

Oneida Tribal Judicial System

Onayote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

APPELLATE COURT

Randall Denny,
Appellant

Docket No. 13-AC-005

v.

Leonard Stevens,
Respondent

Date: September 9, 2013

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 case arises out of Mr. Denny's separation from employment as a substitute relief worker for Oneida Food Distribution Department. We find though Mr. Denny's status for six years was as a sub relief worker that he was in fact treated as a regular employee; therefore, he should have received the benefits of a regular employee which means he could not simply be "let go" but was required to be terminated for cause in accordance with the Oneida Personnel Policies and Procedures.

This court finds the employment of six years as a sub-relief employee extremely exceptional and takes issue with that fact. We reverse the Personnel Commission decision and reinstate Mr. Denny's employment.

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 Oneida Administrative Procedures Act, *Sec. 1.11-1: Appellate Review of Agency or Commission Action (a) Appellate Review of Contested Case or Promulgation of a Rule. Any Person aggrieved by either a final decision in a contested case or by the promulgation of a rule or regulation of a rule under the act, is entitled to appellate review only under the provision of this Act.*

B. Factual Background

From October 2006 to December 2012 Mr. Randall Denny worked as a substitute relief worker at the Oneida Food Distribution Department. Substitute relief workers are classified as temporary employees and identified under *Sec. II.C.1.d of the Oneida Personnel Policies and Procedures.*

In 2008 Mr. Don Miller became the Program Director of the Oneida Food Distribution Department. Mr. Leonard Stevens was Mr. Denny's direct supervisor.

In 2009 Mr. Denny requested for his employment status to be changed because he was only receiving four hours of holiday pay. Mr. Denny was told that another employee had received eight hours holiday pay as an Emergency Temp employee however his title was not a Sub-Relief Worker. Mr. Denny also requested a raise in 2010. He was denied. In 2011 Mr. Denny requested a raise and a change in status due to being a sub-relief worker. Again he was denied.

In 2011 a full-time regular position (Warehouse Assistant) came open in the Food Distribution Department. Mr. Denny wished to be employed in that position. Mr. Stevens and Mr. Miller assured Mr. Denny they would help him get the position. It came to light that in 2009 Mr. Denny had received an OWI conviction. Under the Tribe's Personnel Policies this meant Mr. Denny could not drive for the Oneida tribe for three years. Yet at that point he had been driving for the Tribe for the last 2.5 years. At this point Mr. Denny was in jeopardy of losing his job.

Mr. Miller and Mr. Stevens allegedly altered Mr. Denny's job description eliminating the driving requirement so that Mr. Denny could remain in the position of substitute/relief worker.

In May 2012 the Warehouse Assistant position went to Lila Denny, another current employee. In summer of 2012 Mr. Denny raised issues that he was overworked which lead to some disdain by Mr. Miller towards Mr. Denny.

In August 2012 Mr. Denny again asked if he could be in a full-time position. He also raised the issue that as a sub-relief worker he was still at the lowest level of pay after six years of employment.

On September 4, 2012, Mr. Denny was injured at work. An ambulance was called; Mr. Miller informed Mr. Denny it didn't matter where he went to receive medical care. Mr. Denny went to St. Mary's Hospital. This decision ended up costing Mr. Denny out of pocket money because under the Tribe's Workers Compensation policy the Tribe will only fully cover work-related medical expenses at certain facilities. St. Mary's Hospital was not one of the facilities included. Mr. Denny informed Oneida Human Resources Department that he had been told by Mr. Miller to go anywhere he wanted.

Mr. Denny received a bill from the hospital and complained to Contract Health. He was told to contact Human Resource Department. Mr. Denny spoke to Christina Bluebird at the Human Resource Department and was told to have Mr. Miller call her and let her know what had

happened and why he had gone to the wrong hospital.

Mr. Denny told his supervisor Mr. Stevens what had happened and how he was stuck with the bill. Mr. Denny requested his supervisor to ask Mr. Miller if he would contact Human Resource Department and inform them of Mr. Miller's involvement that it was Mr. Miller that told Mr. Denny he could go to any hospital. Mr. Stevens testified, Mr. Miller said he would not admit to saying that.

