



HO-CHUNK NATION
SUPREME COURT

JoAnn Jones,
Plaintiff,

vs.

Ho-Chunk Nation Election Board,
Defendant,

APPELLATE
DECISION
Case No. CV-95-05

and

Chloris Lowe,
Defendant-Intervenor.

An appeal was requested by Defendant-Intervenor Lowe on the Order (Granting Stay) of Judge Mark Butterfield on this matter dated July 3, 1995 and the Judgement dated July 6, 1995. The attorney for Mr. Lowe, Daniel Berkos, filed an Entry of Appearance on July 19, 1995 and filed a brief on July 24, 1995. The attorney for JoAnn Jones, Jeff Scott Olson, filed a response brief on July 31, 1995. The attorney for the Defendant Election Board, Colleen M. Baird, filed a Response on August 7, 1995 that "the defendant has not appealed the decision of the Trial Court and does not intend to submit a brief or participate in the scheduled oral argument." This Court heard the oral argument on Tuesday, August 8, 1995. Based upon the oral arguments and a review of the record below, this Court hereby AFFIRMS the decision of the Trial Court for the foregoing reasons:

I.

WHETHER OR NOT THE TRIAL JUDGE ERRED IN DENYING THE MOTION FOR RECUSAL?

The Ho-Chunk Constitution states in Article VII, Section 13,

"Any Justice or Judge with a direct personal or financial interest in any matter before the Judiciary shall recuse; failure to recuse constitutes cause for removal in accordance with Article IX, Section 4."

Under the Ho-Chunk Constitution, branches of the government are composed of General Council, Legislature, Executive and Judiciary. The trial judge of the Judiciary was appointed by the Legislative branch. He was not appointed by the President of the Ho-Chunk Nation from the Executive branch. Only in the event of a tie vote in the Legislature will the President cast a deciding vote. This was not the case in the appointment of Judge Butterfield as Chief Judge of the Ho-Chunk Nation.

Judge Butterfield did not have a direct personal interest in this matter. Prior to his appointment to the trial court, he worked for the Justice Department of the Executive Branch of the Ho-Chunk Nation during the time when JoAnn Jones was President. However, he did not act as counsel to the President in any personal matter. His position was as a tribal attorney and his client was the Ho-Chunk Nation. Thus, he did not have an attorney/client relationship with JoAnn Jones. Further, the attorney/client relationship with the Ho-Chunk Nation ended prior to this case as did the relationship with President Jones.

As to other relationships with people, Judge Butterfield has no close family relations to any party in this case. Nor does he have any family-like connections with any party to this case.

Although this Court is not subject to state law or Wisconsin precedent, we have reviewed the statute cited by Mr. Berkos, attorney for the appellant, as a source for comparison. Upon review of that statute, this Court assesses that the judge acted in accordance with the general provisions of the Wisconsin Statute. Wisconsin Statute 757.19, Section 2, Subsections (c) and (d) provides for situations when judges should disqualify themselves. That statute states that disqualification is necessary where the attorney has represented someone in the same proceeding or where the relationship is a continuing one. If this Court were to apply the Wisconsin statute, the trial judge would not have been required to recuse himself.

Likewise, the trial judge had no direct financial interest in the outcome of this case. The judge's financial compensation is mandated by Article VII, Section 12 of the Ho-Chunk Constitution, which states,

"Supreme Court Justices and Trial Court Judges shall receive reasonable compensation. No increase or decrease in compensation for Justices or Judges shall take effect until after the next General Election or appointment to that office."

The compensation for the trial judge was determined by the Legislature. The Legislature was not divided equally in their vote so President Jones was not required to cast a tie vote on his salary.

In reviewing the trial court's handling of this matter, the trial judge afforded all parties in the case an opportunity to come forward with additional evidence that he should recuse himself. No party took the occasion to do so. The trial judge carried out his responsibilities to conduct a fair and impartial hearing on the election challenge.

Finally, it is our opinion that the trial judge made rulings that were adverse to both sides in this dispute. Neither side obtained the exact holding that they were seeking. JoAnn Jones did not obtain access to mailing lists for tribal members as she requested nor did Chloris Lowe, Jr. receive the definition of majority vote as he interpreted the definition. The Court holds that the trial judge did not err in the denial of the motion to recuse himself from hearing the case. AFFIRMED by Greengrass, J., Whiterabbit, J., and Brooks Hunter, C.J.

II.

WHETHER OR NOT THE TRIAL JUDGE ERRED IN HOLDING THAT A MAJORITY UNDER THE HO-CHUNK CONSTITUTION IS DEFINED AS GREATER THAN 50% OF THE VOTE?

The Trial Court did not err in holding that majority is defined as "greater than 50% of the vote" based upon our review of the record below. The Trial Court heard testimony of parties who were involved in the drafting of the new Constitution. Based upon that testimony as well as the evidence presented, this Court cannot find that the Trial Court abused his discretion in his holding.

This Court has thoroughly reviewed the record. The prior language of the Wisconsin Winnebago Constitution states,

"The chairman of the business committee shall be elected at large and shall serve for a four (4) year term, or until his successor has been installed." Article V, Section 6.

This was the determining language for the previous elections in determining a winner of the position of tribal chairman.

According to the testimony of the witnesses before the trial judge, the transcript shows that the people who were drafting the new Constitution were dissatisfied with the manner in which people were elected to this position. Based upon that concern, the evidence below indicates that the language of the Constitution was changed. The language was changed to read as follows:

"The President shall serve four (4) year terms. The President shall serve until a successor has been sworn into office. The President shall be elected by a majority vote of the eligible voters of the Ho-Chunk Nation." Article VI, Section 5, Ho-Chunk Constitution (adopted September 17, 1994).

