

Oneida Tribal Judicial System

Onλyote ʔ a-ka Tsiʔ Shakotiyaʔ Tolé hte

APPELLATE COURT

**Indian Preference Department,
Appellant**

Docket No. 13-AC-018

vs.

**HVS Advertising-Marketing,
Respondent**

Date: September 8, 2014

DECISION

This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers Janice L. McLester, Pro Tem Carole Liggins, Pro Tem Robert Miller, Winnifred L. Thomas and Stanley R. Webster presiding.

I. Background

On December 20, 2013, Appellant, the Indian Preference Department, filed an Appeal and Motion to Stay of Enforcement of the August 16, 2013 Oneida Tribal Judicial System, Trial Court decision, and the November 15, 2013 decision awarding compensatory damages to HVS in the amount of \$850,514.65 to include attorney fees in the amount of \$23,045.15, Docket No. 12-TC-130 under Oneida Tribal Judicial System, Rules of Appellate Procedure, Rule 2(G), Rule 5(C) and Rule 13. Appellant alleges the decisions to be erroneous. Because the Appellant is immune from suit under Chapter 14 of the Tribe's laws, we overturn the decision of the Oneida Tribal Judicial System Trial Court.

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. 1.8-1 of the Oneida Administrative Procedures Act and Chapter 57, Oneida Indian Preference Law, Section 57.8-3. "The Oneida Appeals Commission shall be the hearing body for disputes until such time as the Commission is empowered by the Oneida Business Committee."

B. Factual Background

We borrow and summarize from the Trial Court's Findings of Fact. In June 2012 the Oneida Bingo and Casino (Casino) sought bids from firms for media and marketing services to the Casino. As of 2012, HVS had been providing these services for about 20 years and had a contract set to expire in September, 2012. HVS submitted a bid and was informed it was one of three finalists to receive the contract. The Request for Proposal (RFP) for the contract was for one year, with an option for a one-year extension held by the Casino. After several delays, on October 22, 2013 HVS was informed that it was not selected to enter into contract negotiations.

On October 30, 2012, HVS filed a formal complaint with the Oneida Preference Department alleging nine violations of the Indian Preference Ordinance. The complaints centered on the Casino's alleged failure to correctly apply preference as required under Chapter 57 of the Tribe's laws. (Our discussion and references to Chapter 57 will be as it existed at the time the events of this case took place. Chapter 57 was amended in March 2013 while this case was pending. The amendments do not apply retroactively to this case.)

Ms. Stevens with the assistance of Patrick Stensloff, Assistant Purchasing Director, determined the HVS complaint had no merit in eight (8) of the assertions and found only one (1) of the nine (9) alleged violations implicated the Indian Preference Law. This one (1) challenge was whether Davis Marketing changed the scores after the selection was determined. Davis Marketing had

been brought into the selection process by the Casino to assist with awarding the marketing contract.

Ms. Stevens, as Director of the Indian Preference Department conducted an investigation and found Davis Marketing had no part in the scoring and therefore no violation of the Indian Preference Law occurred.

By letter of December 4, 2012 the Director Stevens stated that only one of the nine allegations had been investigated and with respect to that one, no violations were found.

C. Procedural Background

Dissatisfied with the IPD response, on December 17, 2012, HVS filed an original complaint in the Trial Court against the Casino and the IPD challenging the bidding process utilized in awarding the marketing contract for Oneida Bingo and Casino (OB&C).

Motions to Dismiss were filed by OB&C, on January 11, 2013, claiming sovereign immunity and by IPD on January 14, 2013 to dismiss for HVS' failure to establish a right to relief based on the facts and law presented, citing as support Oneida Tribal Judicial System, Rules of Civil Procedure, Rule 14(B)(3). The Indian Preference Department did not raise the defense of sovereign immunity.

On January 24, 2013, through the Petitioner's Response Brief, the parties stipulated to dismiss the Casino from the case with prejudice.

On January 29, 2013, a pre-trial was held to determine if the case should proceed to trial. At the pre-trial HVS agreed, through stipulation, to dismiss the Casino from the suit with prejudice. On January 30, 2013, pursuant to the stipulation, the Trial Court entered an order dismissing the Casino from this action with prejudice and without costs to any party. The hearing was recessed until February 1, 2013.