Mr. Denny then filed a "grievance" with Oneida Human Resources Department complaining about Mr. Miller's refusal to tell the truth; that he told Mr. Denny he could go to any hospital, and as a result Mr. Denny got stuck with the bill.

On September 5, 2012 Mr. Denny went to the next person in the chain of command, Ms. Linda Torres and complained to her about his situation and also his job title and lack of raises and benefits. Ms. Torres stated she would set up a meeting with Mr. Miller, Mr. Stevens, Ms. Torres and Mr. Denny. However a meeting with Mr. Miller and Mr. Stevens and Ms. Torres was held without inviting Mr. Denny to attend. A letter was sent to Mr. Denny from Ms. Torres stating "if I wanted a second meeting with everyone there, we could do that."

In September and October 2012 Mr. Denny pointed out to Mr. Stevens on at least two occasions that he was doing more of the work and heavy lifting than other employees in his same position. Mr. Denny continued to complain about unfair treatment.

The Oneida Personnel Policies and Procedures, Sec. V.D.5.D, Complaints, Disciplinary Actions, and Grievances states in part:

Disciplinary procedures provide a systematic process for handling problem employees. Disciplinary procedures serve to correct unacceptable behavior and to protect the Tribe. Grievance procedures provide a systematic process for hearing and evaluating job related disputes. Grievance procedures serve to protect employees from inconsistent and unfair treatment.....

On November 5, 2012 Mr. Denny was terminated for alleged issues related to work performance (*Sec. V.D.2.1.a, Oneida Personnel Policies and Procedures*) and personal actions and appearance (*Sec. V.D.2.IV.k, Oneida Personnel Policies and Procedures*). Mr. Denny states he was terminated for complaining too much. The documented reasons by the employer are not included in the appellate court record only the citations to sections of the Oneida Personnel Policies and Procedures. The citations for the discipline were V.D.2.1.a. Work Performance and V.D.2.IV.k. Personal Actions and Appearance. On the disciplinary action form in the space for Date and Description of Incident(s) were the words SEE ATTACHED, however there were no attachments included in the court records. Those sections are reproduced below:

The Oneida Personnel Policies and Procedures V.D.2.1.a Work Performance: Insubordination (including disobedience) or failure/refusal to carry out assignments or instructions. (W/S/T)

Oneida Personnel Policies and Procedures V.D.2.IV.k: Failure to be courteous in dealing with fellow employees or the general public. (W/S/T)

In the hearing Mr. Denny was asked about the complaints concerning his actions. His response was when he placed packaged food items on a cart to be taken out to client's cars; he sometimes dropped boxes instead of placing them gently on the carts. When he dropped something he stated in testimony it was because he was in pain and his back hurt.

The November 5, 2012 termination was voided by the Oneida Human Resource Department when Don Miller, the Area Manager, failed to respond to Mr. Denny's appeal within 10 days. Within the current Oneida Personnel Policies and Procedures there are no consequences to the Area Manager for his failure to follow procedures.

On December 3, 2012, Mr. Denny received a letter from Oneida Human Resources Department that he was reinstated because the termination had been voided.

On December 4, 2012, at 4:30 pm, Mr. Denny received a call from his supervisor Leonard Stevens. Mr. Stevens asked Mr. Denny to come in to work at 9:30 a.m. on Wednesday December 5, 2012. Upon his arrival Mr. Stevens informed Mr. Denny that he had won his appeal and would be getting his back pay for the month of November.

Mr. Stevens handed Mr. Denny a memo thanking him for his work at the Oneida Food Distribution and letting him know that his services were no longer needed and his position as a Sub-Relief Worker ended effective December 5, 2012.

C. Procedural Background

On December 14, 2012, Mr. Denny appealed his termination to Mr. Miller, the Area Manager, who upheld the termination. Mr. Denny then appealed timely on January 7, 2013 to the Oneida Personnel Commission.

