

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Cindy L. Lecker,
Petitioner

CASE NO: 22-EMP-005

v.

DATE: April 20, 2022

Head Start/Early Head Start Department
Respondent

FINAL ORDER

This case has come before the Oneida Trial Court, Honorable John E. Powless III presiding.

STATEMENT OF THE CASE

Petitioner filed an appeal of her Area Manager's decision to uphold Petitioner's termination from employment.

ISSUES

The Court must determine if one or both of the following conditions exist in order to hear the grievance:

- a. Was the decision of the Area Manager clearly against the weight of the evidence?
- b. Were procedural irregularities exhibited during the appeal process that were harmful to the Petitioner?

PRINCIPLES OF LAW

Oneida Nation Personnel Policies and Procedures Manual (OPPP):

Section V.D.6.d.1(a)(b). The Court will hear an appeal only if one or both of the following conditions exist:

- (a) The decision of the Area Manager is clearly against the weight of the evidence and/or,
- (b) Procedural irregularities were exhibited during the appeal process that may have been harmful to one of the parties to the grievance.

Section V.D.6.a.1.b.

6. Grievance

An employee who receives a disciplinary action which he/she believes is unfair may grieve the action. The Grievance process (including appeals of disciplinary action) shall be conducted with utmost consideration for due process (within the time limits set forth herein) but will allow and account for recognized Tribal holidays and unforeseen circumstances (such as illnesses, deaths in the immediate family of principals, etc.). The HRD office will make every attempt to ensure that grievance procedures are concluded within forty-five (45) working days; however, extensions granted for reasonable unforeseen circumstances (as determined by the HRD Manager) may extend the process. The Grievance process will be governed by the following guidelines:

a. For all disciplinary actions, regardless of severity:

- 1) The employee (petitioner) must file an appeal in writing.
 - a) The employee may seek the assistance of a spokesperson or advocate at any time after the disciplinary action has been issued to aid in the resolution of the grievance process.
 - b) The appeal must be filed with the Area Manager and the HRD Manager (or designee) within ten (10) working days from the day the employee receives the disciplinary action.
- 2) The Area Manager, for all disciplinary action investigations, will have ten (10) working days from the receipt of the employee's appeal to complete the investigation. One extension of no more than five (5) working days may be requested of and granted by the HRD Manager (or designee) at his or her discretion.
- 3) The Area Manager will do one of the following:
 - a) Uphold the disciplinary action; or
 - b) Modify the disciplinary action; or
 - c) Overturn the disciplinary action. If a suspension or termination is overturned, the employee (petitioner) shall be reinstated with full back pay.
- 4) The Area Manager will file a decision with the employee and the HRD Manager (or designee) and will include a reason for the decision, an explanation of the decision and the action to be taken as a result of it.

Section V.D.2(c)

(c) The actions listed below are examples of unacceptable work performance and do not constitute a comprehensive or exhaustive list. The actions in parentheses are guidelines for a supervisor to use in administering disciplinary actions. (W =written warning; S = suspension; T = termination):

2) Attendance and Punctuality

- a) Failure to report promptly and observe work schedules (such as starting time, quitting time, rest, and meal breaks) without the specific approval of the supervisor. (W/S/T)

ANALYSIS

In accordance with the Oneida Personnel Policies and Procedures (OPPP), an employee who receives a disciplinary action and believes it to be unfair may appeal an employee grievance. In doing so, the petitioning employee must sufficiently allege the following:

- a. The decision of the Area Manager is clearly against the weight of the evidence; and/or
- b. Procedural irregularities were exhibited during the appeal process that were harmful to the petitioner.

PROCEDURAL IRREGULARITY EXHIBITED DURING THE APPEAL PROCESS

The OPPP requires the Court to determine if procedural irregularities were exhibited during the appeal process that may have been harmful to one of the parties. Here, Petitioner's lone claim is the Area Manager did not timely respond to her appeal. Petitioner identified that as a result of the Area Manager's untimely response to her appeal, the decision of the Area Manager was clearly against the weight of the evidence *and* a procedural irregularity was exhibited during the appeal process. Petitioner did not state how the alleged procedural irregularity was harmful to her.

Petitioner argues the Area Manager must respond to the appeal within ten (10) working days from the receipt of the employee's appeal.

