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CHEROKEE SUPREME COURT
CHEROKEE, NC

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IN THE CHEROKEE SUPREME COURT
EASTERN BAND OF CHEROKEE INDIANS
CHEROKEE, QUALA BOUNDARY, NORTH CAROLINA
CSC-18-01

FILED

In Re:	]	
	]	
ROBERT OSLEY SAUNOOKE,	]	OPINON AND ORDER
	]	VACATING ORDER ON
Appellant.	]	MOTION TO SHOW CAUSE

PER CURIUM.

Appellant Robert O. Saunooke, appearing *pro se*, appeals Judge Sharon Barrett's May 1, 2018, Order on Show Cause revoking the April 19, 2017 Order on Motion *Pro Hac Vice* and terminating his appearance *pro hac vice* in the Cherokee Courts on all matters in 17-CV-168; and enjoining and restraining Mr. Saunooke from the practice of law in this jurisdiction, unless specifically permitted by a subsequent court order. This Court heard the appeal on October 11, 2018.

I. FACTS

Appellant is not a member of the bar of the State of North Carolina. He is licensed to practice law in the State of Florida.

The Cherokee Court was created in April 2000 and at that time, Cherokee Code ("C.C.") § 7-5 empowered the Cherokee Supreme Court to establish qualifications for the practice of law and provided that no person shall be permitted to practice law in any court of the Judicial Branch unless that person had a license to practice law from the State of North Carolina.

In 2003 with the approval of the Tribal Council, Appellant appeared and represented Councilman Robert Blankenship in impeachment proceedings before the Tribal Council.

Additional language determining who could conduct business in the Tribe's jurisdiction was added to the Cherokee Code in 2006, C.C. § 87-1(5) stated:

To protect the health, safety and welfare of members of the Eastern Band of Cherokee, the following professionals, in order to practice their profession within the territory of the Eastern Band, must have a current license issued by the appropriate state regulatory agency authorizing them to practice their

profession in the State of North Carolina, and must be in good standing with that regulatory agency: Attorneys.

Following the amendment to the Cherokee Code in April 2006, Mr. Saunooke's application for membership in the Bar of the Cherokee Courts was denied under C.C. § 87-1.

In May 2006, C.C. § 7-5(c) was amended to read as follows:

The Supreme Court shall have the power to establish written rules for the Judicial Branch, including qualifications to practice law, provided such rules are consistent with law. No person shall be permitted to practice law in any court of the Judicial Branch unless that person has a license to practice law from the State of North Carolina, or *that person is an enrolled member licensed from another state.*

(Emphasis added.)

In December 2006, C.C. § 87-1(5) was amended to read:

Except as otherwise provided in Tribal law, the following professionals, in order to practice their profession within the territory of the Eastern Band, must have a current license issued by the appropriate state regulatory agency authorizing them to practice their profession in the State of North Carolina, and must be in good standing with that regulatory agency: Attorneys.

(Emphasis added.)

In February 2007, Mr. Saunooke's application for membership in the Bar of the Cherokee Courts was granted under C.C. § 7-5(c) as an enrolled member licensed to practice law in another state, not North Carolina.

Thereafter, the Tribal Council ratified Ordinance 403 (2008) on September 4, 2008 and it became effective upon being signed into law by the Principal Chief on September 10, 2008. The language of Ordinance 403 (2008) stated "Tribal Council hereby directs that any attorney practicing law in the Cherokee Tribal Court System must have a valid North Carolina law license." It further provided that "any legislation in conflict with this requirement is hereby rescinded in its entirety." (EBCI Ord. 403 (2008).)

Following the enactment of Ordinance 403 (2008), the lower court, with its judges sitting together, utilizing its own inherent authority summoned Mr. Saunooke to a hearing on the applicability of Ordinance 403 (2008) to his membership in the Bar of the Cherokee Court. The lower court determined that Ordinance 403 (2008) had no effect or applicability to Mr. Saunooke's membership in the Bar of this Court as

the court has the supervisory authority over all attorneys who practice before it and the inherent authority to determine the question presented. (*Memorandum Order*, M-08-01, October 6, 2008).

