

No. SC-CV-09-17

NAVAJO NATION SUPREME COURT

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Erik Francisco  
Petitioner/Appellant,

v.

Navajo Nation Division of Public Safety,  
Respondent/Appellee.

OPINION

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

Appeal from the decision of the Navajo Nation Labor Commission concerning Cause No. NNLC-2013-016, the Honorable Casey Watchman, Chairperson, presiding.

David Jordan, Gallup, New Mexico, for Appellant; Colin Bradley, Tempe, Arizona, for Appellee.

This case concerns the burden of proof for claims under Section 604(C)(3) of the Navajo Preference in Employment Act.

I

On February 26, 2013, Appellant Erik Francisco (“Francisco”), an Internal Affairs Investigator employed by the Office of Internal Affairs, filed a grievance against Appellee Navajo Nation Division of Public Safety (“DPS”) claiming he was put on investigatory leave without just cause, harassed by his employer, and passed over for promotion in violation of the Navajo Preference in Employment Act (“NPEA”). Just prior to the evidentiary hearing before the Navajo Nation Labor Commission (“NNLC”), on April 6, 2016, the Navajo Nation Council amended the NPEA by Resolution No. CMA-13-16. Among the changes, an amendment to 15 N.N.C. § 604(B)(9) requires the employee alleging a violation of this subsection must have the

burden of proof to show the violation by a preponderance of the evidence. On October 18, 2016, the NNLC held an evidentiary hearing.

In an Order of Dismissal entered on January 26, 2017, the NNLC concluded that Francisco failed to prove he was placed on investigatory leave without just cause (15 N.N.C. § 604(B)(8)), harassed by his employer (15 N.N.C. § 604(B)(9)), and passed over as the most qualified applicant (15 N.N.C. § 604(C)(3)). Francisco appealed the NNLC's decision only as to that part of the decision that he failed to meet his burden of proof that DPS violated 15 N.N.C. § 604(C)(3).

## II

The issue is whether the NNLC abused its discretion by concluding that Francisco failed to meet his burden of proof that DPS violated 15 N.N.C. § 604(C)(3), pursuant to amendments by Resolution No. CMA-13-16, when Francisco filed his grievance prior to the passage of the amendments.

## III

The NNLC abuses its discretion when it makes an erroneous legal conclusion or its factual findings are not supported by substantial evidence. *Begaye v. Navajo Nation Environmental Protection Agency*, 9 Nav. R. 287, 288 (Nav. Sup. Ct. 2009).

## IV

Francisco appeals the NNLC's dismissal of his complaint based on the conclusion that he failed to meet his burden of proof that DPS violated 15 N.N.C. § 604(C)(3), which required the most qualified candidate to be hired. Francisco argues that the NNLC erred as a matter of law when it found DPS had not violated 15 N.N.C. § 604(C)(3) when he showed that as a qualified applicant he scored the highest during the interview for the Internal Affairs Supervisor position

and when DPS selected Ronald Silversmith (“Silversmith”), who should have been disqualified due to an unclear domestic violence charge. Conversely, DPS argues that the NNLC did not err in its legal conclusion because Francisco failed to produce the interview scoring sheets and any documents that Silversmith was convicted (administratively or criminally) of domestic violence to prove his claims.

The NNLC concluded that Francisco failed to meet his burden of proof, prompting the question of what was the burden of proof for a claim filed before the amendments? The timing of Francisco’s grievance is important in our analysis. Francisco filed his grievance with the NNLC on February 26, 2013. The law then in effect, concerning compliance review, complaint proceeding, investigation or hearing, placed the burden of proof on the employer to prove compliance with the NPEA by a preponderance of the evidence. *See Milligan v. Navajo Tribal Utility Authority*, 9 Nav. R. 14, 18 (Nav. Sup. Ct. 2006)(citing 15 N.N.C. § 611(B) (2005)). The law placed the parties on notice that proceedings would proceed accordingly for claims of alleged violations during this period.

Because of the law against retroactive legislation, the amendments that later followed by CMA-13-16, on April 6, 2016, had no bearing on Francisco’s grievance, which was filed prior to the amendment. The prohibition against retroactive legislation was discussed in *Ramah Navajo Community School v. Navajo Nation*, 8 Nav. R. 141 (Nav. Sup. Ct. 2001)(citing the prohibitions against ex post facto legislation and bills of attainder under the Navajo Nation Bill of Rights). The prohibition is not absolute. *Id.* at 148. “The question to be asked is . . . ‘whether the new provision attaches new legal consequences to events completed before its enactment’ or whether the new provisions affect existing contract or property rights.” *Id.* Other cases have recognized

this principle. *E.g., Judy v. White*, 8 Nav. R. 510 (Nav. Sup. Ct. 2004); *Tso v. Navajo Housing Authority*, 9 Nav. R. 175 (Nav. Sup. Ct. 2007).

Here, Francisco's right to a proceeding wherein DPS carried the burden of proof for events that occurred prior to the amendments were affected, not by the amendment for that was lawful, but by the NNLC's erroneous application of the law. We therefore reject DPS's argument that the burden of proof changed during the course of the proceeding. The law in effect at the filing of the claim governed the proceedings that followed under notions of fundamental fairness. To rule otherwise under the circumstances of this case, would undermine notions of fair play and elicit gamesmanship. The NNLC erred in its erroneous legal conclusion that the burden of proof was upon Francisco, amounting to an abuse of discretion.

We move on to arguments that Francisco may have agreed to the burden of proof announced at the hearing that the employee alleging a violation is required to carry the burden under the amendment and, contrariwise, if the amendment applied to Francisco's complaint, the burden shifted to DPS during the evidentiary hearing when Francisco submitted evidence that he was the most qualified candidate. The second argument has been addressed with our decision, *supra* at 3, that the amendments had no bearing on Francisco's complaint. DPS asserts that Francisco failed to meet his burden of proof and no shifting of the burden to DPS would have been necessary even if it were required, raising the issue of whether the parties may agree to a burden of proof other than that required by law. The answer is simply no. To permit parties to proceed contrary to the law defeats the rule of law. The NNLC erred in placing the burden of proof on Francisco contrary to the law then in effect, amounting to an abuse of discretion.

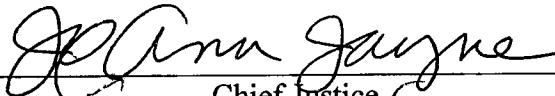
Our decision is simply to declare that the NNLC erred when it applied the new standard of proof to a case that was filed prior to the enactment of the amendments. With this ruling, we

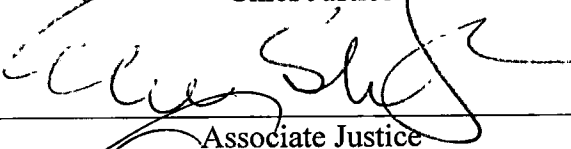
do not need to decide whether Francisco failed to meet his burden of proof that DPS violated 15 N.N.C. § 604(C)(3). We also do not need to decide whether the new burden of proof applied to claims under 15 N.N.C. § 604(C)(3). We leave that to the NNLC on remand.


V

Based on the foregoing, the decision of the NNLC is REVERSED and REMANDED for a hearing with the burden of proof on the employer to prove compliance with the NPEA.

Dated this 1<sup>st</sup> February day of ~~January~~, 2021.

  
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Chief Justice

  
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Associate Justice

  
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Associate Justice