

Navajo Nation Law CLE

Section 8

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Navajo Preference in
Employment Act /
Civil Jurisdiction in
Indian Country

THE NAVAJO PREFERENCE IN EMPLOYMENT ACT / CIVIL JURISDICTION IN INDIAN COUNTRY

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I. Introduction to the NPEA

The Navajo Preference in Employment Act (NPEA), 15 N.N.C. §601 et. seq., was passed by the Navajo Nation Council in 1985 “to provide employment opportunities for the Navajo Workforce.” 15 N.N.C. §602(A)(1). The Act sets out a broad scheme for regulating employment in the Navajo Nation, including requirements for preferential treatment of Navajos in hiring, promotion, transfer, retention and other areas. The Act created the Office of Navajo Labor Relations (ONLR) and the Navajo Nation Labor Commission (NNLC) to administer and enforce the Act’s requirements. The Act has been amended a few times by the Navajo Nation Council, and its terms have been significantly impacted by a number of decisions of the Navajo Nation Supreme Court. As a result, the NPEA now is the source of most employment law rules under Navajo Nation law.

A. Employers Subject to the NPEA – the question of jurisdiction

The NPEA applies to any “persons firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person, whether as employee, agent, or servant.” 15 N.N.C. §603(C). There is no minimum number of employees required. The Act states that it will be the law “within the territorial jurisdiction [or near the boundaries of] the Navajo Nation” and to any employers “engaged in any contract with the Navajo Nation.” Therefore, the Act would appear to extend to all employers in the Navajo Nation and in the border communities (Flagstaff, Winslow, Holbrook, Page, Gallup, Farmington).

The question of whether the NPEA applied to Tribally-Controlled Grant Schools was the subject of litigation in Navajo Nation and Federal Courts. Under Public Law 101-512, all claims against Grant Schools are deemed to be claims against the United States and, therefore, lawsuits against Grant Schools must be brought in Federal Court. Also, under Public Law 101-512, Grant Schools are protected by the Federal Tort Claims Act and all lawsuits against Grant Schools must be defended by the United States Attorney. In Stago v. Wide Ruins Community School, 8 Nav. R. 118 (2001) the Navajo Nation Supreme Court initially held that Grant Schools could not be sued for NPEA claims in the Labor Commission under P.L. 101-512. However, the Court later reversed itself and held that P.L. 101-512 did not protect Grant Schools from NPEA claims in Navajo forums. Stago v. Wide Ruins Community School, 8 Nav. R. 259 (2002). The school subsequently filed an action in the United States District Court for the District of Arizona to enjoin further proceeding in the Navajo Nation forums. The District Court ruled that P.L. 101-512 does not protect the Grant Schools against NPEA suits in the NNLC. Wide Ruins Community School v. Stago, 281 F. Supp 2nd 1086 (D.Ariz. 2003).

More recently, the jurisdiction of the Navajo Nation to enforce the NPEA against Arizona public school districts operating within the Navajo Nation has been litigated in Navajo Nation and Federal

courts. In 2005, four former employees of two different school districts filed charges with the ONLR to challenge their dismissal from employment. Before the Navajo Nation Labor Commission, the districts moved to dismiss the claims for lack of jurisdiction. When the NNLC ruled in favor of the former employees, the districts appealed to the Navajo Nation Supreme Court. The Court relying on the Nation's exclusion authority under the Treaty of 1868, ruled that the *Montana* test for jurisdiction did not apply, and that the NPEA could be enforced in Navajo Nation forums against the districts. Cedar Unified School District and Red Mesa Unified School District v. Navajo Nation Labor Commission, Navajo Nation Supreme Court, November 21, 2007. The districts then filed an action in Federal court to enjoin the Navajo Nation proceedings. The District Court applied the *Montana* and *Hicks* framework for analysis, and concluded that "as a matter of law the Navajo Nation has no regulatory or adjudicative jurisdiction over Red Mesa's and Cedar's employment-related decisions underlying this action." Red Mesa Unified School District v. Yellowhair, 2010 U.S. Dist. LEXIS 104276 (D. Ariz. 2010). In a 2001 opinion granting the parties' stipulation to dismiss the appeal pending before the Navajo Nation Supreme Court, the Court noted its strong disagreement with the decision of the U.S. District Court, stating that the District Court "has created a pool of immunity for state employees performing long-term activities of indefinite duration on Indian land, even when the employees are members of the Navajo Nation." Hasgood v. Cedar Unified School District, Navajo Nation Supreme Court, May 9, 2011.