This language was adopted by the Ho-Chunk members who voted to adopt the new Constitution on September 17, 1994.

In reviewing the two documents, the language of the contested provisions is clearly different. On its face, the language in the new provision is requiring "a majority vote" which was not a part of the earlier Constitution. One cannot find any other intention on the part of drafters than to obviously make a change from the previous manner that a winner was chosen. The lower court reviewed evidence and took testimony on this matter.

Unfortunately, the drafters of the new Constitution did not state a definition along with the inclusion of the new wording. That omission is what gives rise to much of this dispute. Therefore, the Court must find a legal remedy which is to define the term gleaned from the record. Based upon the information presented to him, the trial judge, in the July 6, 1995 Judgment on this matter, held that a majority vote is defined as "50% or greater of the votes actually cast." Upon review of the record, this Court cannot find an error on the part of the trial judge in reaching that decision.

This Court is also aware that much public sentiment exists as to the election process changing and the lack of specific language in the Constitution about the definition of the word "majority". However, the Court is charged with interpreting the Constitution and that is what judicial decisions are based upon. That is, a court will look at legislative history, written and/or oral, as well as notes, records and other documentation available to interpret meanings. Justice Whiterabbit asserts in his dissent that "[I]n the absence of a clear definition, then interpretation of the term applies." The lower court did exactly that in this case. The trial judge was unable to find a clear definition so he interpreted the term within the bounds of the law and the Ho-Chunk Constitution. Therefore, the Court upon review of the record does not find an error in the lower court's decision.

For the concern about the definition, this Court urges the voters to use the mechanism provided in the Constitution and define the meaning by amending the Constitution. That process is utilized in analogous sovereigns to correct and change legislation which the public dislikes. The Ho-Chunk constituency may change the definition by utilizing the general council process to seek a constitutional amendment. This Court may only interpret the language that is currently in place and that language clearly denotes a change from the previous electoral process.

Affirmed by Greengrass, J. and Brooks Hunter, C.J.

Dissenting, Whiterabbit, J.

Under the former Constitution, the tribe's CEO was called the Chairman of the business committee. The election provision noted in Article V, Section 6 was as follows:

"The Chairman of the business committee shall be elected at large and shall serve for a four (4) year term, or until his successor has been installed."

Under our new Ho-Chunk Constitution, the election provision in Article VI, Section 5 reads as follows:

"The President shall serve four (4) year terms. The President shall serve until a successor has been sworn into office. The President shall be elected by a majority vote of the eligible voters of the Ho-Chunk Nation."

There is no question that the wording of our new Constitution has changed; what is important is the meaning of majority as it applies to how we elect our leaders. What was the intent of the Drafters of our new Constitution by using the word-majority?

A review of testimony by Adam Hall, who was present at many meetings of the Drafters of our Constitution, indicated that there was not a great deal of discussion regarding the meaning of majority. It was stated that only a handful of voters have elected officials in the past. From the testimony, it was clear that there was discussion to change the way we elected our leaders for the purpose of getting more support for them. However, what is unclear is the method on how this was to be accomplished. From the testimony, majority could be construed that a way to gain more support for our elected officials could be providing an avenue for more people to vote. There is reference to lowering the voting age to 18 years of age, making more people eligible to vote and subsequently, having more support for the elected officials.

This testimony was not supported by any drafting notes, meeting minutes, or any other documentation to precisely note what is meant by majority. The lack of any evidence to corroborate the testimony of the witness does little to establish the intent of the Drafters to define the meaning of majority.

Also, there is nothing in the Constitution that defines the term, majority. In the absence of a clear definition, then interpretation of the term applies. I dissent.
Whiterabbit, J.

III.

IS THE REMEDY OF LAW, THE RUN-OFF ELECTION, ORDERED BY THE TRIAL COURT WITHIN ITS POWER AND AUTHORITY?

Based upon the lower court's ruling that a run-off election is the remedy to the contested election, this Court holds that such a remedy is within the power of the judiciary. Article VII, Section 6 of the Constitution states that "[T]he Trial Court shall have the power to issue all remedies in law..." In so doing, the Trial

Court ruled that the first election be considered as the primary election and ordered the run-off election to achieve the majority vote.

Article VIII, Section 2 also states "Special Elections shall be held when called for..." by this Constitution. This provision states that the judiciary has the authority to call a special run-off election as remedy to the current election dispute. It reinforces the Trial Court decision to order a one-time election to achieve the "majority vote".

The Ho-Chunk Nation is being governed by a new Constitution. The trial court was faced with inconsistencies surrounding the drafting of this Constitution, the most recent election, versus past practices. Based on testimony, the intent of the drafters was to eliminate the narrow margin that had elected past officials and to create a wider margin of support. In achieving the trial court's holding that "shall be elected by a majority vote..." to mean "50% or greater", a run-off election was ordered as a legal remedy in this instance.

The trial court did not make any amendments to the Constitution. That right to seek constitutional amendments still remains within the power of the General Council and/or Legislature. Article XIII, Constitution. Therefore, the trial court did act within its power and authority in ordering a run-off election for the purpose of this election only. AFFIRMED by Greengrass, J., Whiterabbit, J., Brooks Hunter, C.J.

Based upon the foregoing, the trial court decision is AFFIRMED and the election ordered for August 15, 1995 will proceed.

Dated this 14th day of August, 1995.