



February 1, 2019

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**OPINIONS OF THE ATTORNEY GENERAL
OF THE OSAGE NATION
ONAG-2019-01¹**

QUESTIONS SUBMITTED BY: The Honorable Geoffrey M. Standing Bear, Principal Chief of the Osage Nation.

This Office has received your request for an Official Attorney General opinion regarding job descriptions contained in the Osage Nation Workforce Pay for Performance Act.

To which you ask:

May the qualifications, duties, responsibilities, and job descriptions of employment positions in the Human Resource Department which are defined in the Osage Nation Workforce Pay for Performance Act be updated or changed as the Executive Branch deems appropriate even if they are different than what appears in the Osage Nation Workforce Pay for Performance Act?

I. SHORT ANSWER

Yes. The Supreme Court struck down the job qualifications and job duties for positions within the Human Resources Department contained in the Osage Nation Workforce Pay for Performance Act as a violation of the separation of powers provision of the Constitution. Therefore, the Executive Branch may designate the daily operational duties of Human Resources Department personnel as it sees fit – free of the restrictions contained in the Osage Nation Workforce Pay for Performance Act.

¹ NOTICE: This opinion is subject to formal revision before official publication. Readers are requested to notify the Office of the Attorney General using the header information, or at AttorneyGeneralOffice@osagenation-nsn.gov, of any typographical or other formal errors, so that corrections may be made prior to official publication.

II. DISCUSSION

In your Executive Memorandum requesting our opinion, you refer to two Congressional bills, specifically ONCA 10-85 and ONCA 15-100. The bills created and amended the Osage Nation Workforce Pay for Performance Act (“Pay for Performance Act”), codified at 19 ONC § 3-101, *et seq.* ONCA 10-85 formed the Pay for Performance Act and ONCA 15-100 amended the Act by adding the Human Resource Department job qualifications and job duties at section 3-104(B) – the sections in question here. However, in certain points of your Executive Memorandum, you discuss the bills as existing separate and independent from the law the bills created and amended.² For clarification, we are discussing the codified statute, as the bills are now merged to make one law. *See*, <https://osage.nation.codes/ONC/19-3>.

The Supreme Court in *Standing Bear v. Whitehorn*, SCO-2015-01, for all intents and purposes, removed Section 3-104(B) of the Pay for Performance Act. The Supreme Court specifically found “sections 1(B)(1), 1(B)(2) and 1(B)(3) of ONCA 15-100, which establish job qualifications and job duties for positions within the Human Resources Department, unconstitutional.” *Whitehorn* at 18. Further, “Legislating job qualifications and job descriptions goes beyond establishing an employment system.” *Whitehorn* at 17. And lastly, “Congress’ establishment of such qualifications, duties and responsibilities encroaches into the Executive’s constitutionally designated powers to designate the daily operational duties of persons in its employ in the Human Resources Department.” *Whitehorn* at 17.

Therefore, the Supreme Court “struck” the language in sections 1(B)(1), 1(B)(2) and 1(B)(3) of ONCA 15-100. This section is codified at 19 ONC § 3-104(B). This means the Pay for Performance Act can be read as if Section 3-104(B) does not exist – even though the section has not been physically removed from the Act. The job qualifications and job duties listed in the Pay for Performance Act at Section 3-104(B) for the Director of Human Resources, Benefits Analyst, and Compensation Analyst are unconstitutional, held for naught, and have no force or effect. And, the Executive Branch has the authority to update and modify the qualifications, duties,

²E.g., “The Osage Nation Congress passed ONCA 15-100 which contained much of the same language as ONCA 10-85 so it stands to reason, the language in ONCA 15-100 which was declared unconstitutional would be just as unconstitutional if it appears in another bill or law;” and “Provisions of the Osage Nation Workforce Pay for Performance Act which were struck down as unconstitutional still appear in the Osage Nation Code at 19 ONC §3-101 *et seq.* and ONCA 10-85.”, *Request for Attorney General Opinion on Constitutionality of Osage Nation Code 19 ONC §3-104*, Executive Memorandum, Dec. 20, 2018.

responsibilities, and job descriptions of the employment positions within the Human Resource Department.

III. CONCLUSION

It is, therefore, the official opinion of the Attorney General, that:

The Executive Branch may Constitutionally designate the qualifications, duties, responsibilities, and job descriptions of employment positions within the Human Resources Department, no matter if the job qualifications, duties, and positions are listed in the Osage Nation Workforce Pay for Performance Act or underlying bills, as the Supreme Court held the legislative establishment job qualifications and duties within the Human Resources Department unconstitutional.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Clint Patterson", is written over a horizontal line.

Clint Patterson,
1st Asst. Attorney General