

TRIBAL CODE

CHAPTER 45:

EMPLOYMENT RIGHTS ORDINANCE

CONTENTS:

CHAPTER I: General Provisions

- 45.101 Title.
- 45.102 Purpose.
- 45.103 Authority.
- 45.104 Effective Date.
- 45.105 Abrogation and Greater Restrictions.
- 45.106 Interpretation.
- 45.107 Severability.
- 45.108 Nonliability.
- 45.109 Applicability.
- 45.110 Definitions.

CHAPTER II: Tribal Employment Rights Commission

- 45.201 Establishment of Commission.
- 45.202 Duties of Commission.
- 45.203 Tribal Employment Rights Office (TERO).
- 45.204 Commission Funds.
- 45.205 Regulations.
- 45.206 Reporting and On-site Inspections.
- 45.207 Publication of Ordinance.

CHAPTER III: Indian Preference

- 45.301 Indian Preference Required.
- 45.302 Compliance.
- 45.303 Union Agreements.

45.304 Religious Freedom.

CHAPTER IV: TERO Tax

{Reserved}

CHAPTER V: Hearing and Appeals

45.501 Commission Complaint.

45.502 Complaint by Individual.

45.503 Notice.

45.504 Hearing Procedure.

45.505 Commission Order.

45.506 Appeal to Tribal Court.

45.507 Scope of Review.

45.508 Additional Evidence.

45.509 Relief Pending Appeal.

45.510 Further Appeal.

45.511 Enforcement Order.

CHAPTER VI: Enforcement and Penalties

45.601 Enforcement by Officers.

45.602 Penalties.

45.603 Parties to a Violation.

45.604 Enforcement Procedure.

HISTORY NOTE:

Adopted by the Tribal Council July 21, 1986, Resolution No. 269(86); effective as to members July 21, 1986.

The ordinance was disapproved as to non-members by the Secretary of the Interior on August 6, 1986, and so does not apply to non-members.

Chapter IV, the TERO Tax, was to take effect upon a referendum vote within a year of its adoption. No such referendum was held, so Chapter IV never went into effect.

Application of this ordinance has been suspended as a practical matter.

TRIBAL CODE

CHAPTER 45:

EMPLOYMENT RIGHTS ORDINANCE

CHAPTER I: GENERAL PROVISIONS

45.101 Title.

This ordinance shall be known as the Tribal Employment Rights Ordinance.

45.102 Purpose.

The purpose of this ordinance is to promote the employment of Indian people in the private sector on or near the reservation, to provide for Indian preference in employment in accordance with federal law, to combat employment discrimination against Indian people, and to establish a Tribal Employment Rights Commission and Office to further these objectives.

45.103 Authority.

This ordinance is adopted pursuant to Article VI, Sections 1 (a), (i), (n), (t), and (u) of the Tribal Constitution. It is also adopted pursuant to and in furtherance of the policy underlying the provisions of federal law relating to Indian preference:

- (1) Section 703(i) of Title VII of the Civil Rights Act of 1964:

"Nothing contained in this Title shall apply to any business or enterprise on or near an Indian reservation with regard to any publicly announced employment practices of such business or enterprise under which preferential treatment is given to any individual because he is an Indian."

- (2) Executive Order 11246 (September 24, 1965):

"Work on or near Indian Reservation. It shall not be a violation of equal opportunity clause for a construction or non-construction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from work in the course of a work day. Contractors or sub-contractors extending such a preference shall not, however, discriminate against Indians on the basis or religion, sex, or tribal affiliation, and the use of such preference shall not excuse a contractor from complying with the other requirements contained in this chapter."

- (3) Section 7(b) of the Indian Self-Determination and Education Assistance Act:

"Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596) as amended, (the Johnson O'Malley Act) or any other Act authorizing federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible:

"(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

"(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts and grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in Section 3 of the Indian Financing Act of 1974 (88 Stat. 77)."