B. Employees Covered by the NPEA

As originally written, the NPEA gave some protections only to Navajos (such as the right to be terminated only for just cause), some to Non-Navajo spouses of Navajos (preference in employment) and some to all employees (the right to a workplace free from harassment). However, only Navajos could file charges with the ONLR. The Navajo Nation Supreme Court, however, has judicially expanded the enforcement provisions of the NPEA.

In Staff Relief, Inc. v. Polacca, No. SC-CV-86-98, a Hopi individual – Delmar Ray Polacca - was offered an employment position by Staff Relief, Inc., but the offer was later withdrawn. Mr. Polacca filed a complaint against Staff Relief with the Navajo Nation Labor Commission. One issue on appeal was whether Mr. Polacca – as a Hopi – had the right to file a complaint under the NPEA. The Navajo Nation Supreme Court held that Mr. Polacca did have a right to file a complaint. The Court stated:

"Under basic principles of equal protection of law, any person who is injured by a violation of NPEA may file a claim with the Commission."

"We extend the remedy [of filing a complaint under the NPEA] to all individuals employed within the Navajo Nation."

"[The NPEA] must be read to protect all employees within the Navajo Nation where NPEA provides protection in employment."

From the Court's statements, it is clear that the NPEA now applies to "all employees" with respect to "protection in employment." So, for example, all employees can only be terminated for just cause and with written notice. Also, all employees are entitled to a safe and clean working environment that is free of prejudice, intimidation, and harassment.

Unfortunately, the Court's decision is unclear with respect to issues of recruiting, hiring, promotions, reductions-in-force, and lay-offs. For example, if the Court's opinion is interpreted to mean that all job applicants have preferred rights in the hiring process, it would completely do away with any

Navajo or Indian preference at all. It is hard to believe that the Court intended such a broad-sweeping result. Perhaps the Court intended to expand Navajo preference to Indian preference. After all, Mr. Polacca, who was the subject of the case, is Indian. But if that is true, why didn't the Court say, "Any *Indian* who is injured by a violation of NPEA may file a claim?" Instead, the Court chose to say, "Any *person*."

In sum, the meaning of the Polacca case is unclear. Based on our best reading, we believe the case stands for the proposition that Navajo preference (Tribal preference) continues to apply for purposes of recruiting, hiring, promotions, reductions-in-force, and lay-offs. With respect to all other employment-related protections, including adverse actions and terminations, the provisions of the NPEA apply to all employees.

II. Navajo Employment Law Under the NPEA

A. Specific Requirements of the NPEA

The NPEA requires that all employers shall:

1. Give preference in employment to Navajos;
2. File a written Navajo affirmative action plan with the Office of Navajo Labor Relations (ONLR);
3. Include and specify a Navajo employment preference policy statement in job announcements, advertisements, and employer policies;
4. Post in a conspicuous place a Navajo preference policy notice prepared by ONLR;
5. Utilize Navajo Nation employment sources and job services for employee recruitment and referrals, except when a current Navajo employee is selected for the position;
6. Advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation, except when a current Navajo employee is selected for the position;
7. Use non-discriminatory job qualifications and selection criteria in employment;
8. Not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause and written notification of the cause(s), provided to the employee at the same time that the action is taken;
9. Maintain a safe and clean working environment and provide employment conditions that are free of prejudice, intimidation, and harassment;
10. Provide training; and
11. Establish written necessary qualifications for each employment position in their work force, and provide a copy of the qualifications to all applicants when they express an interest in the position.

15 N.N.C. § 604(B).

B. Unionization Rights

The NPEA also specifically recognizes employee unionization rights, including the rights to strike and picket. 15 N.N.C. §606. However, there are no rights to strike and picket for “employees of the Navajo Nation, its agencies or enterprises.” Id.

C. Prevailing Wage for Construction Projects

The NPEA established a system for determining Navajo prevailing wages in construction trades which requires most construction contractors and subcontractors to pay that prevailing wage for work on most construction projects. 15 N.N.C. §607.

D. OSHA

Finally, the NPEA requires employers to “adopt and implement work practices” that conform to Occupational Safety and Health Standards. 15 N.N.C. §608.

