

FILED
IN THE HO-CHUNK NATION
TRIAL/SUPREME COURT

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Marcella Cloud
Clerk of Court/Assistant

**IN THE HO-CHUNK NATION
SUPREME COURT**

Coalition for a Fair Government II,

Plaintiff/Appellee,

v.

Chloris A. Lowe, Jr. and Kathyleen Lone Tree-Whiterabbit,

Defendants/Appellants

No. SU 96-02

MEMORANDUM AND ORDER

HISTORY OF THE CASE

This Petition for an Expedited Appeal was filed by Kathyleen Lone Tree-Whiterabbit to review the preliminary injunction issued by the Trial Court on May 21, 1996. Attached to the petition and brief were exhibits not presented to the Trial Court. On May 28, 1996 this Court granted the Petition to Appeal and on June 4, 1996 granted Chloris A. Lowe, Jr's petition to join in the appeal. All parties submitted briefs as well as the Ho-Chunk Nation Department of Justice at the request of this Court. On June 20, 1996, one day prior to oral arguments, the Ho-Chunk Nation Legislature filed a Motion to Intervene, and a Motion to Recuse the Chief Justice. The Coalition joined in that motion.

The Supreme Court heard oral arguments on June 21, 1996. This memorandum and order address the Motion to Recuse, the Motion to Intervene and the Petition for Review.

I.

THE MOTION TO RECUSE THE CHIEF JUSTICE.

This Court received a Motion to Recuse Chief Justice Mary Jo Brooks Hunter in the late afternoon on Thursday, June 20, 1996. Due to the Court's desire to address the matter, this Court considered the Motion by telephone on that day. This Court considered the motion although it had been filed by a non-party. A Motion to Intervene was also filed with the Motion to Recuse. Later on the same day, a Motion to Recuse Chief Justice Mary Jo Brooks Hunter was filed by the Appellee, Coalition For Fair Government II based upon the documents filed by the non-party.¹

The full Court reviewed the motion which was based upon two matters. The first basis for recusal was due to an editorial comment written by the Chief Justice in response to the per capita views expressed by two legislatures in 1993 which appeared in the tribal newsletter. The letter to the editor was penned by the Chief Justice prior to the creation of the current Ho-Chunk Nation Constitution and her current position of Chief Justice. The letter does not refer in any way to the current 80/20 matter and, in fact, predates that issue. The opinion expressed was not made by the Chief Justice while she was holding office. The action is too remote in time and relevance to affect the ability of the Chief Justice to hear this matter.

The second leap in logic is much more of a quantum leap. The second allegation involves personnel matters of the Chief Justice in 1989. The Chief Justice was terminated from a tribal

¹Counsel for Kathyleen Lonetree-Whiterabbit filed a motion opposing the request for recusal on June 21, 1996 which this Court was unable to consider during its deliberations.

position seven years ago. Again, the length of time between that incident and the election of Mary Jo Brooks Hunter to the position of Chief Justice is all the more remote.

This Court grappled with the concept of the appearance of impropriety by a judge in the case of *Ho-Chunk Nation Legislature*, SU-96-01 (February 28, 1996) as well as *Jones v. Ho-Chunk Nation Election Board and Chloris A. Lowe, Jr.*, CV-95-05 (July 6, 1995). During oral argument in *HCN Legislature v. Lowe*, the Court discussed the various relationships that are prone to occur within tribal governments. For instance, we viewed the legislature's appointment of the trial judge and the legislature's decision on the salary level of the trial judge as being events which would not be considered as ongoing conflicts of interest so that Judge Butterfield would not be perpetually barred from hearing cases that involved the Ho-Chunk Nation Legislature. Yet, in *HCN Legislature v. Lowe*, 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. In that case, a retroactive pay increase which had been requested by the trial judge remained undecided by one of the parties. The event was recent in time and could be construed as a "direct financial interest".

This Court was concerned with the multitude of prior relationships that occur within tribal governments, especially in areas involving tribal members. Therefore, a line must be drawn, as the Ho-Chunk Nation Constitution does, to matters involving "a direct personal or financial interest." Ho-Chunk Nation Constitution, Article VII, Section 13. That does not include past comments or occurrences but goes to matters that are currently relevant and timely.

