CHEROKEE NATION

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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Harvey Chaffin, Attorney for the Cherokee Nation Election Commission, on behalf of the Election Commission

Opinion Number: 2015-CNAG-04

Date Decided: March 5, 2015

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

1. How should campaign expenditures from a candidate's own funds incurred before, during and after an election be reported to the Election Commission?

2. When and to what extent may such expenditures be considered loans?

As we understand the factual basis for your question, the Cherokee Nation Election Code sets forth the statutory requirements for the disclosure of campaign finances in 26 CNC, Chapter 5, §§ 41-47, but does not specifically reference how to treat the aforementioned items.

SHORT ANSWERS:

1. Expenditures from a candidate's own funds shall be reported on the individual candidate's Financial Disclosure Report (FDR) pursuant to 26 CNC §§ 46-47. Expenditures from a candidate's own funds incurred before the election period shall be included as expenditures on the candidate's first FDR for the election period. Expenditures from a candidate's own funds incurred after the beginning of the election period but before the first FDR is due shall be included as expenditures on the candidate's first FDR for the election period. All subsequent expenditures of a candidate's own funds shall be reported as expenditures on the candidate's monthly FDR for the month in which the expenditures were made.

2. An individual candidate may report up to $5,000.00 of expenditures from a candidate's own funds as a loan to the candidate's campaign, but is not required to do so. The candidate can

reimburse his or her personal funds from campaign contributions in the amount of the reported loan(s).

Background

Political campaigns have been regulated in the Cherokee Nation for many years. The Cherokee Nation Election Code (the "Election Code"), in its current incarnation, is codified at Title 26 of the Cherokee Nation Code and was enacted pursuant to Legislative Act 04-14, which was passed by the Tribal Council on February 10, 2014 and subsequently signed into law by the Principal Chief. The Election Code is the controlling law for the conduct of all Cherokee Nation elections for any elective office, Constitutional amendments, initiatives and referenda of the Cherokee Nation. 26 CNC § 1.

The Cherokee Nation Election Code, 26 CNC § 1, *et seq.*, contains a number of sections regarding the collection, use and disclosure of campaign funds. The Election Code mandates that candidates report campaign contributions and furnish certain other information for public disclosure. The Election Code also restricts or prohibits certain campaign practices. Section 41 defines "campaign contribution" to mean a contribution in money or services offered or given with the intent that it be used in connection with a campaign. "Campaign expenditure" is defined to mean an expenditure of money or services in connection with a campaign for elective office or on behalf of a ballot measure. Whether a campaign expenditure is incurred before, during or after an election does not affect its status as a campaign expenditure. "Loan" is defined to mean a payment made from the candidate's own funds for campaign purposes, or any funds obtained by loan to the candidate from a bank, savings and loan association or credit union and any such loan shall be considered a campaign contribution. Section 41 also describes "in-kind contribution" as a campaign contribution of goods or services rather than a money donation. "Election period" shall include the primary election and the runoff election. 26 CNC § 3-A(15). For purposes of this Opinion, this Office shall interpret "election period" to include the six months immediately preceding the primary or special election date.

Section 43 mandates that only individual natural persons may contribute to campaigns and that those contributions are limited to $5000 in cash or in-kind contributions. Section 44 prohibits any personal use of campaign contributions and mandates that left over contributions be placed in an escrow account to be used for costs of subsequent elections.[1] This Section further limits anonymous contributions to $1000 in the aggregate to any one candidate per election period. Section 45 makes it a criminal offense for any Indian to violate any provision of Sections 43 and 44 and may result in the disqualification of an elective candidate.

Sections 46 and 47 detail the use of financial disclosure reports (FDR) which must be submitted monthly to the Election Commission with a final report to be submitted at least five days prior to the swearing in of the successful candidates. The disclosure reports shall certify all contributions and expenditures for each reporting period and any candidate or candidate's financial agent who knowingly fails to fully disclose the required information is guilty of a crime and any such person convicted of such a crime is barred from holding elective office with the Cherokee Nation for five years and may be subject to removal if already elected and sworn into office.