The Oneida Personnel Commission held a hearing on February 20, 2013 and issued its decision on February 25, 2013 to uphold the termination saying that Mr. Denny failed to provide sufficient testimony and evidence to prove that the ending of his services was an adverse employment action.

The Oneida Personnel Commission's decision relied on testimony from Susan Doxtator, an Equal Employment Officer from the Oneida Human Resource Department. Ms. Doxtator testified that according to the Oneida Personnel Policies and Procedures, a sub-relief worker may be let go when the employee's services are no longer needed. Sec. II.C.3.h of the Oneida Personnel Policies and Procedures states: All temporary employees are subject to lay-off based upon department job needs and budgets.

The Oneida Personnel Commission heard testimony from Mr. Miller and received evidence that there had been a decrease in services to the community from the Food Distribution Program and decided to uphold Mr. Denny's separation from employment.

Evidence was presented to the Oneida Personnel Commission regarding the number of client participation at the Food Distribution Program in reference to the fact of declining participants.

YEAR	PARTICIPANTS
2007-08	531
2009-10	460
2010-11	381
2011-12	349

Mr. Denny timely appealed to the Oneida Tribal Judicial System Appellate Court in conformance with Sec. 1.10-1. Contested Cases of the Oneida Administrative Procedures Act, claiming the decision of the Oneida Personnel Commission is clearly erroneous and against the weight of the evidence presented at the hearing level, and the decision is arbitrary and/ or capricious.

II. Issues

Was the decision of the Oneida Personnel Commission arbitrary and capricious?

Was the decision of the Oneida Personnel Commission clearly erroneous and against the weight of the evidence presented at the hearing level?

Was this termination an Adverse Employment Action?

III. Analysis

Was this termination an Adverse Employment Action?

Yes, this termination was an Adverse Employment Action. There are a couple of aspects of this case that makes this question a closer call than normal. First, Mr. Denny was employed as a sub-

relief worker. There was testimony at the hearing level that sub-relief workers can be let go at any time and do not possess the same right to their job that regular full-time or even part-time employees receive. That policy is not in the Personnel Policies and Procedures and was not provided as a part of the record to the Appellate Court.

Ms. Susan Doxtator testified that according to the Oneida Personnel Policies and Procedures, a sub-relief worker could be let go when the employee's services are no longer needed. When asked if sub-relief workers are kept in positions for six or more years Ms. Doxtator's response was this case is unusual. During testimony the question was asked where is the policy that addresses the process of a "firing at will" for sub-relief workers because it could not be found in the Oneida Personnel Policies and Procedures. Ms. Doxtator replied "it's out there when services are no longer needed". When she was asked where to find the answer her response was "maybe it was in the hiring compensation procedures but it's out there." The creditability of this witness's testimony is suspect. Ms. Doxtator's testimony on the content of the policy can only be viewed as hearsay because there was no documentation provided to the Appellate Court of previous disciplines or the process that was used in this action.

The Oneida Personnel Commission concluded by making a Motion for Additional Documentation from Human Resources Department requesting the policy governing emergency temporary employees and sub reliefs, to include when services are no longer needed and/or separation policies. However the fact remains this court did not receive any documentation to that effect.

It is true that temporary employees are subject to layoff based upon department job needs and budgets. Oneida Personnel Policies and Procedures, Sec. II.C.3.h. However, the record reflects that Mr. Denny's job was immediately filled after he was let go proving that in fact there was still a need for his labor.

Second, Mr. Denny's separation of employment could have arguably been a layoff. However, all the facts and circumstances surrounding his separation weigh against such a finding. The Layoff Policy was not followed. His supervisors had previously tried to terminate his employment, not lay off Mr. Denny. Finally, Mr. Denny's position was filled with another worker which undermines any claim of changing business conditions.

Also persuasive is that temporary employees as a general class are entitled to appeals in the case of a termination for cause. Oneida Personnel Policies and Procedures, Sec. II.C.3.g. Mr. Denny's supervisor and Area Manager believed he was a regular employee because they attempted to terminate him for cause using the common disciplinary action forms used for all employee discipline. That attempt failed for procedural reasons. Mr. Denny, after being reinstated, was immediately told he was being let go.

