

**COURT OF APPEALS**

---

Anita F. Barber,  
Appellant,

Case No. 18-AC-001

v.

November 16, 2018

George Skenandore,  
Respondent.

---

**FINAL DECISION**

---

This matter has come before Appellate Judges Sharon House, Chad Hendricks and Leland Wigg-Ninham.

INTRODUCTION

The Oneida Personnel Commission (hereinafter “OPC”) upheld George Skenandore’s (hereinafter “Skenandore”) termination of Anita Barber (hereinafter “Barber”) on December 29, 2017. Barber appeals the OPC’s decision. The decision of the OPC is *affirmed*. Judge Wigg-Ninham dissents.

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 August 25, 2017, Barber was terminated from her position as an Area Manager of the Cultural Heritage Department by her supervisor, Skenandore, Governmental Services Division Director, for violating Oneida Personnel Policies and Procedures Section V.D.2.I.: Work Performance (f) Failure to comply with health, safety and sanitation requirements, rules and regulations.; (g) Negligence in the performance of assigned duties.; and Section V.D.2.IV. (j) Failure to exercise proper judgment.

Skenandore initiated an investigation after it was brought to his attention that a Rites of Passage youth trip to Akwasasne, New York had a volunteer with a felony conviction accompanying the youth. Skenandore conducted his investigation over the course of three (3) months where he interviewed several employees and spoke with the Oneida Human Resources Department and the Oneida Law Office. After his investigation was complete, Skenandore terminated Barber on August 25, 2017, when it was clear that no background checks were performed on any of the volunteers on the Rites of Passage trip. Furthermore, Skenandore felt the Cultural Heritage Department was poorly run with a lack of cooperation from all employees within the department, which was ultimately Barber's responsibility.

Barber appealed her termination to the OPC on September 8, 2017. After several requests to postpone the grievance hearing, a hearing was held over the course of two days on December 28 and 29, 2017. The OPC issued its decision to uphold Barber's termination on December 29, 2017.

On January 23, 2018, Barber filed a timely Notice of Appeal with the Oneida Judiciary. The Court of Appeals accepted Barber's case for review on February 21, 2018. Barber filed a Motion to Declare a Mistrial and Order that she be made whole with this Court on April 23, 2018. On May 16, 2018, Barber filed a Motion for De Novo Review and Stay Timeline for Reply Brief. The Court denied both of these motions on July 24, 2018. Barber then filed a Motion to Reconsider her stay on July 27, 2018, which the Court denied on September 13, 2018. Barber most recently filed a Motion to Dismiss her case with a request that the Court vacate the OPC's decision of December 29, 2017. The Court denied this motion on October 31, 2018.

In her appeal Barber alleges the decision of the OPC: 1) Violated substantive provisions of applicable Oneida law; 2) Is an administrative decision that is arbitrary and capricious and an abuse of discretion; and 3) The decision is not supported by substantial evidence on the record as a whole. Barber requests that she be reinstated as the Area Manager of the Cultural Heritage Department with all backpay including wage increases, bonuses, accumulated vacation, personal time, insurance, and any and all other benefits afforded to all of the Oneida Nation's employees. She also seeks courts costs and any advocate fees she's incurred.

## ISSUES PRESENTED

1. Whether the OPC's decision violated substantive provisions of applicable Oneida law?
2. Whether the OPC's decision to uphold Barber's termination was arbitrary and capricious, or an abuse of discretion?
3. Whether the OPC's decision was not supported by substantial evidence on the record?

## ANALYSIS

### Substantive Violation

Barber argues it was a substantive violation that she was represented by a tribal advocate from Gaming as opposed to an employee advocate. The Oneida Personnel Policies and Procedures Manual (Blue Book) §V.D.6.a.1.a. states that an employee "may seek the assistance of a[n] . . . advocate at any time." There is nothing in the Blue Book that states that employees *must* be provided with an employee advocate. Barber provided no evidence to substantiate her claim of a violation of any substantive laws. Furthermore, since nearly four (4) months elapsed between Barber filing her appeal to her hearing before the OPC, she had plenty of time to find another advocate or attorney to represent her.

