

Oneida Tribal Judicial System

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APPELLATE COURT

Claudia Skenandore,
Supervisor

Appellant

Docket No. 12-AC-009

vs.

Florence Petri,
Area Manager Elderly Services

Respondent

Date: November 27, 2012

Martha Braeger, Employee
Indispensable Party

FINAL DECISION

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 is an appeal of an Oneida Personnel Commission's decision, dated February 22, 2012, upholding the Area Manager's decision that overturned Supervisor Claudia Skenandore's termination of employee Martha Braeger. This case was accepted for Appellate Review in accordance with Rule 9(D)(3) of the Rules of Appellate Procedures. We find the Personnel Commission's decision is clearly erroneous and against the weight of the evidence presented at

the original hearing level. Therefore, we reverse and uphold the supervisor's decision to terminate employment.

A. Jurisdiction

This case was accepted in accordance with the Oneida Administrative Procedures Act, Sec.1.11-1. *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, which 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

Ms. Martha Braeger worked as an Administrative Assistant at the Oneida Elder Services Office. Her termination from employment arose out of her failure to call in or timely provide an excuse for missing work for three consecutive days in violation of the Oneida Personnel Policies and Procedures.

Ms. Braeger's history of attendance issues is relevant to this case. Ms. Braeger's employee evaluation on July 26, 2010, contained the comment that Ms. Braeger's attendance is a "constant concern. Employee has many physical issues and is absent often for long periods."

On October 29, 2010, Ms. Braeger's supervisor, Claudia Skenandore, provided Ms. Braeger with a memo regarding "Expectations and Responsibilities – follow-up and changes." The first item in the memo is Time and Attendance. The memo states that "call-ins need to be made to my cell phone or home phone." The bullet point reminds Ms. Braeger: "If a Dr. excuse is turned in (return to work slip) a kronos needs to be submitted the next working day." On the same day, October 29, 2010, Ms. Braeger received an "Employee Job Performance Referral Form" also

referred to as an EAP referral which stands for Employee Assistance Program. The reason for the referral is checked as "excessive absences."

In December, 2010 Ms. Braeger received a written warning when she failed to have phone calls forwarded to the answering service upon the end of her shift at 4:30 p.m.

By February 4, 2011, Ms. Braeger had accumulated four unexcused absences and received a written warning. Ms. Braeger appealed to her Area Manager, Florence Petri. Ms. Petri wrote in her response that Ms. Braeger claimed she did not understand the expectations of her. Ms. Petri stated that it is up to Ms. Braeger to ask if she does not understand and then emphasized the importance of regular attendance:

Excessive absenteeism affects the consistent customer service relationship represented at the front desk of Elder Services. This representation affects the whole Tribal organization. It is a burden to other staff who have to cover in your absence, as they are pulled away from their responsibilities and duties. I have highlighted the areas you need to comply with and improve on. Continually requesting unplanned or frequent time off may warrant progressive action. (Underlining in original.)

Nevertheless, Ms. Petri modified the written warning to a verbal warning. On February 4, 2011, Ms. Braeger was given a second EAP referral for excessive absences.

On March 8, 2011, Ms. Skenandore sent an email to all office staff with her cell phone number and home number instructing the employees to call her directly when calling in for absences from work.

Some time in summer 2011, Ms. Braeger continued to have medical issues. Ms. Braeger took leave beginning July 11, 2011 and was scheduled to return to work on July 18, 2011. On July 15, 2011 Ms. Braeger saw and spoke with her supervisor at the Oneida Health Clinic. At that time Ms. Braeger was under a doctor's care for an injured arm. Ms. Braeger and Ms. Skenandore spoke to each other. There is not an agreement between the two as to exactly what

was communicated. The Oneida Personnel Commission found Ms. Skenandore's version more credible. We defer to the Oneida Personnel Commission as the finders of fact. Ms. Skenandore did not ask Ms. Braeger if she was coming back to work or whether she was going to need more time off. Ms. Braeger, did not ask her supervisor if she could have more time off or inform Ms. Skenandore when she would be back to work. Ms. Braeger stated "I am seeing my doctor and I could be, might not be able to return to work on Monday." The following Monday, Ms. Braeger did not call Ms. Skenandore to let her know that she would not be returning to work. In fact, on Friday, July 15, 2011, Ms. Braeger did see the doctor and was given a doctor's excuse to be off of work for the dates of July 18-22.

