

Oneida Tribal Judicial System

Onayote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

APPELLATE COURT

Re: Petition for removal of Chairman

Brian A. Doxtator,
Appellant,

Docket # 13-AC-013

v.

Date: March 27, 2014

Edward J. Delgado,
Respondent.

FINAL DECISION AND OPINION

This case has come before the Appellate Court, Oneida Tribal Judicial System. Panel of Judicial Officers presiding over this matter: Lead Judicial Officer Stanley R. Webster, Jennifer Webster, Pro Tem Judges: Amanda L. WhiteEagle, Ho Chunk, Robert Miller Jr., Stockbridge-Munsee, and Robert Kitecon, Menominee.

INTRODUCTION

This appeal arises from a decision in a Trial Court proceeding regarding the removal of the Oneida Tribal Chairman. In August 2013, Brian A. Doxtator, a member of the Oneida Tribe of Indians of Wisconsin, filed a Petition for removal of the Chairman, Respondent Edward Delgado, with the Tribal Secretary; it was signed by six hundred twenty-three (623) tribal members. The petition was filed in accordance with the Oneida Removal Law. Chairman Delgado was accused of violating the Oneida Code of Ethics, two General Tribal Council Resolutions 2-25-82, 1-17-98, and finally, the Chairman Job Description that was approved by the Oneida General Tribal Council. The Trial Court dismissed the Petition for removal “due to petitioner’s failure to meet the burden of proof by clear and convincing evidence.” CITE. We affirm the Trial Court’s dismissal of the petition for removal.

BACKGROUND

On August 2, 2013, Brian A Doxtator, Oneida, filed a "Petition for Removal" of Edward J. Delgado, Chairman of the Business Committee, with the Tribal Secretary, in accordance with the Removal Law. The Petition had 623 signatures of members of the Oneida Tribe of Indians of Wisconsin. The Trial Court, on preliminary review, found the alleged violations for removal were sufficient grounds to warrant a hearing, and scheduled the hearing of Case No. 13-TC-124, re: "*Removal Petition Statement & Affidavit*" *Brian A. Doxtator v. Edward Delgado*, for September 5-6, 2013.

On September 10, 2013, the Trial Court in a written decision found that Petitioner failed to meet the burden of proof with clear and convincing evidence, and dismissed the Petition for Removal. On September 20, 2013, Appellant, through counsel, filed a Notice of Appeal of the Trial Court dismissal of the Petition, as a "Matter of Right" under Rule 5(A) of the Rules of Appellate Procedure as legal jurisdiction and grounds for appeal, claiming the decision is clearly erroneous. The Initial Review Body reviewed Appellant's Notice of Appeal and accepted the case for appeal on September 26, 2013. Appellant sufficiently alleged "the decision of the original hearing body is clearly erroneous and is against the weight of evidence presented at the hearing level" under Rule 9(D)3 of the Rules of Appellate Procedure. Parties were sent notice that the appeal was accepted, along with a briefing schedule. After review of briefs, the Appellate Court heard oral arguments presented by:

Attorney Brian Stevens, representing the Appellant Brian A. Doxtator, and Attorney Eric R. Wimberger, representing respondent Edward Delgado.

APPLICABLE LAWS

The 1838 Buffalo Creek Treaty between the Oneida Tribe and the United States recognizes the customs and traditions of the Oneida people. Article IV states: *Hereby secure to them . . . the right to establish their own form of government, appoint their own officers, and administer their own laws . . .*

The 1936 Oneida Constitution, Art. I: (*. . . jurisdiction . . . shall extend to the territory within the present confines of the Oneida Reservation and to such lands as may be hereafter added thereto*

within or without said boundary lines under any law of the Untied States . . .)

