

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

OCT 31 2001

T. Pattikane
Clerk of Court/Assistant
Clerk of court

Joan Marie Whitewater, Dean Allen Whitewater,
Kathleen Lynn Whitewater, Kenneth Lee Whitewater,
Barbara Ann Enger, Vicki Lee Johnson, Tina Marie
Danielski, Gerald Ray Whitewater, and
Larry Edward Whitewater,

Appellees,

Decision

Case No. SU 01-06

vs.

Ho-Chunk Nation Office of Tribal Enrollment and
Ho-Chunk Nation Legislature
Appellants.

Heard before Justice *Pro Tempore* Gerald Hill, Associate Justice *Pro Tempore*
Kim Vele and Chief Justice *Pro Tempore* John Wabaunsee, presiding.

This is an appeal of the decision of Ho-Chunk Nation Trial Court. For the reasons
set forth below, the decision of the trial court is reversed and the matter is remanded to
the trial court for disposition not inconsistent with this decision.

The Trial Court based its decision on upon an extensive Stipulation of Facts
which it incorporated for the most part as Findings of Fact. None of the parties on appeal
have challenged the Findings of Fact and this court incorporates these findings in this
opinion as set forth below.

FACTUAL BACKGROUND

The Plaintiffs are descendants of Frank Whitewater and Maggie Dickson
Whitewater. The plaintiffs first sought enrollment in the Wisconsin Winnebago Tribe in
the 1960's.¹ Prior to 1976 the Tribe passed an ordinance which created an Enrollment
Committee to handle applications for enrollment in the Tribe. The standards for
enrollment were found in the Tribe's Constitution. In 1976 the Wisconsin Winnebago
Business Committee Enrollment Committee, acting in accordance with the Enrollment
Ordinance, approved the applications for enrollment for eight of the nine named
plaintiffs. At that time, the Tribe's Constitution and Enrollment Ordinance required that

a person have $\frac{1}{4}$ Wisconsin Winnebago blood. However, in 1977 the Bureau of Indian Affairs disapproved the enrollment of the plaintiffs on the grounds that they did not possess a sufficient amount of Wisconsin Winnebago blood. The Bureau of Indian Affairs interpretation of the Tribe's Constitution and Enrollment Ordinance was not contested by the Tribe. The parties agree that after 1977 the plaintiffs were not considered enrolled members of the Tribe. Throughout the remainder of the 1970's and 1980's the plaintiffs continued to press their applications for membership. It appeared that the plaintiffs were $\frac{1}{8}$ Wisconsin Winnebago and $\frac{1}{8}$ Nebraska Winnebago. While they were at least one quarter Indian, their Wisconsin Winnebago blood was not sufficient for enrollment.

On November 1, 1994, after a vote by the members of the Wisconsin Winnebago Tribe, a new Constitution became effective. Among other things the Tribe changed its name to the Ho-Chunk Nation. Most importantly, for the Whitewater family under the new Constitution, qualifications for membership changed and the plaintiffs were eligible for membership. A person such as the Whitewaters would no longer have to demonstrate they were $\frac{1}{4}$ Wisconsin Winnebago. Article II (Membership), Section 5 of the HCN CONSTITUTION authorized the newly named Ho-Chunk Nation Legislature to "...enact laws not inconsistent with this Article to govern membership." On November 23, 1994 the plaintiffs submitted new applications for membership to the Ho-Chunk Nation Office of Enrollment. At the time of the November 23 application the Legislature had not enacted a new enrollment ordinance. The only ordinance that the Enrollment Office could use was the 1976 ordinance that had been used to deny plaintiffs' enrollment.

On January 11, 1995 the Enrollment Office notified the plaintiffs that their applications would be placed in a "pending" enrollment status until the new Membership Code took effect. On March 31, 1995 HCN Nation Enrollment Committee approved the applications for fifty eight persons for membership, but none these fifty eight were the plaintiffs. All of these fifty eight persons who were approved met the enrollment standards under the 1976 Wisconsin Winnebago Business Committee Enrollment Act. (See, paragraphs 3, 30 and 31 of the parties stipulation of facts dated March 16, 2000.)

