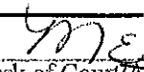


IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
SUPREME COURT

JAN 03 2005


Clerk of Court/Assistant

**TIMOTHY G. WHITEEAGLE and
GRETCHEN EAGLEMAN,**

Appellants,

vs

DECISION

Case No. SU 04-06

ALVIN CLOUD, chairman of the General Council of October 11, 2003, in his official capacity; **ROBERTA FUNMAKER**, Secretary of the General Council, in her official capacity; and the **Ho-Chunk Nation General Council Planning Committee**,

Appellees.

This case is an appeal from the dismissal of a challenge to actions of a General Council of the Ho-Chunk Nation in October 2003. The case is brought by two Tribal members who attended the HCN General Council of October 11, 2003. The members seek a declaration that a General Council requires a quorum during the passage of any particular act. The Trial Court granted a *Motion to Dismiss* on several grounds, including holding that the plaintiffs lacked standing, the Trial Court had no authority to issue a *Declaratory Judgment* without a separate enabling Act from the legislature and the sovereign immunity of the General Council Planning Committee.

This matter came before the HCN Supreme Court at *Oral Argument* on October 9, 2004. The court issued one extension on this case to allow it further time to consider the complexity and importance of this case until December 9, 2004. A second extension was issued on December 15, 2004 for additional consideration. This case concerns the scope of this Court's authority to interpret the parameters of the authority of the HCN

General Council, sovereign immunity, standing, and other critical issues. The HCN Supreme Court reverses the *Judgment* of the Trial Court in part and affirms in part.

Applicable Law

HO-CHUNK NATION CONSTITUTION.

ARTICLE III - ORGANIZATION OF THE GOVERNMENT

Section 1. Sovereignty. The Ho-Chunk Nation possesses inherent sovereign powers by virtue of self-government and democracy.

Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be composed of four (4) branches: General Council, Legislature, Executive, and Judiciary.

Section 3. Separation of Functions. No branch of the government shall exercise the powers or functions delegated to another branch.

Section 4. Supremacy Clause. This Constitution shall be the supreme law over the territory and within the jurisdiction of the Ho-Chunk Nation.

ARTICLE IV - GENERAL COUNCIL

Section 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant all inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk Nation are entitled to participate in General Council.

Section 2. Delegation of Authority. The General Council hereby authorizes the legislative branch to make laws and appropriate funds in accordance with Article V. The General Council hereby authorizes the executive branch to enforce the laws and administer funds in accordance with Article VI. The General Council hereby authorizes the judicial branch to interpret and apply the laws and Constitution of the Nation in accordance with Article VII.

Section 3. Powers Retained by the General Council.

- (a) The General Council retains the power to set policy for the Nation.
- (b) The General Council retains the power to review and reverse actions of the Legislature except those enumerated in Section 4 of this Article. The General Council shall return such reversals to the Legislature for reconsideration consistent with the action

of the General Council. The General Council retains the power to review and reverse decisions of the Judiciary which interpret actions of the Legislature. The General Council does not retain the power to review and reverse decisions of the Judiciary which interpret this Constitution.

- (d) The General Council retains the power to establish its own procedures in accordance with this Constitution.
- (e) The General Council retains the power to call a Special Election.
- (f) Actions by the General Council shall be binding.

Section 7. Procedures. Twenty (20) percent of the eligible voters of the Nation present in General Council shall constitute a quorum. *Each action of the General Council shall require the presence of a quorum.* The President shall call all Annual and Special General Council Meetings, except those meetings called pursuant to Article IX, Section 2. When a quorum is attained, the General Council shall select either the President or another person to conduct the meeting. A secretary shall be appointed to record the minutes of an General Council meetings, including any votes taken. The secretary shall transmit the minutes of General Council meetings to the Legislature. (Italics added).

ARTICLE VII - JUDICIARY

Section 1. Composition of the Judiciary. There shall be a Supreme Court of the Ho-Chunk Nation, a Trial Court of the Ho-Chunk Nation, such other lower courts of special jurisdiction as deemed necessary by the Legislature, and other forums of special jurisdiction for traditional dispute resolution as deemed necessary by the Legislature.