ANALYSIS AND DISCUSSION

[1] There is concern that provisions for the turnover of unused campaign funds may constitute an unconstitutional taking of private property for public use without just compensation as prohibited by Article III, Section 3 of the Cherokee Nation Constitution, but that Question is not currently before this Office.

A. Introduction

In responding to your question, we must examine the Cherokee Nation Election Code. The Election Commission has the primary jurisdiction to "[i]nvestigate and audit all financial reports and disclosures required" by the Election Code. 26 CNC § 11(C)(12)(F). Thus, this Office would typically defer to the Election Commission's interpretation for those areas of the Election Code. However, when an official opinion is requested of this Office pursuant to the Attorney General Act, LA 12-07, this Office shall opine as to such a question of law and said opinion "shall have the force of law in the Cherokee Nation until a differing opinion or order is entered by a Cherokee Nation court…" LA 12-07, codified at 51 CNC § 104(B)(4).

With respect to interpretation of the Election Code, several principles of statutory construction are relevant to your inquiry. The first being that when writing statutes, it is presumed the Tribal Council intends to use ordinary English words in their ordinary senses. Second, ascertaining and effectuating legislative intent should be done whenever possible. Next, statutes should be given a reasonable and practical construction that is consistent with the purpose and policy stated in the statute. There is a standard presumption that the Tribal Council acts reasonably and does not intend an absurd or unjust result. Also, there is a presumption that when two statutes conflict, the one enacted last prevails (the "Last in Time" rule). Finally, because the Election Code section in question may attach criminal penalties to any violation thereof, the statute must be narrowly construed. While some other jurisdictions have addressed similar questions, these appear to be issues of first impression in Cherokee Nation jurisprudence.

B. Reporting expenditures of a candidate's own funds

While the Election Code imposes restrictions or prohibitions on certain campaign practices, a thorough review of the Election Code does not reveal any limitation on the amount of money a candidate can expend in furtherance of their campaign. Any such prohibition, were it to appear in the Election Code, would be of questionable constitutionality as it would burden candidates' rights of free speech.

There is also no express period of time within which a candidate may expend their own funds in furtherance of their own campaign, unlike the period of acceptance for campaign contributions set forth in 26 CNC § 44(A). That Section provides that "[n]o officeholder, no candidate, no potential candidate for elective office and no financial agent shall receive campaign contributions prior to the beginning of the six month period immediately preceding…" the election. 26 CNC § 44(A). The Election Code is silent regarding any corresponding period for campaign expenditures. In actuality, the Election Code anticipates that campaign expenditures may occur at virtually any time: "Whether an expenditure is incurred before, during or after an election does not affect its status as a campaign expenditure." 26 CNC § 41(B). While nearly identical language appears in the definition of "campaign contribution"[2] in the same Section, the Tribal Council has declined to place any restriction on when campaign expenditures may be incurred as opposed to a restriction on the acceptance of campaign contributions. As such, campaign expenditures can occur at any time "before, during or after" an election, but those expenditures must be properly documented on the individual candidate's FDR pursuant to 26 CNC §§ 46-47.

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[2] Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution. 26 CNC § 41(A).

26 CNC § 46 mandates that each candidate for elective office shall file a monthly FDR with the Election Commission, beginning with the month that the candidate filed for office and "shall comprise of the entire previous month, beginning on the first day of the month and ending on the last." A final report is due no later than five days prior to the swearing in of the successful candidates which is subject to revision up to seven months after the election. Id. The FDR shall reflect all campaign contributions and expenditures for the monthly reporting period. Id.

The filing period for elective office begins three months prior to an election. *See* 26 CNC § 36 and 26 CNC § 51. However, as noted above, the Election Code allows for campaign expenditures to be incurred at any time before, during or after an election and for campaign contributions to be accepted as early as six months prior to an election. *See* 26 CNC § 41 and 26 CNC § 44. The Election Code is silent as to how or when campaign contributions and expenditures from more than thirty days before the first FDR is due should be reported, only mandating that they must be reported.

