

## COURT OF APPEALS

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DEBORAH THUNDERCLOUD and  
JACQUELINE SMITH,

Appellants,

Case No.: 21-AC-008

v.

Date: April 11, 2022

MELISSA R. SKENANDORE,

Respondent.

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### FINAL DECISION

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This matter has come before Appellate Judges Diane House, Leland Wigg-Ninham, and Janice McLester (pro tempore).

#### JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Sec. 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. This matter arises out of Respondent's termination from employment and her subsequent appeal. This appeal is from a final order of the Trial Court which overturned Respondent's termination.

#### PROCEDURAL HISTORY

The Respondent, Melissa R. Skenandore (hereinafter "Skenandore"), was terminated on November 22, 2019, by her supervisor, Appellant, Jacqueline Smith (hereinafter "Smith"), for various alleged violations of the Oneida Personnel Policies and Procedures Manual (hereinafter "OPPP"). Skenandore appealed her termination to the Area Manager, Appellant, Deborah Thundercloud (hereinafter "Thundercloud"). Thundercloud upheld the termination. Skenandore then appealed Area Manager's decision to the Trial Court. After numerous hearings, the Trial Court overturned the termination on June 21, 2021. Thundercloud and Smith (hereinafter

“Thundercloud/Smith”) appealed the Trial Court Order to this Court on July 7, 2021. The appeal was accepted for review on July 28, 2021.

### STANDARD OF REVIEW

Both parties cite to Section 801.8-3(a)(1) as the appropriate standard of review for this matter. Thundercloud/Smith state the standard of review for all issues is the clearly erroneous standard. Skenandore states that the Appellate Court does not substitute its judgment on credibility or weight of the evidence for that of the Trial Court and shall affirm the decision unless it is clearly against the weight of the evidence.

Section 801.8-3(a)(1) states that findings of fact may only be rejected where the Appellate Court determines they are "clearly erroneous." Past appellate decisions have reviewed questions of law de novo. When reviewing the Trial Court decision, we apply a clearly erroneous standard to factual findings and a de novo standard to legal issues. We also will follow the requirement in §801.8-3(a) that we "shall not substitute [our] judgment or wisdom of the credibility of testimony or the weight of evidence for that of the original hearing body."

### ISSUES PRESENTED

Did the Trial court commit error in finding that procedural irregularities existed that were harmful to Skenandore?

Whether the findings of fact in the Trial Court decision were clearly erroneous?

Whether the Trial Court erred in reversing the termination of Skenandore?

### ANALYSIS

This has been a highly contested case with many motions, hearings, and orders occurring throughout both the Trial Court and Appellate Court. However, as complex as this case has been, it comes down to fundamental and important issues surrounding what constitutes an employee's right to due process.

Smith became aware of an issue with a reimbursement request within the vocational rehabilitation (VR) program. As a result, she began an investigation on September 19, 2019. On September 30, 2019, Smith was notified that the FY2020 VR grant had not been renewed. Due to this notification

of non-renewal, Smith felt compelled to immediately lay-off all personnel in the VR department on September 30, 2019, including Skenandore.

Two months after she began, Smith concluded her investigation on November 19, 2022. On November 21, 2019, two days later, at 3:10 p.m., Smith called Skenandore and left a message requesting to meet on November 22, 2019, at 1:30 p.m. In this message, Smith also informed Skenandore she was conducting “an investigation.” On November 22, 2019, at 8:35 a.m., Smith left a second message for Skenandore requesting again to meet that afternoon at 1:30 p.m. When Skenandore did not show up for the November 22, 2019, at 1:30 p.m., Smith interpreted Skenandore’s absence tantamount to a “refusal to meet” and an act of insubordination, and thus terminated Skenandore.

#### Due Process

It is uncontested that Smith did not meet with Skenandore. Smith did not meet with her during the investigation; nor did she meet with her when she concluded the investigation. What is contested is whether Smith was required to meet with Skenandore prior to concluding her investigation and issuing the termination on November 22, 2019. Skenandore contends this failure to meet with her was a violation of her due process. After providing each side an opportunity to be heard on this matter, the Trial Court agreed with Skenandore and found this to be a violation of her due process. As a matter of law, we agree with the Trial Court.

A fundamental or minimal requirement of due process is the opportunity to be heard before a neutral magistrate as well as being informed about the matter at hand. *Somers v. Oneida Business Committee Officers et.al.*, 18-AC-007 (August 23, 2019). What constitutes the opportunity to be heard and sufficient notice has also been addressed by other courts. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985)(explaining that the opportunity to respond must be “appropriate to the nature of the case”); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (a fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their claims and objection); and *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (requiring that the reply opportunity be meaningful).

