

COURT OF APPEALS

Jennifer Falck, Director,
Legislative Reference Office,
Appellant,

Case No. 17-AC-008

v.

Date: November 20, 2017

Taniquele Thurner,
Respondent.

FINAL DECISION

This matter has come before Appellate Judges Pro Tempore Diane House and Chad Hendricks, and Appellate Judge Sharon House.

INTRODUCTION

The Oneida Personnel Commission (hereinafter "OPC") overturned a suspension that Jennifer Falck issued against Taniquele Thurner on March 17, 2017. Jennifer Falck appeals the OPC's decision. The decision of the OPC is *reversed*.

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 March 17, 2017, Respondent Taniquele Thurner (hereinafter "Thurner"), Legislative Reference Office (hereinafter "LRO") attorney, was issued a written warning by her supervisor Appellant Jennifer Falck (hereinafter "Falck"), LRO Director, for violating Oneida Personnel Policies and Procedures Section V.D.2.c.1) *Work Performance* (a) Insubordination (including disobedience) or failure to carry out assignments or instructions. At the same meeting, Falck also

issued Thurner a suspension for violating Oneida Personnel Policies and Procedures Section V.D.2.c.1) *Work Performance* (a) Insubordination (including disobedience) or failure to carry out assignments or instructions; and V.D.2.c.4) *Personal Actions and Appearance* (k) Failure to be courteous in dealing with fellow employees or the general public. Thurner appealed both the written warning and suspension to the OPC. The OPC consolidated both appeals and conducted grievance hearings on both the written warning and suspension on April 27, 2017, and May 8, 2017 respectively. On April 28, 2017, the OPC upheld the written warning issued to Thurner. On May 12, 2017, the OPC overturned the suspension issued to Thurner. Thurner did not appeal the OPC's decision to uphold the written warning issued against her.

Regarding the OPC's decision to overturn Thurner's suspension, Falck filed a timely Notice of Appeal with the Oneida Judiciary on June 8, 2017. The Oneida Judiciary's Court of Appeals accepted this case for review on June 30, 2017. In her appeal, Falck alleges the OPC's decision violates provisions, substantive or procedural, of applicable Tribal law or applicable federal law; is clearly erroneous, arbitrary and capricious; and against the weight of evidence presented at the hearing level. Falck requests that the suspension issued against Thurner be upheld.

ISSUES PRESENTED

1. Whether the OPC committed an abuse of discretion when they concluded that Falck was required to allow Thurner time to improve her work performance before issuing the suspension right after issuing a written warning?
2. Whether the OPC committed an abuse of discretion when they concluded that Falck showed bias toward Thurner by issuing a more severe level of discipline?

ANALYSIS

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.*

No Time to Improve Work Performance

One of the questions on appeal is whether the OPC abused its discretion when it concluded that Falck was required to give Thurner time to improve her work performance before issuing her a suspension on March 17, 2017. To maintain this argument, Falck would have to persuade this Court that the OPC committed legal error in exercising their discretion and 1) considered irrelevant factors; or 2) failed to consider relevant options or factors of the case that were presented during the hearing. We find that Falck has met this burden.

This action stems from a series of separate disciplinary actions issued against Thurner arising from different incidents with two different employees. The OPC held that Falck violated the Oneida Personnel Policies and Procedures when she did not allow Thurner time to improve her work performance and suspended Thurner right after she issued Thurner a written warning on March 17. The OPC determined this was an error on Falck's part, inconsistent with Oneida Personnel Policies and Procedures V.D.2.a.3), and overturned the suspension issued against Thurner.

There are several undisputed facts that provide the foundation for this analysis including:

- 1) Three separate incidents gave rise to Thurner being disciplined by Falck;
- 2) These three separate incidents occurred on three consecutive days;
- 3) These incidents involved two different employees;

- 4) These incidents gave rise to two separate disciplinary actions; and
- 5) Falck gave Thurner the suspension right after she issued her a written warning.