Art. III section 3, (3rd ¶ - GTC may remove any official --- pursuant to duly adopted ordinance)

Resolution 8-19-91-A, §§ I. A, B. B1, B.4. & C:

1. **Resolution 8-19-91-Adendum** established jurisdiction of the Oneida Appeals Commission in Section I *Appointment and Authority*,

I. B. *The Oneida Appeals Commission shall have authority to hear appeals which fall under the jurisdiction of the Oneida Tribe and shall include appeals which arise under the following instances:*

1. *A decision of a subcommittee of the Oneida Appeals Commission or a Tribal commission, board or entity action that would be in violation of the Indian Civil Rights Act as adopted in the Oneida Constitution and/or the Oneida Constitution and ordinances, rules and/or regulations duly adopted by the Oneida Tribe.*

4. *Individual, enterprise or corporation vs. a Tribal officer, employee or staff person.*

I. C. *A subcommittee of the Oneida Appeals Commission shall have authority to hear and attempt to resolve actions that are subject to ordinance or rules that have no specified hearing forum within the Oneida Tribe.*

Chapter 1 Administrative Procedures Act, §1.4-1(c) (definition of contested cases)

1.4-1. (c) **"CONTESTED CASES"**: *A proceeding before an "Agency" in which an opportunity for a hearing before said "Agency" is required by law prior or subsequent to the determination of the "Agency" of the legal rights, duties, or privileges or specific parties unless otherwise provided for by tribal law. This shall include the revocation, suspension, or modification of a license or permit when a grant of such application is contested by a person directly affected by said licensing or permitting.*

§1.7-1. Contested Cases (a)(c)(15)

(a) *Notice. Whenever a contested case has arisen within the Oneida Tribal Administrative System, the following notice requirements shall be adhered to:*

(c) *Procedures and Rules. The following shall be adhered to when a contested case is being heard:*

(15) The parties have the right to request one (1) appeal of the final decision of the Original Hearing Body to a designated appeals body of the Oneida Tribe because of:

- (A) *Procedural irregularities which were objected to at the formal hearing, and/or procedural irregularities which are brought to the attention of the Original Hearing Body and/or*
- (B) *Decisions which were made clearly against the weight of testimony and evidence presented to the Original Hearing Bodies and/or*

(C) New evidence which is made available to the appeal body which was not available to the parties or Original Hearing Officers until after the final decision.

Rules of Appellate Procedure, Rule 5(A) *(As a Matter of Right)*

Rule 5 Appeal - How Granted

(A) As a Matter of Right: A final judgment or final order of any original hearing body or the trial court of the O.T.J.S. may be appealed to the O.T.J.S. appellate court in accordance with the A.P.A. unless otherwise expressly provided by law. The Oneida Appeals Commission retains the discretion to deny acceptance of an appeal where it fails to comply with these Rules of Appellate Procedure.

(B) By Permission: A non-final judgment or order not appealable under section A above may be appealed via an interlocutory appeal³ to the O.A.C. prior to a final judgment or order upon leave granted if the Initial Review Body determines that an interlocutory appeal will:

- 1. (1) Materially advance the termination of the litigation or clarify further proceedings in the litigation;*
- 2. (2) Protect the petitioner from substantial or irreparable injury; or*
- 3. (3) Clarify an issue of general importance in the administration of justice.*

Chapter 3, Code of Ethics, §3.3-3(a)(1)(2) & §3.3-3(b)(2)(3), §3.3-3(b)(2)(3) & 3.3-3(d)
According to the Removal Law: any eligible voter may file a petition seeking removal of an elected office, must state the facts and grounds for removal in the petition, with 50 or more eligible voter signatures. Petition for removal of Chairman Delgado:

- Alleges Chairman Delgado violated: 1) Tribe's Code of Ethics,
 - Sec 3.3-3(a)(1)(2), and Sec 3.3-3(b)(2)(3), by directing the scores be reconsidered as related to the South Eastern Oneida Tribal Services (SEOTS) Facility Proposal, and
 - Sec 3.3-3(b)(2)(3), and Sec 3.3-3(d) by giving approval to divulge sensitive strategic information
- 2) Violated General Tribal Council (GTC) Resolutions:
 - GTC Resolution 2-25-82,
 - GTC Resolution 1-17-98, and
 - GTC approved Chairman Job Description, by directing tribal management positions to act over and above their approval program procedures
- 3) Violated Oath of Office
- Petition requires 50 or more signatures or a number equal to at least 30% of the vote cast in previous general election, including roll number
- Petition filed with Tribal Secretary, had required number of signatures. Enrollment office confirmed signatures and sent copy of petition to Oneida Appeals Commission and Mr. Delgado.
- Trial Court accepted Petition, and held hearing on Case No. 13-TC-124, Brian Doxtator vs. Edward Delgado, on September 5-6, 2013.

