

## TITLE 8. EMPLOYMENT

### CHAPTER 1. EMPLOYEE REVIEW CODE

8 M.P.T.L. ch. 1 § 1

#### § 1. Definitions

Unless otherwise required by the context, the following words and phrases shall be defined as follows:

a. "Active Discipline" means discipline for the past 12 month period. In situations where identifiable similar policy violations, behavior issues, or performance problems consistently reoccur over a period of years, the Active Discipline may extend beyond the 12 month standard.

b. "Arbitration Award" means a determination, decision or award rendered by an independent third-party arbitrator or arbitrators in a grievance arbitration pursuant to a Collective Bargaining Agreement entered under Title 32 M.P.T.L. between an Employer and the exclusive bargaining representative of employees of the Employer.

c. "Benefits" means vacation, sick leave, medical coverage or other employment enhancements provided to employees.

d. "Board of Review" means an impartial panel of employees who are assembled to review a Disciplinary Action and issue a Final Decision which may be appealed by either party to the tribal court.

e. "Board of Review Record" or "Record" means the evidence presented to the Board of Review. This Record shall include all Active Discipline and any other relevant material in the Employee's personnel file. In connection with the determination required pursuant to §8(f)(3) herein, the Record may include performance reviews, character witness statements, commendations, and other discipline.

f. "Collective Bargaining Agreement" means an agreement entered between an Employer and an exclusive bargaining representative certified under tribal law, with respect to wages, hours and other terms and conditions of employment as provided under Title 32 M.P.T.L.

g. "Day" means calendar day. Whenever a deadline falls on a weekend or holiday observed by the Mashantucket Pequot Tribe, the deadline shall be extended to the next business day.

h. "Disciplinary Action" means any action by an Employer that results in an employee being suspended or separated from employment due to the Employee's violation of any of the Employer's policies and/or procedures or, in the case of employees covered by a Collective Bargaining Agreement, the Employee's violation of any term of the Collective Bargaining Agreement or any applicable Employer policy and/or procedure.

i. "Employee" means a natural person employed by an Employer who has been the subject of Disciplinary Action and who properly requested and participated in a Board of Review hearing. "Employee" shall also refer, where appropriate, to an Employee's attorney. The term "Employee" will not include the following categories: High Level Executives; probationary employees; Political Appointees; casual and part-time employees; any employee who is voluntarily or involuntarily separated from employment as a direct result of the implementation of the Staffing Reorganization/Reassignment Policy; any employee who is terminated due to a violation of a condition of employment, such as, a licensing requirement, or an employee who is excluded by the Mashantucket Pequot Tribal Gaming Commission or the Mashantucket Pequot Elders Council.

j. "Employer" means the Mashantucket Pequot Tribal Nation, the Mashantucket Pequot Gaming Enterprise, or any other subdivision, arm, agency, department, entity or enterprise of the Tribal Nation.

k. "File" means to physically place into the possession of the Mashantucket Pequot Tribal Court Clerk. Filing is not effective upon mailing.

l. "Final Decision" means the decision of the Board of Review as to whether to uphold or rescind a Disciplinary Action and shall include articulated findings with respect to the factors set forth in §8(f)(1-4).

m. "High Level Executive" means a Director or above and/or a professional who may not oversee other employees but who has specialized knowledge, such as an advanced degree, in a particular field.

n. "Moderator" means the person appointed by the Mashantucket Pequot Tribal Council to facilitate the Board of Review hearing including receiving the requests for a Board of Review, communications with the Employee and Employer concerning the Board of Review, the appointment of panels, assembling the Board of Review Record, the conduct of the hearing and transmittal of the Record to the tribal court when necessary.

o. "Political Appointee" means an employee on the staff of a member of the Mashantucket Pequot Tribal Council or an employee who is appointed to his or her position by Tribal Council and reports directly to the Tribal Council.

