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OFFICIAL OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Bill Davis, Registered Voter District 11

Opinion Number: 2013-CNAG-06

Date Decided: September 26, 2013

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

1. Is the decision of the Cherokee Nation Election Commission to deny absentee ballot requests which were timely submitted, but without a Cherokee Nation membership registration number or with an incorrect Cherokee Nation membership registration number, contrary to Cherokee Nation election law?

As we understand the factual basis for your question, for the October 12, 2013 District 11 special election the Cherokee Nation Election Commission ("EC" or "Election Commission") received a number of timely requests for absentee ballots which either did not contain the voter's Cherokee Nation membership registration number or contained an incorrect Cherokee Nation membership registration number for the individual voter. The Election Commission determined that any such absentee ballot request received shall be rejected and a letter will be mailed to each affected voter informing them of the rejection and advising said voter that they may still vote at their designated precinct on election day or by in-person absentee ballot at the Election Commission Office for the prescribed period of time prior to election day.

BACKGROUND

The Cherokee Nation Election Code (“Election Code”), in its current incarnation, is codified at Title 26 of the Cherokee Nation Code Annotated and was enacted pursuant to Legislative Act 46-12 which was passed by the Tribal Council on December 10, 2012 and subsequently signed into law by Principal Chief Bill John Baker. The Election Code was promulgated for the purpose of conducting all Cherokee Nation elections for Principal Chief, Deputy Principal Chief, Council, Constitutional amendments, initiatives and referenda of the Cherokee Nation. 26 CNCA § 1.

The Cherokee Nation Tribal Council (the “Council”) is the constitutionally created legislative body for the Cherokee Nation. Cherokee Nation Constitution, Article VI, Section 1 (2003). The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation; provided those laws shall not be contrary to the provisions of the Constitution. *Id.* at Section 7. The Council is further charged with enacting appropriate election laws “not inconsistent with the provisions of this Constitution that will govern the conduct of all elections.” Cherokee Nation Constitution, Article IX, Section 1 (2003).

The Cherokee Nation Election Commission (the “CNEC”) is the constitutionally created “autonomous and permanent entity charged with the administration of all Cherokee Nation elections, in accordance with election laws” as promulgated by the Council. Cherokee Nation Constitution, Article IX, Section 1 (2003).

SHORT ANSWER:

The Election Commission shall approve those absentee ballot requests which were rejected for not containing the voter’s Cherokee Nation membership registration number or containing an incorrect Cherokee Nation membership registration number.

The first sentence of Article IX, Section 1 of the Cherokee Nation Constitution states that there “is hereby created a Cherokee Nation Election Commission.” This Section provides that the CNEC “shall be an autonomous and permanent entity charged with the administration of all Cherokee Nation elections, in accordance with election laws.” Cherokee Nation Constitution, Article IX, Section 1 (2003). This Section further provides that “[t]he Council shall enact an appropriate law not inconsistent with the provisions of this Constitution that will govern the conduct of all elections.” *Id.*

As previously noted, the Council is the constitutionally created legislative body for the Cherokee Nation. Cherokee Nation Constitution, Article VI, Section 1 (2003). The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation; provided those laws shall not be contrary to the provisions of the Constitution. *Id.* at Section 7. The Council is further charged with enacting appropriate election laws “not inconsistent with the provisions of this Constitution that will govern the conduct of all elections.” Cherokee Nation Constitution, Article IX, Section 1 (2003). In response to its constitutionally charged duty, the Council enacted LA-46-12, which codified the Cherokee Nation Election Code at Title 26 of the Cherokee Nation statutes.

Generally, absentee voting is the participation (usually by mail) in elections by qualified voters who are unable to appear at the polls in person on election day. Black's Law Dictionary (9th ed. 2009). The absentee voter receives his or her ballot prior to election day. Jessica Fay, Ensuring Absentee Ballot Integrity for Older Voters, 13 Elder Law Journal 453 (2005) (citing John C. Fortier & Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J.L. Reform 483, 505 (2003)). The voter then selects his or her voting choices prior to the election and mails or delivers the ballot to the appropriate authorities on or before election day. Id. By eliminating the need for attendance at the polls, the absentee voting process enables many groups of people, including overseas members of the military, travelers, students, and people with disabilities, to vote when they otherwise might have been denied the opportunity. Id.

Absentee voting procedures can be either "no-excuse", which allows a voter to request an absentee ballot for any reason, or they can require a voter to provide some acceptable excuse before being granted an absentee ballot. The Cherokee Nation absentee voting procedures belong to the former group.

