

COURT OF APPEALS

Linda S. Dallas,
Appellant,

Docket # 15-AC-014

v.

August 29, 2016

Oneida Personnel Commission,
Respondent.

FINAL DECISION

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

Jurisdiction

This case is being reviewed pursuant the authority of the Oneida General Tribal Council Resolution 01-07-13-B and Chapters 150, 152, 153, 154 and 155 of the Oneida Code of Laws.

Procedural History

This appeal was filed on August 31, 2015, by the Appellant, Linda S. Dallas (hereinafter referred to as "Appellant"), against the Oneida Personnel Commission (hereinafter "OPC"), Commissioners Rochelle A. Powless, Carol Smith, and Sandra Dennett, Respondents (hereinafter referred to as "Respondents"), and their Decision holding the Appellant in direct contempt and assessing her four thousand dollars (\$4,000.00) for four (4) acts of contempt, and forbidding her from advocating until all fines are satisfied. The Decision was signed by the Respondents on July 31, 2015.

Although the matter was brought forward naming the OPC as a party in interest, the actual parties in interest were the named Commissioners who presided over the hearing that issued the Decision of Direct Contempt against the Appellant.

The putative acts of contempt occurred at a grievance hearing before the Respondents on July 23, 2015. As noted on the Initial Review, the Decision of the OPC did not separate the contempt matter from the original case. Because this was a harmless error, the Court accepted this case for appellate review. The original case has since been completed and has no effect on this appellate proceeding. This appeal is based upon matters that occurred at the hearing before the OPC and presided over by the Respondents on July 23, 2015.

Several motions by the parties for delay or extensions of time were granted, which took the final decision out of the usual 180-day time frame as required by §154.9-3. On May 9, 2016 the Court extended the final decision date to August 29, 2016.

The briefing schedule was completed by the parties on July 6, 2016. The Appellant filed two (2) additional Motions to Recuse Judges Gerald L. Hill and Diane House on July 22, 2016 and August 16, 2016. The rulings on those Motions are addressed in this Final Decision.

Issues

I. Motions for Recusal of Judge Hill and Judge House

During the course of this appeal, Appellant first filed motions to recuse Judges Hill and House on January 13, 2016. The Court denied these motions because the Appellant failed to comply with §154.10-2 and §154.10-6(c)(1)-(4) of the Oneida Rules of Appellate Procedure.

A. Recusal of Judge Hill

On July 22, 2016, Appellant filed a second motion for recusal of Judge Hill citing his prior employment as the legal counsel for the OPC as justification for the recusal request. Appellant

also alleges a violation of Oneida Tribal Judiciary Canons of Judicial Conduct §2.1 as the basis for her argument of recusal. We find Appellant's argument is without merit.

When a motion for recusal is submitted, the first level of judicial review is to assess whether the motion is legally sufficient. The next is to determine whether the allegations are sufficient to compel the judge to disqualify him or herself. When confronted with a recusal motion, it is initially the judge's responsibility to exercise his or her personal conscience to determine whether impartiality is an issue.

Judge Hill no longer represents the OPC nor does he continue to have "frequent business contacts" or an implied interest in the outcomes of the OPC's business or decisions. When Judge Hill represented the OPC, he did not have any involvement with Appellant's previous matters before the OPC. Judge Hill has demonstrated that impartiality is not an issue in this appeal and has sworn to administer impartial justice and the Court agrees. Thus, the motion for recusal of Judge Hill is denied. Judge Hill abstained from this part of the decision.

B. Recusal of Judge House

On August 16, 2016, Appellant filed a second motion for recusal of Judge House alleging several violations of Oneida Tribal Judiciary Canons of Judicial Conduct §2.1, §2.2, and §2.2.1 as the basis for her argument of recusal. Appellant sets forth several allegations against Judge House and submits several documents to support her position that Judge House should be recused.

Again, the first order of judicial review is to assess whether the motion is legally sufficient. The Appellant's motion contains many allegations and exhibits to support her position of recusal. However, all of the Appellant's exhibits are legally insufficient, and fail to meet the requirements set forth in §154.10-2 and §154.10-6(c)(1)-(4) of the Oneida Rules of Appellate Procedure. As a result, they are not considered in this decision.

Exhibit A, signed by former Tribal Chairman Ed Delgado, attempt to prove Judge House's impartiality by his "barring witness" to alleged statements she had made. (Appellant's Motion for

Recusal Exhibit A). However, because Exhibit A does not constitute a sworn statement or affidavit, the statements made in Exhibit A are hearsay and will not be considered pursuant to §155.11.2 of the Oneida Rules of Evidence.

