

No. SC-CV-15-18

SUPREME COURT OF THE NAVAJO NATION

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Austin C. Bahe,  
Petitioner,

v.

Navajo Nation Labor Commission,  
Respondent,

And Concerning,  
Navajo Engineering and Construction Authority,  
Real Party in Interest.

OPINION

Before, JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice and THOMPSON, C., Associate Justice by Designation.

Original action against the Navajo Nation Labor Commission concerning Cause No. NNLC-2017-034.

David R. Jordan, Gallup, New Mexico, for Petitioner; Jennifer Skeets, Office of the Legislative Counsel, Window Rock, Navajo Nation, for Respondent; and Albert Hale, Phoenix, Arizona, for Real Party in Interest.

Opinion issued by SHIRLEY, Associate Justice.

I

A Petition for Writ of Mandamus was filed on March 22, 2018 and this Court issued an alternative writ setting the matter for a hearing on May 23, 2018. This Court entered a ruling by granting the petition and issuing a Permanent Writ of Mandamus against the Navajo Nation Labor Commission (NNLC) pursuant to 7 N.N.C § 303(C) and, further, stated that a written memorandum decision would follow. This decision follows.

In reviewing the pleadings and after hearing oral arguments, the Court finds that the Real Party in Interest, Navajo Engineering and Construction Authority, had terminated Austin C. Bahe

(Petitioner), who then filed a formal charge with the Office of Navajo Labor Relations. On August 25, 2017, the Office of Navajo Labor Relations issued a Notice of Right to Sue to the Petitioner permitting the filing of a formal complaint. On October 18, 2017, the Petitioner filed a formal complaint with the NNLC and a first Notice of Hearing, dated October 26, 2017, set the matter for hearing on February 08, 2018. A second Notice of Hearing was then issued on February 02, 2018 rescheduling the hearing to August 22, 2018. The rescheduling was done pursuant to the Chief Legislative Counsel's memorandum, dated September 30, 2017. The memorandum advised that, in view of the effective date of October 01, 2017 in CJY-42-16, no hearing would occur until the five (5) Navajo Nation Labor Commissioners were all appointed. To date, only two appointments have been made and three positions continue to remain unfilled. As a result, complaints filed with NNLC have not been adjudicated by the NNLC because of the delayed appointments by the Health, Education and Human Services Committee and the Navajo Nation President.

By law, appointments to the NNLC are made pursuant to 15 N.N.C § 303 of the Navajo Preference in Employment Act (NPEA). The most recent amendments to 15 N.N.C. § 303 under Resolution CJY-42-16 and Law and Order's Resolution LOCMY-01-14 caused confusion about the term of service for the previously appointed NNLC members and the new members. Because of the different interpretations made to 15 N.N.C. § 303, the NNLC has not held any hearings. Thus, the Petitioner filed a Petition for Writ of Mandamus for this Court to mandate the NNLC to adjudicate his complaint pursuant to 15 N.N.C. § 611(A) by deciding the status of 15 N.N.C § 303(D) of the NPEA.

## II

The Court concludes that the Petitioner has no plain, speedy and adequate remedy at law. "The Supreme Court shall have the power to issue any writs or orders: . . . C. To cause a Court to

act where such Court fails or refuses to act within its jurisdiction.” 7 N.N.C. § 303(C). “A writ of mandamus will be issued to compel a [respondent tribunal] to perform a judicial duty required by law, only if there is no plain, speedy and adequate remedy at law. *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986). The NNLC has scheduled and re-scheduled a hearing on the merits of Petitioner’s complaint with no certainty that a hearing under 15 N.N.C. § 611(A) will be held because of the delayed appointments of commission members. Respondent asserts it has met its obligation under § 611(A), which states “the Commission shall schedule a hearing within 60 days of the filing of a written complaint by a petitioner with the Commission.” Respondent cites this Court’s previous holding that § 611(A) requires only that a hearing be scheduled and not be held. *E.g., Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 36 (Nav. Sup. Ct. 2000). Though the NNLC’s duty under § 611(A) is argued, it is the NNLC’s purpose under § 302 and its duties and responsibilities under § 304 that are decisive when considering the larger obligations to the Navajo people. Further, the Respondent relied on cases, which were decided under entirely different facts during a time when there was a full panel of the NNLC. Under the facts of this case, there is no fully appointed body of the NNLC, or quorum, due to the delayed appointments of its members causing a complete failure of the NNLC to act as authorized and directed to under § 304.

