

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT

Respondent

Case No. 07-CA-051156

And

LOCAL 406, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Charging Union

MOTION TO EXPEDITE

Respondent, the Little River Band of Ottawa Indians Tribal Government (the “Band”) hereby moves to expedite disposition of this case. By Order dated August 13, 2014, the United States Court of Appeals for the Sixth Circuit remanded this case to the Board for further consideration in light of the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In that Order, the Court stated as follows: “we expect . . . the NLRB will . . . proceed expeditiously on remand.” For the reasons set forth below, the Band requests that the Board satisfy the Sixth Circuit’s expectation and expedite disposition on the existing record and briefs of the parties.

BACKGROUND

The Band is an Indian tribal government with a government-to-government relationship with the United States. *See* 25 U.S.C. §§ 1300k-1300k-7 (reaffirming federal government’s relationship with the Little River Band of Ottawa Indians). This case involves a request that the Board strike down the Band’s operational labor laws. *See Complaint* (GC Exhibit 1(b) to *Joint*

Motion to Transfer Proceeding to Board on Stipulated Record (“*Joint Motion*”). This is unprecedented. The Board has never been asked to issue an order that would compel a government to “rescind” its laws, *see Complaint* at 3-4. Obviously, such a case – now pending for over six years – casts a significant shadow upon the Band’s ability to effectively govern its reservation affairs.

The Laws At Issue

The Band’s laws at issue are found in Articles XVI and XVII of the Band’s Fair Employment Practices Code (“FEPC”), *SSF* Joint Exhibit 4 (attached as part of Exhibit A).¹ They are fully operational, with parties relying upon them to govern labor relations, generally, and to negotiate and establish the terms and conditions of continuing employment relations under collective bargaining agreements, specifically. *See SSF* at ¶¶ 67-79. They are the product of lengthy legislative processes within the Band’s governing Tribal Council and the deliberations of its regulatory commission. *See id.* ¶¶ 20-22, 35-69. Thus, they reflect important public policy choices about such things as the conditions under which collective bargaining should take place, the mandatory subjects of bargaining when it does, definitions of unfair labor practices, and the procedures for resolving them. *See id.* ¶¶ 57-66.

By way of example, one provision that varies from the NLRA prohibits collective bargaining over “the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Band.” *SSF* Joint Exhibit 4 §16.20(b). In enacting this provision, the Band’s Tribal Council “considered the devastating impact that drug and alcohol abuse has had upon its tribal members . . . and decided that it was in the best interests of the Band and its

¹ The parties submitted the case to the Board upon a stipulated record, including a *Statement of Stipulated Facts* (“*SSF*”). *See* <http://www.nlr.gov/case/07-CA-051156>. The *SSF*, with the parties’ Joint Exhibit 4, is attached hereto as Exhibit A. The Band’s FEPC and other laws are also available at <https://www.lrbain.gov/index.php/government/tribal-code>.

community to eliminate such policies from the mandatory subjects of bargaining, provided that such policies are consistent with the Band's law, which includes civil rights under the Band's Constitution." *SSF* ¶ 65. Other provisions, like the public sector labor laws of many states, prohibit strikes and lock-outs and direct parties facing collective bargaining impasses to engage in binding interest arbitration. *SSF* Joint Exhibit 4 §§ 16.06-16.07, 16.17; *SSF* ¶¶ 38, 40-41, 58. Another provision, similarly tracking state law, requires labor organizations engaged in organizing within the Band's agencies, departments, and subordinate organizations to obtain licenses. *SSF* Joint Exhibit 4 §§ 16.08; *SSF* ¶ 40.

The on-the-ground operation of the Band's law has a wide sweep. It has been fully operational at the Band's gaming facility, the Little River Casino Resort ("LRCR"), since 2008. *SSF* ¶¶ 36-79. The LRCR exists by virtue of the Band's governmental authority, recognized and endorsed by Congress in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, to raise revenues to fund tribal governmental services. *SSF* ¶ 10, 16-18. *See also Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan*, 5 F.3d 147, 148 (6th Cir. 1993) (reciting IGRA's purpose to promote "strong tribal governments"). Multiple bargaining unit elections have taken place at LRCR under the auspices of the Band's Neutral Election Official in accordance with the FEPC. *SSF* ¶ 67-69; *see also Affidavit of Rose Ludden in Support of Motion of Petitioner, The Little River Band of Ottawa Indians Tribal Government, to Expedite Appeal* (filed in *Little River Band of Ottawa Indians Tribal Government v. NLRB*, U.S. Court of Appeals for the Sixth Circuit, Case No. 13-1464), attached hereto as Exhibit B. The law has guided hundreds of hours of painstaking collective bargaining between a licensed labor organization, the United Steel Workers ("USW"), and management at LRCR for multiple bargaining units of employees. *SSF* ¶¶ 70-79; Exhibit B. It has governed the parties' resolution of election disputes and petitions,

bargaining impasses through interest arbitrations, and the ultimate consummation of several collective bargaining agreements. *SSF* ¶¶ 70-79; Exhibit B. Elected USW representatives and LRCR management have likewise relied upon the Band's law to resolve a variety of unfair labor practice claims. *SSF* ¶ 70. The law has been, and continues to be, implemented by the Band's regulatory agencies and boards charged with regulating and overseeing LRCR in accordance with tribal law. *SSF* ¶¶ 27-29, 43-49. And as recently as last year, collective bargaining continued for two bargaining units at the LRCR in reliance upon the law. *See* Exhibit B.

Because the very existence of this case casts a shadow upon the stability of the Band's law, the Band has moved at every turn to expedite disposition.

Case Proceedings

This case commenced in March, 2008 with the filing of an unfair labor practice charge alleging that the Band's enactment and implementation of its laws constituted an unfair labor practice in violation of the NLRA because certain provisions of those laws varied from the Act.² The complaint issued on December 12, 2010, seeking to strike down the laws of the Band as applied to LRCR insofar as they varied from the NLRA.³

On August 2, 2011, the parties filed the above-referenced *Joint Motion* with a jointly proposed briefing schedule that would have resulted in the case being fully submitted to the Board for decision by October, 2011. Having heard nothing from the Board on the *Joint Motion*, the heads of the Band's legislative and executive branches wrote directly to the Executive Secretary on November 14, 2011 "to express [their] concerns about the Board's delay in reaching disposition." *See* Letter from Tribal Council Speaker Stephen Parsons and Ogema

² The charge was made part of the record as "GC Exhibit 1(a)" to *Counsel for the Acting General Counsel's Statement of Position*. A copy of the charge is attached hereto as Exhibit C.

³ The complaint was made part of the record as "GC Exhibit 1(b)" to *Counsel for the Acting General Counsel's Statement of Position*. A copy of the complaint is attached hereto as Exhibit D.

Larry Romanelli to Lester A. Heltzer (Exhibit E) at 1. They pointed out that “this case involves a direct attack upon the laws of a sovereign Indian government. As such, it deserves timely disposition.” *Id.* at 2. The Executive Secretary responded by letter dated December 14, 2011, stating “I sincerely regret the length of time that the parties’ motion has been pending before the Board” and assuring that action would be taken “in the very near future.” *See* Letter from Lester A. Heltzer to Speaker Parson and Ogema Romanelli (Exhibit F).

The parties’ *Joint Motion* was later granted, but due to further delays, the case was not fully briefed and submitted to the Board until May 15, 2012. On May 24, 2012, the Band moved the Board for expedited disposition. *See* Exhibit G. Nearly one year later, on March 18, 2013, the Board issued decision, striking down the Band’s laws as requested in the complaint. *See Little River Band of Ottawa Indians Tribal Gov’t & Local 406, Int’l Bhd. of Teamsters*, 359 NLRB No. 84 (Mar. 18, 2013).

The Band filed a petition for review in the United States Court of Appeals for the Sixth Circuit, and immediately moved the Court for expedited briefing and oral argument. *See* Exhibit H. The Sixth Circuit granted the Band’s motion. *See* Exhibit I. Under the resulting expedited briefing and oral argument schedule, on October 9, 2013 the Sixth Circuit took the case under advisement for disposition. It was stopped in its tracks, however, by the Supreme Court’s *Noel Canning* decision, resulting in its current remand to the Board.

Given the extraordinary nature of this case and the length of time it has taken to reach resolution, it is not surprising that the Sixth Circuit expects the Board to move expeditiously.⁴

⁴ Events following submission of the case to the Sixth Circuit have continued to show the Band’s need for timely resolution of this matter. To give just one example, in the fall of 2013, a LRCR employee invoked the FEPC and the NLRA to seek remedies under both laws for the same alleged unfair labor practice. *See* Exhibit J (copies of the charges). In accordance with the FEPC, the Band assigned a Fair Employment Practices Investigator (“FEPI”), who proceeded to investigate the tribal-law charge. *See* Exhibit K (FEPI certified letter with FEPC charge and subpoena issued under the FEPC). At the same time, an NLRB case

ARGUMENT

I. EXPEDITION IS REQUIRED OUT OF RESPECT FOR THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN THE UNITED STATES AND THE BAND.

President Obama has made clear that “[t]he United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions.” *President’s Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 57,881 (Nov. 9, 2009). He has reconfirmed the Executive Orders of his predecessors, declaring:

Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.

Exec. Order No. 13, 175, § 2 (a)-(c), 65 Fed. Reg. 67, 249 (Nov. 9, 2000), *reconfirmed by* 74 Fed. Reg. 57,881.

Congress, no less than the Executive, likewise emphasizes the importance of respecting Indian tribal governments. To give just one example, Congress declares that “[t]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government,” and “through statutes, treaties, and the exercise of administrative authorities, [Congress] has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.” 25 U.S.C. § 2601(2)-(3) (2001).

The federal judiciary is fully aligned with the other branches in this regard. The Supreme Court consistently recognizes, and defers to, Congress’s commitment to “a policy of supporting

investigator separately investigated the NLRA charge. *See* Exhibit L (NLRB investigator notice). The Band asked the NLRB to defer to its process, *see* Exhibit M (letter from Acting Speaker for the Band to General Counsel, NLRB), but to no avail. The FEPI issued a detailed report pursuant to the FEPC, *see* Exhibit N, and the NLRB investigator separately concluded his investigation. Such dueling assertions of authority over these reservation labor relations foster ongoing, persistent uncertainties within the Band with an attendant drain on resources.

tribal self-government and self-determination.” *E.g.*, *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 & n.17 (1983); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987).

Regardless of the merits of any party’s position in this case, there can be no disagreement about that fact that it involves a continuing challenge to the ability of an Indian tribal government to implement a set of carefully designed laws, reflecting considered public policy choices. It therefore directly implicates the federal government’s unique relationship to Indian tribal governments and warrants expeditious resolution on that basis.

II. EXPEDITION IS REQUIRED TO ENABLE PARTIES TO RELY UPON SETTLED EXPECTATIONS.

As fully set forth above, this case puts labor relations within the Band’s reservation in a state of uncertainty. Because of this ongoing challenge to the Band’s laws, the rules for collective bargaining and the resolution of unfair labor practice are unstable. As the Band pointed out in its successful motion to expedite the case before the U.S. Court of Appeals for the Sixth Circuit, the existence of this case

infuses an air of uncertainty around the Band’s laws and the ability of parties, with real economic interests, to rely upon them. In a very real sense, it casts a cloud over the ability of an Indian tribal government to implement its laws and the ability of individuals, with real life expectations, to reach agreements and understandings in a stable legal regime. There is no such thing as settled expectations for the Tribal Government whose laws are under challenge and for LRCR management, a labor organization, and represented employees seeking to operate under those laws.

Exhibit H at 8-9.

Thus, apart from the necessity of expedited disposition owing from the federal government’s unique relationship to Indian tribal governments, this matter calls out for resolution to bring stability to the on-the-ground expectations of individuals.

CONCLUSION

For all of these reasons, the Band respectfully asks that the Board grant this motion and expedite disposition of this case without any further proceedings.

Dated: August 26, 2014

/s/ Kaighn Smith, Jr.
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Exhibit A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT**

Respondent

and

Case 7-CA-51156

**LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Charging Union

I. STATEMENT OF ISSUES

1. Whether the Board has jurisdiction over the Respondent Little River Band of Ottawa Indians Tribal Government and the authority to proceed on the Complaint in this matter against it with respect to the application of its Fair Employment Practices Code and related regulations to the Little River Casino Resort.
2. Whether, if the Board has such jurisdiction, the Respondent has violated Section 8(a)(1) of Act by applying the provisions of its Fair Employment Practices Code and related regulations to the Little River Casino Resort.

II. STATEMENT OF STIPULATED FACTS

The parties stipulate as follows:

1. The Little River Band of Ottawa Indians (*Gaá Čhíng Ziibi Daáwaa Aníshinaábek*) (the “Band” or the “Tribe”) is a federally recognized Indian tribe. 25 U.S.C. § 1300k-2(a).
2. The Tribe has over 4,000 enrolled members (or “tribal members”), most of whom live within or near the Tribe’s aboriginal lands in the State of Michigan. Approximately 380 tribal members reside in Manistee County, Michigan, the principal location of the Band’s government.
3. Pursuant to Congress’s 1994 Act reaffirming the Band’s federal recognition, 25 U.S.C. §§ 1300k to 1300k-7 (the “Reaffirmation Act”), the Band has enacted a Constitution

("LRBOI Const."), and amendments thereto, in accordance the Indian Reorganization Act, 25 U.S.C. § 476 (the "IRA"), which have been approved by the Secretary of the Interior. (Joint Exhibit 1)

4. Article II, section 1 of the Tribe's Constitution restricts tribal membership to certain individuals who possess at least one-fourth (1/4) degree Indian blood, of which at least one-eighth (1/8) degree must be Grand River Ottawa or Michigan Ottawa. (Joint 1 Ex. 1, LRBOI Const. Art. II, § 1)

5. Pursuant to the Band's Constitution, the Band is governed by an executive branch, through the office of the Tribal Ogema; a legislative branch, through the office of the Tribal Council; and a judicial branch, through the Tribal Court. (Joint Exhibit 1, LRBOI Const. Articles IV-VI)

6. The Band's Constitution provides, that "[t]he Tribe's jurisdiction over its members and territory shall be exercised to fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law." (Joint Exhibit I, Art. I, § 2.)¹

7. Since the passage of the Reaffirmation Act, the United States, through the Secretary of Interior, has taken over 1, 200 acres of the Tribe's ancestral lands in and near Manistee and Mason Counties into trust on behalf of the Tribe (said lands are referred to herein as "trust lands").

8. The Band exercises governmental authority over the activities of tribal members, other Native Americans, and non-Indians on these trust lands.

¹ The Band publishes its Constitution, laws, and regulations, including those referenced in these stipulations, on its public website at <https://www.lrboi-nsn.gov/council/ordinances.html>. The Band's laws and regulations are regularly updated and amended, and such changes are reflected in the materials posted on said website. The Tribal laws and regulations that have been made Joint Exhibits and a part of the Stipulated Record are the current tribal laws and regulations of the Band. It is understood that the Band's website and any future changes made to the Constitution, laws and regulations posted on the website are not a part of the Stipulated Record

9. The Little River Casino Resort ("LRCR") is a tribally chartered instrumentality and a subordinate organization of the Band established by the Tribal Council pursuant to Article IV, Section 7 of the Band's Constitution to operate gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710-2721 ("IGRA"). The LRCR is overseen by a Gaming Enterprise Board of Directors, which is subject to the oversight of the Tribal Ogema and the Tribal Council as described below. (Joint Exhibit 1, LRBOI Const. Art., IV, § 7).

10. Pursuant to the IGRA, the Band has entered into a compact with the State of Michigan in order to conduct class III gaming activities, as defined by 25 U.S.C. § 2703(8), on the Band's trust lands in Manistee Michigan. (See Joint Exhibit 25, Compact and Amended Compact, with Department Interior Letter on Amended Compact). Further, as mandated by IGRA and the Band's Gaming Ordinance (Chapter 400, Title 1 of the Tribal Code of the Band), (a) the Band has the sole proprietary interest in, and responsibility for gaming at LRCR and (b) the net revenues generated from gaming at LRCR are the governmental revenues of the Band, which may be used only for the Band's governmental services, the general welfare of the Band and its members, tribal economic development, to support local governmental organizations, or to donate to charitable organizations. See 25 U.S.C. §§ 2710(b)(2)(A), 2710(b)(2)(B), 2710(d)(2)(A); LRBOI Gaming Ordinance, Chapter 400 §§ 5.01, 6.01 (Joint Exhibit 20);

11. The facilities of the LRCR include: (1) a casino with more than 1500 slot machines, as well as gaming tables, a high limits gaming area, and bingo facilities, (2) a 292 room hotel, (3) a 95 space RV park, (4) a 1700 seat events center, which is rented for business conferences and weddings and is used for entertainment events featuring nationally known acts, (5) three restaurants, and (6) a lounge. The gross revenues for the LRCR exceed \$20,000,000 annually. During the 2010 fiscal year, ending December 31, the Band earned in excess of \$20,000,000

from its LRCR gaming operation. During the 2010 fiscal year, the Band purchased and received at its Manistee facilities gaming supplies, services, and other supplies directly from suppliers located outside of the State of Michigan valued in excess of \$50,000 for use in connection with the LRCR. During the same period of time, the Band received in excess of \$50,000 from the federal government to fund various programs for its tribal members.

12. The LRCR currently has 905 employees, including 107 employees who are enrolled members of the Band and 27 who are other Native Americans. The majority of employees employed at the LRCR are neither enrolled members of the Band nor Native Americans. The majority of the LRCR employees live outside of the Band's trust lands. The majority of LRCR customers are non-Native American, and come from Michigan outside of the Tribe's trust lands, other states, and Canada. The LRCR competes with other Indian-owned casinos and non-Indian owned casinos located in Michigan, other states, and Canada. The LRCR advertises for customers using various media in Michigan and in other states.

13. The Band's governmental services and programs for its members and community include: health services, including clinic and community health, behavioral health, and treatment programs provided through the Band's Health Clinic; educational services to support tribal members pursuing, or enrolled in, higher education programs through the Band's Department of Education; family services through the Band's Department of Family Services; housing services for tribal members and elders through the Band's Housing Department; the provision of police and other public safety services within the Tribe's territory through the Band's Department of Public Safety; conservation, restoration, and monitoring of natural resources within the Tribe's territories through the Band's Department of Natural Resources; reservation economic development and the provision of employment opportunities for the Band's members through the

Band's Department of Commerce and its subordinate organizations, including the Band's reservation gaming operations (LRCR) under the IRGA; the administration of justice through a prosecutor's office and Tribal Court system; the maintenance of the Band's legislative, judicial, and executive branches of government; and infrastructure support for all of these activities.

14. The Band's Housing Department, for example, has built, and is continuing to build, reservation homes for low income and elderly tribal members. The Band's Health Department provides direct health care services to many tribal members and their families. It is upgrading its clinic to include a fitness center and has plans for a pharmacy to better serve the tribal community. The Band's *Bedabin* services (meaning "coming of the dawn") support tribal members in need of mental health counseling, including substance abuse counseling. Through its Department of Natural Resources, the Band is engaged in restoring sturgeon fish populations within the reservation. The Tribe is preserving its language through *Anishinaabemowin* language programs for tribal member youths and elders, and it recently completed construction of a new Community Center on the reservation to unify, and enhance services to, the tribal community.

15. The Band has no significant base within its jurisdiction upon which to levy taxes.

16. The Band's governmental programs and services are jointly funded by (a) the Band's generation of revenues through its gaming operations (LRCR) pursuant to the IGRA, and (b) federal government support, principally through contracts entered into by the Band with federal agencies through Congress's Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (known as "P. L. 638"), Indian Health Care Improvement Act of 1976, 25 U.S.C. §§ 1601, *et seq.*, administered by the U.S. Department of Health and Human Services, Indian Health Service ("IHS"), and Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4212 ("NAHASDA"). The Band's IGRA gaming

revenues from the LRCR generally provide in the order of \$20 million per year in support of tribal government, which is over 50% of the Band's total budget. The remainder is covered primarily through a combination of the above-referenced federal programs.

17. For example, under the Band's fiscal year 2011 Government Services Budget, the Band combines federal funds with its IGRA gaming revenues from the LRCR to support the activities of its Department of Natural Resources, with about 60% of the budget funded from IGRA gaming revenues from the LRCR and 40% from P. L. 638 funds from the federal government; its Department of Public Safety, with 62% of the budget funded from IGRA gaming revenues and 38% from P. L. 638 funds from the federal government; its behavioral health (*Bedabin*) services, with about 80% of that budget funded from IGRA gaming revenues from the LRCR and 20% from IHS funds from the federal government; maintenance and overhead for its Health Clinic building, with about 80% of those costs covered by IGRA gaming revenues from the LRCR and 20% from P. L. 638 funds from the federal government; its Department of Family Services, with 77% of the budget funded from IGRA gaming revenues and 23% from P. L. 638 funds from the federal government; its Housing Department, with 60% of the budget funded from IGRA gaming revenues from the LRCR and 40% from NAHASDA, (apart from 2011 "stimulus" funds). In that same budget, the Band's IGRA gaming revenues from the LRCR provide 100% of the funds to support the Tribal Prosecutor's office and the Tribal Court. All of these percentages of funding sources for the Band's governmental services have remained the same, on average, from year to year since 2007.

18. The Band's current funding agreement with the IHS (see Joint Exhibit 3, selected pages of the agreement) is a good example of the method by which the Band supports its services to tribal members with both federal funds and LRCR gaming revenues. Under that agreement,

which covers all aspects of health services, ranging from clinical services to behavioral, family, and home care services, the Band is required to merge its own revenues sources with those provided by IHS in order to supplement funds provided by IHS. (Joint Exhibit 3 at page 8 of 18.).

19. A total of 1,150 employees (including 905 at LRCR) currently work for the Tribe's governmental departments and subordinate organizations. This includes tribal members and members of their immediate family, members of other Indian tribes, and non-Indians. Under the Tribe's laws, qualified enrolled members of the Tribe are given preferences over non-Indians for employment positions within the Tribe's governmental departments and subordinate organizations, including the LRCR. In addition to the 107 tribal members currently working at the Band's IGRA gaming operations (LRCR), 108 tribal members work for the Band's other operations. For example, thirteen tribal members provide health care services, with three providing *Bedabin* services; five tribal members work for the Band's Tribal Court (including three Judges and two probation officers); five tribal members work for its Family Services Department; and four work for its Public Safety Department.

20. The Band's Constitution vests the Tribal Council with the legislative authority of the Tribe and provides that the Tribal Council has the power "[t]o exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances and adoption of resolutions not inconsistent with this Constitution . . . to govern the conduct of members of the Little River Band and other persons within its jurisdiction" and "to promote, protect and provide for the public health, peace, morals, education, and general welfare" of the Tribe and its members. (Joint Exhibit 1, LRBOI Const. Art. IV, § 7).

21. The process by which the Tribal Council enacts legislation is governed by the Band's Constitution (Joint Exhibit 1, LRBOI Const. Art. IV, § 6), the Tribal Council Meeting Procedures Ordinance, Chapter 100, Title 2 of the Tribal Code ("TCMPO"), (Joint Exhibit 19), and the Band's Administrative Procedures Act — Ordinances, Chapter 100, Title 7 of the Tribal Code ("APA"). (Joint Exhibit 18).

22. The Band's legislative process is designed to maximize input from the community and tribal members affected by the development of ordinances of the Tribe. It includes: the posting of all ordinances for public comment, review of public comments by the Tribal Council, open working sessions of the Tribal Council as needed to address policy considerations, and formal adoption of any ordinance by Tribal Council Resolution in open session. (Joint Exhibit 18, APA § 1.01; Joint Exhibit 19, TCMPO § 6.03).

23. Larry Romanelli, an enrolled member of the Band, serves as the elected Ogema (head of the Executive Branch), pursuant to vote of the enrolled members of the Band. He has served as the Ogema of the Band since June 20, 2007, and has recently been reelected to another term. Pursuant to Article V of the Band's Constitution, the Ogema is vested with the executive powers of the Band to (among other things) enforce and execute the laws, ordinances, and resolutions of the Tribal Council; to manage the economic affairs of the Tribe, including the Tribe's IGRA gaming operations (LRCR), consistent with the ordinances and resolutions enacted by the Tribal Council; to prepare and present the annual budget of the Band to the Tribal Council for approval or other action; and, with the approval of the Tribal Council, to appoint, among other officials, members of the Band's regulatory commissions created by ordinance. (LRBOI Const. Art V, Joint Exhibit 1).

24. Pursuant to its authority to create regulatory commissions and subordinate organizations under Article IV, Section 7(f) of the Band's Constitution, the Tribal Council has delegated authority to a Gaming Enterprises Board of Directors ("Gaming Enterprise Board") to oversee the Band's IGRA gaming operations (including the LRCR and future gaming operations) pursuant to the Gaming Enterprise(s) Board of Directors Act of 2010, Chapter 800, Title 3 of the Tribal Code of the Band ("GEBDA"). (Joint Exhibit 1, LRBOI Const. Art. IV, § 7(f); Joint Exhibit 5, GEBDA §§ 1.02 and 4.01). Currently, the Band's only gaming operations are at the LRCR.

25. The Gaming Enterprise Board is comprised of five Directors, all of whom must be enrolled members of the Band. Two are elected officials of the Band and three are "at large" (not elected officials). The first seat for an elected official may be held by the Tribal Ogema, and if the Ogema declines to serve, the Ogema shall appoint a sitting member of the Tribal Council to serve in his place with approval of the Tribal Council. The second seat for an elected official is held by a sitting member of the Tribal Council, appointed by the Ogema and approved by the Tribal Council. The three at large directors are appointed by the Ogema and approved by the Tribal Council. If the Ogema decides to serve as a member of the Board, the Ogema may serve as the Chairperson of the Gaming Enterprise Board of Directors, and if he declines to serve then the member of the Tribal Council that he appoints to serve in his stead becomes the Chairperson. (Joint Exhibit 5, GEBDA § 4.02).

26. The Gaming Enterprise Board of Directors may vote to remove a Director for cause, and the Tribal Council may likewise remove a Director for cause in the event that the Gaming Enterprise Board fails to bring a charge for removal. (Joint Exhibit 5, GEBDA §§ 5.01-5.03, 5.05).

27. The Gaming Enterprise Board is charged with responsibility “[to] ensure compliance with the laws and resolutions enacted by the Tribal Council”; to ensure that the Band’s IGRA gaming operations at LRCR comply with the provisions of the IGRA, the Band’s gaming compact with the State of Michigan, the laws of the Band, and all applicable laws; and to ensure that all revenues from the Band’s IGRA gaming operations are accounted for and transferred to the accounts of the Band controlled by the Tribal Council as directed by the laws of the Band and procedures approved by the Tribal Council. (Joint Exhibit 5, GEBDA § 9.01(a)-(c).

28. The Gaming Enterprise Board is also charged with responsibility to increase the number of enrolled members of the Band employed by LRCR in accordance with the Band’s Indian Preference in Employment Ordinance, Chapter 600, Title 2 of the Tribal Code. (Joint Exhibit 5, GEBDA § 9.01(d)-(e), Joint Exhibit 23, Indian Preference in Employment Ordinance).

29. The Band’s Tribal Council has delegated to the Gaming Enterprise Board limited authority to execute collective bargaining agreements for the LRCR and to execute a waiver of sovereign immunity on behalf of the Tribe in such an agreement, but only to the extent that such a waiver is consistent with the waiver of sovereign immunity provided by Article XVI of the Band’s Fair Employment Practices Code, Chapter 600, Title 3 of the Tribal Code of the Band (“FEP Code”). Except as specifically delegated, the ability to waive sovereign immunity rests with the Tribal Council. (Joint Exhibit 5, GEBDA §§ 10.02(a), 10.03; Joint Exhibit 4, FEP Code).

30. The Band’s Tribal Council has delegated to the Gaming Enterprise Board additional limited authority to waive the sovereign immunity of LRCR only in contracts for "essential daily operational needs," and any such waiver must be by Board resolution. (Joint Exhibit 5, GEBDA §§ 10.02(b); 10.04(a)).

31. In accordance with the Band's Constitution and GEBDA, the Gaming Enterprise Board prepares (or has prepared) a proposed annual budget, various reports and operating plan for the LRCR, which must be presented to, and approved or amended by, the Tribal Council by September 1. The Chairperson of the Gaming Enterprise Board, which may be the Tribal Ogema or someone appointed by the Ogema to act as Chairperson, or in such Chairperson's absence, the Vice Chairperson, is responsible for presenting the proposed budget, operating plan and reports to the Tribal Council. The budget must be accompanied by an operating plan for the LRCR and a human resources report and other detailed reports for the LRCR for the current fiscal year to date as well as for the upcoming year by month.

The Gaming Enterprise Board is required to submit an operating plan that "shall report on proposed activities for the upcoming fiscal year by month and shall include but not be limited to:

1. Operating goals for the enterprise
2. Operating goals for each department
3. Proposed changes in operations
4. Status of collective bargaining agreement and other union activities
5. Schedule and discussion of risks and opportunities.

The Gaming Enterprise Board is required to include in the annual human resources report the following:

1. Head count schedule
2. Preference employment report
3. Hiring plans

4. Employee development plans
5. Proposed changes to employee benefits/plans
7. Compensation plans
8. Disclosure of bonus type plans
9. Status of collective bargaining agreements and other union activities
10. Termination report.

(Joint Exhibit 5, GEBDA §§ 12.01, 12. 02(a), 12. 02(c)-12. 02(e) and § 12.03).

In addition, the Gaming Enterprise Board is required to submit a monthly report to the Ogema and the Tribal Council, including all resolutions adopted by the Board and summarizing the status of material aspects of the LRCR, including, among other reports, a human resources report and a report on the status of collective bargaining and other union activities. (Joint Exhibit 5, GEBDA § 12.03).

Section 12.01 of the Band's Gaming Enterprise Act provides in part, "No deviation from approved plans and budgets shall occur unless approved by Board of Directors and ratified by Tribal Council Resolution." (Joint Exhibit 5, GEBDA § 12.01).

The Tribal Council takes actions that affect the terms and conditions of employment of the LRCR employees, including, for example, approving their health insurance plans; enacting laws concerning employment matters, such as hiring preferences for tribal members and the limitations on collective bargaining set forth in provisions of the FEP code; and exercising authority to approve or amend the personnel manual.

32. The Gaming Enterprise Board accounts to the Band's Tribal Council for all revenues generated by LRCR and transfers those funds to the accounts of the Band under the control of the Tribal Council, excluding authorized operating funds. (Joint Exhibit 5, GEDBA § 9.01(c)).

33. The Gaming Enterprise Board has authority to approve and amend the personnel manual for the LRCR, subject to overriding authority of the Tribal Council to alter the personnel manual by law or resolution. The Gaming Enterprise Board must give the Ogema and Tribal Council 30 days notice of any proposed changes to the personnel manual. (Joint Exhibit 5, GEDBA § 9.03(c)).

34. The Gaming Enterprise Board also has authority to hire a General Manager for the LRCR and to enter into an employment contract with said manager, subject to ratification by the Tribal Council. (Joint Exhibit 5, GEDBA § 9.03(a)).

35. In 2005, following the legislative processes described in paragraphs 20-22 above, the Tribal Council permanently enacted the Band's Fair Employment Practices Code, Chapter 700, Title 3 of the Tribal Code, to govern a variety of employment and labor matters within its jurisdiction, including rights and remedies for employment discrimination, minimum wages, and other matters. (Joint Exhibit 4, FEP Code, Art. I.).

36. In 2007, following the above-referenced legislative processes, the Tribal Council permanently enacted Article XVI of the FEP Code ("Article XVI") to govern labor organizations and collective bargaining within public employers. Section 16.01 of the FEP Code provides:

The Little River Band of Ottawa Indians exercises powers of self-government over its members and territory. The Tribe has inherent authority to govern labor relations within its jurisdiction, and this includes regulating the terms and conditions under which collective bargaining may or may not occur within its territory. The Tribe's inherent authority further includes the right to protect the health, welfare, and political integrity of the Tribe from being harmed or threatened by the activities of nonmembers within the Tribe's territory. The purpose of this Article is to protect essential attributes of tribal self-government and the health and welfare of the members of the Tribe if labor organizations conduct operations within the jurisdiction of the Tribe. (Joint Exhibit 4, FEP Code § 16.01).

37. In furtherance of that purpose, the Tribal Council decided that it was in the best interest of the Band to allow collective bargaining by employees within its public sector, subject

to regulations that would protect the integrity of its governmental operations, the Band's governmental revenues, and the economic welfare of its members.

38. To this end, the Tribal Council considered examples of public sector labor laws of the state and federal governments and enacted provisions to, among other things, prohibit strikes against its governmental operations; ensure that if a labor organization was elected to represent a bargaining unit of employees within the Band's governmental operations, no employee would be required to join the union or to pay union dues; and establish jurisdiction within the Band's Tribal Court to enforce certain provisions of Article XVI. (Joint Exhibit 4, FEP Code §§ 16.05, 16.06, 16.24).

39. Pursuant to Article XVI, Section 16.03 of the FEP Code, a "Public Employer" is defined as "a subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band," and "Governmental Operations of the Band" are defined as:

the operations of the Little River Band of Ottawa Indians exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band's governmental services and programs, including the operation of . . . gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band's jurisdiction. (Joint Exhibit 4, FEP Code § 16.03).

Section 16.03 of the FEP Code also states:

Little River Casino Resort means the Band's gaming enterprise, including related hotel and restaurant services, located at 2700 Orchard Highway, Manistee, Michigan, wherein the Tribe operates Class II and Class III gaming to generate governmental revenue for the Tribe pursuant to the Indian Gaming Regulatory Act. (Joint Exhibit 4, FEP Code § 16.03).

