

No. SC-CV-41-13

SUPREME COURT OF THE NAVAJO NATION

Darren Yazzie,
Petitioner/Appellant,

v.

Navajo Nation Department of Law Enforcement,
Chinle District,
Respondent/Appellee.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and PLATERO, W.,
Associate Justice by Designation.

An appeal of a decision of the Navajo Nation Labor Commission concerning Cause No. NNLC
2013-006, Chairperson Casey Watchman, presiding.

David R. Jordan, Gallup, New Mexico, for Appellant; Attorney General Ethel Branch and Paul
Spruhan, Window Rock, Navajo Nation, for Appellee.

Opinion delivered by PLATERO, Associate Justice by Designation.

This case concerns an employment matter involving the non-selection of an applicant
who received the highest scores after the required written test and oral interview.

I

The Navajo Nation Department of Personnel Management (“DPM”) referred the names
of two applicants to Appellee Navajo Nation Department of Law Enforcement (“NNDLE”) for
the Sergeant’s position in the Chinle District. The referral stated both applicants met the
minimum qualifications established for the position. The referral also stated “To expedite the
referral process, the verification of education was not completed.” Respondent/Appellee’s Ex. 7.

The DPM provided no other information, not even a required priority ranking regarding preferences. One of the applicants was Appellant Darren Yazzie (“Yazzie”).

After the referral, Lieutenant Dempsey Harvey (“Harvey”), Acting Captain for the Chinle Police District, sent a letter to the applicants informing them that DPM forwarded their applications for “assessment and hiring.” Respondent/Appellee’s Ex. 8. Applicants were also informed “This assessment will consist of two parts; a written test and the oral interview.” *Id.* One Captain and three Lieutenants from police districts of Shiprock, Kayenta, Dilkon and Window Rock were called upon to conduct the assessment. An office specialist from the Chinle Adult Corrections was also called upon to monitor and assist.

On July 14, 2011, the three Lieutenants conducted the assessment. Based on the results of the written test and oral interview, Yazzie received the highest scores on both the written test and the oral interview totaling 329.5 points. The other applicant received 322 points.

Despite Yazzie’s higher scores, on July 15, 2011, Harvey prepared letters to Yazzie informing him that he was not selected and to DPM stating the other candidate was selected. Harvey stated he conducted a background and history inquiry. “Based on the testing, background and inquiry, position title, work experience as Acting Sergeant, and exceptional leadership skills[,]” Harvey selected the other candidate. *See* Respondent/Appellee’s Ex. 13. Yazzie challenged the decision. Harvey’s reasons are discussed in detail below.

On September 18, 2013, the Navajo Nation Labor Commission (“Commission”) dismissed Yazzie’s complaint after an evidentiary hearing, concluding that Harvey’s comparison was reasonable and that Yazzie’s testimony was not sufficient to convince the Commission that he was more qualified. The Commission, therefore, ruled in favor of the NNDLE finding it

showed by a preponderance of the evidence it did not violate the Navajo Preference in Employment Act. This appeal followed.

II

The issue is whether the Commission's decision to uphold the non-selection of Yazzie is supported by sufficient evidence when the NNDLE fails to adhere to its hiring policy and when the NNDLE's decision is based on an investigation that does not comply with the hiring policy.

III

"This Court reviews decisions of the Commission under an abuse of discretion standard. For example, the Commission abuses its discretion when it makes a mistake as to applicable law, that is, makes an erroneous legal conclusion. The Court's review of factual findings, however, is more deferential. This Court will find that a decision is supported by substantial evidence when 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." *Toledo v. Bashas' Diné Market*, 9 Nav. R. 68 (Nav. Sup. Ct. 2006) (internal emphasis and citations omitted). Thus, we consider whether the Commission made reasonable findings of fact and drew reasonable inferences from the record. *Silentman v. Pittsburg and Midway Coal Mining Company*, 8 Nav. R. 306, 312 (Nav. Sup. Ct. 2003).

IV

The personnel manual is a contract between the employer and employee with mutual obligations by both parties to abide by the manual. *Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 39-40 (Nav. Sup. Ct. 2000). The manual creates a reasonable expectation by the employee that the employer will abide by the terms and procedures set forth in the manual. *Id.* at 40.

In this case, the Navajo Nation Personnel Policies Manual (“PPM”) is the contract between the Navajo Nation and Yazzie. *Smith v. Navajo Nation Dept. of Head Start*, 8 Nav. R. 709, 714-715 (Nav. Sup. Ct. 2005). Pursuant to the manual, applicants submit their applications to DPM. The DPM conducts a qualification assessment and then refers the names of applicants who meet the minimum qualifications to the hiring department. The hiring department, or the NNDLE in this case, had a long-established practice or internal policy to conduct an assessment by written test and oral interview. The assessment is conducted by personnel from other districts. The background investigation, on the other hand, is conducted by the Department of Internal Affairs (“IA”). The applicant with the highest score at conclusion of the assessment and a favorable background investigation is then hired.

