

# NavajoNationCouncil.org/Code

## Chapter 7. Navajo Preference in Employment Act

### History

Former Chapter 7. Former Chapter 7 was repealed in its entirety by CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

CAU-39-63, August 20, 1963.

CA-54-58, August 26, 1958.

### § 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

### History

CO-78-90, October 25, 1990.

CAU-63-85, § 1, August 1, 1985.

**Note.** Slightly reworded for purposes of statutory form.

### Annotations

#### 1. Construction and application

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc.*

v. *Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"We hold that the cited provisions of the 1985 Navajo Preference in Employment Act are valid exercises of the treaty powers, inherent powers, and police power of the Navajo Nation. The Navajo Nation has the right to enact legislation to regulate labor and employment, including provisions to protect the civil rights of workers." *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 249 (Nav. Sup. Ct. 1990).

## **2. Validity**

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"... [W]e hold that the application of the Navajo Preference in Employment Act to the Judicial Branch does not violate the principle of separation of powers and judicial independence under the Navajo Nation Judicial Reform Act of 1985 and the Title II Amendments of 1989." *Tuba City Judicial District of the Navajo Nation v. Sloan*, No. SC-CV-57-97, slip op. at 11 (Nav. Sup. Ct. September 7, 2001).

## **3. Jurisdiction**

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

### **§ 602. Purpose**

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;
2. To provide training for the Navajo People;
3. To promote the economic development of the Navajo Nation;
4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;

5. To foster the economic self-sufficiency of Navajo families;
6. To protect the health, safety, and welfare of Navajo workers;  
and
7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### **Annotations**

#### **1. Validity**

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 et seq., conflicts with the New Mexico Human Rights Act, § 28-1-1, et seq. NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

#### **2. Purpose**

"Additionally, the Commission must consider these factors in light of the stated intent of the Navajo Nation Council in passing the NPEA, which includes '[t]o provide employment opportunities for the Navajo work force,' and '[t]o foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.' 15 N.N.C. § 602(A)(1)(7) (1995)." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

"We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation Council enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 8 (Nav. Sup. Ct. August 12, 2003).

"Among the purposes of NPEA is the protection of the health, safety, and welfare of Navajo workers." *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 262 (Nav. Sup. Ct. 1990).

#### **3. Construction and application**

"Absent an unmistakable waiver of the Nation's authority to regulate employment, all lessees, including public school districts must comply with the NPEA." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 6 (Nav. Sup. Ct. November 21, 2007).

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station, Salt River Project; and Gonnies v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"Because employment is central to living a good life, in that it provides for the well being of the people, the duty and authority to legislate or regulate for the protection of employees and employers cannot be delegated to a non-Navajo entity." *Thinn v. Navajo Generating Station, Salt River Project; and Gonnies v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8 (Nav. Sup. Ct. October 19, 2007).

"We hold that the prohibition on hiring and retaining relatives by marriage was a violation of the Act ... " *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 263 (Nav. Sup. Ct. 1990).

#### **4. Construction with United States law**

"This Court has previously held that the Eleventh Amendment does not grant state school districts immunity from NPEA claims." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 7 (Nav. Sup. Ct. November 21, 2007), citing *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated Dist. No. 22*, No. SC-CV-13-98, slip op. at 3-5 (Nav. Sup. Ct. June 5, 2002).

"The Court holds that Title VII has no effect on the NPEA's 'just cause' requirement, and therefore does not prohibit Commission review of Real Parties' claims, even if *Dawavendewa* was binding." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 11 (Nav. Sup. Ct. November 21, 2007).

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor

Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

#### **5. Comity; res judicata**

"The clear mandate of the Council to apply the NPEA in all situations not explicitly exempted precludes this Court from deferring to Arizona law." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 12 (Nav. Sup. Ct. November 21, 2007).

"Comity does not independently block review of a complaint under the NPEA, but is a threshold requirement before Navajo Nation courts or administrative tribunals can grant or deny res judicata effect to a separate sovereign's decision. Comity means that a Navajo court or administrative tribunal may refuse to recognize a separate sovereign's decision, but, in the interest of promoting respectful relations between governments, such tribunals should recognize the decision unless some strong policy justifies rejection. Only after comity is granted does a court or tribunal have to analyze whether res judicata applies." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 3-4 (Nav. Sup. Ct. February 16, 2007).

"The Court concludes that the unique purposes of the state unemployment statute and the NPEA make application of res judicata inappropriate." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 11 (Nav. Sup. Ct. February 16, 2007).

#### **§ 603. Definitions**

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 N.N.C. § 254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the

sole purpose of co-counseling in association with a person described in Clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions.

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, § 1, August 1, 1985.

## Cross References

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

## Annotations

### 1. Construction and application

"Under this test, we find clear intent to override NHA's general exemption from enforcement of a monetary judgment in the NPEA. In that act the Council defines the term 'employer' to include 'all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities who engage the services of a person for compensation, whether as an employee, agent or servant.' " *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

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"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

### 2. Employer

"NHA is clearly included within the NPEA definition of employer." *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

### 3. Independent contractors

"[W]e conclude there is a distinction recognized by the Navajo Nation Council, and therefore this Court, between 'employees' and 'independent contractors.' Further, independent contractors are not covered by the NPEA. Consequently, if Etsitty was an independent contractor, as it is only empowered to hear complaints under the NPEA." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 4 (Nav. Sup. Ct. December 5, 2005).

