



POARCH BAND OF CREEK INDIANS TRIBAL CODE



TRIBAL GRIEVANCE BOARD POLICIES AND PROCEDURES

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**TITLE 33
TRIBAL EMPLOYMENT RIGHTS¹**

**CHAPTER I
GENERAL PROVISIONS**

§ 33-1-1 Short Title

This Title shall be known as the Poarch Band of Creek Indians Tribal Employment Rights Title (“TERO”).

§ 33-1-2 Authority

The Tribal Council enacts this Title pursuant to its authority under the Poarch Band Constitution, Article IV, Section 4, which empowers the Tribal Council to “establish and enforce ordinances” (Section 4(k)), to “regulate trade” (Section 4(m)), and to exercise “all inherent powers” of the Tribe (Section 4(n)).

§ 33-1-3 Definitions

When used in this Title:

- (a) “Commission” means the Tribal Employment Rights Commission established under Chapter Two of this Title (“TERO Commission”).
- (b) “Discrimination” has the meaning indicated at Section 33-4-4. Discrimination does not include preference based on membership in the Tribe, family relationship with a member of the Tribe or membership in another federally-recognized tribe.
- (c) “Employee” means any individual employed by the Tribe, including Tribal Government and all Tribal Commercial Entities, corporations or limited liability companies owned by the Tribe, and any other person engaging in any activity, enterprise or business employing at least one individual on Tribal Lands. “Employee” does not include any individual employed by his or her parents, spouse or child or any individual who receives a 1099 for tax purposes.
- (d) “Employer” means the Tribe, including Tribal Government and all Tribal Commercial Entities, and any other person engaging in any activity, enterprise or business employing at least one individual on Tribal Lands. “Employer” does not include a social club or fraternal society under with respect to a particular job for which the club or society seeks to employ or employs a member, if the particular job is advertised only within the membership.

¹ Legislative History

- (e) “First Generation Descendant” means a child of a living or deceased Tribal Member as recognized by the Tribal Enrollment Department.
- (f) “Indian” means an enrolled member of a federally-recognized tribe.
- (g) “Indian Preference” means the preference to which Tribal Members, First Generation Descendants, Indians, or enterprises owned and controlled by Tribal Members and/or Indians are entitled under this Title and under federal and state laws.
- (h) “Marital status” means the status of being married, single, divorced, separated or widowed.
- (i) “Reservation” means all lands either held in trust by the United States of America for the Poarch Band of Creek Indians or held by the Poarch Band of Creek Indians subject to restrictions by the United States of America against alienation, whether presently held or acquired in the future.
- (j) “Spouse” means a party, widow, or widower to a marriage to a Tribal Member recognized by any jurisdiction, including the Tribe, which must be shown by (1) a marriage certificate and (2) an affidavit from the Tribal Member spouse (for current marriage) or death certificate of the Tribal Member (for widowhood). It shall not include a party to a common law marriage to a Tribal Member.
- (k) “Tribe” and “Tribal” means the Poarch Band of Creek Indians.
- (l) “Tribal Council” means the Poarch Band of Creek Indians Tribal Council.
- (m) “Tribal Employee” means any person who is employed by an Employer under this Title.
- (n) “Tribal Commercial Entities” means all authorities established by the Tribal Council for commercial purposes.
- (o) “Tribal Government” means the Tribal Council, the office of the Tribal Chairman, all offices and departments that report directly to the Tribal Chairman, governmental authorities, commissions, and all boards, instrumentalities, and other entities established by the Tribal Council.
- (ii) “Tribal Lands” means the Poarch Band of Creek Indians Reservation and land owned by the Poarch Band of Creek Indians in fee simple.
- (jj) “Tribal Member” means any person included on the official roll of the Poarch Band of Creek Indians.

§ 33-1-4 Effective Date

These Bylaws and Policies and Procedures for the Tribal Grievance Board shall become effective as of March 1, 2016.

**CHAPTER II
ADMINISTRATION**

§ 33-2-1 Establishment of Commission

(a) Establishment

There is hereby created a Tribal Employment Rights Commission

(b) Number, Tenure, Nomination and Qualifications of the Commissioners

The number of Commissioners which shall constitute the whole Board shall be five (5). A Commissioner shall be a natural person of at least twenty-one (21) years of age, and a majority of the Commissioners shall be enrolled Tribal Members. No employee of the TERO Office and no owner or employee of a Certified Business shall be eligible for service on the Board of Commissioners. The Tribal Council shall designate annually one Tribal Council member as its representative director on the TERO Commission; the designated Tribal Council representative commissioner shall serve a term of one (1) year. All other Commissioners shall be elected by the Tribal Council for staggered four (4) year terms, and each Commissioner elected shall hold office until such Commissioner's successor is elected and qualified.