Trial Court “found that petitioner has failed to meet the burden of proof by clear and convincing evidence and whether the allegations constitute sufficient grounds for removal; therefore the Petitioner’s request for removal is dismissed” on September 10, 2013. 4.7-3.[*If the Oneida Appeals Commission determines that sufficient grounds have not been proven the Oneida Appeals Commission shall dismiss the petition.*]

Chapter 4, Removal Law

In 2006, the General Tribal Council adopted Chapter 4, REMOVAL LAW, Kwah On^ <luwalihut@kwas Kayanl^hsla Just when they will remove him our kind of laws

4.1. Purpose and Policy

4.1-1. The purpose of this law is to govern the removal of persons elected to serve on boards, committees and commissions of the Oneida Tribe of Indians of Wisconsin.

4.1-2. It is the policy of the Oneida Tribe of Indians of Wisconsin to provide an orderly and fair process for the removal of persons elected to serve on boards, committees and commissions.

4.4. Grounds for Removal

4.4-1. An elected official may be removed from office for any of the following reasons:

(f) violating a Tribal law which specifies removal as a penalty, or

4.5. Petition

4.5-1. Any eligible voter may file a petition with the Tribal Secretary seeking the removal of an elected official. No petition shall request the removal of more than one (1) elected official. **The petition** shall state with particularity the facts upon which it is based and the specific grounds for removal, in not more than two hundred (200) words, and **must be signed by fifty (50) or more eligible voters or a number equal to at least thirty (30) percent of the vote cast in the previous general election, whichever is greater.** A petition may not be amended after it is filed with the Tribal Secretary.

4.5-2. The petition shall be filed within thirty (30) days after the date the first signature is obtained on the petition.

4.5-3. The petition shall contain, in ink:

(a) The appropriate lines for the eligible voter’s:

- (1) Printed name
- (2) Signature
- (3) Street address
- (4) Enrollment number

(b) An oath verifying the fact that:

- (1) The circulator witnessed each person sign the petition
- (2) Each signature appearing thereon is the genuine signature of the person it purports to be, and
- (3) The petition was signed in the presence of the witness on the date indicated.

4.5-4. Upon receipt of a petition, the Tribal Secretary shall promptly:

(a) Submit such petition to the Oneida Tribal Enrollment Department which shall, within five (5) business days, determine whether the petition contains the requisite number of signatures of eligible voters; and

(b) Notify the elected official sought to be removed that a petition has been filed seeking his or her removal by providing a copy of the uncertified petition.

4.5-5. If the Enrollment Department determines that the petition does not contain the requisite number of signatures, the Tribal Secretary shall so certify to the Oneida Business Committee and file the petition without taking further action, and the matter shall be at an end. No additional names may be added to the petition, and the petition shall not be used in any other proceeding.

4.5-6. If the Enrollment Department determines that the petition contains the requisite number of signatures, then the Tribal Secretary shall promptly cause a certified copy of the petition to be served upon the elected official sought to be removed and forward a copy of the same to the Oneida Appeals Commission.

4.5-7. In the event the removal of the Tribal Secretary is sought, the Tribal Vice Chairperson shall perform the duties assigned to the Secretary under this law.

4.6. Preliminary Review

4.6-1. The Oneida Appeals Commission, upon receipt of the petition shall schedule a preliminary review, to take place within twenty (20) calendar days, to determine whether the allegations set forth in the petition would constitute sufficient grounds for removal. The Oneida Appeals Commission may request that the parties submit arguments in writing, and the parties may be represented by counsel.

4.6-2. If the Oneida Appeals Commission determines that a petition does not allege sufficient grounds for removal, the petition shall be dismissed. If the Oneida Appeals Commission determines that the petition alleges sufficient grounds for removal, the Oneida Appeals Commission shall conduct a hearing under 4.7.

