



Council of the Cherokee Nation

Cherokee Nation Tribal
Council
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Legislation Text

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A LEGISLATIVE ACT AMENDING TITLE 51 OF THE CHEROKEE NATION CODE ANNOTATED - CIVIL PROCEDURE

BE IT ENACTED BY THE CHEROKEE NATION:

SECTION 1. TITLE AND CODIFICATION

This Act shall be known as the “**Employee Access to Justice Act of 2017**” (“Act”) and codified under Title 51, Chapter 10 of the Cherokee Nation Code Annotated (CNCA).

SECTION 2. PURPOSE

The purpose of this Act is to repeal and replace **Chapter 10** of Title 51 of the Cherokee Nation Code Annotated.

SECTION 3. LEGISLATIVE HISTORY

Legislative Act 12-96
Legislative Act 20-96
Legislative Act 17-05
Legislative Act 03-10
Legislative Act 01-12

SECTION 4. SUBSTANTIVE LAW

Title 51, Chapter 10 of the Cherokee Nation Code Annotated shall be amended as follows:

EMPLOYEE ADMINISTRATIVE PROCEDURES

§ 1001. Short title

This act shall be known and may be cited as the Employee Administrative Procedures Act.

§ 1002. Purpose

The purpose of this act is to establish a timely and fair procedure for appeals of employment terminations by employees of Cherokee Nation, which provides to the employees due process and other protections guaranteed by the federal Indian Civil Rights Act of 1968 and the Cherokee Nation Constitution, Article II [now Article III], including notice and an opportunity for a hearing.

§ 1003. Definition

As used in the Employee Administrative Procedures Act:

1. “**Act**” shall mean the Employee Administrative Procedures Act.

2. **"Administrative proceeding"** means the formal process employed by the Employee Appeals Board for consideration of an employee termination appeal resulting in a final administrative decision.
3. **"Board"** shall mean the Employee Appeals Board.
4. **"Cause to terminate employment"** shall have the meaning as defined in 51 CNCA § 1011.
5. **"District Court"** shall mean the trial court of Cherokee Nation.
6. **"Employee Appeals Clerk"** shall mean a designated person in the Executive Offices of Cherokee Nation.
7. **"Employee of Cherokee Nation"** or **"employee"** shall mean a person who has been directly employed by Cherokee Nation on a regular permanent full-time basis for at least one (1) continuous year immediately prior to termination of employment, including such employees who have renewable contracts with the Cherokee Nation. For purposes of employee termination appeals under this act this term shall not include employees of any corporation for profit or other business entity owned and operated by Cherokee Nation, such as, but not limited to, Bingo Outpost, Cherokee Nation Enterprises and Cherokee Nation Industries; nor to specialized authorities and entities created by the Legislature, such as, but not limited to, the Arkansas Riverbed Trust Authority.
8. **"Final administrative decision"** means a final decision made by an Employee Appeals Hearing Officer pursuant to this act and which is subject to judicial review.
9. **"Former employee"** shall mean an employee as defined in paragraph 4 of this section who was terminated from employment.
10. **"Human Resources Director"** shall mean the Human Resources Director of Cherokee Nation.
11. **"Order"** means all or part of a formal or official decision made by the Employee Appeals Board or Supreme Court.
12. **"Parties to an appeal"** shall mean an employee who has been terminated from employment with Cherokee Nation and the Human Resources Director or his or her designee acting as the client representative of the employer.
13. **"Supreme Court"** shall mean the three (3) Justices of the Supreme Court acting en banc as an appellate court.
14. **"Termination of employment"** shall mean the involuntary severance of an employee from Cherokee Nation employment, including a decision to not renew a contract with an employee, provided that such term shall not include a temporary or permanent layoff for lack of funds or work.

§ 1004. Cherokee Nation Employee Appeals Board

The Cherokee Nation Employee Appeals Board is hereby established to serve in the capacity of an administrative body to hear appeals by former employees of decisions to terminate said persons.

