

DEC 12 2002

J. Pettibone
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION SUPREME COURT

Kathy A. Stacy,
Appellant,

vs.

DECISION
Case No. SU 02-05

Ho-Chunk Nation and
Clarence Pettibone, former Vice-President of the
Ho-Chunk Nation and Wade Blackdeer, present
Vice-President of the Ho-Chunk Nation, in their
Individual and official capacities,
Appellees.

Heard before the Honorable Kim Vele, Justice Pro Tempore, Honorable Gerald Hill,
Justice Pro Tempore and Chief Justice Mary Jo B. Hunter, presiding.

I Procedural Background

The Appellant commenced this action with a Complaint filed on January 26, 2001. A Summons was issued on the same date. A timely Answer was filed by the Appellees on February 15, 2001. The Appellees filed a Notice and Motion for Summary Judgment and a Brief in Support of the Motion for Summary Judgment on May 16, 2001. The Appellant filed a Motion to Amend the Scheduling Order on June 6, 2001. The Appellant then filed a Response to the Appellees' Motion for Summary Judgment on June 19, 2001. Several other procedural Motions were filed before the Trial date, August 1, 2001. On that date the parties argued the Motion for Summary Judgment which was granted for the Appellants.

The Judgment was appealed to the Ho-Chunk Nation Supreme Court which on January 24, 2002 reversed the Trial Court and Remanded it back for a trial on the merits because there were several material facts in issue. The Remand Trial was convened on June 13, 2002. At the conclusion of the Trial, the Trial Court found facts substantiating the actions of the Defendants/Appellants and granted judgment in their favor.

The Plaintiff/Appellant filed a timely appeal to the Ho-Chunk Nation Supreme Court which was heard on October 9, 2002.

II. Facts

The Petitioner Appellant was employed by the Ho-Chunk Nation Casino at from January, 1990 until October 13, 2000 when she was selected by the Ho-Chunk Nation Legislature and appointed to a position as a Commissioner on the Ho-Chunk Nation Gaming Commission. The record is unclear as to whether she understood that she would receive less at the time prior to her appointment.

The Petitioner is an enrolled member of the Ho-Chunk Nation, a primary qualification for a Ho-Chunk Nation Gaming Commissioner.

The Petitioner's salary at her former position was \$22.82 per hour. After she was appointed the Petitioner learned by her first pay check that she was getting \$4.17 less per hour than when she was a permanent employee.

The Petitioner's inquiry led her to learn that the Petitioner's had at first entered her previous pay rate, which was within the allowable range of a Gaming Commissioner's compensation, and then reduced it to the lower rate without her knowledge.

Upon learning of the lower rate the Petitioner remonstrated with the Appellees to no avail. Formal action was then initiated in the Trial Court.

After a trial, the matter was appealed to the HCN Supreme Court which reversed the Trial Court's holding of Summary Judgment in favor of the Appellees and remanded it to the Trial Court to address the merits of the case. The Trial Court found in favor of the Appellees on the merits and it was from that decision that this appeal was held.

III. Issues to be decided:

- A. Whether an appointed position on a Nation regulatory Commission is a *promotion* within the Nation's Personnel Management Policies?
- B. Whether the Trial Court abused its discretion in ruling that the Supervisor Respondent in setting the starting salary of a new commissioner acted within his authority?

IV. Discussion

It appears from the record and the discussion at oral argument that there are no issues of fact, only the requirement of determining Ho-Chunk Law regarding the issues as

presented. Specifically, the parties acknowledged that this case was not presenting issues of promissory estoppel, but whether, as a matter of law, the Appellant was entitled to a determination of whether her appointment to the Ho-Chunk Gaming Commission constituted a *promotion* under Ho-Chunk law. If her new position as a Gaming Commissioner is a promotion, her pay would be governed by the Ho-Chunk Nation Personnel Policies and Procedures requiring that a promotion be accompanied by a raise in salary. If it is a *transfer*, the policy requires that the salary in the new position be at least equal to that of the position from which the employee was transferred under the same authority

The Petitioner's attorney argued that since she was an enrolled Tribal member, a specific qualification for the position of Gaming Commissioner, this was a *prima facie* determination of higher qualification than the position she left to accept the appointment. In this circumstance the Appellees, as a matter of Ho-Chunk law, would be obliged to pay her at or above the wage she received as an employee from the position which she left to become an Commissioner.

