The road to the courthouse

Lawsuit over council pay raises makes its way to Annual Council

BY HOLLY KAYS
STAFF WRITER

A year's worth of time and a shakeup in leadership haven't been enough to take the pay raises Cherokee Tribal Council voted itself last year out of the public eye. With a lawsuit already filed in the tribe's court system, the impending legal battle took center stage during Annual Council last month.

Held every year in October, Annual Council kicks off Cherokee's fiscal year by allowing tribal members to submit legislation for council's consideration throughout the month. Among the resolutions making their way to the council floor in October were three related to the impending legal proceedings.

The legislation was controversial even outside of its content, as the 16 named defendants include five sitting council members. Those five questioned whether council should even discuss the resolutions in open session, as the conversation could take a turn toward something better saved for court.

"We've been sued. Should we be actually hearing the legislation?" asked Council Chairman Bill Taylor, of Wolfetown, during session Oct. 29, expressing a recurring theme. "Because this resolution involves and talks about the lawsuit that is pending in the tribal court system, it is my advice to this body to not make any decisions or really even discuss these issues," said Interim Attorney General Hannah Smith, also echoing a point she'd reiterated many times.

"I think it is worthy of a discussion in front of the members of this tribe that have to live with the decision made that day (Oct. 14, 2014), and it has bothered them," counteracted Council member Teresa McCoy, of Big Cove. She was referencing a different lawsuit-related resolution during a different October Council session, but the point was one she repeated throughout the month.

It was McCoy's resolution that brought the pay raise issue to the Annual Council. During the Oct. 14 session, she submitted legislation that would have required all 16 defendants to retain their own attorneys rather than expecting tribal government to pay their legal expenses.

"All the people on this boundary have to hire an attorney, and sometimes when tribal government misrepresents — intentionally or not — the integrity of its community, it should be open for suit," McCoy said. "Because if not, it's one-sided against the public that the government can do what it wants to whom it wants."

Smith responded to McCoy's resolution by advising council to take the discussion to closed session to avoid compromising the defense. Council member Alan "B" Enslow of Yellowhill, who is a defendant in the lawsuit, agreed, at one point moving that council go to closed session.

But the motion was not successful, and the resolution launched a long back-and-forth in which some council members expressed their continued discomfort with the pay raises and everything that surrounded them, while others voiced concern that passing McCoy's resolution could imperil the tribal government's legislative immunity down the road.

Council member Adam Wachacha of Snowbird, also a defendant in the lawsuit, held that position, telling council that he'd already hired his own lawyer but would still advise council to be cautious of McCoy's resolution.

"We think (the attorney) suggested to me was if that if this resolution passes, then we're basically giving up a piece of our legislative immunity," Wachacha said.

Enslow agreed.

"I think if this council passed this resolution, all the other boards and committees, they're going to be liable, and I don't think that's what we want to happen," Enslow said, moving to kill the resolution.

A COUNTER-RESOLUTION

The legislation wound up passing narrowly — Enslow, Wachacha, Yellowhill Council Member Anita Lossiah and Painttown Council Members Marie Junalusa and Tommye Saunooke voted against it, with Richard French, of Big Cove, abstaining and Taylor absent — but its success was short-lived. A week later, on Oct. 22, Lossiah and Councilmember Travis Smith, of Birdtown, brought in a new resolution for consideration to replace McCoy's.

"The spirit of the other one (McCoy's resolution) I fully supported, but I was concerned for the liability of this tribe," Lossiah said. "I feel this clarifies it and it brings to the attention that we always need to protect this immunity."

Lossiah and Smith's resolution asserted that "additional research was needed concerning the public policy behind legislative and government immunity and whether it would be affected by the passage of (McCoy's resolution)" and laid out an alternative way to navigate the question of who should pay the defendants' legal fees.

Basically, the resolution says that the tribal council should pay up front if one of its representatives is sued — whether the suit is filed against that person as an official or an individual — in the course of his or her duties. However, if the court finds that person to have been acting outside the scope of his or her official authority, the defendant will have to repay their legal expenses.

