

IN THE
HO-CHUNK NATION SUPREME COURT

RAE ANNA GARCIA,

Appellant

DECISION

vs.

SU 03-01

**JOAN GREENDEER-LEE, LOA PORTER,
HATTIE WALKER and GREG GARVIN,**
as Officials of the Ho-Chunk Nation; **HO-CHUNK NATION
PERSONNEL DEPARTMENT and HO-CHUNK NATION
HEALTH AND HUMAN SERVICES DEPARTMENT,**

Appellees

This case comes before the Ho-Chunk Nation Supreme Court on appeal of the Trial Court's Order granting Appellee's *Motion for Summary Judgment* dated December 20, 2002. Oral Argument before Chief Justice Mary Jo B. Hunter, Associate Justice Mark Butterfield and Associate Justice Jo Deen B. Lowe on March 15, 2003.

STATEMENT OF FACTS

The Appellant initiated this *pro se* filing with the Trial Court after exhausting available administrative remedies. Appellant had requested and been denied paid leave for attendance at a religious event. Appellant is an enrolled member of the Ho-Chunk Nation who professes the belief's of Jehovah's Witnesses. Appellant requested leave to attend "the memorial of Christ's Death."

Ms Garcia's request for leave was submitted in accordance with the Tribe's Wąkšik Wošga Leave Policy; her leave request had been approved by her immediate supervisor, but was subsequently denied by the Ho-Chunk Nation Director of Personnel

Joan Greendeer-Lee. The Appellee's argue that the Director of Personnel was well within the scope of her authority given the goals and the structure of Wąkšik Wošga Leave Policy, and that Ms. Garcia was not entitled to paid leave under the policy.

Ms. Garcia requested that the Trial Court find the Wąkšik Wošga leave policy violates her rights to freely exercise her religion and is thus contrary to the provisions of the HCN CONSTITUTION, Article X, § 1 (a)(1). On December 18, 2002, these matters came before the Ho-Chunk Nation Trial Court in a *Pre-trial Scheduling Hearing* and *Oral Arguments* were heard on the Motion for Summary Judgment filed by the Appellees. At *Oral Argument*, Appellant's Counsel, Gary Montana, first made an appearance in the case. He informed the Trial Court that while he was not familiar with the specifics of the *pro se Complaint* filed by Ms. Garcia, he was prepared to argue. Those arguments were that the policy violates the HCN CONSTITUTION, Article 10, §§ 1 (a) (1) and 8.

Bill of Rights. (a) The Ho-Chunk Nation, in exercising its powers of self-government shall not:

- (1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for redress or grievances;...
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Further that the application of the policy and procedure selectively sets aside certain religious and gives benefits to a few select people. The transcript reflects Appellant's argument that the policy is inconsistent in its recognition of paid holidays not only for members of the Native American Church or the Medicine Lodge, but also because its

employees are paid for recognized Christian holidays.¹ Appellant's counsel argued that because religion is a fundamental issue, that the Court should apply a strict scrutiny standard in reviewing the equal protection and free exercise claims.

However, Appellee's counsel argued that the equal protection claim had not been included in the original *Complaint*, and that the time for amending the pleadings had passed. The Trial Court agreed that the deadline for amendments to pleadings had passed. (*Transcript of Oral Argument*, CV-02-52, December 18, 2002, page 8, lines 15-17). The Trial Court offered to address any other matters aside from the *Motion for Summary Judgment*. The record reflects that Appellant's counsel did not address the Court regarding any other matters. (*Transcript of Oral Argument*, CV-02-52, December 18, 2002, page 8, lines 22-24). An *Order Granting Summary Judgment* for the Appellees was ordered on December 20, 2002. The *Notice of Appeal* was received by the HCN Supreme Court on January 17, 2003. Briefs were submitted by the parties and *Oral Argument* was heard before the full HCN Supreme Court on March 15, 2003.

