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SUPREME COURT
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NAVAJO NATION

No. SC-CV-14-19

Re: OHA-DPM-011-18

IN THE SUPREME COURT of the NAVAJO NATION

CECELIA WHITETAIL-EAGLE,

Appellant/Appellant,

v.

NAVAJO NATION

RAMAH CHAPTER—OFFICE OF GRANTS AND CONTRACTS,

Appellee/Appellee.

OPENING BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

Pursuant to Rule 11(b) of the Navajo Rules of Civil Appellate Procedure, Appellee incorporates the Statement of the Case made by Appellant in her Brief of the Appellant ("Opening Brief") filed on June 14, 2019 on page 3, paragraph 1. N. R. C. A. P. Rule 11(b).

STATEMENT OF PROCEEDINGS

Pursuant to Rule 11(b) of the Navajo Rules of Civil, Appellee incorporates the Appellant's Statement of Proceedings in her Opening Brief on pages 3-4. N.R.C. A.P. Rule 11(b). However, Appellee would note that Appellant improperly attaches an exhibit to her Opening Brief. Under the Rules, Appellant's Opening Brief must reference "the record or page of the transcript where such evidence appears" and there are not exhibits to appellate briefs. N.R.C.A.P. Rule 11(a)(4). Thus, this Court should strike the exhibit from the Opening Brief.

STATEMENT OF FACTS

Pursuant to Rule 11(b) of the Navajo Rules of Civil, Appellee incorporates the Appellant's Statement of Proceedings in her Opening Brief on pages 4-6. N.R. C. A.P. Rule 11(b). However, Appellee would note that Appellant's Statement of Facts is insufficient under the Navajo Rules of Civil Appellate Procedure. Under the Rules, Appellant's Opening Brief must reference "the record or page of the transcript where such evidence appears." N.R.C.A.P. Rule 11(a)(4). Here, Appellant failed to comply with this requirement.

What's more, Appellant's fact number 7 is a legal conclusion, and should be stricken.

Finally, Appellant supplements the Appellant's Statement of Facts as follows:

1. On January 23, 2003, the Ramah Navajo Chapter President issued a memorandum titled Policy Governing Hiring and Termination of the Executive Director. Index of Record ("Index"), at 35, Ex. 27. In this memorandum to the Chapter community, the Chapter

President stated that the "the staff of the Office of Grants and Contracts and I have been working on a policy to be used when an Executive Director of the Office is hired or terminated." *Id.*, at 1. This policy became effective on January 23, 2003, and became Appendix D to the Ramah Personnel Policy Manual. *Id.* The memorandum also stated that pursuant to a Chapter resolution, the Chapter President was granted authority over the Office of Grants and Contracts ("OGC"). *Id.* Finally, the memorandum was notifying the Chapter that Appellant was being hired as the Executive Director of OGC. *Id.*

2. On January 23, 2003, Ramah Chapter President issued a memorandum titled Justification of Hire of Cecelia Whitetail Eagle as Executive Director of OGC. Index, at 35, Ex. 28. In this memorandum, the Chapter President explained that "Per Appendix D, [Ramah] Personnel Policy of the Office of Grants and Contracts . . . I am submitting justification of the hire of Cecelia Whitetail Eagle as Executive Director." *Id.*
3. On September 20, 2017, the Navajo Nation Labor Commission issued its Findings of Fact, Conclusions of Law, And Final Order. Appellant's Motion to Dismiss, Ex. B; Index, at 39. In this matter, Appellant was contesting being placed on administrative leave. *Id.*, at 5. In its Findings of Fact, the Labor Commission found that Appellee failed to meet her burden of proof. *Id.* The case also involved the application of the Ramah Navajo Chapter's Personnel Policy. *Id.*, at 3-4.
4. At the hearing on January 9, 2019, Appellant's counsel admitted that she never followed the Ramah Personnel Policy Manual. Transcript. Page 44.
5. At the hearing on January 9, 2019, Appellant's counsel stated the reason that the Step One Grievance was filed in an untimely manner was that "[y]ou don't count the first day." Transcript, Page 44.

