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IN THE
HO-CHUNK NATION TRIAL COURT

Betty J. Kingsley,
Plaintiff,

v.

Case No.: CV 11-21

Ho-Chunk Nation Election Board and Judy
Whitehorse, Chairperson,
Defendants.

**ORDER
(Final Judgment)**

INTRODUCTION

The Court must assess the merit of an election challenge to the March 8, 2011 General Primary Election. The Court holds that the plaintiff has failed to satisfy the applicable statutory burden of proof. The analysis of the Court follows below.

PROCEDURAL HISTORY

The Court recounts the procedural history in significant detail within a previous judgment. *Order (Prelim. Determinations)*, CV 11-21 (HCN Tr. Ct., Mar. 24, 2011) at 1-2. For purposes of this decision, the Court notes that the above-referenced order afforded the parties notice of the *Trial*. *Id.* at 2. The Court convened *Trial* on April 1, 2011, at 10:00 a.m. CDT. The following parties appeared at the *Hearing*: Election Board Chairperson Judith A. Whitehorse, defendant; Ho-Chunk Nation Department of Justice Attorneys Nicole M. Homer and Wendi L. Huling, defendants' counselors; and Betty J. Kingsley, plaintiff. At *Trial*, the

1 Court afforded the plaintiff a further opportunity to submit affidavits in support of her claim(s).

2 *Id.* at 2-3. On April 5, 2011, the plaintiff filed an additional thirty-seven (37) affidavits.

3
4 **APPLICABLE LAW**

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

6 **Art. VIII - Elections**

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

12 **ELECTION CODE, 2 HCC § 6**

13 **Ch. I - General**

14 **Subsec. 3. Definitions.** The following definitions shall be applicable with respect to the
15 interpretation of the *Election Code* (2 HCC § 6). All other words shall have their commonly
16 understood definition:

17 uu. "Write-In" means a vote cast for an alternative not prelisted on a ballot wherein
18 the voter physically adds the alternative of choice to the ballot. Write-in candidates are
19 prohibited in all elections, except a Primary Election.

20 **Subsec. 5. Elections.** The Constitution prescribes two (2) types of elections: General
21 Elections and Special Elections. When three (3) or more candidates run for a seat in a General or
22 a Special Election, there shall be a Primary Election, and, if required, a Runoff Election as
23 described in Section 5, paragraph d., below.

24 a. **Primary Election.**

25 (2) If no candidate in any Primary Election receives more than fifty percent
26 (50%) plus one (1) of the votes cast in such Election, the two (2) candidates with the highest vote
27 totals from the Primary Election (any candidate(s) tied with the lower of such totals) shall appear
28 on the ballot in the Runoff Election.

(3) Any candidate who receives fifty percent (50%) plus one (1) of the total
votes cast shall be deemed as the winner.

(4) Primary Elections shall be conducted in the manner prescribed by the
Election Code (2 HCC § 6) and in accordance with the timetable adopted by the Election Board.

1 (5) Only Primary Elections may have write-in candidates.

2 Ch. II - Pre-Election Day Procedures

3 Subsec. 8. Qualifications.

4 a. Qualifications of Legislators.

5 (1) All candidates for a position on the Legislature shall meet the
6 qualifications listed in Article V, Section 7 of the Constitution, which states: *Section 7.*
7 *Qualifications. Members of the Legislature shall be at least twenty five (25) years old and*
8 *eligible to vote and shall possess a four-year baccalaureate degree conferred by an accredited*
9 *institution of higher education. No person shall become a Member of the Ho-Chunk Nation*
10 *Legislature if otherwise employed by the Ho-Chunk Nation. No person convicted of a felony*
11 *shall serve as a Legislator unless pardoned.*

12 e. Certification of Qualifications.

