

1 and set out the standards for the parties to apply early the next morning and held a preliminary
2 injunction hearing the following day May 10, 2007. *See Order (Preliminary Injunction Hearing)*
3 *CV 07-34 (HCN Tr. Ct. May 10, 2007).*² The following day the Trial Court issued an *Order*
4 *(Denying Preliminary Injunction)* primarily on the basis that the plaintiff candidate White Wing
5 had failed to exhaust his pending appeal before the HCN Election Board which he filed as of
6 May 9, 2007 but on May 10, it had not resolved. The Trial Court very properly declined to
7 address the issue which was appropriately before the HCN Election Board. The Trial Court cited
8 the *HCN Election Ordinance* which gave the HCN Election Board until May 14th to decide
9 candidate White Wing's appeal. *Id* at 11 (citation to HCN Election Ordinance omitted).

10 Simultaneously, the candidate White Wing was facing a recall election scheduled for
11 May 15, 2007, which the Trial Court declined to enjoin as he had failed to properly appeal the
12 decision which gave rise to the recall election. *Id.* at 11. The HCN Election Board apparently
13 met May 10, 2007 as indicated by its minutes of May 16, 2007 filed in Court.³ Mr. White
14 Wing's attorney then faxed a "chatty" letter on May 16th, to Court objecting to the action of the
15 HCN Election Board and requesting a hearing on his *Motion for a Preliminary Injunction* on
16 May 24, 2007. The Court held its *Preliminary Injunction Hearing* on May 18, 2007 at which
17 Mr. Reynolds appeared representing Mr. White Wing.

18 The Trial Court then rendered its decision on May 22, 2007, which is the decision being
19 appealed in this matter. *See Order (Candidacy Appeal) CV 07-34 (HCN Tr. Ct. May 22, 2007).*
20 The Appeal in this case was filed May 24, 2007 though the date "signed" by the appellant's
21 attorney was May 29, 2007. The Appellant HCN Election Board filed its *Appellant's Brief* on
22 May 31, 2007. This Court heard the matter via teleconference on May 31, 2007 and granted

24 ² The minutes of the May 10 hearing or Log of Proceedings Electronically Recorded [LPER] were not available to
25 the HCN Supreme Court at the time of Oral Argument or when this decision was considered.

³ The record is curiously blank as to what the Election Board did on May 10 at its meeting or even that it actually
met and if it met what significance that had in this case. This makes knowing the proper course to pursue even less
certain.

1 permission to appeal and set a briefing schedule closing that afternoon, as a regularly scheduled
2 meeting of the HCN Supreme Court was previously scheduled for June 2, 2007 and the HCN
3 General Election which would be impacted by this decision is scheduled for Tuesday June 5th,
4 2007.

5 Without exaggeration, this case has proceeded with breakneck speed, which has taxed the
6 powers of the parties and that of the HCN Court System to thoroughly consider some of the
7 important issues in this matter. However, the HCN CONSTITUTION requires that the HCN Trial
8 Court render decisions in Election matters with 20 days, HCN CONST. ART. VII § 7. and the
9 HCN Supreme Court has set an expedited appeal schedule to accommodate the need for certainty
10 in HCN elections and to provide the least intrusion of the Courts into the electoral process.

11 **DECISION**

12 This case began due to a General Primary Election on April 24, 2007, which included a
13 seat for District III. District III is an electoral district with one representative in the HCN
14 Legislature and which includes the Hocał community of Pacinał or Wittenberg in Shawano
15 county and nearly all counties north of Wisconsin Highway 29 and stretching all the way to the
16 city of Green Bay and its environs. As the Trial Court recites, that election resulted in a tie for
17 second place, which is critical to the outcome of this case. The results of the primary were that
18 Byron Thundercloud won with 36 votes followed by two people in a tie with 33 votes each:
19 Dallas White Wing - Lawrence Walker Jr.. See *White Wing v. HCN Election Board et.al*, CV
20 07-34 (HCN Tr. Ct. May 22, 2007) *Order (Candidacy Appeal)*. The Election Board certified the
21 results of the election on April 25, 2007, placing the three top vote getters into the General
22 Election on June 5, 2007. It is what followed next that generated this case.