In accordance with these provisions of the FEP Code, the Band considers the LRCR to be a public employer within the meaning of the FEP Code, and the Band at all material times has applied and continues to apply the provisions of the FEP Code, as amended, to the LRCR, to the employees of the LRCR, and to labor organizations seeking to represent employees of the LRCR, including the provisions of the FEP Code alleged in paragraphs 8(a)-(q) in the Complaint in the instant case. The Band at all material times has also applied Labor Organization Licensing Regulations described below to the LRCR, to the employees of the LRCR and to labor organizations seeking to represent employees of the LRCR. (See Joint Exhibits 4, 6, 7, 8 and 9).

40. In early 2008, the Tribal Council adopted permanent amendments to Article XVI of the FEP Code to, among other things, require labor organizations doing business within the jurisdiction of the Band to apply for and obtain a license; prohibit lock-outs by the Band's public employers; and expand the enforcement powers of the Band's Tribal Court with respect to said licensing requirement and prohibition against lock-outs and strikes. (Joint Exhibit 4, FEP Code §§ 16.07, 16.08 (a)-(c) and 16.24).

41. In enacting these 2008 amendments, the Tribal Council decided that it was in the best interest of the Band, and would promote fairer labor relations, if public employers were prohibited from engaging in lock-outs in the same manner that public employees are prohibited from engaging in strikes under the labor organization laws of most states.

42. In enacting these 2008 amendments, the Tribal Council also decided to delegate authority to the Band's Gaming Commission (the "Gaming Commission" or "Commission") to license labor organizations operating within any of the governmental operations of the Band because the Commission is the only governmental body of the Band with licensing experience and capability. (Joint Exhibit 4, FEP Code § 16.08).

43. The Gaming Commission is a regulatory body, established by the Tribal Council under authority of the Band's Constitution, and governed by the Band's Gaming Commission Ordinance, Chapter 400, Title 4 of the Tribal Code of the Band, and the Commissions Ordinance, Chapter 150, Title 01 of said Code. (Joint Exhibit 26, Gaming Commission Ordinance).

44. The Gaming Commission is made up of between three and five Commissioners, each of whom is appointed by the Band's Tribal Ogema with approval by the Band's Tribal Council for four year terms. Each Commissioner is an enrolled member of the Band and is subject to rigorous background checks and regulatory training in order to qualify to serve as Commissioner. LRBOI Gaming Commission Ordinance, Chapter 400, Title 4, §§ 5.01-5.05. (Joint Exhibit 26).

45. The Gaming Commission is charged with licensing outside entities that conduct business within the territorial jurisdiction of the Band to protect the health, safety, and welfare of the Band and its community; it has significant experience in carrying out investigations and related licensing activities for the issuance of licenses to entities or individuals who engage in economic activity within the territorial jurisdiction of the Band; and no other commission or body of the Band has such licensing experience or authority. *See* LRBOI Gaming Commission Ordinance, §§ 6.01(a), (d), (g), and 8.01-8.03 (Joint Exhibit 26).

46. Pursuant to the FEP Code, the Tribal Council has given the Gaming Commission authority to enact regulations to investigate and license labor organizations engaged in organizing employees working for public employers within the jurisdiction of the Band. (Joint Exhibit 4, FEP Code § 16.08(b)).

47. In 2008, the Gaming Commission drafted regulations to govern labor organizations operating within the Band's IGRA gaming operations, and, in so doing, studied examples of licensing procedures from other jurisdictions, including Michigan.

48. On June 3, 2008, after several drafting sessions and meetings, the Commission completed its first draft regulations to govern labor organizations within the Band's gaming operations and posted them for public comment. Thereafter, on July 24, 2008, the Commission enacted those regulations and, thereafter, on February 16, 2010 amended the regulations to better delineate information about background checks and related authorizations from applicants. The Tribal Council approved the initial regulations and the amendments to the regulations. As a condition of obtaining a license under these regulations, a labor organization must agree to be bound by the laws and regulations of the Tribe, including, among others, the FEP Code. (Joint Exhibit 4, FEP Code § 16.08(a)(3)(A) & (B); Joint Exhibits 6, 7, 8 & 9).

49. Since 2008, the Gaming Commission has issued three annual licenses to the United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW"). (Joint Exhibits 15, 16, & 17).

50. In April of 2008, the Tribal Council voted unanimously in favor of a resolution directing all elected officials to remain impartial with respect to union activity within the Band's jurisdiction and prohibiting said officials from commenting, discussing, or announcing their personal opinions on union activity. (Joint Exhibit 21, Neutrality Resolution).

51. Later in 2008, pursuant to Article V, section. 5 of the Band's Constitution, the Band entered into an Agreement with the USW ("Security Officers Bargaining Unit Election Procedures Agreement") to establish procedures for employees within the security department of the Band's IGRA gaming operations, LRCR, to identify themselves as an appropriate

bargaining unit for collective bargaining and to make a showing that 30% or more of the employees within the unit supported union representation so as to trigger a union election; to establish “civility” rules for union and management to follow during any election campaign; to set forth secret ballot voting procedures for employees to vote for union representation; and to establish processes for resolving disputes arising out of any campaign or vote. (Joint Exhibit 22).

52. The Ogema’s office negotiated and entered into said Agreement with a goal to minimize disruptions to the Band by establishing fair and orderly procedures for a union campaign, and it became a template for a “Model Band-Union Election Procedures Agreement,” later adopted by the Tribal Council.

53. Pursuant to October 15, 2008 amendments to Article XVI of the FEP Code, the Tribal Council provided that the Model Band-Union Election Procedures Agreement, may serve as the basis for other Agreements entered into by the Band and labor organizations to establish procedures for determining appropriate bargaining units for collective bargaining within the governmental operations of the Band and elections by such units of public employees for exclusive bargaining representatives. (Joint Exhibit 4, FEP Code XVI §§ 16.09, 16.10; Joint Exhibit 10, Model Band-Union Election Procedures Agreement).

54. In 2008, the Tribal Council approved Attorney David M. Peterson (of Straub, Seaman & Allen, St. Joseph, Michigan) to serve as the Band’s Neutral Election Official to oversee the processes established by the Security Officers Election Procedures Agreement (or any future similar Agreement based on the “Model Band-Union Election Procedures Agreement”) for determining (among other things) an appropriate bargaining unit within a public employer for union representation, when employees within such a bargaining unit could

trigger a secret ballot election for union representation, and the outcome of any such secret ballot election.

55. Neutral Election Official Peterson previously served as Chief Judge for the Fifth District Court in the State of Michigan and as Presiding Judge of the Criminal Division of the Berrien County Trial Court. He currently serves as Tribal Judge for the Pokagon Band of Potawatomi Indians.

56. Neutral Election Official Peterson's duties are set forth in a memorandum approved by the Tribal Council (Joint Exhibit 13).

57. Section 16.02 of the FEP Code provides as follows:

The Tribal Council declares that it is the policy of the Tribe to promote harmonious and cooperative relationships between tribal government and its employees by permitting employees within the Governmental Operations of the Band to organize and bargain collectively; to protect orderly Governmental Operations of the Band to provide for the health, safety, and welfare of the Band and its members; to prohibit and prevent all strikes by employees within the Governmental Operations of the Band; to protect the rights of employees within the jurisdiction of the Band to join or refuse to join, and to participate in or refuse to participate in, labor organizations; to protect the rights of tribal members to employment preferences; and to ensure the integrity of any labor organization doing business within the jurisdiction of the Band by requiring any such labor organization to obtain a license. (Joint Exhibit 4; FEP Code § 16.02).

58. In furtherance of the policy set forth in Section 16.02 of the FEP Code, in enacting additions to Article XVI in October 2008, the Tribal Council drew from the public sector labor laws of states to: (a) define the rights and duties of employers, employees, and labor organizations within the Band's public sector with respect to collective bargaining, including the duty to bargain in good faith, which excepts from such duty any requirement to bargain over any matter that would conflict with the laws of the Band (all as reflected in FEP Code §§ 16.12, 16.14, 16.21, and 16.24(d)); (b) provide procedures for resolving alleged violations of those rights and duties, including unfair labor practice procedures (as reflected in FEP Code §§ 16.15

and 16.16); (c) design processes for management of public employers and exclusive bargaining representatives to resolve bargaining impasses through mediation, fact finding and arbitration, and setting the standards for consideration by arbitrators (all as reflected in FEP Code §§ 16.17); (d) establish that management and exclusive bargaining representatives may bargain over “fair share” contributions by public employees within a bargaining unit who do not join the union, and setting procedures for employees to vote to rescind any such “fair share” provision (all as currently reflected in FEP Code § 16.13); (e) limit the duration of public sector collective bargaining agreements to three years or less (as currently reflected in FEP Code § 16.18); and (f) provide a process for a bargaining unit of public employees to vote to decertify an exclusive bargaining representative with oversight by the Band’s Neutral Election Official (as reflected in FEP Code § 16.19).

59. In furtherance of the public policy set forth in FEP Code § 16.02, in enacting additions to Article XVI in October, 2008, the Tribal Council provided that the terms and conditions under which the Band's public employers may test employees for alcohol or drug use shall not be subject to collective bargaining with any labor organization (as reflected in FEP Code § 16.20). It also waived the sovereign immunity for the Band's public employers from suit for the purpose of the enforcement of any collective bargaining agreement in the Tribal Court and for limited review of certain arbitrator decisions related to unfair labor practices (as reflected in FEP Code § 16.26) and provided for the use of the “Model Band-Union Election Procedures Agreement” as referenced above.

60. In March, 2009, the Tribal Council enacted additional amendments to the FEP Code in furtherance of the public policy set forth in FEP Code § 16.02 to, among other things: (a) establish a Charge of Discrimination form for public employees to use to assert rights and

remedies under the Band's law for alleged employment discrimination on the basis of union affiliation (as currently reflected in FEP Code §§ 6.02 and 16.16(b) of the FEP Code); (b) clarify limits on the duty of public employers to bargain in good faith with regard to management prerogatives, consistent with other public sector labor laws by specifying that management does not have a duty to bargain about its decisions to hire, layoff, recall or reorganize the work duties of employees (as reflected in FEP Code § 16.12(a)(1)); (c) clarify procedures for resolving different categories of unfair labor practice charges to ensure that those involving management or elected bargaining representatives, if not settled, are resolved by arbitration with limited judicial review, that those involving alleged discrimination against an individual employee by employer or union go through discrimination procedures provided in Article VI of the FEP Code, and that claims of breach of duty of fair representation by an employee against an exclusive bargaining representative proceed to the Band's Tribal Court (as reflected in FEP Code § 16.16); (d) clarify and further streamline bargaining impasse procedures (currently reflected, in part, in FEP Code §§ 16.17(c) and 16.17(d)); and (e) provide for limited review of an arbitrator's award resolving a bargaining impasse by the Tribal Council and by the Tribal Court (as currently reflected in FEP Code § 16.17(e) and 16.17(h)).

61. In January, 2010, the Tribal Council again amended the FEP Code by enacting Title XVII. Sections 17.1 (b) and (c) of Article XVII state:

(b). In providing for procedures, rights, and remedies for employers, employees, and labor organizations under this Code, including those afforded through actions in the Little River Band of Ottawa Indians Tribal Court, the Tribal Council has carefully considered (and continues to consider) the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake. This has included careful consideration of, amongst other things, (i) the time, costs, and inconvenience of parties and witnesses involved in proceedings to resolve controversies or to establish rights and remedies under this Code; (ii) the need to protect the governmental operations of the Band from undue burdens from litigation, while according fair treatment to

employees within those operations; and (iii) methods to resolve disputes through early settlement, including mediation.

(c). The integrity of this Code is threatened if parties bypass the procedures, rights, and remedies established herein and seek, instead, to invoke procedures or remedies outside of this Code for controversies that this Code is designed to address and resolve in accordance with the unique public policies of the Band. Investigations or proceedings directed at employers, apart from those provided for by this Code, which seek to address controversies or rights covered by this Code, require the expenditure of time and resources to the detriment of those involved and, in many instances, to the governmental operations of the Band. Such investigations or proceedings also threaten duplicative witness testimony and production of documents already available, or undertaken, pursuant to the provisions of this Code. (Joint Exhibit 4, FEP Code § 17.4).

62. In furtherance of the policy set forth in Section 17.1 of the FEP Code, the Tribal Council in January 2010 enacted sections 17.4 and 17.5 of Article XVII to prohibit public employers from producing documents or giving testimony under subpoena from such outside authorities without the approval of the Tribal Council in circumstances where the employee initiating proceedings by external authorities has failed to exhaust his or her remedies provided by the FEP Code. (Joint Exhibit 4, FEP Code §§ 17.4-17.5).

63. In July, 2010, the Tribal Council adopted permanent amendments to Article XVI of the FEP Code, in furtherance of the public policy set forth in § 16.02 to, among other things: (a) correct perceived unfairness in the allocation of costs between parties in paying for the arbitration of unfair labor practices by allowing the arbitrator to allocate costs consistent with the parties' relative successes on issues (as reflected in FEP Code § 16.16(a)(2)(D)); (b) clarify that no complaint for employment discrimination based on union affiliation may be brought in the Band's Tribal Court unless a charge of discrimination is filed within 180 days of the alleged discrimination (as reflected in FEP Code § 16.16(b)(iii)); and (c) correct perceived unfairness in the process for resolving collective bargaining impasses, which had allowed public employers to reject the award of an interest arbitrator with respect to economic terms of a collective

bargaining agreement (i.e. wages, salaries, bonuses, insurance premiums, and pension or retirement contributions), by (i) requiring any public employer seeking to reject such an award to show cause to the Tribal Council for the rejection, (ii) providing opportunity to both the public employer and the exclusive bargaining representative to be heard on the matter, and (iii) providing for the Tribal Council to resolve the impasse either by accepting the arbitrator's award or the public employer's final offer on such economic terms (as reflected in FEP Code §16.17(e)).

64. All of the above-referenced enactments and amendments of provisions to the FEP Code set forth in paragraphs 35-42, 46, 53, and 57-63 proceeded in accordance with the legislative processes described in paragraphs 20-22 above. The Tribal Council conducted ten (10) work sessions between 2007 and 2010 to address public policy considerations relative to the above-referenced enactments and amendments of provisions to the FEP Code.

65. In the work sessions and open session meetings at which the Tribal Council addressed said enactments and amendments to the FEP Code, the Tribal Council deliberated over a number of public policy considerations. The following are examples:

- In deciding whether or not to prohibit strikes within the governmental operations of the Band, the Tribal Council considered whether bargaining impasses could be resolved through mandatory mediation, fact finding, and arbitration with less disruption to the ordinary operations of the Band's departments, agencies, commissions and subordinate organizations, and it concluded that such impasse resolution methods would better serve the Band's interests and the welfare of its community than allowing strikes.
- In designing said mandatory bargaining impasse procedures — mediation, fact finding, and interest arbitration, with limited review of continuing impasses over economic terms before the Tribal Council —the Tribal Council sought to provide an efficient, non-disruptive procedure for the parties to come to agreement, and left Tribal Council with the ultimate role to resolve any ongoing impasse with respect to the economic terms of a collective bargaining agreement because such terms affect the treasury of the Band, its governmental revenues, and therefore its ability to provide governmental services.

- In requiring parties to attempt to resolve alleged unfair labor practices before commencing arbitration and then limiting judicial review of arbitration decisions on unfair labor practice charges to review for legal error or inconsistencies with the laws of the Band, the Tribal Council determined that it was in the best interests of the Band and its governmental operations to promote early resolution of such disputes by mandating early, good faith settlement discussions and to streamline any post-arbitration judicial review.
- In excluding from the mandatory subjects of bargaining between management of a public employer and an exclusive bargaining representative any provisions that would conflict with the laws of the Band, the Tribal Council ensured that the public policies reflected in the body of the Band's laws would not be placed in conflict with the terms of a collective bargaining agreement entered into under Article XVI. This would cover such things as the requirements of the Band's Indian Preference in Employment Ordinance, Chapter 600, Title 2 of the Tribal Code.
- In deciding whether or not to allow management and exclusive bargaining representatives within the Band's governmental operations to bargain over fair share contributions from employees who decide not to join a union, the Tribal Council considered whether or not workplace harmony would be better promoted by allowing such bargaining to occur or whether the choice of individual employees should be given more value. The Tribal Council concluded, on balance, that allowing bargaining over fair share contributions would be in the best interests of the Band and its community by furthering workplace equity. The Tribal Council then limited the time frame for employees to petition for a vote to deauthorize a fair share provision in a collective bargaining agreement to ninety (90) days after the execution of the collective bargaining agreement in order to foster workplace stability.
- In considering whether to eliminate from the mandatory subjects of bargaining any drug or alcohol testing policy of a public employer that comports with the laws of the Band, the Tribal Council considered the devastating impact that drug and alcohol abuse has had upon its tribal members and Native American communities generally and decided that it was in the best interests of the Band and its community to eliminate such policies from the mandatory subjects of bargaining, provided that such policies are consistent with the Band's law, which includes civil rights under the Band's Constitution.

66. The Tribal Council continues to assess the provisions of the FEP Code and Article XVI to consider improvements in light of the experience of ongoing collective bargaining within certain bargaining units at its IGRA gaming operations. In making such assessments, the Tribal Council regularly looks for lessons to be drawn from other public sector labor laws of state governments, including those of the State of Michigan.

67. Since 2008 the Band has entered into three Band-Union Election Procedures Agreements to govern elections procedures for bargaining units at LRCR, all containing the requisite provisions of the Model Band-Union Election Procedures Agreement (Joint Exhibit 10).

68. Elections for union representation, the initiation and resolution of election disputes, collective bargaining, the initiation and resolution of alleged unfair labor practices, and the initiation and resolution of bargaining impasse procedures have all proceeded apace for nearly three years pursuant to Article XVI of the FEP Code and the terms of the above-referenced Band-Union Election Procedures Agreements.

69. Since his appointment in 2008, Neutral Election Official Peterson has (a) overseen (and issued sworn declarations in reference to) the count of signatures of employees to verify the requisite support for union elections with respect to four separate bargaining units of employees at LRCR, (b) subsequently overseen four elections for union of representation in four bargaining units at the LRCR, and (c) issued Official Tallies of Votes with respect to those elections. (Joint Exhibit 14).

70. Over the course of the last three years, at least four unfair labor practice claims have been resolved under Article XVI of the FEP Code or the provisions of an executed Band-Union Election Procedures Agreement, including one by written decision of an arbitrator.

71. During the last four years, there have been collective bargaining agreement negotiations with respect to four separate bargaining units of employees at the LRCR, involving over 40 full days of negotiation sessions. The four bargaining units constitute over 250 employees, and each of the four bargaining units is made up of enrolled tribal members as well as nonmembers.

72. Enrolled tribal members have served on the LRCR management's negotiating team with respect to collective bargaining for all four bargaining units.

73. Enrolled tribal members also serve on management's negotiating team with respect to meetings held to administer the collective bargaining agreement entered into with the USW with respect to the LRCR security officers bargaining unit as described in paragraphs 74-77 below, and a tribal member served on the employees' initial negotiating team, represented by the USW, with respect to that agreement.

74. After over a year of collective bargaining with respect to the security employees' bargaining unit, the LRCR management and the USW reached an impasse over certain terms and conditions of employment. As a result, they invoked the three step impasse resolution process provided for in Article XVI of the FEP Code. (Joint Exhibit 4, FEP Code § 16.17).

75. A hearing was held on or about June 24, 2010, by a fact finder, chosen by the parties—Attorney Anne T. Patton, Esq. — and, in accordance with FEP Code Section 16.17(c)(2), she issued a 32 page "Findings of Fact and Recommendations," dated August 8, 2010. As a result of said Findings of Fact and Recommendations, the LRCR management and the USW narrowed the issues left for negotiation and then preceded to interest arbitration.

76. In accordance with FEP Code Section 16.17(d), an interest arbitration hearing was held on or about October 11, 2010, by the arbitrator chosen by the parties, Attorney Richard N. Block, Esq, and, thereafter he issued a 39 page "Opinion and Award" in the matter.

77. Thereafter, the Gaming Enterprise Board of Directors agreed to accept the interest arbitration award with respect to the payment of wages, bonus, and economic terms subject to certain conditions. (See Joint Exhibit 11). The USW and the LRCR management tentatively agreed to a collective bargaining agreement covering security employees' bargaining unit, which

was ratified by the security employees on December 16, 2010 and was approved by the Gaming Enterprise Board on December 20, 2010. (See Joint Exhibits 12 and 24). Tribal Omega, Larry Romanelli, commented on the signing of this collective bargaining agreement in the February, 2011 edition of *Currents* the monthly newsletter of the Tribe which is published on its public website, as follows:

In the last half of December, two controversial agreements were signed by the Little River Band of Ottawa Indians. . . . LRBOI also signed a collective bargaining agreement with the United Steel Workers after months of negotiations. The agreement is one of the first of its kind in the Nation and follows our Tribal Law. There will be much written on this for some time.

78. A decertification petition was filed and related union decertification election was held resulting in the decertification of the exclusive bargaining representative in another bargaining unit of employees at LRCR in August, 2010, in accordance with Article XVI of the FEP Code, and was overseen by Neutral Election Official Peterson, who issued an Official Tally of Votes to certify the results. One hundred and thirty four (134) employees (excluding a challenged ballot) casted votes in that election. A separate decertification petition and related union decertification vote by a separate unit of employees at LRCR, held in February, 2011, did not result in the decertification of the exclusive bargaining representative for that separate unit. The petition and vote for this decertification also proceeded in accordance with Article XVI of the FEP Code and was overseen by Neutral Election Official Peterson, who issued an Official Tally of Votes to certify the results. Sixty-eight employees (excluding 2 challenged ballots) casted votes in that election. (Joint Exhibit 14).

79. Collective bargaining negotiations continue pursuant to Article XVI of the FEP Code with respect to the two other bargaining units of employees at LRCR.

80. The Respondent maintains that LRCR employees and any labor organization that seeks to represent them are subject to and are governed by the FEP Code, and that LRCR employees any labor organization seeking to represent them are not governed by the National Labor Relations Act.

81. The Charging Union, Local 406, International Brotherhood of Teamsters is, and at material times has been, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

82. The parties do not stipulate to the relevance of the facts herein, and any party objecting to the relevance may do so in their brief.

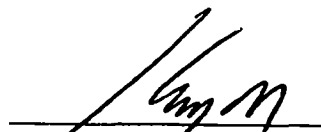
83. The parties agree that in addition to the forgoing stipulated facts, Joint Exhibits 1-26 shall be part of the record. The parties stipulate to the authenticity of the Joint Exhibits, but reserve the right to object to their relevance, and may do so in their briefs.

84. The parties stipulate that upon the Board's acceptance of the stipulated facts, no party will rely on evidence contained in the affidavits or exhibits attached to the "Statement of Undisputed Facts in Support of the Motion of Respondent Little River Band of Ottawa Indians Tribal Government to Dismiss or For Summary Judgment," filed in this matter on March 4, 2011 unless specifically included in these Stipulations or the Joint Exhibits.

Respectfully submitted this 3rd day of August, 2011



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JOINT EXHIBIT 4

FAIR EMPLOYMENT PRACTICES CODE
Ordinance # 05-600-03

Article I. Purpose; Findings

1.01. *Declaration and Policy.* As a sovereign Indian tribe, the Little River Band of Ottawa Indians has inherent authority to govern employment relations within its jurisdiction. It is the public policy of the Band to:

- a. ensure that members of the Band and other Indians gain and maintain employment opportunities within the Band's jurisdiction;
- b. prevent and remedy any discrimination in employment (other than to promote the employment of Band members and other Indians) on the basis of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; and
- c. ensure that employees within the jurisdiction of the Band work in safe conditions, receive fair compensation, and otherwise have fair terms and conditions of employment.

1.02. *Purposes.* The purpose of this Code is to:

- a. prevent and remedy discrimination in employment, unless in furtherance of Indian employment preferences, on the basis of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; and
- b. establish standards for fair and safe working conditions.

1.03. *Findings.* The Tribal Council of the Little River Band of Ottawa Indians finds that:

- a. the Constitution of the Little River Band of Ottawa Indians delegates to the Tribal Council the responsibility to "...exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances and adoption of resolutions not inconsistent with this Constitution:

1. to govern the conduct of members of the Little River Band and other persons within its jurisdiction;
2. to promote, protect and provide for public health, peace, morals, education and general welfare of the Little River Band and its members[.]” *Article IV, Section 7(a).*

Article II. Adoption; Amendment; Repeal; Severability

2.01. *Adoption.* This Ordinance is adopted by Tribal Council resolution # 05-1102-564.

2.02. *Amendment.* This Ordinance may be amended in accordance with the procedures set forth in the Administrative Procedures Act - Ordinances. An emergency amendment to add Article XVI, Labor Organizations and Collective Bargaining was adopted by Resolution # 07-0620-334. Permanent adoption to add Article XVI Labor Organizations and Collective Bargaining was adopted by Resolution # 07-0801-427. Article XVI was revised and adopted on an emergency basis by Resolution #08-0206-32, and permanently adopted by Resolution #08-0319-76. Emergency amendments were again adopted to revise Article XVI, to add a new Article XII, Whistleblower Protection, to establish remedies for violations of new Article XII, and to correct minor typographical errors in the Code by Resolution # 08-1015-348. Further amendments were adopted by Resolution # 09-0304-60 to (1) require the posting of employee rights provided by this Code under Article XIII; (2) revise Article XII, Whistleblower Protection, to clarify investigation requirements; and (3) revise Article XVI to (a) more specifically describe public employer bargaining duties, (b) more specifically provide for Tribal Court review of certain disputes, (c) more specifically identify employee rights by separate article, (d) require good faith efforts by parties to resolve alleged unfair labor practices, (e) streamline procedures for the resolution of bargaining impasses, and (f) more specifically describe terms and conditions not subject to change during bargaining impasse. Amendments were made by Resolution # 09-0715-194 to (a)amend Article XVI, section 16.16(b) to correct a drafting error

regarding remedies available to public employees who suffer discrimination for exercising rights under section 16.14 and (b) amend section 16.25 to better clarify the scope of the limited waiver of sovereign immunity for the enforcement of rights and remedies against public employers. By Resolution 09-1202-334, emergency amendments were made to (a) add Article XVII to protect the integrity of this Code, (b) add an exception to the confidentiality rule stated in section 6.03 when employees fail to exhaust remedies provided for by this Code and to clarify the admissibility of FEPI reports in the Tribal Court under that section, (c) add new sections 6.09, 8.07, 10.07, 11.02, and 16.25 to provide for specific Tribal Court authority to resolve jurisdictional controversies, (d) to re-label prior sections 16.25 and 16.26 as current sections 16.26 and 16.27, respectively, and (e) to correct clerical errors, with permanent adoption by Resolution 10-0127-19. By Resolution 10-0728-268, amendments were made to (a) allocate the parties' responsibilities for paying for the services of arbitrators retained to resolve unfair labor practice charges under section 16.16(a)(2); (b) establish the 180 day time limitation for assertions of certain unfair labor practices under section 16.16(b); (c) protect potential confidential information from disclosure in the decisions of fact finders or arbitrators under sections 16.17(c) and 16.17(d); (d) eliminate from an arbitrator's mandatory consideration under section 16.17(d) items involving the public welfare of the Little River Band of Ottawa Indians; and (e) to provide an additional review process before Tribal Council for the resolution of bargaining impasses pursuant to new section 16.17(e).

2.03. *Repeal.* This Ordinance may be repealed in accordance with the procedures set forth in the Administrative Procedures Act - Ordinances.

2.04. *Severability Clause.* If any provision of this Ordinance or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are severable.

2.05. *Title.* This law shall be referred to as the Fair Employment Practices Code.

2.06. *Waiver of Sovereign Immunity.* The sovereign immunity of the Band is hereby waived for any actions brought pursuant to this Code and for any process, including subpoenas.

2.07. *Persuasive Authority.* Decisions of the United States Supreme Court and the Court of Appeals for the Sixth Circuit, and the regulations and guidelines of the United States Equal Employment Opportunity Commission shall be persuasive authority in guiding the construction of the provisions of this Code to the extent that they are similar to federal enactments addressing employment discrimination.

Article III. Definitions.

3.01. *Definitions.* For purposes of this Ordinance, certain terms are defined in this Article. The word "shall" is always mandatory and not merely advisory.

3.02. *Band* means the Little River Band of Ottawa Indians.

3.03. *Direct threat* means a significant risk to the health or safety of others that can not be eliminated by reasonable accommodation.

3.04. *Disability* means a physical or mental impairment of an individual which substantially limits one or more of such person's major life activities, the state of having a record of such impairment, or the state of being regarded as having such an impairment.

a. *Physical or mental impairment* means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, genitourinary; hemic and lymphatic; skin; and endocrine; cardiovascular; reproductive; any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; and includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy,

muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

b. *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

c. *Having a record of such an impairment* means having a history of, or having been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

d. *Being regarded as having an impairment* means having B

1. a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation,

2. a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

3. having none of the impairments defined in paragraph (a) of this section but being treated by an employer as having such an impairment and as being substantially limited by such impairment in one or more major life activities.

3.05. *Discriminate* means to segregate or separate, and, for purposes of section 4.02 as it relates to an individual with a disability, "discriminate" means:

a. Limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of the disability of the applicant or employee;

b. Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

c. Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer;

d. Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

e. Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity; and

f. Failing to select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude or any other factor of the applicant or employee that the test is designed to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant (except when such skills are the factors that the test is designed to measure).

"Discriminate" shall not mean treating Indians differently than non-Indians or Band members differently than other Indians in order to promote employment preferences for members of the Band or other Indians.

3.06. *Employee* means an individual employed by an employer. "Employee" does not include any individual employed by that individual's parents, spouse or child.

3.07. *Employee benefits*, for the purposes of Article VIII, addressing family and medical leave protection, "employee benefits" means all benefits, other than salary and wages, provided or made available to employees by an employer and includes group life insurance, health insurance, disability

insurance and pensions, regardless of whether benefits are provided by a policy or practice of an employer.

3.08. *Employer* means any type of organization, including tribal or foreign corporations and partnerships; the Band; any political subdivision, agency, or department of the Band; and any tribally chartered enterprise of the Band doing business on lands within the jurisdiction of the Band and employing any number of employees.

3.09. *Family medical leave*, for the purposes of Article VIII, addressing family medical leave protection, "family medical leave" means leave requested by an employee:

- a. Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee;
- b. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter;
- c. Because of the placement of a son or daughter with the employee for adoption or foster care;
- d. In order to care for the spouse, or a son, daughter or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition.

3.10. *Health care provider* for the purposes of Article VIII, addressing family medical leave protection, "health care provider" includes a medical or osteopathic doctor, psychologist, psychiatrist, or other health care provider recognized by the employer's health insurance carrier.

3.11. *Illegal drug* means a substance defined as unlawful by state and/or federal law or a prescribed drug used outside of the prescribed manner, or an over-the-counter drug used outside the prescribed manner.

3.12. *Indian* means an enrolled member of a federally recognized Indian tribe or band.

3.13. *Public body* means all of the following:

- a. An officer, agency, department, division, commission, council, authority or other body of the Band;
- b. A law enforcement agency or any member or employee of a law enforcement agency; and
- c. The Tribal Court and any member or employee of the Band's judiciary.

3.14. *Qualified individual with a disability* means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. For the purposes of this Code, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

3.15. *Reasonable accommodation* may include -

- a. making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- b. job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Reasonable accommodation shall not include making changes that would conflict with the application of the Band's policies or laws providing employment preferences for members of the Band or other Native Americans.

3.16. *Serious health condition* for the purposes of Article VIII, addressing family medical leave protection, "serious health condition" means an illness, injury, impairment or physical or mental condition that involves:

- a. Inpatient care in a hospital, hospice or residential medical care facility; or
- b. Continuing treatment by a health care provider.

3.17. *Tribal Court* means the Little River Band of Ottawa Indians Tribal Court.

3.18. *Undue hardship.*

a. *In General.* The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in paragraph (b) of this section.

b. *Factors to Be Considered.* In determining whether an accommodation would impose an undue hardship on an employer, factors to be considered include -

1. the nature and cost of the accommodation needed under this Code;
2. the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
3. the overall financial resources of the employer; the overall size of the business of the employer with respect to the number of its employees; the number, type, and location of its facilities; and
4. the type of operation or operations of the employer, including the composition, structure, and functions of its workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

Article IV. Unlawful Employment Discrimination

4.01. *Unlawful Discrimination: General Rule.* Except when based on a bona fide occupational qualification or in furtherance of the provision of employment preferences to members of the Band or other Indians pursuant to the law, rules, or policies of the Band or pursuant policies or actions giving preferences to Indians under 42 U.S.C. § 2000-2(i), it shall be unlawful employment discrimination, in violation of this Code B

a. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their sex, race, color, national origin, religion, age, or disability; or

b. For an employer to discriminate in any manner against individuals because they have opposed a practice that would be a violation of this Code or because they have made a charge, testified or assisted in any investigation, proceeding or hearing under this Code.

c. For any employer to discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment as provided by Article XII section 12.03.

4.02. *Unlawful Discrimination Against Qualified Individual with a Disability; Medical Screening; Illegal Use of Drugs and Use of Alcohol.*

a. *General Rule.* An employer may not discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.

b. *Medical Examinations and Inquiries.* The prohibition against discrimination referred to in paragraph (a) of this section shall include medical examinations and inquiries.

1. *Preemployment.*

A. *Prohibited Examination or Inquiry.* Except as provided in subparagraph (B), an employer shall not conduct a medical examination or make inquiries

of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

B. *Acceptable Inquiry*. An employer may make preemployment inquiries into the ability of an applicant to perform job-related functions.

