THE CHEROKEE SUPREME COURT

EASTERN BAND OF CHEROKEE INDIANS
QUALLA BOUNDARY, CHEROKEE, NORTH CAROLINA

TERESA MCCOY,	)	
Appellant	)	
	)	
V.	)	**CSC-19-03**
	)	
	)	**AMENDED ORDER AND**
	)	**OPINION**[1]
BOARD OF ELECTIONS OF THE	)	
EASTERN BAND OF CHEROKEE INDIANS,	)	
	)	
Appellee.	)	
	)	

Dungan, Kilbourne & Stahl, P.A., by James W. Kilbourne, Jr., for Appellant Teresa McCoy.

Interim Attorney General Michael W. McConnell, and Associate Counsel Christian N. Siewers, Jr., for Appellee Board of Elections of the Eastern Band of Cherokee Indians.

SAUNOOKE, Chief Justice.

Teresa McCoy (Ms. McCoy) appeals pursuant to Cherokee Code § 161-4(c)(4) from the 15 April 2019 final decision of the Eastern Band of Cherokee Indians (EBCI) Board of Elections (the Board) denying Ms. McCoy certification to serve as a candidate for the office of Principal Chief in the June 2019 primary election on the grounds that Ms. McCoy did "not satisfy Section 161-3(d)(2) of the Election[ ] Code and Section 17 of the Charter and Governing Document of the EBCI (Charter), thus making [her] ineligible to be a candidate for the position of Principal Chief." On 24 April 2019, this Court filed an order allowing Ms. McCoy's Motion to Expedite the briefing

[1] This Court's Amended Order and Opinion addresses the parties' respective arguments in CSC-19-03, not CSC-19-03 & CSC-19-04.

schedule and her appeal in this matter due to the strict timelines contained in Cherokee Code, Chapter 161 (the Election Code), mandating the expedited filing of the record with this Court by the Board and simultaneous briefing by the parties, and staying the Board's 15 April 2019 decision until further order by this Court. On 25 April 2019, the Board filed the record on appeal with this Court. On 29 April 2019, the parties simultaneously submitted their respective briefs and presented their respective oral arguments to this Court. "Due to the extremely compressed schedule" for the 6 June 2019 primary elections as set out in the Election Code, this Court filed an order without written opinion on 29 April 2019 vacating and reversing the Board's decision to deny certification to Ms. McCoy as a 2019 candidate for the Office of Principal Chief of the EBCI , mandating that the Board certify and place Ms. McCoy on the primary ballot as a 2019 candidate for said office, and indicating that a written opinion would be forthcoming from this Court. Having carefully reviewed the record, briefs, and oral arguments of the parties, this Court hereby amends the order issued 29 April 2019 and does reverse, as opposed to vacate and reverse, the Board's 15 April 2019 decision and directs the Board to certify Ms. McCoy as a candidate for Principal Chief and to place her on the June 2019 primary ballot.

Background

On 1 March 2019, Ms. McCoy, an enrolled member of the EBCI and a resident of the Big Cove community, submitted a Notice of Candidacy form for the Office of Principal Chief, along with the requisite filing fee mandated by Cherokee Code § 161-4(a) and (b). In her Notice of Candidacy, Ms. McCoy solemnly swore or affirmed that she was aware of and understood (1) the residency and eligibility requirements for the Office of Principal Chief; (2) that her communications with the Board and the public "shall be truthful"; (3) "the applicable financial

and ethics requirements" pursuant to Chapter 161 of the Cherokee Code governing elections and Cherokee Code § 117-45.3(9) governing ethics; (4) "that any violations of the requirements for candidacy or oaths or attestations shall be grounds for decertification by the Board"; and (5) that, by signing the Notice of Candidacy form in the presence of a Board official, she would "be subjected to a nation-wide federal and state criminal background check," including, but not limited to residency verification, and the Board could "use all available resources to verify that [she met] candidacy requirements."

The Board is comprised of six members and includes Chair Denise L. Ballard, along with Board members Shirley Reagan, Pamela E. Straughan, Margaret French, Annie S. Owens, and Roger Smoker. On 18 March 2019, the Board met to discuss issues pertaining to the June 2019 primary election. According to the meeting minutes, the Board discussed, among other things, that Chair Ballard had "received an anonymous 3 pages regarding an investigation of Teresa McCoy defrauding the Tribe in 1996," which had been "serious enough to investigate," but had never been "prosecuted as far as [Chair Ballard] knew." The Board's minutes further reflect that the Board members present at the 18 March 2019 meeting considered the matter "serious enough to investigate" regarding Ms. McCoy's certification as a candidate for the Office of Principal Chief.

After this Board meeting, several members of the Board conducted further investigation into the allegations against Ms. McCoy stemming from the 1996 incident based on the documentation that Chair Ballard had received and that the Board had discussed on 18 March 2019. Specifically, the record indicates that, between 21 March and 26 March 2019, Chair Ballard and Board members Reagan and Straughan conducted interviews with Lynne Harlan, the Director of Cultural Resources for the EBCI in 1996; Cherokee Indian Police Officer Neil Ferguson, who had spent several months in 1997 investigating the alleged fraud committed by Ms. McCoy; former

Principal Chief Joyce Dugan (1995-1999); and Rob Saunooke, who served as Tribal Council attorney in April 1997.[2]

On 28 March 2019, the Board met to discuss, and ultimately decide whether candidates would be certified to run for elected office in the June 2019 primary elections. The meeting minutes reflect that Board member Reagan moved to deny certification to Ms. McCoy "because we believe from the evidence she defrauded the Tribe."[3] Board member Straughan seconded the motion, and the Board unanimously voted to deny Ms. McCoy certification as a candidate for Principal Chief.

