IN THE HO-CHUNK NATION
TRIAL/~~SUPREME~~ COURT
APR 04 2013
Clerk of Court/Assistant

IN THE
HO-CHUNK NATION TRIAL COURT

Robert Two Bears, Plaintiff, v. **HCN Election Board and Judy Whitehorse, Election Board Chairperson,** Defendants.	Case No.: **CV 13-04**

ORDER
(Final Judgment)

INTRODUCTION

The Court must determine whether to grant the relief requested by the plaintiff concerning an election challenge to the March 5, 2013 General Primary Election. The Plaintiff failed to meet the statutory burden of proof. Therefore, the Court hereby finds in favor of the defendants and the results of the March 5, 2013 General Primary Election are upheld.

PROCEDURAL HISTORY

The Court recounts the procedural history of the instant case in detail within its prior decision. *Order (Preliminary Determinations)*, CV 13-04 (HCN Tr. Ct., Mar. 22, 2013) at 1-2. For purposes of this decision, the Court notes that on March 26, 2013, the defendants, by and through Attorney Heidi Drobnick, filed the *Defendant's [sic] Memorandum in Support of Motion to Dismiss*. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 19(A). The plaintiff failed to file a timely response and requested that the Court grant a

continuance of the scheduled March 27, 2013 *Motion Hearing* which the Court denied. *HCN R. Civ. P.* 19(B); *Order (Denying Continuance)*, CV 13-04 (HCN Tr. Ct., Mar. 27, 2013). The Court nevertheless determined to deny the defendants' *Motion to Dismiss*. *Order (Mot. Hr'g)*, CV 13-04 (HCN Tr. Ct., Mar. 29, 2013).

Thereafter, the Court convened a *Trial* on April 2, 2013 at 8:15 a.m. CDT. The following parties appeared at the *Trial*: the plaintiff, Robert Two Bears; Judy Whitehorse, defendant, with counsel Attorney Heidi Drobnick; Gregory A. Littlejohn, Kathyleen LoneTree, and Douglas Greengrass, interested individuals. *See Order (Notification to Interest Individuals),* CV 13-04 (HCN Tr. Ct., Mar. 18, 2013). The following party failed to appear and did not provide the Court with notice explaining his nonattendance: James Greendeer. The Court proceeded in the party's absence as permitted by *HCN R. Civ. P.* 44(C).

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Art. V – LEGISLATURE

Section 1. Composition of the Legislature.

a. Legislative powers shall be vested in the Legislature.

Section 6. Terms of Office. Members of the Legislature shall serve four (4) year terms not to exceed two (2) consecutive four (4) year terms, which shall be staggered, unless the Legislator's first term is filling a vacancy under Article IX of Constitution, it will not count as a term for purposes of this section. Legislators shall represent their respective Districts until their successors have been sworn into office except if the Legislator has been successfully removed or recalled in accordance with this Constitution. Members of the Legislature shall be elected by a majority vote of the eligible voters from their respective Districts.

Section 7. Qualifications. Members of the Legislature shall be at least twenty five (25) years old and eligible to vote. No person shall become a member of the Ho-Chunk Nation Legislature if otherwise employed by the Ho-Chunk Nation. No person convicted of a felony shall serve as a Legislator unless pardoned.

Art. VIII – Elections

Sec. 1. General Elections. General Elections shall be held on the first Tuesday in June of odd numbered years. Offices of the Legislature, Executive, and Judiciary shall be filled at General Elections.

Sec. 6. Certification of Election Results. The Election Board shall certify election results within three (3) days after the date of the election.

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

ELECTION CODE, 2 HCC § 6

Subsec. 2. Purpose and Construction.

The *Election Code* (2 HCC § 6) is enacted to provide basic rules and establish election procedures to ensure that all elections are conducted in a fair and proper manner. The *Election Code* (2 HCC § 6) shall be interpreted liberally in order to accomplish this purpose. Substantial compliance shall satisfy the *Election Code* (2 HCC § 6). Technicalities shall not be used to interfere with, delay, or block elections or cause confusion or a loss of voter confidence in the election system.

Subsec. 18. Challenges to Election Results.

