

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT
MAR 25 2002
W. Redford
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

Demetrio D. Abangan,
Tribal Enrollment No. 439A000001, (CV02-08)
Appellant,

v

Ho-Chunk Nation Election Board
in their official capacity,
Appellee,

-AND-

DECISION

SU02-02

Stewart J. Miller,
Tribal Enrollment No. 439A002566, (CV02-10)
-and-
Brenda Neff,
Tribal Enrollment No. 439A002134,
Appellants,

v

Ho-Chunk Nation Election Board,
Appellee.

Heard before Associate Justices Rita A. Cleveland, Debra C. Greengrass, and Chief Justice Mary Jo B. Hunter, presiding.

This matter came before the Ho-Chunk Nation Supreme Court upon Appellants' *Notice of Appeal* filed February 15, 2002. The Appellant's are challenging the Special Redistricting Election held on January 12, 2002. On January 19, 2002 the HCN Supreme Court issued an Order adopting written rules for challenging the January 12, 2002 election results. The Trial Court rendered its decision on February 12, 2002, Order (Denial of Election Challenge). On March 05, 2002 the HCN Supreme Court accepted the matter for appeal. The Appellant's Supporting Brief was timely filed on February 20, 2002. The Appellee's Response Brief was timely filed on February 25, 2002. The Appellants filed a Reply Brief in Support of Appeal on March 4, 2002. In response, the Appellees' filed a Notice and Motion Opposing Appellants

Filing Reply Brief on March 5, 2002. The Appellant's filed a Request For Permission To File Reply Brief on March 7, 2002. The Supreme Court scheduled Oral Arguments to be heard on March 15, 2002. On March 18, 2002 the Court issued an Extension Order needing additional time to review the Trial Court record. The Supreme Court concludes that the Trial Court abused its discretion by imposing a higher standard of proof than the 'clear and convincing' standard stated in the HCN Election Ordinance, Section 14.01 (b). The Court, hereby, REVERSES and REMANDS the matter back to the Trial Court for further disposition consistent with our opinion.

On January 12, 2002, HCN Election Board conducted a third Special Redistricting Election pursuant to the HCN Constitution, Art. V, Sec. 4. The Appellants filed their special election challenges with the Trial Court pursuant to the HCN Constitution, Art. VIII, Sec. 7, and the HCN Supreme Court Special Election Order dated January 19, 2002. The HCN Election Ordinance, HCC-95-002, Section 14.01 outlines challenges to the election results.

APPLICABLE LAW

Ho-Chunk Nation Constitution, Art. VII, Section 7(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."

Ho-Chunk Nation Judiciary Act of 1995

"The justices employed by the Judiciary and acting pursuant to the authority vested by the Constitution of the Ho-Chunk shall exercise the powers of the Judiciary in accordance with Article VII of the Constitution of the Ho-Chunk Nation."

Ho-Chunk Nation Election Ordinance, HCC-95-002

Section 14.01, Challenges to the Election Results

"(b) The person challenging the election results shall prove by clear and convincing evidence that the Election Board violated the Election Ordinance or otherwise conducted an

unfair election, and that the outcome of the election would have been different but for the violation.”¹

Section 19.01, Intent, Purpose and Construction

“This 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.”

DEFINITIONS

From Black’s Law Dictionary, 6th Ed., West Publishing Co. (1991)

“Beyond a reasonable doubt. In evidence means fully satisfied, entirely convinced, satisfied to a moral certainty; and phrase is the equivalent of the words clear precise and indubitable.”

“Clear and convincing proof. That proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will show where the truth of the facts asserted is highly probable.”

DECISION

In this case, this Court must determine if the Trial Court erred in holding that the Appellants had to produce ninety-three (93) individuals who would have voted against Scenario E if they had received proper notice of the Special Redistricting Election. This Court agrees with Appellee’s counsel, Mr. Murphy, that the issue of defective notice was resolved by the Trial Court and is a non-issue for this Court on appeal. The issue presented by Appellants was that they were denied their due process rights by the requirements of discovery as to the method and

¹ In reviewing past copies of the Election Ordinance, it appears that the word “could” was initially used in Section 14.01 (b). Recent copies of the Election Ordinance contain the word “would”. The Legislative History of the ordinance did not specifically indicate any changes in Section 14.01 (b).

time allowance. Appellants, in their reply brief, also questioned the standard of review used by the Trial Court.

This case is one of first impression for this Court. The test to determine whether Judge Matha made an error of law is if “reasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to the matter submitted ” occurred. *Daniel Youngthunder, Sr. v. Jonette Pettibone, Ann Winneshiek, Ona Garvin, Rainbow Casino Mgmt., SU00-05* (HCN S. Ct. July 28, 2000).

