

**POKAGON BAND OF POTAWATOMI INDIANS  
EMPLOYMENT AND CONTRACTING PREFERENCES CODE**

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## **CHAPTER 1 General Provisions**

### **Section 1.01 Title.**

This Code shall be known as the “Employment and Contracting Preferences Code”.

### **Section 1.02 Authority.**

As a sovereign Indian tribe, the Band has inherent authority to govern employer-employee relations within the Band’s jurisdiction, to determine the standards for hiring, promotions, and retention of employees, and to prescribe policies and procedures concerning the procurement of goods and services by the Band, including its agencies and enterprises. The Tribal Council enacts this Code pursuant to the express grant of legislative powers to the Tribal Council in Article IX, subsection 2 (a) and 2(j) of the Constitution and in fulfillment of the duties the Tribal Council stated in Article IX, subsection 1(a) and 1(c) of the Constitution.

### **Section 1.03 Findings.**

(a) Since the arrival of Europeans, Native American people have suffered extreme poverty and economic hardship and have lost many of their traditional means of survival. Band unemployment and poverty rates, as well as those for other Native American communities, have historically been and remain much higher than those for non-Native Americans. Continued unemployment and poverty prevent the Band and other Native American communities from achieving economic self-sufficiency, independence, higher standards of living as well as the dignity and self-respect attending such achievements.

(b) The Band has always retained its status as separate sovereign government. The Band’s sovereign authority includes the right to place conditions upon the presence of persons who are not Band Citizens and on non-Native American businesses located within the Band’s jurisdiction.

(c) The Tribal Council declares that the employment and economic advancement of the Band is a compelling interest of the Band that is critical to the Band’s goals of tribal self-determination and independence. The provision of Band employment and contracting preferences within the Band’s jurisdiction constitutes an important exercise of sovereignty, serves to protect of the Band’s sovereign authority within its jurisdiction, and promotes the integrity and welfare of the Band’s unique Indian community.

(d) It is the public policy of the Band to provide employment and contracting opportunities within the Band’s jurisdiction to the Band community and Band businesses before offering such opportunities to other job applicants and businesses. The Band’s use of employment and contracting preferences involves political classifications based on a

person's status as a Band Citizen or member of the Band community. The Band's use of employment and contracting preferences does not involve classifications on the basis of race, color, national origin, or ancestry.

#### **Section 1.04 Effective Date.**

This Code shall become effective on the date it is enacted into law by the Tribal Council.

#### **Section 1.05 Severability.**

(a) If any section, subsection, clause, sentence, paragraph, or part of this Code or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Code, which shall continue in full force and effect.

(b) To the extent this Code conflicts with any provision of law, resolution, motion or any other action of the Band heretofore taken, the provisions of this Code shall govern and the conflicting provisions are hereby superseded and repealed.

#### **Section 1.06 Definitions.**

When used in this Code with initial capitals, the terms and assigned meanings set forth hereunder shall apply within this Code.

(a) "Applicant Pool" means all Band Citizens who contact the Department of Human Resources and express interest in being considered for Open Positions.

(b) "Band" means the Pokagon Band of Potawatomi Indians, a sovereign, federally-recognized Indian tribe and all agencies, political subdivisions, instrumentalities, and enterprises of the Band, provided that the term Band excludes the Pokagon Gaming Authority and Mno Bmadsen.

(c) "Band Citizen" or "Citizen" means an enrolled member of the Band.

(d) "Band Contractor" means:

(1) a corporation, limited liability company, sole proprietorship, or any other business entity, at least fifty-one percent (51%) of which is owned and operated by one or more Band Citizens, provided that such ownership and operation status must be maintained throughout the bidding stage; or

(2) Mno Bmadsen.

(e) "Band Contractor List" means one or more lists maintained by the Band of Band Contractors that wish to be considered for Open Contracts.

(f) “Contracting Officer” means the person authorized to award a contract to a Qualified Contractor and includes persons who are authorized to award a contract on behalf of any Contractor that is engaged to provide services to the Band, whether such engagement is made directly by the Band or indirectly by another business entity engaged by the Band, including through subcontract, sub-subcontract, or other contractual relationship to such other business entity.