§ 1005. Board qualification

The Employee Appeals Board shall be composed of three (3) Hearing Officers appointed by the Principal Chief and confirmed by Cherokee Nation Council. Qualifications of the Board members shall be as follows:

1. The person must be currently licensed to practice law by the Oklahoma Supreme Court and be a member of the Cherokee Nation bar;
2. The person must have a working knowledge of this act;
3. The person must not be an owner, stockholder, employee or officer of, nor have any other business relationship with,

any corporation, partnership, or other business or entity that is subject to regulation by Cherokee Nation;

4. The person must be separate and apart from the Legal Division or Office of General Counsel of Cherokee Nation;

5. The person must not be responsible to or subject to the supervision or direction of a Cherokee Nation employee or agent engaged in the performance of investigative or prosecuting functions for Cherokee Nation; and

6. The person must not have been engaged in the performance of investigative or prosecuting functions for Cherokee Nation regarding the terminated employee.

§ 1006. Employee Appeals Board term

The first term of office for each Board member shall commence on October 1, 1996 and expire on September 30, 1999. Thereafter, commencing on October 1, 1999, the terms shall run every four years.

§ 1007. Employee Appeals Board officers

The Employee Appeals Board shall select a Chairman and a Vice-Chairman from its membership. Term of office shall be for one (1) year from October 1 until the following September 30. Any officer selected after October 1 of any given year shall serve the remainder of the one-year term expiring on the following September 30.

§ 1008. Appeals heard by Employee Appeal Board en banc

Any party to an appeal shall have a matter decided by Employee Appeal Board members en banc.

§ 1009. Employee Appeals Board Clerk

A person designated by the Principal Chief shall act as the Employee Appeals Board Clerk. The responsibilities of the Employee Appeals Board Clerk shall include maintenance of the appeal casefile, issuance of notices, and such other duties as required by the Employee Appeals Board.

§ 1010. Termination for cause

A. An employee of Cherokee Nation may be terminated for cause without prior warning, counseling, or reprimand, based on one (1) of the following grounds:

1. Any reason involving moral turpitude affecting or potentially affecting conduct while on duty, including without limitation any violation of the Cherokee Nation Code of Ethics; falsification of time cards, time sheets, tribal records or other documents; theft, embezzlement or misappropriation or destruction of property or funds; or use of official position for personal profit or advantage; provided that a criminal conviction shall not be a prerequisite for termination based on any conduct which could subject the employee to criminal prosecution;

2. Engaging in conduct while on duty which affects or could affect the safety of the work environment and co-workers or which could affect public safety, including possession of weapons, explosives or dangerous materials on the job without written authorization; drinking alcoholic beverage or using controlled drugs without a legal prescription during work while on duty or reporting to work under the influence of alcohol or drugs without a legal prescription; and any other conduct which poses a threat to the public safety;

3. Sexual harassment in the workplace;

4. Harassment of an employee because of political affiliations, religion, race, gender, age, disability, or national origin;

5. Conviction of a felony;

6. Mental or physical abuse to a child; and

7. Engaging in criminal sexual activity or sexual misconduct that has impeded the effectiveness of the individual's performance of duties.

B. An employee of Cherokee Nation may be terminated for cause, provided that the employee has received prior warning, counseling, and reprimand on one or more previous occasions, based on any one or any combination of the following grounds:

1. Repeated negligence in performance of duty;

2. Willful neglect of duty;

3. Other willful misconduct related to a violation of standards of conduct for employees of Cherokee Nation as defined in the Cherokee Nation Human Resources Manual.

§ 1011. Initiation of termination-Employee status

A termination action may be initiated by the employee's supervisor; but policy concurrence for the action shall be obtained in advance of the action by the Human Resources Director. The written notice of dismissal must be given to the employee, and must describe the reasons involved and a statement apprising the employee of his or her right to appeal the termination. The termination action shall take effect according to the written notice of such actions given to the employee, and shall remain in effect according to the notice even though review proceedings or appeal hearings concerning such matter have been instituted and are pending and not completed.

§ 1012. Human Resources Director review

A. A former employee may request review and reconsideration of the termination by the Human Resources Director in writing delivered to the Human Resources Director within ten (10) working days after receipt of the termination decision. The request should include a statement of reasons why the employee believes the termination was without cause, and should include any documents not already contained in the former employee's personnel file which the former employee believes to be relevant.

