



CHEROKEE NATION
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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Jamie Cole, Controller, Cherokee Nation Financial Resources Department
Opinion Number: 2016-CNAG-01
Date Decided: January 6, 2016

You have asked the Office of the Attorney General for an official opinion interpreting the revenue sharing and allocation provisions of the Cherokee Nation Motor Vehicle Licensing and Tax Code. In effect, you ask the following question:

1. Whether the 5% funding match to the 5% earmark for STEM classes/programs required by Title 68, § 1306(C)(2) shall be paid from the revenues allocated pursuant to § 1306(B)(4), the funds allocated to counties, municipalities and the Marshal Service, or from § 1306(B)(5), the motor vehicle licensing and tax surplus funds.

BACKGROUND

The Cherokee Nation Motor Vehicle Licensing and Tax Code, in its current form¹, is codified at Title 68 of the Cherokee Nation Code Annotated (2014). Title 68, § 1306(B)(2) provides 38% of the revenue collected pursuant to the Cherokee Nation Motor Vehicle Licensing and Tax Code shall be allocated and made available to certain Oklahoma public schools. 68 C.N.C.A. §1306(B)(2) (hereinafter, the “School Allocation Fund”). Title 68, § 1306(C)(2) provides 5% of the 38% of the School Allocation Fund shall be set aside to assist with teaching core subjects with an emphasis placed on STEM classes/programs. 68 C.N.C.A. §1306(C)(2). Section 1306(C)(2) provides further that the 5% shall be matched with an equal amount “to be paid from revenues described in paragraph 4 of subsection (B).” *Id.*

Under the current law, the revenues described in § 1306(B)(4) are funds available and appropriated “among the counties and municipalities within the Nation’s reservation boundaries and/or the Cherokee Nation Marshal Service.” 68 C.N.C.A. § 1306(B)(4) (hereinafter, “Law Enforcement Funds”). However, under a previous version of the law, the revenues described in § 1306(B)(4) were “any funds not appropriated or expended pursuant to paragraphs (1), (2) or (3) of this subsection shall remain available in the General Fund for appropriation and expenditure pursuant to Legislative Act.” Cherokee Nation Motor Vehicle Licensing and Tax

¹ The Tribal Council enacted the current version of the Motor Vehicle Licensing and Tax Code in Legislative Act 03-15 on February 26, 2015. The Principal Chief approved and signed LA-03-15 on March 11, 2015.

Code of 2008, Legislative Act 05-08, § 105(B) (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.) (hereinafter, “Surplus Funds”).

As we understand it, you are unsure whether the Tribal Council intended to use a portion of the Law Enforcement Funds for the 5% funding match to the 5% earmark from the School Allocation Fund for STEM classes/programs. Or, if the cross-reference to “paragraph 4” is simply a typographical error since the Surplus Funds are described in the paragraph 5 of § 1306(B).

ANALYSIS

I. Statutory Interpretation & Scrivener’s Error Doctrine

Your request requires an examination of 68 C.N.C.A §1306(C)(2). Where “the terms of the statute are clear and unambiguous, the inquiry ends and we simply give effect to the plain language of the statute.” *United States v. Sprenger*, 625 F.3d 1305, 1307 (10th Cir. 2010) (internal quotation mark omitted). Indeed, it is and ought to be a very rare and highly unusual thing for the courts or the Attorney General to dismiss the results dictated by the Tribal Council’s plain statutory command. But, when a statute contains a drafting error, courts will correct the statute pursuant to the scrivener’s error doctrine. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993). The scrivener’s error exception to the plain meaning rule allows judges to correct obvious clerical or typographical errors. *Id.*

Scrivener’s errors are apparent from the relationship of a particular word or phrase to its surrounding text. For example, Congress might use a cross-reference that, in context, could refer only to a nearby section other than the one actually named. *See, e.g., United States v. Coatoam*, 245 F.3d 553, 557 (6th Cir. 2001) (correcting a mistaken cross-reference to drug testing because the cross-referenced provision did not deal with drug testing, but an adjacent provision did); *King v. Hous. Auth.*, 670 F.2d 952, 954 n.4 (11th Cir. 1982) (noting that, while a regulation refers to the “elements” of a hearing, “as defined in §866.53(d),” that reference is an obvious “scrivener’s error” because “the ‘elements’ referred to are actually set out in §866.53(c)”). Accordingly, when an internal textual inconsistency is apparent from reading a word or phrase in the context of the text as a whole, there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise.

