

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
SUPREME COURT

MAR 16 2001

T. Pettibone
Clerk of Court/Assistant

Jacob LoneTree, Forrest Whiterabbit,
Elliot Littlejohn, Libby Fairchild,
Spencer LoneTree, and Parmenton Decorah,
Appellees,

Decision
Case No. SU 00-16

vs.

Mr. Robert Funmaker, Jr., Darcy Funmaker-Rave,
Gloria Visintin; and Ho-Chunk Nation Election Board,
Appellants.

Heard before Associate Justice Rita A. Cleveland, Justice Pro Tempore John Wabaunsee and Chief Justice Mary Jo B. Hunter, presiding.

This matter involves a General Council Removal of the President that came before this Court on appeal from a Declaratory Judgement filed by the Honorable Judge Mark Butterfield on December 7, 2000. This Court reviewed, the Appellant's Notice of Appeal filed on December 14, 2000, the Appellant's Brief in Support of Appeal filed on December 12, 2000, the Appellee's Brief in Response filed on January 5, 2000, the Defendant's Motion to Disqualify Justice Greengrass filed on January 5, 2001, the Appellant's Reply Brief filed on January 11, 2001, and the Trial Court Record. On January 2, 2001, this Court filed a Scheduling Order accepting this Appeal; granting expedited consideration;¹ denying a Stay of the December 7, 2000 Declaratory Judgement and reserved Oral Argument.

On January 12, 2001, this Court granted the Defendant's Motion to Disqualify Justice Greengrass. At a Legislative Meeting on January 16, 2001, the Legislature made a motion to appointed John Wabaunsee as Justice Pro Tempore. On February 6, 2001, this Court filed an Order scheduling Oral Argument and heard Oral Argument on February 17, 2001. This Court deliberated via telephonic conference call on Wednesday, February 21, 2001. This Court hereby

¹ Due to the recusal of Justice Greengrass and the lengthy process in the appointment of a Justice Pro Tempore, this Court was unable to consider this case in an expedited manner. The inability to meet with an expedited time limit did not affect the interest of justice in this matter.

affirms the Declaratory Judgement of the Honorable Mark Butterfield filed on December 7, 2000. The Chief Justice concurs in part and dissents in part.

ISSUES PRESENTED ON APPEAL

Issues presented on appeal were:

- I. Did the Trial Court err in concluding that the language of Coalition for Fair Government II v. Chloris Lowe, Jr., et al., CV 96-22 and Ho-Chunk Legislature v. Chloris Lowe, Jr., et al., CV 96-24, consolidated, was only dicta and / or judicial comments relating to the authority of Appellee Visiten to Serve Notice of Intent to Remove on October 3, 2000, upon President LoneTree?
- II. Did the Trial Court err in concluding that each member of the Ho-Chunk Nation has the inherent right as a member to represent the whole of the General council of the HCN in serving Notice of Intent to Remove under Article IX, HCN Constitution?
- III. Did the Trial Court err in concluding that a quorum was not required by the HCN General Council for the approval of the Agenda for the Annual meeting of October 21, 2000, prior to any action being taken, including but not limited to the removal issue?
- IV. Did the Trial Court err in holding that no member is allowed to speak on behalf of the any official who his the target of removal under Article IX of the HCN Constitution and that such action does not violated Article X, Section 1, (a)(1)(8) of the HCN Constitution?
- V. Did the Trial Court err in not allowing a review of the substantive due process of the Appellant(s) relating to the term “malfeasance” and whether that term should be held to a definitive standard to protect the substantive and procedural due

process rights of officials under Article X, Section 1 of the HCN Constitution?

- VI. Did the Trial Court err in not disqualifying himself after he indicated that he had discussed the merits of this matter with the Appellee Visiten; thus, giving the appearance of judicial impropriety and a violation of judicial ethics?
- VII. Did the Trial Court err in not allowing the Appellant(s) the opportunity to be heard on the alleged Motion for Summary Judgement noted in the language of the Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgement, pursuant to the requirements of Rule(s) 19 (A) and 55 of the HCN Rules of Civil Procedure?
- VIII. Did the Trial Court err in granting Declaratory Relief in favor of the defendant(s) on December 7, 2000, without allowing for a hearing on the matter or trial on the merits, due to the fact that no Motion for Summary Judgement was ever filed by the Defendant(s) and the Appellant(s) were never granted an opportunity to be heard on the matter of Summary Judgement?

