

EBCI
CHEROKEE SUPREME COURT
CHEROKEE, NC

2013 APR -8 PM 3: 49

CHEROKEE SUPREME COURT

EASTERN BAND OF CHEROKEE INDIANS

EBCI
CHEROKEE TRIBAL COURT
CHEROKEE, NC

2013 APR -8 PM 3: 38

**IN RE: PRIMARY ELECTION
FOR THE OFFICE OF
PRINCIPAL CHIEF, JUNE 6,
2013**

**EASTERN BAND OF CHEROKEE
INDIANS BOARD OF ELECTIONS,
RESPONSE TO PETITION FOR WRIT OF
MANDAMUS**

Case No. _____

RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

Pursuant to Rule 11(b)(3) of the Eastern Band of Cherokee Indians Rules of Appellate Procedure, Respondent Eastern Band of Cherokee Indians Board of Elections ("Board") files this Response to Petitioner Patrick Henry Lambert's ("Petitioner") Petition for Writ of Mandamus (the "Petition"). The Board respectfully asserts the following:

I. STATEMENT OF FACTS

This Petition seeks to undo the Board's decision that the Petitioner was not eligible to run for the office of Principal Chief in a primary election in 2013 because the Board determined no election for that office would be held until the end of the current term of the Principal Chief, in 2015. The facts leading up to this decision began in late 2011 when the Board began working on suggested legislation that would eventually become the "2012 Amendment" at issue in this case, as described more fully below.¹

1. The Board suggested amending Section 161-1 of the Election Ordinance to change the day for primary elections from the first Thursday in July to the first Thursday in June to improve voter participation and to provide additional time between the primary and general election.

¹ See also, Board Decision, Findings of Fact (Petition, Attachment 4)(March 19, 2013).

2. To effectuate this amendment, the Board went through a number of revisions to the Election Ordinance. During the drafting process, the Board never discussed or considered modifying the term of Principal Chief and Vice Chief or changing the year of the next primary election for Principal Chief and Vice Chief to 2013 instead of 2015. *See* Board Decision at 3-5 (Petition, Attachment 4).

3. The Board presented its suggested amendments to change the day and the month of primary elections to the Tribal Council. The Tribal Council held numerous work sessions in which it discussed eliminating primary elections altogether, leaving them in the first week of July, moving them to the first week of June, or moving them to the second week in June. During its considerations of amendments to the Election Ordinance, the Tribal Council, however, never discussed changing the primary year for the Principal Chief and Vice Chief from 2015 to 2013. *Id.*

4. On September 6, 2012, the Tribal Council amended the Election Ordinance (referred herein as the “2012 Amendment”).

5. On November 29, 2012, the Board published in the tribal newspaper (Cherokee One Feather) a notice identifying the offices, qualifications and deadlines for individuals who wished to run for office in 2013. The published notice did not identify the offices of Principal Chief or Vice Chief as being up for election in 2013.

6. On February 26, 2013, Petitioner sent a letter to the Tribal Council and Tribal Members asserting that the 2012 Amendment required that an election for the office of Principal Chief and Vice Chief occur in 2013 and that he intended to file as a candidate for the office of Principal Chief.

7. On March 1, 2013, Petitioner attempted to pay the filing fee to run as a candidate for the office of Principal Chief.² The tribal Finance Department declined to accept Petitioner's filings fees because the Board had informed the Finance Department that 2013 was not an election year for the offices of Principal Chief and Vice Chief.

8. Later that day Petitioner went to the Board's office to request a written explanation for why he was denied the ability to file forms to run as a candidate for the office of Principal Chief. On March 5, 2013, the Board issued a letter to Petitioner explaining that his application was premature as Section 161-1(b) contained a clerical error that inadvertently identified 2013 as the year for primary elections for the offices of Principal Chief and Vice Chief. The Board's decision further explained that Section 161-1(b) was in conflict with the Tribal Charter, and as such could not be given effect because a tribal law is void if it is in conflict with the Tribal Charter.