On the following Monday, July 18, 2011, Ms. Braeger's granddaughter, Marissa Doxtator, delivered a blank leave form and a doctor's excuse to the Oneida Elder Services office. The form contained no identifying information. Ms. Skenandore called Ms. Braeger's home to discuss the blank form and the doctor's excuse; there was no answer so she left a message. Ms. Braeger denies receiving the message.

On July 18, 19, and 20, 2011, Ms. Braeger was absent from work and did not call her supervisor. No completed leave form or other request was filed.

On July 20, 2011, having heard no call back and no other communication from the employee, Ms. Skenandore terminated Ms. Braeger's employment for failing to call in to work for three consecutive days in violation of section V.D.2.II.a., failure to report promptly and observe work schedules, without the specific approval of the supervisor.

Ms. Braeger had been employed by the tribe for 12 years. Over the 454 days leading up to the termination, Ms. Braeger had been absent from the work place 161 days. Included in the absence report there had been 28 days of leave; 19 days with medical excuse; 51 days pre-scheduled but not vacation and 59 call-ins. Ms. Braeger has never been denied leave.

C. Procedural Background

Ms. Braeger, appealed the termination to the Area Manager, Florence Petri. Area Manager Petri overturned the termination citing the following factors:

- Documentation of 5 physician slips and leave request forms
- July 20, 2011 was Ms. Braeger's first written disciplinary action for not calling in
- No history of documentation to support attempts made for employee to improve

The quality and thoroughness of Ms. Petri's investigation is an issue in the case and was an issue at the hearing. Shortly after Ms. Braeger's appeal, Ms. Petri requested the information surrounding Ms. Braeger's termination from Ms. Skenandore. Ms. Skenandore replied that she did not have it at her fingertips and would have to gather it. Ms. Petri was dissatisfied with this response and proceeded to overturn the termination without the benefit of the supervisor's back-up information. When confronted with the information at the hearing, Ms. Petri stated that she was not aware the information existed. Next Ms. Petri stated that it didn't matter; the supporting background information would not have changed her mind.

On February 22, 2012, the Personnel Commission upheld the Area Manager decision.

Ms. Skenandore timely appealed the Oneida Personnel Commission's decision to the Oneida Tribal Judicial System's Appellate Court, claiming the decision of the Oneida Personnel Commission was erroneous and against the weight of the evidence presented at the trial.

D. Applicable Rules and Laws

With respect to employee appeals of a supervisor's disciplinary action, Oneida Personnel Policies and Procedures (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).

II. Issues

Does a supervisor have a right to appeal an Area Manager's decision to overturn a termination of employment?

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

III. Analysis

Does a supervisor have a right to appeal an Area Manager's decision to overturn a termination of employment?

We partially addressed this issue in this case in December, 2011 when Ms. Petri brought an

interlocutory appeal of the Personnel Commission's decision to deny Ms. Petri's motion to dismiss the supervisor's appeal. See *Koehler v. Hill-Kelly et al., v. Petri*, 11-AC-026 (12/16/11). We affirm that ruling as explained below.

We have confronted this issue previously and our previous case law supports a supervisor's right to appeal an Area Manager's decision. We first decided the issue in *Oneida Bingo and Casino v. Oneida Human Resources*, Docket # 02-AC-007, (8/12/02). In that case, the employee was issued an eight-day suspension by his supervisor. The employee appealed the disciplinary action to the Area Manager. The Area Manager was on vacation and upon his return sought an extension of time to complete his investigation with the Oneida Human Resources Department. The request was denied and the disciplinary action was voided by the Oneida Human Resources Department on the grounds that Area Manager had filed an untimely request and that the investigative period had passed. The employee's supervisor filed an appeal with the Oneida Personnel Commission which denied the grievance hearing. The Oneida Personnel Commission held that the supervisor had failed to establish a right to relief or an adverse employment action which could be resolved by the Oneida Personnel Commission.