B. The Human Resources Director shall thereafter review the former employee's request, documents included with the request, and relevant documents in the employee's personnel file, and issue a written decision within ten (10) working days of receipt of the request for review.

C. If the Human Resources Director revokes the termination, the former employee shall be immediately restored to Cherokee Nation employment in the same or similar job position, with pay no less than the pay received at the time of termination and benefits retroactive to the date of the termination; his personnel records adjusted as may be consistent with the revocation action.

D. If the Human Resources Director revokes the termination, the decision shall be a final unappealable decision. If the Human Resources Director upholds the termination based on cause, the decision of the Human Resources Director shall be final unless the former employee appeals the decision to the Employee Appeals Board pursuant to procedures set forth in 51 CNCA § 1013.

§ 1013. Manner of filing appeal

A former employee must deliver to the Cherokee Nation Human Resources Office and to the Employee Appeals Board Clerk a written Notice of Appeal of Termination Decision no later than ten (10) working days from the date the Human Resources Director's decision upholding the termination was received by the former employee. The Notice of Appeal shall state the date of the termination and the reasons why the former employee believes the termination was without cause.

§ 1014. Administrative record and casefiles

A. Human Resources Summary Statement. If the former employee appeals the decision to the Employee Appeals Board, the Human Resources Director or his designee shall prepare a Human Resources Summary Statement for placement in the administrative record on a form containing the following information: case number; name of appealing party; position of employee; date decision made; date appeal received by the Human Resources Office; statement that the former employee filed appeal within time required or that the former employee did not file his appeal within the time required; and list of any specific Cherokee Nation laws and Cherokee Nation and/or federal regulations, policies and/or standards applicable to the former employee's conduct or termination of employment.

B. Administrative record. The administrative record shall be prepared by the Human Resources Director or his designee, who shall place the following documents in the record: Human Resources Summary Statement; Disciplinary Action Form containing notice of the termination which is the subject of the appeal; the former employee's written appeal; any documents submitted by the Human Resources Director, including designated documents from the former employee's personnel files; and any other relevant documents allowed into the record by the Board. The Employee Appeals Board Clerk shall add to the record all documents submitted by the former employee, including designated documents from his/her personnel files.

C. Establishment of casefile. The Employee Appeals Board Clerk shall maintain an Employee Appeals Board casefile for each appeal filed, which shall contain the administrative record; all notices issued by the Employee Appeals Board Clerk and all return receipts; any other documents accepted by the Appeals Board; and decision of the Appeals Board. The Human Resources Director shall initially prepare the casefile, by placing those portions of the administrative record in his or her possession in a file and delivering it to the Employee Appeals Board Clerk. The Employee Appeals Board Clerk shall assign each casefile a number beginning with the words "Emp. Ad. Appeal No.", followed by the last two digits of the year in which the appeal was filed, followed by a dash, followed by an individual number for each appeal.

D. Access to casefiles. Public inspection of the Human Resources Summary Statement and the Employee Appeals Board decision shall be allowed. Other materials contained in the casefile may be released for public inspection only if authorized by written consent of the former employee or authorized by the Employee Appeals Board Chairman pursuant to rules established by the Board.

§ 1015. Scheduling of hearing

The Hearing Officer designated to hear the case shall promptly notify the Employee Appeals Board Clerk of the scheduling of a hearing. The hearing shall be no later than thirty (30) days from date of the Appeals Board Clerk's receipt of the appeal notice, provided that for good cause the Board may grant either party an extension of time for the hearing date.

§ 1016. Employee administrative appeal proceedings-Notice of hearing

A. In an appeal proceeding, all parties shall be afforded an opportunity for hearing after reasonable notice. The Employee Appeals Board Clerk shall send notices to the Human Resources Director by inter-office mail and to the former employee, by certified mail, return receipt requested. The notice must be served on the parties at least ten days (10) before the hearing, unless the appealing party states that he waives any objection he might have to receiving the notice. If the certified letter is returned undelivered, then a second notice shall be sent by regular mail. Service of notices will be considered to have been made on: the date of delivery indicated on the return receipt when the notice has been sent by certified mail, return receipt requested; or the date the second notice sent by regular mail is returned by the post office as undelivered, or ten (10) days after the date the second notice is sent by regular mail when the letter has not been returned by the post office, whichever occurs first.