A February 1, 2013 hearing was held to determine if the case against IPD was to proceed. The Trial Court denied the IPD's motion to dismiss citing Chapter 57.8-3 which states the "Oneida Appeals Commission shall be the hearing body for disputes until such time as the Commission is empowered by the Oneida Business Committee." To date no License Commission has been established by the Oneida Business Committee. Chapter 57 Oneida, Indian Preference Law, was adopted on July 29, 1998, with two amendments of March 27, 2002 and March 26, 2003.

On April 16th, April 17th and April 22nd, 2013, hearings were held before the Trial Court to hear evidence and arguments as to whether the IPD violated Oneida Indian Preference Law by failing to conduct a proper investigation into alleged violations of this law made by Oneida Bingo and Casino in their failure to give Indian Preference in awarding the current marketing contract to HVS.

On August 16, 2013, the Trial Court found in favor of HVS. It found IPD failed to properly investigate the selection process for the RFP for the Oneida Bingo & Casino Marketing contract. The Trial Court also found that the Casino selection committee failed to give HVS's score "5% across the board" as required by Chapter 57. When added to its total, 5% more points gave HVS the highest score of all finalists. The Trial Court reserved a ruling on remedies and damages and identified September 25, 2013 for further hearings.

On November 15, 2013, the Trial court awarded to HVS compensatory damages in the amount of \$850,514.65 including attorney's fees. Punitive damages were denied. Civil forfeiture was denied.

On December 20, 2013, Appellant, Indian Preference Department filed an Appeal and Motion to Stay of Enforcement of Oneida Tribal Judicial System, Trial Court decision of August 16, 2013 and the November 15, 2013 decision awarding compensatory damages in accordance with Oneida Tribal Judicial System, Rules of Appellate Procedure, Rules 2(G); Rule 5(C); and Rule 13. Damages awarded to HVS were in the amount of \$850,514.65, which included attorney fees

in the amount of \$23,045.15 under Docket No. 12-TC-130. Appellant asserted the Trial Court erred in failing to grant the IPD's Motion to Dismiss where the trial division lacked subject matter jurisdiction and in awarding monetary damages where no tribal law authorizes monetary damages against the Tribe.

On December 23, 2013, the Initial Review Body, Judicial Officers Stanley R. Webster, Lois Powless and Pro Tem James Van Stippen 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)(2)(5): *The decision is outside the scope of the authority or otherwise unlawful. 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 and per Rules of Appellate Procedure, Rule 2(G):*

Oneida Administrative Procedures Act: An appellant may choose to file an appeal under the time line established by the Oneida Administrative Procedures Act, which provides that an appeal must be filed within thirty business days of the entry of the original hearing body decision.

(1) In such an instance, a fully completed appellants brief must be filed, which shall be in conformance with these rules regarding brief format.

(2) The appellants brief will be subject to initial review, and the matter will proceed immediately with the filing of the respondent's brief and further appellate review.

An exchange of briefs was completed on February 4, 2014. There was no Appellant's Rebuttal Brief submitted.

The Appellate Review body consisting of Judicial Officer Janice L. McLester, Pro Tem Judicial Officer Carole Liggins, Pro Tem Judicial Officer Robert Miller, Judicial Officer Winnifred L. Thomas and Judicial Officer Stanley R. Webster, deliberated on April 8th, May 3rd, May 30th, June 11th, July 3rd, and September 2nd, 2014 to review the merits of the appeal and now files its decision to overturn the decision of the Oneida Tribal Judicial System, Trial Court in Docket No. 12-TC-130, *HVS Advertising-Marketing vs. Indian Preference Department.*

II. Issues

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

III. Analysis

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

It is with some frustration that we dismiss this case due to the sovereign immunity of the Indian Preference Department. Chapter 14 of the Tribe's ordinances addresses the Tribe's sovereign immunity. In no uncertain terms it states the Tribe is immune from suit absent a waiver. There is no waiver here and the implications for the Tribe's sovereignty are significant.

Keeping with our current law, at least one previous case decided by this Court strongly supports dismissal. In *Jordan v. Wheelock*, 12-AC-16 (6/19/2012), we held that Chapter 14's expression of sovereign immunity required dismissal of a preference claim against the Oneida Housing Authority Director. HVS is suing the Indian Preference Department, an entity of the Tribe. Chapter 14 is explicit:

The sovereign immunity of Tribal Entities, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against a Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding.

Sec. 14.5-1.

The Indian Preference Department did not waive its immunity from suit for this action and is recognized as a subdivision of the Tribe. The Tribe and its subdivisions are subject to suit only where the Tribe waives its immunity or Congress has authorized suit. The immunity extends to tribal officials and agents acting within the scope of their authority. The Motion to Dismiss the Casino was granted through stipulation with prejudice.