C. *Prior Employment Injury with Employer*. An employer may make preemployment inquiries where the applicant was previously employed with the employer and suffered an on-the-job injury and where that injury is reasonably related to the ability to complete the job duties involved in the applied for position.

2. *Employment Entrance Examination*. An employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if B

A. all entering employees are subjected to such an examination regardless of disability;

B. information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except thatC

i. supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

ii. first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

iii. tribal government officials investigating compliance with this Code shall be provided relevant information on request; and

C. the results of such examination are used only in accordance with this Code.

3. *Examination and Inquiry During Employment*.

A. *Prohibited Examinations and Inquiries*. An employer shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

B. *Acceptable Examinations and Inquiries*. An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. An employer may make inquiries into the ability of an employee to perform job-related functions.

C. *Requirement*. Information obtained under subparagraph (B) regarding the medical condition or history of any employee is subject to the requirements of subparagraphs (B) and (C) of subparagraph (2).

c. *Drug and Alcohol Use Policies*. It shall not be a violation of this Code for an employer to adopt or administer reasonable policies or procedures, including but not limited to drug and alcohol testing, designed to ensure that an individual described in subparagraphs 3(A) or (B) is no longer engaging in the illegal use of drugs or the use or under the influence of alcohol while on the job.

1. *Medical Tests*. For purposes of paragraph (b) of this section, a test to determine the illegal use of drugs or alcohol use or under the influence of alcohol while on the job shall not be considered a medical examination.

2. *Qualified Individual with a Disability*. For purposes of this Code, the term "qualified

individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs or use of alcohol or under the influence of alcohol while on the job, when the employer acts on the basis of such use.

3. *Rules of Construction.* Nothing in subparagraph 4.02(c)(2) shall be construed to exclude as a qualified individual with a disability an individual who B

A. has successfully completed a supervised rehabilitation program and is no longer engaging in the illegal use of drugs or abuse of alcohol, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

B. is participating in a supervised rehabilitation program and is no longer engaging in such use; or

C. is erroneously regarded as engaging in such use, but is not engaging in such use.

4. *Authority of Employers.* An employer may:

A. prohibit the possession or use of illegal drugs and the possession or use of alcohol at the workplace by all employees;

B. require that employees may not be under the influence of alcohol or illegal drugs at the workplace;

C. require that employees behave in conformance with the requirements established under the federal Drug-free Workplace Act of 1988, 41 U.S.C. ' 701 et seq.; and

D. hold an employee who engages in the use of illegal drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which that entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee, provided that an employer shall make reasonable accommodation to an alcoholic or drug user who is seeking treatment or has successfully completed treatment.

E. adopt written policies or procedures that allow for the use of pre-employment, random, reasonable suspicion, post-accident, and follow-up testing that does not violate the protections set forth in this section or the Constitution of the Little River Band of Ottawa Indians.

d. *Defenses.*

1. *General Provisions.* It is a defense to a charge of discrimination under section 4.02 if an alleged application of qualification standards, tests or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability is shown to be job-related and consistent with business necessity, and such performance can not be accomplished by reasonable accommodation.

2. *Qualification Standards Defined.* For the purposes of this section, the term "qualification standard" may include a requirement that an individual does not pose a direct threat to the health or safety of other individuals in the workplace.

3. *Disability.* This Code does not prohibit an employer from discharging or refusing to hire an individual with a disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an individual with disability, if the individual, because of the disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others or is unable to be at, remain at or go to or from the place where the duties of employment are to be performed.

4.03. *Unlawful Employment Discrimination on the Basis of Pregnancy.*

a. *Sex Defined.* For the purpose of Section 4.01(a), the word "sex" includes pregnancy and

medical conditions which result from pregnancy.

b. *Pregnant Women Who Are Able to Work.* It shall be unlawful employment discrimination in violation of this Code, except where based on a bona fide occupational qualification, for an employer to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.

c. *Pregnant Women Who Are Not Able to Work.* It shall also be unlawful employment discrimination in violation of this Code, except where based on a bona fide occupational qualification, for an employer to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.

d. *Employer Not Responsible for Additional Benefits.* Nothing in this subsection may be construed to mean that an employer is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions that result from pregnancy, if the employer does not also provide sick leaves, leaves of absence, medical benefits or other benefits for the employer's other employees and is not otherwise required to provide those leaves or benefits under tribal law or applicable federal law.

4.04. *Unlawful Age Discrimination by Imposing a Mandatory Retirement Age.* It shall be unlawful employment discrimination:

a. For any employer to fail or refuse to hire any applicant 40 years of age or older for employment because of the age of the individual; or

b. For any employer to require, as a condition of employment, any employee to retire at or before a specified age or after completion of a specified number of years of service.

4.05. *Types of Discrimination.* "Unlawful employment discrimination," includes

a. *Overt Discrimination.* an intentional, purposeful act of discrimination, such as direct epithets aimed at an individual because of sex, race, color, national origin, religion, age, or disability, resulting in adverse employment action.

b. *Harassment, Including Sexual Harassment.*

1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature as well as unwelcome comments, jokes, acts and other verbal or physical conduct related to race, color, national origin, religion, age, disability, or an employee's report that is protected under Article XII, section 12.03 constitute unlawful workplace harassment when:

A. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

B. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

C. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. An employer is responsible for its acts and those of its supervisory employees with respect to the types of harassment described in subparagraph (1). When the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or loss of benefits, liability attaches to the employer regardless of whether the employer knew or should have known of the harassment, and regardless of whether the specific acts complained of were authorized or even forbidden by the employer. When the supervisor's harassment does not culminate in a tangible employment action, the employer may raise an affirmative defense to liability or damages by proving by a preponderance of the evidence:

- A. that the employer exercised reasonable care to prevent and correct promptly the harassing behavior, and
 - B. that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
3. With respect to persons other than an employer's supervisors as described in subparagraph (2), an employer is responsible for acts of workplace harassment where the employer, or its supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action;
- c. *Unequal or Disparate Treatment.* treating persons in a different and less favorable manner than other similarly situated individuals on account of race or color, sex, disability, religion, age, national origin, or an employee's report that is protected under Article XII, section 12.03;
 - d. *Disparate Impact.* conduct which, although applied equally to all, has an adverse effect on persons because of their race or color, sex, disability, religion, age, national origin, or because they made a report that is protected under Article XII, section 12.03 as compared to the effect on other persons;
- 4.06. *Proof of unlawful discrimination.* Unlawful employment discrimination exists if a complainant shows that his or her race, color, sex, disability, religion, age, ancestry, national origin, or making a report that is protected under Article XII, section 12.03, even if not the sole factor, was nonetheless a substantial factor motivating the employer's action. If the complainant would not have been rejected, discharged or otherwise treated differently, but for membership in the protected class, the existence of other reasonable grounds for the employer's action does not relieve the employer from liability.

Article V. Not Unlawful Employment Discrimination

- 5.01. *Indian Preference.* Nothing in this Code shall be construed to prohibit any action to provide employment preferences to members of the Band or other Indians pursuant to the laws, rules or policies of the Band or any employment policy or action that is permitted under 42 U.S.C. § 2000e-2(i).
- 5.02. *Age.* It shall not be unlawful employment discrimination to discriminate on account of age to:
- a. Comply with any tribal law relating to the employment of minors;
 - b. Observe the terms of any bona fide employee benefit plan such as a retirement, pension or insurance plan that does not evade or circumvent the purposes of this Code.
- 5.03. *Infectious and Communicable Diseases.* Assignment of individuals with an infectious or communicable disease is governed by the following.
- a. In any case in which an individual has an infectious or communicable disease, which is transmitted to others through the handling of food and is included on the list developed by the United States Secretary of Health and Human Services under the federal Americans with Disabilities Act, Title I, Section 103(d)(1), an employer may refuse to assign or continue to assign the individual a job involving food handling, unless the risk of disease transmission can be eliminated by reasonable accommodation.
 - b. Nothing in this Code may be construed to preempt, modify or amend any tribal law applicable to food handling that is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which can not be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the United States Secretary of Health and Human Services.

Article VI. Procedure before Fair Employment Practices Investigator and Complaints in Tribal Court

6.01. *Fair Employment Practices Investigators.* The Chief Judge of the Appellate Division of the Little River Band of Ottawa Indians Tribal Court shall establish a list of no more than three (3) attorneys who shall fulfill the functions of Fair Employment Practices Investigators (FEPIs) under this Article. The Chief Judge shall solicit applications from attorneys to serve as FEPIs and shall have discretion to make appointments of such individuals to serve as FEPIs under this Article, provided, however, that such individuals must reside within 70 miles of the reservation, be members, in good standing, with a state court bar and a federal court, and have experience in employment law and mediation. The Chief Judge shall establish a reasonable hourly rate and cost reimbursement schedule to compensate the appointed FEPIs. FEPIs shall serve as independent contractors for the Tribe and shall not be under any supervisory authority by the Tribal Court or any judge of the Tribal Court, provided, however, that the Chief Judge shall have discretion to remove any FEPI from the list for any reason and substitute new, qualified FEPIs, as appropriate. FEPIs shall have subpoena powers to investigate Charges of Discrimination.

6.02. *Charge of Discrimination.* Any person who believes that he or she has been subject to unlawful employment discrimination may file a Charge of Discrimination under oath with the Tribal Court Clerk on the "Charge of Discrimination" form available from the Tribal Court Clerk, setting forth the facts of alleged discrimination, provided that such a Charge of Discrimination must be filed with the Clerk not more than 180 days after the alleged act of unlawful employment discrimination. The Clerk shall date-stamp the Charge upon receipt and mail it, with an appropriate cover letter, to the next assigned FEPI. The assignment of Charges to FEPIs shall be consecutive, in alphabetical order by last name of FEPI, to ensure even distribution of Charges to FEPIs. The Clerk shall retain a copy of the Charge and the assignment to the FEPI.

6.03. Investigation and Settlement Efforts.

a. The FEPI shall mail the employer a copy of the Charge of Discrimination and investigate the allegations in the charge. The investigation shall result in a Report, to be completed within 70 days of the Tribal Court Clerk's receipt of the Charge, setting forth the following

1. Substance of complaint, including the name of the filing employee and the allegations of discrimination.
2. Persons interviewed.
3. A determination of whether there is reasonable cause to believe that a violation of this Code has occurred, including findings of fact and conclusions of law.

c. The FEPI shall mail copies of the Report to the complainant and to the employer upon completion.

d. If the Report finds reasonable cause to believe that discrimination in violation of this Ordinance has occurred, the FEPI shall convene a meeting of the employer (through a representative with authority negotiate a settlement if one can be reached) and the complainant within 21 days after mailing the Report and attempt to reach a conciliation agreement. Any such conciliation agreement may include any of the remedies provided by this Article.

e. If, without good cause, the employer fails to attend a conciliation meeting held pursuant to section 6.3(d), the Report shall be admissible in any subsequent action brought by the complainant under this Code. The FEPI shall make note any employer's failure to attend such a conciliation meeting as an Addendum to the Report, and describe the notice of the meeting that was provided to the employer. Copies of the Addendum shall be mailed to the complainant and the employer.

f. If within 60 days of the mailing of the Report, the parties fail to enter into a conciliation agreement signed by the complainant and the employer or otherwise resolve the dispute, the FEPI shall issue a "right to sue" letter to the complainant.

6.04. *Actions Filed by Complainants.* Within the time limitation set forth in section 6.06, a person who claims to have been subject to unlawful employment discrimination may file a civil action in the Tribal Court against the employer alleged to have engaged in unlawful discrimination in violation of this Code.

6.05. *Remedies.* In any action filed under this Code, the Tribal Court may grant the remedies set forth herein.

a. *Equitable Remedies.* If the court finds that unlawful discrimination occurred, its judgment must specify an appropriate remedy or remedies for that discrimination. The remedies may include, but are not limited to:

1. An order to cease and desist from the unlawful practices specified in the order;
2. An order to employ or reinstate a victim of unlawful employment discrimination, with or without back pay or reasonable front pay if reinstatement is unfeasible;

b. *Damages.* Subject to section 6.06, in cases of overt discrimination or unequal or "disparate treatment" as described in section 4.05, but not cases in which an employment practice is unlawful only for disparate impact, the court may award compensatory and punitive damages as provided in this subparagraph.

1. A complaining party may recover compensatory damages against an employer for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, provided, however, that such compensatory damages shall not include back pay, interest on back pay or any other type of relief authorized elsewhere under this subsection.

2. A complaining party may recover punitive damages against an employer if the complaining party demonstrates that the employer engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the rights of an aggrieved individual protected by this Code.

3. When a discriminatory practice involves the provision of a reasonable accommodation, damages may not be awarded when the employer demonstrates good faith efforts, in consultation with the person with the disability who has informed the employer that accommodation is needed, to identify and make a reasonable accommodation that would provide that individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

4. The total sum of compensatory and punitive damages may not exceed \$10,000 for employers with less than 50 employees, \$25,000 for employers with between 50 and 99 employees, and \$50,000 for employers with 100 or more employees

6.06. *Time Limitations.* Any action filed under this section shall be commenced not more than 2 years after the act of unlawful discrimination complained of.

6.07. *Attorneys' Fees and Costs.* In any civil action under this Code, the court, in its discretion, may allow the prevailing party reasonable attorneys' fees and costs, subject to the requirements of section 6.08.

6.08. *Limitations on Attorneys' Fees and Damages; Procedures.* Attorney fees under section 6.07 and civil penal damages or compensatory and punitive damages under section 6.05(b) may not be awarded to a plaintiff in a civil action under this Code unless the plaintiff alleges and establishes that, prior to the filing of the civil action, the plaintiff first filed a Charge of Discrimination with the Tribal Court Clerk and the FEPI has either:

a. Failed, within 90 days after finding reasonable grounds to believe that unlawful discrimination occurred, to enter into a conciliation agreement to which the plaintiff was a party; or

b. Issued a right-to-sue letter and the action was brought by the aggrieved person not more than 2 years after the act of unlawful discrimination of which the complaint was made.

6.09. *Resolution of Jurisdictional Disputes.* In any case or proceeding commenced under this Article VI, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

Article VII. Sexual Harassment Policies and Training

7.01. *General.* All employers shall act to ensure a workplace free of sexual harassment by implementing the following minimum requirements set forth in this Article.

7.02. *Workplace Posting.* An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information:

- a. the illegality of sexual harassment; a description of sexual harassment, utilizing examples;
- b. the complaint process begins by filing a written Charge of Discrimination with the Clerk of the Tribal Court; and
- c. The text of this poster may meet, but may not exceed, eight-grade literacy standards.

7.03. *Employee Notification.*

a. Employers shall provide annually all employees with individual written notice that includes, at a minimum, the following information:

1. the illegality of sexual harassment;
2. the definition of sexual harassment under the Band's law;
3. a description of sexual harassment, utilizing examples; the employer's internal complaint process available to the employee;
4. the legal recourse and complaint process provided by Article VI; and
5. the protection against retaliation as provided pursuant to section 4.01(b).

b. This notice must be initially provided within 90 days after the effective date of this section.

c. The notice must be delivered in a manner to ensure notice to all employees without exception, such as including the notice with an employee's pay.

7.04. *Education and Training.* Employers shall conduct an education and training program for all new employees within one year of commencement of employment that includes, at a minimum, the following information: the illegality of sexual harassment; the definition of sexual harassment; a description of sexual harassment, utilizing examples; the employer's internal complaint process available to the employee; the legal recourse and complaint process available pursuant to Article VI, including the process for filing a Charge of Discrimination with the Clerk of the Tribal Court; and the protection against retaliation as provided under section 4.01(b). Employers shall conduct additional training for supervisory and managerial employees within one year of commencement of employment that includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints.

Article VIII. Family Medical Leave Protection

8.01. *Family Medical Leave Requirement.* This Article applies to employers who employ 50 or more employees within a radius of 75 miles. Every employee who has been employed by the same employer for 12 consecutive months and at least 1250 hours during the previous 12 months is entitled to up to 12 work weeks of unpaid family medical leave in the 12-month period designated by the employer. The following conditions apply to family medical leave granted under this section:

- a. The employee must give at least 30 days' notice of the intended date upon which family medical leave will commence and terminate, unless prevented by medical emergency from giving that notice;
- b. The employer may require certification from a health care provider.

8.02. Family medical leave granted under this Article may consist of unpaid leave. If an employer provides paid family medical leave for fewer than 12 workweeks, the additional weeks of leave

necessary to attain the total of 12 weeks required may be unpaid. An eligible employee may elect, or an employer may require the employee, to substitute any accrued paid vacation leave, personal leave, sick leave or family leave of the employee for leave provided under this Article.

8.03. *Employee Benefits Protection.*

a. *Restoration.* Any employee who exercises the right to family medical leave under this section, upon expiration of the leave, is entitled to be restored by the employer to the position held by the employee when the leave commenced or to an equivalent position with equivalent employee benefits, pay and other terms and conditions of employment.

b. *Maintenance of Employee Benefits.* During any family medical leave taken under this Article the employer shall maintain health insurance coverage for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment.

c. *Certification.* As a condition of restoration to employment, the employer may require the employee to provide health provider certification that the employee is able to resume work. Nothing in this Article shall be construed to prohibit an employer from requiring an employee on leave to report periodically to the employer on the status and intention of the employee to return to work.

8.04. *Effect on Existing Employee Benefits.*

a. *Benefit Accrual.* The taking of family medical leave under this section shall not result in the loss of any employee benefit accrued before the date on which the leave commenced.

b. *Limitations.* Nothing in this Article shall be construed to entitle any restored employee to the accrual of any seniority or employment benefits during any period of leave or any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

8.05. *Prohibited Acts.*

a. *Unlawful Interference or Denial of Rights.* The employer may not interfere with, restrain or deny the exercise of or the attempt to exercise any right provided by this Article.

b. *Unlawful Discrimination Against Exercise of Rights.* The employer may not discharge or in any other manner discriminate against any employee for exercising any right provided by this Article.

c. *Unlawful Discrimination Against Opposition.* The employer may not discharge or in any other manner discriminate against any employee for opposing any practice made unlawful by this section.

8.06. *Judicial Enforcement.* A civil action may be brought in the Tribal Court by an employee against any employer to enforce this Article not later than two years after the date of the last event constituting the alleged violation for which the action is brought. In regard to a willful violation of Section 8.05, such action may be brought within three years. The court may enjoin any act or practice that violates or may violate this Article and may order any other equitable relief that is necessary and appropriate to redress the violation or to enforce the requirements of this Article.

8.07. *Resolution of Jurisdictional Disputes.* In any case or proceeding commenced under section 8.06, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

Article IX. Employment Leave for Victims of Violence

9.01. *Required Leave.* An employer must grant reasonable and necessary leave from work, with or without pay, for an employee to:

a. Prepare for and attend court proceedings;

b. Receive medical treatment or attend to medical treatment for a victim who is the employee's daughter, son, parent or spouse; or

- c. Obtain necessary services to remedy a crisis caused by domestic violence, sexual assault or stalking.

The leave must be needed because the employee or the employee's daughter, son, parent or spouse is a victim of violence, assault, sexual assaults under tribal, state, or federal law, stalking or any act that would support an order for protection under tribal, state, or federal law. An employer may not sanction an employee or deprive an employee of pay or benefits for exercising a right granted by this section.

9.02. *Definitions.* For purposes of this section, the terms "daughter," "son," "parent" and "spouse" have the same meanings as those terms have under federal regulations adopted pursuant to 29 U.S.C. § 2654, as in effect on January 1, 2002. An employer may require an employee to provide reasonable documentation of the family relationship, which may include a statement from the employee, a birth certificate, a court document or similar documents.

9.03. *Exceptions.* Section 9.01 is not violated if:

- a. The employer would sustain undue hardship from the employee's absence;
- b. The request for leave is not communicated to the employer within a reasonable time under the circumstances; or
- c. The requested leave is impractical, unreasonable or unnecessary based on the facts then made known to the employer.

9.04. *Confidentiality.* Information and records received by an employer in connection with a request for leave under this section shall be kept confidential.

9.05. *Civil Penalties.* The Tribal Court may assess civil penalties of up to \$300 against any employer for a violation of this section, provided that notice of the violation was given to the employer and an action for such penalties is commenced within 6 months of the occurrence.

Article X. Employee Wages and Hours

10.01. *Minimum Wage.* Any employee within the jurisdiction of the Band shall be paid an hourly wage of not less than the minimum wage established by federal law pursuant to federal Fair Labor Standards Act of 1938, Title 29 of the United States Code, sections 201 *et seq.*, as amended and regulations concerning the FLSA by the U.S. Department of Labor (FLSA). Such wage may be changed by vote of the Tribal Council. Provided that, tipped employees shall utilize the aggregate of hourly rate and tips to identify wage rate.

10.02. *Maximum Hours.* No employer shall employ any of its employees for a workweek longer than forty (40) hours unless such employee receives compensation for the employee's employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which the employee is employed.

10.03. *Exemptions.* The provisions in sections 10.02 and 10.04 shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity, or any other exemption category outlined in the FLSA.

10.04. *Private Right of Action.* Any individual aggrieved under this section may seek retroactive payment of unpaid minimum wages or unpaid overtime compensation against an employer in the Tribal Court.

10.05. *Statute of Limitations.* Any action to secure unpaid minimum wages or unpaid overtime compensation must be commenced within two years after the date on which such wages or overtime compensation should have been included in an employee's paycheck.

10.06. *Guidance.* For the purposes of interpreting and enforcing this section only, the Tribal Court may look to the FLSA and regulations thereunder as well as relevant case law for guidance, provided however that nothing in this Article shall be construed as an adoption by the Band of the FLSA, nor a waiver of sovereign immunity from suit for any claims or process under the FLSA.

10.07. *Resolution of Jurisdictional Disputes by Tribal Court.* In any case or proceeding commenced under section 10.04, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court

is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

Article XI. Occupational Health and Safety Standards

11.01. The provisions of the Occupational Safety and Health Act of 1970, Title 29 of the United States Code, sections 651 *et seq.*, as amended (OSHA), are adopted as the law of the Band and apply to all employers within the jurisdiction of the Band; provided, however, that the Band does not hereby waive its sovereign immunity from suit for any claims or process under OSHA.

11.02. In any case or proceeding commenced in the Tribal Court to enforce this Article XI, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

Article XII. Whistleblower Protection

12.01. *Purpose.* The purpose of this Article is to protect employees who report violations of law from employment discrimination.

12.02. *Definitions.* For the purposes of this Article, the following terms shall have the following meanings:

a. *Applicable law* means duly enacted tribal ordinances and regulations that apply within the jurisdiction of the Little River Band of Ottawa Indians as well as federal laws expressly made applicable to Indian tribes or to the Little River Band of Ottawa Indians

b. *Employer* means "employer" as defined in Article III, but shall also include elected officials of the Band who exercise hiring, firing, and other authority over the terms and conditions of employment for employees.

12.03. *Discrimination prohibited.* Except as otherwise provided by sections 12.04-12.07, no employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:

a. The employee, acting in good faith, or a person acting on behalf of the employee, reports, in writing, to the employer or to the Tribal Prosecutor what the employee has reasonable cause to believe is a violation of applicable law;

b. The employee, acting in good faith, or a person acting on behalf of the employee, reports, in writing, to the employer or to the Tribal Prosecutor what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual;

c. The employee is requested to participate in an investigation, hearing or inquiry held by a commission or authority of the Tribe, including the Tribal Court, as a result of making a report under subsections a or b;

d. The employee, acting in good faith, has refused to carry out a directive to engage in an activity that would be a violation of applicable law or that would expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the illegal activity or dangerous condition from the employer, provided that the request for correction is made in writing; or

e. The employee, acting in good faith and consistent with tribal and federal privacy laws, reports to the employer, to the patient involved or to the appropriate licensing, regulating or credentialing authority, in writing, what the employee has reasonable cause to believe is an act or omission that constitutes a deviation from the applicable standard of care for a patient by an employer charged with the care of that patient. For purposes of this paragraph, "employer" means a health care provider, health care practitioner or health care entity within the territorial jurisdiction of the Band.

12.04. *Initial report to employer required; exception.* Section 12.03 does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to the Tribal

Prosecutor unless the employee has first given written notice of the alleged violation, condition or practice to a person having supervisory authority within the employer and has allowed the employer a reasonable opportunity to correct the alleged violation of applicable law, condition or practice. Prior written notice to an employer is not required before reporting to the Tribal Prosecutor if the employee has specific reason to believe that a report to the employer will not result in promptly correcting the alleged violation of applicable law, condition or practice.

12.05. *Reported Activity Must Relate to the Operation of Tribal Government or Subordinate Economic Entity, or Occur within Employer Within the Jurisdiction of the Tribe.* Section 12.03 does not apply unless the reported violation involves applicable law that relates to the operation or function of the tribal government or subordinate economic entities owned by the Tribe or otherwise occurs within an employer within the Tribe's jurisdiction.

12.06. *Actual Knowledge Required.* Section 12.03 does not apply unless the reporting employee has actual knowledge of the activity being reported. This means the reporting employee must:

- a. Have witnessed the alleged unlawful activity first-hand; and/or
- b. Have access to, and possession of, tangible evidence which tends to establish or prove the alleged violation of applicable law, condition, or practice at issue.

12.07. *Written Report Required.* Except as provided by section 12.04, reports or notices of violations of applicable law, conditions or practices alleged in to be in violation of section 12.03 must be made in writing and shall include:

- a. The name of the individual making the report and their position within, or relationship to, the Tribe, subordinate economic entity or other employer at issue;
- b. The date the alleged violation of applicable law, or condition or practice at issue occurred;
- c. The factual circumstances surrounding the alleged violation of applicable law, or condition or practice at issue;
- d. Where a violation of applicable law is at issue, identification of the law alleged to have been violated;
- e. How the individual has knowledge of the alleged violation of applicable law or condition or practice; and
- f. The signature of the individual filing the report.

12.08. *Charge of Discrimination.* An employee who believes he or she has been subject to unlawful employment discrimination in violation of section 12.03 shall have all the procedural and substantive rights and remedies under Article VI, provided, however, that an elected official, who is found to have violated section 12.03 shall not be liable for any monetary award to any employee.

12.09. *Prosecutor's Duties Upon Receipt of Report.* When the Tribal Prosecutor receives a report from an employee under subsections 12.03(a) or 12.03(b), he shall proceed with an investigation as he sees fit and proceed, as he sees fit, to address with the employer such measures as would be appropriate to correct any violation of applicable law. Should the report involve an alleged crime, the Tribal Prosecutor shall inform the Chief of Police. Should the report involve a violation of a regulation of a particular Commission, the Tribal Prosecutor shall inform the Chair of the Commission.

12.10. *Employer's Duties Upon Receipt of Report.* When an employer receives a report from an employee under subsections 12.03(a) or 12.03(b), the employer shall duly investigate the allegations and, if they are warranted, establish a corrective plan, in writing, which shall state the expected time such plan will be completed. A copy of the corrective plan shall be provided to the Tribal Prosecutor.

12.11. *Failure to Implement Corrective Action Plan.* The Tribal Prosecutor shall have authority to commence an action in Tribal Court to obtain an order requiring an employer to implement a corrective action plan that has been prepared under subsection 12.09 or 12.10 or to take additional measures as the Tribal Court may find are necessary to protect the public health, safety and welfare.

Article XIII. Workplace Posters

Every employer subject to the provisions of this Code shall post a list, as directed by the Office of General Counsel, of the employee rights established by this Code. The list shall be posted in a common area of the workplace in a location that is readily visible to all employees.

Article XIV. Workers Compensation [reserved]

Article XV. Unemployment Insurance [reserved]

Article XVI. Labor Organizations and Collective Bargaining

16.01 Purpose.

The Little River Band of Ottawa Indians exercises powers of self-government over its members and territory. The Tribe has inherent authority to govern labor relations within its jurisdiction, and this includes regulating the terms and conditions under which collective bargaining may or may not occur within its territory. The Tribe's inherent authority further includes the right to protect the health, welfare, and political integrity of the Tribe from being harmed or threatened by the activities of non-members within the Tribe's territory. The purpose of this Article is to protect essential attributes of tribal self-government and the health and welfare of the members of the Tribe if labor organizations conduct operations within the jurisdiction of the Tribe.

16.02 Public Policy.

The Tribal Council declares that it is the policy of the Tribe to promote harmonious and cooperative relationships between tribal government and its employees by permitting employees within the Governmental Operations of the Band to organize and bargain collectively; to protect orderly Governmental Operations of the Band to provide for the health, safety, and welfare of the Band and its members; to prohibit and prevent all strikes by employees within the Governmental Operations of the Band; to protect the rights of employees within the jurisdiction of the Band to join or refuse to join, and to participate in or refuse to participate in, labor organizations; to protect the rights of tribal members to employment preferences; and to ensure the integrity of any labor organization doing business within the jurisdiction of the Band by requiring any such labor organization to obtain a license.

16.03 Definitions.

The definitions set forth in Article III shall not apply to this Article XVI. The following definitions apply to this Article XVI, whether the terms are stated in singular or plural form and whether the terms are capitalized or not.

Bargaining unit means a unit of employees within the Governmental Operations of the Band identified as an appropriate unit for representation pursuant to section 16.09 or such other criteria that may be recognized by resolution of the Tribal Council.

Confidential Employee means an employee of a public employer who assists or acts in a confidential capacity with respect to legal, financial, accounting or policy matters, and includes such employees who have access to information that is subject to use in contract negotiations,

the disposition of grievances, or other labor relations matters.

Fair share means an assessment to pay for the services of a labor organization with respect to negotiating and administering a collective bargaining agreement with a public employer.

Exclusive Bargaining Representative or *Exclusive Representative* means a labor organization that is lawfully elected to be the exclusive bargaining representative of a bargaining unit within the Governmental Operations of the Band,

Governmental Operations of the Band means the operations of the Little River Band of Ottawa Indian exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band's governmental services and programs, including the operation of "Class II" and "Class III" gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band's jurisdiction.

Indian Gaming Regulatory Act means 25 U.S.C. §§ 2701-2721.

Jurisdiction of the Little River Band of Ottawa Indian Tribe means the jurisdiction or governmental authority -- including legislative, judicial, and regulatory authority -- that the Band may exercise pursuant to its inherent authority as a federally recognized Indian tribe or pursuant to Congressional enactment or delegation, including all such authority over all lands now or in the future held in trust by the United States for the benefit of the Tribe acquired by or for the Tribe pursuant to 25 U.S.C. § 1300k-4(b) or such other lands upon which gaming may lawfully be conducted pursuant to the Indian Gaming Regulatory Act.

Labor organization, labor association, or labor union means any organization of employees organized for the purpose of bargaining over hours of employment, rates of pay, working conditions, grievances, or other terms or conditions of employment.

Laws of the Band or *Laws of the Tribe* means the Constitution and Tribal Code of the Little River Band of Ottawa Indians, resolutions of the Tribal Council and the Tribal Regulations of the commissions, agencies, departments, and authorities of the Little River Band of Ottawa Indians.

Little River Band of Ottawa Indians, the Band or *the Tribe* means the Little River Band of Ottawa Indians.

Little River Casino Resort means the Band's gaming enterprise, including related hotel and restaurant services, located at 2700 Orchard Highway, Manistee, Michigan, wherein the Tribe operates Class II and Class III gaming to generate governmental revenue for the Tribe pursuant to the Indian Gaming Regulatory Act.

Lock Out means any action by a public employer that prevents employees from going to work for the purpose of coercing employees to accept terms or conditions sought by a public employer in a negotiation with an exclusive bargaining representative..

Management means individuals holding supervisory and managerial positions within a public employer, who, because of their supervisory and managerial positions, do not qualify to be within a bargaining unit, and, when context so indicates, such individuals who have been delegated authority by a public employer to negotiate with an exclusive bargaining representative.

Model Band-Union Election Procedures Agreement means the model agreement referred to in Section 16.26 of this Article.

Neutral Election Official or *Election Official* means the Neutral Election Official appointed by the Tribal Council for the purpose of (a) certifying a showing of 30% or more support for union representation and (b) overseeing any union election pursuant to an agreement entered into by the Band with a labor organization that comports with the terms of the Model Band-Union Election Procedures Agreement.

Nonmember public employees means employees within a bargaining unit who are not members of a labor organization.

Public Employee means non-supervisory regular full-time and part-time (working a minimum of four hours per week) employee of a public employer, excluding all supervisory, managerial, confidential, temporary, seasonal, and casual employees.

Public Employer means a subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band.

Strike means an employee's refusal, in concerted action with other employees, to report for duty or to be willfully absent, in whole or in part, from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of employment. The terms "strike" includes boycotts of any kind designed to adversely affect a public employer. Notwithstanding the provisions of any other law, an employee within the Governmental Operations of the Band who, by concerted action with others and without the lawful approval of his or her supervisor, willfully absents himself or herself from his or her position, or abstains in whole or in part from the full, faithful and proper performance of his or her duties for the purpose of inducing, influencing or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment shall be considered to be on strike.

Subordinate Economic Organization means an economic enterprise operating within the jurisdiction of the Band, whether under a tribal or corporate charter, established by resolution or ordinance of the Tribal Council pursuant to Art. IV section 7 of the Constitution of the Little River Band of Ottawa Indians and wholly owned by the Band.

16.04 Time Calculations.

For any action that is to occur under the provisions of this Article XVI within 10 days or less, weekends, tribal, state and national holidays shall not be counted. The Neutral Election Official, mediators, fact finders, and arbitrators shall have discretion to extend the deadlines herein for matters they handle only for good cause shown by a party in advance of the deadline.