"We have to be able to freely pass legislation, as we have been appointed and put in these positions by our communities," Lossiah said, explaining the need for this approach.

"Anything that would erode that protection for this body would be a hindrance on our government function."

McCoy, however, disagreed, contending that while she appreciates "the intent of this legislation," she strongly believes "when tribal government breaks the law, tribal government should be held accountable like everybody else."

Besides, she said, it's not like council has never waived its sovereign immunity for specific situations before.

"Every one of us has sat here a time or two, with the exception of the new ones (council members) and raised our hands to waive immunity, and who do we waive it for?" she said. "Non-enrolled people. Rich people. Money people. Business people. But never do we waive it for our own people when we violate our own law."

McCoy moved to kill the legislation, with a second from Bo Crowe, of Wolfetown. French was the only other council member joining McCoy and Crowe against the resolution, with the other nine council members voting in favor of it.

DEBATING IMMUNITY

The Oct. 22 vote put to rest the question of who will pay for the defendants' legal representation, but it wasn't the last time the lawsuit found its way onto the Annual Council Agenda. On Oct. 29, two of the women at the forefront of the Eastern Band of Cherokee Indians for Justice and Accountability — the organization bringing the suit — came before council requesting, essentially, that the body pass legislation allowing the suit to proceed.

"If we don't get a waiver, you're impeding our right under the Indian Bill of Rights, and you're denying us our right to address the controversy in our own courts," said Peggy Hill, a member of the group.

Hill was referencing the Indian Civil Rights Act, passed in 1968, part of which duplicates the language in the U.S. Bill of Rights. Specifically, Hill pointed out the act prohibits tribes from "deny(ing) any person within its jurisdiction the equal protection of its laws or deprive(ing) any person..."
Chairwoman Terri Henry’s response to Hill last year when asked what recourse tribal members angry about the pay raises might have.

“Madam chair told you at that time, ‘Take us to court.’ That’s all you needed,” Travis Smith said.

Walker disagreed, asking that council still consider the legislation.

“That would probably be your opinion,” she told Travis Smith, “but I would say that everybody here in the council probably doesn’t agree with that.”

Council shot down the resolution, with McCoy, Jones and Crowe — the only three who sat on council 2013-2015 but were not named in the suit — providing the sole nay votes. With the exception of Big Cove Councilmember Richard French, who was absent that day, the rest of council voted against it.

“That black cloud has hung over our community now for more than a year,” Walker said of the pay raises. “People are still upset about it. We want what happened here to be looked at in a court of law.”

The defendants have not yet filed their response to the suit.

“We have to be able to freely pass legislation, as we have been appointed and put in these positions by our communities. Anything that would erode that protection for this body would be a hindrance on our government function.”

— Anita Lossiah
Motion to dismiss filed in lawsuit contesting Cherokee council raises

BY HOLLY KAYS
STAFF WRITER

defendants in a lawsuit stemming from raises and backpay the Cherokee Tribal Council voted itself in October 2014 are hoping to convince a judge to dismiss the case against them.

The motion to dismiss lays out several reasons why the lawsuit should supposedly be thrown out, one of them a claim that many had expected the defendants to make since the beginning — that they’re protected from lawsuits by sovereign immunity. Though the current and former elected leaders of the Eastern Band of Cherokee Indians who are named in the lawsuit are being sued as individuals — not, save one former staffer named in an official capacity, as members of the government — the actions that prompted the lawsuit occurred while they were serving their official duties.

The plaintiffs’ attorney Meghann Burke doesn’t believe that fact should hold off the lawsuit. This summer — before the suit was filed — she said, “We contend that if you act illegally, you cannot possibly be acting under the power of the law.”

The alleged illegal act occurred on Oct. 4, 2014, when Tribal Council voted to pass a budget that included raises of more than $10,000 for each of its 12 members and backpay for the years when they supposedly should have already been earning the higher rate. Backpay checks went out not only to the 12 sitting councilmembers but also to four former councilmembers and to Michell Hicks and Larry Blythe, who at the time were serving as chief and vice chief, respectively.