(g) “Contractor” means a corporation, limited liability company, sole proprietorship, or any other business entity engaged or seeking to be engaged as an independent contractor to perform services for the Band and includes, without limitation, all business entities engaged to provide services to the Band, whether such engagement is made directly by the Band or indirectly by another business entity engaged by the Band, including through subcontract, sub-subcontract, or other contractual relationship to such other business entity.

(h) “Department of Human Resources” means the Band’s Department of Human Resources.

(i) “Lateral Transfer” means the transfer of an employee from a current position to another comparable position with the Band.

(j) “Mno Bmadsen” means Mno Bmadsen, a chartered economic development authority of the Band, and includes any business entity, at least 51% of which is owned by Mno Bmadsen.

(k) “Other Native American” means any duly enrolled member of: (1) a federally recognized Indian tribe other than the Band; or (2) an Indian tribe or First Nation recognized by Canada.

(l) “Other Native American Applicant” means an applicant for any Open Position with the Band who is an Other Native American.

(m) “Other Native American Contractor” means a corporation, limited liability company, sole proprietorship, or any other business entity, at least fifty-one percent (51%) of which is owned and operated by one or more Other Native Americans, provided that such ownership and operation status must be maintained throughout the bidding stage.

(n) “Open Contract” means a current opportunity for a Contractor to provide services to the Band, provided that the term Open Contract shall not include:

(1) contracts that are not subject to bidding requirements under applicable procurement law and policy; and

(2) contracts that will be awarded by decisions made by the Tribal Council, except upon the express decision of the Tribal Council to designate the contract as an “Open Contract” that is subject to the preference requirements of this Code.

(o) “Open Position” means a position of employment with the Band, whether part-time or full-time and without regard to duration, provided that the term Open Position shall not include positions that will be filled by hiring decisions made by the Tribal Council, except upon express decision of the Tribal Council to designate the position as an “Open Position” that is subject to the preference requirements of this Code.

(p) “Parent” means the biological parent, adopted parent, Step-Parent, or legal guardian:

- (1) of a Band Citizen who is under eighteen (18) years of age; and
- (2) who has legal and physical custody of such Band Citizen who is under eighteen (18) years of age.

(q) “Pokagon Applicant” means an applicant for any Open Position with the Band who is a Band Citizen.

(r) “Pokagon Employee” means (only for Retentions and Recalls) an employee who is a Band Citizen.

(s) “Pokagon Gaming Authority” means an unincorporated chartered instrumentality of the Band.

(t) “Pokagon Preferences Code” or “Code” means this Employment and Contracting Preferences Code.

(u) “Promotion” means the advancement of an employee to a better employment position with the Band.

(v) “Qualified” means:

(1) the applicant for a particular Open Position meets the bona fide occupational qualifications for that job, including any permits, licenses, or certifications that are legal requirements for performing the job;

(2) following interviews for the Open Position, the applicant, including a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant attains a composite score that is equivalent to at least sixty (60) percent of the total points on the interview grading scale;

(3) the applicant passes the background check required by the Band’s Screening Policy;

(4) if the applicant is a former Band employee who was terminated or resigned pending an investigation into allegations of misconduct which may have resulted in termination, then (A) at least one year must have passed from the date of termination or

resignation; (B) the termination or resignation must not have involved reasons of child molestation, sexual assault, sexual harassment, theft or embezzlement; and (C) the Tribal Council approves hiring the applicant, but if the Tribal Council previously approved hiring the applicant under this Subsection 1.06(v)(4)(C) and following such approval, the applicant hasn't been terminated or resigned pending an investigation into allegations of misconduct which may have resulted in termination, then subsequent Tribal Council approval isn't required under this Subsection 1.06(v)(4)(C) to rehire the applicant;

(5) if the applicant is a former Band employee who was terminated or resigned employment with the Band under circumstances other than those set forth in subsection 1.06(v)(4)(c) above, and the applicant seeks employment for the same position within one year of resignation, the Tribal Council approves hiring the applicant; and

(6) if the applicant is designated as "Not Eligible for Rehire" pursuant to the Band's Return to Work Program, then the applicant must have first completed the requirements of the Return to Work Program and have been found, under the Return to Work Program, to be eligible to return to work with the Band.

