

# ***Oneida Tribal Judicial System***

OnΛyote ʔ a-ka Tsiʔ Shakotiyaʔ Tolé hte

---

## **APPELLATE COURT**

---

**Kurt Jordan,  
Quality Construction Management,  
Appellant**

**Docket No. 12-AC-016**

**vs.**

**Dale Wheelock,  
Oneida Housing Authority,  
Respondent**

**Date: January 4, 2013**

---

## **DECISION**

---

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

### **I. Background**

On July 10, 2012, Appellant, Kurt Jordan, filed an appeal of the June 19, 2012 Oneida Tribal Judicial System, Trial Court decision, Docket No. 12-TC-052 Dismissal alleging it to be outside the scope of authority or otherwise unlawful, clearly erroneous and against the weight of the evidence, arbitrary and/or capricious and exhibited a procedural irregularity. We affirm the decision of the Oneida Tribal Judicial System, Trial Court dismissal.

*A. Jurisdiction*

This case comes to us as an appeal of an original hearing body, the Oneida Tribal Judicial System, Trial Court. 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. Factual Background*

The Appellant, Kurt Jordan, is the owner of Quality Construction Management. On March 30, 2012, Mr. Jordan filed a Motion for Injunction and/or Restraining Order against Respondents seeking an order to cease and desist accepting bids for multiple projects within the Oneida Housing Authority for several homes under construction. On the same date, March 30, 2012, Mr. Jordan filed a complaint with the Oneida Indian Preference Department.

On April 3, 2012 the Trial Court, Judicial Officers Mary Adams, Judicial Officer Jean Webster and Judicial Officer Leland Wigg-Ninham granted the Injunction and held a hearing on its merits on April 16, 2012. Respondents submitted a Motion to Dismiss based on 1) Injunctive relief should be denied because Appellant could not establish a right to relief alleging there to be no requirement of Oneida Housing Authority to enter into a contract with Appellant and 2) Appellant's suit is barred by sovereign immunity.

On April 23, 2012 the Trial Court after addressing the Motion to Dismiss, by holding in abeyance and "prohibiting the Respondent from contracting with any vendor for services at issue in this lawsuit," granted an Injunction, scheduled a hearing on the petition and allowed the Oneida Indian Preference Department to conduct an investigation into allegations by Mr. Jordan that there was a violation of the bidding process under the Oneida Indian Preference Law which lead to a contract violation. After a rescheduling request from the Indian Preference Department, a hearing was conducted on May 22, 2012.

On June 19, 2012 the Trial Court filed their opinion finding that under the current Independent Contractor Policy adopted by the Oneida Business Committee on April 25, 2012 the Oneida Tribe is prohibited from entering into contracts with employees that own their own business such as Mr. Jordan and that the policy was not in effect when Mr. Jordan filed his claim making that policy not pertinent to this claim as policy changes are not retroactive.

The Trial Court granted the Motion to Dismiss according to *O-Tech Solutions, LLC Mr. Curtis Danforth vs. Oneida Bingo & Casino, Oneida Indian Preference Department*, Docket No. 10-TC-168 (2010) and *Mathew J. Denny Sr., HD Cash Management Services vs. Chad Fuss, Assistant GM-Finance*, Docket No. 12-TC-023 (March 5, 2012) “the IPD shall first investigate and then file on *behalf* of the vendor at the OTJS for violations of the IPL.”

The Trial Court stated Chapter 57 as describing a comprehensive enforcement scheme not including individual vendor’s ability to sue for violations.

The Trial Court addressed only the issue of Mr. Jordan’s ability to bring an enforcement action on its own under Chapter 57. The merits of Mr. Jordan’s other causes of action, specifically breach of contract, breach of Independent Contractor Policy, breach of Sole Source and damages resulting by a violation of the bidding process went unanswered.

On July 10, 2012 Mr. Jordan appealed to the Oneida Tribal Judicial System, Appellate Court for review, alleging:

- 1) The decision is outside the scope of the authority or otherwise unlawful.
- 2) The decision is clearly erroneous and is against the weight of the evidence presented.
- 3) The decision is arbitrary and/or capricious.
- 4) There is exhibited procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision.

*C. Procedural Background*

On July 10, 2012 the Oneida Tribal Judicial System, Appellate Initial Review panel of Judicial Officers Janice L. McLester, Judicial Officer Lois Powless and Judicial Officer Jennifer Webster met to answer the threshold questions regarding the jurisdiction of the case and the procedural and material sufficiency of the Notice of Appeal. In accordance with the Oneida Nation Administrative Procedures Act Section XI, F and the Oneida Tribal Judicial System, Rules of Appellate Procedure, Rule 9, the Initial Review body shall accept an appeal when an Appellant alleges with sufficient clarity that the original hearing body decision contains one or more of the following elements:

1. A violation of constitutional provisions.
2. The decision is outside the scope of the authority or otherwise unlawful.
3. The decision is clearly erroneous and is against the weight of the evidence presented at the hearing level.
4. The decision is arbitrary and/or capricious.
5. There is exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision, which if the error had not occurred, would have altered the final decision.
6. There is a presentation or introduction of new evidence that was not available at the hearing level, which, if available, may have altered the final decision.