The Oneida Personnel Commission stated 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. That decision centered 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, and so did not have a harm to present for judicial review. The supervisor appealed to the Oneida Tribal Judicial System.

The Appellate Court reversed the Oneida Personnel Commission's decision denying Oneida Bingo and Casino a grievance hearing. The Court ruled, in their decision, that supervisors have a sufficient stake in seeing their disciplinary actions upheld to allow them to appeal: "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."

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 is clearly erroneous and against the weight of the evidence.

The heart of this case is the Area Manager's discretion and whether that discretion is unlimited. We find that it is not. Area Managers do and should have a great deal of discretion in reviewing supervisor actions. Presumably they are paid more and have more experience and education to work as upper management. However, there must be some limit to their discretion. Given that our previous case law holds that supervisors have an equal stake in the outcome of employee disciplinary proceedings, they must have an expectation that, at the very least, an Area Manager's decision will have a rational basis in the record. The Area Manager's decision in this case does not.

Before we turn to the specifics of this case, we briefly review our case law regarding Area Manager's discretion. We have limited Area Manager's discretion in the past. In *Oneida Bingo and Casino Security v. Bluebird*, 01-AC-011 (3/20/02), the employee received a written warning for a no-call/no-show. On appeal by the employee, the Area Manager increased the written warning to a three-day suspension after his review uncovered additional attendance problems. The Oneida Personnel Commission overturned because the Area Manager wouldn't allow the employee to have an advocate present during a meeting with the Area Manager. On appeal, we affirmed but also discussed the Area Manager's role. We noted that it was not the Area Manager's job to initiate or deal with disciplinary issues; that role belongs to the supervisor. Furthermore, there was no evidence in the record that supported the Area Manager's finding. That reasoning strengthens our findings here, where all three of the points listed by the Area Manager are questionable and demonstrate an arbitrary disregard for the record.

Another helpful case for our review is *Benson v. Oneida Governmental Services Division*, 99-EP-045 (7/21/00). In that case we identified, in the decision, part of the Area Manager's job in reviewing grievance appeals from employees: "Part of the Area Manager's responsibility is to review the disciplinary action against an employee and decide whether the disciplinary action is in conformance with the Personnel Policies and Procedures." This is significant because while employees' and supervisors' duties and responsibilities are addressed extensively in the Oneida Personnel Policies and Procedures, Area Manager's conduct is rarely addressed. Although in the case of *Oneida Bingo and Casino Security v. Bluebird*, 01-AC-011 (3/20/02) the Area Manager's decision to overturn a termination was upheld, other parts of the Area Manager's decision were struck down. Specifically, modifying a discipline to include job re-assignment and demotion are not within an Area Manager's authority.

In addition to our cases, the Oneida Personnel Policies and Procedures itself also limits an Area Manager's discretion. We find two provisions applicable here. First, the preamble to Sec. V.D. states that "supervisors are enjoined to use common sense, discretion and judicious good sense to resolve . . . and handle grievances." We read the term supervisor to include Area Managers because Area Managers supervise some employees. Next, the Oneida Personnel Policies and Procedures also states that "the Grievance process (including appeals of disciplinary actions) shall be conducted with the utmost consideration for due process" Sec. V.D.6. Therefore, the background requirements of common sense, judicious good sense and due process are applicable to Area Manager's decisions when reviewing a discipline appeal.

We now turn to the specifics of Ms. Braeger's case. The Area Manager's decision rested on three grounds: 1) Documentation of five physician slips and leave request forms; 2) July 20, 2011 was Ms. Braeger's first written disciplinary action for not calling in; 3) No history of documentation to support attempts made for employee to improve. All three have problems.