Section 2. Composition of the Supreme Court. There shall be one Chief Justice and two Associate Justices of the Supreme Court.

Section 5. Jurisdiction of the Judiciary.

(a) The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its officials and employees, shall be a party. Any such case or controversy arising within the jurisdiction of the Ho-Chunk Nation shall be filed in Trial Court before it is filed in any other court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of the Nation's sovereign immunity.

(b) The Supreme Court shall have appellate jurisdiction over any case on appeal from the Trial Court.

Section 6. Powers of the Tribal Court.

(a) The Trial Court shall have the power to make findings of fact and conclusions of law. The Trial Court shall have the power to issue all remedies in law and in equity including injunctive and declaratory relief and all writs including attachment and mandamus.

(b) The Trial Court shall have the power to declare the laws of the Ho-Chunk Nation void if such laws are not in agreement with this Constitution.

Section 7. Powers of the Supreme Court.

(a) The Supreme Court shall have the power to interpret the Constitution and laws of the Ho-Chunk Nation and to make conclusions of law. The Supreme Court shall not have the power to make findings of fact except as provided by enactment of the Legislature.

ARTICLE XII - SOVEREIGN IMMUNITY

Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and officials or employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit.

Section 2. Suit Against Officials and Employees. Officials or employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its jurisdiction for purposes of enforcing rights and duties established by this constitution or other applicable laws.

Procedural History

The Appellants in this case appeal the dismissal of their case by the HCN Trial Court on August 5, 2004. *See Order (Granting Defendant's Motion to Dismiss)*, CV 04-04 (HCN Tr. Ct., August 5, 2004). The Appellants first filed their case January 16, 2004 seeking a *Declaratory Judgment* on the propriety of certain actions at the October 11, 2003 Ho-Chunk Nation General Council. This General Council was held at the Ho-Chunk Nation Convention Center that adjoins the Ho-Chunk Nation Casino midway between Wisconsin Dells and Baraboo Wisconsin on Hwy 12, in Sauk County.

After discovery and motions, which is recounted in the decision below, the defendants filed a *Motion to Dismiss* on May 14, 2004. The defendants constituted both the General Council Planning Commission and the Officers of the General Council of October 11, 2003, Alvin Cloud and Roberta Funmaker. The Appellant's filed a *Brief in Opposition to the Motion to Dismiss* on May 26, 2004 and a *Motion Hearing* was held on May 27, 2004. The *Order (Granting the Motion to Dismiss)* was issued August 5, 2004.

The Appellant timely filed an appeal on September 3, 2004. The Appellant's *Brief in Support of the Appeal* was filed September 17, 2004. The Appellees filed their joint *Reply Brief* on September 27, 2004. *Oral Argument* was heard on October 9, 2004 at the Wa Ehi Hocira¹ on Hwy 54 East Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation. An *Order* giving the Supreme Court an additional 30 days to consider this case was issued, November 9, 2004. On December 15, the Supreme Court granted another extension until December 31, 2004 to issue this decision.

Decision

In this case the Appellants' claim the Trial Court committed an error by dismissing their case. They argue that the Courts should interpret the HCN CONSTITUTION to find that the actions of the General Council of October 11, 2003 were void because it did not have the proper quorum as required by HCN CONST. ART. IV § 7. Specifically, the Appellants allege that there was not a quorum as required of 20% of the eligible voters meeting in General Council. They cite to this language in HCN CONST. ART. IV. § 7, "*Each action of the General Council shall require the presence of a*

¹ This means in Courthouse in the Ho-Chunk language.

quorum.” In their *Brief in Support of Appeal*, the Appellants also argue that actions that violate or abridge a tribal member’s right to participate in General Council are unconstitutional and therefore outside the scope of the authority of any tribal officers or employees. *Brief of Appellant* at 7.

The Appellants must first overcome two important hurdles before getting to the merits of their claim. First, they must have standing with a case and controversy in hand and second, they must overcome the sovereign immunity of the Nation. Sovereign immunity is a fundamental bar to actions against the Ho-Chunk Nation and therefore will be addressed first.

