

ONEIDA JUDICIARY

Tsi nu téshakotiya?tolétha?
COURT OF APPEALS

Kenneth Ninham,

Appellant

Docket # 15-AC-010

v.

Date: October 28, 2015

Evan Doxtater,

Respondent

FINAL DECISION

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

Procedural History

This is an appeal of the Oneida Personnel Commission's decision to uphold the written warning issued to Appellant. This decision is hereby *affirmed*.

On March 3, 2015, Appellant was issued a written warning for violation of Oneida Personnel Policies and Procedure Section V.D.2.I.g.-*Work Performance-Negligence in the performance of assigned duties*. On March 11, 2015, Appellant filed an appeal of this written warning with his Area Manager. On April 1, 2015, the Area Manager upheld the written warning. Appellant filed an appeal with the Oneida Personnel Commission on April 15, 2015. The Oneida Personnel Commission accepted the case and held a grievance hearing on May 28, 2015. The Oneida Personnel Commission upheld the written warning in its decision issued on June 3, 2015. On

June 12, 2015, Appellant filed an appeal with the Oneida Judiciary. The Oneida Court of Appeals accepted the case for appellate review on June 29, 2015.

I. Background of the Case

The matter before this Court is an appeal of an employment- related disciplinary action. Kenneth Ninham, the Appellant, is a Pit Manager of the Table Games Department at the Oneida casino. On March 3, 2015, Appellant was issued a written warning for violation of Oneida Personnel Policies and Procedure Section V.D.2.I.g.-*Work Performance-Negligence in the performance of assigned duties*. This was the result of Appellant having accumulated five (5) infractions within one calendar year, which is a violation of the Table Games Department Procedure SOPTG-30 Titled: *Procedure Infraction and/or Exception Report Variances*. Appellant filed a timely appeal with the Area Manager, who after completion of his investigation upheld the written warning. The Appellant then filed an appeal of the Area Manager's decision with the Oneida Personnel Commission. On June 3, the Oneida Personnel Commission issued a decision which upheld the written warning issued against the Appellant (Oneida Personnel Commission Decision, Docket # 15-WW-004, June 3, 2015). In their decision, the Oneida Personnel Commission found that the procedural errors that occurred in the disciplinary process were harmless error; and that the Appellant was not able to meet his burden in showing that the Area Manager's decision to uphold the written warning was against the weight of the evidence.

On June 12, 2015, Appellant filed an appeal with the Oneida Judiciary. In accordance with Chapter 150 of the Oneida Judiciary Law, Chapter 153 of the Oneida Judiciary Rules of Civil Procedure, and Chapter 154 of the Oneida Rules of Appellate Procedure Section 154.3-

1.(o), an appeal shall be accepted if the Appellant can allege with sufficient clarity if one or more of these six elements are present:

1. A violation of constitutional provisions
2. The decision is outside the scope of the authority or otherwise unlawful.
3. The decision is clearly erroneous and is against the weight of the evidence presented at the hearing level.
4. The decision is arbitrary and/or capricious
5. 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
6. There is presentation or introduction of new evidence that was not available at the hearing level, which, if available, may have altered the final decision.

As it was determined that the Appellant met the criteria of alleging with sufficient clarity that the Oneida Personnel Commission decision may have been clearly erroneous and against the weight of the evidence, and that procedural irregularities may have been exhibited which could be considered harmful error, the Oneida Tribal Judicial System asserted its jurisdiction over this controversy per §150.8-2(a)(2) of the Oneida Judiciary Law and accepted the case for appellate review on June 29, 2015.

II. Issues Presented

Was the Oneida Personnel Commission's decision clearly erroneous when it determined that it was harmless error when Appellant was given a copy of an unsigned disciplinary form?

Was the Oneida Personnel Commission's decision to uphold the written warning clearly erroneous and against the weight of the evidence presented at the Oneida Personnel Commission hearing?

III. Analysis

One of the main issues in this case is whether the Oneida Personnel Commission's decision was clearly erroneous when it determined that it was harmless error when Appellant was given a copy of an unsigned disciplinary form. As the Appellant did not meet his burden of persuasion to show that this procedural irregularity harmed him in any way, this Court agrees with the Oneida Personnel Commission in its finding of harmless error.