STATEMENT OF THE ISSUES

Pursuant to Rule 11(b), Appellee believes that Appellant misstates the issues on appeal. Accordingly, the Appellee states that the only two issues in front of this Court are:

1. Where OHA erred in determining that it did not have jurisdiction?
2. Did OHA erred in determining that even if it had jurisdiction, that the Appellant's grievance was untimely?

LEGAL ARUGMENT

A. Introduction.

In her Opening Brief, Appellee makes four separate claims that OHA mistakenly determined that it did not have jurisdiction and that her grievance was filed in a timely manner. Opening Brief, at 7. Appellant claims that OHA's decision violates the plain language of the NPEA, its decision was arbitrary, she could not contract away her Navajo Preference in Employment Act ("NPEA") right to grieve in front of OHA, that the Ramah Personnel Policy violates due process. However, OHA's Final Order was proper, and should be upheld, for the reasons set forth below:

1. OHA Properly Determined that it Lacks Jurisdiction over the Appellant's Grievance.

Under CO-48-14, the NPEA was amendment by stating:

> Any employee of the Navajo Nation Executive or Legislative Branch or non-local Governance Act Certified Chapter . . . who alleges a violation of the Act [NPEA] shall file a grievance as provided by the Navajo Nation Personnel Polices Manual ["NNPPM"]."

15 N.N.C. § 614(A).

Here, OHA properly determined that this amendment did not apply in this situation. Specifically, OHA determined that the amendment did not grant OHA jurisdiction in this matter because the amendment did not apply, the Appellant agreed to a specific grievance process to adjudicate her NPEA rights in her employment contract, and, that Appellant had previous agreed that the Navajo Nation Labor Commission ("Commission") had jurisdiction over her employment grievances. Final Order, at 4-5. Here, these findings of OHA are proper, and should be upheld as set forth below:

a. **The NPEA Amendments Do Not Grant OHA Jurisdiction Over This Matter.**

The Supreme Court will look to the interpretation of the statute to determine if the administrative bodies have jurisdiction when they have denied jurisdiction. *Gishie v. Morris*, 9 Nav. R. 196, 197 (Nav. Sup. Ct. 2008). The interpretation of the statute will determine whether the Navajo Nation Council ("Counsel") has empowered the administrative bodies to hear the disputes of a complainant. *Id.* In this matter, OHA properly determined in its Final Order that the Ramah Chapter has "the authority to enter into contracts through the [Ramah] office of Grants and Contracts [OGC]" and that this right thus includes the lesser right to "implement its own personnel policy manual." Final Order, at 4. Moreover, OHA determined that Section 614(A) only applies to "employee[s] of applicants who were hired pursuant to the Navajo Nation Personnel Policies Manual." *Id.* Both of these findings were proper for the reasons set forth below:

i. **The OGC of the Ramah Chapter uses its Own Personnel Manual.**

While Section 614(A) of the NPEA on its face states that "[a]ny employee of . . . a non-Local Governance Act Certified Chapter" may bring a claim pursuant to the NNPPM, Section 614(A) nonetheless does not apply in this matter given Ramah's status as a semi-autonomous community and its OGC uses a different personnel manual: the Ramah Personnel Policy. 15 N.N.C. § 614(A).

Though Ramah is a Non-Local Governance Act Chapter ("Non-LGA Chapter"), the Navajo Nation Council ("Council") has previously granted the Ramah Chapter the authority to enter into "mature contracts pursuant to public law 93-638 . . . with the Bureau of Indian Affairs." ACJN-125-89, at page.[1] The Council stated the purpose of this legislation was "for the overall continuance of chapter self-governance" of the Ramah Chapter. *Id.*, at § 6. Thus, despite being a Non-LGA Chapter on the face of the legislation, the Ramah Chapter has previously been delegated broad authority by Council to enter into contracts with the federal government to establish programs for the "self-governance" of the Ramah Chapter.