(w) "Qualified" means (only for Retentions and Recalls):

(1) the employee received at least a satisfactory rating on the employee's last employment evaluation unless the employee has not had an evaluation due to the duration of employment;

(2) on the Retention or date of lay off or furlough, as applicable, the employee was not subject to a performance improvement plan or last chance agreement;

(3) the employee continues to meet the bona fide occupational qualifications for the position, including any permits, licenses, or certifications that are legal requirements for performing the job; and

(4) the employee is able to pass the background check required by the Band's Screening Policy.

(x) "Qualified" means (only for Contractors) that a Contractor has:

(1) submitted a Responsive Bid for an Open Contract; and

(2) passed the background check required by the Band's Screening Policy.

(y) "Recall" means the reinstatement of a laid off or furloughed Qualified employee to his or her same position of employment within the same department where:

(1) the most recent separation from the Band was due to the lay off or furlough;

(2) it has been less than 365 days from the effective date of the lay off or furlough;

(3) the position of employment was not, prior to the lay off or furlough, and is not currently, filled by a hiring decision made by the Tribal Council, or if it is filled by the Tribal Council, then Tribal Council has designated the position as an "Open Position" subject to the preference requirements of this Code;

(4) the Band seeks to fill such position of employment; and

(5) since the lay off or furlough, the Qualified employee has maintained with the Department of Human Resources, the Qualified employee's current address and contact information.

(z) “Reservation” means, pursuant to 25 U.S.C. §1300j-5 or other applicable federal law:

(1) all lands, the title to which is held in trust by the United States for the benefit of the Band; and

(2) all lands proclaimed by the Secretary of the Interior to be part of the Band’s reservation. The term Reservation includes any rights-of-way running through the Reservation.

(aa) “Responsible Bidder” means a bidder who provides written evidence that is satisfactory to the Contracting Officer that it:

(1) is capable of fulfilling all written requirements of the Open Contract;

(2) has a satisfactory performance record;

(3) has a satisfactory record of integrity and business ethics;

(4) has the necessary organization, experience, accounting and operational controls, and technical skills or, if permitted in the bid requirements, the ability to obtain them through subcontracts;

(5) has the necessary production, construction, and technical equipment and facilities or, if permitted in the bid requirements, the ability to obtain them through subcontracts; and

(6) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

(bb) “Responsive Bid” means that the bid complies with all bid requirements and that the Contractor submitting the bid has demonstrated that it is a Responsible Bidder. If required, the Contractor shall also provide evidence that it is capable of being bonded for the work required in the Open Contract.

(cc) “Retentions” (or “Retain”) means the retention of some employees when the Band, as a result of economic circumstances, must lay off or furlough other employees.

(dd) “Screening Policy” means the Band’s Employment, Volunteer, and Contractor Screening Policy and Procedure.

(ee) “Spouse” means a Band Citizen’s lawful partner in marriage.

(ff) “Spouse or Parent Applicant” means an applicant for any Open Position with the Band who is a Spouse or Parent.

(gg) “Spouse or Parent Contractor” means: a corporation, limited liability company, sole proprietorship, or any other business entity, at least fifty-one percent (51%) of which is owned and operated by one or more Spouses or Parents, provided that such ownership and operation status must be maintained throughout the bidding stage.

(hh) “Step-Parent” means the Spouse of a biological or adoptive parent of a Band Citizen.

(ii) “Tribal Council” means the governing body of the Band established pursuant to Article X of the Constitution.

(jj) “Veteran” means an individual who:

(1) actively served in any branch of the United States military, or served in a military reserve force of any branch of the United States military or any state defense force; and

(2) does not possess a dishonorable discharge from any branch of the United States military, or military reserve force of any branch of the United States military, or any state defense force.

(kk) “Veteran Applicant” means an applicant for any Open Position with the Band who is a Veteran.

(ll) “Veteran Contractor” means a corporation, limited liability company, sole proprietorship, or any other business entity, at least fifty-one percent (51%) of which is owned and operated by one or more Veterans, provided that such ownership and operation status must be maintained throughout the bidding stage.

