

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

AUG 03 2005

ME
Clerk of Court/Assistant

CHRISTINE FUNMAKER-ROMANO and,
GERALD CLEVELAND SR.

DECISION

Appellants,

Vs.

HO-CHUNK NATION ELECTION BOARD,
MARY ELLEN DUMAS, CHAIRPERSON,

Appellees,

Case No. SU 05-08

The full Ho-Chunk Nation Supreme Court heard *Oral Argument* on this case on July 23, 2005. An *Amicus Curiae Brief* was filed on behalf of Ona Garvin and Alvin Cloud by their Attorney Richard Monette. The Court issued an *Order (Dissolving Injunction)* on Tuesday July 26, 2005. However, that *Order* only dealt with the procedural issue in the case involving why an injunction should be dissolved. The Court will now address the merits of the case involving the election dispute in Area IV of the Ho-Chunk Nation after the June 7, 2005 General Election.

At *Oral Argument*, the appellants were present in person and represented by Mark Goodman of Osborne and Goodman, S.C. of Sparta, WI., while the appellees were represented by Michael Murphy of the HCN Department of Justice. No personal appearance was made on behalf of *Amicus Curiae*. This is the appeal from an election challenge filed pursuant to HCN CONST. ART. VIII, § 7, which was denied by the Trial Court, Hon. William Bossman presiding. See *Funmaker-Romano and Gerald Cleveland Sr. vs. HCN Election Board and Mary Ellen Dumas Chairman*, CV 05-48 & CV 05-49

(HCN Tr. Ct. June 29, 2005). The Court must now address the substance of the Trial Court's findings that while there were irregularities in the Election the Court would not order a new election.

DECISION

The appellants make two arguments on appeal. First, they complain that despite showing violations of Election law, which were accepted by the Trial Court, namely a improper poll worker requirement that a Ho-Chunk voter show a picture ID card at the Wisconsin Dells voting location, and, a last second change in the location of the polling site in Madison (from the far south side of Madison to the East side of Madison), the Trial Court's conclusion that their election appeal failed is flawed. Their key contention is that the Election law contradicts itself by requiring that a challenger show violations of the *Election Ordinance* by clear and convincing evidence, yet, challengers must also show conclusive proof that the violation would have made a difference in the outcome essentially requires a different higher standard of proof, *i.e.*, beyond a reasonable doubt. The Appellants argue that this contradiction denies them relief despite actually proving their case under the stated standard and cite *Abangan v. Ho-Chun Nation Election Board. Et. Al.* Case No SU 02-02 (HCN S. Ct. Mar. 25, 2002) as support for their view. .

A. No violation of the Due Process Rights of the Appellants.

The Appellants also contend that the Trial Court denied their due process rights by cutting off discovery at an unduly early stage in the litigation despite the compressed Constitutional requirement that the Trial Court reach a decision within 20 days from when an Election Challenge is filed. See HCN Const. Art. VIII. § 7. Because this Court finds that no actual discovery was denied by the Trial Court and that the offered

testimony was proffered by the appellants by an offer of proof by the last minute witnesses, the appellants could not show there was any erroneous exclusion of evidence by the Trial Court. The Supreme Court commends the Trial Court for hearing the evidence as an offer of proof because this Court is able to know what the excluded evidence would have been had it agreed the Trial Court's ruling was improper.

The contention of the appellants would have more merit had they been able to show that the short deadlines imposed by the twenty (20) day Constitutional requirement of deciding a case actually resulted in a denial of discovery or witness testimony to the Election Challenger. This did not occur. While counsel for the appellants was able to show a theoretical problem that there was insufficient time to notice all the witnesses under the *Civil Rules*, this Court has been aware from its inception that it must use reason when interpreting the *HCN Rules of Civil Procedure* in Election disputes for the very reason cited by the appellants. Namely, that there would be a serious risk that their due process rights might be violated if they could not fast track discovery and allow witnesses discovered late in the foreshortened process from testifying.

Indeed, the Constitutional requirements of a rapid decision also impinge upon the Judiciary by forcing it to fast track election appeals both at the Trial and Appellate levels in order not to unduly delay the seating of duly elected representatives of the people. Nonetheless the parties and the Courts must cooperate along with the Election Board to insure that voters are able to exercise their right to be represented by candidates of their choice. To do otherwise would undermine the democracy so cherished by the voters.

B. The Requirement the Legislature set that a Challenger must show that the outcome would have been different but for the Election violation is Constitutional and Abangan is overruled to the extent it is inconsistent.