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

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

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

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

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 24. Substituting, Intervening and Joining Parties.

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

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.

Rule 79. Discovery.

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

Rule 80. Appeals.

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

1. The parties received proper notice of the April 2, 2013 *Trial.*

2. The plaintiff, Robert Two Bears, is an enrolled member of the Ho-Chunk Nation, Tribal ID# 439A002391, and resides at 4416 Van Buren Street NE, Columbia Heights, MN 55421.[1]

3. The Court hereby incorporates *Findings of Fact* 2 through 11 from the previously entered *Order (Mot. Hr'g),* CV 13-04 (HCN Tr. Ct., Mar. 27, 2013).

4. The plaintiff called Attorney General Sheila Corbine as his witness. The Attorney General testified to the following:

   a. she has been the Ho-Chunk Nation Attorney General for eight years;

   b. she maintains oversight over Ho-Chunk Nation Department of Justice (hereinafter DOJ) attorneys;

   c. DOJ attorneys provide expert legal advice to various departments of the Ho-Chunk Nation;

[1] The Court previously used the address of 5516 Van Buren Street NE, Columbia Heights, MN 55421 due to the plaintiff's apparent typographical error contained within the filed March 15, 2013 *Complaint.*

d. she is commonly responsible for providing legal advice concerning the implementation of constitutional revisions by secretarial election;

e. that the opinions of the Attorney General are not law and that clients maintain the responsibility to determine whether to accept the advice;

f. she is concerned about General Council procedures in that issues for secretarial elections are developed and resolutions passed without first screening for legal issues;

g. there exists a lack of legislative history for resolutions passed at General Council as many resolutions are not discussed with tribal membership or receive attention by the Ho-Chunk Nation Legislature;

Trial (LPER, Apr. 2, 2013, 08:22:13 – 08:43:10 a.m. CDT).

7. The defendants moved the Court for a directed verdict based on the failure of the plaintiff to meet the burden of proof to show by clear and convincing evidence that the Election Board violated the ELECTION CODE or conducted the election in an unfair manner. *Id.,* 8:43:26 a.m. CDT; ELECTION CODE, § 6.15b.

8. The plaintiff objected to the defendants' request for a directed verdict, but offered only that he had questions for the Election Board chair. LPER, Apr. 2, 2013, 8:45:15 a.m. CDT.

9. The defendants called defendant Judy A. Whitehorse as a witness as an offer of proof for the record in the directed verdict to flesh out the record for the directed verdict. *Id.*, 8:46:34 a.m. CDT. Ms. Whitehorse testified to the following:

a. she has been a member of the Election Board since 1995 and has been the Chairperson of the Election Board since 2005; *Id.,* 8:48:07 a.m. CDT.

b. in this specific case, the Election Board had an opportunity to discuss the matter of term limits on December 8, 2013 in the presence of their legal counsel; *Id.,* 8:49:57 a.m. CDT.

c. the Election Board has a role in revising the ELECTION CODE when there are Secretarial Elections and that the Election Board or the Legislature makes the changes; *Id.,* 8:51:26 a.m. CDT.

d. the Election Board took the position that the constitutional amendment imposing term limits on Ho-Chunk Nation legislators would be viewed so that starting with this election, this would be the first term of legislators, regardless of what terms had been served in the past. The application was to be prospective and not retroactive; *Id.,* 08:53: 10 a.m. CDT.

e. the Election Board determined that if they did otherwise it would be applying different terms to the election and impacting previous elections; *Id.,* 08:54:25 a.m. CDT.

f. the prospective application was based on fairness principles, and on past practices of the Election Board; *Id.*, 08:54:45 a.m. CDT.

g. the Election Board publishes notices and timelines which contain all deadlines for the elections.

h. candidates Mr. James Greendeer, Mr. Doug Greengrass, Mr. Greg Littlejohn, and Ms. Kathyleen LoneTree Whiterabbit were certified as no objections were received by the Election Board by the February 23, 2013 deadline. *Id.,* 8:56:25 a.m. CDT.

