

Eastern Band of Cherokee Indians

Board of Elections

2017 General Election

Combined Decision on the Protests of Ashley Sessions and Albert Rose

Date of Decision: September 28, 2017

1. The election protests filed by Ashley Sessions and Albert Rose arise from the same set of operative facts and the same race for a Tribal Council seat in the Birdtown Community. For that reason, the Board of Elections has combined its decisions on both protests into this one document.¹

2. Ashley Sessions and Albert Rose were competing candidates for the Tribal Council seats for the Birdtown Community in the 2017 general election held on September 7, 2017. Four candidates competed for the two Tribal Council seats in that community. The Board of Elections published the unofficial election results on September 8, 2017.

3. The unofficial election results showed that Boyd Owle and Albert Rose received the most votes: Mr. Owle received 506 votes; Mr. Rose received 431 votes; Ashley Sessions received 419 votes; and Travis Smith received 323 votes. On September 8, 2017, after the results were published by the Board, Ms. Sessions filed a protest. As part of her protest, she requested a recount of ballots.

4. The Board of Elections recounted the ballots by hand on September 13, 2017. The recount resulted in Ms. Sessions receiving more votes than Mr. Rose. The next day, September 14, 2017, Albert Rose filed his protest.

5. For the Tribal Council race in the Birdtown Community, the Board reported the following results, which include early voting, absentee voting and voting at the polls:

Candidate	Votes Received	
	Election Day Results	Recount Results
Boyd Owle	506	536
Albert Rose	431	443

¹ At all times relevant to this decision, the members of the Board of Elections were: Denise Ballard (Chairperson) (Birdtown), Shirley Reagan (Painttown), Margaret French (Big Cove), Roger Smoker (Snowbird/Cherokee Co.), Annie Owens (Yellowhill), and Pamela Straughan (Big Y/Wolftown). Nancy Locust was the Board's administrative assistant.

Ashley Sessions	419	448
Travis Smith	323	330

7. In her written protest, Ms. Sessions expressed the following: (a) she requested a recount due to “technical issues of concern” at the polls; (b) she alleged that Albert Rose had engaged in vote-buying or bribery by giving a community member \$800 for that person’s granddaughter to go to London two weeks before the election, and that this gift was in exchange for that family’s vote for Mr. Rose; and (c) she alleged that Albert Rose had attacked her on social media.

8. The recount Ms. Sessions requested was performed.

9. At the hearing, Ms. Sessions, through her attorney, removed from the Board’s consideration her allegation that Mr. Rose engaged in vote-buying or bribery. She testified to the Board regarding some social media posts that maligned her. She testified, however, that those posts were made by Collette Coggins, not by Mr. Rose.

10. Therefore, at the hearing, Ms. Sessions essentially restricted her argument to opposing Mr. Rose’s request for relief.

11. In his protest, Mr. Rose alleged that election irregularities unfairly and improperly affected the actual outcome of the election. Specifically, Mr. Rose asserted that the irregularities indicated violations of C.C. § 161-15.1(c)(1) and C.C. § 161-14(f), and the irregularities resulted in Ms. Sessions gaining an inordinate number of votes in the recount (28 votes, to be exact).

12. On September 21, 2017, the Board held one hearing for both protests. Ashley Sessions attended the hearing and was represented by attorney W. Scott Jones. Albert Rose also attended and was represented by attorneys Robert O. Saunooke and Christian Siewers.

13. At the hearing, the presentations by the attorneys were surprisingly brief. Neither side called any witnesses or presented any new evidence. Instead, they made legal arguments.

14. Mr. Saunooke (representing Mr. Rose) argued that the facts already known by the Board warranted the Board to order a run-off election under C.C. § 161-7(e). That section states:

“Should the Board of Elections determine that a recount of ballots would not determine the accurate vote count; the Board of Elections shall issue a run-off election between all candidates that the Board deems as necessary to resolve any issues concerning the accuracy of the vote count. All decisions made by the Board of Elections in regards to run-off elections shall be final.”

15. Mr. Jones (representing Ms. Sessions) argued that Mr. Rose had failed to meet the burden imposed on all protesters in C.C. § 161-16(d) and that Mr. Rose's request for a run-off election should be denied. Section 161-16(d) states:

"Any person filing a protest for election irregularities under Subsection 161-16(c) must establish during a hearing in front of the Board of Elections that the alleged irregularities unfairly and improperly or illegally affected the actual outcome of the election."

16. The parties left the fact gathering to the Board.

17. The Board has an affirmative duty to gather facts when a protester has alleged election irregularities. Cherokee Code § 161-19(g) states:

"The Board shall investigate irregularities and nonperformance of duty and violation of Tribal election rules and regulations by election officials or other persons. The Board may hold hearings in the course of such investigations in accordance with Section 161-16."

18. The Board has the power to make final decisions on protests made to the Board. C.C. § 161-19(a).

19. Cherokee Code § 161-7, cited by Mr. Saunooke at the hearing, addresses run-off elections when two or more candidates, running for the same seat, receive the same number of votes. Subsection (e), however, gives the Board authority to determine the accuracy of the vote count without express restriction to a situation involving tie votes.

