

CHEROKEE NATION
JUDICIAL APPEALS TRIBUNAL
FILED

AUG 25 1995

IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION

IN RE: CONTEST OF JOE BYRD
AS ANNOUNCED ELECTED CANDI-
DATE FOR PRINCIPAL CHIEF.

| Petitioner,

v.

JOE BYRD,

Respondent.

CASE NO. JAT 95-09

JUDGMENT

This is an action filed by Chadwick Smith which he has styled "Petition Contesting Correctness of Election." This Petition was filed with the Cherokee Nation Tribal Election Commission on August 3, 1995, pursuant to Title 26, Cherokee Nation Code Annotated, § 93. Section 93 pocket part requires that a Petition alleging irregularities other than fraud must be filed with the Election Commission no later than 5:00 p.m. on the second Thursday following the election day.

The Petitioner also filed two other pleadings at the same time as the original Petition. These pleadings were styled "Application to Retain Independent Counsel" and "Brief in Support of Petition Contesting Correctness of Election."

Since the election in question was the run-off election which was held on the 29th day of July, 1995, Mr. Smith's Petition was timely filed before the Tribal Election Commission. A meeting was held on August 7, 1995, in which Mr. Smith addressed the Commission

held on August 7, 1935, in which Mr. Smith addressed the Commission concerning his Petition.

On August 9, 1995, at 5:00 p.m. the Tribal Election Commission released its findings in a letter signed by its Chairman, Jackie Bob Martin. The Commission denied Mr. Smith's request for a new run-off election and declined to withdraw its certification of Joe Byrd as Chief of the Cherokee Nation.

The letter stated:

"The Tribal Election Commission has determined that it has no authority to conduct a new run-off election nor to conduct a hearing in this matter."

Since this Court has not been informed of any other actions that have been taken, or are pending before the Tribal Election Commission, we will assume that the letter quoted above which was released at the close of business on August 9, 1995, is a final action which is appealable to the Tribunal.

It is interesting to note at this point that the Petitioner, contemporaneously with the filing of all his pleadings with the Tribal Election Commission, filed the exact same pleadings with this Tribunal. They were (and are) styled "Before the Tribal Election Commission, Cherokee Nation." We suspect, in doing so, the Petitioner was relying upon the procedure outlined in 26 CNCA §§ 92 and 93, as it was last amended by LA 2-94, eff., July 11, 1994. Section 93 reads as follows:

"A. Petitions alleging irregularities other than fraud must be filed with the Election Commission no later than 5:00 p.m. on the second Thursday following the election day. When a Petition . . ."

"B. If such allegations are not made, the petition shall be deemed frivolous by the presiding justice and shall be dismissed." (Emphasis added.)

This section of the Code is not consistent. It starts out in subsection "A" by requiring the Petitions to be filed with the Election Commission, but then subsection "B" directs the presiding Justice of the Judicial Appeals Tribunal to take action if certain requirements are not present in the Petition. The Election Commission and the Judicial Appeals Tribunal are separate entities, and cannot have jurisdiction over the same issue at the same time.

Section 92 of the same title also is inconsistent. It speaks of the Election Commission and the Judicial Appeals Tribunal in the same paragraph, without distinction.

After a careful review of Title 26, §§ 92, 93 and 94, this Court is of the opinion that they are inconsistent, and as such, cannot be followed without some corrections being made. We invite the Tribal Council, if it agrees with us, to take whatever action it deems necessary to correct the inconsistencies of these three sections of the Code.

Notwithstanding the fact that the above sections cannot be relied upon as a basis for jurisdiction, we believe that the Tribunal does in fact have jurisdiction to hear this matter, and that justice requires that we do so. Our jurisdiction is based upon Article VII of the Constitution, and upon Title 20, § 51(A)(B).

The Judicial Appeals Tribunal shall have original and exclusive jurisdiction over:

"A. Constitution. Any disagreements arising under any provisions of the Constitution of the Cherokee Nation."

"B. Tribal Council Enactments. Any disagreements arising under any enactment of the Tribal Council of the Cherokee Nation."

Having established our jurisdiction to hear this matter, we must now determine what rules of procedure govern this action. It is obvious that §§ 92, 93 and 94 of Title 26 were intended to provide a specific procedure to follow. However, since we have decided that they are inconsistent, we will be guided by the Federal Rules of Civil Procedure in this matter. The Federal Rules have previously been adopted by this Court, to be followed, absent any specific rules adopted by the Tribal Council.

In an effort to follow the imperfect procedure as outlined in §§ 92, 93 and 94 of Title 26, the Petitioner has styled all of his pleadings as being before the Election Commission. For our purposes, we hereby amend all pleadings filed with this Court, to show that they are filed before the Judicial Appeals Tribunal, and the original filing date will be considered to be August 10, 1995, which is the date following the final decision of the Election Commission. This case will therefore be heard as an appeal from the final decision of the Election Commission refusing to hear Petitioner's request for the reason that it has no power to hear the case, nor to grant the relief requested by the Petitioner, Mr. Smith.