(c) Vacancies; Removal

Any vacancy occurring in the Board of Commissioners due to the removal or resignation of a Board member, shall be filled by the Tribal Council in a manner prescribed by the Tribal Council following the advertisement of the position for at least thirty (30) days, and the Commissioner shall hold office for the same term as the Commissioner that he or she is replacing (unless removed earlier in accordance with this Charter, and unless such Commissioner is the designated Tribal Council member, in which case the term shall be the shorter of the same term as the Commissioner that he or she is replacing or until such Commissioner is no longer a member of the Tribal Council). Any Commissioner may be removed from office at any time with or without cause, by a vote of two-thirds of the Tribal Council. Further, upon a Commissioner's resignation, death, disability, or upon a Commissioner's unexcused failure to attend three (3) consecutive meetings, the Chairman of the Tribal Council shall declare a vacancy and have the Tribal Council act to fill it. If the vacancy is left by a Commissioner who was the designated Tribal Council member, then such vacancy must be filled with a new Tribal Council member.

(d) Compensation

The Tribal Council shall set the amount and manner of compensation for performance of the Board's duties in accordance with the established policies and procedures of the Tribe.

§ 33-2-2 Powers and Duties of Commission

The Commission shall have the following powers and duties:

- (a) Establish rules, regulations, and policies governing all activities of the Commission and the TERO Office consistent with this Title and tribal law, and submit recommendations for revisions to this Title to the Tribal Council for action;
- (b) In consultation with the appropriate legislative committee, hold public hearings on Tribal employment rights issues, initiate and assist in public education efforts, and encourage Indian employment and economy;
- (c) Hold hearings to adjudicate complaints and appeals from the actions of the Director using the procedure set forth in Chapters 2 and 8 of this Title, and issue subpoenas to non-Tribal parties;
- (d) Establish rules, regulations, and policies governing Bidder responsibility and debarment and suspension proceedings under Chapter 4 of the Procurement Title; and
- (e) Develop a fiscal year budget for the operations of the Commission and the enforcement of this Title by the Commission.

§ 33-2-3 Rules and Regulations

- (a) Rules and regulations that the TERO Commission deems necessary to administer its responsibilities under this Title shall be promulgated only upon thirty (30) days' notice of the proposed rulemaking action, which shall be provided to the Tribal Council and posted at the tribal offices.
- (b) The notice shall specify the purpose of the proposed regulation, the draft language of the proposed regulation, the factors the TERO Commission has considered in its determination to enact the proposed regulation, and the TERO Office's address at which the TERO Commission shall receive comments.
- (c) During the notice period, the TERO Office shall receive comments regarding the proposed regulation at the designated mailing address.
- (d) The comments received by the TERO Office shall be considered by the TERO Commission at a public meeting, and the TERO Commission shall make a final determination regarding the need for the proposed regulation on the basis of all

the information available. All final determinations of the TERO Commission shall be recorded in writing.

- (e) Any final rules and regulations shall be provided to the Tribal Council. No later than thirty (30) days after the final determination of the TERO Commission, the Tribal Council may veto the final rules or regulations or a portion thereof. A veto requires a 2/3 vote of the total membership of the Tribal Council. All members of the Tribal Council do not need to be present.

§ 33-2-4 Establishment of TERO Office

- (a) Establishment

There is hereby created a Tribal Employment Rights Office.

(b) Appointment; Removal

The Tribal Council shall have exclusive authority to appoint, suspend or remove the Director of the TERO Office. The Tribal Council shall consider Commission recommendations concerning appointment, suspension, or removal of the Director. The Commission Chair shall on an annual basis provide the Tribal Council with a written performance evaluation of the Director regarding regulatory duties.

(c) Supervision

The Tribal Chairman shall have supervisory authority to direct the TERO Director with respect to administrative duties.

(d) Qualifications

The Director shall have such administrative ability, education, and training as the Tribal Council determines, with advice from the Commission.

§ 33-2-5 Powers and Duties of TERO Office

The Director shall have the authority to carry out the day-to-day operations of the TERO Office, to enforce this Chapter, and to employ and supervise staff for the TERO Office in accordance with Tribal law and Tribal Government policies and procedures, and such other authority as is convenient or necessary to the efficient administration of this Title. The Director's authority and duties include, but are not limited to, the following:

- (a) Establish procedures, forms and internal policies necessary to carry out the purposes of this Title;
- (b) Certify businesses as a Tribal Business, Tribal Member Business, Indian Business, or Mentorship;
- (c) Maintain a current list of Certified Businesses for purposes of determining whether set-asides are appropriate;
- (d) Assist Members in obtaining certification;
- (e) Coordinate with Procurement Offices, as appropriate, training and mentorship programs for Tribal Members, Indians, and Certified Businesses;
- (f) Inform Tribal Government, Tribal Commercial Entities, Employers, and Contractors of the requirements of this Title with respect to employment and procurement under this Title;