E. “At-Will” Employment Under the NPEA

Under the “American Rule” of employment law, the employment relationship generally is “terminable at the will of either party.” Wood, H.G., *Law of Master and Servant* (1887). This means that, unless a contract or law requires otherwise, an employer may fire an employee for any reason or no reason, and the employee may quit for any reason or no reason. The NPEA, however, states that an employer may not “penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause and written notification of the cause(s), provided to the employee at the same time that the action is taken.” 15 N.N.C. §604(B)(8). This requirement for “just cause” effectively eliminates “at-will” employment under Navajo law.

The concept of “at-will” employment is still relevant, however, in proceedings under the NPEA for purposes of determining how much back pay a claiming employee can be awarded. If an employee was working for an indefinite term (meaning that no contract or employer practice specified an ending date for the period of employment), the employee would be considered to be “at-will” and could claim back pay under the NPEA from the date of termination to the date that the Labor Commission judgment. ONLR v. West World, 2 Nav. A.R. 342 (Nav. Sup. Ct. 1994). If, on the other hand, the employee was working under a contract or arrangement that included a specific ending date (such as an academic year teaching contract), then the claim for back pay should normally be capped by the amount that the employee would have been paid for the remainder of the contract. Id. Accordingly, it is always better for schools subject to the NPEA to use written employment contracts with fixed ending dates (and no provisions for automatic renewal) for all employees (including classified staff). The use of such contracts can help limit a school’s exposure to back pay claims under the NPEA.

F. Prohibition Against “Harassment”

The NPEA requires all employers to “provide employment conditions which are free of prejudice, intimidation and harassment.” 15 N.N.C. §604(B)(9). This provision makes employers subject not only to traditional claims of sexual harassment (quid-pro-quo harassment and hostile work environment harassment), but also to claims of harassment based on factors other than sex (such as family relations, Tribal membership, political affiliation, etc.). Most employers have learned to adopt and implement

specific policies concerning sexual harassment. Under the NPEA, however, such policies might not be sufficient to address the other types of harassment that are actionable only under the NPEA. Careful attention should be paid to employment policies and rules to ensure that any forms of harassing conduct are prohibited, regardless of whether the harassment is based on sex or other factors.

III. The Hiring Process Under the NPEA

A. The “Navajo Preference” in Hiring

The NPEA requires that:

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 shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications; and
3. among the 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.

15 N.N.C. §604(C).

The term “necessary qualifications,” as used above, is defined as “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 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.” The term “qualifications” includes “the ability to speak and/or understand the Navajo language, and familiarity with Navajo culture, customs, and traditions.”

The NPEA provides that a non-Navajo who is legally married to a Navajo and who has resided on the Navajo Nation for a one-year period shall be entitled to preference over other non-Navajos. However, the non-Navajo spouse does not have preference over Navajo applicants.

B. Specific Requirements for Recruiting and Selection

The NPEA sets forth the following specific requirements for the recruitment of employees.

- All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies.
- All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by the ONLR (we are unaware of whether or

not the ONLR has prepared such a notice; assuming they have not, the employer should post a notice stating that it follows Navajo preference).

- 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 obligation if the Navajo who is selected for the employment opportunity was a current employee of the employer.

- All employers shall advertise and announce all job vacancies in at least one newspaper and on at least one radio station serving the Navajo Nation; provided, however, that employers do not have the foregoing obligation if the Navajo who is selected for the employment opportunity was a current employee of the employer.

Thus, when recruiting and hiring employees, employers must give preference to Navajos and the spouses of Navajos. Generally, employers must use Navajo Nation employment services and job services, and they must advertise and announce job vacancies in at least one newspaper and one radio station serving the Navajo Nation.

C. Does the NPEA Violate Title VII of the Civil Rights Act?

Although it is clear that the Navajo Nation, itself, may give a preference in employment to members of the Navajo Nation, the ability of private employers within the Navajo Nation to apply the Navajo preference in hiring without violating Title VII of the Civil Rights Act of 1964 has been the subject of inconclusive litigation in the Federal courts for more than 14 years. In the case of Dawavendewa v. Salt River Project, 154 F.3d 1117 (9th Cir. 1998), the Ninth Circuit Court of Appeals ruled that the Salt River Project's compliance with the Navajo preference required under the NPEA to favor hiring a Navajo applicant over a Hopi applicant constituted national origin discrimination in violation of Title VII of the Civil Rights Act. Title VII contains an exception that allows (but does not require) private employers on or near Indian Reservations to give preference to Indians living on or near a Reservation, but the court ruled that the "Indian" preference exception did not permit a tribal-specific preference for employers subject to Title VII.