I. Sovereign Immunity

The Ho-Chunk Nation as a federally recognized Indian tribe is a sovereign, which enjoys sovereign immunity from suit. The General Council Planning Committee is a sub-entity of the Nation and as such also possesses sovereign immunity from suit. *See* HCN CONST. ART XII. § 1

The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and officials or employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit.

Sovereign immunity protects the Nation from threats of unconsented suits for monetary damages. This is not such a suit for damages. However, even in a case in which the litigant seeks non-monetary relief, as is the case here, they must allege that somehow someone acted “outside the scope of their duties or authority” as is stated in Art. XII, § 1 or the suit is barred. *See also* HCN CONST. ART. XII, § 2.²

² Officials or employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory and non-monetary injunctive relief in Tribal Court by

The General Council Planning Committee is generally only charged with arranging for the meeting, providing notice and advanced logistical support to hold the General Council. Nowhere does either *Complaint* mention that the GCPC did anything wrong in carrying out its duties in this regard. While the Appellants take umbrage at the Trial Court's analysis in footnote 14 and claims that it goes against established precedent, none was cited. A review of the offending footnote and its analysis reveals that the Trial Court read the precedent involving the first ever challenge to the powers of the HCN General Council brought in *Coalition for Fair Government II v. Chloris A. Lowe Jr. et. al.* CV 96-22 (May 21, 1996), consolidated with, *HCN Legislature et. Al. v. HCN Election Bd. et. Al.*, CV 96-24 (HCN Tr. Ct. filed May 14, 1996) very closely to see if it applied the principles of sovereign immunity. Those cases were in the opening years of this Court and while sovereign immunity was mentioned in passing, it was not pressed by either party.

Moreover, the issue of the HCN Election Board is about a unique tribal entity, which may be sued by any Ho-Chunk tribal member who wishes to challenge an election. Pursuant to Constitutional provision, HCN CONST. ART. VIII, § 7. At the core of that case was the special election to fill the seats of the allegedly properly removed Legislators. Therefore, cases involving specifically allowed challenges to elections cannot be said to be precedent for suits directly against the Nation or its sub-entities without alleging specifically what a person or official did to act "outside the scope of their authority" pursuant to HCN CONST. ART. XII, §2.³

persons subject to its jurisdiction for purposes of enforcing rights and duties established by this Constitution or other applicable laws.

³ The issue of standing in those cases was clear as the members who objected to the removals were once actually represented by the alleged removed Legislators and had attended the General Council of April 27,

The HCN Supreme Court has held definitively that the plaintiff must name and show that the General Council cannot be sued directly in violation of HCN CONST. ART. XII, § 2. See *Chloris A. Lowe Jr. v. Ho-Chunk Nation, HCN Legislature and HCN General Council*, CV 97-12 (HCN Tr. Ct. Mar 21, 1997) *aff'd*, SU 97-01 (HCN S. Ct. June 12, 1997). While the casebooks of the Ho-Chunk Nation Courts are full of cases where either the Ho-Chunk Nation or a sub entity appears as a party, they are always cases involving specific and limited waivers of sovereign such as employment or gaming. Other cases invoke specific Constitutional clauses that permit direct suits. E.g. *Mark Stroessner v. HCN Election Board and HCN Legislature*, CV 95-25 (HCN Tr. Ct. Jan 4, 1996) (Challenge to Redistricting plan); *Dallas Rudy White v. HCN Dept of Enrollment*, HCN Trad. Ct. May 29 1996) (member challenging enrollment decision).

The dismissal of the General Council Planning Committee is upheld because appellees presented no evidence alleged that the GCPC acted outside the scope of its authority. Therefore, the dismissal is in accord with long standing precedent in this Court and is hereby affirmed. See *Chloris A. Lowe Jr. v. Ho-Chunk Nation, HCN Legislature and HCN General Council*, CV 97-12 (HCN Tr. Ct. Mar. 12, 1997) *aff'd* SU 97-01 (HCN S. Ct. June 13, 1997); *HCN Legislature v. HCN General Council*, CV 01-11 (HCN Tr. Ct. June 22, 2001). The Appellants in this case must do more than make a bald statement that any actions that interfere with or abridge a member's right to participate in General Council is unconstitutional *per se*.

