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

Michael Sallaway,
Plaintiff,

v.

Case No.: **CV 07-27**

Ho-Chunk Nation Election Board,
Defendant.

**ORDER
(Election Challenge)**

INTRODUCTION

The Court must determine whether to grant the relief requested by the plaintiff regarding an election challenge to the April 24, 2007 General Primary Election. The Court hereby denies the request of the plaintiff. The analysis and holding of the Court follows below.

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail in a previous judgment. *Order (Preliminary Determinations)*, CV 07-27 (HCN Tr. Ct., May 14, 2007) at 1-2. For purposes of this decision, Presidential Candidate Wilfrid Cleveland filed a *Motion to Intervene* on May 17, 2007. The Court, through Chief Judge Todd R. Matha granted this request on May 21, 2007. On this same date, this case was subsequently reassigned to Associate Judge Amanda L. Rockman due to exigent circumstances. The following parties appeared at the May 21, 2007 *Trial*: Michael J. Sallaway, plaintiff, appeared *pro se*; Judith A. Whitehorse, Election Board

1 Chairperson and designated representative; Attorney Michael P. Murphy, defendant's counsel;
2 and Wilfrid Cleveland, appeared *pro se*.

4 **APPLICABLE LAW**

5 **CONSTITUTION OF THE HO-CHUNK NATION**

6 **Art. VI - Executive**

7
8 **Sec. 3. Qualifications.** The President shall be at least thirty-five (35) years old and
9 eligible to vote. No person convicted of a felony shall serve as President unless pardoned.

9 **Art. VIII – Elections**

10 **Sec. 2. Special Elections.** Special Elections shall be held when called for by the General
11 Council, the Legislature, or by this Constitution or appropriate ordinances. In all Special
12 Elections, notice shall be provided to the voters.

13 **Sec. 7. Challenges of Election Results.** Any member of the Ho-Chunk Nation may
14 challenge the results of any election by filing suit in the Trial Court within ten (10) days after the
15 Election Board certifies the election results. The Trial Court shall hear and decide a challenge to
16 any election within twenty (20) days after the challenge is filed in the Trial Court.

16 **ELECTION ORDINANCE, 2 HCC § 6**

17 **Subsec. 2. Purpose and Construction.**

18 This Ordinance is enacted to provide basic rules and establish election procedures to ensure that
19 all elections are conducted in a fair and proper manner. This Ordinance shall be interpreted
20 liberally in order accomplish this purpose. Substantial compliance shall satisfy this Ordinance.
21 Technicalities shall not be used to interfere with, delay, or block elections or cause confusion or
22 a loss of voter confidence in the election system.

22 **Subsec. 6. Qualifications.**

23 **b. Qualifications of the President.**

24 (1) All candidates for the position of President shall meet the qualifications
25 listed in Article VI, Section 3 of the Constitution, which states:

26 *Section 3. Qualifications. The President shall be at least thirty-five (35) years
27 old and eligible to vote. No person convicted of a felony shall serve as President
28 unless pardoned.*

(2) Pardon shall be made by the jurisdiction that issued the felony conviction.

1 Subsec. 15. Challenges to Election Results.

2 a. The results of an election may be challenged in accordance with Article VIII, Section
3 7 of the Constitution, which states:

4 *Section 7. Challenge of Election Results. Any member of the Ho-Chunk Nation may*
5 *challenge the results of any election by filing suit in the Trial Court within ten (10) days*
6 *after the Election Board certifies the election results. The Trial Court shall hear and*
7 *decide a challenge to any election within twenty (20) days after the challenge is filed in*
8 *the Trial Court.*

9 b. The person challenging the election results shall prove by clear and convincing
10 evidence that the Election Board violated this Election Ordinance or otherwise conducted
11 an unfair election, and that the outcome of the election would have been different but for
12 the violation. If the Court finds the challenge is frivolous and/or wholly without merit, the
13 party challenging shall be assessed costs of the action in an amount to equal five hundred
14 dollars (\$500.00).

15 c. If the Trial Court invalidates the election results, a new election shall be held as soon
16 as possible.