On remand from the 9th Circuit, the District Court dismissed the case for failure to join the Navajo Nation as an indispensable party, and the 9th Circuit affirmed the District Court's dismissal. Dawavendewa v. Salt River Project, 276 F.3d 1150 (9th Cir. 2002). In affirming the dismissal, however the Ninth Circuit did not vacate or modify its 1998 decision regarding the conflict between the NPEA and Title VII.

The issue was again addressed by an enforcement action brought by the EEOC in Federal court against Peabody Coal Company. In 2002 the EEOC filed suit against Peabody Coal Company in Federal Court alleging that Peabody violated Title VII by denying employment to members of the Hopi and Otoe tribes to give a preference to hiring members of the Navajo Nation pursuant to the NPEA and various lease provisions. The District Court dismissed the case for failure to join the Navajo Nation as an indispensable party and because the question of whether the NPEA applied to Peabody was a nonjusticiable political question (because the Secretary of the Interior had approved the leases requiring Navajo preference). EEOC v. Peabody Coal Co., 214 F.R.D. 549 (D.Ariz. 2002). On the first appeal, the Ninth Circuit reversed the District Court, holding that the Navajo Nation was a necessary party, but could be joined in the action and that the political question doctrine did not apply. EEOC v. Peabody Coal Co., 400 F.3d 774 (9th Cir. 2005).

On remand, the District Court again dismissed the action, finding that the Navajo Nation and the Secretary of the Interior were both indispensable parties. EEOC v. Peabody Coal Co., 2006 U.S. Dist. LEXIS 74478 (D.Ariz. 2006). On appeal, the 9th Circuit again reversed the District Court, holding, again, that the Navajo Nation could be joined in the suit and that, although the Secretary of the Interior could not be joined, the claims for injunctive relief against Peabody could proceed without the Secretary. EEOC v. Peabody Coal Co., 610 F.3d 1070 (9th Cir. 2008). In March of 2012, the District Court denied a renewed motion by the Navajo Nation to dismiss the case on various grounds. EEOC v. Peabody Coal Co., 2012 U.S. Dist. Lexis 29972 (D. Ariz. 2012). The case remains pending before the court.

The failure of the courts to substantively rule on this issue for more than 14 years presents attorneys representing private employers within the Navajo Nation with a Hobson's choice – advise clients to either violate Title VII as interpreted by the 9th Circuit in *Dawavendewa I*, supra, or violate the NPEA.

D. Suggestion for Hiring Under the NPEA

1. *Pay careful attention to job descriptions and position announcements.* A common pitfall for employers under the NPEA is to have job descriptions or announcements that specify certain requirements for experience and education, but then include a “catch-all” phrase such as “or any combination of education and experience demonstrating the ability to perform the job.” Under the NPEA, job descriptions should be very specific and detailed in order to avoid arguments by unsuccessful candidates that they met the posted requirements.

2. *Carefully document every step in the employment process.* Most employers can avoid or mitigate their exposure to NPEA claims by simply maintaining better records of their actions. For a hiring process, an employer should maintain a complete file containing all of the documents showing compliance with the NPEA (the job announcement with the Navajo Preference policy notice, notices of publication and announcement, etc.) and showing all applications received. The file should also contain all interview notes, scoring sheets and other documents used to evaluate candidates.

3. *Do it Right or Do it Over.* At the conclusion of each hiring process, but before an offer of employment is made, an employer should carefully review the documents relating to the hiring process to make sure that every procedural requirement under the NPEA was met and that, if challenged, the school can present a documented, reasonable basis for its decision. If any errors are noted (such as no announcement was published in a Navajo newspaper), that should be corrected if possible, or the whole process should be cancelled and re-done.

IV. Discipline and Dismissal Under the NPEA

The Navajo Preference in Employment Act provides:

“All employers [including the School] shall not penalize, discipline, discharge nor take any adverse action against any [Indian] employee without *just cause*. A written notification to the employee citing such *cause* for any of the above actions is required in all cases.” (Emphasis added.)

A. “Just Cause” Under the NPEA

An employer may not take an adverse action, such as termination, against an employee unless the employer has just cause for the action. The question then becomes, “What constitutes just cause for an adverse employment action?”