- (g) Develop and maintain the bidder responsibility database and all appropriate lists required by Chapter 4 of the Procurement Title;
- (h) Hire staff pursuant to Tribal Government personnel policies and procedures, expend funds appropriated by Tribal Council, and obtain and expend funding from federal, state or other sources to carry out the purposes of this Title, subject to approval by the Tribal Council;
- (i) Establish and maintain the Tribal Labor Surplus Pool and refer such individuals to an Employer or Contractor for employment consideration;
- (j) Develop and maintain an audit and reporting system which measures the effectiveness of the Indian Preference Policy in meeting its goals and objectives;
- (k) Investigate and process complaints alleging violations of this Title, either directly or through staff compliance officers and legal counsel, and otherwise enforce this Title in accordance with Chapter 8;
- (l) Issue orders and assess penalties to remedy violations of this Title, and represent the TERO Office at hearings and appeals before the Commission, any court or other adjudicatory body, and any proceedings before the Tribal Council; and
- (m) Submit quarterly and annual reports to Tribal Council regarding procurements awarded to businesses certified under the Tribal Employment Rights Title.

§ 33-2-7 Application Procedures

(a) Application for Certification or Registration

A business seeking certification as a Certified Business or registration for a particular category of business shall submit a completed application to the TERO Office on a form provided by the TERO Office. The TERO Office will be available to assist a business in completing the application, request such additional information as it believes appropriate, and conduct such investigations as it deems appropriate. The Legal Department shall assist the TERO Office with review of any and all legal documentation supporting an application.

(b) Issuance of Certification or Registration

The TERO Director shall make a final written finding on an application within twenty-one (21) days of the submission. If the TERO Office requests additional information from the applicant, the twenty-one (21) day period shall be stayed during the time any request for additional information is outstanding. The TERO Director may extend the processing period by an additional twenty-one (21) days, by sending notification of the extension to the applicant by registered mail. The TERO Director shall exercise broad discretion in reviewing the application and

supporting documents in order to preserve the integrity of the Indian preference program. If the TERO Director has any question as to the applicant's fulfillment of one of the requirements, the TERO Director may deny the application.

(c) Appeal of Denial of Application

Within fifteen (15) days of receipt of the TERO Director's issuance or denial of an application, the applicant may request a hearing before the TERO Commission on the application to appeal the preference category or a denial of an application. The TERO Director shall have the burden of proof by the preponderance of evidence to justify the preference category or the denial of an application. The principal(s) of the business shall be present at the hearing and shall have the opportunity to present evidence in support of their case. In addition, any person wishing to present information to the TERO Commission shall be entitled to do so, by requesting an opportunity to participate, no less than one day prior to the hearing. The determination of eligibility as to certification or registration of a business enterprise is vested exclusively in the TERO Commission whose decision shall be final and binding and not subject to any further appeal.

(d) Businesses Certified Prior to the Adoption of these Criteria

(1) Each business holding or who has been granted Indian preference certification by Tribal Government or a Tribal Entity prior to September 1, 2011 shall submit an application as required under this Title to the TERO Office within thirty (30) days after the September 1, 2011. If the TERO Director determines that a business is qualified under these new criteria, he/she shall so find within forty-five (45) days of receipt of the application. If the TERO Office requests additional information from the applicant, the forty-five (45) day period shall be stayed during the time any request for additional information is outstanding. If the TERO Director denies certification, the business may appeal as set forth in Section (c) above.

(2) Any Certified Business that has previously been listed in certain categories of business areas by the TERO Office shall, within thirty (30) days after [the effective date of these changes], file a new application for registration for the general business areas for which it seeks registration. If the TERO Director denies registration for a category of business, the business may appeal as set forth in Section (c) above.

(e) Change in Status and Annual Reports

Each Certified Business shall maintain compliance with all certification requirements at all times during the solicitation, evaluation, and award of contracts and shall report in writing to the TERO Office any changes in its responses to the certification application and/or supporting documents within

thirty (30) days after such changes have occurred. A Certified Business may update its registration for a category of business only during the annual recertification process. On October 1 of each year, each Certified Business shall update the information provided in its initial application(s) on an annual report form to be provided by the TERO Office and provide any supporting documentation for changes in its application responses and/or categories of business. Failure to file the reports pursuant to this Section or a Certified Business' solicitation in a category of business not included in the certification or registration application shall constitute grounds for TERO Director to move for withdrawal of certification pursuant to Section 33-2-8 below.

§ 33-2-8 Withdrawal of Certification

(a) Initiation of Proceedings

The TERO Director may initiate proceedings to withdraw or suspend the certification of any business on any of the following bases:

- (1) Any information provided in any required reports;
- (2) A written grievance with supporting documentation regarding the legitimacy of the business' TERO certification filed by any other business or person;
- (3) Any information acquired during an investigation, audit, or other proceeding conducted by the TERO Office; and/or
- (4) Suspension or debarment by the TERO Commission.

