the decision of the Grievance Review Board (hereinafter GRB). *Daniel Topping*
26 *v. HCN Grievance Review Bd.*, CV 09-02 (HCN Tr. Ct., Aug. 6, 2009). The HCN Supreme
27 Court subsequently overturned the Court's decision and remanded the matter back to the GRB.
28 *Daniel Topping v. HCN Grievance Review Bd.*, SU 09-08 (HCN S. Ct., Jul. 1, 2010) at 9. The

1 GRB held a meeting on September 20, 2010, in an attempt to comply with the HCN Supreme
2 Court's remand order. *Summ. of Discussion* at 1. On September 27, 2010, the GRB issued a
3 *Summary of Discussion* of the September 20, 2010 meeting in which it determined not to reopen
4 the petitioner's case. *Id.* at 4. For unknown reasons, the *Summary of Discussion* was not mailed
5 to the petitioner until October 22, 2010.
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7 On October 27, 2010, the petitioner filed a *Motion for Reconsideration and Motion for*
8 *Hearing* with the GRB. On November 4, 2010, the Chairman of the GRB issued a letter
9 indicating that he would request that the Executive Director of Personnel deny the petitioner's
10 request for reconsideration and a hearing. *Administrative Record* at 21. The letter indicated the
11 Executive Director of Personnel would be issuing a written decision on the petitioner's requests,
12 but the Court has not received any record of such a decision. *Id.* at 22.
13

14 The petitioner initiated the instant case by filing a *Petition for Administrative Review* on
15 November 30, 2010.¹ Consequently, the Court scheduled a *Scheduling Conference* for February
16 21, 2011, at 2:30 p.m. CST. Following the *Scheduling Conference*, the Court issued a
17 *Scheduling Order* on February 22, 2011, setting all relevant briefing deadlines for the case. The
18 respondents filed a *Notice and Motion for Extension of Time to File* on March 14, 2011. The
19 respondents filed the *Administrative Record* on March 15, 2011. On March 17, 2011, the
20 intervenor filed the *Grievance Review Board Motion to Dismiss Petition for Administrative*
21 *Review and Memorandum in Support*. The intervenor's motion to dismiss primarily argues that
22 the petitioner's appeal is untimely. *GRB Mot. to Dismiss Pet. for Administrative Review and*
23 *Mem. in Supp.* at 5. The Court scheduled a *Motion Hearing* for April 19, 2011, at 2:00 p.m.
24 CDT.
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1 The petitioner timely filed a *Brief in Support of Petition for Review* and a *Response to*
2 *Grievance Review Board Motion to Dismiss* on April 7, 2011. On April 18, 2011, the
3 respondents filed a *Reply Brief to Grievance Review Board Motion to Dismiss Petition for*
4 *Administrative Review and Memorandum in Support and Notice of Motion and Motion to*
5 *Dismiss* along with an *Affidavit of Heidi A. Drobnick*. The respondents' *Motion to Dismiss* joins
6 the intervenor's *Motion to Dismiss* and additionally argues improper and ineffective service of
7 the *Petition for Administrative Review. Reply Br. to GRB Mot. to Dismiss Pet. for*
8 *Administrative Review and Mem. in Supp. and Notice of Mot. and Mot. to Dismiss* at 1. The
9 Court subsequently rescheduled the *Motion Hearing* for May 17, 2011, at 2:00 p.m. CDT, to
10 allow the intervenor and the respondents to argue their motions.
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13 The Court convened the *Motion Hearing* on May 17, 2011, at 2:00 p.m. CDT. The
14 petitioner appeared personally along with his attorney, James Ritland. Attorney Heidi Drobnick
15 appeared personally on behalf of the respondents. Attorney William Gardner appeared
16 personally on behalf of the intervenor.
17

18 **APPLICABLE LAW**

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

20 **ARTICLE XII – SOVEREIGN IMMUNITY**

21
22 Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from
23 suit except to the extent that the Legislature expressly waives its sovereign immunity, and
24 officials and employees of the Ho-Chunk Nation acting within the scope of their duties or
25 authority shall be immune from suit.
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28 ¹ The petitioner included a *Certificate of Service* indicating that the attorneys for the respondents and the intervenor were served the *Petition for Administrative Review*. However, the respondents did not become aware of the petition until January 11, 2011. *Aff. of Heidi A. Drobnick* at 1-2.