II. Title 68, §1306(C)(2) Contains Scrivener’s Error

The cross-reference to “paragraph 4” in § 1306(C)(2) is a scrivener’s error because, when read in context as a whole, it is highly unlikely that the Tribal Council intended to use a portion of the Law Enforcement Funds for the 5% match to the 5% earmark from the School Allocation Fund. An analysis of § 1306(C)(2)’s plain language in the context of both the revenue allocation and sharing provisions, along with the legislative history, supports this conclusion.

In 2001, the Tribal Council enacted the Cherokee Nation Motor Vehicle Licensing and Tax Code. Cherokee Nation Motor Vehicle Licensing and Tax Code, Legislative Act 01-01 (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.). Per LA-01-01, § 105(B), revenue collected was allocated four different ways: (1) first to the costs and expenses of the Commission in carrying out the provisions of the Act as authorized and appropriated by the Nation’s comprehensive annual budget; (2) 38% of fees and taxes collected by the Commission remaining after the amount appropriated for costs and expenses shall be allocated and made available to public schools within the Reservation Boundaries of the Cherokee Nation; (3) 20% of all fees and taxes collected remaining shall be available for apportionment to the Nation’s Marshal service and to counties

and municipalities within the Nation's Reservation Boundaries; and (4) any funds not appropriated or expended shall remain available in the General Fund for appropriation and expenditure pursuant to a future Legislative Act. *Id.* at § 105(B)(1)-(4).

In 2002, the Tribal Council amended § 105(B) to create a fifth specific allocation of an amount equal to 20% of all fees and taxes was to be made available for contribution to the cost of constructing or maintaining federally- and/or state-funded highways within the Nation's Reservation Boundaries, to be allocated among such highway projects. Legislative Act 34-02, § 105(B)(3) (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.) (hereinafter, "Highway Allocation Fund").

In 2008, the Tribal Council amended § 105(B)(2) to include the Cherokee Nation Immersion Program and the Cherokee Nation Headstart Program in the list of schools eligible to receive funds from the School Allocation Fund. Cherokee Nation Motor Vehicle Licensing and Tax Code, Legislative Act 05-08, § 1306 (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.). Without explanation², the Highway Allocation Fund was removed from the § 105(B) list. *Id.* at § 105(B).

In 2010, the Tribal Council amended Section 105(C)(2) so that 5% of the 38% of the revenues set aside under Section 105(B)(2) shall be distributed on a competitive basis to eligible schools for Cherokee-specific programming and projects. Cherokee Nation Motor Vehicle Licensing and Tax Code of 2009, Legislative Act 07-10, § 105(C)(2) (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.). LA-07-10 provided further that the 5% "shall be matched with an equal amount to be paid from revenues described in Subsection B(4)." *Id.* "Subsection B(4)" describes the Surplus Funds. *Id.* at § 105(B)(4). Thus, pursuant to LA-07-10, a portion of the Surplus Funds³, were to be used for the 5% funding match to the 5% earmark from the school allocation fund for STEM classes/programs.

² The Education & Culture Committee of the Tribal Council considered LA-05-08 on March 11, 2008. The Tribal Council considered LA-05-08 on April 14, 2008. Neither the Committee, nor the Tribal Council minutes mention the Highway Allocation Fund. As a consequence, there is no indication why the Highway Allocation Fund is not listed in the 2008 version of § 105(b).

³ The Rules Committee of the Tribal Council considered LA-07-10 on February 9, 2010. It is clear from the Act's discussion that the Tribal Council intended the 5% match amount be paid from the motor vehicle licensing and tax surplus funds, not the funds allocated for counties, municipalities and the Cherokee Nation Marshall Service:

[...]

Councilor Buzzard made a motion to take 5% from the school allocation and 5% from the motor fuel tax revenue. Councilor Snell seconded the motion.

Councilor Glory-Jordan inquired how this 5% would impact the other motor fuels programs. Ms. Swepston stated they would have to [d]o a recalculation [of] the motor vehicle tax as it does state 38%. The motor vehicle tax goes to schools, law enforcement, roads and general fund. Councilor Glory-Jordan inquired if general fund would be reduced.

