

COURT OF APPEALS

Elizabeth Somers, Director,
Governmental Services Division,
Appellant,

Case No. 17-AC-002

v.

July 12, 2017

Debra Powless,
Respondent.

FINAL DECISION

This matter has come before Appellate Judges Diane House, Chad Hendricks, and Chief Judge Gerald L. Hill.

INTRODUCTION

The Oneida Personnel Commission overturned a written warning that Elizabeth Somers issued against Debra Powless on October 28, 2016. Elizabeth Somers appeals this Oneida Personnel Commission decision. The decision of the Oneida Personnel Commission is *affirmed*.

JURISDICTION

The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(2) of the Oneida Judiciary Law which gives this Court exclusive jurisdiction to review appeals of agency and administrative decisions.

BACKGROUND

On October 28, 2016, Respondent Debra Powless (hereinafter "Powless"), former Area Manager of Social Services, was issued a written warning by her supervisor Appellant Elizabeth Somers (hereinafter "Somers"), former Governmental Services Division Director, for violating Oneida Personnel Policies and Procedures Section V.D.2.c.I. Work Performance (a) (Insubordination (including disobedience) or failure to carry out assignments or instructions) and (g) (Negligence in the performance of assigned duties). Powless appealed this written warning to the Oneida Personnel Commission (hereinafter "OPC"). The OPC conducted a grievance hearing on December 15, 2016. On December 16, 2016, the OPC's Decision was to overturn the written warning issued to Powless.

On January 13, 2017, Somers filed a timely Notice of Appeal with the Oneida Judiciary. The Oneida Judiciary's Court of Appeals accepted this case for review on February 3, 2017. In her appeal, Somers alleges the decision of the OPC is clearly erroneous, arbitrary and capricious, and against the weight of evidence presented at the hearing level. Somers requests that the written warning issued against Powless be reinstated and that the record be expunged of the OPC's allegations of dishonesty and oath violations against Somers.

ISSUES PRESENTED

1. Whether the OPC committed an abuse of discretion when they concluded that Somers predetermined the disciplinary action?
2. Whether the OPC's decision to overturn Powless' written warning was clearly erroneous?

ANALYSIS

One of the questions on appeal is whether the OPC committed an abuse of discretion when they concluded that Somers predetermined the disciplinary action before meeting with Powless. To maintain this argument, Somers would have to persuade this Court that the OPC committed legal error in exercising their discretion and considered irrelevant factors or failed to consider relevant options or factors of the case that were presented during the hearing. We find that Somers has met this burden for purposes of appellate review.

Abuse of Discretion Standard of Review

Oneida Judiciary Law § 801.8-3 (c) Scope of Appellate Review states that “[w]ithout 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.” To interpret this, we look for guidance in determining how to review judicial rulings in discretionary matters. In *Koon v. United States*, the Supreme Court determined that a district or lower court by “definition abuses its discretion when it makes an error of law.” 518 U.S. 81, 100 (1996). This leaves the Court with the understanding that the failure to apply the law correctly in reaching a decision is an abuse of discretion. Based upon this standard of review, we essentially review for legal error under a de novo standard. This means we independently determine whether the correct standard

of law was applied, but uphold the trial court's findings of fact unless they are clearly erroneous.
Id.

This action arose from a series of events involving the reporting of allegations of elder abuse and how this information was or was not communicated through the chain of command. In its decision, the OPC outlined "seven issues, findings of fact, and conclusions of law." We analyzed those which involved the question of whether an abuse of discretion occurred.

There are several undisputed facts that provide the foundation for this analysis including: 1) Powless became aware of the elder abuse allegations on October 21, 2016; 2) Powless did not inform Somers of this abuse when she became aware of these allegations on October 21, 2016; 3) the Health Division Director informed Somers about the alleged elder abuse on October 26, 2016; 4) Somers directed Powless to provide an update of the abuse allegations by the end of the work day on October 26, 2016; and 5) Powless then directed a subordinate to provide the update, and left work at the end of the day with the belief that she had complied.

Somers maintains that she tried several times to contact Powless during the evening on October 26, 2016, but to no avail. When Somers believed that Powless "chose to be unavailable," she informed the Oneida Business Committee that she intended to contact the HRD/EEO Department (hereinafter "EEO") to address Powless' conduct (Respondent's Brief, pg.4). The OPC found that because Somers consulted with EEO, she had already predetermined how to discipline Powless.

The OPC abused its discretion when it held Somers predetermined how to discipline Powless. The OPC cited no law or precedent supporting its position that contacting EEO for advice and options on how to proceed is a violation of the Oneida Personnel Policies and Procedures. The OPC did not consider that one of the roles assumed by EEO is to provide advice on personnel matters and on how to correctly follow the disciplinary processes. As a matter of precedent, this precise issue has been considered in several cases before. The Oneida Appeals Commission has long held that "HRD, through the EEO office, is involved in the disciplinary procedures to the extent that questions regarding the Blue Book are forwarded from a supervisor to the Office and

general counsel is given as to the options available to the supervisor . . .” *Matthew W. Denny v. Sue Doxtator*, Case No. 09-AC-011, December 8, 2009, citing *Human Resources Department, Oneida Social Services v. Vicki Kochan*, Case No. 97-EP-0016, February 3, 1998. When Somers contacted EEO for advice on how to handle Powless’ discipline she was seeking procedural guidance. Based upon the foregoing, we find that when a supervisor is considering disciplinary action against an employee, initial contact with EEO to discuss potential options does not equate to predetermination.

