

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
SUPREME COURT

MAY 11 1998

Willa Redcloud
Clerk of Court/Assistant

DEBRA KNUDSON,
Appellant,

vs.

RECUSAL ORDER
SU98-01

HO-CHUNK NATION TREASURY DEPARTMENT,
Appellee.

This matter came before the full Court on a telephone conference call on Saturday, May 2, 1998 based upon the Appellee's Notice and Motion for Recusal and Affidavit of Michael P. Murphy in Support of Appellee's Motion for Recusal filed on April 30, 1998. The Motion sought the recusal of Associate Justice Rita Cleveland pursuant to the Ho-Chunk Nation Rules of Appellate Procedure, Rule 4. The grounds for the Motion were based upon Justice Cleveland's previous work relationship with Debra Knudson (the Appellant) and Millie Decorah who was a material witness for the Appellee at the time of the trial. The supporting affidavit indicated that both the counsel for the Appellant and for the Appellee "agreed that such a recusal would be better in order to avoid the appearance of impropriety." (Paragraph 4, Affidavit of Michael P. Murphy in Support of Appellee's Motion for Recusal, hereinafter "Affidavit") The Affidavit further noted "that Justice Cleveland was named as a witness for Debra Knudson on her Preliminary Witness List of July 23, 1997." (Paragraph 6 of Affidavit)

The full Court initially discussed the prior working relationships of Justice Cleveland and the litigants in the case on April 14, 1998. The Court agreed that Justice Cleveland should disclose her respective relationships with the individuals to the attorneys. On April 16, 1998, Justice Cleveland wrote a letter to Mr. Michael Murphy and Mr. Mark Goodman which disclosed that Justice Cleveland had been "Millie Decorah's immediate supervisor" from July 1995 through March 1996. During that same period, Justice Cleveland was in the "chain of command" for

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Debra Knudson. Justice Cleveland's letter indicated that the parties could file a Motion for Recusal by April 30, 1998.

Upon careful consideration of the matter, Chief Justice Mary Jo Brooks Hunter and Associate Justice Debra C. Greengrass **GRANT** the Motion for Recusal. Associate Justice Rita Cleveland dissents from the decision.¹

RECUSAL DECISION

The issue presented is whether or not Justice Rita Cleveland should recuse herself on this matter in order to avoid an appearance of impropriety. The motion was filed as a discretionary recusal under Rule 4 of the Ho-Chunk Nation Rules of Appellate Procedure which states in part, "...a party may request recusal of a Justice by Motion to the Chief Justice of the Supreme Court with Notice given to all parties." Upon such a motion, the full Court decides upon the recusal request. In this case, Justice Cleveland has declined to recuse herself for reasons stated in her dissenting opinion. The remainder of the Court has decided to recuse Justice Cleveland to avoid an appearance of impropriety and to preserve the integrity of the Court.

This Court has addressed the issue of the necessity of avoiding an appearance of impropriety in past decisions. In the case of Ho-Chunk Nation Legislature v. Lowe, SU96-01 (Sup. Ct. Feb. 26, 1996), this Court adopted a standard "that Ho-Chunk Nation Judges shall avoid impropriety and the appearance of impropriety in all of their conduct and activities." In a later decision, the Court referred to the lack of written Rules of Judicial Ethics stating,

¹Although other jurisdictions may allow for an individual jurist to make the decision whether or not to recuse himself or herself, the Ho-Chunk Nation Constitution requires that "[A]ll appeals before the Supreme Court shall be heard by the full Court." HCN Const., Art. VII, Section 14. Therefore, the Supreme Court has decided motions of recusal as "full court" decisions in the same manner as all other motions decided on appeals. In cases where a Justice has decided to recuse him/herself pursuant to the initial phrase of Rule 4, "[A] Justice may recuse him/herself...", the remaining Justices have respected that decision and voted in favor of the recusal as well. See Millie Decorah and Sandy Martin vs. Joan Whitewater, SU98-02 (HCN Sup. Ct., 4/7/98); Karena Day vs. Berna Big Thunder, et. al., SU96-13 (HCN Sup. Ct. 12/26/98).

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“[W]hether or not this Court has adopted Rules of Judicial Conduct is irrelevant. A judge must act in a fair and neutral manner. The Ho-Chunk Nation Tribal members deserve to have judicial officers who act in a manner consistent with the Ho-Chunk Nation Constitution.” Ho-Chunk Nation Legislature v. Lowe and Lowe, SU96-09 (Sup. Ct., Dec. 15, 1996)²

It is the duty of this Court to provide litigants with a court system which is fair. That is, the Court must not only be fair, it must also look fair to those outside of the system. To project the image of fairness requires that this Court avoid looking unfair. That is, the Court must avoid an appearance of impropriety. The Court must not look as if it is acting in an improper way.

