



CHEROKEE NATION
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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Dr. Corey Bunch, Chief of Staff

Opinion Number: 2024-CNAG-01

Date Issued: May 10, 2024

You have asked for an opinion answering the following question:

- I. Whether an employee of the Cherokee Nation, on furlough status or otherwise, may additionally contract with the Nation for wages, salary, per diem, or expenses?

ANSWER AND ANALYSIS

Short Answer:

- I. Yes, employees of the Cherokee Nation, on furlough status or otherwise, may lawfully contract with the Nation for wages, salary, per diem, or expenses under the plain language of Article X, Section 10 of the Constitution of the Cherokee Nation; so long as it does not pose a prohibited conflict of interest under the Cherokee Nation Ethics Act of 2012.

Background:

Article X, Section 10 of the Constitution provides:

No official, member or officer of the Council, Cabinet Member, employee of any official, Council, Cabinet, or subdivisions thereof, or any person employed in any capacity by the Cherokee Nation shall receive from any individual, partnership, corporation, or entity doing business with the Cherokee Nation directly or indirectly, any interest, profit, benefits or gratuity, other than wages, salary, per diem, or expenses specifically provided by law.

In short, this provision prohibits any individual, whether elected, appointed, or employed in any capacity, by the Cherokee Nation, from receiving any form of benefit, profit, or gratuity

from any third-party entity that also does business with the Cherokee Nation. This provision is the subject of frequent inquiry and this Opinion seeks to provide clarity.

Analysis:

Under a plain reading of Article X, Section 10, it is apparent that the provision is not intended to restrict or hinder employment opportunities for employees or officials of the Nation. Its purpose is to promote transparency and accountability in third-party transactions to prevent self-dealing. In further illustration of this goal, both the Council and the Judiciary have clarified that certain contractual relationships are allowable. The current state of the law, when read as a whole provides a straightforward result: employees or officials of the Cherokee Nation may pursue additional employment or service opportunities, so long as it is for constitutionally allowable consideration¹ and is not in violation of the Cherokee Nation Ethics Act of 2012 (“Ethics Act” or “Act”).

The prohibition contained in Article X, Section 10 specifically hinges on an individual or an entity who is “doing business with the Cherokee Nation.” This phrasing necessarily excludes the Nation and its wholly owned entities as the same do not “do business” with themselves. For example, individuals employed by the Nation also commonly contract with the Nation for constitutionally allowable consideration to perform additional services through extra-duty assignments. Similarly, the law does not prevent an employee of the Nation who is placed on furlough status from entering into an individual employment contract with the Nation to perform additional services. Likewise an employee or official of the Nation may engage in volunteer work for the Nation and appropriately receive reimbursement for expenses incurred. The same result is reached where an individual or official is employed by an entity wholly-owned by the Nation.

¹ Where an individual forgoes compensation for services entirely, neither the constitutional prohibition nor the Ethics Act apply because no financial gain is at issue.

These arrangements are allowable under Article X, Section 10 because the entity engaging with the individual employee in each instance is the Nation itself. Likewise, if an individual, employed by the Nation or its entities, desires to serve on a board or commission of the Nation, Article X, Section 10 does not apply as there is no third-party “doing business” with the Nation or its wholly-owned entities.² The parties are still limited to the individual and the Nation, and though the Ethics Act still may apply to promote transparency, the prohibition contained in Article X, Section 10 need not be considered. Therefore, Article X, Section 10, does not bar such an act of service.

The constitutional provision instead only applies where an individual receives an “interest”, a “profit”, “benefits”, or “gratuity” from a third-party who is “doing business” with the Nation. To provide some legislative guidance on the issue, the Council of the Cherokee Nation has established the Ethics Act, specifically prohibiting solicitation of business relationships, undue influence in business decisions, and certain types of contractual arrangements. *See* 28 CNCA §§ 11, 12, and 20. Again, it is clear from the stated purpose of the Ethics Act that the Council did not intend to restrict employment or service opportunities within the Cherokee Nation. The intent was to establish those situations “provided by law” under which a transaction which would otherwise be prohibited by the Constitution is permitted. To this end, the Council established a comprehensive conflicts of interest resolution process. *See* 28 CNCA § 13.³ The Act also notably exempts individual employment contracts from its application, as otherwise, any official and some

² To the extent any prior guidance from this Office conflicts with this Opinion, it is hereby superseded and shall have no further effect.

³ Because the Principal Chief is statutorily directed to resolve any question of whether a conflict of interest exists as to an appointed official, the term “appointed” shall include only those officials who are appointed by the Principal Chief and approved by the Council of the Cherokee Nation. Any conflict related to an official appointed by any other means shall be resolved pursuant to applicable policies and procedures promulgated pursuant to the Ethics Act.

employees would be statutorily prohibited from ever receiving payment for their service in the first instance. In addition to individual employment contracts, in *Smith v. Olaya*, the Cherokee Nation District Court held that employees or officials of the Nation and its entities may lawfully contract to sell their artwork⁴ to the Nation or its entities. *See Smith v. Olaya*, CV-2010-323. Accordingly, there is no prohibition against employees or officials of the Cherokee Nation pursuing additional employment opportunities with third parties “doing business with the Cherokee Nation”, so long as it is for lawful compensation and does not pose a conflict of interest which cannot be resolved under the Ethics Act.⁵

Conclusion:

Article X, Section 10 of the Constitution of the Cherokee Nation foundationally aims to prevent conflicts of interest or undue influence and ensure that individuals do not receive certain types of financial gains from third-parties doing business with the Cherokee Nation. It does not seek to inhibit employment opportunities and to read the provision as doing so would necessarily conflict with numerous statutes and established policies of the Nation. The provision should therefore be interpreted to achieve its primary objective to promote transparency, integrity, and impartiality in dealings with third-party individuals and entities conducting business with the nation, while facilitating service and employment opportunities at the Cherokee Nation.

IT IS THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:


1. Individuals employed by the Cherokee Nation, on furlough status or otherwise, may lawfully contract with the Nation for wages, salary, per diem, or expenses under the plain language of Article X, Section 10 of the Constitution of the Cherokee Nation; so long as it

⁴ To resolve any ambiguity, “artwork” shall be defined broadly to include any act or work of creative expression for which a party may lawfully contract.

⁵ No prohibition applies where an employee of the Nation is additionally employed, for any type of consideration, by an employer who does not “do business” with the Nation. Though such additional employment is not constitutionally prohibited, it must of course otherwise comply with the Nation’s Human Resources Policies and Procedures.

does not pose a prohibited conflict of interest under the Cherokee Nation Ethics Act of 2012.

2. The prohibitions contained in Article X, Section 10 of the Constitution and the 28 CNCA §§ 1 *et seq.* do not apply where individuals receive no financial gain for their service.
3. In the event a conflict of interest arises, it must be resolved pursuant to 28 CNCA § 13.



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