

COURT OF APPEALS

Deborah Thundercloud and
Jacqueline Smith,

Appellants,

v.

Cheyenne J. King,

Respondent.

Case No.: 20-AC-004

Date: June 1, 2021

FINAL DECISION

This matter has come before Appellate Judges Chad Hendricks, Jean Webster Pro Tempore, and Leland Wigg-Ninham.

JURISDICTION

The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(1) of the Oneida Judiciary Law which gives this Court exclusive jurisdiction to review appeals of final orders, sentences and judgments of the Trial Court.

PROCEDURAL HISTORY

This is an employment matter stemming from an appeal of a decision of the Oneida Trial Court (hereinafter “TC”), which overturned the termination of Cheyanne King (hereinafter “King”). King’s termination was initiated by her supervisor, Jacqueline Smith (hereinafter “Smith”) and upheld by the Area Manager, Deborah Thundercloud (hereinafter “Thundercloud”).

BACKGROUND

On November 25, 2019, King was terminated by Smith for violating several policies within the Oneida Personnel Policies and Procedures Manual (hereinafter “OPPP Manual”) including Work Performance, Negligence in the Performance of Assigned Duties, Unauthorized or Improper Use of Oneida Nation Property or Equipment, and Theft of Property. Smith also listed violations of

Oneida's Code of Ethics and Oneida's Conflict of Interest laws as reasons for terminating King. King filed an employee grievance with the Area Manager, Thundercloud, on December 11, 2019. On January 3, 2020, Thundercloud upheld King's termination. King filed her Employee Grievance Complaint with the TC on July 17, 2020.

The TC accepted King's appeal and held a telephonic pre-trial hearing on August 17, 2020. During the hearing, the TC judge explained the purpose of the hearing was to determine if there was any new evidence and to seek additional clarification. Only King as Petitioner and Smith as Respondent appeared at the hearing since Thundercloud was not yet a party to the case. At the pre-trial hearing, the judge specifically asked King if there were any other documents that she felt should be a part of the record, to which she replied, "[t]he consumer file." He then asked the parties if there were any objections to him ordering the production of the consumer file. Neither party objected.

On September 2, 2020, Smith brought a motion to call Thundercloud as a witness at the final hearing scheduled on September 22, 2020 since she was the Area Manager who upheld King's termination. The TC instead interpreted the request as a motion to add Thundercloud as a respondent to the case. Thus, the TC denied Smith's motion to call Thundercloud as a witness and added Thundercloud as party to the case.

During the final hearing, Smith and Thundercloud motioned the TC to introduce evidence they used in deciding whether to terminate King when they realized it was not in the TC's possession. The TC denied this motion. In its decision, the TC overturned King's termination and reinstated her to lay-off status. The TC's reasoning was that there were procedural irregularities exhibited during the appeal process that were harmful to King and the decision of Thundercloud to uphold King's termination was clearly against the weight of evidence. Throughout his opinion, the TC judge stated numerous times that Thundercloud had failed to submit documentation used in determining King's termination to HRD. This documentation included the Oneida Vocational Rehab Handbook (hereinafter "VR Handbook"), documentation of an alleged close friendship, and a Conflict of Interest Form signed by King. Furthermore, the TC judge stated that Thundercloud and Smith failed to provide King with the documentation as required in the OPPP Manual.

Thundercloud and Smith filed an appeal of the TC's decision on October 28, 2020. We accepted their appeal on November 25, 2020. In their appeal, Thundercloud and Smith allege the TC: 1) Denied them a meaningful opportunity to be heard, 2) Incorrectly placed the evidentiary burden on them instead of King, and 3) Issued a decision against the weight of the evidence. We agree. For the reasons explained below, the decision of the TC is reversed, and this matter is remanded to the TC for further proceedings consistent with this decision.

ISSUE PRESENTED

Whether the TC abused its discretion when it denied the Appellants an opportunity to present their evidence?

