

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Kenneth Ninham,
Petitioner

v.

CASE NO: 19-EMP-005

Evan Duxtater,
Respondent

ORDER

This case has come before the Oneida Trial Court, Honorable Layatalati Hill presiding.

Appearing in person: Petitioner, Kenneth Ninham and Petitioner's Advocate, Patricia Campbell, and Respondent, Evan Duxtater and Respondent's Advocate, Donna Smith.

Statement of the Case

The Petitioner is seeking to overturn a written warning he received for accumulating a combination of six (6) Exception Reports and/or Procedure Infractions within a 12-month period.

Issues

1. Were procedural irregularities exhibited during the appeal process that were harmful to the Petitioner?
2. Was the decision of the Area Manager clearly against the weight of the evidence?

Findings of Fact

1. The Oneida Judiciary Trial Court has jurisdiction over this matter pursuant to BC Resolution 03-13-19-C.
2. Notice was provided to all those entitled to notice.
3. The Oneida Casino updated its Standard Operating Procedure for the Table Games (SOPTG-30, hereafter, SOP) on December 6, 2018 which became effective on January 14, 2019.
4. The updated SOP allows an employee to be held accountable for any combination of six (6) Exception Reports and/or Procedural Infractions within a twelve (12) month period.
5. The Petitioner was issued a written warning based on the updated SOP on April 19, 2019.
6. The written warning was for having a combination of six (6) infractions that include, exception reports and/or procedure infractions within a 12-month period.
7. The Petitioner, when meeting with the Respondent and Table Games Assistant Director, Kim LaLuzerne, agreed that he committed the six (6) infractions involved in this case.
8. The six (6) infractions are:

- (1) Date of infraction: 05/03/18. Exception Report #8198: Failure to record accurate totals on the Pit Action Control Log (PACL). The Petitioner only recorded \$5,010 as a cash buy in for a patron when he was in for \$5,710 resulting in a \$700 error.
 - (2) Date of infraction: 08/20/18. Procedure Infraction #18-2497: The Petitioner signed a Table Inventory Form stating there were \$23,500 in \$500 chips when there were \$25,500 in \$500 chips resulting in a \$2,000 error.
 - (3) Date of infraction: 09/19/18. Exception Report #9840: Failure to record accurate totals on PACL. The Petitioner recorded a \$6,300 buy in for a patron which made his total cash buy for the day to be \$10,700. The total for that buy in should have been \$9,700 for this patron which created a \$1,000 error.
 - (4) Date of infraction: 09/28/18. Exception Report #9983: The Petitioner signed a Table Inventory Form stating that there were \$18,500 in \$500 chips on table MMS04. The correct amount was \$28,500 in \$500 chips on that table. This error made the total amount to \$27,079 when it should have been \$37,079 resulting in a \$10,000 error.
 - (5) Date of infraction: 12/08/18. Procedure Infraction #18-3686: The Petitioner signed the Table Inventory Form stating there were \$15,500 in \$500 chips when there were \$17,500 in \$500 chips resulting in a \$2,000 error.
 - (6) Date of infraction: 04/13/19. Exception Report #12682: The Petitioner signed the Table Inventory Form stating there were \$35 in \$5 chip when there were \$505 in \$5 chips creating a \$470 error. The inventory for the \$1 chips reads \$21 and that actual total was \$35 in \$1 chips resulting in a \$14 error. The \$0.50 chips didn't have any total written on the Table Inventory Form when there were \$21 in \$0.50 chips resulting in a \$21 error. This Table Inventory Form has a \$505 error with all the error combined on this Table Inventory Form.
9. The six infractions occurred within a 12-month period.
 10. The attachment to Part II of the Disciplinary Action Form used to describe the time, date and description of the incidents had the following information as to time and/or date:
 - (1) The 1st infraction was missing the date of the infraction and listed the time as “end of Ken’s shift.”
 - (2) The 2nd infraction listed the date and time of 8/19/18 at 3:02 a.m.
 - (3) The 3rd infraction listed the date and time of 9/19/18 “during Ken’s shift.”
 - (4) The 4th infraction listed the incorrect date of 9/29/19. The correct date is 9/28/18.
 - (5) The 5th infraction listed the incorrect date of 12/9/18. The correct date is 12/8/18.
 - (6) The 6th infraction listed the date and time of 4/13/19 around 12:15 a.m.
 11. The Petitioner signed all 6 infractions in this case at the time they occurred.
 12. The Petitioner did not deny or dispute that any of the infractions occurred.