On 1 April 2019, the Board issued its initial decision to Ms. McCoy, notifying her that it had denied her candidate certification based on its determination that she had violated: (1) Cherokee Code § 161-3(d)(2) (providing, in pertinent part, that "[n]o person shall ever be eligible to file for or serve in any of the above Tribal Offices," including Principal Chief, if "[t]he person has aided, abetted, counseled, or encouraged any person or persons guilty of defrauding the Eastern Band of Cherokee Indians or has defrauded the Tribe, or who may hereafter aid or abet, counsel or encourage anyone in defrauding the Eastern Band of Cherokee Indians"); and (2) Section 17 of the Charter and Governing Document of the EBCI (providing that "[n]o person shall ever be eligible for office or appointment of honor, profit, or trust who shall have aided, abetted, counselled, or encouraged any person or persons guilty of defrauding the Eastern Band of Cherokee Indians, or themselves have defrauded the Tribe, or who may hereafter aid or abet,

[2] The record is largely silent with respect to the circumstances under which these interviews were conducted, although it appears that the three Board members interviewed each witness together and conducted the interview of former Chief Dugan via telephone. The record contains what appears to be each Board member's respective notes taken during the interviews, which are labeled "Board Interview Notes From the Investigation" in the record on appeal. None of the individuals interviewed were under oath at the time he or she spoke with these three Board members, and as discussed later, the Board did not disclose to Ms. McCoy that it had conducted the interviews nor did the Board provide Ms. McCoy with the interview notes prior to rendering its 15 April 2019 final decision.

[3] The Board's 28 March 2019 meeting minutes do not list or specify what "evidence" the Board considered.

counsel or encourage anyone in defrauding the Eastern Band of Cherokee Indians" nor "shall any person be eligible to such office, who has been convicted of a felony").

With respect to Ms. McCoy's underlying conduct, the Board found that from 28 January to 31 January 1996, Ms. McCoy and her sister-in-law, Kathie McCoy (Kathie), had attended a Native American Graves Protection and Repatriation Act (NAGPRA) event at the University of Alabama (the University) during which time Ms. McCoy was serving as a duly-elected member of Tribal Council and Kathie was serving as the EBCI's official NAGPRA representative. Before leaving for the NAGPRA event, both Ms. McCoy and Kathie had received a travel advance from the Tribal Council fund for the trip, with Ms. McCoy receiving $432.00 (consisting of $300.00 for per diem expenses and $132.00 for lodging) and Kathie receiving $475.80 (consisting of $120.00 for per diem expenses, $132.00 for lodging, and $223.80 for mileage).

"At some point during or just after" the late-January 1996 NAGPRA event, the University "prepared Miscellaneous Disbursement Vouchers for [Ms. McCoy] and Kathie consistent with the apparent request that those checks be mailed to separate individually held post office boxes in Cherokee, North Carolina," with the 31 January 1996 vouchers containing their respective names, mailing addresses, social security numbers, as well as an itemized description of the payments indicating that each woman respectively received $1500.60, consisting of $1000.00 for a "consultation" fee, $276.60 for mileage, $120.00 for lodging, and $104.00 for food.[4] Ms. McCoy signed and endorsed the check she received from the University, and she signed her own name underneath Kathie's name on the check the University had sent to Kathie, which the Board stated "has the effect of transferring the funds to the person named below the first signature."

[4] It is not clear if the Board's "apparent request" verbiage used in this finding means that the Board found that Ms. McCoy and Kathie requested that the University payments be sent to them individually instead of to the EBCI, or if the University had made the request as Ms. McCoy and Kathie testified to at the hearing.

The Board further found that the Cherokee Indian Police Department (CIPD) had conducted an investigation regarding Ms. McCoy and Kathie with respect to the University payments, and that, in or around 1997, "after a criminal investigation" had been initiated by the CIPD, Ms. McCoy "allegedly gave a sum of money to Principal Chief Joyce Dugan in her office in an apparent effort to pay back money owed to the Tribe as a result of [her] actions." Six years later, on 7 August 2003, Assistant United States Attorney Don Gast sent a letter to then-EBCI Attorney General David Nash explaining that federal authorities had "declined to bring charges against [Ms. McCoy] in 1999" and that "the federal 5-year statute of limitations period [for] bringing possible charges against [her] had expired."

Next, noting that neither the Charter nor the Election Code define the term "defraud," the Board opined said term, as used therein, "is a relatively clear legal concept" and "means '[t]o cause injury or loss to a person or organization by deceit; to trick (a person or organization) in order to get money,' " (quoting *Black's Law Dictionary* (10th ed. 2014)). The Board determined that Ms. McCoy was obligated to give the entire $1500.60 she had received from the University to the Tribe, including the $1000.00 consultation fee, because she had already received money from the Tribe to cover per diem and lodging expenses and because she was earning a salary for her presence at the NAGPRA event in her capacity as a member of Tribal Council. "At a minimum," the Board concluded, Ms. McCoy "should have disclosed this payment to the Tribe, but the proper course of conduct would have been to divert this payment directly to the Tribe since [Ms. McCoy] knew, or should have known, that [she] w[as] already being compensated for [her] time and the University payment could have helped defray tribally-incurred expenses."