Clearly some requirements not at issue here such as requiring proper tribal identification to enter the meeting site may abridge some members right to participate,

1996. The removed legislators joined the case in the consolidated case CV 96-24 and they had the interest of continuing in their office to assure they had a concrete injury and stake to confer standing in the meaning

but so minimally intrude on the member's rights that such a requirement does not constitute a burden upon an important Constitutional right. Therefore, it is incumbent that the Appellant's allege some actual interference with their right to participate by the named defendants to trigger scrutiny. As pointed out in the *Reply Brief*, all such allegations were withdrawn with the filing of the *Amended Complaint* in this case on May 13, 2004. No specific acts of the General Council Planning Committee were alleged to be "outside the scope of their duties."

Indeed, this Court is very aware of the separation of powers and the separation of functions (or no exercise) clause of the HO-CHUNK NATION CONSTITUTION which states that each branch of the government exercises separate and distinct powers of government and one branch may not exercise the powers of the other branch. The requests of the Appellants come dangerously close to asking the Judiciary branch to tell the General Council how to conduct business. This is something the Courts of the Ho-Chunk Nation are very reluctant to do precisely because there is a Separation of Functions clause that forbids intrusion into the other branches affairs other than specifically provided in the Constitution itself. *See* HCN CONST. ART. III § 3. "No branch of the government shall exercise the powers or functions delegated to another branch."

The Supreme Court therefore affirms the dismissal of the GCPC as barred by sovereign immunity.

II. Standing

A. Appellants have the Necessary Personal Stake for Standing

of case and controversy of the HCN CONSTITUTION ART. VII, §5(a).

This Court holds that the Appellants have standing to bring a challenge against alleged infringements of their rights as participants of the General Council. It is admitted without question that the two Appellants are tribal members who attended the General Council. Their interest is higher than that of the tribal members who did not attend. As such they have a right to bring a case if they can show some harm to themselves by actions of the General Council.

Indeed, in a prior case the HCN Courts permitted a coalition of tribal members who had participated in the General Council of April 27, 1996, who believed the General Council acted to deprive Legislators who represented them of their duly elected office had standing to challenge that action. *See generally, Coalition for Fair Government II v. Chloris A. Lowe Jr. et. Al.*, CV 96-22 (HCN Tr. Ct. May 23, 1996). It permitted an individual Tribal member to maintain an action that specifically violated the prohibition against making hiring and firing decisions in the HCN CONST. ART. IV, § 3. *Roger Littlegeorge v. Chloris A. Lowe Jr. et. Al.* CV 96-21 (HCN Tr. Ct. June 4, 1996) (member named chairperson of General Council as defendant for acting outside the scope of his authority in permitting vote on personnel dismissal).

B. Appellants Must Demonstrate Concrete Harm

These litigants have to allege or show an actual harm to their specific interests, which the courts could redress in declaring their rights. Indeed, the final decision in the *Coalition for Fair Government II* line of cases was issued precisely as a declaratory judgment even though it previously had also granted a preliminary injunction along with it. *See Coalition*, CV 96-22 & 24 (HCN Tr. Ct. Jan. 3, 1997). Nearly all cases where the litigant seeks a declaratory judgment involve the declaration of rights in such a manner as

to provide actual relief to the litigant. Getting a declaratory judgment that the United States Forest Service or United States Department of Transportation failed to conduct a proper Environmental Impact Study may have the real effect of stopping a timber sale or highway construction that advances the interests of those opposed to the timber sale or highway construction. There is a clear distinction between those types of cases and the case at bar.

A party with an interest in a case does not automatically have standing in the legal sense of the word. The HCN Courts have held that the person who alleges harm has to have some actual injury, which the Court may redress by its actions. *HCN Legislature v. HCN General Council, et. Al.* CV 01-11 (June 22, 2001) (dismissed on ripeness grounds). Having an actual injury gives the party a stake in the action beyond the mere abstract and sharpens the issues in the crucible of the actual context of a case where the facts of how the action affects the litigant has real meaning. Specifically, in *HCN Legislature*, CV 01-11, the Court there held that “there has to be something that the Court can do to resolve the case. . . . The Legislature has not taken action. It has neither appropriated money to enforce the General Council Resolution nor has it said that it definitively will not appropriate the money.” *Id.* at 15.

