

IN THE  
HO-CHUNK NATION SUPREME COURT

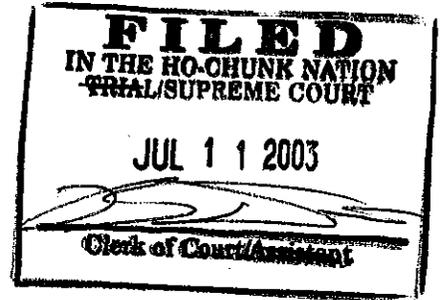
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GREG LITTLEJOHN,  
Appellee,

DECISION  
Case No. SU03-07

v.

HO-CHUNK NATION ELECTION BOARD,  
Chairperson Mary Ellen Dumas and  
The Ho-Chunk Nation Election Board  
Members: Eugene Topping, Jr., Darlene  
Funmaker, Georgianne Funmaker,  
Brandee Alderman, Bonnie Strossner,  
Wilma Thompson, Tari Pettibone, Mary  
Taylor, Elliot Funmaker, Sr., and Tara  
Blackdeer,  
Appellants.



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This case comes before the Ho-Chunk Nation Supreme Court on appeal of the Trial Court's Order granting Appellee's *Order (Granting Election Challenge)* dated June 17, 2003. Heard before Associate Justices Mark Butterfield and Jo Deen B. Lowe, Chief Justice Mary Jo B. Hunter presiding.

**STATEMENT OF THE CASE**

This is an appeal of the *Order (Granting Election Challenge)* issued by the Honorable William Bossman on June 17, 2003. The Appellants filed their *Notice of Appeal* and Appellants' *Notice and Motion for Expedited Consideration* on June 19, 2003. The Appellant then filed their *Appellant's Brief* on June 24, 2003. The Court issued a *Scheduling Order* on June 27, 2003. The Court issued an *Order Setting Time and Date for Oral Argument* on June 30, 2003. The Appellee Greg Littlejohn filed his *Appellee's Response* on June 30, 2003. The Appellant filed a *Certificate of Counsel* on June 30, 2003. Oral Argument was held on July 2, 2003. On July 3,

2003 Appellant's Attorney Mike Murphy filed a letter with the Court concerning documents discussed by the parties at oral argument that were omitted from the Trial Court record.<sup>1</sup>

## DISCUSSION

This case involves an expedited consideration of an election challenge. The matter was reviewed *de novo* in light of the briefs filed and the lower court record. The full Court reviewed the policy considerations of the Ho-Chunk Nation Election Ordinance to provide tribal members with a fair and timely process for elections. In addition, this Court reviewed the prior decisions of two election cases, *Debra Greengrass v. HCN Election Board*, SU99-03 (HCN S. Ct. June 30, 1999) and *Matha v. HCN Election Board*, CV 02-34 (HCN Tr. Ct., April 12, 2003).

The Court views the *Greengrass* case as distinguishable from the instant case. *Greengrass* involved an election challenge by a Supreme Court Justice during the 1999 election. The HCN Election Ordinance that is currently used by the Election Board was not revised until after that election. The *Greengrass* decision is not based on the present ordinance and is inapplicable to this case.

The HCN Election Board was attempting to fulfill its obligation to hold a timely election for the Area V or "At-Large" area tribal members to elect someone to the District V, Seat 2 of the HCN Legislature. In that effort, the HCN Election Board was responding to the decision of this Court in *Robert Mudd v. HCN Legislature, et. Al.*, SU03-02 (HCN S. Ct., April 8, 2003). The HCN Election Board considered the election to be a Special Election in an effort to comply with the timelines of the recently revised HCN Election Ordinance. However, the District V, Seat 2 of the HCN Legislature was initially a vacancy that was open for election under the General Election. It is this creation of a "hybrid" open election seat that impelled the Trial Court

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<sup>1</sup> The Appellee referred to Trial Court exhibits during the oral argument. The Appellant disputed their admission below. Although the exhibits had been admitted they were omitted from the Trial Court Record.  
*Greg Littlejohn v. HCN Election Board et al.* SU 03-07 Page 2 of 5

to discern whether the election seat was a general or special election.<sup>2</sup> However, that query is not necessary under the clear language of the current HCN Election Ordinance.

