

COURT OF APPEALS

Howard K. Elm,
Appellant,

Case #: 17-AC-003

v.

March 13, 2017

Cherice Santiago,
Respondent.

INITIAL REVIEW DECISION

Reviewing Appellate Judges: Diane House, Sharon House, and Chad Hendricks

BACKGROUND

Gaming Licensing Issue

On November 30, 2016, the Oneida Gaming Commission (hereinafter “OGC”) held an administrative hearing on the potential suspension/revocation of Appellant Howard K. Elm’s (hereinafter “Elm”) gaming license after receiving notice of Elm’s August 10, 2016 charge of an Outagamie County ordinance violation of *resisting or obstructing*. On December 1, 2016, the OGC revoked Elm’s gaming license due to this ordinance charge against him. On December 14, 2016, Elm filed an appeal of this license revocation decision with the OGC. The OGC held a hearing on Elm’s appeal on January 19, 2017, and granted Elm a conditional gaming license because the charges against him were dismissed by Outagamie County on January 5, 2017.

Employment Termination Issue

Elm was terminated from his position as a casino server on December 7, 2016, because his gaming license was revoked. On December 28, 2016, the Area Manager upheld Elm’s termination. Elm then appealed his termination to the Oneida Personnel Commission (hereinafter

“OPC”). On January 24, 2017, the OPC denied Elm a grievance hearing on his termination, citing lack of authority and referring Elm to the OGC for his employment-related appeal. Elm filed a Notice of Appeal with the Court of Appeals on February 9, 2017. After review of the information contained in Notice of Appeal and the decision of the OPC, it is determined that Appellant Elm has sufficiently alleged that the decision:

Is an administrative decision that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with applicable law; and

Is not supported by the substantial evidence on the record taken as a whole, or there is new evidence that was unavailable at the time of the hearing, which, if available may have altered the final decision.

Based upon the above, this appeal is **ACCEPTED** for review as Elm has provided sufficient legal grounds for his appeal under Oneida Rule of Appellate Procedure §154.5-2(c)(3). In addition, Elm’s Fee Waiver Request filed on February 9, 2017 is granted.

ANALYSIS

In its Initial Review decision issued on January 24, 2017, the OPC concluded the following:

The Oneida Personnel Commission is not the appropriate entity to file this appeal. The Oneida Personnel Commission has jurisdiction over disciplinary actions. The Disciplinary Action Form issued to Petitioner states, “This termination has been issued for non-disciplinary reasons due to Howard K. Elm having his Oneida Gaming license revoked.” The Petitioner must file his appeal with the Oneida Gaming Commission. Therefore, this Commission DENIES the acceptance of Petitioner’s appeal of termination (p. 2).

With this determination, the OPC has denied Elm his right to appeal the termination decision. Chapter 21 of the Oneida Nation Gaming Ordinance, §21.12-13, *Revocation of a License*, states

very clearly that the OGC's authority is:

[S]olely limited to the licensing matter. Employment related processes resulting from revocation of a License are determined solely through the personnel processes and procedures of the Tribe and are not licensing matters governed by this Ordinance.

Pursuant to the Gaming Ordinance, the OGC's authority in this matter is limited to the licensure issue only. The OGC does not have the authority to provide Elm the remedy he is seeking i.e. having his termination overturned.

In this case, Elm had his license revoked based upon being charged with several Outagamie County Ordinance violations. However, Elm was never convicted of the Ordinance violations because those charges were dismissed. After Elm received a conditional gaming license, there was no licensure issue to be resolved at the OGC.

Elm's termination is what is still at issue. More specifically, was Elm's termination justified? Elm was denied his right to appeal his termination when the OPC denied his grievance and referred him back to the OGC. Because the OGC's authority is limited to the license revocation only; they have no authority to hear an appeal of a disciplinary action that an employee believes is unfair.

Based upon the foregoing and pursuant to §154.13-1(b), the Court of Appeals hereby VACATES the January 24, 2017 Oneida Personnel Commission decision and REMANDS this matter back to the Oneida Personnel Commission to determine whether Elm's appeal meets the following conditions pursuant to Oneida Personnel Policies and Procedures §V.D.6.b.1.:

- a) The decision of the Area Manager is clearly against the weight of the evidence; and/or*
- b) Procedural irregularities were exhibited during the appeal process that may have been harmful to one of the parties to the grievance.*

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolution 01-07-13-B, this case is:

- 1) **ACCEPTED** for review as Elm has provided sufficient legal grounds for his appeal under Oneida Rule of Appellate Procedure §154.5-2(c)(3);
- 2) **REMANDED** back to the Oneida Personnel Commission for a determination on whether Elm's appeal meets the following conditions pursuant to Oneida Personnel Policies and Procedures §V.D.6.b.1.a and/or b; and
- 3) Elm's Fee Waiver Request filed on February 9, 2017 is **GRANTED**.

It is so ordered.