

# ***Oneida Tribal Judicial System***

Onʌyote ʔ aka Tsiʔ Shakotiyaʔ Tolé hte

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## **Appellate Court**

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Tina Pospychala,  
Appellant

Docket No. 12-AC-008

vs.

Date: December 05, 2012

Florence Petri & Leslie Cornette,  
Respondent

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## **Final Decision**

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This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers Winnifred L. Thomas, Janice L. McLester, Lois Powless, Jennifer Webster and Stanley R. Webster, presiding.

### **I. Background**

This case comes to us as an appeal of an original hearing body's decision. The Oneida Personnel Commission upheld the Area Manager's decision to overturn the Supervisor's suspension of employee, Leslie Cornette.

#### ***A. Jurisdiction***

Any person aggrieved by a final decision in a contested case can seek the Oneida Tribal Judicial System's review under Sec. 1.11-1 of the Oneida Administrative Procedures Act. *Authority:* The Oneida Tribe of Indians of Wisconsin has the authority and jurisdiction to enforce this act as well as the responsibility as a government to protect the health, safety, welfare, and economy of the Oneida Reservation lands and all persons who either reside on the reservation or who are visitors and/or are conducting business within the exterior boundaries of the reservation. The Oneida Tribe shall ensure due process of law for the designated citizens through adoption of this

act, pursuant to Article VI of the Oneida Tribal Constitution, as amended. This permits any person aggrieved by a final decision in a contested case to seek appellate review before the Oneida Tribal Judicial System.

***B. Factual Background***

Employee, Leslie Cornette, is a home chore worker for Oneida Elder Services; he was issued a 2-day suspension for alleged no-call-no-show on October 18 and 19 of 2011. Failure to report promptly and observe work schedules without the specific approval or notification of the immediate supervisor.

The employee had run over his wallet with a lawnmower which led to some problems and caused him to miss work. The facts are not in dispute; the employee called the first day and left a message at the meal site to let his supervisor know he wouldn't be in; the employee's girlfriend called in for the employee the second day; however, the supervisor did not get the messages until the middle of the morning of the second day; the supervisor viewed this as a no-call/no-show.

The Supervisor suspended Mr. Cornette for two days. Mr. Cornette appealed the suspension to the Area Manager, and the Area Manager overturned the suspension.

The Supervisor filed with the Oneida Personnel Commission requesting to have the Area Manager's decision overturned.

The Oneida Personnel Commission ruled in favor of the Area Manager. The Supervisor filed an appeal of that decision.

***C. Procedural Background***

On October 20, 2011, Leslie D. Cornette received a two (2) day suspension beginning October 21, 2011, and ending on October 25, 2011.

Mr. Cornette's Disciplinary Action was for an infraction of the Oneida Personnel Policies and

Procedures, Section V.D.2.II. Attendance and Punctuality, Subsection A. Under Date and Description, it further states: "Leslie was a no call/no show for 2 days October 18<sup>th</sup> and October 19<sup>th</sup> 2011. Failure to report promptly and observe work schedules without the specific approval or notification of the immediate supervisor."

On November 2, 2011, Mr. Cornette appealed his discipline to the Area Manager, Florence Petri, Director of Elderly Services.

On November 2, 2011 the Area Manager requested an extension from the Dept. of Human Resources' PRO Susan Doxtator and was given until November 28, 2011 to answer the appeal.

Having received the extension of time from Human Resources Dept., the Area Manager was timely with the response of the appeal

On November 18, 2011, the Area Manager rendered her decision regarding Mr. Cornette's appeal. It was the decision of the Area Manager to overturn the disciplinary action citing several reasons including:

1. The employee's previous head injury which causes him to be forgetful.
2. No written documentation in the employee's file of attempts made to discuss the performance concerns.
3. No signed Training and Development plan.
4. Employee attempted to call in; Area Manager believes he did his best.
5. Failure to follow Social Services Time and Attendance Work Standard 3.23 which requires the supervisor to notify the employee when attendance becomes problematic so the employee has an opportunity to meet the requirements. Should attendance issues continue upon notification, corrective action may occur.