The TERO Director shall send the business notice by registered mail that its certification is being examined, along with the grounds therefore. The business shall have seven (7) business days to submit a written response to the notice and the grounds for questioning its certification with any supporting documentation.

(b) Finding

The TERO Director shall prepare an analysis regarding whether the business continues to meet the eligibility requirements for certification and make a determination of withdrawal or suspension of certification based on all available information. The TERO Director shall send the business by registered mail a copy of the determination of withdrawal or suspension with supporting documentation.

(c) Appeal

A business has five business days to appeal any determination of withdrawal or suspension of certification to the TERO Commission, which will hold a hearing at

which the TERO Director shall have the burden of proof by the preponderance of evidence to explain why the withdrawal or suspension is not justified. At the hearing, the TERO Director shall present the case for suspension or withdrawal, and the business shall have the opportunity to present evidence in support of its eligibility for certification. After the hearing, the Commission may act as follows:

- (1) Withdraw certification;
- (2) Suspend certification for up to one year;
- (3) Place the business on probation; and/or
- (4) Order corrective action be taken within a fixed period.

The TERO Commission's decision on the appeal of a withdrawal of certification of a business is vested exclusively in the TERO Commission whose decision shall be final and binding and not subject to any further appeal.

(d) Period of Ineligibility

A business that has had its certification withdrawn may not reapply for certification of that business or any new business that has one or more of the same owners for a period of one year.

CHAPTER III PROGRAM SERVICES

§ 33-3-1 Findings and Intent

The Tribal Council finds the following:

- (a) A principal goal of the Tribe is to remediate historical employment disadvantages experienced by Tribal members by providing employment preference to Tribal members, their first generation descendants, and enrolled members of other Indian tribes;

§ 33-3-2 General Policy

It shall be the policy of the Tribe to effect a program of preferential treatment for Tribal Members, their first generation descendants, Indians, and enterprises which are owned and controlled by Tribal Members and/or Indians in order to:

- (a) Provide employment opportunities for Tribal Members, First Generation Descendants, and Indians;
- (b) Promote sound and productive free enterprise;

- (c) Provide maximum contracting and subcontracting opportunities for enterprises which are owned and controlled by Tribal Members and/or Indians; and
- (d) Provide quality goods and services to the Tribe that are fair, reasonable and cost effective.

§ 33-3-3 Employment by the Tribe

(a) Hiring.

(1) Except as provided in (c), in the event that more than one applicant meets the qualifications, as stated in a job description, for a position of employment with a Tribal Employer, preference shall be given in the following order:

- (i) Tribal Member
- (ii) First Generation Descendant of a Tribal Member
- (iii) Spouse of Tribal Member
- (iv) Indian
- (v) Non-Indian

(2) In the event that a position of employment is funded in whole or in part by any federal grant and/or contract or other public funding, preference shall be given in the following order:

- (i) Indian
- (ii) Non-Indian

(b) Performance-Based Employment Actions.

For all performance-based employment actions, including promotions, transfers, shifts, etc., preference shall be given in accordance with § (a) above, only if two or more Employees are equally qualified for, or deserving of, the employment action based on performance.

(c) The Tribal Council shall have the authority to designate certain high-level executive or policy-implementing positions as exempt from this Section.

§ 33-3-7 Responsibility for Evaluation of Qualifications

(a) Employment

No Employer may utilize any employment criterion that is not legitimately related to the performance of a position or the project. If an applicant who was disqualified believes that the disqualification was the result of an improper effort by the entity to circumvent preference responsibilities, the applicant may file a complaint with the TERO Office under Chapter 8. The complaint must state why the criterion is not legitimately related to the performance of the position or project and shall provide evidence supporting his/her allegations. The burden shall be on the Employer or Contractor to demonstrate such criterion or requirement is required by business necessity. Once an Employer or Contractor has met that burden, however, there shall be a rebuttable presumption that the Employer's or Contractor's evaluation of an applicant's satisfaction of a qualification or criterion is legitimate.

(b) Procurement

The Tribal Government and Tribal Commercial Entities (and their contractors or subcontractors) shall have the discretion to determine technical qualifications for a particular project. No Tribal entity may utilize any technical qualification that is not legitimately related to the performance of the project. If a Certified Business that was disqualified believes that the disqualification was the result of an improper effort by the entity to circumvent preference responsibilities, the Certified Business may file a complaint with the TERO Office under Chapter 8. The complaint must state why the qualification is not legitimately related to the performance of the project and shall provide evidence supporting his/her allegations. The burden shall be on the Tribal entity to demonstrate such qualification or requirement is required by business necessity. Once a Tribal entity has met that burden, however, there shall be a rebuttable presumption that the evaluation of an applicant's satisfaction of a qualification or requirement is legitimate. If the Tribal Government or a Tribal Commercial Entity has determined that there are no Certified Businesses that are technically qualified, the TERO Director may consult with the procuring entity regarding its reasons and provide the Certified Business a description of areas in which the procuring entity found the Certified Business to be weak and steps it could take to upgrade its qualifications.