Examining the express reporting requirements in the Election Code reveals that campaign contributions and expenditures are reported on the next due FDR after they are received or incurred. 26 CNC § 46. Further, all campaign expenditures and all campaign contributions must be disclosed in the candidate's FDRs. 26 CNC § 47. Accordingly, it makes logical sense that contributions and expenditures occurring prior to the period of time expressly discussed in the Election Code (namely contributions from after the sixth month before the election but prior to the month in which the candidate files for office and campaign expenditures occurring prior to the month in which the candidate files for office) should be reported on the candidate's first due FDR. Any subsequent campaign contributions or campaign expenditures (including expenditures of a candidate's own funds) shall be reported as expenditures on the candidate's monthly FDR for the month in which they occurred. Such reporting is consistent with the intent and purpose of the Election Code and provides for full disclosure of the required information.

C. Loans from a candidate's own funds

The Election Code defines loan to include "any payment made from the candidate's own funds for campaign purposes…and ***shall*** be considered as contributions." 26 CNC § 41(F) (emphasis added). The Election Code further provides that campaign expenditures from the candidate's own funds "***shall*** be included as expenditures" and "***may*** be shown as a loan from the candidate…and ***shall not*** be considered as contributions." 26 CNC § 47(B) (emphasis added). A plain reading of these two sections reveals some inconsistency which will require further resolution.

Initially, it should be noted that taken together, these sections mandate that campaign expenditures from a candidate's own funds must be disclosed as campaign expenditures. These sections further provide that any such expenditures from a candidate's own funds may be reported on the candidate's FDR as a loan from the candidate, but it is not a requirement to do so. As such, while any expenditures from a candidate's own funds must be reported on the candidate's FDR, it is within the candidate's discretion as to whether any of the candidate's own funds are reported as a loan to their campaign. This distinction is important because the Election Code provides that a "candidate may reimburse his or her personal funds from campaign contributions in the amount of the reported loan(s)." 26 CNC § 47(B).

However, an inconsistency arises between the two statutes when addressing whether any such "loan" is considered a campaign contribution. As noted above, Section 41(F) states that loans "shall" be considered as contributions and Section 47(B) states that loans "shall not" be

considered contributions. A plain reading of these sections results in a conflict between the two. The first step in reconciling these conflicting sections requires an examination of the legislative intent of the sections. A thorough review of Cherokee Nation election law reveals that Section 41(F) first appeared in December, 2012 as part of LA 46-12 and Section 47(B) first appeared in May, 1997 as part of LA 7-97. Because Section 41(F) is the most recently enacted section, there is a presumption that it accurately expresses the intent of the Tribal Council in this regard and any examination thereof begins with this Section. The question becomes: Did the Tribal Council intend LA 46-12 to change the designation of loans to being considered a contribution from not being considered as such? This Office answers that question in the affirmative.

LA 46-12 is titled, and appeared on the Tribal Council agendas and minutes, as "An Act Amending LA#06-10, LA#39-05 and LA#7-97; Revising Title 26 ("Elections") of the Cherokee Nation Code Annotated". This Act revised Title 26 of the Cherokee Nation Code in its entirety. *See* LA 46-12, Section 1. The published minutes of the Tribal Council Rules Committee meeting wherein LA 46-12 was introduced and debated provides some insight as to the discussion regarding the revision of the Election Code. *See* December 10, 2012 Meeting Minutes - Final, Rules Committee, Council of the Cherokee Nation (accessed February 27, 2015 from https://cherokee.legistar.com/Legislation.aspx). The Minutes reflect that a "list of amendments with a brief explanation for each" was distributed to the Tribal Council. Id. at page 3. The Minutes further reflect that the Rules Committee Chair "provided an overview of each amendment", but do not provide a record of what was expressed in the overview. Id. at page 4. The Minutes then reflect discussion about a number of the proposed amendments before the Act was approved by the Committee, but contains no mention of Section 41(F) specifically. Id. at pages 4-5.