The Appellate Review panel accepted this case for review under clearly erroneous and against the weight of the evidence.

An exchange of briefs was completed on October 8, 2012.

The Appellate Review body consisting of Judicial Officers Janice L. McLester, Judicial Officer Lois Powless, Judicial Officer Winnifred L. Thomas, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster deliberated on October 31, 2012, November 29, 2012 and December 6, 2012 to review the merits of the appeal and now files its decision to affirm the decision of the Oneida Tribal Judicial System, Trial Court's dismissal of June 19, 2012.

## II. Issues

**Was the decision of the Oneida Tribal Judicial System, Trial Court outside the scope of their authority or otherwise unlawful?**

**Was the decision of the Oneida Tribal Judicial System, Trial Court clearly erroneous and against the weight of the evidence?**

**Was the decision of the Oneida Tribal Judicial System, Trial Court arbitrary and capricious?**

**Was there exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision?**

## III. Analysis

**Was the decision of the Oneida Tribal Judicial System, Trial Court outside the scope of the authority or otherwise unlawful?**

No. Appellant asserts “The Tribal’s decision to dismiss the entire case without deciding the issues of the Breach of Contract and Breach of Independent Contractor Policy on damages caused by the failure to follow the Oneida bidding process violated Rule 9 (D) as Appellant did not have due process to have those claims dismissed by the Tribunal and, there, the Trial Court’s decision was outside the scope of authority...”. Rule 9(D) is within the Rules of Appellate Procedure and lays out the Criteria for Acceptance for an appeal. The Trial Court operates in accordance with the Rules of Civil Procedure, which is Chapter II of the Oneida Tribal Judicial System, Judicial Code. Under the scope of these rules the Trial Court is governed by procedures to be utilized in all contested cases or civil actions, suite and proceedings falling under the jurisdiction of the Oneida Nation and the Oneida Tribal Judicial System ensuring every contested case to secure a swift, fair and inexpensive determination of every contested case by allowing

every individual who files a case the right to be heard. Adoption of Resolution 8-19-91 grants a sub-committee of the Oneida Tribal Judicial System, the Trial Court authority to hear disputes where no other original hearing body is in place to hear. The Appellant failed to show the specifics in how the decision of the Trial Court was outside their scope of authority to hear or was in violation of their rules or regulations.

When read in the context of the case, we believe it is clear the Trial Court dismissed the case based on the absence of a waiver of sovereign immunity. Without Chapter 57's waiver of sovereign immunity, the case cannot proceed against Respondent due to the Tribe's immunity from suit. Chapter 14 of the Tribe's laws is explicit. Section 14.4-2 expressly prohibits suits against Tribal Entities and their employees acting within the scope of their authority. Mr. Wheelock was acting within the scope of his authority as the Housing Director to deny the contract. He was not acting as an individual private citizen; he was not acting in some other capacity; he was acting as the Housing Director.

Even if the Housing Director was acting outside the scope of his authority with respect to giving preference, the Tribe has established a comprehensive and specific enforcement mechanism through Chapter 57. The Trial Court was comfortable ordering the Indian Preference Department to meet its obligations under the law. The Indian Preference Department investigated and found no violations. In the absence of such a finding, the preference claims cannot go forward.

With respect to Appellant Jordan's other claims, we appreciate Mr. Jordan's frustration. The facts of this case are not pretty and it appears the Tribe is lacking in consistency and transparency with respect to how it is treating bidders and applying Chapter 57. Nevertheless, there is no legal path for Appellant to overcome Respondent's sovereign immunity under Chapter 13 on the breach of contract and other claims pleaded by Appellant.

As an aside, we also note that the License Commission envisioned under Chapter 57, to our knowledge, has never been created. The License Commission would be a body, like the Personnel Commission or Gaming Commission, that would conduct hearings in disputed licensing and Indian preference matters. See Sec. 57.3-7. The Preference Ordinance “creates” the License Commission in Sec. 57.8-1, but the six-member body has never come into being. These types of disputes appear to have been intended to be heard by the License Commission. Rights are hollow if they only exist on paper.

**Was the decision of the Oneida Tribal Judicial System, Trial Court clearly erroneous and against the weight of the evidence?**

No. The Appellant did not contest the Oneida Indian Preference determination of there being no violations in his opportunity to bid on projects within the Oneida Housing Authority. Appellant does assert the Trial Court erred by dismissing the entire case and not allowing a hearing on the Breach of Contract and Breach of Independent Contractor Policy on damages caused by the failure to follow the Oneida bidding process, separate issues from the Indian Preference Law that should have been heard by the Trial Court. As we discuss above, those other claims are barred by sovereign immunity.