1 EMPLOYMENT RELATIONS ACT OF 2004

2 34. Administrative Review Process.

3 a. Policy.

4
5 (3) Following a Board decision, the employee shall have the right to file an
6 appeal with the Ho-Chunk Nation Trial Court (Court).

7 35. Judicial Review.

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

12 c. Judicial review of a grievance involving suspension, termination, discrimination, or
13 harassment may proceed to the Ho-Chunk Nation Trial Court only after the
14 Administrative Review Process has been exhausted through the Grievance Review
15 Board.

16 (1) An employee may appeal a Board decision to the Trial Court within thirty (30)
17 calendar days of when the Board decision is served by mail.

18 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

19 Rule 63. Judicial Review of Administrative Adjudication.

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

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

24 a. EMPLOYMENT RELATIONS ACT OF 2004

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

(C) The petitioner shall file copies of the *Petition for Administrative Review* upon all parties to
the action. The petitioner shall promptly file *Certificate of Service* with the Court.

1 **FINDINGS OF FACT**

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

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8 1. The petitioner, Daniel G. Topping, Jr., is an enrolled member of the Ho-Chunk Nation,
9 Tribal ID# 439A005122, and maintains a mailing address of P.O. Box 2, Vesper, WI 54489.

10 2. The respondent, Food & Beverage Supervisor Georgette Martin, was the supervising
11 employee of the petitioner, who subsequently terminated the petitioner.

12 3. The respondent, Ho-Chunk Nation Food & Beverage, is a division within the Ho-Chunk
13 Nation Department of Business (hereinafter Business Department), located at W9010 Hwy 54
14 East, Black River Falls, WI 54615. See DEP'T OF BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1
15 HCC § 3.5c. The Business Department is an executive department with principal offices located
16 on trust lands at Ho-Chunk Nation Headquarters, W9814 Airport Road, P.O. Box 667, Black
17 River Falls, WI. See CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION),
18 ART. VI, § 1(b). The Ho-Chunk Nation (hereinafter HCN or Nation) is a federally recognized
19 Indian tribe. See 73 Fed. Reg. 18533 (Apr. 4, 2008).

20
21 4. The intervenor, GRB, is a statutorily established entity for the purpose of hearing certain
22 employment grievances, and is primarily comprised of randomly selected members who receive
23 training facilitated by the HCN Department of Personnel (hereinafter Personnel Department).
24 ERA, § 5.34a(1-2); see also *Janet Funmaker v. Libby Fairchild, in her capacity as Executive*
25 *Dir. of HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the
26 GRB is “an agency within the Department of Personnel”).
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DECISION

The Court grants the intervenor’s motion to dismiss due to the petitioner’s untimely filing of the *Petition for Administrative Review*. The ERA states that an employee may appeal the decision of the GRB to the Trial Court within thirty (30) days of when the GRB “decision is served by mail.” ERA, 6 HCC §5.35.c.1. Likewise, the *HCN Rules of Civil Procedure* state that any person aggrieved by a final agency decision may request review by the Trial Court by filing a *Petition for Administrative Review* within thirty (30) days of such decision. *HCN R. Civ. P.*, Rule 63(A). The GRB held a meeting on September 20, 2010, in an effort to comply with a Supreme Court directive. *Administrative Record* at 6. The GRB released a *Summary of Discussion* of this meeting on September 27, 2010. *Id.* In this document, the GRB decided not to reopen the petitioner’s case. *Id.* at 9. Therefore, the *Summary of Discussion* constitutes a final agency decision as contemplated by the ERA and the *HCN Rules of Civil Procedure*.