CHAPTER IV
FAIR PRACTICE

§ 33-4-1 Findings and Intent

The Tribal Council finds the following:

- (a) The practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record,

membership in the national guard, or any other reserve component of the military forces of the United States adversely affects the welfare of the Reservation and deprives those individuals of the earnings that are necessary to maintain a just and decent standard of living;

- (b) It is the intent of the Tribal Council to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from wrongful termination and/or from employment discrimination because of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, membership in the national guard, or any other reserve component of the military forces of the United States and to encourage the full, nondiscriminatory utilization of the productive resources of the Reservation and neighboring workforce to the extent consistent with the right of employers to manage their businesses.

§ 33-4-4 Retaliatory Actions Prohibited

Subject to Sections 33-4-5 to 33-4-10, it is an act of employment discrimination to do any of the following:

- (a) To refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in Section 33-4-3; and
- (b) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in Section 33-4-3.
- (c) To discharge, demote, suspend, threaten, harass, or otherwise discriminate against any individual because of any of the following:
 - (1) The individual files a complaint or attempts to enforce his or her rights under this Title or under any other tribal or applicable federal law;
 - (2) The individual testifies or assists in any action or proceeding under this Title or any other tribal or applicable federal or state law;
 - (3) The individual, as required by his or her profession, reports in good faith a violation of tribal or applicable federal or state law;

- (4) The individual's employer believes that the individual has engaged in the acts described in subparagraphs (1), (2), or (3).
- (c) Notwithstanding Section 33-4-4, it is not employment discrimination because of

CHAPTER VIII COMPLAINTS AND ENFORCEMENT

§ 33-8-1 Protest Procedures

- (a) All applicable Programs shall have written protest procedures to resolve disputes relating to their eligibility for program services and shall in all instances disclose information regarding any such protest to the Board.
- (b) A complainant must exhaust all administrative remedies with Departments before pursuing a complaint against a Department within Tribal Government.
- (c) Reviews of protests against Tribal Government by the Board will be limited to the following:
 - (1) Violations of this Program Policy; and/or
 - (2) Violations of a Program's protest procedures for failure to review a complaint or protest that should fall under the jurisdiction of the Tribal Grievance Board. Protests received by the Board other than those specified above will be referred to Tribal Government or the Tribal Commercial Entity.

§ 33-8-2 Complaint

- (a) Any Tribal Member who believes that an Department has violated rights protected by this Board may file a written complaint with the Department.
- (b) The complaint must be sworn to by the complainant and shall be filed within five (5) business days after the complainant's receipt of notice of exhaustion of all administrative remedies for any alleged violation of Program Policy or within six (6) months after the date of the most recent incident(s) for any alleged violation of Program Policy.
- (c) The complaint shall be in writing, signed by the complainant, and describe the Department's action and how that action has violated applicable Program Policy.
- (d) Any person, group of persons, organization, or entity who believes that an action by the Department Director, Division Director, or staff is in excess of the authority granted by the Tribal Grievance Board or is otherwise in violation of Tribal law may file a complaint with the Board at the Legal Department office. The complaint must be filed no later than five (5) days from the date of the action

(or omission) upon which the complaint is based. A hearing on such complaint shall be heard pursuant to the hearing procedures below.

§ 33-8-3 Board Jurisdiction

- (a) The Board shall review the Complaint to determine whether the jurisdictional requirements have been met:
 - (1) The complainant has met the filing deadline; and
 - (2) The complaint falls within the jurisdiction established for the Tribal Grievance Board; and
 - (3) The facts as stated allege a violation of Program Policy.
- (b) If the complainant has not satisfied the jurisdictional requirements, the Board shall dismiss the complaint and/or refer the complaint to the appropriate entity with jurisdiction, stating the basis, in writing.

§ 33-8-4 Investigation

- (a) Responding Entity's Report and Documentation

Once jurisdiction is determined, the Board shall provide a copy of the Complaint to the Employer or Contractor who shall have seven (7) business days to prepare a written report to the Complaint setting forth all relevant facts with supporting documentation and any actions taken for resolution of the matter. Upon receipt of the Employer's or Contractor's report, the TERO Director shall ensure the record is complete and sufficient. If there is insufficient documentation received from the complainant and/or the Employer or Contractor, then the TERO Director shall request the parties provide the additional information necessary to make a decision or issue written requests for production.