The Trial Court should have recognized the Indian Preference Department as fitting the same criteria as the Casino when the motion to dismiss was argued. The Indian Preference Department should have been awarded the same protections under Sovereign Immunity Ordinance and the case dismissed. The Sovereign Immunity law is not clear. On the face value it appears the tribe, agency, or individuals acting within their scope of authority cannot be sued unless sovereign immunity is explicitly waived.

Beyond the legal outcome, our frustration comes from the history of this issue and the apparent lack of commitment on the part of the Tribe and Casino to following the spirit of the Indian Preference ordinance. Over the years there have been many lawsuits attempting to hold various entities accountable for applying (or allegedly failing to apply) the Indian Preference Ordinance. See e.g., *Oneida Seven Generations Corp. v. Quality Construction Management*, 05-AC-020 (4/18/2006); *Native Alliance Corp. v. Oneida Retail et al.*, 08-TC-117 (2/25/2009); *O-Tech Solutions, LLC v. Oneida Bingo & Casino*, 10-AC-017 (12/10/2010). There are many others.

In some of these cases, the vendor who believes it has been wronged went to the Indian Preference Department and filed a complaint under Sec. 57.14-1. The Indian Preference Department then has the authority to investigate. Often the results of the investigation came back to the court in the form of a cursory letter stating no violations were found. Those letters were accepted by the Court in good faith. The same thing happened in this case. However, the record in this case demonstrates that HVS's complaints were not fully investigated. Furthermore, had a proper investigation been conducted, it would have uncovered what HVS found through its efforts in this law suit: violations of the application of the Indian Preference Ordinance.

The dismissal of the Casino and the assertion of sovereign immunity by the Indian Preference Department, while legally correct, creates the perception of injustice, abuse of sovereign immunity, and a lack of accountability. We are aware of this. However, the Tribe's sovereign immunity is a crucial shield against those who would threaten the Tribe's right to self-

determination. While it is our culture that makes us who we are as a people, it is our right to self-determination that helps us preserve and protect that culture. We are disappointed with the apparent behavior and actions of the Tribe in general and the Casino specifically. Sovereign immunity prevents us from fully addressing those behaviors and actions. The Tribe should beware, however, that there is only so long that people will settle for preserving the status quo when the shield of sovereign immunity prevents accountability and responsibility.

IV. Decision

The Oneida Tribal Judicial System, Appellate Court, pursuant to Resolution 8-19-91A is dismissing the original Oneida Tribal Judicial System, Trial Court decision. Our decision on this matter is founded on issues that involve concerns of fundamental fairness (*emphasis added*) The Oneida Tribe of Indians of Wisconsin provides a forum, for tribal members to seek redress of grievances¹ When a tribal member sought redress for a grievance against two tribal entities, the tribe asserted sovereign immunity as a defense for one agency, but not for the other under Chapter 14 Sovereign Immunity **Yukwatawłniyo (we are free from foreign powers)**. Asserting sovereign immunity as a defense in tribal court is a challenge to whether the court has subject matter jurisdiction to move forward with the proceedings. The original Trial Court granted defendant's motion to dismiss under the shield of sovereign immunity for one tribal entity, but continued with the proceedings against the other tribal entity. Both the Oneida Casino and Indian Preference Department are tribal entities. Tribal Sovereign Immunity applies to both tribal entities named in the complaint.

Review of the record is void of any evidence to prove that the other tribal entity specifically waived sovereign immunity for this proceeding. Therefore, the fact that one tribal entity raised

¹ The Oneida Tribe of Indians of Wisconsin Constitution, Article VI-Bill of Rights: All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the tribe. All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, association and due process of law, as guaranteed by the Constitution of the United States.

Chapter 1, Administrative Procedures Act: The Oneida Tribe shall ensure due process of law for the designated citizens through adoption of this act, pursuant to Article VI of the Oneida Tribal Constitution, as amended.

sovereign immunity as a defense, the court has to recognize that sovereign immunity applies to both tribal entities unless the other tribal entity specifically waived sovereign immunity for this proceeding.²

The decision of the Trial Court to move forward with this case is reversible error, and is overturned and dismissed along with the dismissal of this appeal.

It is so ordered.

² Chapter 14 Sovereign Immunity is explicit:

The sovereign immunity of Tribal Entities, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against a Tribal Entity unless the Tribe or the Tribal Entity has specifically waived sovereign immunity for purposes of such suit or proceeding.

Sec. 14.5-1.