B. The notice shall include:

1. A statement of the time, place and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;

4. A copy of the Employee Appeals Board casefile; and

5. A short and plain statement of the matters asserted. If the Human Resources Department or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

D. Unless precluded by law, informal disposition may be made of any individual proceeding by stipulation, agreed settlement, consent order, or default.

§ 1017. Employee Appeals Board record

A. The Employee Appeals Board record in an appeal proceeding shall include:

1. The Employee Appeals casefile, including all pleadings, motions and intermediate rulings;

2. Evidence received or considered at the appeal proceeding;

3. A statement of matters officially noticed;

4. Questions and offers of proof, objections, and rulings thereon;

5. Proposed findings and exceptions;

6. Any decision, opinion, or report by the Hearing Officer presiding at the hearing; and

7. All other evidence or data submitted to the Hearing Officer in connection with consideration of the case, provided all parties have had access to such evidence.

B. Oral proceedings shall be electronically recorded. Such recordings shall be maintained for such time so as to protect the record through judicial review. Copies of the recordings shall be provided by the Employee Appeals Board at the request of any party to the proceeding. Costs of transcription of the recordings shall be borne by the party requesting the transcription. For judicial review, electronic recordings of an individual proceeding, as certified by the Employee Appeals Board, may be submitted to the reviewing court by the Board as part of the record of the proceedings under review without transcription unless otherwise required to be transcribed by the reviewing Court. In such case, the expense of transcriptions shall be taxed and assessed against the nonprevailing party. Parties to any proceeding may have the proceedings transcribed by a Court Reporter at their own expense.

§ 1018. Hearing procedures before Employee Appeals Board

A. In employee appeals hearings, the Cherokee Nation shall present its evidence to show that the termination was for cause, the former employee may then present evidence, and the Cherokee Nation shall have an opportunity to present rebuttal evidence. The burden of proof shall be on the employee to prove that the termination was not for cause, including proof that the decision to terminate was not made in good faith; or that the facts which constituted the grounds for the termination were not supported by substantial evidence; or that such facts were not reasonably believed by the employer to be true.

B. In employee appeal proceedings the Hearing Officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The Hearing Officer shall give effect to the rules of privilege recognized by law in respect to: self-incrimination; confidential communications between husband and wife during the existence of the marriage relation; communication between attorney and client, made in that relation; confessions made to a clergyman or priest in his professional capacity in the course of discipline enjoined by the church to which he belongs; communications made by a patient to a licensed practitioner of one of the

healing arts with reference to any physical or supposed physical disease or of knowledge gained by such practitioner through a physical examination of a patient made in a professional capacity; records and files of any official or agency of any state or of the United States which, by any statute of such state or of the United States are made confidential and privileged. No greater exclusionary effect shall be given any such rule or privilege than would obtain in an action in court. The Hearing Officer may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence. Objections to evidential offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

C. Documentary evidence may be received during the appeal hearing, in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

D. Witnesses must be sworn to tell to the truth prior to the taking of testimony. A party may conduct cross-examinations required for a full and true disclosure of the facts during the appeal hearing.

E. Notice may be taken of judicially cognizable facts. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.

F. Any party shall at all times have the right to counsel, provided that such counsel must be duly licensed to practice law by the Supreme Court of Oklahoma and shall be a member of the Cherokee Nation bar, and provided further that such counsel shall have the right to appear and act for and on behalf of the party he represents.

G. The hearing will be a public hearing. The public, the Human Resources Director and the former employee have the right to be present during the hearing at all times, except when the Board retires to make its decision. The Board will not be bound by technical rules of evidence in the conduct of hearings, and no informality in any proceeding, as in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Hearing Officer.

H. The hearing may be adjourned, postponed and continued if requested by either party, at the discretion of the Employee Appeals Board.