STANDARD OF REVIEW

The facts in this case are not disputed. The Trial Court issued the *Order Granting Summary Judgment* based on its interpretation of the law. While ordinarily the HCN Supreme Court reviews questions of law on a *de novo* basis. *Louella Kelty v. Jonette Pettibone, et al.*, SU 99-02 (HCN Sup. Ct. Sept. 24, 1999), and *Robert A. Mudd v. Ho-Chunk Nation Legislature* SU 03-02 (HCN Sup. Ct. April 8, 2003), this is not a standard interpretation of law. It is rather a question to amend her pleadings at Trial. The proper standard of review of the exercise of discretion of a Trial Court's judgment is to determine whether or not the Trial Court abused its discretion in making that decision.

¹ Holidays such as Christmas and Easter are accorded as paid holidays under the Tribal Personnel Policy.

The Supreme Court accepts under the *HCN R.. Civ. P.* that the Trial Court has the ability to determine the proper course of a Trial. The issue in this case goes to whether or not the Trial Court denied the plaintiff the opportunity to amend her pleadings during the course of the trial.

Given that the Trial Court has the ability to make discretionary rulings at Trial, the proper standard for reviewing such decisions is determining whether the Trial Court abused its discretion and acted properly in making a discretionary decision. The exercise of discretion means that the Trial Court must properly consider all the factors in making a decision to do or not to do an act. However, in reviewing and exercise in discretion, the Supreme Court shall grant the Trial Court greater deference in making such decisions because it can factor in all the myriad of factors such as prejudice to the opposing party, the cost of further delay, the ability to properly prepare a defense and like factors in deciding how to rule on an issue.

DISCUSSION

I. DID THE HCN TRIAL COURT APPLY THE PROPER STANDARD FOR THE ISSUANCE OF A SUMMARY JUDGMENT IN THIS MATTER?

The Court's jurisdiction is first set forth in the HCN CONSTITUTION. The HCN CONSTITUTION, Art. VII, § 5 states, 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 the 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

Id. This matter is properly before the Court as a case or controversy arising within the jurisdiction of the Ho-Chunk Nation and arising under the laws of the Nation. The Appellant had framed a *pro se* complaint which set forth her claims including an allegation that the subject policy violated her right to free exercise of her religion. Through legal counsel at Oral Argument, the Appellant sought to expand her claims to seek a finding of the unconstitutionability of the policy for violation of the equal protection and due process provisions of the HCN CONSTITUTION. However, the Trial Court agreed with Appellees' counsel that the deadline for amendments to pleadings had passed. (*Transcript of Oral Argument*, CV-02-52, December 18, 2002, page 8, lines 15-17). We agree that this finding was proper. Moreover, counsel for the Appellant made no attempt to show that the Trial Court improperly denied him the right to amend the pleadings to include this claim.

A *Motion for Summary Judgment* was sought in this matter by the Appellees. The Ho-Chunk Nation standard for issuance of a summary judgment is set forth in *HCN R.*

Civ. P. 55:

Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary Judgment* on any or all of the issues presented in the action. The Court will render *Summary Judgment* in favor of the moving party if there is not genuine issue as to material fact and the moving party is entitled to judgment as a matter of law.

Id. The Trial Court in issuing the *Summary Judgment* held that the Appellant and Appellee's had no genuine issue of material fact in dispute. The Trial Court set forth the findings regarding material facts in four points. (*Order Granting Motion for Summary*

Judgment, CV 02-52, December 20, 2002, page 6, lines 27, 28 and page 7, lines 1-8). The Trial Court record in this matter reflects a review of the provisions of the Wąkšjik Wošga leave policy and that the request of Ms. Garcia for leave to attend the “memorial of Christ’s death” was not included as a “defined event.” The record of the hearing reveals that Appellant, through her counsel admits that the policy only applies to certain areas of traditional religion related to the Tribe. (*Transcript of Oral Argument*, CV-02-52, December 18, 2002, page 5, lines 2-3). Appellant’s counsel admitted that the policy does not prohibit Ms. Garcia from exercising her freedom of religion. There was no genuine issue of material fact in dispute between the parties as to this matter. The Trial court found that Ms. Garcia “has not shown that she was wrongfully denied Wąkšjik Wošga Leave, and further finds that the defendant is entitled to judgment as a matter of law”. (*Order Granting Motion for Summary Judgment*, CV-02-52, December 20, 202, page 1, lines 19-22). We agree. The Trial Court has properly applied *HCN R. Civ P. 55*.