***D. Applicable Rules and Laws***

With respect to employee appeals of a supervisor's disciplinary action, Oneida Personnel Policies and Procedures V.D.a.3. ( OPPP ) states:

3) The Area Manager will do one of the following:

- a) Uphold the disciplinary action; or
- b) Modify the disciplinary action; or
- c) Overturn the disciplinary action. If a suspension or termination is overturned the employee (petitioner) shall be reinstated with full back pay. Sec. V.D.6.a.3.

Oneida Personnel Policies and Procedures Sec. V.D. states:

**COMPLAINTS, DISCIPLINARY ACTIONS AND GRIEVANCES;**

Grievance procedures provide a systematic process for hearing and evaluating job related disputes. Grievance procedures serve to protect employees from inconsistent and unfair treatment. In all cases of grievance and discipline, supervisors are enjoined to use common sense, discretion and judicious good sense to resolve complaints between employees, exercise disciplinary prerogatives, and handle grievances.

Sec. V.D.6.2. of the Oneida Personnel Policies and Procedures states:

An employee who receives a disciplinary action which he/she believes is unfair may grieve the action. The Grievance process (including appeals of disciplinary action) shall be conducted with utmost consideration for due process....

2) The Area Manager, for all disciplinary action investigations, will have ten (10) working days from the receipt of the employee's appeal to complete the investigation.

Section IV.A.5.i. states:

Vacation/Personal Days; Personal Days can be used for any reason so long as the request is approved by the employee's supervisor at least 24 hours in advance (unless the absence is due to illness or unforeseen circumstances).

Along with the Oneida Personnel Policies and Procedures Law we look to another Code of Justice called the Great Law of Peace. Taken from the twenty-eight wampum... "Cast not over your shoulder behind you the warnings of the nephews and nieces should they chide you for any error or wrong you may do, but return to the way of the Great Law which is just and right. Look and listen

for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground-the unborn of the future Nation.”

While some may say, we as a people have not adopted the Great Law as Oneida Law, however the fact of what is right and just has not changed.

When the laws lack clarity we need to remember always from where we have come from as a people and embrace change that needs to be addressed.

When this court receives an appeal and the laws are vague and not clearly decisive we lean on the Great Law when it states “Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations”.....

The Oneida Business Committee passed *Resolution 4-13-90-A*.

*In the eighth Whereas, “the growth of the Oneida Tribe requires that the role of the Oneida Personnel Committee be updated and amended in order to meet the changing needs of the Oneida Tribe’s employment system, and”*

*In the ninth Whereas, “it would be governmentally functional and feasible to delegate one commission to generate employment policies to the Oneida Business Committee.*

*Now Therefore Be It Resolved: that the Oneida Personnel Selection Committee be re-designated as the Oneida Personnel Commission and that the Oneida Personnel Commission be delegated the sole commission to generate personnel policies to be presented and recommended to the Oneida Business Committee for the Oneida Business Committee to review, take formal action to approve, disapprove, change and/ or amend said personnel policy recommendations.”*

We have had a number of cases concerning Area Managers over the years where Tribal laws are silent, however we do have Case Law when the Area Manager is being challenged by the Supervisor. The Oneida Personnel Policies and Procedures are silent on a Supervisor being able to challenge an Area Manager's decision, Trudell Kohlwey vs. Human Resource Department 02-ADV-003 September 6, 2002 is one of the cases this court defaults to when reviewing Supervisor Standing.

This is a case where the Supervisor, Trudell Kohlwey issued an eight day suspension to an Oneida Bingo & Casino employee, Douglas Haven on February 13, 2002. Mr. Haven contested this disciplinary action with the Area Manager, Matthew Denny, in writing on February 14, 2002. Mr. Denny was on vacation from February 11 through February 20, 2002. Mr. Denny opened the letter contesting the disciplinary action on February 21, 2002 and sought an extension of time to complete his investigation with the Respondent (Oneida Human Resources Department). The request was denied and the disciplinary action was voided by the Respondent (HRD) on the grounds that Mr. Denny had filed an untimely request and that the investigative period had passed.

