

EBCI
CHEROKEE SUPREME COURT
CHEROKEE, NC

SUPREME COURT OF THE EASTERN BAND OF CHEROKEE INDIANS
FILED 6 OCTOBER 2017 CSC 17-057 OCT -6 PM 12:45

ASHLEY SESSIONS,)	FILED
Appellant)	FROM THE ELECTION BOARD
)	EASTERN BAND OF CHEROKEE INDIANS
v.)	QUALLA BOUNDARY
)	CHEROKEE, NORTH CAROLINA
CHEROKEE BOARD OF ELECTIONS,)	
Appellee)	
)	
)	

OPINION

Appellant Ashley Sessions ("Ms. Sessions") appeals from the final "Combined Decision on the Protests of Ashley Sessions and Albert Rose" issued by the Board of Elections on September 28, 2017 ("Combined Decision"). At the request of the Ms. Sessions, the Court issued an expedited briefing schedule and a hearing was held on October 4, 2017. Albert Rose ("Mr. Rose") participated in this appeal at the invitation of the Court, as the Combined Decision was also related to his election protest.

PER CURIAM.

This case involves alleged voting irregularities in the election for two Tribal Council representatives from the Birdtown Township ("Birdtown"). The general election was held on September 7, 2017 to elect two representatives from the four candidates with the highest votes during the June primary election. In this election, each registered voter was allowed to vote for up to two candidates for Tribal Council on their ballot. Voters could exercise their right to vote by voting at the polls on Election Day, voting absentee under certain conditions, or casting their vote during the early voting period. This year was the first time that early voting was available to registered voters based upon the changes in election laws adopted by the Tribal Council in 2016.

The Board of Elections reported the unofficial election results on September 8, 2017 that showed that candidate Boyd Owle led the ticket with the most votes by a wide margin and that candidate Travis Smith received the fewest number of votes by a significant margin. The issues in this case revolve around the two other candidates as to who would serve as the second Tribal Council representative: Mr. Rose, who received 431 votes, and Ms. Sessions, who had 419 votes.

Both candidates filed successive protests concerning the election with the Board of Elections. On September 8, 2017, Ms. Sessions protested based upon election irregularities as well as allegations of improprieties that were later withdrawn. The next day, she added a request for a recount. As a result of her protest and request for recount, the Board of Elections conducted a hand recount on September 13, 2017. This recount tally put Ms. Sessions in the lead with 448 votes while Mr. Rose received 443 votes.

The next day, on September 14, 2017, Mr. Rose filed a protest alleging that election irregularities unfairly and improperly affected the actual outcome of the election. He asserted that the irregularities constituted violations of election laws and caused Ms. Sessions to gain an inordinate number of votes in the recount.

A hearing was held by the Board of Elections on September 21, 2017 to hear the protests of the Birdtown candidates. At the joint hearing, neither candidate called any witnesses to testify or presented any evidence to the Board. The Board of Elections met on September 25, 2017 and issued their Combined Decision on Friday, September 28, 2017 calling for a run-off election to be held due to election irregularities. The Combined Decision of the Board addressed the allegations of improprieties and irregularities alleged by the candidates in their protests, but also relied upon the Board's own findings based upon its investigation.

Ms. Sessions filed this appeal to the Cherokee Supreme Court on September 29, 2017. An expedited briefing and hearing schedule was immediately set by the Court so that the matter could be argued on October 4, 2017 and decided by the Court before the scheduled date for the run-off election: October 10, 2017.

Jurisdiction

The Cherokee Supreme Court has original and exclusive jurisdiction to review a final determination made by the Board of Elections in any election dispute. C.C. § 7-2(e).

Standard of Review

The standard of review for an appeal of a final decision of the Board of Elections is for error of law. C.C. §161-23. Accordingly, in reviewing a final decision of the Board, this Court reviews the matter *de novo*, considering only alleged errors of law. *In Re Primary Election for the Office of the Principal Chief*, 2013 WL 11276388 (Eastern Cherokee S. Ct.).

Discussion

Two questions are presented in this case: (1) whether the Board of Elections had the authority to order a run-off election even though no candidate established election irregularities during a hearing before the board, and (2) whether facts found in the Board's Combined Decision support the Combined Decision's order for a run-off election as a matter of law.

The Board of Elections, created under Section 6 of the Charter and Governing Document of the Eastern Band of Cherokee Indians, is governed by Chapter 161 of the Cherokee Code. Under Chapter 161, the Board is empowered with full authority to conduct and supervise elections, including the consideration, investigation, hearing and resolving of objections and protests to alleged irregularities and violations of the election laws. *Crowe v. EBCI Board of Elections*, 3 Cher Rep. 78, 2003 WL 25902442 (Eastern Cherokee S. Ct.). Under the framework created by Tribal Council to preserve the integrity of the electoral process, the duty and authority

for administering election laws is vested in the Board of Elections, subject only to reversal by this Court for errors of law. C.C. §161-1 *et seq.*

Election laws are for the purpose of assuring that elections result in a correct expression of the intent of the voters. An election protest by a candidate is one vehicle to help ascertain whether a candidate was actually the lawful choice of the voters. In furtherance of its responsibility to supervise elections, the Board of Elections has the duty once an appeal protest has been filed, to conduct its own investigation. In each election, the Board of Elections makes the final decision concerning whether or not an accurate vote count can be had to determine which candidates were elected by the voters, or whether a new election or run-off election is needed. In performing its duties, the Board of Elections has authority to interpret the election laws and apply that interpretation in deciding election protests. *In Re Primary Election for the Office of the Principal Chief, supra.*

We turn now to the specific provisions of the Cherokee Code at issue in this case. Ms. Sessions asserts that the Board's Combined Decision should be overturned and the recount results should be certified because, among other reasons, Mr. Rose did not prove during a hearing before the Board of Elections that an election irregularity had unfairly and improperly or illegally affected the actual outcome of the election. C.C. §161-16(d). She argues that since this did not occur, the Board had no authority to order a run-off election under subsection 16(g)(3) of that statute, as the two subsections of the statute must be read *in tandem*.