9. On March 11, 2013, Petitioner filed a protest with the Board and requested a hearing before the Board. The Board held Petitioner's hearing on March 15, 2013. During the hearing the Board heard testimony from the Petitioner himself and Mr. Dan McCoy. Petitioner also requested that all exhibits that had been offered during the Teresa McCoy hearing be adopted in his proceeding.

10. Pursuant to its authority under Section 161-19, the Board considered witness testimony, written statements, review of the relevant documents, video footage of the Tribal Council work sessions and the overall record involving the 2012 Amendment. The Board conducted interviews with Tribal Council members, Tribal Operations staff and Board staff. Ten of the eleven Tribal Council members contacted and all six current or former Board members

² Teresa McCoy similarly attempted to pay the filing fee to run as a candidate for the office of Vice Chief, which the Finance Department also declined to accept.

involved stated that the date “2013” in Section 161-1(b) was an inadvertent clerical error and should be “2015.”³ All eleven Tribal Council members contacted and all six current or former Board members involved stated that the only purpose for the amendment to Section 161-1(b) that was ever explained by the Board, and the only purpose that was ever discussed or considered by the Tribal Council, was to change primary elections to the first Thursday in June, instead of the first Thursday in July. Neither the Tribal Council nor the Board ever considered, as a purpose of the amendment to Section 161-1(b), attempting to shorten the terms of office for the Principal Chief and Vice Chief.

11. Upon conclusion of Petitioner’s hearing and the Board’s independent investigation, the Board issued its decision concluding that it “would not accept any applications for the positions of Principal Chief or Vice Chief in 2013 and will not conduct primary or general elections for those positions in 2013, because under the Charter it lacks authority to do any of these things until 2015.” Board Decision at 8 (Attachment 4 to Petition). The Board reasoned that the Tribal Charter provides that “[t]he Principal Chief and Vice Chief shall hold office for terms of four years” and because the current Principal and Vice Chief were elected in 2011, the next election for Principal Chief and Vice Chief cannot be held until 2015. *Id.* In reaching its determination, the Board further concluded that this interpretation supported both the Tribal Council and Board’s intention in amending the Election Ordinance. *Id.*

12. Petitioner then filed this Petition challenging the Board’s decision.

II. ISSUES PRESENTED

1. Whether the Board acted within its authority in making a determination that 2013 is not an election year for the office of Principal Chief and Vice Chief.

³ One of the eleven Tribal Council members acknowledged that all that was ever discussed was changing the election month, not the year.

2. Whether the Board was within its quasi-judicial authority to analyze the Charter and amendments to the Election Ordinance in reaching its determination that 2013 is not an election year for the offices of Principal Chief and Vice Chief.

III. STANDARD OF REVIEW

The Supreme Court of the Eastern Band of Cherokee Indians has original and exclusive jurisdiction to review final determinations made by the Election Board in an election dispute. Cherokee Code § 7-2(e). Section 161-23 of the Election Ordinance provides that “the standard of review for an appeal of a final decision by the Board of Elections shall be for error of law.” Election Ordinance, Sec. 161-23. The Supreme Court of the Eastern Band of Cherokee Indians has applied this standard such that “[i]n reviewing a final determination of the Board of Elections, this Court can only review alleged errors of law. We have no authority to make findings of fact. Chapter 7-5(a) Cherokee Code. Our duty is to determine whether the findings of fact support the conclusion of law and decisions of the Board.” *Crowe v. EBCI*, 3 Cher. Rep. 78, 79 (2003).

Although the decision to issue a writ of mandamus is largely committed to the discretion of the issuing court, *Citibank, N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978), the writ is an extraordinary remedy, and should be issued only in exceptional circumstances. *Kerr v. United States*, 426 U.S. 394 (1976); *United States v. Moussaoui*, 333 F.3d 509, 516 (4th Cir. 2003). Thus, the party seeking the writ has the burden of demonstrating a clear and indisputable right to the writ. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 433 (4th Cir. 2005).