Oneida Bingo & Casino representing Mr. Denny filed an appeal with the Personnel Commission, which denied him a grievance hearing. The Personnel Commission held that Oneida Bingo & Casino had failed to establish a right to relief, finding that the Appellant, Oneida Bingo and Casino did not show an adverse employment action which could be resolved by the Personnel Commission.

The Oneida Bingo and Casino filed an appeal to the Oneida Tribal Judicial System's Appellate Court, Docket No. 02-AC-007. The Appellate Court rendered their decision on August 12, 2002.

In the Appellate Court's Analysis of *Oneida Bingo & Casino v Oneida Human Resources Department 02-AC-007* the Court states "*The Personnel Commission serves as the original hearing body for employment grievances. It operates under the auspices of the Personnel Policies and Procedures. The scope of the Personnel Commission's subject matter jurisdiction was clarified and expanded when the Appeals Commission held that any employee may file a grievance against an adverse employment action.*"

The Courts Analysis further stated *“The Personnel Commission in this case has held that a supervisor who has issued a disciplinary action, but had that action overturned, did not establish a sufficient adverse action for which relief could be granted. This decision centers on topics such as due process and fairness to employees and ultimately found that the supervisor did not have any stake or real interest in the disciplinary action, so did not have a harm to present for judicial review.”*

The Appellate Court, in their Analysis, then stated, there are two questions presented to this court for consideration. *“The first is whether a supervisor, as representative of the Tribe as an employer, has a cause of action for an overturned disciplinary action. The second, concerns the factual situation of the case and a determination as to when the time lines for an area manager’s review of a disciplinary action should commence.”*

Keeping in mind that the Kohlwey case is about time lines and the instant case is about Supervisors having standing to appeal an Area Manager’s decision.

The Kohlwey Analysis goes on to state; *“Due process, at a minimum, requires notice and opportunity. This is typically characterized in employment grievances as the proper notice to an employee of the nature of the disciplinary action and the reasons for such action, as well as sufficient opportunity to contest the action before an impartial hearing body. However, due process is a requirement for both parties to a case. While the Personnel Commission’s decision has some merit and is reasonable at a superficial examination, it fails to address due process for all parties and not just employees.”*

The Appellate Court continues in their Analysis with *“It is true that Mr. Haven’s supervisor, Ms. Trudell Kohlwey, has no personal interest or stake in whether his suspension is upheld or overturned. But the supervisor is not presenting this grievance to the Personnel Commission in her personal capacity. She is bringing this action as a representative of the Oneida Bingo and Casino,*

*which is Mr. Haven's employer. And the Oneida Bingo and Casino does have an interest in upholding Mr. Haven's suspension from employment. There may not be a tangible effect on the overturning of Mr. Haven's suspension, such as a loss of money, but the Bingo and Casino as an entity has an interest in maintaining itself and its processes. The merits of the suspension or the lack thereof, are not at issue or even considered by this court, but any employer has an interest in monitoring an employee's behavior and issuing disciplinary action for poor behavior when it is considered appropriate. To find that an employer does not have an interest in being able to pursue a disciplinary action is erroneous."*

The Appellate Court took into consideration there may not be a tangible effect on the overturning of Mr. Haven's suspension however the intangibles exist. Such as the supervisor that imposed the suspension had done what the tribe pays her to do without errors and then to have the suspension overturned. The supervisor is the front line manager and has to follow the Oneida Personnel Policies and Procedures to the letter. They have to make sure the documentation is correct the accumulated discipline is correct along with the constant interfacing with the employee in question. The supervisor aside from managing employees has a duty to the employer as well. Oneida Bingo and Casino recognized the supervisor's position as a supervisor but also recognized that supervisor as an employee. As a result the Appellate Court agreed that the supervisor had standing to appeal the Area Manager's decision.

An employee is an individual who draws a paycheck from the tribe, and the Court recognized the Supervisor as an employee as well as a Supervisor.

