

No. SC-CV-03-15
SUPREME COURT OF THE NAVAJO NATION

Eldon Tsosie,
Petitioner/Appellant,

v.

Arizona Public Service,
Respondent/Appellee.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and BEGAY, M., Associate Justice by Designation.

An appeal of a decision of the Navajo Nation Labor Commission concerning Cause No. NNLC 2012-55, Chairman Casey Watchman, presiding.

David R. Jordan, Gallup, New Mexico for Appellant; John. F. Lomax, Phoenix, Arizona, for Appellee.

This matter concerns the jurisdiction of the Navajo Nation Labor Commission over employment matters of Arizona Public Service.

I

Appellant Eldon Tsosie (“Tsosie”) was terminated by Appellee Arizona Public Service (“APS”) from his employment at the Four Corners Power Plant (“Four Corners”). Four Corners is a coal-fired generating plant located on trust land within the Navajo Reservation. A consortium of power companies, including APS, owns Four Corners. APS operates and manages Four Corners. The Navajo Nation (“Nation”) and APS first entered into a lease granting APS the right to use Navajo land for the development of Four Corners in 1960. In 1966, the Navajo Nation and APS amended the lease to expand the size of Four Corners and to bring in additional participants.

The 1960 lease contained a Non-Regulation Covenant, which was replaced in 1966 using substantially similar language, providing:

The Tribe covenants that, other than expressly set out in the New Lease [the 1966 amendments] or in the Amended Original Lease [the 1960 Lease], respectively, it will not directly or indirectly regulate or attempt to regulate the Lessees [APS and the other power participants] under the New Lease or Arizona [APS] under the Amended Original Lease or the construction, maintenance or operation of the Enlarged Four Corners Generating Station and the transmission systems of the Lessees and Arizona, or their rates, charges, operating practices, procedures, safety rules, or other policies or practices, or their sales of power...

Order Granting Motion to Dismiss (citing Supplemental and Additional Indenture of Lease dated July 21, 1966, at §22).

The Nation and APS amended the lease again in 1985. In 2010 and 2011, the parties yet again amended the lease to facilitate the termination of one of the participating power companies. The Navajo Nation Council (“the Council”) approved those amendments on February 24, 2011, and the Secretary of the Interior approved on December 5, 2011. In all these amendments, the parties reaffirmed the Non-Regulation Covenant.

In the 2011 amendments, the parties agreed to replace the employment preference provisions from the 1960s with the Four Corners Generating Preference Plan (“Preference Plan”) for hiring Native American Indians. The Preference Plan is a five-page plan “giving preference in employment to Indians.” It set out provisions on selection, goals, training, recruiting, advertising, and dispute resolution. As to dispute resolution, the Preference Plan requires that any employment concerns at Four Corners must be resolved by the Advisory Committee, formed pursuant to the lease and consisting of at least two members of the Navajo Nation government.

Tsosie filed a Complaint with the Navajo Nation Labor Commission (“NNLC”) on July 12, 2012 claiming APS terminated his employment at Four Corners in violation of the Navajo Preference in Employment Act (“NPEA”). Among other things, the NPEA requires that employers provide “just cause” when terminating employees. 15 N.N.C. § 604(B)(8). APS filed

a Motion to Dismiss on May 8, 2013. Tsosie responded to the Motion on June 3, 2013 with APS filing a reply on July 2, 2013. Settlement attempts in the months thereafter were unsuccessful. After a hearing on APS's Motion to Dismiss, the NNLC granted the motion and dismissed the Complaint on January 13, 2015.

In its decision, the NNLC determined that it could not hear Tsosie's grievance. Although it discussed *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996), the NNLC concluded that the Council had the authority to approve the leases and amendments, including the Preference Plan, establishing an alternative dispute process. Relying on the Navajo Fundamental Law in *Thinn v. Navajo Generating Station*, 9 Nav. R. 140 (Nav. Sup. Ct. 2007), the NNLC explained that "the Council as leaders have a duty to find solutions to bring viable business into the Nation and support Navajo employment goals through agreed upon labor and employment procedures and dispute resolution process." *Order Granting Motion to Dismiss* at 9, NNLC 2012-055, January 13, 2015.

Tsosie filed an appeal on February 3, 2015, seeking a reversal of the NNLC's decision. APS filed a conditional cross appeal, which was withdrawn at the filing of its response brief. The Court held oral argument on February 7, 2020 in Window Rock, Arizona.

II

The issue is whether the NNLC appropriately concluded it cannot hear Tsosie's Complaint under the agreement of the leases and amendments approved by the Council that employment disputes would be resolved as provided in the Preference Plan.

III

The Court addresses the issue of whether the NNLC abused its discretion when it dismissed Tsosie's Complaint. Tsosie argues that the NNLC erred when it refused to follow

Thinn by dismissing his Complaint. Tsosie believes that the case of *Aspaas* was wrongly decided in federal court, and that it should not govern the Complaint he filed with the NNLC after *Thinn*. Tsosie also argues the federal district court in *Salt River Project Agr. Imp. and Power Dist. ("SRP") v. Lee*, No. CV 08-8028-PCT-JAT, 2010 WL 4977621 (D. Ariz. December 2, 2010) rev'd, 672 F.3d 1176 (9th Cir. 2012), rejected *Aspaas* on the ground that the Navajo Nation was a necessary party that cannot be joined. In furthering his argument, Tsosie states that this Court in *Thinn* was clear in that the Council does not have the power to waive its regulatory power and that it may not delegate the regulation of Navajo employment to a Non-Navajo entity as provided in the Preference Plan.

