

IN THE DISTRICT COURT OF THE CHEROKEE NATION

Robin Carter Mayes,)
Candidate at Large, Pro Se)
))
Petitioner,)
))
v.)
))
Cherokee Nation Election Commission,)
))
Cherokee Nation Office of the)
Attorney General, TODD HEMBREE, an)
Individual, SHAWNA CALICO, an individual,)
TERESA HART, an individual, MARTHA)
CALICO, an individual, CAROLYN ALLEN,)
An individual, PAMELA SELLERS, an)
Individual, JOHN DOE, unknown individuals.)
))
Respondents.)

Case No. CV-17-273

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 FILED
 CHEROKEE NATION
 DISTRICT COURT
 JUSTICE TANCY GYEA
 COURT CLERK

PETITIONER'S COMBINED RESPONSE TO RESPONDENTS' MOTIONS TO DISMISS, AMENDED AND SUPPLEMENTED MOTIONS TO DISMISS

COMES NOW, the Petitioner, Robin Carter Mayes, in and for his Combined Response to Respondents' Motions to Dismiss, Amended and Supplemented Motions to Dismiss and alleges and states as follows, to-wit:

Respondents improperly characterize this action as merely one based upon a Declaratory Judgment and Writ of Mandamus. Petitioner clearly states in his Petition that he reported irregularities amounting to interference in the 2017 election in which he was a candidate. Thus, the Cherokee Nation Administrative Procedures Act would provide a Declaratory Relief from which the Petitioner's action may ensue; waiver of sovereign immunity resides in the remedies applicable under the Administrative Procedures Act.

The Cherokee Nation Administrative Procedures Act, 1 CNCA § 101, et seq. gives standing to the Petitioner to bring this action as a person affected by final agency action. 1 CNCA § 501. This is the Cherokee Nation Council's express waiver of sovereign immunity. Additionally, 1 CNCA § 312 allows for review of the Election Commission Rule § 2.10 (B) as it is compared to its implementation of the provisions in 26 CNCA §11 (C) (12) (f) and that it impaired the rights of the Petitioner and will continue to do so. The Cherokee Nation Election Commission would be generally excluded from the Administrative Procedures Act under definition of "Agency" were it not for the application of its rules in conjunction with election laws that the Cherokee Nation Council's enacted LA 12-16 of 26 CNCA § 11 (C) (12) (f) (enacted May 16, 2016, approved May 18, 2016) pursuant to the Cherokee Nation Constitution, Article IX. Article IX states that "the Commission shall be an autonomous and permanent entity, charged with the administration of all Cherokee Nation elections, in accordance with election laws." Autonomy is defined as "[t]he right of self-government." Blacks Law Dictionary, pg. 130 (7th ed. 1999) 26 CNCA § 11 (C) (7) tasks the Election Commission to "[d]evelope rules and regulations necessary to conduct Cherokee Nation elections..." Because "Agency" is defined as "[.....] The term does not include the Cherokee Nation Election Commission in the exercise of powers derived directly and exclusively from the Constitution," at first glance, it would appear that the Election Commission would be exempt from the Administrative Procedures Act. However, the Election Commission, as stated in 26 CNCA § 11:

...shall be an autonomous and permanent entity, which shall be an independent commission in the performance of its statutory authority to govern the conduct of all elections and in performance of such authority shall not be subject to direction, supervision, *intervention* or interference

or of any other type of influence by the Executive Office or the Cherokee Nation Council. (emphasis added)

and in choosing to follow a subsequent provision from LA 12-16, codified at 26 CNCA § 11 (C) (12) (f) that requires the reporting of accusations regarding campaign activities to the office of the Attorney General for investigation and finding of merit and subsequent reporting to the Election Commission for possible sanctions, penalties or “disqualification under procedures found at Title 26 § 38 of the Cherokee Nation Code Annotated.”, the Election Commission opens itself to the Administrative Procedures Act. In actuality, under Petitioner’s accusations to the Election Commission that candidates were having absentee ballots mailed to the candidate and a candidate having return absentee ballots mailed to the candidate under the name of the Cherokee Nation Election Commission, a criminal investigation supports a report to the office of the Attorney General for sanction or penalties; False Impersonation, 21 CNCA § 1533 would support those the accusations raised by the Petitioner, investigated to by the Attorney General.

Regarding interference in election proceedings, 26 CNCA § 38 provides for hearings conducted pursuant to regulations adopted by the Election Commission. LA 12-16 (enacted May 16, 2016, approved May 18, 2016). The Election Commission adopted its rules and regulations July 12, 2016. In the Rules and Regulations of the Cherokee Nation Election Commission § 2.10 (July 12, 2016), adopted after the enactment of LA 12-16, the Election Commission provides for Disqualification Proceedings: Interference with the Commission. The Commission in subsection B states that “[t]he *Commission* shall investigate charges of violation of § 38 to determine whether the charges have merit.” (emphasis added) This is clearly within the purview of the Cherokee Nation

Constitution and legislative enactments codifying the Election Commissions duty to adopt and promulgate rules and regulations as codified in 26 CNCA § 11 (C) (7).