Appellant argues that the Oneida Personnel Commission committed a harmful error by "allowing Management to use a different disciplinary form from the one that was submitted to HRD. The form provided to the Appellant did not have all of the signatures yet; the one distributed to the authorized persons had all of the signatures" (Appellant's Brief, July 24, 2015, p. 3). To maintain this argument, the Appellant must show that this procedural irregularity affected the outcome in a negatively consequential manner.

During the grievance hearing, the Respondent testified that after he reviewed the disciplinary action form with the Appellant, the Appellant actually signed the form. The Respondent further testified that he then "printed another copy of the disciplinary form from the computer and gave the unsigned copy to the Petitioner" (Oneida Personnel Commission Decision, Docket # 15-WW-004, June 3, 2015, p. 4). The Oneida Personnel Commission determined that the form at issue which was provided to Appellant had all of the required information filled in, with the exception of the Appellant's signature. They found this to be harmless error on the part of the Respondent as "there was no harm done to the Petitioner, this did not cause the appeal process of the Petitioner to be compromised in any way" (Oneida Personnel Commission Decision, Docket # 15-WW-004, June 3, 2015, p. 4).

Appellate Review of Trial Court's Findings of Fact

Chapter 150 of the Oneida Judiciary Law, Section 150.8-3.- *Scope of Appellate Review*, lays out the scope of appellate review of the trial court's findings of fact. 150.8-3(a) (1) states the following: "The Court of Appeals' review 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" (p. 150-7). This clearly erroneous standard means that an appeals court must accept the lower court's finding of fact unless the appellate court is definitely and firmly convinced that a mistake has been made. In other words, it is not enough that the appellate court may have weighed the evidence and reached a different conclusion; the lower court's decision will only be reversed or rejected if it is implausible in light of the evidence.

In addition, when reviewing the decisions of the trial court or initial hearing body in this matter, this Court is also guided by Chapter 150 of Oneida Judiciary Law, Section 150.8-3. *Scope of Appellate Review*, which states the following:

(c) Harmless Error and Discretionary Decisions. 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.

The term "harmless error" has no uniform definition or single test to help this Court to determine whether it exists within a case or fact pattern. In general and depending on the case, harmless error could be a technical error that has no bearing on the outcome; or it could be an error that was later corrected and had no bearing on the outcome. In this instance, the Oneida Personnel Commission made a finding of fact that a harmless error occurred when the Appellant was given a copy of a disciplinary form that was not signed by the Appellant. They further determined that

the Appellant was not harmed in any way by this procedural irregularity as this did not compromise the appeal process of the Appellant.

In applying the above described standards of review, this Court has determined that the Oneida Personnel Commission decision that harmless error occurred is plausible in light of the evidence presented during the Oneida Personnel Commission hearing. Appellant did not bring forward any evidence to support a finding that due to having received an unsigned form, this somehow affected the outcome of his case. In addition, Appellant did not present any evidence to show that the appeal process of the Appellant was compromised in any way. As the Appellant did not meet his burden of persuasion to show that this procedural irregularity affected the outcome of his case or harmed him in any way, this Court agrees with the Oneida Personnel Commission in its finding of harmless error.

The other issue on appeal is whether the Oneida Personnel Commission's decision to uphold the written warning is against the weight of the evidence presented at the Oneida Personnel Commission hearing. Appellant asserts that the decision to hold him accountable for accumulating five (5) infractions within one calendar year, which is a violation of the Table Games Department Procedure Infraction and/or Exception Report Standard Operating Procedure, is clearly erroneous and against the weight of the evidence. Specifically, Appellant asserts that the Oneida Personnel Commission erred by 1) not giving the proper weight to the testimony of one of Appellant's witnesses; and 2) not giving proper weight to Appellant's lack of training at the time several of these incidents in question occurred. We disagree.

Appellant acknowledges responsibility for two of the five accumulated infractions (Exception Reports #10211 and #60364)(Appellate Rebuttal Brief, p. 4); however disputes

responsibility for the remaining three infractions that are listed in the March 10, 2015 Disciplinary Action Form (Exception Reports #56836, #1997, and #59326/59513/59512/59597 which were combined or issued as one infraction). With regard to Exception Report # 56836, Appellant asserts that the Oneida Personnel Commission did not give proper weight to the testimony of an eye witness who allegedly saw him correctly enter the numbers into the CMP. Respondent supports and even acknowledges that the numbers may have been entered into the CMP correctly, but maintains that Appellant did *not* properly complete closure procedures after submission of the correct numbers. According to the Respondent, Appellant's own witness could not verify that "he saw the Appellant submit closure after he entered the numbers" (Respondent's Brief, p. 3). Nor did Appellant rebut Respondent's position on this in his Rebuttal brief.