The Supreme Court does not agree with the argument made by the Appellant that the Trial Court’s *Order Granting Motion for Summary Judgment* was unreasonable, unconscionable or arbitrary or without proper consideration of the facts and law pertaining to the matter submitted to the Trial Court. The standards of review applicable to mixed questions of law and fact are not appropriate in this matter. Here the facts are not disputed, and the *Order Granting Motion for Summary Judgment* as issued by the Trial Court shall stand. The proper standard for review of an exercise of discretion is to show that the Trial Court somehow abused its discretion. Here we find that the Trial Court made a reasoned determination that the time for proper amendments to the pleadings had passed and the assertion of an essentially new cause of action was so late in

the day as to prejudice the defendant. We find no abuse of discretion in this determination.

II. EQUAL PROTECTION

The Appellant urges this Court to find that her right to equal protection of the laws are violated by the Wąkšik Wošga Leave Policy. The Appellant's theory, advanced initially at Oral Argument on December 18, 2002 before the Trial Court, and first reduced to writing in the Notice of Appeal, filed January 17, 2003, is that the creation of legislation, the Wąkšik Wošga policy, which provides paid leave only for traditional Ho-Chunk Medicine Lodge activities and those associated with the Native American Church creates a suspect class and violates the Appellant's rights of equal protection and due process as protected by the HCN CONSTITUTION. Appellant has urged that this Court apply a strict scrutiny standard of review to this question. While this argument may have merit, this Court will not give it further consideration because the matter has not been properly plead.

Parties cannot amend their pleadings at will. The Court formally adopted *Rules of Civil Procedure* which are designed to assist parties in clarifying issues and which aim to assure due process by affording appropriate notice to all parties. Appellant argued that in the interests of judicial economy this Court should consider the expanded arguments seeking findings the Wąkšik Wošga policy violates the HCN CONSTITUTION. The problem with allowing a party to amend their claim or theory of the case so late in the process is that it undermines the ability of the defendant to prepare a proper and well-formulated defense.

In this instance, the Appellant initially proceeded through the Trial Court process

on a *pro se* basis. This Court recognizes the challenges associated with obtaining legal counsel and recognizes that it is important to keep the Courthouse doors open to all, regardless of whether they are represented by legal counsel. In all cases it is important for the litigants to understand that the relief that can be provided by this, or any other Court, is dependent upon the pleadings filed with the Court. Further, it is important for each litigant to be responsible for observing the relevant timelines for amendment or revision of pleadings.

Here, this Court is precluded from review of the issue of Appellant's equal protection challenge, not because it is a political question, but because the matter was not properly and timely plead. The Trial Court's holding that the Appellant could not amend her pleadings at the Trial was not an abuse of discretion.

The Appellant is still free to exercise her religion, just not on a paid basis as are those covered by Wąkšik Wošga Leave. We agree with the Trial Court's finding that the Nation's Wąkšik Wošga Leave Policy does not prohibit the Appellant from participation in her religion. Additionally, the record here does not demonstrate that the Appellant has shown that the Wąkšik Wošga Leave Policy has created any burden on the Appellant that would justify a shift of the examination of this policy and its legislative premise under the appropriate standard of review. Therefore, at this time, this Court declines to address the issues of equal protection and due process as those principles might apply to the Wąkšik Wošga Leave Policy.