IV. ARGUMENT

- A. The Board has broad authority to fully implement and carry out all duties under the Election Ordinance, including interpretation of the Charter and Election Code provisions.

The Board acted well within the bounds of its authority when it determined that the clerical error contained in the 2012 Amendment was in conflict with the Charter thereby precluding a tribal election until 2015 and determined that the Petitioner's application to run for the office of Principal Chief was premature. The Charter required that the "Tribal Council shall establish a Board of Elections and enact election rules and regulations for the conduct of tribal elections." *See* Charter Sec. 6. The Tribal Council established the Board of Elections pursuant to the Election Ordinance under Section 161-17. Election Ordinance Sec. 161-17 (citing Tribal Council Ordinance Nos. 556 (12-28-2006), 409 (8-25-2008), 216 (9-30-2010), and 85 (9-21-2012)). The Election Ordinance explicitly grants the Board "the power to make final decisions on candidate eligibility, proper registrations, absentee eligibility, and protest decisions." Election Ordinance, Sec. 161-19(a). The Election Ordinance further provides that the Board "shall be responsible for certifying each applicant as eligible or ineligible, notifying each applicant of its decision, and holding appeal hearings as set forth in [the Election Ordinance]." *Id.* at 161-19(e). Finally, the Election Ordinance ensures that the Board "shall have the authority to fully implement and carry out all other duties set forth in [the Election Ordinance]." *Id.* at 161-19(l).

The very purpose of the Board is to make findings of fact and conclusions of law that may only be reviewed for errors of law. *See* Election Ordinance, Sec. 161-23. Implied within this jurisdiction is that the Board must avoid creating errors of law that necessarily requires the Board to consider applicable law, most notably the Charter. Together, these statutory provisions make

clear that the Board, as a final decision-making body, had broad authority to interpret the Charter and the Election Ordinance itself to determine under applicable law and all of the facts and evidence, whether an election should occur in 2013. Once the Board determined that the Charter and Election Ordinance did not provide for such an election the Board had authority to make a final decision that Petitioner's application to run for the office of Principal Chief was premature.

In a previous election dispute, this Court agreed that the Board has broad authority to carry out its duties under the Election Ordinance which the Court unequivocally acknowledged include "the consideration, investigation, hearing and resolving of objections and protests to alleged irregularities and violations of the election laws." *Crowe v. EBCI*, 3 Cher. Rep. 78, 79 (2003). The irregularity at issue here was a clerical error that changed the date of the next election for the offices of Principal Chief and Vice Chief to 2013, instead of the 2015 date consistent with the Charter. The Board determined that it could not give legal effect to the clerical error of "2013" because it would conflict with the Charter which provides that a tribal law is "void if such violates the Charter and Governing Document of the Eastern Band of Cherokee Indians." Cherokee Code Sec. 7-5(b). Petitioner, however, asserts that the Board has exceeded its authority in reaching this conclusion.

First, Petitioner asserts that the Board does not have the authority to order new elections. *See* Petition at 6-7 (citing *Kephart v. EBCI*, 3 Cher. Rep. 101, 104 (2004) that "[t]he Board of Elections has no implied authority to create additional situations and order additional elections."). Indeed, the Board has never asserted that it has the authority to order new elections. Rather, the Board was presented with an application for the office of Principal Chief in 2013. The Board appropriately reviewed the controlling law in tribal elections—both the Charter and the Election Ordinance—to determine that 2013 was not an election year. Not only

does the Charter take precedent over tribal laws where there is a conflict, as in this case, but the facts clearly demonstrate that the “2013” date was an inadvertent error and not an intentional act of the Tribal Council.