The current HCN Election Ordinance states at Section 3, Elections:

“The Constitution prescribes two (2) types of elections: General Elections and Special Elections. When three (3) or more candidates run for a seat in a General or Special Election, there shall be a Primary Election and, if required, a Runoff Election as described in paragraph c, below...”

The HCN Election Ordinance at paragraph c, Primary Elections and Runoff Elections states at subsection (2):

“If no candidate in any Primary Election receives more than 50% of the votes cast in such Election, the two candidates with the highest vote totals from the Primary Election (and any candidate(s) tied with the lower of such totals) shall appear on the ballot in the Runoff Election.”  
(Emphasis added.)

Thus, the current HCN Election Ordinance does not distinguish between general and special elections for purposes of holding a primary election. Rather, the question is as described above, whether there are three (3) or more candidates running for a seat. If there are, the HCN Election Board must run a Primary Election as it did in this case.

The next step is that after the primary election is held, the HCN Election Board must determine if a candidate in that Primary Election received more than 50% of the votes cast in that election. If a candidate receives more than 50% of the votes cast, that candidate would be declared the winner. Unfortunately, that language is not expressly stated in the ordinance.

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<sup>2</sup> The Trial Court was understandably concerned with the language of the HO-CHUNK NATION CONSTITUTION. However, this Court’s decision in *Mudd* precluded the HCN Election Board from compliance with the strict timelines of the CONSTITUTION. TO allow for a practical effect and to provide the Ho-Chunk Nation tribal members to cast their vote in District V, the HCN Election Board renamed the election as a Special rather than a General. The “hybrid” election responded to the practical needs of a tribal government and policies. Tribal governments and their agencies utilize non-tribal structures for their day-to-day governance. At the same time, tribal officials elected and appointed must from time-to-time be creative to assure the population of a response that uniquely serves the Ho-Chunk Nation tribal members. Such was the case of the creative use of the “hybrid” election by the HCN Election Board in their effort to follow the HCN CONSTITUTION, HCN Election Ordinance and their charge as an election board. Such an effort to not run afoul of their laws should be applauded not condemned.

However, the section states that “if no candidate in any Primary Election receives more than 50%” so one must infer the obvious.

When no one receives the 50% of the votes cast, then, and only then, is a runoff election held for the two candidates with the highest votes. This did not occur in the instant case. Kathyleen Whiterabbit received more than 50% of the votes cast in the “hybrid” election. She was correctly declared the winner by the HCN Election Board.

The question of whether an election is general or special is no longer a hurdle that must be met in order to have a primary and runoff election. The question at the onset is if there are three (3) or more candidates. If so, a primary election must be held. Once the primary election is held, the next question is whether or not a candidate has received more than 50% of the votes cast in the election. If so, that candidate is the winner. If not, the two highest vote-getters are placed in a runoff election.

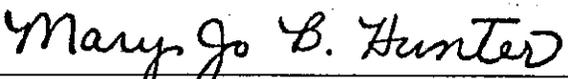
This Court understands that the prior case law has added to the confusion of the election process. However, the case law history in this area predates the current revised HCN Election Ordinance. The HCN Legislature has the authority to create laws to enforce the requirements of the HCN Constitution. To that end, this current version of the HCN Election Ordinance has been created. Applying the Ho-Chunk Nation law to the facts of this case requires this Court to

overturn the decision of the lower court. The decision below is reversed.

Egi Heskekjet.

Dated this 11<sup>th</sup> day of July 2003.

  
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Hon. Jo Deen B. Lowe, Associate Justice  
Ho-Chunk Nation Supreme Court

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