### III

The Court concludes that the Petitioner has met the requirements for a permanent writ of mandamus. “A writ of mandamus, pursuant to 7 N.T.C. § 303 [now at 7 N.N.C. § 303], is used to compel a lower court to perform existing duties within its jurisdiction. It is imperative to show that the petition initially show that 1) he/she has a legal right to have the particular act performed; 2) the respondent [decision maker] has a legal duty to perform the act; and 3) the respondent [decision

maker] failed or neglected to perform the act.” *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986); *In the Matter of A.P.*, 8 Nav. R. 671, 678 (Nav. Sup. Ct. 2005). The Commission is established to hear and adjudicate cases as the quasi-judicial hearing body under the Navajo Preference in Employment Act. 15 N.N.C. § 302(A). Due process is denied when the Commission fails to carry out its statutory duties under § 304. Here, when the Commission scheduled and rescheduled Petitioner’s hearings under 15 N.N.C. § 611(A), it failed to show that it performed its existing duties as specified in § 304 and its actions respected Petitioner’s right to due process.

The Navajo Nation Council established the NNLC to process and decide all formal complaints under the statutory structure of the NPEA. 15 N.N.C. § 302(C). Because of the authorization given to NNLC as a quasi-judicial body to hear and adjudicate employment cases, the NNLC must carry out these statutory duties. The NNLC has a fiduciary duty to the Navajo people to execute the trust the people have placed with them. See *Thinn v. Navajo Generating Station, Salt River Project*, 9 Nav. R. 140 (Nav. Sup. Ct. 2010). The NNLC is part of the Navajo Nation Government and we must not lose sight of the fact that the NNLC also works for and on behalf of the collective Navajo people in their role as *naat’aanii*. *Meadows v. Navajo Nation Labor Commission*, 9 Nav. R. 597, 601, (Nav. Sup. Ct. 2012). As a *naat’aanii*, it is a duty and an obligation to always work and seek a solution for the people, especially when the *ana’ hoot’i’* concerns one’s daily livelihood and requires an harmonious resolution. “Managing its administrative law system in a manner that ensure both access and due process is the sacred duty placed by the Council upon the Commission.” *Id.* Processing and deciding all complaints filed pursuant to fiduciary standards. *Id.* Therefore, it is the NNLC’s duty to have a system that ensures access by holding hearings for all litigants. The NNLC has a duty to adjudicate cases in the interest

of due process and must carry out its sacred duties to the people. Strict adherence to the NPEA and the due process protections of the Navajo Bill of Rights are demanded. *Id.* Here, the Court finds that the Petitioner has a legal right to have his complaint heard by the NNLC and the NNLC is legally bound by law to hear his complaint. Petitioner's filing of the complaint was done on October 18, 2017 and the first notice of hearing, dated October 26, 2017, set the matter for a hearing on February 8, 2018 pursuant to § 611(A). On February 02, 2018, a second Notice of Hearing was then issued rescheduling the hearing to August 22, 2018. Despite the statutory authorization and a mandatory duty to adjudicate cases, the NNLC failed to conduct the set hearing. As of October 01, 2017, the NNLC has not convened to hear any formal complaint that has been filed with the administrative hearing body.

#### IV

The Court concludes 15 N.N.C § 303(D) of the NPEA with its hold-over provision is in effect. Petitioner asserts that pursuant to the hold-over provision of 15 N.N.C § 303(D), the previously appointed Commission members continue to serve in their positions until his or her successor is appointed and that the amended provisions of 15 N.N.C § 303(A) and (B) as contained in CJY-42-16 did not change or rescind § 303(D). By taking this position, Petitioner believes that NNLC has the necessary commission members to convene and conduct a hearing to hear his complaint.

The NNLC was created by the Navajo Nation Council for the purpose of hearing and adjudicating cases as the quasi-judicial hearing body under the NPEA. 15 N.N.C § 302 (2008). The Navajo Nation Council established the composition and qualifications of the Commission at 15 N.N.C. § 303(A) and (B). These two provisions are the subject of contention by the parties.