"The Court accepts the 'control test,' but adds several other factors to the analysis. Because, like 'just cause,' labor relationships vary significantly based on a variety of unique facts, one useful definition for 'independent contractor' is not possible." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 6 (Nav. Sup. Ct. December 5, 2005).

"We therefore expand New Mexico's control test to include the following factors: (1) how the alleged employee was hired, (2) how the employer treated him or her (that is, whether as a regular employee or not for advertising the position, providing fringe benefits, and withholding taxes), (3) whether the work he or she did was a single, finite project to be completed by the end of the contract period or were general duties that the alleged employer would continue even if the contract was not renewed. We also alter the control test's tenth factor, see *supra*, slip op. at 5, by requiring the consideration of whether, based on the representations in the contract and in course of dealing between the parties, the alleged employee reasonably believed he or she was an employee." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

"Additionally, the Commission must consider these factors in light of the stated intent of the Navajo Nation Council in passing the NPEA, which includes '[t]o provide employment opportunities for the Navajo work force,' and '[t]o foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.' 15 N.N.C. § 602(A)(1)(7) (1995)." *Etsitty v. Dine Bii Association for Disabled Citizens, Inc.*, No. SC-CV-48-04, slip op. at 7 (Nav. Sup. Ct. December 5, 2005).

#### **§ 604. Navajo employment preference**

A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation shall:

1. Give preference in employment to Navajos. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this § 604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this Section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this Section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor



organization, only the noncomplying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and bona fide seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in

at least one newspaper and radio station serving the Navajo Nation, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases. Provided, that this Subsection shall not apply to Division Directors, or to other employees and officials of the Navajo Nation who serve, pursuant to a specific provision of the Navajo Nation Code, at the pleasure of the Navajo Nation Council, the standing committees of the Navajo Nation Council, the President of the Navajo Nation, the Speaker of the Navajo Nation Council, the Chief Justice of the Navajo Nation, or those persons employed pursuant to 2 N.N.C. §§ 281(C) and 1009.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the Act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

### **History**

CN-104-98, November 25, 1998.

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### **Cross References**

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

### **Annotations**

#### **1. Construction and application**

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"The NPEA separately required (and still requires) that there be a specific provision mandating Navajo preference in leases with state entities." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 6 (Nav. Sup. Ct. June 23, 2004).

"The Council clearly intended to apply the NPEA to Navajo corporations when they have contracts with the Nation, regardless of the status of the land where the contract is performed. 15 N.N.C. § 604(A) extends the NPEA separately to (1) activities within the territorial jurisdiction of the Navajo Nation, and to (2) activities performed under contracts with the Navajo Nation. We hold that the Navajo Nation's NPEA subject matter jurisdiction extends to the activities of Navajo corporations under contracts with the Nation, whether or not the

contract is to be performed within the territorial jurisdiction of the Nation." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 7 (Nav. Sup. Ct. February 11, 2004).

## **2. Scope of act**

"Petitioner makes much of the language in the NPEA that defines the territorial reach of the act. However, the act prohibits termination without just cause by all employers doing business 'within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation.' " *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 4 (Nav. Sup. Ct. February 11, 2004).

"However, we focus on the language following the word 'or,' which provides an alternative for jurisdiction by applying the NPEA to employers 'engaged in any contract with the Navajo Nation.' This language disposes of this case." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 4 (Nav. Sup. Ct. February 11, 2004).

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## **3. Covered employees**

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

"The NPEA governs all employers in the Navajo Nation, including those under federal contracts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

## **4. Jurisdiction**

"We hold that the Navajo Nation's NPEA subject matter jurisdiction extends to the activities of Navajo corporations under contracts with the Nation, whether or not the contract is to be performed within the territorial jurisdiction of the Nation." *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03, slip op. at 7 (Nav. Sup. Ct. February 11, 2004).

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#### **5. Sufficiency of evidence**

"Cameron's original notification was written on torn scrap paper and stated only that Manygoats was fired for 'violating company policies.' Given that Cameron (1) had no formal personnel policies and procedures in place, (2) did not properly document Manygoats' alleged offenses at the time they occurred, and (3) never told Manygoats until after she was fired that she was in violation of company policies, the Labor Commission was reasonable in concluding that Cameron did not show that it had just cause to terminate Manygoats' employment." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 12-13 (Nav. Sup. Ct. August 12, 2003).

#### **6. Notice**

"Cameron's original notification did not meet the NPEA's requirement that written notification must in all cases cite the cause or specific reasons for the adverse action taken by an employer against an employee. 15 N.N.C. § 604(B)(8). One of the main purposes of the written notification provision is to 'inform an individual of the basis for adverse action.' ... This ensures that employees are given the opportunity to decide whether to take appropriate legal action if they feel they have been wronged. In this case, the notice Manygoats received contained no facts that would support her termination. She had to file a complaint with the ONLR to find out why she had been terminated." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00, slip op. at 13 (Nav. Sup. Ct. August 12, 2003).