20. Cherokee Code § 161-16(g)(3) states in pertinent part:

"If the Board of Elections finds that there was an election irregularity, then the Board of Elections is authorized to issue relief in the form of ordering a new election or a run-off election between two or more candidates affected by the election irregularity."

21. The Board construes C.C. § 161-7 and C.C. § 161-16(g)(3) together to provide authority for the Board to investigate and determine that a recount of ballots, even outside of a tie, may not determine an accurate vote count, and therefore may be an irregularity warranting a run-off election.

22. The Board hereby denies the protest filed by Ashley Sessions, for the following reasons: she has already received the recount she requested; she has withdrawn her allegation that Mr. Rose engaged in vote-buying or bribery; and the Board has no authority to control what any person allegedly posts on social media, or to sanction a person for posting anything. Further, Ms. Sessions did not present any evidence that Mr. Rose and any agent of his posted the material Ms. Sessions found objectionable.

23. Likewise, Mr. Rose did not present any new evidence at the hearing. In that regard, he did not meet the burden imposed on him in C.C. § 161-16(d).

24. The Board, however, has conducted its own investigation as required in C.C. § 161-19(g), and the results warrant the Board to make the order expressed below.

25. The primary and general elections held in 2017 were the first times that the Tribe had allowed early voting. Ordinance No. 261 was passed by Tribal Council in 2016 to Chapter 161 to specifically allow early voting.

26. In the 2017 general election, the Board of Elections underestimated how popular early voting would be, and did not buy enough early voting ballots. It bought 100 early voting ballots for use in the Birdtown Tribal Council race. Therefore, when the poll workers at the Birdtown voting station ran out of early voting ballots they used absentee ballots as a substitute. They used a marker or a pen to cross out the "absentee" designation that had been printed on the ballots and wrote in words to designate the ballots as being "early" voting ballots.

27. In all, 55 absentee ballots were altered by hand by poll workers so they could be used as early voting ballots in the Birdtown Tribal Council race.

28. The Board used an electronic tabulator to count early voting ballots. The tabulator produced a paper record: a ticker tape such as one might see coming off of a CPA's calculator or a cash register, only much longer. Contrary to Mr. Rose's allegation in his protest, all of the tapes are accounted for. None have been lost or misplaced.

29. The tabulators failed to accurately count, or the tapes failed to accurately show, how many early voting ballots were cast in the Birdtown Tribal Council race.

30. The tabulator counted 148 early votes. It should have counted 155.

31. The same type of machine was supplied by Automated Election Services ("AES"), the Board's contractor, and was used at each voting station in each community. In every community except Birdtown, the greatest discrepancy between the original, unofficial results was seven votes. In Birdtown, the discrepancy was extreme: 28 votes were added to Ashley Sessions total; 12 votes were added to Albert Rose's total; 31 votes were added to Boyd Owle's total; and 7 early votes were added to Travis Smith's total.

32. The Board cannot explain these large discrepancies. Further, they are unique to the Birdtown Community.

33. Even Ashley Sessions, in her written protest, recognized the problem. She alleged that "It was expressed to me by community voters that the numbers were not changing when they put their ballot in the machine."

34. The Board has determined that the 55 ballots that were pre-printed as absentee voting ballots but changed by hand to serve as early voting ballots cannot be relied upon, and should not have been used.

35. The way these ballots were changed by hand contributed to the discrepancy between the original vote tally reported by the Board on September 8, 2017, and the recount results reported on September 13.

36. In its investigation, the Board discovered that one person who was not registered to vote was allowed to vote in the Birdtown Tribal Council race. The Board has identified that person as a niece of Ashley Sessions. The Board does not know who the niece voted for.

37. The ballot boxes into which ballots were placed after a voter marked the ballot were locked. However, the box in which early voting ballots were stored was not locked.

38. In light of the foregoing, the Board concludes that the recount of ballots in the race between Ashley Sessions and Albert Rose for a Tribal Council seat in the Birdtown Community has not determined the accurate vote count.

39. As authorized in C.C. § 161-7(e) and in C.C. § 161-16(g)(3), the Board hereby orders a run-off election between the candidates that the Board deems are necessary to resolve the accuracy of the vote count.

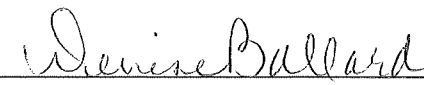
40. In this instance, the candidates are Ashley Sessions and Albert Rose.


41. The run-off election between Ashley Sessions and Albert Rose shall be held on October 10, 2017.

42. Pursuant to C.C. § 161-7(g), the Board shall not provide absentee ballots for the run-off election. Further, there will be no time for early voting.

This the ____ day of September, 2017.

Signed:


Denise Ballard (Chairperson)
(Birdtown)


Roger Smoker
(Snowbird / Cherokee Co.)

Shirley Reagan
Shirley Reagan
(Painttown)

Pamela Straughan
Pamela Straughan
(Big Y/ Wolftown)

Annie Owens
Annie Owens
(Yellowhill)

Margaret French
Margaret French Disagree
(Big Cove)