8 M.P.T.L. ch. 1 § 2

## **§ 2. Jurisdiction**

a. The tribal court is hereby granted jurisdiction to review a Final Decision of the Board of Review. The tribal court is also granted jurisdiction to confirm, vacate or modify an Arbitration Award and to enforce an agreement to arbitrate contained in a Collective Bargaining Agreement entered pursuant to 32 M.P.T.L.

b. The Tribe hereby expressly waives its sovereign immunity and the sovereign immunity of any arm, department, subdivision, agency or entity

of the Tribe from suit in the tribal court for actions founded upon a review of a Final Decision; provided that the Employee has exhausted all remedies available under the Employer's policies and/or procedures and the suit has been timely filed. The Tribe hereby further expressly waives its sovereign immunity from suit and the sovereign immunity of any arm, department, subdivision, agency or entity of the Tribe for an arbitration conducted pursuant to a Collective Bargaining Agreement and for actions brought in tribal court pursuant to Section 11 of this Title to enforce an agreement to arbitrate, or to confirm, vacate or modify an Arbitration Award, so long as such suit has been timely filed.

c. An action pursuant to this Title shall be the Employee's exclusive cause of action against the Employer provided that the Employee has first exhausted all administrative remedies. Notwithstanding the foregoing, if there is a Collective Bargaining Agreement in effect and it gives the Employee the option of either a Board of Review or arbitration to challenge Disciplinary Actions, Employees covered by that Collective Bargaining Agreement may select arbitration as provided under the Collective Bargaining Agreement and if an Employee selects arbitration it shall be the Employee's exclusive remedy against the Employer.

8 M.P.T.L. ch. 1 § 3

### **§ 3. Filing an Appeal from a Final Decision**

a. Either party may seek review of a Final Decision with the Mashantucket Pequot Tribal Court by filing an appeal as provided herein.

b. Within 30 days of mailing the Final Decision to the Employer (by regular mail) and the Employee at his/her last known address (by certified mail, return receipt requested) or within 30 days after personal delivery of the Final Decision upon the Employer and Employee, either party may file a notice of appeal in the office of the tribal court clerk on a form provided by the tribal court clerk. Service of the appeal shall be made by the tribal court clerk by registered or certified mail. A fifty dollar filing fee is required to be paid to the tribal court for such an appeal.

c. The filing of an appeal shall stay the implementation of a Final Decision of the Board of Review, such that the Disciplinary Action initially imposed shall govern the Employee's employment status pending the outcome of the appeal.

d. As part of the appeal of the Final Decision, either party may seek review of alleged violation(s) of procedural due process rights, as that term is defined herein, with respect to the conduct of the Board of Review proceeding; provided the party intending to seek review of a violation of procedural due process rights alleges such a claim(s) in the notice of appeal by stating the following information: (1) date of Disciplinary Action; (2) date of the Board of Review; (3) date of Decision of Board of Review; (4) each and every specific procedural error which the party claims constitutes a violation of procedural due process rights, specifying the date on which such act occurred and who committed

such act; and (5) the alleged impact of such violation on the appealing party. Failure to comply with the foregoing constitutes a waiver of such claim(s).

e. In an appeal under this Title, other than reviewing the Final Decision, the tribal court may consider only whether the appealing party's procedural due process rights, as those terms are defined herein, were violated and shall not review, any other violations of rights enumerated in 20 M.P.T.L. Civil Rights Code, or in any other tribal or federal statute. Claims based upon rights, other than such procedural due process rights, shall be pursued under 20 M.P.T.L. Civil Rights Code and shall be brought against the Tribe.

f. As to both parties under this Title, "procedural due process rights" shall mean the parties' rights at the Board of Review to a meaningful opportunity to be heard including an opportunity to present witnesses and to question witnesses. Further, both parties are entitled to representation by legal counsel, if desired, retained at their own expense.

g. As to the Employee under this Title, "procedural due process rights" shall include those rights listed in subsection 3(f) of this Title and the right to adequate notice of the Disciplinary Action, including the basis for such action.

8 M.P.T.L. ch. 1 § 4

#### **§ 4. Record before the Court**

The Record shall consist of:

- a. a transcript of all recorded proceedings before the Board of Review;
- b. a copy of all evidence, whether testimonial or documentary, presented to the Board of Review;
- c. a copy of the Final Decision rendered by the Board of Review; and
- d. notice of the Final Decision by the Moderator.

8 M.P.T.L. ch. 1 § 5

#### **§ 5. Assembly of the Record**

a. Within 30 days of filing of the appeal, the Moderator shall assemble the Record on appeal, shall certify to the tribal court that it is a true and correct copy of the original documents considered by the Board of Review, and shall file the Record with the tribal court. The Moderator shall bind and consecutively number pages of the Record and shall provide an index indicating the identity and page location of each document.

b. The Moderator shall provide a copy of the certified Record to the parties at no charge.