17 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

18 Rule 24. Substituting, Intervening and Joining Parties.

19 If a party becomes incompetent or transfers his/her interest or separates from some official
20 capacity, another party may be substituted as justice requires. A party with an interest in an
21 action may intervene and be treated in all respects as a named party to the action. To the greatest
22 extent possible, all persons with an interest will be joined in an action if relief cannot be
23 accorded among the current parties without that person, or the absent person's ability to protect
24 their interests is impeded unless they are a party. Failure to join a party over whom the Court has
25 no jurisdiction will not require dismissal of an action unless it would be impossible to reach a
26 just result without the absent party. The Court will determine only the rights or liabilities of
27 those who are a party to the action, or eligible for relief as part of a class certified under Rule 9.

28 Rule 74. Application and Purpose; Sanctions; Definitions.

(A) Application. These *Special Rules for Election Challenges* shall apply to a proceeding where
a party (or parties) seek(s) to challenge an election. Unless otherwise provided for in the *Special*
Rules for Election Challenges, the *Rules of Civil Procedure* and the *Rules of Appellate*
Procedure shall apply.

(B) Purpose. The *Special Rules for Election Challenges* conform to the special constitutional
requirements and allow the Trial Judge to fairly hear and decide the case within the set time
limits.

1 Rule 79. Discovery.

2 All documents and things, answers to interrogatories, and responses to requests for admission
3 requested during discovery shall be provided to the requesting party within three (3) calendar
4 days unless otherwise ordered by the Court. Depositions will be conducted as the parties agree or
5 as ordered by the Court.

6 Rule 80. Appeals.

7 (A) Appeals. The final judgment of the Trial Court is appealable to the Supreme Court. The
8 Appellant and/or Appellee may obtain a copy of the trial transcript at their own expense.

9 1. The *Notice of Appeal* shall be filed and served within three (3) calendar days of
10 entry of judgment.

11 2. The *Notice of Appeal* must state a basis for appeal based upon the laws and/or
12 CONSTITUTION OF THE HO-CHUNK NATION.

13 3. A *Certificate of Service* and fifty dollar (\$50.00 U.S.) filing fee must accompany
14 the *Notice of Appeal*.

15 (C) Filing of Briefs. A *Certificate of Service* shall accompany all briefs.

16 1. *Appellant's Brief*. The appellant's brief shall be filed and served within five (5)
17 calendar days of the *Notice of Appeal*.

18 2. *Appellee's Brief*. The appellee's responding brief shall be filed within five (5)
19 calendar days of service of appellant's brief.

20 3. Further briefs may be permitted at the discretion of the Chief Justice of the Supreme
21 Court.

22 (E) Written decisions. The Supreme Court shall hear and issue a written decision on the appeal
23 within thirty (30) calendar days of the *Notice of Appeal*. The thirty (30) day requirement does
24 toll, if and when, a recusal occurs and an appointment of a Justice *Pro Tempore* is sought from
25 the Legislature.

26 WISCONSIN STATUTES (1971-1972)

27 Sec. 939.22. Words and phrases defined.

28 (22) "Peace officer" means any person vested by law with a duty to maintain public order
or to make arrests for crime, whether that duty extends to all crimes or is limited to
specific crimes.

1 Sec. 939.60. Felony and misdemeanor defined. A crime punishable by imprisonment in the
2 state prison is a felony. Every other crime is a misdemeanor.

3 Sec. 939.61. Penalty when none expressed. Common-law penalties are abolished. Whenever a
4 person is convicted of a crime for which no penalty is expressed, he may be fined not more than
\$250 or imprisoned not more than one year in county jail.

5 Sec. 940.205 Battery to peace officers; firemen. Whoever causes bodily harm to a peace officer,
6 as defined in s. 939.22 (22), or fireman, acting in his official capacity and the person knows or
7 has reason to know that the victim is a peace officer or fireman, by an act done with intent to
cause bodily harm to the peace officer or fireman, without consent of the person so injured, may
be imprisoned not more than 2 years.

8 Resisting or obstructing an officer (946.41) is not a lesser included crime of battery to a peace
9 officer. State v. Zdiarsick, 53 W (2d) 776, 19 3 NW (2d) 833.