ANALYSIS

We focus on the primary issue of whether the TC abused its discretion when it denied Thundercloud and Smith a chance to present evidence. The abuse of discretion standard is the appropriate standard to use when reviewing evidentiary rulings of a lower court. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). When an appellate court reviews a decision for abuse of discretion, it is predisposed to affirm the decision. *See Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 828 (Fed. Cir. 1989). This Court recognizes the original hearing body has superior knowledge of the issues, the record, the proceedings, and the people. Only when a court issues a decision that is not justified by evidence and is clearly against logic, can an appellate court reverse a lower court's decision for an abuse of discretion.

In this case, both the Appellants and Respondent appeared *pro se* at the TC hearings. With the large number of self-represented litigants in tribal courts, it is understandably a challenge for judges to take a more active role in their cases at the same time as maintaining neutrality. Courts at the state and federal level present many challenges for self-represented litigants. However, with the large percentage of litigants representing themselves, tribal court judges should be well prepared to play a far more active role in helping litigants through the procedural process of hearings. To decide cases fairly where one or both parties appear *pro se*, judges have to ask questions and modify procedure to ensure all the relevant facts are brought out. *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When*

Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications (2004) 17 Georgetown Journal of Legal Ethics 423. Tribal court judges should always make reasonable efforts consistent with the law to facilitate the ability of self-represented litigants to fairly be heard. This includes explaining how evidence works and how it can be admitted into court. *See id.*

In this instance, the TC judge took the type of active role described above when he asked King at the pretrial hearing if she believed the consumer file was an important piece of evidence she needed to present her case. After King answered “yes,” the TC judge suggested the consumer file should be a part of the record. The judge ordered its production without any objection from the parties. However, in his decision, the TC judge stated that King requested the production of a consumer file. It is apparent from a review of the record that this is inaccurate. The TC judge asked Smith leading questions about whether she thought the consumer file was important to the presentation of her case. He then suggested that the file should be added to the record and asked both parties if they objected.

When it came time to question Smith, the TC judge did not afford her the same opportunity to present evidence, such as the VR Handbook, at the pretrial hearing. When Smith was questioned by the judge, she alluded to several documents she used in deciding whether to terminate King that the TC judge knew were not a part of the record. Yet, the judge never afforded Smith the same opportunity to present these documents as evidence that he did with King introducing the consumer file. While this Court has no issue with the TC judge intervening to help King introduce evidence pertinent to her case, he must afford the same opportunity to each party and cannot do it at the expense of appearing biased. *Edwards v. Bercier*, 10 CCAR 18 (2009) (Even an appearance of bias towards one party over another violates tenets of procedural due process.) *See also Oneida Tribal Judiciary Canons of Judicial Conduct* §802 Canon #1.

At the final hearing the TC judge then wrongly blamed Smith and Thundercloud for failing to produce several documents they used in terminating Smith. The OPPP Manual §V.D.6.c(1) Collection of Information states:

The Human Resources Department shall collect all information the Area Manager used in making the decision to uphold the disciplinary action.

Section V.D.6.d(1) Review of the Complaint states:

The Human Resources Department shall provide the information obtained to the Oneida Personnel Commission members selected to serve as the hearing body for the complaint, and the Oneida Personnel Commissioners shall review all the information submitted by the Petitioner and the Human Resources Department to determine if one or both conditions exist.

Sections V.D.6.(c) and (d) make it clear that it is HRD's responsibility to collect the information and forward it to the Personnel Commission, or in this case, the TC. The OPPP Manual specifically states the HRD "shall collect all information . . ." and "shall provide the information obtained . . ." This means the HRD "[h]as a duty to" or "is required to" collect all information and forward it to the TC. BLACK'S LAW DICTIONARY 1653 (11th ed. 2019). There is nothing in the OPPP Manual that states it was Thundercloud's duty as Area Manager to provide the information she used in upholding the disciplinary action to HRD or the TC.

Even if it was Thundercloud's duty to provide the documentation she used in upholding King's discipline to HRD and/or the TC, the TC judge should have given her the opportunity to do so. The Oneida Rules of Civil Procedure §803.4-4 states:

At every stage of the proceeding, the Court may disregard any technical error or defect in a failure to comply with this Law as long as the error or noncompliance does not affect the substantive rights of the parties, particularly those not represented by an attorney.