## **CHAPTER 2**

### **Employment Preference**

#### **Section 2.01 Order of Priority.**

The Band shall give preference in hiring for all Open Positions, and in all Promotions, Lateral Transfers, Retentions, and Recalls in the following order of priority:

- (a) First, to Qualified Band Citizens;
- (b) Second, to Qualified Spouses and Qualified Parents;
- (c) Third, to Qualified Other Native Americans;
- (d) Fourth, to Qualified Veterans; and
- (e) Fifth, to all other Qualified applicants.

#### **Section 2.02 Applicant Pool.**

(a) The Department of Human Resources shall maintain the Applicant Pool list, which shall include the names, contact information, and individual qualifications of all Band

Citizens who contact the Department of Human Resources and express interest in being considered for Open Positions.

(b) The Department of Human Resources shall make diligent and good faith efforts to maintain current available contact information for each Band Citizen whose name appears on the list and information describing their particular training, education, skills, experience, permits, licenses, certifications, and other employment qualifications.

(c) The Department of Human Resources shall routinely and diligently pursue its own efforts to ensure that it has the names of all Band Citizens who wish to be included on the list and current and accurate contact information and employment qualifications for all such persons.

### **Section 2.03 Consultation.**

Prior to filling any Open Position, the Band shall ascertain whether a Band Citizen in the Applicant Pool is Qualified for Open Position. If there is one or more Qualified Band Citizens, the Band shall make a diligent effort to contact them and provide a reasonable opportunity to submit an application for the Open Position.

### **Section 2.04 Interviews.**

As may be necessary or helpful in the Band's determination, additional information regarding any applicant's qualifications for an Open Position may be obtained through an interview conducted by phone or in person. Consistent with the requirements of Section 2.01 of this Code, before interviewing any other applicant for an Open Position, the Band shall offer interviews to the best Qualified Pokagon Applicants, provided that the Band is not required to interview more than three (3) Qualified Pokagon Applicants.

### **Section 2.05 Offers.**

(a) All offers of employment to Qualified applicants for Open Positions shall be made in compliance with the priorities stated in Section 2.01 of this Code.

(b) If there is more than one Qualified Pokagon Applicant for an Open Position, the Band shall offer the Open Position to the best Qualified Pokagon Applicant.

(c) If there is no Qualified Pokagon Applicant, and there is more than one Qualified Spouse or Parent Applicant, the Band shall offer the Open Position to the best Qualified Spouse or Parent Applicant.

(d) If there is no Qualified Spouse or Parent Applicant, and there is more than one Qualified Other Native American Applicant, the Band shall offer the Open Position to the best Qualified Other Native American Applicant.

(e) If there is no Qualified Other Native American Applicant, and there is more than one Qualified Veteran Applicant, the Band shall offer the Open Position to the best Qualified Veteran Applicant.

(f) Offers of employment to Qualified Pokagon Applicants, Qualified Spouse or Parent Applicants, Other Native American Applicants, or Veteran Applicants shall include pay and fringe benefit packages that are consistent with the pay and fringe benefits that the Band currently provides or recently provided to similarly Qualified employees in positions that are the same or similar to the Open Position. If the Band has not previously filled a position that is the same or is similar to the Open Position, the pay and fringe benefits offer shall be competitive with the employment market.

### **Section 2.06 Retentions.**

(a) All Retentions of Qualified employees shall be made in compliance with the priorities stated in Section 2.01 of this Code.

(b) If there is more than one Qualified Pokagon Employee that will be laid off or furloughed from the same position, the Band shall Retain the best Qualified Pokagon Employee.

(c) If there is no Qualified Pokagon Employee, and there is more than one Qualified Spouse or Parent employee that will be laid off or furloughed from the same position, the Band shall Retain the best Qualified Spouse or Parent employee.

(d) If there is no Qualified Spouse or Parent employee, and there is more than one Qualified Other Native American employee that will be laid off or furloughed from the same position, the Band shall Retain the best Qualified Other Native American employee.

(e) If there is no Qualified Other Native American employee, and there is more than one Qualified Veteran employee that will be laid off or furloughed from the same position, the Band shall Retain the best Qualified Veteran employee.

### **Section 2.07 Recalls.**

(a) All Recalls of Qualified employees shall be made in compliance with the priorities stated in Section 2.01 of this Code.