This case is highly analogous to the *Abangan v. HCN Election Board. Et. Al.*, SU 02-02, (HCN S. Ct. Mar. 25, 2002) case. In both of these cases, the appellants were able to show by clear and convincing evidence that there was a violation of the *Election Ordinance*, but were not able to show that the violation made a difference in the outcome of the election. In *Abangan*, the issue was improper notice. The Trial Court found there was improper notice of the Special Redistricting Election in *Abangan*, but also found that the appellants were only able to show that 31 instead of 91 voters would have voted differently had notice been proper. This Court was critical of the result and found that the Trial Court improperly found that the plaintiff there applied a higher “beyond a reasonable doubt standard that seeks a precise and indubitable answer.” *Id.*

This case is nearly alike to *Abangan* because the Trial Court found that the appellants here did show by clear and convincing evidence that there were two violations of the *Election Ordinance*. This Court accepts these findings as proper. There is no requirement under the *HCN Election Ordinance* that voters show a picture ID card. The fact that the poll worker required this additional voting requirement was improper and denied at least one Tribal elder her right to vote. Voting within the Ho-Chunk Nation where the poll workers are much more likely to know the voter personally is perhaps one reason that the HCN Legislature did not require the production of a picture ID to vote in Tribal Elections. It was not a requirement to the extent it excluded voters it was improper. The evidence produced was that at least one voter, an elder, was denied the right to vote.

The Second violation of the *Election Ordinance* appears to have been caused by the lack of communication between the HCN Dept. of Administration and the HCN Election Board. The HCN Election Board published notice of where the voters in the Madison District were to vote on June 7, 2005 as being at the Rimrock Road Branch office in South Madison. However, by the time the election actually occurred the Dept. of Administration unbeknownst to the HCN Election Board had negotiated a new lease at a location on the far east side of Madison at the Mendota street. What made matters worse is that the Dept. of Administration moved the Branch office, its phone and furniture before June 7, 2005 despite the fact its lease at the Rimrock Road site was still in effect until June 30, 2005. Thus, the official notice of the election listed one polling site, but on the actual date of the election polling site was different and the Trial Court found at least two voters were denied the right to vote due to the confusion because they went the proper site only to find they had to drive across town to the relocated polling site on Mendota street.

The problem for the appellants, Christine Funmaker-Romano and Gerald Cleveland Sr. is that they lost the election to their respective challengers by six votes for Ms. Funmaker-Romano and by 30 votes for Mr. Cleveland. The Trial Court found that at most they were only able to show four voters were denied the right to vote due to the violations of the *Election Ordinance* when the *Election Ordinance* requires that they had to show the violation would have resulted in a different outcome. A different outcome in each race would have required a showing of six voters who would have voted for the appellant incumbents to tip the balance in their favor. Mr. Cleveland would have to show

thirty (30) or five times the number of voters denied in order to prevail in his challenge.

Obviously, this did not occur.

Nonetheless, the appellants argue that the Trial Court erred in ruling against them and that had it applied the *Abangan* language there would have been a new election. They argue that they met the standard of proof that there were violations of the *Election Ordinance* and that in accordance with *Abangan* it was highly probable that they would be able to show the outcome was altered. This Court seemed to hold that the Trial Judge actually applied a higher standard of proof, *i.e.*, a beyond a reasonable doubt standard of proof and remanded the case to the Trial Judge to apply the proper standard of proof. The problem with *Abangan* is that it was not clearly written. It fails to assist in this inquiry because it appears to confuse an evidentiary standard of proof with a cause and effect requirement under the statute.¹

Pursuant to the *HCN Election Ordinance*, a challenger must not just show that there was a violation of the *Election Ordinance*, which the appellants did in this case, but also that the violation made a difference in the outcome. The challenger must show both. The rationale for this is simple; there can be a myriad of violations of the *Election Ordinance* which do not affect the result. Clearly, the HCN Legislature decided that where minor violations do not actually affect the outcome, such violations should not result in a new election.

Democracy is serious business and ascertaining the choices of the people comes down to who they voted for in a representative democracy. However, it is clear that the

¹ Chief Justice Hunter who co-authored the decision acknowledges the problem. Unfortunately, the Court is limited by the briefs filed on appeal and the trial court record. It is important that arguments are stated fully so that this Court may provide informed decisions. The *amicus* brief provided a complete roadmap which if had been provided in the *Abangan* case may have prevented such a confusing decision.

