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**Appellate Court**

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Hugo Sosa,

Appellant

Docket No. 03-AC-035

vs.

Oneida Bingo & Casino, Slot Department,  
Respondent

Date: May 14, 2004

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**Decision**

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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.

**Background**

On October 9, 2003, the Appellant, Hugo Sosa, was terminated under the Oneida Personnel Policies and Procedures Accumulation Policy, Section V.D. 3. c<sup>38</sup> On October 13, 2003, the Appellant appealed to the Area Manager. On October 24, 2003, the Area Manager upheld the termination. On October 31, 2003, the Appellant appealed the Area Manager's decision to the Oneida Personnel Commission. On December 4, 2003, a decision was rendered by the Oneida Personnel Commission upholding the termination of the Appellant. On January 20, 2004, the Appellant appealed that decision to the Oneida Appeals Commission.

**Issues**

**Was the decision of the Oneida Personnel Commission arbitrary and capricious?**

**Did the Oneida Personnel Commission erroneously uphold the Appellant's termination for the accumulation of three written warnings in a twelve month period?**

**Analysis**

The Appellant, Hugo Sosa, claims he was terminated without proper cause on October 9, 2003 for having three (3) upheld disciplinary actions within a twelve month period. The Appellant further claims the termination was a form of double jeopardy. The Appellant received his first written warning on June 26, 2003 for a violation of attendance and punctuality and did not appeal. The Appellant received his second written warning on July 14, 2003 for violating the drivers eligibility policy, which was upheld by the Area Manager. The Appellant received a suspension on October 1, 2003 for violating the key watcher policy and did not appeal. Upon his return to work, the Appellant was terminated. The Appellant appealed to the Oneida Personnel Commission who upheld his termination. The Appellant is requesting the Oneida Appeals

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The accumulation of three (3) of any combination of upheld warning notices and/or upheld suspensions within any twelve (12) month period. (T)

Commission to overturn the decision of the Oneida Personnel Commission, Hugo Sosa v Sally Murphy, Slot Technician Supervisor, 03-TER-016, 12/4/03, claiming the decision was arbitrary and capricious.

The Appellant contends that the accumulation rule V.D.3.(c)<sup>39</sup>, refers to infractions based on the employee's actions. The Appellant claims his suspension beginning on October 2, 2003 was based on his negligence and chose not to appeal the discipline action. The Appellant claims after suffering the suspension on October 2, 2003, he was terminated on October 9, 2003. The Appellant contends that the termination was a form of double jeopardy because he had already received a discipline for the same infraction by being suspended for three (3) days.

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 Oneida Personnel Policies and Procedures. The rule in question was cited and the question 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 disciplinary actions 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 violation of the Key Watcher policy 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 received three disciplinary actions. One was a written warning for a poor attendance and punctuality violation, the second written warning was for a violation of the Drivers Eligibility Policy, and the third was a suspension for violation of the Key Watcher Policy.

The Appellant believes that the Appellant's termination is for the same offense, namely his three day suspension on October 1, 2003, and then his termination on October 9, 2003, for the accumulation of the combination of three upheld written warnings and a suspension. This is not the case. Accumulation of disciplinary actions is a separate offense under the Personnel Policies warranting termination. The supervisor has discretion whether to implement this disciplinary process.

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

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<sup>39</sup> The accumulation of three (3) of any combination of upheld warning notices and/or upheld suspensions within any twelve (12) month period.

manual. The Appellant further contends he was terminated without cause and he was not progressively disciplined.

The Appellant would have this court put great weight on 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 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 claims he was terminated without a cause for the same 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 suspension which ultimately resulted in his termination. On June 26, 2003 the Appellant was issued a written warning, on July 14, 2003, the Appellant was issued a second written warning, on October 1, 2003, the Appellant was suspended for three days, on October 9, 2003, the Appellant was issued his fourth discipline, which was in the form of termination. The discretionary decision by the supervisor to terminate the Appellant was based on the seriousness of the third violation.<sup>40</sup>

When the Appellant received his third upheld disciplinary action within a twelve month period, termination was warranted under the accumulation rule. That violation is found under Section V.D.3. c., which states that termination is warranted when an employee has three of any combination of upheld warning notices and/or upheld suspensions within any twelve (12) month period.

In *Vanlerberghe vs, Oneida Bingo & Casino*, Docket No. 03-AC-021, the Appellate Court held in part:

*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.*

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5.D.2.b. A supervisor shall initiate disciplinary actions commensurate with the seriousness of the unsatisfactory performance.

The Appellant's claim that his termination was a form of double jeopardy, is unsubstantiated. From his own testimony at the Oneida Personnel Commission hearing, the Appellant admitted that he had been told prior to his termination, in July 2003, that he could be terminated under the accumulation rule, but the supervisor was giving him another chance. On October 1, 2003, the Appellant was suspended and he did not appeal. It was not until the third disciplinary action was upheld that the supervisor utilized discretion to terminate the Appellant. On October 23, 2003, the Area Manager upheld the termination. When V.D.3.c<sup>41</sup>. is applied, termination was warranted.

### **Decision**

The majority of this court agrees with the Oneida Personnel Commission and affirms the decision to uphold the termination of the Appellant.

### **Dissenting Opinion**

I, Mary Adams, Judicial Officer, dissent from the majority. The Appellant, Hugo Sosa, was terminated under the Oneida Personnel Policies and Procedures Accumulation Policy, Section V.D.2.IV.3 (c), on October 9, 2003, because he received three (2) upheld warning notices and a suspension 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). Sosa argues that he has been disciplined twice for the same offense, first he was issued three written warnings then suspended, and upon his return to work, terminated 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 a combination of written warnings and a suspension 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>42</sup>

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<sup>41</sup> The accumulation of three (3) of any combination of upheld warning notices and/or upheld suspensions within any twelve period.

<sup>42</sup> Warnke, Lyle vs. Oneida Bingo & Casino, 2 O.N.R. 3-16, 19

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 eventually terminate poor employees.

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