Pursuant to this authority, the Ramah Chapter developed several programs, including the Office of Grants and Contracts ("OGC")—which assists in administering these Public Law 92-638 ("638") programs and contracts. Therefore, when the Ramah Chapter created, and is administering its 638 programs—through OGC—it is doing so via delegated authority from the Council and the federal government. *See Benally v. Gorman*, 8 Nav. R. 272, 275 (W.R. Dist. Ct. 1987) (stating "[a]s has happened with the states and federal government, the Navajo Nation government became so complex that further authority had to be delegated."). And, pursuant to this authority, the Ramah Chapter has created the Ramah Personnel Policy. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (stating "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Thus, the Ramah Chapter used its delegated authority to create OGC, and, this delegation included the authority to create employment policies, and contracts, that govern

[1] This unique authority is also demonstrated in that Ramah has its own Utility Authority. *See* 21 N.N.C. §51.

OGC; and, importantly, this delegation has never been rescinded by the Council. For these reasons, OHA properly determined that Appellee has the authority to create the Ramah Personnel Policies.

ii. **Section 614(A) only Applies to Employees Who Are Subject to the NNPPM.**

Furthermore, OHA properly determined that Section 614(A) of the NPEA amendments do not apply here because the NNPPM does not apply. Final Order, at 4. This finding is correct given the language of the amendments, and NNPPM, as set forth below:

CO-48-14 made the employee handbooks of Navajo Nation employees the exclusive grievance process for said employees. Under 614(A), made the NNPPM binding for the employees who were already subject to it. Namely, the Navajo Nation Executive and Legislative Branch, who already use the NNPPM, were now bound by its grievance process. Section 614(A). The NNPPM itself even defines the Executive and Legislative branches as the employers that are subject to it by its definition. NNPPM, § XXI Definitions, Page 83 (stating the "for the purpose of this manual, employer is the Executive or Legislative Branch of the Navajo Nation Government."). Thus, by definition, only the Executive and Legislative Branches of the Navajo Nation are subject to the NNPPM.

CO-48-14's purpose of making government employment manuals the binding processes is also highlighted by the NPEA amendments in the following section, Section 614(B), which states that "any employee of the Navajo Nation Judicial Branch . . . shall file a grievance as provided by the Judicial Branch Employee Policies & Procedures." 15 N.N.C. § 614(B). And, under the Judicial Branch Employee Policies & Procedures Section 44, grievances go to the Judicial Branch Grievance Board—and not OHA. Therefore, the amendments to the NPEA were not the blanket transfer to OHA as Petitioner suggests. Rather, the amendments were meant to make the relevant government entities grievance process binding. Here, Ramah has its own grievance process, and it

should be similarly enforced.

Finally, when discussing LGA and Non-LGA certified chapters, it is generally discussing those Non-LGA chapters that have employees who are under the direction of the Division of Community Development ("DED") Transcript, at 73. Those employees are bound by the NNPPM because DED is under the Executive Branch. *Id.*, at 72. These are community service coordinators, accounts maintenance specialists, etc., who work at Non-LGA chapters, but are actually employees of the Executive Branch. *Id.* The Appellee Ramah Chapter does have employees who fit this category, but the Appellant is not one them. *Id.*, at 73. Rather, the Appellant is an employee of the OGC, which is not subject to direction of the Executive Branch, as it is semi-autonomous program. Accordingly, Appellant and Appellee are not bound by the NNPPM.

Thus, OHA properly determined Section 614(A) of the NPEA made the NNPPM binding only on those employees who are subject to the NNPPM. And, here, because the Appellant and Appellee did not use the NNPPM, it simply does not apply in this matter. Thus, OHA's finding was proper, and should be upheld.

b. **The Appellant Agreed to a Specific Grievance Process, with a Specific Forum, and Previously Agreed that the Commission Had Jurisdiction.**

In its Final Order, OHA found that Appellant was "hired via an employment contract which specified the manner of termination of the Contract as well as the grievance process." Final Order, at 4. OHA also found that "[t]he Ramah Personnel Policies Manual has its own specific provision for the termination of the Executive Director." *Id.* Moreover, OHA found that this agreement did not circumvent the NPEA as the Appellant suggests because "[t]he Contract states, 'Since the Executive Director is an enrolled member of the Navajo Nation the parties agree that the [NPEA] applies to the Executive Director.'" Final Order, at 4 (internal citations omitted). Finally, OHA found that "Respondent had previously grieved the administrative leave . . . [before] the Labor

Commission" and that parties agreed to litigate before the Commission. *Id.*, 5.

