

# Oneida Appeals Commission

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## TRIAL COURT

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In Re the Removal of:

### FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

ONEIDA GAMING COMMISSION,

Petitioner,

Docket No.: 03-TC-285

Date: January 16, 2004

v.

LINDA DALLAS and

ROCHELLE POWLESS,

Respondents.

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### PROCEDURAL BACKGROUND

Respondents appeal an April 3, 2003 resolution to remove them as members of the Oneida Gaming Commission (hereinafter referred to as the "Commission"), an agency of the Oneida Tribe of Indians of Wisconsin (hereinafter referred to as the "Tribe"). Respondents commenced the present appeal by filing Motions in Opposition of their Removal. Said motions were filed with the Oneida Appeals Commission and asserted claims against the Oneida Gaming Commission. In their motions, the respondents alleged that there was insufficient evidence to support their removal; that the facts did not support a finding that either violated the Tribe's code of ethics; and that the Gaming Commission violated their rights to due process by failing to conduct an impartial, fact-finding hearing.

conduct an impartial, fact-finding hearing.

The Oneida Appeals Commission reviewed the motions for relief, determined that the Gaming Commission did not conduct a hearing, and on June 20, 2003, ordered an evidentiary hearing by the trial division of the Oneida Appeals Commission.

The trial court consisted of two Judges appointed *pro tem*: Judge Stephan Grochowski and Judge Kimberly Vele and one Oneida Appeals Commissioner, Kirby Metoxen. Attorney Timothy Blank represented the respondents and attorneys Joseph F. Halloran and Shawn R. Frank of Jacobson, Buffalo, Schoessler and Magnuson, Ltd. represented the petitioner.

The trial court conducted a two-day trial, commencing December 1, 2003, considered the testimony of numerous witnesses for both parties, and admitted into evidence numerous exhibits for both parties. Based on the trial court's evaluation of the evidence, including the credibility of the witnesses and the weight of the evidence, the court finds as follows:

#### **FACTS**

Respondents, Linda Dallas and Rochelle Powless, are enrolled members of the Oneida Tribe of Indians of Wisconsin. Respondent Powless was elected to the Oneida Gaming Commission approximately seven years ago, and respondent, Dallas was first elected to that Commission in August 2001. The Gaming Commission is the authorized agency of the Oneida Tribe of Indians of Wisconsin to oversee the operation of the Tribe's gaming enterprises. As such, the Commissioners are privy to highly confidential financial and regulatory material and are required to take an oath of office that mandates each member to manage such information with the "strictest confidentiality."

In June, 2002, Commissioners, Oscar Schuyler, Louise Cornelius, Linda Dallas, and

Rochelle Powless were assigned the duty of preparing the Facility Licensing Report, which is a comprehensive investigatory report on the Tribe's gaming operation. All of the Gaming Commissioners understood that this report contains highly confidential material. The Commission completed the Facility Licensing Report and provisionally approved the same on December 6, 2002. Commissioners Rochelle Powless and Linda Dallas offered to improve the presentation of the report by creating illustrative pie charts and placing the entire report in protective covers.

On January 6, 2003, Commissioners Powless and Dallas worked overtime to finish the report so that it could be finally approved and distributed at the Gaming Commission's January 7, 2003 meeting. They both worked in a secure part of the gaming office that normally requires a pass to enter. Commissioner Dallas worked in her office on the pie charts, and Commissioner Powless worked in the conference room to insert the report pages in protective sheets. Commissioner Powless spread the report out over several conference tables and began assembling the report. Commissioner Dallas worked on the pie charts in her office and walked in and out of the conference room several times to consult with Ms. Powless on the charts' color, size etc.

At approximately 4:25 p.m., before the regularly scheduled close of the business day, Cathy Metoxen, an enrolled member of the Oneida Tribe, appeared at the front reception desk by the background investigation offices. Ms. Metoxen requested the receptionist to page Commissioner Dallas who was located in the Gaming Commission Offices located in a more secure part of the building. The receptionist called Ms. Dallas to the front office to meet Ms. Metoxen. Ms. Metoxen requested the use of a telephone. Commissioner Dallas escorted Ms.