16.05 Freedom of Choice Guaranteed.

Except as otherwise provided in section 16.13, addressing fair share contributions to labor organizations by nonmember public employees, with respect to employment or the terms or conditions of employment within any public employer:

- a. The right to work must be protected and maintained free from undue restraints and coercion. The right of persons to work shall not be denied or abridged by any public employer or by any labor organization on account of membership or non-membership in any labor union, labor organization, or association.
- b. No person shall be required to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment.
- c. No person shall be required, as a condition of employment or continuation of employment to be recommended, approved, referred, or cleared by or through a labor organization.
- d. It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the public employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the public employer.
- e. No person shall be required by any public employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.
- f. It shall be unlawful for any person, labor organization, or officer, agent or member thereof, or public employer, or officer or agent thereof, by any threatened or actual intimidation of an employee or prospective employee or his parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to his property, to compel or attempt to compel such employee or prospective employee to join, affiliate with, or financially support a labor organization or to refrain from doing so, or to otherwise forfeit his rights as guaranteed by provisions of this Article. It shall be unlawful to cause or attempt to cause such employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employee.
- g. Any agreement, understanding or practice, written or oral, implied or expressed, between any labor organization and any public employer which violates the rights of employees as guaranteed by the provisions of this Article is hereby declared to be against public policy, an illegal combination or conspiracy in restraint of trade, null and void and of no legal effect. Any strike, picketing, boycott, or other action by a labor organization for the sole purpose of inducing or attempting to induce any public employer to enter into any agreement prohibited by this Article is hereby declared to be for an illegal purpose and is a violation of this Article.

16.06 Strikes Affecting the Governmental and Operations of the Band Prohibited.

(a) *Declaration and Findings.* The Governmental Operations of the Band are critical to the public health, safety, and welfare of the Tribe and its members. No employee or labor organization shall interfere with, threaten or undermine the Governmental Operations of the Band.

(b) *No Right to Strike.* Employees within the Governmental departments and agencies of the Operations of the Band, including the Little River Casino Resort, have no right to strike.

(c) *Strikes Prohibited.* Strikes, work stoppages, or slowdowns against the Governmental Operations of the Band are contrary to the health, safety and welfare of the Tribe and its members, and are

therefore prohibited. No employee or labor organization shall engage in a strike, work stoppage or slowdown with respect to any Governmental Operation of the Band. No labor organization shall cause, instigate, encourage or support an employee strike against a public employer.

16.07 Lock Outs Prohibited. A public employer shall not engage in any action constituting a lock out.

16.08 Licensing and Registration of Labor Organizations

(a) No labor organization shall engage in organizing employees working for any public employer without a license issued by the Little River Band of Ottawa Indians Gaming Commission, which shall provide as follows:

- (1) the right of such labor organization to conduct business within the Tribe's jurisdiction is a privilege, subject to the consent and regulatory authority of the Tribe;
- (2) the consent of the Tribe to allow such labor organization to conduct business within the jurisdiction of the Tribe is conditioned upon such labor organization's agreement to be subject to the laws of the Tribe and its regulatory authority, including this Code;
- (3) in consideration of the Tribe's consent to such labor organization's conduct of business within the jurisdiction of the Tribe, such labor organization agrees to (A) comply with all rules, regulations, and laws of the Tribe, (B) submit to the jurisdiction of the Tribe, including its Tribal Court, and (C) pay an annual business license fee in the amount of \$500.00;
- (4) such labor organization agrees that a license issued by the Tribe for conducting business within the territorial jurisdiction of the Tribe may be revoked by the Tribe at any time, with or without hearing, for any failure to comply with the laws of the Tribe; and
- (5) such other requirements as the Gaming Commission may require under its regulations.

(b) Subject to the requirements of subsection 16.08(a), the Gaming Commission is hereby authorized by the Tribal Council of the Little River Band of Ottawa Indians to enact such regulations as it sees fit to investigate and license any labor organization seeking to conduct business within the jurisdiction of the Tribe.

(c) Any person who intentionally makes a false statement to the Gaming Commission shall be deemed to be in violation of this Article XVI.

16.09 Appropriate Bargaining Units.

An appropriate bargaining unit of public employees may be established under the terms of an agreement entered into by the Band with a labor union that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.10 Union Elections.

An election for a labor union to become the exclusive representative of an appropriate bargaining

unit of public employees may proceed under the terms of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.11 Bargaining Unit and Election Dispute Resolution.

Disputes between management and a labor organization seeking to represent public employees with respect to (1) the appropriateness of a bargaining unit or (2) election procedures may be resolved under the terms of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.12 Duty to Bargain in Good Faith.

(a) Except as otherwise provided by this Article XVI, if a labor organization is lawfully elected to be the exclusive bargaining representative of a bargaining unit of public employees, management and the exclusive bargaining representative shall

(1) bargain in good faith on wages, hours and other terms and conditions of employment, *provided that* (A) neither management nor the exclusive representative shall be required to agree to a proposal or to make a concession and (B) management decisions to hire, to layoff, to recall, or to reorganize duties shall not constitute "other terms and conditions of employment" under this paragraph, and

(2) enter into written collective bargaining agreements covering employment relations.

(b) The obligation to bargain collectively imposed by this section shall not be construed to require management and an exclusive representative to negotiate over matters that would conflict with the provisions of any other laws of the Tribe, and in the event of a conflict between the provisions of any other laws of the Tribe and an agreement entered into by a public employer and the exclusive representative in collective bargaining, the laws of the Tribe shall prevail.

16.13 Fair Share Provisions for Nonmember Public Employees; Deauthorization of Fair share provisions; Payroll Deductions

(a) Management and the exclusive bargaining representative may bargain over fair share provisions for nonmember public employees, provided that such a provision requires:

(1) any such nonmember public employee to pay only for a fair proportion of costs of negotiating a collective bargaining agreement and contract administration;

(2) fair share contributions by all nonmember public employees in the bargaining unit, with pro-rata reductions for nonmember public employees who hold part-time positions;

(3) the exclusive bargaining representative to notify all nonmember public employees within the bargaining unit (i) that they have the right to be a nonmember, (ii) that they have the right to object to paying for labor organization activities not germane to negotiating a collective bargaining agreement or administering an agreement and to obtain a reduction in fees for such nongermane activities, (iii) of sufficient information to enable them to intelligently decide whether or not to object, (iv) about procedures for filing objections, and (v) that if a nonmember public employee objects, the labor organization must explain to such employee the basis for the calculation of the fair share charged to the employee and that the employee

has the right to challenge the calculation before an arbitrator.

(b) Subject to subsection (d), the exclusive bargaining representative's notice and procedures under subsection (a)(3) shall comply with *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and its progeny.

(c) Public employers shall have no duty to assure that a labor organization provides the notice set forth in subsection (a)(3) prior to deducting fair share amounts from a public employee paycheck if such a deduction is agreed to in a collective bargaining agreement pursuant to subsection (f).

(d) If a nonmember public employee objects to a fair share payment, and such employee and the exclusive bargaining representative cannot resolve the objection, either party shall notify the Neutral Election Official, who shall appoint an arbitrator to resolve the dispute. Such arbitrator shall have experience in public sector labor relations, shall be familiar with the issue of fair share contributions by public sector employees to labor organizations, and shall be a member of the National Academy of Arbitrators. The arbitrator shall hold such hearing and receive such evidence as the arbitrator sees fit to resolve the dispute and shall apply legal standards governing public sector labor relations, including *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and its progeny. The decision of the arbitrator shall be binding upon the employee and the labor organization. The fees and costs of the arbitrator shall be borne by the labor organization.

(e) Within 90-days after a public employer and a labor organization execute a collective bargaining agreement containing a fair share provision, one or more public employees within the bargaining unit may file with the Neutral Election Official a petition to have the fair share provision rescinded. The petition must be in writing and accompanied by a statement signed by 30% or more of the employees in the bargaining unit, stating that they wish to rescind the fair share agreement. The Neutral Election Official shall, within 5 days of receipt of such petition, determine whether the petition is properly supported and timely filed, and, if it is, he shall, within 14 days of such determination, direct a secret ballot election that comports with the mechanics for holding elections set forth in the Model Band-Union Election Procedures Agreement. If a majority of the votes cast in the election favor the fair share provision, it shall continue in effect. If there is no such majority, the Neutral Election Official shall certify deauthorization and the fair share agreement shall be deemed null and void as of the date of the petition, and the labor organization shall ensure the prompt refund of amounts withheld from nonmember employees, retroactive to the date of the petition, without interest.

(f) Payroll deduction of (i) the exclusive representative's membership dues for public employees who are members of a labor organization and (ii) fair share contributions of nonmember public employees shall be a mandatory subject of bargaining if either party chooses to negotiate the issue.

The amount of the dues and, in the case of nonmember public employees, the amount of the fair-share contributions, shall be certified in writing by an official of the labor organization and shall not include special assessments, penalties or fines of any type. A public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement and for so long as the labor organization is certified as the exclusive representative. During the time that a certification of a labor union by the Neutral Election Official is in effect for a particular appropriate bargaining unit, a public employer shall not deduct dues for any other labor organization.

16.14 Rights of Public Employees

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Public employees also have the right to refuse to join or participate in the activities of labor organizations and to represent themselves individually in their employment relations with public employers.

16.15 Unfair Labor Practices.

(a) A public employer is prohibited from:

- (1) Interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed under section 16.14.
- (2) Encouraging or discouraging membership in any labor organization by discrimination in regard to hiring, tenure, or other conditions of employment.
- (3) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the exclusive bargaining representative.
- (4) Discharging or discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided by this Article XVI.
- (5) Dominating, interfering with, or assisting in the formation, existence, or administration of, any labor organization or contributing financial support to such an organization.
- (6) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the exclusive bargaining representative or the employee involved.

(b) A labor organization or anyone acting in its behalf or its officers, representatives, agents, or members are prohibited from:

- (1) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this Article XVI or interfering with, restraining, or coercing management by reason of its performance of duties or other activities undertaken in the interests of the Governmental Operations of the Band.
- (2) Causing or attempting to cause a public employer to discriminate against a public employee because of the employee's membership or nonmembership in a labor organization or attempting to cause a public employer to violate any of the provisions of this Article XVI.
- (3) Refusing to bargain collectively or failing to bargain collectively in good faith with management.

(4) Discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided for in this Article XVI.

(5) Participating in a strike against the Governmental Operations of the Band by instigating or supporting, in any positive manner, a strike. Any violation of this paragraph shall subject the violator to the civil penalties provided in this Article XVI.

(c) Notwithstanding the provisions of subsections (a) and (b), the parties' shall have the right to voice their views consistent with the protections afforded by the Tribe's Constitution, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair labor practice or of any other violation of this Article XVI, if such expression contains no promise of benefits or threat of reprisal or force.

16.16 Resolution of Charges of Unfair Labor Practices; Breach of Duty of Fair Representation

(a) *Charges Involving Management or an Exclusive Representative*

(1) Charges, Notice, Good Faith Effort to Reach Early Resolution

(A) Should either management or an exclusive representative become aware of perceived conduct constituting an unfair labor practice, it shall notify the other party, in writing (which shall be transmitted electronically or by telecopier as well as via hard copy), of the charge and the alleged factual basis for the charge. The recipient party shall respond in writing (which shall be transmitted electronically or by telecopier as well as via hard copy), within 10 days of receipt of such written allegations. Management and the exclusive bargaining representative shall then make a good faith effort to resolve the alleged violation. This good faith effort shall include each party providing the other with unprivileged information relevant to the charge upon request.

(B) If such good faith efforts do not result in resolution of the charge, the objecting party may proceed to request arbitration.

(2) Arbitration

(A) If a claim is not resolved under subsection (a), charges of violations of unfair labor practices, including the duty to bargain in good faith, provided by this Article XVI shall, within 15 days of the receipt by either party of a written demand for arbitration (or such later time as the arbitrator may promptly schedule a hearing) be brought before an arbitrator, mutually agreed to by the exclusive bargaining representative and the public employer. If the parties are unable to agree upon an arbitrator, they shall use the American Arbitration Association (AAA) labor arbitrator selection procedure, provided that any arbitrator selected through the AAA labor arbitrator selection procedure shall be a member of the National Academy of Arbitrators.

(B) The selected arbitrator shall apply the law of the Band to resolve the charge, but in the absence of such law, the arbitrator shall apply persuasive authority

governing public sector labor relations.

- (C) The arbitrator's decision shall be in writing and mailed to the parties, return receipt requested within 30 days of the completion of arbitration. Except as provided by subsection (3), the arbitrator's decision shall be final and binding upon the parties.
- (D) Unless otherwise agreed to in writing by the public employer and the exclusive bargaining representative, if the arbitrator's decision is in favor of the public employer on every issue, the exclusive bargaining representative shall pay the fee of the arbitrator and if the arbitrator's decision is in favor of the exclusive bargaining representative on every issue, the public employer shall pay the fee of the arbitrator. Otherwise, the arbitrator shall allocate the cost of the arbitrator's services between the parties in accordance with the issues on which they have prevailed or not prevailed, and they shall pay their respective share of the arbitrator's fee in accordance with the arbitrator's decision.

(3) Judicial Review

- (A) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review of the arbitrator's decision to the Tribal Court for resolution by that member or the Tribal Court who is licensed to practice law.
- (B) In any such review, the Tribal Court shall be limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.
- (C) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.
- (D) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

(4) Time Limits

No unfair labor practice charge shall proceed to Arbitration or Judicial review under section 16.16(a) unless a demand is made under subsection 16.16(a)(2)(A) no later than 180 days after the alleged action constituting the alleged unfair labor practice.

(b) *Charges of Discrimination by Public Employees*

A public employee who believes he or she has been subjected to unlawful discrimination in violation of section 16.15(a)(4) or section 16.15(b)(4) may proceed to seek relief for such

discrimination under the procedures and remedies provided by Article VI, provided, however, that (i) damages under 6.05(b) may not be awarded, (ii) in the event that the Charge is against a labor organization, the labor organization shall be treated in the same manner as an employer, subject to a Charge of Discrimination under Article VI, and (iii) no complaint may be filed in the Tribal Court unless a Charge of Discrimination has first been filed within 180 days of the asserted violation of section 16.15(a)(4) or section 16.15(b)(4).

(c) *Claims for Breach of Duty of Fair Representation*

(1) *Action in Tribal Court*

A public employee within a bargaining unit, who claims that an exclusive bargaining representative has breached its duty of fair representation, may bring an action in the Tribal Court, no later than 180 days after the alleged breach, against the exclusive bargaining representative.

(2) *Remedies*

If the Tribal Court finds that an exclusive bargaining representative has breached its duty of fair representation to a public employee, the Court shall award the employee such relief as will make the employee whole.

16.17 Resolution of Bargaining Impasse

(a) *Agreement to Resolve Negotiation Impasse.*

As the first step in the performance of their duty to bargain, management and the exclusive bargaining representative shall endeavor to agree upon impasse procedures. Such procedures shall define the conditions under which an impasse exists. Any such agreement with respect to the resolution of impasse issues shall not conflict with the provisions of this section.

(b) *Subjects Not Within Procedures for Resolving Bargaining Impasse.*

Nonmandatory subjects of bargaining shall not be subject to the impasse procedures of this section. Unless mutually agreed to by the parties, the impasse procedures of this section shall not be invoked during the pendency of any charge regarding the required scope of good faith bargaining under section 16.12.

(c) *Mediation and Fact Finding.*

(1) *Mediation.* Following the commencement of negotiations, if management and the exclusive bargaining representative reach an impasse, and they do not otherwise agree to proceed directly to fact finding, they shall jointly retain a mediator to assist them in resolving the impasse issues. In the absence of an agreement on the mediator, either party may request the Election Official to appoint a mediator, and the Election Official's appointment of such mediator shall be binding on the parties. It shall be the function of the mediator to bring the parties together to effectuate a settlement of the dispute, but the mediator may not compel the parties to agree. Any appointed mediator shall be experienced in labor mediation, and shall be drawn from lists of such mediators maintained by the American Arbitration Association.

(2) *Fact Finding and Recommendation.* If the parties agree to proceed directly to fact finding in substitute for mediation or, if mediation under subsection (c)(1) does not result in an agreement on all impasse issues within 21 days of the appointment of the mediator, the parties shall jointly retain a fact finder. In the absence of an agreement on the fact finder, either party may request the Election Official to appoint a fact finder, and the Election Official's appointment of such fact finder shall be binding on the parties. The appointed fact finder shall be experienced in public sector labor relations, shall be drawn from lists of similar fact finders maintained by the American Arbitration Association, and shall be a member of the National Academy of Arbitrators.

Within 5 days of the appointment of the fact finder, the parties shall file with the fact finder a joint list of the issues as to which an impasse has been reached, provided that if such filing is not made jointly, each party shall file a list and serve a copy of the filing on the other party.

The fact finder shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the fact finder that is convenient to the parties. The fact finder may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The fact finder may request briefs, stipulations, or other written submissions from the parties to aid in reaching findings and recommendations. The fact finder shall make written findings of facts and recommendations for resolution of each dispute not later than 15 days from the close of hearing, and shall serve, by certified mail, return receipt requested, such findings upon the public employer, the exclusive bargaining representative, and the Election Official. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party.

Management and the exclusive bargaining representative shall immediately agree to accept the fact finder's recommendations or, commence further negotiations in a good faith effort to reach agreement. If, upon the expiration of 20 days after the Election Official's receipt of the fact finder's recommendations, the parties fail to jointly inform the Election Official that they have fully resolved all impasse issues, the Election Official shall make the fact finder's findings and recommendations public to the membership of the Tribe by arranging for publication on the Tribe's website, in the Tribe's newsletter to members, or both

(d) *Binding Arbitration.*

If the parties fail to resolve their disputes within 30 days of receipt of the fact finder's findings and recommendations, they may mutually agree in writing to proceed to binding arbitration. Absent agreement, either party may request that the impasse issues proceed to resolution by binding arbitration, and such request shall be served upon the other party, in writing, return receipt requested.

Within 10 days of the parties' written agreement or the receipt by one party of a request for binding arbitration, the parties shall jointly select an arbitrator, who shall not be the same individual who served as the fact finder. If the parties fail to agree on an arbitrator within the 10

day period, the selection shall be made using the procedures under the voluntary labor arbitration rules of the American Arbitration Association. Any arbitrator shall be drawn from lists of such arbitrators maintained by the American Arbitration Association, and shall be a member of the National Academy of Arbitrators.

The submission of the impasse items to the arbitrator shall be limited to those issues that had been considered by the fact finder and upon which the parties have not reached agreement. Within 10 days of the appointment of the arbitrator, management and the exclusive bargaining representative shall each submit to the arbitrator their respective recommendations for settling the dispute on each unresolved issue, the draft collective bargaining agreement to the extent that agreement has been reached, and the fact finder's findings of fact and recommendations.

The arbitrator shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the arbitrator that is convenient to the parties. The arbitrator may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The arbitrator shall issue a decision on each issue remaining at impasse not later than 30 days from the day of appointment. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party. The parties may continue to negotiate all offers until an agreement is reached or a decision is rendered by the arbitrator.

The arbitrator shall consider, in addition to any other relevant factors, the following factors:

- (1) Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.
- (2) Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

The arbitrator shall select the most reasonable offer of the parties' respective final offers on each impasse item or the recommendations of the fact finder on each impasse item. The arbitrator shall provide a written summary of the selected provisions and agreed-upon provisions to each party and to the Election Official, return receipt requested.

Said selections of the arbitrator, together with the items already agreed upon by the management and the exclusive bargaining representative shall be deemed to be the collective bargaining agreement between the parties, provided, however, that, subject to subsection (e), provisions related to the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions shall not be binding upon the parties.

- (e) *Limited Review by Tribal Council of Economic Terms Recommended by Arbitrator Upon Rejection by Public Employer.*

If a public employer rejects an arbitrator's decision issued under section 16.17(d) regarding the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement

contributions, it shall so inform (i) the exclusive bargaining representative and (ii) the Tribal Council Speaker, in writing, within five (5) days of receipt of the arbitrator's decision.

Thereafter, the Tribal Council Recorder shall schedule a closed session meeting of the Tribal Council at which the public employer shall appear and show cause for why it has rejected the arbitrator's decision regarding its obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions. If the public employer is the Little River Casino Resort, any member of the Tribal Council that may have served on the Board of Directors of the Resort during the time that decisions were made about the Resort's bargaining position on any impasse issue addressed by an arbitrator's decision under section 16.17(d) shall abstain from voting and deliberating in accordance with the Tribe's Constitution and applicable law.

In advance of the Tribal Council meeting, the public employer shall submit to the Tribal Council the decision of the arbitrator, together with a written statement setting forth the reasons for its rejection of the decision, and it shall, at the same time, mail a copy of said written statement to the exclusive bargaining representative. In advance of the Tribal Council meeting, the exclusive bargaining representative shall be given the opportunity to submit a written statement setting forth the reasons why the Arbitrator's decision is appropriate and, upon submission of such a written statement to the Tribal Council, the exclusive bargaining representative shall mail a copy to the public employer.

At the scheduled meeting of the Tribal Council, both the public employer and the exclusive bargaining representative shall have the opportunity to be heard.

The Tribal Council shall decide only whether (a) the public employer's final offer regarding any impasse over wages, salaries, bonuses, insurance, pension or retirement shall become part of the parties' collective bargaining agreement or (b) the arbitrator's decision on any such impasse issue shall become part of the parties' collective bargaining agreement.

(f) *Costs of Impasse Resolution Proceedings*

Unless otherwise agreed to in writing, the public employer and the exclusive bargaining representative shall share equally all fees and costs of mediation, neutral arbitration, and binding arbitration provided for by this section.

(g) *Status of Terms and Conditions of Employment Pending Impasse Resolution*

At all times when an impasse remains unresolved, the status quo regarding wages and working conditions shall remain in effect even if a prior collective bargaining agreement governing the bargaining unit has expired. In such event, the status quo or the terms of any prior collective bargaining agreement shall continue in force and effect, until a new agreement shall be executed; provided, however, that for the purposes of this paragraph, the status quo, or continuing terms, shall not include fair share provisions, or increases to wages, increases in employer contributions to insurance, or increases in employer contributions to pensions.

(h) *Judicial Review*

- (1) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review

of the arbitrator's decision to the Tribal Court for resolution by that member or the Tribal Court who is licensed to practice law.

- (2) In any such review, the Tribal Court shall be limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.
- (3) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.
- (4) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

16.18 Duration of Collective Bargaining Agreements for Public Employees.

Collective bargaining agreements entered into by the public employer and an exclusive bargaining representative shall have terms of three years or less.

16.19 Decertification of Exclusive Representative.

(a) A member of a labor organization or the labor organization itself may initiate decertification of a labor organization as the exclusive representative of a bargaining unit if thirty percent (30%) of the public employees in the bargaining unit make a written request to the Neutral Election Official for a decertification election. Decertification elections may be held in a manner prescribed by the Neutral Election Official so long as they are in accord with the mechanics for holding elections set forth in the Model Band-Union Election Procedures Agreement. A decertification election shall only be valid if forty percent (40%) of the eligible employees in the bargaining unit vote in the election.

(b) When there is a collective bargaining agreement in effect, a request for a decertification election shall be made to the Neutral Election Official no earlier than 120 days and no later than 90 days before the expiration of the collective bargaining agreement.

(c) When, within the time period prescribed in subsection (b) of this section, a competing labor organization files a petition containing signatures of at least thirty percent (30%) of the public employees in the appropriate bargaining unit pursuant to an agreement entered into by the Band with such labor organization that comports with the terms of the Model Band-Union Elections Procedures Agreement, a representation election, rather than a decertification election, shall be conducted in accordance with the election procedures of such agreement.

(d) When an exclusive representative has been certified but no collective bargaining agreement is in effect, the Neutral Election Official shall not accept a request for a decertification election earlier than twelve months subsequent to a labor organization's certification as the exclusive representative

16.20 Policies of Public Employers Addressing Abuse of Alcohol and Drugs Not Subject to Collective Bargaining.

- (a) *Declaration and Findings.* The abuse of alcohol and both legal and illegal drugs within

the public employers harms the health, safety and welfare of the Band and its members. Tribal communities, including that of the Band, are particularly vulnerable to drug and alcohol abuse, and the regulation of such abuse within public employers is critical to the health, safety, and welfare of the Band and its members.

(b) *Prohibition of Collective Bargaining Affecting Alcohol and Drug Testing Policies.* Public employers shall have the right to address the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Band, and such policies shall not be subject to bargaining with any labor organization.

16.21 Conflicts Between the Laws of the Band and Band-Union Election Procedures Agreement.

In the event of a conflict between any law of the Band and the provisions of the Model Band-Union Election Procedures Agreement or the provisions of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement, the laws of the Band shall control.

16.22 Conflicts Between Collective Bargaining Agreements and Personnel Policies.

Except as provided by 16.20, in the event of a conflict between the personnel policies or procedures of a public employer and the provisions of a collective bargaining agreement entered into by a public employer and a labor organization, the latter shall control.

16.23 Conflicts Between Collective Bargaining Agreements and Individual Contracts.

In the event of a conflict between the provisions of a collective bargaining agreement entered into by a public employer and a labor organization and the provisions of an individual contract of an employee within a bargaining unit, the terms of the collective bargaining agreement shall control.

16.24 Enforcement.

(a) *Strikes: Civil Actions, Penalties, Decertification and Exclusion* Any public employee or labor organization, and any employee or agent of any labor organization, that violates, or seeks to violate, the prohibition against strikes set forth in section 16.06 of Article XVI shall be subject to a civil action by the affected public employer for declaratory and injunctive relief in the Little River Band of Ottawa Indians Tribal Court. Upon a finding of any such violation by a labor organization or any person acting on behalf of a labor organization, the Court may impose a civil fine against the labor organization, not to exceed \$5,000 for each violation. Upon a finding of any such violation by a public employee, the Court may impose a civil fine against the employee not to exceed \$1,000 for each and the employer of such public employee shall have the right to suspend or terminate the employment of such public employee. Any labor organization found by the Tribal Court to be in violation of the prohibition against strikes shall be deemed decertified from representing any public employees and shall further be deemed not legally entitled to be present on tribal lands and subject to exclusion on a temporary or permanent basis.

(b) *Lock Outs: Civil Actions.* A public employee or labor organization shall have the right to seek declaratory and injunctive relief in the Little River Band of Ottawa Tribal Court against public employers to enforce the prohibition against lock outs set forth in Section 16.07 of this Article XVI.

Upon a finding by the Tribal Court that a public employer has violated section 16.07, the Tribal Court may award such employee or labor organization attorney fees and costs.

(c) *Licenses: Civil Actions, Penalties, Exclusions.* Any labor organization that (1) engages in activities that require a license under this Article XVI without such a license or (2) violates the terms of a license issued by the Gaming Commission in accordance with this Article XVI shall be subject to an action in the Tribal Court by the Gaming Commission or by the Band, through its General Counsel, for declaratory and injunctive relief. Any labor organization found by the Tribal Court to have violated the licensing requirements of this Article XVI or the terms of a license shall be subject to such civil penalty, not to exceed \$5,000. Any labor organization found by the Tribal Court to be in violation the licensing requirements of this Article XVI or the terms of a license issued by the Gaming Commission shall be deemed not legally entitled to be present on tribal lands and subject to exclusion on a temporary or permanent basis.

(d) *Other Tribal Court Declaratory Authority.*

(1) Unresolved disputes between management and an exclusive bargaining representative over the duty to bargain in good faith, involving a controversy over whether a subject conflicts with the laws of the Tribe, may be brought by either party (or by the affected public employer or labor organization) to the Tribal Court for resolution by that member of the Tribal Court who is licensed to practice law by declaratory judgment.

(2) Unresolved disputes regarding an alleged conflict between a provision of a collective bargaining agreement and the laws of Tribe may brought by a party with standing (including the affected public employer or labor organization, an affected public employee, the Gaming Commission, the Tribal Council, or the Ogema) to the Tribal Court for resolution by that member of the Court who is licensed to practice law by declaratory judgment.

(3) Should the Tribal Court find that a party's request for declaratory judgment under subsection d(1) or d(2) of this section is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the action.

(4) A decision of the Tribal Court under subsection d(1) or d(2) of this section shall be final, and there shall be no right of appeal to the Court of Appeals.

16.25 Resolution of Jurisdictional Disputes.

In any case or proceeding commenced under this Article XVI, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

16.26 Limited Waiver of Sovereign Immunity.

The waiver of sovereign immunity set forth in Article II, Sec. 2.06 is of no effect with respect to this Article XVI. With respect to this Article XVI, the Tribe hereby waives the sovereign immunity of public employers solely for (1) actions for declaratory and injunctive relief and attorney fees and costs under subsection 16.24(b) and 16.24(d); (2) actions for judicial review and for the specific remedies and sanctions provided for by subsections 16.16(a), 16.16(b), and 16.17(g); and (3) actions in the Little River Band Tribal Court to enforce a collective bargaining agreement.

16.27 Model Band-Union Election Procedures Agreement.

The Tribal Council has adopted, by Resolution Number 08-1015-350, a Model Band-Union Election Procedures Agreement, which may form the basis for future election procedures for a labor organization seeking to represent a bargaining unit within a public employer. The Tribal Council Executive Assistant shall provide a copy of the Model Band-Union Election Procedures Agreement upon written request of any person, organization or entity.

Article XVII. Integrity of Fair Employment Practices Code.

17.1 Findings

(a) The Little River Band of Ottawa Indians has enacted and implemented this Fair Employment Practices Code pursuant to its inherent sovereign authority, confirmed by the decisions of the United States Supreme Court, and pursuant to the Band's Constitution, which has been approved by the United States Secretary of the Interior in accordance with Congress's Act to Restore the Little River Band of Ottawa Indians, 25 U.S.C. §§ 1300k-1300k-7 and the Indian Reorganization Act, 25 U.S.C. § 476.

(b) In providing for procedures, rights, and remedies for employers, employees, and labor organizations under this Code, including those afforded through actions in the Little River Band of Ottawa Indians Tribal Court, the Tribal Council has carefully considered (and continues to consider) the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake. This has included careful consideration of, amongst other things, (i) the time, costs, and inconvenience of parties and witnesses involved in proceedings to resolve controversies or to establish rights and remedies under this Code; (ii) the need to protect the governmental operations of the Band from undue burdens from litigation, while according fair treatment to employees within those operations; and (iii) methods to resolve disputes through early settlement, including mediation.

(c) The integrity of this Code is threatened if parties bypass the procedures, rights, and remedies established herein and seek, instead, to invoke procedures or remedies outside of this Code for controversies that this Code is designed to address and resolve in accordance with the unique public policies of the Band. Investigations or proceedings directed at employers, apart from those provided for by this Code, which seek to address controversies or rights covered by this Code, require the expenditure of time and resources to the detriment of those involved and, in many instances, to the governmental operations of the Band. Such investigations or proceedings also threaten duplicative witness testimony and production of documents already available, or undertaken, pursuant to the provisions of this Code.

17.2 Purpose

The purpose of this Article is to protect the integrity of the procedures, rights, and remedies established by this Code as described in the foregoing findings.

17.3 Definitions

As used in this Article, the following terms have the following meanings:

- (a) Employee means any employee of an employer.
- (b) Employer means any "employer," as defined in section 3.06 and any "public employer" as defined in section 16.03, and any agent, officer, or representative of such employer.

17.4 Prohibition of Employer Testimony and Documents Disclosure in External Proceedings When Employees Fail to Exhaust Tribal Remedies

- (a) *Disclosures only with approval of Tribal Council.* Except with the express, written approval of the Tribal Council, employers are prohibited from giving testimony or witness statements of any kind or producing documents or other information of any kind in response to requests or subpoenas issued by outside authorities, other than those authorities expressly granted powers under this Code, engaged in investigations or proceedings on behalf of current or former employees, when such employees have failed to exhaust their remedies under this Code.
- (b) *Examples of failure to exhaust remedies.* For the purposes of subsection 17.4(a), employees shall be deemed to have "failed to exhaust their remedies under this Code" if they have failed to exhaust the procedures, rights, remedies, and appeals (including opportunities to challenge jurisdiction) available under this Code or the procedures of the Little River Band of Ottawa Indians Tribal Court, and have, instead, invoked investigations or proceedings outside of those authorized by this Code to (i) address controversies or rights covered by this Code, such as discrimination (see Article VI), family medical leave (see Article VIII), minimum wages (see Article X), whistleblower protection (see Article XII), and unfair labor practices (see Article XVI, section 16.15) or (ii) challenge the assertion of jurisdiction under this Code.

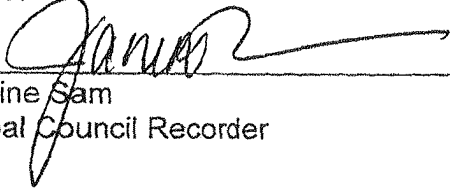
17.5 Actions for Injunctive Relief to Prevent Disclosures.

The Little River Band of Ottawa Indians Tribal Court shall have authority to grant preliminary and permanent injunctions to prevent employer disclosures in violation of section 17.4, and the sovereign immunity of employers imbued with sovereign immunity from such actions is hereby waived.

17.6 Use of Reports of Fair Employment Practice Investigators.

Reports of Investigators prepared pursuant to sections 6.01-6.02 may be submitted in any proceedings or controversies related to an employee's failure to exhaust remedies under this Code as described in subsection 17.4(b), provided, however, that such reports shall remain subject to section 6.03(b) regarding their admissibility in Tribal Court for the purposes proving or disproving the merits of Charges of Discrimination filed under section 6.02.

I, Janine Sam, Tribal Council Recorder, do hereby certify that this is a true and correct copy of the Fair Employment Practices Code adopted by the Tribal Council on July 28, 2010.