Mr. Denny's immediate separation from employment after his supervisor's botched his termination has the strong appearance of a retaliatory adverse employment action. Once Mr. Denny's supervisor failed, they were informed by the Oneida Human Resources Department they could let him go by simply stating he was "no longer needed."

There was no discussion in the record or OPC decision of a downward change in business condition so severe that it would lend to a change in staffing levels. It's not credible that this change in business conditions suddenly arose the day after Mr. Denny was reinstated following the failed attempt of his supervisors to terminate his employment.

Of course, after Mr. Denny worked there for six years and on the heels of their failed attempt to fire him the first time, it is not credible for the supervisor to claim that Mr. Denny was no longer needed.

Mr. Stevens testified he had hired his own nephew who was at the warehouse building working the same day that Mr. Denny was receiving his notice of termination. The surrounding events

and the timing of Mr. Denny's release from employment raise a strong appearance of retaliation with overtones of nepotism.

Was the decision of the Oneida Personnel Commission clearly erroneous and against the weight of the evidence presented at the hearing level?

Yes, the decision of the Oneida Personnel Commission is clearly erroneous and against the weight of the evidence presented at the hearing level. The weight of the evidence at the hearing level was that Mr. Denny was being called a sub-relief worker when in fact he was more like a regular employee.

This case presents a troubling set of facts. Mr. Denny worked for six years as a "temporary" sub-relief worker with no pay increases and limited benefits. Over the years when he questioned his status and lack of benefits and pay raises, he was rebuffed every time. When he questioned his working conditions, shortly thereafter he was terminated for cause. When the termination was voided due to procedural errors, Mr. Denny's superiors simply told him that his services were no longer needed and terminated him from employment again.

In the court's view, Mr. Denny's categorization as a sub-relief employee for six years was wrong and an abuse of the sub-relief classification.

A review of the Oneida Personnel Policies and Procedures provisions on temporary employees supports our conclusion that six years is an abuse of the sub-relief classification. On August 4, 1993, the Business Committee updated the Oneida Personnel Policies and Procedures by defining the various classifications of temporary employees. Emergency employees are not to exceed 90 days. Limited term employees are not to exceed two years. Seasonal employees go with a weather or holiday season. The Substitute/Relief employee is defined as follows:

An employee who will periodically be on-call to work for a Program or Enterprise. The Area Manager along with the Human Resources Department will annually review and update the list.

BC Motion, 8-4-93, defining temporary classifications.

We understand that the Tribe may need these types of employees in certain situations and that some individuals may prefer a lower commitment to employment. However, in this case, where Mr. Denny repeatedly requested over the years to be given a more regular employment situation, it appears the Food Distribution Department abused the sub-relief classification.

The sub-relief designation is a “temporary” classification. Even the limited term employee is limited to two years. Mr. Denny’s commitment was more on the level of a regular full-time or part-time employee. It was neither fair to Mr. Denny nor consistent with the Personnel Policies and Procedures to classify Mr. Denny as a sub-relief for six years when he regularly worked and questioned whether he should have a regular employment status.

We are not stating what the policy of the Tribe should be, but six years as a sub-relief is far too long where the employee is working on a regular basis. It means that the employee was in fact being treated as a regular employee but being referred to and paid as a sub-relief employee.

We addressed somewhat similar circumstances in the case of Oneida Bingo & Casino Bingo Department, Samantha Skenandore v. Wayne Lambert, Case No. 11-AC-018 (Oneida Appeals 12/13/2011). There Mr. Lambert appeared to be misclassified as a Bingo Floor Worker when in fact he was doing the work of the higher-paid Bingo Caller without receiving the higher pay. We overturned the Personnel Commission decision awarding Mr. Lambert back pay based on lack of evidence in two key areas: 1) Mr. Lambert had not sought the assistance of the Oneida HRD and 2) no intent on behalf of Bingo management.