Judge Matha was required to apply the Election Ordinance to the issues of the case. Specifically, he had to decide if the requirements of Section 14.01 (b) were satisfied. That section requires clear and convincing proof that the Election Board violated the Election Ordinance or otherwise conducted an unfair election. Both parties agree that Judge Matha’s holding on this part was correct. Judge Matha wrote:

“(T)he Court, therefore, finds (sic) the publishing of the *Official Notice of Election* defective”. *Abanagan, et. al. Vs. HCN Election Board, CV02-08, CV02-10* (Feb. 12, 2002). Judge Matha went on to hold that “(T)he plaintiffs ... have not demonstrated by the same burden of proof ‘that the outcome of the election would have been different but for the violation’. Scenario E passed by a margin of ninety-three (93) votes, and the plaintiffs have only produced thirty-one (31) individuals capable of testifying that they would have voted against Scenario E if they received proper notice of the Special Redistricting Election. The Court recognizes the significant obstacle erected by the statutory standard, but this corresponds with the justifiable need to settle voter expectations.”

Abanagan, lines 1-10, page 15. It is on this portion of the requirements for an election challenge that Judge Matha abused his discretion.

Judge Matha asks if the plaintiffs had demonstrated that the election results would have differed if the Election Board had provided meaningful notice. He answers they certainly had not. In so doing, Judge Matha applied the higher standard of proof of proof beyond a reasonable

doubt that seeks a precise and indubitable answer. If the plaintiffs had provided ninety-three (93) individuals, there would have been no question that the election would have been different. If Judge Matha had applied the standard of clear and convincing proof as the statute requires, he may have held that the plaintiffs had met their burden of showing that the facts asserted were highly probable. That is, the Trial Court could have held that the plaintiffs had provided the high probability of a different result because they provided thirty-one (31) individuals who would have voted against Scenario E. In addition, the Judge is in the position to assess the likelihood that more individuals would have been provided if the Appellants had more time to locate the individuals. Yet, Judge Matha did not take this into account.

Rather, he arbitrarily set out a deadline without any allowance for additional time for the Appellants to locate other parties. He required that the entire difference of ninety-three (93) votes be met rather than considering the high probability of such an outcome when in a short amount of time, thirty-one (31) individuals were located. Finally, Judge Matha made no attempt to balance the conflicting interests of the requirements of the HCN Constitution for quick resolutions of election challenges against the rights of individual of due process. The result is to deny individuals their due process rights as required by the Ho-Chunk Nation Constitution.

The HCN Election Ordinance, Section 19.01, Intent, Purpose and Construction states 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”. The Trial Court had concluded that “(T)he plaintiffs have satisfied that portion of the standard which mandates a clear and convincing showing of an ELECTION ORDINANCE violation or an unfairly conducted election,…” The procedures were established to assure the eligible voters of the Ho-Chunk Nation that any election will be conducted fairly.

Failure to ensure the proper publication of the *Official Notice of Election* to the Ho-Chunk Nation eligible voters infringes on an individuals fundamental right to vote. Secondly, the Court in haste to facilitate the current litigation, within the timeline of twenty (20) days, set strict deadlines in which the parties must submit their discovery. The Appellants due process rights were lessened when the time constraints were so narrow.

This matter is REVERSED and REMANDED to the Trial Court for a rehearing. The correct standard of clear and convincing evidence should be applied by the Trial Court Judge. It is up to Judge Matha to determine if the plaintiffs met the requirements of a clear and convincing standard.

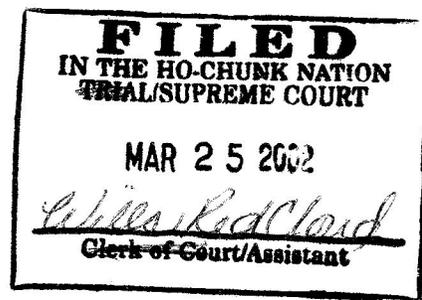
EGI HESHJENET

Dated this 25 day of March 2002.


Rita A. Cleveland, Associate Justice


Debra C. Greengrass, Associate Justice


Mary Jo B. Hunter, Chief Justice



CERTIFICATE OF SERVICE

I, Willa RedCloud, Clerk Assistant of the Ho-Chunk Nation Supreme Court, do hereby certify that on the date set forth below I served a true and correct copy of the DECISION file in Case No. SU- 02-02 By the United States Postal Service, upon all person listed below:

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Date: March 25, 2002

Willa RedCloud
Willa RedCloud, Clerk of Court Assistant
Ho-Chunk Nation Supreme Court