

ONEIDA JUDICIARY

Tsi nu téshakotiya?tolétha?

COURT OF APPEALS

Tina Moore,

Appellant

Docket # 15-AC-011

v.

Date: November 10, 2015

Mark Skenandore,

Respondent

FINAL DECISION

This case has come before the Oneida Judiciary, Appellate Court Judges Diane House, Gerald L. Hill, and Sharon House presiding.

Procedural History

This is an employment-related appeal of the Oneida Personnel Commission's decision to overturn Respondent Mark Skenandore's termination. The decision of the Oneida Personnel Commission is *reversed*.

I. Background of the Case

The Respondent Mark Skenandore, a Pit Manager at the Oneida Casino, was terminated from employment on January 21, 2015, for violation of the Oneida Personnel Policies and Procedure Sections V.D.2.I.g. *Work Performance-Negligence in the performance of assigned duties*; and V.D.3. c. *Accumulated Disciplinary Actions Warranting Termination*. The termination was the result of Respondent 1) having accumulated five (5) exception reports or infractions within one (1) calendar year, which is a violation of the Table Games Department Procedure SOPTG-30 Titled: *Procedure Infraction and/or Exception Report Variances*; and 2) having accumulated three (3) upheld warnings and/or suspensions within a twelve month period

(said accumulated and upheld disciplinary actions were a suspension issued on May 13, 2014; a written warning issued June 15, 2014; and a suspension issued October 11, 2014). Respondent filed an appeal with the Area Manager, Lambert Metoxen, who after completion of his investigation upheld Respondent's termination in a decision issued on February 20, 2015. The Respondent then filed an appeal of the Area Manager's termination decision with the Oneida Personnel Commission. After a grievance hearing that was held on May 19, 2015, the Oneida Personnel Commission issued a decision which overturned Respondent's termination (Oneida Personnel Commission Decision, Docket # 15-TER-001, May 20, 2015). In their decision, the Oneida Personnel Commission found that the Area Manager's decision to uphold the termination was against the weight of the evidence presented at the grievance hearing. Specifically, the Oneida Personnel Commission considered the length of time between the third disciplinary action and the date of termination (3 ½ months) to be unfair and in violation of a precedent set by a previous Oneida Appeals Commission decision. The Oneida Personnel Commission made a further finding that it was unfair to the Respondent when the Appellant, Tina Moore, went back and used old exception reports dating back to May 2014 (this constituting an eight month timeframe) to terminate Respondent's employment. As a result, the Oneida Personnel Commission found the time periods taken to address both the accumulated disciplinary actions (3 ½ months) and accumulated exception reports (8 months) with the Respondent as being excessive and unfair to the Respondent. The Oneida Personnel Commission overturned the Area Manager's decision to uphold the termination and ordered Respondent's reinstatement back to his Pit Manager position with full back pay, full shift differentials, and accrued benefits.

Appellant filed this appeal with the Oneida Judiciary on June 18, 2015, seeking a reversal of the Oneida Personnel Commission's decision to overturn the termination. As it was determined that the Appellant met the criteria of alleging with sufficient clarity that harmful procedural irregularities may have existed and that the Oneida Personnel Commission decision may have been arbitrary and capricious, the Oneida Tribal Judicial System asserted its jurisdiction over this matter 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

Did the Oneida Personnel Commission commit an error when they applied the two-month precedent in Oneida Bingo and Casino v. Susan Betters to its decision to overturn Respondent's termination?

Was the Oneida Personnel Commission's decision to overturn the Respondent's termination clearly erroneous and against the weight of the evidence presented at the Oneida Personnel Commission hearing?

III. Analysis

Appellant asserts that the Oneida Personnel Commission committed an error when it applied the precedent set in the Oneida Appeals commission decision Oneida Bingo and Casino Table Games v. Susan Betters because that "case is not factually similar to the Respondent's case; therefore it does not support overturning his termination" (Docket No. 02-AC-005, July 30, 2002) (Appellant's Rebuttal Brief, p. 4). This Court agrees with the Appellant that the Betters case is factually distinguishable and as a result, the two-month precedent regarding enforcement of a termination decision does not apply to the current case before this Court.

The Betters case involved a two-month delayed decision to terminate an employee by a temporary supervisor after an investigation was completed months earlier by the initial supervisor. The Appeals Commission found it "unreasonable and inequitable...to allow assurances to be made by one supervisor [not to terminate at the time the accumulated suspensions were discovered] and then rescinded by another temporary substitute more than two months later..." (p. 4). The decision goes further to state "To allow that decision to be undermined later by another, would generate a level of uncertainty and inconsistency which the Personnel Policies and Procedures are supposed to prevent" (p. 4). They found the two months that lapsed between these two sequential and contrary supervisory decisions based on the same accumulation level of disciplinary actions [i.e. no other infractions were upheld to trigger the second supervisory decision] was "well beyond reason for enforcement of the Appellant's decision [the second supervisory decision] to terminate" (p. 5).

