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IN THE HO-CHUNK NATION TRIAL COURT

THERESA LYNN HENDRICKSON,	:	
	:	Case No.: CV 99-10
Petitioner,	:	
	:	
vs.	:	JUDGMENT
	:	
HO-CHUNK NATION OFFICE OF	:	
TRIBAL ENROLLMENT,	:	
Respondent	:	

INTRODUCTION

The petitioner challenges the manner in which she was removed as a member of the Ho-Chunk Nation pursuant to the TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995 [hereinafter TEMA] and the INELIGIBLE TRIBAL MEMBERS REMOVAL PROCEDURES [hereinafter ITMRP]. This case is the first of its type and presents new questions on how to treat challenges to Tribal membership in a manner consistent with the HCN CONSTITUTION. Appearances: Gerald Fox representing the petitioner, Wendy Helgemo representing the respondent. Oral Argument was heard in this case on February 15, 2001.¹

PROCEDURAL HISTORY

This case began with the filing of an affidavit from Adam J. Hall, HCN Tribal Enrollment Officer on October 28, 1998, which stated that there was reason to believe an error had been made in considering Theresa Hendrickson as a member of the Ho-Chunk Nation. *See*

¹ This case originally was heard by Chief Judge, Mark Butterfield. Judge Butterfield left office on March 7, 2002, prior to rendering a decision in this case. Subsequently, the case was assigned to Chief Judge William Bossman, who enters this *Judgment* after a careful examination of the entire record in this case.

1 ITMRP § 1.04. Ms. Hendrickson had been enrolled since 1976 when she was four years old.
2 On November 12, 1998 a hearing was held before the Tribal Enrollment Committee pursuant to
3 ITMRP. Based on the evidence brought forth at the hearing Ms. Hendrickson was tentatively
4 removed as a member of the Ho-Chunk Nation. Her removal will not be finalized unless the
5 General Council ratifies this action within one year of the final removal action.

6 On February 9, 1999 Ms. Hendrickson initiated this appeal of the Committee of Tribal
7 Enrollment decision removing her name from the membership roll of the Ho-Chunk Nation by
8 filing her *Petition for Review*. On October 12, 1999, the Court entered an *Order (Standard of*
9 *Review)*. The Court determined that the proper standard of review for the consideration of
10 fundamental procedural interests in the *Enrollment Hearing* was strict scrutiny. The Court also
11 determined that once the Office of Tribal Enrollment satisfies procedural due process the Court
12 will apply the standard of review of whether the decision is supported by substantial evidence
13 and is not arbitrary, capricious or an abuse of discretion. The Court also ordered the Committee
14 on Tribal Enrollment to make a complete record of all the material it considered in rendering its
15 decision.
16

17 On September 12, 2000, the Enrollment Committee rendered a final decision denying the
18 petitioner's claim to membership in the Ho-Chunk Nation. The petitioner filed for judicial
19 review on September 29, 2000. The parties filed briefs, and Oral Argument was held on
20 February 15, 2001. The Court now enters this *Judgment* finding that the decision of the Tribal
21 Enrollment Committee was not supported by substantial evidence and is arbitrary, capricious and
22 an abuse of discretion.
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1 **APPLICABLE LAW**

2 **HO-CHUNK NATION CONSTITUTION**

3 **ARTICLE II – MEMBERSHIP**

4
5 Section 1. Requirements. The following persons shall be eligible for membership in the Ho-
6 Chunk Nation, provided, that such persons are not enrolled members of any other Indian nation:

7 (a) All persons of Ho-Chunk blood whose names appear or are entitled to appear on the
8 official census roll prepared pursuant to the Act of January 18, 1881 (21 Stat. 315), or the
9 Wisconsin Winnebago Annuity Payroll for the year one thousand nine hundred and one (1901);
10 or the Act of January 20, 1910 (36 Stat. 873), or the Act of July 1, 1912 (37 Stat. 187); or

11 (b) All descendants of persons listed in Section 1(a), provided, that such persons are at least
12 one-fourth (1/4) Ho-Chunk blood.