13 (1) Prior to an Election, the Election Board shall hold a meeting to certify that
14 all candidates meet the qualifications for office and/or verify that all documents to be [sic] true
15 and accurate. Background checks shall be done by the Ho-Chunk Nation Compliance
16 Department [sic] or its designee. The Election Board shall determine whether each candidate for
17 elective office meets the appropriate qualifications listed in the Constitution and any other
18 qualifications required under the laws of the Ho-Chunk Nation, including Section 8,
19 subparagraph d., above, and the Ho-Chunk Nation *Code of Ethics Act* (2 HCC § 1). Background
20 checks conducted to determine if a candidate meets these qualifications for office shall be made
21 available and seen by all Election Board Members prior to the Election Board making the
22 determination as to whether or not the candidate meets these qualifications for office.
23 Background checks shall be submitted at the same time to the Election Board for review prior to
24 certification. Unless precluded by something beyond its control, the Election Board shall make
25 the decision regarding certification of candidates at the same time for all candidates. After the
26 Election Board makes the determination as to whether or not the candidate meets the
27 qualifications for office, the background check shall be immediately returned to the Election
28 Board office. The Election Board shall make a record of which Election Board Members viewed
the background checks and when they returned it to the Election Board office. The Election
Board office shall then maintain the background checks in a secure location until all potential
legal challenges to the determination have been exhausted.

(2) The Election Board shall immediately notify a candidate in writing by
certified mail if the candidate does not meet the qualifications for office. The candidate shall
have five (5) working days from the date of receipt of notice to appeal the eligibility
determination to the Election Board. The Election Board shall issue a decision within five (5)
working days of receipt of the appeal. The candidate/appellant may appeal the decision of the
Election Board to the Trial Court within five (5) working days of the decision only upon the
grounds that it is inconsistent with the *Election Code* (2 HCC § 6) and/or the Ho-Chunk Nation
Constitution.

1 Subsec. 9. Notice of Election.

2 a. The Election Board shall post an Official Notice of Election at the location of the
3 twelve (12) Polling Places and any other appropriate locations at least ninety (90) calendar days
4 before the election, except that a Notice of Special Election shall be published in the Nation's
5 Newspaper (currently the *Hocqk Worak*) as early as practicable before a Special Election. For
6 purposes of the preceding sentence the appropriate locations shall be specified in the Election
7 Board's internal operating rules provided for in Section 4.

8 b. The Election Board shall use an Official Notice of Election. The Notice shall
9 include the following information:

- 10 (1) Candidate filing deadline.

11 Subsec. 10. Nominations.

12 d. **Deadline for Return of Official Nomination Petition.** A candidate for elective
13 office shall submit an Official Nomination Petition Form to the Election Board at least sixty (60)
14 calendar days before the date of the election as noted in the Official Notice of Election. The
15 petition needs to be submitted to the Election Board office and/or to an Election Board Member
16 by four thirty prime meridian [*sic*] (4:30 p.m.) Central Time on the deadline date. The Election
17 Board shall specify the deadline for return of the Official Nomination Petition Form.

18 g. **Official Declaration of Candidacy.** A candidate for elective office shall submit an
19 Official Declaration of Candidacy Form (Election Board Form 2 at Appendix A) to the Election
20 Board at least sixty (60) calendar days before the date of the election except as practicable for
21 Special Elections. A candidate shall include any applicable documentation with the Official
22 Declaration of Candidacy Form. An Official Nomination Petition Form (Election Board Form 1
23 at Appendix A) shall not be valid unless accompanied by a completed Official Declaration of
24 Candidacy Form and a cash filing fee, which amount shall be set forth by the Election Board.

25 h. **Final List of Candidates.** The Election Board shall certify all valid Official
26 Nomination Petition Forms and Official Declaration of Candidacy Forms. The Election Board
27 shall post the final list of candidates for each elective office at appropriate locations at least thirty
28 (30) calendar days before the date of the election. The Election Board shall use the Certificate of
Nomination Form (Election Board Form 3 at Appendix A).

Ch. III - Election Day Procedures

Subsec. 12. Official Ballots.

a. The Election Board shall approve an Official Ballot, including an Absentee
Ballot. For purposes of the preceding sentence the Election Board only needs to approve
Absentee Ballots, if, pursuant to Section 14, the Election Board determines not to hold the
election by Mail Balloting.

1 b. All Official Ballots and Absentee Ballots shall list the name(s) of the candidate(s)
alphabetically by last name, and/or shall describe the issue(s) to be decided in the Election.

2 c. Voters shall be permitted to write-in candidates on Primary Election Ballots only
3 including Absentee Ballots for a Primary Election. Write-in candidates shall not be allowed on
4 any General or Runoff Election Ballot.

5 Subsec. 13. Poll Place Voting. Section 13 shall only be applicable when the Election Board,
6 pursuant to Section 14, determines to not hold the election by Mail Balloting.

