

Oneida Tribal Judicial System

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ONEIDA TRIBAL JUDICIAL SYSTEM TRIAL COURT

**HVS Advertising-Marketing,
Petitioner**

v.

**Indian Preference Department,
Respondent**

Case No.: 12-TC-130

DECISION

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers; Jean Webster, Mary Adams and Leland Wigg-Ninham, presiding.

I. INTRODUCTION

This case arises out of a dispute over the alleged failure of the Indian Preference Department to correctly apply and implement the Oneida Tribe of Indians of Wisconsin Indian Preference Laws, found at Chapter 57 of the Tribe's ordinances. Petitioner, HVS Advertising-Marketing (HVS), alleges that preference was misapplied when it sought to win a media and marketing contract offered for bid by the Oneida Bingo and Casino. Based on the evidence and arguments presented during the two day trial, April 16-17, 2013, the Court found the Indian Preference Department failed to meet its duties and that violations of Chapter 57 had occurred; therefore a hearing on damages was held September 25, 2013.

As a result of that hearing, the Court awards the Petitioner \$850,514.65 in compensatory damages and attorney fees against the Respondent, Indian Preference Department. We deny Petitioner's request for punitive damages and civil forfeiture.

II. FINDINGS OF FACT

On September 24, 2013 a hearing was held to address the remedies and damages. Petitioner argues the damages to HVS have been enormous. The Petitioner is requesting compensatory damages and punitive damages. Petitioner summarizes and alleges compensatory damages for:

1. Revenue lost from contract that should have been awarded to Petitioner for fiscal years 2013 and 2014: \$826,344.50.
2. Over-staffing due to delay notifications. Cost for employee wages and benefits for the period of August 22, 2012 to October 22, 2012: \$45,797.67.
3. Overhead expenses that had to be reduced during the two month delay: \$10,015.98.
4. Salary and benefit reductions for remaining employees during the two month delay: \$7,289.18.
5. Staff time and out-of-pockets expenses incurred to prepare the complaint, pre-trial hearing prep, and trial prep: \$83,000.00.
6. Loss of potential new revenue and seek new sales due to the inability to hire a sales person and staff devoting their time to the case: \$36,000.00.
7. Attorney fees and expenses from October 2012 to April 2013: \$23,045.15.
8. Estimated attorney fees and expenses from May 2013 to September 2013: \$2,000.00.
9. Attorney fees and expenses-Paul Swanson for bankruptcy filing: \$1,125.00.
10. Civil Forfeiture for violations by Indian Preference Department: \$55,000.

The damages as alleged and presented by Petitioner were largely uncontested by Respondent. Therefore, we adopt the above as findings of fact. However, as we discuss below, not all of the losses by Petitioner were shown to have been caused by Respondent's actions. Therefore, we have limited Petitioner's damages to those which we found to be sufficiently caused by Respondent.

Petitioner further requests the Court to schedule a “Show Cause” hearing or the Court order the Respondent to file a petition against the Oneida Casino. Petitioner stated in the decision of the original hearing the Court found the Oneida Casino was largely responsible in that they did not apply preference when selecting the contractor; therefore they were in violation for failure to carry out and properly apply the functions under the Indian Preference law.

On November 4, 2013 the Court notified the parties of an extension of the decision and a final deliberation was scheduled for November 13, 2013; however, due to scheduling conflicts the final deliberation was moved to November 15, 2013.

III. ISSUES

1. Is the Petitioner entitled to receive compensatory and punitive damages, attorney fees, and civil forfeiture award?
2. Should the Court order a “Show Cause” hearing; ordering the Oneida Casino to appear before the Court or order the Respondent, Indian Preference to file a petition against Oneida Casino?

IV. ANALYSIS

1. Is the Petitioner entitled to receive compensatory and punitive damages, attorney fees and civil forfeitures?

Compensatory Damages -

Compensatory damage is a sum of money awarded as a result of a wrongful act, omission or negligence. The Court found the Respondent, Indian Preference Department, failed to carry out and properly apply the functions under the Indian Preference Law and failed to properly investigate the complaint filed by HVS which resulted in the Petitioner, HVS, being improperly denied the contract; therefore the Court finds the Petitioner is entitled to compensatory damages.

The Court examined Petitioner's requests and grant damages in the amount of \$850,514.65. The amount of damages is based on the lost revenue for the two years the contract should have been awarded to HVS. In addition the Court is awarding attorneys' fees for Attorney Green-Gretzinger and Attorney Swanson to HVS.

The Court is not convinced the other requests for damages are sufficiently related to the Respondent's violations. The overstaffing costs and benefits reductions due to delay would have been incurred even if HVS had been awarded the contract. The loss of revenue due to failure to hire a new sales person is too tenuously connected to Respondent's misconduct. The request for compensation for staff time is also denied.

Punitive Damages -

Punitive damages are a monetary award intended to punish the wrongdoer. Punitive damages are limited to when the party has acted willfully, maliciously or fraudulently. *See e.g., Quality Construction Management, Inc. et al. v. Oneida Seven Generations Corp. 05-TC-018, (9/21/2005).*

The Court found the Petitioner was contacted to submit an RFP and was selected to participate in the interview process. While Respondent failed to conduct a thorough investigation of the Petitioner's complaint, the Court is not convinced the Respondent's actions met its true definition.

