



1 **APPLICABLE LAW**

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

4 **Art. VII - Judiciary**

5 **Sec. 6. Powers of the Tribal Court.**

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

9 **AMENDED AND RESTATED GAMING ORDINANCE OF THE HO-CHUNK NATION**

10 **Ch. 11 - Powers & Duties of the Ho-Chunk Nation Trial Court**

11 **Sec. 1101. Appeal of Commission Decision to the Tribal Court.**

12 (a) Appellants. A License Applicant may appeal the denial of a License or conditions  
13 placed upon a License as provided in this Section. A party aggrieved by decision of the  
14 Commission pursuant to an enforcement proceeding may appeal the decision as provided in this  
15 Section.

16 (c) Procedures. Appeals to the tribal court shall be brought as provided by tribal law,  
17 except that the tribal court shall apply the same standard of review set out in subsec. (v) below.

18 (v) Decisions. Decisions of the trial court shall be based upon a review of the  
19 record of the Commission's proceedings. Oral arguments, if any, and any written  
20 statements submitted. [sic] The trial court shall not exercise de novo review of  
21 Commission decisions and shall give proper deference to the administrative expertise of  
22 the Commission and to determinations of credibility. The tribal court shall not set aside  
23 or modify any decision unless it finds that the decision was arbitrary and capricious,  
24 unsupported by substantial evidence or contrary to law. The trial court shall issue a  
25 written decision on all appeals.

26 (vii) Relief afforded to appellants. The Trial Court of the Ho-Chunk Nation is  
27 limited to the following relief for actions under this Ordinance:

28 (a) In the case of employee or vendor licensing determinations, the  
Trial Court is limited to remanding determinations to the Gaming Commissions  
for reconsideration consistent with its findings should it find that the Gaming  
Commission acted in an arbitrary and capricious manner or its decision was  
unsupported by substantial evidence or contrary to law.

1 (b) Should the trial Court remand a determination of the Gaming  
2 Commission for reconsideration, the Commission, upon reconsideration, may  
3 award up to six (6) months in lost wages and health care costs, if any (minus any  
4 compensation, including unemployment benefits, that an employee may have  
5 received during a suspension). In the case of a vendor, the Commission may  
6 refund of a license fee remitted to the Commission.

7 (c) Any reconsideration ordered by the Court under this section must  
8 occur within thirty (30) days of the Court's order. During that time, the Trial  
9 Court retains jurisdiction of the case.

10 Ch. 12 - Licensing Procedures

11 Sec. 1203. Application for License.

12 (b) No License shall be issued to any Applicant who has been determined by  
13 Legislature or the Commission to be a person who prior activities, criminal record, if any, or  
14 reputation, habits and association pose a threat to the public interest or to the effective regulation  
15 and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices,  
16 methods, or activities in the operation of gaming or the carrying on the business and financial  
17 arrangement incidental thereto.

18 Sec. 1212. Cancellation or Suspension. The Licensee and his or her or its employee shall be  
19 legally responsible for any violation of the Ordinance or the License. Any License issued  
20 hereunder may be canceled by the Commission for the breach of any of the provision of the  
21 License, this Ordinance, or any rules promulgated pursuant to this Ordinance, as provided in  
22 Chapter 18 and as follows:

23 (b) Suspensions. A license may be summarily suspended for up to thirty (30) days  
24 without prior hearing for good cause by a majority vote of the Commission; provided  
25 however, that licensee shall be suspended during such period as required under the IGRA  
26 if the cancellation hearing arises as a result of notice from the NIGC under regulations.

27 Sec. 1801. Enforcement. Any person who:

28 (e) Fails to observe the Commission's Rules of Procedure and Practice, License  
conditions imposed by the Commission or Legislature, or decision of the Commission rendered  
pursuant to this Ordinance. Resolutions [*sic*] of the Legislature, or tribal court decision shall be  
subject to civil penalties as provided in sec. 1802.

Sec. 1803. Investigations.