Rather than meaningfully disputing this finding of OHA, Appellant instead cites irrelevant cases and makes unfounded assertions.[2] Appellant claims that she "did everything she could in reference to filing her grievance for termination in the proper forum to appeal RNC's decision to terminate her." Opening Brief, at 8. Appellant also argues that "[t]he RNC grievance process was never contemplated as forum for the Appellant to adjudicate her termination." *Id.*, at 9. Finally, Appellant claims that her own Employment Contract is invalid because it circumvents the NPEA, and she could not agree to waive her right to grieve her termination in front of OHA. *Id.*, at 11.

i. **The Ramah Grievance Process Was Agreed Upon by the Parties, and, Created Specifically for the Appellant.**

The Appellant's Employment Contract clearly provides a process that was specifically designed for the Appellant to grieve her termination. In the Employment Contract, the parties agreed that Appellant could be terminated and that she could grieve said termination according to Appendix D of the Ramah Personnel Policy. *See* Employment Contract, at § VIII (B); Termination Notice, Ex. 2; Index, at 39. Indeed, Appendix D of the Ramah Personnel Policy way created *specifically for* the Appellant.

On January 23, 2003, the Ramah Navajo Chapter President issued a memorandum titled in part "Policy Governing Hiring and Termination of the Executive Director." Index, at 35, Ex. 27. In this memorandum to the Chapter community, the Chapter President stated that the "the staff of the Office of Grants and Contracts and I have been working on a policy to be used when an Executive Director of the Office is hired or terminated." *Id.*, at 1. This policy became effective on January

[2] For example, Appellant claims that OHA's finding that "Respondent argues that the Labor Commission is the forum that should hear this matter" is false. Opening Brief, at 8. This is simply untrue. Appellee has argued, *arguendo*, that the Commission "has more appropriate jurisdiction under its statutory authority" and given the parties previous agreement. Motion to Dismiss, at 10-11, & n.5. Thus, Appellant's assertion is demonstrably false.

23, 2003, and became Appendix D to the Ramah Personnel Policy Manual. *Id.* The memorandum also stated that pursuant to a Chapter resolution, the Chapter President was granted authority over the Office of Grants and Contracts ("OGC"). *Id.* Finally, the memorandum was notifying the Chapter that Appellant was being hired as the Executive Director of OGC. *Id.* On the same day, January 23, 2003, Ramah Chapter President also issued a memorandum titled Justification of Hire of Cecelia Whitetail Eagle as Executive Director of OGC. Index, at 35, Ex. 28. In this memorandum, the Chapter President explained that "Per Appendix D, [Ramah] Personnel Policy of the Office of Grants and Contracts . . . I am submitting justification of the hire of Cecelia Whitetail Eagle as Executive Director." *Id.* Therefore, it is clear that the grievance process in Appendix D was created specifically for the Appellant. Accordingly, the Appellant's assertions that "[t]he RNC grievance process was never contemplated as forum for the Appellant to adjudicate her termination" is clearly false. Opening Brief, at 9. Not only was the process referenced and incorporated into her Employment Contract, the Appellee issued two memorandums that stated that Appendix D was created specifically to both hire and fire the Appellant. Thus, OHA properly found that "[t]he Contract between the parties cannot be more clear as to how Petitioner [Appellant] must appeal her grievance." *Id.*, at 5.

What's more, Appellant's claims that she did "everything" she could have to grieve her termination is also unfounded. Appellant admits that "Appellant never attempted to avail herself" to the Ramah Personnel Policy Grievance Process. *Id.,* at 9. Therefore, not only did Appellant agree to follow the Ramah Personnel Policy, which contains a specific process for her to grieve her termination, she failed to even attempt to engage in this process. Accordingly, Appellant did not even attempt to follow the grievance process which she agreed to use. Appellant should not be rewarded for her own missed opportunity and violation of her own sacred words in her