CONCLUSION

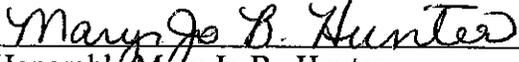
For the foregoing reasons, the Order Granting Summary Judgment by the

Honorable William Bossman entered on December 20, 2002 in this matter is hereby affirmed.

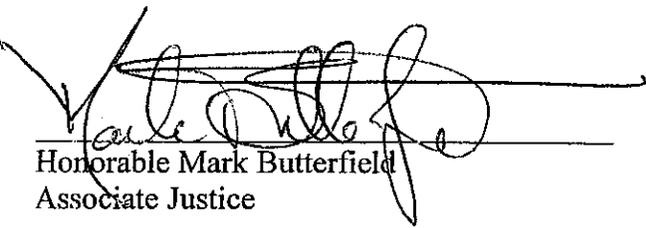
It is so ordered. Egi Heskekjet.

Dated this 30th day of April, 2003

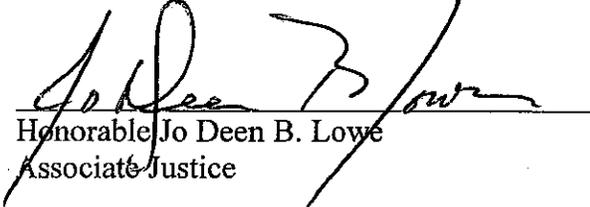
Per Curiam.



Honorable Mary Jo B. Hunter
Chief Justice



Honorable Mark Butterfield
Associate Justice



Honorable Jo Deen B. Lowe
Associate Justice

SU03-01
CONCURRING OPINION
OF
CHIEF JUSTICE HUNTER

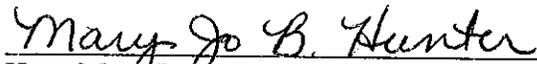
I concur with the majority opinion. However, as an enrolled member of the Ho-Chunk Nation, it is my own understanding of the words *Waksik Wosga* that underlies my opinion that the lower court's order is affirmed. If one takes the literal meaning of the words and attempts to translate the words, *waksik* means all Indians, if not ALL people. However, I have heard the word used within conversations, prayers and statements to refer to all American Indians. If one adds to that the word, *wosga*, that word means the way, the ways or the way of life. If one takes the policy statements in the Ho-Chunk Nation Personnel Policies and Procedure Manual, *Waksik Wosga* Leave Policy (Indian Ways) at pp. 42-44, the proclamation clearly states that the purpose is

“to promote participation and preserve the Nation’s culture...[T]he *Waksik Wosga* Leave Policy shall provide a means in which enrolled tribal member employees can practice religion, culture and tradition, when obligated to, without the threat of losing a job or losing pay.”

The intent of the policy combined with an understanding of the language establishes that the policy is solely for enrolled Ho-Chunk Nation members. In addition, that employee must have an obligation to participate in the event that he or she is attending. Further, the Defined Events listed in Section 5 of the policy were created with the assistance of the Traditional Court. Counsel for Ms. Garcia questioned the inclusion of the Native American Church. His questions indicate the lack of understanding of the clear intent of the policy. The drafters of the policy certainly understood the tradition and history of the Ho-Chunk Nation. The practices of religion, culture and tradition that sustained the Ho-Chunk people are valued and should be sustained. Therefore, the

Defined Events section states the specific ways in which the Ho-Chunk people have survived. The history of the Ho-Chunk Nation includes the Native American Church as a “way of life” for many Ho-Chunk members. The policy includes all of the “ways” that our people have participated in to exist spiritually and culturally. Protecting these “ways” and the obligatory participation in the “ways” is the essence of tribal sovereignty. These “ways” are the backbone of cultural support that makes us distinctly Ho-Chunk. For these reasons, I concur with affirming the lower court order.

Egi Heskekjet.



Hon. Mary Jo B. Hunter, Chief Justice
Ho-Chunk Nation Supreme Court