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**Appellate Court**

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Lane Gerarden,  
Appellant

Docket No. 03-AC-025

vs.

Oneida Bingo & Casino, Table Games  
Supervisor,  
Respondent

Date: January 2, 2004

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**Remand**

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This case has come before the Oneida Appeals Commission Appellate court. Judicial Officers Leland Wigg-Ninham, Mary Adams, Janice McLester, Kirby Metoxen and Winnifred Thomas presiding.

**I. Background**

This case is an appeal of an Oneida Personnel Commission decision Docket No. 03-ADV-003 which ruled that the Appellant had filed an untimely appeal to the Area Manager. On August 21, 2003, the Oneida Personnel Commission ruled to deny the Appellant's Adverse Employment Action and the request of lost wages. The Oneida Personnel Commission further ruled that; "The Appellant didn't follow the Oneida Tribes Personnel Policies and Procedures Manual Grievance Process or the Oneida Tribes Drug and Alcohol Free Workplace Notice of Suspension/Termination of Employment."

**II. Issues**

**Was the Appellant's appeal filed untimely?**

**III. Analysis**

**Was the Appellant's appeal filed untimely?**

No, the Appellant has filed his appeal timely. The Appellant contends that the time limitation to appeal his Adverse Employment Action should have begun to toll when he received his payroll check on June 4, 2003. Appellant feels this is proper because that is the date he first noticed he was harmed by having fifty-one (51) hours of wage compensation not included on his paycheck. The Appellant further contends that he was led to believe he would be paid, when two supervisors told him that they thought he would be paid for the time lost during the suspension if the drug test proved negative. The Appellant also asserts that according to the Oneida Tribe's Drug and Alcohol Free Work Place Policy, the Respondent did not follow the proper procedure and violated Appellant's rights as an employee.

The Appellant argues that he did not have anything to appeal at the time of his suspension because he (1) knew the drug test would come back negative and; (2) had the assurance of two supervisors, who thought he would be paid for the lost wages due to the suspension. The Appellant also argues

that it was only after he received his paycheck and realized he was not compensated for his lost fifty-one (51) hours, did he have something to appeal.

This Court agrees with the Appellant because it was clear from testimony that the Appellant had good reason to believe he was going to receive payment for his lost hours. The Appellant would only know if the drug test would come back negative if he in fact was not guilty of the violation. When the Appellant asked his supervisors if he would be paid, if the drug test was negative, the Appellant's supervisors said they thought Appellant would be paid. The perception the Appellant would be paid was created. The Appellant relied on this information because the supervisor is the person in charge and the supervisor would be the person to answer this type of question. If the two supervisors said Appellant might not be paid his lost hours, then a reasonable person could conclude that he/she would not be paid and would begin the appeal process immediately especially if that person knew they were not guilty.

The Respondent argues that the appeal is untimely according to the Oneida Personnel Policies and Procedures for filing an appeal. The Respondent further claims that the Oneida Appeals Commission and Oneida Personnel Commission always "harp<sup>1</sup>" on procedure. The Respondent's claim is partly correct but that argument is flawed simply because the Respondent failed to apply common sense and equity in the determination on the time line to file an appeal. They go on to contend that according to the information on the bottom of form 410-G, on the Oneida Tribe's Drug and Alcohol Free Work Place Policy, the Appellant had 10 days to file an appeal. Although it states an employee has ten (10) days to appeal, it does not mention anything in regard to negative drug tests. In the name of fairness and equity then, a reasonable person would conclude that the time should start when the employee realized he/she had something to appeal. It is this court's decision that in this instance the time to file an appeal was when the Appellant first realized the suspension negatively affected his income, and that was on June 4, 2003.

In her dissenting opinion Commissioner Skenandore, of the Oneida Personnel Commission said, "The Area Manager had the authority to correct this situation from the date he received the appeal from the Petitioner." This court agrees with Commissioner Skenandore that because the Area Manager failed to exercise good judgement, the Petitioner was harmed.

#### **IV. Decision**

The main issue here is timeliness. Therefore this court will only address that issue and remand this matter back to the Oneida Personnel Commission to conduct a hearing on the merits of this case within sixty (60) days upon receipt of this decision.

The issues, which the Oneida Personnel Commission must resolve in the Oneida Drug and Alcohol Free Work Place Policy are:

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<sup>1</sup> Attachment IV of Respondent's brief.

- 1) Authority to conduct test. Was the proper authority adhered to?
- 2) Approval. Was there proper approval by the supervisor to conduct the drug test?
- 3) Supervisor's role. Was the supervisor in compliance with the Oneida Drug and Alcohol Free Work Place Policy?
- 4) Back pay because of negative drug tests. What is the assurance of back pay to employee if tests prove negative.
- 5) When an employee reports another employee. What are the procedures/guide lines for management to adhere to for protection of both employees?
- 6) Reporting back with results to employer/employee. What are the time lines for test results to get back to employee/employer?