In the year 2010, this Court promulgated Local Rules of Practice and Procedure that included Local Rule ("L.R.") § 83.1(b) that requires that "to be eligible for admission to and continuing membership in the Bar of the Cherokee Court, a person must be admitted to the practice of law in North Carolina and in good standing with the State Bar of North Carolina." Following, in March 2011, Chief Justice William Boyum issued an Order of the Supreme Court dated March 31, 2011, directing the lower court to take cognizance of the bar membership issue relating to Mr. Saunooke's membership in the Bar of this Court in light of the provisions of Local Rule § 83. The trial court judges sitting together issued an Order adjudging that "the membership of Robert Osley Saunooke in the Bar of this Court had been TERMINATED on this date as a result of the implementation of LR 83(b) through the rule making authority of the Supreme Court." (*Omnibus Memorandum Order*, CR-06-668, *et al.*, April 26, 2011).

Since having his membership in the Bar of the Cherokee Court terminated in April 2011, Mr. Saunooke has continued to be admitted to appear *pro hac vice* in cases before the Cherokee Courts. In addition, Mr. Saunooke has also continued to be permitted to appear before the Tribal Council and Election Board.

When matters arising from the preliminary stages of the Tribal Council impeachment proceedings were filed in the Tribal Court in case 17-CV-168, the court granted Mr. Saunooke's Motion for *Pro Hac Vice* on April 19, 2018, without any objection from any of the parties or the Attorney General. Mr. Saunooke was associated with Mr. Chris Siewers who is a member of the Bar of the Cherokee Court and licensed to practice law in North Carolina. Mr. Siewers was hired by the Tribal Council under Resolution No. 502 (2017) to represent that body in impeachment proceedings. Upon resolution of the initial actions before the Cherokee Courts, Mr. Saunooke and Mr. Siewers continued their representation of the Tribal Council in impeachment proceedings before the Tribal Council from May 22-25, 2018.

During the pendency of case 17-CV-168, Mr. Saunooke represented another client before the Board of Elections in September 21, 2017. Upon appeal of the decision of the Election Board to the Supreme Court, this Court granted Mr. Saunooke's request to appear before this Court *pro hac vice* while reserving any questions regarding Mr. Saunooke's prior appearance before the Board of Elections. *Order on Motion for Pro Hac Vice*, 17-CSC-05 (October 4, 2018).

The Tribe's Attorney General prior to his resignation submitted a letter dated September 22, 2017, to the Cherokee Court that Mr. Saunooke's appearance on behalf of clients before the Board of Elections on September 21, 2017, and before the Tribal Council from May 22-25, 2017, were "a clear violation of the *pro hac*

vice order under Local Rule 83.1 (d) and Cherokee Code § 87-1 (a)(5) which is punishable as a misdemeanor under C.C. § 87-2 with a fine up to \$5,000.00 and imprisonment for up to one year or both." (Atty. Gen. Danny E. Davis Letter to Hon. Thomas Cochran). Chief Judge Thomas Cochran assigned the matter to Judge Sharon Tracey Barrett. Judge Barrett thereafter issued an *ex mero muto* Order to Show Cause on October 26, 2017. In the Order to Show Cause, the judge also issued an injunction against Appellant from the practice of law within the Tribe's jurisdiction pending further hearings on the matter. Pursuant to the terms of the Order to Show Cause, Appellant filed a responsive pleading and memo of law. No other party, including the Tribe's acting Attorney General, filed any documents or requested leave to file any objection or support for the allegations contained in the letter of former Attorney General Davis.

A hearing on the Order to Show Cause was held March 29, 2018, and Judge Barrett filed her decision, Order on Motion to Show Cause, on May 1, 2017 [sic]. The Order on Motion to Show Cause, among other things, revoked Judge Barrett's earlier Order on Motion for Pro Hac Vice thereby terminating Saunooke's appearance in case 17-CV-168 pending before the court; required that any future motions for *pro hac vice* admission to practice in the Cherokee Courts be accompanied by this same order; and, further Saunooke was "completely and entirely ENJOINED and RESTRAINED from practicing law in this jurisdiction, unless and until it is specifically permitted by a subsequent court order."

