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**Appellate Court**

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Kristina Vanlerberghe,  
Appellant

Docket No. 03-AC-021

vs.

Oneida Bingo & Casino, Slot Department,  
Respondents

Date: February 25, 2004

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**Final Decision**

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This case has come before the Oneida Appeals Commission. Judicial Officers Leland Wigg-Ninham, Mary Adams, Linda Cornelius, Janice McLester and Stanley R. Webster.

**I. Background**

On May 7, 2003, the Petitioner was terminated under the Oneida Personnel Policies and Procedures Accumulation Policy, Section V.D.3.b.<sup>11</sup> On May 14, 2003, the Petitioner appealed to the Area Manager. On May 19, 2003, the Area Manager requested a ten (10) day extension from the Oneida Human Resource Department and was granted an extension until May 29, 2003. On May 29, 2003, the Area Manager upheld the decision of the Respondent to terminate the Appellant. On July 7, 2003, a hearing was held at the Oneida Personnel Commission. The Appellant is requesting the Appellate Court to overturn the Oneida Personnel Commission decision, dated July 31, 2003. On September 12, 2003, the Appellant filed an appeal of the Oneida Personnel Commission decision upholding her termination. At issue is the Appellant's termination as the result of her receiving two upheld suspensions for attendance violations.

**II. Issues**

**Was the Personnel Commission decision arbitrary and/or capricious?**

**Did the Personnel Commission erroneously uphold the Appellant's termination for the accumulation of two suspensions in a twelve month period?**

**III. Analysis**

The Oneida Personnel Commission's decision held in part that:

*The main issue in this case is whether the Petitioner could be terminated for the accumulation of two (2) upheld suspensions. The Petitioner believes she was wrongfully terminated and that she was disciplined for the same infraction twice. The Petitioner received her first suspension on 10/02/02, and her second suspension on 4/29/03. Neither of these suspensions were appealed by the Petitioner. The blue Book states that a disciplinary action becomes final when an appeal is upheld by the Area Manager or is not appealed within the time line of the appeal process. Termination is warranted according to*

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V.D.3.b. the accumulation of two (2) upheld suspensions within any twelve (12) month period. (T)

*the Blue Book for the accumulation of two upheld suspensions.*

The basic standard of review for an issue of an arbitrary and/or capricious decision is whether a rationale is presented for the decision. The Oneida Personnel Commission determined that termination was warranted under the language of the Personnel Policies and Procedures. The rule in question was cited and the question was answered. The Oneida Personnel Commission has presented a conclusion and a basis for that decision. It is therefore not an arbitrary and/or capricious decision. However, this appellate court must still determine whether the interpretation and rationale presented was erroneous.

The essential argument between the parties in this case centers on whether the accumulation of suspensions is an independent offense under the language of the Personnel Policies and Procedures Handbook (Personnel Policies). The Appellant argues that she has been disciplined twice for the same offense in that she was suspended for violations of the Personnel Policies and then terminated upon her return to work without any other act or acts that might be considered a violation. The Respondent argues that the accumulation rule should be construed as a separate offense under the Personnel Policies, warranting termination.

The Appellant did not contest either of these suspensions. Each suspension was for poor attendance and punctuality violations of the Oneida Personnel Policies and Procedures Handbook. Over the course of this time period, and prior to the completion of the second suspension, the Respondent presented thirteen instances in which the Appellant was tardy, or otherwise failed to appear for work on time with a valid excuse. The first six instances were used to implement the first suspension. The next seven violations were used to implement the second suspension.

When the Appellant completed her second suspension, her conduct met the criteria for another violation of the Oneida Personnel Policies and Procedures. That violation is found under Section V.D. 3.b., which states that termination for an employee is warranted when that employee has two upheld suspensions in a twelve month period.

The Appellant believes that the Appellant's termination is for the same offense, namely her punctuality. This is not the case. Accumulation of disciplinary actions is a separate offense under the Personnel Policies warranting termination. The supervisor has discretion as to whether to implement this disciplinary process.