#### **7. Adverse action; just cause**

"These two cases dispose of Mr. Tsosie's final argument because his contract expired on its own terms after both parties fulfilled their contractual obligations and the contract did not require automatic renewal. The NNLC therefore did not abuse its discretion when it found by substantial evidence that the non-renewal of Mr. Tsosie's contract was not 'adverse action' and that CCSD was not required to show 'just cause'." *Tsosie v. Central Consolidated School District*, No. 22, No. SC-CV-34-06, slip op. at 8 (Nav. Sup. Ct. August 12, 2009).

"The Court holds that Title VII has no effect on the NPEA's 'just cause' requirement, and therefore does not prohibit Commission review of Real Parties' claims, even if *Dawavendewa* was binding." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 11 (Nav. Sup. Ct. November 21, 2007).

"The phrases 'willful misconduct' and 'just cause' differ only in words and not in legal substance. Both determine if an employer had a justifiable reason for termination of an employee. If either tribunal finds fault on the part of an

employee, the termination is used to deny benefits or award remedies. Merely because ADES does not utilize the exact phrase 'just cause' in its determination does not mean that the ADES action is different for purposes of res judicata." *Bradley v. Lake Powell Medical Center*, No. SC-CV-55-05, slip op. at 9 (Nav. Sup. Ct. February 16, 2007).

"The NPEA mandates that employers only 'penalize, discipline, discharge' or take 'adverse action' when there is 'just cause'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006).

"To protect an employee from unjust action by an employer, the Navajo Nation Council (Council) enacted a broad range of requirements for employers to fulfill, including engaging in 'adverse action' against an employee only for 'just cause'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006).

"The School's refusal to employ Goldtooth clearly is 'adverse.' 'Action' in this context does not include all types of acts by the employer, however, but only those acts affecting 'ongoing employment'." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 4-5 (Nav. Sup. Ct. July 18, 2005).

"Assuming there was 'adverse action,' the validity of the contract also determines whether there was 'just cause' under the NPEA, and therefore whether the School is liable to Goldtooth for damages. If there was 'adverse action' the School must have provided written justification of 'just cause' for the action." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 5 (Nav. Sup. Ct. July 18, 2005).

"An explicit rule in the Navajo Nation Personnel Policies provides that failure to call or report to a supervisor for three days will subject an employee to termination. Is such failure 'just cause' for termination under the Navajo Preference Employment Act? Under the circumstances of this case we affirm the Navajo Nation Labor Commission that the employee violated the rule and uphold the termination." *Smith v. Navajo Nation Department of Head Start*, No. SC-CV-50-04, slip op. at 1 (Nav. Sup. Ct. September 21, 2005).

"Based on these reciprocal expectations, a rule set out clearly in a personnel manual, with notice to the employee, generally is binding, and this Court will enforce it as 'just cause' for termination if termination is a stated consequence for non-compliance." *Smith v. Navajo Nation Department of Head Start*, No. SC-CV-50-04, slip op. at 5 (Nav. Sup. Ct. September 21, 2005).

## **8. Harassment**

"A security company supervisor shouted at his subordinates and was terminated by his employer. We conclude that, under the circumstances, the supervisor's conduct constitutes 'harassment,' and therefore 'just cause' for termination. We therefore reverse the Navajo Nation Labor Commission." *Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 1 (Nav. Sup. Ct. October 12, 2005).

"Lacking any guidance in the NPEA, the Court adopts Anderson's suggested

definition of 'harassment' as consistent with the policies of the statute and *Diné bi beenahaz'áanii.*" *Kesoli v. Anderson Security Agency*, No. SC-CV-01-05, slip op. at 5 (Nav. Sup. Ct. October 12, 2005).

#### **9. Contract; apparent authority**

"Under the circumstances of this case, we hold that a binding contract exists between the parties. Under the rule suggested by Goldtooth, the Executive Director had the apparent authority to offer the contract, as Goldtooth's belief that such authority existed was reasonable based on the conduct of the Board. Goldtooth's acceptance therefore was enough to create a contract." *Goldtooth v. Naa Tsis' Aan Community School, Inc.*, No. SC-CV-14-04, slip op. at 7 (Nav. Sup. Ct. July 18, 2005).

#### **10. Lay off; reduction in force**

"This Court holds that a layoff is 'adverse action' and therefore within the jurisdiction of the Commission to review. A layoff clearly affects ongoing employment in a tangible, negative way as, by definition, an employee no longer works for the employer. Further, because a layoff is 'adverse action' an employer must provide 'just cause,' and the Commission may review whether such just cause was provided." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 4 (Nav. Sup. Ct. March 23, 2006).

"Unless there is a clear layoff policy in some other document available to NTUA's employees, Milligan's layoff is invalid. The only other document that might set out a layoff policy is NTUA's affirmative action plan, a document required by the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 7 (Nav. Sup. Ct. March 23, 2006)

"Despite the good job performance of employees, businesses sometimes have to make adjustments to their work force to maintain financial viability and operational efficiency. As a tribal enterprise providing needed utilities for Navajo people, NTUA has a unique need to promote financial viability and operational efficiency. The NPEA anticipates the need for employer flexibility and balances it with the rights of Navajo workers, requiring that, when there is a 'reduction-in-force,' Navajos be retained until all non-Navajo workers are first 'laid-off'." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 8 (Nav. Sup. Ct. March 23, 2006).

