

Oneida Tribal Judicial System

Onʌyote ʔ a-ka Tsiʔ Shakotiyaʔ Tolé hte

**ONEIDA TRIBAL JUDICIAL SYSTEM
TRIAL COURT**

**Oneida Personnel Commission,
Petitioner**

v.

**Human Resources Department,
Respondent**

Docket No: 08-TC-115

Date: May 1, 2009

Decision

This case has come before the Oneida Tribal Judicial System, Trial Court. Judicial Officers, Mary Adams, Jean M. Webster, and Stanley R. Webster, presiding.

I Background

On August 21, 2008 Petitioner, Oneida Personnel Commission, filed a complaint seeking Injunctive and Declaratory Relief against Respondent, Oneida Human Resources Department. Furthermore, Petitioner alleges the current Standard Operating Procedure addressing the use of previous Oneida employment history is invalid for two reasons: 1) the SOP exceeds Respondent's authority to create internal Standard Operating Procedures (SOP) and 2) the SOP denies both due process and equal protection of tribal law to employees and applicants. We find the SOP in question does exceed Respondent's authority but does not raise equal protection or due process concerns. Therefore, we fine in favor of Petitioner and grant the request for declaratory relief.

On December 17, 2008 Petitioner filed a Notice of Failure of Peacemaking Process and Request for Trial Schedule and requests the court to issue an Injunction directing Respondent to cease

and desist from using the Employee Verification Policy. Petitioner's request for an Injunction was denied. The case entered back into trial proceedings, due to failed Peacemaking efforts. A pre-trial hearing was scheduled for January 6, 2009.

At the January 6, 2009 pre-trial hearing, the parties requested the Court to schedule briefing and oral arguments on the following issues:

1. Does the Human Resources Department Employee Verification Standard Operating Procedure violate the rights of employees of the Oneida Tribe by subjecting them to a different standard of review of previous employment history than applicants from outside the Tribe?
2. Does HRD have the authority to create substantive Tribal law independent of the requirements of the APA?

On March 10, 2009 Oral Arguments were heard.

Petitioner's arguments:

Petitioner maintained Respondents' Standard Operating Procedures (SOP), Employee Verification Procedure (EVP) is substantive law and exceeds their authority. Petitioner claims the EVP affects employee rights and/or benefits and is therefore substantive law. Petitioner pointed out, substantive law differs from procedural law and substantive law can only be created by the Tribe's legislature in accordance with the Tribe's Constitution.

Petitioner contends according to OBC Resolution 4-13-90-A, which reads in part: "...the Oneida Personnel Commission be delegated the sole commission to generate personnel policies to be presented and recommended to the Oneida Business Committee to review, take formal action to approve, disapprove,...said policy recommendations." (Emphasis added)

Petitioner claims the EVP was developed by Respondent in 2003 and then came to the attention of Petitioner in 2007. Petitioner asserts their concern with the additional screening provisions the EVP contained, most importantly that it was an internal document for the benefit of supervisors making informed choices about who would be best for a particular position after the standard was applied and authorized employment interviews had been conducted. Petitioner

points out that the history of an applicant who has never worked for the Tribe would not be subjected to the same scrutiny as an applicant who had worked for the Tribe. Petitioner agrees that finding the best qualified applicant is a shared desired outcome, but the EVP has the potential to change from year to year or from applicant to applicant and the best way to ensure fairness is to submit the EVP through the Tribe's legislative process. Petitioner argues all applicants should be subjected to the same scrutiny of their employment history whether or not such history is with or outside of the Tribe.

Respondent's arguments:

Respondents argue, the EVP is a procedure that defines the Hiring Procedure in accordance with Oneida Policies and Procedures, III B 2f 1 a. "*Verify that all applications are complete, are accurate (through reference checks), and were submitted on time.*" Respondents claim they have stopped using the EVP since January 2009. Respondents assert they are revising the form and once the form is ready they will implement it once again.

II Analysis

The relevant facts are not in dispute. From testimony, the Employee Verification Procedure has changed over the years beginning with 2003. Petitioner assisted with some revisions beginning in 2005. Currently, the EVP form is under revision status; the Respondents are not using the form, but have plans to revise and seek approval from HRD to implement it again. The Standard Operating Procedure for the EVP form was approved on December 3, 2007 by Geraldine Danforth, HRD Manager. The EVP states, the "*Human Resource Representative will compile employment history for applicants in the hiring process.*" In contrast, the Oneida Policies and Procedures do not include procedures for compiling employment history. According to the Oneida Policies and Procedures, III B2f1a, the HRD is to ensure the application is accurate by completing "reference checks" only.

When creating and implementing SOPs, the Personnel Policies and Procedures limit the scope and extent of the SOPs. Sec VII of the Oneida Personnel Policies and Procedures states enterprises and programs may establish internal rules and regulations as long as the internal rules

“do not conflict with or take the place of Tribal Personnel Policies and Procedures.”

The issue is whether compiling employment history is the same as reference checks. The court found it is not the same. The court agrees with Petitioner, compiling employment history is not the same as reference checks. A reference check includes personal references and employment references and generally consists of contacting the references and determining if the contacts are legitimate. When an applicant who has never worked for the Tribe submits an application, they have the choice to include or omit various employers and personal references. Compiling an employment history differs because only Tribal employee records contain a detailed work history. This doesn't mean HRD cannot perform employee history checks, however that power is currently not included under the section Respondents refer to as “reference checks.” The court found the HRD's SOP is in conflict with the Oneida Personnel Policies and Procedures manual, specifically Sec. III.B.2.f.1.a.

Every corporation and enterprise wants the most qualified and skilled employee with a good work history. Both parties agreed. In addition, it is understandable that the EVP form would go through such a magnitude of revisions, so that it is in polished form. However, it's important to note that multiple revisions imply a different standard could be initiated at any time. Employees need to know what standard is used from year to year.

It is evident, this type of procedure falls within Resolution 4-13-90-A, that the Oneida Personnel Commission present recommendations of the personnel policies to the Oneida Business Committee to review, take formal action to approve, disapprove, change and/or amend.

The court disagrees with Petitioner's equal protection and due process arguments. If the Business Committee or General Tribal Council decide HRD should have the power to review an applicant's previous Oneida employment history, in general such a policy would not raise due process or equal protection concerns. Job applicants who worked previously for the Tribe are not similarly situated to those applicants who have not previously worked for the Tribe. Furthermore, job applicants do not have an entitlement to a job or vested property right which

would raise due process concerns.

III Decision

Pursuant to Sec. 1.9-1(a) of the Administrative Procedures Act, we declare that the Human Resources Department's SOP addressing employment history conflicts with the Oneida Personnel Policies and Procedure and is therefore invalid. The court declines to issue injunctive relief as there have not been facts presented where an applicant has shown the policy as applied to him/her actually resulted in damage or harm to the applicant

It is so ordered.