II. OPINION

The Court having reviewed the Order on Motion to Show Cause, the Appellant's Initial Brief, and Appellant's Notice of Filing of Supplemental Information submitted to the Court on Nov 28, 2018, vacates Judge Barrett's Order on Motion to Show Cause for reasons set out below.

Standard of Review

The granting or denial of a preliminary injunction and subsequent permanent injunction is reviewed under abuse of discretion standard and is not reviewed de novo. *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000); *Mitek Holdings, Inc. v. Arce Engag Co., Inc.*, 189 F.3d 840, 842 (11th Cir. 1999). The court's actions involving termination of Appellant's *pro hac vice* appearance and removal from the case 17-CV-168, and the restraining order on Appellant's practice of law in the Tribe's jurisdiction will be reviewed as an abuse of discretion standard.

The standard of review for all other aspects of this appeal, including Judge Barrett's analysis of the ordinances of the EBCI and the local rules of this court is *de novo*. See *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *Beeman v. TDI Managed Care Svcs.*, 449 F.3d 1035, 1038 (9th Cir. 2006); see also *Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) (reviewing de novo BIA's interpretation of

statute, but explaining that "[i]f, however, Congress has not directly addressed the exact issue in question, a reviewing court must defer to the agency's construction of the statute so long as it is reasonable." (Internal citations omitted).

Jurisdiction

Appellant argues on appeal that the court does not have jurisdiction over parties who appear in proceedings or hearings before the Tribal Council or the Election Board, but only has jurisdiction over cases and controversies before the Cherokee Courts. Appellant bases this argument on the fact that the Court was established by the Tribal Council and not under Constitutional grant of authority, and therefore the Court can only exercise the powers explicitly granted by the Tribal Council. The Court disagrees with the Appellant's conclusion that the Court is strictly limited to the explicit powers granted by the Tribal Council.

In April 2000, "Tribal Council ... created a Judicial Branch of government, and vested it with power ... " *EBCI v. Rattler*, 5 Cher. Rep. 17, 22, 2006 N.C. Cherokee Sup. Ct. LEXIS 8, 16 (2006); see also C.C. §§ 7-1 through 7-3. Tribal Council's express vesting of the judicial power in the Judicial Branch in C.C. Sec. 7-3(a) **"to interpret and apply the Charter, laws, customs, and traditions of the Eastern Band of Cherokee Indians"** and the express vesting of jurisdiction to the Judicial Branch in C.C. § 7-2(a) over "all persons, activities, and property within the territory of the Eastern Band" has led this Court to recognize for many years that "[t]he Judicial Branch of Tribal government is a co-equal branch of government alongside the Executive and Legislative branches." *EBCI v. Rattler*, at 16. (Emphasis added.)

The Tribal Council's express vesting of judicial and jurisdictional powers in the Tribe's Judicial Branch necessarily acknowledges the inherent powers of its courts to perform its judicial functions, unless specific inherent powers are restricted or removed under law.

Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has powers reasonably required to act as an efficient court.

Jim R. Carrigan, *Inherent Powers and Finance*, Trial Magazine 7, no. 6, p. 22 (1971). The inherent powers of the judicial branch are the powers that are "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. The NC. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694; 696 (1987); see *State v. Rorie*, 348 N.C. 266, 270, 500 S.E.2d 77, 80 (1998).

Appellant's jurisdictional challenge is also without merit. The express language of C.C. § 7.2(a) grants the Judicial Branch broad jurisdiction over "all persons, activities, and property within the territory of the Eastern Band." Tribal law requires that "except as otherwise provided in Tribal Law" attorneys practicing law in this jurisdiction must be licensed by the state of NC. See C.C. § 87-1. Appellant's "activity" of practicing law before the Tribal Council or the Election Board is within the jurisdiction of the Cherokee Courts.