4.6-3. The Tribal Secretary's certification of the sufficiency of the number of signatures on the petition may be reviewed by the Oneida Appeals Commission upon motion of the elected official whose removal is sought. The motion shall be filed within twenty (20) calendar days of service of the certified copy of the petition upon the elected official sought to be removed. The motion shall be in writing and the grounds limited to:

(a) the authenticity of the signatures, and

(b) whether the signature is that of an eligible voter.

4.6-4. The Oneida Appeals Commission review shall be conducted in the presence of the parties, who may be represented by counsel during the inspection. Opportunity to present evidence and testimony shall be provided. If the Oneida Appeals Commission determines that a petition contains less than the required number of valid signatures, the petition shall be dismissed.

4.6-5. In the event the removal of a member of the Oneida Appeals Commission is sought, the Clerk of Courts shall convene a panel of three (3) judges who are members of the Wisconsin Tribal Judges Association to carry out the Oneida Appeals Commission's responsibilities under this law.

4.7. Hearing

4.7-1. Rights of Elected Official at Hearing. An elected official whose removal is sought shall have the right to present witnesses on his or her behalf, to cross-examine adverse witnesses, to, at his or her expense, be represented by counsel of his or her choice.

4.7-2. Burden of Proof. A person seeking the removal of an elected official shall have the burden of proving by clear and convincing evidence that ground(s) for removal exist.

4.7-3. Findings. The Oneida Appeals Commission shall, within twenty (20) calendar days after the preliminary review has been completed, determine whether each allegation of the petition has been proven by clear and convincing evidence, and whether such allegations constitute sufficient grounds for removal under: 4.4-1.

4.4-1. If the Oneida Appeals Commission determines that sufficient grounds have not been proven the Oneida Appeals Commission shall dismiss the petition. If the Oneida Appeals Commission determines that the sufficient grounds have been proven, the Oneida Appeals Commission shall forward the written findings to the Tribal Chair.

4.8. General Tribal Council Meeting

4.8-1. Special Meeting. Upon receipt of the findings from the Oneida Appeals Commission, the Tribal Chair shall call a special General Tribal Council meeting to consider the findings to be held within forty-five (45) calendar days after receipt of the Oneida Appeals Commission findings.

4.8-2. Right to address the Council. An elected official whose removal is sought shall have the right to address the General Tribal Council personally.

4.8-3. Determination. An elected official may only be removed from office upon the affirmative vote of a two-thirds (2/3) majority of the General Tribal Council at a meeting called for the purpose of considering the removal.

4.8-4. Quorum. If the meeting of the General Tribal Council fails to obtain a quorum, the removal petition shall be dismissed.

ISSUES

The first issue before the Court is one of jurisdiction; does the Court have appellate jurisdiction?

The second issue would be, if it has jurisdiction, should the Court exert jurisdiction over the instant matter? If so, the Court must reach the merits of the case.

ANALYSIS

A. Jurisdiction

Before we examine the merits, the Appellate Panel is confronted with the question of its jurisdiction. This case is one of first impression. The Removal Law does not specifically state

whether the Trial Court's decision under Sec. 4.7 is appealable to the appellate division of the Oneida Tribal Judicial System. For the following reasons, we conclude that appeals are permissible.

We start by stating that our appellate jurisdiction is broad. This Court recognized and acknowledged the importance of the Great Law over 20 years ago when we stated:

The legal base from which this body assumes jurisdiction is inherently derived from the KAYANLA* KOWAH-Great Law, of the Haudenoshoni-Six Nations Confederacy. These principles of law and custom continue to be practiced by the Oneida People and define the Oneida Nation as a distinct society and provide the basis for Oneida sovereignty. The Oneida Nation is distinct from state government with a model Constitution. The Oneida Nation is not a municipality. The United States federal government does not have treaties with municipalities. The Oneida Nation has entered into treaties with the United States. Treaties are between two sovereign nations. Under the U.S. Constitution, the states cannot enter into a treaty. The Oneida Nation is located in a territory, surrounded by the state of Wisconsin. The Oneida Nation is not a corporation, but because of its sovereign status as a Nation, has provisions for corporate entities. The Oneida Nation and the United States Government, throughout treaty negotiations and other agreements continue to recognize this government to government relationship. The United States of America, Congress and the U.S. Supreme Court recognize commerce and trade as a source of economy. A responsibility of the Oneida government is to maintain a stable economy so the people can sustain their families into the next seven generations. Because of this government to government relationship, the people in the state of Wisconsin also realize a number of benefits to the local economy in working for and with the Oneida Nation.