Because neither the Charter nor the Election Code define "aid and abet" or "encourage" the Board again turned to *Black's Law Dictionary* to define these terms, opining that "aid and abet"

means " '[t]o assist or facilitate the commission of a crime, or to promote its accomplishment,' " (quoting *Black's Law Dictionary* (10th ed. 2014)), and that "encourage" means " 'to instigate; to incite to action; to embolden; to help,' " (quoting *Black's Law Dictionary* (10th ed. 2014)). The Board employed the same reasoning it had applied to Ms. McCoy to conclude that Kathie was not entitled to the University payment, and determined that "[t]he apparent acceptance of the check made payable to Kathie . . . into [Ms. McCoy's] own personal bank account defrauded the Tribe of money that neither [she] nor Kathie were entitled to receive," and that Ms. McCoy had aided and abetted, as well as encouraged, Kathie to defraud the Tribe.

On 5 April 2019, Ms. McCoy timely noted her appeal from the Board's 1 April 2019 decision denying her candidate certification and requested a hearing before the Board pursuant to Cherokee Code § 161-4(c). On 9 April 2019, the Board held a hearing on Ms. McCoy's appeal, at which Ms. McCoy presented her evidence, consisting of, among other things, her own sworn testimony; the sworn testimony of Kathie; the sworn testimony of Terry Henry, who had served as Tribal administrator for former Chief Dugan during the operative 1996-1997 time frame; and documentary evidence, including an article from The Cherokee One Feather that Ms. McCoy asserted established, in conjunction with her testimony, that Tribal Council had resolved the University payment issue and "cleared" her of any wrongdoing following a June 1997 hearing during which time Ms. McCoy was a duly-elected member of Tribal Council. Both Ms. McCoy and Kathie testified that the University had informed them at the NAGPRA event that they would receive an "honorarium" or "gift" and that the University had instructed them to put their own names and personal information on the forms. According to Ms. McCoy, she had never seen any of the documents, such as the Miscellaneous Disbursement Voucher discussed in the Board's decision, that itemized the payment she had received. Ms. McCoy did state that she filled out and

received from the University a form 1099 for $1000.00 which she reported on her taxes. Ms. McCoy did not provide any testimony as to the additional $500.60 she received from the University, but she did testify that "[she] was not ever told . . . that [she] owed the [T]ribe anything," and that "[she] did not misuse [T]ribal funding." Regarding the University payment to Kathie, both Ms. McCoy and Kathie testified that Ms. McCoy had cashed Kathie's check per Kathie's request and then brought the funds to Kathie at her place of employment.

On 15 April 2019, the Board met to discuss Ms. McCoy's appeal, voted unanimously to affirm its 1 April 2019 decision, and issued its final decision to deny Ms. McCoy's certification.[5] As it had done in its 1 April 2015 decision, the Board defined "defraud," "aid and abet" and "counsel" with reference to *Black's Law Dictionary*. Ultimately, the Board determined that "[t]he testimony provided at the hearing did not disprove [its] previous determination that the Tribe was defrauded of duplicative reimbursements, one of which should have been either sent to the Tribe or eliminated the need for a reimbursement." The Board also concluded that Ms. McCoy had not "disprove[d] the Board's prior decision that [her] acceptance of payment from the University . . . after [she had] already been compensated by the Tribe [was] conduct that 'defrauded the Tribe.' " Moreover, regardless of Ms. McCoy's contention that the University payment "was an honorarium or gift," the "face of the [University] documents themselves" indicated that the funds were for motel expenses, mileage expenses, meal expenses, and a consultation fee that she was not entitled to receive. Regarding Kathie's payment, the Board determined that Ms. McCoy's evidence that her actions only consisted of cashing the check for Kathie and bringing Kathie the funds at her workplace did "not rebut a finding that [Ms. McCoy] essentially facilitated . . . Kathie's taking of

[5] The record indicates that Board member Straughan recused herself from the 15 April 2019 vote. Board member Reagan, however, participated in the 15 April 2019 vote, despite being absent from the 9 April 2019 hearing at which Ms. McCoy presented her evidence.

the funds made payable [to Kathie] by the University" to which Kathie was not entitled. Ultimately, the Board affirmed its 1 April 2019 decision because "the information submitted at the hearing did not" (1) "undermine the Board's initial finding that [Ms. McCoy's] acceptance of the funds from the University . . . [constituted] conduct that 'defrauded the Tribe' "; or (2) "disprove [the Board's] initial finding that [her] conduct aided, abetted, and encouraged Kathie . . . to defraud the Tribe."

Ms. McCoy subsequently appealed from the Board's 15 April 2019 decision to this Court. On 25 April 2019, the Board filed the record in this matter pursuant to this Court's 24 April 2019 order. On 26 April 2019, Ms. McCoy filed a "Motion to Request Permission of the Court to Supplement the Record on Appeal" seeking to include certain documents in the record that she had brought to and discussed at her appeal hearing. On 29 April 2019, the Board filed its response objecting to Ms. McCoy's motion. On 4 June 2019, this Court allowed Ms. McCoy's motion in regard to the documents identifiable in the transcript as being presented at the hearing.

Discussion

In this Court, Ms. McCoy argues we should reverse the Board's final decision, remand this matter to the Board, and order the Board to certify her as a candidate for Principal Chief in the June 2019 primary for several independent reasons: (1) the record raises significant concerns bearing on the issue of fundamental fairness involving a subject matter of great importance to the EBCI—elections; (2) the Board does not have the authority to decline to certify her based on the 1996 University payment because Tribal Council conclusively resolved the issue and cleared her in June 1997 when she was a sitting Tribal Council member; (3) the facts found by the Board do not support its conclusion that she defrauded the Tribe or aided and abetted Kathie to defraud the