23 Apparently, candidate Lawrence Walker filed a complaint regarding candidate White
24 Wing's electioneering conduct sometime after the Primary Election. He also apparently filed an
25 election challenge. See *Lawrence Walker Jr. v. HCN Election Board*, CV 07-28 (HCN Tr. Ct.

1 May 11, 2007) (*Order* dismissing appeal at request of plaintiff). The actual facts regarding that
2 filing are unknown since the Trial Court failed to make any findings regarding this complaint
3 and the Election Board's investigation of that complaint. *See Order (Denying Preliminary*
4 *Injunction)* CV 07-34 (HCN Tr. Ct. May 11, 2007) pp 7-8: *See also Order (Candidacy Appeal)*
5 CV 07-34 (HCN Tr. Ct. May 22, 2007) pp 5-9. The allegations of the Lawrence Walker Jr.
6 complaint and the purpose of the May 6, 2007 HCN Election Board hearing are not mentioned in
7 the Trial Court's findings of fact, even though they are likely relevant.

8 The fact remains that the HCN Election Board had a meeting on May 6th, 2007 without
9 any notice to candidate White Wing that it would consider the complaint filed against him by
10 Lawrence Walker Jr. and giving him the opportunity to appear and defend the allegations against
11 him. *Order (Candidacy Appeal)* at ¶ 9-10 p. 6. (HCN Tr. Ct. May 22, 2007). It is clear
12 candidate White Wing did not know this matter would be considered and he did not appear at
13 that HCN Election Board meeting of May 6. The HCN Election Board considered the
14 allegations against Mr. White Wing that he violated the rules which gave him access to a District
15 III membership list as an incumbent HCN Legislator for the purpose of providing legitimate non-
16 election information to his constituents. The constituent list was provided to Dallas White Wing
17 with the clear condition set by the HCN Attorney General that the "provided names do not get
18 used for campaign literature". *Id.* at ¶ 14-15.

19 At its meeting on May 6, 2007 the HCN Election Board found that the provided names
20 were improperly used for campaigning by Dallas White Wing. Mr. White Wing received more
21 absentee votes than any other candidate which allowed him to tie for second place in the
22 election. *Id.* at ¶17. The HCN Election Board then voted to decertify Mr. White Wing as a
23 candidate for violating the Election Code by failing to maintain high moral and ethical standards.
24 *Id.* at ¶ 7. Mr. White Wing found out about the result of the HCN Election Board meeting on
25 May 6, 2007, which simultaneously cancelled a May 11, scheduled special election between the

1 two second place candidates for District III. Mr. White Wing then filed an appeal, the history of
2 which is recited above.

3 However, there is a subsequent history in this complicated case which becomes relevant
4 in the resolution of this case. First, the Special Election between the two candidates tied for
5 second was scheduled for May 11, 2007 but cancelled on May 6 at the HCN Election Board
6 meeting Mr. White Wing did not attend. Second, due to a long drawn out challenge to a
7 attempted recall by the General Council which was ultimately decided in part in Mr. White
8 Wing's favor, voters limited to District III electors, but partly against, a recall election was held
9 as scheduled on May 15, 2007. *See Decision D. White Wing v. HCN General Council et Al. CV*
10 *05-93 (HCN Tr. Ct. Mar. 1, 2007)*. Mr. White Wing apparently lost this recall election.⁴

11 Additionally, if this wasn't complicated enough, the HCN Election Board held another
12 meeting on May 16, 2007 to consider Mr. White Wing's appeal of his decertification decision
13 among other matters. Mr. White Wing did not attend nor did his counsel Mr. Reynolds.
14 Remarkably, the minutes of that HCN Election Board meeting were delivered and filed in open
15 Court that same day, May 16, 2007. However, it was represented to the Supreme Court by
16 Counsel for the HCN Election Board that Mr. White Wing did have actual notice of this HCN
17 Election Board meeting.⁵

18 The appellant in this case asks that the HCN Supreme Court find that the Trial Court
19 committed error by finding that the lack of notice to candidate White Wing should not invalidate
20 the actions of the HCN Election Board decertifying him as a candidate as found by the Trial
21 Court and further that Mr. White Wing's decertification can stand pursuant to 2 HCC Rule 6.d.

