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Opinion No. 05-066

Tennessee Commission on Indian Affairs Tribal Recognition Criteria

QUESTION

The Cherokee of Lawrence County filed a petition for recognition with the Tennessee Commission on Indian Affairs (Commission) in 2000. That Commission was terminated under the “Sunset Laws” in 2002. Tenn. Code Ann. §§ 4-29-112, -222. The current Commission that was created in 2003 passed a resolution on December 4, 2004, that will require a tribe to have maintained a continuous state-tribe relationship since 1796 to be recognized by the State of Tennessee. Will the Cherokee of Lawrence County be grandfathered under the tribal recognition criteria of the previous Commission, or will they be subject to the criteria set forth in the December 4, 2004 resolution?

OPINION

The tribal recognition criteria of the previous Commission are no longer in effect, and, therefore, the Cherokee of Lawrence County will be subject to whatever criteria the current Commission will develop in the future. That being said, the Cherokee of Lawrence County are not subject to the criteria set forth in the December 4, 2004, resolution because the recognition criteria under Tenn. Code Ann. § 4-34-103(6) have to be established through rulemaking under the Uniform Administrative Procedures Act (UAPA).

ANALYSIS

In 2003, the Legislature charged the current Commission with establishing a procedure for tribal recognition pursuant to Tenn. Code Ann. § 4-34-103(6). The statute directed the Commission to:

[E]stablish appropriate procedures to provide for legal recognition by the state of presently unrecognized tribes, nations, groups, communities or individuals, and to provide for official state recognition by the commission of such[.]

The previous Commission had a similar charge and established recognition criteria and procedures for Native American Indian nations, tribes, bands, organizations, and individuals through the promulgation of rules and regulations under the UAPA. *See* Tenn. Comp. R. and Reg., ch. 0785-1

(1990). The previous Commission was terminated under the “Sunset Laws” on June 30, 2001. *See* Tenn. Code Ann. §§ 4-29-112, 4-29-222. The Cherokee of Lawrence County presumably submitted an application for recognition under these rules in 2000, but the previous Commission did not act upon the application before it was disbanded.

As previously stated, the former Commission terminated on June 30, 2001, but the Commission’s rules remained in effect until June 30, 2002. Tenn. Code Ann. §§ 4-5-226 and 4-29-112 provide that the rules expire upon completion of the one-year wind-up period for certain governmental entities.

(b) (1) Notwithstanding any other provision of law to the contrary, unless legislation is enacted to delete the expiration date provided by this subsection, each permanent rule, which does not expire under the provisions of subsection (a), shall expire on the day provided in chapter 29, part 2 of this title for termination of the agency which promulgated such rule; provided, that if such agency continues in existence pursuant to § 4-29-112, such agency rule shall expire upon completion of such wind-up period. Tenn. Code Ann. § 4-5-226

and

Upon the termination of any governmental entity under the provisions of this chapter, it shall continue in existence until June 30 of the next succeeding calendar year for the purpose of winding up its affairs. During that period, termination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity. When the wind-up period expires, the governmental entity shall cease all activities. Tenn. Code Ann. § 4-29-112

In 2003 the Legislature reenacted the Commission under Acts 2003, ch. 344, that went into effect on June 13, 2003. *See* Tenn. Code Ann. § 4-34-101. Acts 2003, ch. 344, § 11(c)(3) provided, in part, that all rules and regulations promulgated by the previous Commission prior to and in effect on the effective date of legislation would remain in force and effect. More specifically, it states as follows:

(3) All rules, regulations, policies, orders and decisions promulgated or issued by the Tennessee commission of Indian affairs prior to, and in effect on June 13, 2003 shall remain in force and effect and shall be administered and enforced by the Tennessee commission of Indian affairs created by this act until duly amended, repealed, expired, modified or superseded.

The former Commission’s rules were not in effect on June 13, 2003, because they had expired on June 30, 2002. Therefore, the recognition criteria established by the former Commission are not in effect under Acts 2003, ch. 344, §11(c)(3). The current Commission must promulgate new rules under the UAPA to establish procedures for legal recognition of tribes, nations, groups, communities, or individuals and to provide for official state recognition by the Commission of such.

Because there are no recognition criteria currently in effect for the reasons stated, above, the Cherokee of Lawrence County will be subject to the new criteria when they are established by the current Commission.

Finally, it is this Office's understanding that the current Commission repealed its December 4, 2004, resolution on tribal recognition at the March 12, 2005, meeting and passed another resolution adopting the recognition criteria set forth by the previous Commission under Tenn. Comp. R. and Reg., ch. 0785-1 (1990) until it promulgates new rules. Mere resolutions do not meet the requirements set forth in Tenn. Code Ann. § 4-34-103(6), and, therefore, the Cherokee of Lawrence County and any other group seeking recognition are not subject to these resolutions as recognition criteria. The current Commission must promulgate rules under the UAPA in order to establish recognition criteria and procedures.

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