

SUPREME COURT OF THE NAVAJO NATION

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Justin Jones,  
Appellant,

v.

BHP Billiton/New Mexico Coal Co.,  
Appellee.

MEMORANDUM DECISION

Before YAZZIE, H., Chief Justice, SHIRLEY, E., Associate Justice, and LIVINGSTON, L., Associate Justice by Designation.

An appeal of a decision of the Navajo Nation Labor Commission concerning Cause No. NNLC 2009-051, Chairperson Casey Watchman, presiding.

David Jordan, Gallup, New Mexico, for Appellant; Brian K. Nichols, Albuquerque, New Mexico, for Appellee.

A terminated employee appeals the dismissal of his wrongful termination action against his former employer. For the reasons set forth below, we reverse in part and affirm in part.

I

The following facts are undisputed. Appellant Justin Jones ("Jones") is an enrolled member of the Navajo Nation and was employed as a Senior Governmental Affairs Representative<sup>1</sup> with Appellee BHP Billiton/New Mexico Coal Company ("BHP") from September 7, 2004 to June 9, 2008. BHP is an employer doing business within the territorial jurisdiction of the Navajo Nation as defined in the Navajo Preference in Employment Act (NPEA).

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<sup>1</sup>The position of Senior Governmental Affairs Representative is a salaried position and is not subject to any collective bargaining agreement.

As a condition of his employment, Jones received copies of BHP's *General Rules of Conduct* ("Rules") and *Guide to Business Conduct* ("Guide"). As required, Jones signed disclosure statements confirming he read and understood the *Rules* and *Guide*, and had the opportunity to discuss any questions with his supervisor. Jones then made the following disclosures: (1) he is a member of the Navajo Nation Bar Association; (2) he periodically receives Pro Bono case assignments in Navajo Nation Courts; and (3) he periodically represents clients in Navajo Nation courts in matters not relevant to the business of BHP. Jones later acknowledged that BHP's *Rules* and *Guide*, applicable to his salaried position, do not provide for a grievance process and that he could be fired for any violation, depending on the seriousness of the violation and other relevant circumstances.

BHP hired Jones knowing he was a Navajo medicine man with a traditional *Diné* upbringing. BHP's senior officials acknowledged Jones' cultural expertise, which was regarded as an asset to BHP. On behalf of BHP, Jones developed a *Jishchau* policy (a traditional *Diné* approach to protect employees who handle Anasazi ruins and artifacts). Jones also spearheaded the planning and construction of a *hooghan* for ceremonial use by BHP employees. BHP also established health benefits that reimburse employees for the cost of native healing ceremonies and permits paid leave for participating in such ceremonies.

On April 10, 2008, Jones' supervisor, Human Resource Manager Norman Benally, along with three other BHP officials met with Jones and gave him a Notice of Disciplinary Action, placing him on administrative leave without pay pending an investigation for alleged violations of BHP's *Rules* and *Guide*. This was the first adverse action taken against Jones. Five days later, on April 15, 2008, BHP sent Jones a written statement detailing the alleged violations along with investigation questions. Jones responded to BHP's questions on April 22, 2008. On June 9, 2008,

BHP terminated Jones from his employment by sending him a written letter. The letter cited four violations of the *Rules* and two violations of the *Guide*.<sup>2</sup>

The Commission determined Jones was not terminated based on minor neglect of duty but on substantial misconduct, determining each of the following was “just cause” for Jones’ termination: 1) Petitioner Jones failed to disclose to BHP his for profit law practice and get BHP approval to engage in law practice as an outside business; 2) Jones left work without permission to review client case files so he could engage in his private legal practice; 3) Jones failed to disclose his affiliation with the Institute of Dine Culture, Philosophy and Government, LLC, (“Institute”) for which he was a senior officer and presenter. Jones was required to get approval to engage in outside business; 4) Jones recommended that Respondent BHP pay a conference fee for a fellow employee to the Institute without disclosing that he was part owner of the business and BHP paid the fee; 5) Jones failed to attend several meetings of Association of Commerce & Industry (“ACI”) and falsely reported attendance to his supervisor. Jones was required to attend the meetings because he represented his employer at those meetings; and 6) Jones did not disclose his previous familial relationship with Chad Pfeiffer, an applicant for a subordinate position, and was instrumental in having him hired for the position.

In response to his termination, on October 1, 2009 Jones filed a complaint with the Navajo Nation Labor Commission (“Commission”), alleging he was (1) terminated without just cause; (2) put on administrative leave without pay in violation of 15 N.N.C. §§ 604(B)(8)-(9)<sup>3</sup>:

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<sup>2</sup> The provisions of the *Rules* allegedly violated by Jones included: (1) Leaving Work without Permission; (2) Falsification of Records; (3) Reading of Non-Work Related Material; and (4) Inappropriate Use of Company Equipment. The provisions of the *Guide* allegedly violated included: (1) Conflicts of Interest and (2) Outside Activities

<sup>3</sup> Sections 604(B)(8) states “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. . . .” Section 604(B)(9) states “All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.”