(b) The Department of Justice may investigate without limitation the background and  
suitability of any Applicant or Licensee to ensure that the Applicant's or Licensee's prior  
activities or reputation, habits and associations do not pose a threat to the public interest or the

1 effective regulation of gaming, or create or enhance the danger or unsuitable unfair or illegal  
2 practices and methods and activities in the conduct of gaming.

3 EMPLOYMENT RELATIONS ACT, 6 HCC § 5

4 Ch. 1 - General Provisions

5 Subsec. 4. Responsibilities.

6 b. Departments and Units.

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8 (1) Each department, division, or unit of the Nation with the approval and  
9 consultation of the Executive Director of the Department of Personnel may develop,  
10 implement, and revise as necessary internal procedures and operating rules pertaining to  
11 the unique operational requirements of the work unit for efficient and effective  
12 performance. Advance notice of internal unit procedures and rules shall be provided to  
13 employees and must be posted in public places to serve as notice to all employees.

12 HO-CHUNK NATION CLASS III INTERNAL CONTROL MANUAL

13 Sec. 100.01. Gaming Operation's Organization.

14 I. Security Department. The casino shall maintain a Security Department supervised  
15 by a director who shall cooperate with, yet perform independently of all other  
16 departments and report directly to the General Manager or Designee. The Security  
17 Department shall be responsible for the following:

- 18 1. Physical safety of patrons and employees in the establishment.
- 19 2. Physical safeguarding of the Nation's assets.
- 20 3. Protection of the patron's and the establishment's property from illegal activities.
- 21 4. All incidents to which security has knowledge shall be documented.

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23 **DECISION**

24 The Supreme Court concurs with the Trial Court assessment that the Gaming  
25 Commission relied upon an incorrect statutory provision when meting out discipline in the  
26 instant case. *Decision*, SU 06-06 at 3-5. The Gaming Commission determined "that Mr.  
27 Gerhartz did not demonstrate his suitability (Gaming Ordinance, Sec. 1203(b)) necessary to  
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1 resolve th[e] situation in an acceptable manner.” *Decision & Order*, SC05-014 (HCN Gaming  
2 Comm’n, Oct. 21, 2005) at 6. However, Section 1203(b) applies in licensing determinations,  
3 whereas Section 1803(b) controls subsequent licensing investigations, leading the Supreme  
4 Court to conclude that “the Gaming Commission applied the wrong provision of the ORDINANCE,  
5 so their decision is contrary to law.” *Decision* at 4 (citing GAMING ORDINANCE, §§ 1101(c)(v)).  
6 In this key respect, the petitioner prevailed on his claim that “the representation that a finding of  
7 a violation of 1203(b) is supported by the evidence is in error. 1203 has to do with application  
8 for a license and what is required for a license to be issued. Mr. Gerhartz had already received  
9 his license and this section is simply inapplicable.” *Appellant’s Br.*, CV 05-104 (Apr. 27, 2006)  
10 at 5.  
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13 Even so, the Gaming Commission articulated a second basis for the petitioner’s  
14 suspension, namely a violation of the *HCN Class III Internal Control Manual* (hereinafter ICM).  
15 Specifically, “Mr. Gerhartz failed to ensure an individual’s physical safety while on the Nations  
16 [sic] lands.” *Decision & Order* at 6 (citing ICM, § 100.01(I)(1)). The Trial Court accepted this  
17 finding when deferentially viewing the agency assessment. *Order (Final J.)*, CV 05-104 (HCN  
18 Tr. Ct., Sept. 13, 2006) at 15-16. The Court omitted any discussion of the standards associated  
19 with administrative review since it concluded that the GAMING ORDINANCE did not delegate  
20 authority to discipline an employee for an alleged ICM violation under the auspices urged by the  
21 Gaming Commission.<sup>1</sup> *Id.* at 17; *see also Willard Lonetree v. Larry Garvin, in his official*  
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26 <sup>1</sup>As an aside, the Court noted that the tangentially related *Security Department Procedural Manual* probably lacked  
27 formal approval as required by prevailing law. *Order (Final J.)* at 17; *see also* EMPLOYMENT RELATIONS ACT, 6  
28 HCC § 5.4b(1). The Court dedicated a single sentence of its opinion to make this point, and did not, as the Supreme  
Court ascribed, “err[ ] by judging the validity of the suspension based on the validity of the Security Department  
*Procedural Manual.*” *Decision* at 6. Instead, the Court merely wrote: “[a]lso, the respondent presented no  
evidence that the HCN Legislature or respondent approved the Security Department Procedural Manual.” *Order*  
*(Final J.)* at 17. This sentence clearly does not encapsulate any dispositive finding in relation to the two (2) grounds  
for the suspension identified above.