Mr. Denny’s case avoids these pitfalls. First, Mr. Denny did seek the assistance of Oneida Human Resource Department. Second, there is enough evidence of the supervisor’s intent by the timing of the second termination and hiring of another worker to immediately replace Mr. Denny despite the claim he was “no longer needed.”

The employer failed in several aspects of this case. Under Sec. II.C.3.d, temporary/sub-relief workers are to sign a statement upon hire accepting the conditions of temporary employment and the length of term. No such document is in the record. The Human Resource Department representative testified that she did see something that Mr. Denny signed and it was dated 2004 or 2006, however no documentation is provided.

Also, Mr. Denny testified that the job description was altered because of Mr. Denny's driver's license status. This fact is of note. Did Mr. Denny's supervisors think well enough of him that they would resort to questionable steps of altering a job description? Or were they covering themselves?

The treatment of this individual did not comply with the Oneida Personnel Policies and Procedures, Sec. V.D.5. 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. (Emphasis added).

If Mr. Denny had been a regular employee Mr. Denny would not have been subject to lay-off or termination except in accordance with the Oneida Personnel Policies and Procedures or the Oneida Lay Off Policy. Neither of those was applied; rather Mr. Denny was summarily fired.

Mr. Denny's letter to Area Manager, Don Miller, and dated December 14, 2012 with regard to "Appeal of Adverse Employment Action" claimed that his termination by Mr. Stevens was directly in response to the Human Resource Department Office voiding of Mr. Denny's termination.

Mr. Denny stated in this same letter to Mr. Miller dated December 14, 2012, "As you are aware, my termination from my position as sub-relief Warehouse Worker was voided by the Equal

Employment Opportunity Office at Human Resource Department. The action taken by Mr. Stevens is directly in response to the Equal Employment Opportunity Office voiding the termination. He makes it appear as though there are no hard feelings, but this underhanded, and clearly retaliation, as evidenced by him having the Notice of Voided Discipline attached to his memo to me. Under other circumstances, I could probably accept this, but apparently Mr. Stevens is trying everything he can to get rid of me.”

Mr. Miller upheld Mr. Steven’s decision to “Let Mr. Denny go.”

On January 7, 2013 Mr. Denny wrote a letter to the Oneida Personnel Commission Members regarding Adverse Action Appeal. Mr. Denny disagreed with Mr. Miller’s findings. Mr. Denny claimed, even if the numbers show a decline why after his termination did Mr. Stevens hire his own nephew?

The Tribe is strongly encouraged to develop a policy that will protect employees such as Mr. Denny and one that clearly and fairly requires employees to be classified in such a way that matches their actual working conditions.

This court finds the employment of six years as a sub-relief employee extremely exceptional and takes issue with that fact. For all relevant purposes, including this appeal, Mr. Denny should have been vested with the rights of a regular employee. Therefore, he could not be summarily terminated from employment.

Was the Oneida Personnel Commission Decision Arbitrary and Capricious?

Mr. Denny argues the Oneida Personnel Commission’s decision is arbitrary and capricious. Black’s Law Dictionary, Seventh Edition, states arbitrary means “(of a judicial decision) founded on prejudice or preference rather than on reason or fact.” In addition capricious is defined as contrary to the evidence or established rule of law.

Due to our findings that the Oneida Personnel Commission's decision was against the weight of the credible evidence, it is not necessary to decide whether the decision is arbitrary and capricious.