The mere signing of a statement in the presence of a notary, or a notary's placement of an "acknowledgment" on a statement, does not constitute a sworn statement or affidavit. *Schelsteder v. Montgomery County, Tex.*, 2006 WL 1117883, at *3 (S.D. Tex. 2006). In *Schelsteder*, the court rejected the plaintiffs' submissions as proper evidence stating that although plaintiffs have filed a number of witness statements that plaintiffs' counsel characterize as "affidavits," they are not sworn to nor are they statements made under penalty of perjury. *Id.* Thus, the court rejected the plaintiff's proposed "affidavits" because the plaintiffs' failed to present proper statements, made under penalty of perjury. *Id.*

A statement must satisfy three essential elements in order for it to constitute an affidavit upon which courts will rely: "(1) a written oath embodying the facts as sworn to by the affiant; (2) the signature of the affiant; and (3) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer." 3 AM. JUR. 2D Affidavits §8 (2008).

The court's consideration of whether the affiant provided the statement with a true understanding of the significance of his submission is likely the most critical element. *See Tishcon Corp. v. Soundview Communications, Inc.*, 2005 WL 6038743, at *4 (N.D. Ga. 2005); *United States v. Bueno-Vargas*, 383 F.3d 1104, 1111 (9th Cir. 2004). In *Tishcon*, the court held the element of greatest importance in its evaluation of the statement is whether the person "signal[s] that he understands the legal significance of his statements and the potential for punishment if he lies." *Id.* If a party's submission demonstrates a lack of understanding of the statement's legal significance, or perhaps an indifference to the penalties of perjury, the submission should be properly excluded from the court's evaluation. *See id.*

Affidavits or sworn statements that do not set forth facts that conform to the Rules of Evidence are considered inherently unreliable and are therefore, insufficient. The requirements for sworn

statements and affidavits exist to protect the integrity of the truth-seeking process and to guard the rights of the parties from abuse.

Because the Appellant's motion to recuse Judge House is legally insufficient it is not considered. Judge House has demonstrated that impartiality is not an issue in this appeal and has sworn to administer impartial justice and the Court agrees. The motion for recusal of Judge House is denied. Judge House abstained from this part of the decision.

II. Contempt

A. Was there contemptuous behavior?

The Appellant was the advocate for a party in the main case and is the putative contemnor. At the grievance hearing on July 23, 2015, the Appellant requested a postponement indicating that she had just been retained the evening before. She explained that she had not fully reviewed the case materials given to her by her client nor was she able to discuss the case with her beforehand. The Respondents denied the Appellant's request for a postponement and continued the hearing.

At each phase of the hearing the Appellant continually objected and repeated that she did not have time to prepare the case or have an opportunity to discuss it with her client. The Respondents were determined that further delay was not justified because the Appellant's client had already been given twenty (20) days to find counsel but waited until the last day to retain representation.

The repeated objections by the Appellant resulted in admonitions from the Respondents that such objections were disruptive of the proceeding. The Respondents recessed the hearing several times to address the Appellant's behavior and each time they returned denying the Appellant's objection adamant that there would be no further delays. Eventually, the opposing party's advocate joined the Appellant in requesting that the proceeding be rescheduled. Because of the drawn out nature of the proceeding due to the objections of the Appellant, the opposing advocate indicated that her witnesses were unable to stay to testify due to other obligations. Furthermore,

it was apparent that the Appellant would continue her pattern of repeated objections throughout the hearing and nothing else would be accomplished.

The questions presented are whether the Appellant's conduct was contemptuous and if so, whether the Appellant's due process rights were violated by the Respondents when they found her in contempt. In her reply brief, the Appellant argues that her conduct did not rise to the level of contempt, and even if it did, the imposition of a \$1,000 fine for each of the four (4) infractions was excessive. The Appellant also argues that her due process rights were violated because she was first notified in writing that the Respondents found her in contempt eight (8) days after the July 23, 2015 hearing.

Contempt is a procedure that empowers the court to control the disruptive, defiant, and inappropriate behavior of the parties, their attorneys or advocates, witnesses, or any other persons who may be present during the hearing. The *Grounds* for contempt, the *Relief*, and the *Procedure* to the court are set forth in §153.26 of the Oneida Code of Laws.

The Court recognizes two types of contempt: direct and indirect. §153.26-(3)(a). Direct contempt is one committed in the presence of the Court or so near in presence as to be disruptive of the judicial proceedings, and such may be adjudged and punished summarily. *Id.* All other acts of contempt must be treated as indirect contempt. *Id.*

Direct includes conduct that is stubborn or willfully disobedient. *See U.S. v. Britton*, 731 F.3d 745, US Ct. of Appeals (7th Cir. 2013).

