

RESOLUTION OF THE
NAVAJO NATION COUNCIL

23rd NAVAJO NATION COUNCIL - Second Year, 2016

AN ACTION

RELATING TO LAW AND ORDER, HEALTH, EDUCATION AND HUMAN SERVICES,
AND NAABIK'ÍYÁTI' COMMITTEES AND NAVAJO NATION COUNCIL; AMENDING
THE NAVAJO PREFERENCE IN EMPLOYMENT ACT AT 15 N.N.C. §§ 604, 611
AND 614

BE IT ENACTED:

Section One. Findings

- A. The Navajo Nation empowered the Navajo Nation Law and Order Committee to review and recommend proposed Navajo Nation Code enactments and amendments. 2 N.N.C. § 601(B)(14)(2012); see also CJA-03-13.
- B. The Health, Education and Human Services Committee exercises oversight over employment matters. 2 N.N.C. § 401(C)(6)(2012).
- C. The Navajo Nation Council Speaker shall assign "[a] proposed resolution that requires final action by the Navajo Nation Council to...the Naabik'íyáti' Committee"; this resolution proposes a positive law amendment and requires the Navajo Nation Council's approval. 2 N.N.C. § 164 (A) (9) (2012) and 2 N.N.C. § 164 (A) (2012) see also CO-45-12.
- D. Currently, the general burden under the Navajo Preference in Employment Act ("NPEA") is on the employer to prove by a preponderance of the evidence that the law was not violated. 15 N.N.C. § 611(B). Preponderance of the evidence is defined as "just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true." See <http://legal-dictionary.thefreedictionary.com>
- E. When an employee makes a grievance under 15 N.N.C. § 604(B)(9) specifically claiming harassment, the burden of proof is unclear.

- F. Under current Labor Commission rules, the employee alleging harassment has the burden to establish first that the employer harassed him or her. See Labor Commission Rules attached as Exhibit A.
- G. The proposed revision to 15 N.N.C. § 604(B)(9) would make it clear that in harassment cases the employee has the burden to establish the violation based on the unique nature of such a claim.
- H. The proposed revision to 15 N.N.C. § 611(B) would shift the burden of proof from the respondent to a burden of proof that both parties - petitioner and respondent - share equally.
- I. The proposed revision to 15 N.N.C. § 614 would apply the same shared burden of proof to cases filed by Navajo Nation Government Employees.

Section Two. Amendments to Title 15 of the Navajo Nation Code

The Navajo Nation hereby amends the Navajo Nation Code, Title 15, §§ 604, 611 and 614 as follows:

TITLE 15. LABOR

CHAPTER 5. NAVAJO PREFERENCE IN EMPLOYMENT ACT

§ 604. Navajo employment preference

B. Specific requirements for Navajo preference:

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and including sexual harassment. The employee alleging a violation of this subsection shall have the burden of proof to show that violation by a preponderance of the evidence.

§ 611. Hearings

B. Burden of proof. ~~In any compliance review, complain 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.~~ In any hearing, the employee alleging violation shall have the burden of proof to show violation by a preponderance of evidence.

§ 614. Grievance Procedure for Navajo Nation Government Employees

- A. An employee of the Navajo Nation Executive or Legislative Branch or a non-Local Governance Act Certified Chapter, or applicant for employment with the Navajo Nation Executive or Legislative Branch or non-Local Governance Act Certified Chapter, who alleges a violation of this Act shall file a grievance as provided by the Navajo Nation Personnel Policies Manual. The hearing officer may award the employee or applicant any remedy authorized by Section 612(A) of this Act. Directed verdict shall be discouraged in favor of a hearing to hear evidence from all parties.
- B. Any employee of the Navajo Nation Judicial Branch or an applicant for employment with the Navajo Nation Judicial Branch who alleges a violation of the Act shall file a grievance as provided by the Judicial Branch Employee Policies & Procedures. The hearing board may award the employee or applicant any remedy authorized by Section 612(A) of this Act.

C. Except as otherwise provided in this Act, in any compliance review hearing, the employee alleging violation shall have the burden of proof to show violation by a preponderance of evidence. Directed verdict shall be discouraged in favor of a hearing to hear evidence from all parties.