10 WISCONSIN STATUTES (1973-1974)

11 Sec. 6.03. Disqualification of electors. (1) The following persons shall not be allowed to
12 vote in any election and any attempt to vote shall be rejected.

13 (b) Any person convicted of treason, felony or bribery, unless his civil rights are restored.

14 Sec. 57.078. Civil rights restored to convicted persons satisfying sentence. Every person who is
15 convicted of crime obtains a restoration of his civil rights by serving out his term of
16 imprisonment or otherwise satisfying his sentence. The certificate of the department or other
17 responsible supervising agency that a convicted person has served his sentence or otherwise
18 satisfied the judgment against him is evidence of that fact and that he is restored to his civil
19 rights. Persons who served out their terms of imprisonment or otherwise satisfied their sentences
prior to August 14, 1947, are likewise restored to their civil rights from and after September 25,
1959.

20 Restoration of civil rights is not a "pardon" for the purposes of liquor and cigarette license
statutes. 60 Atty. Gen. 452.

21 Sec. 941.29. Possession of a firearm. (1) A person is subject to the requirements and penalties
22 of this section if he or she has been:

23 (a) Convicted of a felony in this state.

24
25 **FINDINGS OF FACT**

26
27 1. The parties received proper notice of the May 11, 2007 *Trial*.

1 2. The Court reprints the *Findings of Fact* from previous decisions, as well as provides
2 additional *Findings of Fact* below. *Order (Preliminary Determinations)*, CV 07-27 (HCN Tr.
3 Ct., May 14, 2007) at 5; *Order (Notification of Interested Parties)*, CV 07-27 (HCN Tr. Ct., May
4 4, 2007) at 3.

5 3. The plaintiff, Michael J. Sallaway, is an enrolled member of the Ho-Chunk Nation, Tribal
6 ID# 439A001978, and maintains an address of W5172 Bringe Road, Holmen, WI 54636.

7 4. The defendant, Ho-Chunk Nation Election Board (hereinafter Election Board), is a
8 constitutionally established entity, and maintains an address of 4 East Main Street, Black River
9 Falls, WI 54615. CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART.
10 VIII, § 4.
11

12 5. The interested party, Wilfrid Cleveland, is an enrolled member of the Ho-Chunk Nation,
13 Tribal ID# 439A000351, and maintains an address at Elk Circle, Black River Falls, WI 54615.
14

15 6. On January 23, 1972, Jackson County Deputy Sheriff Alfred Young filed a *Criminal*
16 *Complaint* in Jackson County Court against Wilfrid Cleveland. The complainant asserted in his
17 *Criminal Complaint* that Mr. Cleveland did:
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19 *feloniously* cause bodily harm to a police officer, to-wit: Alfred Young, Deputy
20 Sheriff of Jackson County, Wisconsin, while acting in his official capacity, and
21 said Wilfred [*sic*] Cleveland did know or had reason to know that the victim was a
22 police officer, and said act was done with the intent to cause bodily harm to the
23 police officer without the consent of the person so injured, contrary to section
24 940.205 of the Wisconsin Statutes, and prays that the defendant be dealt with
25 according to law: that the basis for the complainant's charge of such offense is:
26 the personal knowledge and observations of the complainant in that said Wilfred
27 [*sic*] Cleveland, while said complainant was trying to make a lawful arrest, did
28 strike said officer in the nose, breaking his glasses and causing swelling about the
nose and eye; that Alfred Young is a deputy sheriff for Jackson County,
Wisconsin, and did not give his consent to Wilfred [*sic*] Cleveland to be so
harmed.

Def. 's Ex. A. (emphasis added).

1 7. On February 7, 1972, Wilfrid Cleveland was found guilty of battery pursuant to
2 WISCONSIN STATUTES § 940.205. *State of Wisconsin v. Wilfrid Cleveland*, Case No. 1798
3 (Jackson Co. Ct., Feb. 7, 1972).