Had the Election Commission stuck to that scheme of procedure, even by hiring outside counsel to conduct its investigation, it would be in compliance with the Cherokee Nation Constitution Article IX, 26 CNCA § 11, and 26 CNCA § 11 (C) (7). This did not happen. The Council of the Cherokee Nation stepped beyond the mandates of the Cherokee Nation Constitution and its expression of autonomy of the Cherokee Nation Election Commission and enacted 26 CNCA § 11 (C) (12) (f) with its provision for an officer of the Executive branch of the Cherokee Nation to intervene in the election proceedings by investigating accusations of interference and to report a finding of merit or not and make a recommendation if merit found. There can be no more clear intervention in the election proceedings under the control of the Cherokee Nation Election Commission than that.

By intervening in the election proceedings and investigating the accusations of interference made by the Petitioner, the office of the Attorney General became an arm or agent of the Cherokee Nation Election. As such, the office of the Attorney General and its employees would then fall within the waiver of sovereign immunity under the Administrative Procedures Act for Petitioner's claims that the application of the rules of the Cherokee Nation Election Commission in conjunction with 26 CNCA § 11 (C) (12) (f) are reviewable by this Court for Declaratory Judgment upon the Constitutionality of 26 CNCA § 11 (C) (12) (f) and for Mandamus that the Cherokee Nation Election Commission investigate the Petitioner's accusation of interference. Petitioner contends that an Assistant Attorney General was the drafter, and potentially the investigating

officer, of the Report to the Election Commission that had campaign signs in support of a candidate accused of interference with the Election Commission. Such action would show directly the type of intervention and influence that Article IX is designed to protect from.

Thus, when the Cherokee Nation Election Commission failed to apply its Constitutionally and Legislatively mandated Rules to maintain its autonomy, it stepped outside the exception to the application of the Cherokee Nation Administrative Procedures act to it. The Election Commission did not hold a hearing upon its ruling that there was no merit to Petitioner's accusation. Looking at 1 CNCA § 501 and 502, the Petitioner is entitled to Judicial review of the ruling of the Election Commission as it affected him as a candidate competing in an election against a candidates accused of interference with the Election Board and its election proceedings by having absentee ballots mailed to the candidate and another having return absentee ballots mailed to the the candidate under the name of the Election Board.

CONCLUSION


Both the Cherokee Nation Constitution and the Cherokee Nation Council state that the Election Commission is an autonomous commission and the Council goes so far as to say it is free from intervention from the Executive and Legislative branches. 26 CNCA Section 11(C)12(f) provides for the accusation made by the Plaintiff to the election commission to be submitted to the AG and an investigation and Report. However, this is not the final say from the Council on the matter and not the only avenue in which the Plaintiff's accusations were to be investigated. 26 section 38(A) states that any hearing on the issue of interference would be according to the rules promulgated by

the Election Commission. LA 12-16 (May 2016) The election commission rules and regulations, adopted and promulgated July 12, 2016 require it to investigate an accusation of interference. Section 2.10 (B). This did not occur. This investigation did not occur. The Election Commission merely submitted the accusation to the Attorney General and relied upon an Executive Agency finding. This patently shows why it is that the provision for the Attorney General to investigate and submit a report is in contravention of the Cherokee Nation Constitution that the Election Commission be an autonomous arm of the Nation without influence in its operations from the Executive, Judicial or Legislative Branches. This clearly places this issue before the District Court under the Administrative Procedures Act as the Legislation of the Council interferes with the autonomy of the Election Commission by directing its investigation be conducted by the Executive Branch as well as the interference and intervention in the election process by such an investigation to determine merit of election related accusations. Just because the Election Commission has staff and time issues to deal with does not absolve it from acting in a manner that is autonomous.

Sustaining a Motion to Dismiss at this stage of the proceeding would be akin to summarily ruling that the Cherokee Nation Council is free to enact legislation that requires the Election Commission to conduct its activities in such a manner that would destroy a free election in which the citizens of the Cherokee Nation may freely choose between candidates duly qualified and provides the opportunity for the Executive Branch to overlook the disqualifications of a candidate that may be more supportive of its positions within the Cherokee Nation and its laws.

WHEREFORE, above premises considered, Petitioner moves this Court to overrule the Respondent's various Motions to Dismiss as Amended and Supplemented and to set this matter for further hearing as this Court deems necessary to resolve the issue, and for any and all other relief to which Petitioner may be entitled.

Respectfully submitted,



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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 12th day of April, 2018, I deposited a true and correct copy of the foregoing Petitioner's Combined Response to Respondents' Motions to Dismiss, Amended and Supplemented Motions to Dismiss with the U.S. Postal Service, with postage thereon fully pre-paid, addressed to:

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