All but one of the councilmembers in the room at the time voted for the raises, with Councilmember Bo Crowe, of Wolfetown, the sole nay vote. Councilmembers Brandon Jones, of Snowbird, and Teresa McCoy, of Big Cove, were absent at the time and came out strongly against the action.

Many tribal members reacted angrily, pointing out that the tribe’s Charter and Governing Document explicitly states that any raises given to councilmembers must wait until after the next election to go into effect — these had been paid out immediately. Hicks, meanwhile, said that they were “pay adjustments,” not raises, given to comply with a 2004 law that said pay raises given councilmembers should be comparable to those given tribal employees. Council pay hadn’t increased since 2007, he said, so the extra money was just accounting for that lag.

All councilmembers receive the same salary, regardless of the number of years served, though the chair and vice chair positions do come with a slightly higher salary.

Hicks’ explanation didn’t sit well with some tribal members, who formed a group called the EBCI for Justice and Accountability, secured Burke as a lawyer and filed a lawsuit in Tribal Court.

Carlton Metcalf of the Asheville firm Van Winkle, Buck, Wall, Starne and Davis, P.A., is representing the defendants.

Aside from the sovereignty issue, the motion to dismiss claims that:

• The plaintiffs don’t have standing. To bring a lawsuit, the person or organization must have standing, meaning that they’ve been specifically injured by the action they’re protesting. Metcalf contends the EBCI for Justice and Accountability doesn’t meet that criterion.

• The plaintiffs did not “exhaust administrative remedies.” According to Metcalf, the plaintiffs didn’t try everything they could have to fix the problem before going to court, including, according to the motion, “pursuing potentially available relief directly from Tribal Council.”

Members of the EBCI for Justice and Accountability did approach Tribal Council during the aftermath of the decision. At one point, group leader Peggy Hill came forward during a council session to ask, “Where do we go now? What do we do now?”

“If you choose to bring a lawsuit against the Tribal Council, you have the right to do that,” then-Chairwoman Terri Henry had responded.

Before filing the lawsuit, the plaintiffs had sent demand letters to the councilmembers who voted for the raise, letting them know a suit would be filed if they didn’t reverse the decision, but no reversal came.

• No way to prosecute four of the defendants. Four of the people named in the lawsuit — Diamond Brown, Michael Parker, James Owle and James Taylor — received backpay checks but were not sitting on council at the time the raises and backpay were approved. They had no opportunity to vote for or against the raises. Metcalf says that there’s no basis for suit against them.

• Civil conspiracy isn’t addressed in Cherokee law. The lawsuit includes a claim of civil conspiracy against Hicks and Blythe, asserting that the two had agreed to introduce and sign into law a resolution containing the raises and backpay, which the suit says “plainly violates” Cherokee law. However, Metcalf’s motion to dismiss says that civil conspiracy isn’t a valid claim recognized under Cherokee law.

• Some parties were omitted from the lawsuit. The motion says that the lawsuit fails to “join one or more necessary parties,” meaning that some people who should have been included were not. It’s unclear who these “necessary parties” are or why they should have been included.

The defendants have not yet asked that a hearing be scheduled on the motion. However, if and when they do a judge will have to preside and determine whether the case should continue.

If the case survives the motion to dismiss, it will go to trial.

Both Burke and Metcalf declined to comment, as the court case is pending.

SMN photo
Arguments hinge on standing, tribal sovereignty

BY HOLLY KAYS
STAFF WRITER

About 20 tribal members filled the audience benches in Cherokee Tribal Court last week, watching the first court hearing in a lawsuit decrying pay raises Cherokee Tribal Council gave itself in 2014. The suit’s defendants are asking Judge Sharon Barrett to dismiss the claims.

“The concepts of accountability, the concepts of transparency are perfectly fine. I want to be very clear for everyone that the position of the defendants is not that those concepts should be challenged,” said Carlton Metcalf, the defense attorney. “The issue that is being dealt with here is simple: whether the claims that have been brought have a legal basis.”