RELIEF REQUESTED BY THE PETITIONER

In his Amended Petition, filed with the Tribunal on August 10, 1995, Chadwick Smith alleged that the run-off election, held on July 29, 1995, was irregular in that it did not have his name on the run-off ballot, and that he was entitled to have his name on the ballot.

He asked that the Tribunal grant him a hearing and following the hearing, to order the Election Commission to place his name on the ballot. He then asked that we either conduct or order the Principal Chief to call a run-off election, in not less than six weeks from the date of our Order, and for the Tribunal to order the Election Commission to withdraw its certification of the election of Joe Byrd as Principal Chief of the Cherokee Nation.

In his Supplemental Brief, the Petitioner states that the sole irregularity alleged is that the run-off election did not contain his name on the ballot, and that it did not comply with 26 CNCA § 83.

We disagree with Mr. Smith for the following reason(s). Section 83 of Title 26, as last amended by LA 2-94, eff., July 11, 1994, states:

"A. 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."

When the votes were counted following the general election held on June 17, 1995, no candidate received a majority of the votes.¹ Mr. Bearpaw and Mr. Byrd were the two highest vote getters and were entitled to be in a run-off election scheduled for July 29, 1995.

¹The official tally released by the Election Commission shows the results as follows: The first number is the number of absentee votes received, and the second number is the total. (1) George Watie Bearpaw 2,282/4,722; (2) Joe Byrd 998/3,522; (3) Chad Smith 982/2,113; (4) George Wickliffe 210/1,188; (5) Harold Wade 21/135; (6) Mary Elizabeth Birmingham 58/78; (7) James R. Burris 37/60; (8) Charles (Cowboy) Juby 19/41; and (9) Harry Tootle 13/21.

The total number of votes cast for Principal Chief was 11,880, with 4,620 votes being absentee votes, or 38% of the total.

Following the general election, the Election Commission correctly set the date for the run-off election to be July 29, 1995, with the names of Mr. Bearpaw and Mr. Byrd on the ballot, pursuant to § 83 above.

The Election Commission then went about its business of preparing to hold the run-off election. This included sending out run-off ballots to all voters who voted absentee in the general election.² These ballots must be mailed in time for them to be returned no later than the close of business of the U.S. Post Office in Tahlequah, Oklahoma, on the day of the election.³

On July 19, 1995, only ten days prior to the run-off election, a Petition was filed with the Judicial Appeals Tribunal by Robin Mayes seeking to have George Bearpaw disqualified from being a candidate for Principal Chief, and to have his name stricken from the ballot for the July 29, 1995, run-off election.

On the same day, a similar action was filed by Jeff Muskrat, whereby he alleged that George Bearpaw was ineligible to stand for election and to serve if elected, by virtue of Article 9, § 2 of the Constitution and Title 26 CNCA § 32(F).

²Title 26 CNCA § 63(B), as last amended by LA 2-94, eff., July 11, 1994.

³Title 26 CNCA § 70, as last amended by LA 4-94, eff., September 12, 1994.

He asked that Mr. Bearpaw's name be stricken from the July 29, 1995, run-off ballot, and that the ballot be reformed in accordance with the provisions of Title 26 CNCA § 83, and to have the run-off rescheduled for 60 days from the date of the Order issued by the Tribunal, all in accordance with § 83, above.

It must be noted at this point, that Petitioner, Chadwick Smith, did not join in the proceedings even after the Mayes case and the Muskrat case were consolidated and the Cherokee Nation and the Election Commission were joined as parties.

It must also be noted, at this point, that Petitioner, Chadwick Smith, is now asking for essentially the same relief as was requested by Jeff Muskrat in his case as, that is, to reform the ballot, and to re-set the election for 60 days from the date of the Tribunal Order, all pursuant to 26 CNCA § 83(A).

A hearing was held on July 23, 1995, during which all parties were allowed to fully argue their respective positions. The following day, July 24, 1995, the Tribunal filed its decision.

In our Order disqualifying Mr. Bearpaw, we stated:

"The Tribal Election Commission is hereby ordered to strike Mr. Bearpaw's name from the ballot, and if that is not possible, they are ordered to collect all the ballots after the election that were cast for him, without counting them and hold them for naught."

"They are further ordered to continue with the run-off election on July 29, 1995 and to declare those with the highest number of votes as a winner, without consideration for the votes cast for Mr. Bearpaw."

Although Motions to Reconsider and/or Motions for Rehearings were filed by the Respondents in that case, they were denied by Summary

Order on July 28, 1995. The election was held on the following day with only the names of Gordon Bonham and T. ■ ■ ■ ■ ■ and the Election Commission, pursuant to the Order of the Court, did not count the ballots cast for Mr. Bearpaw. Of a total number of votes cast in the election, Joe Byrd received over 59% of the vote.

We find that the July 29, 1995, run-off election was conducted pursuant to the Order of this Court. Having so found, we hold that the Petition of Chadwick Smith is without merit when the only irregularity complained of was the manner in which the run-off election was held. When an election is held, utilizing a procedure that was imposed by a Court of competent jurisdiction, it cannot per se, be found "irregular."

Ordinarily, we would dismiss the action at this point. However, since the case is a case of first impression, and has generated so much public interest, we feel it would further the cause of justice to respond to all of the issues raised by Mr. Smith.