DISCUSSION

I. Did the Trial Court err in concluding that the language of Coalition for Fair Government II v. Chloris Lowe, Jr., et al., CV 96-22 and Ho-Chunk Legislature v. Chloris Lowe, Jr., et al., CV 96-24, consolidated, was only dicta and / or judicial comments relating to the authority of Appellee Visiten to Serve Notice of Intent to Remove on October 3, 2000, upon President LoneTree?

The Appellants claim that the Trial Court decision of Coalition for fair Government II v. Chloris Lowe, Jr., et al., CV 96-22 and Ho-Chunk Legislature v. Chloris Lowe, Jr., et al., CV 96-24, consolidated, were binding in this case. The Trial Court held in this case that the language that Appellant LoneTree relies on was dicta and not controlling on the Trial Court. The merits of the claims in Coalition II and Ho-Chunk Legislature, although appealed were never addressed by this Court. As a result, there is no binding precedent on the Trial Court. Article VII Section 7

(c) provides that decisions of this Court are binding on the Trial Court. While the trial court should try to remain consistent in its decisions, only decisions by this court are limitations on the Trial Court. In this case (LoneTree appeal), this Court is not reviewing the earlier decisions in Coalition and Ho-Chunk Legislature. The Court is reviewing the Trial Court's decision in LoneTree and as discussed below find no error in the decision.

It is the decision of this Court, that Coalition for fair Government II v. Chloris Lowe, Jr., et al, CV 96-22 and Ho-Chunk Legislature v. Chloris Lowe, Jr., et al., CV 96-24, consolidated, are factually distinguishable and does not affect the outcome of the present case. The HCN Constitution does not specify who shall serve notice for removal it only provides a means for a removal of the President through General Council. Therefore, this Court does not find that the Trial Court erred.

II. Did the Trial Court err in concluding that each member of the Ho-Chunk Nation has the inherent right as a member to represent the whole of the General council of the HCN in serving Notice of Intent to Remove under Article IX, HCN Constitution?

Justice Cleveland and Justice Pro Tempore Wabaunsee concur on this issue, Chief Justice Hunter Dissents.

The HCN Constitution, Article IX, Section 2, allows for the General Council Removal of the President, provided that the President was given reasonable notice of the impending action and has had a reasonable opportunity to be heard. The fact that Mr. LoneTree was served Notice of Intent to Remove eighteen (18) days prior to the General Council meeting date is undisputed. The Appellant, Mr. LoneTree, questions whether Ms. Visintin, a Ho-Chunk Tribal member has the inherent right to represent the General Council in serving him with the Notice of Intent to Remove under Article IX. Article IX does not address the manner in which Notice of Intent to Remove, is to be accomplished, nor does the HCN Constitution delegate that task. In Article X, Section 1, (a) (1) of the HCN Constitution, Tribal Members are given the right to petition for a redress of grievances. In this case, Ms. Visitin, exercised her right as an individual and a voting

member of the HCN in initiating the General Council Removal of the President, to redress grievances that she felt constituted malfeasance. In doing so, Ms. Visitin did properly serve Mr. LoneTree in accordance to Article IX, Section 2 of the HCN Constitution.

The HCN Constitution is silent on the issue of who can serve Notice of Intent to Remove. To effectuate a Notice of Intent to Remove the notice must first be served, in order for Service to be accomplished; an individual must perform that act. Whether that individual is representing himself/herself or a group or organization provided that the service requirements set forth in Article IX are met, an individual tribal member has the right to serve a Notice of Intent to Remove. Based upon that, this Court does not find that the trial court erred.

III. Did the Trial Court err in concluding that a quorum was not required by the HCN General Council for the approval of the Agenda for the Annual meeting of October 21, 2000, prior to any action being taken, including but not limited to the removal issue?

