

ONEIDA JUDICIARY

Tsi nu teshakotiya?toletha?

COURT OF APPEALS

Michelle Mays,

Appellant,

v.

Tonya Boucher,

Respondent,

DECISION

This case comes before the Oneida Judiciary, Court of Appeals Judges Gerald L. Hill, Sharon House and Chad Hendricks presiding.

This case is being reviewed pursuant the authority of the Oneida General Tribal Council Resolution 01-07-13-B and Chapters 150 and 154 of the Oneida Code of Laws.

Procedural History

This case was refilled from the Oneida Tribal Judicial System, Appellate Court which was dissolved as of March 1, 2015. As the case was uncompleted before March 1, 2015, it was dismissed without Prejudice as required by Oneida General Tribal Council Resolution 01-07-13-B and permitted to be refilled with the Oneida Judiciary. The Case was on appeal from a decision of the Oneida Personnel Commission, an original hearing body of the Oneida Nation. It is that appeal that is reviewed here.

Background of Case

The Respondent was given notice on September 9, 2013 that she would be laid off from the Legislative Resource Office of the Legislative Operating Committee on November 1, 2013. The basis of the layoff was that the LOC had determined to reorganize the Legislative Operation Committee and absorb the Legislative Resource Office in which the Respondent was employed. The reorganization plan entailed elimination of the Respondent's position. After receiving the notice of layoff, which would be permanent, the Respondent met with the Area Manager, as provided in the Tribal Layoff Policy, alleging that the layoff was an "adverse employment action" which, as such, she was appealing. The Area Director informed her that it was a layoff based upon a business decision and therefore not appealable. The Area Manager addressed the matter as a request for clarification of the action of layoff and explained to the Respondent the layoff process, in writing, and the assistance that would be provided to her in seeking other employment within the Oneida Tribe. The Respondent brought the case to the Oneida Personnel Commission on appeal of the decision to lay her off which she alleged was an "adverse employment action." On August 7, 2014, the Oneida Personnel Commission issued their decision in favor of the Respondent, ruling that her termination was a "disguised layoff." The decision ordered reinstatement to her position with full back pay to November 1, 2013.

This court disagrees with the decision of the Oneida Personnel Commission as arbitrary and against the weight of the evidence and reaffirms the decision of the Area Manager as to the layoff of the Respondent, Tonya Boucher.

Analysis

The parties to this case both address the issue of whether or not the layoff of the Respondent was the result of a *bona fide* business decision. The appeal of the Respondent, from the time she was notified of the layoff alleged that it was an "adverse employment action" disguised as a layoff and as such violative of the Layoff Policy and other laws of the Oneida Tribe. The Appellant argued that the layoff was part of a restructuring plan, i.e. a business decision, which had been made by the Legislative Operating Committee in 2011, notwithstanding that it had not been completed by 2013.

If this was a good faith business decision of the Legislative Operating Committee to restructure and reorganize itself by absorbing its own Legislative Resource Office which resulted in the elimination of the Respondent's position then it is a layoff which is unappealable.

If the layoff, as argued by the Respondent, was a subterfuge, then the Layoff Policy was violated in that it would be an action intended to terminate her position. The layoff here would be an action that she had every right to appeal because it didn't adhere to the Layoff Policy as required.

Layoffs are governed by a Tribal Policy, Layoff Policy, BC-9-23-98-D, which is one of the stand-alone policies set forth in the Oneida Personnel Policies and Procedures. This policy recites the purpose, scope, definitions, policy statements, general procedures, and a Human Resources Department Layoff Checklist. The policy is clear in its intent that this policy is not to be used for disciplinary purposes and the procedure that must be followed in a layoff.

The Respondent was directed by the Legislative Operating Committee on September 4, 2013 to develop a layoff SOP as required by the Layoff Policy (Exhib C, p.4). On September 9, 2013 Tonya Boucher met with Michelle Mays, Wanita Decorah, and Jo Anne House, Area Manager of Legislative Operating Committee: At this meeting, the Respondent was provided a letter informing her that her position was being eliminated as of November 1, 2013 as a result of the reorganization. She was informed of her rights and assistance available to her as a laid off employee to seek other employment within the Tribe.

The Respondent, Tonya Boucher, as stated above filed an appeal of her notice of layoff to the Area Manager, Jo Anne House. The Respondent made no mention in her appeal of problems with the Petitioner, Michelle Mays. Instead, the Respondent cited the resulting hardships and adverse effects of the layoff on her career, her family, and her perceptions of being treated unfairly. The Area Manager determined to treat the appeal as a request for clarification citing Randall Denny v. Leonard Stevens, 13-AC-005, layoffs are not appealable. On October 8, 2013, the Respondent, Tonya Boucher appealed her layoff to the Oneida Personnel Commission.