The first issue raised by Mr. Smith is whether or not the run-off election held on July 29, 1995, complied with 26 CNCA § 83(A). We hold that it did. Under the facts of this case, our Order did not become final until the Motions for Rehearing were ruled upon. That ruling, because of the extremely limited time frames in this case, was filed on the evening of July 28, 1995, approximately nine hours before the polls opened for the run-off. It was not possible to remove Mr. Bearpaw's name from the ballots, so there were two names on the ballot for the run-off election. It is also important

to remember that Mr. Bearpaw continued to campaign during the time that this Court was considering his Motion to Reconsider.

This Court had directed that the votes received by Mr. Bearpaw be collected after the election "without counting them and hold them for naught." The intent of our Order, which the Election Commission correctly interpreted, was not to count them as votes for Mr. Bearpaw, but to count them to determine the overall number of votes cast in the election. By following the procedure as directed by this Court, the Election Commission was able to determine that Mr. Joe Byrd received approximately 59% of all votes cast in the run-off. It is also important to know that of the 11,880 people who cast their votes in the general election, approximately 82% of them voted in the run-off. We find that under the set of facts, that the provisions of 26 CNCA § 83(A) were indeed complied with.

The next question is, whether or not, under the facts of this case, should Joe Byrd be declared the winner.

In making that determination, this Court in Mayes, supra, utilized what is called the "American" or "Majority" Rule, which is stated in 133 ALR 320.

"The general rule is that votes cast for a deceased, disqualified, or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards to the other candidate."

The other rule is called the English Rule. Under the English Rule, the voter's knowledge of the death or disqualification is material,

and votes cast for a person known to be deceased or disqualified are to be treated as void, and thrown away, and are not to be counted in determining the results of the election, as regards to the other candidate, the theory being that voters, who, knowing that a person is dead or is ineligible to office by reason of any disqualification, are deemed to mean not to vote for anyone for that office, so that the eligible candidate receiving the next highest vote is elected.

Under either rule, Joe Byrd won the election legally. However, under the circumstances present in this case, where the disqualification took place the night before the election, we felt that the best avenue to take was to adopt the American Rule as stated above. We therefore hold that, when a candidate either dies or becomes disqualified, after the ballots are printed, but before the election is held, the American Rule, as stated in 133 ALR 320 will apply. The "American" Rule was utilized in the July 29, 1995, run-off election. The election of Joe Byrd was, and is, legal and final.

There is one final issue that we feel we must address in this case, and that is whether or not the holding in Mayes and Muskrat v. Cherokee Nation Tribal Election Commission is *res judicata*. We hold that it is *res judicata* and operates to bar this action.

As we stated earlier, Petitioner Smith in this case is asking for the same remedy as was Petitioner Jeff Muskrat in JAT 95-08. In that opinion, we stated:

"Petitioner Muskrat would have this Court disqualify Mr. Bearpaw, but would have us cancel the July 29th run-off and order a new run-off election between the candidates who finished 2nd and 3rd in the June 17 general election. He would also have us set a new run-off far enough in the future to allow the candidates time to campaign."
(Emphasis added - Order of July 24, 1995.)

We declined to grant the relief requested by Mr. Muskrat concerning the new run-off then, and we likewise reject the same request now. The issue was decided in the Muskrat case and is *res judicata*. Petitioner Smith cannot again raise the same issue.

WE THEREFORE DENY the relief requested by Petitioner Smith and hold that THE ELECTION AND CERTIFICATION OF JOE BYRD AS PRINCIPAL CHIEF WAS, AND IS, LEGAL AND HIS ELECTION WILL STAND.

IT IS SO ORDERED on this 25th day of August, 1995.

JUDICIAL APPEALS TRIBUNAL OF THE
CHEROKEE NATION

By: Chief Justice Dwight W. Birdwell
Justice Philip H. Viles, Jr.
Justice Ralph F. Keen

Viles, Justice (Specifically Concurring): I reluctantly sign today's judgment. My hesitation stems from my two previous dissents, both wanting to hold a new election for Principal Chief. The majority never agreed with me, and with the swearing-in of Chief Joe Byrd on August 14th, even I realize that a new election is not going to happen. In his brief, Mr. Wilcoxon repeats the reasons for which a sitting Chief can be deposed and I have finally given up my quest for another election.

The majority today talk much about *res judicata* and its application here. I don't believe that it does apply. I think that Chad Smith is in a better position to argue for his place on the ballot than were the Plaintiffs in Mayes/Muskrat; they offered election-postponement scenarios as a means to their end, which was the disqualification of candidate Bearpaw. Mr. Smith proposes them for a far different and far more personal reason--his quest to be Principal Chief. Yet, a further hearing would serve no purpose, since he and the other parties have stated their positions well in their briefs.

Had Mr. Smith entered this litigation prior to our extraordinary Sunday hearing, had the Bearpaw litigation been filed months earlier, had the pardon come earlier, had the Election Commission checked pleas rather than convictions As an individual citizen of the Cherokee Nation, I support greater resources for the Election Commission and more continuity between elections.