



CHEROKEE NATION
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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Chief of Staff, Corey Bunch

Opinion Number: 2023-CNAG-02

Date Decided: May 9, 2023

This Office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Are employees and/or contractors of Cherokee Nation or its entities permitted to serve on boards and commissions of the Nation?

SHORT ANSWER:

No, the Constitution and laws of the Nation prohibit employees and/or contractors of the Cherokee Nation or its entities from serving on boards and commission of the Nation, unless specifically provided by law. There are no current exceptions provided by law.

ANALYSIS AND DISCUSSION

There are both Constitutional and statutory provisions that prohibit employees and contractors of the Cherokee Nation and its entities from serving on boards and commissions of Cherokee Nation. There are also potential inherent conflicts with employees of the Nation and its entities serving on the boards and commissions of the Nation.

i. Constitutional, statutory, and ethical prohibitions

Article X, Section 10, of the Cherokee Nation Constitution states:

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 a previous Attorney General Opinion, this Office interpreted that provision to prohibit Tribal Council members from contracting or sub-contracting with the Cherokee Nation. See 2009-CNAG-01. The provision above applies equally to other “official[s]”¹ and “any person[s] employed in any capacity with the Cherokee Nation.” Years of informal opinions of this Office have also interpreted those classes of individuals to include officials and employees of Cherokee Nation entities based on the broad language “employed in any capacity.”

This provision means that no official or employee of the Nation or its entities is allowed to separately do business with the Nation, unless there is an exception provided by law. There are a few such exceptions.

Because the Constitution prohibits an employee from “doing business with the Nation” it was determined that Nation and entity employees could not sell art to the Nation. However, that prohibition was challenged in the courts of the Cherokee Nation resulting in an Order that stated, “employees of the Cherokee Nation and its entities shall be lawfully permitted to sell their artwork to the Cherokee Nation and its entities.” See *Smith v. Olaya*, CV-2010-323. This

Court

¹ Because the word “official” is not limited to “elected officials” as it is in other parts of the Constitution and laws of the Cherokee Nation, the term “official” is interpreted to apply to both elected and appointed officials, including board and commission members, regardless of compensation. For the purpose of conflict of interest, the Ethics Act defines “official” as “any elected or appointed person to any governmental entity, instrumentality, commission or board of the Cherokee Nation government or its instrumentalities [,] any entities in which the Cherokee Nation is the sole or majority stock holder or owner and all entities that are 51% or more owned by Cherokee Nation.” The OAG has used a consistent interpretation of “official” when opining both formally and informally on conflict of interest questions.

Order allows employees (but not officials) of the Nation and its entities to sell artwork to the Nation provided that that neither the individual nor an immediate family member has any involvement in the purchasing decision. See 28 C.N.C.A. § 12.

The other exception to the prohibition on officials and employees of the Nation or its entities doing business with the Nation was added by Tribal Council in the Cherokee Nation Ethics Code of 2012. The Constitution prohibits officials and employees from doing business with the Nation unless “specifically provided by law.” In the 2012 amendment the Ethics Act, Tribal Council excluded from “interest, profit, benefit, or gratuity” “any benefit paid on behalf of and for the betterment of a Cherokee Nation citizen, regardless of the payee of the benefit.” To date, this provision has allowed “payment” to officials and employees in circumstances where the Nation is providing a direct benefit to a citizen, but the compensation is paid directly to a third party, chosen by the citizen. Examples include: rental assistance, child care, and home repairs.

Other than the two exceptions above, it has generally been the rule that officials and employees of the Nation and its entities cannot receive any additional compensation or payment from the Nation.² Most board and commission members are compensated³ in some way from the Nation, and that payment happens through a contract. Therefore, any employee of the Nation is constitutionally prohibited from “contracting” with the Nation as a board or commission member, unless specifically provided by law.