Appellant claims to have followed the same bidding process he utilized in the past and received the contract. Respondent claims the Appellant’s business was not awarded as contractor for the Oneida Housing Authority projects in that there had not been the required three (3) bids in accordance with the Oneida Tribe’s Accounting Manual Purchasing Policy received at the initial bidding opportunity. In the second round of bids Quality Construction Management won the bid, but once the contract to award the bid was reviewed by the Oneida Law Office it was denied and the contract was not formally signed. Respondent argues the award does not constitute a binding contract. A third bidding posting was released at which time Mr. Jordan filed for an Injunction and Restraining Order to prevent the opening of the sealed bids.

On March 30, 2012, Mr. Jordan filed a Motion for Injunction and/or Restraining Order at the Oneida Tribal Judicial System and the same day filed a complaint at the Oneida Indian Preference Department to cease and desist in the current bid process.

The Oneida Indian Preference Law is specific in that it defines who can file a complaint.

Section 57.14. Violations of this Law:

57.14-1. Complaints of Violation. Any individual aggrieved by what he/she believes to be a violation of this law, or of any regulation or policy issued pursuant to this law, may file a complaint with the Indian Preference Department. The complaint must be in writing and provide such information as is necessary to enable the Indian Preference Department to carry out an investigation.

In this case, Appellant, Mr. Jordan filed a complaint with the Indian Preference Department the same day, March 30, 2012, as he filed a Motion for Injunction and/or Restraining Order. The Indian Preference Department investigated and on May 18, 2012 found no violation of the Indian Preference Law in that Mr. Jordan had been given the opportunity to bid on all three (3) bidding notices of opportunity.

The Trial Court found had there been a violation of the Indian Preference Law the Oneida Indian Preference Department would be the agency to bring a suit against the violator. Section 57.14-3:

57.14-3. Determination of Violation and Filing of a Complaint. The Indian Preference Department may file a complaint with the Oneida Appeals Commission for an original hearing if the Department reasonably believes that there is sufficient evidence of a genuine and material issue of non-compliance with this law or the regulations or policies issued pursuant to this law, and (1) an attempt to resolve the alleged non-compliance has failed through informal resolution, arbitration, or dispute or termination provisions, or (2) a party has refused to participate in an informal resolution process, or to cooperate in good faith.

The Indian Preference Department also found Mr. Jordan failed to follow the Indian Preference Law, Section 57.14-4 Injunction by filing with the Oneida Tribal Judicial System, Trial Court for an Injunction on March 30, 2012.



57.14-4. Injunction. The Indian Preference Department may, after consulting with the tribal contracting party and attempting resolution, request an injunction from the Appeals Commission suspending the terms of the contract during the pendency of the litigation and preventing further payment to the contractors.

The Trial Court found in its findings and conclusion of law that under the current Independent Contractor Policy as adopted by the Oneida Business Committee on April 25, 2012, the Oneida Tribe is prohibited from entering into contracts with employees that own their own business but was not in effect when Mr. Jordan filed his claim and the policy changes are not retroactive.

The Trial Court granted the Motion to Dismiss according to *O-Tech Solutions* and *DS Cash Management Services* which ruled the Indian Preference Department shall first investigate and then file on behalf of the vendor for violations of the Indian Preference Law.

The Trial Court was “disturbed by the facts of this case which raised questions about the Tribe’s commitment to Chapter 57”, Oneida Indian Preference Law intended to give preference to tribal members and tribal-members who owned their own business. The case left questions unanswered, blocked by section 57-14-3.

**Was the decision of the Oneida Tribal Judicial System, Trial Court arbitrary and capricious?**

No. As we explain above, the law required dismissal due to the Respondent’s immunity from suit and the lack of a waiver of sovereign immunity.

**Was there exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision?**

No. Appellant argued a procedural irregularity occurred within the Trial Court decision. Appellant has not persuaded us there exist any errors that may have created a procedural irregularity. The testimony presented by Appellant confirmed there was no signed contract

between Quality Construction Management and the Oneida Housing Authority. Evidence presented indicated documents that were signed by owner Kurt Jordan and no authorizing signature by Housing Director, Dale Wheelock or another representative. Testimony by Kurt Jordan swayed between having a contract in place to not being sure if one existed.

Futhermore, the Trial Court appeared to believe its hands were tied and we agree. There is no waiver of sovereign immunity, other than that found in Chapter 57. This case has left several questions unanswered. How do vendors bring suit? Does the law provide fair and equal rights to tribal member owned businesses trying to develop? How is Chapter 57 being applied and interpreted by the Indian Preference Department?

If it is true that Respondent is concerned with the tax implications of a tribal member working as an employee for the Tribe and receiving contracts from the Tribe as a tribal-member owned business, we would expect the Tribe to find a solution because under the facts of this case, it appears that the intent and spirit of the Indian Preference Ordinance are not being met.

The Appellate body is not the fact finder nor are we as close to the case as the original hearing body, in this case the Oneida Personnel Commission. It is the original hearing body that sees and hears first-hand the evidence and witness testimony presented when making their decisions. The Appellate Court may not substitute a judgment of the original hearing body, in this case Oneida Judicial System, Trial Court, unless the relevant facts of evidence or a clear error of judgment is presented.

#### **IV. Decision**

The decision of the Oneida Tribal Judicial System, Trial Court is affirmed.

It is so ordered.