"The Court holds that 'just cause' for layoffs does not require 'substantial misconduct' of employees, but layoffs may be made when necessary to promote financial viability or operational efficiency." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 8-9 (Nav. Sup. Ct. March 23, 2006).

"However, a mere statement by an employer that a layoff was necessary is not sufficient, because the employer has the burden of proof to justify its action under the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"Therefore, the Commission must review the evidence presented by the employer on the reasons for the layoff, and the employee may challenge the evidence as inaccurate or as pretext to avoid a conduct-based termination." *Milligan v.*

*Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

#### **11. Sexual harassment**

"The Court holds that in this case the very broad, ambiguous language in Section 604(B)(9) does not authorize an employee to file a claim with the Commission against an employer for sexual harassment." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 6 (Nav. Sup. Ct. July 11, 2007).

#### **12. Waiver**

"It is also true that when dealing with the sovereign powers of the Nation, only clear, unmistakable words of the Council or its properly empowered designee can waive governmental authority. To decide whether an alleged waiver is unmistakable, the Court looks to the language of the purported waiver, the agreement as a whole, and the legal context within which the agreement was entered." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 5 (Nav. Sup. Ct. October 19, 2007), citing *Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School Dist. No. 22*, No. SC-CV-37-00, slip op. at 4-5 (Nav. Sup. Ct. June 23, 2004).

#### **§ 605. Reports**

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than 10 business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **§ 606. Union and employment agency activities; rights of Navajo workers**

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.



## History

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### **§ 607. Navajo prevailing wage**

A. Definitions. For purposes of this Section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than fifty percent (50%)) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this Section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other bona fide fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to

satisfaction of the conditions prescribed in §§ 607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on the job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

#### B. Establishment of wage rates.

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to the scheduled date for bid

solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this Section in the absence of a contractual requirement for payment of prevailing wages pursuant to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of § 607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under § 611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this Section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this § 607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under § 611.

D. Exemptions. This Section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under § 607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of two thousand dollars (\$2,000) or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., § 276a et seq.,<sup>1</sup> (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires

payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of § 607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of § 607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

8. With the exception of the provisions of § 607(C), a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of § 607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **§ 608. Health and safety of Navajo workers**

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **Cross References**

Navajo Nation OSHA, 15 N.N.C. § 1401 et seq.

#### **§ 609. Contract compliance**

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### **Annotations**

#### **1. Construction and application**

"The Court holds that the NPEA prohibits employees and employers from waiving the act by contract, and therefore the choice of law clauses are invalid." *Cedar Unified School District v. Navajo Nation Labor Commission, and concerning Hasgood, et al., and Red Mesa Unified School District v. Navajo Nation Labor Commission, and concerning Yellowhair*, No. SC-CV-53-06 and No. SC-CV-54-06, slip op. at 9 (Nav. Sup. Ct. November 21, 2007).

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 *et seq.*, conflicts with the New Mexico Human Rights Act, § 28-1-1, *et seq.* NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"The NPEA, then and now, requires a separate provision providing that the contracting party agrees to Navajo preference." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 6 (Nav. Sup. Ct. June 23, 2004).

## **2. Jurisdiction**

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

## **§ 610. Monitoring and enforcement**

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

### **B. Charges.**

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An Individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. Form and Content. A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

a. The name, address and any telephone number of the charging party;

b. The name and address or business location of the respondent against whom the Charge is made.

c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of;

d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;



e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and

f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. Place of Filing. Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. Date of Filing. Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. Amendment. A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. Time Limitation. A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

a. The date on which the charging party had actual knowledge of the claim; or

b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the

Commission or in any court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. Notice to Respondent. Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act, ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual Charge by filing a written notice of withdrawal with the ONLR office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in § 610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the

respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate decision; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under § 610(M).

### C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the Act has been violated.

#### 2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control, or which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in § 610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least 18 years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such

person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the territorial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least 18 years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereto reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is established that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this Section.

#### D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by § 610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approved by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to § 610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by § 610(B)(6); or

c. The Charge has been settled pursuant to § 610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissible on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to § 610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under § 610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated. Any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being

violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations in an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in § 610(H) or initiate a Commission proceeding under § 610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under § 610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

#### G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in § 610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in § 610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this Section. A charging party asserting a claim for breach may either seek:

a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this Section, be deemed to arise on the accrual date of the breach.

#### H. Individual Right to Sue.

##### 1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before

the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to § 610(D)(1);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

## 2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to § 610(D)(2);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under § 610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and prior to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by § 610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

#### I. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).



J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this Section;

b. The underlying Charge was filed within the time limits prescribed in § 610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (b) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in § 610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice violations of the Act which continued to persist during the time limits prescribed in § 610(B)(6) for refiling such Charge.

K. Preliminary Relief. Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

L. Intervention in Commission Proceedings. Within three business days after the date on which any complaint, or petition pursuant to § 610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

M. Confidentiality.

1. Conciliation. In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under § 610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or

invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

a. The evidence is otherwise discoverable; or

b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

## 2. Charge, Records and Information.

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities who have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

2. Privileged Information. Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in § 610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure

would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

N. Non-retaliation. It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;

2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this Section shall be accomplished by personal delivery or certified mail, return receipt requested.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **Cross References**

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

#### **Annotations**

##### **1. Jurisdiction**

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

##### **2. Ministerial acts**

"The receipt of an employment charge form and its subsequent filing are nothing more than ministerial acts, which the law does not restrict to compliance officers. [....] Presumably, any ONLR employee may receive and file an employment charge form." *Kirk, et al. v. Office of Navajo Labor Relations*, 7 Nav. R. 363, 365 (Nav. Sup. Ct. 1998).