With respect to the five physician slips and leave request forms, most of these are not applicable to the specific dates in question, July 18-20, 2011. One doctor's excuse did reach Ms.

Skenandore on Monday, July 18, 2011. However, it was accompanied by a blank leave form. It is completely reasonable for a supervisor to expect more from an employee including talking to the employee herself, as Ms. Skenandore had made extremely clear in her previous communications. Normally, we could understand giving an employee the benefit of the doubt, but given the history here where Ms. Braeger has been told repeatedly verbally and in writing that she must call in when absent, sending a doctor's slip with a blank leave request is understandably unacceptable. The Area Manager's statement suggests there was massive documentation that the supervisor overlooked; the truth is that there was one slip and a blank leave request form and no call in.

Next Ms. Petri states the July 20, 2011, disciplinary action is Ms. Braeger's first written discipline for not calling in. This may be technically true but Ms. Braeger had four unexcused absences in January 2011 alone and two EAP referrals for attendance. Ms. Petri's reasoning makes it appear as though this is the first instance of attendance related problems when the truth is Ms. Braeger's attendance has been an ongoing concern as was mentioned in her employee evaluation a year earlier.

Third, and perhaps most troubling, Ms. Petri states there is no documentation of previous efforts to help the employee improve. Ms. Petri's ignorance of the facts is stunning. If Ms. Petri had waited to receive the documentation from Ms. Skenandore, she would have seen the numerous efforts at support for improvement including two EAP referrals, the October 29, 2010 memo specifically spelling out expectations, the February 2011 written warning and the email from Ms. Skenandore to all office staff giving them Ms. Skenandore's cell and home phone numbers and telling them to call her when they will miss work.

Ms. Petri then testified at the hearing before the Personnel Commission that regardless of the evidence she wouldn't have changed her mind. She may have thought she was protecting her decision by standing behind it. However, her testimony compounds the problem by suggesting that she approached her duties with a closed and prejudiced mind. This combination of the Area

Manager's failure to correctly review the record and her pre-judgment of the case violates all three of the Oneida Personnel Policies and Procedures commands for use of common sense, judicious good sense and due process.

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; nevertheless the standard 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 and our Tribal laws are silent, however we do have Case Law when the Area Manager is in the wrong. Trudell Kohlwey vs. Human Resource Department 02-ADV-003 has not followed Oneida Personnel Policies guidelines.

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 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 case number 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 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.

The Haven's decision continues 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 decision in this case is *"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 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 *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, (B) 2) (c). Service of Notice:

2) Service is completed by hand delivering the required papers to the party. Service may also be completed by delivery of papers to: c) An officer, manager, agent or partner of a non-individual party.

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"*

Resolution # 5-12-93-J goes on;

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.

Resolution GTC 2-28-04-A was presented to the General Tribal Council Meeting on February 28, 2004 was for the adoption of Amendments to the Oneida Personnel Policies and Procedures 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.

In the Conclusion of Trudell Kohlwey vs. Human Resource Department it states; "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 in 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”.

This decision concluded with; “It is the decision of Oneida Personnel Commission to uphold the HRD decision to void the disciplinary action of Mr. Haven, based upon Resolution # 5-12-93-J, Oneida Personnel Policies and Procedure Manual (commonly referred to as the Blue Book) (Section D.6.b.2- Grievance, Page 10) and the Rules of Civil Procedure: Rule 3,2),c.”

This changed the Oneida Personnel Policies and Procedures.

Another case, Tenielle Johnson vs. Rita Reiter and Cher Becker 09-AC-015 (February 17, 2011) affirms the Supervisor has standing to appeal an Area Manager’s decision.

This case involves the nullification of termination of employment by the Oneida Human Resources Department (HRD). A Dental Assistant (Employee) who worked at the Oneida Community Health Center Dental Clinic performed a potentially dangerous dental procedure allegedly without proper authorization or oversight of a doctor and then allegedly signed the doctor’s name on the form.