7 b. Voting Procedure for Absentee Ballots.

8 (4) When the Election Board office receives a completed Absentee Ballot, the
9 Election Board shall record the name of the voter and keep the completed Absentee Ballot in a
secure location.

10 g. Method of Voting.

11 (2) Each voter shall vote in privacy by placing a mark in ink opposite the
12 name of the candidate or candidates whom the voter selects or by indicating the voter's position
13 on the issue being voted on. Upon completion, the voter shall deposit the Official Ballot in the
ballot box.

14 Subsec. 18. Challenges to the Election Results

15 b. The person challenging the election results shall need to prove by clear and
16 convincing evidence that the Election Board violated this *Election Code* (2 HCC § 6) or
17 otherwise conducted an unfair election, and that the outcome of the election would have been
18 different but for the violation. A filing fee as set forth by the Election Board shall be charged.

19 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

20 Rule 80. Appeals.

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

- 23 1. The *Notice of Appeal* shall be filed and served within three (3) calendar days of
24 entry of judgment.
- 25 2. The *Notice of Appeal* must state a basis for appeal based upon the laws and/or
26 CONSTITUTION OF THE HO-CHUNK NATION.
- 27 3. A *Certificate of Service* and fifty dollar (\$50.00 U.S.) filing fee must accompany
28 the *Notice of Appeal*.

1 (B) Filing of Briefs. A *Certificate of Service* shall accompany all briefs.

- 2 1. *Appellant's Brief*. The appellant's brief shall be filed and served within five (5)
3 calendar days of the *Notice of Appeal*.
- 4 2. *Appellee's Brief*. The appellee's responding brief shall be filed within five (5)
5 calendar days of service of appellant's brief.
- 6 3. Further briefs may be permitted at the discretion of the Chief Justice of the Supreme
7 Court.

8 (C) Oral Arguments. Oral arguments may be held at the discretion of the Chief Justice of the
9 Supreme Court. Requests for oral argument should be made with the *Notice of Appeal* for the
10 *Appellant's Brief* or with the *Appellee's Response Brief*.

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

15 FINDINGS OF FACT

- 16 1. The parties received proper notice of the April 1, 2011 *Trial*.
- 17 2. The Court incorporates by reference each enumerated finding of fact in a previous
18 decision. *Order (Notification to Interested Individuals)*, CV 11-21 (HCN Tr. Ct., Mar. 18, 2011)
19 at 4-5.
- 20 3. On December 8, 2010, the Election Board posted notice of the General Primary Election.
21 *Compl.*, CV 11-21 (Mar. 17, 2011), Attach. 7; *see also* ELECTION CODE, 2 HCC § 6.5a(4), 9a.
22 The Election Board established January 7, 2011, as the deadline for submission of *Official*
23 *Declaration of Candidacy and Nomination Petition Form(s)*. *Compl.*, Attach 7; *see also*
24 ELECTION CODE, § 6.9b(1), 10d, g.
- 25 4. On January 3, 2011, the plaintiff hand-delivered the above-referenced forms to the
26 Election Board. Trial Ex. 1-2.
- 27
28

1 5. On January 13, 2011, the Election Board, by and through Office Administrator Melissa
2 A. Olvera, informed the plaintiff of the outstanding fingerprinting requirement and directed her
3 to visit the Majestic Pines Casino Compliance Division office. See ELECTION CODE, § 6.8a(1),
4 e(1). The plaintiff complied on the same date, filing a *HCN Authorization to Conduct FBI &*
5 *State of Wisconsin Investigation (Non-Gaming Position)* and undergoing fingerprinting. Trial
6 Ex. 3.

8 6. On February 5, 2011, the Election Board certified the plaintiff “as [a] candidate for
9 Legislature of the Ho-Chunk Nation District 1, Seat 2 pending Fingerprinting report.” *Compl.*,
10 Attach. 2 at 3. Consequently, the plaintiff’s name initially appeared on the *Notice & Rules of*
11 *General Primary Election, Tuesday, March 8, 2011. Id.*, Attach. 7.

13 7. On February 26, 2011, the Election Board moved “to have Melissa Olvera, EB Office
14 Administrator . . . send a letter to Betty J. Kingsley informing her of the decision that she will not
15 be on the ballot for Legislator Seat 2 due to Incomplete [*sic*] background check.” *Id.*, Attach. 3
16 at 1.