13
14 Section 2. Relinquishment of Membership and Re-enrollment. Enrollment in any other Indian
15 Nation shall constitute voluntary relinquishment of membership. Adult members may relinquish
16 their membership or the membership of their minor children. Relinquishment of membership
17 shall be done in writing. Any adult member who has voluntarily requested to be removed from
18 the membership roll shall not be eligible for re-enrollment. Any minor whose membership has
19 been relinquished by a parent shall be eligible for re-enrollment upon reaching the age of
20 eighteen (18).

21
22 Section 3. Adoption by General. Any person at least one-fourth (1/4) Ho-Chunk blood who does
23 not meet the requirements of Section 1 of this Article may be adopted into membership by a two-
24 thirds (2/3) vote of the General Council, provided, that such individual is not an enrolled member
25 of any other Indian nation.

Section 4. Membership Roll. The Legislature shall maintain one official roll of all tribal
members.

Section 5. Membership Code. The Legislature shall have the power to enact laws not
inconsistent with this Article to govern membership. Removal of any person who is not eligible
for membership from the Membership Roll shall be done in accordance with the Membership
Code, provided, that such removal is approved by at least a two-thirds (2/3) vote of the General
Council.

Section 6. Appeals. Any person who has been rejected for enrollment or who has been removed
from the tribal roll shall have the right to appeal to the Judiciary for a remedy in equity consistent
with this Constitution.

ARTICLE III - ORGANIZATION OF THE GOVERNMENT

Section 4. Supremacy Clause. This Constitution shall be the supreme law over all territory and
persons within the jurisdiction of the Ho-Chunk Nation.

1 TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995

2 Section 11. Removal.

3 (a) No Member shall be removed from the Official membership Roll without the
4 approval of the General Council, according to Article II, Section 5 of the Constitution.
5 PROVIDED, that the Tribal Enrollment Office may remove any member from the Official
6 Membership Roll whom it has determined by clear and convincing evidence has obtained
7 membership by an act of fraud, deceit, or misrepresentation, regardless of the length of time
8 between such act and subsequent removal.

9 (b) Removal under this Section shall be retroactive to the date such fraud, deceit, or
10 misrepresentation occurred.

11 Section 12. Appeals

12 (a) Any member, applicant or sponsor shall have the opportunity to appeal any action
13 of the Office to the Committee on Tribal Enrollment. Such appeal shall be filed within sixty (60)
14 days after the date on which the Tribal Enrollment Office publishes and posts notice of its final
15 determination. The Committee shall within ten (10) days review and revise any finding of fact
16 or conclusion of law within the scope of the appeal. The Committee's determination shall be
17 deemed final for the purposes of judicial review.

18 (b) Any person or sponsor shall have the opportunity to appeal any final determination
19 of the Committee to the Trial Court. Such appeal shall be filed within one hundred and eighty
20 (180) days after the date the Committee issues its final determination. If such an appeal is made
21 by a sponsor, the court's determination shall not preclude the applicant upon becoming available
22 or attaining capacity from filing a subsequent appeal.

23 INELIGIBLE TRIBAL MEMBER REMOVAL PROCEDURES

24 Section 1. Submission of Challenge

25 1.01 Identification of Proponent

The Office of Tribal Enrollment shall attempt to ascertain the identity of each and every individual who contacts the Office of Tribal Enrollment, either telephonically or by written correspondence, alleging inadequate enrollment qualifications of a tribal member. No action shall be taken on anonymous allegations.

1.02 Affidavit Requirement

The Office of Tribal Enrollment shall request that the individual making the allegation, the proponent, submit an affidavit to the Office of Tribal Enrollment in support of the allegation. The Office of Tribal Enrollment shall also inform the proponent of the requirement that at least two (2) other individuals submit affidavits to the Office of Tribal Enrollment, substantiating the factual contentions within the proponent's allegation. The proponent and any other individual submitting affidavits, the affiants, must be tribal members.

1.03 Form and Content of Affidavit

The affidavits shall state with particularity the grounds for the allegation, and be signed in the presence of a notary public. Formal rules of evidence shall not serve as a bar to considering any assertions contained within the affidavits. The Office of Tribal Enrollment shall

1 devise and distribute a recommended affidavit form.

2 1.04 Ministerial Action

3 The Tribal Enrollment Officer shall submit a single affidavit in the event the Office of
4 Tribal Enrollment discovers a ministerial error or oversight affecting the eligibility qualifications
5 of a tribal member. The requirement for two substantiating affidavits shall be waived in this
6 instance.

