
Appellate Court

Steven McNutt

Appellant

Docket No. 03-AC-034

vs.

Oneida Bingo & Casino, Slot Department,
Respondents

Date: May 14, 2004

Final Decision

This case has come before the Oneida Appeals Commission. Judicial Officers Leland Wigg Ninham, Mary Adams, Janice McLester, Winnifred L. Thomas and Stanley R. Webster, presiding.

I. Background

On December 15, 2003, the Appellant filed an appeal of an Oneida Personnel Commission decision to uphold his termination. At issue is the Petitioner's termination as the result of three (3) accumulated upheld written warnings for attendance violations. On August 12, 2003, the Appellant was terminated under the Oneida Personnel Policies and Procedures Accumulation policy, Section V.D. 2. IV., 3. (a), *the accumulation of three (3) upheld warning notices within any twelve month period*. On August 19, 2003, the Appellant appealed to the Area Manager. On August 22, 2003, the Area Manager requested a ten (10) day extension from the Oneida Human Resource Department and was granted an extension until September 1, 2003. On August 29, 2003, the Area Manager upheld the decision of the Respondent to terminate the Appellant. On September 12, 2003, the Appellant filed an appeal to the Oneida Personnel Commission. After a postponement of a scheduled hearing date on October 21, 2003, the hearing was rescheduled to November 25, 2003, after which the Oneida Personnel Commission upheld the termination of the Appellant.

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 three written warnings in a twelve month period?

III. Analysis

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

The overriding issue is whether the Respondent was justified in issuing the termination to the Petitioner for the accumulation of three (3) upheld written warnings. The three upheld warnings include the following dates, February 21, 2003, April 29, 2003, and August 2, 2003. The Petitioner didn't feel there was any cause for alarm because he

didn't receive a suspension for unacceptable behavior. Therefore, he believed he would receive a suspension before he was terminated. The Petitioner states he was unaware of the accumulated disciplinary actions warranting termination.

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 written warnings is an independent offense under the language of the Personnel Policies and Procedures Handbook (Personnel Policies). The Appellant argues that he has been disciplined twice for the same offense in that he was suspended for violations of the Personnel Policies and then terminated upon his 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 believes that the Appellant's termination is for the same offense, namely his 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 had received three written warnings within a twelve month period. The Appellant asserts he should have been given a suspension instead of being terminated so he could have time to correct his behavior according to progressive discipline.

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 discretion away from the supervisor. Under the Appellant's proposed logic, a supervisor must wait to apply further discipline 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 essentially render the accumulation rule meaningless.

The Appellant contends that the Oneida Personnel Commission's decision is based on a strict interpretation of the Oneida Tribe of Indians of Wisconsin Personnel Policies and Procedures manual. The Appellant further contends he was terminated without cause and he was not progressively disciplined.

When the appellant completed his third written warning, his conduct met the criteria for another violation of the Oneida Personnel Policies and Procedures. That violation is found under Section

V.D. 3. a., which states that termination for an employee is warranted when that employee has three (3) upheld written notices within a twelve (12) month period.

The Appellant claims he was terminated without a cause for the same attendance violation and believes he was not allowed time to correct his behavior. This logic is flawed, because the Appellant failed to convince the Oneida Personnel Commission that he made any effort to correct his behavior after his first and second written warnings. The intent of discipline is to correct unacceptable work performance and the Appellant was given two written warnings prior to the third warning which ultimately resulted in his termination. On February 21, 2003 the Appellant was issued a written warning, on April 29, 2003, the Appellant was issued a second written warning, on August 2, 2003, the Appellant was issued a third written warning, on August 12 2003, the Appellant was issued his fourth discipline, which was in the form of termination.

When the Appellant received his third written warning his conduct met the criteria for another violation of the Oneida Personnel Policies and Procedures. That violation is found under Section V.D.3. a., which states that termination is warranted when that employee has three upheld written warnings in a twelve month period.

The Appellant claims that the Oneida Personnel Commission misinterpreted the conclusion of law which the Oneida Appeals Commission found in; Oneida Bingo and Casino, Table Games vs. Elizabeth Kramer, Docket No. 02-AC-002. The Appellant believes that the Oneida Appeals Commission found that the Appellant could get one more violation before he got terminated.

This claim is not from the majority of the Oneida Appeals Commission, therefore this claim is unfounded. In part of its findings of fact, the Oneida Personnel Commission found that :

The key aspect in the Kramer case is that the employee was terminated for accumulated disciplinary actions four months after the most recent disciplinary action.

The Appellant was terminated immediately after the third written warning, not several months later, therefore the Appellant's claim is not persuasive to this court because the facts of Kramer are not applicable.

In Vanlerberghe vs, Oneida Bingo & Casino, Docket No. 03-AC-021, The decision by the court read in part:

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.

On February 21, 2003, April 29, 2003, and August 2, 2003, the Appellant was issued written warnings for attendance violations. On August 12, 2003, the Respondent terminated the Appellant. On August 29, 2003, the Area Manager upheld the termination. When the Respondent applied the standard in Section V. 3, a.³⁶ of the Oneida Personnel Policies and Procedures, termination was warranted.

IV. Decision

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

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The accumulation of three (3) upheld warning notices within any twelve (12) month period. (T)

Dissenting Opinion

I, Mary Adams, Judicial Officer, dissent from the majority. The Appellant, Steven McNutt, was terminated under the Oneida Personnel Policies and Procedures Accumulation Policy, Section V.D.2.IV.3 (a), on August 12, 2003, because he received three (3) upheld warning notices within a twelve month period. I dissent for the same reasons I dissented in the case, Kristina Vanlerberghe v. Oneida Bingo & Casino, (03-AC-034).

The essential argument in both cases centers on whether the accumulation of written warnings or suspensions is an independent offense under the language of the Personnel Policies and Procedures Handbook (Personnel Policies). McNutt argues that he has been disciplined twice for the same offense, first issued a written warning then terminated upon his return to work without any other action that might be considered a violation. In opposition, 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 three written warnings 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.³⁷

The ideals of progressive discipline must be read together and in conjunction with the termination warranted by accumulation of disciplinary actions. It is my opinion that this is not the intent of this rule and therefore an employer cannot issue a third written warning and terminate the employee for the same violation. It goes against the principle of progressive discipline.

Again, if this court were to strictly adhere to the Respondent's line of reasoning and find that the accumulation of disciplinary actions is a separate and distinct action that warrants immediate termination, it 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 received his third written warning, he had been disciplined for poor attendance and punctuality, he accepted his third violation. Rather than being given the opportunity to correct his behavior, the Appellant was terminated without any additional action on his 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

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Warnke, Lyle vs. Oneida Bingo & Casino, 2 O.N.R. 3-16, 19

eventually terminate poor employees.

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