

IN THE JUDICIAL APPEALS TRIBUNAL
OF THE CHEROKEE NATION

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OCT 07 1998

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CHEROKEE NATION
JUDICIAL APPEALS TRIBUNAL

HAROLD DeMOSS, PAULA HOLDER
AND WILLIAM SMOKE, IN THEIR
OFFICIAL CAPACITIES AS COUN-
CIL PERSONS OF THE CHEROKEE
NATION,

Plaintiffs,

v.

GARLAND EAGLE AND JOE BYRD,

Defendants.

Case No. JAT-98-10-B

FOR THE PLAINTIFFS:

Chadwick Smith
P.O. Box 9192
Tulsa, OK 74157-0192

FOR THE DEFENDANTS:

Jennifer E. Williams
Cherokee Nation Department
of Law and Justice
P.O. Box 948
Tahlequah, OK 74464

BEFORE:

Dwight W. Birdwell, Chief Justice

OPINION BY:

Chief Justice Birdwell

ORDER AND DISMISSAL

This lawsuit is similar, but not identical to, *Phillips v. Eagle*, No. JAT-98-09-B. An Order of the Court was entered in *Phillips* on July 25, 1998. This Court was of the belief, at the

time, that the instruction in *Phillips* would resolve the relevant issues in this case.

By letter, dated July 28, 1998, to the attorneys in this lawsuit, the Court said, in part, *Please review the Order in Phillips. It may impact your respective positions in the referenced lawsuit, and eliminate the need for further action in the case. Thereafter, discuss the situation and advise the Court of your conclusions and of any agreement you may be able to reach. Until then, I am today entering an Order staying all further proceedings in Case No. JAT-98-10-B.*

On August 3, 1998, the Plaintiffs filed a Motion seeking dissolution of the stay and the granting of declaratory and injunctive relief concerning alleged acts by the Deputy Principal Chief occurring after the entry of the Order in *Phillips*, namely, the setting and posting of an agenda for the August 10, 1998, Council meeting. Defendants responded, August 4, 1998, that they were "attempting to comply in good faith" with the ruling in *Phillips* and they asked that the stay not be lifted.

Plaintiffs replied on August 5, 1998, that not only was Defendant Eagle attempting to set the agenda, but that he was also replacing Legislative Aid, Gina Blackfox, with a person of his selection, to take the minutes of the Council meeting, and that he had instructed a tribal employee to prepare and mail to the Councilors information packets including legislative items which appeared on the Deputy Chief's agenda for the August 10, 1998, Council meeting.

On August 6, 1998, the Defendants stated that they did not see the *Phillips* ruling as a prohibition against the Deputy Chief acting as a point of contact for agenda information, as to receiving, compiling and posting; and that it was done by him in accordance with Robert's Rules; and it could be approved after the fact, but before the Council meeting, in a same-day committee meeting [August 10, 1998]; and the matter regarding Gina Blackfox was moot, she would be able to attend the Council meeting on Monday, August 10, and in any event, the Deputy Principal Chief was just "housekeeping" and trying to make sure the minute keeping function would be handled.

On Friday, August 7, 1998, the lawyers for both parties agreed that there were no factual issues currently before the Court and that all that was before the Court were issues of Cherokee law as applied to the undisputed facts. It was further agreed by the lawyers for both sides that Defendant Garland Eagle was the party who had taken the current actions from which the Plaintiffs sought relief; and that no relief was required, nor was proper, at this time, as to Joe Byrd, Principal Chief of the Cherokee Nation.

In the meantime, the lawyers for the parties continued to negotiate with the deadline of the Monday night, August 10, 1998, Council Meeting facing them. The lawyers made commendable progress. The net effect of these negotiations appeared to be a stripping away of the items on the competing Council Agendas to the

point that all was left was the "Cherokee Code Agenda."¹ At that point, however, the wrangling and positioning that remained between the parties on an agreed upon stipulation became moot when the subject Council meeting itself was canceled. Nevertheless, the issues raised in this lawsuit were never fully resolved between the parties.