Appellant further asserts that Respondent "failed to provide any proof via Surveillance Video or witness statements that actually viewed [sic] he did not enter" (Appellate Rebuttal Brief, p. 3). This is an erroneous assertion. In accordance with Chapter 150 of Oneida Judiciary Law Section 150.8-3.(b), it is the Appellant, not the Respondent, who has the burden of persuasion to show that he entered the numbers correctly and hit the closure button when finished. After reviewing the documentation and testimony presented at the hearing, the Oneida Personnel Commission found that the "Petitioner failed to provide testimony or proof that the numbers that he entered in the CMT were correctly submitted" (Oneida Personnel Commission Decision, Docket # 15-WW-004, June 3, 2015, p. 2). Upon review, this Court also did not find any support for the contention that after the numbers were correctly entered, Appellant then closed in accordance with procedure. Appellant actually did not even contend that he closed according to procedure in this appeal; he only contended that he entered the numbers correctly and it was Respondent's burden to prove that he didn't close properly. Based on this, this Court

finds that the Oneida Personnel Commission's conclusion is plausible in light of the *lack* of evidence presented by the Appellant.

With regard to the exception reports, Appellant asserts to some degree that these errors were the result of lack of training, and as a result, they should not have been held against him. In one instance, Appellant did not verify the \$25 chip totals (#56836); in four instances that counted as one infraction (59326/59513/59512/59597), Appellant entered incorrect closing amounts; and in another instance a total cash buy-in for \$3200 was not recorded (#1997). Based on the testimony given by Appellant, the Oneida Personnel Commission made findings based on admissions by Appellant as to his commission of the initial errors that resulted in the above-named infraction reports. The OPC made these findings after hearing the testimony of Appellant, along with collaborating testimony from other witnesses. Appellant may have been a new Pit Manager at the casino at the time these infractions occurred, however, the Oneida Personnel Commission held Appellant responsible for his own actions. As a result, the Oneida Personnel Commission found Appellant's argument that the exception reports should not have been held against him were without merit. This Court agrees. Appellant did not meet his burden of persuasion to convince this Court that the Oneida Personnel Commission failed to give proper weight to the evidence presented at the hearing. Appellant did not provide evidence that negated his responsibility as a Pit Manager to enter correct closing amounts, to record cash buy-ins, or to keep his keys in his possession at all times. As a result, the Oneida Personnel Commission's conclusion is plausible again in light of the *lack* of evidence presented by the Appellant.

The Oneida Personnel Policies and Procedures lay out a multi-step process for issuing disciplinary actions to employees. The purpose for issuing a disciplinary action is to correct what the supervisor has deemed to be some level of unacceptable work performance. Issuance is not

intended to punish the employee; but is intended to be an opportunity to become aware of unacceptable performance and what corrective behavior is needed to improve. There are many steps and processes to comply with when issuing a disciplinary action, some of which if missed can deprive the employee of his or her due process or compromise the entire appeal process. However, this is not the case in this appeal. Appellant did not meet his burden in showing that he was harmed by the procedural irregularities due from receiving the incomplete disciplinary action form.

Conclusion

When reviewing the actions of the trial court, the appellate court will only remand or reverse a lower court's decision if the decision "... (b) violates provisions, substantive or procedural, of applicable Tribal law or applicable federal law; (c) is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with applicable law; or (d) not supported by the substantial evidence on the record taken as a whole (Oneida Judiciary Law, Section 150.8-4). As the Appellant did not meet his burden of persuasion to show that the procedural irregularity affected the outcome of his case or harmed him in any way, this Court agrees with the Oneida Personnel Commission in its finding of harmless error. This Court also finds that the Oneida Personnel Commission's decision to uphold the written warning is plausible in light of the substantial evidence on the record taken as a whole and that their decision is not erroneous and against the weight of the evidence presented. As a result, this Court *affirms* the decision of the Oneida Personnel Commission to uphold the written warning issued against the Appellant.

IV. Decision

By Order of the Oneida Judiciary, Court of Appeals, the Oneida Personnel Commission decision dated June 3, 2015, which upheld the written warning issued against the Appellant is hereby *affirmed*.