

No. SC-CV-01-19

NAVAJO NATION SUPREME COURT

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Effie Edsitty,  
Petitioner-Appellant,  
v.

Office of Navajo Nation Tax Commission,  
Respondent-Appellee.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and LIVINGSTON, L., Associate Justice by Designation.

An appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-DPM-001-18, the Chief Hearing Officer Richie Nez, Sr., presiding.

David R. Jordan, Gallup, New Mexico, for Appellant; Colin Bradley, Phoenix, Arizona, for Appellee.

Opinion delivered by SHIRLEY, Associate Justice.

This case concerns the filing of an appeal on an employment case. This Court issues an opinion to clarify the appellate time frame with respect to employment decisions issued by the Office of Hearings and Appeals.

I

Appellant, Effie Edsitty (“Edsitty”), filed a grievance against Appellee, Office of Navajo Nation Tax Commission (“ONNTC”), claiming discriminatory questions were asked during her employment interview. On December 17, 2018, the Office of Hearings and Appeals (“OHA”) dismissed Appellant’s grievance finding her appeal was untimely filed. On January 02, 2019, Edsitty filed a Notice of Appeal with an attached Order of Dismissal. The Notice of Appeal stated “A certified copy of this order was received by undersigned through USPS first class mail on December 21, 2018 and therefore is attached to this notice.” The record on appeal filed by the

OHA did not include a certified mail return receipt or certificate of service documenting when Appellant received the final judgment.

This Court could not verify the date of receipt of the final judgment by Edsitty so it issued an Order *sua sponte* on February 14, 2019, and set the matter for a Status Conference on March 15, 2019. The custodian of the records from the OHA was ordered to appear to explain the procedures for service of the final judgment. No representative from the OHA appeared. This Court recognized that the OHA's participation is essential to the proceeding; thus, it issued another Order setting a second status conference on May 29, 2019. The OHA appeared along with the parties. The OHA informed this Court that it routinely sends its final judgment by regular USPS mail to all parties. Edsitty also informed the Court that she received the judgment by mail on December 21, 2018. This information allows the Court to proceed with its review of the following issue.

## II

The issue presented is whether this Court has jurisdiction over an employment action where the timeframe for receipt of the OHA final judgment by the Appellant cannot be verified as provided in 15 N.N.C. § 614 (D).

## III

An employment grievance falls within the Navajo Preference in Employment Act ("NPEA"). Section 614 (D) of the NPEA (Res. CMA-13-16) formerly 614 (C) (Res. CO-48-14) states that "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..." (Emphasis added). Here, the OHA uses USPS first class mail to send its final

judgments to the parties. Under this method, the Court could not verify, with certainty, the date of receipt of the final judgment by Edsitty or determine whether the appeal was timely filed.

The timeliness of the filing of an appeal goes to the jurisdiction of the Court. *See, e.g., Billie v. Abbott*, 5 Nav. R. 201, 202 (Nav. Sup. Ct. 1987)(finding that the failure to timely file a notice of appeal is a jurisdictional defect and requires a dismissal). Generally, 7 N.N.C. § 302. Jurisdiction, provides the following:

The Supreme Court shall have jurisdiction to hear appeals from final judgment and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law.... 7 N.N.C. § 302 (2005).

Section 302 gave jurisdiction to the Supreme Court to review final judgments and final orders of the district courts and certain administrative agencies. *Bennett v. Navajo Bd. of Election Supervisors*, 6 Nav. R. 201, 202 (Nav. Sup. Ct. 1990). The jurisdictional statute allows the filing of an appeal of a final judgment or order from a lower tribunal; provided that the appeal also conforms to the timeframe of 7 N.N.C § 801. Appeal from final judgment or order provides that:

[E]very person aggrieved by a final judgment or order of a District Court or the order of an administrative agency where the law provides for an appeal to the Supreme Court, shall file a notice of appeal in accordance with the applicable rule of appellate procedure within 30 days from the date of the judgment or order, or as otherwise provided by law. 7 N.N.C. § 801 (2005).

Reading 7 N.N.C. § 302 and § 801 together permits an appeal of a final judgment or order from a lower tribunal within a specific timeframe. The language, “or as otherwise provided by law” further indicates that there may be other applicable laws that governs appeal. The filing of an appeal for employment grievances is governed by 15 N.N.C § 614(D), which specifically requires appeals to be filed within ten (10) calendar days of receipt of the decision. However, the statutory language, “from the date of receipt” leaves the Court in this case unable to determine the 10-day jurisdictional requirement. To be sure that the 10-day jurisdictional requirement is met, a

formal and impartial method to verify the date of receipt is necessary in order for the Court to assume jurisdiction of the matter.