The full Court must address the issue in an objective review for recusal rather than looking at the issue in a subjective manner which may be utilized in other jurisdictions. The Ho-Chunk Nation Constitution’s requirement of full Court appraisal dictates an objective approach to the issue of recusal. To determine whether an appearance of impropriety exists, the question becomes whether or not a reasonable person who looks at the circumstances would question the judge’s ability to be impartial. In this case, the attorneys for the Appellee and Appellant answered that question in the affirmative as evidenced by their agreement that Mr. Murphy would file the Motion for Recusal.³ Thus, Justice Cleveland must recuse herself from this matter.

²The Supreme Court recognizes the immediate need for adopting Rules of Judicial Ethics which are currently before the Court for drafting. Although law trained judges are required to have taken a course and an examination in Professional Responsibility, the Ho-Chunk Nation Constitution allows for judges and justices who are not law trained and, therefore, may not have any prior exposure to the Code of Judicial Conduct or other guidance for judicial ethics. The Ho-Chunk Nation Supreme Court will issue a draft of the Rule of Judicial Ethics for comment in the near future.

³The working relationship in this case is distinguishable from the familial relationships considered in In Re Rick McArthur, SU97-07 (HCN Sup. Ct., Feb. 27, 1998) which concerned Justice Cleveland’s relationship as first cousin to Judge Joan Greendeer-Lee and as to Justice Cleveland’s relationship with Mr. Rick McArthur as Justice Cleveland’s sister’s husband, that is, her brother-in-law. The counsel from the Department of Justice brought the Motion for Recusal on behalf of Judge Greendeer-Lee but indicated an intention to withdraw the Motion at oral

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It is important to note that it is not that Justice Cleveland would not be able to be impartial. Rather, it is whether or not it would appear from the circumstances that she might not be able to be impartial. Depending on the final decision on the matter, either side could point to Justice Cleveland's working relationship with the other litigant as a basis for why they did not prevail on the matter.⁴ Such an appearance does not promote a sense of fundamental fairness in the judicial process. To avoid the appearance of impropriety, this Court hereby **ORDERS**:

1. That the Appellee's Motion for Recusal is **GRANTED** and Justice Rita A. Cleveland is recused from this case;
2. That this Court requests the Ho-Chunk Nation Legislature to appoint a Justice Pro Tempore pursuant to Article VII, Section 13 of the Ho-Chunk Nation Constitution;
3. That this appeal will be addressed after a Justice Pro Tempore is appointed to allow for full Court consideration as required by the Ho-Chunk Nation Constitution.

IT IS SO ORDERED. EGI HESHKEKJENET.

Dated this 11^m of May 1998.

argument. The Elders' advice was sought due to the number of cases within the Ho-Chunk Nation Court system that Judge Groendee-Lee and Advocate McArthur routinely are a part of within the court system. Unlike the argument made by the dissenting opinion, the relationships are quite dissimilar from Justice Cleveland's working relationships with the actual litigants in this matter. In fact, the underlying lack of procedures or other factual matters bearing on the instant case are matters which may have been known to Justice Cleveland in this matter. Due to her familial relationships in In Re Rick McArthur alone, factual matters of the case would not have been within her knowledge simply by reason of the relationship. Since she was initially listed as a witness, one party did believe that Justice Cleveland had some knowledge relevant to the underlying case. Thus, the relationships in this case are more problematic than in McArthur.⁴ For example, if the Appellant Knudson prevailed, it could appear to the Appellee that Justice Cleveland had been influenced by being in the "chain of command" over Ms. Knudson. On the other hand, if the Appellee prevails, Ms. Knudson could construe that Justice Cleveland's prior direct supervision of Ms. Millic Decorah influenced Justice Cleveland's decisionmaking. The two possibilities strengthen the argument for recusal to avoid the appearance of impropriety.

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Mary Jo Brooks Hunter
Hon. Mary Jo Brooks Hunter, Chief Justice
Ho-Chunk Nation Supreme Court

Debra C. Greengrass
Hon. Debra C. Greengrass, Associate Justice
Ho-Chunk Nation Supreme Court

MAY 11 1998

Wileen Red Cloud
Clerk of Court/Assistant

Dissenting Opinion - Motion for Recusal in SU 98-01

Debra Knudson, Appellant

v

Ho-Chunk Nation Treasury Department, Appellee

On Tuesday, April 14, 1998 a Conference call was scheduled at the request of Justice Debra Greengrass. Since my name appeared on the preliminary witness list in the above named case, Justice Greengrass questioned whether or not I should recuse myself from the case. Justice Greengrass and Chief Justice Hunter agreed that I write a letter to the Attorneys disclosing my former work relationship with the Appellant and Millie Decorah, stating that if they felt it necessary, to file their Motion for Recusal by April 30, 1998. Although I disagreed with recusing from the case, I was in agreement with the disclosure and filed my letter on April 16, 1998.