4 8. The penalty for a violation of WISCONSIN STATUTES § 940.205 is imprisonment for up to
5 two (2) years. WIS. STAT. § 940.205 (1971-1972); *see also Criminal Compl.*

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7 9. Mr. Cleveland was sentenced to six (6) months in Jackson County Jail, plus an additional
8 thirty (30) days in county jail that could be served under the terms of the Huber law, and ordered
9 to pay restitution directly to Deputy Young in the amount of \$54.25 for the replacement of his
10 glasses. *State of Wisconsin v. Wilfrid Cleveland*, Case No. 1798 (Jackson Co. Cir. Ct., Feb. 7,
11 1972).

12
13 10. On February 7, 1973, Mr. Cleveland received a *Discharge* from the State of Wisconsin,
14 which restored his civil rights, pursuant to WISCONSIN STATUTES § 57.078.

15 11. On March 4, 2007, the Election Board confirmed Wilfrid Cleveland as a presidential
16 candidate for the April 27, 2007 General Primary Election. (Election Board Agenda, Mar. 4,
17 2007) at 2.

18
19 12. On or about March 5, 2007, the Election Board posted the final list of candidates for the
20 April 24, 2007 General Primary Election. *See* ELECTION ORDINANCE, 2 HCC § 6.8h. The final
21 list included the proviso, “[n]ominees were confirmed pending criminal history checks.”¹ *Final*
22 *List of Candidates* (Mar. 5, 2007).

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24 13. On April 24, 2007, the Election Board conducted the General Primary Election, which
25 included an open seat for President of the Ho-Chunk Nation. Presidential Candidate Wilfrid

26
27 ¹ The plaintiff alleges the performance of an insufficient criminal background check that allowed the presence of a
28 convicted felon in the election process, but the Court also notes the obvious problem with posting a final list of
candidates, which, on its face, lacks finality. The Election Board should seemingly allocate a greater amount of time
between the deadline for the Official Declaration of Candidacy Forms and the approval of the final list. ELECTION
ORDINANCE, § 6.8g-h.

1 Cleveland received 377 votes out of a total of 1,309 votes cast, amounting to 28.8006% of the
2 tabulated votes. Presidential Candidate JoAnn Jones received 234 votes, amounting to
3 17.8762% of the tabulated votes. *JoAnn Jones v. HCN Election Bd.*, CV 07-29 (HCN Tr. Ct.,
4 May 21, 2007) at 5.

5 14. On April 25, 2007, the Election Board certified the General Primary Election results,
6 thereby placing the above two (2) candidates in the constitutionally required June 5, 2007
7 General Run-off Election.² CONST., ART. VIII, § 1.

8 15. On May 4, 2007, the plaintiff filed a timely election challenge. *Id.*, § 7. The plaintiff
9 alleges impropriety in the certification of presidential candidates, and "request[s] that the April
10 24, 2007 Special Election results be expunged [*sic*]." *Compl.*, Attach. 1 at 2.

11 16. At *Trial*, Wilfrid Cleveland testified under oath he never knew his conviction constituted
12 a felony until he received the plaintiff's paperwork. Tr., (LPER, at 7, May 21, 2007, 09:43:36
13 CDT). Therefore, Mr. Cleveland has never sought to apply for a pardon.

14 17. Mr. Cleveland further testified "since that day, up until today, I have been able to vote"
15 and "been able to go out hunting deer season with a rifle." LPER, at 8, 09:48:39, 09:48:46 CDT.

16 18. Mr. Cleveland also testified that he was granted the ability to chaperone a convicted felon
17 through the state Department of Probation and Parole. The grant of this privilege was predicated
18 upon the successful completion of a background check. *Id.*, 09:49:00 CDT.

19 19. The plaintiff stated on the record that Mr. Cleveland admitted to him in or around 1994
20 that he was in fact a felon. *Id.*, at 12, 09:59:51 CDT.

21 20. Mr. Cleveland denied admitting that he was a felon, and presumed that it was related to
22 another more recent charge, which was subsequently dismissed. *Id.*, 09:43:20, 10:01.40 CDT.

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28 ²The official certification of election results does not reflect the date of certification as required by prior decision of
the Court. *Stewart J. Miller v. HCN Election Bd.*, CV 01-57 (HCN Tr. Ct., May 24, 2001).