~~§ 1019. Final Employee Appeals Board decisions-Contents-Notification~~

A. A final Employee Appeals Board decision shall:

1. Be in writing; and

2. Include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with Employee Appeals Board rules, a party submitted proposed findings of fact, the final Appeals Board order shall include a ruling upon each proposed finding. Findings of fact shall be based exclusively on the evidence received and on matters officially noticed in the individual proceeding unless otherwise agreed upon by the parties on the record.

B. Parties shall be notified either personally or by certified mail, return receipt requested, of any final Appeals Board order. Upon request, a copy of the order shall be delivered or mailed forthwith to each party and to his attorney of record.

~~§ 1020. Employee Appeals Board members not to communicate~~

Unless required for the disposition of ex parte matters authorized by law, Employee Appeals Board members

shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An Employee Appeals Board member (1) may communicate with other members of the Board, and (2) may have the aid and advice of one or more personal assistants.

§ 1021. Furnishing of information, attendance of witnesses and production of books and records-Subpoenas

A. 1. The Employee Appeals Board shall have power to require the furnishing of such Information, the attendance of such witnesses, and the production of such books, records, papers or other objects as may be necessary and proper for the purposes of the proceeding.

2. Cherokee Nation and the former employee may take the depositions of witnesses, within or without the state, in the same manner as is provided by law for the taking of depositions in civil actions in courts of record. Depositions so taken shall be admissible in any proceeding affected by this act; provided, however, all or any part of the deposition may be objected to at the time of hearing, and may be received in evidence or excluded from the evidence by the Hearing Officer in accordance with the law with reference to evidence in this act or with reference to evidence in courts of record under the law of Cherokee Nation.

B. In furtherance of the powers granted by subsection (A) of this section, any Hearing Officer, upon his or her own motion may, and upon the request of any party appearing in an individual proceeding shall:

1. Issue subpoenas for witnesses, provided that the Employee Appeals Board Clerk shall also have such authority;

2. Issue subpoenas duces tecum to compel the production of books, records, papers or other objects, which may be served by the Cherokee Nation Marshal Service or by any person in any manner prescribed for the service of a subpoena in a civil action, provided that the Employee Appeals Board Clerk shall also have such authority; or

3. Quash a subpoena or subpoenas duces tecum so issued; provided, prior to quashing a subpoena or subpoenas duces tecum the Hearing Officer shall give notice to all parties. A subpoena or subpoenas duces tecum may not be quashed if any party objects.

C. 1. In case of disobedience to any subpoena issued and served under this section or to any lawful Hearing Officer requirement for information, or of the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before a Hearing Officer, the Hearing Officer may apply to the Cherokee Nation District or Supreme Court or to any Judge or Justice thereof for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith the Court or the Judge shall cite the respondent to appear and shall hear the matter as expeditiously as possible.

2. If the disobedience or refusal is found to be unlawful, the Judge or Justice shall enter an order requiring compliance. Disobedience of such an order shall be punished as contempt of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.

§ 1022. Disqualification of Hearing Officer

A Hearing Officer shall withdraw from any individual proceeding in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a Hearing Officer, on the

ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the Hearing Officer does not remove himself or herself from hearing the case, the issue shall be determined promptly by the remaining two members of the Employee Appeals Board. Upon the entry of an order of disqualification affecting a Hearing Officer, the Employee Appeals Board shall assign another in his or her stead. Upon the disqualification of all three (3) Employee Appeals Board members, the Principal Chief shall immediately appoint a Special Hearing Officer to sit in place of the disqualified members in the proceeding.

§ 1023. Rehearing, reopening or reconsideration of decision

A. A final Employee Appeals Board decision shall be subject to rehearing, reopening or reconsideration. Any application or request for such rehearing, reopening or reconsideration shall be made by any party aggrieved by the final Appeals Board order within ten (10) days from the date of the entry of such final order. The grounds for such action shall be either:

1. Newly discovered or newly available evidence, relevant to the issues;
2. Need for additional evidence adequately to develop the facts essential to proper decision;
3. Probable error committed by the Employee Appeals Board in the proceeding or in its decision such as would be ground for reversal on judicial review of the final order;
4. Need for further consideration of the issues and the evidence in the public interest; or
5. A showing that issues not previously considered ought to be examined in order properly to dispose of the matter.