Sometime at approximately 5:00 p.m. that same day, Ms. Metoxen entered the secure part of the gaming office and began chatting with Commissioner Powless who was in the conference room assembling the Facility Licensing Report. This is the same conference room that non-employees are asked to use when in the secure section of the gaming offices. Ms. Metoxen noticed that Commissioner Powless was having difficulty inserting the report's pages in the protective sheets and offered to assist Commissioner Powless. Commissioner Powless declined Ms. Metoxen's offer but continued to casually chat with Ms. Metoxen who stood in the conference room door and eventually sat in a chair in the conference room. Commissioner Powless never allowed Ms. Metoxen to read, copy or get close to the Facility Licensing Report.

At some point while Ms. Metoxen was in the conference room, Commissioner Dallas handed Ms. Metoxen a report Commissioner Dallas prepared to present to the Tribal Business Committee later that evening. Commissioner Dallas had prepared a three page written statement in opposition to the Tribe's proposed budget cuts in education. Both Commissioner Dallas and Ms. Metoxen planned on attending the general council meeting scheduled later that evening to publicly comment on the proposed cuts. Commissioner Dallas gave the statement to Ms. Metoxen to review prior to the meeting and requested Ms. Metoxen to put the report in sheet protectors. Neither Commissioners Dallas or Powless requested that Ms. Metoxen leave due to the sensitivity of the material being handled in the conference room.

At least five other individuals were present in the secure part of the gaming offices along with Commissioners Powless and Dallas and Ms. Metoxen. The Chairperson of the Gaming Commission, Louise Cornelius, was also working after hours and noticed Commissioners Dallas and Powless working on the Facility Licensing Report. Ms. Cornelius knew what Commissioners Dallas and Powless were working on. Commissioner Cornelius noticed Ms.

Metoxen sitting in a chair in the conference room with a paper in her hand. Commissioner Cornelius did not ask Ms. Metoxen to leave the office's secure area. Another Gaming Commissioner, Oscar Schuyler, also noticed Ms. Metoxen in the conference room after returning to his office to retrieve some paperwork. While on his way to his office, he stopped in the conference doorway, said hello and then proceeded out of the building. He testified he understood that Commissioner Powless was working on the Facility Licensing Report, but said nothing to Ms. Metoxen before leaving the building as he was in a hurry to get back to his family who were waiting in the car. Finally, at least two other non-Commission employees were also present while Commissioners Dallas and Powless worked on the Facility Licensing Report. Tonya Boucher, the Administrative Assistant observed Commissioner Powless and Ms. Metoxen in the conference room stuffing papers she assumed was the Facility Licensing Report. Jim Van Stippen, a Gaming Compliance Officer noticed Ms. Metoxen in the conference room but did not have an opportunity to see what she was doing. Neither Ms. Boucher nor Mr. Van Stippen inquired about Ms. Metoxen's presence or requested her to leave the building.

Despite having not said anything to Ms. Metoxen or Commissioners Dallas and Powless, Commissioner Cornelius informed the other Gaming Commissioners of her observations, requested a copy of the security videotape taken that day, and requested an independent investigation regarding a potential breach of confidentiality. On January 27, 2003, the Gaming Commission held a special meeting to discuss Commissioner Cornelius' concerns and ordered an independent investigation. The Commission contracted with Attorney's Process and Investigation Services, Inc. (hereinafter referred to as "API") to conduct the investigation and determine whether Commissioners Powless and Dallas violated any Code of Ethics, Gaming Ordinances or Privacy/Confidentiality guidelines. API conducted its investigation and

concluded that Ms. Metoxen was present during the assembly of the Facility Licensing Report, that she was not authorized to be present, and that Commissioners Dallas and Powless violated the Tribe's Code of Ethics, the Gaming Ordinance or Privacy/Confidentiality guidelines.

Using the API report's findings and conclusions, the Gaming Commission, on April 3, 2003 held a meeting to consider resolutions calling for the removal of Commissioners Dallas and Powless from the Gaming Commission. Five of the seven-member commission voted in favor of Commissioners Dallas and Powless' removal from the Commission.

On April 8, 2003, Commissioners Dallas and Powless filed a written request with the Gaming Commission urging its reconsideration of the removal ordinances. The Commission reconvened, reconsidered the evidence, and reaffirmed its prior decision.