### Arbitrary and Capricious/Abuse of Discretion

Barber also contends that the OPC acted arbitrarily and capriciously and abused its discretion when it upheld her termination. The arbitrary and capricious standard of review is "exceedingly differential." *Def's. Of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1115 (11<sup>th</sup> Cir. 2013). Whether an agency's action was arbitrary and capricious, we must examine whether the agency came to a rational conclusion based on the available facts. *See Miccosukee Tribe of Indians of Fla. V. United States*, 566 F.3d 1257 (11<sup>th</sup> Cir. 2009). We do not substitute our own judgment for that of the agency. *See id.*

Similar to the arbitrary and capricious standard of review, where an appellate court reviews a decision for abuse of discretion, it is inclined to affirm the decision. *See Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 828 (Fed. Circ. 1989). When a lower court or hearing body makes a discretionary ruling, that decision will be reviewed for an abuse of discretion. It is difficult for appellants seeking a reversal because the abuse of discretion standard reflects appellate judgment

that some decisions are best left to the lower hearing body. *See J.P. Stevens Co. v. LexTex Ltd.*, 822 F.2d 1047, 1051 (Fed Cir. 1987).

In this case, Barber's contention that the OPC's actions were arbitrary and capricious or an abuse of discretion are almost wholly unsupported. Through testimony from several witnesses including Barber herself, the OPC found that: 1) the Rites of Passage event was poorly organized; 2) Barber's involvement was very limited; and 3) no background checks were performed on any of the volunteers. Barber testified that planning for this event began in 2016. Yet several witnesses testified that no background checks had been completed on any of the volunteers who accompanied the youth to Akwasasne.

Once the youth group was in New York, Skenandore, the Cultural Heritage Facilitator, Lou Williams Jr., and Margaret Ellis, Lead Auntie for the Rights of Passage Program, all became aware that an individual in the group had a prior conviction for sexual assault. Skenandore testified that he completed a CCAP search and verified the individual had a sexual assault conviction. Williams Jr. also testified that he was sent a screen shot of the volunteer's conviction for sexual assault. Furthermore, all three testified that when the individual with the sexual assault conviction was confronted, he verified it and immediately returned home without incident.

Barber argues she did not see any proof the volunteer in question was even convicted of a sexual assault. Although there was testimony from Skenandore and Williams Jr. that they verified the sexual assault conviction, Barber is correct that no other evidence was introduced showing the volunteer had been convicted for sexual assault. However, Barber's termination did not hinge on whether a convicted sex offender accompanied the youth group to Akwasasne. Skenandore testified that he ultimately terminated Barber because he found out that no background checks were performed on any of the volunteers accompanying the youth to Akwasasne. This is a fact that Barber herself admitted during testimony.

During the hearing, Barber repeatedly stated that she was on vacation after the volunteer was approved, therefore she could not have ensured the background check was performed on the volunteer in question. However, evidence was introduced showing that Barber approved an A/P

Check Request Form for the volunteer in question over a month prior to the trip's departure date. During the hearing, the Commissioners repeatedly asked Barber if she verified a background check was performed on the volunteer in question prior to signing off on his Request Form. Barber answered that she did not check to see if any background checks were completed.

Barber's attempt to diminish her responsibility in failing to perform background checks on any of the volunteers who accompanied the youth to Akwasasne is unavailing. Barber testified it was in Williams Jr.'s job description to perform background checks. Williams Jr. testified that it was not in his job description and Barber produced no evidence at the OPC hearing of Williams Jr.'s job description. Barber also testified that in her absence it was Skenandore's responsibility as the Division Director to perform background checks. Yet again Barber produced no evidence at her grievance hearing of Skenandore's job description as Division Director. Finally, at one point during the hearing Barber testified that she did not know about the Criminal Background Requirements, Restrictions and Removal SOP only to later admit that she knew the Oneida Nation required that background checks be performed on all volunteers.