The Analysis of the decision concluded with *"The Bingo and Casino operates under a set of work expectations and follows a procedure for enforcement of these expectations. It has a legal interest in maintaining these procedures and principles of due process require that it too, just as any employee, have access to an impartial hearing body to determine legal questions raised by the Bingo and Casino. The question in this case concerns the time lines for an area manager's investigation. The Personnel Commission, as the original hearing body for employment grievances, is most appropriately the first hearing body to consider this question."*

The Oneida Bingo and Casino No. 02-AC-007 final decision in this case was *"The decision of the Personnel Commission is reversed and this case is remanded. It is the finding of this court that Oneida entities, as the employer, have an equal interest in the resolution of disciplinary action questions and that this interest qualifies as an adverse employment action."*

The Oneida Personnel Commission heard this case and rendered their decision on September 6, 2002.

In the case Trudell Kohlwey vs. Human Resource Department No. 02-ADV-003 the decision of the Oneida Personnel Commission dated 09/06/2002 the Oneida Personnel Commission's Issues, Finding of Fact and Conclusions of Law they found there were two issues before them.

- "1. The first is whether a supervisor, as representative of the Tribe as an employee, has a cause of action for an overturned disciplinary action.*
- 2. The second concerns the factual situation of the case and a determination as to when the time lines for an area manager's review of a disciplinary action should commence.*

*Supervisor Kohlwey, alleges that she is bringing this action as a representative of the Oneida Bingo and Casino, which is Mr. Haven's employer. Any employer has an interest in monitoring an employee's behavior and issuing disciplinary action for poor behavior when it is considered inappropriate. Legal interest in maintaining these procedures and processes require that it too, just as any employee, have access to an impartial hearing body to determine legal questions raised by the Bingo and Casino. This appeal concerns the time lines for an area manager's investigation. The original hearing body for employment grievances is most appropriately the first hearing body to consider this question."*

On Remand of Oneida Bingo and Casino v. Oneida Human Resources Department 02-AC-007 (August 12, 2002) the Oneida Personnel Commission in their decision citing the Oneida Personnel Policies and Procedures Section D.6.b.2-Grievance, 2) as the Rule of Law used. Additionally, in accordance with the Rules of Civil Procedures, Rule 3,2) ( c).

The decision further states; *“Furthermore, utilizing Resolution #5-12-93-J, BE IT FURTHER RESOLVED, that the interpretation, notification and enforcement of the Personnel Policy and Procedures will be the responsibility of the Oneida Tribal Human Resources Department and that individual departments, division, key staff, controlling communities or commissions will be held responsible for implementation and compliance, and.*

*BE IT FURTHER RESOLVED, that the interpretation, notification, and enforcement of the Personnel Policy and Procedures will be the responsibility of the Oneida Tribal Human Resources Department and that individual department, division, key staff, controlling committees or commissions will be held responsible for implementation and compliance,*

*BE IT FINALLY RESOLVED that the General Tribal Council has the authority to review and make recommendations at a duly called General Tribal Council.*

The resolution that was presented at the General Tribal Council Meeting on February 28, 2004 was for the adoption of Amendments to the Oneida Personnel Policies and Procedures. GTC 2-28-04-A Resolution and it changed the Oneida Personnel Policies and Procedures concerning Area Managers.

*Area Manager, for all disciplinary action investigations, will have ten (10) working days from the receipt of the employee's appeal to complete the investigation. One extension of no more than five (5) working days may be requested of and granted by the Oneida Human Resources Manager (or designee) at his or her discretion.*

The time line had been three (3) working days to investigate and the Resolution #5-12-93-J provided the Human Resources Department the right to interpret and enforce the Personnel Policies and Procedures manual. The Personnel Policies and Procedures identify that the Area Manager must request a five (5) day extension from the Human Resources Department. Because the request must be submitted to the Human Resources Department it is reasonable that that department has the authority to deny a disciplinary action based on untimely review by the Area Manager. If the Area

Manager disagrees with the Human Resources Department's decision then they have the right to contest that decision to the Oneida Personnel Commission.

