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FILED  
SUPREME COURT

2019 JUL 32 AM 9:31

IN THE SUPREME COURT OF THE NAVAJO NATION  
NAVAJO NATION

In the Matter of: )  
**CECELIA WHITETAIL-EAGLE,** )  
) )  
Appellant, )  
) )  
v. )  
) )  
**NAVAJO NATION RAMAH CHAPTER,** )  
**AND RNC OFFICE OF GRANTS AND** )  
**CONTRACTS,** )  
) )  
Appellee. )  
\_\_\_\_\_ )



Case No: SC-CV-14-19  
Re: OHA-DPM-011-18

**REPLY BRIEF OF THE APPELLANT CECELIA WHITETAIL EAGLE**

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## **Appellee Office of Grants and Contracts (OGC) Did Not Timely File a Brief**

Appellee, the Office of Grants and Contracts, through counselor David Peterson, with whom Ms. Whitetail-Eagle receives her paychecks, did not file a brief. Note that RNC Chapter President David Jose is responsible for the decision to terminate the Appellant, but that OGC holds the purse to make Appellant whole again.

Pursuant to Rule 12(c) of the Navajo Rules of Civil Procedure, “if the appellee does not timely file a brief, the appeal may be decided on the appellate record.” It is requested the Court decide on Appellant’s brief according to the record as to making findings against OGC. Appellee OGC ought to not be permitted to supplement the record absent consent of Appellant.

Appellant requests all her claims and requests for relief as they pertain to the OGC be considered with the evidence on the record, that any motion or offer of evidence, by the appellee hereto, is not permitted to supplement the record by this Court absent consent of Appellant.

### **Appellee RNC Incorporates Appellant’s Statement of the Case, Facts and Proceedings, on Pages 3-6 of Appellant’s Brief**

Appellee RNC on page 1, paragraphs 1, 2 and 3 of their brief, incorporate Rule 11(b) as to Appellant’s Statement of the Case, Facts and Proceedings.

Appellee RNC only disputes finding of fact number 7, calling it a “legal conclusion.” However, whether or not it is a legal conclusion, it is also fact, and it is a relevant fact to this case, as it is the basis of Ms. Whitetail-Eagle’s appeal that “the Appellant was required to file any grievance and/or claims in accordance with the Navajo Nation Personnel Policy Manual (NNPPM), which is consistent with the statutory language in CO-48-14 amending the NPEA to require non-certified chapter employees to proceed vis-à-vis the grievance procedure outlined in the NNPPM.”

Appellee RNC supplements its statement of facts, at the first numbered paragraph 1, on page 1 at the bottom. Appellee’s proposed facts 1-3 are not disputed. Number 4-5 were legal arguments, not

facts, and are hence inappropriate as to the stating of relevant facts, hence they should be stricken from that portion of the brief for being irrelevant and immaterial. Whitetail-Eagle concedes the RNC grievance procedure was never contemplated as a forum for her to adjudicate her wrongful termination.

**Appellee RNC Did Not File an Appeal, Hence They Cannot Reframe the Issues on Appeal**

Rule 11(b) only allows Appellee to brief the statement of the issues if the Appellant's statement of the issues is "insufficient or incorrect."

Appellant's statement of the issues are different than Appellee's, but they incorporate Appellee RNC's 2 issues, hence they cannot be insufficient, and they aren't incorrect.

If Appellee RNC wanted to reframe, and narrow the issues to be considered on appeal, they should have filed their own appeal of the matter; rather the immense burden to pay for and produce a transcript necessary for filing an appeal has been borne by Ms. Whitetail-Eagle. Rule 8(a) required any notice of a cross appeal be made within 20 days of Appellant's notice of appeal. Appellee RNC did not file any such notice, and they should not be permitted to use Rule 11(b) as a backdoor to accomplish the filing of their own appeal.

**IN REBUTTAL TO RNC'S LEGAL ARGUMENTS**

**Appellee RNC's Argument that CO-48-14 Does "Not Apply in This Situation" is False**

Appellee RNC argues the legislative amendments to the NPEA contained in CO-48-14 "did not apply in this situation" is a legal conclusion. This conclusion is unsupported by the facts, any case law, statutory, customary or fundamental law. *See* Appellee RNC's Brief on page 4, paragraph 1.

**NNLC 2016-034, a/k/a Whitetail-Eagle's Administrative Leave Lawsuit, Is Not Being Appealed**

Appellant RNC cites to previous litigation pursued by Ms. Whitetail-Eagle, NNLC 2016-034, whereupon she grieved the decision by RNC Chapter President David Jose to place her on paid administrative leave for 514 days. Ms. Whitetail-Eagle chose not to appeal that decision. That matter

proceeded through the NNLC by stipulation with RNC's then attorney.

### **The NPEA Amendments in CO-40-14 Grant OHA Exclusive Jurisdiction Over This Matter**

Appellee RNC argues Gishie for the proposition that this Court "will look to the interpretation of the statute to determine if the administrative bodies have jurisdiction when they have denied jurisdiction." That matter concerned whether OHA had jurisdiction over fencing disputes occurring on allotments. It's irrelevant to this litigation, and it's dismissive of the Navajo Nation's large volume of cases concerning employment litigation and interpretation of the NPEA.