On April 30, 1998, Attorney for the appellee, Michael Murphy filed a Motion for Recusal based on *HCN Rule of Appellate Procedure 4*.

On April 31, 1998, Chief Justice Hunter scheduled a conference call for Saturday, May 2, 1998 at 9:00 a.m. The call was scheduled to discuss the Motion for Recusal submitted by Attorney Murphy. During this meeting, Chief Justice Hunter and Justice Greengrass voted to recuse me from the case.

My dissent is based on the two very distinct types of recusals: Mandatory Recusal and Discretionary Recusal.

A Mandatory Recusal requires the existence of a direct personal or financial interest in any matter before the Judiciary. This is consistent with *Coalition for a Fair Government II v. Chloris Lowe, Jr., & Kathyleen Lone Tree-Whiterabbit, SU 96-02*, which determines that a direct personal or financial interest involves matters which are occurring presently. Both Attorneys agreed that a direct personal or financial interest does not exist in the present case. My fellow Justices did not base their decision on a direct personal or financial interest either. Failure to recuse on a Mandatory Recusal carries with it a penalty of removal.

A Discretionary Recusal is at the discretion of the individual justice. There is no penalty attached for non-recusal on matters determined to be discretionary. Up until now, a discretionary Recusal was the sole decision of the Justice subject to an appearance of impropriety. This holds true in other jurisdictions as well. I am well aware that HCN is not bound by rules of other jurisdictions, however, the lack of rules provides for inconsistency in the decision making process. *HCN Constitution, Article VII, Section 14* states that all appeals before the Supreme Court shall be heard by the full court. The full Court considered the motion for recusal and with that I should have been able to make my decision on whether or not I, as an individual Justice, could conduct myself in a fair and neutral manner in this case.

In *HCN Legislature v. Lowe, SU 96-01*, this Court held that a judge must recuse himself on a case where there is an *ongoing event* involved which could lead to an appearance of impropriety. Yet in the current case, the majority Justices voted to recuse me from the case based on a prior work relationship with Debra Knudson, Appellant and Millie Decorah, a key witness for the Appellee. As noted in *IN RE Rick McArthur, SU 97-07*, since "relationships" have been raised on both sides, one could view each side as somewhat canceling both sides out or be equally relative.

Also taken into consideration with this decision, is the fact that my name appears on the Appellant's preliminary witness list. It should be so noted that I was not actually called as a witness to provide testimony or enter evidence. Moreover, any testimony I might have added was based on my previous position as Finance Director, a position I held from July 1995 through March 1996. Furthermore, I had no direct knowledge of the case which was initiated a year after my departure from the Treasury Department. Therefore, I was not a part of the case as Justice Greengrass reasoned in her decision for Recusal.

The fact that the appearance of my name on the preliminary witness list was given consideration could have a detrimental impact in future cases. This provides the Attorneys with the ability to control the composition of the Court by submitting preliminary witness lists which include the names of Judges or Justices. It also gives

the appearance that by mutual agreement by the representing Attorneys, they will be able to determine whether a Judge or Justice is able to use his/her own discretion when making a decision on a case. The position of the majority Justices is that because the Attorney's agree it is a discretionary recusal, then it is. There is no basis for the Justices voting to remove me on a discretionary recusal.

In conclusion, the Traditional Court Elders offered guidance in *IN RE Rick McArthur, SU 97-07*, regarding relationships in which, the relationships addressed were much more binding than the present case. The Traditional Court Elder concluded that I would be able to conduct myself in a fair manner despite the relationship. Id. It is my opinion that when you have Judges and Justices that are able to conduct themselves in a fair and neutral manner, this is reflective on the entire court as decisions are made by all Justices of the Court. In my capacity as an Elected Justice, it is my responsibility to actively participate in the decision making process of the Supreme Court. Through the action taken by Justice Greengrass and Chief Justice Hunter, they have effectively censored me out of this case for unfounded reasons, thereby prohibiting me from fulfilling my responsibilities which I took an oath to do.

For these reasons I respectfully dissent.

Dated this 11th day of May 1998.

Rita A. Cleveland
Honorable Rita A. Cleveland, Associate Justice
HCN Supreme Court