Civil Forfeitures –

Petitioner is requesting a monetary award in the form of civil forfeiture. Petitioner alleges there are eleven (11) violations and is requesting a monetary amount of \$5,000 for each violation.

In Violations number 1-6, as noted on Attachment A, allege Respondent violated 57.11-2 of the Indian Preference Law by failing to monitor and enforce the 5% preference percentage across the board, refused to apply the 5% preference percentage to HVS total score, the Respondent became part of the selection process, allowing the Casino to develop a formula of weight rates that resulted in HVS receiving 50 points versus the 5% preference percentage across the board, and creating an irreconcilable conflict of interest as Respondent inserted themselves into the RFP Selection Process and in making themselves part of the Selection Team, Respondent is not able to carry out the investigation responsibilities objectively.

In violations 7 and 8, Respondent allegedly violated 57-14 and 57-14-3 of the Indian Preference Law as Respondent failed to conduct a full and fair investigation, and therefore, failed to refer the case to the Court for an original hearing.

In violation number 9, Respondent allegedly failed to create policies, procedures, and regulations to implement the Indian Preference Law and a policy to implement the 5% preference percentage "across the board."

In violation number 10, Petitioner claims unorthodox delays in the selection process and bringing in a non-selection team member to the interview.

In violation number 11, Respondent allegedly violated 57-14-2 of the Indian Preference Law by refusing to disclose information related to the investigation even after told to do so by the Court and after several discovery requests.

2. Should the Court order a “Show Cause” hearing ordering the Oneida Bingo and Casino to appear before the Court or order the Respondent, Indian Preference Department, to file a petition against Oneida Bingo and Casino?

A “Show Cause” hearing is an order of the Court to bring Oneida Bingo and Casino back as a party. We are reluctant to bring the Oneida Bingo and Casino back into the case for at least two reasons. First, the Oneida Bingo and Casino was dismissed as a party by agreement of all parties including the Petitioner. Second, it raises due process concerns if a party is brought back into the case in the damages phase when it had no part of the liability phase. In order to be fair, if the Oneida Bingo and Casino is brought back into the case, they would have to be given a chance to litigate the underlying merits. Given how far the case has progressed, the entire case would need to be re-heard; this would be time consuming and inefficient. The request for a “Show Cause” hearing against the Oneida Bingo and Casino is denied.

IV. CONCLUSION

Compensatory Damages -

Compensatory Damages shall be pursuant to the Rules of Civil Procedure, specifically Rule 18(C) and Rule 18(C)1).

1. Rule 18(C) states, “*Form of Decision: The trial court may issue decisions in the form of fines, orders, or penalties, which may include, but not be limited to:*”
2. Rule 18(C)1) states, “*Awarding monetary damages, including punitive damages, to be paid by the party found to be in violation of any trial law or regulation, to be the injured party;*”

The Court finds in favor of the Petitioner and compensatory damages shall be awarded, but only in part. Petitioner submitted to the Court, Exhibit 1 and Attachment A, date stamped September 25, 2013, and the Court awards the following damages to the Petitioner:

1. Revenue lost from contract for fiscal years 2013 and 2014 in the amount of \$826,344.50.
2. Attorney fees and expenses for Attorney Greene-Gretzinger from October 2012 to April 2013 in the amount of: \$23,045.15.
 - Attorney fees and expenses for May 2013 to September 25, 2013, Petitioner's shall submit the Attorney fees and expenses for the months of May 2013 to September 25, 2013 within 30 days of this decision and shall be incorporated into this order.
3. Attorney fees and expenses for Attorney Paul Swanson in the amount of \$1,125.00.

Payment of the compensatory damages shall be pursuant to the Rules of Civil Procedure, Rule 20 Enforce of Decisions, specifically Rule 20(A) which states in part: "*Time. The decision debtor (the party who owes some money or property to the other party) shall have sixty (60) days to complete payment of any monetary award or to make arrangements with the decision creditor (the party who is owed some money or property) for payment or installment payments. If the decision.....*"

Punitive Damages –

The Court does not find the Respondent, Indian Preference Department, acted willfully, maliciously or fraudulently. Punitive damages are denied.

Civil Forfeitures –

Forfeiture means to incur a penalty or to become liable for a payment of a sum of money, as a consequence of a certain act. Although the Court found the Respondent did not conduct a thorough investigation, the court is not convenience the Respondent acted willfully, maliciously or fraudently. Civil Forfeiture is denied.

V. DECISION

1. Compensatory damages are awarded to HVS from the Indian Preference Department in the amount of \$850,514.65.
 - Petitioner shall submit the final invoice for the Attorney Green-Gretzinger fees and expenses for the dates of May 2013 to September 25, 2013 within 30 days of this decision and shall be incorporated into this order.
2. Punitive damages are denied.
3. A civil forfeiture is denied.