(4) The Buy Indian Act, 25 U.S.C. ss. 47:

"So far as may be practicable, Indian labor shall be employed and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

(5) Morton v. Mancari, 417 U.S. 535 (1974).

#### 45.104 Effective Date.

(1) Except as provided herein, this ordinance shall be effective from the date of its enactment by resolution of the Tribal Council.

(2) Chapter IV shall be effective and enforceable one (1) year after the date of the ordinance's enactment.

(3) Nothing contained in this ordinance shall apply to nonmembers or businesses owned by nonmembers until such ordinance shall have been approved by the Secretary of the Interior as provided in Article VI, Section 2 of the Tribal Constitution.

#### 45.105 Abrogation and Greater Restrictions.

When this ordinance imposes greater restrictions than those contained in other tribal ordinances, codes, or resolutions, the provisions of this ordinance shall govern.

#### 45.106 Interpretation.

It its interpretation and application the provisions of this ordinance shall be held to be minimum requirements and shall be liberally construed in favor of the Tribe and shall not be deemed as a limitation upon or a repeal of any other tribal power or authority.

45.107 Severability.

If any section, provision, or portion of this ordinance is adjudged to be invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby.

45.108 Nonliability.

The Tribe by the adoption of this ordinance does not waive its sovereign immunity in any respect. There shall be no liability on the part of the Tribe, its agencies, agents or employees for any damages which may occur as a result of reliance upon or actions taken pursuant to this ordinance.

45.109 Applicability.

(1) This ordinance applies to the reservation and to all other areas and activities subject to the jurisdiction of the Tribe.

(2) This ordinance applies to all covered employers, regardless of whether the employer is an Indian or Indian-owned business.

45.110 Definitions.

For the purpose of this ordinance the following terms shall have the meanings ascribed below:

(1) "Commerce" means all trades, traffic distribution, communications, transportation, provision of services, manufacturing, production, agricultural production, building, maintenance, construction, banking, mining, and energy resources production.

(2) "Commission" means the Tribal Employment Rights Commission appointed pursuant to Section 45.201 hereof.

(3) "Council" means the Lac du Flambeau Tribal Council.

(4) "Employee" includes any employee or applicant for employment, and shall not be limited to the employees of a particular employer unless a section explicitly states otherwise, and shall include any individual whose work is ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practices and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employment in the domestic services of any family or person at his home, or any individual employed by any other person who is not an employer herein defined.

(5) "Employee on the reservation" means any employee who, in a non-supervisory or non-managerial position, spends more than one-tenth of his working hours per month or per pay period, whichever is shorter, on the reservation and shall include any employee who is in a supervisory or managerial position and spends more than one-twentieth

of his working hours per month or per pay period, whichever is shorter, on the reservation.

(6) "Employer" includes, but is not limited to, any person who engages in commerce through paid agents or servants or who is hired on contracts for services within the exterior boundaries of the reservation. The term includes any person acting as an agent, contractor, subcontractor or an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation of any state or political sub-division thereof.

(7) The term "Covered Employer" includes any employer who employs 10 (ten) or more employees on the reservation for an aggregate of 60 working days or more in any twelve month period.

(8) "Indian" means:

(a) Any member of any recognized Indian tribe now under federal jurisdiction; or

(b) All others of one-half or more Indian blood of tribes indigenous to the U.S., Eskimos and other aboriginal people of Alaska.

(9) "Indian Business" means any Indian owned and controlled commercial or business activity, whether a sole proprietorship, joint venture or corporation, established or organized for the purpose of profit; provided, that such Indian ownership and control shall constitute not less than 51 percent of the enterprise.

(10) "Indian resident on the reservation" or "Resident Indian" means any Indian person residing on the reservation who, at the time of contract for on-reservation work or, in the case of employment offers made by an employer permanently located on the reservation, has been in residence on the reservation for not less than the preceding sixty (60) days.

(11) "Located near the reservation" means any employer located within daily commuting distance of the reservation.

(12) "Member" means a person enrolled in the Tribe.