*"The decision of this Commission is to support the cause of action by the Petitioner, Trudell Kohlwey, representative of Oneida Bingo and Casino. The Bingo and Casino as an employer has an interest in maintaining itself and its processes. The Bingo and Casino operates under a set of work expectation and follows a procedure for enforcement of these expectations. It has a legal interest to maintain these procedures and principles of due process require that it too, just as any employee, have access to an impartial hearing body to determine legal questions raised by the Oneida Bingo and Casino management and employees."*

The decision goes on to further state *"The Oneida Bingo and Casino as an employer must adhere to all Oneida Tribal employment laws, such as the Oneida Tribal Personnel Policies and Procedures Manual, and Resolutions that impact Oneida Tribal employment law such as Resolution #5-12-93-J. This specific Resolution speaks directly as to how the Oneida Tribal Personnel Policies and Procedure Manual is interpreted and enforced"*.

Matthew W. Denny vs. Oneida Human Resource Department 09-AC-011, (December 08, 2009) and Tenielle Johnson vs. Rita Reiter and Cher Becker 09-AC-015. (February 17,2010) When an Area Manager voids a discipline or when an Area Manager does not do a complete investigation;

The Resolution 4-13-90-A should be enforced and the research should be done to find just how many cases fall under said resolution and make the amendments to the Oneida Personnel Policies and Procedures.

We firmly believe that the Oneida Personnel Policies and Procedures and our cases over the years give Area Managers wide discretion in deciding how to handle their employee appeals.

The Supervisor in this case has to continue working with all the employees in this entity knowing that as a Supervisor she has done everything required of her by the Oneida Personnel Policies and Procedures and the terminated employee is allowed to go back to work.

This is the non-tangibles of these kinds of actions. The Supervisor loses credibility in her authority to manage the employees that she is in charge of. Other employees watch and wait to see what happens which adds stress to the workplace.

When the laws are silent it falls to the court to interpret, the court defaults to precedent case law. When the Legislators and the Resolutions passed by GTC fail to address the decisions that have been rendered by this court; this court has only Precedent Case Law to call upon.

There is case precedent supporting Supervisors that appeal Area Manager's decisions. Based on this history, specific direction for Area Managers should be added to the Oneida Personnel Policies and Procedures changing/amending the Area Manager's role and duty when investigating appeals; defining how to do a proper investigation.

Resolution 4-13-90-A and Resolution 5-12-93-J give authority to the powers that be to make the change to the Oneida Personnel Policies and Procedures, for the greater good of the Oneida Tribe's employment workforce.

## **II. Issues**

**Did the Area Manager fail to do a proper investigation?**

**Was the decision of the Oneida Personnel Commission to uphold the Area Manager's decision against the weight of the evidence?**

## **III. Analysis**

**Did the Area Manager fail to do a proper investigation?**

Yes, the Area Manager failed to do a proper investigation. The evidence submitted to this court from the Oneida Personnel Commission has persuaded this court that a proper investigation had not been done by the Area Manager.

A grievance hearing was held on February 21, 2012. Ms. Pospychala and her representative Mr. Donald Miller along with Ms. Petri and her representative Attorney Patricia Garvey from the Oneida Law Office appeared. Mr. Cornette nor his advocate were present at the hearing.

The evidence revealed the investigation included talking to Mr. Cornette. The previous Supervisor had not been contacted since Ms. Pospychala had only been Mr. Cornette's supervisor for four or five months. The history record of his attendance would have been helpful to see that a pattern existed. The Oneida Personnel Commission ignored the fact that this was the employees second disciplinary for the very same violation in a 12 month period.

The Oneida Personnel Commission ignored the evidence offered in this case that Mr. Cornette did not call his supervisor to let her know that he would not be into work. *The Oneida Personnel Policies and Procedures V.D.2.II.a Attendance and Punctuality; Failure to report promptly and observe work schedules (such as starting time, quitting time, rest and meal breaks) without the specific approval of the supervisor. (W/S/T)*

With respect to the investigation, there are factual and legal issues. On the factual side, it is not clear from the Oneida Personnel Commission's decision what the Area Manager actually did as a part of the investigation. On the legal side, it's not clear what the Area Manager was required to do. On the latter point, previous cases have addressed the issue:

In *Oneida Community Development v. Cornelius* 97-EP-0036 ( 1998 ) the Appellate body ruled that an Area Manager was not negligent when he failed to interview the employee as a part of the employee's appeal.