Janine Sam
Tribal Council Recorder

[Seal]

Exhibit B

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Little River Band of Ottawa)	
Indians Tribal Government,)	
)	
Petitioner)	Case No. 13-1464
)	
v.)	
)	
National Labor Relations Board,)	
)	
Respondent)	

**AFFIDAVIT OF ROSE LUDDEN IN SUPPORT OF THE MOTION OF
PETITIONER, THE LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT, TO EXPEDITE APPEAL**

Now comes Rose Ludden, who deposes and states, under oath, as follows:

1. My name is Rose Ludden. I am an enrolled member of the Little River Band of Ottawa Indians (the “Band”) and serve as Chairman of the Band’s Gaming Enterprise Board of Directors (the “Board”).
2. I provide this affidavit in support of the motion of the Band to expedite the appeal in this matter, and I have personal knowledge of the facts set forth herein.
3. The Little River Band of Ottawa Indians is a federally recognized sovereign Indian Nation, which exercises governmental authority within its current reservation on the eastern shores of Lake Michigan in and around Manistee, Michigan.
4. The Board oversees the operations of the Band’s gaming facility, the Little River Casino Resort (“LRCR”), which operates pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”), to raise governmental revenues to support the Band’s governmental services to its members.
5. LRCR is governed by IGRA; a government-to-government compact entered into with the State of Michigan pursuant to IGRA; and the laws of the Band set forth in its Tribal Code, including the Band’s Fair Employment Practices Code (“FEP Code”) and its Gaming Ordinance, which has been approved by the National Indian Gaming Commission pursuant to IGRA.

6. The Band's Tribal Code is available at <https://www.lrboi-nsn.gov/index.php/government/tribal-code>,
7. Pursuant to the authority conferred to the Board under the laws of the Band, the Board is required to follow the laws and compact provisions described in paragraphs 5 and 6, including Article XVI of the FEP Code.
8. Since 2008, LRCR's managers and representatives of the United Steel Workers ("USW") have engaged in bargaining unit elections, collective bargaining, the resolution of bargaining impasses, the resolution of alleged unfair labor practices, and other activities related to and concerning the rights of employees to organize, join unions, and engage in collective bargaining, all in accordance with Article XVI of the Band's FEP Code.
9. In total, there have been bargaining agent elections for six bargaining units of employees at LRCR. Three have resulted in elections for the USW, and, as a result, LRCR has entered into three collective bargaining agreements ("CBAs") with the USW as the exclusive bargaining representative LRCR employees. The first expired on December 20, 2012, the second expired on April 30, 2013, and the third remains in effect, expiring on October 24, 2014.
10. With respect to the first CBA that expired on December 19, 2012, the LRCR and USW have been involved in a decertification election; the resolution, through arbitration, of objections to that election; and a subsequent vote by the members of the bargaining unit, held on April 11, 2013, in which the USW prevailed. As a result, new negotiations are underway for a successor CBA for the affected bargaining unit at the LRCR.
11. With respect to the second CBA that expired on April 30, 2013, negotiations are now underway for a successor CBA.
12. All of the bargaining unit elections, resolution of election disputes, negotiation of CBAs, and the resolution of disputes and bargaining impasses surrounding negotiations described in paragraphs 8-10, and the ongoing administration of all aspects of labor relations and collective bargaining at LRCR have proceeded, and continue to proceed, in accordance with, and in reliance upon, Article XVI of the Band's FEP Code.

Dated: 5-3-13

/s/ Rose Ludden
Rose Ludden

Personally appeared the above-named, Rose Ludden, who stated, under oath, that the foregoing facts are true, upon her personal knowledge, before me,

Dated: 5-3-13

/s/ Rebecca J. Lenz
Notary Public
Rebecca J. Lenz
My Commission Expires May 20, 2015

Exhibit C

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER**DO NOT WRITE IN THIS SPACE**

Case

GR-7-CA-51156

Date Filed

March 28, 2008

INSTRUCTIONS:

File an original together with four copies and a copy for each additional charged party named in Item 1 with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Little River Band of Ottawa Indians Tribal Government		b. Number of workers employed 500
c. Address (Street, city, state, and ZIP code) 375 River Street Manistee, MI 49660	d. Employer Representative Don Koons, Speaker	e. Telephone No. 231-398-6845 Fax No. 231-398-0675
f. Type of Establishment (factory, mine, wholesaler, etc.) Entertainment	g. Identify principal product or service Casino	
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (11) subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since on or about January 1, 2008, and prior thereto the respondent the Little River Band of Ottawa Indians Tribal Government has promulgated the Constitution of the Little River Band of Ottawa Indians which on its face preempts the National Labor Relations Act jurisdiction. Said Constitution of the Little River Band of Ottawa Indians among it articles reserves authority to govern labor relations including but not limited to regulating terms and conditions under which collective bargaining agreements may or may not occur. The Constitution of the Little River Band of Ottawa Indians among other illegal articles denies employees the right to strike. By this and other conduct the respondent has intimidated employees and utilized the Constitution of the Little River Band of Ottawa Indians as a means to deny employees the right to organize as protected by Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
General Teamsters Local No. 406

4a. Address (Street and number, city, state, and ZIP code) 877 Robinwood Court Traverse City, Michigan 49686	4b. Telephone No. 231-947-0461 Fax No. 231-947-6319
--	--

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

International Brotherhood of Teamsters

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By <u>Zeel D. D. D.</u> (signature of representative or person making charge)	Local 406 Attorney (Print type name and title or office, if any)
4891 Cascade Rd., S.E., Grand Rapids, MI 49546 Address	(fax) 616-940-1942 616-940-1911 (Telephone No.)
	3 28 2008 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit D

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT

Respondent

and

CASE 7-CA-51156

LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Union

COMPLAINT AND NOTICE OF HEARING

The Charging Union has charged that Respondent has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Section 151 et seq. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Charging Union on March 28, 2008, and a copy was served by regular mail on Respondent on the same date.
2. At all material times, Respondent has owned, operated, and managed a hotel, restaurant, entertainment and gaming complex known as the Little River Casino Resort in Manistee, Michigan.
3. During calendar year 2009, a representative period, Respondent, in the course and conduct of its business operations described in paragraph 2, derived gross revenues in excess of \$500,000, and purchased and received goods and supplies at its Manistee, Michigan place of business valued in excess of \$50,000 directly from suppliers located outside the State of Michigan.
4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5. At all material times, the Charging Union has been a labor organization within the meaning of Section 2(5) of the Act.

6. Since its original adoption on November 2, 2005, and as amended, most recently on about July 28, 2010, Respondent has maintained and published a "Fair Employment Practices Code", herein called the FEP Code, which is also known as Ordinance No. 05-600-03, that contains Article XVI, "Labor Organizations and Collective Bargaining," and Article XVII, "Integrity of Fair Employment Practices Code," copies of which are attached hereto as Exhibit 1.

7. Respondent's FEP Code affects and governs terms and conditions of employment of its employees employed at its Little River Casino Resort in Manistee, Michigan, and their rights to organize and bargain collectively.

8. Respondent's FEP Code interferes with, restrains, and coerces employees in the exercise of their rights guaranteed in Section 7 of the Act by the following provisions:

(a). Section 16.01 grants Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur, thereby preempting application of the Act and interfering with access to the Board's processes.

(b). Section 16.02 prohibits all strikes by Respondent's employees and requires any labor organization doing business within Respondent's jurisdiction to obtain a license from Respondent.

(c). Section 16.06(a) prohibits employees and labor organizations from interfering with governmental operations of Respondent, including its Little River Casino Resort, and thereby prohibits or restricts lawful protected concerted activities.

(d). Sections 16.06(b) and (c) prohibit strikes by Respondent's employees.

(e). Section 16.08 requires labor organizations to obtain a license from Respondent to organize employees or conduct other business within Respondent's jurisdiction, including its Little River Casino Resort.

(f). Section 16.12(a)(1)(B) precludes collective bargaining over Respondent's decisions to hire, to lay off, to recall, or to reorganize duties of its employees.

(g). Section 16.12(b) precludes collective bargaining over any subjects in conflict with provisions of Respondent's tribal laws, thereby unlawfully asserting Respondent's supremacy over bargaining rights and obligations established by the Act.

(h). Section 16.13(e) limits the period of time that employees may file a deauthorization petition to the first three months of a contract, thereby interfering with their right under Section 9(e) of the Act to file such a petition during the entire term of the contract.

(i). Section 16.15(b)(1) prohibits labor organizations from calling for any action that interferes with Respondent's business operations, thereby prohibiting lawful strikes and other protected concerted activities of employees.

(j). Section 16.15(b)(5) prohibits labor organizations and employees from participating in, or instigating, or supporting a strike, and it subjects them to civil penalties for strike activity.

(k). Section 16.16 precludes review of arbitration decisions and awards by the Board and the courts, and it requires labor organizations to notify Respondent, in writing, of any alleged unfair labor practice and to attempt to resolve the dispute before resorting to any outside forum, thereby imposing an unlawful exhaustion requirement before seeking access to the Board's processes.

(l). Section 16.17 permits contractual interest arbitration but precludes review of any allegedly unlawful award by the Board or the courts.

(m). Section 16.18 mandates that collective-bargaining agreements have terms of three years or less, thereby unlawfully restricting bargaining over a mandatory subject.

(n). Section 16.20 excludes alcohol and drug abuse policies from collective bargaining, thereby unlawfully prohibiting bargaining over a mandatory subject.

(o). Sections 16.24(a) and (c) unlawfully subject labor organizations and employees to civil fines and injunctive relief for violating the strike prohibitions and union licensing requirements of Article XVI of Respondent's FEP Code.

(p). Section 16.24(d) provides that decisions by Respondent, through its Tribal Court, over disputes involving the duty to bargain in good faith or alleged conflicts between a collective-bargaining agreement and tribal laws shall be final and not subject to appeal, thereby unlawfully limiting access to the Board's processes.

(q). Section 17.1(c) discourages labor organizations and employees from invoking procedures or remedies outside of the FEP Code, thereby unlawfully interfering with access to the Board's processes and reasserting Respondent's authority to regulate collective bargaining and to preempt application of the Act.

9. By the conduct described in paragraphs 6, 7, and 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

10. The described unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, it is prayed that Respondent be ordered to:

1. Cease and desist from engaging in the conduct described in paragraphs 6, 7, and 8, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

- (a). Rescind the provisions of Respondent's FEP Code described in paragraph 8.
- (b). Post appropriate notices.
- (c). Post appropriate notices, and contemporaneously post and maintain a signed and legible copy of the notice on Respondent's web site, on a page made accessible to all employees.

The Acting General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before December 27, 2010, or postmarked on or before December 26, 2010**. Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on the **E-Gov tab**, select **E-Filing** and then follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification for the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Sections 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer needs to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **February 2, 2011, at 10:00 a.m.** and on consecutive days thereafter until concluded, at the National Labor Relations Board located at Gerald R. Ford Federal Building, 110 Michigan Street, N.W., Room 299, Grand Rapids, Michigan, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Detroit, Michigan, this 10th day of December 2010.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director

National Labor Relations Board

Seventh Region, Room 300

Patrick V. McNamara Federal Building

477 Michigan Avenue

Detroit, Michigan 48226

Attachments

FAIR EMPLOYMENT PRACTICES CODE
Ordinance # 05-600-03

Article I. Purpose; Findings

1.01. *Declaration and Policy.* As a sovereign Indian tribe, the Little River Band of Ottawa Indians has inherent authority to govern employment relations within its jurisdiction. It is the public policy of the Band to:

- a. ensure that members of the Band and other Indians gain and maintain employment opportunities within the Band's jurisdiction;
- b. prevent and remedy any discrimination in employment (other than to promote the employment of Band members and other Indians) on the basis of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; and
- c. ensure that employees within the jurisdiction of the Band work in safe conditions, receive fair compensation, and otherwise have fair terms and conditions of employment.

1.02. *Purposes.* The purpose of this Code is to:

- a. prevent and remedy discrimination in employment, unless in furtherance of Indian employment preferences, on the basis of sex, race, color, national origin, religion, age, disability, veteran, marital status, or sexual orientation; and
- b. establish standards for fair and safe working conditions.

1.03. *Findings.* The Tribal Council of the Little River Band of Ottawa Indians finds that:

- a. the Constitution of the Little River Band of Ottawa Indians delegates to the Tribal Council the responsibility to "...exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances and adoption of resolutions not inconsistent with this Constitution:

- 1. to govern the conduct of members of the Little River Band and other persons within its jurisdiction;
- 2. to promote, protect and provide for public health, peace, morals, education and general welfare of the Little River Band and its members[.]” *Article IV, Section 7(a).*

Article II. Adoption; Amendment; Repeal; Severability

2.01. *Adoption.* This Ordinance is adopted by Tribal Council resolution # 05-1102-564.

2.02. *Amendment.* This Ordinance may be amended in accordance with the procedures set forth in the Administrative Procedures Act - Ordinances. An emergency amendment to add Article XVI, Labor Organizations and Collective Bargaining was adopted by Resolution # 07-0620-334. Permanent adoption to add Article XVI Labor Organizations and Collective Bargaining was adopted by Resolution # 07-0801-427. Article XVI was revised and adopted on an emergency basis by Resolution #08-0206-32, and permanently adopted by Resolution #08-0319-76. Emergency amendments were again adopted to revise Article XVI, to add a new Article XII, Whistleblower Protection, to establish remedies for violations of new Article XII, and to correct minor typographical errors in the Code by Resolution # 08-1015-348. Further amendments were adopted by Resolution # 09-0304-60 to (1) require the posting of employee rights provided by this Code under Article XIII; (2) revise Article XII, Whistleblower Protection, to clarify investigation requirements; and (3) revise Article XVI to (a) more specifically describe public employer bargaining duties, (b) more specifically provide for Tribal Court review of certain disputes, (c) more specifically identify employee rights by separate article, (d) require good faith efforts by parties to resolve alleged unfair labor practices, (e) streamline procedures for the resolution of bargaining impasses, and (f) more specifically describe terms and conditions not subject to change during bargaining impasse. Amendments were made by Resolution # 09-0715-194 to (a)amend Article XVI, section 16.16(b) to correct a drafting error

Article XIII. Workplace Posters

Every employer subject to the provisions of this Code shall post a list, as directed by the Office of General Counsel, of the employee rights established by this Code. The list shall be posted in a common area of the workplace in a location that is readily visible to all employees.

Article XIV. Workers Compensation [reserved]

Article XV. Unemployment Insurance [reserved]

Article XVI. Labor Organizations and Collective Bargaining

16.01 Purpose.

The Little River Band of Ottawa Indians exercises powers of self-government over its members and territory. The Tribe has inherent authority to govern labor relations within its jurisdiction, and this includes regulating the terms and conditions under which collective bargaining may or may not occur within its territory. The Tribe's inherent authority further includes the right to protect the health, welfare, and political integrity of the Tribe from being harmed or threatened by the activities of non-members within the Tribe's territory. The purpose of this Article is to protect essential attributes of tribal self-government and the health and welfare of the members of the Tribe if labor organizations conduct operations within the jurisdiction of the Tribe.

16.02 Public Policy.

The Tribal Council declares that it is the policy of the Tribe to promote harmonious and cooperative relationships between tribal government and its employees by permitting employees within the Governmental Operations of the Band to organize and bargain collectively; to protect orderly Governmental Operations of the Band to provide for the health, safety, and welfare of the Band and its members; to prohibit and prevent all strikes by employees within the Governmental Operations of the Band; to protect the rights of employees within the jurisdiction of the Band to join or refuse to join, and to participate in or refuse to participate in, labor organizations; to protect the rights of tribal members to employment preferences; and to ensure the integrity of any labor organization doing business within the jurisdiction of the Band by requiring any such labor organization to obtain a license.

16.03 Definitions.

The definitions set forth in Article III shall not apply to this Article XVI. The following definitions apply to this Article XVI, whether the terms are stated in singular or plural form and whether the terms are capitalized or not.

Bargaining unit means a unit of employees within the Governmental Operations of the Band identified as an appropriate unit for representation pursuant to section 16.09 or such other criteria that may be recognized by resolution of the Tribal Council.

Confidential Employee means an employee of a public employer who assists or acts in a confidential capacity with respect to legal, financial, accounting or policy matters, and includes such employees who have access to information that is subject to use in contract negotiations,

the disposition of grievances, or other labor relations matters.

Fair share means an assessment to pay for the services of a labor organization with respect to negotiating and administering a collective bargaining agreement with a public employer.

Exclusive Bargaining Representative or *Exclusive Representative* means a labor organization that is lawfully elected to be the exclusive bargaining representative of a bargaining unit within the Governmental Operations of the Band,

Governmental Operations of the Band means the operations of the Little River Band of Ottawa Indian exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band's governmental services and programs, including the operation of "Class II" and "Class III" gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band's jurisdiction.

Indian Gaming Regulatory Act means 25 U.S.C. §§ 2701-2721.

Jurisdiction of the Little River Band of Ottawa Indian Tribe means the jurisdiction or governmental authority -- including legislative, judicial, and regulatory authority -- that the Band may exercise pursuant to its inherent authority as a federally recognized Indian tribe or pursuant to Congressional enactment or delegation, including all such authority over all lands now or in the future held in trust by the United States for the benefit of the Tribe acquired by or for the Tribe pursuant to 25 U.S.C. § 1300k-4(b) or such other lands upon which gaming may lawfully be conducted pursuant to the Indian Gaming Regulatory Act.

Labor organization, labor association, or labor union means any organization of employees organized for the purpose of bargaining over hours of employment, rates of pay, working conditions, grievances, or other terms or conditions of employment.

Laws of the Band or *Laws of the Tribe* means the Constitution and Tribal Code of the Little River Band of Ottawa Indians, resolutions of the Tribal Council and the Tribal Regulations of the commissions, agencies, departments, and authorities of the Little River Band of Ottawa Indians.

Little River Band of Ottawa Indians, the Band or *the Tribe* means the Little River Band of Ottawa Indians.

Little River Casino Resort means the Band's gaming enterprise, including related hotel and restaurant services, located at 2700 Orchard Highway, Manistee, Michigan, wherein the Tribe operates Class II and Class III gaming to generate governmental revenue for the Tribe pursuant to the Indian Gaming Regulatory Act.

Lock Out means any action by a public employer that prevents employees from going to work for the purpose of coercing employees to accept terms or conditions sought by a public employer in a negotiation with an exclusive bargaining representative..

Management means individuals holding supervisory and managerial positions within a public employer, who, because of their supervisory and managerial positions, do not qualify to be within a bargaining unit, and, when context so indicates, such individuals who have been delegated authority by a public employer to negotiate with an exclusive bargaining representative.

Model Band-Union Election Procedures Agreement means the model agreement referred to in Section 16.26 of this Article.

Neutral Election Official or *Election Official* means the Neutral Election Official appointed by the Tribal Council for the purpose of (a) certifying a showing of 30% or more support for union representation and (b) overseeing any union election pursuant to an agreement entered into by the Band with a labor organization that comports with the terms of the Model Band-Union Election Procedures Agreement.

Nonmember public employees means employees within a bargaining unit who are not members of a labor organization.

Public Employee means non-supervisory regular full-time and part-time (working a minimum of four hours per week) employee of a public employer, excluding all supervisory, managerial, confidential, temporary, seasonal, and casual employees.

Public Employer means a subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band.

Strike means an employee's refusal, in concerted action with other employees, to report for duty or to be willfully absent, in whole or in part, from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of employment. The terms "strike" includes boycotts of any kind designed to adversely affect a public employer. Notwithstanding the provisions of any other law, an employee within the Governmental Operations of the Band who, by concerted action with others and without the lawful approval of his or her supervisor, willfully absents himself or herself from his or her position, or abstains in whole or in part from the full, faithful and proper performance of his or her duties for the purpose of inducing, influencing or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment shall be considered to be on strike.

Subordinate Economic Organization means an economic enterprise operating within the jurisdiction of the Band, whether under a tribal or corporate charter, established by resolution or ordinance of the Tribal Council pursuant to Art. IV section 7 of the Constitution of the Little River Band of Ottawa Indians and wholly owned by the Band.

16.04 Time Calculations.

For any action that is to occur under the provisions of this Article XVI within 10 days or less, weekends, tribal, state and national holidays shall not be counted. The Neutral Election Official, mediators, fact finders, and arbitrators shall have discretion to extend the deadlines herein for matters they handle only for good cause shown by a party in advance of the deadline.

16.05 Freedom of Choice Guaranteed.

Except as otherwise provided in section 16.13, addressing fair share contributions to labor organizations by nonmember public employees, with respect to employment or the terms or conditions of employment within any public employer:

- a. The right to work must be protected and maintained free from undue restraints and coercion. The right of persons to work shall not be denied or abridged by any public employer or by any labor organization on account of membership or non-membership in any labor union, labor organization, or association.
- b. No person shall be required to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment.
- c. No person shall be required, as a condition of employment or continuation of employment to be recommended, approved, referred, or cleared by or through a labor organization.
- d. It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the public employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the public employer.
- e. No person shall be required by any public employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.
- f. It shall be unlawful for any person, labor organization, or officer, agent or member thereof, or public employer, or officer or agent thereof, by any threatened or actual intimidation of an employee or prospective employee or his parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to his property, to compel or attempt to compel such employee or prospective employee to join, affiliate with, or financially support a labor organization or to refrain from doing so, or to otherwise forfeit his rights as guaranteed by provisions of this Article. It shall be unlawful to cause or attempt to cause such employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employee.
- g. Any agreement, understanding or practice, written or oral, implied or expressed, between any labor organization and any public employer which violates the rights of employees as guaranteed by the provisions of this Article is hereby declared to be against public policy, an illegal combination or conspiracy in restraint of trade, null and void and of no legal effect. Any strike, picketing, boycott, or other action by a labor organization for the sole purpose of inducing or attempting to induce any public employer to enter into any agreement prohibited by this Article is hereby declared to be for an illegal purpose and is a violation of this Article.

16.06 Strikes Affecting the Governmental and Operations of the Band Prohibited.

(a) *Declaration and Findings.* The Governmental Operations of the Band are critical to the public health, safety, and welfare of the Tribe and its members. No employee or labor organization shall interfere with, threaten or undermine the Governmental Operations of the Band.

(b) *No Right to Strike.* Employees within the Governmental departments and agencies of the Operations of the Band, including the Little River Casino Resort, have no right to strike.

(c) *Strikes Prohibited.* Strikes, work stoppages, or slowdowns against the Governmental Operations of the Band are contrary to the health, safety and welfare of the Tribe and its members, and are

therefore prohibited. No employee or labor organization shall engage in a strike, work stoppage or slowdown with respect to any Governmental Operation of the Band. No labor organization shall cause, instigate, encourage or support an employee strike against a public employer.

16.07 Lock Outs Prohibited. A public employer shall not engage in any action constituting a lock out.

16.08 Licensing and Registration of Labor Organizations

(a) No labor organization shall engage in organizing employees working for any public employer without a license issued by the Little River Band of Ottawa Indians Gaming Commission, which shall provide as follows:

- (1) the right of such labor organization to conduct business within the Tribe's jurisdiction is a privilege, subject to the consent and regulatory authority of the Tribe;
- (2) the consent of the Tribe to allow such labor organization to conduct business within the jurisdiction of the Tribe is conditioned upon such labor organization's agreement to be subject to the laws of the Tribe and its regulatory authority, including this Code;
- (3) in consideration of the Tribe's consent to such labor organization's conduct of business within the jurisdiction of the Tribe, such labor organization agrees to (A) comply with all rules, regulations, and laws of the Tribe, (B) submit to the jurisdiction of the Tribe, including its Tribal Court, and (C) pay an annual business license fee in the amount of \$500.00;
- (4) such labor organization agrees that a license issued by the Tribe for conducting business within the territorial jurisdiction of the Tribe may be revoked by the Tribe at any time, with or without hearing, for any failure to comply with the laws of the Tribe; and
- (5) such other requirements as the Gaming Commission may require under its regulations.

(b) Subject to the requirements of subsection 16.08(a), the Gaming Commission is hereby authorized by the Tribal Council of the Little River Band of Ottawa Indians to enact such regulations as it sees fit to investigate and license any labor organization seeking to conduct business within the jurisdiction of the Tribe.

(c) Any person who intentionally makes a false statement to the Gaming Commission shall be deemed to be in violation of this Article XVI.

16.09 Appropriate Bargaining Units.

An appropriate bargaining unit of public employees may be established under the terms of an agreement entered into by the Band with a labor union that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.10 Union Elections.

An election for a labor union to become the exclusive representative of an appropriate bargaining

unit of public employees may proceed under the terms of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.11 Bargaining Unit and Election Dispute Resolution.

Disputes between management and a labor organization seeking to represent public employees with respect to (1) the appropriateness of a bargaining unit or (2) election procedures may be resolved under the terms of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement.

16.12 Duty to Bargain in Good Faith.

(a) Except as otherwise provided by this Article XVI, if a labor organization is lawfully elected to be the exclusive bargaining representative of a bargaining unit of public employees, management and the exclusive bargaining representative shall

(1) bargain in good faith on wages, hours and other terms and conditions of employment , *provided that* (A) neither management nor the exclusive representative shall be required to agree to a proposal or to make a concession and (B) management decisions to hire, to layoff, to recall, or to reorganize duties shall not constitute "other terms and conditions of employment" under this paragraph, and

(2) enter into written collective bargaining agreements covering employment relations.

(b) The obligation to bargain collectively imposed by this section shall not be construed to require management and an exclusive representative to negotiate over matters that would conflict with the provisions of any other laws of the Tribe, and in the event of a conflict between the provisions of any other laws of the Tribe and an agreement entered into by a public employer and the exclusive representative in collective bargaining, the laws of the Tribe shall prevail.

16.13 Fair Share Provisions for Nonmember Public Employees; Deauthorization of Fair share provisions; Payroll Deductions

(a) Management and the exclusive bargaining representative may bargain over fair share provisions for nonmember public employees, provided that such a provision requires:

(1) any such nonmember public employee to pay only for a fair proportion of costs of negotiating a collective bargaining agreement and contract administration;

(2) fair share contributions by all nonmember public employees in the bargaining unit, with pro-rata reductions for nonmember public employees who hold part-time positions;

(3) the exclusive bargaining representative to notify all nonmember public employees within the bargaining unit (i) that they have the right to be a nonmember, (ii) that they have the right to object to paying for labor organization activities not germane to negotiating a collective bargaining agreement or administering an agreement and to obtain a reduction in fees for such nongermane activities, (iii) of sufficient information to enable them to intelligently decide whether or not to object, (iv) about procedures for filing objections, and (v) that if a nonmember public employee objects, the labor organization must explain to such employee the basis for the calculation of the fair share charged to the employee and that the employee

has the right to challenge the calculation before an arbitrator.

(b) Subject to subsection (d), the exclusive bargaining representative's notice and procedures under subsection (a)(3) shall comply with *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and its progeny.

(c) Public employers shall have no duty to assure that a labor organization provides the notice set forth in subsection (a)(3) prior to deducting fair share amounts from a public employee paycheck if such a deduction is agreed to in a collective bargaining agreement pursuant to subsection (f).

(d) If a nonmember public employee objects to a fair share payment, and such employee and the exclusive bargaining representative cannot resolve the objection, either party shall notify the Neutral Election Official, who shall appoint an arbitrator to resolve the dispute. Such arbitrator shall have experience in public sector labor relations, shall be familiar with the issue of fair share contributions by public sector employees to labor organizations, and shall be a member of the National Academy of Arbitrators. The arbitrator shall hold such hearing and receive such evidence as the arbitrator sees fit to resolve the dispute and shall apply legal standards governing public sector labor relations, including *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and its progeny. The decision of the arbitrator shall be binding upon the employee and the labor organization. The fees and costs of the arbitrator shall be borne by the labor organization.

(e) Within 90-days after a public employer and a labor organization execute a collective bargaining agreement containing a fair share provision, one or more public employees within the bargaining unit may file with the Neutral Election Official a petition to have the fair share provision rescinded. The petition must be in writing and accompanied by a statement signed by 30% or more of the employees in the bargaining unit, stating that they wish to rescind the fair share agreement. The Neutral Election Official shall, within 5 days of receipt of such petition, determine whether the petition is properly supported and timely filed, and, if it is, he shall, within 14 days of such determination, direct a secret ballot election that comports with the mechanics for holding elections set forth in the Model Band-Union Election Procedures Agreement. If a majority of the votes cast in the election favor the fair share provision, it shall continue in effect. If there is no such majority, the Neutral Election Official shall certify deauthorization and the fair share agreement shall be deemed null and void as of the date of the petition, and the labor organization shall ensure the prompt refund of amounts withheld from nonmember employees, retroactive to the date of the petition, without interest.

(f) Payroll deduction of (i) the exclusive representative's membership dues for public employees who are members of a labor organization and (ii) fair share contributions of nonmember public employees shall be a mandatory subject of bargaining if either party chooses to negotiate the issue.

The amount of the dues and, in the case of nonmember public employees, the amount of the fair-share contributions, shall be certified in writing by an official of the labor organization and shall not include special assessments, penalties or fines of any type. A public employer shall honor payroll deductions until the authorization is revoked in writing by the public employee in accordance with the negotiated agreement and for so long as the labor organization is certified as the exclusive representative. During the time that a certification of a labor union by the Neutral Election Official is in effect for a particular appropriate bargaining unit, a public employer shall not deduct dues for any other labor organization.

16.14 Rights of Public Employees

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Public employees also have the right to refuse to join or participate in the activities of labor organizations and to represent themselves individually in their employment relations with public employers.

16.15 Unfair Labor Practices.

(a) A public employer is prohibited from:

- (1) Interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed under section 16.14.
- (2) Encouraging or discouraging membership in any labor organization by discrimination in regard to hiring, tenure, or other conditions of employment.
- (3) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the exclusive bargaining representative.
- (4) Discharging or discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided by this Article XVI.
- (5) Dominating, interfering with, or assisting in the formation, existence, or administration of, any labor organization or contributing financial support to such an organization.
- (6) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the exclusive bargaining representative or the employee involved.

(b) A labor organization or anyone acting in its behalf or its officers, representatives, agents, or members are prohibited from:

- (1) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this Article XVI or interfering with, restraining, or coercing management by reason of its performance of duties or other activities undertaken in the interests of the Governmental Operations of the Band.
- (2) Causing or attempting to cause a public employer to discriminate against a public employee because of the employee's membership or nonmembership in a labor organization or attempting to cause a public employer to violate any of the provisions of this Article XVI.
- (3) Refusing to bargain collectively or failing to bargain collectively in good faith with management.

(4) Discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided for in this Article XVI.

(5) Participating in a strike against the Governmental Operations of the Band by instigating or supporting, in any positive manner, a strike. Any violation of this paragraph shall subject the violator to the civil penalties provided in this Article XVI.

(c) Notwithstanding the provisions of subsections (a) and (b), the parties' shall have the right to voice their views consistent with the protections afforded by the Tribe's Constitution, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair labor practice or of any other violation of this Article XVI, if such expression contains no promise of benefits or threat of reprisal or force.

16.16 Resolution of Charges of Unfair Labor Practices; Breach of Duty of Fair Representation

(a) *Charges Involving Management or an Exclusive Representative*

(1) Charges, Notice, Good Faith Effort to Reach Early Resolution

(A) Should either management or an exclusive representative become aware of perceived conduct constituting an unfair labor practice, it shall notify the other party, in writing (which shall be transmitted electronically or by telecopier as well as via hard copy), of the charge and the alleged factual basis for the charge. The recipient party shall respond in writing (which shall be transmitted electronically or by telecopier as well as via hard copy), within 10 days of receipt of such written allegations. Management and the exclusive bargaining representative shall then make a good faith effort to resolve the alleged violation. This good faith effort shall include each party providing the other with unprivileged information relevant to the charge upon request.

(B) If such good faith efforts do not result in resolution of the charge, the objecting party may proceed to request arbitration.

(2) Arbitration

(A) If a claim is not resolved under subsection (a), charges of violations of unfair labor practices, including the duty to bargain in good faith, provided by this Article XVI shall, within 15 days of the receipt by either party of a written demand for arbitration (or such later time as the arbitrator may promptly schedule a hearing) be brought before an arbitrator, mutually agreed to by the exclusive bargaining representative and the public employer. If the parties are unable to agree upon an arbitrator, they shall use the American Arbitration Association (AAA) labor arbitrator selection procedure, provided that any arbitrator selected through the AAA labor arbitrator selection procedure shall be a member of the National Academy of Arbitrators.

(B) The selected arbitrator shall apply the law of the Band to resolve the charge, but in the absence of such law, the arbitrator shall apply persuasive authority

governing public sector labor relations.

- (C) The arbitrator's decision shall be in writing and mailed to the parties, return receipt requested within 30 days of the completion of arbitration. Except as provided by subsection (3), the arbitrator's decision shall be final and binding upon the parties.
- (D) Unless otherwise agreed to in writing by the public employer and the exclusive bargaining representative, if the arbitrator's decision is in favor of the public employer on every issue, the exclusive bargaining representative shall pay the fee of the arbitrator and if the arbitrator's decision is in favor of the exclusive bargaining representative on every issue, the public employer shall pay the fee of the arbitrator. Otherwise, the arbitrator shall allocate the cost of the arbitrator's services between the parties in accordance with the issues on which they have prevailed or not prevailed, and they shall pay their respective share of the arbitrator's fee in accordance with the arbitrator's decision.

(3) **Judicial Review**

- (A) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review of the arbitrator's decision to the Tribal Court for resolution by that member or the Tribal Court who is licensed to practice law.
- (B) In any such review, the Tribal Court shall be limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.
- (C) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.
- (D) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

(4) **Time Limits**

No unfair labor practice charge shall proceed to Arbitration or Judicial review under section 16.16(a) unless a demand is made under subsection 16.16(a)(2)(A) no later than 180 days after the alleged action constituting the alleged unfair labor practice.

