

Oneida Tribal Judicial System

Onʌyote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

APPELLATE COURT

**Carol Penass,
Appellant**

Docket No. 12-AC-017

vs.

**Connie Hill, Mickey Petitjean,
Oneida Bingo & Casino,
Cage Vault Department,
Respondent**

Date: December 3, 2012

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 19, 2012, Appellant, Carol Penass, filed an appeal of the July 5, 2012 Oneida Personnel Commission decision, Docket No. 12-WW-004 alleging it to be a violation of constitutional provisions, outside the scope of authority, clearly erroneous and against the weight of the evidence, it exhibited a procedural irregularity and there is a presentation of new evidence that was not available at the hearing level. We affirm the decision of the Oneida Personnel Commission upholding the modified discipline of written warning on May 22, 2012.

A. Jurisdiction

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

B. Factual Background

The Appellant, Carol Penass, is a Cage Cashier for the Oneida Bingo and Casino. On April 27, 2012, Ms. Penass was issued a Suspension beginning April 28, 2012 to May 23, 2012. The Disciplinary Action Form indicated the discipline was based on an infraction of the Oneida Personnel Policies and Procedures, Section V.D.2.1 Work Performance, Subsection g. The Date and Description of the Incident(s) indicated "On March 11, 2012 Carol reported a variance of \$350.62 short. Priority Audit #12-0900. This variance was found but the money was unrecoverable. A customer was overpaid during a Tito ticket transaction. There was also an error in her check cashing in which a customer was charged twice on an e-check transaction due to a voiding error. Take your time when conducting any kind of transaction to avoid payment errors. Ask for verification of transaction if in doubt of anything. Retraining has been offered."

On May 11, 2012 Ms. Penass appealed to the Area Manager, Mickey Petitjean, Cage/Vault Manager, alleging a multitude of paperwork errors made by supervisor, Connie Hill, Lee Ann Schuyler, Compliance Officer and Ms. Hill's predetermination of the suspension and an E-Check malfunction.

On May 22, 2012 the Area Manager modified the suspension to a written warning. Ms. Petitjean found that supervisor, Connie Hill's failure to put the time of the signing of the Disciplinary Action on the form to be a harmless error and did not merit overturning the disciplinary action. She also determined that Ms. Hill did not predetermine the disciplinary action, having met with Ms. Penass on at least three occasions, April 13, April 19 and again on April 27, 2012 in

investigating the circumstances surrounding the Priority Audit #12-0900.

Ms. Peitjean modified the discipline from a suspension to a written warning because she believed the E-check variance was caused by a system error. This still left a remaining shortage of \$350.62 due to an overpayment to a customer. Ms. Penass' only explanation for the shortage was that she did not clear the transaction from the computer resulting in an overpayment to the next customer.

Ms. Penass then appealed the Area Manager decision to the Oneida Personnel Commission on June 5, 2011. On June 8, 2012 the Oneida Personnel Commission, Initial Review panel of Eric Krawczyk, Clifford Danforth and Susan G. Daniels granted a grievance hearing for June 27, 2012, having found Ms. Penass had sufficiently alleged:

The decision of the Area Manager is clearly against the weight of the evidence
and/or:

Procedural irregularities were exhibited during the appeal process that may have been harmful to one of the parties to the grievance.

On July 5, 2012 the Oneida Personnel Commission entered their decision finding Ms. Penass failed to prove her allegations of harm due to clerical errors, or predetermination of the disciplinary action. The Personnel Commission found that Ms. Penass was subject to discipline based on a violation of the Oneida Personal Policies and Procedures as outlined in the discipline issued on April 27, 2012 and modified by her Area Manager to a written warning on May 22, 2012.

On July 19, 2012, Ms. Penass appealed to the Oneida Tribal Judicial System, Appellate body alleging the decision of the Oneida Personnel Commission to be a violation of constitutional provisions, outside the scope of authority, clearly erroneous and against the weight of the evidence, it exhibited a procedural irregularity and there is a presentation of new evidence that was not available at the hearing level.

C. Procedural Background

On July 24, 2012, the Initial Review Body, consisting of Judicial Officers Janice L. McLester, Winnifred L. Thomas, and Jennifer Webster, of the Oneida Tribal Judicial System, Appellate Court met and accepted the appeal for review, in accordance with Rules of Appellate Procedure, Rule 9(D)(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 new evidence was the denial of Ms. Penass' witnesses.

An exchange of briefs was completed on October 15, 2012.