This entire lawsuit should have become moot following the Court's decision in *Phillips*. Whether the Deputy Chief did not fully understand, or chose not to fully understand, the teachings of *Phillips*, is not relevant. As a matter of law, the relevant and operative fact is the actions taken by the Deputy Principal Chief after the ruling in *Phillips* were contrary to the ruling in *Phillips*. A discussion of the Deputy Principal Chief's post-*Phillips* arguments, as applied to the facts in this case, follows.

Deputy Chief Eagle stated that the Court's Order in *Phillips* "seemed very specific about the prohibited actions of the Council President in regard to the Council agenda" and he is correct in his assertion. Among other things, the Court stated in *Phillips*:

¹ 19 CNCA § 36. *The order of business of each regular meeting of the Council of the Cherokee Nation shall be as follows:*

- A. Call to order;
- B. Invocation;
- C. Roll call;
- D. Approval of minutes of previous meeting;
- E. State of Nation address;
- F. Action of unfinished business;
- G. Committee reports;
- H. New business;
- I. Adjournment.

- 1) For the Deputy Principal Chief to . . . [have] control over the Tribal Council agenda . . . is constitutionally impermissible. *Id.* page 25.
- 2) The Deputy Principal Chief, nor anyone in the executive branch may:
 - i) Approve, disapprove, select or reject any matter whatsoever on any agenda . . . of any regular meeting of Council . . . or any special meeting of Council;
 - ii) Approve, disapprove, select or reject any rules regarding . . . the procedure to be utilized by the Council;
 - iii) Interfere with, manage, control, approve or disapprove of any of the internal operations, or any components thereof, of the Council;
 - iv) Act on behalf of, and/or as the alter ego of, the Council of the Cherokee Nation. *Id.* page 39.
- 3) No branch of government may delegate, assign, transfer or convey its constitutional rights, duties and/or obligations to any other branch of government. *Id.* page 41.

The Deputy Chief stated that the acts of being the contact point for agenda information, receiving the information, compiling it, and posting it, were not specifically mentioned in the list of prohibitions, and, therefore, his actions were valid. However, such a claim is not only contrary to the spirit of the Order in *Phillips*, it is contrary to the Order. In basic terms, the Court stated in *Phillips*:

The powers and duties of the Deputy Principal Chief, as President of the Council, are strictly limited to presiding as the chair of the Council, under the rules for credentials, decorum, and procedure to be established by the Council, to vote only in the event of a tie, and no more. *Id.* pages 29, 38.

The foregoing is, or should be, sufficient guidance for the Deputy Principal Chief in regards to his relationship with the Council of the Cherokee Nation.

Consistent with the foregoing, the holder of the office of Deputy Principal Chief of the Cherokee Nation is not the house-keeper, nor the chief operating officer, of the Council of the Cherokee Nation. The office of Deputy Principal Chief is not the "contact," the "assembler," the "funnel," the "clearinghouse," the "broker," the "agent," the "preparer," the "referee," nor the "compiler" of the Council's agenda, nor does the office have the responsibility or authority, to post the agenda for any meeting of the Council, be it a committee meeting, a regular meeting or a special meeting of the Council.

Deputy Chief Eagle stated that the Council adopted Robert's Rules of Order "pursuant to which it is required for the Chairman of the meeting body to announce the business to be discussed at the meeting over which he is to be preside." That statement is correct as to his ceremonial duties. However, the Deputy Chief then argues that since he "announces the business" that it is his additional duty to receive, compile and post the agenda of the Council. That statement is incorrect and is like saying the referee at a football game, because he is the referee, is obligated, or authorized, to receive, compile and/or post the game plans for the coaches.