Direct contempt is an exception to the due process requirement wherein the court, or hearing body may make a finding of contempt and assess the relief as they determine appropriate. §153.26-(3)(a). Because it is an exception to due process, all such findings must be specific and substantiated by the record and court assessed remedies *summarily* applied. (Emphasis added)

The term summarily, when used in connection with legal proceedings, means a short, concise, and immediate proceeding. *West's Encyclopedia of American Law, 2nd Edition*. In Wisconsin courts, judges presiding over proceedings may impose a punitive sanction upon a person who

commits a contempt of court in the actual presence of the court. Wis. Stat. §785.03(2). The judge shall impose the punitive sanction immediately after the contempt of court and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. *Id.*

In *Schoen v. Oneida Hotel Corp*, 98-EP-0022 (8/16/00), the Oneida Appeals Commission stated:

Respondent was not found in direct contempt while the hearing was in session. Instead, Respondent was found to be in "direct contempt" some sixty-five days after adjournment . . . The trial court erred in finding the Respondent in direct contempt. Because direct contempt is inapplicable in this case, procedures for indirect contempt are applicable. The finding of contempt was made without warning and without notice or opportunity to the Respondent to argue against a finding of contempt. This court finds such action by the trial court to have been contrary to the procedures for contempt and in violation of the due process rights of the Respondent.

In *Cornelius v. Oneida Nation Community Library and HRD*, 06-TC-019 (5/9/08), the Oneida Appeals Commission stated:

[S]ummary contempt proceedings are permissible when the contemptible behavior occurs . . . in the presence of the trial court or so near in presence as to be disruptive of the judicial proceedings . . . The proceedings are disrupted by a party's failure to abide by the rules, and the respect for the process is completely undermined when the parties refuse to engage in the process or be bound by the decision of those charges [sic] with the responsibility for ensuring civil, fair and impartial forum. Generally, a party's intentional refusal to comply with judicial orders is considered egregious enough to warrant possible dismissal of a party's claim or defense.

Both cases cited support the conclusion that Direct Contempt must be addressed immediately by the court, or hearing body, and upon a finding that respect for the orderly processes of the court has been undermined.

From the record it is clear that the Appellant's behavior at the hearing was disruptive, defiant and disrespectful. In one instance, the Appellant made a direct and open verbal attack against a sitting commissioner, stating:

“You’re rude. You’re disrespectful to me. When I sit in on other cases I don’t agree with the way you do your decisions. I don’t think you’re qualified and competent in the matter in which you do your job.”

However, in order to address this behavior the court, or OPC hearing panel, must follow the procedure set forth in the law to address such conduct.

B. Was Due Process Denied to Appellant?

Black’s Law Dictionary, 7th Edition defines due process as follows;

“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case. Also termed due process of law; due course of law.”

Due process generally means that: 1. The accused must be informed of precisely what she is being charged with; when, where and how the alleged behavior was exhibited, 2. The accused must be given time to prepare a defense against the accusations, and 3. The accused must be adjudged in a neutral forum. Due process is fundamental to the adversarial process and guarantees that the rights of the accused must be accorded to address the accusations against them before a fair and neutral forum. The exception to this process is where the law provides authority for summary actions under exigent circumstances.

In *Taylor v. Hayes*, 94 S. Ct. 2697 (1974), the United States Supreme Court stated:

“[No] sentence was imposed during the trial, and it does not appear to us that any final adjudication of contempt was entered until after the verdict was returned. It was then that the court proceeded to describe and characterize petitioner’s various acts during trial as contemptuous,”

“The defense counsel’s failure to appear at status conference did not warrant summary adjudication of contempt. Direct contempt is committed in the actual presence of the court and may be punished summarily. All other contempt must be treated as indirect.” (Head Note)

And in *U.S. v. Hernandez*, 771 F.3d 707, US Ct. of Appeals (7th Cir.2014), it stated:

“The Supreme Court has long held that the trial court must afford “basic due process procedural safeguards” in cases of indirect contempt.”

The briefs and transcript of the hearing show that the behavior of the Appellant was clearly contemptuous due to her repeated objections, and more importantly, her disparaging remarks toward the Respondents at the hearing. As the hearing progressed and the more the Appellant was admonished that her objections were interfering with the procedures and order of the hearing, the more defiant she became. However, the facts of the Appellant's conduct, while undeniably defiant and disruptive, are not at issue in this appeal.

The Respondents appeared to have lost control of the hearing. Even when the opposing advocate stated that it would be in everyone's best interest to reschedule the hearing, the Respondents were not persuaded to reschedule the hearing. The Appellant had stymied the court by her behavior and the Respondents were reacting to the Appellant's behavior rather than presiding according to the Rules of Civil Procedure.

