

IN THE

APR 07 1999

HO-CHUNK NATION SUPREME COURT *Wileen Reed Clard*
Clerk of Court/Assistant

HO-CHUNK NATION ELECTION
BOARD, HO-CHUNK NATION

DECISION

Appellant,

v.

Case No: SU-98-08

AURELIA LERA HOPINKAH,

Appellee.

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

STATEMENT OF THE CASE

The Ho-Chunk Nation Supreme Court renders its decision as to the interpretation of Article VIII, Section 3, the Election Code of the Ho-Chunk Nation Constitution. That provision reads, "The Legislature shall enact an Election Code governing all necessary election procedures at least one hundred and twenty (120) days before the election." The Appellee, Ms. Hopinkah, filed her complaint with the Ho-Chunk Nation (herein HCN) Trial Court on November 16, 1998, challenging Legislative authority to amend law, Election Ordinance, in violation of Article VIII, Sec.3. The Trial Court scheduled a hearing on November 19, 1998 to address Appellee's complaint. On November 20, 1998, the Trial Court entered Judgement Granting Injunctive Relief and Remanded to Election Board. The Appellant, the HCN Election Board (herein Election Board), appealed the judgement as being unconstitutional. The Supreme Court's decision is based upon briefs submitted, trial court record, and Oral Arguments. It is the decision of the Supreme Court to **Reverse** the Trial Court's Judgement dated November 20, 1998.

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STATEMENT OF FACTS

This is a case where the Legislature removed a Legislator for cause, pursuant to Art. IX, Sec. 3, which created a vacant seat within the Legislature. According to Art. IX, Sec. 10(a), should a vacancy occur in the Legislature and,

“ If three (3) months or more remain before the next General Election, the Election Board shall call a Special Election in the appropriate District to be held within thirty (30) days” (emphasis added).

Ms. Hopinkah applied to the Election Board for nomination forms and was denied. Appellee, Ms. Hopinkah, contends that the Appellant, the Election Board, denied her the opportunity to seek election for the vacant seat within the Legislature. The Appellant denied Ms. Hopinkah’s nomination forms because she did not meet the residency requirements as set forth in the Amended and Restated Election Ordinance, September 1, 1998. The Appellee appealed the denial to the Election Board for reconsideration. On November 7, 1998, a hearing was conducted by the Election Board to reconsider Appellee’s appeal. In a letter addressed to the Appellee, dated November 9, 1998 the Election Board reaffirmed their decision that the Appellee does not meet the residency requirements.

On November 16, 1998, Appellee filed a complaint with the HCN Trial Court challenging that the Election Board utilized the September 1, 1998 Election Ordinance in violation of Art. VIII, Sec. 3. The Appellee contends that the one hundred and twenty (120) days had not lapsed for the September 1, 1998 amendment to the Election Code to be applicable. The Primary Special Election, in question, is scheduled for November 28, 1998. The Trial Court held a hearing on November 19, 1998 to address Appellee’s complaint. On November 20, 1998, Judge Greendeer-Lee’s Judgement Grants Appellee Injunctive Relief and Remand to Election Board. The Trial Court ruled that the one hundred and twenty (120) days in Art.VIII,Sec.3, applied to amendments of the Election Code. On Remand, the Election Board was instructed to utilize the January 14, 1997, Amended and Restated Election Ordinance, that the September 1, 1998 Election Ordinance was inapplicable.

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2 ISSUES
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4 **I. Whether the HCN Constitution, Article VIII, Section 3, which requires the Legislature to enact**
5 **an Election Code governing all necessary election procedures at least one hundred and twenty**
6 **(120) days before the election, also applied to all amendments to the Election Code.**

7 The Supreme Court disagrees with the Trial Court's interpretation of Article VIII, Section 3, to
8 include all amendments to the Election Code. The HCN Legislature enacted the Election Code on
9 February 10, 1995. Subsequent changes, amendments, were duly enacted on January 14, 1997, and
10 September 1, 1998, in accordance with their constitutional authority, Art.V. Sec.2(a) and Sec.3.

11 Due to lack of legislative history and testimony from the original framers of the HCN
12 Constitution, the Supreme Court interprets Art. VIII, Sec.3 as to its plain meaning\intent. This Court
13 looks to various resources for the common usage of certain provisional terms and its meaning.