The Council of the Cherokee Nation presently has a Legislative Aid and her name is Gina Blackfox. The Council-approved job description for a Legislative Aid is very detailed and it covers

many areas requiring skills which the Council finds Ms. Blackfox possesses. Among the many job duties stated in the lengthy, written job description for a Legislative Aid (to be performed under the guidance, direction and approval of the Council) are: *Prepare agenda and information packets for Regular Monthly Council Meetings and Special Council Meetings . . . Distribution of the information packets to Council Members . . .* Ms. Blackfox works under the supervision, direction and control of the Council in the performance of her duties; the Deputy Principal Chief is not her supervisor, and he is not responsible for her job performance, nor can he be under the Cherokee Constitution. However, this does not mean that Ms. Blackfox should have no contact with Deputy Principal Chief Eagle. Contact and discussion should exist for Deputy Principal Chief Eagle to perform his constitutionally-mandated responsibility of presiding as President of the Council of the Cherokee Nation.

As earlier stated, counsel for the Defendants represented that the matter of a replacement, selected by Deputy Principal Chief Eagle, for Ms. Blackfox for the August 10, 1998, Council meeting, became moot. As a matter of future guidance, everyone must recognize the fact that, if a Legislative Aid is not able, for whatever reason, to perform the responsibilities of that office, then that is a matter to be handled exclusively by the Council. This is not to say that Ms. Blackfox, or any other Legislative Aid, cannot request voluntary assistance from the office of the Deputy Principal Chief, or any other office, provided she is authorized to

do so by the Council and provided such help does not violate the separation of powers between the branches of government.

Counsel for the Defendants has expressed concern that legislation proposed by the Administration may not be considered by the full Council. The Principal Chief can request that the Administration's legislation be placed on the Council's agenda for consideration. Moreover, prudence dictates that high respect and courtesy be paid to such official request. Nevertheless, considerations of any request made by the Principal Chief must comply with the rules and procedures adopted by the Council for consideration of all proposed legislation. The procedure and rules for the handling of the Administration's requests that items be placed on the Council's agenda are within the Council's discretion.²

While the Principal Chief can, the Deputy Principal Chief cannot, neither in the role of Deputy Principal Chief, nor in the role as President of the Council, request that anything be placed on a Council agenda. To allow the Deputy Principal Chief to

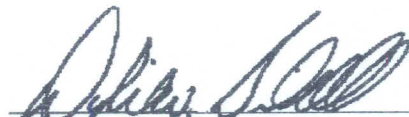
² Further clarification of the foregoing, and the similar language in *Phillips*, is important. It must be clearly recognized that "high respect and courtesy" are also due the Council from the other branches of government. For example, the Principal Chief has no right, and should not attempt, to bypass nor otherwise circumvent Council rules and procedures, such as, but not limited to, the Council committee process, in seeking placement of the Administration's legislation, or other matters, on the Council agenda. The Principal Chief must abide by the same rules and procedures for placement of items on the Council agenda, and in the same fashion, as anyone else. "High respect and courtesy" does not mean, and should not suggest nor imply, that the Principal Chief may place an item on the Council agenda simply because the Administration desires to do so, without following Council-established rules and procedures. The Council of the Cherokee Nation, alone, establishes its own rules for its credentials, decorum and procedure. The executive branch has no part of that process and cannot do indirectly that which it cannot do directly, no matter how well-meaning its stated intent or motives and/or no matter how urgent it may claim the situation to be. Cherokee Const. art. V, § 2.

request items be placed on the Council's agenda would violate the Constitutional responsibilities and powers of the Council and those of the Principal Chief. (The relationship between, and the powers and duties of, the Principal Chief and the Deputy Principal Chief were discussed in the Court's Order in *Phillips*).

Hopefully, the parties in this lawsuit have a better understanding of the role of the Deputy Principal Chief as it pertains to the Council of the Cherokee Nation. If not, the repeating, here, of principles stated in *Phillips* will help them both. Both sides are advised that violation of these principles will not be tolerated by the Court.

The Court Clerk is directed to mail a copy of this Order to all attorneys of record, and to Justice Keen and Justice Viles.

AS ALL ISSUES IN THIS CASE HAVE BEEN RESOLVED, THIS CASE IS HEREBY DISMISSED ON THIS 7th DAY OF OCTOBER, 1998.



DWIGHT W. BIRDWELL, CHIEF
JUSTICE OF THE CHEROKEE NATION

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