The Appellant would have this court put great weight to the notion of progressive discipline, finding that some further act by an employee is necessary in order to justify termination. However, this requirement that some other act occur takes discretionary power from the supervisor. Under the proposed logic, a supervisor must now wait until some other violation of the Personnel Policies and Procedures occurs, even after the employee has met the criteria for termination under the accumulation rule. This would render the accumulation rule essentially meaningless. The Appellant might as well ask that the rule be struck down, leaving only principles of progressive discipline to guide a supervisor's disciplinary discretion, though there is no constitutional or other concrete basis

to do so.

The Appellant cites the case of Oneida Bingo and Casino vs. Susan Betters, 8 O.N.R. 3-131 (7/30/02), in which an employee's termination for the accumulation of disciplinary actions in a twelve month period was reversed. That case presented several factual distinctions from this case and is largely inapplicable. In Betters, the employee was warned after a second suspension that any further violations of the Personnel Policies and Procedures would result in termination. Over two months later, when a temporary supervisor was reviewing the employee's personnel record, the accumulation rule was invoked to terminate. The Appellate Court found that the discretion exercised by the prior supervisor should not be undermined by the temporary replacement, especially more than two months after the second suspension was upheld. In this case, the Appellant was given no such assurances that she had one more chance. No such assurances are required under the rules of the Oneida Personnel Policies and Procedures. The supervisors who regularly oversee the Appellant met after the completion of her second suspension to determine whether the accumulation rule should be invoked. This occurred a day after the second suspension was completed, not several months later. The facts of Betters, are too distinct to be applicable in this case.

The Appellant's argument, if accepted, would render the accumulation rule meaningless. This is because an employee with sufficient disciplinary actions in his or her record to warrant termination under accumulation is likely to be subject to termination under progressive disciplinary principles. While this might seem redundant, it is this court's finding that such was the intent of the General Tribal Council. Maintaining both progressive discipline and the accumulation rule gives the Tribe, as an employer, sufficient discretion to terminate employees who are in violation of Tribal Employment Laws. With the Appellant's argument, a supervisor would now be required to wait for additional violations after two suspensions. Under principles of progressive discipline, termination is a warranted result if an employee commits additional violations of the Oneida Personnel Policies and Procedures after written warning(s) and suspension(s) have been issued, depending on the seriousness of the offense.

The Appellant's case is based upon a belief in equity and the principles of progressive discipline. The Appellant wants this court to give her one more chance, and if this court was the Appellant's supervisor, it could do so. But this court is not the supervisor, and should not put itself in the supervisor's place, replacing the supervisor's discretion. Under the accumulation rule, as it is plainly written, a supervisor would have the discretion to grant or deny that chance to an employee. The Appellant would have this court take away that discretion. This court finds that equity, or fairness, has been largely served in this case. The Appellant had an opportunity to correct her behavior after the first suspension. Further violations of the Oneida Personnel Policies and Procedures led to a second suspension. If the purposes of employee discipline, punishment and deterrence, are to be adhered to, then the termination should be upheld. A five day suspension did not deter the Appellant from further violations. It should be left within the supervisor's discretion to determine if the second suspension would have deterred future violations. Having found that the Appellant would not adhere to punctuality rules, the supervisor should be permitted to terminate for this separate and distinct violation of the Oneida Personnel Policies and Procedures "accumulation" rule.

The Appellant's termination is not an additional penalty for the same offense as the Appellant argues. It is a separate and distinct violation of the Oneida Personnel Policies and Procedures. The termination of the Appellant will be upheld.

#### **IV. Decision**

It is the decision of this court to uphold the decision of the Oneida Personnel Commission. Judgement for the Respondent.

## Dissenting Opinion

I, Mary Adams, Judicial Officer, dissent from the majority. The Appellant, Kristina Vanlerberghe, was terminated under the Oneida Personnel Policies and Procedures Accumulation Policy, Section V.D.3.b.1, on May 7, 2003, because she received two (2) suspensions within a twelve month period.