During its review of Petitioner’s appeal the Board properly considered the record surrounding the recent amendments to the Election Ordinance. It was abundantly clear, based on interviews with Tribal Council members and Board members and staff, that all of the officials involved in amending the Election Code in 2012 simply intended to change the month from July to June. The Board and Tribal Council did not intend to amend the next election year for the offices of Principal Chief and Vice Chief to 2013. The Board and Tribal Council intended that the next primary election for the office of Principal Chief and Vice Chief would occur on the first Thursday in June, 2015. Thus, the Board never attempted to order a new election but instead refused to hold a premature election in direct violation of the Charter and contrary to the Tribal Council’s intended amendments to the Election Ordinance.

Second, Petitioner asserts that the Board has no authority to construe the Charter. Petitioner cites no authority and provides no basis for such an assumption but merely makes the conclusory statement. The Election Ordinance itself and Eastern Band Supreme Court precedent support exactly the opposite conclusion. Pursuant to Section 161-19, the Board must consider, investigate, hear and resolve objections and protests to alleged irregularities and violations of the election laws. *See* Election Ordinance Sec. 161-19; *see also Crowe* at 1. As part of its investigative and quasi-judicial duty, the Board has the authority to review relevant “election law” and other tribal provisions that are controlling, including the Charter. To find otherwise would disregard the overarching legal governing document of the Eastern Band of Cherokee Indians.

Petitioner has therefore failed to demonstrate that the Board lacks the authority to make a final decision as to when an election is to occur. The Board clearly exercised its authority pursuant to the Election Ordinance through its investigation, interview, hearing process and review of controlling law in this matter. The Board acted within its authority to “fully implement and carry out” its duty of maintaining election dates that are consistent with the Charter.

B. The Board, as a quasi-judicial entity responsible for certifying all election applicants and investigating any irregularities of the Tribal Election rules, has not usurped the Judicial or Legislative Powers of the Tribe.

The Board exercised its quasi-judicial powers to make a final determination that 2013 was not an election year for the offices of Principal Chief and Vice Chief. The Election Ordinance unambiguously provides that “in carrying out its decision, [the Board] shall have the authority to subpoena documents and witnesses and shall have quasi-judicial powers to make the final rulings on all election protests properly before it.” *See* Election Ordinance, Sec. 161-19(a). Petitioner himself acknowledges that the Board is a “quasi-judicial” entity that must “carry out the provisions of Section 161 of the Cherokee Code.” Petition at 7. Petitioner erroneously asserts that the Board has somehow usurped the powers of the Judicial and Legislative branches of the Eastern Band of Cherokee Indians government.

The Board in no way usurped this Court’s authority but rather fulfilled its vested right to make quasi-judicial conclusions of law. These quasi-judicial powers necessarily require the Board to review protests before the Board to determine whether there are election irregularities or violations of election and tribal law. The Board fulfilled its duties to investigate Petitioner’s candidacy, along with the irregularities with the 2012 Amendment and issue a final determination pursuant to this quasi-judicial power based on the facts before it. The facts are

clear. An inadvertent clerical error during the 2012 Amendment process resulted in a provision that was in direct conflict with the Charter. The Board would not be fulfilling its duties if it carried on elections in violation of the Charter. Indeed, the Board cannot follow both the Charter and the clerical error in the 2012 Amendment because the two are in conflict. It is crystal clear that in such circumstances the Board is required to follow the Charter. *See* Cherokee Code Sec. 7-5(b). Accordingly, the Board's actions were consistent with the authority granted to it under the Election Ordinance.

Petitioner also asserts that the Board has usurped the Tribal Council's legislative powers. On the one hand Petitioner asserts that the Board is "actually a part of the Legislative Branch of Tribal Government" while on the other hand claims that the Board has "no power to legislate." Petition at 9. Both assertions are irrelevant and misplaced. The Board's sole objective in this case has been to determine whether the Petitioner's application for elected office was premature. The Board was not attempting to "legislate" but rather gather relevant facts regarding the Tribal Council 2012 Amendment process. Again, the facts support the Board's determination. Ten of the eleven Tribal Council members contacted and all six current or former Board members involved stated that the date "2013" in Section 161-1(b) was an inadvertent clerical error and should be "2015." The Tribal Council and Board members further confirmed that they had never considered, as a purpose of the amendment to Section 161-1(b), attempting to shorten the terms of office for the Principal Chief and Vice Chief and hold the election in 2013. Thus, in reaching its determination the Board did not usurp the Tribal Council's powers but instead fulfilled the Tribal Council's intended drafting of the law.