In principle, the Oneida Nation Personnel Policies and Procedures Manual (OPPP) mirrors similar or congruent due process requirements of notice and an opportunity to be heard in Section V.D.5.

*Disciplinary Procedure:*

- a. Supervisor becomes aware of unsatisfactory work performance or violation.
  - 1) The Supervisor investigates *through a meeting* with the employees and determines whether disciplinary action is warranted....
- c. The form will be *discussed with the employee* and a corrective action will be identified (emphasis added).

The cited cases and the OPPP sections included above detail due process concerns that should be addressed in instances where notice and opportunity to respond are at issue.

Meeting with the Employee and Notice

With funding problems, layoffs, and allegations of theft being investigated, the VR department was in disarray. Smith also contends that “Skenandore exposed the Nation to significant financial risk and her conduct directly led to the loss of the VR grant” (Appellant’s Brief at 6). Smith conducted a two-month investigation that included, but was not limited to, interviews with “remaining VR and State of Wisconsin VR staff” (Appellant’s Brief at 7). The Trial Court made a finding that a meeting with Skenandore should have occurred as part of investigation, not after it was concluded. We agree with the Trial Court’s finding on this matter. Section V.D.5. is clear about this requirement.

Smith contends that her two voicemail messages requesting to meet in less than 24 hours was sufficient notice to Skenandore and that because she did not respond to the meeting requests, her no-show can only be interpreted as a refusal to meet. The Trial Court did not interpret Skenandore’s no show as a refusal to meet. The Trial Court, hearing both sides of this issue, made a finding that giving this less than 24-hours’ notice to Skenandore was not sufficient notice given the circumstances.

Providing notice may include an obligation, upon learning that an attempt at notice has failed, to take “reasonable (sic) followup measures” that may be available. See *Jones v. Flowers*, 547 U.S.

220, 235 (2006). After a two-month investigation, Smith was about to make decisions on Skenandore's involvement and culpability on serious allegations, and ultimately her employment. The Trial Court stated: "With the length of the investigation, there was no good reason identified to give less than 24-hours' notice for the meeting" (Trial Court Final Order, at p.4). Follow up measures to schedule and actually confirm a meeting with Skenandore, for example, were more reasonable actions to take given the circumstances and what could be or what was at stake at the conclusion of Smith's investigation.

The Trial Court determined that providing less than 24-hour notice to attend a meeting on a voicemail, especially when the meeting has not been confirmed, is not judicious good sense. We agree. The OPPP Section V.D. preamble, which was cited by the Trial Court, states:

Grievance procedures serve to protect employees from inconsistent and unfair treatment. In all cases of grievance and discipline, supervisors are enjoined to use common sense, discretion, and judicious good sense to resolve complaints between employees, exercise disciplinary prerogatives, and handle grievances.

The Trial Court determined that a procedural irregularity existed that was harmful to Skenandore 1) due to the insufficient notice given to Skenandore; and 2) because a meeting with Skenandore did not occur during the investigation nor prior to her termination. These findings are supported by the evidence presented and are not clearly erroneous. The Trial Court did not alter or create a "fairness standard of review." The Trial Court, by finding that procedural irregularities existed that resulted in due process violations, determined the Area Manager should have recognized this, and as a matter of law, the decision to terminate should have been overturned. We agree. This is not simply a case of an employee's refusal to meet or whether/when the Area Manager has to meet with the employee. This is a case about notice and due process, both of which Skenandore was not afforded by Smith's actions.

### CONCLUSION

The main issue in this case is whether the Trial Court's decision was clearly erroneous by determining a procedural irregularity existed when the supervisor did not meet with the employee as part of the investigation and allowed less than 24 hour's notice of this meeting. We find the

Trial Court decision is not clearly erroneous and was supported by the evidence on the record. The Trial Court also did not commit error in finding that these procedural irregularities caused harm to Skenandore. With no finding of error either in the application of law or in the factual findings made by the Trial Court, we must affirm the Trial Court's decision to overturn Skenandore's disciplinary action.

ORDER

For the reason(s) stated above, the decision of the Trial Court is AFFIRMED. The decision of the Area Manager shall be overturned. Skenandore shall be reinstated with full Back Pay for any lost time in accordance with the Back Pay Policy.

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 Trial Court is *affirmed*. Dated this 11th day of April 2022, in the matter of Case No. 21-AC-008, *Deborah Thundercloud and Jacqueline Smith v. Melissa Skenandore*.

***It is so ordered.***