

SUPREME COURT OF THE NAVAJO NATION

Archie Apachito,
Grievant-Appellee,

v.

Alamo Navajo School Board, Inc.,
Respondent-Appellant.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and TSINIGINE, T., Associate Justice.

Appeal from a decision of the Navajo Nation Labor Commission concerning Cause No. NNLC-2013-093, the Honorable Casey Watchman, Chairperson, presiding.

David Gomez, Santa Fe, New Mexico, for Appellant; Elsie Redbird, Albuquerque, New Mexico, for Appellee.

This case concerns an employment grievance and the decision by the Navajo Nation Labor Commission to defer to orders of protection issued by a court of the Navajo Nation to support its decision that an employer had no just cause to terminate an employee.

I

Appellant, Alamo Navajo School Board, Inc. ("ANSB"), suspended Appellee, Archie Apachito ("Apachito"), for twenty (20) days for engaging in a physical confrontation with a client at his place of work, the Alamo Community Wellness Center. Within a month of the suspension for this confrontation, Apachito got into an altercation with his elderly sister and her two daughters at the Alamo Chapter House ("Chapter House").

The ANSB Executive Director ("Executive Director") conducted an independent investigation and concluded that Apachito violated personnel policies which required employees

to avoid off-duty conduct that damages the public image or business reputation of the ANSB. The ANSB provided Apachito with a Notice of Intent to Terminate, which placed Apachito on suspension without pay. The basis for the Notice stemmed from Apachito's involvement in the altercation at the Chapter House along with the fact that said altercation occurred while Apachito was already on suspension. The ANSB said to Apachito, "you participated in a physical confrontation with three females, your behavior is chronic as this is not the first event that you had behaved and performed in such a manner." Notice of Intent to Terminate, at 4. Apachito was said to have violated off-duty performance standards, constituting just cause for suspension and termination.

Months after his suspension, Apachito filed Petitions for Domestic Abuse Protection Order under the Domestic Abuse Protection Act ("DAPA") against his sister and nieces. A domestic abuse protection hearing was held concerning the altercation at the Chapter House. After a 10-hour hearing, the Alamo Family Court ("Family Court") ruled, by a preponderance of the evidence, that it is more likely than not that an act of domestic abuse had occurred. The Family Court granted Apachito orders of protection restraining his nieces from threatening or committing acts of domestic or family violence, *inter alia*, against Apachito for three years. There was no order of protection issued against Apachito's sister.

The ANSB terminated Apachito. Apachito filed a complaint with the Navajo Nation Labor Commission ("NNLC"). An evidentiary hearing was held. Apachito requested the NNLC to recognize the orders of protection as *res judicata* but the NNLC denied the request. Instead, the NNLC gave "great deference" to the orders of protection and informed the parties that there would be no discussion about the altercation that took place at the Chapter House. The NNLC allowed the Executive Director to testify about his investigation. He testified that he spoke to

Apachito's sister and nieces, and took pictures of the chapter house to determine if Apachito could have exited the scene. Based on the facts of the investigation, the ANSB determined Apachito violated the ANSB Personnel Policies (2011), specifically Section 1.4. The ANSB personnel policies states:

Off-Duty Conduct: Employees shall avoid activities off-duty, which impair the employee's job performance, damage the public image or business reputation of ANSB, or create a conflict of interest, including but not limited to arrest or indictment on any charge, a finding of misconduct by another employee or by a tribunal or agency of any state, tribe, federal or local government.

Maintaining Job Fitness and Certification And Licensing: The employee shall maintain his/her physical and mental fitness to do his/her job and shall avoid activities, which reduce his/her effectiveness in performing it. Employees are required and responsible for maintaining all necessary licenses and certifications for any applicable continuing education necessary to retain such licensing or certification...failure to become properly certified or licensed are grounds for termination.

Following Appropriate Guidelines and Procedures: The employee shall follow the normal procedures established in Department, Divisions, and Business Office Manuals, Guidelines, and other directives concerning purchasing, reimbursements, timekeeping and payroll, travel and other routine ANSB business procedures, without seeking special treatment or privileges as an individual.

Effective Performance: ANSB employees shall strive to effectively perform their job functions and should recognize that a consistent failure to adequately perform is detrimental to the organization and to the Alamo Community.