C. The Board's decision does not harm the Petitioner but would create far-reaching inequities for tribal members if the Board's decision were overturned.

The Board's interpretation of Section 3 and Section 5 of the Charter, in conjunction with the 2012 Amendment, provides clarity and fairness to all Eastern Band of Cherokee tribal members. Petitioner alleges that he has been denied his right to vote. But he cannot be denied voting rights in an election that was never intended to exist, as evidenced by Tribal Council and Board statements that confirm "2013" was an inadvertent clerical error. Petitioner, as well as all eligible tribal members, will be given the opportunity to vote in the election for the offices of Principal Chief and Vice Chief in 2015—four years from the last election as required by the Charter.

Petitioner also greatly misinterprets Section 3 and Section 5 of the Charter. Petitioner asserts that Section 3 and Section 5 of the Charter should be read together to authorize the Board to schedule an early election in 2013, but for terms of office that would not begin until October 1, 2015. As the Board described in its Decision, the Charter allows for an election for Principal Chief and Vice Chief only every four years, at the end of the current terms, and the last election was held in 2011. Section 3 specifically provides that "[t]he [general] election for Principal Chief and Vice Chief and Tribal Council shall be held on the first Thursday in September, 1987, and every two (2) years thereafter, under such rules and regulations as may be adopted by the council.' Section 5 further provides that "[t]he representatives elected to the Tribal Council shall hold office for terms of two years. The Principal Chief and Vice Chief shall hold office for terms of four years." In other words, the Petitioner would have this Court order the Board to contort itself in order to conduct an election the results of which would not take effect for two

years. Such an absurd result cannot be sustained. In fact, for all of Petitioner's discussion of canons of statutory construction, he conveniently omits the fundamental canon that statutes cannot be read to result in absurdities clearly not intended by the Legislature. *See e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982) (finding that acceptance of the Government's new-found reading of a statutory provision "would produce an absurd and unjust result which Congress could not have intended.") Avoidance of such an absurd result should be the end of the matter.

The only way to accurately interpret these provisions in a consistent manner is to recognize that the biennial general elections referenced in Section 3 are only open for offices for which the specified terms in Section 5 are ending. This election cycle has been applied consistently since 1987 through 2011 and should be maintained for 2015. A clerical error cannot be allowed to undo this carefully constructed election cycle on which tribal members rely.

Petitioner would further have this Court undergo a nonsensical statutory construction of the 2012 Amendment. Petitioner argues that in interpreting statutes the Court should "presume that a legislature says in a statute what it means and means in a statute what it says." *See* Petition 12. But the facts here clearly conflict with Petitioner's line of reasoning. Foremost, the majority—10 out of the 11 Tribal Council members—confirmed that the Election Ordinance as drafted does not say what the Tribal Council meant. To the contrary, the Election Ordinance merely contained a clerical error that went unnoticed by the Tribal Council and Board until Petitioner declared that he was running for the office of Principal Chief. The Board's investigation revealed that the Tribal Council never intended to amend the Election Ordinance to provide for an election for the offices of Principal Chief and Vice Chief in 2013. Such a clerical error cannot be allowed to override the Charter's clear and unambiguous election cycle provisions.

Finally, Petitioner's request that the Court vacate the decision of the Board, remand the case to the Board with instructions to reopen and publicize a two week filing period for the offices of Principal Chief and Vice Chief and to conduct the election according to law would harm the tribal election process overall. The Board reasonably concluded that if the Board effectuated the clerical error by holding an election for Principal Chief and Vice Chief in 2013 it would turn the election process on its head.