B. The order of the Appeals Board Hearing Officer granting rehearing, reconsideration or review, or the petition of a party therefor, shall set forth the grounds which justify such action.

C. Nothing in this section shall prevent rehearing, reopening or reconsideration of a matter by the Employee Appeals Board on the ground of fraud practiced by the prevailing party or of procurement of the order by perjured testimony or fictitious evidence.

D. On reconsideration, reopening, or rehearing, the matter may be heard by the Employee Appeals Board Hearing Officer who heard the case. The hearing shall be confined to those grounds upon which the reconsideration, reopening or rehearing was ordered.

E. If an application for rehearing shall be timely filed, the period within which judicial review, under the applicable statute, must be sought, shall run from the final disposition of such application.

§ 1024. Review by Supreme Court

A. 1. Any party aggrieved by a final order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof pursuant to the provisions of this section and 51 CNCA §§ 1025, 1026 and 1027.

2. This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.

3. Neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.

B. Proceedings for review shall be instituted by filing a petition with the Court Clerk of the Supreme Court, within thirty (30) days after the appellant is notified of the final Employee Appeals Board order as provided in 51 CNCA § 1027.

C. Copies of the petition shall be served upon the Cherokee Nation Human Resources Director and all other parties of record, and proof of such service shall be filed with the Court Clerk of the Supreme Court within ten (10) days after the filing of the petition. The Court, in its discretion, may permit other interested persons to intervene.

D. In any proceedings for review brought by a party aggrieved by a final Employee Appeals Board order the responding party may be entitled to recover against such appealing party any court costs and reasonable attorney fees, unless the Court determines that the appeal brought by the other party is frivolous.

§ 1025. Transmission of record to reviewing Court-Stipulations

Within thirty (30) days after service of the petition for review or equivalent process upon it, or within such further time as the reviewing Court, upon application for good cause shown, may allow, the Employee Appeals Board Clerk shall transmit to the reviewing Court the original or a certified copy of the entire record of the proceeding under review. For purposes of this section, "record" shall include such information as specified by 51 CNCA § 1017. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the Court for the additional costs resulting therefrom. The Court may require or permit subsequent corrections or additions to the record when deemed desirable.

§ 1026. Review without jury-Additional testimony

The review shall be conducted by the Supreme Court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the Employee Appeals Board, not shown in the record, testimony thereon may be taken by the Supreme Court. The Supreme Court, upon request, shall hear oral argument and receive written briefs.

§ 1027. Setting aside, modifying or reversing of orders-Remand-Affirmance

A. In any proceeding for the review of a final termination decision, the Supreme Court, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the Administrative Appeals Board for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the Employee Appeals Board's findings, inferences, conclusions or decisions, are:

1. in violation of constitutional provisions; or

2. in excess of the statutory authority or jurisdiction of the Employee Appeals Board; or

3. made upon unlawful procedure; or

4. affected by other error of law; or

5. clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in 51 CNCA § 1019, including matters properly noticed by the Hearing Officer upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the Employee Appeals Board on question of fact; or

6. arbitrary or capricious; or

7. because findings of fact, upon issues essential to the decision, were not made although requested.

B. The Supreme Court, also in the exercise of proper judicial discretion or authority, may remand the case to the Employee Appeals Board for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue.

C. The Supreme Court shall affirm the order and decision of the Employee Appeals Board, if it is found to be valid and the proceedings are free from prejudicial error to the appellant.

D. The decision of the Supreme Court shall be final and shall not be subject to further review by any other state, tribal or federal government body or court.

§ 1028. Remedies for termination without cause

A. If the termination is overturned based on a finding that the termination was without cause by unappealed decision of the Cherokee Nation Employee Appeals Board or by a final decision of the Supreme Court, the former employee shall be immediately restored to Cherokee Nation employment in the same or similar job position, with pay no less than the pay received at the time of termination, and with benefits retroactive to the date of the termination; and the employee's personnel records adjusted as may be consistent with the action of the Cherokee Nation Employee Appeals Board or Supreme Court. The remedies provided herein shall be exclusive, and Cherokee Nation expressly declines to waive sovereign immunity as to suit for recovery of any form of damages or other type or relief other than the relief set forth herein. All remedies listed herein shall be available to employees of corporations wholly owned by Cherokee Nation, if said employee is successful in overturning a termination as provided through the applicable termination appeals process for that corporation.