Employment Contract. *Sells v. Rough Rock Cmty. Sch.*, 8 Nav. R. 643, 649 (Nav. Sup. Ct. 2005) (stating that there is "Navajo Common Law emphasis on keeping one's promises in a contract").

ii. **The Parties Agreed to Apply the NPEA to their Grievance Process.**

Appellant claims that her own Employment Contract is invalid because it circumvents the NPEA, and she could not agree to "waive" her right to grieve her termination in front of OHA. *Id.*, at 11. Though Appellant offers no reasoning for this on appeal, her argument regarding this before OHA was that her contract was an impermissible choice of law clause. Response to Motion to Dismiss, at 10; Index, at 41. However, OHA properly determined that Appellant did not "waive" her NPEA rights. OHA found that OHA found that her Employment Contract did not circumvent the NPEA because "[t]he Contract states, 'Since the Executive Director is an enrolled member of the Navajo Nation the parties agree that the [NPEA] applies to the Executive Director.'" Final Order, at 4 (internal citations omitted). Therefore, contrary to Appellant's assertion, the parties specifically agreed to apply to the NPEA to their grievance. Thus, OHA determined that the Employment Contract was not a choice of law clause as the Appellant asserted.

The Navajo Supreme Court has stated that parties may agree to employment contracts if the employment contract does not contain a provision that is explicitly prohibited by the NPEA. *See Sells v. Rough Rock Cmty. Sch.*, 8 Nav. R. 643, 649 n. 1 (Nav. Sup. Ct. 2005) (stating that where "[t]he NPEA does not discuss" something, it is "not explicitly prohibited" and therefore allowed). Here, because there is no prohibition on forum selection clauses in the NPEA, they are therefore permissible. *Id.*

Indeed, Appellant's argument below highlights that she was confusing a forum clause with a choice of law clause. In her Response, Petitioner alleges that the forum selection clause in Appendix D, Part D, "constitutes an impermissible NPEA choice of law clause." Response, at 10.

However, "[a] choice of law clause is a contract provision by which the parties specify that a particular body of law, often the law of a particular state or jurisdiction, will govern any dispute arising from or related to the contract between the parties." The Wolters Kluwer Bouvier Law Dictionary Desk Edition, Choice of Law Clause (Choice-of-Law Clause) (2012). For example, a choice of law clause would occur if the parties had agreed to apply the laws of Arizona to any dispute between them—since that would be the "law of a particular state." *Id.* Here, the parties did no such thing. In fact, Appellee pointed out, and OHA agreed, that the choice of law clause was actually to the NPEA. Motion to Dismiss, at 9, n. 3. Therefore, there has been no assertion that the parties have agreed to a choice of law clause applying the substantive law of another jurisdiction.

Rather, the parties have agreed to litigate any NPEA claims in a specific *forum*—and that forum is defined in Appendix D, Part D of the Ramah Personnel Policy. "A forum selection clause is a provision in a contract by which the parties agree that any disputes that arise between them related to the contract must be litigated in a particular forum." Bouvier Law Dictionary Desk Edition, Forum Selection Clause (2012). And, a forum selection clause shall be enforced in "all but the most exceptional cases." *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 63 (2013).

Therefore, because there is nothing in the NPEA that prevents parties from entering into forum selection clauses, a forum selection clause shall be enforced in "all but the most exceptional cases." *See Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 63 (2013);[3] Motion to Dismiss, at 8. Petitioner has failed to demonstrate that the forum selection clause should not be enforced because she conflated a forum selection clause with a choice of law clause. And, because

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[3] *See Judy v. White*, 8 Nav. R. 510, 531 (Nav. Sup. Ct. 2004) (stating "we [Navajo Supreme Court] give considerable thought to federal . . . statutory and decisional law.").

Petitioner has failed to cite any law or case that prevents enforcement of a forum selection clause, OHA properly determined that the parties could agree to litigate NPEA claims according to the Ramah Grievance Process.

iii. Appellant Previously Agreed that the Commission Had Jurisdiction Over the Same Claims She Attempted to Make in this Case.