(b) If there is more than one Qualified Pokagon Employee that has been laid off or furloughed from the same position, the Band shall Recall the best Qualified Pokagon Employee.

(c) If there is no Qualified Pokagon Employee, and there is more than one Qualified Spouse or Parent employee that has been laid off or furloughed from the same position, the Band shall Recall the best Qualified Spouse or Parent employee.

(d) If there is no Qualified Spouse or Parent employee, and there is more than one Qualified Other Native American employee that has been laid off or furloughed from the same position, the Band shall Recall the best Qualified Other Native American employee.

(e) If there is no Qualified Other Native American employee, and there is more than one Qualified Veteran employee that has been laid off or furloughed from the same position, the Band shall Recall the best Qualified Veteran employee.

(f) A Qualified employee selected for Recall shall be deemed to have forfeited all rights of Recall with regard to the position if:

(1) the Department of Human Resources does not receive a response to its recall notice from the Qualified employee by the date specified in the recall notice; or

(2) the Qualified employee does not report to work on the starting date specified in the recall notice.

## **CHAPTER 3**

### **Contracting Preference**

#### **Section 3.01 Order of Priority.**

The Band shall give preference in contracting for all Open Contracts in the following order of priority:

- (a) First, to a Qualified Band Contractor;
- (b) Second, to a Qualified Spouse or Parent Contractor;
- (c) Third, to a Qualified Other Native American Contractor;
- (d) Fourth, to a Qualified Veteran Contractor; and
- (e) Fifth, to all other Qualified Contractors.

#### **Section 3.02 Certification of Band Contractors.**

A Contractor may request certification as a Band Contractor. Upon any such request, the Band shall review the qualifications of the Contractor to determine if the Contractor qualifies as a Band Contractor under Section 1.06(d) of this Code. In making such determination, the Band shall require documentation that establishes the requisite ownership under Section 1.06(d) of this Code.

### **Section 3.03 Band Contractor List.**

(a) The Band shall maintain the Band Contractor List, which shall include contact information for each Band Contractor and information describing: (1) relevant experience, including any special technical, administrative and financial capabilities; (2) any permits, licenses, certifications; and (3) other relevant qualifications.

(b) The Band shall make diligent and good faith efforts to maintain current the information on the Band Contractor List.

(c) The Band shall routinely and diligently pursue its own efforts in cooperation with all Contracting Officers to ensure that it has the names of all Band Contractors who wish to be included on the Band Contractor List and current and accurate contact information for all such Band Contractors.

### **Section 3.04 Duty of Consultation.**

Prior to issuing bid notices or invitations, requests for proposals, requests for qualifications, or taking other actions that initiate a procurement process with potential independent contractors regarding any Open Contract, the Contracting Officer shall consult with the Band to ascertain whether a Band Contractor appears able to become Qualified within the time limits of the procurement process for an Open Contract. All Band Contractors that appear able to become Qualified for an Open Contract within the time limits of the procurement process shall be provided an opportunity to submit a bid on the Open Contract.

### **Section 3.05 Written Response.**

(a) If the Contracting Officer determines that a Band Contractor's bid is not a Responsive Bid, the Contracting Officer must provide the Band Contractor with a written response that identifies the specific reasons the Band Contractor's bid does not meet the requirements for a Responsive Bid.

(b) If, due to the size of the particular Open Contract, the Contracting Officer determines that a Band Contractor's bid is not a Responsive Bid because the Band Contractor lacks the qualifications to perform all of the work required for the Open

Contract, the Contracting Officer may, at his or her discretion, divide the work of the Open Contract into smaller portions so that the Band Contractor's bid will meet the requirements of a Responsive Bid for a portion of the work in the Open Contract.

**Section 3.06 Awarding Open Contracts.**

(a) Preference in the award of Open Contracts shall be provided as follows:

(1) Except as otherwise provided in this Section 3.06, the Band shall award an Open Contract to the Qualified Contractor with the lowest Responsive Bid, if that bid is within budgetary allowances established for all work included in the Open Contract.