Tribe; (4) the Board violated her right to Equal Protection under the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301 *et seq.*; and (5) the Board violated her right to Due Process under the ICRA. After careful review, and as set out in greater detail below, we conclude that "fundamental fairness," *Crowe v. E. Band of Cherokee Indians*, 2003 WL 25902442, *1, *3 (Eastern Cherokee Sup. Ct. 2003), a key principle that has been recognized and applied in the "importan[t]" context of EBCI elections, *id.*, necessitates that we reverse the Board's decision and order the Board to certify Ms. McCoy as a candidate for Principal Chief and to place her on the ballot for the June 2019 primary election. Although our decision is based primarily on the independent ground of fundamental fairness, we note that, pursuant to the ICRA, baseline constitutional guarantees of procedural due process also apply to the statutory scheme set out in Chapter 161 of the Cherokee Code. *See Blankenship v. E. Band of Cherokee Indians*, No. CSC-16-03, 1, 11-12 (Eastern Cherokee Sup. Ct. Feb. 8, 2018) (noting, in the context of a constitutional bill of attainder argument, that Tribal Council has "incorporated [the ICRA's] protections into the Cherokee Code in numerous places, clearly indicating that rights protected by the ICRA would be recognized and protected by the EBCI tribal government" (citing Cherokee Code §§ 1-40, 15-7, 7A-27, 48-10, 75-52, 150-1)); *see also* 25 U.S.C. § 1302(a)(8) (articulating a right to due process under the ICRA).[6] Both fundamental fairness and procedural due process require that the Board employ procedures that afford Ms. McCoy a meaningful opportunity to investigate the allegations used to disqualify her and the information or evidence on which it was based, as well as a meaningful opportunity to be heard, and that the Board provide and utilize standards of proof and review that are sufficiently

[6] We emphasize that our discussion of due process is limited solely to **procedural** due process, With respect to substantive due process, our case law is clear that "Tribal officials hold office as a sacred public trust; they do not possess property rights to their positions." *Blankenship*, No. CSC 16-03, at 12.

clear and fairly and consistently applied. Unfortunately, the record indicates that these baseline guarantees were not afforded to Ms. McCoy.

This Court has original and exclusive jurisdiction to review a final decision of the Board regarding an election dispute. *Crowe*, 2003 WL 25902442, at *1. In reviewing the Board's decision, this Court can only review alleged errors of law, including whether the Board's findings of fact support its conclusions of law and the Board' decision. *Id.* This Court does not have the authority to make findings of fact, this is the province of the Board, *id.*; however, the Board's findings must be sufficiently specific and actually constitute findings of fact, *see Kephardt v. E. Band of Cherokee Indians*, 2004 WL 5807675, *1, *4 (Eastern Cherokee Sup. Ct. 2004) (concluding that the Board's decision regarding an election challenge was erroneous because the Board did not find the election protester's allegation to be fact, but rather, used the allegation as the reason or basis for its investigation, and consequently, the Board had not made any findings of fact to support its conclusion or determination that 100 absentee voters were improperly registered).

"Section 6 of the Charter states: 'The Tribal Council shall establish a Board of Elections and enact election rules and regulations for the conduct of elections.' " *Id.* at *3. The Board "is an administrative agency created by the Tribal Council. It has the duty to carry out the provisions of Chapter 161 of the Cherokee Code," *Crowe*, 2003 WL 25902442, at *1, which contains the rules and regulations enacted for the regulation and administration of elections.

With respect to certifying individuals as candidates for an election, Section 161-4 of the Cherokee Code mandates, in pertinent part, that the Board "shall review all applications and other required information, including but not limited to background checks, and ensure that the required filing fees have been paid in order to certify whether or not each applicant is eligible to be a

candidate for Tribal elected office." Cherokee Code § 161-4(c). Nothing in Cherokee Code § 161-4, which governs the initial certification process and decision for applicants, requires the Board to notify the applicant when the Board conducts an investigation into whether the applicant should be certified as a candidate; however, the Board is required to provide notice to each applicant of its certification decision regarding his or her candidacy on or before 31 March of the election year. *Id.* In the event the Board reaches an "adverse" decision on a candidate's certification, the Board "shall include a clear and concise statement as to the reason(s) for denial of an applicant's eligibility," *id.*, and notify the applicant that he or she "may appeal the denial of certification and may request a hearing before the Board of Elections for the appeal," *id.* § 161-4(c)(1).

The resulting appeals process in Chapter 161 is compressed and expedited. *See id.* § 161-4(c)(1) to 161-4(c)(4). The Election Code provides little guidance beyond required timeframes for the conduct and procedures of appeal from a decision in which the Board denies an applicant certification as a candidate. Following an adverse decision, the applicant must file his or her appeal and request for hearing with the Chair of the Board within five business days of receipt of the Board's notice of the denial. *Id.* § 161-4(c)(1). If the appeal is timely and properly filed, and accompanied by the requisite filing fee, the Board must schedule and hold a hearing within five business days of the date the Board received the notice of appeal. *Id.* § 161-4(c)(2). "At the appeal hearing, the appellant shall have the right to present written evidence and/or oral testimony to address the deficiency in his or her application that was identified by the Board's decision which deficiency rendered the appellant ineligible." *Id.* § 161-4(c)(3). The Board must then issue a written decision within five business days following the hearing. *Id.* § 161-4(c)(4). "The written decision shall express whether or not the prospective candidate satisfies the requirements for the office for which candidacy is sought." *Id.* Although the Board is authorized under the law to opt

in and adopt the uniform rules and procedures set forth in Chapter 150 of the Cherokee Code (Administrative Procedure Act), *id.* § 150-3(a), and is empowered to "make administrative rules pursuant to Cherokee Code Chapter 150 (Administrative Procedure Act)," *id.* § 161-19(a), the Board has not adopted the rules and procedures set out in the Administrative Procedure Act, nor has the Board enacted its own administrative rules to govern its hearings.

