

No. SC-CV-14-19

SUPREME COURT OF THE NAVAJO NATION

In the Matter of:
Cecelia Whitetail-Eagle
Petitioner-Appellant,

v.

Navajo Nation Ramah Chapter,
Respondent-Appellee.

OPINION

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

Appeal from a decision of the Office of Hearings and Appeals concerning Cause No., OHA-DPM-011-18, Honorable Joe B. Aguirre, Hearing Officer, presiding.

Barry Klopfer, Gallup, New Mexico, for Appellant; Colin Bradley, Phoenix, Arizona, for Appellee Ramah Navajo Chapter; and David W. Peterson, Albuquerque, New Mexico, for Appellee Ramah Chapter, Office of Grants and Contracts.

This case concerns the Navajo Preference in Employment Act's Grievance Procedure for Navajo Nation Government Employees and its application to an employee of a non-Local Governance Act Certified Chapter, who entered into an employment contract agreeing to the employer's grievance procedure.

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Appellant Cecelia Whitetail-Eagle ("Whitetail-Eagle") was hired as the Executive Director by Appellee Ramah Navajo Chapter ("RNC"), a non-Local Governance Act Certified Chapter ("non-LGA Certified Chapter") through an employment contract executed by the parties in 2003. The employment contract had specific employment terms and conditions, including an

internal procedure for employment grievances as detailed in the appended Ramah Chapter Personnel Policies Manual.

On November 7, 2014, the Navajo Nation amended the Navajo Preference in Employment Act (“NPEA”) to include the Grievance Procedure for Navajo Nation Government Employees under Section 614(A) of the NPEA, allowing Navajo Nation and non-LGA Certified Chapter employees and applicants access to the Office of Hearings and Appeals (“OHA”) for resolution of their employment grievances. 15 N.N.C. § 614(A) (as amended by Navajo Nation Council Resolution No. CO-48-14, November 7, 2014). Section 614(A) required a written grievance to be filed pursuant to the Navajo Nation Personnel Policies Manual.

On August 10, 2017, the RNC Chapter President served Whitetail-Eagle with a Notice of Termination. The notice informed Whitetail-Eagle of the right to appeal pursuant to the Ramah Chapter Personnel Policies Manual, as agreed under the 2003 contract. The notice also stated a written appeal must be submitted to the Chapter President, with a copy to the Human Resources Manager, within five days from the date the Notice of Termination is received, as required by the personnel policies.

Whitetail-Eagle filed an employment charge with the Office of Navajo Labor Relations (“ONLR”) on September 8, 2017 for review by the Navajo Nation Labor Commission (“NNLC”), should the grievance move to trial. On that same day, in accordance with Section 614(A) of the NPEA, Whitetail-Eagle also filed a Step One written grievance with her supervisor pursuant to the Navajo Nation Personnel Policies (“NNPPM”), which required a written grievance within 20 days of the alleged violation. Whitetail-Eagle did not file a grievance under the 2003 contract and its appended Ramah Chapter Personnel Policies Manual.

On September 22, 2017, Whitetail-Eagle filed a Step Two Grievance with the Navajo Nation Department of Personnel Management (“DPM”). With DPM not convening a Step Three hearing, Whitetail-Eagle then filed a Step Four grievance appeal with DPM for transmittal to a hearing officer on October 6, 2017. Whitetail-Eagle filed a Request for Hearing with OHA on November 17, 2017. A Motion to Dismiss was filed by RNC on September 20, 2018 with a Response filed by Whitetail-Eagle on October 08, 2018 and a Reply by RNC on October 18, 2018.

A Motion Hearing was held on January 9, 2019, and Whitetail-Eagle with concurrence from RNC moved for continuance to pursue a settlement. The parties failed to reach a settlement and RNC filed a Motion for Summary Judgment to Dismiss or, in the alternative, for an Order Clarifying its role in the proceeding.

On April 17, 2019, OHA issued a final decision dismissing the grievance for lack of jurisdiction. In arriving at its decision, OHA concluded that Section 614(A) of the NPEA does not apply to Whitetail-Eagle because she agreed to grieve pursuant to the terms of the 2003 employment contract and its appended Ramah Chapter Personnel Policies Manual. The OHA found that Whitetail-Eagle was required to, but did not adhere to, the terms of the 2003 contract agreement. Further, OHA also concluded that even if OHA was the forum for Whitetail-Eagle’s grievance under the NNPPM, Whitetail-Eagle’s initial filing would be one day late and dismissed for not having been filed within 20 working days of the alleged violation.