In *Oneida Governmental Services v. Torres* No. 02-AC-035 ( Oneida Appeals 04/08/2003), the Court affirmed a reversal of employee discipline based on the fact that the employee was not interviewed during the investigation by the person acting as the Area Manager. The Court noted that “in a thorough investigation it is only reasonable that everyone involved in the situation must be interviewed in order to come to a just decision.” That case supports a requirement that the Area Manager must interview the employee being disciplined and all those involved in the matter.

However, *Gollnick v. Powless*, No. 01-AC-020 (Oneida Appeals Commission 01/03/2002), provides an exception to the rule from *Torres*. In *Gollnick* , the Court found that the termination of the employee was proper even though the Area Manager did not interview the employee. In that case the employee was given the opportunity to respond to the termination by the Area Manager, but refused to meet. The Court noted that “due process is about notice and opportunity, and parties cannot avoid opportunity and then claim due process violation.”

The issue also came up in *Powless v. Steinfeldt*, 09-AC-008 (7/13/2009); that case ended up with a remand which included the issue that the Area Manager had to show he made a “good faith effort” to meet with the employee before concluding the investigation.

In *Oneida Bingo Casino- Blackjack Dept. v. Kramer*, 98-EP-0012 (1998), the decision stated: The Oneida Personnel Policies and Procedures state that “The Area Manager will investigate the disciplinary action...” However, they do not state to what extent an investigation should be conducted. This is reasonable because nearly every discipline that requires an investigation will have unique circumstances that dictate how extensive the investigation needs to be. In order to find that the Area Manager’s investigation was not thorough because he did not attempt to contact the respondent by telephone, the Oneida Personnel Commission or party needed to present arguments on (Kramer) how that inaction could have reasonably caused him to change his decision.

The Court has often given deference to Area Managers on Supervisor’s appeals; however there are

more and more cases before the Court concerning the issue of Area Managers not doing thorough investigations.

In a previous case *Claudia Skenandore v. Florence Petri* No. 12-AC-009 November 27, 2012 the Area Manager did not do a thorough investigation and was surprised at the hearing to find the amount of documents that the Supervisor had concerning the employee.

As stated in previous cases the laws lack clarity because the Oneida Personnel Policies and Procedures do not explicitly state that an Area Manager is required to investigate nor does it state what must be included in an investigation. Sec. V.D.6.a.2. of the Oneida Personnel Policies and Procedures states; The Area Manager, for all disciplinary action investigations, will have ten (10) working days from the receipt of the employee's appeal to complete the investigation.

**Was the decision of the Oneida Personnel Commission to uphold the Area Manager's decision clearly erroneous and against the weight of the evidence?**

Yes, the decision of the Oneida Personnel Commission to uphold the Area Manager's decision was clearly erroneous and against the weight of the evidence presented at the hearing.

Mr. Cornette did not report to work on October 18, and 19 of 2011. He did not contact his Supervisor, however someone else contacted the meal site for him. Upon returning to work he was questioned by his supervisor as instructed by the Oneida Personnel Policies and Procedures. Further investigation revealed that Mr. Cornette had been disciplined for this same violation six (6) months previously.

On October 10, 2011 Mr. Cornette was suspended for 2 days for failure to call in.

On November 2, 2011 the Area Manager, Ms. Petri, received an appeal from the Mr. Cornette.

On November 18, 2011 Ms. Petri overturned the suspension.

Ms. Pospychala filed with the Oneida Personnel Commission, requesting to overturn the Area Manager's decision.

A grievance hearing was held on February 21, 2012. The Oneida Personnel Commission ruled in favor of Mr. Cornette.

The Oneida Personnel Commission's decision ruled Mr. Cornette called the only number he could remember to alert his supervisor that he would not be in to work on October 18, 2011, and that was at the elderly meal site. He did not work at the meal site according to the testimony. The second day the girlfriend called for Mr. Cornette and left a message at the elderly meal site.

The Oneida Personnel Commission reasoned that because Mr. Cornette called the meal site to alert his supervisor that he would not be in on October 18, 2011, and the fact the girlfriend called in for Mr. Cornette on the second day that was acceptable; disregarding the Oneida Personnel Policies and Procedures.