Black’s Law Dictionary provides a number of definitions of “just cause,” including a cause based on reasonable grounds; a fair and honest reason; or an adequate, reasonable, and legitimate reason to take a particular action. Basically, just cause is a reason grounded in fairness which provides sufficient, good-faith support for an action.

The Navajo Nation Labor Commission, which enforces the Navajo Preference in Employment Act, is charged with the responsibility of determining whether just cause exists in any given case. In the following cases, the Labor Commission concluded that the employers had just cause to take adverse employment actions with respect to employees.

In the case of Etsitty v. Sessa Corp., 1 Nav. Admin. Dec. 126 (1995), the Labor Commission found that the employer had just cause to terminate the employee because the employee failed to report to work for several successive days and failed to notify the employer of the reasons for his absences.

In Bitsuie v. Agent Orange Family Assistance Program, 1 Nav. Admin. Dec. 156 (1996), the Labor Commission found that the employer had just cause to suspend the employee for insubordination and to terminate the employee for failure to comply with the terms of the suspension. The employee’s acts of insubordination included remarks to his boss that the boss was presenting a “one man show,” hanging up on his boss, and stating that he “did not have to talk to” his boss. The employee’s acts of violating the terms of his suspension included failure to turn in his keys and returning to his office without authorization.

In Rock v. Redhair, NNLC 97-011 (1997), the Labor Commission concluded that the employer had just cause to terminate the employee because the employee twice used the employer’s credit card to purchase fuel for non-work related travel in her personal vehicle and deliberately altered a credit card receipt in an attempt to deceive the employer into authorizing the fuel purchase.

In Blie v. Peabody Western Coal Company, NNLC 97-022 (1997), the Labor Commission determined that the employer had just cause to terminate the employee because the employee engaged in sexually harassing behavior on two occasions, despite receiving a verbal warning that a second incident would provide grounds for termination and despite the fact that the employee was fully aware of the employer’s sexual harassment policy.

In Yazzie v. Navajo Tribal Utility Authority, NNLC 97-026 (1997), the Labor Commission found that the employer had just cause to terminate the employee because the employee violated the employer’s policy on alcohol use. The employee had violated the policy on several previous occasions by being intoxicated while on the job. On those previous occasions, the employer suspended the employee and warned the employee that future violations could result in termination. When the employee violated the policy again, he was terminated.

In Grey v. Barlow, NNLC 98-001 (1998), the Labor Commission concluded that the employer, a private security company, had just cause to terminate the employee, a security guard, because the employee failed to abide by the company’s policies. The employee’s acts of misconduct included failure

to wear the company's uniform while on the job, failure to wear the required number of pepper spray cans, failure to comply with patrol procedures (such as locking doors and gates), refusing to cooperate with co-workers, failure to be in contact with dispatchers while on duty, and sleeping on the job. On various occasions, the employer issued warnings to the employee, took corrective actions, and informed the employee that continued misconduct could lead to termination.

In Cly v. Kayenta Trading Post, NNLC 98-004 (1998), the Labor Commission found that the employer had just cause to terminate the employee because the employee took twelve days of unauthorized sick leave in a four-month period, he refused to do assigned tasks, and he routinely came to work late and left early without authorization. On previous occasions, the employer gave the employee verbal and written warnings regarding his unexcused absences.

From reviewing the Labor Commission's cases, several common themes arise. First, it is crucial that the employer document the details of each incident of the employee's misconduct when the misconduct occurs. In the absence of documentation, it is difficult, if not impossible, to prove that the employer had just cause.

Second, it is important that the employer use progressive discipline with its employees, when appropriate. The Labor Commission is more likely to find that the employer had just cause if the employer used progressive disciplinary measures before terminating the employee. Examples of progressive disciplinary measures include suspensions and warnings that further misconduct could lead to termination.

Third, it is important that the employer has official policies setting forth (1) standards for employee conduct, and (2) procedures for disciplining the employee when he or she engages in misconduct. The Labor Commission is more likely to find that the employer had just cause if the employee is aware of the types of misconduct that might lead to discipline. Further, the employer should document its attempts to ensure that the employee is familiar with its policies, such as through a contract provision stating that the employee agrees to comply with the school's Policies and Procedures.

Fourth, it is important that the employer apply its policies with uniformity. If two employees commit the same infraction, the employer should discipline both employees similarly, unless the employer has good, lawful reasons to treat the employees differently.

