

IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION

CHEROKEE NATION
JUDICIAL APPEALS TRIBUNAL
FILED

JUL 30 1995

ROBIN MAYES,
Plaintiff,

vs.

CHEROKEE NATION and
GEORGE BEARPAW
Defendants,

AND

JEFF MUSKRAT,
Plaintiff,

vs.

TRIBAL ELECTION
COMMISSION, Defendant

AND

CHADWICK SMITH,
Intervenor

No. JAT 95-07
JAT 95-08
(Consolidated)

ORDER

By order dated July 27, 1995, Chief Justice Dwight W. Birdwell invited briefs to be filed in this case before 3:00 p.m. Friday, July 28, 1995. The Judicial Appeals Tribunal ("Tribunal") has read the briefs and acknowledges the following matters were pending before it prior to the Tribunal's Summary Order of July 28th:

1. Joint Motion of Cherokee Nation and Tribal Election Commission to Reconsider Ruling of Judicial Appeals Tribunal on July 24, 1995 and Request for Emergency Hearing
2. Mr. Bearpaw's Petition for Rehearing and Application for Emergency Hearing and his Supplemental Petition for Rehearing and Application for Emergency Hearing
3. Mr. Smith's Motion to Grant Relief by Postponing the Run-Off Election and Adding the Name of Chad Smith to Ballot
4. Mr. Smith's Motion to Intervene and to Reconsider Remedy

The Tribunal's Summary Order said that **#1, #2, and #3** above were DENIED. In amplification, the Tribunal did reconsider its ruling. The only new event or information brought to the Tribunal's attention since our decision of July 24, 1995, is the pardon issued by Wilma P. Mankiller on July 25, 1995.

We find that Article IX, Section 2 of the Cherokee Constitution in using the word "pardon" refers to the jurisdiction in which the felony was committed. Consequently, an appropriate pardon in this situation should come from the State of Oklahoma. Therefore, the pardon issued by Wilma P. Mankiller is a nullity, and our decision of July 24, 1995 stands.

As to #4 above, the Summary Order said that it was under advisement. Mr. Smith's Motion to Intervene is DENIED. His Motion to Reconsider Remedy is DENIED.

The intent of this Order is to deny all pending motions and to make final the Order of July 24, 1995. All parties have been heard and there being no other matters before the Tribunal, we stand adjourned.

Prepared by Chief Justice Dwight W. Birdwell and Justice Ralph F. Keen

VILES, J., concurring in part and dissenting in part,

Again, I differ slightly from the opinion of my colleagues, this time in two areas, (1) the need for an Oklahoma pardon and (2) the remedy.

I concur in the result they reach. We said on July 24th that George Bearpaw was ineligible to be a candidate for Principal Chief in the current election and the pardon is the only new development. It is a given that pardons operate only from their effective date forward; pardons are not retroactive in effect. Hence, even a valid pardon on July 25th could not cure Mr. Bearpaw's defective candidacy in this election since he was not pardoned before he filed for office. While he might now be eligible to serve as Chief in the future, he was not eligible to run for the office in the 1995 election, for the reasons cited in our July 24th opinion.

Further, I have not been shown that the pardon was granted according to our statutory procedures. I am therefor uncertain of its validity for the reasons so ably laid out in Mr. Muskrat's Reply to Petitions for Rehearing. I adopt his views.

I do not agree with my colleagues that an Oklahoma pardon is needed in this case. I think that a valid Cherokee pardon would say that

"whatever Mr. Bearpaw has done under another legal system, he is forgiven under the Cherokee legal system."

Since the pardon was not given before Mr. Bearpaw filed for office and since I have not been shown that it is valid, I still vote to disqualify Mr. Bearpaw from being a candidate, as I did in the July 24th opinion.

The second issue upon which the Justices differ is the remedy. I continue to think, as outlined in the July 24th opinion, that further election(s) for Principal Chief should be held. The holding of the majority which would appear to make Joe Byrd Principal Chief means that he will be "elected" without having received a majority of the votes, as our legislation requires.¹ The Constitution, however, says that "The person having the highest number of votes shall be the Principal Chief; . . ."², (without requiring a majority). The Constitution was passed in 1976 and the first election thereunder (for Deputy Principal Chief and 15 at-large Council seats) was held later in 1976, without provisions for run-offs. The 1979 election was the first where the Election

1 26 C.N.C.A. § 83, pocket part: There shall be a runoff for the offices of Principal Chief and Deputy Principal Chief for the two top candidates in each of the respective offices unless one candidate for each of the respective positions should obtain a simple majority of the votes cast for the respective office, a simple majority meaning over 50 percent or any fraction thereof.

2 Article VI, Section 1, Cherokee Constitution of 1975.

Rules required run-offs.³ Since 1985, the Tribal Council has spoken (at 26 C.N.C.A. § 83) and run-off elections have continued to be required.

The election rules and statutes are more specific that the Constitution (in requiring a majority) and I, too, prefer an election or elections where the ultimate winner has received a majority of the votes cast. By not counting the Bearpaw votes, it can be argued that Mr. Byrd has received a "majority"; in fact, he will have received 100% of the valid votes, but this is not what I have in mind and not, I think, what justice requires. This Court should not usurp the electors' function; the Nation needs a further election or elections for Principal Chief. I would grant Mr. Smith's Motion to Intervene and would proceed to Reconsider the Remedy, hearing his suggestions and those of the other original candidates for Principal Chief, except for Mr. Bearpaw.

3 A run-off was not needed in the Principal Chief's race; Ross Swimmer received 5685 of 8498 votes (67%), but there was a run-off between Perry Wheeler (3612) and Agnes Cowen (1464), who received 45% and 18% of the 8071 total votes cast in that race. Source: Cherokee Advocate, June 1979.