

# ***Oneida Tribal Judicial System***

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## **APPELLATE COURT**

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Donald J. Hahnke,  
Appellant

Docket No. 12-AC-002

v.

Donald R. White,  
Respondent

Date: May 24, 2012

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## **DECISION**

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This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers, Janice L. McLester, Lois Powless, Jennifer Webster, Linda Cornelius (Pro Tem) and James Van Stippen (Pro Tem) presiding.

### **I Background**

This case is an appeal of Oneida Personnel Commission decision of January 9, 2012 which upheld Appellant's, Donald J. Hahnke, Director of the Community Educations Center, layoff of September 22, 2009. Mr. Hahnke alleges the layoff is an adverse employee action taken after he filed a Formal Written Complaint on July 28, 2009 against his supervisor, Respondent, Donald R. White, Governmental Services Division Director. Mr. Hahnke asserts the decision of the Oneida Personnel Commission to be clearly erroneous and against the weight of the evidence presented during the hearing and that his layoff was not a good faith layoff, but was disguised as a retaliatory layoff based on the personal animosity between him and Mr. White and based on the

complaint Mr. Hahnke filed against Mr. White. We find the Oneida Personnel Commission decision was not clearly erroneous and affirm.

*A. Jurisdiction*

This case comes to us as an appeal of an original hearing body decision issued by the Oneida Personnel Commission. Any person aggrieved by a final decision in a contested case can seek Oneida Tribal Judicial System review under Sec. 1.11-1 of the Oneida Administrative Procedures Act.

*B. Procedural Background*

On September 22, 2009, Appellant Donald J. Hahnke, Director of the Community Education Center was laid off in accordance with the Oneida Layoff policy, BC-9-23-98D(3) Routine Layoff:

*"All employees are subject to layoff according to departmental job needs and budgets. Routine layoffs are subject to management discretion, provided a department layoff SOP is approved by the Oneida Human Resource Manager."*

On September 24, 2009, Governmental Services Division Director, Donald White, submitted his layoff decision to the Human Resources Department.

On September 24, 2009, Appellant appealed the layoff to General Manager (Area Manager), Deborah Thundercloud, who rendered her decision on October 15, 2009 to uphold the layoff.

Appellant then appealed to the Personnel Commission on October 30, 2009 alleging:

1. His layoff was based on retaliation of a complaint he had written against Donald R. White.
2. Procedural irregularities existed that have caused him harm.
3. The Area Manager improperly investigated this appeal; that this action was unethical and against the Tribe's stance on layoffs.

Appellant alleges the layoff was used as a disciplinary action resulting from the complaint Mr. Hahnke filed against Mr. White on July 28, 2009 and not within the guidelines as stated in the Oneida Layoff Policy, "*layoffs are subject to departmental job needs and budgets.*"

Respondent, Donald R. White, asserts the layoff was for budgetary reasons and was not disciplinary or retaliatory. Respondent claims there was a \$100,000 shortfall at the end of FY08 which would have impacted the FY09 budget. In addition a GTC directive was given that no direct community services were to be affected in balancing the budget. In order to adhere to this directive in keeping the Community Education Center open, the layoff was based on budgetary concerns and not a disciplinary action issued in retaliation to Appellant's filing of a complaint against him to the General Manager, of which Mr. White claims he was not aware at the time the layoff was determined.

After numerous postponement requests and hearings on Motions, the first (1<sup>st</sup>) Grievance Hearing was scheduled for September 15, 2010. Additional postponements and hearings on Motions continued, until a Grievance hearing was held on November 30, 2010 at which time Mr. Hahnke requested a Stay at the Oneida Tribal Judicial System. A new hearing was then scheduled for February 14, 2011. Additional grievance hearings were conducted in this case. A hearing was completed before the Personnel Commission on May 18, 2011, with a decision rendered on June 13, 2011 which upheld the lay-off of Mr. Hahnke.

Mr. Hahnke appealed this decision to the Oneida Tribal Judicial System for review on June 23, 2011 alleging the Personnel Commission decision to be clearly erroneous and against the weight of the evidence. The Appellate body deliberated on August 23<sup>rd</sup> and September 13, 2011 and filed their decision to remand for a new hearing to be conducted within forty-five (45) days of receipt of this decision.