If the Court granted the Petitioner's request the Board would have to open up the period for filing for Principal Chief and Vice Chief for two weeks. *See* Petition at 15. After the two week filing period, the Board would then have a fifteen day period for certifying the candidates. *See* Election Ordinance Sec. 161-4(b) ("The Board of Elections shall review all applications and shall certify each applicant as either eligible or ineligible and notify the application of its decision within fifteen calendar days of the date of filing."). Assuming the possibility that the Board could deny certification to one or more applicants, any denied applicants would then have a five day period to appeal the decision to the Board of Elections and request a hearing. *See* Election Ordinance Sec. 161-4(e). Thereafter, the Board would need to hold a hearing and issue a decision within two days. *Id.* At the very earliest, assuming the Court granted Petitioner's request on April 9, 2013, that would conclude the certification process on May 16, 2013. Importantly, however, Section 161-19(e) mandates that the "Board shall make public the names of the candidates certified as eligible on the ballot for each Tribal office no later than May 10 of an election year for the primary election and August 10 of an election year for the general election." *See* Election Ordinance Sec. 161-19(e). Further, absentee ballots must be ready by May 1 of an election year. *See* Election Ordinance Sec. 161-15(d).

Petitioner's suggestion that this Court should issue a writ to reopen the filing period for Principal Chief and Vice Chief and to "conduct the election according to law" would in fact do the very opposite and violate numerous Election provisions as outlined above. Moreover, Tribal membership would not be given sufficient notice of an unprecedented change in the election cycle and terms of office. Petitioner claims that tribal members deserve a Board that does not make up the law as it goes along. *See* Petition at 15. To grant Petitioner's request would essentially authorize just that—a new form of election cycle that was never presented to the Tribal membership nor intended by the Tribal Council and would violate Election law. Such a result should not be allowed to proceed.

V. PRAYER

The Board acted within the scope of its authority in determining that Petitioner's application to run for the office of Principal Chief in 2013 was premature. The facts support the Board's conclusion that the 2012 Amendment was a clerical error in conflict with the Charter. The Board properly considered and investigated the facts surrounding the 2012 Amendment and whether such clerical error was in conflict with the Charter. The Board found as a matter of law that the Charter provides that an election for Principal Chief and Vice Chief should occur every four years and correctly determined that the next election for Principal Chief and Vice Chief should not occur until 2015. Because Petitioner has failed to demonstrate a clear and indisputable right to the writ and because the Board's reasoned and sound decision is not an error of law the Petition should be denied. The Board respectfully submits that oral argument is not necessary in this case and the Court should follow the standard process in accordance with Rule 11(b)(3).

Respectfully submitted,

By: 

David D. Moore

Bar # 36016

Earwood and Moore, PLLC

559 W. Main Street

Sylva, NC 28779

828-339-1010

828-339-1011 (fax)

Merrill C. Godfrey

Jason T. Hauter

Pro Hac Vice Applications Pending

Akin Gump Strauss Hauer & Feld, LLP

1333 New Hampshire Ave. NW

Washington, DC 20036

202-887-4195

202-887-4288 (fax)

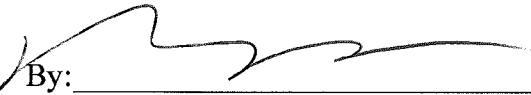
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Eastern Band of Cherokee Indians Board of Elections' Response to Petition for Writ of Mandamus has been provided to the persons listed below via certified U.S. Mail, on this the 8th day of April, 2013.

John R. Wallace
Wallace & Nordan, LLP
3737 Glenwood Avenue, Ste. 260
Raleigh, NC 27612

J. Matthew Martin
The Martin Law Firm, P.A.
3 Briarcliff Drive
Asheville, NC 28803
Attorney for Patrick Henry Lambert

By: 
David D. Moore
Bar # 36016
Earwood and Moore, PLLC
559 W. Main Street
Sylva, NC 28779
828-339-1010
828-339-1011 (fax)