18 8. On February 28, 2011, Office Administrator Olvera telephoned the plaintiff to inform her
19 of the foregoing decision, but did not subsequently notify the plaintiff “in writing by certified
20 mail [that she] d[id] not meet the qualifications for office.” ELECTION CODE, § 6.8e(2).

21 9. The Election Board took the preceding action due to the impending deadline to issue
22 absentee ballots on or around March 3, 2011. *Compl.*, Attach. 7; see also ELECTION CODE, §
23 6.12a-b. The plaintiff’s name was omitted from a revised General Primary Election notice and
24 the official ballots.

26 10. For unknown reasons, the FBI could not process the plaintiff’s federal background check
27 despite her undergoing fingerprinting on four (4) separate occasions. Ultimately, Election Board
28

1 Chairperson Judith A. Whitehorse requested a name-only federal background check, which the
2 Election Board did not receive until March 9, 2011, a day after the General Primary Election.¹

3 11. In contrast, the Election Board timely received the plaintiff's State of Wisconsin felony
4 background check, which did not contain any disqualifying information. The plaintiff has
5 resided in Wisconsin for approximately twenty (20) consecutive years, and has not previously
6 experienced difficulty in connection with job-related federal criminal background checks.
7

8 12. The plaintiff cooperated with the Election Board in all respects.

9 13. The plaintiff conceded that the Election Board was not responsible for the problems
10 encountered with the fingerprinting.

11 14. In order for the plaintiff to demonstrate "that the outcome of the election would have
12 been different but for the [alleged] violation," ELECTION CODE, § 6.18b, the plaintiff must show
13 that if her name appeared on the ballot, then Legislator-elect Weber would have received fifty
14 percent (50%) or less of the total votes. In such an instance, the Election Board would have
15 needed to conduct a General Runoff Election for the position.² The plaintiff can hypothetically
16 demonstrate this result in several ways.
17

18 a. Identify at least thirty-five (35) tribal members who voted for Legislator-elect
19 Weber that would have otherwise opted to switch their votes to the plaintiff. This figure is
20 deduced from the following calculation: 230 (votes cast for Legislator-elect Weber) – 195 (½ of
21 the total votes cast) = 35
22

23 b. Identify at least seventy (70) tribal members that selected not to vote who would
24 have voted for the plaintiff had her name appeared on the ballot. This figure is deduced from the
25

26 ¹ The Compliance Division informed Chairperson Whitehorse that a federal background check could take up to five
27 (5) to six (6) weeks to process, and, therefore, the timeframe between declaration of candidacy and candidate
28 certification is likely insufficient. However, roughly eight (8) weeks elapsed before finalizing absentee ballots, and
removal of the plaintiff's name therefrom. Nonetheless, the Election Board would be well-advised to allocate
additional time in future General Elections given the problems encountered in this case.

² *Greg Littlejohn v. HCN Election Bd. et al.*, SU 03-07 (HCN S. Ct., Jul. 11, 2003) at 3-4.

1 following calculation: 230 (votes cast for Legislator-elect Weber) – 160 (combined votes cast
2 for candidate Ward and write-in options) = 70.

3 c. Identify a mathematically adequate combination of the two (2) preceding
4 scenarios.

5 15. The plaintiff submitted a total of thirty-eight (38) notarized affidavits each stating:
6

7 This affidavit is to verify that I would have voted for Betty J. Kingsley on
8 the March 8, 2011 Hochunk [*sic*] Nation primary elections if her name had
9 been on the ballot. Even though her name was on the original notice of
candidates, her name was not on the final ballot and therefore I felt I had
only two choices.

10 Pl.'s Affs.

11 16. The plaintiff submitted an additional affidavit repeating the above statement, but also
12 noting: “[The voter] was unable to vote that day, cause [*sic*] [the voter] was here.” Affidavit of
13 Elva R. Brown, CV 11-21 (Apr. 5, 2011).
14

15 17. The defendants did not object to the admissibility of said affidavits.