7 Section 2. Withholding of Benefits

8 2.01 Departmental Notification

9 The Office of Tribal Enrollment shall direct the appropriate administrative departments
10 to withhold per capita distributions and housing entitlements upon the receipt of the affidavits
11 from the proponent and at least (2) other tribal members. No other tribally derived rights or
12 entitlements shall be disturbed during the course of the removal procedures.

13 2.02 Treatment of Per Capita Distributions

14 The accumulated per capita distributions of the affected member shall be placed in an
15 interest bearing account pending the resolution of the removal procedures. The withheld per
16 capita distributions and accrued interest shall be payable to the affected member upon a final
17 determination of eligibility by the Committee on Tribal Enrollment or the Ho-Chunk Nation
18 Tribal Court or in the event the General Council fails to vote on a negative final determination
19 within one year following its issuance. The Nation shall receive the withheld per capita
20 distributions and accrued interest upon approval by the General Council of a final determination
21 of ineligibility.

22 Section 3. Notice to Affected Member

23 3.01 Notice Requirements

24 The Office of Tribal Enrollment shall notify the affected member by first class mail of
25 its receipt of the affidavits, the withholding of benefits and the scheduled date of a hearing before
the Committee on Tribal Enrollment. The Office of Tribal Enrollment shall also inform the
affected member of his/her right to be represented by counsel at the scheduled hearing. The
notice shall be mailed within at least five (5) days after the receipt of the final required affidavit.

3.02 Scheduling of Hearing

The hearing before the Committee on Tribal Enrollment shall occur within at least
fifteen (15) days after the mailing of the notice to the affected member.

Section 4. Removal Hearing

4.01 Role of the Office of Tribal Enrollment

The Office of Tribal Enrollment, in furtherance of its statutory duty to maintain the
Official Membership Roll, shall assist in the presentation of newly articulated or uncovered
evidence, but shall not specifically advocate for the affiants unless acting pursuant to Section
1.04.

1 4.02 Provision of Evidence

2 The Office of Tribal Enrollment shall provide copies of the affected member's
3 enrollment file and the challenging affidavits to the Committee on Tribal Enrollment and the
4 affected member at least five (5) days prior to the scheduled removal hearing.

4 4.03 Participation of Affiants

5 The affiants shall attend the hearing unless excused for good cause as determined by the
6 Committee on Tribal Enrollment. The hearing may proceed, in the discretion of the Committee,
7 despite the non-attendance of one or more affiants. The Committee on Tribal Enrollment may
8 reschedule the removal hearing under extreme circumstances.

8 4.04 Chairperson to Preside

9 The Chairperson of the Committee on Tribal Enrollment shall preside over the hearing,
10 and shall be responsible for controlling the presentation of evidence, appearance of witnesses,
11 and the overall order of hearing.

10 4.05 Confidential Proceedings

11 The hearing and record of the hearing by the Committee on Tribal Enrollment will
12 involve confidential and private matters and shall be closed to the public, unless the affected
13 member requests in writing or on the record at the commencement of the hearing that the hearing
14 be open. At a closed hearing, the Committee on Tribal Enrollment, the Enrollment Officer, and
15 designated Enrollment staff, the affiants, and the affected member, and the counsel (if any) of
16 each party may be present at all times. Witnesses, other than the forgoing persons, shall be
17 present only when giving testimony.

15 4.06 Video Tape Record

16 The hearing shall be video taped in full and the tape retained by the Office of Tribal
17 Enrollment not less than one year after the hearing. Tapes will not be released to any person,
18 including the affected member, other than as required by the discovery rules applicable to any
19 appeal of the Committee's decision to the Ho-Chunk Nation Trial Court.

18 4.07 No *Ex Parte* Communication

19 The Office of Tribal Enrollment, the affected member and the affiants shall not
20 communicate with any member or alternate of the Committee on Tribal Enrollment regarding
21 any matter pertaining to the merits of the hearing.

21 4.08 Conduct of Appeals Hearing.