(b) ***Charges of Discrimination by Public Employees***

A public employee who believes he or she has been subjected to unlawful discrimination in violation of section 16.15(a)(4) or section 16.15(b)(4) may proceed to seek relief for such

discrimination under the procedures and remedies provided by Article VI, provided, however, that (i) damages under 6.05(b) may not be awarded, (ii) in the event that the Charge is against a labor organization, the labor organization shall be treated in the same manner as an employer, subject to a Charge of Discrimination under Article VI, and (iii) no complaint may be filed in the Tribal Court unless a Charge of Discrimination has first been filed within 180 days of the asserted violation of section 16.15(a)(4) or section 16.15(b)(4).

(c) *Claims for Breach of Duty of Fair Representation*

(1) *Action in Tribal Court*

A public employee within a bargaining unit, who claims that an exclusive bargaining representative has breached its duty of fair representation, may bring an action in the Tribal Court, no later than 180 days after the alleged breach, against the exclusive bargaining representative.

(2) *Remedies*

If the Tribal Court finds that an exclusive bargaining representative has breached its duty of fair representation to a public employee, the Court shall award the employee such relief as will make the employee whole.

16.17 Resolution of Bargaining Impasse

(a) *Agreement to Resolve Negotiation Impasse.*

As the first step in the performance of their duty to bargain, management and the exclusive bargaining representative shall endeavor to agree upon impasse procedures. Such procedures shall define the conditions under which an impasse exists. Any such agreement with respect to the resolution of impasse issues shall not conflict with the provisions of this section.

(b) *Subjects Not Within Procedures for Resolving Bargaining Impasse.*

Nonmandatory subjects of bargaining shall not be subject to the impasse procedures of this section. Unless mutually agreed to by the parties, the impasse procedures of this section shall not be invoked during the pendency of any charge regarding the required scope of good faith bargaining under section 16.12.

(c) *Mediation and Fact Finding.*

(1) *Mediation.* Following the commencement of negotiations, if management and the exclusive bargaining representative reach an impasse, and they do not otherwise agree to proceed directly to fact finding, they shall jointly retain a mediator to assist them in resolving the impasse issues. In the absence of an agreement on the mediator, either party may request the Election Official to appoint a mediator, and the Election Official's appointment of such mediator shall be binding on the parties. It shall be the function of the mediator to bring the parties together to effectuate a settlement of the dispute, but the mediator may not compel the parties to agree. Any appointed mediator shall be experienced in labor mediation, and shall be drawn from lists of such mediators maintained by the American Arbitration Association.

(2) *Fact Finding and Recommendation.* If the parties agree to proceed directly to fact finding in substitute for mediation or, if mediation under subsection (c)(1) does not result in an agreement on all impasse issues within 21 days of the appointment of the mediator, the parties shall jointly retain a fact finder. In the absence of an agreement on the fact finder, either party may request the Election Official to appoint a fact finder, and the Election Official's appointment of such fact finder shall be binding on the parties. The appointed fact finder shall be experienced in public sector labor relations, shall be drawn from lists of similar fact finders maintained by the American Arbitration Association, and shall be a member of the National Academy of Arbitrators.

Within 5 days of the appointment of the fact finder, the parties shall file with the fact finder a joint list of the issues as to which an impasse has been reached, provided that if such filing is not made jointly, each party shall file a list and serve a copy of the filing on the other party.

The fact finder shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the fact finder that is convenient to the parties. The fact finder may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The fact finder may request briefs, stipulations, or other written submissions from the parties to aid in reaching findings and recommendations. The fact finder shall make written findings of facts and recommendations for resolution of each dispute not later than 15 days from the close of hearing, and shall serve, by certified mail, return receipt requested, such findings upon the public employer, the exclusive bargaining representative, and the Election Official. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party.

Management and the exclusive bargaining representative shall immediately agree to accept the fact finder's recommendations or, commence further negotiations in a good faith effort to reach agreement. If, upon the expiration of 20 days after the Election Official's receipt of the fact finder's recommendations, the parties fail to jointly inform the Election Official that they have fully resolved all impasse issues, the Election Official shall make the fact finder's findings and recommendations public to the membership of the Tribe by arranging for publication on the Tribe's website, in the Tribe's newsletter to members, or both

(d) *Binding Arbitration.*

If the parties fail to resolve their disputes within 30 days of receipt of the fact finder's findings and recommendations, they may mutually agree in writing to proceed to binding arbitration. Absent agreement, either party may request that the impasse issues proceed to resolution by binding arbitration, and such request shall be served upon the other party, in writing, return receipt requested.

Within 10 days of the parties' written agreement or the receipt by one party of a request for binding arbitration, the parties shall jointly select an arbitrator, who shall not be the same individual who served as the fact finder. If the parties fail to agree on an arbitrator within the 10

day period, the selection shall be made using the procedures under the voluntary labor arbitration rules of the American Arbitration Association. Any arbitrator shall be drawn from lists of such arbitrators maintained by the American Arbitration Association, and shall be a member of the National Academy of Arbitrators.

The submission of the impasse items to the arbitrator shall be limited to those issues that had been considered by the fact finder and upon which the parties have not reached agreement. Within 10 days of the appointment of the arbitrator, management and the exclusive bargaining representative shall each submit to the arbitrator their respective recommendations for settling the dispute on each unresolved issue, the draft collective bargaining agreement to the extent that agreement has been reached, and the fact finder's findings of fact and recommendations.

The arbitrator shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the arbitrator that is convenient to the parties. The arbitrator may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The arbitrator shall issue a decision on each issue remaining at impasse not later than 30 days from the day of appointment. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party. The parties may continue to negotiate all offers until an agreement is reached or a decision is rendered by the arbitrator.

The arbitrator shall consider, in addition to any other relevant factors, the following factors:

- (1) Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.
- (2) Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

The arbitrator shall select the most reasonable offer of the parties' respective final offers on each impasse item or the recommendations of the fact finder on each impasse item. The arbitrator shall provide a written summary of the selected provisions and agreed-upon provisions to each party and to the Election Official, return receipt requested.

Said selections of the arbitrator, together with the items already agreed upon by the management and the exclusive bargaining representative shall be deemed to be the collective bargaining agreement between the parties, provided, however, that, subject to subsection (e), provisions related to the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions shall not be binding upon the parties.

- (e) *Limited Review by Tribal Council of Economic Terms Recommended by Arbitrator Upon Rejection by Public Employer.*

If a public employer rejects an arbitrator's decision issued under section 16.17(d) regarding the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement

contributions, it shall so inform (i) the exclusive bargaining representative and (ii) the Tribal Council Speaker, in writing, within five (5) days of receipt of the arbitrator's decision.

Thereafter, the Tribal Council Recorder shall schedule a closed session meeting of the Tribal Council at which the public employer shall appear and show cause for why it has rejected the arbitrator's decision regarding its obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions. If the public employer is the Little River Casino Resort, any member of the Tribal Council that may have served on the Board of Directors of the Resort during the time that decisions were made about the Resort's bargaining position on any impasse issue addressed by an arbitrator's decision under section 16.17(d) shall abstain from voting and deliberating in accordance with the Tribe's Constitution and applicable law.

In advance of the Tribal Council meeting, the public employer shall submit to the Tribal Council the decision of the arbitrator, together with a written statement setting forth the reasons for its rejection of the decision, and it shall, at the same time, mail a copy of said written statement to the exclusive bargaining representative. In advance of the Tribal Council meeting, the exclusive bargaining representative shall be given the opportunity to submit a written statement setting forth the reasons why the Arbitrator's decision is appropriate and, upon submission of such a written statement to the Tribal Council, the exclusive bargaining representative shall mail a copy to the public employer.

At the scheduled meeting of the Tribal Council, both the public employer and the exclusive bargaining representative shall have the opportunity to be heard.

The Tribal Council shall decide only whether (a) the public employer's final offer regarding any impasse over wages, salaries, bonuses, insurance, pension or retirement shall become part of the parties' collective bargaining agreement or (b) the arbitrator's decision on any such impasse issue shall become part of the parties' collective bargaining agreement.

(f) *Costs of Impasse Resolution Proceedings*

Unless otherwise agreed to in writing, the public employer and the exclusive bargaining representative shall share equally all fees and costs of mediation, neutral arbitration, and binding arbitration provided for by this section.

(g) *Status of Terms and Conditions of Employment Pending Impasse Resolution*

At all times when an impasse remains unresolved, the status quo regarding wages and working conditions shall remain in effect even if a prior collective bargaining agreement governing the bargaining unit has expired. In such event, the status quo or the terms of any prior collective bargaining agreement shall continue in force and effect, until a new agreement shall be executed; provided, however, that for the purposes of this paragraph, the status quo, or continuing terms, shall not include fair share provisions, or increases to wages, increases in employer contributions to insurance, or increases in employer contributions to pensions.

(h) *Judicial Review*

- (1) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review

of the arbitrator's decision to the Tribal Court for resolution by that member or the Tribal Court who is licensed to practice law.

- (2) In any such review, the Tribal Court shall be limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.
- (3) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.
- (4) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

16.18 Duration of Collective Bargaining Agreements for Public Employees.

Collective bargaining agreements entered into by the public employer and an exclusive bargaining representative shall have terms of three years or less.

16.19 Decertification of Exclusive Representative.

(a) A member of a labor organization or the labor organization itself may initiate decertification of a labor organization as the exclusive representative of a bargaining unit if thirty percent (30%) of the public employees in the bargaining unit make a written request to the Neutral Election Official for a decertification election. Decertification elections may be held in a manner prescribed by the Neutral Election Official so long as they are in accord with the mechanics for holding elections set forth in the Model Band-Union Election Procedures Agreement. A decertification election shall only be valid if forty percent (40%) of the eligible employees in the bargaining unit vote in the election.

(b) When there is a collective bargaining agreement in effect, a request for a decertification election shall be made to the Neutral Election Official no earlier than 120 days and no later than 90 days before the expiration of the collective bargaining agreement.

(c) When, within the time period prescribed in subsection (b) of this section, a competing labor organization files a petition containing signatures of at least thirty percent (30%) of the public employees in the appropriate bargaining unit pursuant to an agreement entered into by the Band with such labor organization that comports with the terms of the Model Band-Union Elections Procedures Agreement, a representation election, rather than a decertification election, shall be conducted in accordance with the election procedures of such agreement.

(d) When an exclusive representative has been certified but no collective bargaining agreement is in effect, the Neutral Election Official shall not accept a request for a decertification election earlier than twelve months subsequent to a labor organization's certification as the exclusive representative

16.20 Policies of Public Employers Addressing Abuse of Alcohol and Drugs Not Subject to Collective Bargaining.

- (a) *Declaration and Findings.* The abuse of alcohol and both legal and illegal drugs within

the public employers harms the health, safety and welfare of the Band and its members. Tribal communities, including that of the Band, are particularly vulnerable to drug and alcohol abuse, and the regulation of such abuse within public employers is critical to the health, safety, and welfare of the Band and its members.

(b) *Prohibition of Collective Bargaining Affecting Alcohol and Drug Testing Policies.* Public employers shall have the right to address the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Band, and such policies shall not be subject to bargaining with any labor organization.

16.21 Conflicts Between the Laws of the Band and Band-Union Election Procedures Agreement.

In the event of a conflict between any law of the Band and the provisions of the Model Band-Union Election Procedures Agreement or the provisions of an agreement entered into by the Band that comports with the terms of the Model Band-Union Elections Procedures Agreement, the laws of the Band shall control.

16.22 Conflicts Between Collective Bargaining Agreements and Personnel Policies.

Except as provided by 16.20, in the event of a conflict between the personnel policies or procedures of a public employer and the provisions of a collective bargaining agreement entered into by a public employer and a labor organization, the latter shall control.

16.23 Conflicts Between Collective Bargaining Agreements and Individual Contracts.

In the event of a conflict between the provisions of a collective bargaining agreement entered into by a public employer and a labor organization and the provisions of an individual contract of an employee within a bargaining unit, the terms of the collective bargaining agreement shall control.

16.24 Enforcement.

(a) *Strikes: Civil Actions, Penalties, Decertification and Exclusion* Any public employee or labor organization, and any employee or agent of any labor organization, that violates, or seeks to violate, the prohibition against strikes set forth in section 16.06 of Article XVI shall be subject to a civil action by the affected public employer for declaratory and injunctive relief in the Little River Band of Ottawa Indians Tribal Court. Upon a finding of any such violation by a labor organization or any person acting on behalf of a labor organization, the Court may impose a civil fine against the labor organization, not to exceed \$5,000 for each violation. Upon a finding of any such violation by a public employee, the Court may impose a civil fine against the employee not to exceed \$1,000 for each and the employer of such public employee shall have the right to suspend or terminate the employment of such public employee. Any labor organization found by the Tribal Court to be in violation of the prohibition against strikes shall be deemed decertified from representing any public employees and shall further be deemed not legally entitled to be present on tribal lands and subject to exclusion on a temporary or permanent basis.

(b) *Lock Outs: Civil Actions.* A public employee or labor organization shall have the right to seek declaratory and injunctive relief in the Little River Band of Ottawa Tribal Court against public employers to enforce the prohibition against lock outs set forth in Section 16.07 of this Article XVI.

Upon a finding by the Tribal Court that a public employer has violated section 16.07, the Tribal Court may award such employee or labor organization attorney fees and costs.

(c) *Licenses: Civil Actions, Penalties, Exclusions.* Any labor organization that (1) engages in activities that require a license under this Article XVI without such a license or (2) violates the terms of a license issued by the Gaming Commission in accordance with this Article XVI shall be subject to an action in the Tribal Court by the Gaming Commission or by the Band, through its General Counsel, for declaratory and injunctive relief. Any labor organization found by the Tribal Court to have violated the licensing requirements of this Article XVI or the terms of a license shall be subject to such civil penalty, not to exceed \$5,000. Any labor organization found by the Tribal Court to be in violation the licensing requirements of this Article XVI or the terms of a license issued by the Gaming Commission shall be deemed not legally entitled to be present on tribal lands and subject to exclusion on a temporary or permanent basis.

(d) *Other Tribal Court Declaratory Authority.*

(1) Unresolved disputes between management and an exclusive bargaining representative over the duty to bargain in good faith, involving a controversy over whether a subject conflicts with the laws of the Tribe, may be brought by either party (or by the affected public employer or labor organization) to the Tribal Court for resolution by that member of the Tribal Court who is licensed to practice law by declaratory judgment.

(2) Unresolved disputes regarding an alleged conflict between a provision of a collective bargaining agreement and the laws of Tribe may brought by a party with standing (including the affected public employer or labor organization, an affected public employee, the Gaming Commission, the Tribal Council, or the Ogema) to the Tribal Court for resolution by that member of the Court who is licensed to practice law by declaratory judgment.

(3) Should the Tribal Court find that a party's request for declaratory judgment under subsection d(1) or d(2) of this section is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the action.

(4) A decision of the Tribal Court under subsection d(1) or d(2) of this section shall be final, and there shall be no right of appeal to the Court of Appeals.

16.25 Resolution of Jurisdictional Disputes.

In any case or proceeding commenced under this Article XVI, where the regulatory or adjudicatory jurisdiction of the Band or the Tribal Court is called into question, the Tribal Court shall address the jurisdictional question by means of a declaratory judgment.

16.26 Limited Waiver of Sovereign Immunity.

The waiver of sovereign immunity set forth in Article II, Sec. 2.06 is of no effect with respect to this Article XVI. With respect to this Article XVI, the Tribe hereby waives the sovereign immunity of public employers solely for (1) actions for declaratory and injunctive relief and attorney fees and costs under subsection 16.24(b) and 16.24(d); (2) actions for judicial review and for the specific remedies and sanctions provided for by subsections 16.16(a), 16.16(b), and 16.17(g); and (3) actions in the Little River Band Tribal Court to enforce a collective bargaining agreement.

16.27 Model Band-Union Election Procedures Agreement.

The Tribal Council has adopted, by Resolution Number 08-1015-350, a Model Band-Union Election Procedures Agreement, which may form the basis for future election procedures for a labor organization seeking to represent a bargaining unit within a public employer. The Tribal Council Executive Assistant shall provide a copy of the Model Band-Union Election Procedures Agreement upon written request of any person, organization or entity.

Article XVII. Integrity of Fair Employment Practices Code.

17.1 Findings

(a) The Little River Band of Ottawa Indians has enacted and implemented this Fair Employment Practices Code pursuant to its inherent sovereign authority, confirmed by the decisions of the United States Supreme Court, and pursuant to the Band's Constitution, which has been approved by the United States Secretary of the Interior in accordance with Congress's Act to Restore the Little River Band of Ottawa Indians, 25 U.S.C. §§ 1300k-1300k-7 and the Indian Reorganization Act, 25 U.S.C. § 476.

(b) In providing for procedures, rights, and remedies for employers, employees, and labor organizations under this Code, including those afforded through actions in the Little River Band of Ottawa Indians Tribal Court, the Tribal Council has carefully considered (and continues to consider) the values and interests of the Band in order to establish fair processes, rights, and remedies for the parties and interests at stake. This has included careful consideration of, amongst other things, (i) the time, costs, and inconvenience of parties and witnesses involved in proceedings to resolve controversies or to establish rights and remedies under this Code; (ii) the need to protect the governmental operations of the Band from undue burdens from litigation, while according fair treatment to employees within those operations; and (iii) methods to resolve disputes through early settlement, including mediation.

(c) The integrity of this Code is threatened if parties bypass the procedures, rights, and remedies established herein and seek, instead, to invoke procedures or remedies outside of this Code for controversies that this Code is designed to address and resolve in accordance with the unique public policies of the Band. Investigations or proceedings directed at employers, apart from those provided for by this Code, which seek to address controversies or rights covered by this Code, require the expenditure of time and resources to the detriment of those involved and, in many instances, to the governmental operations of the Band. Such investigations or proceedings also threaten duplicative witness testimony and production of documents already available, or undertaken, pursuant to the provisions of this Code.

17.2 Purpose

The purpose of this Article is to protect the integrity of the procedures, rights, and remedies established by this Code as described in the foregoing findings.

17.3 Definitions

As used in this Article, the following terms have the following meanings:

- (a) Employee means any employee of an employer.
- (b) Employer means any "employer," as defined in section 3.06 and any "public employer" as defined in section 16.03, and any agent, officer, or representative of such employer.

17.4 Prohibition of Employer Testimony and Documents Disclosure in External Proceedings When Employees Fail to Exhaust Tribal Remedies

(a) *Disclosures only with approval of Tribal Council.* Except with the express, written approval of the Tribal Council, employers are prohibited from giving testimony or witness statements of any kind or producing documents or other information of any kind in response to requests or subpoenas issued by outside authorities, other than those authorities expressly granted powers under this Code, engaged in investigations or proceedings on behalf of current or former employees, when such employees have failed to exhaust their remedies under this Code.

(b) *Examples of failure to exhaust remedies.* For the purposes of subsection 17.4(a), employees shall be deemed to have "failed to exhaust their remedies under this Code" if they have failed to exhaust the procedures, rights, remedies, and appeals (including opportunities to challenge jurisdiction) available under this Code or the procedures of the Little River Band of Ottawa Indians Tribal Court, and have, instead, invoked investigations or proceedings outside of those authorized by this Code to (i) address controversies or rights covered by this Code, such as discrimination (see Article VI), family medical leave (see Article VIII), minimum wages (see Article X), whistleblower protection (see Article XII), and unfair labor practices (see Article XVI, section 16.15) or (ii) challenge the assertion of jurisdiction under this Code.


17.5 Actions for Injunctive Relief to Prevent Disclosures.

The Little River Band of Ottawa Indians Tribal Court shall have authority to grant preliminary and permanent injunctions to prevent employer disclosures in violation of section 17.4, and the sovereign immunity of employers imbued with sovereign immunity from such actions is hereby waived.

17.6 Use of Reports of Fair Employment Practice Investigators.

Reports of Investigators prepared pursuant to sections 6.01-6.02 may be submitted in any proceedings or controversies related to an employee's failure to exhaust remedies under this Code as described in subsection 17.4(b), provided, however, that such reports shall remain subject to section 6.03(b) regarding their admissibility in Tribal Court for the purposes proving or disproving the merits of Charges of Discrimination filed under section 6.02.

I, Janine Sam, Tribal Council Recorder, do hereby certify that this is a true and correct copy of the Fair Employment Practices Code adopted by the Tribal Council on July 28, 2010.



Janine Sam
Tribal Council Recorder

[Seal]

Exhibit E



Gaa Ching Ziibi Daawaa Anishinaabek

Little River Band of Ottawa Indians

375 River Street
Manistee, MI 49660

Tribal Council

Phone (231) 398-6845
Fax (231) 398-0674

November 14, 2011

Via Fax and First Class U.S. Mail

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570-0001

Re: In re: Little River Band of Ottawa Indians (Case 7-CA-51156)

Dear Mr. Heltzer:

We write on behalf of the Little River Band of Ottawa Indians in reference to the above matter. The Little River Band of Ottawa Indians is a federally recognized sovereign Indian tribe.

This communication is made in the spirit of the government-to-government relationship between the Band and the United States to express our concern about the Board's delay in reaching disposition in this case and inaccurate representations that have been made to the federal court about the Board's process.

As you may know, this case involves an unfair labor practice proceeding against the Little River Band of Ottawa Indians Tribal Government. The Complaint seeks an order to strike down the duly enacted laws of the Band governing labor relations and collective bargaining.

When this matter first arose three years ago, the Band brought an action in the United States District Court for the Western District of Michigan, asking for relief from the Board's proceeding on the ground that the Board lacked jurisdiction to strike down the Band's laws. In response to that action, the Board asserted that the Band's tribal government would face no harm in responding to an unfair labor practices Complaint issued by the Board and presenting its jurisdictional arguments to the Board for disposition. In its "Sur-Reply" brief to the federal court, the Board stated as follows:

[T]he Band need only follow the course charted in *San Manuel Indian Bingo & Casino* . . . and file a motion to dismiss with the Board on jurisdictional grounds. If those arguments fail to carry the day before the Board, the Band will have an adequate opportunity to present those very same arguments to an appropriate circuit court.

As you may also know, the federal court ultimately dismissed the Band's action, agreeing with the Board that the Band needed to exhaust the Board's proceeding. The Band chose not to appeal from that decision.

The representation that the Board made to the federal court – that the Band need only file a motion to dismiss with the Board upon receiving a Complaint – has proven incorrect. We briefly recount the proceedings to date:

- On December 13, 2010, the Band received the Complaint and Notice of Hearing in this matter. The notice demanded that the Band file an Answer on or before December 27, 2010, and scheduled a trial before an Administrative Law Judge for February 2, 2011. The deadline for any motion to dismiss or for summary judgment was January 6, 2011. *See* 29 C.F.R. § 102.24(b) (motions must be filed 28 days prior to hearing date).
- The Band was able to obtain an extension on its Answer to January 6, 2011 and an extension on the deadline for a motion to dismiss or for summary judgment to March 3, 2011. It also obtained extensions of the trial date, first to March 17, 2011 and then to April 10, 2011.
- Consistent with the Board's representation to the federal court, the Band filed a motion to dismiss, expecting a prompt briefing schedule and disposition. As the weeks passed, however, there was no sign of any such process. *See* 29 C.F.R. § 102.24(b) (Board may issue a notice to show cause why a motion to dismiss should not be granted). Finally, upon inquiring with your office, the Band's counsel was informed that the Board almost never addresses motions to dismiss or for summary judgment, but instead awaits the development of a trial record, even if there are no disputed facts. Counsel for the Acting General Counsel confirmed this view.
- Given this situation, the Band, through its counsel, agreed to work with counsel for the Acting General Counsel to submit the case directly to the Board on stipulated facts. *See* 29 C.F.R. § 102.35(a)(9). This occurred on August 3, 2011 when the parties filed a Joint Motion to Transfer Proceeding to the Board on Stipulated Record. In that filing, the parties jointly proposed a briefing schedule that would have allowed the case to be fully submitted to the Board by October 14, 2011.
- Over three months have now passed without any action by the Board on the parties' Joint Motion; close to a year has now passed since the unfair labor practices Complaint was filed in this matter to strike down the Band's law; and the Band's law has been the subject of a lingering challenge since 2008.

This state of affairs does not match the one the Board described to the federal court over a year ago when it represented that the Band's case could easily proceed before the Board on a motion to dismiss. To the contrary, by all accounts it would be extraordinary for the Board to proceed on such a motion. And even now, with the parties in full agreement on the facts, the case appears stalled.

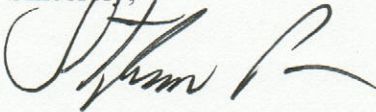
It bears emphasis that this case involves a direct attack upon the laws of a sovereign Indian government. As such, it deserves timely attention and disposition. The delays of the Board suggest complacency about the governmental status of the Band and moving this controversy to closure.

We are particularly concerned that in recent filings to the federal courts, the Board continues to make incorrect statements about the ease of its process, including as it pertains to this case. We observe that in a filing submitted in the case of *Chickasaw Nation v. NLRB* to the U.S. District Court for the Western District of Oklahoma, the Board stated that the Nation "need only follow the course charted in *San Manuel Indian Bingo & Casino* . . . and file a motion to dismiss with the Board on jurisdictional grounds," and it described this as a "relatively modest procedure." More recently, the Board made the same representation to the U.S. District Court for the Eastern District of Michigan in the case of *Saginaw Chippewa Indian Tribe of Michigan v. NLRB*. It also stated that the parties to the instant case are now "awaiting a briefing schedule," but, in fact, the Board has yet to even address the parties' Joint Motion.

The Band stands in a government-to-government relationship with the United States, including the NLRB. Out of respect for that relationship, we request that the Board give this case top priority for expedited disposition. While the Band understands that it could file a motion to expedite this case as a named Respondent, we think it more appropriate, in the first instance, to address this situation in the spirit of mutual respect for our governmental relationship.

Thank you for your immediate attention to this.

Sincerely,



Stephen Parsons
Tribal Council Speaker
Little River Band of Ottawa Indians



Larry Romanelli
Ogema
Little River Band of Ottawa Indians

Tribal Council, Little River Band of Ottawa Indians
William B. Cowen, Solicitor, NLRB
Lafe Solomon, Acting General Counsel, NLRB

Exhibit F

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE EXECUTIVE SECRETARY
FACSIMILE TRANSMITTAL SHEET

TO: Stephen Parsons
Tribal Council Speaker
Larry Romanelli, Ogema
Stephen M. Glasser, RD
NLRB Region 7

From: Lester A. Heltzer,
Executive Secretary

COMPANY

DATE

Little River Band of Ottawa Indians
7-CA-51156

12/14/2011

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TOTAL NO. OF PAGES INCLUDING COVER:

2

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United States Government

NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th Street, NW, Suite 11600
Washington, DC 20570

December 14, 2011

RE: Little River Band of Ottawa Indians
Case 7-CA-51156

Stephen Parsons
Larry Romanelli
375 River Street
Manistee, MI 49660

[Via Fax and Regular Mail]

Dear Mr. Parsons and Mr. Romanelli:

This is in response to your November 14, 2011 letter in which you urge the Board to expedite its disposition of the parties' Motion to Transfer Proceeding to the Board on a Stipulated Record in the above-captioned case.

I sincerely regret the length of time that the parties' motion has been pending before the Board. The Board is well aware of the keen interest of all parties that the motion be acted on. I cannot at this time advise you when a ruling on the motion will be forthcoming, I assure you, however, that the case is actively being processed and I anticipate that the Board's ruling on the motion will issue in the very near future..

Very truly yours,

A handwritten signature in black ink, reading "Lester A. Heltzer", is written over a horizontal line.

Lester A. Heltzer
Executive Secretary

cc: Region 7

Exhibit G

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT

Respondent

Case No. 07-CA-051156

And

LOCAL 406, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Charging Union

**MOTION OF RESPONDENT LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT TO EXPEDITE DISPOSITION**

The Respondent Little River Band of Ottawa Indians Tribal Government (the “Band” or “Tribal Government”) hereby moves for expedited disposition of this case. The reasons for this motion are set forth herein.

INTRODUCTION

This is an extraordinary case. It involves a request that the Board enjoin the laws of a federally recognized Indian tribal government. *See Complaint* (GC Exhibit 1(b) to *Joint Motion to Transfer Proceeding to Board on Stipulated Record* (“*Joint Motion to Transfer*”). The Board has never before been asked to issue an order that would compel a government to “rescind” its laws. *See Complaint* at 3-4. As such, this case casts a shadow upon the respondent Tribal Government as long as this case continues.

And the length of time this case has continued is as extraordinary as the substantive issue presented. The case began with the Charge filed against the respondent Tribal Government on March 28, 2008, *see Charge Against Employer* (GC Exhibit 1(a) to *Joint Motion to Transfer*), it

continued with the Complaint filed against the Tribal Government on December 12, 2010, and it has continued on from there through the parties' briefing, based on a stipulated record accepted by the Board, which was finally completed on May 15, 2012. In short, the present challenge to the respondent Tribal Government has lingered over four years and counting.

Nothing less than the dignity of the Tribal Government is at stake in this case. The case is fully ready for decision, and the Board should expedite this case on its docket.

1. THIS CASE CHALLENGES THE AUTHORITY OF AN INDIAN TRIBAL GOVERNMENT.

This case involves an effort to compel the rescission of the fully operational labor laws of the Tribal Government. *See Complaint*. The parties have stipulated to the facts, which show that the very laws that the Acting General Counsel and Charging Union seek to strike down are fully operational and continue to govern the rights and responsibilities of a management, a labor organization, and the employees at the gaming operations of Little River Band of Ottawa Indians. *See Statement of Stipulated Facts* at ¶¶ 67-79. Labor organizations and management have spent years negotiating collective bargaining agreements under this law; union election campaigns and elections have proceeded under it; unfair labor practice disputes have been resolved pursuant to it; bargaining impasses have been resolved under it; and collective bargaining agreements have been entered into in accordance with it. *See id.* Further, the Band's lawmakers and regulators have expended hours upon hours of time to develop the subject laws and make them operational. *See Statement of Stipulated Facts* at ¶¶ 20-22, 35-69.

Yet all of this work and effort (and all ongoing work related to it) is obscured by a shadow of uncertainty cast by the Complaint in this case, which seeks to substitute the National Labor Relations Act for fully operational tribal law and the National Labor Relations Board for the Band's governing bodies. *See Complaint* at 3-4. The very existence of this case, subjecting

the Band's laws and their effective operation to the scrutiny of this Board, affects the integrity of the Tribal Government. Indeed, every time the Band now contemplates an amendment to the operational laws under scrutiny in this case, it must spend time and effort to ensure that the record before this Board is amended to reflect its work.¹

2. EXPEDITED DISPOSITION OF THIS CASE IS CONSISTENT WITH PRESIDENT OBAMA'S RECONFIRMATION OF EXECUTIVE ORDER 13175. As emphasized in the President's November 5, 2009 *Memorandum for the Heads of Executive Departments and Agencies*, "[t]he United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions." 74 Fed. Reg. 57,881 (Nov. 9, 2009). The President further reconfirmed Executive Order 13175 of November 6, 2000. *Id.* That Order sets forth the following "fundamental principles":

Sec. 2. Fundamental Principles.

In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

- a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
- b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-

¹ This predicament is exemplified by the pending *Joint Motion to Substitute Exhibit and Stipulations* filed on February 16, 2012, necessitated by a change to the Band's law that had previously been submitted as part of the Stipulated Record as of August 3, 2011.

government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

c. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Exec. Order No. 13, 175, § 2 (a)-(c), 65 Fed. Reg. 67, 249 (Nov. 9, 2000).

Regardless of the merits of any party's position in this case, there can be no disagreement that it involves critical concerns of the named respondent, an Indian tribal government. Out of respect for the historic government-to-government relationship between the United States and Indian nations confirmed by Executive Order 13175 and President Obama's endorsement of that Order, this case should be given high priority for disposition on the docket before the Board. The longer this case lingers, the more harm is done to the spirit that undergirds the fundamental relationship between the United States and the Band.

3. EXPEDITED DISPOSITION IS CONSISTENT WITH CONGRESS'S PRONOUNCEMENTS WITH RESPECT TO FEDERAL-TRIBAL RELATIONS. Congress confirms that "[t]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and "through statutes, treaties, and the exercise of administrative authorities, [Congress] has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes." 25 U.S.C. § 2601(2)-(3) (2001). The Supreme Court consistently recognizes Congress's commitment to "a policy of supporting tribal self-government and self-determination." *E.g., National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987).

Again, regardless of any view of the merits, this case presents concerns for the respondent Tribal Government about tribal sovereignty and tribal government of the highest order. Nothing less than the dignity of the Band and the legitimacy of its operational laws, are at

stake in this case. The President's and Congress's pronouncements with regard to the federal government's trust responsibility to Indian nations warrants respect for these concerns. That respect should be reflected in the manner by which the Board treats a case that challenges the respondent Tribal Government's exercise of authority. Consistent with the federal government's relationship to Indian nations, this case, now continuing into its fifth year, should receive top priority for disposition.

CONCLUSION

For all of these reasons, the Band respectfully asks the Board to grant this motion and expedite decision in this case.

Dated: May 24, 2012

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Counsel for the Little River Band of
Ottawa Indians Tribal Government
Drummond Woodsum MacMahon
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 253-0559
Email: ksmith@dwmlaw.com

STATEMENT OF SERVICE

Copies of this Motion have this day been served upon the following by electronic mail to the email addresses shown:

- ☐ Gary W. Saltzgiver, Esq., National Labor Relations Board (Gary.Saltzgiver@nrlb.gov)
- ☐ Dennis Boren, Esq., National Labor Relations Board (Dennis.Boren@nrlb.gov)
- ☐ Local 406, International Brotherhood of Teamsters c/o its counsel Ted M. Iorio, Esq. (titorchmi@aol.com)
- ☐ Ted M. Iorio, Esq. (titorchmi@aol.com)
- ☐ Rebekah M. Krispinsky, Esq., Office of the Solicitor, U.S. Department of the Interior (Rebekah.Krispinsky@sol.doi.gov)

This Motion has this day been electronically filed with the Executive Secretary of the National Labor Relations Board.