~~E.~~ D. Any party to the grievance may appeal a final decision of the hearing officer or hearing board to the Navajo Nation Supreme Court within ten (10) calendar days of receipt of the decision. The employee or applicant shall file a notice of appeal with the Navajo Nation Supreme Court and the hearing officer or hearing board.

Section Three. Effective Date

The Navajo Nation Code amendment enacted herein shall be effective pursuant to 2 N.N.C. § 221(B).

Section Four. Codification

The provisions of this Act which amend or adopt new sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall incorporate such amended provisions in the next codification of the Navajo Nation Code.

Section Five. Savings Clause

Should any provisions of this ordinance be determined invalid by the Navajo Nation Supreme Court, or the District Courts of the Navajo Nation, without appeal to the Navajo Nation Supreme Court, those portions of this ordinance which are not determined invalid shall remain the law of the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 15 in favor and 1 opposed, this 23rd day of March 2016.



LoRenzo Bates, Speaker
Navajo Nation Council


4-1-16

Date

Motion: Honorable Jonathan L. Hale
Second: Honorable Seth Damon

ACTION BY THE NAVAJO NATION PRESIDENT:

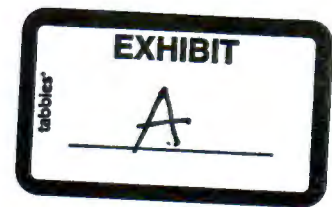
1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (10), on this 6th day of April 2016.



Russell Begaye, President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. §1005 (C) (11), this _____ day of _____ 2016 for the reason(s) expressed in the attached letter to the Speaker.

Russell Begaye, President
Navajo Nation



**AMENDED RULES OF PROCEDURE FOR
THE NAVAJO NATION LABOR COMMISSION**

1. **APPLICABILITY:** These rules shall apply to all proceedings before the Navajo Nation Labor Commission ("Commission") pursuant to the Navajo Preference in Employment Act ("NPEA") 15 N.N.C. §301 and §601 et. seq. These rules shall be cited as LCRP.
2. **PARTIES:** The Office of Navajo Labor Relations ("ONLR") or the individual party filing the complaint ~~shall be~~ is the Petitioner and the person alleged to have committed the violations of NPEA ~~shall be~~ is the Respondent. Petitioner shall be present at all stages of the proceedings. Respondent shall have a representative(s) present at all stages of the proceedings who has the authority to negotiate and approve a settlement agreement.
3. **INITIATION OF PROCEEDINGS:** Commission P proceedings before the ~~Commission~~ shall be initiated when Petitioner upon the filings of a written complaint ~~by a Petitioner~~ pursuant to 15 N.N.C. §610(J). A non-refundable filing fee of \$25.00 made payable to the Navajo Nation is required to initiate the processing of the complaint. The filing fee may be waived upon a written request to the Commission.
4. **REQUEST FOR PRELIMINARY INJUNCTION:** ~~Prior to filing a Charge with the ONLR, Petitioner must file an ONLR Charge prior to filing a Petition for Preliminary Injunction for Petitioner, upon notice to the Respondent, may petition the Commission for preliminary relief pursuant to 15 N.N.C. §610(K).~~ This petition shall meet the recognized requirements for an injunction. The moving party must show that he/she: (1) has a protectable interest; (2) has a high likelihood of success on the merits; (3) that irreparable injury, loss, or injury is likely to occur if the preliminary injunction is not issued; (4) that the threatened injury, loss or damage is substantial in nature; and (5) does not have an adequate remedy at law.

Petitioner shall serve the petition for preliminary injunction on the Respondent within 5 (five) days of filing the petition with the Commission.

A hearing shall be held within fifteen (15) business days of the filing of the petition for preliminary injunction.