This Court will not find in favor of an employer when the employer fails to adhere to its hiring policy. An employer who acts outside its hiring policy does so at its own peril. Harvey, as Acting Captain or local commander, for the Chinle Police District, conducted an independent investigation not authorized by the internal policy. The then Acting Chief of Police testified that the purpose of bringing in Lieutenants from other districts and allowing IA to conduct the investigation was to prevent bias and favoritism by local personnel. The independent investigation by Harvey did not comply within the internal policy and it did not comport with the purpose of minimizing local interference. Additionally, a copy of the investigation report used to justify the non-selection of the high-scoring applicant, Yazzie, was not part of the record and, from a review of the transcript of the evidentiary hearing, NNDLE did not move to admit the report to justify its decision. The Commission’s decision cannot be supported by substantial evidence when the employer fails to follow its own procedures throughout the hiring process.

We must address concerns regarding bias. Testimony before the OHA provided that Yazzie's position opposing domestic violence put him at odds with Harvey, who had a domestic violence history. During oral argument, counsel clarified that Yazzie had opposed Harvey previously on domestic violence issue. This appearance of bias is sufficient. Fairness in the selection and hiring policy is essential. The requirement to follow established policies ensures fairness and minimizes such bias. Not only did NNDLE deviate from its internal policy when Harvey undertook an unauthorized investigation, fairness was undermined when the investigation was conducted by personnel with a conflict.

V

Beyond the failure of NNDLE to comply with its internal hiring policy and the issue of bias, we cannot conclude the Commission made reasonable findings of fact and drew reasonable inferences from the record. The record is ripe with unsupported issues that were resolved to the detriment of Yazzie: 1) job titles, 2) internal investigation, 3) supervisory experience, and 4) initiative and leadership. All of these issues were used to justify Yazzie's non-selection and each is supported solely by testimony of Harvey without supporting documentation and obtained in violation of the NNDLE policy through Harvey's investigation. We take each in turn.

Job Titles. Harvey did not select Yazzie because the other applicant's title is Senior Police Officer and Yazzie is a Police Officer, who has not held a Senior Police Officer position. DPM determined both applicants were "minimally qualified" for the position. The Job Vacancy Announcement ("JVA") did not require prior employment as a Senior Police Officer nor did it specify a preference for such an applicant.

Internal Investigations Report. Harvey did not select Yazzie because the result of a background and history inquiry with IA revealed "No History or Background" for the other

applicant and two complaints on Yazzie. However, at the evidentiary hearing, Harvey admitted the two complaints against Yazzie were unsubstantiated.

Supervisory Experience. Harvey did not select Yazzie because Harvey concluded the other applicant has experience supervising a unit/shift and "Yazzie has been delegated in the absence of a Sergeant occasionally and no experience in supervising a unit/shift."

Respondent/Appellee's Ex. 13. By Harvey's own written statement, Yazzie had been delegated, even if occasionally. Yazzie also testified as to his delegated supervisory experience, which was undisputed.

Initiative and Leadership Skills. Yazzie was not selected because Harvey concluded the other applicant has initiative and has shown exceptional leadership skills. Harvey also stated he has not seen Yazzie take an initiative to make his department improve nor has he shown any leadership capabilities. Harvey then provided reasons as to the other applicant based on his personal observations and familiarity with the other applicant. Although the Commission determined that Yazzie did not attach his community awards to substantiate his work in the Pinon community, neither did the other applicant based on the record admitted into evidence. Harvey's observations were grounded on his personal knowledge of one of the applicants. This is in fact, bias, and is exactly the type of local interference that was contemplated by the internal policy.

In addition to the written reasons provided above, at the evidentiary hearing, Harvey also provided additional, verbal reasons for not selecting Yazzie and the Commission took those reasons into consideration to bolster the NNDLE's decision not to select Yazzie. In *Manygoats v. Atkinson Trading Co.*, 8 Nav. R. 321 (Nav. Sup. Ct. 2003), this Court disagreed with an employer's ad hoc justifications for termination after an employee filed a complaint and the

Court restricted its review to the original notification. *Id.* at 338. Likewise, under concepts of fairness, review must be restricted to the initial justifications provided to the employee.

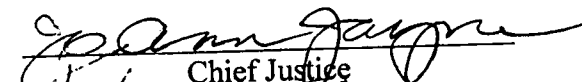
Overall, the NNDLE contends that it complied with the PPM by providing written justifications for its selection, as required anytime a lower priority applicant is selected over a higher priority applicant. Here, this was not a situation where a priority ranking based on preference applied. The relevant provision required that the Navajo with the best qualifications be selected pursuant to 15 N.N.C. § 604(C)(3). As mentioned above, the NNDLE had an internal policy governing such selection.

After examining the evidence, we disagree with the conclusion that Yazzie's testimony was not sufficient to convince the Commission that he was more qualified. While both applicants possessed the necessary qualifications as determined by the DPM, Yazzie outperformed the selected applicant at the conclusion of the administered assessment. Harvey's comparative analysis to justify the non-selection of Yazzie was not supported by substantial evidence. We therefore cannot defer to the Commission's conclusion that Harvey's comparative analysis of the applicants was reasonable.


VI

Based on the foregoing, the decision of the Commission is REVERSED and REMANDED for remedies.

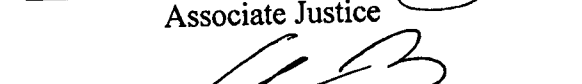
Dated this 30th day of November, 2018.



Chief Justice



Associate Justice



Associate Justice