The hearing shall be conducted as follows:

- 22 (i) The Enrollment Officer and/or his or her designated staff shall present the
23 evidence in documentary form or through witnesses.
24 (ii) The affected member shall then be given adequate opportunity to present
25 evidence in documentary form or through witnesses, and confront the available
affiants.
(iii) The Enrollment Officer or his or her designee or Attorney shall be provided with
the opportunity to rebut any evidence presented by the affected member.
(iv) The Enrollment Officer and the affected member shall be given the opportunity to

1 make a brief closing statement to the Committee on Tribal Enrollment.

2 4.09 Evidentiary Showing

3 The Office of Tribal Enrollment or the affiants, through the Office of Tribal Enrollment,
4 must at a minimum, raise a reasonable suspicion that the affected member does not meet the
5 established constitutional requirements for membership.

6 4.10 Rules of Evidence

7 Formal rules of evidence shall not apply at the hearing, but evidence which is irrelevant,
8 cumulative or which would be unfair or prejudicial may be excluded by the Chairperson or may
9 be admitted by the Chairperson under special conditions or stipulations. Basic rules of relevancy,
10 materiality and probative force shall be used by the Chairperson as a guide to admissibility.
11

12 4.11 Witnesses.

13 Prior to giving any testimony, each witness shall be administered an oath or affirmation
14 by the Chairperson. Testimony may be presented either in the form of questions and answers or
15 by narrative statement of the witness. Each witness, upon completion of his or her direct
16 testimony, may be cross-examined first by the other party and then by any members of the
17 Committee on Tribal Enrollment.

18 4.12 Official Notice

19 The Committee on Tribal Enrollment may take official notice of generally recognized
20 facts or any established technical or scientific facts provided that it informs the Office of Tribal
21 Enrollment, the affected member and the affiants of such matters and provides them with the
22 opportunity to rebut any fact officially noticed.

23 4.13 Documentary Evidence.

24 Documentary evidence may be received in the form of copies or excerpts if the original
25 is not readily available. Upon request, opportunity shall be granted to compare the copy to the
original.

26 4.14 Record of Hearing

The record in a hearing shall include:

- 27 (i) Evidence presented at the hearing and any stipulation or admission entered
28 into at the hearing.
- 29 (ii) The video tape record of the hearing.

30 Section 5. Committee on Tribal Enrollment Determinations

31 5.01 Timeline for Decision

32 The Committee on Tribal Enrollment shall deliver a decision at the hearing after the
33 conclusion of the proceedings, and subsequently mail/deliver a written copy of the decision to
34 the Office of Tribal Enrollment, the affected member and the affiants within two (2) days of the
35 hearing.

5.02 Voting

The Committee shall decide the challenge by a majority vote with the Chairperson

1 casting the deciding vote in the instance of a tie. Only primary members shall vote at the hearing
2 unless excused by the Chairperson because of a conflict of interest in which case the alternate
3 may serve in a voting capacity. A conflict of interest shall be defined in accordance with the
4 Bylaws of the Committee on Tribal Enrollment.

5 5.03 Committee Decisions

6 The Committee may render any of the following decisions:

- 7 (i) The Committee on Tribal Enrollment may find the challenge to be frivolous
8 and/or malicious, and therefore dismiss the challenge. The proponent:
9 shall then be subject to the penalty structure below.
- 10 (ii) The Committee on Tribal Enrollment may find that the Office of Tribal
11 Enrollment or the affiants, through the Office of Tribal Enrollment failed to meet
12 the required evidentiary showing pursuant to Section 4.09.
- 13 (iii) The Committee on Tribal Enrollment may confirm an admission of the affected
14 member that he/she does not fulfill the enrollment qualifications of the Ho-
15 Chunk Nation.
- 16 (iv) The Committee on Tribal Enrollment may deem the affected member ineligible
17 for tribal enrollment if documentary and/or testimonial evidence proves clear
18 and convincing evidence that the affected member cannot claim Ho-Chunk
19 lineage and a Ho-Chunk blood quantum of at least one-quarter (1/4).
20 (a) The decision rendered under subsections (i) through (iv) shall be
21 considered final decisions for purposes of judicial appeal.
- 22 (v) The Committee on Tribal Enrollment may order the affected member and the
23 ancestor(s) needed to establish Ho-Chunk lineage to submit to a DNA analysis to
24 be conducted by an independent testing laboratory chosen by the Ho-Chunk
25 Nation.