(2) Notwithstanding the above, solely for the purpose of determining the lowest Responsive Bid, the following shall apply:

(A) First, each Responsive Bid from a Qualified Contractor shall be reduced pursuant to Table 1 below:

**Table 1**

<b>Bid amount from each subcontractor that is a Qualified Band Contractor that was included in Qualified Contractor's bid*</b>	<b>Reduction in Qualified Contractor's Responsive Bid (select the lesser of)</b>
less than \$100,000	10% of that bid, or \$8,000
At least \$100,000, but less than \$200,000	8% of that bid, or \$12,000
At least \$200,000, but less than \$400,000	6% of that bid, or \$16,000
At least \$500,000, but less than \$1 million	4% of that bid, or \$30,000
\$1 million or more	3% of that bid, or \$50,000

\*No subcontractor that is at least 51% owned by the bidding Qualified Contractor shall receive preference under Table 1.

(B) Second, after any reduction under Table 1 above, each Responsive Bid from a Qualified Contractor that is a Qualified Band Contractor shall be reduced pursuant to Table 2 below:

**Table 2**

<b>Lowest Responsive Bid from Qualified Contractor other than a Band Contractor (after reduction under Table 1 above)</b>	<b>Reduction in Qualified Band Contractor's Responsive Bid (select the lesser of)</b>
less than \$100,000	10% of that bid, or \$8,000
At least \$100,000, but less than \$200,000	8% of that bid, or \$12,000
At least \$200,000, but less than \$400,000	6% of that bid, or \$16,000
At least \$500,000, but less than \$1 million	4% of that bid, or \$30,000

\$1 million or more	3% of that bid, or \$50,000
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(3) If, after any reductions to a Responsive Bid under Subsections 3.06(a)(2)(A) and 3.06(a)(2)(B) above, there are two or more Qualified Contractors with an equal Responsive Bid amount, the Open Contract shall be awarded in accordance with the order of priority provided in Section 3.01 of this Code, provided that if two Qualified Contractors are entitled to the same order of priority, then the Open Contract shall be awarded to the best Qualified Contractor, as determined by the Band.

**Section 3.07 Acknowledgement Form.**

A duly authorized representative of every Contractor shall, as a condition of the Contractor being awarded a contract to provide services to the Band, sign the following acknowledgement:

**ACKNOWLEDGEMENT**

This Acknowledgement is submitted on behalf of the following contractor:  
 \_\_\_\_\_ (“Contractor”)

I hereby represent that: (a) I am a duly authorized representative of the Contractor; (b) I am authorized to sign this acknowledgment on behalf of the Contractor; (c) I have read the Employment and Contracting Preferences Code on behalf of the Contractor; and (d) the Contractor, as a condition of being awarded a contract to provide services to the Band, is fully capable of and committed to complying fully with all requirements of the such Code throughout the duration of the contract.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Printed Name and Title

**CHAPTER 4  
 Complaints**

**Section 4.01 Eligibility.**

(a) Complaints alleging a violation of this Code may only be brought by the following:

(1) A Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant who has reasonable grounds to believe that he or she

did not receive an offer of employment, a Promotion, or a Lateral Transfer in violation of this Code;

(2) A Citizen, Spouse, Parent, Other Native American, or Veteran who has reasonable grounds to believe that his or her right to Retention was not honored in violation of this Code;

(3) A Citizen, Spouse, Parent, Other Native American, or Veteran who has reasonable grounds to believe that his or her right to Recall was not honored in violation of this Code;

(4) A Band Contactor, excluding Mno Bmadsen, who was not provided an opportunity to submit a bid on an Open Contract in violation of this Code, provided that there are reasonable grounds to believe that such Contractor would have been able to become Qualified for the Open Contract within the time limits of the procurement process; or

(5) Any of the following who have reasonable grounds to believe that they were denied preferential treatment in violation of this Code: (i) Qualified Band Contractor, excluding Mno Bmadsen, (ii) Qualified Spouse or Parent Contractor, (iii) Qualified Other Native American Contractor, or (iv) Qualified Veteran Contractor.

(b) All complaints shall be filed under oath with a neutral Fact Finder appointed by the Tribal Council in accordance with the requirements of Band law. The complaint shall be filed on a form provided by the Fact Finder, which sets forth the facts of the alleged violation and identifies the specific provision(s) of this Code that is alleged to have been violated.