The OPC also abused its discretion when it determined that Somers had predetermined disciplinary action for Powless because the disciplinary action form was partially filled out. It is undisputed that the disciplinary action form was partially filled out, but Somers maintains that before meeting with Powless on October 28, 2016, she was still undecided as to what disciplinary action was warranted. During the hearing, Somers repeatedly maintained that she felt she concluded her investigation on October 27, 2016. After she concluded her investigation, and made her decision to discipline Powless, Somers argues she is not prohibited “in terms of when or where to fill out the disciplinary forms, except that the forms must be completed within five days and must be discussed with the employee.” *William Gollnick v. Debra Powless and Lois Strong*, Case No. 01-AC-019, July 1, 2002. We agree. When the OPC made the findings of predetermination, it erred by considering irrelevant factors. Therefore, the OPC erred when it found that Somers predetermined Powless’ discipline because the disciplinary form was partially filled out.

Somers also argues the OPC abused its discretion by finding that she was not honest in the grievance hearing, and therefore had “violated her oath.” (see OPC Decision, pg. 5). Dishonesty implies intent to mislead, deceive, or misdirect. Violation of an oath also implies a deliberate intent to avoid or conceal a known fact. Findings of “dishonesty” and “violations of oaths,” without the support of established facts are unwarranted conclusions about a party’s character, and unprofessional personal opinions. It is clear from the record and the decision of the OPC that there were wide differences in the positions of the parties. However, there is nothing in the record that supports the OPC’s conclusion that Somers was being dishonest. Therefore, the

OPC's findings that Somers was dishonest and in violation of her oath of testimony are without merit and hereby rejected by this Court.

Whether the OPC's Decision to Overturn Powless' Written Warning Was Clearly Erroneous?

We are also presented with the question of whether the OPC's decision to overturn Powless' written warning was clearly erroneous. Somers challenges several issues decided by the OPC, most notably their determination the disciplinary process was not followed and that Somers failed to conduct a proper investigation into the incident in question. Based upon a review of several findings made by the OPC, Somers does not succeed on this argument.

Clearly Erroneous Standard of Review

The Oneida Judiciary Law §801.8-3(a)(1) states that:

[T]he 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.

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." *Oneida Personnel Commission v. Oneida Business Committee*, Case No.14-AC-013, July 17, 2015.

Powless alleges several procedural violations occurred regarding the investigation process and subsequent disciplinary actions taken by Somers. The OPC agreed and made several findings in its decision regarding the disciplinary and investigative process. According to the Personnel Policies and Procedures, §V.D.2.a, the supervisor will always discuss the action with the employee being disciplined to ensure that the employee:

- 1) Understands the reason for the disciplinary action;
- 2) Understands the expected work performance in light of the disciplinary action;
- 3) Understands the consequences of continued unacceptable behavior.

In addition, the supervisor is required to investigate “through a meeting with the employees and determines whether disciplinary action is warranted.” (Personnel Policies and Procedures, §V.D.5.a.1). Powless maintained that had Somers investigated the incident, she would have considered the October 26, 2016 report submitted by the Elder Abuse Coordinator. However, during the hearing Somers testified that she did not recall if she had received this report by the end of day on October 26, 2016. Had Somers properly investigated whether her directive to Powless to submit a report by the end of the day was complied with or not, this report should have been a topic of discussion in this investigative meeting. Furthermore, Somers should have discussed whether the report met her expectations.

The OPC also found that Somers did not comply with the requirements of Personnel Policies and Procedures §V.D.2.a.(1)-(3). In the hearing, Powless maintained that 1) she was unaware that Somers considered this series of events as proof of her unacceptable performance; 2) she was unaware that she was being considered for disciplinary action; and 3) corrective action was never discussed with Somers. Based upon the testimony of both parties, it appears that the OPC must have agreed with Powless on these issues.

As stated above, the clearly erroneous standard requires that the appellate court give great deference to the trial court’s findings of fact. We are not allowed to substitute our own judgment for the judgment of the original hearing body even when more than one reasonable inference can be drawn from the evidence. *See Michelle Skolaski v. Kenneth Ninham*, Case No. 15-AC-008, October 28, 2015, citing *Stevenson v Stevenson*, 2009 WI App 29, ¶ 14.

Somers argues that the OPC clearly erred in its findings by agreeing with Powless’ version of what transpired in her two meetings with Somers. However, we are not persuaded that a legal error has been committed. When the OPC determined that the requirements of Personnel Policies and Procedures §V.D.2.a.(1)-(3) and §V.D.5.a.(1) were not followed in the investigative and disciplinary process, we have to accept these inferences which were based upon how the OPC weighed the evidence that was presented at the hearing. Based upon the clearly erroneous standard of review, Powless succeeds.

CONCLUSION

The Oneida Personnel Commission's findings that Somers was dishonest and in violation of her oath of testimony are without merit and rejected by this Court. We also reject the findings by the Oneida Personnel Commission that the disciplinary action was predetermined. However, we accept the findings by the OPC that Somers did not comply with the requirements of Personnel Policies and Procedures §V.D.2.a.(1)-(3) and §V.D.5.a.(1). Accordingly, we affirm the Oneida Personnel Commission's decision to overturn Powless' written warning issued on October 28, 2016.

DECISION

Based upon the foregoing, the Oneida Personnel Commission Grievance Decision in Docket No. 16-WW-004, dated December 16, 2016, which overturned Powless' written warning is hereby *affirmed*.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 3-19-17-A, this decision is issued this 12th day of July, 2017, in the matter of Case No. 17-AC-002, *Elizabeth Somers, Director, Governmental Services Division v. Debra Powless*.

It is so ordered.