The OHA and the Navajo Nation Labor Commission (“NNLC”) are administrative bodies, which hear employment disputes and grievances. In contrast, the statute pertaining to the NNLC process is very clear. *See* 15 N.N.C. § 611(C)(4) (“copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt”). The NPEA requires the NNLC to provide copies of the final decision to all parties by certified mail, return receipt requested.

On the other hand, this Court conducted the two status conferences on March 15, 2019, and May 29, 2019, with the parties and the OHA, and found that the OHA generally sends out its written decisions by regular mail with mail log entries made by the Office Assistant. Once the decision is mailed, if the mail is not returned, the OHA presumes that the parties have received it. The OHA has no other way of verifying receipt of its decision by the parties.

There is a difference on the process of delivering decisions to parties of record between the OHA and the NNLC. The Court does not take jurisdictional requirements lightly. Thus, whether jurisdictional requirements are met cannot be presumed. The Court must be certain that the ... requirements are met. Further, this is an issue capable of repetition. Thus, there is a definite need to clarify Section 614(D) so that parties will have a clear process for appeals under OHA proceedings. Under the Dine fundamental principles, the Court has a duty of *iishjani adoolniil* (to make things clear) so that *doo naaki niliida* (there is no doubt). *See Yazzie vs. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005)(Finding that our statutes and rules must be clear so that people may understand them and can follow them).

#### IV

This Court has both the duty and the ultimate authority to determine whether employment appeals are timely filed in order to assume jurisdiction.

Edsitty informed the Court that she received the decision on December 21, 2018 by regular mail with no objection by ONNTC. Having received the information without objection from opposing party, this Court will accept the date of receipt of December 21, 2018 as the date which Appellant received the decision.

Because of the need to further clarify § 614(D), and to avoid repetition of this procedural difficulties with this case, we hold that, henceforth, the OHA shall send copies of its final written decisions to all parties of record by certified mail, return receipt, and which will be a part of the lower court record upon transmittal. Requiring the administrative agency to handle employment grievances in this fashion ensures consistency with all NPEA provisions, establishes a date certain of filing for all parties, and clearly defines the timeframe under 15 N.N.C. § 614(D).

#### V

The only remaining question before this Court is whether this Court will apply this requirement to similarly situated cases. This Court has previously used its discretion to apply rules prospectively. *See Tso v. Navajo Hous. Auth.*, 9 Nav. R. 66, 67 (Nav. Sup. Ct. 2006). This Court exercises its discretion again. The OHA shall adhere to the certified-mail-return-receipt-rule enunciated in this decision to all OHA final orders entered after the date of this opinion. *See Fort Defiance Hous. Corp. v. Allen*, 8 Nav. R. 492, 499 n. 4 (Nav. Sup. Ct. 2004) (Court has authority based on *k'e* to apply rule announced in opinion only to cases filed after date of opinion).

In the interest of fairness to aggrieved parties, we hold that this rule requiring the establishment of the receipt date by certified mail apply to final judgments issued after the date of this opinion.

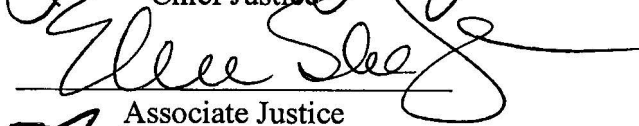
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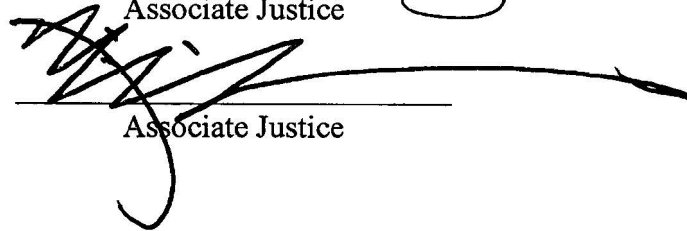
As Edsitty has informed this Court that she received the judgment on December 21, 2018, this Court will accept Edsitty's word on the date of receipt in this instance.

The Clerk of the Supreme Court shall issue a Rule 10(b) Notice to the parties of record to begin the briefing process.

Dated this 22<sup>nd</sup> day of July, 2019.

  
Chief Justice

  
Associate Justice

  
Associate Justice