(3) not provided a formal grievance process in violation of 15 N.N.C. §§ 604(B)(8)-(9); (4) discriminated against for his religious beliefs; and (5) BHP's personnel policies and procedures were violated<sup>4</sup>. Upon a hearing, the Commission ruled in favor of BHP by finding just cause for BHP's placement of Jones on leave without pay and just cause for his subsequent termination from employment. The Commission also found that BHP had not discriminated against Jones for his "religious beliefs"<sup>5</sup> when it terminated his employment. Jones filed this appeal.

## II

The Court applies a *de novo* standard of review of legal interpretations by lower courts or administrative agencies. *See Begay v. Navajo Nation Election Administration*, 8 Nav. R. 241, 250 (Nav. Sup. Ct. 2002).

## III

The NPEA requires employers to provide written notice and a showing of just cause for any adverse action taken against any Navajo employee. 15 N.N.C. § 604(B)(8). Upon review of the record, BHP failed to provide Jones adequate written notice at the time it took adverse action against him by placing him on unpaid administrative leave; however, this Court finds BHP had just cause to ultimately terminate Jones from employment.

### **Contemporaneous Written Notice**

Jones argues the written notice BHP used to place him on administrative leave without pay did not comply with the notice requirements of 15 N.N.C. § 604(B)(8). According to *Smith v. Red Mesa Unified School District*, 7 Nav. R. 135 (Nav. Sup. Ct. 1995), the written notice must inform the employee of the reasons for the adverse action so that employee can pursue remedies

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<sup>4</sup> The complaint that BHP failed to abide by its personnel policies and procedures was not considered by the Commission because it was not raised by Jones in his Individual Charge.

<sup>5</sup> The Court's use of "religious beliefs" is by Jones' own terminology. The Court neither accepts nor denies that Dine cultural practices are religious beliefs.

with an understanding of what facts the employee must address. *Id.* at 137. The requirement of a factually developed notice with reasons is important because the employer is bound by the reasons specified in the written notice or contemporaneous documents, and, thereafter, cannot come forward with new justifications. *Id.* In *Dilcon Navajo Westerner v. Jensen*, 8 Nav. R. 28 (Nav. Sup. Ct. 2000), this Court ruled the written notice must be meaningful, through reasonably clear language and facts that would support the adverse action, and contemporaneously delivered to the employee with the adverse action to guard against ad hoc justifications. *Id.* at 39. In *Jackson v. BHP World Minerals*, 8 Nav. R. 560 (Nav. Sup. Ct. 2004), this Court stated “[w]hat constitutes meaningful language in a notice depends on the whole context of the employment relationship, in that the language is designed to alert a specific employee at a specific place and time of the reasons for the [adverse action].” *Id.* at 569. The full interaction between the employer and the employee leading up to the notice—not just the bare language—is examined to determine if the notice is meaningful. *Id.*

The April 10, 2008 Notice of Disciplinary Action did not contain facts sufficient to provide adequate written notice of BHP’s reasons for placing Jones on administrative leave without pay. Notice is insufficient where it states that the adverse action is simply due to a “violation of company policies.” *Manygoats v. Atkinson Trading Co.*, 8 Nav. R. 321, 338 (Nav. Sup. Ct. 2003). Like *Manygoats*, BHP’s notice was insufficient because it stated the reason for the action was “[a]lleged violations of [BHP’s] *General Rules of Conduct* and [] *Guide to Business Conduct*, as explained to Justin Jones in a meeting immediately preceding this action.” *Notice of Disciplinary Action* (April 10, 2008). The notice did not include the required facts the employee must address to seek legal remedies. Reference to verbal explanations provided is insufficient to fulfill the law’s requirement of meaningful written contemporaneous notice.

On April 15, 2008, BHP eventually provided a second written notice of the alleged violations in greater detail, however, adverse action had already been taken against Jones five days earlier when he was placed on administrative leave without pay. BHP's actions do not meet the requirements set forth by this Court in *Dilcon* because sufficient written notice was not provided to Jones contemporaneously with the adverse action. *Dilcon, supra*, 8 Nav. R. at 39. Failing to provide written notice violates 15 N.N.C § 604(B)(8). Therefore, the Commission erred in finding no violation of the NPEA when BHP placed Jones an administrative leave without pay.

#### **Just Cause**

Jones claims that he was terminated without just cause in violation of 15 N.N.C. § 604(B)(8). "Just cause" cannot be defined with any precision for all cases through one test. *Smith v. Navajo Nation Dep't of Headstart*, 8 Nav. R. 709, 714 (Nav. Sup. Ct. 2005). "Just cause" is a broad concept that involves unique factual circumstances in each situation, and therefore must be applied based on the unique facts of each case. *Id.* The term describes "a wide range of employer justifications for adverse actions." *Id.* It includes "only 'substantial misconduct' and not 'a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a defamation action against the employer.'" *Id.* (citing *Manygoats v. Atkinson Trading Co.*, 8 Nav. R. 321, 337-38 (Nav. Sup. Ct. 2003)). The case specific determination of just cause is subject to the caveat "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*, 8 Nav. R. at 715. However, personnel rules that are impossible to comply with, violate public policy, or call for disproportionate punishment will not be enforced. *Id.*

The Commission found Jones (1) failed to disclose his for-profit legal practice, (2) failed to disclose his ownership interest and role with the Institute, (3) recommended BHP pay a fee to the Institute without disclosing the conflict of interest, (4) left work without permission and double billed legal clients and BHP, (5) failed to attend several ACI meetings and falsely reported attendance to his supervisor, and (6) failed to disclose his previous relationship with an applicant for a subordinate position and was instrumental in the hiring process. A thorough review of the record on appeal, especially the exhibits introduced at the hearing, reasonably support the Commission's findings. Thus, the Court will defer to the factual findings of the Commission.