Whitetail-Eagle filed an appeal of OHA’s decision. Oral argument was held on September 18, 2020.

II

The issues are 1) whether the OHA erred when it concluded the Grievance Procedure for Navajo Nation Government Employees, Section 614(A) of the Navajo Preference in Employment Act as amended by Resolution No. CO-48-14, did not apply to Whitetail-Eagle because she agreed to grieve pursuant to the terms and conditions of the 2003 employment contract; and 2) whether OHA erred when it concluded even if OHA was the proper forum, Whitetail-Eagle failed to file within 20 working days of the alleged violation as required by the Navajo Nation Personnel Policies.

III

We review decisions of a quasi-judicial administrative agency under an abuse of discretion standard. *Manygoats v. Atkinson Trading Co.*, 8 Nav. R. 321, 336 (Nav. Sup. Ct. 2003). Among other things, an agency abuses its discretion when it makes an erroneous legal conclusion, or if its factual findings are not supported by evidence. *Id.* We review the legal conclusions de novo, with no deference given to the OHA's interpretation of the law. Our review of the factual findings is more deferential. This Court will find that a decision is supported by substantial evidence where, after examining the relevant evidence, a "reasonable mind could accept [the evidence] as adequate to support the conclusion, even if it is possible to draw two inconsistent conclusions from the evidence." *Jackson v. BHP World Minerals*, 8 Nav. R. 560, 568 (Nav. Sup Ct. 2004).

IV

In dismissing Whitetail-Eagle's grievance, OHA reasoned that though the 2014 amendment of 614(A) created the Grievance Procedure for Navajo Nation Government Employees, authorizing employees of the Navajo Nation Executive, Legislative and non-LGA

certified Chapter employees to seek relief before OHA, RNC did not update its policy to inform its employees of the new process. Thus, OHA found Section 614(A) did not apply to Whitetail-Eagle because she agreed to grieve under the 2003 contract as detailed in the Ramah Navajo Chapter Personnel Policies Manual. Furthermore, OHA found that Section 614(A) applies only to those hired under the NNPPM.

Whitetail-Eagle asserts that Section 614(A) allows her as an employee of a non-LGA Certified Chapter to file a grievance pursuant to the NNPPM, and as supported by ONLR's instruction that she file accordingly. Whitetail-Eagle also asserts the grievance procedure required by the 2003 employment contract is a sham because it does not afford her due process nor fundamental fairness when the RNC Chapter President, who initiated her termination is also the individual vested with final authority to override the hearing officer's decision at the conclusion of the grievance. On the other hand, RNC supports OHA reasoning and contends that Section 614(A) does not apply to its activities because of its semi-autonomous community status as granted by the Navajo Nation Council authorizing it to enter P.L. 93-638 contracts and, accordingly, adopt its own personnel policy manual.

The Navajo Nation, among other things, amended Section 614(A) of the NPEA in 2014. Section 614(A) of the NPEA states: "Any employee of the Navajo Nation Executive or Legislative Branch or a non-Local Governance Act Certified Chapter or applicant for employment with the Navajo Nation Executive or Legislative Branch or non-Local Governance Act Certified Chapter, who alleges a violation of this Act shall file a grievance as provided by the Navajo Nation Personnel Policies Manual" 15 N.N.C. § 614(A).

We must address the issue of whether Section 614(A), as amended in 2014, applies to Whitetail-Eagle when she entered into an employment contract in 2003. The parties entered into

an employment contract in 2003 with the agreement that the NPEA applied, as did all laws of the Navajo Nation. When the NPEA was amended by the Navajo Nation in 2014, those amendments by operation of law automatically applied to all employers. OHA draws the same conclusion in its final order. The OHA stated, “Ramah Chapter has not updated its policy manual to inform its employees that they can now initiate a grievance pursuant to 614(A).” *Findings of Fact Conclusions of Law and Final Order*, at 3. We infer from this finding that, though RNC did not update its policy, OHA concluded RNC was required to update its policy manual as the 2014 amendments applied even to the RNC.