In its Final Order, OHA found that "Respondent had previously grieved the administrative leave . . . [before] the Labor Commission" and that parties agreed to litigate before the Commission. *Id.*, 5. In her Opening Brief, Appellant concedes that all of these findings are true. Opening Brief, at 4 ¶3 & 10. However, Appellant fails to disclose to this Court that she was attempting to litigate these *exact same claims* before OHA in this matter. Motion to Dismiss, at 10; Index, at 39. Appellee argued Appellee's previous agreement that the Labor Commission had jurisdiction over her claims, and her attempt to re-litigate claims that she lost, that Appellant should be estopped from brining her claims under the doctrine of equitable estoppel because she is forum shopping her grievance. Motion to Dismiss, at 10-11.

Thus, OHA's determination that Appellant previously agreed that the Commission was the proper forum, and that she attempted to relitigate the exact same claims, demonstrates that Appellant is merely attempting to bring her claim anywhere but her contractually agreed upon process. This Court should estop the Appellant breaching her previous agreement, attempting to relitigate waived claims, and, uphold OHA's Findings of Fact because they are supported by the record.

2. RVC's Employment Dispute Policy Offered Proper Procedural Due Process to Appellant.

Procedural due process requires individuals to have adequate notice and an opportunity to be heard. *Yazza v. Smith*, 8 Nav. R. 191, 192 (Nav. Sup. Ct. 2001). In *Yazza*, the appellant disputed

a child support order made against him by arguing that he did not receive sufficient due process. *Id* at 193-94. The court upheld the child support order because the court stated that the appellant received proper due process when he received timely notice of a modification in the mail. *Id*. The court held that the notice gave the appellant a sufficient opportunity to appeal the modification and the appellant failing to do so was an effective waiver of his opportunity to be heard. *Id* at 195.

Here, like the timely mailed letter to the appellant in *Yazza*, the Ramah Personnel Policy offered proper due process to Appellant. The Ramah Personnel Policy also afforded Appellant proper and timely notice because Appellant signed and reviewed her employment agreement when she was first hired—years before her termination. The Ramah Personnel Policy grievance process also afforded Appellant an opportunity to a hearing if the she followed the process; and, defined due process in the context of a grievance. Reply to Response to Motion to Dismiss, at 12-13; Index, at 43. Here, Appellant is again attempting to circumvent her agreed upon process by not only failing to participate, but attacking a process that she never took part in. Like the appellant in *Yazza* who failed to request a hearing, Appellant has also waived her opportunity to be heard—and even challenge the grievance process—by failing to participate in it at all. Appellant's failure waived her opportunity to be heard. An employee has their own discretion to appeal their termination; therefore, due process is valid. Although the Chapter president created the employment dispute policy, along with OGC, the Chapter President does not determine who may or may not appeal a termination unless the former employee failed to follow the appeals process.

Thus, Appellant's due process claims are unfounded, and, OHA's Final Order should be upheld.

3. Even if OHA Does Have Jurisdiction, the Appellant's Step One Grievance was Untimely.

In computing time for purposes of statutes of limitations, the last day of the statutory period shall be counted unless the last day of the period computed is a Saturday, a Sunday, or a court holiday, in which event the period runs until the end of the next business day which is not a Saturday, a Sunday, or a court holiday. Rule 6(a) of the Nav. R. Civ. P. "[Since] it is physically impossible for a litigant to file a complaint on a Saturday, Sunday, or legal holiday . . . [i]t is reasonable to conclude that a complaint filed on the first day the court is open following a weekend or holiday fits the intent of the statute of limitations." *Jensen v. Giant Industries*, 8 Nav. R. 203, 209 (Nav. Sup. Ct. 2002).

Here, the NNPPM—if it applies, which Appellant does not concede it does—required the Appellant to file her employment grievance within twenty working days. NNPPM, § XIV(C)(1). Counting these days generally includes Monday through Friday, however, regarding holidays, they only count towards the total if the last day of the statutory period is a holiday or weekend. *Jensen v. Giant Industries*, 8 Nav. R. 203, 209 (Nav. Sup. Ct. 2002). Here, Appellant filed her grievance on Thursday September 8, 2017. Appellant attempts to use the Labor Day holiday as an exception for filing late, however, Labor Day fell on Monday, September 4, 2017—days before her deadline. Furthermore, Appellant's statutory deadline fell on a Wednesday, September 7, 2017; therefore, there is no reason that Appellant could not have filed her employment grievance on the last day of the statutory period—because the last day was not a holiday.

a. OHA Properly Determined That Appellant's Employment Grievance Should be Dismissed for Failure to File Within the Twenty-Day Period.