It is clear from the record that the Respondents were frustrated with the Appellant's conduct and that such conduct was disruptive of the hearing and unquestionably insulting and disrespectful to the commissioners. As indicated earlier, the Appellant directly impugned the character of one of the sitting commissioners by declaring that she was incompetent. The Appellant's briefs continued to assert her denial of due process, however by her Reply Brief, it was clear that the basis of her appeal was that she was NOT given an opportunity to respond to the assertion of contempt nor was she found in contempt at the hearing. The Respondents did admonish her a number of times about her behavior during the hearing, but took no action or made no finding of contempt.

The Decision issued on July 31, 2015 found the Appellant to be in Direct Contempt and sanctioned her as follows; \$4,000.00 for four acts of contempt and forbade her future representation as an advocate before the OPC until this fine is satisfied.

One of the primary issues in this appeal is whether or not the behavior acted against the Respondents during the hearing on July 23, 2015, was directly or indirectly contemptuous. Though the Respondents could have addressed the Appellant's behavior as Direct Contempt as defined in §153.26-1, grounds set forth in (a) through (g), the fact is that they did not. Instead,

the Respondents issued their decision on July 31, 2015, eight (8) days later. We find this to be the fatal error in the Decision in that it was not summary, i.e. behavior of Appellant was not addressed as it had occurred in open court/at the hearing, notwithstanding the admonitions to the Appellant, and was, therefore, not a summary finding by the Respondents upon which relief could be based. In Rules of Civil Procedure §153.26. Contempt is clear in its definitions of Direct and Indirect Contempt.

153.26-3. Procedure

(a) *“Direct contempt is one committed in the presence of the Court or so near in presence as to be disruptive of the judicial proceedings, and such may be adjudged and punished summarily. All others are indirect contempt.”* (Emphasis added)

(b) Indirect contempt may be determined after a hearing in which the person accused of contempt is given notice and an opportunity to be heard.

(1) The Court may, after testimony is given concerning the reasons for any contemptuous act, allow the person accused one (1) opportunity to comply or be held in contempt.

It is clear and obvious that, though the Respondents appear to have had grounds for findings of direct contempt under the rule, they failed to take any summary action or make even make summary findings. The Decision and review of the record seem to substantiate factual elements of contempt by the Appellant in open court, or at the hearing, yet the Respondents did not act until eight (8) days later.

The power of contempt is an inherent, as well as statutory, authority of the court, or hearing body in maintaining orderly proceedings. The rules on contempt, set forth in the Oneida Code of Laws, §153.26, recognize this power. The same rule sets forth the grounds, the relief, and the procedure to be followed. Simply put, the rules of contempt were not followed. For that reason the Decision of the Oneida Personnel Commission, issued on July 31, 2015 against the appellant was an error of law that denied the rights of due process to the Appellant.

The facts regarding the putative contempt are not in dispute. The Appellant made repeated interruptions, objections, and was argumentative and disrespectful during the hearing the import of which was that she was new to her client's case having been retained the day before the hearing without the opportunity to review the case or to discuss it with her client. Moreover, that because of this, she was unable to prepare and present her client's case and requested a postponement. This dynamic was repeated throughout the hearing. While there may be some merit to the Appellant's request to reschedule the hearing, her manner and conduct were unprofessional, insulting and disruptive. Nevertheless, the process set forth in Rule §153.26 must be followed by the hearing body.

The Appellant's briefs, including her Reply Brief, asserted her right to due process as she was not allowed to respond to the finding of contempt. We agree.

Ruling on Motions for Recusal

Judge Hendricks and Judge House find that Chief Judge Hill's prior involvement with the Oneida Personnel Commission do not rise to the level of requiring his recusal from the case at hand. The recusal of Chief Judge Hill is DENIED.

Chief Judge Hill and Judge Hendricks find the Appellant's allegations and claims against Judge House are insufficient to compel the recusal of Judge House. The recusal of Judge House is DENIED.

Final Decision

The Oneida Personnel Commission's Decision, dated July 31, 2015, finding the Appellant Linda Dallas in Direct Contempt by Commissioners Rochelle Powless, Carol Smith and Sandra Dennett is hereby REVERSED and Sanctions vacated.

By the authority vested in the Oneida Judiciary, Court of Appeals pursuant to Oneida General Tribal Council Resolution 01-07-13-B, this Final Decision is entered this 29th day of August, 2016 in the matter of Docket # 15-AC-014, *Linda S. Dallas v. Oneida Personnel Commission*.

It is so ordered.