(c) A complaint must be filed with the Fact Finder not more than thirty (30) days after the date of the alleged violation.

#### **Section 4.02 Settlement and Investigations.**

Upon receipt of such a complaint that meets the requirements of Section 4.01, the Fact Finder shall:

(a) Provide an opportunity for the complainant and respondent Band or Contracting Officer to resolve the matter by settlement agreement prior to a determination of whether a violation of this Code has occurred. Third-party mediation may be pursued by agreement of the complainant and the respondent, with the approval of the Fact Finder. Evidence of conduct or statements made in compromise settlement negotiations, offers of settlement and any final agreement may not be made public without the written consent of the parties to the proceeding nor used as evidence in any subsequent proceeding, civil

or criminal, except in a civil action alleging a breach of settlement agreement filed by a party.

(b) The Fact Finder shall conduct an investigation to the extent necessary for the Fact Finder to determine whether there are reasonable grounds to believe, under a preponderance of the evidence standard, that a violation of the Code has occurred. In conducting an investigation, the Fact Finder shall have access at all reasonable times to premises, records, documents, individuals and other evidence or possible sources of evidence and may examine, record and copy those materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation. The Fact Finder may issue subpoenas to compel access to or production of those materials or the appearance of those persons and may serve interrogatories on a respondent to the same extent as interrogatories served in aid of a civil action in the Tribal Court. The Fact Finder may administer oaths and take sworn statements. The complaint and evidence collected during the investigation of the complaint, other than data identifying persons not parties to the complaint, shall become a matter of public record only upon final disposition of the complaint by the Fact Finder if there is no settlement. Notwithstanding any other provision of this Section, the complaint and evidence collected during the investigation of the complaint may be used as evidence in any subsequent proceeding, civil or criminal.

(c) If the Band asserts that a listed job requirement is a bona fide occupational qualification, the Band must establish such qualification by a preponderance of the evidence.

#### **Section 4.03 Written Decision.**

(a) For any complaint involving an Open Position, (including Promotions, and Lateral Transfers) or Retention or Recall, after exploring settlement opportunities and completing an investigation of the allegations in the complaint, the Fact Finder shall issue a written decision and each party shall receive a copy of the Fact Finder's decision.

(1) If the Fact Finder does not find reasonable grounds to believe that a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant did not receive an offer of employment, Promotion, Lateral Transfer, Retention, or Recall due to violation of the Code, the Fact finder shall enter an order so finding, and dismiss the complaint.

(2) If the Fact Finder finds reasonable grounds to believe that a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant did not receive an offer of employment, Promotion, Lateral Transfer, Retention, or Recall due to violation of the Code, the Fact Finder shall endeavor to remedy the violation by informal means such as conference, conciliation and persuasion. Nothing said or done as part of such endeavors may be made public

without the written consent of the parties to the proceeding, nor used as evidence in any subsequent proceeding, civil or criminal, except in a civil action alleging a breach of settlement agreement filed by a party. If the case is disposed of by such informal means in a manner satisfactory to the Fact Finder, the Fact Finder shall dismiss the proceeding.

(3) If the Fact Finder finds reasonable grounds to believe that a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant did not receive an offer of employment, Promotion, Lateral Transfer, Retention, or Recall due to violation of the Code, and settlement cannot be achieved within a reasonable time, the Fact Finder shall issue an order to resolve the violation as the Fact Finder deems just and proper in the circumstances, including an order to hire, promote, transfer, reinstate or recall the applicant or employee, as applicable, provided that the Fact Finder shall not have the authority to terminate the employment of any Qualified applicant, or any retained or recalled employee in order to make the employment position filled by the Qualified applicant or the retained or recalled employee, as applicable, available to a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant whose rights under this Code were determined by the Fact Finder to have been violated. In a situation where an order to hire, promote, transfer, reinstate, or recall a Pokagon Applicant, Spouse or Parent Applicant, Other Native American Applicant, or Veteran Applicant suffering the consequences of a violation of this Code may not be appropriate or adequate, the Fact Finder may impose a monetary penalty against the Band not to exceed (i) back pay and/or (ii) front pay for one (1) month. Any award for back pay or front pay shall be calculated in accordance with standards used in the federal courts when establishing such remedies for victims of employment discrimination.