Moreover, Appellant consented to the civil jurisdiction of the Cherokee Courts in cases 17-CV-168 and 17-SC-05. As a condition precedent to being granted *pro hac vice* admission to practice, Appellant agreed "that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the Orders and amenable to the disciplinary action and the civil jurisdiction for the Cherokee Courts ... in all respect". C.C. § 7.5(d)3. Appellant's practice of law before the Tribal Council impeachment proceedings during May 22-25, 2018 was essentially connected to the matters brought by Appellant in 17-CV-168. In fact, Appellant's practice of law before the Election Board on September 21, 2018, was specifically referenced and reserved in the order granting Appellant's admission *pro hac vice* to practice before the Court in 18-SC-05. Therefore, the court did not err in exercising its jurisdiction when it issued to Saunooke the October 26, 2017 *ex mero muto* Order to Show Cause.

Authority To Practice Law Without A License

Appellant's argument that the alleged violation of practicing law before the Tribal Council is unreviewable because it falls within the scope of the political question doctrine encompassing the impeachment proceedings is misplaced. The same is true for the allegation made by former Attorney General Davis that Appellant violated the court's order granting admission *pro hac vice* in 17-CV-168 when he appeared before the Tribal Council and the Election Board in contravention of Local Rule ("LR") § 83.1(d).

The Cherokee Supreme Court has rule-making authority to govern the practice of law in the judicial branch under C.C. § 7.5(c):

The Supreme Court shall have the power to establish written rules for the Judicial Branch, including qualifications to practice law, provided such rules are consistent with law. No person shall be permitted to practice law in any court of the Judicial Branch unless that person has a valid North Carolina law license.

Under C.C. § 7.5(c), the Cherokee Supreme court adopted Local Rules ("LR") 83.1 for the limited practice of law by attorneys licensed in other states. However, LR 83.1 is limited to the practice of law in the courts, and doesn't extend to the Election Board or the Tribal Council.

LR 83.1 – Attorneys

....

(d) Limited Practice of Out-of-State Attorneys

Any attorney domiciled in another state, and regularly admitted to practice in the Courts of record of and in good standing in that state, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the Cherokee Courts, may, on motion, be *admitted to practice in that forum* for the sole purpose of appearing for a client in the proceeding.... (emphasis added.)

In addition, an attorney licensed in another state seeking admission to practice *pro hac vice* in the Cherokee Courts is required to associate and appear with a licensed NC attorney who is a resident of this State, duly admitted to the practice in the General court of Justice of North Carolina and the Cherokee Courts. §§7.5(d)(4).

There is nothing in the Cherokee Code that prohibits a non-NC licensed attorney from practicing law in the executive or legislative branches of the Eastern Band of Cherokee Indians where it is otherwise permitted by law.

Cherokee Code § 87-1 states the law in regard to the license required to practice law within the jurisdiction of the tribe: “(a) *Except as otherwise provided by Tribal law . . . [lawyers] must have a current license issued by the appropriate state regulatory agency authorizing them to practice their profession in the State of North Carolina.*” (Emphasis added).

A review of the Cherokee Code shows that the Cherokee Code is silent as to whether and under what terms a Tribal administrative agency may grant a limited admission to practice before that agency of a non-NC licensed attorney who has been hired to represent clients before that agency. Whereas, North Carolina law specifically allows administrative agencies and specific commissions to grant, on motion, a request for admission to practice before that agency or commission by a non-NC licensed attorney who has associated with an attorney licensed in North Carolina and has agreed to be subject to the civil jurisdiction of the court among other requirements. See N.C. Gen. Stat. § 84-4.1.

Appellant argues that he was authorized to practice law before the Tribal Council on May 22-25, 2018 and the Election Board on September 22, 2018. Therefore, the Court reviewed the record and agrees that under tribal customary law, Appellant was authorized to practice before the Tribal Council and the Election Board.