(13) The term "Notice", as it is required to be given by the TERO Director, shall be sufficient if it is published and posted in a public place on the reservation, as to: unnamed parties in an action; all interested persons who are not parties to an action; and in all instances where a specific person is not addressed.

(14) "Person" includes both natural and artificial persons including, but not limited to, corporations, trusts, partnerships, unions, agents, societies, sole proprietorships, and estates of descendents.

(15) "Reservation" means the area within the external boundaries of the Lac du Flambeau Reservation.

(16) "Secretary" means the Secretary of the Interior or his duly authorized representative.

(17) "Tribe" means the Lac du Flambeau Band of Lake Superior Chippewa Indians.

(18) "Tribal Court" means the Lac du Flambeau Tribal Court.

(19) "Union" means an organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work.

## CHAPTER II: TRIBAL EMPLOYMENT RIGHTS COMMISSION

### 45.201 Establishment of Commission.

(1) There is hereby established a Tribal Employment Rights Commission to carry out the powers and duties set forth herein. The Commission shall consist of five (5) Commissioners appointed by the council for two (2) year terms.

(2) The Commission shall hold meetings and conduct business in accordance with bylaws adopted by the Commission for that purpose. The Commissioners shall not be compensated but shall be reimbursed for expenses in accordance with Council policy regarding tribal committees.

### 45.202 Duties of Commission.

The Commission responsibility shall be to carry out the purposes of this ordinance. Its powers shall be:

(1) To oversee and supervise the work of the Tribal Employment Rights Office.

(2) To establish rules and regulations governing all activities of the Commission.

(3) To oversee expenditures of funds appropriated by the Council for the Office.

(4) To obtain funding from federal, state, or other sources to supplement Council appropriations.

(5) To establish numerical hiring goals and timetables specifying the minimum number of Indians an employer must hire by craft or skill level.

(6) To require employers to establish or participate in job training programs as the Commission deems necessary to increase the pool of Indians eligible for employment on the reservation.

(7) To assist and monitor the establishment and implementation of a tribal hiring hall and require employers to use it.

(8) To prohibit employers from using the job qualification criteria or personnel requirements that may bar Indians from employment unless such criteria or requirements are required by business necessity. Commission regulations may adopt Equal Employment Opportunity Commission Guidelines or may adopt additional requirements to eliminate employment barriers unique to Indians and the reservation.

(9) To enter into agreements with the unions to ensure union compliance with this ordinance.

(10) To require employers to give preference to tribal and other owned businesses in the award of contracts and subcontracts.

(11) To establish counseling programs to assist Indians in obtaining and retaining employment.

(12) To hold hearings and to subpoena witnesses and documents in accordance with this ordinance.

(13) To require employers to submit reports and take all action deemed necessary by the Commission for fair and rigorous implementation of this ordinance.

(14) To enter into cooperative agreements with federal employment rights agencies such as Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance Program (OFCCP) to eliminate discrimination against Indians both on and off the reservation.

(15) To take other actions as are necessary to achieve the purposes and objectives of the Office established in this ordinance.

(16) In establishing and maintaining the numerical hiring goals, the requirements for training programs, minimum numerical goals and the requirements for reports, the Commission shall, whenever practicable, consult with the affected employees so as to consider their input and recommendations.

#### 45.203 Tribal Employment Rights Office (TERO).

(1) The Office is hereby established with the full supervisory authority vested in the Director, who shall report directly to the Commission. The Director, however, shall have quasi-reporting authority directly to the Council.

(2) The Director shall be hired in accordance with the Personnel Policies and Procedures. The Director shall have the authority to hire staff, expend funds appropriated by the Council, and, subject to prior approval by the Council and Commission, to obtain and expend funding from federal, state, or other sources to carry out the purpose of his office. The Director shall have the authority to implement guidelines, rules, and regulations adopted by the Commission to further the employment rights requirements imposed by the ordinance; to subpoena witnesses and documents for hearings; to require employers to submit reports, to petition to the Commission and tribal court for orders, and to take such other actions as are necessary for the fair and rigorous implementation of the ordinance. The Director, during his absence, may appoint another person to act on behalf of the tribe for the conduct of hearings.

