

**ONEIDA JUDICIARY**  
**Tsi nu téshakotiya?tolétha?**

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**TRIAL COURT**

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**Elizabeth J. Somers,**  
**Petitioner**

**v.**

**CASE NO: 18-EMP-001**

**Oneida Business Committee Officers**  
**Melinda Danforth, Lisa Summers, and**  
**Patricia King,**  
**Respondents**

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**ORDER**

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This case has come before the Oneida Trial Court, Honorable John E. Powless III presiding.

*Appearing in person:* Petitioner, Elizabeth J. Somers; Respondent, Lisa Summers; Respondent, Melinda Danforth; and Respondent's Attorney, Patricia Garvey.

**STATEMENT OF THE CASE**

Petitioner, Elizabeth J. Somers, was the Governmental Services Division Director for the Oneida Nation. On March 24, 2017, Petitioner received a 5-day suspension for an infraction issued pursuant to Oneida Personnel Policies and Procedures, Section V.D.2.I, Work Performance §§ (a), (e), and (g) and Personal Actions and Appearance §§ (b), (j), (k), (l), and (n).

On March 24, 2017, Petitioner received a termination for an infraction pursuant to Oneida Personnel Policies and Procedures, Section V.D.2.I, Work performance, §§ (a) and (e) and Personal Actions and Appearances, §§ (j) and (l).

On April 6, 2017, Petitioner filed an employee grievance appeal to the Oneida Personnel Commission and alleged that the decision of the immediate supervisor or supervisors was clearly against the weight of the evidence. Petitioner also alleged multiple procedural irregularities including, but not limited to: violations of due process (e.g. deficient notice and failure to provide discovery); abuse of power (e.g. using the Oneida Business Committee office to influence the investigation); violations of General Tribal Council resolution prohibiting the Oneida Business Committee from having day-to-day and personnel involvement; intimidating witnesses and negatively influencing the Oneida Personnel Commission; repeated *ex parte* communications; and a pre-determined termination.

Following the dissolution of the Personnel Commission, Petitioner agreed to continue the hearing in the Judiciary's Trial Court. The Trial Court received and conducted a thorough review of the Oneida Personnel Commission transcripts and a status hearing was held on June

26, 2018. A contested hearing was held on July 10-11, 2018 and on July 17, 2018. Written closing arguments were submitted by the parties on or before July 20, 2018. On July 27, 2018, the Court entered an order pursuant to 8 O.C. 803.6-2(a) extending the deadline for the written decision to on or before August 17, 2018.

## **ISSUES**

The main issues for the Trial Court to consider are as follows:

1. Was the decision of the immediate supervisor or supervisors clearly against the weight of the evidence?
2. Were procedural irregularities exhibited during the process that were harmful to one of the parties to the grievance?

## **PRINCIPLES OF LAW**

### **Oneida Personnel Policies and Procedures<sup>1</sup>:**

Section V.D.2.c.1, Work Performance § (a), (e), and (g).

- a. (a) Insubordination (including disobedience) or failure/refusal to carry out assignments or instructions (W/S/T),
- b. (e) Failure to provide accurate and complete information where such information is required by an authorized person, (S/T),
- c. (g) Negligence in the performance of assigned duties, (W/S/T).

Section V.D.2.c.4, Personal Actions and Appearance, § (b), (j), (k), (l), (n).

- b. Intimidating, interfering with or using abusive language toward customers, clients, co-workers or others (S/T),
- j. Failure to exercise proper judgment (W/S/T),
- k. Failure to be courteous in dealing with fellow employees or the general public (W/S/T),
- l. Any of the following acts by employees: Arson, bribery, perjury, obstruction or interference with an investigation authorized by the Oneida Tribe. (S/T)
- n. Any violation of duly adopted Tribal ordinances. (W/S/T).

Section V.D.6.b, Grievance

- b. The employee may appeal the Area Manager's decision to the Oneida Personnel Commission. The appeal must be filed with the Oneida Personnel Commission within ten (10) working days from employee's receipt of the Area Manager's decision. Upon receipt of the appeal the Commission shall, within one business day, notify the HRD Manger (or designee) that an appeal has been filed by the employee.
  - 1) Copies of all information of the subject case upon which the disciplinary action was upheld by the Area Manager will be hand delivered to the

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<sup>1</sup> All references to the Oneida Nation's Personnel Policies and Procedures are subject to the version in Exhibit B pages 27-50.

members of the Personnel Commission. The Personnel Commission will hear an appeal only if one or both of the following conditions exists:

1. The decision of the Area Manager is clearly against the weight of the evidence and/or
2. Procedural irregularities were exhibited during the process that may have been harmful to one of the parties to the grievance.