- (b) Scope and Procedure

No later than thirty (30) days after receipt of the written report, the TERO Director or designee shall make such investigations as the TERO Director deems necessary to determine whether an Employer or Contractor has violated any provision of this Title or any rule or order hereunder. Upon reasonable written notice to the Employer or Contractor, the TERO Director or designee may enter, during business hours, the place of business or employment of any Employer or Contractor for the purpose of the investigation. When a bona fide investigation is underway based on a complaint, the TERO employees shall have the authority to inspect and copy all relevant records of an entity, to interview employees, and to engage in similar investigatory activities. Employees may not be compelled to speak with or not to speak with TERO investigators. All information collected by

the TERO Office shall be kept confidential, unless disclosure is required for further investigation, or during a hearing or appeal conducted in accordance with this Title. The TERO staff shall conduct all investigations in a professional manner that does not unduly interfere with the business activities of the entity under investigation.

(c) Refusal to Cooperate

If an Employer or Contractor refuses to cooperate with an investigation or refuses to permit TERO from reasonably inspecting or copying documents, the TERO Director shall prepare subpoenas for the missing information, taking into account the scope of the claims and the relevancy of the information being subpoenaed. Upon request of TERO Director, a subpoena may be issued by the Chair of the TERO Commission. The subpoenas shall be issued to the Employer, Contractor, and/or the Complainant. The recipients of the subpoenas shall have the right to challenge the scope and relevancy of the subpoenas before the Commission.

(d) Initial Determination

After conclusion of the investigation, the TERO Director shall determine whether the actions taken complied with the requirements of this Title and notify the complainant and responding entity of the TERO's findings and the basis for such findings. If the TERO Director finds insufficient evidence to establish that a violation occurred, the complaint shall be closed. If the TERO Director finds that a violation occurred, the TERO Director shall state the specific violations and the basis for those findings.

(e) Conciliation

Upon issuance of an initial complaint determination that contains a finding of a TERO violation and prior to issuing a noncompliance order to a responding entity, the TERO Director shall contact the Employer or Contractor in an attempt to achieve voluntary compliance from the responding entity and remedy the violation by settlement conference or conciliation. Mitigation by the responding entity may include, but is not limited to, (i) agreement to change its procedures; (ii) where possible, reversing the action that is the subject of the complaint; or (iii) recommending disciplinary action against employees responsible for the causing the violation. Conciliation conferences shall be considered confidential, and the contents of these discussions shall not be used as evidence in any subject hearing unless the parties agree. If settlement is reached, the agreement shall be reduced to writing and signed by the responding entity. Any conciliation agreement may be made public if the complainant and responding entity agree.

(f) Issuance of Noncompliance Order

If the TERO Director cannot eliminate or mitigate the violation as aforesaid, the TERO Director shall issue a formal noncompliance order, which shall advise the noncompliant entity of all rights to appeal the order. The noncompliance order shall set forth in writing the nature of the violation(s), the fact that conciliation was attempted but was unsuccessful, the penalties, sanctions and back and/or front pay, or reimbursement of costs assessed to remedy the violation, if any, as allowed under Section 33-8-7, and any other steps that must be taken to achieve compliance. The order shall provide that the responding entity shall either comply or appeal the order to the Commission within twenty (20) days of issuance of the order. If the TERO Director has reason to believe that irreparable harm will occur during that period, the TERO Director may require that compliance occur within a shorter time period. The order shall provide a clear statement of the responding entity's rights to appeal the noncompliance order, and the consequences of failing to comply with or appeal the order.

(g) Failure to Comply

If the noncompliant entity fails or refuses to comply and has not appealed the noncompliance order to the Commission within the twenty (20) day appeal period, the noncompliant entity shall lose all rights to challenge or appeal the order and such order shall be immediately enforceable.

(h) Service

Service of any documents under this Section shall be sufficient if accomplished by personal delivery or electronic mail with a return receipt to any Tribal Entities or the complainant and by regular mail to any non-Tribal entities or individuals.

§ 33-8-5 Appeals to the Board

Any Tribal Member that is aggrieved by a denial of applicable program services of a Department or Division Director or a complainant that is aggrieved by the closing of a complaint may appeal to the Commission.

The aggrieved party shall have ten (10) days from the date the denial is issued to file a notice of appeal of such denial.

The appealing party's notice of appeal shall be submitted in writing to the Board and shall attach a copy of the denial or findings appealed and the reasons that the complainant disagrees.

The Board shall issue and serve a written notice of hearing to the Department and Division and the complainant, specifying the nature of the violation and requiring the Department Director or Division Director, in this section called the "respondent", to answer the appeal at a hearing before the Board.

The notice shall specify a time of hearing within a reasonable time after service of the appeal based on the availability of the parties, but in no event later than thirty (30) days after notice of the appeal.

§ 33-8-6 Appeal Hearing Procedures

The Tribal Grievance Board shall serve as the hearing body for all appeals brought before them related to applicable Programs within Tribal Government. Administrative hearings shall be held in accordance with the following procedures:

(a) Recusal by Board Members

Any Board member who has a conflict of interest under the Ethics Title with respect to a complaint before the Board shall disclose the conflict to the other Board members and recuse himself or herself from participation. In the event that the Board loses a quorum due to conflicts of interest, the Board shall request that the Tribal Council appoint one or more disinterested individuals to make a quorum.