The Appellate Review body consisting of Judicial Officer Janice L. McLester, Judicial Officer Lois Powless, Judicial Officer Winnifred L. Thomas, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster deliberated on November 15, 2012 to review the merits of the appeal and now files its decision to affirm the decision of the Oneida Personnel Commission in upholding the modified written warning of May 22, 2012.

II. Issues

Was the decision of the Oneida Personnel Commission a violation of constitutional provisions?

Was the decision of the Oneida Personnel Commission outside the scope of the authority or otherwise unlawful?

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

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?

Was there a presentation or introduction of new evidence that was not available at the hearing level which, if available, may have altered the final decision?

III. Analysis

Was the decision of the Oneida Personnel Commission a violation of constitutional provisions?

Appellant, Ms. Penass claimed the Oneida Personnel Commission had failed to provide proper and timely notice of the hearing which was scheduled June 27, 2012. Evidence presented indicated the original notice for this hearing was signed for certified mail on June 13, 2012. The record reflects that Ms. Penass originally began her appeal to the Oneida Personnel Commission with employee advocate, Larry Smith and then released him and was then represented by Gladys Dallas. This resulted in a delay triggered by Appellant, Ms. Penass, and not the Oneida Personnel Commission. We find that proper and timely notice of the grievance hearing was afforded to the Appellant.

Was the decision of the Oneida Personnel Commission outside the scope of the authority or otherwise unlawful?

Appellant asserts "The Oneida Personnel Commission to uphold the mandates of the Oneida Constitution, Oneida Administrative Procedures Act and the Oneida Personnel Policies and Procedures. This violates the rights of the Appellant, violates their own rules and regulations and is therefore considered unlawful." The Appellant failed to show the specifics in how the decision of the Oneida Personnel Commission was in violation of the Oneida Constitution, the Oneida Administrative Procedures Act and the Oneida Personnel Policies and Procedures. No specifics were introduced to prove how the Appellant was harmed or how the Oneida Personnel Commission was in violation of their rules or regulations.

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

Appellant asserts the Oneida Personnel Commission failed to consider all the errors presented in the hearing. The Personnel Commission record clearly states they considered all the allegations of predetermination of discipline, paperwork errors, or whether there was one or two priority audits. The Oneida Personnel Commission found the paperwork errors (incorrect employee number, missing time on the disciplinary action form and incorrect dollar amount) were harmless errors.

Oneida Tribal Judicial System, Rules of Civil Procedure, Rule 19(B) Clerical or Harmless Error:

No error in either the admission or exclusion of evidence, and no error defect in any ruling or order or in anything done or omitted by the Oneida Tribal Judicial System, or by any of the parties, is grounds for granting a new hearing or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Oneida Tribal Judicial System, to be inconsistent with substantial justice. The Oneida Tribal Judicial System at every stage of the proceeding shall disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The Appellant failed to persuade this Appellate review body that the disciplinary action issued for job negligence was not warranted.

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 when they were denied the use of Cage /Vault Standard Operating Procedure, SOPCV-06 titled "Employee Paperwork Error Tracking." The Oneida Personnel Commission denied entry of this document for lack of relevance. Appellant indicated it was to be used to show that employees are held accountable for their paperwork errors and that so too should the supervisors. We find this denial to be within the

discretion of the Oneida Personnel Commission.

Appellant argues there was a conflict of interest in that the Area Manager, Mickey Petitjean, knew beforehand the results of the audit before the supervisor did and that this created a procedural irregularity. This audit process has been in place for many years and as part of this process the Area Managers are in the chain of command as to notification. Appellant failed to sway this Review body as to how the decision of the Oneida Personnel Commission in upholding the modified written warning 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.

Was there a presentation or introduction of new evidence that was not available at the hearing level which, if available, may have altered the final decision?

Appellant asserts she was denied her witness list which would have provided supporting testimony as to the predetermination of her original three day suspension by supervisor Connie Hill. The Oneida Personnel Commission denied the witnesses on the basis that no one on the list was in the meeting between Appellant and her supervisor. They could not testify as to what the conversation was between the two individuals. The testimony would not be first-hand knowledge, but would only have been "hearsay" of what Appellant told them was said between herself and the supervisor. This was an appropriate exercise of the Oneida Personnel Commission's power under Administrative Procedures Act, Section 1.10-1(d)(1)(B) to exclude "incompetent" witnesses. Incompetent is used here in the legal sense that a witness is not competent to testify if he or she does not have direct knowledge of the subject on which testimony is being taken.

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 Personnel Commission, unless the relevant facts of evidence or a clear error of judgment is presented.

IV. Decision

The decision of the Oneida Personnel Commission is affirmed. Modified written warning is upheld.

It is so ordered.