When Falck began her investigation of the March 13 incident, Thurner was involved in two more incidents with a different employee on March 14 and 15. According to the OPC's interpretation of the Personnel Policies and Procedures, Falck would be required to overlook Thurner's second and third incidents on March 14 and 15 in order to give Thurner time to improve her work performance. The OPC failed to consider that these disciplinary actions arose out of several incidents that occurred over three consecutive days. Supervisors are not required to give employees time to improve their behavior at the expense of continual and repeated unsatisfactory work performances. Whether any further disciplinary action is warranted depends on the actions and behavior of the employee.

The OPC also erred in its interpretation of the intent of Oneida Personnel Policies and Procedures V.D.2.a.3). This section provides guidance to supervisors on what to cover with the employee when issuing a disciplinary action. No law or precedent was cited by the OPC supporting its position that issuing a disciplinary action right after issuing another is a violation of the Oneida Personnel Policies and Procedures. Based upon the foregoing, we find that the OPC abused its discretion when it held Falck was required to give Thurner time to improve her performance before being issued the second disciplinary action[Office1]. Oneida Personnel Policies and Procedures V.D.2.a.3) does not require a supervisor to give an employee time to improve his performance before issuing a disciplinary action.

Biased and Inconsistent Treatment of Employees

The OPC ruled the inconsistent treatment of the two employees involved in the same incidents on March 14 and 15 proved Falck showed "un-objectivity, and a bias" toward Thurner.¹ This is clearly an erroneous finding because the OPC failed to consider that the employees involved were at different stages in a progressive disciplinary process.

¹ OPC Grievance Decision, Docket #17-SUS-001, May 12, 2017, pg. 7.

After investigating the March 14 and 15 incidents, Falck suspended Thurner and verbally warned the other employee involved. Thurner had previously been issued a verbal warning and a written warning. Any further disciplinary action against Thurner, if warranted, would be a suspension. Falck issued the written warning for the incident on March 13. She then issued a suspension for the incidents on March 14 and 15. This issuance of different disciplinary actions for employees at different stages in the progressive disciplinary process does not show bias. As a result, we find the OPC abused its discretion when it determined Falck was not being objective and showed bias in issuing Thurner a suspension and the other employee a verbal warning.

Thurner also argues that progressive discipline is applicable only “for repeated violations of the same type” and Falck erred in progressively disciplining her for unrelated violations.² This would mean that because Thurner was disciplined for three different types of unacceptable work performance (showing up late, failing to collaborate, and argumentative behavior), she would be able to have three separate progressive disciplinary tracks ongoing for each type of violation. This is a clearly erroneous position and not what §V.D.2.a.3) directs supervisors to do. The progressive disciplinary process can be cumulative if disciplinary actions occur within a certain period of time.

CONCLUSION

We reject the OPC’s finding that Falck did not comply with the requirements of Personnel Policies and Procedures §V.D.2.a.3) Falck was not required to give Thurner time to improve her performance before being issued the second disciplinary action on March 17. The OPC's finding that Falck showed bias in issuing Thurner a more severe disciplinary action than the other employee is without merit, and is rejected by this Court. Accordingly, we find that the OPC committed legal error and abused its discretion by not considering certain relevant facts when deciding these specific issues of progressive disciplinary action presented before them. As a result, we hereby reverse the OPC's decision to overturn Thurner’s suspension issued on March 17, 2017.

² Respondent’s Brief, paragraph 2, pg. 12.

DECISION

Based upon the foregoing, the Oneida Personnel Commission Grievance Decision in Docket No. 17-SUS-001, dated May 12, 2017, which overturned Thurner's suspension is hereby *reversed*.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolution 01-07-13-B and 3-19-17-A, this decision is issued this 20th day of November 2017, in the matter of Case No. 17-AC-008, *Jennifer Falck v. Taniquelle Thurner*.

It is so ordered.