In 2016, the Navajo Nation Council amended these two provisions which now read:

- A. Membership. The Commission shall consist of: (2) two members of appointed by Health, Education, and Human Services Committee of the Navajo Nation Council to be designated by that committee; and (3) three members appointed by the President of the Navajo Nation with the concurrence of the ~~Government Service~~ Naabik'iyati' Committee of the Navajo Nation Council.
- B. Commission Members Qualification: ~~The two members of the Human Services Committee and the three members of the Commission appointed by the President of the Navajo Nation shall be familiar with labor practices, Human resources and employment of the Navajo Nation. One appointed Member shall be a Navajo worker familiar with human resources and Employment practices. Neither the Executive Director of the Division Of Human Resources ("DHR"), the Director of the Division of Human Resources ("DHR"), the Directors of any department within DHR, nor any Person employed by DHR or its departments shall be eligible to serve as a Member of the Commission.~~

The five Commission members shall be 1) familiar with the Navajo Nation labor practices, human resources and employment; 2) member of the Navajo Nation Bar in good standing, and; 3) two Commission members shall be licensed to practice law in either Arizona, New Mexico, or Utah.

Resolution CJY-42-16 (July 21, 2016).

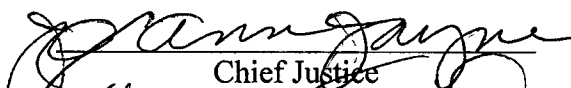
Respondent claims that prior to the passage of CJY-42-16, in 2014, the Law and Order Committee of the Navajo Nation Council amended 15 N.N.C § 303(D) and repealed the hold-over provision therein. However, in the passage of CJY-42-16 there is no inclusion of the purported language of LOCMY-01-14 when the Navajo Nation Council later amended the qualifications of members in CJY-42-16. Further, there was no underscore or overstrikes in LOCMY-01-14 as required by 2 N.N.C. § 164(D). Rather than recognize conflicting provisions of LOCMY-01-14 by a standing committee of the Navajo Nation Council, this Court recognizes the action of the full Council in the passage of CJY-42-16.


This Court notes that 15 N.N.C § 303(A) and (B) were the only changes in CJY-42-16. The provision of 15 N.N.C § 303(D) as it pertains to the Term of Office remained un-touched. The Court notes that when a legislator introduces a legislation, it must follow a certain format as

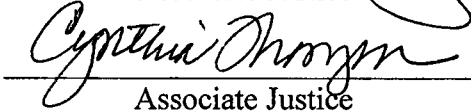
outlined in 2 N.N.C § 164 (as amended by Resolution CAP-10-11, May 11, 2011) before the legislature can take the matter under consideration. The Court takes judicial notice that it has been the practice of the legislature to underscore new proposed language and overstrike language proposed for deletion as required by 2 N.N.C. § 164(D). Thus, an action by the legislature is presumed to be a valid enactment. *Navajo Nation v. MacDonald*, 6 Nav. R. 463, 467 (W.R. Dist. Ct. May 17, 1989). The rationale given to the legislative body is that when they are carrying out their legislative act, it is done with much discussion and deliberation under the guiding principle of the best interest of the Navajo people. Despite the Respondent's argument that CJY-42-16 repealed the hold-over provision of § 303(D), Respondent failed to show the language was overstricken. This Court recognizes the validity of CJY-42-16 and, absence of any overstricken language of 15 N.N.C. § 303(D), it is still an operative provision. We hold that CJY-42-16 did not repeal the hold-over provision of 15 N.N.C. § 303(D). More specifically, the hold-over provision at 15 N.N.C. § 303(D) provides that "[E]ach member of the Commission shall serve a term of four years *and until his or her successor is appointed.*" (Emphasis added.) This provision permits previously appointed members to continue serving on the NNLC until such time a successor is appointed and confirmed. With two appointments made thus far and, in conjunction, with previously appointed members who continue to serve, the NNLC has a fully seated panel to meet and adjudicate employments cases. We, therefore, reject Respondent's argument that previously appointed members on the NNLC are no longer serving and that the Commission lacks a panel as a result of the effective date as contained in CJY-42-16. This Court opines that the NPEA amendments concerning qualifications and the hold-over provision under § 303(D) must be read together.

The Petition for Writ of Mandamus is hereby GRANTED. Recognizing previously seated Commissioners must serve until his or her successor is appointed, 15 N.N.C. § 303(D), the Court also ORDERS the Commission of previously appointed Commissioners and newly appointed Commissioners to hear and adjudicate cases without further delay. Furthermore, the Court ORDERS the Commission to re-schedule and conduct Petitioner Bahe's hearing before August 22, 2018.

Dated this 29 day of June, 2018.

  
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Chief Justice

  
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Associate Justice

  
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Associate Justice