However, the Oneida Personnel Commission's decision was deficient in several respects:

- Oneida Personnel Commission's decision failed to render any finding of facts as required by the Oneida Administrative Procedures Act, Sec. 1.7-1.c (20)
- The Oneida Personnel Commission's hearing record fails to show what if any evidence was entered into the record during the hearing.
- The Oneida Personnel Commission on its own motion requested policies from the Human Resources Department and received them on February 22, 2013. However, it failed to preserve and make the documents requested a part of the record for review on appeal.
- The Oneida Personnel Commission's decision fails to show how the employer's action of letting Mr. Denny go is justified under the Rule of Law that they cited.
- The Oneida Personnel Commission's decision did not address Mr. Denny's claim of retaliation.
- The Oneida Personnel Commission's decision does not provide the reasoning for denying Mr. Denny's claim of adverse employment action other than referencing the Oneida Personnel Policy and Procedures during testimony at the hearing.
- The Oneida Personnel Commission's decision did not address the lack of documentation concerning the altered job description due to Mr. Denny's driver's license status.
- The Oneida Personnel Commission did not recognize this entire action as a Lay Off. More troubling is a disciplinary action/Adverse Employment Action is disguised as layoff. The Oneida Personnel Commission should have recognized this action as a Lay Off. Layoffs are not to be utilized as disciplinary actions. Layoffs are not appealable. Layoffs are to follow the Tribe's Layoff Policy. This did not happen.

IV. Decision

The decision of the Oneida Personnel Commission is reversed.

The ending of Mr. Denny's working status as a sub-relief worker within the Food Distribution area should have been handled as a layoff. Both Area Manager Miller and Supervisor Stevens failed to follow the Tribe's Lay Off Policy and checklist of actions to be completed in a layoff. There are various steps outlined within that policy, which included potential job search opportunity (placement), EAP amongst a few steps to be followed.

Layoffs are not to be utilized as disciplinary actions, which this has the appearance.

Layoffs are not appealable, if this had been followed correctly, the Oneida Personnel Commission should not have accepted it and it would not have reached this level of appeal.

Mr. Denny is reinstated to his position. Back pay and all other benefits due Mr. Denny shall be paid to him within thirty (30) days.

Under the Oneida Back Pay Policy, Sec. 4-1 Back Pay Calculation, calculation of back pay begins on the day the employee is suspended or terminated and ends on the day the employee returns to work, due to either the end of the suspension period or reinstatement.

IT SO ORDERED.

Concurring opinion by **Stanley R. Webster**

This case is about an Oneida Tribal member who worked six years for the Oneida Food Distribution Department as a Sub-Relief Worker. November 2012 he received a disciplinary action that was voided by HRD, and was reinstated on December 3, 2012. December 4, his supervisor called and told him to come into the office the next day at 9:30am. December 5, 2012 Mr. Denny reported to his supervisor's office at 9:30am. The supervisor informed Mr. Denny that he won his appeal and would receive his back pay. The supervisor then handed Mr. Denny a memo thanking him for his work and informed him his services were no longer needed and his position as a Sub-Relief Worker ended effective December 5, 2012.

December 14, 2012, Mr. Denny appealed his case to the Oneida Personnel Commission claiming that letting him go was an adverse employment action. The Oneida Personnel Commission hearing body heard the grievance and held in favor of the Oneida Food Distribution Department ending the services of Mr. Denny; saying that Mr. Denny failed to provide sufficient testimony and evidence to prove that the ending of his services was an adverse employment action. The Oneida Personnel Commission hearing body issued its final decision on February 25, 2013.

Mr. Denny appealed the Oneida Personnel Commission hearing body decision to the Oneida Appeals. On appeal, Mr. Denny claims the decision of the Oneida Personnel Commission is clearly erroneous and against the weight of the evidence presented at the hearing level, and that the decision is arbitrary and/ capricious.

This issue in this matter is employment related and will be reviewed under the Oneida Personnel Policies and Procedures.

How do we look at inconsistent and unfair treatment of employees working for the Oneida Tribe of Indians of Wisconsin?

This individual worked for six years without a blemish on his record, until November of 2012, when he was terminated by his supervisor, won his case and reinstated December 3, 2012, only to be let go by his supervisor on December 5, 2012. The timing of these incidents opens the door

for speculation of retaliation by the superior of the Oneida Food Distribution Department because Mr. Denny was not terminated for cause in accordance with the Oneida Personnel Policies and Procedures. Nor was he laid-off in accordance with the Layoff Policy. He was simply “let go” via a memo handed to him by his supervisor.