The Oneida Personnel Commission accepted the appeal and held a hearing which resulted in their reversal of the decision of the Area Manager to layoff the Respondent, Tonya Boucher. The Oneida

Personnel Commission decision ordered the reinstatement of the Respondent in her former position in the LRO from November 1, 2013 with full back pay and benefits.

While the court must give deference to the original hearing body as to the "...wisdom of the credibility of testimony or the weight of evidence..." Oneida Judiciary Law, 150.8-3 (a). The Court of Appeals' "... may reject a finding of fact only where it determines that the finding is clearly erroneous." Oneida Judiciary Law, 150.8-3(a)(1). The Oneida Personnel Commission made no finding of fact to substantiate its conclusion that the layoff in this case was an "adverse employment action" or "...disguised layoff." as they recited in their decision and which we rule is clearly erroneous.

In order to logically conclude that the Layoff Policy had been violated, the duty of the Oneida Personnel Commission is to make factual findings that would support their conclusions, in this case an "adverse employment action." The decision of the Oneida Personnel Commission and review of the record shows that no facts were reviewed to determine violation of any of the required processes in a layoff.

Of course, most rules or statutory assertions are rarely absolute. Though some laws, rules, acts, or decisions may be declared unappealable or otherwise final, circumstances showing that defined procedures were not followed is the burden of the alleging party to prove. Oneida Judiciary Law, 150.8-3(b). In other words, facts to support an allegation of deviation from the required process that would prove the process was not followed or was inappropriately applied must be factually proven. In this case, the allegation was made but no facts presented, either by direct testimony of witnesses or evidence introduced, to substantiate the finding of any facts to show that the Layoff Policy was violated. The argument of the Respondent alleged that her layoff was an adverse employment action and the Oneida Personnel Commission arrived at that conclusion without the logical connection of facts to support or substantiate the allegation. It is understandable that the Respondent would feel adversely *affected* by the layoff however she still had the heavier burden of proving the implied facts of her allegation, i.e. that the Layoff Policy was violated making the layoff an "adverse employment action."

The Respondent further alleged that the Indian Preference Policy was not followed and that directives of the Oneida General Tribal Council were also ignored. She also argued that the approval of the FY '14 budget by the Oneida General Tribal Council mandating that no Oneida Tribal member would lose their job was also violated.

The threshold issue of whether the Oneida Layoff Policy was followed is determinant of the other allegations. We find from a review of the record and briefs submitted that the Oneida Layoff Policy was followed in all respects and that the layoff of the Respondent was properly implemented. We further rule that the Oneida Personnel Commission erred in ruling that the Respondent's layoff was an "adverse employment action" because the Respondent had not met her burden of factually proving the Layoff Policy was violated. Thus, the conclusory ruling of an "adverse employment action" in this case by the Oneida Personnel Commission is clearly erroneous and cannot be sustained.

Although much time is devoted by the Oneida Personnel Commission to the other issues we must defer to the threshold fact that "adverse employment action" has not been substantiated. We will, however, briefly discuss the other allegations.

The directive of the Oneida General Tribal Council cited, Oneida General Tribal Council Resolution, 09-21-2013-A, was introduced to show that approval of the budget proved that her layoff was not due to lack of funds. Directives of the Oneida General Tribal Council are given as much deference as the statutory and case law of the Oneida Tribe. Still such directives must be read to complement the other laws of the Tribe. The directive relied upon by the Respondent included both approval of the Oneida Tribes FY '14 budget which included the proviso that "... the budget must not result in the layoff of any Tribal member who is an employee of the Oneida Tribe..." We cannot support the inference that that directive was meant to "supersede the Layoff Policy" as suggested by the Respondent or as ruled by the Oneida Personnel Commission in this case.

The Layoff Policy is not contradicted by the Oneida General Tribal Council directives cited by the Respondent. These are to be read together to give both laws effect based upon reasonable interpretations. The Respondent implies that the only grounds for layoff are lack of work and/or lack of funding. The Layoff Policy recites in the statement of "A. Purpose. 1. To establish a fair, respectful policy for employee layoff and recall which enables Oneida Nation programs and enterprises to operate effectively and efficiently in varying economic conditions...." Respondent's position was not eliminated due to lack of work or lack of funds but based upon the determination of the Legislative Operating Committee that it would result in increased efficiency and effectiveness. The reorganization of the Legislative Operating Committee was a business decision which resulted in elimination of the Respondent's position. Moreover, nothing in the record supports the conclusion that the layoff was anything more than a routine procedure that adhered to all the requirements of laws and policies of the Oneida Nation.