26 Section 6. DNA Analysis and Findings

27 6.01 Testing Procedure

28 The affected member must coordinate the required testing with the Office of Tribal
29 Enrollment in order to set testing times and locations for both him/her and the chosen
30 ancestor(s).

31 6.02 Failure to Cooperate

32 The Committee on Tribal Enrollment will deem a failure of the affected member to
33 cooperate with the Office of Tribal Enrollment or failure to submit to testing within a reasonable
34 period of time as equivalent to an admission of ineligibility for membership under Section 5.03
35 (v), unless the difficulty proves beyond the control of the affected member.

36 6.03 Testing Results

37 The DNA analysis results shall be delivered upon completion to the Committee on
38 Tribal Enrollment from the independent testing laboratory. The Committee on Tribal Enrollment
39 shall render a decision by majority vote in accordance with Section 5.02 based on the results
40 within ten (10) days after receipt. The Committee on Tribal Enrollment shall mail/deliver a
41 written copy of the decision to the Office of Tribal Enrollment, the affected member and the

1 affiants within two (2) days of the decision. Such decision shall be deemed final for purposes of
2 judicial review.

3 6.04 Standard of Proof

4 The Committee on Tribal Enrollment shall deem the affected member ineligible for
5 tribal enrollment only if the testing results indicate by clear and convincing evidence that the
6 affected member cannot claim Ho-Chunk lineage and a Ho-Chunk blood quantum of at least
7 one-quarter (1/4).

8 Section 7. Penalty Assessment

9 7.01 Membership Status Upheld

10 In the event the results of the DNA analysis confirm the eligibility of the affected
11 member, the proponent shall reimburse the Office of Tribal Enrollment for the cost of the DNA
12 testing, and compensate the affected member in the amount of \$250.00.

13 7.02 Frivolous and/or Malicious Challenge

14 A finding of a frivolous and/or malicious challenge by the Committee on Tribal
15 Enrollment shall subject the proponent to an award of damages to the Ho-Chunk Nation in the
16 amount of \$5,000.00 of which \$250.00 shall be given to the affected member as restitution.

17 Section 8. Appeal to the Ho-Chunk Nation Trial Court

18 Any final determination of the Committee on Tribal Enrollment shall be appealable to
19 the Ho-Chunk Nation Trial Court if such appeal is filed within ninety (90) days of the final
20 determination.

21 Section 9. General Council Approval

22 9.01 Constitutional Role

23 The General Council must approve any final determination of ineligibility for membership
24 status, administrative or judicial, by at least a two thirds (2/3) vote pursuant to the Constitution of
25 the Ho-Chunk Nation, Art. II, Sec. 5, Membership Code.

9.02 Failure to Act

If the General Council fails to approve the final determination of ineligibility for membership
status within one (1) year of the final determination, the affected member shall maintain
membership status and no future challenges can be asserted against the individual in any forum.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 58. Amendment to or Relief from Judgment or Order.

(A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
must be based on an error or irregularity which prevented a party from receiving a fair trial or a
substantial legal error which affected the outcome of the action.

1
2 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
3 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
4 conclusions or make additional findings or conclusions, amending the judgment accordingly.
5 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
6 time for initiating an appeal commences upon entry of the amended judgment. If the Court
7 denies a motion filed under this rule, the time for initiating an appeal from the judgment
8 commences when the Court denies the motion on the record or when an order denying the
9 motion is entered, whichever occurs first. If within thirty (30) days after the filing of such
10 motion, and the Court does not decide a motion under this Rule or the judge does not sign an
11 order denying the motion, the motion is considered denied. The time for initiating an appeal from
12 judgment commences in accordance with the Rules of Appellate Procedure.

8 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*
9 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*
10 must be based upon new information that has come to the party's attention that, if true, could
11 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify
12 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal
13 commences when the Court denies the motion on the record or when an order denying the
14 motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of
15 such motion, and the Court does not decide the motion or the judge does not sign an order
16 denying the motion, the motion is considered denied. The time for initiating an appeal from
17 judgment commences in accordance with the Rules of Appellate Procedure.

14 (D) Erratum Order or Reissuance of Judgment. Clerical errors in a court record, including the
15 *Judgment* or *Order*, may be corrected by the Court at any time.