"[A] court can bring up the timing issue on its own motion, it alternatively can proceed with hearing the case, in the absence of a motion to dismiss by respondent. The timing issue is

therefore not of 'jurisdictional significance,' as it does not prevent the Commission from hearing the case at all, but permits dismissal of the case if properly asserted by the Commission or the respondent." *Peabody W. Coal Co. v. Navajo Nation Labor Comm'n*, 8 Nav. R. 488, 491 n.1 (Nav. Sup. Ct. 2004); *See also In re Quiet Title to Livestock Grazing Permit No. 8-487*, 9 Nav. R. 548, 553 (Nav. Sup. Ct. 2011)(stating "[s]tatutory time limit exists . . . for purposes of imposing a reasonable limit on the time in which the property of a person dying testate should be distributed. This means that persons wishing to present a will for probate must do so within the applicable time limits, otherwise the probate of that will is precluded.").

Here, the OHA has the discretion to, on its own, determine that a case should be dismissed for not being filed within the statute of limitations. The OHA determined, on its own, that it would have dismissed Petitioner's case for lack of timeliness. Final Order, at 5-6. Appellant has failed to timely file her grievance with DPM because she filed her grievance on the twenty-first working day instead of the required twentieth day. Furthermore, Appellant also asserts that Appellant's employment grievance should be dismissed for the foregoing reason:

b. **Even if Appellant Does Have a Valid Excuse for Filing her Employment Grievance After the Statute of Limitations Ran, Appellant Waived this Argument on Appeal.**

When a party fails to make an argument or claim in lower court, that party cannot raise the argument or claim for the first time on appeal. *Toledo v. Bashas' Dine' Market.,* 9 Nav. R. 68, 71 (Nav. Sup. Ct. 2006).

Failure to assert or address arguments below waives the argument on appeal. *Id.* In *Toledo*, a Petitioner appealed an employment termination that the Commission upheld against him. *Id* 68-69. On appeal, the petitioner addressed issues not brought before the Commission. *Id.* The Supreme court held that the petitioner's claims were barred because he did not argue them before the Commission. *Id* at 71.

Here, like the petitioner in *Toledo* who failed to address statutory issues with the Commission. In fact, Appellant's reason for filing late was entirely different. Appellant's counsel stated that she filed late because "[y]ou don't count the first day." Transcript, Page 44. Here, like the petitioner in *Toledo* who brought up statutory issues on appeal for the first time, Appellant is making her holiday argument for the first time on appeal. Like *Toledo*, where this Supreme Court held that failure to bring all arguments in lower court bars all arguments on appeal, this Court should hold that Appellant's failure to bring her holiday argument below bars this on appeal.

CONCLUSION

In conclusion, for all the reasons set forth above, OHA's decision should be affirmed because it is not an abuse of discretion.

Respectfully submitted this 17th day of July, 2019.

By: [signature] *for*
Colin Bradley, Attorney
Counsel for the Appellee Ramah Chapter

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing **OPENING BRIEF OF THE APPELLEE** was filed by hand-delivery this 17th day of July 2019, to

The Supreme Court of the Navajo Nation
East of the Navajo Nation Veteran's Memorial Park
P.O. Box 520
Window Rock, Navajo Nation, Arizona 86515

and a true copy of the foregoing was emailed and/or mailed via U.S.P.S. 1st class mail to:

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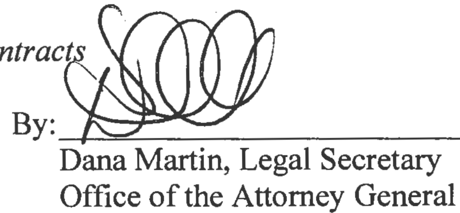

By:__________________________
Dana Martin, Legal Secretary
Office of the Attorney General