

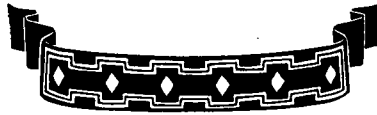
Oneida Appeals Commission

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Trial Court

Lisa Benson,
Petitioner

Docket No. 04-TC-012

vs.

Oneida Human Resources Department,
Respondent

Date: May 12, 2004

Final Decision

This case has come before the Oneida Appeals Commission, Trial Court. Judicial Officers, Mary Adams, Janice McLester, and Leland Wigg-Ninham presiding.

Background

On April 5, 2004 the Petitioner, Lisa Benson, filed a motion for an Injunction against the Respondent, Oneida Human Resources Department to place a stay on a position to stop the hiring process in order for the Petitioner to appeal her personnel file. On April 13, 2004 a hearing was scheduled to discuss the Motion for an Injunction. The court denied the Motion for an Injunction. The Petitioner failed to convince the court that she would suffer irreparable injury if a stay was not placed on the hiring process for the position she was seeking.¹ The parties agreed that the Petitioner's personnel file is the principle issue.

¹ Rules of Civil Procedure, Rule 3 (E) 2: Grounds for Injunction: When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the party seeking injunctive relief;

The Petitioner was denied employment with the Oneida Tribe of Wisconsin due to two (2) infractions in her personnel file. The Respondent screened out her application, claiming the Petitioner is not bondable with the Tribe's insurance policy.

Petitioner applied for the Clerk of Courts position at Oneida Appeals Commission. On March 16, 2004 Petitioner received a memo from Respondent stating she was ineligible for the Clerk of Courts position. The memo indicated that any questions should be directed to Mr. Kendall Barton, Director of Backgrounds. At the hearing, Petitioner submitted exhibit #1, affirming that she called for Kendall Barton on March 18, 2004 and April 1, 2004 in attempts to meet with him regarding her ineligibility status.

On April 8, 2004 Respondent filed a Motion to Dismiss with prejudice against Petitioner's Motion for an Injunction. Respondent claims the reason for the Petitioner's Motion for an Injunction is moot. The Clerk of Courts position is placed temporarily on hold until after the hearing. Petitioner asserts they did not receive the Motion to Dismiss but received the Answer to the Motion for an Injunction. Respondent could not provide the court with a registered mailing receipt for the Motion to Dismiss. The court called a recess so that Petitioner had time to look over the Motion to Dismiss.

The court denied the Motion for an Injunction. According to Rules of Civil Procedure, Rule 31, Grounds for Injunction, Petitioner had not provided enough information to establish a legal principle or legal law preventing the hiring of the position. Parties decided that the principle issue is Petitioner's personnel file, whether she is eligible for employment. Both parties agreed to argue that issue. The court ordered additional documentation supporting their positions on Petitioner's personnel file.

Issue

Has Respondent properly found the Petitioner is not bondable under the Tribe's bonding policy?

Analysis

On January 17, 2001, the Petitioner was issued a disciplinary notice under the Personnel Policies and Procedures, V.D.4(J) "Failure to exercise proper judgement" and received a written warning. The written warning was for the Petitioner's action in providing false information to an insurance company. The insurance company declined to press charges against the Petitioner. Petitioner did not appeal the written warning. According to the Investigation Report dated January 1998, the Petitioner's actions resembled a fraud violation. However, the supervisor only issued a written warning. Approximately, three years later, Respondent now claims the written warning "*Failure to exercise proper judgement*" is an act of fraud. Respondent claims that the reason Petitioner was not charged with fraud is because the Personnel Policies and Procedures did not include fraud as a violation at the time. This court disagrees, the Oneida Business Committee took action to approve, Section V.D.III use of Property (e) to include "defrauding" on December 2, 1988.²

On the face of the first disciplinary action, Petitioner was charged with failure to exercise proper judgement. While Petitioner's action may appear to be a fraudulent, her supervisor made the decision to issue a written warning. The supervisor had the chance to charge Petitioner with fraud. No one questioned the supervisor's rationale or decision in 2001. It is now too late to reinterpret or second guess the supervisor's decision.

The supervisor chose to charge Petitioner with a lesser charge. Petitioner argues the written warning did not include *fraud*. The Petitioner further argues, since there was no charge of fraud, she decided to not challenge the lesser charge. A charge of fraud is a serious offense. If an employee is charged with fraud, then that employee should be fully aware of a fraud charge. Respondent failed to persuade this court that the Petitioner's written warning, January 17, 2001

². Theft of property shall include theft, embezzlement, cheating, defrauding, pilfering, robbery, extortion, racketeering, swindling or any of these actions, or conspiracy to commit such actions with Tribal employees or other persons against the Tribe, its guests, employees, members, customers and/or clients while on or about Tribal premises. (S/T)

was for fraud. The Tribe can not use the written warning as a fraud accusation. The written warning for failure to exercise proper judgement shall remain in her personnel file.

Respondent argues the second infraction contained in Petitioner's personnel file is for a dishonest act which resulted in her termination. Petitioner was charged for "*Unauthorized use of Tribal keys*" by the Human Resources Department and was ultimately terminated. Petitioner appealed that decision to the Oneida Personnel Commission. The Oneida Personnel Commission upheld the termination in their decision Lisa Benson v. Geraldine Danforth, 10/5/01.