(b) Ex Parte Communication

Neither the respondent, TERO Director (or complainant), nor any of the witnesses shall have any oral or written communication regarding the merits of the appeal with members of the Tribal Grievance Board. Any such communication shall be reported in writing to the Legal Department who, in turn, will report the communication to the Tribal Council, so that necessary and appropriate measures may be taken, including, but not limited to, disqualification from participation in the proceedings.

(c) Request for Appearance

The Board is not empowered with the authority to issue subpoenas to compel attendance of witnesses and to produce relevant documents; however all Tribal Government employees are required to coordinate with requests for appearances from the Board to participate in hearing activities. All requests for appearances shall be signed by the Board Chair (and Tribal Chair) and issued within a reasonable time prior to a hearing.

Persons failing to obey such requests for appearance shall be reported by the Board to appropriate Chain of Chain. The scope and relevancy of the requests may be challenged before the Commission.

(d) Review of Program Files

Any party to an appeal shall have the right to review the case file of the Program by scheduling a visit to the Department during regular working hours at any point after receiving notice of a hearing. The Department Director shall have the right to excise proprietary information, the identity of confidential informants or other confidential information from the file, which will not be relied upon in the presentation of Department's case. Irrelevant, confidential information shall be excised in a manner that causes the loss of the least amount of information from the files.

(e) Disclosure of Witnesses

(1) **Notice.** The respondent and TERO Director (or complainant) shall provide the other party with a list of potential witnesses no later than five (5) business days prior to the date set for hearing. A copy of the witness list, the approximate length of their testimony, the subject matter and relevance of their testimony, and any requests for subpoenas to compel attendance of witnesses shall also be provided to the TERO Commission no later than five (5) business days prior to the date set for hearing. The Commission may deny, in its discretion, any subpoena requests where the party has failed to establish the relevance of the testimony. Persons failing to provide the other party with a list of potential witnesses shall be subject to sanctions by the TERO Commission. If the TERO Commission determines that additional witnesses are necessary, the TERO Commission will provide a list of those witnesses to both parties no later than two (2) business days prior to the date set for the hearing.

(2) *Pre-Hearing Interviews.* The respondent and TERO Director (or complainant) shall have the right to interview the witnesses of the other party prior to the hearing. The TERO Director's witnesses shall be interviewed in the presence of the TERO Director or delegate. The respondent's witnesses shall be interviewed under such reasonable conditions as are established by the respondent. Either party may appeal

to the TERO Commission Chairman if cooperation is not forthcoming on this matter, and the Chairman is empowered to require such steps as are necessary to resolve the problem.

(e) Disclosure of Documents

The respondent and TERO Director (or complainant) shall provide the other party with a reasonable opportunity to review any relevant documents to be used at the hearing as soon as possible, but no later than ten (10) business days prior to the date set for hearing. The respondent and TERO Director (or complainant) shall also provide the TERO Commission Chairman with a list of items they wish to have subpoenaed and the relevance of each no later than five (5) business days prior to the hearing. The parties shall request a subpoena duces tecum for documents and items that are not reasonably accessible through less formal means of production. The Commission Chairman may deny, in his or her discretion, subpoena requests where the party has failed to establish the relevance or need for the subpoena duces tecum.

(f) Continuances

Any request for an extension of the hearing date must be submitted in writing to the TERO Commission Chairman no fewer than three (3) business days prior to the hearing. If the respondent and TERO Director (or complainant) mutually submit a request for a continuance because there is a possibility of settling the matter, the request for a continuance may be submitted at any time.

(g) Conduct of Hearings

- (1) Hearings shall be closed to the general public. Attendance shall be limited to the parties and their representatives;
- (2) The Chair shall preside over the hearing and begin the proceedings by reading the allegations of the complaint into the official record;
- (3) Witnesses shall be excluded from the hearing until such time as they are called upon to testify. Witnesses will be sworn under oath by the Chair prior to testifying;
- (4) The respondent may give an opening statement;
- (5) The TERO Director (or complainant) may give an opening statement;
- (6) The respondent may call any witnesses and submit any documentary evidence in support of its position and the TERO Director (or complainant) shall be afforded the opportunity to cross-examine each witness;