In accordance to Article IV, Section 7, each action of the General Council shall require the presence of a quorum. Although in Article IV, Section 2, (d), of the HCN Constitution, the General Council retains the right to establish its own procedures in accordance with this Constitution, the General Council has yet to establish those procedures. This Court agrees that the setting of the agenda is an action of the General Council. According to the October 21, 2000 Annual Meeting of the HCN General Council, a question was raised as to whether a quorum was present at the time the agenda was voted on, however it appears that no action was taken except to proceed to the issue of removal.² The HCN Constitution does not require the General Council to set an agenda in order conduct business. Therefore, it is reasonable to conclude that whether the General Council established an agenda or not, the General Council would act on the Notice of Intent to Remove as well as all other issues placed on the Agenda. In this case the outcome of the number of votes that were cast on the removal issue clearly indicates that a quorum was

² This Court is relying upon the minutes of the October 21, 2000 Annual Meeting of the HCN General Council that were a part of the Trial Court record.

present when the action took place. This Court does not want to second-guess the decision of the General Council. If the General Council did not want to take action on quorum, then this Court does not feel that it should to interfere, as all decisions of the General Council are binding, HCN Constitution, Article IV, Sec. 3, (f). Such interference will only serve to diminish the authority of the General Council by invalidating a removal that not only met the removal requirements of Article IX of the HCN Constitution, but was also done with a quorum present. This Court does not find that the Trial Court erred on this point.

IV. Did the Trial Court err in holding that no member is allowed to speak on behalf of the any official who his the target of removal under Article IX of the HCN Constitution and that such action does not violated Article X, Section 1, (a)(1)(8) of the HCN Constitution?

This Court agrees with the Trial Court that the HCN constitution requires that Mr. LoneTree only be given the opportunity to be heard. The HCN Constitution as presently drafted does not require any debate or discussion once the person to be removed has been given the opportunity to respond. There is no question that Mr. LoneTree was given and took the opportunity to defend himself on the issues presented in the Notice of Intent to Remove, and therefore, Article X, Section 1, (a)(1)(8) was not violated. Mr. LoneTree also claims that his supporters were denied their rights to free speech and due process under Article X of the HCN Constitution. According to the minutes of the General Council meeting, the motion to remove Mr. LoneTree was placed before the General council. Mr. LoneTree was given the opportunity to answer the charges. Mr. LoneTree had the ability to structure the presentation of his own defense in whatever manner he saw fit, including requesting friends and relative to speak on his behalf. At oral argument, page 15, Mr. LoneTree's Attorney stated that he did not request anyone to speak on his behalf. After hearing Mr. LoneTree's presentation, the General Council decided to proceed directly to a vote. Mr. LoneTree complains that the decision of the chair to limit debate denies his supporters their right to due process and freedom of speech.

There are no formal rules of the General Council other than those set forth in the HCN Constitution. Article IV Section 7, provides that when a quorum is present the General council shall select either the President or another person to conduct the meeting. There are no rules on how the person selected to conduct the General Council meeting shall conduct the meeting. Two people were nominated to conduct the meeting, Mr. LoneTree and Robert Funmaker, Jr. Mr. LoneTree withdrew his name from consideration so that the only person to be considered to conduct the meeting was Mr. Funmaker. The HCN Constitution sets no limits on how Mr. Funmaker should have conducted the meeting except those found in Article IV, Section 7 and Article X (Bill of Rights). While it may have been the better practice and more consistent with the Ho-Chunk people's traditions to allow debate and have HCN members address the General Council, the decision of Chairman Funmaker to limit the debate or discussion is not an abridgement of the freedom of speech. Article X, Section 1, (a)(1)(8) of the HCN Constitution, was not violated and does not invalidate the removal.

V. Did the Trial Court err in not allowing a review of the substantive due process of the Appellant(s) relating to the term "malfeasance" and whether that term should be held to a definitive standard to protect the substantive and procedural due process rights of officials under Article X, Section 1 of the HCN Constitution?

Substantive due process is an American legal concept, and is not expressly found in the Ho-Chunk Nation Constitution. Article X, Section 1 (a)(8) of the HCN Constitution provides as follows:

The Ho-Chunk Nation, in exercising its powers of self-government, shall not deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without the due process of law.

In American Law there are two kinds of due process, procedural and substantive.