Dated: May 24, 2012

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Counsel for the Little River Band of
Ottawa Indians Tribal Government
Drummond Woodsum MacMahon
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 253-0559
Email: ksmith@dwmlaw.com

Exhibit H

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Little River Band of Ottawa)
Indians Tribal Government,)
)
Petitioner/Cross-Respondent)
)
v.)
)
National Labor Relations Board,)
)
Respondent/Cross-Petitioner)

Case No. 13-1464
(Case No. 13-1583)

**MOTION OF PETITIONER, THE LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT, TO EXPEDITE CASE**

Petitioner, the Little River Band of Ottawa Indians Tribal Government (the “Band” or “Tribe”) hereby moves pursuant to 6 CIR. R. 27(f) to expedite this case. The Band petitions for review of an order issued by the National Labor Relations Board (the “NLRB” or the “Board”) on March 18, 2013, requiring the Band to rescind, or otherwise render inoperable, the Band’s laws governing labor relations within its jurisdiction and territory. The Band respectfully requests that (a) the due date for filing the record in this matter remain 40 days after the Board was served with the Band’s Petition for Review, rather than 40 days after the Board filed its Cross-Application for Enforcement, *see* FED. R. APP. 17(a); (b) oral argument be scheduled for the Court’s session commencing on September 30, 2013; and (c) the Court set the matter for expedited disposition. The Band is not seeking a

compressed briefing schedule, and, in fact, proposes a schedule that would provide more time to the NLRB for filing its brief than in the ordinary course. The reasons for this motion are set forth herein.

BACKGROUND

The Little River Band of Ottawa Indians is a self-governing federally recognized Indian tribe with a government-to-government relationship with the United States, expressly reaffirmed by Congress in 1994. *See* 25 U.S.C. §§ 1300k-1300k-7. It has continued to exist as a distinct political and cultural community within its ancestral homeland in Michigan from before treaty times to the present. *See* 25 U.S.C. § 1300k(4).

The Band petitions for review of a Decision and Order of the NLRB, requiring it to repeal, or announce the ineffectiveness of, the Band's laws governing labor organizations and collective bargaining within its territorial jurisdiction because they vary from the National Labor Relations Act ("NLRA"). *See Petition for Review*, attached hereto as Exhibit A with attached Decision and Order of the NLRB. This is the first time the NLRB has sought to strike down the laws of a government. And the laws at issue here are fully operational, with parties readily relying upon them to govern labor relations, generally, and to negotiate and establish the terms and conditions of continuing employment relations under

collective bargaining agreements, specifically. *See Statement of Stipulated Facts* at ¶¶ 67-79.¹

The Band's laws, which the Board's order on review in this case seeks to strike down, are found in Articles XVI and XVII of the Band's Fair Employment Practices Code, *SSF* Joint Exhibit 4 (attached as part of Exhibit B).² They are modeled on the public sector labor laws of states, and they have been fully operational at the Band's gaming facility, the Little River Casino Resort ("LRCR"), since 2008. *SSF* ¶¶ 36-79. The LRCR exists by virtue of the Band's governmental authority, recognized and endorsed by Congress in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, to raise revenues to fund tribal governmental services. *SSF* ¶ 10, 16-18. *See also Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan*, 5 F.3d 147, 148 (6th Cir. 1993) (reciting IGRA's purpose to promote "strong tribal governments").

The laws at issue are the product of lengthy legislative processes within the Band's governing Tribal Council and the deliberations of its regulatory commission. *See SSF* ¶¶ 20-22, 35-69. They reflect important public policy choices about such things as the conditions under which collective bargaining

¹ The parties submitted the case to the Board upon a stipulated record, including a *Statement of Stipulated Facts* ("SSF"), which is fully available at <http://www.nlr.gov/case/07-CA-051156>. The *SSF*, with the parties' Joint Exhibit 4, is attached hereto as Exhibit B.

² The Band's Fair Employment Practices Code and other laws are available at <https://www.lrboi-nsn.gov/index.php/government/tribal-code>.

should take place, the mandatory subjects of bargaining when it does, definitions of unfair labor practices, and the procedures for resolving them. *See SSF ¶¶ 57-66.*

By way of example, one provision that the Board declares unlawful because it varies from the NLRA prohibits collective bargaining over “the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Band.” *SSF Joint Exhibit 4 §16.20(b).* In enacting this provision, the Band’s governing body, its Tribal Council, “considered the devastating impact that drug and alcohol abuse has had upon its tribal members . . . and decided that it was in the best interests of the Band and its community to eliminate such policies from the mandatory subjects of bargaining, provided that such policies are consistent with the Band’s law, which includes civil rights under the Band’s Constitution.” *SSF ¶ 65.* Other provisions, like the public sector labor laws of many states, prohibit strikes and lock-outs and direct parties facing collective bargaining impasses to engage in binding interest arbitration. *SSF Joint Exhibit 4 §§ 16.06-16.07, 16.17; SSF ¶¶ 38, 40-41, 58.* Another provision, similarly tracking state law, requires labor organizations engaged in organizing within the Band’s agencies, departments, and subordinate organizations to obtain licenses. *SSF Joint Exhibit 4 §§ 16.08; SSF ¶ 40.*

The on-the-ground operation of the Band’s law has a wide sweep. Multiple bargaining unit elections have taken place at LRCR under the auspices of the

Band's Neutral Election Official in accordance with the Band's law. *SSF* ¶ 67-69; *see also Affidavit of Rose Ludden*, attached hereto as Exhibit C (“*Ludden Affidavit*”). The law has guided hundreds of hours of painstaking collective bargaining between a licensed labor organization, the United Steel Workers (“USW”), and management at LRCR for multiple bargaining units of employees. *SSF* ¶¶ 70-79; *Ludden Affidavit*. It has governed the parties’ resolution of election disputes and petitions, bargaining impasses through interest arbitrations, and the ultimate consummation of several collective bargaining agreements. *SSF* ¶¶ 70-79; *Ludden Affidavit*. Elected USW representatives and LRCR management have likewise relied upon the Band's law to resolve a variety of unfair labor practice claims. *SSF* ¶ 70. The law has been, and continues to be, implemented by the Band's regulatory agencies and boards charged with regulating and overseeing LRCR in accordance with tribal law. *SSF* ¶¶ 27-29, 43-49. And collective bargaining is presently underway for two bargaining units at the LRCR in reliance upon the law. *See Ludden Affidavit*.

This case began over five years ago, on March 28, 2008, when the International Brotherhood of Teamsters (the “Teamsters”) filed an unfair labor practice charge against the Band with the NLRB's regional office in Grand Rapids, Michigan. As the charging party, the Teamsters alleged that the Band's enactment and implementation of its laws constituted an unfair labor practice in violation of

the NLRA because certain provisions of those laws varied from the Act.³ Based on the Teamsters' charge, the Board's Acting General Counsel filed a formal complaint against the Band before the NLRB on December 12, 2010, requesting an order to require the Band to rescind the provisions of Articles XVI and XVI of its Fair Employment Practices Code that vary from the NLRA and apply to the LRCR.⁴ After the parties submitted the case to the Board on stipulated facts, the Board issued the Decision and Order under review before this Court on March 18, 2013. The Board's Order grants the relief requested in the complaint, and requires the Band to either rescind, or otherwise render inoperable, its laws. The Band filed its Petition for Review on April 15, 2013. The Board subsequently filed a Cross-Application for Enforcement on April 30, 2013.

REASONS FOR EXPEDITING THIS CASE

The Band asks for modest accommodations to move this case to disposition on an expedited basis: retention of the due date for the filing of the record within 40 days of service upon the Board of the Band's Petition for Review, rather than 40 days after the filing of the Board's Cross-Application; the scheduling of oral argument at the earliest date after the completion of briefing, which would be the

³ The Teamsters charge was made part of the record as "GC Exhibit 1(a)" to *Counsel for the Acting General Counsel's Statement of Position*. A copy of the charge is attached hereto as Exhibit D.

⁴ The complaint was made part of the record as "GC Exhibit 1(b)" to *Counsel for the Acting General Counsel's Statement of Position*. A copy of the complaint is attached hereto as Exhibit E.

Court's session commencing September 30, 2013; and expedited disposition. The reason for this request, as described more fully below, is that this case casts a cloud upon the Band's governmental authority and the functioning of its laws for employment relations at LRCR.

The Band's requested expedition would have no effect upon the Respondent Board other than causing it to meet the earlier of the two deadlines for filing the record: within 40 days of service of the Band's Petition, rather than within 40 days of filing its Cross-Application, *see* FED. R. APP. 17(a). The Board can easily accomplish filing the record, however, because the parties stipulated to it and filed it in electronic form before the Board. Indeed, it is fully available on the NLRB's website.⁵ Priority scheduling for oral argument, likewise, should be of no prejudice to the Board, nor should advancement of the case for disposition.⁶ Finally, the Band proposes a briefing schedule which would give the Board over six weeks following the filing of the Band's brief to file its responsive brief (as opposed to the 30 days that it would get even in a non-expedited case).

⁵ The stipulated record was presented by joint motion of the parties on August 3, 2011, which the Board granted on December 20, 2011. *See* "Office of the Executive Secretary's Order," dated 12/20/11, and "Motions," dated 8/3/11, available at <http://www.nlr.gov/case/07-CA-051156>.

⁶ The Band will request oral argument in this case pursuant to 6 CIR. R. 34, for it implicates fundamental principles of federal Indian law. *See generally* *U.S. v. Doherty*, 126 F.3d 769, 778 (6th Cir. 1997) ("[T]he tribes exercise powers of self-government not pursuant to a . . . grant of authority, but pursuant to their status as sovereigns. . . . '[U]ntil Congress acts, the tribes retain their existing sovereign powers.' *United States v. Wheeler*, 435 U.S. 313, 323 (1978).").

By its Decision and Order of March 18, 2013, the Board has declared that the operational labor laws of a sovereign Indian tribal government are invalid because they vary from the NLRA, and it has ordered them repealed. These laws have been enacted and implemented on the ground at LRCR; they are fully operational, governing the rights and responsibilities of management, a labor organization, and employees within the Band's territorial jurisdiction. *See SSF ¶¶ 67-79*; 25 U.S.C. § 2710(b)(1), § 2710(d)(1) (gaming must occur on Indian lands over which Indian nations exercise governmental authority). Indeed, two bargaining units are just commencing labor negotiations in reliance upon these laws. *See Rose Ludden Affidavit*.

While the Board's order has no force in its own right unless and until the Board obtains an enforcement order from this Court, *see Meyers v. Bethlehem Steel Corp*, 303 U.S. 41, 48 (1938), the very existence of the Board's Decision and Order cannot help but infuse an air of uncertainty around the Band's laws and the ability of parties, with real economic interests, to rely upon them. In a very real sense, it casts a cloud over the ability of an Indian tribal government to implement its laws and the ability of individuals, with real life expectations, to reach agreements and understandings in a stable legal regime. There is no such thing as settled expectations for the Tribal Government whose laws are under challenge and for LRCR management, a labor organization and represented employees seeking to

operate under those laws. Thus, for very practical reasons, there is good cause for ensuring timely filing of the record, advancing the case to oral argument as soon as briefing is complete, and giving this matter priority for disposition.

Beyond this, respect for the government-to-government relationship between the United States and the Band supports granting the Band's request. *See generally Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney*, 369 F.3d 960, 961 (6th Cir. 2004) (describing history of the "government-to-government relationship" between the U.S. and the Grand Traverse Band and the "essentially parallel" history of that between the U.S. and the Little River Band of Ottawa Indians). As President Obama explained in his November 5, 2009 *Memorandum for the Heads of Executive Departments and Agencies*, "[t]he United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions." 74 Fed. Reg. 57,881 (Nov. 9, 2009). The President reconfirmed *Executive Order 13175* of November 6, 2000, which declared that "[o]ur Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over

their members and territory.” Exec. Order No. 13, 175, § 2 (a)-(c), 65 Fed. Reg. 67, 249 (Nov. 9, 2000).

Congress likewise confirms that “[t]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government,” and “through statutes, treaties, and the exercise of administrative authorities, [Congress] has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.” 25 U.S.C. § 2601(2)-(3) (2001). The Supreme Court consistently recognizes, and defers to, Congress’s commitment to “a policy of supporting tribal self-government and self-determination.” *E.g.*, *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 & n.17 (1983); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 & n.5 (1987).

Regardless of the merits of any party’s position in this case, there can be no disagreement that it involves the ability of an Indian tribal government to implement its laws in the face of a pronouncement by the NLRB that those laws are invalid. Thus, apart from the on-the-ground practical need for early resolution of this controversy, good cause exists for expediting this case in the spirit of the government-to-government relationship between the United States and the Little River Band of Ottawa Indians.

CONCLUSION

For all of these reasons, the Band respectfully asks the Court to grant this motion and thereby (a) set the due date for the filing of the record 40 days after the Board was served with the Band's Petition for Review, May 28, 2013; (b) schedule oral argument for the Court's session commencing on September 30, 2013, and (c) set the matter for expedited disposition.

The Band additionally sets forth below proposed deadlines for briefing which it has reviewed, through its counsel, with counsel for the Respondent.

The Band proposes the following deadlines:

Brief of Petitioner:	July 15, 2013
Brief of Respondent:	August 28, 2013
Reply Brief of Petitioner:	September 16, 2013

The Band is authorized to represent that the Respondent does not oppose the briefing schedule proposed above. The Respondent takes no position on the remainder of the motion.

Dated: May 9, 2013

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.
Drummond Woodsum
84 Marginal Way, STE 600
Portland, ME 04101-2480
Telephone: (207) 253-0559
E-mail: ksmith@dwmlaw.com

Counsel for Petitioner/Cross-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I served the above motion, with attached Exhibits A through E, upon the Respondent/Cross-Petitioner, National Labor Relations Board, through counsel, who have entered appearances in this matter, by means of the Court's ECF system as follows:

Linda Dreeben: appellatecourt@nlrb.gov, linda.dreeben@nlrb.gov

Jill A. Griffin: jill.griffin@nlrb.gov, appellatecourt@nlrb.gov

Kira D. Vol: kira.vol@nlrb.gov

Dated: May 9, 2013

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.

Drummond Woodsum

84 Marginal Way, STE 600

Portland, ME 04101-2480

Telephone: (207) 253-0559

E-mail: ksmith@dwmlaw.com

Counsel for Petitioner/Cross-Respondent

Exhibit I

Case No. 13-1464/13-1583

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT

Petitioner Cross - Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent Cross - Petitioner

Upon consideration of the Petitioner's motion to expedite the above causes,

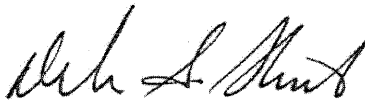
It is **ORDERED** that the request for the filing date of the certified list to remain May 28, 2013 is **GRANTED** it is further **ORDERED** that the request to expedite oral argument is **GRANTED**.

In order to facilitate expedited submission to the Court, briefing shall be completed pursuant to the schedule set to be set by separate letter.

The request to expedite the decision may be raised to the merits panel.

**ENTERED PURSUANT TO RULE 45(a),
RULES OF THE SIXTH CIRCUIT**

Deborah S. Hunt, Clerk



Issued: May 21, 2013

Exhibit J

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case

07-CA-114526

Date Filed

Oct 17, 2013

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

b. Tel. No.

231-398-3855

c. Cell No.

f. Fax No.

g. e-Mail

h. Number of workers employed

Little River Casino & Resort

d. Address (Street, city, state, and ZIP code)

2700 Orchard Hwy
Marquette, MI 49660

e. Employer Representative

Lynn Saunders

i. Type of Establishment (factory, mine, wholesaler, etc.)

Gambling Casino

j. Identify principal product or service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(A)(3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

on Aug 16th 2013 the above name employer threw its officers, agents and representatives unlawfully terminated me in retaliation for my union activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Trudy Thomas

4a. Address (Street and number, city, state, and ZIP code)

2086 W 1st First St.
Scottville, MI 49454

4b. Tel. No.

231-757-9469

4c. Cell No.

231-510-5182

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

By Trudy Thomas
(signature of representative or person making charge)

(Print/type name and title or office, if any)

Address 2086 W 1st St Scottville, MI 49454 10-4-2013
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

CHARGE OF DISCRIMINATION Fair Employment Practices Little River Band of Ottawa Indians			CHARGE NUMBER
NAME (Indicate Mr., Ms., Mrs.) Mrs. TRUDY THOMAS		HOME TELEPHONE (Include area code) 231-757-9469	
STREET ADDRESS 2086 W 1st ST Scottville MI 49454		CITY, STATE AND ZIP CODE 11/30/44	
DATE OF BIRTH			
EMPLOYER/LABOR ORGANIZATION SUBJECT OF CHARGE (If more than one list below.)			
NAME LITTLE RIVER CASINO		NUMBER OF EMPLOYEES, MEMBERS ?	
STREET ADDRESS 2700 Orchardway		CITY, STATE AND ZIP CODE Manistee, MI 49660	
NAME		TELEPHONE (Include Area Code)	
STREET ADDRESS		CITY, STATE AND ZIP CODE	
NAME		TELEPHONE (Include Area Code)	
STREET ADDRESS		CITY, STATE AND ZIP CODE	
STREET ADDRESS		CITY, STATE AND ZIP CODE	
CAUSE OF DISCRIMINATION BASE ON (Circle appropriate box (es))		DATE DISCRIMINATION TOOK PLACE	
<input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input checked="" type="checkbox"/> SECTION 16.14 RIGHTS <input type="checkbox"/> OTHER (SPECIFY)		Earliest Latest Aug 12-2013 Aug 16, 2013 <input type="checkbox"/> CONTINUING ACTION	
THE PARTICULARS ARE (if additional space is needed, attach extra sheet (s)): <i>Every since my activities with the United Steelworkers union I have been discriminated against. 2007 there one hundred of us filed for organizing and I have been over supervised, discriminated against, coerced, and unjustly disciplined and I consider this discrimination. I went home sick, vomiting and dizzy. I went home Aug 12-2013 sick HR called me and said I was terminated I said for going home sick. So HR put me on administrative leave till they investigate. So on Aug 16-2013 HR called and terminated me.</i>			
I declare under penalty of perjury that the foregoing facts (including the facts set forth on the attached additional ___ pages) are true and correct.			
Date 12-11-13		Charging Party Signature <i>Trudy Thomas</i>	

* See Attached

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case

Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

b. Tel. No.

231-398-3855

c. Cell No.

f. Fax No.

g. e-Mail

h. Number of workers employed

Little River Casino & Resort

d. Address (Street, city, state, and ZIP code)

e. Employer Representative

2700 Orchard Hwy

Marquette, MI 49660 Lynn Saunders

i. Type of Establishment (factory, mine, wholesaler, etc.)

j. Identify principal product or service

Gaming Casino

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(A)(3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

on Aug 16th 2013 the above name employer threw its officers, agents and representatives unlawfully terminated me in retaliation for my union activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

TRUDY THOMAS

4a. Address (Street and number, city, state, and ZIP code)

2086 W 1st FIRST ST.
Scottville, MI 49454

4b. Tel. No.

231-757-9469

4c. Cell No.

231-510-5182

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Trudy Thomas
(signature of representative or person making charge)

(Print/type name and title or office, if any)

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

Address 2086 W 1st ST Scottville, MI 49454

10-4-2013
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is

Request for Board of Review Meeting

Date filed with HR: _____

Section A
Employee Information

Employee Name: Trudy Thomas Date of hire: 9-3-2003
 Position: House Keeper Department: Hotel
 Status: ☒ Full time ☐ Part Time Telephone: 231-757-9469 Alternate #: _____
 Best time to call: _____ (circle one) AM PM
 Home Address: _____

Section B
Complaint Information

Please describe the policy violation in detail (use additional paper, if necessary):

set was not insubordination or company policy violation I was
and wanted to go home I told Debbie I would return tomorrow
she said okay I have been discriminated against, over supervised, harassed
since my activities with the Steelworkers. Management is aware of such
 List witnesses, if any (Required): activities and I consider them unjust discipline.
Board of review one aware of the problems and that I would be
fixed.

Section C
Remedy Request

3. What do you believe would be a fair remedy? (use additional paper, if necessary):

Reinstate me back in my job and stop the harassment

Employee Signature: _____

Date: _____

Section D
For HR Use only - BoR Qualification

Qualifies?: ☐ Yes ☐ No

If no, please explain: _____

Determined by: ☐ _____ ☐ _____ Date Employee notified: _____

Grievance submitted to: _____

Director

Directly to Board of Review

Date: _____

9-17-2013 Trudy Thomas 362-46-0458

I didn't quit I went home sick. I told the supervisor that I was sick and vomiting and wanted to go home and that I would be back tomorrow and hoped they had some answers for me. Human Resources called me and said I was terminated and I said for going home sick. Human Resources said they would call me back and not to come to work till I heard from them. So on 8-16-2013 Human Resources called and said I was terminated. Every worker in our department can go home if they are sick so why am I being discriminated against. Every since 2007 when I was fired for union activities I have been discriminated against, harassed, over supervised, coerced and discriminated against. I was sick and vomiting why would they make me stay? Why wouldn't I be able to go home? I had a doctor's appointment Aug 8-2013 and had cortisone shots in both shoulders and both hips. I was not feeling good at all.

Exhibit K



**SMITH HAUGHEY
RICE & ROEGGE**

ATTORNEYS AT LAW

101 N. Park St., Ste. 100

Traverse City, MI 49684

Phone: 231-929-4878 Fax: 231-929-4182

01-13-14 A07:42 IN

Anders J. Gillis
Direct: 231-486-4507
agillis@shrr.com

January 8, 2014

CERTIFIED MAIL

Confidential

Lynn Saunders
Director of Human Resources
Little River Casino Resort
PO Box 417
2700 Orchard Highway
Manistee, MI 49660

RE: FEPI Investigation, Trudy Thomas v. Little River Casino Resort

Dear Ms. Saunders:

This letter is to confirm that Janis Adams and I have been appointed as FEPI Investigators by the Tribal Court in the above matter. Enclosed you will find a copy of the Complaint and the Charge of Discrimination. I will be contacting you shortly to arrange for witness interviews. You can reach me at 231-486-4507, or at agillis@shrr.com. In the meantime, please be advised that you must preserve any relevant documents, records, or evidence with regard to the Complainant's allegation.

Best regards,

Anders J. Gillis

AJG:ajg

CHARGE OF DISCRIMINATION Fair Employment Practices Little River Band of Ottawa Indians		CHARGE NUMBER
NAME (Indicate Mr., Ms., Mrs.) Mrs. Trudy Thomas		HOME TELEPHONE (Include area code) 231-757-9469
STREET ADDRESS 2086 W 1st St Scottville, MI	CITY, STATE AND ZIP CODE 49454	DATE OF BIRTH 11/30/44
EMPLOYER/LABOR ORGANIZATION SUBJECT OF CHARGE (If more than one list below.)		
NAME Little River Casino	NUMBER OF EMPLOYEES, MEMBERS 2	TELEPHONE (Include Area Code)
STREET ADDRESS 2700 Orchardway	CITY, STATE AND ZIP CODE Manistee, MI 49660	COUNTY
NAME	TELEPHONE (Include Area Code)	
STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
CAUSE OF DISCRIMINATION BASE ON (Circle appropriate box (es))		DATE DISCRIMINATION TOOK PLACE
<input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input type="checkbox"/> RETALIATION <input type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input checked="" type="checkbox"/> SECTION 16.14 RIGHTS <input type="checkbox"/> OTHER (SPECIFY)		Earliest Aug 12-2013 Latest Aug 16, 2013 <input type="checkbox"/> CONTINUING ACTION
THE PARTICULARS ARE (if additional space is needed, attach extra sheet (s)): Every since my activites with the united Sleetworker union I have been discriminated against. 2007 there one hundred of us fired for organizing and I have been over supervised, discriminated against, coerced, and unjustly disciplined and I consider this discrimination. I went home sick, vomiting and dizzy. I went home Aug 12-2013 sick HR called me and said I was terminated I said for going home sick. So HR put me on administrated leave till they investigated. So on Aug 16-2013 HR called and terminated me.		
I declare under penalty of perjury that the foregoing facts (including the facts set forth on the attached additional ___ pages) are true and correct.		
Date 12-11-13	Charging Party Signature Trudy Thomas	

** See Attached*

DO NOT WRITE IN THIS SPACE

Case

Date Filed

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

b. Tel. No.

231-398-3855

c. Cell No.

f. Fax No.

d. Address (Street, city, state, and ZIP code)

e. Employer Representative

g. e-Mail

2700 Orchard Hwy

Marquette, MI 49660 Lynn Saunders

h. Number of workers employed

i. Type of Establishment (factory, mine, wholesaler, etc.)

j. Identify principal product or service

Gaming Casino

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections) 8(A)(3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

on Aug 16th 2013 the above name employer threw its officers, agents and representatives unlawfully terminated me in retaliation for my union activities.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Trudy Thomas

4a. Address (Street and number, city, state, and ZIP code)

2086 W 1st First St.
Scottville, MI 49454

4b. Tel. No.

231-757-9469

4c. Cell No.

231-510-5182

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Trudy Thomas
(signature of representative or person making charge)

(Print/type name and title or office, if any)

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

Address 2086 W 1st St Scottville, MI 49454 10-4-2013
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Mar. 13, 2006). The NLRB will further obtain these uses upon request. Disclosure of this information to the NLRB is

Request for Board of Review Meeting

Date filed with HR: _____

Section A Employee Information

Employee Name: TRUDY Thomas Date of hire: 9-3-2003
 Position: House Keeper Department: Hotel
 Status: ☒ Full time ☐ Part Time Telephone: 331-757-9469 Alternate #: _____
 Best time to call: _____ (circle one) AM PM
 Home Address: _____

Section B Complaint Information

Please describe the policy violation in detail (use additional paper, if necessary):
yet was not insubordination in company policy violation I consider
and wanted to go home I told Debbie I would return tomorrow
she said okay I have been discriminated against over supervisor harassment
since my activation with the Steelers management is cause of check
 List witnesses, if any (Required): activator and I consider this unjust discipline.
Board of directors are aware of the problems and that I would like
fixed.

Section C Remedy Request

3. What do you believe would be a fair remedy? (use additional paper, if necessary):
Reinstates me back in my job and stop the harassment

Employee Signature: _____

Section D For HR Use only - BoR Qualification

Qualifies?: ☐ Yes ☐ No

If no, please explain: _____

Determined by: ☐ _____ ☐ _____ Date Employee notified: _____

Grievance submitted to: ☐ Director ☐ Directly to Board of Review Date: _____

9-17-2013 Trudy Thomas

I didn't quit I went home sick. I told the supervisor that I was sick and vomiting and wanted to go home and that I would be back tomorrow and hoped they had some answers for me. Human Resources called me and said I was terminated and I said for going home sick. Human Resources said they would call me back and not to come to work till I heard from them. So on 8-16-2013 Human Resources called and said I was terminated. Every washer in our department can go home if they are sick so why am I being discriminated against. Every since 2007 when I was fired for union activities I have been discriminated against, harassed, over supervised, coerced and discriminated against. I was sick and vomiting why would they make me stay? Why wouldn't I be able to go home? I had a doctor's appointment Aug 8-2013 and had cortisone shots in Both shoulders and Both hips. I was not feeling good at all.

Little River Band of Ottawa Indians Tribal Court

3031 Domres Road Manistee, Michigan 49660	SUBPOENA Order to Appear and/or Produce	Case Number: 14001CD
--	---	-----------------------------

Plaintiff(s)/Petitioner(s) <input type="checkbox"/> People of the Little River Band of Ottawa Indians <input checked="" type="checkbox"/> <u>Trudy Thomas</u>	V	Respondent(s) Little River Casino Resort Charge:
---	----------	---

In the matter of: _____

— In the name of the People of the Little River Band of Ottawa Indians —

TO: Little River Casino Resort

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

YOU ARE REQUIRED:

<input type="checkbox"/> 1. To appear personally at the time and at the place stated below. You may be required to appear time to time and day to day until excused.	
<input checked="" type="checkbox"/> To produce the requested information by:	
Date: February 4, 2014	Time: _____

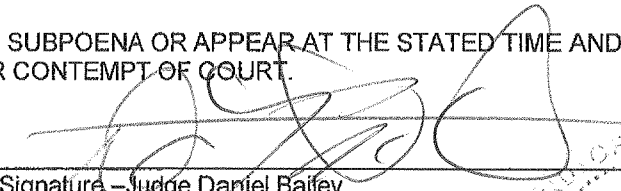
- | | |
|---|---|
| <input type="checkbox"/> 2. Testify at trial/examination/hearing.
<input checked="" type="checkbox"/> 3. Produce/permit copying of: See Exhibit A attached hereto; and delivered to
<input type="checkbox"/> 4. Testify as to your assets, and bring with you items listed in line 3 above.
<input type="checkbox"/> 5. Testify at deposition.
<input type="checkbox"/> 6. Prohibition against transferring or disposing of property attached.
<input type="checkbox"/> 7. Other: _____ | Anders J. Gillis
101 N. Park St., Ste. 100
Traverse City, MI 49684 |
|---|---|

Person Requesting Subpoena: Anders J. Gillis, Tribal Court Investigator		Telephone No: (231) 929-4878, Ext. 64507	
Address: 101 N. Park St., Ste. 100	City/Town: Traverse City	State: MI	Zip Code: 49684

Note: If requesting a debtor's examination or injunction under Item 6, this subpoena must be issued by a judge. Debtor's assets can also be discovered without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

FAILURE TO OBEY THE COMMANDS OF THIS SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.

Date: 1/21/14


 Signature — Judge Daniel Bailey

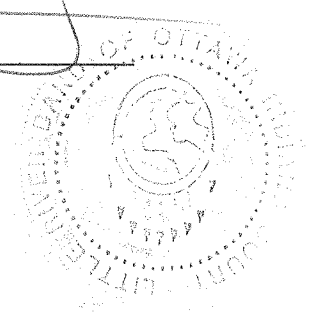


EXHIBIT A
TO SUBPOENA (INVESTIGATIVE)

Trudy Thomas v Little River Casino Resort

1. Provide a copy of any and all documents, including written and electronic, relating or referring in any way to Trudy Thomas's 2013 termination.
2. Provide a copy of any and all correspondence pertaining to Trudy Thomas's employment and/or termination of employment, including written and electronic documents between Little River Casino Resort ("Resort") and Trudy Thomas.
3. Produce a copy of Trudy Thomas's personnel file.
4. Provide a copy of the Resort's employee handbook/manual in effect during 2013.
5. Produce a copy of Trudy Thomas's grievance file.
6. Produce a copy of any of the Resort's Medical/ Personal Leave policies.
7. Provide a copy of any and all documents, including written and electronic, relating or referring in any way to Trudy Thomas's prior termination and her subsequent reinstatement in or around 2007.
8. Provide a copy of any and all documents relating or referring in any way to the Steelworker's Union ("Union") and the Resort during 2013.

Exhibit L



United States Government
NATIONAL LABOR RELATIONS BOARD
Region 7 - Resident Office

Gerald R. Ford Federal Building
110 Michigan Street, NW Room 299
Grand Rapids, MI 49503-2363

Telephone (616) 456-2200 Fax (616) 456-2596 Email ethan.ray@nlrb.gov
Toll-Free Number 1-866-667-NLRB (1-866-667-6572)
Visit our website – www.nlrb.gov

October 22, 2013

Lynn Saunders, Director of Human Resources
Little River Casino Resort
P.O. Box 417
2700 Orchard Hwy
Manistee, MI 49660-0417

Re: Little River Casino Resort
Case: 07-CA-114526

Dear Ms. Saunders:

The above-captioned case has been assigned to me for investigation. In order to fully evaluate the issues raised by this charge please address the following allegations and supply the any documentary evidence to me as soon as possible, but not later than close of business **October 29, 2013**.

The charge alleges that the Little River Casino Resort (Employer), discharged and discriminated against Trudy Thomas. Please provide the Employer's response to following:

1. It is alleged that on about August 12, Thomas spoke with Vicki Glover while working. Thomas explained to Glover that she was sick and had been vomiting and requested to leave work. Glover denied Thomas' request. Please provide the Employer's account of this meeting.
2. It is alleged that on about August 12, you called Thomas at home and initially informed her that she had been discharged for going home without permission. Thomas explained that she had been sick and that she had gone home sick. You later called Thomas to explain that she was placed on administrative leave pending the outcome of an investigation. Please provide the Employer's account of this meeting.
3. It is alleged that on about August 16, the Employer discharged Thomas for insubordination and leaving work without authorization. Please provide the Employer's position.
4. Please provide copies of discipline issued to employees for the past two years for the same or similar misconduct that Thomas was discharged for.
5. Please provide copies of any documents, records, emails or phone notes utilized by the Employer during its investigation of Thomas' misconduct and the determination to discharge her.
6. Please provide a copy of Thomas' personnel files.
7. If the Employer maintains a progressive disciplinary system, please indicate how the decision to discharge Thomas was in accordance with the Employer's system.
8. It is alleged that in about June, an employee told Karl Stone that they were not going to go back and clean rooms that were already done and that they were going home and that Karl should have fun

tearing the rooms apart. The employee was not disciplined or discharged. Please provide the Employer's position.