Hill v. Oneida Bingo and Casino, 93-EP-0003 (1/10/94).

Furthermore, the Resolution creating the current judicial system grants broad appellate jurisdiction to the Oneida Tribal Judicial System in Sec. I.B.:

The Oneida Appeals Commission shall have authority to hear appeals which fall under the jurisdiction of the Oneida Tribe and shall include appeals which arise under the following instances.

* * *

4. Individual, enterprise or corporation vs. a Tribal officer, employee or staff person.

While the Removal Law does not specifically address whether appeal from the initial trial panel is permitted, the structure of the law allows for the possibility of appeal. Section 4.7-3 requires that the Commission determine within 20 calendar days of the preliminary review “whether each allegation of the petition has been proven by clear and convincing evidence, and whether such allegations constitute sufficient grounds for removal.” There is no time requirement for those findings to then be forwarded to the Tribal Chairman. In this case the lack of timeline did not matter because the Trial Court found the grounds were insufficient; therefore, the removal process essentially stopped and no General Tribal Council meeting would be called. In a case where the grounds are found proven and sufficient, there is no deadline for submission to the Tribal Chair for purposes of calling a special General Tribal Council meeting under Sec. 4.8.

The lack of a deadline at least leaves open the possibility that an appeal could take place after the Trial Court determination and before the findings are sent on for a General Tribal Council meeting. However, it would behoove the Oneida Tribal General Council to address these matters further within its legislation.

In addition, the seriousness of these proceedings weigh in favor of allowing appeal. Appellate review is an important part of due process and protection for both parties to the process. No matter how conscientious or careful the Trial Court is, there may be errors. Appellate review ensures a better chance of correcting those errors. Discretionary review focuses primarily on systemic values and permits the appellate Court to exercise two essential appellate functions, 1) to resolve conflicts among lower courts and 2) to maintain the supremacy of Oneida case law. Litigants routinely expect to have a right to appeal. This institutional legitimacy value also overlaps with the values of individual dignity and participation in the Oneida judicial system. The appellate system promotes participation by allowing litigants to seek a second chance at justice by presenting their concerns to a higher tribunal. Even if they do not prevail on appeal, a ruling on the substance of their claim by a second tribunal gives litigants a greater voice in the justice system.

Therefore, we find and hold that the Appellate Court has jurisdiction to hear appeals from Trial Court removal decisions and accept jurisdiction of the Appellant's appeal.

B. Merits

Both parties agree and we concur that the standard of review is whether the Trial Court decision is clearly erroneous. The clearly erroneous standard is deferential to the Trial Court. It does not appear we have ever elaborated on the clearly erroneous standard in any of our opinions. We cite to Seventh Circuit Judge Richard Posner's declaration that "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors v. Sterling Elec.*, 866 F.2d 228, 233 (7th Cir. 1988) (Posner, J.), cert. denied, 493 U.S. 847 (1989)).

We have carefully reviewed the Trial Court's September 10, 2013 decision. We do not find any deficiencies or concerns which rise to the level of being clearly erroneous. The Trial Court weighed the evidence and explained its reasoning. Reasonable minds could differ on some of the choices made, but none strike us as wrong or even probably wrong and certainly not clearly and absolutely wrong. The Trial Court had the benefit of hearing and seeing the witnesses in person. Although this case did not turn on credibility determinations, the tone, demeanor and attitude of the witnesses during their testimony is also an important part of the proceedings and important part of the Trial Court reaching its conclusions.

The actions of the Chairman may have been questionable but the Trial Court reasonably found that the evidence before it did not establish that the Chairman acted unethically when judged under Chapter 3 of the Tribe's laws.

FINAL DECISION

The Appellate Court has inherent jurisdiction to hear appeals. Appellant has not persuaded us that the decision of the trial court is clearly erroneous. The Trial Court's decision is affirmed in all aspects.

IT IS SO ORDERED.