#### Section V.D, Complaints, Disciplinary Actions, and Grievances

Disciplinary procedures provide a systematic process for handling problem employees. Disciplinary procedures serve to correct unacceptable behavior and to protect the Tribe. Grievance procedures provide a systematic process for hearing and evaluating job related disputes. Grievance procedures serve to protect employees from inconsistent and unfair treatment. In all cases of grievance and discipline, supervisors are enjoined to use common sense, discretion and judicious good sense to resolve complaints between employees, exercise disciplinary prerogatives, and handle grievances.

#### Section V.D.2, Disciplinary Actions

##### 2. Disciplinary Actions

- a. Disciplinary actions will be initiated by an immediate supervisor for the purpose of correcting unacceptable work performance. 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.
- b. A supervisor shall initiate disciplinary actions commensurate with the seriousness of the unsatisfactory performance. A supervisor must consider each disciplinary action in progressive order and justify a deviance from that recommended progression.
- c. The actions listed below are examples of unacceptable work performance and do not constitute a comprehensive or exhaustive list. The actions in parentheses are guidelines for a supervisor to use in administering disciplinary actions. (W = written warning; S = suspension; T = termination):
  1. Work Performance
    - a. Insubordination (including disobedience) or failure/refusal to carry out assignments or instructions. (W/S/T)
    - b. Loafing, loitering, sleeping or engaging in personal business. (W/S/T)
    - c. Unauthorized disclosure of confidential information or records. (S/T)
    - d. Falsifying records or giving false information to departments and/or employees responsible for Recordkeeping. (S/T)

- e. Failure to provide accurate and complete information where such information is required by an authorized person. (S/T)
- f. Failure to comply with health, safety and sanitation requirements, rules and regulations. (W/S/T)
- g. Negligence in the performance of assigned duties. (W/S/T)

## **ANALYSIS**

### Decision of the Supervisor(s):

In this case, Petitioner was disciplined for insubordination based on her alleged failure to participate in the investigation process authorized by the Oneida Nation. Petitioner asserts that Respondents did not present evidence to support their decision to deviate from progressive discipline outlined in the Oneida Personnel Policies and Procedures. Petitioner also claims that Respondents were unable to present any witness testimony supporting their allegations. The Court finds that this assertion is not supported by the record and there is ample evidence to support that Petitioner's own actions led to the deviation, which was appropriate.

### Procedural Irregularities:

Petitioner alleges that her grievance process was compromised. Petitioner first contends that she was denied notice of the complaint(s) and the allegations against her. The Nation's Personal Policies and Procedures is silent as to requiring the Nation to provide access of the complaint(s) to the complainant. Furthermore, the "Complaint Process for Direct Reports," approved by the Nation's Human Resource Department, does not require the complaint be given to the complainant. While the Human Resource Department's Equal Employment Opportunity (EEO) Director, Matt Denny, advised Petitioner that a copy of the complaint should be provided to her, this Court looks to what is reflected in the policy, which conflicts with the advice provided by Mr. Denny.

Petitioner's second assertion is that she was denied discovery. In response to this claim, the Court finds that Petitioner was allowed to enter certain discovery into evidence and the parties were afforded ample opportunity to review and address any documents that should have been exchanged.

Petitioner's third claim is that she was not provided a fair and neutral hearing while the case was before the Oneida Personnel Commission. The Oneida Personnel Commission was dissolved on April 11, 2018. As a result, employee grievances were transferred to the Judiciary - Trial Court. Parties were given the opportunity to start their grievance hearing over or continue the case from where it was when the dissolution occurred. Petitioner chose to continue her grievance hearing where it last left off in the Oneida Personnel Commission. As Petitioner could have started her hearing over in front of the Judiciary - Trial Court, this alleged deficiency is found to have been waived. Additionally, this Court spent a significant amount of time reviewing the transcripts from the Oneida Personnel Commission and does not find that the proceedings themselves were unfair or lacked neutrality.

Petitioner's fourth assertion is that Respondents abused their power by disregarding the supervisor and/or manager's ability to resolve and manage issues. The Court finds that the submission of a complaint is governed by the Personnel Policies and Procedures and/or within a Division's Standard Operating Procedure. In this case, one of the complaints was submitted by a Governmental Services Division (GSD) employee, as the subject of the complaint was the

Division's Director. The Court does not find that it was inappropriate for that complaint to be forwarded to the Oneida Business Committee, as there would have been no way for the supervisor of the employee who submitted the complaint to investigate it without the Division Director's involvement.

Petitioner's fifth claim is that Respondents abused their power by awarding themselves a legal advantage not afforded to her by obtaining professional legal representation from the Oneida Law Office. The Court finds that a party may have counsel, whether that be an attorney or advocate, represent them at their own expense before either the Oneida Personnel Commission or the Judiciary. Petitioner chose not to do so. As the Oneida Law Office represents the Nation in actions before the Judiciary, Respondents did not abuse any power or authority by seeking Law Office representation.