None of the 16 defendants were present June 8 as the hearing began, though Amy Metcalf began by telling Barrett why the EBCIJA felt so strongly that the raises were illegal that they enlisted Burke’s services and filed suit against the councilmembers who had voted for the raise, as well as tribal employees received that year, and they took effect immediately — nearly a year before the 2015 elections. But Hicks argued that the action was legal. The increase was a “pay adjustment,” for the years when council hadn’t received raises in keeping with the 2004 law, he said, not a “pay raise.”

The EBCIJA isn’t an entity capable of bringing a suit. The group isn’t incorporated or registered in any way, he said. There’s no individual identified as being its leader or having suffered personal harm as a result of council’s actions.

“We do not know what the party’s organization looks like. We don’t know who the party officers are. We don’t know if it has officers,” Metcalf said. “We don’t know anything about the organization.”

The EBCIJA is asking for the defendants to return all the money from raises and back pay to tribal coffers, also seeking reimbursement for court costs and attorney’s fees.

But right now, the group is waiting to find out whether the case will even be heard. The defense argued six different reasons why the court should dismiss the case, but the strongest arguments rested on issues of standing and tribal sovereignty.

Metcalf began by telling Barrett why the state of Alabama violated its Fourteenth Amendment due process rights by requiring it to disclose its membership lists. The court ruled that disclosing the list would suppress membership. This is a similar situation, Burke said, because in this case also EBCIJA members have reason to fear retaliation, loss of employment and humiliation if their names were public.

She also contended that, because all members of the tribe receive minor’s fund payouts when they come of age and per capita checks twice per year, they have an explicit, vested interest in the finances of the tribe.

“All members of the tribe are affected when Tribal Council violates tribal law for individual personal gain,” Burke said.

Cherokee people have a long history of government by consensus and non-hierarchical structure, she continued. And that fact creates a problem with Metcalf’s argument that the EBCIJA should produce lists of party officers.

“They (the EBCIJA) have chosen not to box themselves into some Western concept of how an organization should be structured,” Burke said. “They have rejected that.”

Barrett appeared to have some difficulty with Burke’s arguments, however.

“I think that in order to have standing we may need to have a little more clarification about just what it (the EBCIJA) is,” she said.

“What is the plaintiff?”

“I’m not disbelieving you,” Barrett said later during the exchange, “but at the same time there’s no verification by anybody.”

Questions of sovereign immunity

Metcalf also asked that Barrett dismiss the case on the basis of sovereign immunity.

“As I understand, the plaintiffs are not arguing that sovereign immunity has been waived but rather that it is not applicable here,” Metcalf said. “We contend that is erroneous for a number of reasons.”

As nearly every chapter in Cherokee’s code of ordinance states, the EBCI is a sovereign nation and has immunity as such. Waiving that immunity requires an act of either Tribal Council or the U.S. Congress.

Burke had recognized that sovereign immunity would be an obstacle from the case’s beginning, therefore opting to sue each of the defendants — save the tribe’s finance director — in their individual capacities.

Metcalf argued that’s a nonstarter. The allegations surround budgetary legislation, and that’s “quintessential legal activity which would be covered by legislative immunity even if the defendants are sued in their individual capacity,” he said.

Burke, meanwhile, countered that council did not enact the pay raises as part of their official capacity. Rather, they were a “flagrant and blatant” violation of tribal law.

“Here the tribal officials that we sued did not have the power to do what they did,” Burke said. “The tribe restricted their power.”

Barrett questioned Burke’s position.

“Sovereign immunity is alive and well in the tribal courts,” Barrett said. “Why is this different? You’re saying the thrust of it is, ‘This was so illegal, Judge, that you should just throw sovereign immunity out the window.’”

Legislative sovereignty applies only when officials are acting within their official capacity, Burke responded, and in this case there was a very specific law in place that outright denied council the right to do what it did. But they didn’t follow the bounds of that law.