On March 14, 2022, Petitioner timely filed the appeal of her immediate supervisor's decision to terminate her from employment with the Nation. Petitioner filed her appeal to Debra Thundercloud, Head Start Director, and on the following day, filed another copy with Jacqueline Smith, who was the Area Manager identified on the Disciplinary Action Form. On March 16, 2022, both Ms. Thundercloud and Ms. Smith recused themselves from hearing Petitioner's appeal for various reasons. On March 17, 2022, Mark W. Powless, General Manager, received and accepted the appeal. On March 31, 2022, Mr. Powless investigated and timely issued his decision to uphold Petitioner's termination.

In determining that the decision was timely issued, the Court looks to the OPPP, which states that "[t]he Area Manager, for all disciplinary action investigations, will have ten (10) working days from the receipt of the employee's appeal to complete the investigation." When there is a recusal involved, it is unreasonable to expect an Area Manager to complete an investigation and formulate a decision in a grievance appeal when the Area Manager does not have sufficient time. Therefore, in accordance with 8 O.C. 801.2-6, and relying on laws such as Wis. Stat. § 48.315(1)(c) for guidance, the Court finds that any period of delay caused by the disqualification or recusal of an Area Manager shall be excluded from the time periods established by section V.D.6.a.2. A failure to make such a finding would have resulted in Mr. Powless having three fewer days to thoroughly investigate and formulate a decision, this would have disastrous effects

from a due process standpoint on cases where a new Area Manager may not be assigned until after the allotted ten (10) working days has lapsed.

The Court does not find that there has been a procedural irregularity exhibited during the appeal process, and even more so, there is no factual basis alleged to base a finding that it was harmful to Petitioner. Additionally, the decision of the Area Manager was not shown to be clearly against the weight of the credible evidence. If there was, in fact, a timeline violation, that would be considered a procedural irregularity and not a factor related to the decision of the Area Manager being clearly against the weight of the credible evidence.

In conclusion, the Court finds the decision of the Area Manager to be reasonable and that Petitioner failed to sufficiently allege a procedural irregularity harmful to Petitioner exists. Therefore, the Court must deny the appeal for a hearing and affirm the decision of the Area Manager.

FINDINGS OF FACT

1. The Court has subject matter, personal and territorial jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. Petitioner is an Executive Assistant for the Head Start/Early Head Start Department.
4. Petitioner's immediate supervisor, Susan Arnold, investigated and issued a termination to Petitioner for violations of the Oneida Nation Personnel Policies and Procedures Manual (OPPP).
5. Petitioner was terminated from employment on March 8, 2022 for the following alleged OPPP violation:
 - a. Probationary Period – Terminate For Cause
 - b. Excessive Absenteeism and/or Tardiness – V.D.2.c.2.b.
6. Petitioner timely appealed the immediate supervisor's decision to Area Manager Jacqueline Smith.
 - a. On March 14, 2022, Petitioner submitted her appeal to Debra Thundercloud, Head Start Director and Matthew Denny, EEO, after allegedly being notified that Thundercloud is the correct individual and/or position to appeal to.
 - i. On March 16, 2022; Debra Thundercloud recused herself from hearing this appeal due to nepotism.
 - b. On March 15, 2022, Petitioner also submitted her appeal to Jacqueline Smith and Matthew Denny, EEO, as Jacqueline Smith was identified as the Area Manager to appeal to on the Disciplinary Action Form.
 - i. On March 16, 2022, Jacqueline Smith also recused herself from hearing this appeal due to offering possible next steps solutions regarding Petitioner's unexcused absenteeism and/or tardiness at a meeting on March 4, 2022.

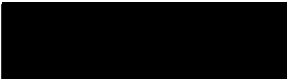
7. On March 17, 2022, Mark W. Powless, General Manger received and accepted Petitioner's appeal.
8. On March 31, 2022, Area Manager Powless investigated and timely issued his decision to uphold Petitioner's termination.
9. On April 13, 2022, Petitioner timely filed her appeal of the Area Manger's decision to the Judiciary's Trial Court.

ORDER

The decision of the Area Manger is UPHELD.

IT IS SO ORDERED.

By the authority vested in the Oneida Judiciary pursuant to Resolution 01-07-13-B of the General Tribal Council an Order was signed on April 20, 2022.



John E. Powless III, Trial Court Judge