The NNLC concluded that the ANSB failed to prove by a preponderance of the evidence that it had just cause to terminate Apachito as required by the Navajo Preference in Employment Act ("NPEA"). In its final judgment, the NNLC gave great deference to the Orders of Protection issued by the Family Court and found that "[the nieces] were the culprits at the July 2, 2012 Chapter House altercation" and that "[ANSB's] reliance on [Apachito's] involvement in that altercation to justify termination is incorrect." *Findings of Fact and Conclusions of Law, at 4-5.* The NNLC ordered the ANSB to reinstate Apachito to his former position, or an equivalent

position, and awarded back pay, and attorney costs. The NNLC denied Apachito's request for annual and sick leave pay out because "[Apachito] appears to have issues with anger management." *Id.* The ANSB filed an appeal on February 1, 2016.

The ANSB appeals the final judgment claiming the NNLC abused its discretion in giving great deference to the Orders of Protection when it concluded Apachito was not the culprit and the ANSB, thus, had no just cause to terminate Apachito. The ANSB also asserts the NNLC abused its discretion when it refused to hear testimony concerning the altercation at the Chapter House, depriving the ANSB of the right and opportunity to prove it complied with the NPEA, as required by the NPEA.

II

The issues on appeal are 1) whether the NNLC abused its discretion by giving deference to Orders of Protection issued pursuant to the Domestic Abuse Protection Act (DAPA) to find fault in individuals other than Apachito concerning the altercation that resulted in his suspension and termination and 2) whether there was just cause to suspend and terminate Apachito under the NPEA.

III

The ANSB argues the NNLC abused its discretion by giving great deference to the domestic violence protection orders in an employment grievance. The ANSB asserts that the DAPA is intended to protect persons from domestic violence while the NPEA protects Navajo Nation employment rights. The ANSB points out the Orders of Protection lack findings of facts in general and there are no specific findings within the order itself that Apachito's nieces were culprits nor that Apachito was not the culprit, as independently determined by the NNLC. The ANSB asserts by being denied the opportunity to provide testimony about the Chapter House

altercation as grounds for Apachito's termination, the NNLC failed to conduct the hearing in a fair and orderly manner, and extend to all parties the right to be heard as required pursuant to 15 N.N.C. § 611(C). The ANSB contends, the burden of proof was upon it, as an employer, to show compliance with the provisions of the NPEA, however, the NNLC did not give it the opportunity to be heard.

In response, Apachito contends the ANSB stipulated to enter the Orders of Protection into the record as evidence. Furthermore, Apachito asserts the ANSB did not object to Apachito's request that the NNLC accept the Findings of Facts, and the Family Court held a 10-hour domestic violence hearing regarding the altercation.

The NPEA provides that the employer shall not penalize, discipline, nor take adverse action against any employee without just cause. 15 N.N.C. § 604 (B)(8). An employer must show by preponderance of evidence that it complied with the NPEA. 15 N.N.C. § 611(B).

When Apachito filed his initial grievance, he challenged the adverse action taken by the ANSB. The NNLC looked at whether Apachito was terminated for just cause under NEPA, 15 N.N.C. § 604 (B)(8). Case laws specifies that "just cause" is broad and encompasses a wide range of employer justification for adverse action. The presence or absence of 'just cause' in a particular situation is a factual matter, which is particularly suited to specialized inquiry before the Commission." *Smith v. Red Mesa Unified School District No. 27.*, 7 Nav. R. 135, 138 (Nav. Sup. Ct. 1995). Pursuant to the NPEA, the responsibility to show just cause lies with the employer. When the ANSB issued its termination notice to Apachito, it had to comply with the NPEA by showing that there was just cause for the action it took.

In the process of the evidentiary hearing, the NNLC considered the altercation at the Chapter House through the Executive Director's testimony and determined that any action there

could not have impaired Apachito's job performance by their review of (giving deference to) the orders of protection. *Section 1.4, Off-Duty Conduct*. The NNLC further gave judicial notice to Family Court's protection orders that are based on the adjudicative facts it ascertained. The Family Court sat as the trier of fact, received testimonial evidence first-hand from the witnesses, and issued a protection order as provided by law under the Domestic Abuse and Protection Act, 9 N.N.C. § 1655(B).