IV, A., 5., i. Personal Days can be used for any reason so long as the request is approved by the employee's supervisor at least 24 hours in advance (unless the absence is due to illness or unforeseen circumstances).

- 1) In the case of illness or unforeseen circumstance, the supervisor shall be notified no later than 15 minutes before the scheduled starting time.

IV, A., 5., j. An employee shall notify his/her supervisor of intent to use personal days in the following ways:

- 2) Six (6) days or more-two (2) weeks advance notification.

k. An employee shall notify his/her super supervisor one (1) day in advance if she/she will take off one (1) to two (2) days of vacation. Programs and enterprises may institute stricter standards of notification.

- 1) Three (3) to five (5) days of vacation require a one (1) week advance notification.
  - 2) Six (6) or more days of vacation require at least two (2) weeks advance notification.
1. The burden shall be on the supervisor to show that a denial of a personal day or a

vacation day is based upon interference with the business of the Tribe.

Mr. Cornette has been an employee of the tribe for eight years so he should know the Oneida Personnel Policies and Procedures that govern call-ins.

The Oneida Personnel Commission's decision stated Ms. Pospychala did not meet with Mr. Cornette before disciplining him, while the evidence in the record shows the opposite.

#### **IV. Decision**

The Oneida Personnel Commission's decision is overturned.

The Area Manager's decision to overturn the Supervisor's decision is overturned.

The Supervisors decision to suspend Mr. Cornette for two days is upheld.

**IT IS SO ORDERED**

I, Stanley R. Webster and Janice L. McLester respectfully dissent from the majority decision because the Oneida Personnel Policies and Procedures (“Blue Book”) do not support the right of a supervisor to appeal an Area Manager decision. The immediate supervisor is the only person authorized to initiate a disciplinary action against an “employee”. Only the “employee” receiving a disciplinary action may “grieve the action”.<sup>1</sup>

Section V.D.6 of the Oneida Personal Policies and Procedures addresses grievances. The employee may grieve to the Area Manager, the supervisor’s disciplinary action. After receiving the Area Manager’s decision, the Oneida Personnel Policies and Procedures states, “[t]he *employee* may appeal the Area Manager’s decision to the Oneida Personnel Commission.” Sec. V.D.6.b (italics added). There is no mention of the right of the supervisor to appeal. In my view, when the Area Manager makes a decision, he or she is speaking for the employer collectively, including the supervisor. The supervisor has essentially been overruled by the Area Manager and must accept that ruling.

I am aware that by case law we have established the supervisor’s right to appeal. See *Oneida Bingo and Casino v. Oneida Human Resources*, Docket # 02-AC-007, (8/12/02). We affirmed that decision by interlocutory appeal in the pending case. *Koehler v. Hill-Kelly et al., v. Petri*, 11-AC-026 (12/16/11). I believe these cases were wrongly decided and should be overruled.

In *Oneida Bingo and Casino v. Oneida Human Resources*, we wrote it “is the finding of this court that Oneida entities, as the employer, have an equal interest in the resolution of disciplinary action questions and that this interest qualifies as an adverse employment action.” *Oneida Bingo and Casino v. Oneida Human Resources*, 02-AC-007 (8/12/2002). This statement is misleading. Yes, the employer has an equal interest in resolution of disciplinary actions. However, the employer’s interest transfers to the Area Manager once the employee appeals the supervisor’s decision. The Personnel Commission and Oneida Tribal Judicial System should not be adjudicating what is

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<sup>1</sup> Oneida Personnel Policies and Procedures, §V.D. 6. Grievance: □An employee who receives a disciplinary action which he/she believes is unfair may grieve □the action. . . The Grievance □process will be governed by the following guidelines: a. For all disciplinary actions, regardless of severity: □1) The employee (petitioner) must file an appeal in writing.

essentially an internal dispute within the management of the Tribe.

It is true that the employee's actions and performance have been less than stellar. However, for whatever reason, the Area Manager decided to reinstate Mr. Cornette. The Oneida Personnel Policies and Procedures specifically provide the right to appeal to the employee, not the supervisor.