24 ⁴ This is not clear in the record which this Court has access to on a weekend though it may be readily apparent from
25 some record available during the business week.

⁵ Due to the fact there were no explicit findings on the notice of the May 16 Election Board hearing and the fact that
substitute counsel could not reasonably be expected to be familiar with facts of what happened just prior to May 16
having been engaged only the day prior to *Oral Argument*, this is also in doubt.

1 which allows a disqualification of a candidate following removal by the HCN Legislature or
2 General Council pursuant to HCN CONST. ART. IX.

3 **I. The Trial Court did not Commit Error by Failing to agree with the HCN Election**
4 **Board that a Recalled Official may not Hold Office for Four Years Pursuant to 2**
5 **HCC Rule 6d.**

6 The HCN Supreme Court declines find the Trial Court should have upheld the HCN
7 Election Board's decertification decision pursuant to 2 HCC Rule 6d. The Trial Court rejected
8 this contention and this Court upholds that decision. The appellant HCN Election Board argued
9 that this Court's recent decision in *George Lewis v. HCN Election Bd. Et. al*, SU 06-07 (HCN S.
10 Ct. March 12, 2007) renders the distinction between a removed and a recalled official
11 meaningless and therefore anyone recalled can be banned from running and holding office for
12 four years. While this Court held that the issue of whether "malfeasance" of an elected official is
13 primarily a political question for the General Council and upon which the HCN Courts should be
14 loath to intrude in the *George Lewis* case, it maintained that the person seeking removal must
15 allege that the official sought to be removed committed an act which arguably constitutes
16 malfeasance.

17 While this Court was sharply criticized by the Trial Court on remand, that Court did *not*
18 make a ruling that no possible interpretation of the allegations against George Lewis met the
19 threshold level of malfeasance. This course, difficult as it was, remained open then as it does
20 now for a Trial Judge considering a challenge to a malfeasance charge. Regardless of the Trial
21 Court's *dicta* upon remand in *George Lewis v. HCN Election Board et. al. Id.* this Court holds
22 that there is a meaningful distinction between removal of an official for committing
23 "malfeasance" which is some bad act, and recall which is for no reason other than disagreement
24 with the political direction of the electors from the elected official they had previously put in
25 office. The distinction remains meaningful because to ban someone from office for four years is

1 quasi-criminal and is directly linked to the elected official having been found to have committed
2 a removable offense as set forth in HCN CONST. ART. IX.

3 Therefore this Court rejects the HCN Election Board's invitation to equate recall with
4 removal and upholds the Trial Court's rejection of that reason to uphold the decertification
5 decision of Dallas White Wing.

6 **II. The Trial Court Committed Error in Finding that Failure to Provide Immediate**
7 **Notice to the Decertified Candidate in This Case Required an Invalidation of the**
8 **Decision to Decertify Candidate White Wing**

9 This case is remarkable in that it has proceeded in such a rushed manner that the fact
10 finding process has been severely hampered. What is remarkable is that despite dozens of
11 election challenges in HCN jurisprudence the HCN Election Ordinance has never built in a
12 sufficient time frame to accommodate the judicial electoral challenge process as enshrined in the
13 HCN Constitution. *See* HCN CONST. ART. VIII § 7 (Any elector may challenge an election
14 within 10 days of an Election). Therefore, as an opening matter this Court urges that the HCN
15 Legislature consider so amending the Election Ordinance to prevent the possibilities of errors
16 due to challenges of primaries impacting the timeframes for the General Election.