Procedural due process requires, among other things, that the government in exercising its powers allow its citizens to have notice of proceedings, the right to be present at proceedings, the right to be heard and the right to an impartial fact finder. Procedural due process addresses the

method by which government deals with its citizens. Under American law, substantive due process on the other hand seeks to protect citizens from arbitrary and unreasonable laws. Substantive due process addresses the nature of the rights to be protected. Counsel for Mr. LoneTree claims the failure to define the term malfeasance denies his client the right to substantive due process, but provides no authority to support this position.

The Trial Court held that the General Council need not define the term “malfeasance”. The Appellant claims at page 15 of his brief that it is the Trial Court that is the appropriate forum to determine whether Mr. LoneTree committed malfeasance and the failure to define malfeasance denies him substantive due process. The Trial Court correctly reasoned that it would not make the determination, and that it was the General Council’s decision. As has been said before in this decision, the HCN courts are extremely reluctant to interfere with the political decisions of the General Council. It was not error for the Trial Court judge to refuse to review the General Councils decision that Mr. LoneTree’s actions constituted malfeasance.

VI. Did the Trial Court err in not disqualifying himself after he indicated that he had discussed the merits of this matter with the Appellee Visiten; thus, giving the appearance of judicial impropriety and a violation of judicial ethics?

Appellant raises the question of whether the Judge Mark Butterfield should have disqualified himself. The Ho-Chunk Nation Supreme Court has adopted Ho-Chunk Nation Rules of Judicial Ethics. Judge Butterfield properly disclosed his conversation with Gloria Visitin at the hearing on November 6, 2000. At that time, the Appellants stated that they did not have any objection to Judge Butterfield continuing to hear the case. They did not file a motion to recuse Judge Butterfield as provided in the HCN Rules of Judicial Ethics. If a motion to recuse a judge is not filed with the judge to be recused, it cannot be argued on appeal that the Judge erred for remaining on the case.

VII. Did the Trial Court err in not allowing the Appellant(s) the opportunity to be heard on the alleged Motion for Summary Judgement noted in the language of the Defendant’s

Brief in Opposition to Plaintiff's Motion for Summary Judgement, pursuant to the requirements of Rule(s) 19 (A) and 55 of the HCN Rules of Civil Procedure?

VIII. Did the Trial Court err in granting Declaratory Relief in favor of the defendant(s) on December 7, 2000, without allowing for a hearing on the matter or trial on the merits, due to the fact that no Motion for Summary Judgement was ever filed by the Defendant(s) and the Appellant(s) were never granted an opportunity to be heard on the matter of Summary Judgement?

The last two issues raised by the appellant are basically the same question, whether the Trial Court improperly granted summary judgement. The Trial Court concluded that Summary Judgement was appropriate in this case because there was no contested issues of fact and the trial court had only to rule on issues of law. Under Rule 55 of the HCN Rules of Civil Procedure, the Trial Court has the authority on its own initiative to enter summary judgement. The appellants have not pointed out any material issues of fact that require further hearings. The Appellee's have pointed out two references in the transcripts where counsel for Mr. LoneTree seemingly agrees that the court can hear the matter on the basis of summary judgement. Like the issue of recusal, the Appellant raises for the first time on appeal the issue of inappropriateness of summary judgement. This Court finds no err in the Trial Courts granting summary judgement.

CONCLUSION

The Court hereby affirms the Trial Court's findings as stated in the Declaratory Judgement filed by Judge Mark Butterfield on December 7, 2000.

Egi Hleskekjet, this 16th day of March 2001.

Rita A. Cleveland

Hon. Rita A. Cleveland, Associate Justice

John Wabaunsee

Hon. John Wabaunsee, Justice Pro Tempore

Mary Jo B. Hunter

Hon. Mary Jo B. Hunter, Chief Justice
HCN Supreme Court

(Concurring in part and Dissenting in part.)

Dissenting Opinion of The Chief Justice

Yes, the Trial Court erred in concluding that each member of the Ho-Chunk Nation has the inherent right as a member to represent the entire General Council, without that body's approval, to serve Notice of Intent to Remove under Article IX of the Ho-Chunk Nation Constitution. To determine whether or not an individual Ho-Chunk member has such a right, one must look at Article IV of the Ho-Chunk Nation Constitution.