Notwithstanding the lack of formal administrative rules and procedures, the Board has delegated authority to set the parameters of its hearings, but the restrictions and control the Board imposes through this delegated authority must be "reasonable." *Id.* § 161-32 ("The Board of Elections shall have authority to control the conduct of hearings before the Board. The Board may impose reasonable restrictions on the presence of parties, witnesses and other persons, the sequestration of the same, the presentation of evidence and the duration of hearings. Such control shall be exercised to provide a safe and orderly hearing and to minimize disruption and delay."). Furthermore, "[f]undamental fairness" and "the great importance" of elections require that those parameters be reasonably discernible, consistently and fairly applied, and designed to arrive at truth. *See Crowe*, 2003 WL 25902442, at *3 (concluding that, due to "[f]undamental fairness" and "the great importance" of elections, this Court should review the Board's decision regarding the appellant's election protest for errors of law even though the appellant failed to meet his procedural burden at the Board hearing).

Having carefully reviewed the record, and as discussed below, we conclude that fundamental fairness was violated here. Although we recognize that the Board only received the documents that prompted its investigation of Ms. McCoy from an anonymous source shortly before the 18 March 2019 Board meeting with a 31 March 2019 deadline for issuing a certification decision looming, the Board must nevertheless comply with fundamental fairness and baseline

guarantees of procedural due process.[7] Specifically, we note the following problems and concerns that bear significantly on the fundamental fairness issue presented here: (1) the lack of transparency and foundational evidentiary problems regarding the 47 pages of documents, labeled as "Documents Relevant to Investigation of Applicant" in the record, that the Board provided to Ms. McCoy as support for its adverse determination on her candidate certification and that were discussed at the 9 April 2019 hearing;[8] (2) the Board's failure to inform and provide notes to Ms. McCoy of the March 2019 interviews that the three Board members conducted with Ms. Harlan, Officer Ferguson, former Chief Dugan, and Mr. Saunooke, thereby depriving Ms. McCoy of critical opportunities to question or cross-examine these individuals and any other witness Ms. McCoy might have wanted to testify pursuant to Cherokee Code § 161-19(a); (3) the Board's failure to clearly articulate and employ any coherent or consistent burden or standard of proof necessary to support its findings, conclusions or ultimate decision on Ms. McCoy's certification, or that Ms. McCoy could meet to overcome the Board's adverse determination on her candidacy; and (4) the lack of any adverse action taken by any prior Board with respect to Ms. McCoy's candidate certification regarding the 1996 University payment incident over the more than two

[7] Prior to oral argument before this Court there was some dispute between the parties regarding what the "anonymous 3 pages" referred to by Chair Ballard at the 18 March 2019 Board meeting consisted of or contained. Ms. McCoy believed the three pages consisted of an anonymous letter that the Board had neglected to provide her. At oral argument, the parties agreed that the documents referred to in the 18 March 2019 Board minutes consisted of three documents consisting of four total pages. Specifically, the documents are (1) the first page of a Cherokee Indian Police Department report (Case # 9704151500) regarding an investigation of Ms. McCoy for "Embezzlement and Theft from Indian Tribal Organizations" in violation of 18 U.S.C. § 1162, stemming from the $1500.60 University payments to her and Kathie; (2) a one-page 30 July 2013 cover letter from former Attorney General David Nash to Assistant United States Attorney Don Gast noting that Mr. Nash had enclosed "a 1997 criminal investigation report (File No. 9704151500)" regarding Ms. McCoy that had recently been brought to Mr. Nash's attention, and requesting information regarding any prior disposition of the matter and/or that Mr. Gast accept the matter "for a determination of whether further investigation [wa]s warranted"; and (3) a two-page 7 August 2013 reply letter from Mr. Gast indicating that the case had been referred to the United States Attorney's Office in June 1997, that the case was declined in July 1999 for "staleness," and that no further investigation was warranted in 2003 because the statute of limitations had already expired.

[8] The record does not indicate the date on which the Board provided these documents to Ms. McCoy.

decades that passed between the 1996 incident and the 1997 CIPD investigation thereof and the Board's March 2019 investigation and 15 April 2019 final decision, during which period prior Boards repeatedly certified Ms. McCoy as a candidate for Tribal office every two years between 1997 and 2015, an article published 2 July 1997 in The Cherokee One Feather appears to report that Tribal Council addressed the 1996 honorarium payment issue and reached some form of resolution with Ms. McCoy during a June 1997 hearing when she was a sitting Council member, and federal authorities declined to take any action against Ms. McCoy in 1999 for staleness and in 2003 because the applicable federal statute of limitations had run, all dates for more contemporaneous to the 1996 University payment incident.[9]

First, regarding fundamental fairness and the 47 pages of documents contained in the Board's packet, although the record indicates that the Board obtained these documents as part of its March 2019 investigation into Ms. McCoy and provided Ms. McCoy with these documents for her appeal hearing, nothing in the record provides an index listing the specific documents by name, from whom and under what circumstances any of these miscellaneous documents were obtained, or at what point the documents were provided to Ms. McCoy prior to the 9 April 2009 hearing. Moreover, nothing in the record indicates that any of these documents were authenticated via sworn testimony or otherwise, and the Board has conceded that they were not. Additionally, at