8 M.P.T.L. ch. 1 § 6

**§ 6. Pre-Hearing Conference**

a. Within 30 days of the filing of the Record, the court shall schedule and conduct a pre-hearing conference to deal with the following matters:

- (1) correction of the Record;
- (2) clarification of issues;
- (3) preparation of stipulations;
- (4) scheduling of briefs or other written argument;
- (5) setting of the hearing date and such other deadlines as the court deems appropriate;
- (6) setting a date for an additional pre-hearing conference; or
- (7) other matters that may facilitate the resolution of the matter.

b. At the conclusion of the pre-hearing conference, the court may issue any necessary orders.

c. The court may extend or shorten deadlines in the interest of fairness or expediting the proceedings.

8 M.P.T.L. ch. 1 § 7

**§ 7. Briefs**

a. No later than 60 days from the filing of the Record, the appealing party shall file two copies of a typed or clearly legible copies of a brief which shall clearly and concisely set forth the specific reasons for requesting a review of the Final Decision. The brief shall not exceed 25 double spaced pages in length, unless permission is granted by the court, and shall include proper citations for any legal authorities relied upon and specific references to the Record.

b. The responding party's brief shall be filed within 30 days of the filing of the appealing party's brief and shall conform to the rules as described above.

c. The appealing party shall have the right to submit a reply brief within 10 days of the filing of the responding party's brief. The reply brief shall not exceed 10 double spaced pages in length and shall be limited to the issues raised in the responding party's brief.

d. At the conclusion of the hearing, the court may order additional briefs, as the court deems necessary.

e. The court, on its own or by way of motion filed by either party, may modify the foregoing briefing timetable as necessary and appropriate to accommodate its own calendar and/or that of the movant, so long as doing so would not cause undue hardship to the other party.

8 M.P.T.L. ch. 1 § 8

## § 8. Hearing

a. The hearing shall be held within 10 days of the filing due date of the reply brief, unless the court orders otherwise.

b. The hearing and the court's review shall be limited to the Record before the court, any briefs filed by the parties, and oral argument presented by the parties.

c. The court shall not substitute its judgment for that of the Board of Review as to the weight of the evidence or credibility of the witnesses.

d. The Record may only be supplemented with new evidence as set forth in this Section 8(d) and 8(e). In the interest of a fair review of the Employee's appeal, upon a showing of exceptional circumstances, the court may review new or additional evidence, or may remand the matter to the Board of Review to review new or additional evidence, provided that such new or additional evidence is shown not to have been previously available for consideration at the Board of Review hearing through no fault of either party and that such new evidence is relevant and probative of the appeal.

e. In the unusual circumstance where testimony outside of the Record is deemed necessary and appropriate in connection with the matter being appealed, the court may compel the attendance of necessary witnesses. Prior to taking such testimony in connection with an appeal, however, the court shall assess whether the matter should be remanded to the Board of Review for purposes of taking and considering such testimony.

f. In reviewing an appeal, the court shall determine whether the Board of Review's Final Decision was appropriate by considering whether:

(1) There was a reasonable basis for the Board or Review's consideration that the Employee did or did not violate the policies and/or procedures established by the Employer for the position held by the Employee;

(2) There was a reasonable basis to find that the Employer did or did not substantially comply with the policies and/or procedures regarding discipline;

(3) The Employee was given a description of the offense or conduct that was the basis for the Disciplinary Action and both parties were afforded a reasonable opportunity to present and refute evidence regarding the offense or conduct and/or evidence of aggravating or mitigating circumstances relating thereto;

(4) There was a reasonable basis for the Board of Review's decision as to whether the form of discipline was or was not appropriate for the offense or conduct; and

(5) The Board of Review's decision is in violation of tribal law or exceeds the Board's authority under tribal law;

g. In reviewing an appeal when the Employee is covered by a Collective Bargaining Agreement, the court shall use the same standard of review set forth in subsection 8(f) of this Title, except that the review shall be based on whether or not the Employee violated and whether or not the Employer substantially complied with the Collective Bargaining Agreement and any applicable Employer policies and/or procedures.

8 M.P.T.L. ch. 1 § 9

**§ 9. Miscellaneous**

a. All actions brought pursuant to this Title shall be heard by the court and not a jury. No costs shall be taxed against the Tribe or its enterprises.

b. In all actions where it is alleged that the liability of the Employer is based upon or related to the action of an agent, servant, or employee of the Employer acting within the scope of his or her employment, there shall be no separate cause of action existing against said agent, servant, or employee, and nothing in this Title shall be construed to waive the sovereign immunity of the Tribe to the extent that sovereign immunity would be applicable to such individual.

c. With respect to any action brought hereunder, in addition to possible reinstatement of employment, damages awarded by the tribal court shall be limited to actual damages consisting of ascertainable loss of salary or wages, and/or benefits sustained as a result of a Disciplinary Action.

d. The following shall not apply to appeals against the Tribe or any arm, department, subdivision, agency or entity of the Tribe: (i) any rule of law imposing absolute or strict liability; (ii) any award or other judgment imposing consequential, punitive or exemplary damages; (iii) any award for loss of consortium; (iv) any award for pain and suffering or mental anguish; and (v) any order for injunctive relief.