Principles of Law

Oneida Nation Personnel Policies and Procedures Manual:

Section V.D.6. b.1. The Court will hear an appeal only if one or both of the following conditions exist:

- (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.

Section V.D.5.b. If disciplinary action is warranted, within five (5) working days the supervisor will fill out the five (5) part disciplinary action form stating the behavior for which the action is being taken, the time and date of its occurrence, and the specific policy section under which action is being taken.

Oneida Casino Standard Operating Procedure Table Games Infraction Accountability

Section 3.1. In the event an Exception Report, Procedure Infraction, Recovered Monetary Error, Surveillance Report, or Unrecovered Monetary Error occur, an employee may be held accountable for the following standards:

Section 3.2. Unrecovered monetary errors

- 3.2.1 \$10.01 to \$99.99; Five (5) allowed in a one-year period (12 months).
- 3.2.2 \$100 to \$499.99; Three (3) allowed in a one-year period (12 months).
- 3.2.3 \$500 and above; Any one (1) within a one-year period (12 months).

Section 3.3. Recovered monetary errors

- 3.3.1 \$10.01 to \$99.99; Six (6) allowed in a one-year period (12 months).
- 3.3.2 \$100 to \$499.99; Four (4) allowed in a one-year period (12 months).
- 3.3.3 \$500 and above; Two (2) allowed in a one-year period (12 months).
- 3.3.4 Any combination of six (6) Unrecovered/Recovered Monetary errors in a 12-month period.

Section 3.4. Any combination of six (6) Exception Reports and/or Procedure Infractions within a 12-month period.

Analysis

The Petitioner claims he was disciplined under a new SOP when he, as well as other supervisors, but not all, understood the Director to say not to use infractions dated prior to the issuance of the new SOP. The Petitioner was under the impression that Exception Reports and Procedure Infractions issued under the old SOP were not to be combined with Exception Reports and Procedure Infractions issued under the new SOP. This belief, however, is incorrect. For one, it is not a new SOP, but an updated SOP, which is more lenient. Secondly, the decision of the Area Manager clarified that the old SOP was not to be used after January 14, 2019. Going forward the updated SOP had to be used, but Exception Reports and Procedure Infractions issued under the old SOP may still be combined with those issued under the updated SOP for disciplinary actions. This was further clarified by an email from Franklin L. Cornelius, Director of Table Games, to Kenneth J. Ninham on Friday, April 26, 2019 which stated, “*I did not state* any violations prior to it going into effect (1/14/19) do NOT combine with new infractions/exception reports due to the new policy. This is supervision discretion.” (*Emphasis added*).

Here, the supervisor used such discretion to combine Exception Reports and Procedure Infractions issued under the old SOP and the updated SOP to issue a disciplinary action. Therefore, the belief of the Petitioner that infractions issued under the old SOP cannot be combined with infractions issued under the updated SOP is mistaken and is not grounds to overturn the written warning.

The Petitioner also claims there was no meeting to discuss his appeal with the Area Manager and that the Area Manager only called him to discuss his appeal. This claim was addressed by the Area Manager's decision based on new evidence being submitted. In that decision, Table Games Assistant Director, Kim LaLuzerne stated she discussed his appeal with him by phone at his request to do so by phone. It may be true the Petitioner had difficulty discussing his appeal with the Area Manager over the phone, but he, himself, requested it to be done over the phone. To now claim it is a procedural irregularity to overturn the written warning is not appropriate. Therefore, discussing the Petitioner's appeal to the Area Manager with the Area Manager over the phone is not grounds to overturn the written warning when the Petitioner, himself, requested the meeting to be done by phone.

The Petitioner next points out missing, and/or inaccurate dates and times that were used on Part II of the Disciplinary Action Form. Part II of that form requires the time and date of the incidents in accordance with Section V.D.5.b of the Oneida Nation Personnel Policies and Procedures Manual. Here, the Respondent typed in the space provided for such information, "Please see attached for Times, Dates, and Description of Incidents." The purpose of providing such information is to enable an employee to prepare a defense to such incidents. Here, even after the correct information was provided, the Petitioner did not deny that the infractions occurred or make any additional arguments. Having the missing and inaccurate information did not change any of the Petitioner's defenses. Therefore, although there may have been a procedural irregularity, it was not harmful to the Petitioner as required in the Oneida Nation Personnel Policies and Procedures Manual Section V.D.6. b.1. (b) and are not grounds to overturn the written warning.