### **Jurisdiction and Standards for Removal**

The Oneida Tribe of Indians of Wisconsin is a federally recognized Tribe organized under the Indian Reorganization Act of 1934. 25 U.S.C. s. 476. As such, the Tribe is a separate sovereign that retains its inherent authority to choose its own form of government. Santa Clara Pueblo v. Martinez et al, 436 U.S. 49, 56 (1978) citing Worcester v. Georgia, 6 Pet. 515, 559 (1832). Subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves undermines the Tribe's authority and infringes on the Tribe's right to be self-governing. See Fisher v. District Court, 424 U.S. 382, 387-388 (1976), Williams v. Lee 358 U.S. 217, 223 (1959). Self governance includes the Tribe's exclusive right to interpret its own Constitution, By-laws, ordinances and other Tribal laws; to determine the composition of the Council or other governing body; and to resolve employment disputes involving employees of the Tribe's government. National Farmers Union Insurance v. Crow Tribe of Indians et.al, 471 U.S. 845 (1985), Bowen v. Doyle, 230 F. 3d 525 (2ndCir. 2000).

This case involves a review of the Oneida Tribe's Gaming Commission's resolutions to remove two enrolled Tribal members from the Tribe's Gaming Commission for alleged violations of the Tribe's Code of Ethics, Oaths of Office and policies regarding the disclosure of confidential information. The Tribe's right to determine the validity of the alleged violations forming the grounds for the removal resolutions is primary and is exclusive of all other forums.

Removal of Commissioners is authorized by the Tribe's Removal Ordinance. Article IV; section 1 states as follows:

All members of agencies shall be subject to removal from membership in an agency only under this law. A subcommittee of the Oneida Appeals Commission shall hear removal hearings.

Section 4-2(a) of that Ordinance provides a hearing process for removal as follows:

All removals shall begin by resolutions passed by two-thirds of the full membership of any agency provided that the author is noted within the minutes of a duly called special or regular meeting. Provided further, that Resolutions calling for removal must contain the following minimum information: sufficient facts describing the reason removal is called for, and legal basis upon which removal is requested; and shall be considered the final judgment from the Original Hearing Body.

According to Section 4-3 of the Tribe's Procedures for reviewing Removal Resolutions, the review is limited to the resolution, any supporting documents to that resolution, the brief in opposition to the resolution and any documentation in support of that opposition. Only the accused is permitted to request oral testimony. *Id.* at Section 4-6.

Both the Removal Ordinance and the Appeals Commission Rules are silent on what standard of review is used when the subcommittee of the Appeals Commission hears the matter. Because of the absence of a clear standard, the parties were invited to fully brief what standard of review and burden of proof would apply in this case. Following the briefing, this court decided as

a matter of public policy that the party seeking removal would have the burden of proof, and that the evidence supporting the removal should be clear and convincing. Because Tribal Board and/or Committee members are either elected by the general tribal membership or appointed by the tribally elected governing officials, those Board or Committee members should not be removed unless the evidence is clear and convincing that a violation of tribal law occurred. Even if this Court finds a violation of tribal law, the remedy does not necessarily have to be removal. Section 4.4-7(b)(1)-(3) authorizes the Oneida Appeals Commission Subcommittee hearing body to either affirm or reject the removal request, or suspend the accused with or without pay in case of paid positions.

### **Argument and Decision**

The Oneida Gaming Commission argues that the respondents should be removed from the Gaming Commission because they breached their duty to protect privileged information. Specifically, the Gaming Commission claims that the respondents failed to comply with the Tribe's policies governing Board and Committee members. The standards to which the Gaming Commission refers are set forth in the Tribe's Comprehensive Policy Governing Boards, Committee and Commissions. Section XII, 12-7(d) of those policy states as follows:

Officials and their administrative staff shall protect the privileged information to which they have access in the course of official duties, and be prudent in the use of information acquired in the course of their duties.

Further, all government officials are bound by the Tribe's Code of Ethics. Section. 3-1, Oneida Tribe Code of Ethics. Section 32 of the Tribe's Ethics Code recognizes that "the concept of ethical conduct encompasses actions as well as inaction, and represents an area of self regulation." Further, it is the Tribe's policy for its government officials to "demonstrate the



highest standards of personal integrity, truthfulness, honest, (sic) and fortitude in all public activities." Id. Finally, Section 3-3 of the Oneida Tribe's Code of Ethics requires the following:

Government officials and their administrative staff shall protect the privileged information to which they have access in the course of official duties, and be prudent in the use of information acquired in the course of their duties. Further, they should not use confidential information for any personal gain, or in a manner, which would be detrimental to the welfare of the employer.