To allow past or indirect matters to be a basis for removal would, in effect, tie the hands of anyone assuming the bench in the Ho-Chunk Nation. A direct personal or financial interest involves matters which are occurring presently. For example, if the Chief Justice were to write an editorial

letter on a matter before the Court while she is in her current position that would be a basis for a direct interest. The Chief Justice would be advocating on a present issue and she would have a direct personal interest.

Since the concerns raised do not rise to a level of a direct personal or financial interest, the Motion for Recusal is denied.

II.

MOTION OF THE HO-CHUNK NATION LEGISLATURE FOR LEAVE TO INTERVENE ON APPEAL.

A motion to intervene was filed June 20, 1996 by the Ho-Chunk Nation Legislature in the instant case, currently on appeal from Preliminary Injunction order dated May 21, 1996. The Ho-Chunk Nation Supreme Court's Scheduling Order dated May 28, 1996 set time periods as to filing of briefs and scheduled oral arguments for June 21, 1996 at 10:00 a.m..

The Ho-Chunk Rules of Appellate Procedure lacks a specific rule authorizing intervention at the appellate level. Ho-Chunk Nation Appellate Rule 1a provides that the Supreme Court may look to Federal Rules of Appellate Procedure for guidance. The federal rules also lack any provision regarding intervention during the appeal process. In absence of a specific rule addressing intervention, the decision to allow intervention should be up to the Supreme Court's discretion.

In referring to Ho-Chunk Nation Interim Rules of Civil Procedure Rule 19A, Filing of Motions, the time period set forth in that rule is five (5) calendar days prior to the hearing. The filing of this motion within 24 hours of scheduled oral arguments is untimely. The intervening party had ample time to intervene at the trial court level.

The purpose of this procedure is to enable anyone having an interest in a subject of litigation

to intervene in the case in a timely manner to protect his/her rights. The late filing of this motion to protest the intervening party's interest is unconvincing in light of *Ho-Chunk Nation Legislature v. Chloris A. Lowe, Jr., Chairman of the April 27, 1996, Ho-Chunk Nation Special General Council, Kathyleen Lone Tree - Whiterabbit, Secretary of the April 27, 1996, Ho-Chunk Nation Special General Council, The Ho-Chunk Nation General Council Planning Committee, and The Ho-Chunk Nation Election Board*, CV 96-24. The intervening party filed their own law suit during the pendency of this case before the Court. Judge Butterfield's Scheduling Order dated May 15, 1996 made reference to "that a similar lawsuit had been filed less than an hour prior to the scheduling conference in this case." This Court was appraised of the other pending case CV96-24, as stated in the Motion to Intervene, relating to the same matter.

The Motion to Intervene is hereby denied. Denial by this Court does not mean that the moving party will not be allowed to do so in trial court.

III.

PETITION TO REVIEW PRELIMINARY INJUNCTION.

The Coalition for a Fair Government II sought declaratory and injunctive relief against Kathyleen Lone Tree-Whiterabbit, as Secretary of the General Council of the Ho-Chunk Nation and Chloris A. Lowe, Jr., as Chairman of the General Council, (the appellants) for decisions made by the General Counsel of the Ho-Chunk Nation at a meeting held on April 27, 1996. Specifically the plaintiffs sought to prevent the implementation of General Council actions significant to the Ho-Chunk People including the removal of three legislators. Our decision today is not a ruling of the merits of the Coalitions claims, rather this court is reviewing the decision of the Trial Court to issue a preliminary injunction preserving the *status quo*, pending final resolution of this case. Before

addressing the merits of the appellants appeal, it is important to note two things. First, this opinion is not a final opinion of the merits of the appellants claim. It is only a review of the Honorable Mark Butterfield's decision to enjoin the holding of a special election to replace the three legislators purportedly removed at the April 27, 1996 meeting. Judge Butterfield has not had the time to conduct a full hearing on this matter, but issued the injunction to prevent the possibility of two persons claiming the same position in the Ho-Chunk Nation Legislature. Second, there is an injunction in *Ho-Chunk Nation Legislature v. Lone Tree-Whiterabbit, et al.*, CV 96-24 identical to the injunction in the Coalitions's, except that the Ho-Chunk Nation Elections board is a party in the Legislature's case. If the Coalition's case were reversed and the appellants granted their requests, nothing would change except that any advisers ruling by this Court could be the basis for the appellants to seek to modify or dismiss the Legislature's claim. The existence of the unappealed injunction means that this court is extremely reluctant to enter a decision that would have no force and effect.

