

IN THE HO-CHUNK NATION SUPREME COURT

JAN 10 1997

T. P. [Signature]
Clerk of Court/Assistant

LOA L. PORTER,
Plaintiff/Appellee,

v.

DECISION

CHLORIS LOWE, JR.,
Defendant/Appellant.

SU96-05

This matter came before the full Court on a telephonic hearing on December 31, 1996 based upon the Appellant's brief, exhibits and transcripts from the trial court. The Appellee did not submit an appellate brief and the Court is unable to allow more time to pass without a decision on this matter. Based upon the record before us and without hearing oral argument, this Court hereby **REVERSES** the rulings of the court below and **DISMISSES** the matter due to lack of standing by the plaintiff below.

BACKGROUND

This case was initially before this Court in August of 1996 when the Appellee filed a Notice of Appeal on the July 18, 1996 Order (Re: Motion for Reconsideration and Motion to Dismiss) which is signed and dated on July 19, 1996. At that time, this Court denied the appeal because the interlocutory appeal was not final in nature. Since it was not an issue that was final at that point, the matter is now before this Court as a portion of this appeal.

On October 14, 1996, an appeal was filed by the Appellant which appealed the decisions of the trial court in the prior July 18, 1996 Order as well as the October 2, 1996 Judgment. The Appellant filed his Appellant's Brief in Chief on November 19, 1996 in accordance with this Court's November 7, 1996 Scheduling Order. To date, the Appellee has not filed a Brief. Oral argument was not requested on this matter.

The Appellant raises the following issues:

1. Whether or not the trial court erred in finding that the Appellee Porter had standing to bring the suit?
2. Whether or not the trial court abused its discretion and/or committed errors of law in the October 2, 1996 Judgment?

ANALYSIS

1. LOA PORTER DID NOT HAVE STANDING TO BRING THE ACTION. THE HO-CHUNK NATION LEGISLATURE IS THE PROPER PARTY TO REVIEW THE ACTION OF THE EXECUTIVE BRANCH ON THIS MATTER.

A. Loa Porter did not have standing to bring this action as an individual. The Ho-Chunk Nation Legislature is the proper party in the instant case. The Legislature has reserved their power to deal with such actions by the Executive Branch as stated in the Ho-Chunk Nation Constitution at Article V, Section 2, subsection (b), to wit, "the Legislature reserves the power to review any action taken by virtue of such delegated power." The delegated power being the power of the Executive Branch to administer departments of the Ho-Chunk Nation. The Legislature has the power to enact legislation to establish Executive Departments. To correct the action complained of in this case--the restructuring of departments under the supervision and administration of the Executive Branch--the Ho-Chunk Nation Legislature has the power to enact legislation to establish, or restructure, Executive Departments. Under the powers delegated to the Ho-Chunk branches of government by our Constitution, it is not for the Judiciary to establish or re-establish departments anymore than it is for the Executive Branch to do so. Rather, that power is enumerated in our Constitution that "[T]he Legislature shall have the power...(b) [T]o establish Executive Departments, and to delegate legislative powers to the Executive branch to be administered by such Departments, in accordance with the law; any Department established by the Legislature shall be administered by the Executive; the Legislature reserves the power to review any action taken by virtue of such delegated power." If the Executive Branch acted

beyond the limitations of the Constitution, it was for the Legislative body to seek redress. Such redress would seem to be in the form of legislative measures which are not within the powers of the judiciary branch. Furthermore, the Legislature could have taken corrective measures by enacting legislation as allowed under Article V, Section 2, subsection (a) without utilizing the Court. Apparently, the Legislature chose not to take such steps in this instance. This Court is unclear as to why such action was not taken by the Legislative branch but such speculation is beyond the scope of this review.

B. Loa Porter did have a personnel issue as stated in the Order. However, it is clear that the issue was one of an individual's personnel issues. As the lower court stated, "Ms. Porter's allegations that the reorganization impaired her ability to do her job by causing emotional turmoil, confusion about the chain of command, chaos within the department and uncertainty regarding her future employment...is clearly personal to her." Order (Re: Motion for Reconsideration and Motion to Dismiss: dated July 13, 1996, page 9. Those types of matters require the individual to seek redress in accordance with the laws of the Ho-Chunk Nation.

The lower court correctly stated that "[T]he Personnel Procedures governs all employment related actions. The HCN (sic), as the employer, and the HCN (sic) employees are obligated to abide by rules set forth in the Personnel Procedures." Judgment dated October 2, 1996, page 16. Further, the lower court held that "the defendant [President Lowe] is within his inherent power to recommend changes or to remove and (sic) Executive Director." Judgment dated October 2, 1996 at page 15.

Given that holding, Loa Porter's issues were in the nature of a personnel issue. The Ho-Chunk Nation Legislature has enacted Personnel Policies and Procedures which are applicable to all employees of the Ho-Chunk Nation. The Personnel Policies and Procedures provide for employees to make grievances within certain codified rules as to issues specifically outlined by the trial court as being particular to Ms. Porter. Why is Ms. Porter given special treatment and allowed to bypass the administrative process to seek redress when all other employees of the Ho-Chunk Nation are required to comply with that process? This Court cannot

endorse such disparate treatment. All Ho-Chunk Nation employees are required to comply with the administrative process enacted by the Ho-Chunk Nation Legislature. Therefore, Ms. Porter does not have standing to bring a lawsuit on a personnel matter where she has not initially followed the legislatively enacted administrative process of the Ho-Chunk Nation Personnel Policies and Procedures.