The Appellees argued that an appointment was not a promotion and thus that the Nation's personnel rules could not be interpreted to compel the finding that the Appellant was entitled to a raise or minimally that she would receive the same salary she was earning in the position she left. They pointed to that provision of the Ho-Chunk Nation Amended and Restated Gaming Ordinance. Section 801., which sets forth the discretion of the Legislature to appoint Commissioners.

The absence of further direction in the Tribal law applied suggests that while there are issues of equity, since the parties agreed that there are no disputable facts, resolution is left to interpretation of existing law. It is clear, at the onset that an appointed position is political in nature as well as the prerogative of the authority of the Ho-Chunk Nation Legislature to promulgate rules including the establishment of compensation.

IV. Opinion

Having heard the oral arguments of counsel and review of the last briefs and the record, the opinion of the Trial Court is upheld. The discretion of the Legislature to appoint is limited only by provisions set forth in the Ho-Chunk Nation Constitution. This includes the legislative authority to enact Ordinances and Policies not inconsistent with the

Constitution to guide and direct sub-entities of the Nation. The Ho-Chunk Nation Human Resources Department is such a sub-entity and is responsible for administering all personnel and work force of the Nation.

A regulatory entity of the Ho-Chunk Nation is created by the Legislature, pursuant to the Constitution and delegated to the oversight of the operation and management of a particular area within the Nation. The Gaming Commission is such a regulatory entity. It is created to oversee the operation of the Nation's Gaming Enterprise by, among other things, conducting background checks on all gaming employees and issuing licenses. The qualifications for members of the Commission are set forth in the Ho-Chunk Nation Amended and Restated Gaming Ordinance and include the threshold requirement of being an enrolled member of the Nation.

As a matter of policy, the Ho-Chunk Nation has determined that Nation membership is necessary to insure that all Commissioners are representative of the interests of the Nation. Membership in the Nation is not the only qualification, as shown in the record and at oral argument but it is absolute. The Court has determined that such required qualification of who may serve in the position of a Gaming Commissioner does not by itself obligate a conclusion that the position is superior to any position of regular or permanent employment. The Gaming Commission must then be considered as regulatory body of the Nation whose members must necessarily be enrolled Nation members. This fact makes an appointed position different from those of regular employees but not superior.

The complication in this case is that the policies and practices of the Ho-Chunk Nation Human Resources Department do not address the distinction between regular and appointed positions. It does not require more analysis to show that the lack of guidance within in the policies of HRD were the inherent cause of the case at bar.

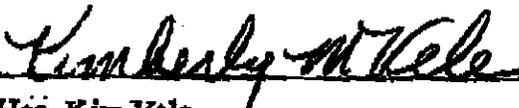
Each of the parties was acting under reasonable assumptions and within their respective authorities and each gave reasonable interpretations of the Nation law they cited.

Because of the vagueness of the law in making more helpful distinctions between regular employees and appointed political appointees this Court must adhere to existing law and reasonable rules of construction.

The lack of guidance in this area of Nation law may be addressed by the Ho-Chunk Nation Legislature to make clear its intent by statute with regard to the compensation of appointed officials, particularly where an appointee is a regular permanent employee. This Court holds that the Appellees acted within their authorized discretion and that no instances of abuse by the Trial Court were effectively shown in the record nor adduced in oral argument.

The matter is affirmed.

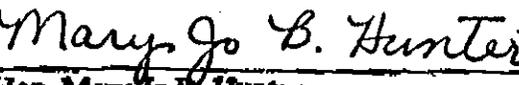
IT IS SO ORDERED this 12th day of December 2002.



Hon. Kim Veale



Hon. Gerald Hill



Hon. Mary Jo B. Hunter