

**COURT OF APPEALS**

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Elizabeth Somers,

Appellant,

Case #: 17-AC-006

v.

May 8, 2017

Oneida Personnel Commission,

Respondent.

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**INITIAL REVIEW DECISION AND REMAND ORDER**

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

**BACKGROUND**

On Thursday, March 23, 2017, at approximately 4:00 P.M., Appellant Elizabeth Somers (hereinafter "Somers") attempted to file a petition for employee protection with the Oneida Personnel Commission (hereinafter "OPC") at its office located on the third floor of the Oneida Social Services Building. Though uncited, we are treating this as a reference to Oneida Code of Laws, Title 2. Employment-Chapter 211, Employee Protection Policy. Somers was terminated from her position on Friday, March 24, 2017. On March 24, 2017, Somers filed her petition for employee protection with the OPC. On Tuesday, March 28, 2017, the OPC issued its Initial Review decision (hereinafter "IR Decision") and found that because Somers was not considered an employee at the time of her filing with the OPC on March 24, 2017, she was not eligible for employee protection. As a result, Somers' request for employee protection was denied by the OPC.

On Thursday, April 6, 2017, Somers filed a Notice of Appeal with the Court of Appeals. After review of the information contained in the Notice of Appeal, and the March 28, 2017, IR Decision of the OPC, it is determined that the Somers has sufficiently alleged that the OPC decision:

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

*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 IR Decision.*

## ANALYSIS

In its IR Decision issued on March 28, 2017, the OPC concluded the following:

*The “Request for Employee Protection” was submitted to the Oneida Personnel Commission on March 24, 2017, at approximately 9:00 am. The employee, Elizabeth Somers, was not considered an employee at the time of this filing. . . [d]ue to the fact that Ms. Somers was not an employee at the time of her filing, this Commission cannot provide Employee Protection to Ms. Somers. Therefore, the request for employee protection is DENIED (pg.2).*

The OPC justified the denial of Somers’ access to the protections under the Employee Protection Policy based upon the fact that Ms. Somers was no longer an employee at the time she actually filed for protection on March 24, 2017. However, the OPC failed to consider whether it played any part in Somers’ (late) March 24, 2017, filing with the OPC. Somers alleges that she tried to file on the afternoon of March 23, 2017, but “no one in the OPC were [sic] in their offices, the department was empty. This is verified by an Oneida Nation Social Services 2<sup>nd</sup> floor employee, Micheal [sic] Hoeft, that [sic] witnessed that the Appellant was in the Social Service Building looking for the Personnel Commission Department . . . .”<sup>1</sup> The denial by the OPC failed to set forth facts in support of their conclusions, particularly as they relate to times indicated in the petition and in the IR Decision.

The OPC held Somers to a strict interpretation of the Employee Protection Policy when determining whether she was an employee at the time her filing was accepted i.e. she was required to file her petition before she was terminated as an employee on March 24, 2017.

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<sup>1</sup> See Somers’ Notice of Appeal, Exhibit #3.

However, Somers alleges that she could not file on March 23, 2017, as intended due to “an unoccupied OPC office.” The OPC’s IR Decision did not address the issue of whether the OPC, or its designees, were present to accept Somers’ first attempt at filing for protection during regular business hours on March 23, 2017. The OPC must address whether anyone was available to accept the Somers’ filing on March 23, 2017, during regular Oneida business hours? If not, Somers’ inability to file on March 23, 2017, was due to a circumstance beyond her control and should have been discussed in the review and decision of the OPC.

The facts alleged suggest that the delayed filing here is attributable to the unattended or closed offices of the OPC on March 23, 2017, and form a “basis for judicial acceptance of an excuse for the appellant’s delay [in filing a notice of appeal] in order to do justice.” *In re Benoit*, 10 Cal.3d 72, 84 (1973). *Benoit* was about the reliance on a promise of trial counsel to timely file the notice on defendant’s behalf and then failed to do so. Although the facts in *Benoit* are distinguishable from the present circumstances before us, it had some similarities to guide us in making this analysis. What happens when an appellant acts diligently and promptly, but the other party fails to follow through on what they are required to do? In this case, Somers alleges that she attempted to file for employee protection several times: 1) the first attempt was during normal business hours on March 23, 2017; and 2) the second attempt was before normal business hours on March 24, 2017. However, it is unclear if Somers made a third attempt on March 24, 2017; or which attempted filing by Somers constituted the OPC to make the determination that the “Request for Employee Protection,” was submitted to the Oneida Personnel Commission on March 24, 2017, at approximately 9:00 am.”<sup>2</sup> Somers’ second attempt at filing, which was before normal business hours, is not at issue. It is her first attempt to file her petition on March 23, 2017, that must be further examined. With regard to Somers’ first attempt on March 23, 2017, the OPC, not a party but the body making the contested decision, failed to consider or address the following issues:

- 1) Was the OPC office open at all times on March 23, 2017, during regular business hours, and were OPC employees present to accept grievances or employee filings until close of normal business hours on behalf of the OPC? If not, why not?
- 2) Had the OPC offices been open until 4:30 P.M. on March 23, 2017, would Somers have

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<sup>2</sup> See OPC March 28, 2017, IR decision, page 2.

been able to file her petition requesting employee protection?

