

IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

SUPREME COURT
FILED

IN RE: ELECTION)
RECOUNT PETITION OF)
LUCIAN TIGER.)

Case No.: SC 19-01

OCT 02 2019

mm

COURT CLERK
MUSCOGEE (CREEK) NATION

ORDER AND OPINION

**MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV
YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM
MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.¹**

Before: ADAMS, *C.J.*; THOMPSON, *V.C.J.*; LERBLANCE, HARJO-WARE, and
MCNAC, *JJ.*

DEER AND SUPERNAW, *JJ.*, not participating in the decision.

ADAMS, *C.J.*, delivered the opinion of the Court, in which, THOMPSON, *V.C.J.*,
LERBLANCE and MCNAC, *J.*, joined.

HARJO-WARE, *J.*, abstaining in the decision.

Recount not authorized.

¹ "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoche law."

ADAMS, C.J., delivered the opinion of the Court.

Pursuant to M(C)NCA Title 19 § 8-203, “[i]t shall be the duty of a quorum of the Supreme Court Justices of the Muscogee (Creek) Nation to attend and, in conjunction with the Election Board, conduct a recount. It shall be the exclusive and sole duty of said Justices to hear evidence as to whether the ballots have been preserved in the manner prescribed by this title, whether the ballots are the identical ballots cast by the voters, and whether the ballots have been exposed to the reach of unauthorized persons thus affording a reasonable opportunity for an unauthorized person to tamper with or change the ballots.”

On Friday, September 27, 2019, a *Petition for Recount* was submitted to the Clerk of the Muscogee (Creek) Nation Supreme Court on behalf of Lucian Tiger, a candidate for Principal Chief of the Muscogee (Creek) Nation in the September 21, 2019, Primary Elections (Hereinafter, the “Petitioner”). The Petitioner requested “a recount of the absentee ballots cast for the election of Principal Chief[.]” Pursuant to M(C)NCA Title 19 § 8-202, “it shall be the duty of the Manager of the Election Board to order said recount to begin not less than three (3) nor more than then (10) calendar days from the date of filing of [a properly filed and paid *Petition*].”

On Wednesday, October 2, 2019, five (5) calendar days after the filing of the *Petition for Recount*, a quorum of the Supreme Court Justices of the Muscogee (Creek) Nation, including Chief Justice Andrew Adams III, Vice-Chief Justice George Thompson, Jr., Justice Richard Lerblance, Justice Leah Harjo-Ware and Justice Amos McNac (Hereinafter, “the Court”), appeared at the time and location agreed upon in consultation with the Manager of the Election Board, and in accordance with its duties under Title 19, initiated recount procedures.

The Court heard testimony from members of the Election Board detailing how the absentee ballot transfer cases were processed and secured. Additionally, the Court heard from Lighthorse

Police Officers concerning how the absentee ballot transfer cases were moved from the counting location on election night (located in the Housing Building) to the Lighthorse Police Office for storage.

The absentee ballot transfer cases, in addition to all other voting district transfer cases, were stored in a holding cell located in the Lighthorse Police Office. The holding cell was located in a secure office space with access only to authorized personnel. The office space was equipped with a 24-hour video surveillance system with unobstructed views to the holding cell containing the transfer cases. The holding cell has been used exclusively for storage of the transfer cases since the September 21, 2019, Primary Election. The office room was also behind an electronically locked door with access only to approved individuals.

All absentee ballots, privacy envelopes, and mailing envelopes were enclosed in separate plastic transfer cases secured by red plastic straps. The red plastic straps were attached to either end of the ballot transfer case through a round eyelet in both the lid and the container and tightened down to prevent the lid from opening. The red plastic straps were each marked with the word "seal[.]" followed by a seven digit unique number. In order to remove the red straps an individual must break the strap, rendering the strap incapable of further securing the transfer cases. Stated differently, in order to open the ballot transfer case the red strap must be broken.

The box containing absentee privacy envelopes contained red straps with numbers 3649086 and 3649085 on either end of the plastic transfer case.