We take deference and give latitude to lower courts as to how best to conduct its hearing on a DAPA action, which the Court will not second-guess. Further, the parties in the DAPA action did not appeal the ruling to this Court and therefore, the Court is of the opinion that the DAPA Protection Orders are valid orders. In addition, the ANSB testified about the Chapter investigation in the evidentiary hearing. The NNLC is allowed to give weight to testimonial facts. *Rule 15.H. Navajo Nation Labor Commission Rules of Procedures, amended by NNLC April 28, 2016*. The NNLC did not abuse its discretion by giving deference to Orders of Protection.

Accordingly, the NNLC did have findings of fact in their order based upon the ANSB's witness, the Executive Director, and his testimony. It found that Apachito was not the culprit in the altercation at the Chapter. It also found that the Executive Director conducted 500 hours investigating the Chapter House altercation. Moreover, since the NNLC is the adjudicative body, it determined that any facts offered by the ANSB did not meet the burden (a conclusion of law) that there was just cause in the termination notice that it issued against Apachito.

The ANSB had the opportunity at the final hearing to present evidence, which it did with the Executive Director's testimony. The NNLC surmised that the DAPA orders enjoined Apachito's nieces from committing acts of domestic violence against Apachito as the protected

party. All the ANSB had to do was prove by a preponderance of the evidence that the action at the Chapter House was an off-duty activity which impaired Apachito's job performance, damaged the public image or business reputation of the ANSB, or created a conflict of interest for its just cause to terminate Apachito. The NNLC found that the ANSB did not have just cause to terminate Apachito.

IV

The ANSB appeals Apachito's reinstatement to his former position or an equivalent asserting that the NNLC determined that Apachito has a history of violence and anger issues, and thus, the NNLC abused its discretion. The ANSB cites two (2) occasions to demonstrate that Apachito has a history of violence. First, it points to a twenty (20) day suspension placed on Apachito for a physical confrontation with a client at the workplace. Secondly, the ANSB indicates that an altercation between Apachito and his relatives, while on suspension, shows Apachito's violence. Lastly, the ANSB asserts that the NNLC's decision to grant Apachito's reinstatement of his job, or an equivalent position, was not supported by substantial evidence and, therefore, the NNLC abused its discretion.

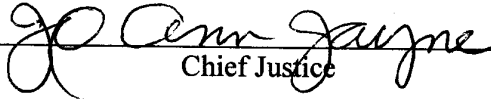
The NNLC found that the ANSB placed Apachito on suspension for a confrontation with a client at his place of work. It also found that while still on suspension, Apachito got into a physical brawl with his relatives, which, after a hearing, the Family Court ruled that Apachito was the protected party since he was not the culprit. Finally, the NNLC found that the Notice of Intent to Terminate given to Apachito was based on the Chapter House altercation not the suspension for the confrontation at the workplace. The NNLC eliminated any consideration of the workplace confrontation and focused on a Chapter House brawl for its decision. The NNLC deferred to the Family Court protection orders' findings for its decision. The findings of the

Family Court concluded that others represented credible threats to the physical safety of Apachito. Furthermore, the Family Court concluded that, upon preponderance of the evidence, that it was “more likely than not that an act of domestic abuse has occurred” against Apachito. The Family Court ordered Apachito’s relatives to refrain from committing acts of abuse or threats of abuse against Apachito and were restrained from further contact with him. *Orders of Protection*.

Substantial evidence requires relevant evidence which a reasonable “mind could accept as adequate to support the conclusion, even if it is possible to draw two inconsistent conclusions from the evidence.” *Silentman v. Pittsburgh and Midway Coal Mining Company*, 8 Nav. R. 306, 312 (Nav. Sup. Ct. 2003). The evidence presented by the ANSB does not rise to the level of substantial evidence. Though given the opportunity as the employer to present its case to the NNLC, the employer failed to present evidence to support the Notice of Intent to Terminate including any anger issues. The NNLC’s judgment contains findings that the ANSB had no just cause to terminate Apachito. There was no finding that Apachito had anger issues but rather, the NNLC only used the verbiage of “...based on its concern that Petitioner ‘appears’ to have issues with anger management.” This only infers issues which is not enough to support as it creates a certain amount of doubt. There is not a clear finding to state that Apachito has anger issues. Accordingly, this Court finds that NNLC’s decision to reinstate Apachito is supported by substantial evidence when NNLC gave great deference to the Family Court’s orders of protection. The NNLC did not abuse its discretion when it ordered the ANSB to reinstate Apachito to his former position or to an equivalent position.

The Court AFFIRMS the decision of the NNLC. The Court need not address the ANSB's Due Process arguments.

Dated this 5 day of May, 2021.