“Instead what these individual defendants did is they raided the tribal coffers to put into their own pockets,” she said.

But what about political remedies, Barrett asked. Why is the court’s job to redress this alleged wrong? Shouldn’t that happen through elections or impeachment?
Burke pointed out that impeachment requires a two-thirds vote of Tribal Council, and it is unlikely they would vote to impeach themselves. Indeed, several of the councilmembers who voted for the raises lost their bids for re-election last fall, but that doesn’t mean that the raises go away. Councilmembers — regardless of how long they have served — are still earning that higher rate and last budget season even considered giving themselves another raise, just under 5 percent. That proposal was abandoned, however.

“This law is marching onward in perpetuity,” Burke said. “What will that do to the tribal budget over time? What will that do to people who are living in abject poverty?”

**Other Arguments**

Metcalf acknowledged that the first two arguments were his strongest case for throwing out the lawsuit, but he cited several other grounds for dismissal as well. First, he said, some Tribal Council members from the time period in question were missing from the suit, so the claims should be invalid if they only selectively name parties. Further, he said, some of the actions fall outside the statute of limitations, which reaches back to Oct. 1, 2014. Also, he said, it’s not clear that Tribal Court even recognizes the civil conspiracy claim the suit brings against Hicks and Blythe.

Burke asserted that the suit does indeed enjoin all people who public records show received pay raises, save those who were opposed to the legislation, and that all actions named in the suit stem from Oct. 1, 2014, or later.

“If events occurred prior, we would like to know about them,” she said.

**Next Steps**

Barrett gave both parties two days after the June 8 hearing to submit any further documentation they’d like her to consider as she forms her decision.

For his part, Metcalf feels the case for dismissal is ironclad.

“It is our position that standing alone is sufficient,” he said. “That’s where the court can stop. But if you want to proceed, certainly the case can be dismissed with any of the immunity arguments we raised.”

Burke, meanwhile, reiterates the solid footing of the claims and her belief that council’s actions should be considered by the court.

“What Tribal Council did violated tribal law,” she said. “My client respects tribal law and asks that it be respected.”

Standing outside the courthouse in a circle of EBCIJA members who had come to watch the hearing, Burke thanked them for their presence in the courtroom. The standing issue could be a difficult one for the case, she said, but Burke assured those gathered that Barrett would give the case a fair shot.

“Judge Barrett is a very fair, very sharp judge,” she said. “No matter the result, whether we like it or not, it’s going to be a fair opinion.”
Court rules plaintiffs lack standing

BY HOLLY KAYS
STAFF WRITER

A lawsuit seeking to declare illegal a controversial Tribal Council decision to issue its members pay raises has been dismissed in Tribal Court, according to a Sept. 1 decision from Temporary Associate Judge Sharon Barrett.

The decision, which stemmed from a June court hearing, didn’t consider whether Council’s actions in October 2014 had broken the law. Rather, it evaluated whether those bringing the case had a right to ask the court to rule on the issue.

“Plaintiff’s sincerity and earnest concern about the propriety of Defendants’ alleged actions is not the benchmark for standing,” wrote Barrett, who had been sworn in shortly before the hearing following a decades-long legal career, first as an attorney and then as district court judge in Buncombe County and a special superior court judge for North Carolina.

“Even where it appears that a taxpayer, citizen or group of such persons has a genuine concern regarding the use of funds and that this interest may be prompted by their status as taxpayers or citizens,” she continued, “it is not enough to create standing unless those persons are in danger of suffering any particular concrete injury as a result of the operation of the challenged law.”

The complaint

The plaintiff in this case was the Eastern Band of Cherokee Indians for Justice and Accountability, a group of tribal members aiming to ensure fairness and honesty in tribal government. The defendants — all 16 of them — were a collection of current and former elected officials of the tribe and one former finance officer, an appointed position. They had allegedly been involved or benefited from an October 2014 vote to boost pay for Tribal Council members and cut paycheck checks for the years when those members supposedly should have been earning the higher salary.