CO-40-14 instructed Ms. Whitetail-Eagle, as a non-LGA certified chapter employee, to go to OHA to file her appeal. Further, Ms. Whitetail-Eagle was denied by the ONLR to pursue the Commission as a remedy. And finally, the RNC OGC Personnel Policy Manual didn't provide her a grievance process whose final decision couldn't be overwritten by RNC Chapter President, David Jose, whom fired her in the first place.

### **The RNC OGC Personnel Policy Manual Violates the NPEA**

It is a fact that RNC OGC has their own personnel policy manual. But the manual violates the law. In particular, were Ms. Whitetail-Eagle had attempted to avail herself of it, the grievance process that it affords is a sham. Her boss RNC Chapter President David Jose has the authority under those same grievance procedures to override the decision of the adjudicator to sustain his own termination. The decision of David Jose would be the final decision on the matter concerning his decision to unjustly terminate Ms. Whitetail-Eagle. He would be the judge, jury and executioner so to speak.

RNC cites to no authority for the proposition that the NPEA "does not apply" to Appellee, even with Ramah being a semi-autonomous community. There's no separate statutory code for Ramah, hence there is not employment code other than the NPEA.

### **The NPEA Protects All Employees on the Navajo Nation**

Appellee RNC argues CO-40-14 was meant to make the “relevant government entities grievance process binding.” RNC argues “Ramah has its own grievance process.” RNC Brief, bottom of page 6.

The problem with such an interpretation is such government entities might develop a defective process, like the Appellee did, and simply not give employees an actual grievance process. RNC’s grievance procedure is a misnomer. There is no due process where the procedure gives the employer the authority under those same grievance procedures to override the decision of the adjudicator to sustain his or her own decision to terminate the employee.

If the intention of council were to make government employment manuals binding, then this legislation did not achieve that. In fact, as in this matter, it did the exact opposite in explicitly divesting non-LGA certified chapters from using their own manual. It’s unreasonable to extrapolate an opposite meaning from the what the plain language CO-40-14 conveys.

#### **The Parties’ Employment Contract Constitutes an Illegal Choice of Law Clause**

Appellee has gone rogue in flaunting their resistance to engage in the most minimum of workplace protections guaranteed under Navajo employment law. Appellee RNC inadequately addresses, if at all, the due process and fundamental law concerns were they to prevail in having Whitetail-Eagle’s termination summarily dismissed without a hearing. Appellees give no consideration to engaging in K’é. It does not seem to be a concern in Appellee’s brief.

It is through employment that the people, both employees and business owners, provide for themselves and their families, and such employment assist them in living the good life. Thinn v. Navajo Generating Station, 9 Nav. R. 140 (Nav. Sup. Ct. 2007).

There are two grievance procedures set forth in the NPEA, the DPM/OHA procedure, and the ONLR/Labor Commission procedure. Each are independently and explicitly authorized under the

NPEA, and each carry their own set of procedural rules. Neither of these procedures are used in the RNC OGC Personnel Policy Manual. It is because of this that RNC OGC Personnel Policy Manual employs an impermissible choice of law clause that is explicitly disallowed by the NPEA. There is no “third way” to legally adjudicate employment disputes under the NPEA, and if there were, it would not be a procedure that gives the employer the authority to override the decision of the adjudicator to sustain his or her own decision to terminate the employee.

Appellee cites to foreign law for the position that Whitetail-Eagle should be bound to a grievance procedure that gives the employer the authority to override the decision of the adjudicator to sustain his or her own decision to terminate the employee. Foreign employment law is vastly different than Navajo employment law. Appellant asks the Court to look to its own body of employment law to overrule the OHA. It was erroneous and contrary to Navajo fundamental law for the hearing officer to dismiss this without so much as calling witness testimony and allowing the parties to talk things out.

#### **Whitetail-Eagle Timely Filed her Step 1 Grievance**

The OHA uses its own procedural rules, including that of the NNPPM. The NNPPM is clear on its face that it uses working days in its calculation of the timeline to which an aggrieved employee must file their Step 1 grievance. This definition is built into the grievance procedure.

There is no rule in the NNPPM that states “working days” are calendar days unless the day falls on holiday or is the last day tolled. Appellee is simply making up such a rule. In fact, the NNPPM states that the presumption in tolling is calendar days, unless it is stated otherwise. And it is stated otherwise in NNPPM XIV(C)(1). See definitions for “days.” NNPPM(XXI).

#### **CONCLUSION**

Appellant again respectfully requests the Court to impose fundamental law, to which the OHA makes no reference of its consideration, nor does the OHA cite to any case law for that

matter, and to reverse the OHA. It is for good reason that council divested all non-LGA certified chapters from developing their own grievance procedure using their personnel policy manuals. It's possible other governmental entities would follow Ramah's suit and develop policies intended to cripple and disadvantage the aggrieved employee to the point where the uniqueness of Navajo employment law would give way to the economic oppression of settler colonial employment at-will doctrines.

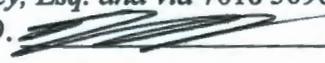
Respectfully submitted:

*Law Office of Barry Klopfer, P.C.*

By:

  
Barry Klopfer, Attorney for Appellant

CERTIFICATE OF SERVICE

*I hereby swear upon oath that a true and correct copy of this Reply Brief was emailed certified mail return receipt request nos. 7018 3090 0001 2621 2846 to Colin Bradley, Esq. and via 7018 3090 0001 2621 2853 to David Peterson, Esq., on this 1 day of August 2019.*   
Barry Klopfer