Jones has not argued that it was impossible for him to comply with the employment policies, nor that the rules violate public policy. As a matter of fact, Jones does not impugn these allegations. BHP's *Rules* and *Guide* are clear. Jones signed documents stating he had read and understood these policies and the consequences therein.

The Commission held that Jones was terminated for numerous, substantial violations of BHP's employment policies but it found it unnecessary to discuss every violation in great detail. Jones would like for this Court to ignore certain factual findings pertaining to his non-attendance and false reports of attendance of ACI meetings because the Commission did not specify them in its conclusions of law. However the Court, in its *de novo* review, must consider all evidence in the record on appeal. Evidence shows Jones failed to carry out one of his primary responsibilities, which was to represent BHP at the ACI meetings and that he submitted false reports concealing his absence at these meetings. Based on the evidence it is clear that BHP's decision to terminate Jones from employment was due to his substantial misconduct.

Furthermore, Jones is a medicine man. A medicine man is a person of high regard, a *naat'ánii* in Navajo society, and is held to a higher ethical standard. The numerous violations coupled with the elevated status of being a medicine man, *naat'ánii*, and even a lawyer cannot be ignored by this Court. For the foregoing reasons, the Court affirms the Commissions' decision in finding BHP had sufficient just cause to terminate Jones from employment.

### **Religious Discrimination**

Jones claims his termination from employment was for no other reason than his practice of and belief in Navajo traditional religion. Jones is a presenter/instructor on Navajo religious beliefs, values, and traditions for the Institute, which he operates as a business. He claims that his termination was due to his affiliation with the Institute and is religious discrimination prohibited by 15 N.N.C. § 604(B)(9).

An employee is unlawfully discriminated against when a distinction is made arbitrarily or without sound basis and to his detriment. *APS v. ONLR*, 6 Nav. R. 246 (Nav. Sup. Ct. 1990). Any action taken with regard to an employee should be on the basis of the employee's merit and qualifications and not based upon some broadly preconceived notion of what may be proper employment limitations, when that notion has no demonstrated relation to the work performance. *Id.*

We find Jones' argument regarding religious discrimination to be without merit. Facts in the record show Jones' religious beliefs were not a factor in his termination. BHP hired Jones knowing he practiced Navajo cultural beliefs and viewed his expertise as an asset to the company. The record further shows Jones' knowledge of Navajo culture was accepted and promoted by BHP in all aspects of Jones' employment. BHP actually accommodated *Diné* cultural practices for all of its Navajo employees with the assistance of Jones.

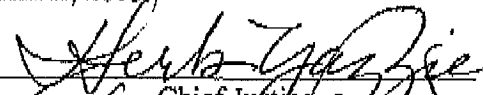


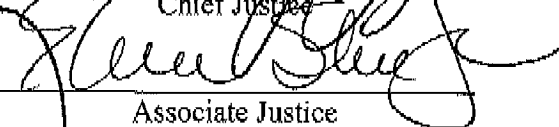
Religious discrimination was not a basis for BHP's objection to Jones' involvement with the Institute.<sup>6</sup> Rather, BHP objected to Jones' involvement with the Institute because he failed to disclose his ownership interest and his high ranking position in the Institute when he recommended that BHP send its new employee to the fee-for-service Institute. Consistent with *APS*, BHP's employment termination of Jones was not arbitrary or without a sound basis. The Commission did not err in finding religious discrimination was not a factor in Jones' dismissal.

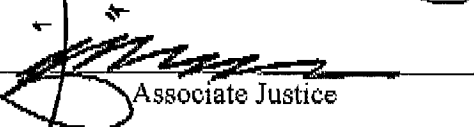
#### IV

For the foregoing reasons, the Court hereby REVERSES the Commission's January 10, 2011 decision that BHP did not violate the NPEA as to the administrative leave without pay action. The Court AFFIRMS the Commission's finding that Jones was terminated for just cause and AFFIRMS the Commission's finding that Jones' religious beliefs were not deciding factors in his termination from employment. For the violation concerning the administrative leave without pay, the matter shall be REMANDED to the Commission for remedies and sanctions pursuant to 15 N.N.C. § 612.

Dated this 6<sup>th</sup> day of December, 2013.

  
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Chief Justice

  
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Associate Justice

  
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<sup>6</sup> Because the Court affirms the Commission's holding that religious discrimination is not germane to its finding of just cause, the Court finds no need to address Jones' contention that BHP treats employees who are pastors, deacons, or roadmen differently from the treatment he received as a medicine man.