² This unallowable additional compensation only applies to payment in exchange for goods or services provided to the Nation. It does not prohibit a citizen, who is also an employee or contractor, from receiving governmental services or payment for which they otherwise qualify. For example, there is no prohibition on an a citizen, who is also an employee or a contractor, applying for and receiving COVID impact payments, emergency assistance, clothing vouchers, etc.

³ However, non-compensation as a board or commission member still makes the individual an “official” of the Nation who, if also employed, would be separately compensated by the Nation, which is prohibited unless specifically provided by law.

In addition to the Constitutional prohibition on board and commission members being employees or contractors of the Nation or its entities, the Election Code also specifically prohibits an Election Commission member from being an “employee of the Cherokee Nation, including any corporation, agency or other entity which is at least fifty-one percent (51%) owned by the Cherokee Nation. 26 C.N.C.A. § 11(B).

There are other statutorily created boards and commissions that do not explicitly prohibit employees from serving, but language about the independence, autonomy of the board or commission, and prohibition from political influence would prohibit employees from serving on those boards. Those boards and commissions include the Gaming Commission, 4 C.N.C.A. § 21(F); Editorial Board, 44 C.N.C.A. § 6(E); Tax Commission, 68 C.N.C.A. § 12(E); and the Comprehensive Care Agency, 63 C.N.C.A. § 104(G).

In addition to the constitutional and statutory prohibition on employees and contractors of the Nation and its entities serving on boards and commissions of the Nation, there is real potential for otherwise unaddressed conflicts. Boards and commissions by their nature are meant to be independent bodies that oversee the work of that body. If an employee of the Nation or its entities serves on a board or commission, there is an appearance of dependence on the Nation, not independence. To avoid appearance of or actual conflicts of interest, employees of the Nation and its entities should not serve on boards and commissions of the Nation, unless specifically provided by law.

ii. Exceptions provided by law

As mentioned above, there are very limited exceptions in the law for instances where employees or officials may be able to receive additional monetary payment for goods or services

from the Nation. This Office is unaware of any exception in the laws of the Nation that would allow employees or contractors to serve on boards or commissions.

There could be situations where, in the judgment of the legislative body, an employee should serve on a board or commission of the Nation. The Constitutional provision that has been interpreted to prohibit employees from serving on boards and commissions makes an exception to that provision if “specifically provided by law.” If, in the formation of a board or commission, Council determined that an executive director of a department, cabinet member, etc., should sit on a board or commission of the Nation, Tribal Council could so designate in the legislation or resolution creating such a board or commission. There could still be potential conflict issues, but it would be allowable under the Constitution. However, we are aware of no such exception.

iii. Non-voting Board and Commission Members

None of the analysis above applies to advisory, ex-officio, or other non-voting members of boards and commissions, because by definition, those board and commission members cannot vote or otherwise officially act on behalf of boards and commissions. Therefore, it is acceptable for employees of the Nation or its entities to serve as non-voting board or commission members.

iv. Cure

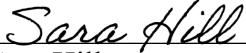
Pursuant to the Cherokee Nation Ethics Act, if a conflict exists, “such conflict may be resolved by discontinuing the transactions(s) that resulted in the conflict, and/or by transfer of the employee to another department and/or by any other action deemed appropriate by the applicable reviewing body, including any appropriate disciplinary action.” As this is an issue of first impression, if there is an employee or contractor of Cherokee Nation or its entities on a board or commission of Cherokee Nation, the conflict can be cured either by 1) removing the individual from the board or commission; or 2) by ceasing employment or contracting

between the individual and the Cherokee Nation or its entities.

CONCLUSION

Therefore, it is the Official Opinion of the Attorney General:

- 1. Unless specifically provided by law, no employee or contractor of the Cherokee Nation or its entities may serve on any board or commission of the Cherokee Nation, regardless of compensation. If there is a current employee or contractor serving on a board or commission of the Cherokee Nation, the conflict can be resolved by the cessation of either 1) board or commission service; or 2) employment or contract.**



Sara Hill
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Cherokee Nation