At oral argument on June 21, 1996, counsel for all parties agreed that the central issue in this case is whether the General Council properly removed the three legislators as set forth in Article IX, §1 of the Ho-Chunk Nation Constitution. Traditionally, the power of the Ho-Chunk Nation rested in the General Council. In 1994, a new Ho-Chunk Constitution created four branches of government, the General Council, the legislative, executive and judicial. Each branch was delegated certain powers, while the General Council acted in accordance with the Constitution.

There is no doubt that the trial court had to act quickly in this case. The Constitution provides that an election to fill a vacancy in the legislature must be held within 30 days of the vacancy. There was not enough time to have a full hearing on the validity of the General Council

removal within the 30 day time limit. A preliminary injunction is an appropriate mechanism to preserve the rights of the parties pending a full and final resolution of the case. In the absence of any legislative enactments the trial court has set forth the standards for the issuance of a preliminary injunction as follows:

1. There is no adequate remedy at law.
2. The threatening injury to the person seeking the injunction outweighs the harm of the injury.
3. The party seeking the injunction has at least a reasonable likelihood of prevailing on the merits of their claim.
4. The issuance of the injunction serves the public interest.

See, *Thundercloud v. Ho-Chunk Nation Election Board*, CV-95-16, Order granting preliminary injunction dated August 24, 1995 and, *Warner v. Ho-Chunk Election Board*, CV-995-03, Order granting preliminary injunction dated July 3, 1995. This court agrees that this is the appropriate standard for issuance of a preliminary injunction. Preliminary injunctions are to be used sparingly and their principal purpose is not to be used to give the moving party their ultimate relief without allowing the responding party the chance to be fully heard on the merits of this case.

With this standard in mind, this Court must decide if the trial court erred in issuing the preliminary injunction. As was said before, this is not a review of the merits of any of the parties claims, since they have not had the opportunity to be fully presented to the trial court. We have before us only a limited record on appeal with one of the critical parties in the case (the legislature) absent. The parties at oral argument also agreed that our standard for review is whether the trial court abused its discretion in granting the preliminary injunction. An abuse of discretion standard

places a higher burden of proof on the appellants. The appellants position seems to be based primarily on the facts of this case, and the legal conclusions that are to be drawn from the disputed facts. The appellants have not demonstrated clear error with respect to the factual findings of the trial court. Given the procedural status of this case and the case brought by the Legislature, this Court is reluctant to disturb the legal conclusions absent a full hearing on the facts.

Finally, this Court expressed some concern about the standing of plaintiff, Coalition for a Fair Government II. This was based solely on the appellants petition to appeal the preliminary injunction. Their petition did not address the Legislature's case which contained a similar injunction. This Court was concerned whether two people on behalf of an unknown association had the requisite interest in the case sufficient to stop an election and advocate the position that could be better argued by the legislature or the removed legislators. This court is not ruling at this time that individual members of the Ho-Chunk Nation have the right at any time to challenge the actions of the General Council. We leave that issue for a later date. In this case where the Legislature has filed suit against the General Council and based on statements of counsel that the issues in the Legislature's case are identical to the Coalition's we will let the Coalition's action proceed. We suggest that the trial court consider consolidating both cases to insure that there be no inconsistent results.

ORDER

Based on the foregoing memorandum, this Court orders that the Motion to Recuse the Chief Justice is denied, the Motion of the Ho-Chunk Nation Legislature for Leave to Intervene is denied and the Petition to Review the Interlocutory Injunction is denied.

IT IS SO ORDERED. EGI HESHKEK JANAT

Dated this 29th day of June 1996.

Mary Jo Brooks Hunter
Mary Jo Brooks Hunter
Chief Justice

Debra C. Greengrass
Debra Greengrass
Associate Justice

John Wabaunsee
John Wabaunsee
Associate Justice

A true and correct copy of the foregoing was sent to the following parties of record this

1st day of July, 1996.

John Fredricks III, Brian Pearson
Alexis C. Reynolds, J. Espinosa, J. S. Olson

Asst. / Clerk Marulla Cloud