Chief Justice

/s/ The Honorable Eleanor Shirley
Associate Justice

I disagree with the majority and offer my dissent to uphold the NNLC's decision granting "great deference" to the Alamo Family Court's Orders of Protection for the reasons that follow. Apachito sought and was granted Orders of Protection under the Domestic Abuse Protection Act. The Family Court concluded, "pursuant to 9 N.N.C. § 1601 *et. seq.*, upon preponderance of the evidence that it is more likely than not that an act of domestic abuse has occurred." The Orders of Protection were boiler-plate orders with checkboxes of generic findings.

The NNLC ruled it would not hear any facts regarding the July 2, 2012 altercation at the Alamo Chapter House and, instead, gave "great deference" to the Orders of Protection. The NNLC offers no explanation to support its decision, especially when there is no information in the Orders of Protection about the date and place of the incident. The Orders of Protection do not contain any findings at all to verify the Orders of Protection concerned the altercation at the Alamo Chapter House, especially when the incident of concern supposedly occurred months prior. Nevertheless, the NNLC relies on the Orders of Protection to enter unsupported, *independent* findings that Apachito's relatives were culprits and that Apachito was not and, that the ANSB failed to demonstrate Apachito's termination was with just cause.

This Court in *Yazzie v. Catron*, 7 Nav. R. 19, 23 (Nav. Sup. Ct. 1992), gave deference to a decision of the trial court in a grazing dispute and affirmed the trial court's decision because it was supported by facts proven by the parties at a hearing. This Court stated, "unless the district court's decision was clearly erroneous or not supported by facts proven, it should be affirmed." In this case, the NNLC ruled it would not hear any facts regarding the July 2, 2012 altercation – and from my review of the transcript, it did not - yet then it gave "great deference" to two Orders of Protection for findings not actually found in the Orders, nor supported at the hearing.

Based on the NNLC's ruling that it would not hear any facts regarding the July 2, 2012 altercation, no testimony was given at the Evidentiary hearing verifying the two Orders of Protection that were admitted into the record were based on the altercation at the Alamo Chapter House. The NNLC expects the parties and the Supreme Court of the Navajo Nation to infer the Orders of Protection concern the altercation at the Alamo Chapter House. The majority is of the opinion that is sufficient, but I disagree in the absence of such evidence. By not allowing testimony regarding the altercation, the NNLC used "nonexistent facts" and the legal standard of preponderance of the evidence as to domestic violence to rule there was no *just cause* to terminate Apachito. It is further troubling the NNLC's Order provides no explanation as to why it did not find Apachito violated the ANSB's policies; Off-Duty Conduct, Maintaining Job Fitness and Certification and Licensing, Following Proper Guidelines and Procedures and Effective Performance. I disagree with the NNLC's decision, to give great deference to the Alamo Family Court's Protective Orders to conclude Apachito "was not the culprit."

The NNLC has committed reversible error in granting great deference to the Alamo Family Court's Orders of Protection and for prohibiting the parties from testifying and providing essential facts at the evidentiary hearing. This Court held in *Begay v. King*, 9 Nav. R. 247, 249 (Nav. Sup. Ct. 2009), "this Court has long held that lower tribunals are required to make findings of fact to support their legal conclusions; citing *Navajo Nation v. Badonie*, 8 Nav. R. 507, 509 (Nav. Sup. Ct. 2004)(findings of facts in criminal judgments required; *Burbank v. Clarke*, 7 Nav. R. 369, 372 (Nav. Sup. Ct. 1999)(findings of facts in civil cases required); and *Charley v. Benally*, 9 Nav. R. at 223 (meaningful judicial review cannot occur if the lower quasi-judicial tribunal does not provide reasons why it decided a certain way and not another). The ANSB was denied their right to provide information and essential facts to meet their burden of proof, which

is by a preponderance of the evidence as required pursuant to 15 N.N.C. § 604, to show Apachito was terminated for *just cause*, as required by 15 N.N.C. § 604 (B)(8). As a result, the legal issue concerning Due Process protections should have been addressed by this Court. So as to not skirt the issue, the ANSB has a right to a hearing conducted in a fair and orderly manner, as required pursuant to 15 N.N.C. § 611(C). The ANSB must be given the opportunity to prove compliance with the NPEA: Unlike the majority, I find reverse and remand was appropriate in this case.

/s/ The Honorable Tina Tsingine
Associate Justice