14 The Supreme Court refers to Black's Law Dictionary , Pocket Version (1996), for the common
15 usage of the terms "enact" and "amend". First the term "enact" is "the action or process of making into
16 law," enactment of a legislative bill. The HCN Legislature, by an act of majority vote, enact bills into
17 law to govern affairs of the HCN. Second, "amend" is "to put right, to change". An amendment is "a
18 legislative change(or)...by adding provisions not in the original". In American Jurisprudence, 2d,
19 Constitutional Law, at 34 reads:

20 "Amendment is a change or addition within the lines of the original instrument
21 as it will affect an improvement or better carry out the purpose for which the
instrument was framed"(emphasis added)

22 The Legislative body amend existing law by altering the language of the original document to better
23 serve the HCN. Thirdly, election, in the singular tense, is an "act or process of choosing, by vote among
24 candidates to fill an office or position" American Heritage Dictionary, (19). Elections, in the plural
25 tense, pertains to more than one act or process of choosing. In the present case, the Election Code, is
26 in the singular tense, and pertains to a single document, an Election Code. The fourth term, "all"
27 Roger's Thesaurus, (Revised Pocket Edition), refer to" whole, total, entire, intact and uncut". The usage
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1 of "all" in Art. VIII, Sec.3, does not refer to a single act or process but refers to all procedures, the two
2 (2) types of elections, in the original Election Code. Other constitutional provisions deal with General
3 Elections and Special Elections separately.

4 The Legislative body has the authority "to make laws, including codes, ordinances, resolutions
5 and statutes" according to Art. V, Sec.2 (a). As part of their internal operating procedures, the
6 Legislatures adopted the "Bill Process Act" (herein BPA) on February 8, 1995. This BPA is the process
7 by which the Legislature enact a bill into law. An amendment to the original BPA was enacted through
8 Resolution 7/02/96D. This amended BPA states within item 3 that the "Legislature shall provide the
9 public reasonable notice"...of a proposed bill due to be enacted into law (emphasis added). The purpose
10 of such a notice is to inform the tribal members about the effect and content of the proposed legislation.
11 Furthermore, the BPA, states at item 6, "A bill shall be enacted into law upon a majority vote of the
12 Legislature" (emphasis added).

13 In this case, the Election Code was duly amended and enacted into law on September 1, 1998
14 in accordance with Bill Process Act. The amendments to the Election Ordinance were placed out for
15 public comments for a period of thirty (30) days per the HCN Legislative Notes dated December 9, 1997.
16 The Legislatures upon review of those public comments duly enacted the Amended and Restated
17 Election Ordinance on September 1, 1998, by a majority vote of eight (8) affirmative, one (1) opposing
18 and one (1) abstaining. The Supreme Court supports the "Bill Process Act" as it reassures the Ho-Chunk
19 Nation tribal members that the Legislative body cannot pass bills into law without public input, for or
20 against it, prior to any legislative enactment.

21 The Legislative body has the authority to amend existing laws. The amendments are intended
22 to improve and better carry out its original intent. The Legislative authorization in Resolution
23 09/01/98A states "the enactment of an Election Code at least one hundred and twenty (120) days before
24 the first election held under the existing constitutional structure" (emphasis added). The Resolution
25 further states, "the Legislature deems it necessary to amend the existing Election Code so as to codify
26 intervening judicial interpretation..." It is further resolved by majority vote, to be law of the land,
27 effective immediately. The Legislature did not change the constitutional provision but interpreted, and
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1 understood it to mean, the original Election Code was to be enacted one hundred and twenty (120) days
2 prior to the first election under the newly adopted HCN Constitution.

3 The Legislative body enacted the “original” Election Code on February 10, 1995, pursuant to Art.
4 VIII, Sec. 3. The Election Code is the law governing all necessary elections such as General Elections
5 which are conducted every June of the odd numbered years and the Special Elections when called for
6 by the HCN Constitution. The issue before this Court is whether the one hundred and twenty (120) days
7 apply to all enactment of amendments to the original Election Code. Absent any legislative history or
8 testimony from the original framers of the HCN Constitution, the Supreme Court interprets Article VIII,
9 Section 3 to mean “the original Election Code before the first election”. Any amendments to the
10 Election Code are not subject to the one hundred and twenty (120) day time frame.