[9] Regarding the fourth concern bearing on fundamental fairness, we emphasize that we are not suggesting that the evidence of record compels particular findings or determinations regarding Tribal Council's June 1997 handling of the 1996 University payment matter or the reasons why federal authorities declined to investigate or pursue any charges against Ms. McCoy in 1999 and 2003, such as, for example, that Ms. McCoy was definitively "cleared" of any wrongdoing as she and Ms. Henry testified to at the 9 April 2019 hearing. As discussed later, because the record in this matter is plagued by significant fundamental fairness issues and the Board failed to make important factual findings in its 15 April 2019 decision, this Court is significantly limited in terms of what we can glean from the record regarding the significance of the lack of any further action by Tribal Council after June 1997, the lack of any action by federal authorities in 1999 and 2003, and the lack of any action by a prior Board regarding Ms. McCoy's candidate certification based on the 1996 incident prior to 2019. Nevertheless, based on the record here, we do conclude that the passage of time combined with the lack of any action by these three respective entities does bear on fundamental fairness, albeit since Cherokee Code § 161-4 does not contain any statute of limitation or repose, this would not, standing alone, be determinative.

least two of the documents included in the Board's packet are seriously questionable in terms of authenticity and possess a high likelihood of misleading or confusing the fact-finder, to wit: (1) a notarized, sworn verification statement containing Ms. McCoy's signature dated 5 April 2017 from an unrelated legal action that Ms. McCoy had filed, stating that "Teresa McCoy, first being duly sworn, deposes and says that [s]he has read the foregoing Verified Complaint and the allegations therein, with the exception of those made upon information and belief, are true to the best of [her] own knowledge," that appears to have been inserted or included in the Board's packet in error and which could mislead the Board into believing that Ms. McCoy had sworn to the truth and accuracy of the contents of the documents contained in the Board's file; and (2) an undated, anonymous, handwritten page, stating, among other things, "we have no record of Teresa paying any travel reimb. from 94-present" about which the record reveals no foundation or context, including who created it, when, and for what purpose. This Court does note that Ms. McCoy failed to submit her written "documented response" containing her arguments on appeal, including evidentiary issues and documents relied upon, at the 9 April 2019 hearing by the agreed upon deadline of 11 April 2019, and instead submitted her response to the Board on 15 April 2019, the date on which the Board rendered its final decision. Ms. McCoy did, however, repeatedly object to these two documents on the record during the hearing. Accordingly, we agree with Ms. McCoy that these two documents should not have been considered by the Board.

While we would like to believe that the Board disregarded these two documents in arriving at its determination that Ms. McCoy should not be certified as a candidate for Principal Chief for allegedly violating Cherokee Code § 161-3(d)(2) and Article 17 of the Charter, the Board did not enter any ruling on Ms. McCoy's objections in the record, nor did the Board mention these two documents in its 15 April 2019 final decision. As such, the record does not foreclose the possibility

that one or more Board members erroneously relied, at least in part, on these two documents in deciding to deny Ms. McCoy certification. In sum, the "evidence" provided to Ms. McCoy by the Board as supporting its decision that Ms. McCoy should be denied certification consisted of 47 pages of unauthenticated and unsworn documents, at least two of which should not have been considered, thereby undermining fundamental fairness.

Second, with respect to the March 2019 interviews and notes, the record demonstrates that the Board provided Ms. McCoy with no notice that these interviews had occurred or about the content of the interview notes, labeled as "Board Interview Notes from the Investigation" in the record, until Ms. McCoy received a copy of the record on appeal that the Board filed with this Court on 25 April 2019 pursuant to this Court's order. Significantly, the record indicates that, despite failing to disclose this key information to Ms. McCoy, the Board indeed considered the interview notes as evidentiary support in arriving at its 15 April 2019 final decision. Specifically, the Board's 15 April 2019 meeting minutes state, among other things: "Our Decision wasn't based on the three pages. It was based on the 45 pages and the interviews."[10] In doing so, the Board deprived Ms. McCoy of critical information that she needed to effectively present her case and eliminated any opportunity she had to question the interviewees under oath before the Board, including using the Board's subpoena powers under Cherokee Code § 161-19(a) to compel witnesses to testify before the Board, so that the Board could hear and view these witnesses under oath regarding a twenty-three-year-old matter. In sum, the Board's lack of disclosure of the interviews and the notes resulting therefrom, which were not based on sworn testimony, and the

[10] While this statement by the Board suggests that the Board did not consider two of the pages contained in the Documents Relevant to Investigation of Applicant, nothing in the record or the Board's final decision indicates which two pages the Board declined to consider.

Board's reliance on the interview notes to support its findings and conclusions in its 15 April 2019 final decision, significantly undermined fundamental fairness.

Third, fundamental fairness requires that the Board employ standards that are sufficiently clear, fair, and consistently applied with respect to (1) the evidence the Board considers or refrains from considering; (2) the quantum of evidence necessary to support its findings of fact; (3) the burden or showing that the Board must meet to support its conclusions and ultimate determination that a candidate should not be certified for defrauding the Tribe under the Election Code and the Charter; and (4) the burden or showing that an applicant, like Ms. McCoy, must make to overcome the Board's determination that the applicant should be disqualified as a candidate for Tribal office for allegedly defrauding the Tribe. The record raises significant issues with respect to all the above. As noted earlier, neither the Board's final decision nor the record clearly indicate what evidence the Board considered or refrained from considering, or what standards the Board employed in arriving at its evidentiary determinations in this matter. Similarly, the Board's decision does not articulate any discernible standard employed by the Board with respect to the quantum of evidence or showing necessary to support the factual findings the Board made in arriving at its determination that Ms. McCoy should not be certified as a candidate. Moreover, with respect to the burden or standard of proof necessary to support the Board's conclusions and ultimate determination that a candidate should not be certified for defrauding the Tribe or aiding and abetting another in doing the same under the Charter and the Election Code, again, the Board's decision is unclear. And, significantly, during the appeal before this Court, the Board maintained that, since the term "defraud" has been present in the Charter since at least 1875 and is rooted in EBCI culture and tradition, the Board is only required to employ an "I know it when I see it" standard in which four out of six Board members need to be satisfied in their own minds that they should vote in the

affirmative to take the very solemn act of denying someone the opportunity to run for public office, which the Board unanimously decided to do here. Although the term "defraud" has been present in the Charter since at least 1875, this is a case of first impression for this Court. This Court has no knowledge of a candidate being denied original certification for having committed acts to "defraud" the Tribe. As such, the mere statement that the "I know it when I see it" standard is rooted in culture and tradition is insufficient. The standard advanced by the Board would essentially allow each Board member to apply his or her own personal standard to the Board's determination, raising serious fundamental fairness concerns here.[11]