1
2 **DECISION**
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4 Subject to the CONSTITUTION and ELECTION ORDINANCE, a tribal member is not qualified
5 to run for President if he or she has been convicted of a felony for which he or she did not
6 receive a pardon. CONST., ART. VI, § 3; ELECTION ORDINANCE, §6.6b. Pursuant to the
7 ELECTION ORDINANCE, a challenger must prove by clear and convincing evidence that the
8 Election Board violated the ORDINANCE or conducted an unfair election. ELECTION ORDINANCE,
9 § 6.15b. In addition, it must be proven that the election would have been different, but for the
10 violation. *Id.*; see also *Demetrio D. Abangan et al. v. HCN Election Bd.*, SU 02-02 (HCN S. Ct.,
11 Mar. 25, 2002) at 3 n.1 (acknowledging the statutory modification from “could” have been
12 different to “would” be different). Under this two-part test, minor infractions can be dismissed if
13 the election results would remain unchanged, however with major violations there is a greater
14 chance of variance in the results. See generally *Christine Funmaker-Romano and Gerald*
15 *Cleveland, Sr. v. HCN Election Bd. et al.*, SU 05-08 (HCN S. Ct., Aug. 3, 2005) at 6. The
16 Supreme Court previously determined that the legislative intent for creating the second prong of
17 this test was to ensure that the wishes of the voting populace are upheld to the extent that the
18 ORDINANCE allows. *Id.* at 8. In close races where it cannot be proven that the outcome would
19 change, it would undermine “the credibility of the Judiciary to have it decide who won an
20 election and makes it seem merely an arm of the political branches by deciding close elections.”
21 *Id.* Therefore, both prongs must be proven by clear and convincing evidence in order to
22 successfully challenge an election.
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1 With regard to whether Presidential Candidate Wilfrid Cleveland is a felon, it is the
2 obligation of the plaintiff to prove such allegation by clear and convincing evidence. The clear
3 and convincing standard of proof requires that the result shall not be reached by a mere balancing
4 of doubts or probabilities, but rather by clear evidence which causes the Court to be
5 unequivocally convinced that the allegations sought to be proved are true. The standard of proof
6 is the level of proof required in a legal action to discharge the burden of proof, i.e., convince the
7 Court that a given proposition is true. Three levels of proof exist: preponderance of the
8 evidence, beyond a reasonable doubt, and clear and convincing evidence. Clear and convincing
9 evidence is the intermediate level of burden of persuasion, falling somewhere between the
10 traditional standards of “preponderance of the evidence” and “beyond a reasonable doubt.”
11 *Robert A. Mudd v. HCN Election Bd.*, CV 97-140 (HCN Tr. Ct., Oct. 27, 1997) at 10.
12

13
14 In order to prove something by “clear and convincing evidence,” the party with the
15 burden of proof must convince the Court that it is substantially more likely than not that the thing
16 is in fact true. As previously set forth in a former judgment, the plaintiff needed to be prepared
17 to establish that the
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19 Election Board’s alleged violation either a) resulted in the presence of a felon in
20 the scheduled General Runoff Election or b) elevated at least one (1) of the two
21 (2) remaining presidential candidates to the Runoff Election since specifically
22 identified members who cast votes for a documented felon would have otherwise
cast votes for a third candidate who would have surpassed the remaining
candidate with the addition of such votes.

23 *Order (Prelim. Determinations)* (HCN Tr. Ct., May 14, 2007) at 6, fn. 4.

24 Based upon the evidence submitted, it is unclear whether Presidential Candidate Wilfrid
25 Cleveland was indeed convicted of a felony. During a 1994 conversation, the plaintiff stated that
26 Mr. Cleveland mentioned to the plaintiff that he was a felon.³ LPER at 12, 09:59:51-10:01:31
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³ Mr. Cleveland testified that he never was under the impression he was a felon. *Tr.* (LPER, at 12, 10:01:40-

1 CDT. Upon remembering this conversation, the plaintiff began investigating Mr. Cleveland's
2 criminal background. *Id.* The information discovered prompted the plaintiff to file a *Complaint*
3 in which he claimed the Election Board violated the CONSTITUTION and ELECTION ORDINANCE
4 by allowing a tribal member convicted of a felony to run for the Office of the President. *Id.*;
5 *Compl.* In January 1972, Mr. Cleveland was arrested for violating WIS. STAT. § 940.205. This
6 statute governs instances of battery upon peace officers or firemen in the state of Wisconsin.
7 Specifically, the statute stated:

9 Whoever causes bodily harm to a peace officer, as defined in s. 939.22 (22), or
10 fireman, acting in his official capacity and the person knows or has reason to
11 know that the victim is a peace officer or fireman, by an act done with intent to
12 cause bodily harm to the peace officer or fireman, without consent of the person
13 so injured, may be imprisoned not more than two years.