From the record, ONLR also drew a similar conclusion upon Whitetail’s filing an employment charge. ONLR stated Whitetail-Eagle named RNC, a non-LGA Certified Chapter, and recited the 2014 amendments before concluding it was unable to accept the claim as the ONLR and NNLC no longer had jurisdiction. Record, Petitioner’s Ex. 76. ONLR returned Whitetail’s employment charge and attachments along with the grievance procedures under the NNPPM.

We defer to laws duly enacted by the Navajo Nation Council. *In re Termination of Alfred Yazzie and Alfred Barney v. Division of Community Development*, 9 Nav. R. 123, 125 (Nav. Sup. Ct. 2007)(internal citations omitted). “Likewise, when a personnel policy or regulation conflicts with a clear and unambiguous provision within the Navajo Nation Code, this Court will rely on the Code provision.” *Id.* There is nothing within the NPEA that exempts RNC as a non-LGA Certified Chapter from Section 614(A). An update to RNC’s personnel policies to inform its employees that they can initiate a grievance pursuant to Section 614(A) was not required. The Court defers to the clear language of 15 N.N.C. 614(A) and rejects RNC’s argument that Section 614(A) does not apply to RNC. OHA’s decision fails to take into account

that a statute must prevail over a conflicting policy. OHA failed to take into account that RNC and Whitetail-Eagle executed this contract in 2003 not aware such amendments would ever follow, countering any argument that she waived its application.

The Court has emphasized that personnel policy manual is the contract that shall be followed, so long as the manual complies with the NPEA which is the general labor code protecting all employees within the Navajo Nation. *See Begay v. Navajo Nation EPA*, 9 Nav. R. 287, 289 (Nav. Sup. Ct 2009)(citing *Staff Relief, Inc., v. Polacca*, 8 Nav. R. 49, 57 (Nav. Sup. Ct 2000)). Because the NPEA provides for employment protection, an employer of the government including its subdivision, chapters, etc., must provide and avail fundamental fairness in the Navajo sense. RNC's personnel policies manual, as written, does not provide fundamental fairness to all employees when the Chapter President who terminated Whitetail-Eagle is the person who receives the grievance, receives the recommendation from the hearing officer, and makes a final decision at the conclusion of the grievance. The NPEA, particularly Section 614(A) demand protections against these types of situations.

OHA erred when it determined and concluded that Section 614(A) does not apply to Whitetail-Eagle because she agreed to adhere to the 2003 employment contract and its grievance procedures. OHA erroneous interpretation of Section 614(A) of the NPEA amounts to an abuse of discretion.

V

As to the issue of whether OHA erred when it concluded, that even if OHA was the proper forum, Whitetail-Eagle's Step One grievance under the NNPPM was not filed within 20 working days of the alleged violation as required. Whitetail-Eagle disputes that her grievance

was filed one day late because Labor Day as a recognized Navajo Nation holiday was considered a non-work day.

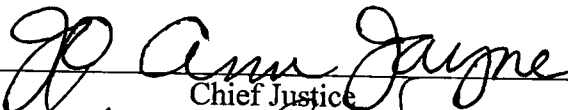
We clarified above that the 2014 amendment of Section 614(A) applied to Whitetail-Eagle as a non-LGA certified chapter employees permitting her to file a written grievance pursuant to the NNPPM. The NNPPM required a Step One grievance within twenty working days of the alleged violation of the NPEA. *Findings of Fact Conclusions of Law and Final Order* at 5 (citing Section XIV.C.1 of the Navajo Nation Personnel Policies Manual).

Whitetail-Eagle was served with a Notice of Termination on August 10, 2017. This is the date of the alleged violation. Recognizing Labor Day as a Navajo Nation holiday is observed by the Judicial Branch during which courts of the Navajo Nation are closed, September 4, 2017 was not considered a work day. With this in mind, the 20th working day fell on September 08, 2017. Whitetail-Eagle filed her grievance on September 8, 2017. OHA's finding that Whitetail-Eagle filed her appeal one day too late is clearly erroneous, resulting in an erroneous legal conclusion. OHA's erroneous legal conclusion is an abuse of discretion.

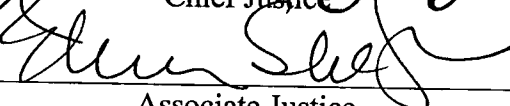
VI

Based on the foregoing, the decision of the OHA is REVERSED and REMANDED for further proceedings on the merits.

Dated this 19 day of March, 2021.



Chief Justice



Associate Justice

/s/ The Honorable Tina Tsinigine
Associate Justice