5. **CONTENTS OF COMPLAINT:** The Complaint ~~shall~~ must be in writing, doubled spaced, and shall not exceed ten (10) pages. ~~and~~ The Complaint shall contain:

- (a) a statement that Petitioner is authorized to file the complaint under the terms and conditions prescribed in 15 N.N.C. §610(J)(1)(a)-(c);
- (b) a statement that Petitioner is: (1)is an enrolled member of the Navajo Nation; ~~or,~~ (2) ~~is legally~~ married to an enrolled member of the Navajo Nation and meets the conditions prescribed in 15 N.N.C. §614 including a copy of a valid marriage certificate and proof that he/she has resided within the Navajo Nation continuously for one year, or, (3) he/she is eligible to file the complaint pursuant to *Staff Relief vs. Polacca*, 8 Nav. R. 49 (Nav. Sup. Ct. 2000).
- (c) Petitioner and Respondent's valid mailing address and telephone numbers. All mail sent to the parties at the address(es) provided shall be deemed served. If Respondent is a corporation, Petitioner shall provide the name and address of the corporation's registered agent to insure that Respondent receives notice of the filing of the Complaint.
- (d) the identification of the person(s) alleged to have violated the NPEA;
- (e) the date(s) on which the violations occurred, or where such acts are of a continuing nature, the period of time when the acts occurred;
- (f) a statement of the facts constituting the alleged violation(s);
- (g) **all Section 604(B)(9) allegations of hostile work environment, harassment, humiliation, or intimidation shall be specifically plead and shall include specific name(s), date(s), place, and a brief description of the event(s);**
- (h) the relief sought by Petitioner. ~~in accordance with the NPEA;~~
- (i) a copy of the Charge filed with ONLR ~~shall~~ **must** be attached to the complaint.

6. **FILING OF DOCUMENTS:** The complaint may be filed in person ~~with~~ at

the Commission office located off Morgan Boulevard, Training Center, Window Rock, Navajo Nation, Arizona or by certified mail, addressed to: Post Office Box 3450, Window Rock, Arizona 86515. All other documents may be sent by First Class mail to the address listed above. **Only those documents consisting of 7 ten (10) pages or less may be filed by facsimile at (928) 871-7415. Parties will pay \$2.00 per page for each faxed document that exceeds ten (10) pages.**

7. **NOTICE OF HEARING:** A hearing shall be scheduled within sixty (60) calendar days of filing the complaint, but a hearing need not be held within sixty (60) calendar days of the filing of the complaint. A notice of hearing, a copy of the complaint, and these rules will be sent by certified mail to the parties or counsel of record. Petitioner may personally serve the complaint on a Respondent Corporation to insure that proper notice has occurred.

NOTE: The Commission is only obligated to send a copy of the complaint and notice of hearing to the Respondent upon the initial filing of the complaint. If the notice by certified mail is not delivered to the Respondent for any reason, Petitioner will be responsible for effecting service on the Respondent.

8. **SERVICE; FILING OF OTHER PLEADINGS AND PAPERS:**

- (a) Except as otherwise required in these rules, every pleading, motion or other papers filed after the original complaint shall be served by the filer upon all the parties or counsel of record within three (3) business days of filing said documents with the Commission. All pleadings and every paper filed with the Commission shall contain a certificate of service showing the date and manner of service.
- (b) Additional Time After Service by Mail. Whenever a party is required to do some act or take some proceedings within a prescribed time after the service of a notice or other paper upon him and the notice or paper is served by mail, five (5) days shall be added to the prescribed time.
- (c) Proposed exhibits shall be filed with the Commission and served on the opposing party, no later than ten (10) business days prior to the initial hearing. Exhibits shall not be filed by facsimile will not be accepted. Petitioner's exhibits shall be marked in alphabetical order. Respondent's exhibits shall be marked in numerical order. Exhibits in

excess of ten (10) or more ~~shall~~ must be tabbed, indexed and put in a 3-ring binder. Acceptance of supplemental exhibits filed less than ten (10) business days prior to the hearing is discretionary. ~~The parties shall submit complete exhibits at the evidentiary hearing.~~