APS, on the other hand, asserts that the NNLC did not err in its decision because *Aspaas* remains binding precedent for Four Corners and Tsosie's reliance on *Thinn* and *SRP v. Lee* is misguided.

The Court disagrees with both parties. We disagree with Tsosie's reading of the conclusion in *Thinn* and his discussion of Navajo Fundamental Law. Tsosie also raised 15 N.N.C. § 609(A) (NPEA prevailing over lease agreements) at oral argument, but failed to preserve the issue for appeal. As a result, this Court declines to address this statutory provision because it was an issue raised for the first time at oral argument. We also disagree that *SRP v. Lee* is applicable because it was reversed by the Ninth Circuit in 672 F.3d 1176 (9th Cir. 2012). We also disagree with APS because the *Aspaas* decision did not consider the analysis of Navajo law, as noted in *Thinn*. Therefore, this Court will not discuss the applicability or governability of *Aspaas*. Although we are in agreement that the NNLC was not the proper audience for the Complaint, we believe the Navajo Fundamental Law in *Thinn*, as relied upon by the NNLC, governs the outcome of the present case, not *Aspaas*.

The Thinn case involved consolidated claims by former employees of SRP and its contractor at the Navajo Generating Station, who filed charges claiming they were terminated in violation of the NPEA. Relying on *Aspaas*, the NNLC dismissed their claims. On appeal, this Court reversed the NNLC's decision rejecting claims that the terms of the lease between the Navajo Nation and SRP concerning the Navajo Generating Station waived the Nation's right to regulate employment relations pursuant to the NPEA. The Court determined - as to that lease - that a waiver is inconsistent with the Navajo principles of leadership responsibility to the people stating, "leaders never lay down this trust and the laws because a leader is taught that they must always find the solution, for it is always available." 9 Nav. R. at 144. The Court explained that "as demonstrated in the design of the sacred wedding basket, a leader through adherence to the laws, the analysis of the stories of the Diné journey, and a positive approach will find a solution (*bi'q'iidzá*) around, through, or over that which confronts the people." *Id.*

In the case at hand, the NNLC distinguished the *Thinn* case from the facts in this case. The Four Corners lease is an entirely different lease from the Navajo Generating Station lease in *Thinn*. This determination is supported by the NNLC's record. The Preference Plan, inserted into the lease, also distinguishes Four Corners from the Navajo Generating Station, and this Court's conclusion in *Thinn*. The five-page Preference Plan negotiated by the parties contemplated employment regulation in their discussions at the time of the lease amendments and created an alternative process to address employment disputes.

In its decision, the NNLC relied on the Navajo Fundamental Law in *Thinn* to conclude that the Council had the duty and authority to approve the lease and lease amendments with APS. This Court in *Thinn* discussed the duty of the Council to protect the rights of the tribe and its government because it is through the government that the people exercise self-governance. "The

government in turn must protect all persons within the Nation, through, among other things, regulating the relationship between employers and employees.” 9 Nav. R. at 143. With employment being central to living a good life, the duty and authority to legislate or regulate employment relationships cannot be delegated or handed over wholesale to a non-Navajo entity. *Id.* at 144.

The Navajo Fundamental Law in *Thinn* is relevant and applicable in the present case, not the conclusion as to Navajo Generating Station in *Thinn*. In *Thinn*, we explained the opening of the sacred wedding basket imparts that leadership must find a solution, for it is always available. “[A] leader through adherence to the laws, the analysis of the stories of the Diné journey, and a positive approach will find a solution (*bi’q’iidzá*) around, through, or over that which confronts the people.” 9 Nav. R. at 144. Under circumstances found in the *Thinn* case, this Court concluded that there was no unmistakable waiver in the lease and that such a waiver was inconsistent with Navajo principles of leadership. *Id.* Tsosie would have us ignore circumstances and blindly apply our legal conclusion in *Thinn* to all cases regardless of varying circumstances. We decline to do so because doing so would consume the teachings of the sacred wedding basket.

The potential closing of Four Corners is what confronted the Council in this case. Rather than terminating the lease and closing Four Corners, the Council found balance by approving an agreement to maintain employment and protect employees’ rights at Four Corners. Contrary to Tsosie’s oral argument that 15 N.N.C. § 609(A) prohibits such an agreement, the Council did not waive Navajo law, but approved an alternative process, the Preference Plan, in adherence with Navajo law, including that of the sacred wedding basket. In doing so, the Council through an agreement required APS to honor specific protections that provide employees with substantive


and procedural rights in an alternative process from the NNLC and with the involvement of Navajo representatives, an action which did not hand over the Nation's regulation whole sale. The Council found a viable solution to ensure the Four Corners' operation for jobs and economic development for the Navajo people.

The NNLC did not abuse its discretion when it dismissed Tsosie's complaint on grounds supported by Navajo Fundamental Law. The Court finds the NNLC appropriately dismissed Tsosie's Complaint.


IV

The NNLC's decision is hereby AFFIRMED.

Dated this 30th day of April, 2020.



Chief Justice



Associate Justice

Telephonically Approved by Hon. Malcolm Begay
Associate Justice