8 M.P.T.L. ch. 1 § 10

**§ 10. Rulings**

a. Upon the consideration of the factors listed in Section 8(f), if the court finds that the Board of Review's decision was not appropriate it shall render a decision in favor of the appealing party pursuant to subsection (b) of this Section.

b. In the event the court renders a decision in favor of the Employee, the court may order reinstatement of the Employee and/or award lost wages and benefits as provided by this Title. Where appropriate, the court may hold a closed hearing with the parties so that the terms of an appropriate employment arrangement and a determination of damages may be made part of any final order of the court.

c. The court shall issue a written reasoned decision supported by references to the Record.

**§ 11. Arbitration**

a. Any party to a Collective Bargaining Agreement aggrieved by the alleged failure, neglect or refusal of another to arbitrate under an agreement to arbitrate contained in a Collective Bargaining Agreement may petition the tribal court for an order directing that such arbitration proceed in the manner provided for in such agreement.

b. At any time within one year after an Arbitration Award has been rendered, any party to the arbitration may petition the tribal court for an order confirming the award. The court shall grant such petition unless the Arbitration Award has been vacated or modified as prescribed in sections 11 (c) & (d) of this Title. If the Arbitration Award requires the performance of any act or payment of money, the tribal court may issue such orders as necessary to enforce such Arbitration Award.

c. Upon application of any party to an Arbitration Award, the tribal court shall make an order vacating an Arbitration Award if it finds, by clear and convincing evidence, any of the following defects: (1) the award has been procured by corruption, fraud or undue means; (2) there has been evident partiality, bias or corruption on the part of any arbitrator; (3) the award is in direct conflict with tribal law; (4) the arbitrator(s) were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (5) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. Notwithstanding the time within which an Arbitration Award is required to be rendered, if an award issued pursuant to a grievance taken under a Collective Bargaining Agreement is vacated the court shall direct a rehearing unless either party affirmatively pleads and the court determines that there is no issue in dispute.

d. Upon application of any party to an Arbitration Award, the tribal court shall make an order modifying or correcting an Arbitration Award if it finds, by clear and convincing evidence, any of the following defects: (1) there has been an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award; (2) the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted; or (3) the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to carry out the intent thereof and promote justice between the parties.

e. When interpreting and applying the provisions of Section 11 of Title 8, the tribal court shall be guided by the decisions of the federal courts interpreting similar provisions in the Federal Arbitration Act.



f. At any time during arbitration being conducted pursuant to a Collective Bargaining Agreement entered pursuant to 32 M.P.T.L. the parties to the arbitration may jointly petition or the arbitrator may petition the tribal court for a determination of any issue of tribal law. The tribal court shall issue its determination of tribal law and such determination shall bind the arbitrator(s) in rendering the Arbitration Award. Either party to the arbitration may appeal the tribal court's determination of tribal law to the Mashantucket Pequot Court of Appeals by filing a notice of appeal with the Court of Appeals within 20 days of the tribal court's determination.

g. Any application filed under Section 11(c) or 11(d) must be filed with the tribal court within 30 days after the parties to the Arbitration are notified of the Arbitration Award.

8 M.P.T.L. ch. 1 § 12

#### **§ 12. Appeal**

The decision of the court may be appealed to the Mashantucket Pequot Court of Appeals. The decision of the Court of Appeals shall be final.

8 M.P.T.L. ch. 1 § 13

#### **§ 13. Application of Law**

Any matter brought pursuant to this Title shall be determined in accordance with tribal law. The court may be guided, but shall not be bound by the common law of other jurisdictions.

8 M.P.T.L. ch. 1 § 14

#### **§ 14. Effective Date**

This Title and any amendments thereto shall apply to any Disciplinary Action imposed on or after its enactment. The amendments to this Title concerning arbitration under Collective Bargaining Agreements shall apply to any Collective Bargaining Agreement in effect on the date of enactment of the amendments and to any Collective Bargaining Agreement entered after their enactment.