i. the Election Board received legal advice from Attorney Wendy Huling, legislative counsel Attorney Mike Murphy, and the Attorney General;

j. past practices of the Election Board that guided the Board in this matter of prospective application of the law were:

i. The Secretarial election which required the institution of a mandate that the legislative members must have a four year degree. There it was decided that the current terms would be allowed to end and then the law would apply.

ii. In the case of redistricting, the result was that an area 4 legislator did not live in the district. The question was whether a special election should be held or to allow him to remain in the legislature. In that case the Election Board determined that the legislator would sit until the term was completed and that the law would apply going forward with the next election. *Id.*, 9:00:45 a.m. CDT.

k. that in another Constitutional interpretation stemming from the August 2012 Secretarial Election, the Judiciary is to be elected. The Election Board determined to allow the current Judiciary to remain seated and let the term run before causing an election for the Judiciary to take place. *Id.*, 9:02:48 a.m. CDT.

l. that the 2013 primary election was complex and had many issues. Due to the number of questions that related to the appeal of the Secretarial Election, notice was provided to candidates at the time the nomination paperwork was released. The candidates were required to sign a statement that they knew the Secretarial Election was under appeal and that the CONSTITUTION and ELECTION CODE could be overturned. The Election Board made an effort to provide notice to everyone of the potential problems. *Id.,* 9:07:37 a.m. CDT.

10. The plaintiff questioned Ms. Whitehorse concerning the role of legal counsel in assisting the Election Board with interpreting the laws. His questioning was limited by the objections of the defendants that records referenced were subject to privilege. *Id.,* 9:25:29 a.m. CDT.

DECISION

This is an election action concerning the Ho-Chunk Nation Election Board's decision to certify those candidates running for Ho-Chunk Nation Legislature who had already served two consecutive terms leading into the March 5, 2013 General Primary Election. The plaintiff, Robert Two Bears, contends that such action violates the CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION) and the ELECTION CODE. *Compl.* at 1. For the reasons stated below, the Court finds the plaintiff has not met his burden to prove by clear and convincing evidence that the Election Board's prospective application of the recent constitutional amendments violated the ELECTION CODE or the CONSTITUTION.

I. Facts

The facts surrounding the instant case are not materially disputed. On August 14, 2012, the Ho-Chunk Nation conducted a Secretarial Election, ultimately amending the CONSTITUTION to impose term limits on members of the Ho-Chunk Nation Legislature:

> Terms of Office. Members of the Legislature shall serve four (4) year terms *not to exceed two (2) consecutive four (4) year terms, which shall be staggered, unless the Legislator's first term is filling a vacancy under Article IX of Constitution, it will not count as a term for purposes of this section.* Legislators shall represent their respective Districts until their successors have been sworn into office except if the Legislator has been successfully removed or recalled in accordance with this Constitution. Members of the Legislature shall be elected by a majority vote of the eligible voters from their respective Districts.

CONST., Art. V, § 6 (emphasis added).

Thereafter, on March 5, 2013, the Election Board conducted a General Primary Election in which candidate Kathyleen LoneTree Whiterabbit defeated the plaintiff by receiving 49 out of the total 89 votes cast, amounting to 55.06% of the tabulated votes. The plaintiff received 37

votes, amounting to 41.57% of the tabulated votes, and three (3) votes designated as write-in selections, amounting to 3.37% of the tabulated votes. *Official Certificate of Election Results* (Mar. 6, 2013); *see also* ELECTION CODE, § 6.14h(3).

II. Plaintiff's Challenge

In the instant case, the plaintiff concedes that candidate Kathyleen LoneTree Whiterabbit received over 50% plus 1 of the votes for the Area V, Seat 1 election. He does not dispute that Ms. LoneTree Whiterabbit meets the minimum candidate qualifications for Legislator as stated within the CONSTITUTION and the ELECTION CODE:

> Section 7. Qualifications. Members of the Legislature shall be at least twenty five (25) years old and eligible to vote. No person shall become a member of the Ho-Chunk Nation Legislature if otherwise employed by the Ho-Chunk Nation. No person convicted of a felony shall serve as a Legislator unless pardoned.

CONST., Art. V § 7; ELECTION CODE, § 6.8a.i.