The box containing mailed absentee envelopes contained red straps with numbers 3649059 and 3001489 on either end of the plastic transfer case.

The box containing absentee ballots contained red straps with numbers 3649093 and 3649029 on either end of the plastic transfer case.

The Election Board Manager initially advised the Court that a log book was kept containing the unique seal numbers applied to each ballot transfer case. However, upon arrival of the Election Board Chairperson, the Justices were further advised that the unique seal numbers are in-fact not kept in a log book, but transcribed on the outside of manila envelopes containing counting data designated for each voting district. The Justices were shown a large manila envelope that contained material concerning the absentee ballots. The Election Board Chairperson stated that the numbers on the red plastic straps were typically marked on the outside of the manila envelopes. However, the envelope designated for the absentee ballots from the September 21, 2019 Primary Election did not contain the unique seal numbers of the corresponding red straps from the absentee ballot transfer cases in writing on the outside envelope. Multiple Election Board representatives could not explain why the numbers were not written on the envelope or recorded elsewhere. Further, the Election Board Chairperson advised the Court that the absentee ballot transfer case numbers were not recorded in any other location. Stated simply, no master record was retained by the Election Board evidencing a chain of custody for the absentee ballot transfer cases.

The Court heard from the Lighthorse Police Officer that moved the transfer cases to the Lighthorse Office, who stated that two vehicles were taken; one driven by the officer and the other driven by a member of the Election Board. The Officer stated that he followed the second vehicle, and that the vehicle never left his sight. The ballot transfer cases from all districts were then unloaded and secured into the holding cell at the Lighthorse Police Office.

Thereafter, the Court recorded the seal numbers on each absentee ballot transfer case and directed that the absentee ballot transfer cases be moved to the Mound Building Auditorium to continue the investigation into whether or not the absentee ballots contained in the plastic transfer cases were the identical ballots case by voters and whether the ballots had been exposed to the

reach of unauthorized persons, or created a reasonable opportunity for an unauthorized person to tamper with or change the ballots.²

The matter subsequently resumed in the Mound Building Auditorium and, after a check was conducted to verify the seal numbers recorded while at the Lighthouse Police Office matched the seal numbers on the absentee ballot transfer cases then before the Court, the absentee ballot transfer cases were opened before the Court. At the direction of the Court an Election Board representative broke the red strap to the first absentee ballot transfer case containing absentee envelopes with a simple twist of the wrist.

The transfer case containing absentee ballots was opened and two broken red security straps, similar in nature to the red straps found on either end of the stored transfer cases, were discovered inside the absentee ballot transfer case. The additional enclosed broken red straps contained numbers 2415502 and 3649099. The Court questioned members of the Election Board about the broken red straps and requested an explanation for their inclusion inside the absentee ballot transfer case. The Election Board representatives hypothesized that certain hand-counted ballots might have been inadvertently left out of the absentee ballot transfer case before its initial sealing; that, once the error was realized, the Election Board representatives broke the red straps sealing the absentee ballot transfer case and placed the hand-counted ballots and their correlating tally sheets inside before resealing the absentee ballot transfer case. However, no Election Board representative could specifically account for this action. The Election Board was unable to show any record evidencing a chain of custody for the individual transfer cases, or any other documentation, memorandum, affidavit or otherwise explaining access to previously sealed absentee ballot transfer cases. The Court thus concludes that the Election Board's failure to

² See M(C)NCA Title 19, § 8-203.

document access to the absentee ballot transfer cases, combined with specific evidence found in this instance showing that at least one of the absentee ballot transfer cases were in-fact opened after affixing the initial red straps, and that no contemporaneous record was kept justifying this subsequent access; that the transfer cases were unreasonably susceptible to unauthorized persons in violation of Title 19.

