

# ONEIDA JUDICIARY

Tsi nu téshakotiya?tolétha?  
COURT OF APPEALS

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Michelle Skolaski,

Appellant

Docket # 15-AC-008

v.

Date: October 28, 2015

Kenneth Ninham,

Respondent

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## DECISION

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This case has come before the Oneida Judiciary, Appellate Court Judges Chad Hendricks, Diane House and Jennifer Hill-Kelley presiding.

### INTRODUCTION

Michelle Skolaski appeals an order of the Oneida Personnel Commission (hereinafter "OPC") that upheld a written warning she received from her supervisor Kenneth Ninham on March 7, 2015. *Affirmed.*

### JURISDICTION

The court has jurisdiction over this matter per §150.8-2(a)(2) of the Oneida Judiciary's Rules which gives the Court of Appeals exclusive jurisdiction to review appeals of agency and administrative decisions.

### HISTORICAL BACKGROUND

On March 7, 2015, the Appellant Michelle Skolaski (hereinafter "Skolaski"), was issued a written warning by her supervisor Kenneth Ninham (hereinafter "Ninham"). Skolaski received a

written warning for violating *Oneida Personnel Policies and Procedures Section V.D.2.IV Personal Actions and Appearance*, subsection K due to an incident where Skolaski allegedly failed to be courteous to fellow employees. Skolaski appealed her written warning on March 10, 2015 to the Area Manager, Lambert Metoxen (hereinafter "AM"). On March 25, 2015, the AM requested and was granted a 5-day extension to review the appeal from the Human Resources Department. On March 30, 2015, the AM upheld the written warning issued to Skolaski.

Skolaski appealed to the OPC on April 10, 2015. The OPC held a grievance hearing on May 14, 2015 and on May 18, 2015, the OPC issued a decision upholding the AM's decision.

This case was timely filed with the Oneida Judiciary's Court of Appeals on June 3, 2015 and accepted for review on June 15, 2015. In her appeal, Skolaski alleges the decision of the OPC is clearly erroneous, arbitrary and capricious, and against the weight of evidence presented at the hearing level. Skolaski requests that her written warning be overturned and her record be expunged.

#### **STANDARD OF REVIEW**

This case involves several questions of fact, entitled to the 'clearly erroneous' standard of review. The Oneida Judiciary Law, §150:8-3(a)(1) states that review by the Court of Appeals "shall be limited to matters of record in the case, and may reject a finding of fact only where it determines that the finding is clearly erroneous." This standard of review is heavily weighted in support of an original hearing body's findings.

## ANALYSIS

We are presented with the question of whether the OPC's decision to uphold the written warning Skolaski received on March 7, 2015 was erroneous. Skolaski challenges several issues decided by the OPC including: 1) whether Skolaski's supervisor conducted a proper investigation, 2) whether her supervisor discussed the complaint with Skolaski, 3) whether the supervisor had the disciplinary action already written up prior to meeting with Skolaski, 4) whether the supervisor gave Skolaski an opportunity to provide her side of the story, 5) whether Skolaski was addressed by a supervisor of any prior incidents, and 6) whether the discipline issued to Skolaski was ever explained to her.<sup>1</sup>

Section 150.8-3(a)(1) of the Oneida Judiciary Law states that:

... the Court of Appeals shall not substitute its judgment or wisdom of the credibility of testimony or the weight of evidence for that of the original hearing body. [R]eview shall be limited to matters of record in the case, and may reject a finding of fact only where it determines that the finding is clearly erroneous.

### **Were the Findings by the OPC Clearly Erroneous?**

We give great deference to findings of fact by the original hearing body because it has the fact-finding power. Even if we disagree with the factual findings or would have decided the case differently under the same facts, we are not allowed to substitute our own judgment for the judgment of the original hearing body.

The standards of review for factual findings in tribal, state, and federal courts, are based on the premise that the original hearing body is better able to make factual determinations than the

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<sup>1</sup> Skolaski also argues that one of the Commissioners should have recused herself from the hearing due to a conflict with one of the witnesses. In her Notice of Appeal, she alleges Rochelle Powless has a conflict, in her Appellate Brief she alleges Carol Smith has the conflict, and in her Rebuttal Brief she alleges Arlene Danforth has the conflict. Because Skolaski is not clear in who the conflict is with, this issue is not addressed.

reviewing court. With so many cases turning on questions of credibility, the original hearing body is able to evaluate factors such as demeanor, facial expressions, and tone to determine if one witness is more credible than the other. Therefore, we will accept an original hearing body's credibility finding unless it is so "inconsistent or improbable on its face that no reasonable factfinder could accept it." *U.S. v. Huebner*, 356 F.3d 807, 813 (7<sup>th</sup> Cir. 2004).

Skolaski asserts that the OPC erred in how it decided each one of the several issues listed above. Her principal argument centers on the credibility of testimony from nearly every witness the Respondent called to testify. Therefore, like most cases premised solely on an error of fact and credibility of witnesses, Skolaski does not succeed.

As explained above, in reviewing the OPC's findings, "we do not ask whether the ruling was erroneous, but whether it was clearly erroneous." *In re Teranis*, 128 F.3d 469, 471 (7<sup>th</sup> Cir. 1997). When more than one reasonable inference can be drawn from credible evidence, the reviewing court must accept the inference drawn by the trier of facts. *Stevenson v Stevenson*, 2009 WI App 29, ¶ 14. Skolaski's brief contains one conclusion after another why the OPC erred in its findings. However, we are not persuaded that a firm mistake has been committed in any one of the OPC's findings.

Skolaski's brief contains numerous opinions, and contains several examples of informal and emotional language. There are also several instances where the facts are misconstrued. This detracts from the credibility of Skolaski's argument, and is not enough to overturn the OPC's findings. Therefore, we hold that the findings of the OPC are not clearly erroneous.

### **Whether the OPC Committed a Harmless Error?**

We are also presented with the issue of whether the OPC committed an error in finding that Ninham addressed Skolaski's behavior in the past. Section 150.8-3(c) Harmless Error and Discretionary Decisions, of the Oneida Judiciary Law states that:

Without limiting the appropriate standard of review, the Court of Appeals shall give due deference to the rule of harmless error and discretionary decisions of the Tribe or any Tribal agency.

This law limits reversal to prejudicial errors and promotes the integrity of the hearing body by recognizing that minor errors that do not warrant reversal can occur during the fact-finding process. For an error to affect the substantial rights of a party, there must be a "reasonable possibility" that the error contributed to the outcome of the action or proceeding. *State v. Dyess*, 370 N.W.2d 222 (1985).

In the OPC's decision, it stated "[t]he testimony provided by Respondent proved that he did address the Petitioner, with her negative behavior previously." *OPC Decision* pg. 3. However, the documentation showed a different supervisor, Robert Matthews, actually addressed Skolaski about her negative behavior and not the Respondent, Ninham. Therefore, because we do not find that the decision of the OPC would have been different but for the error, we hold that the OPC committed a harmless error when it stated that Ninham addressed Skolaski's behavior in the past.

### **CONCLUSION**

We hold that the findings by the OPC were not clearly erroneous and the OPC committed a harmless error when it stated that Ninham addressed Skolaski's behavior in the past. Accordingly, we affirm the OPC's decision to uphold the discipline Skolaski received on March 7, 2015.

By Order of the Oneida Judiciary, Court of Appeals.