The principal contention between the parties concerns whether the constitutional term limitation adopted via the August, 2012 Secretarial Election process was intended to be applied retroactively to the incumbent legislative candidates. Specifically, the plaintiff disputes the Election Board's interpretation of the constitutional term limits imposed upon Ho-Chunk Nation Legislators resulting in a prospective implementation of the term limitation language—effectively recognizing this election the first term for all those candidates elected to serve the Nation's Legislature. Rather, the plaintiff seeks a determination that the term limit should be applied to members of the legislature currently sitting, in a retroactive manner, and specifically, as to candidate Kathyleen LoneTree Whiterabbit that she be de-certified for not having been absent from the Legislature for one full four year term.

In accordance with the ELECTION CODE, a challenger must prove by clear and convincing evidence that the Election Board violated the ELECTION CODE or conducted an unfair election. ELECTION CODE, § 6.15b. In addition, it must be proven that the election would have been different but for the violation. *Id.*; *see also Demetrio D. Abangan et al. v. HCN Election Bd.*, SU 02-02 (HCN S. Ct., Mar. 25, 2002) at 3 n.1 (acknowledging the statutory modification from "could" have been different to "would" be different). Under this two-part test, minor infractions can be dismissed if the election results would remain unchanged. However, with major violations there is a greater chance of variance in the results. *See generally Christine Funmaker-Romano and Gerald Cleveland, Sr. v. HCN Election Bd. et al.*, SU 05-08 (HCN S. Ct., Aug. 3, 2005) at 6.

The Court finds the plaintiff has failed to produce evidence necessary to meet the first part of the two-part examination. Relying on unsupported contentions that the Election Board is bound to follow the advice of legal counsel or the Bureau of Indian Affairs (hereinafter BIA), that the Election Board may have received inadequate training, or that the duration of time leading up to the constitutional amendment mandates a particular application to the current Legislators, the plaintiff has provided no binding authority and little persuasive authority as to why the recently enacted term limits should apply retroactively.

To begin, it is well settled that there is no obligation of a client to follow the advice of legal counsel, regardless of the wisdom of such a practice. In her testimony, Attorney General Sheila Corbine testified that she had been the AG for the Nation for eight years, and during that time she supervised the attorneys advising the Election Board. Further, that her opinions prepared for her client were just opinions and recommendations as to potential courses of action. Generally, she would advise as to whether a matter was likely to be subject to attack based on a

certain course of action. However, she was very clear that there is no duty of the client to follow the expert advice of counsel. LPER, Apr. 2, 2013, 08:41:34 a.m. CDT.

In addition, the Court remains highly averse to adopting the plaintiff's proposed application due to constitutional prohibitions against the enactment of *ex post facto* laws or bills of attainder. The policy for both rests upon the unfairness of application of retro-active laws. In civil proceedings, the court looks to whether there is a clear statement of intent. If no such clear statement of intent to retroactive application exists, no retroactive effect is given to statutes burdening private interests. *Johnson v. United States*, 529 U.S. 694, 701, 120 S. Ct. 1795, 146 L.Ed 2d 727 (2000); *see also Parmenton Decorah v. HCN Legislature, and HCN Dept. of Personnel*, CV 99-08, at 8-10 and 12-13. (Employment resolution singles out small class of people and the enacted law was used as the basis for a subsequent determination that an individual in the class would not get paid, negatively impacting specifically identifiable individual and having retroactive application). The retroactive application of a prospective law was determined to be an *ex post facto* law. There the private interest was in getting paid for services performed. Likewise, private interests include fundamental rights; and voting is a fundamental right.

Furthermore, the Election Board's decision to apply the law of the constitutional amendment instituting term limits in a prospective fashion is consistent with principles of fairness and notice of due process. Constitutional amendments, as well as statutes, are self-executing and are applied prospectively unless a clear intent is shown from the language of the amendment that it is to be applied retroactively. The United States Supreme Court has summarized the rational and policy for prospective application of constitutional amendments:

> The rule is based on a principle of fairness. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal

> doctrine centuries older than [the federal] Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " *Kaiser [Aluminum & Chemical Corp. v. Bonjorno]*, 494 U.S. [827], at 855, 110 S.Ct. 1570, 108 L.Ed.2d 842[(1990)] (Scalia, J., concurring). *Landgraf v. USI Film Products,* 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed.2d 229 (1944).