#### 45.204 Commission Funds.

All funds derived from collection of employer taxes and fees and other appropriate resources collected by the Commission shall be placed in a special account to be utilized by the Commission, subject to the final approval of such expenditures by the Council. Such funds shall be regarded as general fund monies under Article IX of the Tribal Constitution.

#### 45.205 Regulations.

(1) In issuing rules, regulations, and guidelines, the Commission is to be guided by the policies and standards enumerated throughout this ordinance and such further resolutions as the Council may issue. The Commission shall ensure that provisions for due process be made in all rules, regulations, and guidelines that are issued.

(2) Except in cases where the Commission has determined that an emergency situation exists, the Commission shall follow the following minimal procedures in issuing all rules, regulations, and guidelines:

(a) All proposed rules, regulations, and guidelines shall be sent to the Council and shall be posted in a public place for not less than twenty (20) days and in a file in the Director's Office which is open to public inspection, on the reservation.

(b) The Commission shall accept comments from any interested parties during said twenty (20) days. The Commission shall discuss in a preamble to such final rules, regulations, and guidelines, the major issues raised by the comments.

(c) The final rules, regulations, and guidelines shall be in effect upon being approved by the Commission and the Council. Final rules, regulations, and guidelines shall be posted in a public place, and in a file in the office of the Director which is open to public inspection, on the reservation.

(d) Any amendments or additions to the final rules, regulations and guidelines will be made in accordance with the Commission's and Council's rules, regulations, and procedures.

#### 45.206 Reporting and On-Site Inspections.

Employers shall submit reports and other information requested by the Commission on report forms furnished by the Office for reporting purposes. The Commission and Office staff shall have the right to inspect and copy all relevant records of any employer, of any signatory union, contractor, and subcontractor, and shall have the right to speak to workers and conduct on-site investigations.

#### 45.207 Publication of Ordinance.

(1) The Commission shall notify all employers of this ordinance and their obligations to comply. All bid announcements issued by federal, tribal agencies, or other private or public entities, shall contain a clause or statement that the successful bidder will comply with this ordinance and all rules, regulations, and orders of the Commission where applicable.

(2) All tribal agencies and federal agencies responsible for issuing business permits and/or other tribal permits for reservation activities, or otherwise engaged in activities involving contracts with prospective employers on the reservation shall be responsible for advising such prospective employers of their obligations under this ordinance and rules, regulations, and orders of the Commission.

(3) The Office shall send a copy of the ordinance to every employer operating on the reservation and all federal agencies and interested parties as so required.

### CHAPTER III: INDIAN PREFERENCE

#### 45.301 Indian Preference Required.

(1) The term "Indian Preference" means that Indians residing on the Reservation are given preference over non-resident Indians in employment, training, and contracting and that Indians are given preference over non-Indians in employment, training and contracting.

(2) Preference in employment means that if there is a preferred applicant who meets the qualifications for the position, that applicant shall be hired in preference to a person who is not a preferred applicant.

(3) Preference in contracting means that a contract shall be awarded to a qualified bidder in preference to a nonpreferred

bidder if the preferred bidder's bid is within the following range of the lowest bid received from a qualified contractor:

(a) No more than 5% greater than such bid for a bid amount of less than \$500,000; and

(b) Greater by no more than \$25,000 plus 1% of the amount by which the bid exceeds \$500,000 for a bid amount of \$500,000 or more.

(4) All employers are hereby required to give preference in Indian hiring, promotion, training, and all other aspects of employment. Preference in contracting, subcontracting, and all other business activities will be adhered to herein. Employers shall comply with the guidelines, rules and regulations of the Commission in regard to Indian preference in contracting and subcontracting.

#### 45.302 Compliance Plan.

As of the effective date of this ordinance, no new employer may commence work on the reservation until it has consulted with the Commission with regard to meeting its obligations under this ordinance and has discussed a plan for compliance herewith.