- (7) The TERO Director (or complainant) may call any witnesses and submit any documentary evidence in support of the complaint and the respondent shall be afforded the opportunity to cross-examine each witness;
- (8) The TERO Commission need not strictly adhere to the rules of evidence, but shall ensure that due process is afforded to the respondent;
- (9) Any sworn testimony by a complainant, respondent or witness may be used for impeachment or as a party admission in any further civil or criminal proceedings in accordance with the rules of evidence otherwise applicable in such other proceedings;
- (10) Upon the conclusion of the testimony and receipt of evidence, the respondent shall be afforded the opportunity to give a closing statement in support of his or her position;
- (11) Upon the conclusion of the testimony and receipt of evidence, the TERO Director (or complainant) may give a closing statement in support of its position;
- (12) The respondent (or complainant in the event of an appeal from a TERO Director's finding of no violation) shall have the burden to prove by a preponderance of the evidence that the TERO Director was incorrect in his or her initial determination or compliance order or that any proposed penalty, sanction, award, or required action ordered by the TERO Director is incorrect or unwarranted; and
- (13) The TERO Commission shall convene in executive session to deliberate and determine whether the respondent (or complainant) has provide that the TERO Director's determination or order should be overturned; and, if so, to determine what relief is required. All Commissioners, including the Chairman, will be entitled to vote on the appeal in executive session. Only the Commission's final order shall be made public.

(h) Legal Representation

Either party may have an attorney present as an advisor. However, the attorney may not make any presentations, examine or cross-examine witnesses, or address the TERO Commission.

§ 33-8-7 Disposition of Complaints and Remedies

- (a) The Commission shall serve a certified copy of its order on the parties within thirty (30) days after the hearing. All orders of the Commission in conformity with this Title shall be valid and in force, and final. An individual aggrieved by noncompliance with the order may have the order enforced specifically by suit in equity in Tribal Court.

- (b) If, after a hearing, the Commission finds that the TERO Director was correct in finding that the respondent violated the Title, and that the penalties and other remedies ordered are appropriate for the violations, the Commission shall enter an order affirming all or parts of the TERO Director's order that the Commission finds to be correct.
- (c) The Commission may grant such relief as justice requires, which may include the following; provided, that the Commission may not assess total monetary penalties or remedies in excess of the total amount of monetary penalties or damages issued by the TERO Director in the written noncompliance order, except for justified adjustments in back and/or front pay or costs of reimbursement amounts:
 - (1) If practical, order the respondent to hire the complainant if the position has not been filled or to award the complainant the contract if the contract has not been awarded;
 - (2) Impose a remedial civil penalty on respondent in an amount not to exceed \$25,000.00 for each violation;
 - (3) Order the respondent to pay back and/or front pay up to an amount equal to the annual salary of the Employee;
 - (4) Order the respondent to hire, promote, or train an Indian preference eligible individual found to have been denied applicable preference;
 - (5) Order the respondent to pay the costs of filing and pursuing the complaint, or if no other relief is available, the costs of preparing and submitting a bid, to any aggrieved Certified Business deprived of a contract through violation of this Title; and/or
 - (6) Such other relief as the Commission deems necessary and appropriate and in accordance with applicable law, including, but not limited to, future commitments to the complainant relative to hiring, reinstatement of position, training, mentoring, etc. or recommendations to the appropriate supervisor that the employee(s) found to be deliberately violating or not complying with this Title be subject to disciplinary action in accordance with the Employer's personnel policies and procedures.
- (c) Any monetary damage awards to complainants shall be limited to orders of back and/or front pay or costs of reimbursement.
- (e) If an Employer or Contractor fails to comply with an order from the Commission within ten (10) days, the TERO Director (or complainant) shall seek appropriate enforcement against Tribal Government or a Tribal Commercial Entity through the Tribal Council and against any other Employer or Contractor through the Poarch Band of Creek Indians Tribal Court. The Tribal Court shall assess

attorney's fees and costs and any other sanctions in addition to those contained in the Commission's order that the Court deems just and reasonable.

§ 33-8-8 Exclusivity of Remedy

No compensation for lost profits, emotional distress, punitive damages, or other types of damages shall be awarded by the TERO Director, Commission, or Tribal Court.

§ 33-8-9 Limited Waiver of Sovereign Immunity for Enforcement Purposes

Nothing contained in this Title shall be construed as a waiver by the Tribe of sovereign immunity from unconsented lawsuits or as consent by the Tribe to the bringing of any action against the Tribe, its officers, agents, employees, departments or business entities or enterprises. Notwithstanding the foregoing, the Tribe expressly waives its sovereign immunity from suit by the TERO Director (or complainant) for the expressly limited purposes of enforcement of an order pursuant to this Title and consents to be sued in the Tribe's Tribal Court. In no instance shall any enforcement of any kind whatsoever be allowed against any assets of the Tribe other than the limited assets of the Tribe necessary to satisfy any relief specified in Section 33-8-7 of this Title and only to the extent necessary to satisfy any claim set forth in this Title.

§ 33-8-10 Severability

If any provision of this Title shall be found to be invalid by any administrative agency, or similar body, or court of competent jurisdiction or found to be in violation of any existing loan covenants for the Tribe or one of its Tribal Entities as of the effective date of this Title, such findings shall not affect the remaining provisions of this Agreement, and all other provisions herein shall remain in full force and effect.