16 18. The plaintiff failed to demonstrate that any of the voters who submitted affidavits
17 actually voted for Legislator-elect Weber in the General Primary Election.
18

19 19. Consequently, the plaintiff failed to show that had her name been on the ballot,
20 Legislator-elect Weber would have received fifty percent (50%) or less of the total votes cast.
21

22 DECISION

23 At the *Pre-Trial Hearing*, the Court clearly informed the plaintiff of her burden of proof
24 in the instant case. *Order (Prelim. Determinations)* at 3. Specifically, the plaintiff would “need
25 to prove by clear and convincing evidence that the Election Board violated th[e] *Election Code*
26 (2 HCC § 6) or otherwise conducted an unfair election, *and* that the outcome of the election
27 would have been different but for the violation.” ELECTION CODE, § 6.18b (emphasis added).
28

1 The Court also communicated the manner by which the plaintiff could satisfy the latter prong of
2 the statutory standard.³ Regardless, the plaintiff presented ambiguous documentary evidence,
3 *i.e.*, the Court cannot discern whether the proffered testimony would tend to yield a different
4 electoral outcome.

5 Moreover, the Court remains largely unconvinced that the plaintiff has satisfied the
6 former prong of the standard. The Election Board is obligated to certify candidates for
7 legislative office. *Id.*, § 6.8e(1), 10h, 12b. In doing so, the Board must confirm that candidates
8 satisfy constitutional qualifications, including the absence of felony convictions.⁴ *Id.*, § 6.8a(1).
9 The Election Board must receive a federal background check of all legislative candidates in order
10 to ensure compliance with this requirement. The plaintiff neither disputed this premise nor
11 ascribed fault on behalf of the Election Board.
12

13
14 The plaintiff instead questioned the Election Board's decision to remove her as a named
15 candidate on the official ballot. The plaintiff argued that she should have remained on the ballot
16 pending receipt of the federal background check. Furthermore, if the background check
17 ultimately rendered the plaintiff ineligible, then the Election Board could have simply stricken
18 votes inappropriately cast for the plaintiff. This proposition fails for at least two (2) reasons.
19 First, the Election Board cannot include a non-certified candidate on an official ballot. Second, a
20 subsequent decision to strike votes, depending upon the allocation, could require a further
21 election, *e.g.*, a runoff election.
22

23
24 At first glance, the plaintiff's exclusion seems unfair, especially given the eventual
25 outcome of the federal background check. The statutory standard does not require subjective
26

27 ³ The plaintiff criticized the prospect of asking members of the electorate to divulge their voting choices in order for
her to present her case. *See* ELECTION CODE, § 6.13b(4), g(2). The Court appreciates this criticism, but cannot re-
write the applicable statutory standard.

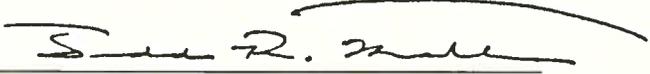
28 ⁴ Write-in candidates are not obviously subjected to this scrutiny, but such individuals do not enjoy a reserved place
on the ballot. ELECTION CODE, § 6.3uu, 5a(5), 12c.

1 intent on behalf of the Election Board to “conduct[] an unfair election.” *Id.*, § 6.18b. Yet, any
2 resulting unfairness cannot be attributable to the Election Board’s compliance with the statute.
3 In one respect, however, the Election Board did fail to comply with a statutory mandate:
4 “immediately notify[ing the] candidate in writing by certified mail if the candidate does not meet
5 the qualifications for office.” *Id.*, § 6.8e(2).
6

7 Assuming *arguendo* that the plaintiff can satisfy the first prong of the statutory standard,
8 the plaintiff still cannot prevail on her election challenge. The findings of fact confirm an
9 inability to prove a different outcome to the election. *Supra* pp. 7-8. The Court consequently
10 must deny the plaintiff’s request for relief.
11

12 **BASED UPON THE FOREGOING**, the Court denies the plaintiff's election challenge.
13 The plaintiff failed to present evidence that the election results would have been different
14 regardless of the merit of the specific challenge. The parties retain the right to appeal this final
15 judgment pursuant to the *Special Rules for Election Challenges. HCN R. Civ. P. 80.*
16

17 **IT IS SO ORDERED** this 6th day of April 2011, by the Ho-Chunk Nation Trial Court
18 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
19

20 
21 _____
22 Honorable Todd R. Matha
23 Chief Trial Court Judge
24
25
26
27
28

Ho-Chunk Nation Court System
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