According to documents from a public records request procured by the EBCIJA, backpay checks for councilmembers ranged from $10,637 to $33,391, with former Principal Chief Michelle Hicks receiving $42,500 in backpay and former Vice Chief Larry Blythe $5,100. The pay raise had boosted councilmembers’ annual salaries by more than $10,000 to $80,600, with the chair and vice chair pulling in $86,400 and $83,500, respectively.

EBCIJA members were upset about the sum of the expenditures but even more upset about the way council went about approving them. The pay raises and backpay were included as part of the yearly budget bill and not debated in open council. The vote was taken without discussion at the end of a budget hearing at which two councilmembers, who afterward vocally opposed the pay raises, were not present. And the higher salaries and backpay were paid out immediately, rather than being embargoed until the next election had passed and those new members were seated.

Opponents of the pay raises had argued that last part is what made the pay raises illegal. The tribe’s Charter and Governing Document states that “no pay raise (for Tribal Council) is to take effect until the next Council is seated.” The conventional understanding of that had been that any pay raise council approved for itself had to wait until after winners of the next election were seated to take effect. But Hicks had argued that the pay increases were not raises but rather “adjustments” to comply with a 2004 resolution stating pay for councilmembers should increase at the same rate as that of tribal members. Council hadn’t gotten a raise since 2007, at which time they had also voted themselves a $10,000 increase.

Lack of standing

Before getting a judge to rule on the claims themselves, the EBCIJA had to establish that it had a right to bring those claims, the key issues being standing and tribal sovereignty.

Megann Burke, representing the EBCIJA, had acknowledged after the June hearing that the standing issue “is a very difficult one for us” but held to the opinion that the EBCIJA had a case. She argued in court that her clients were indeed directly injured when council put more than $1 million in backpay and associated benefits into their own pockets. Otherwise, she said, those funds would be poured into tribal programs and services to benefit tribal members — her clients. Cherokee tradition sees decisions more heavily through the lens of group impact and consensus than does American tradition, Burke continued, and the court should take that into account when considering how to determine standing.

“Even where it appears that a taxpayer, citizen or group of such persons has a genuine concern regarding the use of funds … it is not enough to create standing unless those persons are in danger of suffering any particular concrete injury as a result of the operation of the challenged law.”

— from Judge Sharon Barrett’s ruling

Reactions to the ruling

Burke said that though she respects the decision, she’s disappointed with the ruling.

“The Eastern Band of Cherokee Indians for Justice and Accountability proudly stands on the values, customs and traditions of the Cherokee people, as well as clearly established law recognizing associational standing, in asserting a legal injury as a result of the wrongs committed by these defendants,” Burke said in a written statement following the decision. “Not once did the arguments raised in court deny that these elected officials violated Tribal law.”

The suit is not necessarily dead. The plaintiffs have the right to appeal Barrett’s decision to the Cherokee Supreme Court but have not yet decided whether they will pursue that course of action.

Defense Attorney Carleton Metcalf, however, is confident that the ruling would hold up regardless.

“We are pleased that the court agreed the case should be dismissed,” he said in a written statement, “and believe the ruling to be sound in light of the law and the allegations that were made in this matter.”

Some tribal members had looked to a July indictment of nine former members of the Winnebago Tribal Council as encouraging news for their cause. The indictment includes charges of conspiracy, theft and misapplication of funds belonging to an Indian gaming establishment, according to a press release from the U.S. Department of Justice. In that case, defendants had received salary increases of about 35 percent in February 2013 that were retroactive to October 2012, as well as five separate bonuses in 2013 totaling $6,000 and six separate bonuses in 2014 totaling $11,000, the release said.

But even if the buck does indeed stop here, said EBCIJA member Becky Walker, the group has a lot to be proud of.

“Though the case has been dismissed, I feel really confident about the work that was done here in the community, and I feel like the people have sent a strong message to tribal leadership, basically saying that we’re not afraid to stand up when we feel like the people have been treated wrongfully,” Walker said.