The Court finds this fairness policy concern to be persuasive. Further, the defendants urged that this Court look to the sister jurisdiction of the State of Wisconsin, where the courts apply constitutional amendments prospectively unless contrary intent is shown:

> The established rule is that constitutional amendments which deal with the substantive law of the state are presumed self-executing in nature and prospective in effect, and that such amendments repeal inconsistent statutes and common law which arose under the Constitution before the amendment.

Kayden Inds., Inc. v. Murphy, 34 Wis 2d 718, 731, 150 N.W. 2d 447, 453 (1967).

With the term limit language, there is no indication from the language of the proposed amendment that any retroactive application of the term limits was intended by either the electorate or the drafters. In light of the specific absence of direction for retroactive effect, prospective application is consistent with fairness to the candidates and to those that cast their votes in this election. Therefore the determination of the Election Board to prospectively apply the amendment is consistent with federal, state and tribal law.

Finally, the Election Board's decision to prospectively apply the term limitation language of the constitutional revision is consistent with the past practices of the Election Board where implementation of constitutional revisions is concerned. The proponents of the proposed action were silent as to how the term limitation language was to be implemented. The Election Board had no specific knowledge that the Ho-Chunk people wanted the term limits to go into effect retroactively. No evidence was proffered by the Plaintiff that there was knowledge or any

legislative intent that the law was intended to be applied retroactively so that candidates having served a term or terms prior to March 5, 2013 would be prohibited from participation in this election.

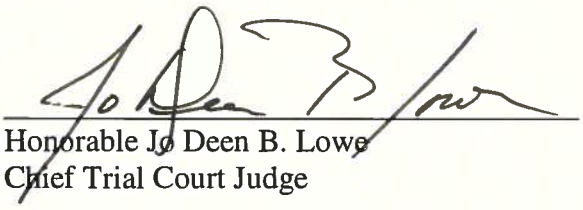
Election Board Chairperson Judy Whitehorse testified that there was no evidence provided to the Election Board from the General Council relating to the prospective application and implementation of the term limitation language. Based on past practice, the Election Board had determined to allow the current terms to expire and that the law would be prospectively applied. This had been done in the situation where a constitutional revision called for a mandated college education requirement for Legislators, and where redistricting had resulted in a dislocation of a seated legislator from the district he had been elected to serve. In both instances the affected individuals were permitted to serve out their terms and the law applied at the next election. LPER, Apr. 2, 2013, 09:00:45 a.m. CDT. The result of the decision to prospectively apply the constitutional revision is that each candidate would serve their first term, starting with the March 5, 2013 General Primary Election. *Id.*, 8:53:10 a.m. CDT. The prospective application of the term limits allowed the Election Board to fairly apply the law and avoid interference with prior elections. To have changed the rules during a term is not consistent with the principles of notice, due process and general fairness.

In summation, it is the determination of this Court that the plaintiff failed to meet the burden of proof to show by clear and convincing evidence that the Election Board violated the Nation's CONSTITUTION or the ELECTION CODE. The prospective application of the constitutional revision relating to term limits is appropriate. Therefore the Election Results must stand and the candidates that are elected to the Nation's Legislature shall be recognized as

serving their first term, for purposes of the term limitation amendment to Art. V, §6 of the CONSTITUTION.

The parties retain the right to appeal this final judgment pursuant to the *Special Rules for Election Challenges*. *HCN R. Civ. P.* 80.

IT IS SO ORDERED this 4th day of April 2013, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.



Honorable Jo Deen B. Lowe
Chief Trial Court Judge

A true and correct copy of the foregoing was sent to the following parties of record this 4th day of April, 2013.
Robert Two Bears, Heidi Drobnick, Judy Whitehorse, E.B., Kathyleen Wuetree-Whitehorse, Greg Uttyogh, Jamie Greenleaf, Doug Greenleaf
Asst/Clerk Margaret Jean

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