13 WIS. STAT. § 940.205 (1971-1972).

14 The plaintiff stated that this represented a felony. LPER at 5, 09:34:25 CDT. Further, he stated
15 that if Mr. Cleveland committed battery upon a peace officer, then it is a per se felony, and any
16 other reading would lead to an absurd result. *Pl.'s Resp.* at 3; LPER, at 4, 09:31:57-09:32:16.
17 The plaintiff requested the Court to look to *State v. Caruso* for guidance on this matter. *State v.*
18 *Caruso*, 44 Wis. 2d 696 (1969). Therefore, under the plaintiff's analysis, Mr. Cleveland would
19 be barred from running for the Office of the President. The CONSTITUTION specifically states,
20 "[n]o person convicted of a felony shall serve as President unless pardoned." CONST., ART. VI
21 §3. Further, the ELECTION ORDINANCE states, "[a]ll candidates for the position of President shall
22 meet the qualifications listed in Article VI, Section 3 of the Constitution, . . . [p]ardon shall be
23 made by the jurisdiction that issued the felony conviction." ELECTION ORDINANCE, § 6.6.
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26 10:02:56 CDT). He states that he has been able to vote, hunt during deer season with a rifle, and after having a
27 background check done by the Wisconsin Department of Probation and Parole was able to chaperon a relative that
28 was a felon. *Id.* at 8, 09:45:50-09:49:29. Furthermore, he states he never served time in a prison, but rather Jackson
County Jail. Therefore, Mr. Cleveland states he does not know what Mr. Sallaway is speaking of because he could
not have disclosed such information because he never believed himself to be a felon. *Id.* at 12, 10:01:40-10:02:56.

1 At first glance, this case appears to be black and white. Based upon basic legal principles
2 of criminal law, felonies are typically serious crimes punishable by imprisonment for more than
3 one year or by death. BLACK'S LAW DICTIONARY 933 (7th ed. 1999). Thus, all crimes that are
4 less serious than felonies are misdemeanors that are "punishable by fine, penalty, forfeiture, or
5 confinement (usu. for a brief term) in a place other than prison (such as county jail)." *Id.* at
6 1014. However, every state has its own criminal code, and thus the ability to define crimes and
7 set punishments as it sees fit. Based upon the common view of felonies, § 940.205 as worded in
8 1972 would probably qualify as a felony since the maximum prison term could be more than one
9 year.
10

11 In Wisconsin, the statutes in place at the time of the incident and conviction are
12 ambiguous as to whether battery upon a police officer was then classified as a felony. The
13 Wisconsin Legislature did not follow the common approach when it drafted its definition of
14 felony. Instead, WISCONSIN STATUTES § 939.60 stated "[a] crime punishable by imprisonment in
15 the state prison is a felony. Every other crime is a misdemeanor." WIS. STAT. § 939.60 (1971-
16 72). Section 940.205 did not specify if the two year imprisonment was to be spent in prison or
17 jail. Therefore, it is unclear whether the statute was meant to create a felony or a misdemeanor.
18 Furthermore, the default provision when a penalty was not expressed stated that "[c]ommon-law
19 penalties are abolished. Whenever a person is convicted of a crime for which no penalty is
20 expressed, he may be fined not more than \$250 or imprisoned more than one year in county jail."
21 WIS. STAT. § 939.61 (1971-72). Thus, when a penalty was not expressed, the default
22 classification for a crime was a misdemeanor.
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26 Mr. Cleveland alleges he was unaware the crime of which he was convicted constituted a
27 felony because he retained his right to vote in tribal, state, and local elections. LPER at 8,
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1 09:48:39 CDT. Under Wisconsin law, Mr. Cleveland's ability to vote does not prove or disprove
2 his status as a convicted felon. The revocation of the ability to vote, also known as
3 disenfranchisement, is implemented for currently imprisoned felons in 46 states. In Wisconsin,
4 felons who are restored to their civil rights by discharge under section 57.078 regain the right to
5 vote in all elections, since state law governs disenfranchisement. WIS. STATS. §§ 6.03, 57.078
6 (1973-1974).
7