In the matter before this Court, the Oneida Personnel Commission found the length of time between the third disciplinary action and the actual date of termination (3 ½ months) to be unfair and in violation of its interpretation of the precedent set by the Besters case. However, the facts in the Besters case are distinguishable from the matter that is before this Court. As a result, the two month time frame referred to in the Besters case, which is considered an excessive amount to enforce a decision to terminate after completion of an investigation, does not apply to the facts in this case. In this case, the 3 ½ months that lapsed between the third disciplinary action and the actual date of termination was the result of a discretionary decision not to terminate (after the suspension was issued on October 11, 2014) and the occurrence of a fifth infraction or exception report and its resulting investigation.

In this case, Respondent received his third disciplinary action (a suspension) on October 11, 2014. At that time, the supervisor used his discretion and chose not to terminate the Respondent in accordance with established practice. The Area Manager testified at the grievance hearing that it was “not their practice to terminate after the third offense, that they always waited until the next one, which gave the employee a chance to improve their performance” (Oneida Personnel Commission Grievance decision, p. 6). Based upon the above, Appellant asserts the application of the Doug Skenandore v. Oneida Custodial Department, case (95-EP-0016, January 9, 1996) to this matter before us which held “while the Blue Book warrants a termination for the accumulation of three disciplinary notices, termination is not a mandatory result of such accumulation” (Appellant’s Brief, p. 8). We agree with Appellant that the Skenandore case also applies to this matter before us, and that Appellant was within her discretionary authority to not automatically terminate Respondent after the third accumulated disciplinary action was issued on October 11, 2014.

The Respondent then received his fifth exception report on December 17, 2014. The Supervisor became aware of this fifth exception report on December 19th. Appellant then met with Respondent on December 19, 2014. Appellant contends that her investigation of the five (5) accumulated exception reports began on December 19-the date when she became aware of the fifth exception report-and concluded on January 15, 2015. It was also during this investigation period that another exception report (a sixth) was issued against Respondent. This sixth exception report was then investigated by Appellant, and was found not to have involved the

Respondent. As a result, it is clear that this erroneous/sixth exception report was not held against Respondent as it was not listed in the termination disciplinary action form issued on January 21. This is contrary to Respondent's position that Appellant "tried to use incorrect exception reports against Respondent to begin the termination process" (Respondent's Brief, p. 3). We find this also contrary to one of the findings made by the Oneida Personnel Commission.

One of the main issues during the hearing was after discovery of the sixth and erroneous exception report was issued, was whether Appellant, once she realized "that she was using an incorrect exception report that did not involve the Petitioner [Respondent in this matter], the Respondent [Appellant in this matter] then went back as far as May 2014 and June and July of 2014, in order to justify terminating the Petitioner [Respondent in this matter]." (Oneida Personnel Commission Grievance decision, p. 4). The Oneida Personnel Commission also found that despite the Area Manager's testimony as to the process of how exception reports are investigated, documented, and addressed with employees, it made a finding that the Appellant basically waited eight months to address exceptions reports dating as far back as May 2014. This is an erroneous finding not supported by the evidence presented to this Court.

Although the Appellant did not provide copies of the five exception reports issued against the Respondent in order for the Oneida Personnel Commission to review prior to making its decision, this Court was provided copies of all five exception reports (Appellant's Rebuttal Brief, Exhibit #1). In accordance with the Oneida Judiciary Law § 150.8.-3(a)(2), this Court finds that Appellant properly preserved this issue to present to this Court as it was raised during the Oneida Personnel Commission hearing when the Area Manager testified as to the exception report processes that were followed.

What is clear in all five of these exception reports is that they show that every infraction is clearly described; every exception report clearly lists the corrective action to be taken in the future; and every exception report has both the Respondent's signature and the Supervisor's signature who reviewed the form with the Respondent. In addition, these exception reports show that each one was reviewed with Respondent within one week of when the infraction occurred. These exception reports, which are all signed by the Respondent, rebut Respondent's position and provide absolutely no factual basis to support the Oneida Personnel Commission's findings that Appellant waited eight months to address the all of the infractions listed in the five exception

reports. These reports refute Respondent's position that he was unaware of the number of exception reports in his file: his signature is on all five exception reports. As a result, he is to be held constructively aware of these and it is not the supervisor's sole responsibility to make him aware of these accumulations.

With regard to a related issue involving the eight month time period, the Oneida Personnel Commission also made a finding that the Appellant "did go back months, to be precise eight (8) months to utilize old exception reports to terminate the Petitioner's [Respondent in this matter] employment" (Oneida Personnel Commission Grievance decision, p. 5). The Oneida Personnel Commission found this eight month period to be an excessive amount of time to address those exceptions reports..." (p. 4). This finding is also erroneous. Appellant is correct in her assertion that the Table Games Department Procedure SOPTG-30 Titled: *Procedure Infraction and/or Exception Report Variances* allows a supervisor to review accumulated infractions going back an entire calendar year, and once five (5) infractions or exception reports have accumulated, the supervisor can issue a disciplinary action. This is what happened in this case: The last exception report was issued on December 17, 2014: The SOP allows the supervisor to take into account any infractions that have accumulated or occurred within one calendar year prior or since December 2013. As the five exception reports were all issued within one calendar year (May 12, June 3, June 29, July 29 and December 17-all in the year 2014), we find that the Oneida Personnel Commission's conclusion that this eight month period was excessive and contrary to existing law is without merit.