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12 **II. Whether the Judiciary has the authority to enjoin the Special Election that the HCN**
13 **Constitution, Article IX, Section 10(a) requires shall be held within thirty (30) days.**

14 A Legislator was removed for cause, Art. IX Sec. 3, which created a vacant seat on the
15 Legislature. Vacancies are filled according to Art. IX Sec. 10 (a) that,

16 “If three months or more remain before the next General Election, the Election
17 Board shall call a Special Election in the appropriate District to be held within
18 thirty (30) days (emphasis added).

19 The term “shall” dictate a mandatory character to the provision. This mandates the Election Board to
20 conduct a Special Election within thirty (30) days of the Legislators removal. The Election Board has
21 an obligation to fill the vacancy by Special Election among qualified candidates. On November 20,
22 1998, the Trial Court enjoined the Special Election and Remanded to the Election Board to reconsider
23 the Appellee’s residency based upon the Amended and Restated Election Ordinance, January 14, 1997,
24 not the September 1, 1998 version.

25 The January 14, 1997 Election Ordinance, Sec. 3.02 (3), the Election Board “shall ensure that
26 all candidates meet the qualification for office”. Section 5.04, Residency Requirements for Legislators,
27 (a) “A candidate for Legislature shall be eligible to run for office in the District in which the candidate
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1 has resided for at least one (1) year. (b) "Residency" is defined as the place where the voter's habitation
2 is fixed. (c) Acceptable proof of residency shall include, but not limited to, utility bills, rental
3 agreements, or any other reliable documentation that demonstrates the voter's length of residence in the
4 District." Election Procedures, Sec. 11.12, Other Matters Decided by the Election Board, "any other
5 election matters not specifically addressed in this Ordinance shall be decided by the Election Board.
6 The decision of the Election Board shall be final." Unfortunately, the Appellee does not meet the
7 residency requirements, nor would the matter be subject to judicial review.

8 The Amended and Restated Election Ordinance (September 1, 1998), Sec. 5.05 (a) states "a
9 candidate for Legislature shall be eligible to run for office in the District in which the candidate has
10 resided for at least one (1) year immediately prior to filling the petition declaring his or her candidacy.
11 (b) "Residency" is defined as the physical address stated on the periodic Address Verification Forms
12 solicited by the Nation's Office of Tribal Enrollment with respect to per capita distribution...
13 Certification of Qualification, Sec. 5.06, states, "The candidate may appeal the decision of the Election
14 Board to the Trial Court within five (5) days of the decision only upon the grounds that it is inconsistent
15 with this Act and the Constitution.

16 The Trial Court misinterpreted Art. VIII, Sec. 3, to mean that the one hundred and twenty (120)
17 days applied to all amendments and enjoined the Special Election. The Trial Court ruled the September
18 1, 1998 Election Ordinance as inapplicable. The Trial Court's misinterpretation and misapplication of
19 existing law enjoined the Special Election contrary to Art.IX, Sec.10(a)

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22 **III. Whether the Judiciary can enforce the Election Board to act in violation of the Constitution
23 by enjoining a Special Election.**

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24 The Constitution is clear that the Election Board "shall" call a Special Election within thirty (30)
25 days to fill a Legislative vacancy, Art.IX, Sec.10(a). The Election Board had determined that the
26 Appellee was a resident of Area II and not Area V based on the documentation submitted. At the
27 November 7, 1998 Hearing for Reconsideration with the Appellee present, the Election Board

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1 reaffirmed that the Appellee did not meet the residency requirement for candidacy according the
2 applicable Amended and Restated Election Ordinance, adopted September 1, 1998.

3 The Trial Court failed to apply the well established standard before enjoining the Special
4 Election. In Warner V HCN Election Board, CV 95-03 (HCN Tr. Ct. June 26, 1995) the Judiciary must
5 apply a four (4) prong test before granting an injunction. Without satisfying the standard for granting
6 an injunction the trial court can not order the Election Board to violate duly enacted law.

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8 **IV. Trial Court Ruling was arbitrary as Appellee made no showing to meet the minimum test for**
9 **granting injunctive relief.**

10 The standard for granting injunctive relief has been set forth in Warner, et al V. Ho-Chunk
11 Nation Election Board, CV-95-03(HCN Tr. Ct. June 26, 1995), Order Granting Stay, as follows: (1) no
12 adequate remedy at law; (2) the threatened injury to the petitioner outweighs the harm of the injunction;
13 (3) the petitioner has a reasonable likelihood of success on the merits and (4) granting the injunction
14 serves the public interest.