16 (E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
17 party made within a reasonable time for the following reasons: (1) newly discovered evidence
18 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
19 misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
20 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii); did not
21 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
22 released, discharged or is without effect due to a judgment earlier in time.

20 Rule 61. Appeals.

21 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk Nation
22 Supreme Court. The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*
23 *Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent
24 actions of a *final Judgment* or Trial Court *Order* must follow the HCN *Rules of Appellate*
25 *Procedure*.

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DECISION

This case is an appeal from a decision removing a tribal member from the membership roll of the Ho-Chunk Nation. There are three enactments that govern the issue of removal of members: HCN CONST. ART. II §§ 5, 6; the TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995 § 11; and the INELIGIBLE TRIBAL MEMBER REMOVAL PROCEDURES § 4. All these provisions address the issue of removal of members from the membership roll.

The HCN CONSTITUTION is supreme. HCN CONST. Art. III, § 4. Therefore, the Court will first examine the constitutional provisions governing removal of members. The HCN CONSTITUTION contains three key principles governing removal of members: (1) “Removal of any person who is not eligible for membership from the Membership Roll shall be done in accordance with the Membership Code.” HCN CONST. Art. II, § 5; (2) All removals must be “approved by at least a two-thirds (2/3) vote of the General Council.” HCN CONST. Art. II § 5; (3) “Any person who has been...removed from the tribal roll shall have the right to appeal to the Judiciary for a remedy in equity consistent with this Constitution.” HCN CONST. Art. II, § 6.

Since the HCN CONSTITUTION provides that removals “shall be done in accordance with the Membership Code”, HCN Const. Art. II, § 5, the Court will first analyze the relevant provisions of the TRIBAL ENROLLMENT AND MEMBERSHIP ACT OF 1995. TEMA § 11 Removal, states as follows:

- (a) No Member shall be removed from the Official Membership Roll without the approval of the General Council, according to Article II, Section 5 of the Constitution. PROVIDED, that the Tribal Enrollment Office may remove any member from the Official Membership Roll whom it has determined by clear and convincing evidence has obtained membership by an act of fraud, deceit, or misrepresentation, regardless of the length of time between such act and subsequent removal.
- (b) Removal under this Section shall be retroactive to the date such fraud, deceit, or misrepresentation occurred.

1 Therefore, in order for a removal to meet the constitutional mandate of being “done in
2 accordance with the Membership Code,” the removal must be approved by the General Council.
3 HCN CONST. Art. II, § 5. TEMA also provides the only statutory authority for the Tribal
4 Enrollment Office to remove any member from the Official Membership Roll.² “The Tribal
5 Enrollment Office may remove any member from the Official Membership Roll whom it has
6 determined by clear and convincing evidence has obtained membership by an act of fraud,
7 deceit, or misrepresentation, regardless of the length of time between such act and subsequent
8 removal.” TEMA § 11. It is clear from the plain language of the statute that the only authority
9 possessed by the Tribal Enrollment Office to remove a member is in cases of fraud, deceit or
10 misrepresentation.
11

12 In addition to the HCN CONSTITUTION and TEMA, the Court must also look to the
13 ITMRP. ITMRP § 4.09 provides that the “Office of Tribal Enrollment, must, at a minimum,
14 raise a reasonable suspicion that the affected member does not meet the established
15 constitutional requirements for membership.” ITMRP § 4.09. The ITMRP does not mention the
16 statutory requirement of “fraud, deceit, or misrepresentation” as provided by TEMA § 11.
17 However, taking the provisions of TEMA and ITMRP together, it is clear that in order to remove
18 a member from the membership rolls, the Office of Tribal Enrollment must meet a two part
19 evidentiary standard. In order for a member to be removed from the membership rolls, the
20 following must be proved: (1) There must be a “reasonable suspicion that the affected member
21 does not meet the established constitutional requirements for membership.” ITMRP § 4.09, and
22 (2) It must be shown “by clear and convincing evidence” that the member “has obtained
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25 ² Any action taken by the Tribal Enrollment Office to remove a member from the official roll would still be subject to the constitutional provision that such removal must be “approved by at least a two-thirds (2/3) vote of the General Council.” HCN CONSTITUTION, ART. II § 5.