(b) For any complaint involving an Open Contract, after exploring settlement opportunities and completing an investigation of the allegations in the complaint, the Fact Finder shall issue a written decision and each party shall receive a copy of the Fact Finder's decision.

(1) If the Fact Finder does not find reasonable grounds to believe that a Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor did not receive an offer of contract due to violation of the Code, the Fact Finder shall enter an order so finding, and dismiss the complaint.

(2) If the Fact Finder finds reasonable grounds to believe that a Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor did not receive an offer of contract due to violation of the Code, the Fact Finder shall endeavor to remedy the violation by informal means such as conference, conciliation and persuasion. Nothing said or done as part of such endeavors may be made public without the written consent of the parties to the proceeding, nor used as

evidence in any subsequent proceeding, civil or criminal, except in a civil action alleging a breach of settlement agreement filed by a party. If the case is disposed of by such informal means in a manner satisfactory to the Fact Finder, the Fact Finder shall dismiss the proceeding.

(3) If the Fact Finder finds reasonable grounds to believe that a Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor did not receive an offer of contract due to violation of this Code, and settlement cannot be achieved within a reasonable time, the Fact Finder shall issue an order to resolve the violation as the Fact Finder deems just and proper in the circumstances, including an order to contract with the Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor, provided that the Fact Finder shall not have the authority to take any action which would cause the applicable budget to be exceeded or to terminate or otherwise interfere with any existing contract with any Qualified Contractor, including without limitation, in order to make the contract with the Qualified Contractor available to the Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor whose rights under this Code were determined by the Fact Finder to have been violated. In a situation where an order to contract with a Band Contractor, Spouse or Parent Contractor, Other Native American Contractor, or Veteran Contractor suffering the consequences of a violation of this Code may not be appropriate or adequate, the Fact Finder may impose a monetary penalty against the respondent not to exceed the lesser of five percent (5%) of the total contract amount or \$5,000.00.

(4) The Fact Finder's decision under this Section 4.03(b) shall be final and not subject to Tribal Court review.

#### **Section 4.04 Confidentiality.**

Persons who are not parties to a complaint under this Code have a right to privacy. Any records of the Fact Finder that are open to the public shall be kept in such a manner as to ensure that data identifying these third-parties is not reflected in the record.

### **CHAPTER 5 Review of Fact Finder's Decision**

#### **Section 5.01 Limited Review in Tribal Court.**

(a) Any party to a complaint filed with the Fact Finder under Section 4.03(a) may seek review of the Fact Finder's dismissal of a complaint or finding of a violation and order of remedy by filing a complaint with the Tribal Court within thirty (30) days of the date of the Fact Finder's order.

(b) The Tribal Court shall set a briefing schedule and shall hear arguments of the parties. The Tribal Court shall, except for compelling reasons, limit its review to the administrative record, which shall be limited to the parties' briefs, materials and information obtained by the Fact Finder, the Fact Finder's report and recommendation, and the Fact Finder's order under Section 4.03.

(c) The Tribal Court may set aside the Fact Finder's decision only upon a finding that it was arbitrary, capricious, and unsupported by substantial evidence in the record, or in violation of the law of the Band. The Tribal Court shall give deference to the reasonable interpretation and application of this Code by the Fact Finder.

### **Section 5.02 Limited Waiver of Sovereign Immunity.**

The sovereign immunity of the Pokagon Band of Potawatomi Indians is hereby waived for investigations (including subpoenas, issued in relation to investigations conducted pursuant to Chapter 4), complaints, and remedies provided by this Code.

#### Legislative History

The "Pokagon Preferences Code" was enacted by the Tribal Council on July 25, 2011, through Resolution No. 11-07-25-02; amended July 27, 2015, through Motion; amended December 16, 2015, through Resolution No. 15-12-16-01; On November 12, 2019, by Resolution No. 19-11-12-02, Subsection 1.06(u)(4) of the Code was amended; amended June 23, 2020, through Resolution 20-06-23-03; amended October 5, 2020, through Resolution No. 20-10-05-01.