15 The Appellee must prove the Election Board violated the law. The Appellee did not present any
16 new evidence to the Trial Court that the Election Board erred. The Election Board reviewed the
17 documentation that the Appellee submitted such as various invoices, bills, property taxes paid, income
18 tax forms and the HCN Address Verification Forms. The Election Board applied the law, Amended and
19 Restated Election Ordinance, September 1, 1998, and determined that the Appellee did not qualify as
20 a candidate.

21 The Appellee fails to prove that she was harmed by the actions of the Appellants' in this matter.
22 The Election Board in this case found conflicting documentation and had no recourse but to rely on the
23 Address Verification Forms. These Address Verification Forms are used for the HCN Per Capita
24 distribution and are generated by the HCN Enrollment Department every three (3) months. According
25 to the Amended and Restated Election Ordinance, (Sept. 1, 1998) Sec. 8.03, "the Enrollment Office
26 prepare and maintain a master list of all Members age eighteen (18) and over by District based upon
27 physical address appearing in Enrollment Records." Enrollment records are the Address Verification

1 Forms mailed to eligible tribal members, quarterly. Printed on these Address Verification Forms is a
2 "NOTE: Residential address/County will be used to establish residence for voting purposes". The
3 Appellee, on seven (7) of the Address Verification Forms submitted, attested that the information
4 contained in the forms was true and correct. The Appellee claimed as of July 3, 1997, that she resided
5 in Tomah, County of Monroe, up until September 23, 1998. The Election board relied on the List of
6 Eligible Voters prepared by the Enrollment Department and were correct that the Appellee did not meet
7 the residency requirements as stated in the September 1, 1998 Election Ordinance, Sec. 5.05.

8 Appellee failed to prove a likelihood of success on the merits. The residency requirement for
9 Legislator is one year in both the January 14, 1997 and September 1, 1998 Election Ordinances. The
10 Appellee failed to present new evidence that she was a resident of Madison, County of Dane, within the
11 one year requirement for candidacy.

12 Granting the injunction would not serve the public interest. The public interest would be to the
13 tribal members. The district tribal members affected, have a right to vote, in the Special Election were
14 hindered by an injunction. The residency requirement for eligible voters, the Election Ordinance (Jan.
15 14, 1997), Sec. 8.02, is one (1) year. In the Election Ordinance (Sept.1, 1998), Sec.8.02(a) amended
16 the residency requirement for voters to three (3) months. Allowing those tribal members, who relocate
17 from district to district, a greater opportunity to vote than the one (1) year clause. The three (3) months
18 amendment coincides with the "List of Eligible Voters" prepared by the Enrollment Department based
19 on the information contained in the Address Verification Forms.

20 A vacancy of legislative representation poses a unique concern especially during major "Gaming
21 Compact" negotiations. Tribal members should have fair representation when dealing with affairs of
22 the Ho-Chunk Nation. It is unfortunate that the Appellee was denied a right to campaign for the vacant
23 legislative seat but the Election Code has set standards to determine a tribal member's eligibility. The
24 Election Board followed those guidelines based upon our own governmental procedures to verify
25 residence. The most reliable is the Address Verification Forms that, we, as tribal members fill out on
26 a quarterly basis before a Notary Public attesting the information is true and correct.

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CONCLUSION

The Supreme Court interprets, Article VIII, Section 3, the Election Code provision to mean the original Election Code governing all necessary election procedures at least one hundred and twenty (120) days before the first election. The language in the HCN constitution uses the singular word, "election" and not "elections". The HCN Legislature enacted the original Election Code on February 10, 1995, to govern the General Elections and Special Elections within the HCN. Amendments to the original Election Code are not subject to one hundred and twenty (120) days as required of the first enactment. The Legislature duly enacted the Amended and Restated Election Ordinance on September 1, 1998.

The Supreme Court on December 3, 1998 Granted a Stay Pending Appeal. The Court Stayed the Trial Court Judgement of November 20, 1998, Granting Injunctive Relief and Remand to Election Board to utilize the inapplicable January 14, 1997 Election Ordinance. The Stay is hereby lifted. The Special Election proceeded as scheduled governed by the applicable law, the September 1, 1998 Amended and Restated Election Ordinance. The September 1, 1998 Election Ordinance shall govern all election procedures from its effective date until amended and enacted by a majority vote of the Legislative body.

IT IS SO ORDERED. PER CURIAM.

Dated this 7th day of April, 1999.


Debra Greengrass, Associate Justice
Ho-Chunk Nation Supreme Court