- 3) Is Somers' declaration of her attempt to file on March 23, 2017, supported by a witness statement sufficient evidence to substantiate her claim of an attempted filing on March 23, 2017, with the OPC?
- 4) Was Somers still considered an employee at the close of business on March 23, 2017?
- 5) When and how did the OPC become aware of Somers' employment status or make a determination of such status?
- 6) The decision indicates that the petition was received on March 24, 2017, at approximately 9:00 am. Because precise times of filing and acceptance are at issue in this matter, it is critical that all of the specific times referred to be included and addressed in the analysis by the OPC in reaching their decision to accept or deny Somers' petition.

When employees are required to submit documents or filings to the OPC or any other hearing body within a given timeline, the hearing body must be open during the Nation's normal working hours to accept the filings. If it is determined that the OPC was closed and unable to accept filings, or played any part in preventing Somers from filing her documents on March 23, 2017, the OPC must provide a rationale for not providing Somers access to the OPC to file her documents on March 23, 2017; and then must consider whether to grant Somers a fair hearing on her petition.

Moreover, considering the serious allegations attached as exhibits to Somers' petition for protection, summary dismissal of her petition also dismisses that part of §211.1-1 that recites the purpose of the policy “. . . to protect the Oneida Nation . . . from fraud, theft . . . .”

The OPC may also consider whether the petition itself may have been compromised. The exhibits provided include many other persons other than the two (2) named Oneida Business Committee members who had participated in the correspondence about Somers' allegation of serious wrongdoing i.e. sexual abuse, fraud, and misuse of Nation property.

Based upon the foregoing and pursuant to §805.13-1 (b), the Court of Appeals hereby VACATES the March 28, 2017 Oneida Personnel Commission IR decision and REMANDS this matter back to the Oneida Personnel Commission to make a determination on issues 1-6 above.

#### CONCLUSION

Based upon the above, this Court orders the following:

- A) This case is **ACCEPTED** for review as Somers has provided sufficient legal grounds for her appeal under Oneida Rule of Appellate Procedure §805.5-2(c)(3);
- B) The March 28, 2017 Oneida Personnel Commission IR Decision is **VACATED**; and
- C) This matter is **REMANDED** back to the OPC for a determination on the following issues:
  - 1) Whether the OPC offices were open on March 23, 2017, and were OPC employees present to accept grievance or employee filings until close of normal business hours on behalf of the OPC?
  - 2) Whether Somers would have been able to file her documents requesting employee protection had the OPC been open during regular business hours on March 23, 2017?
  - 3) Whether Somers' declaration of her attempt to file on March 23, 2017, supported by a witness statement, is sufficient evidence to substantiate her claim of an attempted filing on March 23, 2017, with the OPC?
  - 4) Whether Somers was still considered an employee at the close of business on March 23, 2017?
  - 5) How and when did the OPC learn of Somers' employment status or make a determination of such status?
  - 6) The decision indicates that the petition was received on March 24, 2017, at approximately 9:00 am. Because precise times of filing and acceptance are at issue in this matter, it is critical that all of the specific times referred to be included and addressed in the analysis by the OPC in reaching their decision to accept or deny Somers' petition.
  - 7) The OPC is further directed to join any other related issues to Somers' employment status.

8) Finally, the OPC is directed to review the mandates of Oneida Judiciary Rules of Civil Procedure, §803.4-3, *Other Rules of Procedure Used*; §803.4-4; and §803.4-6, *Application of this Law*, regarding applicability to the case at hand.

Should the OPC determine that 1) Somers was unable to file on March 23, 2017, because OPC offices were unattended, but did so on the following day, the OPC must address whether this constitutes an effective filing; and 2) if she was an employee at the close of business on March 23, 2017, the OPC is further ordered to determine whether Somers' petition meets the required criteria to grant Somers protection pursuant to the Employee Protection Policy. Further, a determination on how this affects Somers' employment status must be part of the required analysis.

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, dated this 8th day of May, 2017, in the matter of Case No. 17-AC-006, *Elizabeth Somers v. Oneida Personnel Commission*.

***It is so ordered.***