Tribal Council passed Resolution No. 502 (2017) expressly authorizing the Tribal Council to hire a Special Impeachment Prosecutor. The Tribal Council hired Chris Siewers, a NC licensed attorney, under this resolution. According to then Tribal Council Chairman Dennis Taylor, Mr. Saunooke was also hired to assist Mr. Siewers as Special Impeachment Prosecutor under authority and approval of the Tribal Council. (Taylor Aff. ¶7). The Court also takes judicial notice of the fact that the

Tribal Council hired non-NC licensed attorneys, including Mr. Saunooke and other non-tribal member attorneys, as counsel in impeachment proceedings in 2006. (Taylor Aff. ¶ 3-4). Therefore, the Court finds that Appellant did not violate C.C. § 87-1(a)(5) when practicing law before Tribal Council on May 22-25, 2018 as Tribal Council knowingly approved the hiring of Appellant under Tribal customary law.

Appellant argues that his practice of law in front of the Election Board on September 21, 2017 was not a violation of C.C. § 87-1(a)(5), but rather that he was authorized by the Tribal Election Board to engage in the practice of law before the Election Board. This Court has held that in accordance with the Tribal Charter and C.C. § 161, the Election Board possesses all authority to administer elections, investigate, hold hearings and resolve protests involving election disputes. *Crowe v. EBCI Board of Elections*, 3 Cher. Rep 78, 2003 WL 25902442 (Eastern Cherokee S. Ct.).

The Cherokee Election Code § 161-16(e) states that “[a]ll persons shall have the right to have legal counsel represent them at the hearing.” According to the Chair of the Election Board Denise Ballard, “The Election Board does not limit the term ‘legal representation’ solely to attorneys licensed to practice by the State of North Carolina.” (Ballard Aff. ¶ 5). Mr. Saunooke requested permission of the Election Board to represent his client before that board and the Election Board granted its permission and approval. (Ballard Aff. ¶ 7). Further, the attorney representing the Election Board during the proceeding “did not object or have any issue with Mr. Saunooke’s appearance on behalf of Mr. Rose.” (Ballard Aff. ¶ 9).

Further, Appellant argued that it is Tribal customary practice of the Election Board to permit non-lawyer tribal members to represent candidates before Election Board hearings and provided the Court with names of dates of tribal members who have represented candidates without the benefit of a law license. According to the Chair of the Election Board, “the Election Board permits any person to act as a spokesperson or legal representative of anyone involved in an Election Board Hearing.” (Ballard Aff. ¶ 6). This Court takes judicial notice of tribal customary law that permits the Election Board to allow non-NC law licensed individuals to represent candidates for office before the election board based on tribal customary practice.

Based on the above, this Court finds that the trial court committed legal error when it found that Appellant was engaged in the unauthorized practice of law in violation of C.C. § 87-1. Appellant had authority under Tribal common and customary law to practice law before the Tribal Council and the Election Board. Therefore, the court erred when revoking Appellant’s admission to practice *pro hac vice* before the Cherokee Courts in 17-CV-168 and 17-CSC-05 for violating LR 83.1(d).

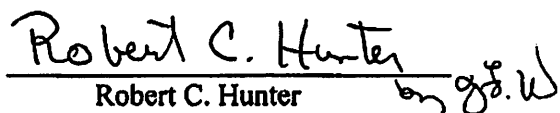
The Court recommends the Tribal Council consider amending the Cherokee Code to expressly set out in the code the authority of specific agencies or boards to permit individuals representing other parties to appear before them and to clarify for the public what those representatives appearing before boards or agencies have to do,

including any pre-requisites for obtaining permission to appear before boards or agencies, for example, submitting to the civil jurisdiction of the court, associating with a NC-licensed attorney who is a member of the Cherokee Court Bar, and any other requirements that the non-attorney or non-licensed attorney may need to do so as not to be in violation of C.C. § 87.1.

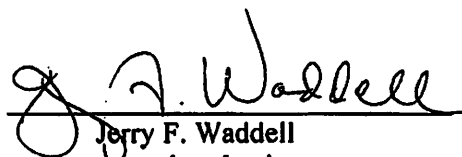
It is hereby ordered that the Order on Motion to Show Cause is vacated.



Brenda Toineeta Pipestem
Presiding Chief Justice

 on J.F.W.

Robert C. Hunter
Associate Justice



Jerry F. Waddell
Associate Justice,
by designation