- (d) The parties shall file their list of witnesses along with their address, phone number, and e-mail address, no later than ten (10) business days prior to the hearing.
 - (e) The parties shall file one (1) original and eight (8) copies of the Complaint, all pleadings, exhibits, and written documents with the Commission. The parties, ~~however~~, need only file one copy of subpoenas or proposed order(s).
 - (f) All motions, briefs, or memorandums must be answered within ten (10) calendar days after receipt by a party. Application of this rule may vary depending on whether a party is represented by counsel.
 - (g) The Commission may impose sanction(s) when a party fails to comply with any of the provisions prescribed by this rule.
9. **TIME:** In computing time under these rules, by order of the Commission, or as mandated by the NPEA, the date of the act, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a holiday, in which event, the period runs until the end of the next business day which is not a Saturday, Sunday or a holiday.
10. **CONTINUANCE OF HEARING DATE:** A hearing may be extended upon a written request showing good cause. The moving party shall indicate whether the opposing party has consented to the continuance and how much additional time is needed. A request for a continuance must be made ten (10) business days prior to the hearing date. Thereafter, no requests for continuances shall be considered, unless there is a showing of exigent or unforeseeable circumstances.
11. **ANSWER:** The Respondent shall file an ~~written~~ Answer to the complaint within twenty (20) calendar days after ~~the~~ receipt of the notice of hearing. ~~Failure to file a written Answer shall be deemed an admission of the allegations~~

~~contained in the complaint. The Answer shall be limited to three (3) pages.~~
NOTE: A Respondent who files a motion to dismiss for lack of jurisdiction is not required to file an Answer until ten (10) days after the Commission rules on the motion to dismiss. An Answer must be filed within the prescribed time where a motion to dismiss is filed on any other grounds except for lack of subject matter jurisdiction.

12. **AMENDMENTS:** An amended complaint may be filed before an Answer is served on Petitioner. An amended Answer may be filed twenty (20) calendar days after the Answer has been served on Petitioner. Otherwise, a complaint or Answer may only be amended by leave of the Commission or by written consent of the adverse party. Leave to amend shall be freely given when justice requires. Respondent shall file an Answer to an amended complaint within 15 (fifteen) calendar days of being served with the amended complaint.
13. **DEFAULT JUDGMENT:** Upon Respondent's failure to file a timely Answer, the party entitled to a default determination shall: (1) file a motion for an entry of default showing that the opposing party is in default and attaching proof of service of the complaint; (2) give notice of the motion for entry of default to the party claimed to be in default by certified mail.

An entry of default shall not be made until ten (10) calendar days after the filing and receipt of the notification of motion for entry of default judgment by the opposing party who is allegedly in default. A default shall not be entered if the party claimed to be in default pleads or otherwise defends as provided by these rules prior to the expiration of ~~the~~ ten (10) calendar days from the filing and notification of the motion for entry of default. A judgment by default may be issued after an entry of default has been entered by the Commission.

This rule does not apply where the Navajo Nation or any public entity, officer, employee or agent of the Navajo Nation is the Respondent. See 1 N.N.C. §555(B). Exceptions may apply where the Navajo Nation fails to participate in proceedings or fails to honor orders of the Commission. *Loley v. Dept. of Employment & Training*, 7 Nav. R. 406, 409 (Nav. Sup. Ct. 1999).

14. **SUBPOENAS:** All requests for subpoenas by a party, or on the initiative of the Commission shall be in writing. The Commission may issue a subpoena compelling the disclosure by any person evidence relevant to the complaint, including a subpoena ordering (a) the attendance and testimony of witnesses at

a deposition or hearing; (b) responses to written interrogatories; (c) the production of evidence including any relevant documents; and (d) access to evidence for the purpose of examination and copying. ~~NOTE:~~

A subpoena is not required to serve interrogatories. A notice certificate of service ~~showing the date and manner of service of the interrogatories~~ must be filed with the Commission before or at the time it interrogatories are served. Parties must respond to the requests for interrogatories within twenty (20) calendar days of receipt of the interrogatories. Interrogatories shall be limited to fifteen (15) questions including subparts.

Requests for subpoenas shall be filed no later than fifteen (15) business days prior to a scheduled hearing. The recipient shall have five (5) business days after receipt of the request to object to the subpoena. Upon receipt of the request and response to the subpoena, the Commission shall grant or deny the request for subpoena. The Commission has discretion to grant requests for subpoenas not made within this time period. All discovery must be completed no later than fifteen (15) days prior to the hearing.