1 capacity as *Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007) at 11-  
2 14, *appeal docketed*, SU 07-04 (HCN S. Ct.) (explaining standards of review in relation to  
3 agency action).

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5 The Gaming Commission argued that the Legislature adopted the ICM as contemplated  
6 within Chapters 5 and 8 of the GAMING ORDINANCE. *Respondent's Resp. Br.*, CV 05-104 (HCN  
7 Tr. Ct., May 30, 2006) at 6. The Gaming Commission made no argument that the ICM  
8 represented "rules promulgated pursuant to th[e Gaming] Ordinance, as provided in Chapter 18."  
9 GAMING ORDINANCE, § 1212. As the Court surmised, the only rules referenced in Chapter 18 are  
10 the *Commission's Rules of Procedure and Practice. Order (Final J.)* at 17 (citing GAMING  
11 ORDINANCE, § 1801(e)). Therefore, the Court concluded that "the respondent failed to provide  
12 this Court with any evidence of a violation that it could punish by the suspension of a gaming  
13 license." *Id.*

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15 The Supreme Court characterized this conclusion as only relating to the Trial Court's  
16 passing reference to the *Security Department Procedural Manual*, which the Court adequately  
17 counters in footnote one. *Decision* at 5. Nonetheless, the Supreme Court acknowledges that the  
18 Gaming Commission derives its authority to suspend from specific statutory provisions, *i.e.*, "the  
19 Court adopts the more reasonable interpretation . . . that Section 1212 and, therefore, Section  
20 1801 apply [*sic*] to both suspensions and cancellations." *Id.* at 7. Consequently, the Supreme  
21 Court must attempt to deduce, as did the Trial Court, whether the ICM can constitute "rules  
22 promulgated pursuant to th[e Gaming] Ordinance, as provided in Chapter 18." GAMING  
23 ORDINANCE, § 1212.

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25 Unlike the Trial Court, however, the Supreme Court answers this question in the  
26 affirmative by employing the following analytical steps.  
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1 The Appellants [*sic*] . . . point[ ] out the fact that the Legislature originally  
2 approved [the ICM] in December of 1994 and has been repeatedly  
3 amended and modified since then. The introduction of the ICM states that  
4 the ICM is a document that integrates controls that the Gaming  
5 Commission must follow into one operational system. Therefore, the ICM  
6 falls within the category of “rules promulgated in pursuance [*sic*] of this  
7 Ordinance.”

8 *Decision* at 8 (internal citations omitted).<sup>2</sup> The Supreme Court earlier quoted the relevant phrase  
9 in its entirety, adding “as provided in Chapter 18,” and even opining that “[t]he words ‘as  
10 provided’ suggest that the Legislature believed that the ‘rules promulgated pursuant to this  
11 Ordinance’ were currently stated or implied within Chapter 18.” *Id.* at 7 (quoting GAMING  
12 ORDINANCE, § 1212). One would expect the Supreme Court to scrutinize Chapter 18 for  
13 language impliedly referring to the ICM, but no such attempt occurs in this instance. Instead, the  
14 Supreme Court focuses on contemporaneous dates of adoption and other inferences.<sup>3</sup>

15 Ultimately, the above comments only represent points of concern with the appellate  
16 decision. The Supreme Court directs this Court “to remand [the case] to the Gaming  
17 Commission to evaluate [petitioner’s] conduct in accordance with [its] decision.” *Id.* at 10. In  
18 doing so, the Supreme Court seemingly abandons the possibility of the Gaming Commission  
19 proceeding under the ICM or, at a minimum, fails to mention this available avenue.<sup>4</sup> The  
20 Supreme Court rather desires that the Gaming Commission receive a second chance to apply the  
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24 <sup>2</sup>The ICM legislative history indicates an initial approval of March 31, 1994. ICM at 278.