The Personnel Commission held a pre-trial hearing on November 2, 2011 and scheduled grievance hearings to be conducted on November 9, 2011 and November 18, 2011. Respondent requested a continuance, which was granted, the hearings were rescheduled for January 3, 2012 and January 4, 2012.

On January 9, 2012, the Oneida Personnel Commission filed their decision to uphold the layoff of Appellant. The Personnel Commission found the Appellant failed to prove through testimony or evidence the allegations to have merit and the layoff was performed within the scope of the Lay-Off Policy and was issued due to budgetary constraints.

On January 17, 2012, Appellant, appealed to the Oneida Tribal Judicial System, Appellate Court asserting the decision of the Oneida Personnel Commission to be clearly erroneous and against the weight of the evidence.

On April 24, 2012 the Appellate body deliberated and filed their decision to uphold the decision of the Oneida Personnel Commission. The layoff is affirmed.

## **II Issues**

**Was the decision of the Oneida Personnel Commission clearly erroneous and against the weight of the evidence?**

## **III Analysis**

**Was the decision of the Oneida Personnel Commission clearly erroneous and against the weight of the evidence?**

No it was not. The Appellate body found that a review of the layoff of an employee as a retaliatory act indicates that a finding of retaliation requires clear and convincing evidence that an employee was laid off as a retaliatory measure. Evidence that creates mere suspicion of

retaliation is not sufficient to meet this standard. We can only overturn an Oneida Personnel Commission decision if it is evident that a clear error has been made. In this case the Appellant has failed to provide sufficient evidence to persuade the Appellate review body the layoff was not a result of budgetary constraints.

A review of Oneida case law indicates that courts may not overturn an Oneida Personnel Commission decision unless there is a finding that the Personnel Commission "has made a clear error of judgment." *Oneida Bingo and Casino, Player Development Department v. Joan Larock*, 08-AC-015 (12/03/2008); *Tonya Webster v. Connie Vandehei*, 07-AC-029 (2/26/2008); *Oneida Bingo and Casino v. Parker* (04-AC-012). In the case of *Oneida Compliance Division v. Cathy Metoxen*, the court noted that the Personnel Commission is subject to two standards of review: 1) Findings of fact are owed deference so that when findings are supported by the evidence presented they will be affirmed; and 2) Findings of fact are reversed only when the court is convinced when reviewing the record that the finding was unreasonable and a clear mistake has been made. *Oneida Compliance Division v. Cathy Metoxen*, 99-EP-0051 (4/14/2000)

Ms. Thundercloud received a complaint against Mr. White from Mr. Hahnke on July 28, 2009. Ms. Thundercloud failed to respond for over fifty (50) days. The day after Mr. Hahnke followed up on this complaint, he was laid off. Mr. Hahnke appealed his layoff to Ms. Thundercloud, claiming the layoff to be a disciplinary action disguised as a layoff in retaliation to his filing a complaint against the Respondent. This action, if true, is not permissible in accordance with the Tribe's Layoff policy, section E(5): Layoffs are not for disciplinary reasons and are not subject to appeal by the employee. Layoffs shall not be used for disciplinary reasons. Ms. Thundercloud upheld the layoff on October 15, 2009.

To the extent Mr. Hahnke's case rests on retaliation by Mr. White due to the complaint against him, there is no evidence to support Mr. White's knowledge of the complaint. In order for an act to be retaliatory, the alleged retaliator (in this case Mr. White) must be shown to have knowledge

of the complaint. Mr. White testified he was not aware of the complaint. Appellant does not draw our attention to any evidence, direct or otherwise, that show that Mr. White knew of the complaint.

The other main support of Mr. Hahnke's argument is Mr. White's alleged animosity towards Mr. Hahnke. However, only two relevant witness statements were mentioned by the Personnel Commission decision: Susan House who stated she had no recollection of Mr. White being angry with Mr. Hahnke; and, Mr. White who stated he had no animosity towards Mr. Hahnke. No other witness is mentioned on this point in the Personnel Commission decision. (Regina Robinson did testify she felt the layoff was related to performance, but did not mention the relationship between Mr. White and Mr. Hahnke).