Trial Court did apply a searching evidentiary standard in finding the facts. In finding paragraph 6, the Trial Court carefully recounted the evidence, which was contradictory as to how many people were turned away at the Dells, but resolves those issues by the applying the clear and convincing evidence standard to find that only one known voter who was turned away did not return to vote. The Court made a finding in paragraph 8 that said voter would have voted for appellant Funmaker-Romano and against appellant Cleveland.

The *Abangan* court quoted the language from the *Election Ordinance* that” [T]his ordinance is intended to establish procedures to ensure fair elections. This ordinance shall be interpreted liberally in order to accomplish such intent. Substantial compliance shall satisfy this Ordinance.” *Id. Page 3*. It also requires that, “the person challenging the election results shall prove by clear and convincing evidence that the Election Board violated this *Election Ordinance* or otherwise conducted an unfair election, *and* that the outcome of the election would have been different, *but for* the violation. *Funmaker-Romano & Cleveland v. HCN Election Board. Et. Al., CV 05-48 & 49 at 8, (HCN Tr. Ct. June 29, 2005)*. (Italics added for emphasis).

In this case there were violations of the *Election Ordinance* but despite this approximately the same number of voters voted in both elections. Unfortunately, the Trial Court failed to make comprehensive findings of fact on the number of votes cast in each contest although the exhibits to the case contain the undisputed numbers of votes in each election and from which polling site. What all this tells us is that the Trial Court could not find sufficient evidence to conclude that the outcome would have been different in the election had the violations not occurred.

This is not beyond a reasonable doubt standard of proof. In this case, the appellants proved the violations, *i.e.*, the cause but they were unable to show that the violations had the effect of costing them the election. The Election of June 7, 2005 would certainly have been fairer had the violations NOT occurred but the result would not have been different. With a vote total of over 30 votes difference as in the Cleveland/Cloud race the Judiciary has to be very careful not to deny the choice of the voters to their chosen candidate. It undermines the credibility of the Judiciary to have it decide who won an election and makes it seem merely an arm of the political branches by deciding close elections. It is undoubtedly with this in mind that the HCN Legislature has required that challengers show that the outcome would have been different and that substantial compliance with the ordinance is sufficient to uphold an election result.

In this case the Election Board did not cause the problem. It was apparently unaware of the HCN Dept. of Administrations plans to move the Madison Branch office. Once it discovered the problem it sought to correct the obvious deficiency by putting a sign on the door directing voter to the proper polling site and stationing a worker there to redirect them. While evidence was produced that this was not 100 percent effective, it did achieve substantial compliance with allowing voters to cast ballots. Moreover, the clear and convincing evidence accepted by the Trial Court was that all but one voter was able to cast their ballot in the Dells. This too is substantial compliance. That is what is required by the *Election Ordinance*, not absolute perfection.

While this Court can imagine a case where one vote denied or as many as four as possible here would swing an election outcome, it would not have done so under any circumstances in the Cleveland/Cloud race. Moreover while the constraints of the short

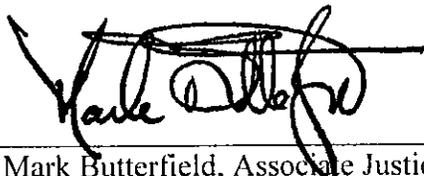
time of election appeals inherent in the Ho-Chunk Nation Election challenge process coupled with a probability of four votes added to Ms. Funmaker-Romano's vote total means the appellant comes within a handbreadth of success it is not enough to show the outcome of the election would have been different and we must find against appellant Funmaker-Romano.

Due to the seriousness of the issues raised in this case and the clear violations of the *Election Ordinance* found, this Court urges the HCN Legislature and HCN Election Board to review their procedures and the Ordinance to remove any apparent contradictions in the standard of proof in sufficient time prior to the next election to make sure these problems do not reoccur. To the extent the *Abangan* decision equates the requirement of showing an election would have been different but for the violation with a requirement of proving a case beyond a reasonable doubt, it is overruled. The HCN Election Board is urged to seek greater coordination with the HCN Dept. of Administration in the siting of polling stations and to train its poll workers better so that should there be a question about whether a voter should be turned away it is done not by an misinformed worker but after consultation with the HCN Election Board staff and counsel prior to leaving the polling site.

In accordance with the above discussion, the HCN Trial Court in these two related case is hereby affirmed.

EGI HESKEKJET. Dated this 3rd Day of August 2005

Per Curiam



Hon. Mark Butterfield, Associate Justice

Mary Jo B. Hunter

Hon. Mary Jo B. Hunter, Chief Justice

Jo Deen B. Lowe

Hon. Jo Deen B. Lowe, Associate Justice pro tempore