### 3. Filing a charge

"Under a plain reading of the statutory language, there was no charge with the 'dated signature of an ONLR employee' for purposes of Section 610(B)(4) until ONLR filed its own charge on March 29, 2005. A date stamp is not a signature, and therefore Martinez's charge of February 1, 2005, cannot be considered 'filed' for purposes of the NPEA's timing requirement. ONLR's charge of March 29, 2005, is the charge that is signed and dated by an ONLR employee and therefore is the only one that is 'filed' pursuant to Section 610(B)(4)." *Martinez v. Sage Memorial Hospital*, No. SC-CV-47-06, slip op. at 3 (Nav. Sup. Ct. August 7, 2007).

"According to ONLR's interpretation of the NPEA, if an employee files an individual charge, and ONLR decides later to file its own charge, the time to file a complaint runs from its latter charge, and not the earlier individual charge. This Court agrees. By filing its own charge, ONLR effectively took over the case for Martinez and the other employees. Their individual charges, whether with proper ONLR signatures or not, ceased to exist, and any time was to be calculated from ONLR's new charge." *Martinez v. Sage Memorial Hospital*, No. SC-CV-47-06, slip op. at 4 (Nav. Sup. Ct. August 7, 2007).

"Based on the language of Section 610(B)(6), the Court agrees with the Commission and BHP. That section starts the time to file a charge from the 'accrual' of 'the claim which constitutes the alleged violation of the Act.' Though 'accrual' is not separately defined, the section's language equates the employee's 'claim' with the employer's 'alleged violation,' and therefore the claim occurs when an employer allegedly violates some provision of the NPEA. The Court concludes that this language means that the employee's claim 'accrues,' that is when the time to file a charge starts running, on the date of the employer's action that allegedly violated the NPEA, unless there are special circumstances where the employee was not notified of the action, or for some other reason could not reasonably be expected to know that the action occurred." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 3 (Nav. Sup. Ct. May 14, 2007).

"The employee's voluntary participation in an employer's internal grievance process does not change the timing. There is simply no reference whatsoever to internal grievance processes in that section, and therefore no indication that the Navajo Nation Council intended to allow extra time if an employee chooses to file a grievance instead of filing a charge." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 3-4 (Nav. Sup. Ct. May 14, 2007).

"Similarly here, the omission of any reference to internal grievance processes bars an employee from automatically tolling the timing requirement by voluntarily going through such a process." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 4 (Nav. Sup. Ct. May 14, 2007).

"The choice to file a grievance is not a circumstance beyond Moore's control that prevented him from filing a charge. He voluntarily participated in the grievance process, and nothing prevented him from at the same pursuing his charge." *Moore v. BHP Billiton*, No. SC-CV-32-05, slip op. at 5 (Nav. Sup. Ct. May 14, 2007).

"The NPEA Procedure begins with filing of an employee 'charge,' which must include 'a clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

"The Court holds that the ONLR charge process is the only statutory requirement before an employee may file a complaint with the Commission, and therefore there is no implied requirement to exhaust an employer's termination appeal process." *Taylor v. Dilcon Community School*, No. SC-CV-73-04, slip op. at 6 (Nav. Sup. Ct. September 21, 2005).

"The filing of an amended complaint with the Commission does not require the petitioner to return to the ONLR with an amended charge, therefore, 15 N.N.C. § 610(B)(5) does not apply to the amended complaint." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 411 (Nav. Sup. Ct. 1999).

"We agree with the Commission that telephone calls do not qualify as an attempt to file a charge with the ONLR." *Kirk, et al. v. Office of Navajo Labor Relations*, 7 Nav. R. 363, 364 (Nav. Sup. Ct. 1998).

#### **4. Limitations, generally**

"We do not believe the timing requirements are jurisdictional for purposes of a writ of prohibition. Petitioner relies on a statement in *Harvey v. Kayenta Unified School District* that Section 610(J)(1)(c) 'appears to be a hybrid of a jurisdictional statute and a limitation statute.' 7 Nav. R. 374, 375 (Nav. Sup. Ct. 1999). However, further in the *Harvey* opinion we indicated that equitable tolling may apply, suggesting that Section 610(J)(1)(c) operates as a statute of limitations and not a jurisdictional condition. *Id.* at 375-76. Though our opinion in *Harvey* was not clear, we clarify today that the NPEA timing requirements are not jurisdictional, in that they may be waived by failure of the respondent to plead them as a defense, and may be altered by other considerations such as equitable tolling. We reject any suggestion in *Harvey* to the contrary." *Peabody Western Coal Company, Kayenta Mine v. Navajo Nation Labor Commission*, No. SC-CV-33-04, slip op. at 2-3 (Nav. Sup. Ct. May 24, 2004).