Appellant appealed his layoff to the Personnel Commission claiming the Layoff was really a termination, a result of retaliation of a complaint he had filed against the Respondent. On November 24, 2009 the Personnel Commission denied Mr. Hahnke's claim on the grounds that layoffs are not appealable in accordance with section E(5); *Layoffs are not for disciplinary reasons and are not subject to appeal by the employee*. A series of events followed which began on December 10, 2009 and included an appeal of this decision, a remand, extensions, a Final Personnel Commission hearing and decision, an appeal, a remand back to the Personnel Commission, postponements, a Stay upon appeal, an Interlocutory Appeal, postponements, a Personnel Commission final decision on June 16, 2011 to uphold the layoff, an appeal, a remand and final Personnel Commission grievance hearings on January 3, 2012 and January 4, 2012 with a decision issued on January 9, 2012 to uphold the layoff. The Appellant filed an appeal on January 17, 2012 to the Appellate body of the Oneida Tribal Judicial System for review alleging the Personnel Commission decision to be clearly erroneous and against the weight of the evidence.

Appellant, Donald Hahnke was formerly employed at the Community Education Center (CEC) as its Director. During the summer of 2009 Appellant was tasked with balancing the CEC's budget and was directed to cut the budget in a manner that would have no direct impact on services provided. Appellant claims to have submitted budget proposals to Respondent, Donald White and asserts Respondent was not responsive. It was on July 28, 2009 Appellant filed a complaint against Respondent with General Manager, Deborah Thundercloud.

After receiving no response in regard to his complaint, Appellant followed up with Ms. Thundercloud on September 21, 2009. The following day he was laid off.

The Appellate Court, in reviewing this case must make a determination as to whether there was a clear error in the Personnel Commission's decision to uphold Appellant's layoff. Appellant asserts that the Personnel Commission ignored important evidence that supports his retaliation allegations. If the Personnel Commission did indeed overlook relevant and important evidence, this could constitute a "clear error." Appellant refers to several pieces of evidence in his February 15, 2012 Appellant's Brief that he believes the commission did not give full consideration to or ignored. The most supportive of his claim that he was not laid off for budgeting issues was an August 19, 2009 email written by Brian Doxtator which states "*Don White did inform me of his intent to lay off the C.E.C. director... There was an implication that Mr. Hahnke was not the best fit, based on performance, for the CEC Director. However, due to Don Hahnke's current behavior, he (Don White) wanted to lay off Don Hahnke on August 14, 2009.*" In the Personnel Commission decision it states: "*There appeared to be misinterpretation of statements made in several email messages from the Human Resource Department personnel that led the Petitioner to believe his lay off was for disciplinary reasons, not budgetary.*" Mr. Doxtator did not testify to support or deny Appellant's accusations.

The Personnel Commission also recognized in its decision that witnesses provided testimony that was contradictory to the emails presented as evidence. This indicates the Personnel Commission considered the evidence Appellant believes the Commission ignored.

We are especially reluctant to disturb the Personnel Commission ruling in a case like this one which rested, in large part, on credibility judgments of the witnesses. This case largely turns on facts established through testimony. Therefore witness credibility takes on extra importance. The Personnel Commission heard all the witnesses and while there was some evidence to support Mr. Hahnke's assertions, the Personnel Commission ruled it wasn't enough. Based on the record before us, we will not second-guess those credibility judgments or the ruling on the merits.

#### **IV Decision**

Retaliatory actions are most difficult to prove. The Appellant must provide clear and convincing evidence that the layoff was retaliatory. The question of whether the layoff was predetermined and indeed retaliation cannot be determined on the evidence and record presented. In reviewing this case the Appellate body determined the evidence put forth could not reasonably support the overturning of the Oneida Personal Commission's decision. The Appellate body was not persuaded the layoff of Mr. Hahnke was an impermissible disciplinary or retaliatory act.

The Oneida Personnel Commission decision to uphold the layoff is affirmed.