25 <sup>3</sup>The Court reiterates that the respondent presented no such argument at the trial level, and that the Supreme Court  
26 characterized the respondent’s appellate argument as “unclear about the relationship between Section 1801(e) and  
27 Section 1212.” *Decision* at 5. The Supreme Court also criticizes the ambiguity present in the legislation, but  
28 refrains from employing its earlier announced rule of judicial restraint, *i.e.*, “it is not the Court’s job to essentially  
rewrite legislation by interpreting the law so broadly as to change its meaning.” *Id.* at 5.

<sup>4</sup> The Court can only surmise that the Supreme Court omitted this reference since it reserved as a final comment a  
reminder to “the Gaming Commission that their primary function is to ensure the integrity in the operation of  
gaming.” *Decision* at 10. The basis for suspension under the ICM more closely resembles a personnel matter. Still,  
simply upholding the Gaming Commission’s decision on this basis would have obviated the need to reexamine the  
case under Section 1803(b).



1 correct law.<sup>5</sup> The Court, therefore, directs the Gaming Commission to complete its  
2 reconsideration upon remand within thirty (30) days of the issuance of this judgment.<sup>6</sup> GAMING  
3 ORDINANCE, § 1101(c)(vii)(c).  
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6 **IT IS SO ORDERED** this 4th day of October 2007, by the Ho-Chunk Nation Trial Court  
7 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.  
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11 Honorable Todd R. Matha  
12 Chief Trial Court Judge  
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19 <sup>5</sup> The Supreme Court questions why the Trial Court “d[id] not follow the precedent set in *Hiller*.” *Decision* at 9.  
20 First, the *Hiller* opinion holds no precedential value. The Supreme Court previously decided that “[w]hile the trial  
21 court should try to remain consistent in its decisions, only decisions by this court are limitations on the Trial Court.”  
22 *Jacob LoneTree et al. v. Robert Funmaker, Jr. et al.*, SU 00-16 (HCN S. Ct., Mar. 16, 2001) at 3-4. Secondly, the  
23 Gaming Commission in *Hiller* acknowledged its citation error and attempted to rectify the same within its  
24 responsive pleading. *Kerry A. Hiller v. Ho-Chunk Gaming Comm’n*, CV 99-72 (HCN Tr. Ct., July 5, 2000) at 17.  
25 The Supreme Court remarked that “the significance of this distinction is never explained.” *Decision* at 9. The  
26 significance rests in the Court’s acceptance of the Commission’s insistence that the citation to Section 1203(b)  
27 represented a technical error. *Hiller*, CV 99-72 at 19. The Court was not inclined to rule in favor of the plaintiff in  
28 light of an admitted agency oversight. In the instant case, the Gaming Commission did not even abandon its  
indefensible position on appeal.

<sup>6</sup> The Court hopes that the appellate decision does not signal a different approach in relation to administrative  
review. The Supreme Court entitled the relevant portion of its judgment, *The Trial Court Should Have Remanded  
the Case to the Gaming Commission without Specific Instructions in Regards to Remedies*. *Decision* at 9. The Trial  
Court has a long-standing practice of requiring the Gaming Commission to provide specific relief upon remand.  
*See, e.g., Ralph H. Babcock et al. v. HCN Gaming Comm’n*, CV 01-87, -96 (HCN Tr. Ct., Jan. 14, 2002); *Francis P.  
Rave, Sr. v. HCN Gaming Comm’n*, CV 96-33 (HCN Tr. Ct., Oct. 9, 1997). A grievant would have little to no  
incentive to appeal an administrative decision if the Judiciary adopted a practice of remanding to the agency with  
singular direction as to how to properly perform its function. A petitioning party would certainly think twice before  
committing the time and resources necessary for waging an appeal that could only yield a second opportunity for the  
agency.