C. An individual may not seek redress through the judiciary until they have exhausted their administrative processes. The situation of Loa Porter is distinguishable from the case previously heard by this Court which involved the Coalition for Fair Government II. This Court did not state expressly the basis for allowing standing for those individuals. The rationale was that the individuals in that case had attempted to seek redress through the proper channels before filing a lawsuit. They attempted to participate in the process pursuant to the Ho-Chunk Nation Constitution, Article IV, section 1 by attending the General Council. They sought to have their concerns addressed in a manner consistent with the laws of the Ho-Chunk Nation. When they were dissatisfied with the final result of that process, they thereafter sought redress in the judicial forum.

In the case before us, Ms. Porter did not participate in General Council as to the issues. Nor did Ms. Porter avail herself of the administrative process which has been set out by legislative enactment. Rather, she immediately filed a lawsuit prior to utilizing the process which has been mandated by the Ho-Chunk Nation Legislature as a basis for Ho-Chunk Nation Employees to seek redress as to issues concerning them in the workplace.

D. The Judiciary may hear all cases and controversies arising under the Constitution, laws, custom and traditions of the Ho-Chunk Nation but only insofar as they are cases and controversies properly before the courts. In this case, the trial court judge who signed the July 18, 1996 Order on July 19, 1996 states that the standing issue is "based on the elements set forth in the February 23, 1996 decision on standing." A review of the trial record reveals no such order. However, this Court does take judicial notice of the March 1, 1996 Order (Denying Motion to Dismiss and Reassigning Case) as being the decision that is referenced. In the March

1, 1996 Order, the lower court holds that "[I]t is first for the courts to decide whether the laws of the Nation are legal or have been followed or properly followed. Had the Legislature acted, it may have mooted this case. The Legislature's failure to act or take political action on a perceived or actual reorganization does not mean the Judiciary must abdicate its roll if a case and controversy within the jurisdiction of the Courts is presented. The Court finds (sic) that the plaintiff does have standing to pursue this action. Defendant's Motion to Dismiss is denied." March 1, 1996 Order at page 4.

The Judiciary does have the power to interpret and apply the Constitution and laws of the Ho-Chunk Nation. Ho-Chunk Nation Constitution, Article VII, Section 4. The Trial Court does "have original jurisdiction over all cases and controversies...**arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation.**" Ho-Chunk Nation Constitution, Article VII, Section 5, subsection (a). The Ho-Chunk Nation Constitution states early on that "[N]o branch of the government shall exercise the powers or functions delegated to another branch." Ho-Chunk Nation Constitution, Article III, Section 3.

In this case, the Judiciary cannot take on a case which is a personnel matter for an individual until after the person has exhausted the administrative process which has been set out by law by the legislative branch. Further, the Judiciary cannot decide to hear a case simply because the proper party, here the Ho-Chunk Nation Legislature, has not "acted". To do so is to have the Judiciary exercising the powers or functions delegated to another branch of the Ho-Chunk Nation government. That would violate the Ho-Chunk Nation Constitution.

We are a nation in transition. Our Constitution is new and it is being tested. However, we have to be cognizant of the reality of the separation of powers. For the Judiciary, it is necessary for us to adopt case law and precedent as well as rules to guide the court in its infancy. To that end, this Court is basing this decision on an effort to provide some direction as to when parties have standing as well as to what a case and controversy is for purposes of jurisdiction. This Court's function is to interpret our Constitution. To that end, it is unfathomable to believe that the intention of the cases and controversies clause was to allow in each and every action that is

brought to the lower court. Rather, the Ho-Chunk Nation Constitution modifies that clause by referring to cases "arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation. We interpret that to mean that cases and controversies must first arise from a process or law of the Ho-Chunk Nation. That is, a personnel matter should be dealt with as an issue within the Ho-Chunk Nation Personnel Policies and Procedures as mandated by the Ho-Chunk Nation Legislature. Issues of policy within the Nation must be first addressed by individuals through the General Council as mandated by the Constitution. Ho-Chunk Nation Constitution, Article IV, Section 3, subsection (a). The issues of the actions of those delegated legislative powers are to be reviewed by the Legislature. Ho-Chunk Nation Constitution, Article V, Section 2, subsection (b). Those are a few examples of the initial avenues of addressing a case and controversy prior to it becoming justiciable. After a case or controversy has arisen through the proper channels, then the Judiciary has the ability to address the matter. Not before.

CONCLUSION

For the foregoing reasons, this Court hereby REVERSES the July 18, 1996 Order signed on July 19, 1996 as well as the March 1, 1996 Order as they relate to the issue of standing. Because we hold that the plaintiff below did not have standing to proceed, the case is dismissed. Because the case is dismissed, we do not reach the merits of the case which were in the October 2, 1996 Judgment.

Since this Court views the matter as a personnel issue for the plaintiff below, we hold that any personnel grievance deadlines which were initially available to her will begin to toll with the date that this decision is filed.

REVERSED.

IT IS SO ORDERED. EGH HESHKEKJBNIT.

Dated this 8th day of January 1997.

By the Court:

Debra C. Greengrass
Debra C. Greengrass, Associate Justice

Forrest Whiterabbit
Forrest Whiterabbit, Associate Justice

Mary Jo Brooks Hunter
Mary Jo Brooks Hunter, Chief Justice

FILED
IN THE HO-CHUNK NATION
SUPREME COURT

JAN 10 1997

T. Pettibone
Clerk of Court/Assistant

CERTIFICATE OF SERVICE

I, Tari Pettibone, Clerk of the Ho-Chunk Nation Supreme Court of the Ho-Chunk Nation, do hereby certify that on the date set forth below I served a true and correct copy of the attached paper filed in Case No. SU96-05, by the United States Postal Service, upon all persons listed below:

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Date: 1/10/97

T. Pettibone
Tari Pettibone, Clerk
Ho-Chunk Nation Supreme Court