The question here, does a charge of unauthorized entry cause a person to be ineligible for employment with the Oneida Tribe of Wisconsin? The Oneida Tribe entered into a contractual agreement with CUBB (Federal Insurance Company) on August 01, 1994, hereafter known as the bonding company. The bonding company provides insurance coverage for losses caused by employees. According to the Executive Protection Policy of the bonding company's terms and conditions, Exclusions 7(c) the policy does not provide coverage for employees that have committed act(s) of theft, fraud or dishonesty.³

Is the Petitioner ineligible for employment? The Oneida Personnel Commission upheld the decision to terminate Petitioner in the Benson case. The Petitioner's termination was not based on her ability or inability to be bonded. The Personnel Commission found that the Petitioner violated the Oneida Personnel Policy and Procedures for unauthorized use of Tribal keys. The Petitioner filed an appeal with the Oneida Appeals Commission. However, due to an untimely filing, her appeal was dismissed. According to the Tribe's bonding policy, dishonesty is not defined. To get a clear understanding of dishonesty, Black's Law Dictionary, 6th edition, is referenced,

³. Coverage under Insuring Clause 1 of this coverage section does not apply to: (c) loss caused by an Employee if an elected or appointed officer of the Insured possessed at any time knowledge of any act or acts of Theft, fraud or dishonesty committed by such Employee: (1) in the service of the Insured or otherwise during the term of employment by the Insured,

Dishonesty; Disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity.

Are all acts of dishonesty grounds for ineligibility for employment based on bondability. If an employee calls in and claims they are sick, when they are not, is this enough to justify dishonesty? Is Petitioner's charge of unauthorized use of Tribal keys enough to justify a dishonest act? Respondent claims that Backgrounds Department has the authority to determine whether a person is bondable based on that person's personnel file. The Director of Backgrounds Department determined the Petitioner was not bondable based on the decision of the Oneida Personnel Commission that found the Petitioner was appropriately terminated. The Petitioner was terminated due to her unauthorized entry into an office. Respondent further contends that the Petitioner's unauthorized entry into a locked Oneida Gaming Commission office and removal of confidential documents from that office is a dishonest act. Backgrounds Department decided the Petitioner's dishonest act made her ineligible for bonding under the Tribe's bonding policy.

At this point, the court is limited by the decision of the Oneida Personnel Commission. The Petitioner's termination case cannot be re-adjudicated. The Oneida Personnel Commission found that the Petitioner violated the provision of the Oneida Personnel Policies and Procedures and that violation warranted termination. The Petitioner was afforded the right to appeal. The appeal was dismissed.

Is the charge, unauthorized use of Tribal keys, a dishonest act? The Petitioner argues that a violation of unauthorized use of Tribal keys is not a dishonest act. Petitioner bears the burden of proof that her unauthorized use of Tribal keys is not a dishonest act. In doing so, Petitioner must prove that Respondent's reasoning is faulty. Respondent's responsibility is to prove that their reasoning is valid. Petitioner claims the decision to deny Petitioner's application was not made by the Backgrounds Department but by Lisa Duff, Human Resources Specialist. Petitioner claims Ms. Duff does not have the right to determine her ineligibility, which is why she attempted to contact Mr. Barton. Petitioner asserts Mr. Barton, Director of Backgrounds did not return her calls.

Respondent asserts that the Backgrounds Department gathers information, criminal, education and employment, on applicants or prospective employees of the Oneida Tribe to ensure that they are eligible for employment. In summary, Backgrounds Department determines if an applicant is bondable based on their history. The Investigators utilize the Wisconsin state statutes to categorize convictions and compare those conviction to the bonding policy. In essence, the Backgrounds Department is considered the experts in their field and most familiar with the bonding company.

Respondent argues that the Benson decision charges the Petitioner with unauthorized use of Tribal keys. Respondent argues that the circumstances in this case, caused the termination of Petitioner for *unauthorized use of Tribal keys*, which makes her not bondable under the Tribe's bonding policy.

Petitioner argues that she was not charged with a dishonest act, and that nowhere in her disciplinary notice is a charge of a dishonest act. In the Petitioner's brief, dated April 19, 2004, the Petitioner reargues the Benson case and requests the court to overturn the Respondent's determination that found the Petitioner "ineligible for employment". Again, the court cannot re-adjudicate the findings of an original hearing body.

The difference in the Petitioner's second violation, is that this case went through the judicial process. Petitioner was charged with a violation and the charge was upheld. Petitioner was charged with a dishonest act. The bonding company determined that a dishonest act is not bondable.

The Tribe first entered into a contract with this bonding company in 1994. The terms and conditions may need to be revised. While the Tribe must give deference to its bonding company there are many positions within the Casino, Governmental, Legislative and Judicial that differ in terms of responsibilities from maintenance to executive. Once an employee is terminated for violating terms in the bonding policy, they suffer a loss plus, they are never to be employed by

the tribe, ever again. Is this excessive and is this what the Oneida membership had in mind when it endorsed the bonding policy?

Decision

Based on the arguments set forth, the court finds that the Petitioner's act of entering into an unauthorized area without permission is an act of dishonesty. Therefore, the Petitioner is not eligible for employment under the Tribe's current bonding policy.

By the authority vested in the Oneida Appeals Commission pursuant to Resolution 8-19-91A of the General Tribal Council it is so held on this 12th day of May 2004, in the matter of Lisa Benson vs. Oneida Human Resources Department, Docket No. 04-TC-012.

Mary Adams

Mary Adams, Lead Judicial Officer

Janice McLester

Janice McLester, Judicial Officer

Leland Wigg-Ninham

Leland Wigg-Ninham, Judicial Officer