

Oneida Tribal Judicial System

Onλyote ʔ a-ka Tsiʔ Shakotiyəʔ Tolé hte

APPELLATE COURT

**Carol Penass,
Appellant**

Docket No. 12-AC-018

vs.

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

Date: December 27, 2012

DECISION

This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers Janice L. McLester, Winnifred L. Thomas, James Van Stippen (Pro Tem), Jennifer Webster and Stanley R. Webster presiding.

I. Background

On August 22, 2012, Appellant, Carol Penass, filed an appeal of the August 2, 2012 Oneida Personnel Commission decision, Docket No. 12-SUS-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. We affirm the decision of the Oneida Personnel Commission upholding the six (6) day suspension issued on May 22, 2012 for negligence.

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 May 22, 2012, Ms. Penass was issued a Suspension beginning May 23, 2012 and concluding May 31, 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 April 13, 2012 Carol reported a \$100.00 shortage on cage #A4. This is Priority Audit #12-1269. After a thorough investigation this Priority Audit has been UNFOUND. Further violations of this policy may result in progressive discipline. Retraining has been offered. Take the time to ensure all transactions are paid out correctly and accurately."

On June 7, 2012 Ms. Penass appealed to the Area Manager, Mickey Petitjean, Cage/Vault Manager, alleging:

- 1) An excessive amount of time had lapsed from April 13, 2012 the date of the alleged violation, until completion of the investigation and issuance of the May 22, 2012 unsatisfactory work performance.
- 2) Supervisor Connie Hill to be in violation of Oneida Personnel Policies and Procedures, Section V.D.2.b DISCIPLINARY ACTIONS "A supervisor shall initiate disciplinary actions commensurate with the seriousness of the unsatisfactory performance. A supervisor must consider each disciplinary action in progressive order and justify a deviance from that recommend progression.
- 3) HRD should have notified supervisor, Connie Hill regarding the modified previous discipline from a three (3) day suspension to a written warning "so she could have disciplined me accordingly to the Oneida Blue Book"

On June 13, 2012 the Area Manager, Mickey Petitjean, upheld the suspension issued on May 22, 2012 for violation of Oneida Personnel Policies & Procedures, Section V.D.2.a.g Work Performance; Negligence in the performance of assigned duties. Ms. Petitjean found that supervisor Connie Hill met with Appellant, Ms. Penass, as part of her investigation, explained the reason for the discipline, the expected work performance as documented on the disciplinary form, along with consequences of continued unacceptable behavior. She found the supervisor conducted an investigation; consulted with HRD and utilized her discretion to issue the progressive disciplinary action within five (5) working days of completing her investigation.

Ms. Penass appealed the Area Manager decision to the Oneida Personnel Commission on June 27, 2012 requesting:

- 1) The timeline for accounting to complete the investigation by Lee Ann Schuyler, Compliance Officer.
- 2) The time line for supervisor to complete their investigation.
- 3) Why Priority Audit #12-1269 was not added to her Employee Coversheet.
- 4) Asserting a conflict of interest in that Area Manager, Mickey Petitjean was aware of the results of the Priority Audit before Supervisor, Connie Hill.
- 5) Disciplined for two separate violations in one disciplinary.
- 6) Why didn't the supervisor wait until Ms. Penass' appeal of a suspension issued on April 27, 2012 had been completed.
- 7) Why HRD did not notify supervisor of modification of the April 27, 2012 discipline.

On July 10, 2012 the Oneida Personnel Commission, Initial Review panel of Richard Moss, Yvonne Jourdan and Susan G. Daniels granted a grievance hearing for July 31, 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 August 2, 2012 the Oneida Personnel Commission hearing panel of Tonya Boucher, Melanie Burkhart and Carol L. Smith entered their decision finding Ms. Penass failed to prove her allegations of a conflict of interest and procedural irregularities of the disciplinary action. They found the threshold issue of the case to be whether or not Appellant, Ms. Penass was subject to discipline based on an infraction of the Oneida Tribe's Personnel Policies and Procedures. Evidence and testimony presented supported an infraction occurred and was subject to discipline.

On August 22, 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.

C. Procedural Background

On August 28, 2012, the Initial Review Body, Judicial Officers Janice L. McLester, Lois Powless and Winnifred L. Thomas 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)(3): *The decision is clearly erroneous and is against the weight of the evidence presented at the hearing level.*

An exchange of briefs was completed on October 29, 2012.

The Appellate Review body consisting of Judicial Officer Janice L. McLester, Judicial Officer Winnifred L. Thomas, Pro Tem Judicial Officer James Van Stippen, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster deliberated on December 12, 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 six (6) day suspension 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?

III. Analysis

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

No. Appellant, Ms. Penass, claimed the Oneida Personnel Commission had failed to provide proper and timely notice of the hearing which was scheduled July 31, 2012 and failed to allow Ms. Penass adequate amount of time to seek representation.

Evidence presented indicated:

In the June 27, 2012 appeal to the Oneida Personnel Commission, Ms. Penass indicated her advocate was Gladys Dallas and requested all certified mail be sent to Ms. Dallas' address.

On July 14, 2012, advocate Dallas received via certified mail the original hearing notice which indicated a hearing date of July 31, 2012.

Seventeen days advance notice is enough time in this situation. It gives the employee over two weeks' notice of the hearing date. Furthermore, it's not as though the advocate and employee would be going into the hearing totally cold. The employee had already appealed once to the Area Manager. Then a second appeal was prepared and filed with the Personnel Commission. These appeals are of use and assist the advocate and employee in preparing for the actual hearing before the Personnel Commission.