The Gaming Commission bases its decision to remove the respondents from office on the grounds that the respondents allowed an unauthorized individual access to the highly confidential Facility Licensing Report and therefore failed to protect privileged information obtained in the course of their official duties.

The respondents admit that the Facility Licensing Report is a highly confidential report and each acknowledges that Ms. Metoxen was present during the assembly process of that report. Each denies disclosure of any information in that document to Ms. Metoxen and each denies that Ms. Metoxen handled any of the report or was left with the report without supervision. Because the information contained in the report was not disclosed, the respondents argue that they did not breach their oath to protect confidential material. Further, they argue that other Gaming Commissioners were present, understood the confidential nature of the material being assembled, and did nothing to remove Ms. Metoxen from the offices. They argue that those Commissioners are just as culpable and not being held accountable for their like failure to protect privileged information.

By taking the oath of office, all Gaming Commissioners are required to fulfill their job responsibilities with the strictest confidentiality. Taking the oath creates an assured expectation that the Oneida Tribe's gaming business is managed in strict confidence. Any such business

information clearly is not intended for public disclosure. Thus, the Facility Licensing Report, which contained highly confidential information, required those who had the care, control or supervision over that document to rigorously protect the privacy of its contents. Presumably, those individuals with the most direct control would have the highest duty to protect the information. But even those with less direct control over the privileged material have an affirmative duty to protect the privacy of that information.

In the instant case, it is unquestionable that Commissioners Powless and Dallas, working in their official capacities as Gaming Commissioners, had direct control over the Facility Licensing Report; they were revising statistics used in the report and assembling it for limited distribution to the Commission members. As such, both had a *strict* obligation to manage the information very carefully. Allowing the report to be assembled in the presence of a non-employee was careless and exposed a highly confidential document to unreasonable risk of exposure. The completion of the report was not done privately so that the possibility of having the information displayed, reviewed or exposed was minimized. Instead, Commissioners Powless and Dallas continued to actively work on highly confidential material in the direct presence of Ms. Metoxen, a non-employee. Although the record does not indicate that Ms. Metoxen actually read or viewed any of the information contained in the report, the mere risk of exposure is clearly sufficient to constitute a violation of the ethics code requiring the strict protection of that information.

Likewise, this *strict duty to protect* naturally extends to those with whom the information is entrusted, even if those individuals are not actively managing, supervising or controlling the information. In this case, all of the Gaming Commissioners had access to the Facility Licensing Report; all of the Commissioners were aware of the highly confidential nature of the report; and

all of the Commissioners had a strict obligation to protect the privacy of that report. Yet despite the same obligation to protect privileged information, Commissioners Cornelius and Schuyler chose not to act. Both witnessed Ms. Metoxen in the conference room. They also knew that Commissioners Powless and Dallas were actively working on the Facility Licensing Report, and each acknowledged the highly confidential nature of that report. Neither chose to question Commissioners Powless or Dallas, neither questioned Ms. Metoxen, and neither requested Ms. Metoxen to leave the secure area of the building. Such inaction is inconsistent with the strict affirmative duty to protect the privileged information.

### **ORDER**

We conclude that the evidence clearly and convincingly establishes that Commissioners Dallas and Powless violated the Tribe's Code of Ethics that requires strict protection of confidential material. However, because other Gaming Commissioners also failed to exercise reasonable care with respect to that same information despite being aware of the highly confidential nature of the material, we decline to affirm the Commission's request for removal. Instead we find that suspension is the more appropriate sanction and that the term of suspension should be proportionate to the level of control each had over the privileged information.

Since Commissioner Powless sat in the same conference room as Ms. Metoxen, she had the most control and is therefore the most culpable. We recommend a suspension from office for ninety (90) days.

Since Commissioner Dallas actively worked on a portion of the report primarily in her office and not the conference room where Ms. Metoxen was seated, she had less control and is therefore less culpable. We recommend a suspension from office for sixty (60) days.