"The NPEA requires the complaint to be filed within 360 days of the charge." *Peabody Western Coal Company, Kayenta Mine v. Navajo Nation Labor Commission*, No. SC-CV-33-04, slip op. at 1-2 (Nav. Sup. Ct. May 24, 2004).

"The statute appears to be a hybrid of a jurisdictional statute and a limitations statute. [...] ... [C]onsiderations of fairness and substantial justice require that parties have ... opportunity to assert equitable tolling before the Commission." *Harvey v. Kayenta Unified School District*, 7 Nav. R. 374, 375 (Nav. Sup. Ct. 1999).

## **5. Consent to application**

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 et seq., conflicts with the New Mexico Human Rights Act, § 28-1-1, et seq. NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

## **6. Notice to respondent**

"ONLR then sends a copy of the charge or a notice of its contents to the respondent, the first time the employer is informed of the allegations that it violated the NPEA." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

## **7. Probable cause**

"After its investigation, if appropriate, ONLR issues a probable cause determination. The NPEA requires that ONLR in its determination 'identify each violation of the Act for which probable cause has been found'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

## **8. Conciliation; settlement**

"Next, ONLR must make a good faith effort to settle 'any allegations in an individual Charge' for which it found probable cause." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4 (Nav. Sup. Ct. January 5, 2006).

## **9. Right to sue**

"If the employer will not settle all the allegations, ONLR then may issue a right to sue letter, which authorizes the employee to file a complaint with the Commission." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 4-5 (Nav. Sup. Ct. January 5, 2006).

## **10. Complaint**

"The complaint is then filed and served on the respondent. The complaint is properly filed, if, among other things, the 'underlying Charge' was timely filed." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav. Sup. Ct. January 5, 2006).

## **11. ONLR authority**

"ONLR has the authority to file its own charge and investigate violations of the NPEA, 15 N.N.C. § 610(B)(1) (2005), and may remedy any violation by Basha's through this process. It is ONLR's duty and responsibility, in the absence of

an employee charge that an employer violated the NPEA, to investigate violations of the act, and use its authority to seek a remedy." *Toledo v. Basha's Diné Market*, No. SC-CV-41-05, slip op. at 7 (Nav. Sup. Ct. August 17, 2006).

#### **§ 611. Hearings**

A. The Commission shall schedule a hearing within 60 days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

- a. The attendance and testimony of witnesses;
- b. Responses to written interrogations;
- c. The production of evidence; and
- d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by a preponderance of the evidence.<sup>1</sup>

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the

complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **Cross References**

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

#### **Annotations**

##### **1. Jurisdiction**

"Like FECA, the NPEA is a more narrowly drawn statute. We find that NPEA claims should function in a manner analogous to FECA claims. However, while FECA provides access to the federal courts, the NPEA provides access to tribal courts." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 11 (Nav. Sup. Ct. August 29, 2002).

"Upon reconsideration we hold that Dr. Stago's NPEA claim falls outside the Federal Tort Claims Act (FTCA) and that the NNLC [Navajo Nation Labor Commission] has jurisdiction over her claim." *Stago v. Wide Ruins Community School Inc.*, No. SC-CV-63-99, slip op. at 1 (Nav. Sup. Ct. August 29, 2002).

##### **2. Answer**

"The NPEA allows the employer to answer the complaint." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav. Sup. Ct. January 5, 2006).

##### **3. Notice**

"The Commission then sets a hearing, and in its notice of hearing must state 'in clear and simple terms the nature of the alleged violations'." *Hood v. Navajo Nation Department of Headstart*, No. SC-CV-11-05, slip op. at 5 (Nav.



Sup. Ct. January 5, 2006).

#### **4. Sufficiency of evidence**

"However, a mere statement by an employer that a layoff was necessary is not sufficient, because the employer has the burden of proof to justify its action under the NPEA." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"Therefore, the Commission must review the evidence presented by the employer on the reasons for the layoff, and the employee may challenge the evidence as inaccurate or as pretext to avoid a conduct-based termination." *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 9 (Nav. Sup. Ct. March 23, 2006).

"The prevailing evidentiary standard for employment litigation in the United States, judicial or administrative, is the civil 'preponderance' of the evidence, where the factual question is whether it is 'more likely than not' that an element of the cause of action or statute has been violated." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 15-16 (Nav. Sup. Ct. January 14, 2000).

"The civil 'more likely than not' standard is easier for the Commission to use." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 16 (Nav. Sup. Ct. January 14, 2000).

"In the absence of any evidence supporting the governmental interest in the standard, and in light of policy statements which urge the Navajo Nation to do more about employment, we find that there is no governmental interest in support of the use of clear and convincing evidence. The standard at 15 N.N.C. § 611(B) violates due process of law under the Navajo Nation Bill of Rights, 1 N.N.C. § 3, so it cannot survive." *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 17 (Nav. Sup. Ct. January 14, 2000).

"We reverse the Commission's order on the clear and convincing standard of proof, [ ... ]" *Manygoats v. Cameron Trading Post*, No. SC CV-50-98, slip op. at 18 (Nav. Sup. Ct. January 14, 2000).