B. Recommended Procedures to Discipline or Dismiss an Employee Under the NPEA

1. Follow written Personnel Policies

When the ONLR and the NNLC review complaints and charges, an important aspect of their investigations centers on whether or not the employer followed its own personnel policies. If the ONLR or the NNLC find that the employer did not follow its own policies, they are more likely to find that the employer violated the NPEA. As such, it is imperative that the employer follow its own policies. However, if there is ever a conflict between the policies and the NPEA, the employer should follow the NPEA.

2. Document Every Employment Transaction

In order to properly defend against ONLR and NNLC complaints and charges, we must be able to submit evidence that the employer did not violate the NPEA. Most often, evidence consists of

witness testimony and reliable documents. Thus, it is crucial that an employer maintain contemporaneous documentation of events leading up to, triggering, and following all employment decisions.

For example, if an employer terminates an employee, and if the employee files an NNLC complaint alleging that he/she was terminated without just cause and without written notice, the employer must provide evidence to the contrary. That evidence may include documentation from the employee's personnel record showing that he/she engaged in misconduct (thus providing proof of the just cause) and copies of the written notice that was given to the employee of the just cause.

Notably, the ONLR and NNLC also like to see that the employer used "progressive discipline" with the employee. Whenever progressive discipline is appropriate, it should be used and documented.

V. Affirmative Action Plans

According to the NPEA, 15 N.N.C. §604(A)(1), all employers must develop "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." Section 604(A)(2) requires all employers to file their affirmative action plan with the ONLR. Any time a labor organization represents an employer's employees, the affirmative action plan must be filed jointly with the employer and the labor organization. Failure to file a plan that complies with the NPEA constitutes a violation of the Act, and may subject the employer to formal charges under the NPEA.

In addition, on November 22, 2002, the Human Services Committee adopted Regulations that reinforced the requirement that all employers adopt and file affirmative action plans and timetables.

A. Contents of Affirmative Action Plans under the NPEA

The NPEA, Section 604(B)(10), states, "Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment."

In addition, Section 604(B)(11) states, "An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans under the Act. Such programs 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 employees."

The Human Services Committee Regulations go into much more detail with respect to what must be included in the affirmative action plans and how the plans and timetable must be implemented. In summary, the Regulations require the following:

- The employer must develop a policy statement that (1) indicates the employer's position on the subject of Navajo preference; (2) assigns responsibility for implementing Navajo preference; (3) sets forth a procedure for reporting and monitoring Navajo preference.
- The employer's policy statement must discuss employment and training for Navajo workers.

- The employer's policy statement must state that employment decisions and personnel actions shall be based on the principles, intent and purposes of the NPEA.

- The employer must appoint a management-level employee with decision-making authority to implement and monitor the affirmative action plan. The employee's responsibilities shall consist of (1) developing the plans, policy statements, goals and objectives, and internal and external communication procedures; (2) identifying problems and implementing corrective solutions for problems in providing Navajo preference; (3) designing and implementing audit and reporting systems that will measure the effectiveness of the employer's affirmative action plan, indicate the need for remedial action, and determine the degree to which the employer's goals and objectives have been met; and (4) serve as a liaison between the employer and the ONLR.

- The employer must establish goals and timelines for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications, including supervisory and management positions. The goals and timelines should be attainable, based on the employer's analysis of several factors, including the positions that are currently held by non-Navajos, the qualifications for the positions, and timelines for Navajo workers to obtain qualifications for positions held by non-Navajos.

- The affirmative action plan "should" contain a workforce analysis, consisting of a list of each job title, ranked from lowest paid to highest paid, within each department, including mid-management and top-management, as well as "lines of progression ... through which employees could move upward." The plan "should" also include an analysis of all positions and an explanation of whether Navajos are "under utilized" in that position, meaning that fewer Navajos are employed in that position "than would be expected by the availability of qualified Navajo workers."

- "An in-depth analysis of the following shall be made:

1. Composition of Navajo and non-Navajo employees by position/classifications.
2. Composition of applicant flow of Navajos and non-Navajos.
3. Selection process, including recruitment, job descriptions, interview criteria, written tests and final selection.
4. Retention, promotion, transfer, reduction in force and recall.
5. Apprenticeship program/trainings.
6. Company training – formal and informal."

- "If any of the following are identified in the analysis, a plan of corrective action must be established immediately:

1. An under-utilization of Navajo employees.
2. Vertical movement of Navajos occurs at a lesser rate than that of non-Navajos.