17 That having been said, this Court finds itself torn in reading much cogent reasoning by
18 the Trial Court which discusses the notice issue. As a threshold matter this Court endorses the
19 Trial Court's finding that while voting is a fundamental right, and holding office absent
20 malfeasance has aspects of a liberty interest, being a candidate for office is not a fundamental
21 right. *See Order (Candidacy Appeal)* pp. 11-13 (HCN Tr. Ct. May 22, 2007).

22 One problem with the Trial Court's decision is that it does not distinguish between a pre
23 and post deprivation notice. The *HCN Election Ordinance* requires that "the HCN Election
24 Board shall immediately notify a candidate if the candidate does not meet the qualifications of
25 office. What appears clear from the structure of the Ordinance is that the determination of
whether a candidate meets or does not meet the qualifications is made prior to the candidate

1 knowing if he or she is certified. Therefore, it appears that the Election Ordinance contemplates
2 the HCN Election Board meeting after candidates have filed their nomination papers and the
3 Board is able to examine whether there are enough signatures, whether the candidate is a resident
4 in the voting district they are running for, or are a lawyer if running for chief justice and the like.

5 This structure means that notice as required must by its very nature be post-decisional.
6 For example, the Election Board meets examines nomination papers and determines that the
7 candidate for office failed to get ten electors from his district to sign his or her nomination
8 papers. Perhaps upon checking the voter role, the Election Board notices that a nominee's
9 elector is from Area V and not the area he is running for. The Election Board would then notify
10 the candidate they are not certified as a candidate and the appeal process kicks in. It is then that
11 2 HCC § 6d(2) would require that the Election Board notify the candidate they have a right to
12 file an appeal.

13 What makes this case more than a garden variety challenge is that candidate White Wing
14 was previously certified in order to be on the Primary Election ballot. That does not change the
15 rationale for a post decertification notice. In this case, another candidate notified the Election
16 Board that they believed Mr. White Wing had violated important electioneering rules long held
17 important by Ho-Chunk electors. *See generally JoAnn Jones v. HCN Election Board*, CV 95-05
18 (HCN Tr. Ct. July 6, 1995) and *Joyce Warner and others v. HCN Election Board*, CV 95-03,
19 04, 05, 06, 09 & 10 (HCN Tr. Ct. July 3, 1995) *aff'd* (HCN S. Ct. July 25, 1995) (direct
20 provision of enrollment list to candidates by any official of the HCN government banned). The
21 Election Board apparently considered this information in the absence of Mr. White Wing just as
22 they would an examination of nomination papers.

23 While this may appear to be unfair given the fact that the HCN Election Board both knew
24 of the allegations against Mr. White Wing and had apparently had its staff check into them, and
25 could have given notice to Mr. White Wing before it made its decision, what the Court is

1 required to examine is whether the Election Board is required to give pre-decertification notice.
2 It is not for the Court to determine what would be the best possible type of notice, which would
3 obviously been a pre-decertification of candidacy notice, but rather what the Election Ordinance
4 actually provides. To be constitutionally suspect the action must affect a fundamental right and
5 so violate notions of due process that there is no meaningful redress to the agency affecting the
6 right sought to be protected. Since this Court had held that it endorses the holding that candidacy
7 for office is not a fundamental right, it must now examine whether the notice scheme in the HCN
8 *Election Ordinance*, 2 HCC § 6d(2) violates constitutional principles of notice and an
9 opportunity to be heard, *i.e.*, due process.