With respect to the burden or showing that Ms. McCoy needed to meet in order to overcome the Board's adverse determination on her candidacy, we note that the Board's decision does attempt to articulate some standards that Ms. McCoy needed to meet including that: (1) "[t]he information presented at [the] appeal hearing did not disprove the underlying issues involving [Ms. McCoy's] conduct that [the Board] concluded constituted actions" that defrauded the Tribe and aided and abetted, counseled or encouraged Kathie to do the same; (2) "[t]he testimony provided at the hearing did not disprove [the Board's] previous determination that the Tribe was defrauded of duplicative reimbursements, one of which should have been either sent to the Tribe or eliminated the need for reimbursement"; (3) "the information submitted at the appeal hearing did not disprove the Board's prior decision that [Ms. McCoy's] acceptance of payment from the University of Alabama for attending the NAGPRA consultation after already [being] compensated by the Tribe is conduct that 'defrauded the Tribe' "; (4) the "offered evidence does not rebut a finding that [Ms. McCoy] essentially facilitated Kath[ie] in carrying out the same defrauding of the Tribe as that discussed in [Ms. McCoy's] case"; and (5) "[u]ltimately the Board has determined that the

[11] Additionally, fundamental fairness requires that the fact-finders (members of the Board) be present at the appeal hearing to view the applicant's evidentiary presentation as a condition for voting for the final decision on appeal.

information submitted at the hearing did not disprove its initial finding that [Ms. McCoy's] conduct aided, abetted, and encouraged Kathie . . . to defraud the Tribe. Again, these purported standards requiring Ms. McCoy to "disprove" the Board's determinations do not amount to any meaningful standard at all. Additionally, the Board's decision on appeal does not include specific findings or reject Ms. McCoy's arguments on appeal but merely provides conclusory statements based on unsworn unauthenticated documents about her failure to overcome the Board's adverse determination on her candidacy.

Fourth, with respect to the passage of time between the 1996 University payment incident and the Board's 2019 investigation and final decision, and the evidentiary forecast tending to show that Tribal Council addressed the honorarium payment matter with Ms. McCoy in 1997 while she was a duly-elected, sitting Tribal Council member, that federal authorities elected not to take any action on the matter in 1999 after referral by Tribal Council and in 2003 after an inquiry by the then-Attorney General for the EBCI, and that the Board has certified Ms. McCoy as a candidate for Tribal office every two years from 1997 through 2015, it is important to emphasize that, given how fundamentally flawed the proceedings before the Board were here, it is impossible for this Court to discern with any degree of confidence from the record before us and the Board's final decision what happened with respect to why these three respective entities (i.e., Tribal Council, federal authorities, and prior Boards) did not take any action against Ms. McCoy at times far more contemporaneous to the 1996 University payment incident, especially when it is not this Court's role to speculate on a cold record and find facts. And, in addition to the significant fundamental fairness concerns with respect to the procedures afforded to Ms. McCoy and the standards employed by the Board discussed in our first three concerns regarding fundamental fairness, the Board's final decision fails to make key factual findings regarding these issues by merely reciting

Ms. McCoy's testimony in its factual background, which does not constitute findings of fact, *see Kephardt*, 2004 WL 5807675, at *4 (concluding that, because the Board's recitation of an election protestor's evidence regarding improper registration of voters was not actually a finding of fact, the Board had made no factual findings to support its conclusion that voters had been improperly registered, and accordingly, that the Board's decision was erroneous), and by sidestepping its role of making key findings on important issues in its legal analysis, thereby further frustrating this Court's ability to review these matters and what we can glean about them from the record. For example, with respect to Tribal Council's June 1997 handling of Ms. McCoy's 1996 honorarium payment, the Board's factual background in its final decision merely recites testimony offered by Ms. McCoy, stating: "[a]t the hearing, [Ms. McCoy] offered testimony to suggest that the matter concerning [her] defrauding the Tribe was resolved by Tribal Council in June 1997"; "[Ms. McCoy] also testified that [she] gave Joyce Dugan the amount of $1000.00 to pay back the Tribe"; "[Ms. McCoy] further testified that [she] submitted documents to the [IRS] that included the receipt of the payment from the University of Alabama"; and "[Ms. McCoy] also stated that [she] ha[d] never been charged or convicted for [her] conduct" and then sidesteps making any findings of fact as to what actually happened in 1997 regarding the honorarium issue, stating "[a]ny hearing held by Tribal Council[,] as well as any action or inaction taken by Tribal Council regarding [Ms. McCoy's conduct[,] has no bearing on [her] eligibility or ineligibility to be certified as a candidate for the position of Principal Chief for the 2019 election" and that "the fact that [Ms. McCoy] ha[d] been previously certified as a candidate for Tribal Office d[id] not establish that [she is] eligible to be certified as a candidate for the 2019 election." In doing so, the Board left key factual issues unexplored and unresolved, such as whether Tribal Council intended to resolve the 1996 University payment matter with finality, as Ms. McCoy contends, and whether any prior Board

knew or should have known about the 1996 University payment incident and elected to certify Ms. McCoy despite it, as opposed to this being the first time that any Board had knowledge of the 1996 University payment incident.