Not only were Thundercloud and Smith not represented by an attorney, Thundercloud did not take part in the pretrial hearing since she was not a party at the time it was held. Smith did request that Thundercloud be admitted as a witness at trial so she can introduce evidence she used to uphold the termination. However, the TC judge denied her request and instead added Thundercloud as a party. At no time was Thundercloud allowed to introduce any evidence at all. Furthermore, the correct procedure for forwarding documents from HRD to the TC has not even been established. Although the responsibility to hear employee grievance complaints has now transferred to the TC, officially there is nothing in the OPPP that specifically states what documents HRD should forward to the TC, whose responsibility it is, and the procedure for how and when those documents should be forwarded to the TC.

King's rights would not have been affected in any way by allowing Smith and Thundercloud to introduce the documents they used in terminating her as evidence. In his decision, the TC judge stated that King was unable to adequately defend herself because Smith and Thundercloud did not provide her with information as required in the OPPP Manual. There were exceptional circumstances that contributed to the difficulty King had in accessing her file and work documents, none of which were the fault of Smith and Thundercloud. King was in "lay off" status, the Oneida's Vocational Rehab Program was shut down due to lack of funding, and the Oneida Nation offices were shut down for an extended period of time due to the Covid-19 Pandemic. In the search for truth and justice, the TC judge should have done what was necessary to ensure all the relevant facts were brought out. This includes allowing Smith and Thundercloud the opportunity to introduce as evidence the documents they used in deciding whether to terminate King. In fairness to King, the TC judge could have ordered a continuance of the final hearing to allow for King to review these documents and prepare her case.

It is apparent from the record that both Smith and Thundercloud were denied the opportunity to fully present their case. They fully expected an opportunity to submit documentation they used to determine whether to terminate King as evidence and should have been given the chance to do so. Because Smith and Thundercloud were denied the opportunity to fully present their case, we reverse the TC's order and remand for further proceedings consistent with this decision.

Preponderance of Evidence Standard

For guidance on remand, we also address King's burden of proof. King has the burden to prove by a preponderance of the evidence that she should prevail. Oneida Rules of Civil Procedure §803.4-8. To prevail by a preponderance of evidence means that a petitioner must present evidence that has "the most convincing force" and "superior evidentiary weight." BLACK'S LAW DICTIONARY 1431 (11th ed. 2019). A petitioner meets this burden of proof by presenting physical and testimonial evidence to prove their case and the proposition that it is more likely to be true than not true that the respondent was wrong. The respondent does not have to do anything to prove or defend their case if the petitioner fails to prove their case by a preponderance of the evidence. In other words, it is not Smith's and Thundercloud's burden to prove what was stated in the VR

Handbook as the TC judge asserts in his opinion. King has the sole burden to prove by the greater weight of evidence that Smith and Thundercloud were wrong in terminating her.

CONCLUSION

The TC erred in reversing King's termination. To make an independent determination of whether King was wrongfully terminated, the TC judge should have given Smith and Thundercloud an opportunity to submit the documents they used in deciding whether to terminate her. Furthermore, when parties appear *pro se*, as they are here, a liberal approach to whether parties should be allowed to submit evidence applies with even more force. There is nothing in the OPPP Manual that states it was Smith's or Thundercloud's duty to provide the documentation they used in terminating King to HRD or the TC. Thus, the TC judge abused his discretion when he did not allow Smith and Thundercloud the opportunity to submit evidence they used in deciding whether to terminate King.

DECISION

The decision of the Trial Court is reversed, and this matter is remanded to the Trial Court for further proceedings consistent with this decision pursuant to §805.13-1 (a) and (b) (1), (3), and (4).

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, the decision of the Oneida Trial Court is **REVERSED** and **REMANDED**. Dated this 1st day of June 2021, in the matter of Case No. 20-AC-004, *Deborah Thundercloud and Jacqueline Smith v. Cheyanne King*.

It is so ordered.