In making her termination decision, Appellant determined that Respondent violated the Oneida Personnel Policies and Procedure Sections V.D.2.I.g.-*Work Performance-Negligence in the performance of assigned duties*; and V.D.3. c.-*Accumulated Disciplinary Actions Warranting Termination*. The termination was the result of Respondent 1) having accumulated five (5) exception reports or infractions within one (1) calendar year, which is a violation of the Table Games Department Procedure SOPTG-30 Titled: *Procedure Infraction and/or Exception Report Variances*; and 2) having accumulated three (3) upheld warnings and/or suspensions within a twelve month period (Said accumulated and upheld disciplinary actions were a suspension issued on May 13, 2014; a written warning issued June 15, 2014; and a suspension issued October 11, 2014). Appellant is correct in her position that termination based on these circumstances is in

accordance with existing law and the precedent set in Richard Prevost v. OBC Employee Services (Docket #08-AC-020, January 30, 2009). We find the Prevost case is factually similar: Mr. Prevost was not automatically terminated after accumulating two suspensions within a twelve month period but was terminated after another or third incident occurred. The Oneida Appeals Commission stated:

“While the two previous suspensions were not used by his supervisor to terminate Mr. Prevost at the time the second suspension occurred, they do count against Mr. Prevost as negative disciplinary actions on his record. The supervisor was correct to take all three disciplines into account when assessing discipline...” (p. 6).

In this case, the Respondent was not automatically terminated after the third disciplinary action was issued on October 11, 2014; Appellant asserts that the decision to terminate occurred after Respondent was issued another exception report (December 17th), and these accumulated disciplinary actions (3) and exceptions reports (5) were all taken into account in the Appellant’s decision to terminate. We agree with the Appellant and find the Oneida Personnel Commission was in error when they misconstrued what this time period represented: it did not represent excessive time for a delayed termination decision but actually allowed for one more infraction to occur, thus actually giving Respondent another chance to improve his performance.

Section 150.2-6 of the Judiciary Law states the following:

“Case law precedent that has been established through a prior decision of the Oneida Appeals Commission/Oneida Tribal Judicial System shall remain precedent unless overturned or otherwise modified by a decision of the Judiciary, or by a law adopted by the Oneida Business Committee or the Oneida General Tribal Council.”

This concept of precedent allows for the judicial interpretation of rules or laws in order to determine what these mean and when they are applicable. It is also important for the adjudicating bodies to evaluate precedents set from past decisions in order to determine whether the case or issue at hand is within or outside the scope of this existing precedent. If a party can properly distinguish the facts of the case, then the holdings from precedent case does not apply. We find that Appellant has met this burden in distinguishing the Bettors case and as a result, that case does not apply to this matter before this Court. We also agree that Appellant has met her burden in presenting the Skenandore and Prevost cases as applicable to the matter before this Court.

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." Based upon the above analyses, we find no factual basis to support the Oneida Personnel Commission's contention that the length of time between the third disciplinary action and the actual date of termination (3 ½ months) was unfair and in violation of the precedent set by the Besters case. This Court agrees with the Appellant that the Besters case is factually distinguishable and as a result, the two-month precedent regarding enforcement of a termination decision does not apply to the current case before this Court. As result, any conclusions of law that were made which were based on having exceeded this two-month time frame were made in error.

With regard to the five exception reports which are all signed by the Respondent within one week of each occurrence, these clearly rebut Respondent's position and provide no factual basis to support the Oneida Personnel Commission's findings that Appellant waited eight months to address the infractions listed in the five exception reports. As a result, we reject this finding that that an excessive amount of time occurred before Appellant addressed these infractions with the Respondent.

The SOP allows the supervisor to take into account any infractions that have accumulated or occurred within one calendar year prior or since December 2013. As the five exception reports were all issued within one calendar year (May 12, June 3, June 29, July 29 and December 17 and all in the year 2014), we find that the Oneida Personnel Commission's conclusion that going back eight months was unfair and excessive and contrary to existing law is also without merit. As a result we reject this finding as well.

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, §150.8-4). This

Court has determined that the Oneida Personnel Commission incorrectly applied the *Butters* case. As a result, this Court finds that the Oneida Personnel Commission's decision to overturn Respondent's termination is erroneous and not supported by the evidence presented and taken as a whole. In accordance with Judiciary Law §150.8-3 (b), we find the Appellant has met her burden in showing that the termination was in accordance with existing procedures and case law, and the result of accumulating three (3) disciplinary actions and five (5) exception reports, all eight incidents having occurred within one calendar year.

Based on the foregoing, this Court reverses the decision of the Oneida Personnel Commission, and as a result, the Respondent's termination from employment as a Pit Manager at the Oneida Casino is upheld.

IV. Decision

By Order of the Oneida Judiciary, Court of Appeals, the Oneida Personnel Commission decision in Docket # 15-TER-001, dated May 20, 2015, which overturned Respondent's termination, is hereby *reversed*.