Fortunately, the Tribal Council website also contains links to the video taken of the December 10, 2012 Rules Committee Meeting wherein LA 46-12 was discussed. In reviewing the video of the Rules Committee Meeting (the "video"), the Rules Committee Chair is observed reading through each proposed amendment contained in the Act and giving a brief overview. At minute 87:55 Section 41(F) is reviewed and discussed.[3] The video reveals no further discussion or debate of Section 41(F) and, after review and debate of various other proposed amendments, the Act was approved by the Rules Committee to go to full Tribal Council where it was approved without further debate later that evening. Viewed in light of the Rules Committee Chair only going over the individual sections which were proposed as amendments to the existing Election Code, and that in his review of Section 41 the Chair twice refers to the "new" definition of "loan" (*See* fn 3, below) before reading the text of Section 41(F), only one logical conclusion can be reached as to the intent of the Tribal Council. The Tribal Council fully intended to change the definition of "loan" to now be considered as a campaign contribution. Because the intent of the Council was clearly expressed in discussing the "new" definition of "loan" in LA 46-12 and because Section 41(F) is the most recent piece of enacted legislation, to the extent that Section 41(F) is in conflict with Section 47(B), Section 41(F) is controlling. Accordingly, any "loan"

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[3] RULES COMMITTEE CHAIR HOSKIN, JR.: "[Section 41] creates ***new*** definitions for what it means to have a loan to your campaign account and what it means to have an in-kind contribution. Under the ***new*** definition of "loan": "Loan" shall be any payment made from the candidate's own funds for campaign purposes, or any funds obtained by loan to the candidate from a bank, savings and loan association or credit union on his or her own behalf, and shall be considered as contributions..." *See* December 10, 2012 Video, Rules Committee Meeting, Council of the Cherokee Nation (accessed February 27, 2015 from https://cherokee.legistar.com/Legislation.aspx).

reported to a candidate's campaign shall be considered a campaign contribution and shall be reported as such.

It should be noted that because a "loan" is considered a campaign contribution, it is also subject to the restrictions set forth in Section 43 of the Election Code. Contributions may only be made to a campaign from individual natural persons and contributions are limited to no more than five thousand dollars ($5000) in cash or in-kind to any one candidate during an election. 26 CNC § 43. Read in conjunction, it becomes clear that a candidate may report up to five thousand dollars ($5000) of their own expended personal funds as a loan to their own campaign and may be reimbursed from campaign contributions up to the amount reported as the loan(s). If a candidate were to obtain a personal loan from a bank, savings and loan association or credit union on their own behalf for campaign funding, the candidate could report up to five thousand dollars ($5000) of that loan as a contribution from their own personal funds to their campaign and could be reimbursed accordingly. This is certainly a departure from how campaign finance was accounted for prior to LA 46-12, but is squarely in line with the Election Code as it appears today.

Conclusion

It is therefore the Official Opinion of the Attorney General that:

1. Expenditures from a candidate's own funds shall be reported on the individual candidate's Financial Disclosure Report (FDR) pursuant to 26 CNC §§ 46-47. Expenditures from a candidate's own funds incurred before the election period shall be included as expenditures on the candidate's first FDR for the election period. Expenditures from a candidate's own funds incurred after the beginning of the election period but before the first FDR is due shall be included as expenditures on the candidate's first FDR for the election period. All subsequent expenditures of a candidate's own funds shall be reported as expenditures on the candidate's monthly FDR for the month in which the expenditures were made.

2. An individual candidate may report up to $5,000.00 of expenditures from a candidate's own funds as a loan to the candidate's campaign, but is not required to do so. The candidate can reimburse his or her personal funds from campaign contributions in the amount of the reported loan(s).

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