8 Mr. Cleveland additionally raised his ability to carry a rifle during deer hunting season as
9 proof he was not previously convicted of a felony. LPER at 8, 09:48:39 CDT. This point
10 appears to support Cleveland's assertion he was never convicted of a felony under Wisconsin
11 law. The WISCONSIN STATUTES simply did not address firearm possession in 1973.⁴ The rules
12 for possession of a firearm were implemented first in 1981, and codified under WIS. STAT. §
13 941.29. However, the section retroactively criminalizes the possession of a firearm by those
14 convicted of a felony within the state. WIS. STAT. § 941.29(1)(a). State case law has clarified
15 that the application of the statute to felons convicted before the statute's enactment was not an
16 unconstitutional ex post facto law, since the statute is regulatory, not punitive. *State v. Kittleson*,
17 570 N.W.2d 911 (Wis. 1997). The restoration of civil rights provided under section 57.078 (or
18 its modern counterpart, § 304.078) does not overcome the specific prohibition. *State v. Thiel*,
19 514 N.W.2d 56 (Wis. Ct. App. 1993).
20
21

22 Under Wisconsin law, the characterization of a felony versus a misdemeanor is the
23 location of the incarceration: "a crime punishable by imprisonment in the state prison is a felony:
24 Every other crime is a misdemeanor." WIS. STAT. § 939.60. The plaintiff argues that just
25 because a statute does not reference a felony, it does not mean that it is not a per se felony. For
26
27

28 ⁴ The statutes address a prohibition on the possession and use of machine guns. WIS. STAT. § 164 (1973-1974).
However, that is not applicable in this case.

1 example, first degree murder does not statutorily state that it is a felony. It is undoubtedly a
2 felony. LPER, at 4, 09:32:12 CDT. Logically, first degree murder results in imprisonment in the
3 state prison, not the county jail; therefore, murder is a felony.

4 Further, Mr. Cleveland stated, “according to the statutes, felony and misdemeanor
5 defined a crime punishable by imprisonment in the state prison is a felony, every other crime is a
6 misdemeanor. So according to this definition, I was never imprisoned at a state prison at any
7 time.” LPER at 8, 09:45:50 CDT. Likewise, the defendant stated that it was unclear whether
8 Mr. Cleveland was convicted of a felony. In particular, the defendant pointed to the fact that the
9 crime was classified as “unspecified” in the United States’ Department of Justice’s database.
10 *Def.’s Ex. A*; LPER at 4, 09:31:33 CDT.

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13 The *Judgment of Conviction Sentence Imposed & Stayed & Order of Probation* indicates
14 that Mr. Cleveland pled guilty on February 7, 1972 “to the crime of Battery in violation of §
15 940.205” *Def.’s Ex. A*. In 1972, the year of Mr. Cleveland’s conviction and sentencing,
16 section 940.205 did not characterize the crime or specify the location of the imprisonment. WIS.
17 STAT. § 940.205. The judgment further states that “the defendant is hereby sentenced to Jackson
18 County Jail for [the] term of six (6) months, plus an additional Thirty (30) Days in the County
19 Jail which may be served under the terms of the Huber Law.” *Def.’s Ex. A*; LPER, at 11,
20 09:57:59 CDT. In 1972, if no penalty is expressed, the maximum sentence is a fine of \$250 or
21 not more than one year in county jail. WIS. STATS. § 939.61. This clarification would result in
22 Mr. Cleveland’s unspecified conviction in 1972 constituting a misdemeanor, not a felony.