#### **§ 612. Remedies and sanctions**

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to § 610(H), award costs and attorneys' fees if the respondent's position was

not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order directing the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as amended.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

**Note.** Slightly reworded for purposes of statutory form.

### **Cross References**

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

### **Annotations**

#### **1. Remedies**

"The Commission misinterpreted Section 612(A)(1). The key phrase is 'without limitation.' Through this language, the Council intended to make the list of remedies in the section examples of possible remedies, not an exhaustive list of all remedies the Commission is empowered to award to an employee." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 3 (Nav. Sup. Ct. July 11, 2007).

"Consistent with these principles, the Court holds that the Commission is not restricted to the specific listed remedies in Section 612(A)(1), but is empowered to grant remedies reasonably tied to making an employee whole. What is reasonably tied depends on the circumstances of the case, but certain remedies are not reasonably tied to making a person whole in any circumstance, such as compelling an employer to fire a worker based on a complaint by another employee, as that remedy does not compensate the employee claimant, it simply punishes the other employee." *Yazzie v. Navajo Sanitation*, No. SC-CV-16-06, slip op. at 4 (Nav. Sup. Ct. July 11, 2007).

"... [W]hile Loley has submitted his sum certain damages, a damages hearing is always necessary for the Navajo Nation to defend its treasury." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 412 (Nav. Sup. Ct. 1999).

"Under the NPEA, if the respondent violates the act, the Commission 'shall issue one or more remedial orders, including without limitation ... back pay.'

" *Tso v. Navajo Housing Authority*, No. SC-CV-10-02, slip op. at 6 (Nav. Sup. Ct. August 26, 2004).

#### **2. Review**

"On appeal, Central Consolidated additionally argued that the Navajo Preference in Employment Act, 15 N.N.C. § 601 et seq., conflicts with the New Mexico Human Rights Act, § 28-1-1, et seq. NMSA 1978, and was not enforceable according to the Lease. This Court issued a memorandum decision affirming the Navajo Nation Labor Commission. We held that Central Consolidated consented to the application of the NPEA and that the NPEA was not in conflict with the New Mexico Human Rights Act." *Office of Navajo Labor Relations v. Central Consolidated School District No. 22*, No. SC-CV-37-00, slip op. at 2-3 (Nav. Sup. Ct. June 23, 2004).

"We find that there is ample support in the record for the Labor Commission's determination that Cameron's position was not substantially justified. Cameron's legal argument were at best misguided, and its evidence ranged from

thin to lacking credibility. Therefore we affirm the Labor Commission's decision to award Manygoats attorneys' fees and costs." *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-00 slip op. at 14 (Nav. Sup. Ct. August 12, 2003).

### **3. Navajo Nation as defendant**

"Once the sovereign protection of relating to answering complaints has been afforded, the NDET, or any other Navajo Nation governmental body, is held to the same standard as a private litigant. We affirm the Commission's entry of default." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 410 (Nav. Sup. Ct. 1999).

"While a Navajo Nation government agency need not file an answer to a complaint under 1 N.N.C. § 555(B), it is not free to extend that privilege to ignore the valid orders of the [Labor] Commission (or a court for that matter). Once the Navajo Nation has been afforded its sovereign protection, it will be held to the same standards and responsibilities of any litigant." *Loley v. Department of Employment and Training*, 7 Nav. R. 406, 409 (Nav. Sup. Ct. 1999).

### **4. Attorneys' fees**

"The Court holds that 1) because, first and foremost, Section 612(A)(2) mandates an exception to the general rule, the employer's defense against the employee's claim alone cannot obviate the mandate—the employer's litigating position alone cannot swallow the mandate; 2) that the overall conduct of a respondent-employer, including pre-litigation conduct, will be considered in the decision whether the employer's litigating position was substantially justified; and 3) that the overall conduct of the employer will be reviewed under a reasonable person standard. To this extent, this Court's interpretation in *Jenson* that respondent's position means employer's litigating position is clarified." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 5–6 (Nav. Sup. Ct. April 16, 2009).

"The Court holds that the employer's overall conduct will be weighed against the statutory mandate; i.e., does the employer's overall conduct justify nullifying the mandate that a prevailing employee shall be paid costs and attorney's fees? The Court further holds that because this exercise is a weighing of the reasonableness of each party's conduct, the award of costs and attorney's fees is not an all or nothing proposition." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 6 (Nav. Sup. Ct. April 16, 2009).

"We hereby hold an employer shall be deemed 'substantially justified' as that term is used in 15 N.N.C. § 612(A)(2) when the respondent-employer shows 1) that the employee's pleading or document was not submitted in good faith, or that it contains material misstatement of fact or law; or that it is not made upon adequate investigation or research or 2) that the employee failed to participate in the proceedings. We emphasize that such exceptions and the substantial justification decision must be established by specific findings by the NNLC." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 6–7 (Nav. Sup. Ct. April 16, 2009), citing, *Largo v. Gregory & Cook*, 7 Nav. R. 111, 119 (Nav. Sup. Ct. 1995).

"The NNLC has the duty to decide how to handle costs and attorney's fees whenever the employer is found to have violated NPEA, regardless of whether the party has raised it as a claim or not. It is an affirmative obligation by the NNLC to consider costs and attorney's fees." *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, No. SC-CV-12-06, slip op. at 7 (Nav. Sup. Ct. April 16, 2009), citing, *Largo v. Gregory & Cook*, 7 Nav. R. 111, 118 (Nav. Sup. Ct. 1995).

