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**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** Chuck Hoskin, Jr., Cherokee Nation Tribal Council

**Opinion Number:** 2011-CNAG-01

**Date Decided:** July 22, 2011

This office has been asked for an opinion answering the following:

***When the term of a Principal Chief expires and the office has not yet been filled pursuant to an election, is a vacancy in the office of Principal Chief created and, if so, how is it filled?***

For the reasons below, we<sup>1</sup> believe that a vacancy is created, and that the sitting Deputy Principal Chief assumes the duties of Principal Chief until the election process is concluded.

“As a general rule, in the absence of a constitution or statute providing otherwise, an officer is entitled to hold his office until his successor is appointed or elected and has qualified.” C.J.S., Officers and Public Employees, § 95. Cherokee law is unusual in this respect; many jurisdictions have hold over provisions for incumbents to remain in office until a successor is duly seated.<sup>2</sup> Many States have specific provisions mandating such a hold over in order to further the public interest of providing a stable government. For example, Oklahoma’s Constitution states: “That all officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.” Okla. Const. Art. 23, § 10.

The Cherokee Nation Constitution does not have a hold over provision regarding the Principal Chief or Deputy Principal Chief, but does for the Tribal Council. Article VI, Section 3 states, in part, “Each Council member shall be elected in the general election for a term of four (4) years **and until his or her successor is duly elected and installed**” (emphasis added). There is a legal maxim of construction, *expressio unius est exclusio alterius*, which provides that the enumeration of certain specifics in a provision will be construed to exclude all things not enumerated. In other words, given that the framers of the Cherokee Constitution specifically included a hold over provision for the Tribal Council, but not for the Principal Chief, it is assumed that the exclusion was intentional, and that therefore, hold over is not available to the Principal Chief. The Constitutional provisions must be read as a whole, and no one part may be

<sup>1</sup> Sara Hill, Nason Morton, & Robert Garcia contributed research to this opinion.

<sup>2</sup> See, e.g., C.J.S., Officers and Public Employees, § 94.

read in exclusion to the others. Given that different language was used in the Executive and Legislative Articles of the Constitution regarding the terms of office and hold over, it must be assumed that the difference is intentional.

Article VII, Section 1, of the Cherokee Constitution states, in part “The Principal Chief shall hold office for a term of four (4) years.” Section 4 of the same Article states:

In the case of the absence of the Principal Chief from office due to death, resignation, removal or inability to discharge the powers and duties of the office, the same shall devolve upon the Deputy Principal Chief for the remaining portion of the four (4) year term to which the Principal Chief had been elected. In case of disability, such powers shall continue during the term of such disability.

In the event of the death, resignation, or removal of the Deputy Principal Chief, or his or her inability to discharge the powers and duties of the office, the person who is then the Speaker of the Council shall succeed to the office of the Deputy Principal Chief for the balance of the term. In the case of temporary disability, said person shall serve as Acting Deputy Principal Chief for the duration of the disability and thereafter shall reassume the office of Speaker.

In the cases of *Mayes v. Cherokee Nation* and *Muskrat v. Tribal Election Commission*, JAT-95-07 & 08 (consolidated) our highest Court had to determine whether a candidate for Principal Chief should be declared ineligible for office, where the election was a very short time away. The Court held the candidate (George Bearpaw) ineligible and directed the Election Commission to proceed with a runoff and “declare those with the highest number of votes as a winner, without consideration for the votes cast for Mr. Bearpaw.” In explaining its holding the Court stated:

This Court has considered other remedies, but has rejected them as being not in the best interest of the Cherokee Nation. It is of critical important (sic) that the tribe continue without interruption following the expiration of the terms of the current Principal Chief and Deputy Principal Chief.

p. 4, Judgment, July 23, 1995. Clearly the Court did not believe that hold over of the then current Principal Chief was an option, and that it was imperative that the election for Chief continue. Although the Court was operating under the 1975, and not the 2003, Constitution, the pertinent provisions are similar<sup>3</sup>. An analogous conclusion can be drawn from the way the Court has addressed other hold over issues, including for its own members.<sup>4</sup> In JAT-AD-98-07, the Court had occasion to discuss judicial hold over for its own justices. In adopting a rule formally acknowledging the ability of a Justice to hold over until a successor takes the oath of office, the Court stated:

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<sup>3</sup> Interestingly, the 1975 Constitution did make specific allowance for the holdover of the Principal Chief for one time only – the then current Chief was to stay in office until “his successor is duly elected in the 1979 election and installed.” 1975 Cherokee Constitution, Art. VI, Section I.

<sup>4</sup> See, e.g., *Thornton v. Viles*, JAT-02-04, and Rules of the Cherokee Nation Supreme Court, Rule 160.

The common law right and duty to hold over, . . . is applicable to Justices of the Tribunal, and other appointed Cherokee Nation officials.

p. 2, Order, December 23, 1998. Elected officials are clearly omitted from the application of this holding, which is reasonable given the specifically articulated order of succession for Principal Chief and Deputy Principal Chief, and the hold over and replacement provisions for the Tribal Council.

Although the Constitution does not specifically address the present situation – a second election for the Principal Chief, where the first one was held to be invalid - it does contemplate temporary disabilities. We believe that the gap between the end of the present four year term, which expires August 14, 2011, and the time that the new election is finally concluded and the next Principal Chief takes the oath of office represents a “temporary disability” which should be filled by the Deputy Principal Chief under the provisions of Article VII, Section 4, above.<sup>5</sup>

We therefore answer the question in the affirmative and opine the following:

***When the term of a the Principal Chief expires and the office has not yet been filled pursuant to an election, a temporary vacancy in the office of Principal Chief is created and must be filled under the provisions of the Cherokee Constitution by the temporary assumption of that office by the Deputy Principal Chief.***

Respectfully submitted by:



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July 22, 2011

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<sup>5</sup> It should be noted that this would be the result in the United States of America for the office of the President. “if a President shall not have been chosen before the time fixed for the beginning of his term . . . then the Vice President elect shall act as President until a President shall have qualified;” Amendment XX, Section 3, United States Constitution.