

IN THE
HO-CHUNK NATION SUPREME COURT

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

OCT 28 1997

Wileen Red Cloud
Clerk of Court/Assistant

HO-CHUNK NATION ELECTION BOARD,
Appellant,

v.

ROBERT ANTHONY MUDD,
Appellee.

SU97-05
DECISION

This matter came before the full Court by telephonic conference call on Monday, October 27, 1997 upon the submission of briefs filed by the Appellant and Appellee. Upon review of the full record below of Trial No. CV-97-129, this Court hereby **AFFIRMS** the Judgement dated October 3, 1997 signed by the Honorable Mark Butterfield.

This case arises out of the Special Election held on September 13, 1997 to elect a legislative representative to the Ho-Chunk Nation Legislature. The Special Election was held to fill the District V (also referred to as the At-Large area) seat which had been vacated by the resignation of Christine Steeples on August 19, 1997. Based upon the Ho-Chunk Nation Constitution, the Election Board must call a Special Election within thirty (30) days of a vacancy which occurs three months or more before the end of the term. HCN Const., Art. IX, section 10(a). The Ho-Chunk Nation Election Board certified seven candidates for the Special Election of September 13, 1997.

The Ho-Chunk Nation Election Board convened a meeting on Sunday, September 14, 1997 to certify and tally the election results. On September 15, 1997, Vaughn C. Pettibone, the Election Board Chairperson, issued a Certification of the September 13, 1997 Special Election. The certification of Mr. Harry Steindorf as Area V Legislator was based upon the "Motion by Ruth Decorah to accept the results of Harry Steindorf by plurality of the September 13, 1997, Special Election due to the Special Election of Shirley Lonetree's results of not having the 50 +

1. Also, area V does not have representation at this time. Second by Katie Funmaker. 8 (Berefsky, Lonetree, Hillmer, Funmaker, Winneshick, Sprain, Mallory and Ruth Decorah)-0-0. Motion Carried." The Certification Notice indicated that challenges to the election results "in Ho-Chunk Tribal Court is September 25, 1997 by 4:30 PM."

A Complaint signed by Robert Anthony Mudd and dated September 19, 1997 was filed on September 18, 1997. A Motion for Expedited Hearing was filed on September 18, 1997. On September 22, 1997, the Ho-Chunk Nation Election Board filed an Answer and a Motion for Summary Judgement. A scheduling hearing was held on September 23, 1997. On September 30, 1997, a hearing was held before the Honorable Mark Butterfield for the purpose of hearing argument. That hearing resulted in the Judgement filed October 3, 1997 which is being appealed.

ISSUES ON APPEAL

I. WHETHER OR NOT THE TERM 'MAJORITY VOTE' MEANS GREATER THAN FIFTY PERCENT OF THE ACTUAL VOTES CAST WHEN APPLIED TO A SPECIAL ELECTION?

Appellant Ho-Chunk Nation Election Board concedes that the prior court cases are binding but argues that the *stare decisis* is binding only in the case of a General Election. *Stare decisis* is the policy of courts to stand by prior established precedent. In this instance, the precedent has been established that "majority is defined as 'greater than fifty (50) per cent of the vote'" as this Court held in our first decision. See, Jones v. HCN Election Bd. and Lowe, CV-95-05 (HCN Tr. Ct. July 6, 1995), *aff'd.*, (HCN Sup. Ct. Aug. 15, 1995) The question then becomes whether or not that rule is applicable to Special Elections in the Ho-Chunk Nation?

The answer to that question is that the definition of majority which is applicable in general elections is also applicable to special elections. The Ho-Chunk Nation Constitution established two types of elections which could be held in two different instances. Ho-Chunk Nation Constitution, Article VIII, sections 1 and 2. The General Election under section 1 creates the election which is to be held at regular intervals to fill offices as vacancies regularly occur. Section 2 which covers Special Elections was created to provide a process for holding elections

which are "special". One of the definitions in Webster's Dictionary for "special" is "of or for a particular purpose." That is, elections which are "specially" called for by the General Council, the Legislature, or by the Constitution or an appropriate ordinance. Neither section specifies that the procedure used to determine the results of the election should differ. Although the counsel for the Ho-Chunk Nation Election Board argues that silence as to majority vote requirement for special elections means that such a definition is inapplicable, this Court would look to the common sense interpretation that such an omission reinforces the need to have the same definition applied to each of the methods of establishing an election--general or special. Such a common sense interpretation is necessary to protect the rights of persons within the jurisdiction of the Ho-Chunk Nation to equal protection of our laws. Ho-Chunk Nation Constitution, Article X, Section 1, (a) (8).

It is incumbent upon this Court to ensure that all classes of constituents, whether in District II or District V, be provided the same mode of procedure in the election process. Constituents of all districts should be able to access the same electoral process.

This Court cannot uphold a practice which would grant an elected seat to one individual with a plurality vote such as Mr. Steindorf but, on the other hand, require that another individual, such as Mr. Lonetree, be required to win by a majority vote.¹ We hold that all candidates for office who are running in either a General Election or a Special Election shall be required to win by fifty (50) per cent or greater of the votes actually cast. The current Ho-Chunk Constitution which revised our past election procedures was created in part to rectify the past injustices which had occurred in the election process. It is crucial that the Ho-Chunk Constitution be applied in a

¹Some of the confusion about the use of the plurality vote began with the Special Election of Mrs. Shirley Lonetree. The Ho-Chunk Nation Election Board looked to its own precedent and applied it in this case. The Special Election of Mrs. Lonetree was not challenged and therefore, neither this Court or the Trial Court was able to rule on the use of the plurality vote method. However, the Election Board's continuous misapplication of the plurality rule can be understood when no one comes forward to challenge the error as has occurred in this case. Neither the Ho-Chunk Nation Trial Court or the Supreme Court may decide an issue which is not put before it although the action may be a deviation from precedent.

manner which allows for all candidates for office to have the same requirements for attaining an office. *Ibid.*, *Jones*, at p. 3.