#### 45.303 Union Agreements.

Any covered employer who has a collective bargaining agreement with any union shall obtain written agreements from the union stating that the union shall comply with the Indian preference laws, rules, regulations, and guidelines of the Tribe. Such agreement shall be subject to the approval of the Commission and Council in order to ensure that all such agreements comply with the intent of this section and sections hereof covering this term. Such agreement and approval does not constitute official tribal recognition or sanction or any union.

#### 45.304 Religious Freedom.

Employers shall make reasonable accommodation to the religious beliefs of Indian employees. The Commission may issue guidelines relating to such accommodation.

### CHAPTER IV: TERO TAX

{RESERVED}

## CHAPTER V: HEARINGS AND APPEALS

### 45.501 Commission Complaint.

If the Commission believes that an employer, contractor, subcontractor, or union has failed to comply with the ordinance or any rules, regulations, or order of the Commission, it may file a complaint and notify such party of the alleged violations. The Commission will attempt to achieve an informal settlement of the matter, but if an informal settlement cannot be achieved, the Commission may request a hearing upon the matter pursuant to Section 45.504.

### 45.502 Complaint by Individual.

If any Indian believes he has been discriminated against by an employer because he is an Indian, he may file a complaint with the Commission specifying the alleged violation. Upon receipt of the complaint, the Commission shall investigate and attempt to achieve an informal settlement of the matter. If an informal settlement cannot be achieved, the individual or Commission may request a hearing pursuant to Section 45.504. An employer, contractor, or union may request a hearing as well.

### 45.503 Notice.

If a hearing is requested by the Commission, an individual, an employer, or union pursuant to this Chapter, a written notice of hearing shall be given to all parties concerned of the nature of the hearing and the evidence to be presented, and shall advise such parties of their right to be present at the hearing, to present testimony of witnesses and other evidence, to be represented by counsel at their own expense, and that the Commission may be represented by the Director or general counsel for the Tribe.

### 45.504 Hearing Procedure.

Hearings shall be governed by the following rules of procedure:

(1) All parties may present testimony of witnesses and other evidence and may be represented by counsel at their own expense.

(2) The Commission may have the advice and assistance of the general counsel for the tribe at the hearing.

(3) The Chairman of the Commission or the Vice-Chairman shall preside. No formal rules of evidence or procedure need to be followed, but the Commission shall proceed to ascertain the facts in a reasonable and orderly fashion.

(4) Any matter to be proven must be done so to the satisfaction of the Commission by a preponderance of the evidence.

(5) The hearing may be continued at the discretion of the Commission.

(6) The Commission shall render a written decision and notify all parties of its decision on the matter within thirty (30) days after the hearing.

(7) Notice of appeal rights shall be included with the decision.

#### 45.505 Commission Order.

Upon finding after hearing that an employer, contractor, or subcontractor has violated this ordinance or Commission rules, regulations, or order issued hereunder, the Commission shall enter a remedial order which may include any of the following remedies:

(1) Denial of right to commence or continue business inside the reservation.

(2) Suspension of all operations inside the reservation.

(3) Payment of back-pay and damages to compensate any injured party.

(4) An order to summarily remove employees hired in violation of this ordinance, or rules, regulations, and order of the Commission.

(5) Imposition of civil remedial money penalties of up to \$500.00 per day of violation.

(6) Prohibition from engaging in any future operations on the reservation.

(7) An order requiring employment, promotion, and training of Indians injured by the violation.

(8) An order requiring changes in procedures and policies necessary to eliminate the violations.

(9) An order making any other provisions deemed by the Commission necessary to alleviate, eliminate, or compensate for any violation.

#### 45.506 Appeal to Tribal Court.

(1) Any person aggrieved by an order of the Commission, may obtain a review of such order from the Commission by filing with the tribal court within twenty (20) days after notice of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

(2) Except as provided in Section 45.508, review by the tribal court shall be limited to the record made at the hearing before the Commission. The Commission shall file with the tribal court the record of the proceedings upon which the order was based within ten (10) days of the filing of the appeal petition.