1 membership by an act of fraud, deceit, or misrepresentation.” TEMA § 11. This is the only
2 interpretation that will both uphold the constitutionally mandated three key principles governing
3 removal of members, and give meaning to both TEMA and ITMRP.

4 In applying these evidentiary standards to this case, the Court is guided by the standard of
5 review established by the Court in this case in the October 12, 1999 *Order (Standard of Review)*.
6 The Court must determine “whether the decision is supported by substantial evidence and is not
7 arbitrary, capricious or an abuse of discretion.” The “Substantial Evidence Rule” is the
8 “principle that a reviewing court should uphold an administrative body’s ruling, if it is supported
9 by evidence on which the administrative body could reasonably base its decision.”³

11 The Court will first address the issue of whether it has been shown “by clear and
12 convincing evidence” that the member “has obtained membership by an act of fraud, deceit, or
13 misrepresentation.” Since the terms “fraud,” “deceit,” and “misrepresentation” are not defined in
14 TEMA, the Court will begin with the definitions of those terms found in BLACK’S LAW
15 DICTIONARY. Fraud is defined as “A knowing misrepresentation of the truth or concealment of a
16 material fact to induce another to act to his or her detriment.”⁴ Deceit is defined as “The act of
17 intentionally giving a false impression.”⁵ Misrepresentation is defined as “The act of making a
18 false or misleading statement about something, usually with the intent to deceive.”⁶

19 Since these proceedings began with the submission to the Tribal Enrollment Office of the
20 October 26, 1998 *Affidavit* of Adam J. Hall, the Court will first determine if there were any
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23 ³ BLACK’S LAW DICTIONARY 1442 (7th ed. 1999)

24 ⁴ *Id.* at 670.

25 ⁵ *Id.* at 413.

⁶ *Id.* at 1016.

1 allegations of “fraud, deceit, or misrepresentation” made in that *Affidavit*. The Court cannot find
2 in the *Affidavit* of Adam J. Hall any allegation of conduct that could remotely be considered
3 “fraud, deceit, or misrepresentation.”⁷ Second, the Court will consider whether there were any
4 factual findings of “fraud,” “deceit,” or “misrepresentation” made by the Tribal Enrollment
5 Committee. The Court finds that there were none. Since the Court finds there was no evidence
6 of fraud, deceit, or misrepresentation, the Court also finds that the decision of the Tribal
7 Enrollment Committee to remove Ms. Hendrickson from the membership roll was not supported
8 by substantial evidence.
9

10 Now that the Court has determined that the decision of the Tribal Enrollment Committee
11 was not supported by substantial evidence, the Court will next determine whether the decision
12 was “arbitrary, capricious or an abuse of discretion.” The Court will look to the definitions of
13 those terms found in BLACK’S LAW DICTIONARY. Arbitrary is defined as “founded on prejudice
14 or preference rather than on reason or fact.”⁸ Capricious is defined as “contrary to the evidence
15 or established rules of law.”⁹ Abuse of discretion is defined as “failure to exercise sound,
16 reasonable, and legal decision-making.”¹⁰ The decision of the Tribal Enrollment Committee was
17 not supported by any evidence of “fraud, deceit, or misrepresentation.” Therefore, the decision
18 was arbitrary, because it was not based upon “reason or fact.” Likewise, the decision is
19 capricious because it was “contrary to the evidence.” Finally, the decision amounts to an abuse
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22 ⁷ In fact, in its *Answer to the Petition for Review*, the defendants admitted to the allegation that “Neither the *Removal*
23 *Affidavit* nor the *Notice of Removal Hearing* allege that the petitioner or any other person, engaged in fraud, deceit
or misrepresentation in connection with the petitioner’s enrollment application.”

24 ⁸ *Id.* at 100.

25 ⁹ *Id.* at 203.

¹⁰ *Id.* at 10.