Article IV, Section 1 establishes the powers of the General Council. That section states as follows:

“The People of the Ho-Chunk Nation hereby grant *all* inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk Nation are entitled to participate in General Council.” HCN Const., Art. IV, Sec. 1.

The HCN Constitution expressly states that the General Council has the inherent sovereign power. It is **not** delegated to any individual Ho-Chunk member. Rather, Ho-Chunk members who are eligible voters may participate in the General Council. The General Council is a branch of government of the Ho-Chunk Nation. HCN Const., Art. III, Sec. 2. A branch is defined in Black's Law Dictionary as “[A]ny member or part of a body (e.g. executive branch of government), or system.” It is **not** defined as an individual but as unit or division.

The General Council is a unique branch of government. Its creation preceded the present Ho-Chunk Constitution. It is a branch of government which is fluid in nature in that it only functions as a branch of government when it meets certain requirements for formation. For example, General Council is to meet at least once each year after a meeting is called by HCN President. The notice of the Annual Meeting is provided by the HCN President. See HCN Const., Art. IV, Sec. 5.

The General Council branch of government forms in other instances when Special

Meetings are called by the President upon petition by twenty percent of the eligible voters of the Ho-Chunk Nation or upon written request of a majority of the HCN Legislature. HCN Const., Art. IV, Sec. 6.

These are the only methods that the HCN Constitution provides for the branch of government called the General Council to be initiated. Upon the initiation of the General Council by any of these methods, the HCN Constitution requires that another procedural hurdle be met prior to the General Council taking action. The General Council is required to establish a quorum. A quorum for General Council requires twenty percent of the eligible voters of the Ho-Chunk Nation **present** in General Council. HCN Const., Art. IV, Sec. 7.

The HCN Constitution clearly requires that “[E]ach action of the General Council shall require the presence of a quorum.” HCN Const., Art. IV, Sec. 7. Thus, **each action** that is taken as a function of the branch of government called the General Council must be conducted with the presence of a quorum.

The question then becomes whether the notice of removal was an action of the General Council. In this case, the notice that was provided to former President Lonetree stated, “Pursuant to Article IX, Section 2, **the People of the Ho-Chunk Nation** hereby serve notice upon Jacob Lonetree...” *Jacob Lonetree, et. al v. Robert Funmaker, et. al*, CV-00-105, Trial Court record, Ex. 1, a (10-27-00) (emphasis added). The notice does not state the name of Gloria Visintin, the individual Ho-Chunk member who served the notice, as the party who is seeking Mr. Lonetree’s removal. Rather, the notice states that the **People of the Ho-Chunk Nation** are notifying Mr. Lonetree of his pending removal at the General Council meeting. Thus, the notice becomes an action of the branch of government, the General Council.

A notice may be served by an individual. However, the individual must have the authority to effectuate that service. As stated in Black’s Law Dictionary:

“Notice in its legal sense is information concerning a fact, actually communicated to a person by an **authorized** person, or actually derived by him **from a proper source...**”

Therefore, a notice must be authorized or from a proper source.

In this case, the authorization would have to come from the General Council. The act of serving notice must be approved by the General Council as is required by the HCN Constitution which states, **“Each action of the General Council shall require the presence of a quorum.”**

Where a notice is served as a function of the branch of government made up of the Ho-Chunk Nation eligible voters or people, that notice must be approved by the General Council as a function of that branch. Any other interpretation thwarts the HCN Constitution.

For the foregoing reasons, the Chief Justice respectfully dissents from the majority view as to whether the Trial Court Judge erred in holding that any individual member of the Ho-Chunk Nation may serve a notice of removal without the authorization of the General Council. The question of whether or not Ms. Visintin could have been retroactively authorized by the General Council is not before this Court. However, it seems that such a vote would provide General Council authorization of the action taken by an individual member of the Ho-Chunk Nation. Allowing the individual eligible voters present at the General Council meeting to ratify the actions taken by an individual member on their behalf legitimates an otherwise unconstitutional action of that body. For these reasons, the Chief Justice respectfully dissents on Issue II presented on appeal.