The essential argument between the parties in this case centers on whether the accumulation of suspensions is an independent offense under the language of the Personnel Policies and Procedures Handbook (Personnel Policies). The Appellant argues that she has been disciplined twice for the same offense in that she was suspended for violations of the Personnel Policies and then terminated upon her return to work without any other act or acts that might be considered a violation. The Respondent argues that the accumulation rule should be construed as a separate offense under the Personnel Policies, warranting termination. To address that argument, the context of the disciplinary process and goals behind discipline must also be examined.

While technically correct in finding that termination is warranted when an employee has accumulated two suspensions within a twelve month period, in my opinion, some other violation by the employee is necessary before such a termination can be fairly imposed upon the employee.

The Oneida Tribe stresses progressive discipline as a method of correcting employee behavior. The established purpose of discipline is to punish violations of the Personnel Policies and Procedures, and to deter the employee from further violations and other employees from similar violations.<sup>12</sup>

The ideals of progressive discipline must be read together and in conjunction with the termination warranted by accumulation of disciplinary actions. Under normal circumstances, an employee who has received a suspension has likely first received a written warning. Most disciplinary actions follow the suggested progressive sequence of written warning, suspension, and then termination. Though it is probable that supervisors, when exercising their discretion and adhering to rules that require disciplinary action commensurate with the seriousness of the offense, do not follow immediate progression, going straight from warning to suspension to termination. An employee may properly receive several warnings if the violations are minor in nature, but still require corrective behavior. This may progress then to one or more suspensions. Depending on the time frame involved, it is then that the accumulation rule might be invoked. However, disciplinary action should be imposed judiciously and should reflect the seriousness of the employee's violation.<sup>13</sup> Is it judicious for a supervisor to suspend an employee from work and then have that employee return to work and then terminate them because they now have been suspended twice within a year and

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<sup>12</sup> Warnke, *Lyle vs. Oneida Bingo & Casino*, 2 O.N.R. 3-16, 19

<sup>13</sup> Personnel Policies **V.D.** 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. **V.D.2.b.** A supervisor shall initiate disciplinary actions commensurate with serious of the unsatisfactory performance. A supervisor must consider each disciplinary action in progressive order and justify a deviance from that recommended progression.

meet the requirement under V.D.3.b? In my opinion, this is not the intent of this rule. An employer cannot suspend and terminate an employee for the same violation. It goes against the principle of progressive discipline.

The majority agrees with the Respondent's line of reasoning and found that the accumulation of disciplinary actions is a separate and distinct action that warrants immediate termination. In my opinion, this would undermine the principles of progressive discipline, as well as the purpose of the disciplinary process outlined in the Personnel Policies and Procedures. When the Appellant returned from her suspension, she had been disciplined for poor attendance and punctuality. The first purpose of disciplinary action, punishment, had been served. Presumably, the third purpose of discipline, deterrence from similar future action by other employees aware of the discipline is also served. However, the second purpose of discipline, deterring the employee in question from future behavior is not served. Rather than being given the opportunity to correct her behavior, the Appellant was terminated without any additional action on her part. In my opinion, that defeats the purpose of progressive discipline and the principle that attempts to treat employees fairly, while maintaining the Tribe's authority as an employer and its ability to discipline and eventually terminate particular employees.

Starting when the Appellant first got suspended and ending with the final suspension, there was no evidence provided by the Respondent proving that the Appellant was progressively disciplined. (No written warnings, verbal consultations with the Appellant, V.D.2.<sup>14</sup>) There was testimony from the grievance hearing stating that the Respondent did talk to the Appellant, but that was prior to the final suspension and should have been provided in the form of documentation, but was not.

It is my opinion that the decision of the Oneida Personnel Commission be reversed.

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Disciplinary Actions: Disciplinary actions will be initiated by an immediate supervisor for the purpose of correcting unacceptable work performance. The supervisor will always discuss the action with the employee being disciplined to ensure that the employee: 1.) Understands the reason for the disciplinary action; 2.) Understands the expected work performance in light of the disciplinary action; 3.) Understands the consequences of continued unacceptable behavior.