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25 Within the *Criminal Complaint*, the complainant police officer states that

26 *feloniously* cause bodily harm to a police officer, to-wit: Alfred Young, Deputy
27 Sheriff of Jackson County, Wisconsin, while acting in his official capacity, and
28 said Wilfred [*sic*] Cleveland did know or had reason to know that the victim was a
police officer, and said act was done with the intent to cause bodily harm to the

1 police officer without the consent of the person so injured, contrary to section
2 940.205 of the Wisconsin Statutes, and prays that the defendant be dealt with
3 according to law: that the basis for the complainant's charge of such offense is:
4 the personal knowledge and observations of the complainant in that said Wilfred
5 [sic] Cleveland, while said complainant was trying to make a lawful arrest, did
6 strike said officer in the nose, breaking his glasses and causing swelling about the
7 nose and eye; that Alfred Young is a deputy sheriff for Jackson County,
8 Wisconsin, and did not give his consent to Wilfred [sic] Cleveland to be so
9 harmed.

10 Although the word "feloniously" was employed, this language is not indicative of the Court's
11 opinion, as the *Criminal Complaint* is not a final judgment of the Court.

12 The plaintiff additionally cites to the *Caruso* case as proof that battery of a peace officer
13 constitutes a felony, not a misdemeanor under Wisconsin law. *State v. Caruso*, 172 N.W.2d 195
14 (Wis. 1969). The Court finds, however, that *Caruso* may be distinguished from the present case.
15 While Mr. Caruso was charged and convicted under the same provision, Mr. Caruso was
16 specifically sentenced to eighteen (18) months in prison, not the county jail. Since Mr. Caruso
17 was specifically sentenced to state prison, his conviction constitutes a felony under section
18 939.60, and does not invoke the clarification principles of section 939.61. Further, the plaintiff
19 urges the Court to adopt the *Caruso* case, and review the legislative intent of the statute.
20 However, the Court refrains from interpreting the legislative intent, when relevant statutes are in
21 existence.

22 The Court is not unequivocally convinced that the allegations sought to be proved, i.e.,
23 that Mr. Cleveland is a felon, are true. The plaintiff needed to present clear and convincing
24 evidence that Mr. Cleveland was a felon. This cannot be accomplished by the Jackson County
25 Court file submitted into evidence. It was the burden of the plaintiff to bring in expert witnesses,
26 individuals who were apart of the underlying crime, to question Mr. Cleveland, etc. For
27 example, the plaintiff could have subpoenaed, to the extent that they were available, then
28

1 Jackson County Assistant District Attorney, now Jackson County Circuit Court Judge Gerald W.
2 Laabs or the battered police officer, Alfred Young, in order to discuss the underlying charges,
3 timeframe, location, and so on and so forth.

4 The Court, the Nation's Election Board and its counsel do not have an interest in
5 corrupting, perverting or debasing the CONSTITUTION by altering or modifying the language
6 within the CONSTITUTION. The Election Board has an interest in securing and elevating ethical
7 individuals who have not committed felonies into the Office of the President. The Court is
8 cognizant that under today's standards, it is a felony to batter a law enforcement officer or
9 fireman.⁵ However, this is not unequivocal evidence that such a crime was a felony then, as laws
10 do evolve through time.
11

12
13 **BASED UPON THE FOREGOING**, the Court finds that the plaintiff has failed to
14 prove the first prong of the two-part test established for deciding election challenges. ELECTION
15 ORDINANCE, § 6.15b. Namely, the plaintiff did not unequivocally convince the Court that the
16 defendant violated a section of the ELECTION ORDINANCE, under the clear and convincing
17 standard. The parties retain the right to appeal this final judgment pursuant to the *Special Rules*
18 *for Election Challenges*. HCN R. Civ. P. 80.
19

20 **IT IS SO ORDERED** this 24th day of May 2007, by the Ho-Chunk Nation Trial Court
21 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
22

23
24 _____
25 Honorable Amanda L. Rockman
26 Associate Trial Court Judge
27

28 ⁵ Today, the relevant statute reads as follows: “[w]hoever intentionally causes bodily harm to a law enforcement officer or fire fighter, as those terms are defined in s. 102.475 (8) (b) and (c), acting in an official capacity and the person knows or has reason to know that the victim is a law enforcement officer or fire fighter, by an act done without the consent of the person so injured, is guilty of a Class H felony.” WIS. STAT. § 940.20(2) (2006).