In this decision the Appellate Body stated “The *Kohlwey* decision was explicitly overruled in *Oneida Bingo & Casino v. Oneida HRD*, 02-AC-007 (08/12/2002) There the Court states:

“It is true that [the employee’s supervisor] has no personal interest or stake in whether [the disciplinary action is upheld.] 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 employer].

This action resulted in a termination of employment by the immediate supervisor. The employee filed a timely appeal with HRD and the Area Manager. The Area Manager failed to respond to

the timely appeal. HRD then reinstated Employee due to the failure of the Area Manager to act. The Supervisor (Appellant) filed a request for a grievance hearing with the Oneida Personnel Commission (OPC) to appeal the decision of HRD to void the termination of Employee.

On February 23, 2009, the termination of a Dental Assistant employed at the Oneida Health Center. The employee timely appealed to the Area Manager. The Area Manager chose not to answer the appeal due March 19, 2009. This failure triggered the Oneida Human Resource Department to void the termination on April 29, 2009. The Supervisor elected to appeal to the Oneida Personnel Commission, naming the Employee and Personnel Relations Officer as Respondents.

On July 1, 2009 the Personnel Commission upheld the voided termination. It reasoned there were no procedural irregularities exhibited during the disciplinary process and that GTC Resolution 2-28-04-A provides a basis for the Human Resource Department to void terminations in circumstances such as these.

On August 5, 2009, the Supervisor timely appealed to the Oneida Tribal Judicial System. The Oneida Tribal Judicial System ruled in favor of the employee. "We Reverse and remand with further instructions."

In the *Tenielle Johnson* decision the Appellate Court states; "The Kohlwey decision was explicitly overruled in *Oneida Bingo & Casino v. Oneida HRD*, 02-AC-007 (08/12/2002). There the Court states:

It is true that [the employee's supervisor] has no personal interest or stake in whether [the disciplinary action is upheld.] 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 employer].

...There may not be a tangible effect on the overturning of [the employee's] suspension, such as a loss of money, but the [employer] as an entity has an interest in maintaining itself and its processes. ... To find that an employer does not have an interest in being able to pursue a disciplinary action is erroneous."

The decision further state; the supervisor here has an interest in the outcome as a supervisor at the Oneida Community Health Center. As such, she has a job to do, which includes responsibility for patient health and safety. The Supervisor has made a decision she believes is in the best interest of patient health and safety. She has an interest in seeing that decision upheld. Otherwise, if her decision is not upheld, she will have a whole set of challenges and issues to deal with, if the Employee is reinstated. In short, the Supervisor has standing to appeal the HRD decision to void the employee's termination from employment."

The Final Decision in this case was "The HRD decision to void the termination is vacated. The Personnel Commission decision is vacated. The case is remanded to the Personnel Commission with instructions as given above."

The cases that have been decided in the past have been decided by defaulting to Case Law since the Oneida Personnel Policies and Procedures have not been amended to reflect the decisions that have been rendered.

The Oneida Personnel Policies and Procedures do not spell out what is a complete investigation. Webster's Dictionary explains investigate "To make a systematic inquiry (into): examine deeply". Black's Law Dictionary Seventh Edition states; "To inquire into (a matter) systematically". The Oneida Personnel Policies and Procedures do not define the Area Manager's procedure. In V.D.6.2) of the Oneida Personnel Policies and Procedures it 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.....and goes on to say what the Area Manager will do. So in many cases the Area Managers may say they have done an investigation and in reality they may not have spoken to anyone involved. There is no clear definition as to what a thorough investigation is and the Area Manager's discretion dictates they may do whatever they choose. In this case the documentation presented by the Supervisor at the hearing was a surprise to the Area Manager. The Area Manager stated on record she did not

know there was so much documentation. Had a systematic investigation been done this should not have been a surprise.