3. The selection process eliminates a significantly higher percentage of Navajos than non-Navajos.
4. Position/job descriptions are inaccurate in relation to actual duties and function[s].
5. Testing and/or test forms having adverse impact at a higher rate on Navajos than non-Navajos.
6. Non-support of the company's affirmative action policy by employees, supervisors or managers.
7. No formal criteria established for evaluating the effectiveness of the affirmative action program."

VI. Enforcement Proceedings Under the NPEA

A. ONLR Charges

The NPEA provides that "Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her individual rights under the Act." 15 N.N.C. §610(B). Also, the ONLR may file a charge on behalf of individual Navajos or a class of Navajos. Id. Under the Staff Relief decision discussed earlier, however, the Act has been expanded to allow any person to file a charge under the NPEA regardless of his or her race or Tribal membership.

All charges under the NPEA must be filed with the Office of Navajo Labor Relations within one year after the accrual of the claim. The ONLR must notify the employer of the charge within 20 days after it is filed (there is no penalty, however, if the ONLR fails to do that).

The ONLR is required to "conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the act has been violated." 15 N.N.C. §610 (C). The ONLR may, in conducting its investigation, issue subpoenas to produce evidence, request answers to interrogatories, and interview witnesses. Id. Typically, the ONLR will issue a letter to the employer setting out the charge, asking for responses to specific questions, and requesting copies of documents. A prompt and complete response to such requests is almost always the best approach.

At the conclusion of the investigation, the ONLR can dismiss the charge and issue a "right to sue" letter to the charging party or it can issue a "probable cause determination" setting out its findings as to why it believes the employer violated or is violating the Act. If a probable cause determination is issued, the ONLR is required to "make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion." 15 N.N.C. §610(F). If conciliation fails, the ONLR may initiate proceedings before the Labor Commission on behalf of the employee, or issue a "right-to sue letter" to the employee.

B. Labor Commission Complaints

The Navajo Labor Commission is the five-member body established by the Council to hear and adjudicate claims under the NPEA. Complaints must be filed with the Labor Commission no later than 360 days after the date on which the ONLR charge was filed. If the complaint is filed before 180 days

after the charge is filed, then a “right to sue letter” must first be obtained from the ONLR. No “right-to-sue” letter is required if more than 180 days have elapsed since the filing of the charge.

The act requires the Commission to schedule a hearing within 60 days of the filing of the Complaint and give notice to the employer describing the complaint and the employer’s right to appear and defend against the Complaint. The Commission has adopted *Rules of Procedures for Proceedings Before the Navajo Nation Labor Commission* that require the employer to file a written answer to the Complaint within 10 days after receipt of the Notice of hearing. Failure to file an answer is deemed to be an admission of the allegations in the complaint.

The NPEA does not spell out procedures for pre-hearing discovery, but the Commission does have subpoena power. At the hearing, the Act specifies that: the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by clear and convincing evidence.” However, in Manygoats v. Cameron Trading Post, No. SC-CV-50-98 (Nav. Sup. Ct. 2000), the Navajo Nation Supreme Court held that the “clear and convincing” evidence standard violates the due process rights of employers under the Navajo Nation Bill of Rights. The Court suggested that the Commission should use the “preponderance of the evidence” standard (meaning “more likely than not”), but the decision does not clearly say what the correct standard is. In either case, Commission proceedings remain unique in that the employer always has the burden of proof.

If the Commission finds that an employer violated the act, it has a very broad range of authority to award relief, including back pay, front pay, injunctive relief, and mandatory corrective actions. If the Commission finds that a violation was intentional, it may impose civil fines. Also, if the Commission finds that the employer’s position was “not substantially justified,” it can award attorney’s fees to the petitioner.

C. Judicial Review and Enforcement of Commission Orders

The Act provides that the Commission’s decisions may be enforced by proceedings in the District Courts of the Navajo Nation. However, the substance of the Commission’s decision can only be appealed to the Supreme Court of the Navajo Nation. A party has 10 days from receipt of the Commission’s decision to appeal. The appealing party may seek a stay of execution of the decision from the Commission (subject to various requirements specified in the Act, including the posting of an appeal Bond). The Act, itself, does not place any limits on the scope of the Supreme Court’s review of a Commission decision, but the Commission’s Rules of Procedures states that the appeal may only address “questions of law.”

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