The Trial Court Judgement characterizes the Ho-Chunk Nation Election Board as stubbornly resisting the majority vote interpretation. Although this Court cannot alter that portion of the Trial Court's Judgement, we respectfully disagree with the lower court's assessment of the members of the Election Board. This Court views the Ho-Chunk Nation Election Board as being comprised of fellow members of our Nation who are also trying to apply a new Constitution, a revised Election Ordinance and countless court decisions. It is our opinion that the Election Board members are putting forth their best efforts in uncharted territory. In addition, their past action in this area went unchallenged which might have misled the members of the Election Board in their subsequent decisions.

This Court hopes that the members of the Election Board were simply "doing their jobs" in the best way that they understood that those jobs were to be carried out. This Court is reluctant to accept the view that the members of the Election Board are purposely resisting the precedents previously set out by this Court and the Trial Court. Rather, we view the Election board members as being in a process of learning. One, the Election board is learning what the role of the election process is within the Ho-Chunk Constitution. Second, the Election Board is learning what the effects of the legal interpretations of that process are that stem from the Constitution. Although the Trial Court was in a position to hear from the litigants, it is not evident from the record below that the lower court based that portion of the decision on evidence to that effect. It is our hope that the members of the Election Board who are entrusted with overseeing our electoral process are NOT "favoring some candidate over others and failing to be (sic) uphold the appearance of impartiality so important to the electoral process." See footnote 2, page 8, *Robert Mudd v. HCN Election Bd.*, CV 97-129.

Although the Ho-Chunk Nation Election Board argues that the Board may decide any matters not addressed in the Election Ordinance with such decisions being final, the Certification of Vaughn Pettibone states otherwise. The Ho-Chunk Nation Election Board recognized that the

Special Election could be challenged as evidenced by their own Certification Notice which informed potential challengers of September 25 as the final day to challenge the result in the Ho-Chunk Tribal Court. See, Exhibit 'B', CV97-129. It appears that the Election Board acknowledged that their final decisionmaking rested only within their own administrative realm. That view is consistent with this Court's view that any further challenges of an election must be made in the courts after the administrative process has been exhausted.

II. WHETHER THE TRIAL COURT PURSUANT TO THE HCN CONSTITUTION HAS THE AUTHORITY TO COMPEL A RUN-OFF ELECTION CONTRARY TO ELECTION ORDINANCE SECTION 13.01?

Appellant Ho-Chunk Nation Election Board questions whether the Trial Court had the authority to compel a run-off election contrary to Election Ordinance Section 13.01. That section states "In the case of a tie between one or more candidates, a Special Runoff Election shall be held to break the tie." That section refers to situations in which two candidates have received the same number of votes in an election. For the purposes of the facts in this case, that section is irrelevant.

Appellant correctly questions the actions of the Trial Court pursuant to the Ho-Chunk Nation Constitution. Actions of the Trial Court which are prescribed by the Constitution are addressed at Article VII, Section 6(a), which states: "...The Trial Court shall have the power to issue all remedies in law and in equity..." (emphasis added) In this case, the Ho-Chunk Nation's laws do not specifically state that the remedy to be applied to correct an election by plurality vote. However, under the Ho-Chunk Nation's notion of fairness, the Trial Court has fashioned an equitable remedy to allow for all classes of constituents to select their elected representatives by the same mode of procedure. Here, the remedy fashioned in equity by the Trial Court to uphold the notion of fairness was to order a run-off election based upon the Constitutional powers of the Trial Court.

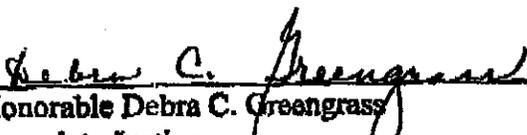
Therefore, we hold that the Trial Court did not act contrary to Section 13.01 of the Election Ordinance because it was not applicable to the remedy fashioned by the Trial Court. The Trial Court acted within the prescribed powers of the Ho-Chunk Nation Constitution.

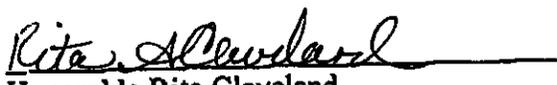
CONCLUSION

In accepting this case for appeal, this Court ordered that the Judgement dated October 3, 1997 and signed by the Honorable Mark Butterfield was stayed pending this appeal. The Stay of the Judgement is lifted. The decision of the Trial Court in Robert Anthony Mudd v. Ho-Chunk Nation Election Board, CV 97-129 (HCN Tr. Ct., Oct.3, 1997) is **AFFIRMED**.
IT IS SO ORDERED. EGI HESHKEKJENET.

Dated this 28th day of October 1997.

By the Court:


Honorable Debra C. Greengrass
Associate Justice


Honorable Rita Cleveland
Associate Justice


Honorable Mary Jo Brooks Hunter
Chief Justice
Ho-Chunk Nation Supreme Court