Furthermore, the Petitioner had an opportunity to defend himself by contesting or disputing all infractions at the time they were reviewed with him, by both the Respondent and the Area Manager, as well as during the hearing held on June 13, 2019. The Petitioner, however, did not dispute that any of the infractions occurred, except for that Procedural Infraction 18-3686 should not count. His argument that it should not count is because, although he committed an error, he submitted an error notification slip that was accepted by accounting. However, Table Games Assistant Director, Kim LaLuzerne testified that even though an error notification slip was submitted and accepted by accounting, it does not negate the initial error and a Procedural Infraction is still issued. Therefore, the Petitioner's argument on this issue fails.

The Petitioner also points out that the date is missing for Exception Report #8198. Based on the missing date, it would be very difficult for any employee to prepare a defense to an incident if the date of the incident is not included in the Disciplinary Action Form or any attachments.

However, even though there was a missing date and incorrect dates on the Respondent's attachment, the missing date and corrected dates were provided in documents submitted during the hearing. After the correct information was provided, the Petitioner still did not deny that the infractions occurred or make any additional arguments. Therefore, although there may have been a procedural irregularity, it was not harmful to the Petitioner as required in the Oneida Nation Personnel Policies and Procedures Manual Section V.D.6. b.1. (b) and are not grounds to overturn the written warning.

The Petitioner also claimed that stating an infraction occurred "during Ken's shift" or at the "end of Ken's shift" is not specific enough to satisfy the requirement of providing the time that the infraction occurred. The Respondent testified that using "during" or "end of shift" is acceptable and is often used for describing the time of the infraction. According to Black's Law Dictionary, ninth edition, time is defined as 1. a measure of duration. 2. a point in or period of duration at or during which something is alleged to have occurred. Therefore, time may be expressed as a period of duration. Here, "during" or "end of shift" is a period of duration during which the infractions are alleged to have occurred. Therefore, the use of "during Ken's shift" or "end of Ken's shift" is acceptable as it relates to the requirement of including the time.

In this case, the infractions have been proven and are not disputed by the Petitioner. The Court disagrees, as explained above, with the Petitioner's arguments for why some of the infractions should not count. And, although in some cases, missing dates may amount to a procedural irregularity that was harmful to one of the parties, here, it does not. As mentioned, the purpose of providing the time and dates of the infraction is to enable an employee to prepare a defense to such incidents. In this case, the Petitioner was given an opportunity to contest and defend against any, and all the Procedural Infractions and/or Exception Reports once the time and dates were provided. The Petitioner failed to do so and still did not dispute that the Procedural Infractions and Exception Reports occurred. Therefore, the issue of not providing correct notice as to dates and times is not grounds to overturn the written warning because even if the dates and times were correctly provided, it would not have changed any of the Petitioner's stances or arguments. Therefore, although there may have been a procedural irregularity, it was not harmful to the Petitioner as required in the Oneida Nation Personnel Policies and Procedures Manual Section V.D.6. b.1. (b) and are not grounds to overturn the written warning.

The Petitioner next claims the Area Manager's decision is clearly against the weight of evidence because of the missing and inaccurate information used to support the written warning. However, the Area Manager's decision was based, in part, on additional documents that supplied the missing and inaccurate information that was missing or inaccurate on the attachment to the Disciplinary Action Form. These documents were provided to both the Court and the Petitioner during the hearing. As described above, after the correct information was provided, the Petitioner still did not deny that the infractions occurred or make any additional arguments. Therefore, the Area Manager's decision is not clearly against the weight of evidence.

The Petitioner would like this Court to hold his supervisor, Evan Doxtater, accountable for mistakes the Petitioner believes are either the same or similar to the ones he made as the basis for his written warning. The Respondent claims, and the Court agrees, it is not the Court that would hold his supervisor accountable for such mistakes. It is the responsibility of Mr. Doxtater's supervisor to issue discipline, not the Court.

Conclusions of Law

1. Procedural irregularities were not exhibited during the appeal process that were harmful to the Petitioner.
2. The decision of the Area Manager was not clearly against the weight of the evidence.

Order

The decision of the Area Manager is upheld.

IT IS SO ORDERED.

By the authority vested in the Oneida Judiciary pursuant to Resolution 01-07-13-B of the General Tribal Council an Order signed on June 19, 2019.