Again, this Court cannot speculate on a cold record and make findings of fact for the Board; nevertheless, in our view, the evidentiary forecast in the record that tends to show that 23 years have passed between the underlying incident and the Board's investigation and denial of Ms. McCoy's candidate certification here, that Tribal Council appeared to resolve the honorarium payment issue with Ms. McCoy in June 1997, that federal authorities did not take any action against Ms. McCoy based on the 1996 incident, and that no prior Board declined to certify Ms. McCoy based on the incident does bear on the overall equation of fundamental fairness. With respect to Tribal Council's handling of the honorarium matter in June 1997, The Cherokee One Feather Article presented by Ms. McCoy to the Board at the 9 April 2019 hearing appears to show that at least one Tribal Council member moved to "suspend [Ms.] McCoy from [Tribal] Council for the rest of the term with no compensation" when Tribal Council discussed the matter in June 1997, but no other Council member seconded the motion; that then-Tribal Council Chair, Jack Gloyne, noted "the matter [wa]s resolved as far as Tribal Council [was] concerned"; and that any further "action depend[ed] on what the U.S. District Attorney's office" did with the matter.[12] With respect to the lack of any subsequent action by federal authorities, the evidentiary forecast in the record tends to show that the matter was dismissed for "staleness" in 1999 and declined in 2003 because the statute of limitations had already run. With respect to what, if anything, any prior Board knew or should have known about the 1996 University payment incident, the record is

[12] Because Ms. McCoy was a duly-elected, sitting Tribal Council member during the operative 1996-1997 window, the University payment matter did fall within the ambit of Tribal Council's traditional and original jurisdiction to suspend, censure, or impeach its members, including for a violation of Article 17 of the Charter.

essentially silent, but importantly, nothing in the record indicates that the 1996 University payment incident that was discussed publicly in The Cherokee One Feather was unknown or recently discovered by the Tribe or the Board, or that any new or recent evidence bearing on the 1996 incident had been discovered by the Board. [13]

In sum, each factor that we have identified above operates on its own to significantly undermine fundamental fairness; however, the combination of all these factors, as reflected in the record, leads us to conclude that fundamental fairness was violated here, and consequently, that the Board's decision must be reversed. In other words, "because the process [here] was so badly flawed," *Begay v. Navajo Nation Election Administration,* 4 Am. Tribal Law 604, 610 (Nav. Sup. Ct. 2002), in violation of fundamental fairness, we conclude that it would be fundamentally "unfair to exclude [Ms. McCoy,]" *id.*

Importantly, we note that, while this Court is vested with the authority to interpret election laws, "[i]t is not this Court's place to draft election laws and procedures." *Lambert v. Cherokee Board of Elections*, 2007 WL 7080146, *1, *2 (Eastern Cherokee Sup. Ct. 2007). As such, we suggest that Tribal Council consider amending Chapter 161 of the Cherokee Code to move the time period for candidate filing to an earlier date on the calendar, and to extend the timelines for the appeal process to the Board and to this Court to allow sufficient time on the calendar prior to the required date on which absentee ballots must be made available to the electorate. Additionally, we suggest that the Board consider availing itself of the administrative procedures contained in

[13] Even assuming certain members of the Board as currently constituted did not know about the 1996 University payment incident, it does not automatically follow that prior Boards were unaware of it, and nothing in the record indicates that any new or recent evidence bearing on the incident had been discovered.

Chapter 150 of the Cherokee Code via the enabling provision that Tribal Council has provided for the Board.[14]

In sum, the record in this matter indicates that the Board did not afford Ms. McCoy baseline guarantees of fundamental fairness and procedural due process. Due to the significant problems revealed in this record that, in combination, wholly undermined fundamental fairness to the candidate, we conclude that fundamental fairness requires that Ms. McCoy be certified as a candidate and placed on the ballot for the upcoming primary election. Therefore, the Board's 15 April 2019 decision is hereby reversed, and this matter is remanded to the Board with instructions to certify Ms. McCoy as a candidate for Principal Chief and to place her on the June 2019 primary ballot.

REVERSED AND REMANDED.

Justice Hunter concurring.

[14] In light of our determinations regarding fundamental fairness and procedural due process, we need not address Ms. McCoy's remaining arguments.

Justice Pipestem concurring in part.

I concur in the Court's decision to reverse the Board's decision of 15 April 2019 and to remand this matter to the Board with instructions to certify Ms. McCoy as a candidate for Principal Chief based on the fundamental fairness issues discussed above, except for the majority's treatment and discussion of the fourth factor that the majority concludes bears on that issue. This Court's role is to review the record for error of law, but due to the gross violations of procedural due process revealed in the record here, including the lack of foundation and authentication regarding the 47 pages of documents and the notice and foundation issues regarding the interview notes based on unsworn statements that were used to support the Board's factual findings, there is simply no clear, reliable factual record for this Court to review. In other words, the process here was too flawed and the record is too underdeveloped to arrive at any determinations regarding any action or lack thereof by Tribal Council, federal authorities, and the Board before 2019; as such, I specifically refrain from joining the majority in hypothesizing what might be gleaned from the record here. Additionally, and determinative as the record now stands, Cherokee Code § 161-4 does not contain any statute of limitations or other prohibition that applies to the Board's certification decision under the circumstances as presented in this case. Finally, but for the Court being bound by the strict timelines governing the availability of absentee ballots as mandated by the Election Code and the impending June 2019 primary election, which render a new Board hearing that complies with fundamental fairness wholly impracticable, I would remand this matter back to the Board to develop a full record consistent with proper considerations of fundamental fairness and due process.