B. Prevailing parties may be awarded costs and reasonable attorney fees as determined by the appropriate Board or Court.

§ 1029. Time computations

In computing any period of time prescribed or allowed by this act, the day of the act, or event, from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday as defined by the Oklahoma Statutes or any other day when the receiving office does not remain open for public business until 4:00 p.m., in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday as defined by the Oklahoma Statutes, or any other day when the receiving office does not remain open for public business until 4:00 p.m.

EMPLOYEE ACCESS TO JUSTICE

§ 1001. Short title

This act shall be known and may be cited as the Employee Access to Justice Act of 2017.

§ 1002. Purpose

The purpose of this act is to expedite the judicial review of employment terminations and involuntary demotions by employees of the Cherokee Nation and included entities as defined herein while providing due process and for cause removal protections guaranteed by the Cherokee Nation Constitution.

§ 1003. Definition

As used in the Employee Access to Justice Act:

- A. **“Act”** shall mean the Employee Access to Justice Act.

- B. **“Cause to Terminate”** or **“Cause to Demote”** shall have the meaning as set forth in the policies and procedures of the Cherokee Nation and included entities, or as defined herein, or by the Human Resource Director and approved by the Principal Chief or included entities’ CEO.

- C. **“Demotion”** or **“Demoted”** or **“Demote”** shall mean involuntary reduction in base pay of an employee within the Cherokee Nation or included entities.

- D. **“Demoted Employee”** shall mean an employee who received an involuntary reduction in base pay.

- E. **“District Court”** shall mean the trial court of Cherokee Nation.

- F. **“Employee”** shall mean a person who has been directly employed by the Cherokee Nation or included entities on a regular, permanent, full-time basis for at least one (1) continuous year immediately prior to termination or involuntary demotion. This term shall not include part-time, seasonal, temporary, or limited-term contract employees, regardless of the length of the contract.

- G. **“Executive Director”** shall mean the managing director of a department or agency of the Cherokee Nation or included entities.

- H. **“Former Employee”** shall mean an employee who was involuntarily terminated from employment.
- I. **“Human Resources Director”** shall mean the Human Resources Director of the Cherokee Nation or included entities, or his or her designee.
- J. **“Included Entities”** shall mean any company, corporation, or other for profit business entity owned by the Cherokee Nation, including but not limited to Cherokee Nation Businesses, LLC, Cherokee Nation Entertainment, LLC, and Cherokee Nation Industries, LLC. This term shall not include specialized authorities and entities created by the Legislature, such as, but not limited to, the Arkansas Riverbed Authority.
- K. **“Parties to Suit”** may include a former or demoted employee and the Cherokee Nation or the applicable included entity from which the employee was terminated or demoted.
- L. **“Termination” or “Terminated”** shall mean the involuntary severance of an employee from employment. This term shall not include current employees who resign their employment, employees who are separated due to lack of work, lack of funds or downsizing, employees who failed to report for their scheduled shift for three (3) consecutive days without notifying their supervisor or Human Resources representative, or employees who do not return to work after a job-protected leave expires.

§ 1004. Termination or Demotion for Cause

- A. An employee of the Cherokee Nation or included entities may only be terminated or demoted for cause.
- B. Cause to terminate or demote, shall be determined in accordance with Cherokee Nation or included entities’ policies and procedures or by the Human Resources Director.

§ 1005. Pre-Termination Procedure; Notice of Termination

- A. An employee shall be given written notice of the charges against him or her or other reasons that are the basis of the cause to terminate employment.
- B. An employee shall be afforded a pre-termination opportunity to respond to the charge against him or her and/or the reason(s) that are the basis of the cause to terminate.

- C. An employee shall be given written notice describing the cause(s) for termination. Such notice shall include a statement apprising the employee of his or her right to seek redress through the District Court.

- D. The termination shall take effect according to the written notice given to the employee.