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

No. 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. The Oneida Personnel Commission is granted authorization to hear appeals pursuant to Oneida Personnel Policies and Procedures, Section V.D.6.b: If the Area Manager upholds the disciplinary action, the employee (petitioner) may make one final appeal in writing to the Personnel Commission..." 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?

No. Appellant asserts the Oneida Personnel Commission failed to consider all the errors presented and found in the hearing. The Personnel Commission answered Ms. Penass' allegations in their Finding of Fact:

- 1) Testimony provided by Area Manager, Mickey Petitjean, indicated there was no Standard Operating Procedure in existence which lays out a definitive time line for the Compliance area to complete an investigation into a Priority Audit.

- 2) Ms. Penass alleged an excessive amount of time to issue the discipline. Respondent testified she became aware of the \$100 shortage on May 3, 2012, began her investigation, which consisted of reviewing documents from Accounting (after they completed their investigation), reviewing the employee file, a report from surveillance and meeting with Appellant. Once completing her investigation she issued her discipline. This in accordance with Oneida Personnel Policies and Procedures, Section V.D.5.a.1).b:

Disciplinary Procedure The Following procedure shall be adhered to whenever disciplinary action is taken:

- a. Supervisor becomes aware of unsatisfactory work performance or violation.
 - 1) Supervisor investigates through a meeting with the employees and determines whether disciplinary action is warranted.
 - b. If disciplinary action is warranted, **within five (5) working days the supervisor will fill out the five (5) part disciplinary action form** stating the behavior for which the action is being taken, the time and date of its occurrence, and the specific policy section under which action is being taken.
- 3) Why was the Priority Audit #12-1269 not added to "Employee Coversheet." The date of May 3, 2012 was added as the date supervisor became aware of a \$100 shortage.
- 4) Conflict of interest in the Area Manager having knowledge of the Priority Audit before the Supervisor. Priority Audits are sent from Compliance Officer to all Managers in the chain of command. No conflict in that it is the supervisor's discretion on whether to issue a disciplinary action along with the severity.
- 5) Disciplined for two separations. Disciplined for a violation of Oneida Personnel Policies and Procedures, Section V.D.2.1 Work Performance as a result of a \$100

shortage on cage #A4 a resulting Priority Audit. One violation.

- 6) Disciplined while appeal pending. Within supervisor discretion to issue progressive discipline in accordance with Oneida Personnel Policies and Procedures, Section V.D.2.b DISCIPLINARY ACTIONS: A supervisor **shall** initiate disciplinary actions commensurate with the seriousness of the unsatisfactory performance. A supervisor must consider each disciplinary action in progressive order and justify a deviance from that recommended progression.

Disciplines:

1. Written Warning issued 6/28/11 V.D.2.a Work Performance (g) unrecoverable shortage of \$195.62
2. 3 day suspension issued 4/27/12 V.D.2.a Work Performance (g) unrecoverable shortage of \$350.62 since modified to a written warning.
3. 6 day suspension issued 5/22/12 V.D.2.a Work Performance (g) unfound shortage of \$100.

- 7) Supervisor discretion Oneida Personnel Policies and Procedures, Section V.D.2.b DISCIPLINARY ACTIONS.

The Oneida Personnel Commission considered and answered the allegations presented by Appellant, Ms. Penass.

The issue of whether the supervisor violated Sec. V.D.5.b. by exceeding the five days for the investigation has been previously addressed in our cases. See *Rentmeester v. Madrid*, 10-AC-007 (11/23/2010), *Oneida Bingo and Casino v. Heier*, 07-AC-011 (11/26/2007), *Oneida Bingo and Casino v. Betters*, 02-AC-005 (7/30/2002). The issue in most of these cases has been from what point does the five days begin counting: from the date of the incident, from the date of the end of the investigation or something else? Generally we have held that the five days begins running from the end of the investigation and that the supervisor has some discretion as to how long the investigation will take and when it ends. *Oneida Bingo and Casino v. Heier*, 07-AC-011 (11/26/2007).

Here, the investigation was not too long and the discipline was issued within five days of the end of the investigation. This case is one of the reasons we have previously said that the length of the investigation can be longer than five days. When audits must be conducted to review the thousands of transactions that occur every day at the casino, it is understandable that an investigation may take longer than five days. As long as the investigation is not abusively or unreasonably long, supervisors should have some discretion to make sure all of the facts are gathered. This aids in making sure the supervisor will make a good decision.

The Appellant failed to persuade this Appellate review body that the disciplinary action issued for work performance negligence was not warranted or that the Personnel Commission erred.

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 Standard Operating Procedures for Priority Audits. Testimony presented indicated there was no formal document in place.

Appellant argues they did not receive Exhibit C in sufficient time to present their arguments at the hearing of July 31, 2012 and requested a postponement. Respondent argued this request to be untimely. The Personnel Commission agreed noting the Appellant had received the notice of hearing on July 14, 2012 and had time to prepare or request a postponement in accordance with the hearing notice. "Postponements will be granted only for exceptional reasons and will be subject to the Personnel Commission's approval. The submission of requesting a POSTPONEMENT in writing is REQUIRED at least five (5) working days prior to the scheduled hearing. 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 information exchange includes the shift manager, supervisors, area manager, operation managers and 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. Disciplines are issued only by the supervisors, utilizing their discretion.

We don't see how the Area Managers knowledge of the audit result is harmful to the employee. If anything it promotes fairness and a better result: with the Area Manager in the loop, the supervisor should be more inclined to consult with the Area Manager and less inclined to make an erratic or arbitrary choice.

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 a Standard Operating Procedure for Priority Audits. Testimony sufficiently proved no document was in existence.

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. Six day suspension is upheld.

It is so ordered.