Barber finished her testimony by stating she cannot be expected to be the only person responsible for ensuring background checks are completed on volunteers. It was never determined if anyone shared the responsibility with Barber to ensure background checks were completed on volunteers. However, as the Area Manager of the Cultural Heritage Department, the OPC correctly found that Barber was ultimately responsible for the operational functions of her department, which includes ensuring that background checks are performed on all volunteers who work with youth.

The OPC did not err in upholding Barber's termination. Barber offers no legal reason as to why the Court of Appeals should overturn her termination. Furthermore, as the appellant, Barber has the burden of persuasion. §801.8-3(b) – *Burden of Persuasion*. This means that it is Barber's duty to produce evidence that will prove her claims. Barber has failed in this respect. But even if Barber had offered some proof to support her allegations, it would not constitute conduct that is arbitrary and capricious or an abuse of discretion that would lead to us overturning the OPC's decision. Barber cannot simply announce her rationale and insist it supports a decision.

### Whether the OPC's Decision Was Not Supported by Substantial Evidence on the Record?

We are also presented with the question of whether the OPC's decision to uphold Barber's termination was not supported by substantial evidence on the record. Any final ruling made by a court or lower hearing body must be supported by evidence with some substance to it. This is also a highly deferential standard. Almost any evidence may be sufficiently "substantial" to support a decision by the finder of fact.

Barber's argument that the OPC did not take all of the information into consideration when it upheld her termination is unpersuasive. The OPC provided a thorough explanation for its decision to uphold her termination. Specifically, the OPC noted that Barber offered no evidence to support the notion that it was anyone else's responsibility to complete background checks on volunteers other than her own. Most notable is their determination, based on the testimony of several witnesses including Barber herself, that the ultimate responsibility of the operational functions of the Cultural Heritage Department "lay upon the shoulders of [Barber]." In light of the OPC's sound exercise of discretion in considering the evidence, Barber does not succeed on this argument.

### CONCLUSION

Barber has not provided evidence that any substantive laws were violated during her grievance process. Barber's accusation that the OPC's decision to uphold her termination was arbitrary and capricious and an abuse of discretion is without merit and rejected by this Court. Finally, we also reject Barber's contention that the OPC's decision was not supported by substantial evidence on the record. Accordingly, we *affirm* the OPC's decision to uphold Barber's termination issued on August 25, 2017.

### DECISION

Based upon the foregoing, the Oneida Personnel Commission decision in Docket # 17-TER-004, dated December 29, 2017, which upheld Barber's termination 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 3-19-17A, this Final Decision is issued this 16th day of November 2018, in the matter of Case No. 18-AC-001, *Anita F. Barber v. George Skenandore*.

*It is so ordered.*

#### DISSENTING OPINION

I, Leland Wigg-Ninham, respectfully dissent from the majority for the following reasons. The Oneida Personal Commission erred in finding that the Appellant, Anita Barber, was solely responsible for not conducting a background investigation on the chaperone that was found to have committed a sexual felony as testified by the Respondent, Division Director, George Skenandore. After reviewing the record, I could not find any evidence or testimony that proved the chaperone committed an offence that posed a threat to the group, except for the Background Investigator, Kendall Barton's, testimony testifying that after performing the background check, he determined the chaperone "failed." He never provided the OPC with date(s), time, or any record of the alleged offence. It was never decided if Mr. Barton was an expert witness which would qualify him to make that determination.

My other issue is; accountability and responsibility. The Appellant testified she went on vacation before the group left on their trip. Even though she signed a check for per diem for the chaperone prior to her leaving that does not make her responsible for the chaperone's past record. The OPC and the majority on this appeal failed to logically reason how they came to the conclusion that she alone was responsible. In the hierarchal chain of command, the person at the top is responsible for all the actions/inactions of all those below them. In this case when the Appellant left on vacation, the Respondent became responsible for the Cultural Heritage Department. So, in my opinion, the Appellant was only partly responsible for the background check infraction, just as the project coordinator and the supervisor of the project were, but ultimately the accountability and responsibility lie with the Respondent which includes communication and establishing a respectful working environment for the employees under his "command." In my opinion termination was too harsh under the Oneida Nation's progressive discipline policy where its purpose is to retain employees and for them to correct the infraction and give them an opportunity to correct the infraction.