For unknown reasons, the GRB did not mail the *Summary of Decision* to the parties until October 22, 2010. *GRB Mot. to Dismiss Pet. for Administrative Review and Mem. in Supp. of Mot. to Dismiss* at 4; *Mot. for Recons. and Mot. for Hr’g* at 1. Service by mail is effective upon the act of mailing. *Diana Wolf v. HCN GRB*, CV 09-48 (HCN Tr. Ct., May 7, 2010) at 10-11. Thus, the petitioner had thirty (30) days from October 22, 2010, to file the *Petition for Administrative Review* in the Trial Court. The petitioner did not file the *Petition for Administrative Review* until November 30, 2010. This filing was therefore untimely. In the absence of a timely filing, the petitioner cannot avail himself of the limited waiver of sovereign immunity incorporated within the ERA. 6 HCC §5.35.a, c(1); *Wolf*, CV 09-48 at 9-10.

1 Therefore, the intervenor's motion to dismiss must be granted.² The Court makes no ruling as to
2 the merits of the petitioner's *Petition for Administrative Review*.

3 The petitioner argues that the timeframe for filing the *Petition for Administrative Review*
4 should begin tolling on November 4, 2010. *Resp. to GRB Mot. to Dismiss* at 1. On November 4,
5 2010, the GRB Chairman mailed a letter to all parties responding to the petitioner's *Motion for*
6 *Reconsideration and Motion for Hearing*. *Administrative Record* at 21. The letter indicated that
7 he would recommend that the Executive Director of Personnel deny the petitioner's requests. *Id.*
8 The petitioner argues that the decision of the GRB did not become a final decision subject to
9 appeal until his motions were decided, and thus, the November 30, 2010 *Petition for*
10 *Administrative Review* should be considered timely. *Resp. to GRB Mot. to Dismiss* at 1-2.

13 The Court finds the petitioner's argument flawed as the GRB has no statutory authority to
14 hear motions for reconsideration. The ERA sets out the procedures the GRB must follow
15 throughout the grievance process. 6 HCC §5.34. Following a GRB decision, employees have a
16 right to file an appeal with the Trial Court, and must do so within thirty (30) days of when that
17 decision is served by mail. ERA, 6 HCC § 5.34.a(3), 35.c(1). Although the GRB has previously
18 allowed motions for reconsideration under an "internal directive," the ERA makes no mention of
19 motions for reconsideration. *Mot. Hr'g* (LPER at 10, May 17, 2011, 02:21:07 CST). Neither the
20 HCN Legislature, nor a member of the Executive branch with properly delegated authority has
21 ever adopted the "internal directive" as an operating rule. *Id.* Therefore, all employees seeking
22 review of a GRB decision must abide by the timelines articulated in the ERA and echoed by the
23 *Ho-Chunk Nation Rules of Civil Procedure*. The petitioner failed to follow these delineated
24 timelines, and thus the case must be dismissed.

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² The respondents filed an additional *Motion to Dismiss* based on improper service of the *Petition for Administrative Review*. However, as the respondents joined in the intervenor's *Motion to Dismiss*, and the motion is granted, the

1 The parties retain the right to file a timely post judgment motion with this Court in
2 accordance with *HCN R. Civ. P. 58, Amendment to or Relief from Judgment or Order.*
3 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme
4 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*
5 *App. P.*], specifically *Rules of Appellate Procedure, Rule 7, Right of Appeal.*” *HCN R. Civ. P.*
6 *61.* The appellant “shall within sixty (60) calendar days after the day such judgment or order
7 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or
8 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*
9 *7(b)(1).* “All subsequent actions of a final *Judgment* or *Trial Court Order* must follow the [*HCN*
10 *R. App. P.*].” *HCN R. Civ. P. 61.*

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12 **IT IS SO ORDERED** this 22nd day of June 2011, by the Ho-Chunk Nation Trial Court
13 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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18 Honorable Amanda L. Rockman
19 Interim Chief Trial Court Judge
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Court declines to rule separately on the respondents’ motion.