#### **§ 613. Appeal and stay of execution**

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within 10 days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in Subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;
2. Appellant will be irreparably harmed in the absence of a stay;
3. Appellee and interested persons will not be substantially harmed by a stay;
4. The public interest will be served by a stay; and
5. An appeal bond or other security, in the amount and upon the terms prescribed by Subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:

- a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;

- b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the

Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as amicus in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **Cross References**

Navajo Nation Healthy Start Act of 2008, 15 N.N.C. §§ 701-708.

#### **Annotations**

##### **1. Exhaustion of remedies**

Exhaustion requirement was met by consideration of dispute between Navajo

Nation and electric utility over application of Navajo Preference in Employment Act (NPEA) to employment practices at power plant on leased tribal trust land and Navajo Nation Supreme Court's determination of tribal jurisdiction was thus properly the subject of federal review. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir.(Ariz.) 1995).

#### **§ 614. Non-Navajo spouses**

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this Section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **Annotations**

##### **1. Construction and application**

"This responsibility is to all people within the Nation, whether Navajo or non-Navajo. Consistent with this view, the Court interprets the NPEA to protect all employees within the Nation, including non-Indians." *Thinn v. Navajo Generating Station*, Salt River Project; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8-footnote 1 (Nav. Sup. Ct. October 19, 2007), citing *Milligan v. Navajo Tribal Utility Authority*, No. SC-CV-31-05, slip op. at 3 (Nav. Sup. Ct. March 23, 2006); and *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98, slip op. at 4-5 (Nav. Sup. Ct. August 18, 2000).

#### **§ 615. Polygraph test**

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this Section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

**Note.** The words "lie detector" were changed to "polygraph".

#### **§ 616. Rules and regulations**

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under § 611 of the Act, provided that such rules are consistent with the provisions of the Act.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

**Note.** Slightly reworded for purposes of statutory form.

#### **Annotations**

##### **1/2. Construction and application**

"Because employment is central to living a good life, in that it provides for the well being of the people, the duty and authority to legislate or regulate for the protection of employees and employers cannot be delegated to a non-Navajo entity." *Thinn v. Navajo Generating Station, Salt River Project*; and *Gonnie v. Headwaters Resources*, No. SC-CV-25-06 and No. SC-CV-26-06, slip op. at 8 (Nav. Sup. Ct. October 19, 2007).

##### **1. Pro se representation**

"If the Criminal Code prohibits corporate pro se representation, the Commission cannot allow it under its rules. Though the Labor Commission is authorized to create rules to govern its proceedings, 15 N.N.C. § 616 (2005), its rules cannot violate provisions of the Navajo Preference in Employment Act." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 9 (Nav. Sup. Ct. August 7, 2006).

##### **2. Criminal code**



"Similarly, the Commission may not, through its rules, allow parties or their representatives to violate other statutes, particularly prohibitions in the Criminal Code." *Perry v. Navajo Nation Labor Commission*, No. SC-CV-50-05, slip op. at 9-10 (Nav. Sup. Ct. August 7, 2006).

### **3. Privacy and Access to Information Act**

"The Court holds that the Act does not regulate access to Commission proceedings, regardless of whether Commission records are covered by the Section. As noted above, the Act regulates access to records, that is physical objects held by the government." *Navajo Nation Department of Child Support v. Navajo Nation Labor Commission*, No. SC-CV-22-06, slip op. at 4 (Nav. Sup. Ct. August 24, 2006).

"The Commission has discretion to adopt rules to govern its own proceedings, 15 N.N.C. § 616 (2005), and therefore may decide whether to close a particular hearing due to the revelation of potentially sensitive information through witness testimony. The Act does not bar that discretion. If the Navajo Nation Council wishes to control access to Commission hearings, it may do so by amending the Act of the Navajo Preference in Employment Act or by passing separate legislation. The Court holds that the Act does not regulate access to Commission proceedings, regardless of whether Commission records are covered by the Section. As noted above, the Act regulates access to records, that is physical objects held by the government." *Navajo Nation Department of Child Support v. Navajo Nation Labor Commission*, No. SC-CV-22-06, slip op. at 4 (Nav. Sup. Ct. August 24, 2006).

#### **§ 617. Prior inconsistent law repealed**

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **§ 618. Effective date and amendment of the Act**

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in § 610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in § 610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in § 610.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

#### **§ 619. Severability of the Act**

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

#### **History**

CO-73-90, October 25, 1990.

CAU-63-85, August 1, 1985.

### **Chapter 8. Navajo Nation Healthy Start Act**

#### **§ 701. Short Title**

This Act shall be known as the "Navajo Nation Healthy Start Act."

#### **History**

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

#### **§ 702. Purpose**

The purpose of this Act is to provide for opportunities for working mothers to obtain the health benefits of breast-feeding for their infant children, themselves, and the Navajo Nation, through provision for breast-feeding or use of a breast pump, or both, within workplaces on the Navajo Nation.

#### **History**

CO-40-08, October 22, 2008. Navajo Nation Healthy Start Act of 2008.

#### **§ 703. Definitions**

A. "Breast-feeding" means the practice of allowing a working mother, with privacy and dignity, to feed her child milk from her breasts.