Petitioner's sixth alleged procedural irregularity is that Respondents violated a General Tribal Council resolution prohibiting the Oneida Business Committee from having day-to-day and personnel involvement. The Court finds that this argument does not properly consider BC Resolution 11-26-14-C and fails for that reason.

Petitioner's seventh claim is that the EEO review was compromised when Matt Denny was removed from conducting the review and that the review form did not contain all required information. The testimony indicated that both the EEO Officer and the EEO Director conduct a majority of the EEO reviews; however, the HRD Manager has also conducted EEO reviews in the past. The testimony does not establish any irregularity. While the failure to include the date on the disciplinary form should have been resolved by the Respondents prior to entering the form, that fact does not negate the insubordination of the Petitioner and what could be reconciled as a harmless error does not warrant overturning the discipline. Furthermore, Respondent requested to deviate from progressive discipline; therefore, the procedural irregularity claim as it pertains to the form is moot.

Petitioner's eighth claim is that Respondents made procedural errors in pre-determining Petitioner's termination. Based on the finding of insubordination, the Court does not find merit with this claim.

Petitioner's final claim was that she was not provided with an opportunity to tell her side of the story regarding the discipline. After being contacted by Respondents, Petitioner stated, "I refuse to answer the questions if it relates to a specific complaint. I feel my due process rights have been violated as I have not received a copy of the complaint." In response to this, Respondents attempted to meet with Petitioner at her office which led to Petitioner choosing not to talk and departing from her office area. Later that same day, Respondents set up a meeting with Petitioner to again discuss the situation. On March 24, 2017, Respondents met with Petitioner and issued a 5-day suspension for violating the HIPAA confidentiality of a GSD employee. Later that same day, Respondents terminated Petitioner for her failure to participate in the investigation process authorized by the Oneida Nation. Based on the testimony, Petitioner was afforded multiple opportunities to present her side of the story. Petitioner was also made aware of the reasons for the disciplinary actions against her and she declined to sign the disciplinary action form. This claim lacks merit.

As to all other procedural irregularities alleged, the Court finds that they are without merit.

The position of Governmental Services Division Director is a senior leadership position within the Nation that is responsible to oversee over 140 programs and approximately 320 employees. For anyone in a senior leadership position like the Governmental Services Division Director, it is vital to participate in ongoing investigations regarding complaints involving both the employee themselves and others. If Petitioner was not comfortable participating without counsel, then at the very least Petitioner should have offered an alternate date and time when she could participate in the investigation while being represented. That did not occur. The failure to participate in the investigation is not acceptable for our senior management and our leaders.

### **FINDINGS OF FACT**

The Court finds as follows:

1. The Court has both subject matter and personal jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. After the Oneida Personnel Commission was dissolved, Petitioner consented to this matter continuing in the Judiciary - Trial Court.
4. Petitioner, Elizabeth J. Somers was the Governmental Services Division Director for the Oneida Nation.
5. Respondents attempted to meet with Petitioner to discuss whether disciplinary action was warranted.
  - a. On March 22, 2017, Respondents interviewed Petitioner related to concerns that stemmed from complaints identified in Petitioner's 90-day evaluation. The Petitioner stated "I refuse to answer the questions if it relates to a specific complaint. I feel my due process rights have been violated as I have not received a copy of the complaint."
6. Respondents attempted to discuss disciplinary actions with Petitioner.
  - a. On March 23, 2017, Respondents attempted to discuss disciplinary actions with Petitioner at her office. Petitioner stated she was surprised, intimidated and scared, resulting in her choosing not to talk to Respondents.
7. On March 24, 2017, Respondents issued a 5-day suspension to Petitioner for violating the HIPAA confidentiality of a GSD employee.
8. On the same day of the suspension, the Petitioner was terminated for infractions in the Oneida Personnel Policies and Procedures.
9. Respondents deviated from the progressive order of discipline.
  - a. The deviation from progressive discipline is based on Petitioner's unwillingness to participate in an investigation authorized by the Oneida Nation.
10. Petitioner did not complete the disciplinary action form.
  - a. The disciplinary action form was discussed with the employee.
  - b. Petitioner did not sign the disciplinary action form.
    - a. Petitioner refused to discuss the action with her supervisor and the form was not signed.
  - c. Petitioner filed a timely appeal.

## **CONCLUSIONS OF LAW**

1. The decision of the immediate supervisor or supervisors was NOT clearly against the weight of the evidence.
2. Procedural irregularities WERE NOT exhibited during the process that were harmful to one of the parties to the grievance.

## **ORDER**

The Court enters the following order:

2. Petitioner's disciplinary action is UPHELD and Petitioner is not entitled to back pay.

IT IS SO ORDERED.

By the authority vested in the Oneida Judiciary pursuant to Resolution 01-07-13-B of the General Tribal Council and Order signed on August 17, 2018.

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John E. Powless III, Trial Court Judge