Historically, the Election Commission has assisted voters who were submitting voter registration forms, absentee ballot requests, and the like, whenever reasonably possible. This has included assisting voters with verifying their citizenship information and filling in missing information on absentee ballot request forms if possible. Such a practice is consistent with the spirit and intent of the Election Code and furthers the ultimate goal of ensuring that every Cherokee Nation citizen wishing to exercise his or her right to vote is given that opportunity, particularly elderly or disabled persons who are not physically capable of traveling to their designated precinct on election day.

The issue for this Office to decide is whether the Cherokee Nation absentee voting laws require strict compliance with all its provisions, or whether substantial compliance is sufficient to give validity to the absentee ballot requests. In construing voting statutes, we must recognize the principal policy that no voter should be disenfranchised on a doubtful construction, and statutes tending to limit the exercise of a ballot should be liberally construed in a voter's favor. 26 Am. Jur. 2d Elections § 335. The Cherokee Nation Election Code provides for the allowance of absentee voting "upon timely written request by a registered voter of the Cherokee Nation in compliance with the requirements of the Act" for any reason. 26 CNCA § 71. The Election Code requires that any such request be timely submitted in writing, preferably on a form provided by the Election Commission but any written form will suffice, and at a minimum shall contain the voter's: 1) name; 2) date of birth; 3) address; 4) Cherokee Nation membership registration number; and 5) signature¹. 26 CNCA § 72. Although the statute clearly sets forth what must be disclosed by the person requesting the absentee ballot, there is no statutory directive regarding the treatment of absentee ballot requests which do not contain all of the

¹ It is important to note that the Cherokee Nation has long recognized the importance absentee voting in Cherokee Nation elections. LA-01-78 allowed a registered voter to submit a request for an absentee ballot which must contain: 1) name; 2) date of birth; 3) address; 4) voter registration number; 5) Dawes Commission roll number; and 6) signature. In recent elections, there has been a marked increase in the number of registered voters utilizing the absentee voting procedures.

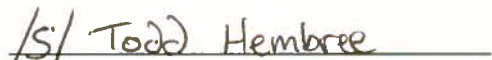
information required by 26 CNCN § 72. In contrast, there is a clear statutory directive regarding the treatment of absentee ballots which do not meet the requirements for the return of absentee ballots. 26 CNCA § 91 specifically provides that a ballot attached to an affidavit which does not meet the requirements of 26 CNCA § 77 shall be rejected without being opened. Liberally construing 26 CNCN § 72 in a voter's favor, this Office cannot infer the Council's intent to invalidate an absentee ballot request which is in substantial compliance with the information required by the statute.

Further examination of 26 CNCA § 72 leads this Office to conclude that its provisions are directory. We are unable to discern from the provisions of that section a clear legislative intent that the failure to follow the letter of its provisions should result in the denial of absentee ballot requests by registered Cherokee Nation voters who are otherwise qualified to vote absentee. It cannot be said that the lack of a Cherokee Nation membership registration number on an absentee ballot request affects the integrity of the request itself, when substantial other identifying information has been included on the request. The statutory requirement that the absentee ballot request "shall" contain the five items listed in Section 72 is simply not a definitive statement by the Council that requests which are missing the voter's Cherokee Nation membership registration number are illegal or void. In contrast, an absentee request which has not been signed at all, or which has been signed by someone other than the prospective absentee voter, does not constitute substantial compliance with the statutory requirements and renders the absentee ballot request void. 26 Am. Jur. 2d Elections § 335, citing Brown v. State ex rel. Stack, 227 Ind. 183, 84 N.E.2d 883 (1949); Wichelmann v. City of Glencoe, 200 Minn. 62, 273 N.W. 638 (1937).

As such, any application for an absentee ballot must substantially conform to the statutory requirements as to form and content set forth in 26 CNCA § 72. Any timely received absentee ballot request received by the Election Commission which does not contain the voter's Cherokee Nation membership registration number or contains an incorrect Cherokee Nation membership registration number shall be approved and processed when substantial other identifying information has been included on the request.

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

- 1. Absentee ballot requests which are in substantial compliance with the statutory requirements as to form and content set forth in 26 CNCA § 72 shall be approved and processed by the Election Commission.**



Todd Hembree
Attorney General of the Cherokee Nation



Robert Garcia
Assistant Attorney General