Based on the above and foregoing reasons, and in the absence of ballot transfer cases that meet the minimum security standards placed on ballot boxes under M(C)NCA Title 19, § 3-111³, or records, contemporaneous memorandums and/or affidavits detailing the chain of custody for each ballot transfer case, the Court cannot determine that the cast absentee ballots have been properly preserved, in accordance with Title 19. Additionally, the lack of control and preservation measures exercised by the Election Board over the absentee ballots call into question the legitimacy of the entire election. Once the Court determines that ballots have not been properly preserved, M(C)NCA Title 19, § 8-203 is clear that “the election” will be deemed null and void. “Where a statute states in plain language on a particular matter, the Court will not place a different meaning on the words.”⁴ If the legislative body intended any new election to apply only to the race falling under the Petition for Recount, (i.e., the race for Principal Chief in this instance) the clear language should state this. The Court interprets the current language under M(C)NCA Title 19, §

³ M(C)NCA Title 19, § 3-111, provides, “[t]here shall be one (1) ballot box for each precinct. Said ballot box shall be constructed of substantial material and shall be equipped with three (3) locks so that the keys of one lock will not unlock the others....”

The ballot transfer cases do not comply with the minimum standard required for ballot boxes. The current transfer cases are made out of plastic material, which is arguably not a “substantial material[.]” The transfer cases are not secured with three (3) locks as required for ballot boxes, but are secured with plastic zip-tie like straps. As long as the Election Board continues to use lower standards for the construction of its transfer cases, and applies no internal policy for their chain of custody, there may be continued challenges concerning the security and preservation of the ballots.

⁴ See Tiger v. Muscogee (Creek) Nation Election Board, SC 2007-04, *Opinion*, at Pg. 3 (Citing generally, Cox v. Kamp, 4 Mvs. L. Rep. 75, 79).

8-203 (as amended by NCA 11-133) as a requirement that the entire election must be null and void.

IT IS THEREFORE ORDERED that the September 21, 2019, Primary Election is hereby deemed null and void, as required by M(C)NCA Title 19 § 8-203.

IT IS FURTHER ORDERED that the Election Board shall schedule a new Primary Election for all offices up for election in 2019 to take place within sixty (60) days of this Judgment, as required by M(C)NCA Title 19 § 8-203.

IT IS FURTHER ORDERED that, in accordance with M(C)NCA Title 19, § 8-203, all funds paid by the Petitioner for the above-styled recount shall be refunded, as no recount has taken place.

IT IS FURTHER ORDERED that the Court has not found specific evidence of tampering in the September 21, 2019 Primary Elections, but that the Election Board's lack of control and preservation methods have created a reasonable opportunity for tampering. As such, the Court finds an independent investigation into specific tampering is not warranted.

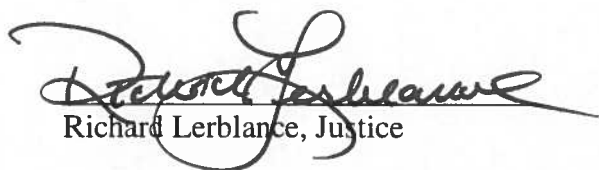
IT IS SO ORDERED.



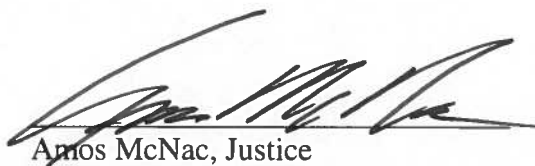
Andrew Adams III, Chief Justice



George Thompson, Jr., Vice-Chief Justice



Richard Lerblance, Justice



Amos McNac, Justice

Justice Leah Harjo-Ware abstaining in the decision.

CERTIFICATE OF MAILING

I hereby certify that on October 2, 2019, I mailed a true and correct copy of the foregoing Order and Opinion with proper postage prepaid to each of the following: Nelson Harjo, Jr., MCN Election Board, P.O. Box 580, Okmulgee, Oklahoma 74447; Rod Wiemer, McCulloch Building, Suite 200, 114 North Grand, Okmulgee, Oklahoma 74447 (Counsel for Lucian Tiger). A true and correct copy was also hand-delivered to: Donna Beaver, Clerk of the Muscogee (Creek) Nation District Court.


Laura Marks, Deputy Court Clerk