§ 1006. Pre-Demotion Procedure, Notice of Demotion

- A. An employee shall be given written notice of the charges against him or her or other reasons that are the basis of the cause to demote.

- B. An employee shall be afforded a pre-demotion opportunity to respond to the charge against him or her and/or the reason(s) that are the basis of the cause to demote.

- C. An employee shall be given written notice describing the cause(s) for demotion. Such notice shall include a statement apprising the employee of his or her right to seek redress through the District Court.

- D. The demotion shall take effect according to the written notice given to the employee.

§ 1007. Petition for Wrongful Termination or Demotion

- A. A former employee aggrieved by a termination may file a petition for wrongful termination in the District Court as described herein.

- B. A demoted employee aggrieved by an involuntary demotion may file a petition for wrongful demotion in the District Court as described herein.

- C. A petition for wrongful termination or wrongful demotion shall be brought in the name of the former employee or demoted employee against either the Cherokee Nation or the included entity from which the employee was terminated or demoted.

- D. Any petition for wrongful termination or wrongful demotion shall be limited to claims that the former employee or demoted employee was terminated or demoted without cause or denied due process of law.

§ 1008. Filing of Petition

- A. A former employee may file a petition for wrongful termination, or a demoted employee may file a petition for wrongful demotion, with the clerk of the District Court within twenty (20) days of the effective date of termination or demotion. A file stamped copy of the same must be served upon the Human Resources Director and the Office of the Attorney General or Office of the Chief Legal Officer for included entities within five (5) days of filing.

- B. The Attorney General or Chief Legal Officer shall file a response within twenty (20) days of receipt of service.

- C. Any claim not timely filed shall be forever time-barred.

- D. All filing fees under this Act shall be waived.

§ 1009. Damages Allowed, Punitive Damages Disallowed

- A. Relief from a judicial finding of wrongful termination or wrongful demotion, shall be limited to the following:
 - 1. Reinstatement of the employee to his or her former position, or a similar position at the same rate of base pay.

 - 2. In the case of wrongful termination, an award of back-pay and benefits for the period of separation from employment, less any unemployment compensation or other wages that the former employee has received since termination. Provided that no such award shall exceed one (1) year of the former employee's salary and benefits.

 - 3. In the case of wrongful demotion, an award of back-pay equivalent to the difference between the employee's former base pay and their current base pay from the time of the demotion. Provided that no such award shall exceed one (1) year of the employee's salary and benefits.

 - 4. An award of reasonable costs and attorney's fees. Provided that in no event shall such an award of costs and attorney's fees exceed twenty percent (20%) of the amount of an award of back-pay and benefits.

- B. Any award of punitive or exemplary damages against the Cherokee Nation or included entities is expressly disallowed.

§ 1010. Scheduling of Hearing

- A. The District Court shall set a hearing on the merits of any timely-filed petition for wrongful termination or wrongful demotion within six (6) weeks of filing.

- B. An extension of time by the District Court may only be had upon approval of all parties to suit or for good cause shown under extraordinary circumstances.

§ 1011. Time computations

In computing any period of time prescribed or allowed by this act, the day of the act, or event, from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday as defined by the Oklahoma Statutes or any other day when the receiving office does not remain open for public business until 4:00 p.m., in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday as defined by the Cherokee Nation, or any other day when the receiving office does not remain open for public business until 4:00 p.m.

§ 1012. No waiver

Nothing in this Act shall be deemed as a waiver of the Cherokee Nation's sovereign immunity, except as to the specific suit allowed herein, for any purpose.

§ 1013. Provisions Not Cumulative

The provisions of this Act shall not be cumulative to existing law and shall supersede any existing law in conflict therewith.

§ 1014. Severability

The provisions of this Act are severable and if any part of the provisions hereof, or their application to any person or circumstance, shall be held unconstitutional the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this Act.

§ 1015. Effective Date

The provisions of this Act shall become effective thirty (30) days from and after the date of its passage and approval.

§ 1016. Self-Help Contributions

To the extent that this Act involves programs or services to citizens of the Cherokee Nation or others, self-help contributions shall be required, unless specifically prohibited by the funding agency, or a waiver is granted due to physical or mental incapacity of the participant to contribute.