Councilor Buzzard amended his motion for 5% from the motor vehicle general fund account and 5% from the school allocation amount. Councilor Fulbright request she be removed as sponsor of the original legislations.

[...]

In 2012, the Tribal Council amended Section 105(C)(2) so that the 5% of revenues set aside shall be allocated for programs to assist public schools within the Cherokee Nation with the A-F grading system, specifically to assist with teaching core subjects with emphasis placed on STEM classes/programs. Cherokee Nation Motor Vehicle Licensing and Tax Code of 2012, Legislative Act 51-12, § 105(C)(2) (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.). LA-51-12 further amended Section 105(C)(2) by removing the \$25,000 award limitation, along with removing the requirement that a school that received funding for two consecutive years wait one year before reapplying. *Id.* Lastly, LA-51-12 instructed Education services to develop policies and procedures for the priority level of distribution for the funds and to give special consideration to schools that receive a C-F and have high enrollment of Cherokee students. *Id.* No change, however, was made to the cross-reference in §1306(C)(2).

In 2015, the Tribal Council amended various subsections in § 1306⁴. The amendments include an addition to the list of schools eligible to receive funds from the Education Allocation Fund and replaced “reservation boundaries” with “Compact Jurisdiction Area”. Cherokee Nation Motor Vehicle Licensing and Tax Code of 2015, Legislative Act 03-15, § 1306(C)(2) (codified as amended in Chapter 9 of Title 68 of the C.N.C.A.). Without explanation⁵, the Highway Allocation Fund reappears⁶ in the § 1306(B) list. *Id.* at §

Motion to table failed by roll call vote.

[...]

Councilor Jack D. Baker commented that we presently don't have any un-appropriated funds. What affect will this 5% coming from general fund have on other programs[?] Ms. Knight stated that the 5% coming from the general fund portion which Mr. Doug Evans has stated has not all been budgeted therefore there should be funds available for the 5%. Mr. Evans stated the residual transfer to the gen fund was not submitted this month. The budget equals everything left after apportionment. This particular budget would have increased the gen funds revenue available for appropriation by \$356,000. He stated this is where the 5% or approximately %138,00 would have to be funded from.

The motion to amend was read into the record as 5% from the gen fund of the motor fuel tax portion and 5% from the school fund allocation.

[...]

The motion to approve with the friendly amendment carried with a roll call vote.

[...]

⁴ The Cherokee Nation Code Annotated was recodified in 2014. In doing this, § 105 was renumbered to § 1306.

⁵ The Rules Committee of the Tribal Council considered LA-03-15 on February 26, 2015. The Tribal Council considered LA-03-15 on February 26, 2015. Neither the Committee, nor the Tribal Council minutes mention the Highway Allocation Fund. As a consequence, there is no indication why the Highway Allocation Fund is now re-listed in the 2012 version of § 1306(B).

⁶ However, 20% of the fees collected continued to be paid to the Highway Allocation Fund from 2008 through 2015 despite the removal of the language from the statute.

1306(B)(3). This addition renumbers the Law Enforcement Fund and Surplus Funds to § 1306(B)(4) and § 1306(B)(5), respectively. No change, however, was made to the cross-reference in §1306(C)(2), despite the renumbering.

When read in context as a whole, including the text of the statute and the Committee and Tribal Council minutes, it is highly unlikely that the Tribal Council intended to use a portion of the Law Enforcement Funds for the 5% match to the 5% earmark from the School Allocation Fund. We are convinced that the reference to paragraph 4 was a simple scrivener's error, a typographical mistake. The true meaning of § 1306(C)(2) is clear, and so we fix the mistake. Section 1306(C)(2) should be read as if the 5% shall be matched with an equal amount to be paid from revenues described in paragraph 5 of subsection (B), the Surplus Funds, not paragraph 4, the Law Enforcement Funds.

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

1. The 5% funding match to the 5% earmark for STEM classes/programs from the school allocation found in Title 68, § 1306(C)(2) of the Cherokee Nation Code Annotated (2014) shall be paid from the motor vehicle licensing and tax surplus funds described in Title 68 § 1306(B)(5), not from the funds described in Title 68, § 1306(B)(4), the funds allocated to counties, municipalities and the Marshal Service.

Pursuant to Title 51, § 105(4), 2016-CNAG-01 shall have the force of law in the Cherokee Nation until a differing opinion or order is entered by a Cherokee Nation Court.



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