The canons of statutory construction do not support this reading the statute.

"A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter... Courts construe all parts of a statute together, without according undue importance to a single or isolated portion. The meaning of a statute is determined, not from special words in a single sentence or section, but from the statute as a whole and viewing the legislation in light of its general purpose." 2A *Sutherland Statutory Construction* § 46:5 (7th ed. 2016).

Furthermore, such a reading of this statute as proposed by Ms. Sessions would handcuff the Board of Elections in performing its duties and could require it to disregard information it obtains from its own investigations of irregularities. It also fails to consider that separate statutory provisions give the Board of Elections the duty to investigate and act upon the "nonperformance of duty and violation of tribal election rules and regulations by election officials," and the power to order a run-off election if it determines that a recount of ballots would not determine the accurate vote count. C.C. §§161-19, 161-7(e).

Although candidates are entitled to file election protests to assert grievances with the way that the tribal elections are conducted, an election protest is unlike an ordinary civil action. An election protest is not merely for the adjudication of competing claims between rival candidates at a hearing before the Board of Elections. The goal of an election protest is to assist the Board in deciding who was actually the lawful choice of the voters. When reading Chapter 161 as a whole, the Court concludes that the Board of Elections' duty to determine whether a runoff is needed

does not depend exclusively upon the proof produced at a protest hearing. In this instance, the protest prompted the investigation, but the Board was the only entity that had access to the facts surrounding the irregularities that were found and thus necessarily must have the authority to order a run-off election.

Next we turn to the question of whether the Board's decision was erroneous as a matter of law. The Combined Decision of the Board of Elections here was a detailed, five-page document comprised of forty-two numbered paragraphs. It includes factual findings related not only to the numerous allegations made by the candidates in their protests, but also facts found as a result of the Board's own investigation relating to the conduct of this election.

The Board's investigation found numerous specific facts about irregularities related to this election. Among other things, the Board noted that this was the first general election where early voting was allowed, then detailed how the implementation of this new process led to mistakes with balloting and tabulation of those ballots. The Board admitted that it underestimated the number of voters that would participate in early voting in Birdtown and, as a result, failed to buy enough prints of early voting ballots. As early voting proceeded, the problem created by the shortage of early vote ballots was compounded by the conduct of the poll workers when they ran out of early ballots and substituted pre-printed absentee ballots after using a marker or pen to cross out the designation of the ballot as "absentee" and handwrote the word "early" on the ballot. The Board found that the box in which early voting ballots were stored was not kept locked. Also, the Board found that the tabulators in the voting machines failed to accurately count, or the tapes printed by the machines failed to accurately show, how many early voting ballots were cast in the Birdtown Tribal Council race. The tabulator counted 148 early votes whereas it should have counted 155. In a very close Tribal Council election where the both initial count and recount tallies between Ms. Sessions and Mr. Rose varied by very few votes, it is significant that some fifty-five voters used these ballots that the Board found should not have been used and could not be relied upon.

Further, the Board's independent investigation led to the recount of every township's Tribal Council elections. The Board found in the Birdtown Tribal Council vote that "the discrepancy was extreme." In every community except for Birdtown, the greatest discrepancy between the original, unofficial results and the hand recount results was seven votes. In contrast, the recount results in Birdtown added to the candidates totals as follows: Ms. Sessions gained 28 votes, Mr. Rose gained 12 votes, Boyd Owle gained 31 votes, and Travis Smith gained 7 votes. The Board found that all townships utilized the same type of voting machine. The Board expressly found that it "cannot explain these large discrepancies [in Birdtown]."

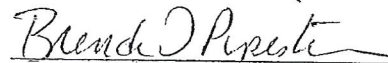
In its investigation, the Board also learned that a person who was not registered to vote – a relative of Ms. Sessions – was in fact allowed to vote in the Birdtown Tribal Council race. Standing alone, this might not be a significant factor in evaluating the election results, but in a case where the vote count was so close and the problems about the conduct of the election were so many, we do not discount this finding. All the above findings call into question the integrity and accuracy of the vote count from the Birdtown Tribal Council election.

Ms. Sessions' reliance on *Kephardt v. EBCI Board of Elections*, 2004 WL 5807675 (Eastern Cherokee Sup.Ct.) is misplaced. A review of *Kephardt* shows that the facts and statutory language governing the Board of Elections in 2004 were very different from the facts in this case and the current statutory framework of Chapter 161. In *Kephardt*, the Board of Elections failed to find facts about the reasons for ordering a run-off election. In that case, the allegation was that some 100 absentee voters were registered in the wrong township. This Court reversed the Board for ordering a new election without investigating and determining whether those allegations were true, i.e. whether those particular voters were, in fact, improperly registered. In this case, the Board of Elections did make an investigation about the alleged election irregularities and set forth in their decision the facts that led to their decision to order a run-off election. Once the Board determines that a recount would not resolve the accuracy of the vote count, the Board is required by law to conduct a run-off election. C.C. §161-7(e).

The Court does not find that the Board's decision to order a run-off election was erroneous as a matter of law.

The Board of Elections Combined Decision is AFFIRMED.

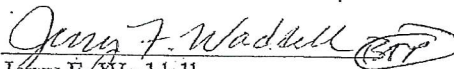
This is the 14th day of October, 2017.



Brenda Toineeta Pipestem
Presiding Chief Justice



Sharon Tracey Barrett
Associate Justice by designation



Jerry F. Waddell
Associate Justice by designation