10 What the Trial Court found is that notice of the decertification decision was received by
11 candidate White Wing with sufficient time for him to file a “timely appeal with both the Election
12 Board and this Court.” *Order (Candidacy Appeal)* (HCN Tr. Ct. May 22, 2007) at 10. Again,
13 due to the nature of the expedited appeal this Court is hampered by the incomplete findings of
14 fact by the Trial Court, which would shed light on the nature and timeliness of the notice to
15 candidate White Wing, but it does appear moot in that even mailed notice from Black River Falls
16 to Wittenberg may not even have reached him by the time he filed his appeal by fax and mail on
17 May 9, 2007. Formal notice after the fact of the appeal in the strange context of this case would
18 appear to be a technicality which should not otherwise impede an election.⁶ The *HCN Election*
19 *Code*, 2 HCC § 2 states that “substantial compliance shall satisfy this Ordinance. Technicalities
20 shall not be used to interfere with, delay or block elections or cause confusion or loss of voter
21 confidence in the election system.”

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23 ⁶ The decertification decision was rendered May 6, a Sunday. Candidate White Wing not only found out about the
24 decision but filed an appeal with the Election Board and the Court on May 9, though its receipt on that day by the
25 Election Board was disputed at the May 18, 2007 hearing before the Trial Court. *See Minutes* of LPER p. 2 of 22
2:47:58 pm Atty Stevens speaking, the fax number the appeal was sent to was not the Election Board’s but the
Courts and the Election Board actually received the appeal by mail on May 11, so counting 5 days from May 11th is
May 16, the day the Election Board met and entered its decision reaffirming the removal of Mr. Dallas [sic] from the
ballot.

1 What the Trial Court found is that Mr. White Wing knew of the Election Board's actions
2 on May 6th and had enough time to file an appeal in a timely manner both with the Election
3 Board and with the Court. Indeed, the major reason the Trial Court refused to act was to not
4 interfere with the Election Board's consideration of candidate White Wing's appeal. However,
5 this is where things appear to begin to come apart. In its *Order (Denying Preliminary*
6 *Injunction)* the Trial Court presumed the date of receipt of the appeal with the Election Board as
7 being the same day he filed in Court and therefore set a date of last consideration of May 14. *See*
8 *Id.* at p 11. However, the date of receipt of the appeal by the Election Board was disputed and
9 argued by the Election Board to be May 11, making its decision reaffirming decertification
10 timely under the *Election Ordinance* (within 5 days of receipt) or May 16. The Trial Court failed
11 to make explicit findings of fact regarding the notice to candidate White Wing of the May 16,
12 Election Board meeting or the date of receipt of the appeal by the Election Board of his appeal
13 mailed May 9. This Court understands the rushed nature of this case but nonetheless finds that
14 these failures to find facts by the Trial Court to go to the nature of the claim of deprivation of
15 notice and therefore undermines the finding of the Trial Court to negate the decertification by the
16 Election Board. The Court reluctantly finds this to be an abuse of discretion and error.

17 This is especially puzzling in light of the extended nature of the Trial Courts examination
18 of the Election Board's authority to examine ethical violations directly related to the election it
19 was conducting. *Order (Candidacy Appeal)* (HCN Tr. Ct. May 22, 2007) at pp. 13-15. The
20 Trial Court discussed at some length the authority of the Election Board to consider the misuse
21 of the enrollment list by candidate White Wing as a violation of the Ethics Code. The Trial
22 Court seems to have upheld this authority and we concur in that the Election Board may examine
23 ethical conduct such as this which is directly related to the proper conduct of an election under
24 its supervision. This Court also endorses the Election Board's examination of misuse of an
25 enrollment list because it gives the specter of the Ho-Chunk Nation government directly aiding

1 one candidate over another. However, as the access to the HCN electorate evolves with the use
2 of the internet, this should not be seen as a bar to future Legislative changes to the *Election Code*
3 which deal equally with all candidates.

4 The Trial Court got many things right in this decision, however, it made some critical
5 errors in fact finding which undermined its conclusion that the lack of formal notice which was a
6 “statutory violation” by not immediately notifying candidate White Wing of its decision should
7 undermine everything else. *See Order (Candidacy Appeal)* (HCN Tr. Ct. May 22, 2007) at 16.
8 The Trial Court’s remedy for the violation was to order a Special Election between the two
9 second place and tied candidates even despite upholding the Election Board’s authority to
10 examine and find candidate White Wing violated the *Ethics Code* in his misuse of the enrollment
11 list.