¹ The Wisconsin Winnebago Tribe is the predecessor to the Ho-Chunk Nation

On November 28, 1995 the Ho-Chunk Nation Legislature adopted the Tribal Enrollment and Membership Act of 1995 (hereinafter The Membership Act). The Membership Act incorporated the changes to the 1994 Constitution Act. Under the Membership Act the plaintiffs were eligible for membership. Section 6 (f) of the Membership Act further required that any applications that were pending and not approved by the date of the Membership Act had to be re-submitted.² The plaintiffs resubmitted their applications. On June 6, 1996, the Enrollment Office approved the plaintiffs' applications. The approval of the plaintiff's applications resulted in their eligibility for a per capita distribution for May, 1996.

Plaintiffs sued the HCN Office of Tribal Enrollment and the HCN Legislature claiming that they were each entitled to per capita payments of \$4,000, the amount of payments they claim they would have been entitled to receive since the effective date of the 1994 Constitution. The plaintiff's claimed that Section 6 (f) of the Enrollment Act deprived them of property rights contrary to ART X, Sec 1(a)(8) of the HCN CONSTITUTION. The plaintiffs claimed that their right to enrollment and per capita payments vested on November 1, 1994, and the decision of the Enrollment Office denied them their right to the per capita payments. The plaintiff also claim that the approval of the fifty eight applications in 1995 and the failure to approve their applications in 1995 denied them equal protection of the law as guaranteed by ART. X, Sec. 1 (a)(8) of the HCN CONSTITUTION.

The defendants asserted that the plaintiffs' claims were barred because the plaintiffs failed to exhaust their administrative remedies and the actions of the Enrollment Committee and the Legislature were consistent with the HCN Constitution. The defendants also raised other arguments about the awarding of retroactive per capita payments as a remedy in this case. Given our decision to reverse the decision of the Trial Court on other grounds, this Court does not have do address the issue of whether the Trial Court could order back per capita payments.

² The Membership Act also required that the Enrollment Office notify any applicants with pending applications that they had to submit new applications by December 12, 1995. The Enrollment Office did not give notice to the plaintiffs until December 18, 1995. The plaintiffs promptly resubmitted their applications. There is no claim that the plaintiffs submitted untimely applications.

I.

PLAINTIFFS HAD NO ADMINISTRATIVE REMEDIES TO EXHAUST

As a condition for waiver of its sovereign immunity, the Ho-Chunk Nation requires parties to utilize various administrative remedies. See, e.g. *Sliwicki v. Rainbow Casino and HCN*, Case No SU 96-15 (HCN Sup. Ct. June 20, 1996) and Section 12, HCN Membership Act.

The defendants claim that the plaintiffs' claims are barred because the plaintiffs failed to exhaust their administrative remedies. The Trial Court held that the plaintiffs need not exhaust their administrative remedies in part because the plaintiffs were seeking to hold a portion of the Membership Act unconstitutional. The decision of the trial court is correct on the exhaustion issue, but the decision is reversed on other grounds because as discussed below we disagree with the Trial Court on the constitutionality of the Membership Act.

In January 1995 the Enrollment Sub-Committee decided to take no action on plaintiff's application. This is the crucial decision in this case. The plaintiffs could have appealed the Enrollment Sub-Committee's decision. In a letter dated January 11, 1995, the Enrollment Office notified the plaintiffs their applications would be placed in the "pending enrollment status". See, Trial Court Exhibit R-18. Section 405 of the Enrollment Ordinance in effect on January 11, 1995 provides that if a person wants to contest a denial of application, the Enrollment Sub-Committee or the Business Committee shall provide notice of a time and date for a hearing. An administrative remedy might have been available to the plaintiffs. However, neither party acted as if this administrative remedy was available. The HCN Courts did not acquire jurisdiction to review enrollment decisions until the 1995 Membership Act. Compare Section 407 of the Enrollment Ordinance with Section 12 of the Membership Act. The Enrollment Sub-Committee in January, 1995 acted as if there was no administrative remedy. They cannot say at a later date that the plaintiffs' failed to exhaust an administrative remedy.