1 of discretion because making the decision to remove a member from the membership roll
2 without receiving any evidence of “fraud, deceit, or misrepresentation” as required by TEMA §
3 11, shows a “failure to exercise sound, reasonable and legal decision-making.”¹¹

4 Because the Court has concluded that there was no substantial evidence of fraud, deceit,
5 or misrepresentation, and that the petitioner was improperly removed from the membership roll
6 of the Ho-Chunk Nation, the Court will not address the issue of whether there was substantial
7 evidence that the petitioner does not meet the constitutional requirements for membership. The
8 Office of Tribal Enrollment must prove both the existence of fraud, deceit or misrepresentation
9 and the failure to meet the constitutional requirements for membership. Since there was no
10 showing at all of fraud, deceit, or misrepresentation, there is no need to address the issue of
11 whether the petitioner meets the constitutional requirements for membership.
12

13 14 **CONCLUSION**

15
16 The Court hereby exercises the power granted by HCN CONST. art. II § 6, to render a
17 “remedy in equity consistent with this Constitution.” The decision of the Tribal Enrollment
18 Committee removing Theresa Lynn Hendrickson from the membership roll is reversed. The
19 Court has determined that the decision was not supported by substantial evidence and was
20 arbitrary, capricious and an abuse of discretion. Further, the Court enters the following *Orders*
21 in order to implement and carry out the Court’s *Judgment*. These *Orders* are consistent with the
22
23

24
25 ¹¹ The Court is aware that the Tribal Enrollment Committee based its decision solely upon ITMRP rather than on
both ITMRP and TEMA. It is an understandable error because ITMRP as a procedural code intended to guide the
Office of Tribal Enrollment in the implementation of TEMA, should be expected to incorporate all substantive law
found in TEMA. In no way does the Court believe that the Committee intentionally ignored established laws.

1 HCN CONSTITUTION and are necessary to restore the petitioner to her rightful status as a member
2 of the Ho-Chunk Nation.

3 **ORDER**

4
5 **THE COURT HEREBY ORDERS** the Ho-Chunk Nation Office of Tribal Enrollment
6 to restore the name Theresa Lynn Hendrickson, DOB April 5, 1972 to the membership roll with
7 the enrollment number 439A001171.

8
9 **THE COURT FURTHER ORDERS** the Ho-Chunk Nation Department of Treasury to
10 release to the petitioner all her per capita distributions from February 1, 1999 through the date of
11 this *Judgment*, along with five per cent (5%) interest on each payment from the time it was
12 originally due. These funds were to have been held in an interest bearing account pending the
13 outcome of this action according to ITMRP § 2.01 and the October 12, 1999 *Order (Standard of*
14 *Review)* previously entered herein. The petitioner shall be entitled to receive all future per capita
15 distributions in the same manner as all other members of the Ho-Chunk Nation.

16 17 **RIGHTS OF THE PARTIES**

18
19 The parties retain the right to file a timely post judgment motion with this Court in
20 accordance with *HCN R. Civ. P. 58, Amendment to or relief from Judgment or Order.*
21 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk
22 Nation Supreme Court.¹² The *Appeal* must comply with the Ho-Chunk Nation *Rules of*
23

24
25 ¹²The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.” *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court, therefore, has voluntarily adopted an abuse of discretion standard “to determine if an error of law was made by the lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see*

1 *Appellate Procedure* [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right
2 of Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the
3 day such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a
4 Notice of Appeal from such judgment or order, together with a filing fee of thirty-five dollars
5 (\$35 U.S.)” *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court
6 *Order* must follow the [*HCN R. App. P.*]” *HCN R. Civ. P.* 61.

7
8 **IT IS SO ORDERED** this August 5, 2002 at the Ho-Chunk Nation Courthouse in Black
9 River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.

10
11 _____
12 Honorable William Bossman
13 Chief Trial Judge
14 Ho-Chunk Nation Court System

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21 _____
22 *also Coalition for a Fair Gov't II v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and
23 *JoAnn Jones v. Ho-Chunk Nation Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme
24 Court accepted the following definition of abuse of discretion: “any unreasonable, unconscionable and arbitrary
25 action taken without proper consideration of facts and law pertaining to the matter submitted.” *Youngthunder, Sr.*,
SU 00-05 at 2 (*quoting* BLACK’S LAW DICTIONARY 11 (6th ed. 1990)). Regarding findings of fact, the Supreme
Court has required an appellant to “demonstrate[] clear error with respect to the factual findings of the trial court.”
Coalition II, SU 96-02 at 8; *but see Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., Mar. 25,
1997) at 1-2.