The party requesting issuance of subpoenas shall arrange for service. A subpoena compelling the appearance of a witness for a hearing or deposition shall be served by a Navajo Police Officer or by any other person who is not a party and not less than 18 years of age, who shall execute a Return of Service. All other subpoenas may be served by certified mail. A subpoena served by ordinary first class mail shall be invalid. Parties are required to confer with each other prior to filing discovery objections or motions to compel discovery.

~~NOTE: Commission P proceedings before the Commission is~~ are intended to afford the parties a prompt, informal and inexpensive process for to resolve ing employment disputes. As such, Commission These proceedings require lesser formalities than those required by both the Navajo Nation and federal discovery practice to foster the intent of the NPEA. Parties are strongly urged to refrain from engaging in extensive and costly discovery. Parties are strongly encouraged to initiate discovery as early as possible after an Answer has been filed to avoid delay.

15. CONDUCT OF HEARING:

- A. The Chairperson shall preside at the hearing at which a quorum of three (3) members of the Commission are present. The Vice-Chairperson shall serve in the absence of the Chairperson. In the absence of the Chairperson, and Vice-Chairperson, the Secretary shall preside at the hearing.
- B. Either party may file a written motion to disqualify a member of the Commission from hearing a case. The motion must be supported by an affidavit or by relevant, adequate evidence to show that actual bias exists.
- C. A Commissioner shall disclose that she/he has a past or present relationship to a party/ witness. If a party objects to that Commissioner's participation, the Commissioner shall consider whether she/he can remain fair and impartial despite the relationship. However, recusal shall not result in losing a quorum so as to deny a party access to a hearing.
- D. The Chairperson of the Commission shall regulate the course of the hearing, shall conduct the hearing in a fair and orderly manner and shall extend to all parties the right to be heard.
- E. Oaths shall be administered by the Clerk of the Commission.
- F. Use of a Navajo interpreter:
- (1) ~~A party that wishes to present his/her case in the Navajo language shall declare such intention in the original petition, or Answer. A written request will be considered if timely filed ten (10) days prior to the hearing.~~
 - (2) A certified Navajo interpreter is preferred. The party requesting that his/her case be presented in the Navajo language a Navajo interpreter is shall be responsible for compensating the interpreter and providing notice to the opposing party that he/she intends to use an interpreter.
- G. Representation: Parties shall have the right to appear *pro se* or be represented by counsel who is a member in good standing with the Navajo Nation Bar Association ("NNBA"). Counsel shall file an entry

of appearance: ~~which states that they are a member in good standing with the NNBA.~~ A non-resident attorney, who is a member in good standing with any state bar, may participate in one case per year before the Commission by filing. ~~The non-resident attorney(s) shall submit a written request to appear and shall associate with a NNBA member.~~

If A Respondent ~~is a~~ corporation, it is required to be represented by counsel who is a member of the NNBA. *Perry v. Nav. Labor Commission & conc. Utah Nav. Dev. Corp.*, No. SV-CV-50-05, slip op. (Nav. Sup. Ct. Aug. 7, 2007).

- H. The Commission shall not be bound by any formal rules of evidence. The Chairperson may exclude evidence that is irrelevant, immaterial, or unduly repetitious.
- I. Each party may call, examine, and cross examine witnesses. The Commission may question any of the witnesses upon conclusion of their testimony. Either party may question those witnesses regarding only the issues raised by the Commission's inquiry.
- J. Each party shall have an opportunity to give an opening statement prior to the presentation of their case.
- K. Order of Proceedings: The Respondent has the burden of going forward with evidence that they did not violate the NPEA. After the Respondent has rested, the Petitioner may present evidence to support of his/her claim. EXCEPTION: The Petitioner has the initial burden of going forward with evidence that Respondent created a hostile work environment and/ or harassed, humiliated or intimidated Petitioner in violation of 15 N.N.C. §604(B)(9). The burden will then shift to the Respondent to show no violation of 15 N.N.C. §604(B)(9). The Petitioner may rebut the evidence presented by the Respondent.
- L. Each party may give closing arguments upon conclusion of presentation of the evidence.
- M. A party may move for a Directed Verdict at the close of the evidence offered by an opponent. A motion for directed verdict shall state specific grounds. The opponent shall have an opportunity to respond to the

motion.