9. It is alleged that in about July, another housekeeper quit by walking off the job. Charmine Stone called the employee and urged her not to quit and to return to work. The employee returned to work. Please provide the Employer's position.
10. It is alleged that in about July another employee engaged in a heated discussion with Karl Stone and Jake Kequam. The employee announced that they were quitting and turned in their badge. Karl Stone then meet privately with the employee and called Charmine Stone where Charmine Stone asked the employee not to quit. The employee was only off work for one day. Please provide the Employer's position.
11. It is alleged that it is not uncommon for the Employer to grant employee requests to leave work early due to a personal matter or due to illness and that the Employer maintains a point system for attendance. Please provide the Employer's position.
12. Please provide copies of documents showing the attendance points for all housekeepers for the past year.
13. Please provide copies of any work rules, handbook or other documents showing the terms and conditions of employment for bargaining unit employees as of August 12, 2013.

I require the Employer's response to the issues raised by this charge as soon as possible, but not later than close of business **October 29, 2013**. If you wish to respond to this charge by making witnesses available for the provision of sworn affidavits to Board agents, please contact me as soon as possible so that arrangements can be made. Please be cautioned, however, that submission of a position statement alone does not constitute full and complete cooperation in the investigation.

If you wish to provide a position statement, in lieu of affidavits, or other documentary evidence in response to these charges, I encourage you to utilize our electronic filing system at mynlrb.nlr.gov and click on the E-File tab.

Feel free to contact me if I can be of any assistance.

Regards,

Ethan N. Ray
Field Examiner

Exhibit M



Gaa Ching Ziibi Daawaa Anishinaabek
Little River Band of Ottawa Indians
2608 Government Center Drive
Manistee, MI 49660
(231) 398-6845
Tribal Council

November 8, 2013

Richard F. Griffin, Jr., Esq.
General Counsel
National Labor Relations Board
1099 14th St., N.W.
Washington, D.C. 20570-0001

Terry A. Morgan
Regional Director
National Labor Relations Board
110 Michigan St., N.W., Room 229
Grand Rapids, MI. 49503-2363

Re: Request for Consultation and Case No. 07-CA-114526 (Trudy Thomas/Little River Casino Resort)

Dear Mr. Griffin and Ms. Morgan:

We write on behalf of *Gaá Čhíng Ziibi Daáwaa Aníshinaábek*, the Little River Band of Ottawa Indians (the "Band") to request consultation pursuant to the President's Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009) (the "President's Memorandum") with regard to the controversy that is the subject of the above-referenced Charge.

Reconfirming Executive Order 13175, the President directs federal agencies to consult with tribal officials concerning "actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." See President's Memorandum (incorporating definition of Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000), of "policies that have tribal implications").

The above-referenced Charge has substantial direct effects upon the Band, its relationship with the Federal Government, and the distribution of power and responsibilities between the Federal Government and the Band because it directly implicates the Band's self-governing authority over labor relations within its jurisdiction. Specifically, by proceeding with this Charge before the claimant has exhausted her remedies under the Band's law, the NLRB will impinge upon the authority of the Band and its Tribal Court to adjust rights and remedies associated with labor controversies within its reservation in accordance with its own laws.

We ask for consultation to address (a) why, under the circumstances presented, proceedings related to this Charge should not be stayed to allow for the exhaustion of tribal remedies and (b) if the Band and the NLRB have a dispute about the application of the tribal exhaustion doctrine to this case, how we may most effectively resolve that dispute and avoid adversarial tensions to the detriment of our government-to-government relationship.

Background

The Band comprehensively governs labor relations within its agencies, commissions, and subordinate organizations pursuant to its Fair Employment Practices Code (“FEPC”). In the Charge at issue, a former employee of the Little River Casino Resort (“LRCR”), Trudy Thomas, asserts that she was wrongfully terminated in retaliation for her union affiliation. A copy of the Charge is attached as Tab 1. As explained in more detail below, the Band’s FEPC addresses this controversy by establishing rights and remedies for employees within the Band’s public sector employers who claim that they have suffered employment discrimination due to union affiliation or support.¹

LRCR is a wholly-owned instrumentality and subordinate organization of the Band, operating the Band’s gaming under the Indian Gaming Regulatory Act (“IGRA”) on lands held by the United States in trust for the Band. IGRA codified the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that Indian tribes have inherent authority to engage in, and regulate, gaming activity within their reservations for the purpose of raising government revenues. The Band’s IGRA gaming operations at LRCR are not unlike state-owned horse-racing facilities or lotteries, the purpose of which is to raise revenues to support governments.

Indeed, the very purpose of IGRA is to allow tribes to generate governmental revenues through gaming in order to “promot[e] tribal economic development, self-sufficiency, and strong tribal governments,” 25 U.S.C. § 2702(1). And pursuant to IGRA and the Band’s law, the net revenues from the Band’s gaming at LRCR must be used to support tribal government. *Id.* § 2710(b)(2)(B).

Upon enacting IGRA, Congress announced, consistent with *Cabazon*, that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” 25 U.S.C. § 2701(5). The application of the Band’s FEPC to LRCR falls within this confirmed regulatory authority and is an exemplary exercise of tribal governmental authority under established principles of federal Indian law.

The Band’s labor relations law, set forth in Article XVI of its FEPC is similar, in many respects, to the public sector labor laws of states. In addition to providing for union election procedures, the law includes licensing provisions for unions doing business within the reservation. It prohibits strikes and lock-outs and establishes bargaining impasse resolution procedures. It also defines the duties of employers and unions, and establishes remedies for unfair labor practices.

Of most significance to this consultation request, the Band’s law prohibits discrimination against employees for supporting unions, the basis of the Charge at issue. Under the Band’s law, it is an

¹ The Band’s FEPC is accessible at <https://www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title%20600-03.pdf>.

unfair labor practice for any public employer to take adverse employment action against an employee because the employee supports a union. Remedies, including injunctive relief, reinstatement, back pay, and attorney fees, can be awarded by the Little River Band of Ottawa Indians Tribal Court to prevailing employees. See FEPC §§ 6.02, 16.16(a)(4), and 16.16(b), highlighted in Tab 2.

Employees commence such actions by filing a Charge of Discrimination with the Tribal Court. The Tribal Court, in turn, assigns the Charge to a neutral Fair Employment Practices Investigator, drawn from a small pool of local lawyers, who must have experience in the field of labor and employment law. The assigned Investigator has subpoena power to fully investigate the Charge. Upon completing the investigation, the Investigator issues a report setting forth the substance of the complaint, persons interviewed, and “a determination of whether there is reasonable cause to believe that a violation” of the Band’s law has occurred. Mandatory mediation follows if the Investigator finds such reasonable cause. Regardless of the findings of the Investigator, employees may commence actions in the Tribal Court for the remedies established in the law. See FEPC provisions, Tab 2 (highlighted sections).

Trudy Thomas, the complaining party in Case No. 07-CA-114526 has not proceeded with her available remedies under the Band’s law. By letter dated November 7, 2013, Kimberly McGrath, the Chief Legislative Counsel for the Band, informed Ms. McGuire of her available tribal law remedies for the occurrences alleged in the Charge. A copy of that letter is provided under Tab 3.

The Tribal Exhaustion Doctrine

The doctrine of tribal exhaustion, established by the Supreme Court and applied by innumerable federal courts, requires federal tribunals to refrain from reaching the merits of a controversy when there is a colorable basis for tribal jurisdiction over the matter and tribal remedies have not been exhausted. The doctrine applies whether there is a pending tribal proceeding or not.

The Supreme Court has said that placing tribal and federal forums in direct competition with each other undermines tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). See *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Hous. Authority*, 207 F.3d 21, 33 (1st Cir. 2000) (describing this concern as the “epicenter of the tribal exhaustion doctrine”). The doctrine therefore operates as a matter of comity to favor tribal adjudications, including those concerning jurisdiction.

Federal adjudications of reservation controversies must be dismissed without prejudice or stayed to allow tribal proceedings governing the same controversy to run their course. The Supreme Court has said that application of the exhaustion doctrine is necessary to further the well-established federal goal of promoting tribal self-government. *Iowa Mutual*, 480 U.S. at 14-15. Complete exhaustion of all tribal remedies is required, including all available appeals. *Id.* at 15. Although the doctrine is not jurisdictional, federal courts hold that if a transaction or occurrence arises within an Indian reservation or trust lands and involves rights and remedies affecting tribal entities or members, courts have no discretion not to apply the doctrine. *E.g., Hartman v. Kickapoo Tribe Gaming Commission*, 319 F.3d 1230, 1233 (10th Cir. 2003); *Bank One, N.A. v.*

Shumake, 281 F.3d 507, 514-515 (5th Cir. 2002); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994). See also *Ninigret Development Corp.*, 207 F.3d at 32 (jurisdiction “presumptively lies in the tribal courts” quoting *Iowa Mut.*, 480 U.S. at 18). So important is the doctrine that it will be raised and addressed by a federal court on its own, even if not raised by any of the parties. *Id.* at 31-32.

The doctrine applies to any reservation-based controversy where there is colorable jurisdiction unless (a) the assertion of jurisdiction by a tribal forum involves harassment or bad faith, (b) exhaustion of tribal remedies would be futile because of a lack of a tribal forum, (c) tribal jurisdiction is plainly lacking over a non-member of a tribe under principles of federal Indian common law, or (d) asserted tribal jurisdiction would violate express jurisdictional prohibitions. See *Ninigret Development Corp.*, 207 F.3d at 33-34. See also *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (delineating exceptions).

None of these exceptions apply in the instant case. The first two are easily set aside because tribal law remedies are fully available to Ms. Thomas without harassment or bad faith. The third exception is inapplicable because it is firmly established that the Band has regulatory and adjudicatory authority over consensual relations between non-members and the Band or its subordinate organizations within its reservation or trust lands. Employment between non-members and tribes or tribal entities within trust or reservation lands is a consensual relationship falling within this jurisdiction. See, e.g., *MacArthur v. San Juan County*, 497 F.3d 1057, 1072-73 (10th Cir. 2007); *Paddy v. Mulkey*, 656 F. Supp. 2d 1241, 1244-48 (D. Nev. 2009); *Graham v. Applied Geo Technologies, Inc.*, 593 F. Supp. 2d 915, 919 (S.D. Miss. 2008). Finally, there is no express jurisdictional prohibition against the application of the Band’s laws to resolve the controversies at issue.

It is not surprising, therefore, that the federal courts routinely hold that the tribal exhaustion doctrine applies to labor and employment controversies arising within tribes’ reservations or trust lands and involving employees of tribes or tribal organizations. E.g., *Graham*, 593 F. Supp.2d at 922; *Hartman v. Kickapoo Tribe Gaming Commission*, 176 F.Supp.2d 1168, 1181 (D.Kan. 2001), *aff’d* 319 F.3d 1230 (10th Cir. 2003); *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111, 1114 (D.S.D. 1997); *Davis v. Mille Lacs Band of Chippewa Indians*, 26 F.Supp.2d 1175, 1179 (D. Minn. 1998), *aff’d*, 193 F.3d 990 (8th Cir. 1999).

Requested Consultation

We request consultation with the appropriate decision-makers at the NLRB to discuss our respective views about why, under the circumstances presented, the pending Charge should not be stayed under the exhaustion doctrine. Further, if we cannot come to agreement on such a stay, we would like to discuss how we may most effectively resolve a dispute about the application of the tribal exhaustion doctrine in a manner that is respectful to our differences.

On the latter subject, we recognize that, in the ordinary case, NLRB regional offices process unfair labor practice charges with initial investigations to assess the merits, and that they possess subpoena authority for that purpose. If the LRCR is forced to respond to the merits of the present charges, however, core values of the tribal exhaustion doctrine will be undermined. The

purpose of the doctrine is to allow reservation-based controversies (including questions of tribal jurisdiction) to be resolved in accordance with tribal law processes. Again, those processes reflect public policy assessments unique to the Band, including careful consideration of the time, costs, and inconvenience of the parties, and the appropriate delineation of rights, remedies, and processes to resolve disputes. Indeed, the Band has built, and funds, a comprehensive infrastructure to ensure that its policy goals are met. As just one example, the Band expends governmental revenues to compensate Fair Employment Practice Investigators assigned to investigate Charges of Discrimination and issue their reports; these investigations proceed at no cost to employees. *See* FEPC § 6.01

Forcing the LRRC to respond to the merits of the NLRB Charge places the NLRB in direct conflict with the Band. For it would launch a process that is outside the design of the Band's law, which reflects policy values and judgments unique to this Indian tribe.

In this context, we ask that you consult with us so we can explore ways to avoid this friction. Should our views differ about the application of the exhaustion doctrine to the current controversy, we would like to find a way to attain a binding ruling on the issue without the NLRB seeking to force a response to the merits Case No. 07-CA-114526. Any attempt by the NLRB to force such responses would do significant harm to the spirit of the exhaustion doctrine and, therefore, tribal self-government, which is the overarching goal of federal Indian policy.

* * *

We believe the problems we have identified above fall squarely within the concerns of the President's directive, calling for consultation before action, and we appreciate your careful consideration of our request. We propose meeting at your convenience either at our Tribal Government Offices in Manistee, Michigan or at the NLRB's Regional Office in Grand Rapids, Michigan.

Sincerely,



Sandy Mezeske
Acting Tribal Council Speaker
Little River Band of Ottawa Indians

cc: Tribal Council, Little River Band of Ottawa Indians
Jodi Gillette, Senior Policy Advisor for Native American Affairs, White House Domestic Policy Council
Hillary Tompkins, Solicitor, U.S. Department of Interior
Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice
Ethan N. Ray, Field Examiner, NLRB
Kaighn Smith Jr., Special Counsel, Little River Band of Ottawa Indians

Exhibit N



**SMITH HAUGHEY
RICE & ROEGGE**

ATTORNEYS AT LAW

101 N. Park St., Ste. 100
Traverse City, MI 49684
Phone: 231-929-4878 Fax: 231-929-4182

Janis L. Adams
Direct: 231-486-4539
jadams@shrr.com

**THE LITTLE RIVER BAND OF
OTTAWA INDIANS TRIBAL COURT**

TRUDY THOMAS,

Charge No. 14001CD

Claimant,

VS

LITTLE RIVER CASINO RESORT,

Respondent.

**FAIR EMPLOYMENT PRACTICES
INVESTIGATOR'S REPORT**

This report is prepared pursuant to the Little River Band of Ottawa Indians Fair Employment Practices Code, Ordinance No. 05-600-03 ("FEPC" or "Code"). Under the FEPC, employees are protected from unlawful employment discrimination as described in the Code. Employees who believe their rights have been violated can file a Charge of Discrimination ("Charge") with the Tribal Court, which is then assigned to a Fair Employment Practices Investigator ("FEPI"). The undersigned have been assigned as the FEPI investigators to investigate the Charge filed by Trudy Thomas ("Charging Party" or "Thomas") on December 11, 2013 against the Little River Casino Resort (the "Resort"). This report is based upon consideration of the following: (1) the investigative interview of the Charging Party, (2) investigative interviews with

(3) a review of relevant documents produced by the Resort pursuant to an Investigative Subpoena, and (4) relevant documents produced by Thomas.

I. EXECUTIVE SUMMARY OF CLAIMS

Thomas alleges that she was subjected to discrimination, coercion, highly scrutinized supervision, and wrongful discipline on the basis of her union activities. Pursuant to Article XVI, Section 14 of the FEPC, union activities are protected. Thomas claims that her employer, the Resort, interfered with these protected rights, and that she was wrongfully terminated because of her union activities.

II. PROCEDURAL STATUS OF CLAIM

Pursuant to the FEPC, Section 6.02, any person who believes that he or she has been subjected to unlawful employment discrimination may file a Charge of Discrimination under oath with the Tribal Court Clerk on the "Charge of Discrimination" form available from the Tribal Court Clerk, setting forth the facts of alleged discrimination, provided that such Charge is filed with the Clerk not more than 180 days after the alleged act of unlawful discrimination.

Thomas was terminated from her employment with the Resort on August 16, 2013. She filed her Charge of Discrimination with the Tribal Court on December 11, 2013. **See Exhibit A.** In her Charge of Discrimination, Thomas alleged discriminatory acts going back until at least 2007. *Id.* Though her Charge of Discrimination was timely filed, most of this time frame is relevant only for the purposes of background information. Since a Charge of Discrimination can only be filed "not more than 180 days after the alleged act of unlawful employment discrimination," this Report focuses on the time frame from June 13, 2013 – 180 days prior to the date the Charge of Discrimination was filed – until Thomas's termination on August 16, 2013. **See FEPC 6.02.**

III. DOCUMENTS/WITNESSES

During the course of the investigation, the following documents were reviewed:

1. Fair Employment Practices Code, Ordinance #05-600-03, approved July 28, 2010
2. Charge of Discrimination by Thomas
3. Termination Letter
4. Thomas's Request for Board Review
5. Performance Improvement Plans for Thomas
6. Annual Performance Reviews for Thomas
7. Records Relevant to Thomas's Loss of Employment in 2008
8. Video Recording of Thomas on August 12, 2008 (the day of her termination)
9. Resort Employee Emails with Regard to Thomas's Termination
10. Employee Handbook
11. Management Guidelines for Attendance and Punctuality
12. Email from Thomas to Saunders on August 12, 2013
13. Redacted Termination Letters to Other Employees who Abandoned Jobs

14. Union Placards
15. Thomas's Medical Records from August 8, 2013
16. All other Material/Exhibits Produced by the Resort Pursuant to its Position Statement
17. All other Subpoenaed Materials

During the course of the investigation, the following individuals were interviewed:

1. Trudy Thomas
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.

IV. FINDINGS OF FACT

Based upon the above interviews and review of records, I make the following findings of fact:

Background of Employment

A. Time Period of 2003-2008

Trudy Thomas is sixty-nine year old woman with a high school education. She started working at the Resort on September 3, 2003, and from her date of hire, until her termination, she worked primarily in laundry and housekeeping. **See Exhibit A.** As a part of her job, Thomas was often expected to clean an allotted amount of rooms in what she felt was a short period of time. Physically, the job could exhaust her.

According to Thomas, around 2006, after the Resort changed certain employment practices and policies, some Resort employees became increasingly involved in union activities. Thomas was among them. As a result, when she was laid off from her job on November 23, 2008, she filed a grievance on January 5, 2009, alleging that she was discriminated against because of her union activities. **See Exhibit B.** The Resort, however, viewed the layoff as an economic decision. **See Exhibit C.** Thomas was eventually reinstated with back pay. *Id.* Thomas felt that the fact that she was reinstated was an admission of guilt on behalf of the Resort.

Thereafter, Thomas became even more involved in union activities. She stated that as a result of those activities, she was consistently subject to a higher level of supervision than other employees. In support of her allegation, Ms. Thomas provided, for my review, a notebook where she kept contemporaneous notes as to her work activities. She claimed that the notebook evidenced the fact that she had been over supervised. The record does reflect that after her increased involvement in union activities, and after her recall from the layoff, her performance review scores diminished. However, the relevance of the allegations made with regard to years 2003-2008 is of minimal consequence with regard to this Charge of Discrimination as Resort management, supervision, and policies changed. Moreover, under FEPC 6.02, a "Charge of Discrimination must be filed with the Clerk not more than 180 days after the alleged act of unlawful employment discrimination." Therefore, I make no findings of fact, or conclusions of law, with regard to this time period.

B. Time Period of 2008-2012

According to [redacted], a United Steelworkers Representative, Thomas became increasingly involved with union activities during this time. As stated by [redacted], Thomas's leadership, and her opinions, quickly earned her the trust and respect of others involved in union activities. Within union circles, she was purportedly referred to as "Mother Theresa." During this time period, the Resort's records evidence that Thomas exhibited flashes of insubordination and at times argued with supervisors.

C. Time Period of 2013

According to [redacted], by the summer of 2013, Thomas was the "runner" for the entire Resort, meaning that she coordinated, led, and recruited for union activities. During the summer of 2013, she actively recruited on behalf of the United Steelworkers Union and provided employees with union placards. Thomas also provided Union brochures for the employee dining room. During August 2013, the month of Thomas's termination, she was actively recruiting other employees to unionize.

Throughout this time, Thomas claims she was continually over supervised, harassed, coerced and discriminated against for her union activities. She even claims to have been regularly sabotaged by those who did not support the United Steelworkers Union. According to Thomas, others would place coins on the floor of the rooms after she cleaned them so that the rooms would not fully pass inspection and she would receive unfavorable reviews. When pressed for specifics as to who sabotaged her, Thomas could only speculate. In her interview, she predicted that video evidence would show that she had in fact been sabotaged.

On August 12, 2013, at 10:44 am, Thomas was cleaning Room 102 at the Resort. She was scheduled to complete the cleaning of eleven other rooms after finishing Room 102. At 11:39 am, [redacted], Thomas's immediate supervisor, following required protocol, inspected Thomas's clipboard, which tracked her progress.

At 11:59 am, Thomas talked to [redacted], a Resort houseman in charge of maintenance. According to [redacted], Thomas claimed that she was being sabotaged, and that someone had

March 31, 2014

Page 5

placed coins in her room and spilled coffee on her sheets. [redacted] states that Thomas never advised that she was sick.

The video record reflects that Thomas was not sabotaged. Nobody went into the rooms she was cleaning, no guest or employee spilled coffee on the bed sheets on her cart, and no one threw coins into the rooms while passing by. In short, though Thomas may have earnestly believed that she was being "sabotaged," the record reveals that there is no such evidence.

After making her claim of sabotage to [redacted], Thomas made a phone call to [redacted] met Thomas in the hallway. According to [redacted], Thomas made the same allegations about sabotage, pulled out her notebook, and mentioned that she had documented her discrimination. Like [redacted] maintained that Thomas did not mention that she was sick, or that she had thrown up, but merely demanded "answers."

Thomas admits that she made accusations of sabotage and that she hoped to return the very next day to get her "answers." But unlike [redacted] and [redacted], she maintains that she plainly stated that she "didn't feel well," and that she was vomiting and dizzy when she went home. After speaking with [redacted] Thomas – almost routinely – collected her personal items and left down the hallway without incident.

Subsequently, [redacted] reported the incident to [redacted], Human Resources Generalist, claiming that Thomas walked off the job without permission. Thomas was thereafter terminated for insubordination and leaving work without authorization. When informed of her termination, Thomas responded with communication indicating that she was sick and that she had informed [redacted] that she was sick. [redacted] stated that Thomas's claims of sabotage, and sickness, concerned her. As a result she initiated an investigation to determine what actually occurred.

As a part of the investigation, [redacted] watched a video of the incident outside Room 102 (as described above). See **Exhibit G**. Unfortunately, the video lacks audio. After watching the video and noticing that Thomas showed no appearance of fatigue, sickness, vomiting, or dizziness, and after interviewing [redacted] and [redacted], both of who stated that Thomas never claimed she was sick or showed any signs of illness, Saunders concluded that Thomas was in fact lying, and that she never stated she was sick before leaving the Resort.

On August 16, 2013, after consulting with those in upper management, including [redacted], [redacted] confirmed with Thomas that her employment was terminated. See **Exhibit I**. At the time of her termination, Thomas had been employed by the Resort for approximately ten years. See **Exhibit A**.

According to [redacted], after Thomas's termination, union activities at the Resort effectively ceased.

V. STANDARD OF REVIEW

Under FEPC 6.03, a FEPI must make a determination of whether there is “reasonable cause to believe that a violation of this Code has occurred, including findings of fact and conclusions of law.”

VI. FAIR EMPLOYMENT PRACTICES CODE

A. Rights of Public Employees

The relevant portions of the FEPC, state as follows:

16.14. *Rights of Public Employees.*

It shall be lawful for public employees to organize together or to form, join, or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of the own free choice:

Public employees also have the right to refuse to join or participate in activities of labor organizations and to represent themselves individually in their employment relations with public employers.

16.15 *Unfair Labor Practices*

a. A public employer is prohibited from:

1) Interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed under section 16.14

* * *

4) Discharging or discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14...

* * *

VI. ANALYSIS

A. Claim of Highly Scrutinized Supervision

According to Thomas, after being laid off in 2008, and subsequently recalled, she was over supervised as a result of her outspoken union activities. In support of this allegation, Thomas produced a notebook which documented her activities at work. On August 12, 2013, the day she was first informed of her termination, Thomas pointed to her notebook's documentation as proof that she was being sabotaged, over supervised, coerced, and discriminated against.

I found the notebook unpersuasive. My finding is based on the fact that Thomas also strongly believed she was being sabotaged when the video evidence plainly revealed that there was no sabotage. Thomas may have felt targeted, but it is just as likely that her beliefs were misperceptions.

Thomas's other piece of evidence to support her allegation that she was over supervised because of her union activities was her claim that supervisors began following her in order to prevent union organization activities.

The evidence does reflect that on at least one occasion, in 2008, a supervisor stood in her presence as she worked, ostensibly to give Thomas an assignment, and that Thomas angrily confronted him and refused to listen to his directions. **See Exhibit E.** However, at the end of the day, this is only one piece of evidence to support Thomas's allegation. Furthermore, the evidence is long past the 180 day period during which Thomas could have filed a Charge of Discrimination. Moreover, Thomas could point to no specific incident within the 180 day period. One incident in the span of ten years of employment is hardly enough.

Finally, the video record reflects that on the day of her termination, [redacted] walked by Thomas's cart, checked her clipboard to investigate her progress, and then, promptly left. **See Exhibit G.** There was no video evidence of Thomas's claim of over supervision. As a result, there is no reasonable basis to believe that Ms. Thomas was over supervised.

B. Discrimination

Thomas also alleges that she was discriminated against because of her union activities. When pressed on how she was treated disparately, however, Thomas was indefinite and vague. She alleged that her rooms were monitored with greater frequency. This evidence was rebutted by [redacted] and [redacted], both supervisors of the cleaning staff. The most specific incident Thomas could point to was her termination, which she claims would have not occurred for an employee who was not supportive of union activities. The wrongful termination claim is addressed below.

C. Coercement

Thomas also alleges that she was coerced to not join the Union. I could find no specific indication that she was personally coerced by the Resort to not join the Union within the relevant time period.

All of the specific alleged acts of coercion that Thomas pointed to, including repeated Resort employee meetings supposedly meant to delegitimize the Union, related to actions prior to June 2013. Those acts are outside the scope of this investigation. **See FEPC 6.02.** As a result, there is no reasonable cause to believe that Thomas was coerced.

D. Unjust Discipline/Wrongful Termination

Thomas claims that she was wrongly terminated because of her union activities. In support of her claim, Thomas produced union placards which evidence that she was becoming increasingly involved in union activities during the summer prior to her termination. **See Exhibit F.** The placards signed before Thomas's termination were witnessed and collected by Thomas. *Id.* Furthermore, the placards were signed between July 6, 2013, and August 1, 2013. The placards stated:

YES! I WANT UNITED STEELWORKERS UNION REPRESENTATION!

During the summer of 2013, a United Steelworkers Representative, [REDACTED], provided Thomas with United Steelworkers' brochures and encouraged Thomas to speak openly about her union involvement. [REDACTED] claimed that in the two years prior, Thomas joined him during union negotiations with the Resort, and that Union supervisors were fully aware of the extent of her involvement. Thomas confirmed that she was open about her union involvement, claiming that it was conspicuous because she spoke openly about union activities in the Employee Dining Room, recruited others to join union activities, provided brochures on union activities, and openly spoke in favor of the Union at public meetings with supervisors and employees.

In interviewing Resort supervisors, however, all of them claimed that they knew Thomas was involved in the Union, but denied that they were aware of the full extent and nature of her leadership activities, or the fact that she had become particularly active in the weeks and days just before her termination.

While it cannot be conclusively presumed that Resort supervisors knew the full extent of her union activities, there is a reasonable basis to conclude that Resort supervisors knew that Thomas was an important Union leader. I base this finding on: (1) the close proximity in time between when some of the Union placards were signed, on August 1, 2013, and when Ms. Thomas was initially terminated, on August 12, 2013; (2) Laney's testimony that Thomas was providing United Steelworker Union brochures for the Employee Dining Room during the Summer of 2013; (3) the fact that Thomas had openly, in the past, spoke in support of the Union; and (4) the fact that, according to Laney, she was the "main runner" for the Resort's union organization activities.

The Resort maintains that it performed an unbiased investigation to determine whether or not Thomas stated she was sick, or whether she simply left her job. [REDACTED], and [REDACTED] all seemed to indicate that Thomas is generally honest. Nevertheless, the decision was still made to terminate her based on a finding by the Resort that she lied about stating she was sick. **See Exhibit I.**

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According to the Resort's Employee Handbook, Section 7(D), insubordination includes a "refusal to respond to a request or order from a supervisor." Thomas was also terminated under Section 7(O), which requires employees to not leave work without following absence reporting procedures.

Under Section 3.2 of the Employee Handbook, in order to follow the proper reporting procedure for leaving work, an employee "must personally contact his/her supervisor." While generally an employee is to provide two hours of notice, there are exceptions under 3.2 for "rare circumstances when an employee is unable to provide the expected notice." According to the Resort's Employee Handbook, Section 7, insubordination, and failure to properly report, are both offenses which may result in termination. The subpoenaed evidence reveals that employees have consistently been terminated on such bases. **See Exhibit J.** However, the subpoenaed evidence also appears to reveal that none of the employees terminated on such bases also claimed that they were sick, and most of the employees had worked at the Resort for short periods of time. *Id.*

It is not in dispute that Thomas did personally contact her supervisor, [REDACTED]. It is not in dispute that Thomas wrongly accused the Resort of sabotage. It is not in dispute that [REDACTED] did not give Thomas permission to leave. What is in dispute is whether Thomas also informed [REDACTED] that she was sick, which could have constituted a "rare circumstance" legitimizing Thomas's short notice prior to leaving work. See Employee Handbook, Section 3.2.

When interviewing [REDACTED] as to whether Thomas stated that she was sick, I noticed that he fidgeted, had trouble making eye-contact, and periodically glanced at the Resort's attorney, as if searching for approval. In speaking with [REDACTED] she seemed to indicate that she was not particularly fond of Thomas. Both indicated that they did not support union activities.

Thomas, conversely, without hesitation or time to think of an answer, laughed when confronted with [REDACTED] statement that Thomas never mentioned being sick. Thomas is adamant that she informed [REDACTED] and [REDACTED] that she was "not feeling good." Furthermore, it is reasonable to conclude that Thomas was too paranoid about being unjustly terminated – as evidenced by her thorough documentation of materials – and too savvy to leave her work without advising that she was sick.

Thomas was a nearly ten year employee with a general reputation for honesty. Nevertheless, she was not given the benefit of the doubt, even though she had been to the doctor's office in days prior. Though Thomas failed to mention her doctor's appointment in her Charge of Discrimination, she did specifically claim that she was sick, vomiting, and dizzy. **See Exhibit A.** The video evidence can neither conclusively deny, nor affirm, what Thomas was feeling. Furthermore, she did make the Resort aware of her doctor's appointment months before she filed her Charge of Discrimination and has provided documentary evidence to substantiate her claim. **See Exhibit A and Exhibit K.**

Thomas's allegation that she was being sabotaged was either false or a misperception. However, her claim of sabotage was not so novel that it would have necessarily required termination. According to [REDACTED], Thomas had made such allegations at least four times in the past, all without being terminated.

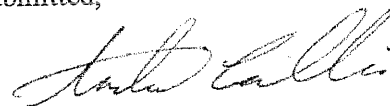
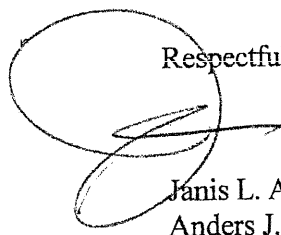
In short, the decision to terminate Thomas for abandonment and insubordination was based on a review of a video with no audio, and a credibility determination that found [redacted] and [redacted] more credible than Thomas. Despite her general reputation for honesty, the Resort was willing to terminate a ten year employee for what amounted to an inconclusive "he said/she said" investigation. More compelling, however, is the fact that the Resort made this decision to terminate just eleven days after Thomas was recruiting union pledge placards. The contemporaneous nature of that event to the termination, combined with the weak evidence supporting policy violations, leads me to find that the policy violations were mere pretext and there is reasonable cause to believe that Thomas was wrongly terminated.

VII. CONCLUSION

- The Investigators do not find reasonable cause to believe that the Resort over supervised Ms. Thomas.
- The Investigators do not find reasonable cause to believe that the Resort discriminated against Ms. Thomas prior to August 12, 2013.
- The Investigators do not find reasonable cause to believe that the Resort coerced Ms. Thomas to not participate in union activities.
- The Investigators do find reasonable cause to believe that Thomas was unjustly terminated for her union activities.

If you have any questions, please do not hesitate to contact us.

Respectfully submitted,



Janis L. Adams
Anders J. Gillis

STATEMENT OF SERVICE

Copies of this Motion to Expedite with Exhibits A through N have this day been served upon the following by electronic mail to the email addresses shown:

- ☐ Gary W. Saltzgiver, Esq., National Labor Relations Board (Gary.Saltzgiver@nrlb.gov)
- ☐ Dennis Boren, Esq., National Labor Relations Board (Dennis.Boren@nrlb.gov)
- ☐ Local 406, International Brotherhood of Teamsters c/o its counsel Ted M. Iorio, Esq. (titorchmi@aol.com)
- ☐ Ted M. Iorio, Esq. (titorchmi@aol.com)
- ☐ Rebekah M. Krispinsky, Esq., Office of the Solicitor, U.S. Department of the Interior (Rebekah.Krispinsky@sol.doi.gov)

This Motion has this day been electronically filed with the Executive Secretary of the National Labor Relations Board.

Dated: August 26, 2014

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.

Counsel for the Little River Band of
Ottawa Indians Tribal Government

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