12 Likewise, this Court finds the Trial Court’s ultimate conclusion and failure to consider
13 what happened on May 16 to be significant. While counsel for appellee White Wing noted that
14 the issue of the notice to White Wing of the May 16th Election Board meeting and reaffirmation
15 of its decertifying decision was not noticed as critical issue on appeal by the appellant, this Court
16 has an obligation albeit within the cramped timeframes to examine the facts which logically flow
17 from the decision on notice rendered by the Trial Court. If this were any other type of case, the
18 Court would be free to remand the factual issues for further development and even order re-
19 briefing on explicit legal issues not previously thought critical. The problem for this Court and
20 the Trial Court before it, is that it is not so free to give the deliberate consideration such a case
21 deserves because of the strict requirements of timeliness mandated by the election cycle.

22 This is why this Court strongly recommends that the *Election Ordinance* be reviewed by
23 the HCN Legislature to provide that time in between primary elections and the general election
24 as well as provide some criteria for the Election Board to decide in cases such as this where a tie
25 occurs. When queried at *Oral Argument*, neither counsel for the Election Board nor its

1 Chairperson knew of a tie breaking criteria to deal with the situation presented by this case,
2 which put the Election Board in the awkward situation of scheduling a Special District run off
3 election in between the primary and general election. While this may be manageable in a
4 Legislative District race, it could also conceivable occur in a judicial seat or in a Presidential
5 election where primaries produce not just two way ties but three or four way ties.

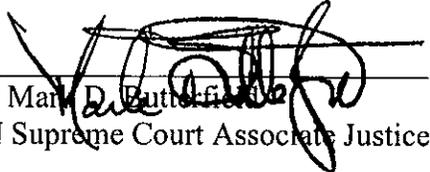
6 In addition, this Court was unpersuaded by the logic of the Trial Court which first found
7 that there was no fundamental right to candidacy and applied a rational basis standard of review
8 *Order (Candidacy Appeal)* (HCN Tr. Ct. May 22, 2007) at p. 13, only to find that an appeal
9 which was timely and apparently rendered timely, was insufficient. The Trial Court found that
10 the Election Board could consider an *Ethics Code* violation of this precise nature and reviewed
11 its finding for sufficiency of the evidence and found it adequate. The Trial Court went on to find
12 that though the Election Board did not give notice to candidate White Wing, his actual notice of
13 the decertification and timely appeal rendered that moot. *Id.* at 10. This Court, like the Trial
14 Court, is troubled by the lack of a prepared and properly served notice of the original May 6
15 decertification decision.

16 This case is an abnormality and the Election Board must be held to give actual prompt
17 notice of its decisions to not certify nominees as candidates and to decertify candidates in future.
18 This Court differs from the Trial Court in finding that candidate White Wing's actual notice and
19 ability to appeal, even perhaps appear at the May 16, Election Board meeting and present his
20 case cures the lack of notice prior to the May 6 Election Board meeting. While this Court
21 encourages the Election Board to let candidates facing adverse action to present their case so that
22 they might be heard as a better and more laudable practice given this Court's protection of due
23 process in many other contexts such as employment, removals and deprivations of fundamental
24 rights, it is not required under the *Election Code*.

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IT IS SO ORDERED. EGI HESKEKJENET. This 3rd day of June, 2007.

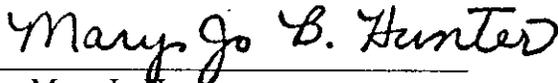
Per Curiam.



Hon. Mark D. Buttrick
HCN Supreme Court Associate Justice



Hon. Dennis M. Funmaker
HCN Supreme Court Associate Justice



Hon. Mary Jo Hunter
HCN Supreme Court Chief Justice