The Respondent also asserts that the Indian Preference Policy was not followed in that she, as an enrolled member of the Oneida Nation, was the only one laid off while non-members kept their positions. Again, the Indian Preference Policy was not an issue that was determinative but rather an implied assertion of unfairness by the Respondent. As such, and since no facts were adduced to show how it may have impacted the outcome of this case the Oneida Indian Preference Policy has no relevance in this case.

The decision of the Oneida Personnel Commission addressed eight (8) specific issues and findings of fact. These are addressed in the order presented in their decision:

1. Was the Layoff an adverse employment action that is appealable? **No.** This court, as set forth above, rules that the Oneida Personnel Commission was clearly erroneous in its conclusion.
2. Does this layoff violate the GTC directive that tribal members will not lose their jobs? **No.** For the reasons set forth above, the directive of the Oneida General Tribal Council was not violated in this case.
3. Was the Re-organization (sic) SOP and Layoff Policy followed? **Yes.** No facts were found to show that the Appellant acted contrary to the requirements of the Layoff Policy or any other Oneida law. The decision narrowly interprets the Reorganization by addressing the moving of employees from one department to another or departments from one division to another.

- However, testimony indicated that it could also be applied internally. Ultimately, it made little difference because the required procedures of the Layoff Policy were followed.
4. Was the Layoff a discipline in disguise? **No.** Again, for the reasons set forth above, no facts were introduced to support the Oneida Personnel Commission's conclusion on this issue.
 5. Was the Layoff due to changing economic conditions or for lack of available work? **No.** The layoff was a considered administrative decision of the Oneida Legislative Operating Committee to improve efficiency and effectiveness of their committee; a discretionary business decision within their scope of authority and within the procedures set forth in the Layoff Policy.
 6. Did the Area Manager properly address the Petitioner's Appeal according to the Oneida Personnel Policies and Procedures? **Yes.** Notwithstanding that the Respondent, Appellant in the Oneida Personnel Commission decision, alleged that her layoff was an "adverse employment action" the Area Manager characterized her "appeal" as a request for clarification of the layoff. Furthermore, before other witnesses, the Area Manager explained the reasons for the layoff to the Respondent and the employment alternatives as well as her eligibility for transfers, reassignment, recruiting, retraining resources of the Tribe, and finally the availability of Employee Assistance counselling. As discussed above, there was no finding of facts to support the allegation that the Layoff Policy was not followed. Without such a finding of facts to show the Layoff Policy was not followed the Respondent's allegation was not substantiated and therefore there could be no logical inference to support the Oneida Personnel Commission's conclusion of an "adverse employment action." We conclude that the Area Manager properly addressed the Respondent/Appellant, Tonya Boucher when the matter was brought before her.
 7. Did the Human Resources Department assist the Petitioner with alternative employment? **Yes.** The Oneida Human Resources Department is not required to provide laid off employees with jobs, they are required to inform her of available positions for which she may apply. The Respondent, Tonya Boucher, was informed on September 9, 2013 that she would be laid off on November 1, 2015. During that period, the record shows numerous correspondences with various Human Resources staff regarding employment opportunities.
 8. Did the complaint made by the HR Manager affect the Petitioner's, Tonya Boucher, ability to find alternative employment in the Tribe? **No.** Although the record shows that the witness, when testifying about the complaint, was visibly upset this in itself proves nothing but a speculative motive on the part of the Human Resources Manager. Moreover, the Oneida Personnel Commission confuses the complaint process with the grievance process. Unless there is further action on a complaint, the complaint becomes final. It is not a disciplinary action that evokes due process procedures and thus is not subject to further investigation or action. Later, testimony of the same witness indicated that the matter of the complaint had no bearing on her duty vis-à-vis the Layoff Policy. Nothing was introduced to indicate that the complaint was a factor in Tonya Boucher's job search.

Based upon the foregoing, this court hereby reverses the decision of the Oneida Personnel Commission.

Decision

By Order of the Oneida Judiciary, Court of Appeals, the Decision of the Oneida Personnel Commission, dated August 7, 2014, is hereby reversed and the actions of the Area Manager and Appellant are reinstated and affirmed in the layoff of the Respondent.