Yet, according to the hearing record of the Oneida Personnel Commission Hearing body, the Mr. Denny was not able to argue successfully that the actions of his supervisor letting him go was an adverse employment action.

Mr. Denny’s position as a Substitute/Relief Worker was brought to light in the wake of his appeal before the Oneida Personnel Commission, upon his claim that the manner by which he was let go, is an adverse employment action, under the guise of a memo saying his services were no longer needed, plus, the position of Substitute/Relief Worker ended effective December 5, 2012.

Review of the procedural due process found in the Oneida Personnel Policies and Procedures raises questions as opposed to providing answers on the manner by which the letting go of Mr. Denny came about.

According to the hearing record, Mr. Denny stated that he does not remember signing a statement as a temporary employee¹. Yet his position was defined as that of an emergency/temporary position under:

Section II-Recruiting C. EMERGENCY /TEMPORARY POSITIONS. 1. The Human Resources Department will periodically recruit individuals who are interested in filling temporary positions which consist of the following: d. Substitute/Relief².

¹ Oneida Personnel Policies and Procedures, Section II – Recruiting Recruitment/Selection d. The selected candidate will sign a statement accepting conditions of temporary employment, and length of the employment where applicable. Page 11, OPP&P

² Oneida Personnel Policies and Procedures, Section II – Recruiting, Addenda Definitions Substitute/Relief: An employee who will periodically be on-call to work for a Program or Enterprise. The Area Manager or along with the Human Resources Department will annually review and update the list. (Legislative Action 1993) Page 38, OPP&P

The Oneida Personnel Commission lists the following issues and findings of fact:

Did the Petitioner have adverse action taken against him?

Other than stating an issue, the hearing body does not state the findings of fact. The hearing body appears to rest its decision on a document referenced during testimony by the Equal Employment Officer. At the conclusion of the hearing, the hearing body, on its own motion, moved to request additional documentation governing emergency temporary employees and sub-reliefs to include when service were no longer needed and/or separation policies. The hearing record shows that HRD filed the policy regarding emergency/temporary positions 2/22/13. (However, that particular document is not included in the record of the hearing).

The hearing body cites the OPP&P Sec. II.1.d. Emergency temporary positions; II.C.h. Reruiting emergency temporary position but fails to cite any findings of fact, or include evidence relied upon to support the reasoning for its decision.

The hearing body concludes with: OPC upheld the ending of services of the petitioner saying that Mr. Denny failed to provide sufficient testimony and evidence to prove that the ending of his services was an adverse employment action.

On review, the Oneida Personnel Commission Hearing Body decision does not meet the findings of fact and conclusions of law test required under the Oneida Administrative Procedures Act findings of fact and conclusions of law clause.

The hearing body fails to identify evidence admitted to record.

The hearing body fails to show how the employer's action of letting the Appellant go is justified or supported under the rule of law cited in its decision.

The hearing body fails to address Appellant's claim of retaliation.

The hearing body fails to provide the reasons for denying Appellant's adverse employment action claim, except to reference testimony at the hearing.

The Appellant's term of employment as a Substitute/Relief Worker for the Oneida Food Distribution Department (6 years) is unprecedented, especially when viewed in along side the maximum term for a temporary employee "will not exceed (90) days" (definition: emergency temp) (page 37 OPP&P)

Even if the Appellant worked as a "Limited Term" worker, the maximum term of employment would not extend beyond two years "an employee who will be utilized for long term assignments over ninety (90) days, but no longer than two (2) years" is restricted to two years (definition: emergency temp) (page 38 OPP&P)

The grievance procedures provided under the OPP&P provides for "evaluating job related disputes", and the "grievance procedures serve to protect employees from inconsistent and unfair treatment" (OPP&P V.D. 2nd paragraph, page 22)

After six years, this one employee was suddenly (within his last 30 days) at the receiving end of unfair treatment within the meaning of the Oneida Personnel Policies and Procedures. Many, is the man, who has been made to accept unfair treatment at the gist of his employer in order to make a living when he should have been treated in a manner like that of his fellow employees with like benefits.