The Resolution 4-13-90-A was created to re-designate the Oneida Personnel Selection Committee to the Oneida Personnel Commission, delegate the sole commission to generate personnel policies to be presented and recommended to the Oneida Business Committee. Oneida Business Committee to review, take formal action to approve, disapprove, change and/or amend said personnel policy recommendation, should be enforced.

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. However, where there is a total disregard for the facts along with a close-minded approach, that discretion has been abused. The termination of Ms. Braeger's employment was in conformance with the Oneida Personnel Policies and Procedures. This Court was not persuaded the Supervisor did not work with this employee. While it may have been possible for the Area Manager to carefully and thoughtfully find mitigating circumstances to justify a modification, she did not do so.

The Supervisor has to continue working with all the employees in this entity knowing that as a Supervisor she had done everything required of her to do 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 in her charge. 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 the history presented, 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 would be a good place to start. Throughout the entire Personnel Policies and Procedures there are numerous detailed instructions to which a Supervisor must adhere. The Area Manager's position is silent on the details for individuals to follow.

A more recent case concerning this very issue came before this Appellate Body on December 16, 2011. The case for appellate review was *Docket No. 11-AC-026 Grace Koehler, Printing Manager, vs. Jennifer Hill-Kelly, Interim Asst. General Manager and Cindy Lecker Employee Services Indispensable Party & Claudia Skenandore, Office Manager, vs. Florence Petri, Area Manager and Martha Braeger, Administrative Assistant, Indispensable.*

This case was accepted as an Interlocutory Appeal according to Rules of Appellate Procedures, Rule 6. The case involves the Respondents Jennifer Hill-Kelly and Florence Petri's challenge of the Oneida Personnel Commission's decision denying Appellants Grace Koehler, Printing Manager and Claudia Skenandore, Office Manager's Motions to Dismiss for failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction, in Personnel Commission Docket No.'s 11-ADV-005, 11-SUS-006 and 11-ADV-004. The legal issue in each case is the same: whether the supervisor who originally disciplined an employee may appeal the Area Manager decision to modify or reverse the supervisor's disciplinary action.

This is taken from the Interlocutory Appeal Final Decision and Decision on Motion to Join Docket No. 11-AC-026 "On November 17, 2011 the Initial Review Body of the Oneida Tribal Judicial System, Appellate Court granted a Stay of the pending case before the Oneida Personnel Commission until a decision is made on the Interlocutory Appeal. "On December 14, 2011, the Oneida Tribal Judicial System, Interlocutory Appeal Body of the Appellate Court deliberated

and files its decision to affirm the decision of the Oneida Personnel Commission and deny the Motion to Dismiss.”

“Stay of proceeding before Oneida Personnel Commission is lifted. The Oneida Personnel Commission shall hear arguments on whether or not the rights of the Supervisor would be harmed by denying their opportunity to challenge the Area Manager decision and regarding the joining of Docket No’s 11-ADV-005, 11-SUS-006 and 11-ADV-004. It is so ordered.”

Decision

The decision to terminate Ms. Braeger’s employment from the Oneida Tribe of Indians of Wisconsin by Supervisor Claudia Skenandore is affirmed by this Appellate Court.

The decision to overturn the termination by the Area Manager is reversed by this Appellate Court.

The Oneida Personnel Commission decision to uphold the Area Manager’s decision is reversed.

Remedial training for Area Manager on how to conduct a proper investigation with notice to Appellate Court when training is complete no later than 3 months.

IT IS SO ORDERED.

Formal dissent from majority decision by Stanley R. Webster and Janice L. McLester on November 27, 2012.

I 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.

Section V.D.6 of the Blue Book addresses grievances. After an employee is disciplined by his or her supervisor, the employee may grieve to the Area Manager. Upon receiving the Area Manager decision, the Blue Book 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 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 Ms. Braeger. The Blue Book gives only the employee the right to appeal, not the supervisor.

For the foregoing reasons, I respectfully dissent.