The defendants claim that the plaintiff's failed to exhaust their administrative remedies by not appealing within 60 days of the decision to enroll the plaintiffs in 1996. At the time of their approval, the plaintiffs were not harmed by the decision to allow their

enrollment. They had nothing to appeal in 1996. If the plaintiffs were harmed, the harm occurred in 1995. Under the unique facts of this case, this court determines that there were no administrative remedies for the plaintiffs to utilize, and their claim cannot be barred for failure to exhaust administrative remedies.

II.

THE PLAINTIFFS HAD NO RIGHT TO A PER CAPITA PAYMENT WHEN THE NEW CONSTITUTION WAS ADOPTED

The Trial Court incorrectly concluded that the plaintiff's right to per capita payments vested on the date the new constitution was adopted. The new constitution was not self-executing. The new constitution empowered the HCN Legislature to pass a new Membership Act. Only after the plaintiffs were enrolled as members did their rights as tribal members vest including their rights to approved per capita distributions. If the legislature had failed to adopt a new Membership Code, or if the plaintiffs were denied enrollment after the approval of the new constitution, then they might have a cause of action. There is nothing in the record to indicate that the HCN Legislature acted unreasonably in not passing the Membership Act until late 1995 or that their failure to act denied the plaintiffs any constitutional rights.

Based on conclusion that the plaintiff's rights to tribal membership and per capita payments vested on the date of the adoption of the HCN Constitution, the Trial Court found Section 6(f) of the Membership Act to be unconstitutional because it denied the plaintiffs certain property rights. However, no property rights to per capita payments vested in 1994 though 1995, and until June, 1996 (the date of their approval for membership) the plaintiffs rights were anticipatory at best. The plaintiffs had an expectation of a property right, but the expectation does not give right to a due process claim for the six per capita payments after November 1, 1994. Therefore, the holding of the Trial Court that Section 6 (f) of the HCN Membership Act is unconstitutional is reversed.

III.

THE PLAINTIFFS WERE NOT DENIED EQUAL PROTECTION OF THE LAWS

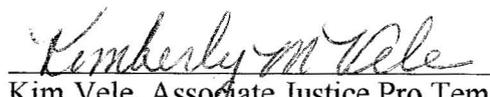
Article X, Section 1 (a)(8) The Ho-Chunk Nation Constitution also guarantees to all person equal protection of the laws. The equal protection clause of the HCN Constitution guarantees that all person similarly situated will be treated equally. The Trial Court held that the plaintiffs were denied equal protection of the law because in January, 1995 their enrollment applications were not approved and 58 other persons were approved. As was said earlier, all of the 58 persons who were enrolled met the enrollment standards under the Membership Ordinance in effect at the time. The plaintiffs had no right to be enrolled until the HCN Legislature acted. The plaintiffs were in a different class of people than the 58. If there were persons in the group of 58 who did not meet the old enrollment standard, but were granted enrollment and per capita payment, then the plaintiffs might have an equal protection claim. Nothing in the Record or in the stipulated facts indicate applicants with the same issues as the plaintiffs were enrolled.

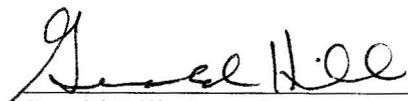
CONCLUSION

It is therefore the decision of this Court that the decision of the Trial Court to declare Section 6 (f) of the HCN Membership Act unconstitutional and to retroactively award per capita payments to the plaintiffs is reversed and the matter remanded to the Trial Court for dismissal.

IT IS SO ORDERED. EGI HESHKEKJENET


John Wabaunsee, Chief Justice Pro Tem


Kim Vele, Associate Justice Pro Tem


Gerald Hill, Associate Justice Pro Tem

CERTIFICATE OF SERVICE

I, Tari Pettibone, Clerk 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- 01-06 By the United States Postal Service, upon all person listed below:

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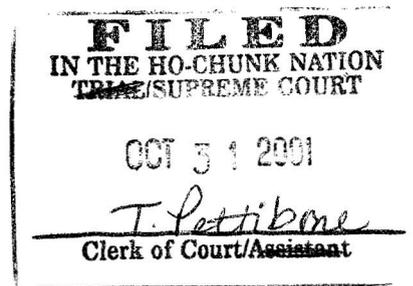
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Date: October 31, 2001

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Tari Pettibone, Clerk of Court
Ho-Chunk Nation Supreme Court