Here the Court’s assistance is sought to declare something in the abstract, but that would not resolve anything. Appellants have failed to allege that the actions of the General Council of October 11, 2003 harm them in any way. All they seemingly want is a declaration that the General Council must always have a quorum when taking action. Unless the Appellants seek to invalidate an action of this October 11, 2003 General Council that specifically harms them this Court is reluctant to undo the hard work of the

General Council by declaring that two persons unhappy with the voting procedures at that General Council should undo the actions of over a thousand members assembled in the spirit of being involved in their own government and giving it policy direction.

The Appellants have failed to meet their burden regarding the alleged lack of a quorum. Appellants pleadings provide no quorum information for the controverted meeting and therefore their claim must fail. They presented a mere mathematical formulation and a conclusory belief that every tribal member departed after voting. The Trial Court record does not set forth a proper finding as to what constituted a quorum in the decision appealed from. The records reviewed by this Court are void of any proof or even an allegation in the *Amended Complaint*. This Court is not inclined to speculate regarding the conduct of the General Council.

The Appellants must establish that they are within the zone of harm and have an actual case and controversy, which the Court has the ability to provide relief for. HCN CONST. ART. VII, § 5 (the Trial Court shall have original jurisdiction over all cases and controversies . . .”). *HCN Legislature v. HCN General Council, et. Al.*, CV01-11 p. 15 (HCN Tr. Ct. June 22, 2001). The injury of the Appellants must be redressable. *Id.* In other words there must be some remedy the Court can provide that will undo the alleged harm suffered by the litigant.

While this Court is troubled by some of the allegations of the Appellants, the Appellants' claims fail to allege an actual harm, which is redressable by the Court and fail to allege actual concrete injury to the named Appellants. It is important to note that the Supreme Court disagrees with the grounds of dismissal found by the Trial Court. Specifically, the Supreme Court finds that a tribal member who actually attended the

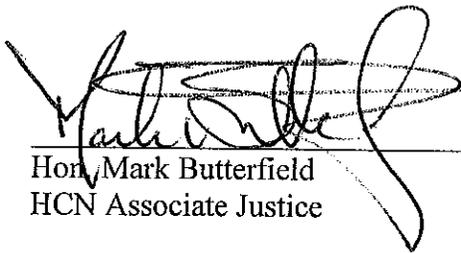
General Council objected to, does have standing in the Courts to bring a case *if* they are able to allege actual harm or injury to their rights as participants in the General Council. However, the Supreme Court will stop short of the claims of the Appellants that any restriction on their right to participate is an unconstitutional act *per se*. This seems to flout common sense and invites the Courts into the business of regulating every aspect of how a General Council should be conducted. Therefore, the Supreme Court upholds the dismissal on the grounds that there is no actual case and controversy in this instance in accordance with *HCN Legislature v. HCN General Council*, CV 01-11 (June 22, 2001).

In the past this Court has only considered cases involving concrete issues to make sure the General Council had not acted arbitrarily, or in violation of specific Constitutional prohibitions such as gross violations of due process rights of members or intrusions into forbidden areas such as hiring and firing of personnel. The Ho-Chunk Nation General Council is an important part of the Ho-Chunk way of governance and should be given wide latitude in the governance and establishment of its own procedures. *E.g. Coalition for Fair Government II et. Al. v. Chloris A. Lowe Jr.*, CV 96-22 &24 (January 3, 1997). The Appellants did not show that a quorum did not exist. Therefore issuing a declaratory judgment to state the obvious that the General Council must have a quorum for each of its actions seems to be an exercise without purpose.

Accordingly, the decision appeal from is affirmed and the appeal is dismissed.

IT IS SO ORDERED this ____ 30th ____ day of December 2004.

Egi Heskekjet



Hon. Mark Butterfield
HCN Associate Justice

Mary Jo B. Hunter

Mary Jo Hunter
HCN Chief Justice



JoDeen B. Lowe
HCN Associate Justice