N. Motions for Summary Judgment are not allowed.

Q. The burden of proof shall be on the Respondent to show compliance with the provisions of the NPEA by a preponderance of the evidence.

P. In the event a party does not make an appearance on the day set for hearing, the Commission may enter a default determination against the non-appearing party.

Q. Witnesses shall be excluded from the hearing room prior to the presentation of their testimony.

R. All hearings ~~shall be~~ are recorded. Any party may request a copy of the ~~tapes~~ a recording of the proceedings at their own expense.

S. A party may record the proceedings via any electronic audio recording device that does not interfere or obstruct the proceedings. A party may employ a court reporter upon notice to the opposing party. All transcripts generated from the foregoing are unofficial and may not be substituted as an official record of the Commission.

T. A ~~damages~~ remedies hearing may be held where the prevailing party ~~shall have~~ has the burden of proof to show that he/ she is entitled to the remedial relief requested. Opposing party will have an opportunity to respond to the remedial relief requested.

16. ~~STIPULATION OF PARTIES:~~ SETTLEMENT AGREEMENTS: All ~~stipulations~~ settlement agreements executed by the parties or counsel of record shall be submitted in writing as soon as practical. If a ~~stipulated~~ settlement agreement is made within five (5) calendar days prior to the hearing, the terms of the agreement shall be presented at the scheduled hearing, unless otherwise ordered by the Commission. All confidential settlement agreements must be filed with the Commission which will be sealed and will remain unavailable to the public.

17. **DECISION:** The decision shall be reduced to writing, signed by the Chairperson or designee. Copies of the decision shall be sent by certified mail

to all parties of record.

18. **APPEAL:** The decision of the Commission shall be final with a right of appeal to the Navajo Nation Supreme Court. An appeal must be filed with the Navajo Nation Supreme Court within ten (10) calendar days after receipt of the decision.
19. **MODIFICATION:** The Commission reserves the right to modify these rules.
20. **EFFECTIVE DATE:** These Rules shall be in effect on and after _____, 5:00 P.M.

Rules Of Procedures for Proceedings Before the Navajo Nation Labor Commission, *adopted* May 10, 1991. *Amended* January 30, 2001 by Res. NNLC-JAN-74-01. *Amended* October 09, 2001 by Res. NNLC- OCT-78-01. *Amended* October 9, 2001 by Res. NNLC-OCT-78-01. *Amended* October 12, 2005 by Res. NNLC-SEPT-03-05. *Amended* December 19, 2006 by Res. NNLC-DEC-01-06. *Amended* September 25, 2007 by Res. NNLC- SEPT-01-07. *Amended* December 3, 2009 by Res. NNLC-DEC-01-2009. *Amended* October 12, 2011 by Res. NNLC-OCT-01-2011. *Amended* June 28, 2012 by Res. NNLC-JUN-02-2012. *Amended* September 5, 2013 by Res. NNLC-SEPT-02-2013. **Pending Amendment,** _____, by Res. NNLC- - _2015.

NAVAJO NATION

RCS# 392

Special
Winter Session

3/23/2016
01:42:30 PM

Amd# to Amd#

Legis. 0418-15 (as amended)
Amending the Navajo Preference
in Employment Act of 15 N N C
Sections 604, 606 & 614

~~PASSED~~
~~FAILED~~
VMS

MOT Hale
SEC Damon

Yea : 15

Nay : 1

Not Voting : 6

Yea : 15

Begay NM
BeGaye N
Bennett
Daniels

Fifred
Jack
Perry
Pete

Phelps
Shepherd
Sim
Smith

Tao
Witherspoon
Yazzie

Nay : 1

Crotty

Not Voting : 6

Bates
Begay, K

Begay, M
Brown

Chee
Damon

Hale
Tosor