45.507 Scope of Review.

(1) Unless the tribal court finds a ground for setting aside, modifying, remanding or ordering Commission action under a specific provision of this section, it shall affirm the Commission's action and enter an order directing its enforcement.

(2) The tribal court shall remand the case to the Commission for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(3) The tribal court shall set aside or modify the Commission order if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the Commission for further action under a correct interpretation.

(4) The tribal court shall not substitute its judgment for that of the Commission as to the weight of the evidence on any disputed finding of fact. The tribal court shall, however, set aside a Commission order or remand the case to the Commission if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(5) The tribal court shall reverse or remand the case to the Commission if it finds that the Commission's exercise of discretion is outside the range delegated by this ordinance; is inconsistent with a Commission rule, officially stated policy or prior practices, if deviation therefrom is not explained to the satisfaction of the court; or is otherwise in violation of a constitutional or statutory provision; provided, that the court shall not substitute its judgment for that of the Commission on an issue of discretion.

(6) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the Commission, as well as the substantial discretionary authority conferred upon it by this ordinance.

(7) The court's decision shall provide whatever relief is appropriate hereunder, including orders in the case of a remand. If the court affirms or modifies an order, it shall enter an enforcement order pursuant to Section 45.511.

45.508 Additional Evidence.

If a party wants to introduce additional evidence not presented before the Commission, he/she/it may petition to the tribal court. For good cause, the court may order the Commission to conduct a new hearing allowing new evidence. Good cause shall require that the new evidence is important and could not be presented at the prior hearing through no fault of the party seeking the new hearing. The court may hear additional evidence itself on the issue of procedural irregularities only.

45.509 Relief Pending Appeal.

The commencement of appeal proceedings shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. The court may order bond to be posted or other appropriate action prior to entering a stay of the Commission's order.

45.510 Further Appeal.

Any party, including the Commission, may secure review of the decision and order of the tribal court by filing an appeal with the tribal court of appeals pursuant to the Tribal Court Code, Tribal Code Ch. 80.

45.511 Enforcement Order.

If the Commission enters an order pursuant to Section 45.505 which is not appealed, and the order is not complied with, the Commission may petition the tribal court for an order compelling compliance with the Commission order. The tribal court shall issue an enforcement order if it appears from the petition that the Commission order was entered pursuant to a written decision following a hearing and was within the scope of the authority granted to the Commission under this ordinance.

CHAPTER VI: ENFORCEMENT AND PENALTIES

45.601 Enforcement by Officers.

Tribal law enforcement officers are hereby authorized and directed to carry out the provisions of enforcement orders entered by the tribal court pursuant to Section 45.511. In addition, any law enforcement officer empowered to enforce the laws of the State of Wisconsin is hereby authorized to enforce such orders.

45.602 Penalties.

Any person who violates an enforcement order issued by the tribal court shall be liable for penalty in addition to the remedial measures contained in the Commission order, as follows:

(1) For a civil remedial money penalty of up to \$500.00 per day of violation. Each day during which a violation exists shall constitute a separate violation.

(2) For a civil remedial forfeiture of any property used in the commission of a violation of an enforcement order.

(3) For suspension or revocation of any license or permit issued to the defendant by the Tribe.

(4) For court costs in the amount of \$25.00.

#### 45.603 Parties to a Violation.

(1) Whoever is concerned in the commission of a violation of this ordinance is a principal and may be charged with the violation although he or she did not directly commit it and although the person who directly committed it has not been convicted of a violation.

(2) A person is concerned in the commission of a violation if the person:

(a) directly commits the violation;

(b) aids and abets the commission of it; or

(c) is a party to a conspiracy with another to commit it or advises, hires, or counsels or otherwise procures another to commit it.

#### 45.604 Enforcement Procedure.

Proceedings for violation of an enforcement order shall be conducted in accordance with Chapter IV of the Tribal Court Code, Tribal Code Ch. 80; provided, that citations issued hereunder may be served by ordinary mail.