



CHEROKEE NATION
OFFICE OF THE ATTORNEY GENERAL

P.O. Box 948
Tahlequah, OK 74465-0948
918-453-5000

A. Diane Hammons
Attorney General

OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Cara Cowan-Watts, Cherokee Nation Tribal Council
Taylor Keen, Cherokee Nation Tribal Council

Opinion Number: 2006-CNAG-3

Date Decided: October 2, 2006

This office has received your request for an official Attorney General Opinion in which each of you asked for interpretation of the various Cherokee Nation provisions that guide the level at which a Cherokee Nation Councilmember may do outside business with another Indian tribe. The question has been consolidated for response.

To what extent may a Tribal Council member of the Cherokee Nation work for or contract with, another Indian tribe?

ANSWER AND ANALYSIS

I. Cherokee Constitutional Provisions/Analysis of Definition of Office

The Cherokee Nation Constitution only has one specific provision that addresses this issue, and that is found in Article IX, regarding Elections. Section 2 of that provision states, in part:

Any person who holds any office of honor, profit or trust in any other tribe or Nation of American Indians, either elective or appointive shall be ineligible to hold simultaneously any office of honor, profit or trust of the Cherokee Nation unless approved by the Council.

See, also, 26 CNA §32. The pivotal question then, is what constitutes an “office of honor, profit or trust.” This term of art, which has been a part of American jurisprudence for over a century, is determined on a case by case basis. “The determination whether an office is one of trust or profit has to be made on a case-by-case basis, depending on the nature and importance of the office in

question.” 63C Am.Jur.2d, Public Officers and Employees, §22, Commonwealth v. Hancock, 506 S.W.2d 503 (Ky. App. 1974). Like art, some things are known to be an office when we see it – elected officials and members of the judiciary, for example, are almost always held to be officers.

The American cases have rendered some guidelines to be considered for more questionable situations: Alabama has held that an officer under its laws is one who “is vested with a portion of the powers of government, whether it be legislative, judicial or executive.” Montgomery v. State, ex rel. Enslin, 107 Ala. 372, 18 So. 157 (1894). Oklahoma law has a similar litmus test. In Oklahoma City v. Century Indemnity Co., 62 P.2d 94 (Okla. 1936), the Oklahoma Supreme Court developed a three part test to determine whether an individual was a public officer. “First, the position must be created or authorized by law; second, the law must impose definite duties; and third, the duties must entail the exercise of sovereign power.” *Id.*, at 97.

Clearly, a member of the Cherokee Nation Tribal Council is an “officer” under Cherokee Nation law. Thus, whether employment or contracting with another tribe violates the Article IX prohibition turns on the nature of the position with the other tribe. Typically, a short term contract for labor provision (such as a construction contract) would not entail “exercise of sovereign power” and would not be prohibited. A position within the other tribe such as judge, council member, elected official, board member, or any similar position would be prohibited.

There have been a number of Oklahoma Attorney General provisions that interpret the meaning of “office of trust” under state law. For example, a municipal police officer has been found to be such an officer under the Oklahoma Constitution because:

Municipalities are created by statute, and they, in turn, create police officer positions in accordance with their charges and invest police officers with a portion of the sovereign’s power to arrest, search and seize.

Okl.A.G. Opin. No. 00-58, 2000 WL 33155865 (Nov. 16, 2000). Other Oklahoma AG opinions have held that a member of a university foundation is an officer (Okl.A.G. Opin. No. 06-28, 2006 WL 2104272 (July 19, 2006) and a local school board member (Okl.A.G. Opin. No. 00-39, 2000 WL 1100240 (August 1, 2000)).

II. Cherokee Statutory Provisions

Although a position with another Indian tribe might not violate the specific Constitutional prohibition found in Article IX, above, there could still be a conflict of interest present. The Cherokee Nation’s ethical code of conduct is codified in Title 28 of the Cherokee Nation Code. The following subsections provide some guidance on the issue of outside employment.

28 § 4. Code of Ethical Standards

Every official and employee of the Cherokee Nation should endeavor to:

(A) Put loyalty to the highest moral principles and to the Cherokee Nation above loyalty to other persons, parties or governmental entities.

(F) Never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of tribal duties.

(H) Engage in no business with the tribe, either directly or indirectly, which is inconsistent with the conscientious performance of tribal duties and further **make every effort in his or her private work to avoid conflicts of interest; unless participation in the conduct of the business, personal and tribal, is deemed to be of no substantial effect on his or her integrity and any other interests are deemed insignificant.**

(I) Never use any information gained confidentially in the performance of tribal duties as a means of making private profits to the detriment of the Cherokee Nation.

(J) Never use his or her position in any way to coerce or give the appearance of coercing anyone to provide a financial benefit to himself or herself or another person.

(emphasis added). Using the above standards, clearly a Tribal Council member could not use knowledge gained by his or her Council position to personally profit from another tribe, to the detriment of the Nation. See, Sections A, H, I, and J, above. Engaging in work for another tribe that is in competition with the Nation, either in the market place or in competition for federal funding/grants, could also be violative of sections A and F, above.

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

A Cherokee Nation Council Member holds an office within the Nation. He or she can not hold an office with another Indian tribe, absent Tribal Council approval, under Article IX of our Constitution. What constitutes an office within another tribe is a factual determination which must be made on a case by case analysis. Looking at holdings and discussions from other jurisdictions for guidance, we can offer certain advice – if a position is an “office” within another jurisdiction, it may very well be an “office” in the outside Indian tribe. Therefore, the position of Chief or Chairman, Deputy Chief or Chairman, Council member, Commissioner, Board member, police officer, or any other individual who exercises, by virtue of his position, some power of the government, qualifies as an officer.

Further, even though a position in another tribe might not qualify as an “office,” and therefore be constitutionally permissible, there are additional specific statutory ethical standards that must be consulted in determining whether that inter-tribal employment constitutes a conflict of interest. The Council member should be guided by those standards enunciated in the Cherokee Nation code, and by his or her oath of office.

The office will be happy to provide any further guidance on specific positions, which were not included with these requests.

A handwritten signature in cursive script, appearing to read "A. Diane Hammons".

A. DIANE HAMMONS
Attorney General of the Cherokee Nation