

COURT OF APPEALS

Elizabeth Somers,

Appellant,

v.

Case No. 18-AC-007

Oneida Business Committee Officers
Melinda Danforth, Vice-Chairwoman,
Patricia King, Treasurer, and
Lisa Summers, Secretary,

August 23, 2019

Respondents.

FINAL DECISION

This matter has come before Appellate Judges Chad Hendricks, Sharon House, Leland Wigg-Ninham, and Chief Appellate Judge Gerald L. Hill.

JURISDICTION

The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(2) of the Oneida Judiciary Law which gives this Court exclusive jurisdiction to review appeals of agency and administrative decisions. As the remand order was invoked and responded to by the Oneida Judiciary Trial Court (hereinafter “OTC”) to no avail, this Court resumes the process of continuing the appeal.

PROCEDURAL HISTORY

This is an employment matter stemming from an appeal of a decision of the OTC upholding two (2) disciplinary actions against Elizabeth Somers (hereinafter “Somers”). One is a suspension and the second is a termination. Both disciplines stemmed from incidents initiated by Business Committee (hereinafter “BC”) Officers; Secretary Lisa Summers, Vice-Chairwoman Melinda Danforth, and Treasurer Patricia King (hereinafter “Respondents”). M. Danforth no longer serves on the BC.

BACKGROUND

On March 24, 2017, Somers was suspended for violating Oneida Personnel Policies and Procedures (hereinafter “OPPP”) §V.D.2.1, Work Performance §§(a), (e), and (g) and Personal Actions and Appearances §§(b), (j), (k), and (n). On the same date, Somers was terminated for violation of §V.D.2.1, Work Performance §§(a) and (e) and Personal Actions and Appearances §§(j) and (l). Somers filed an employee grievance with the Oneida Personnel Commission (hereinafter “OPC”) on April 6, 2017. After a series of delays and the dissolution of the OPC, Somers was provided three (3) options to complete her case. She could finish with the OPC, continue further proceedings with OTC, or start over with OTC. Somers chose to continue her grievance in the OTC. On August 17, 2018 the OTC upheld Somers’ disciplines and she filed her appeal with this Court on August 28, 2018. We accepted her appeal on September 27, 2018.

There were several extensions of time sought and granted throughout this case. On May 7, 2019, we remanded this case to the OTC to convene a Status Conference of the parties as to the amenability of Peacemaking/Mediation pursuant to Rules of Appellate Procedure, §805.13-1(b)(2). We also tolled the time for thirty (30) or no longer than forty-five (45) days to give the OTC time to determine if a settlement was possible. This Court received notice on June 14, 2019 from the OTC that the remand order was addressed, and that Peacemaking/Mediation was to no avail.

ISSUES ON APPEAL

1. Whether the facts on the record support the disciplinary termination?
2. Whether the findings of fact in the Trial Court’s decision were arbitrary and capricious or an abuse of discretion?
3. Whether the facts on record support the disciplinary suspension?

Disciplinary Process

This appeal may be viewed from many aspects; however, we focus on the primary issue of disciplinary termination. The Respondents were Somers’ duly authorized collective supervisors. On March 22, 2017, the Respondents attempted to interview Somers as part of their investigation of five (5) separate complaints it received pertaining to her. The Respondents asked Somers several

questions regarding these complaints, to which Somers replied that she “refuse[d] to answer the question if it relates to a specific complaint.”

Due Process

Somers contends the Respondents violated her rights to due process by not providing her copies of the complaints for which they were conducting an investigation. The supervisor’s charge pursuant to the complaint process is to attempt a resolution of the complaint. *OPPP §V.D.1.b. Complaints*. The intent of the complaint process is to provide guidance in addressing complaints, but without the coercion of considering disciplinary action. *See OPPP §V.D. Complaints, Disciplinary Actions, and Grievances*.

Article VII of the Oneida Nation’s Constitution states that: “*All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, association and **due process of law**, as guaranteed by the Constitution of the United State.*” (*emphasis added*) The Fifth Amendment of the U. S. Constitution states that: “No person shall . . . be deprived of life, liberty, or property without due process of law . . .” Due process minimally means the timely opportunity to be heard before a neutral magistrate as well as being informed about the matter at hand.

When it comes to workplace investigations within the Tribe, there are no constitutional rights at issue. Nothing in the OPPP Manual states that an investigator must provide a copy of a complaint to an employee when conducting an investigation. Geraldine Danforth (hereinafter “Danforth”), who has worked as the Area Manager for the Oneida Human Resources Department for 16 years, testified on two different occasions that an investigator should never give the complaint to the employee. (OPC Gr. Hr’g Tr. Vol. 3 at 468, 484, Jan. 29, 2018). The reason being, Danforth stated, is because it can create more issues between the employee, supervisor, and other employees within the organization. (OTC Gr. Hr’g Tr. at 56, July. 17, 2018). More importantly, the complaint is never given to the employee because the supervisor is simply trying to determine if the allegations of the complaints have merit and if so, to address them administratively. *See id.*

Somers argues that she relied on EEO Director Matt Denny’s (hereinafter “Denny”) advice that she not answer any questions until she receives copies of the complaints against her. However, Denny himself testified that “[t]here’s nothing in the [OPPP] saying you have to give somebody a

copy [of the complaint].” (OPC Gr. Hr’g Tr. Vol. 2 at 302, Jan. 8, 2018). Furthermore, Danforth testified that Denny helped write the Standard Operating Procedure for Direct Reports to the BC that makes no mention of giving copies of the complaints to employees. (OPC Hr’g Tr. Vol. 3 at 485), Oneida Tribe of Wis. - *Complaint Process for Direct Reports to the Bus. Comm.* (Oct. 13, 2015).

An effective investigator will only disclose details of the complaint that are necessary for the inquiry. The purpose of this is to elicit extemporaneous responses that are not just responses to the person making the complaint or the accusations in the complaint. Somers testified that she refused to answer questions because the questions she was being asked were “general and broad . . . and not specific” (OTC Gr. Hr’g Tr. at 40, July. 11, 2018). However, an effective workplace investigation requires investigators to ask open-ended questions and to not disclose too much about the complaint. FOLEY & LARDNER LLP, *Top Five Best Practices for Workplace Investigations* (May 31, 2016), <https://www.foley.com/en/insights>. This includes not sharing a copy of the complaint with the employee.

The Respondents were conducting an investigation into a complaint when they met with Somers to question her. Although this is an important process, disciplinary actions are not a part of investigating complaints. *See OPPP §V.D.1 Complaints*. The supervisor is simply attempting to determine merit as stated above or find a resolution. Nation employees are obligated to cooperate when it comes to investigations of workplace complaints, that are non-criminal in nature, without the expectation of receiving the complaint. Supervisors conducting investigations into complaints have the responsibility to ask questions as well as expect cooperation. Therefore, Somers claim that her due process rights were violated by her supervisors’ complaint investigation fails.

Abuse of Discretion/Arbitrary and Capricious

Somers also contends that the OTC acted arbitrarily and capriciously and abused its discretion when it upheld her disciplinary termination. The arbitrary and capricious standard of review is “exceedingly deferential.” *Def. Of Wildlife v. U.S. Dep’t of Navy*, 733 F.3d 1106, 1115 (11th Cir. 2013). Whether the OTC’s actions were arbitrary and capricious depends on whether the court came to a rational conclusion based on the available facts. *See Miccosukee Tribe of Indians of Fla.*

V. United States, 566 F.3d 1257 (11th Cir. 2009). We do not substitute our own judgment for that of the OTC. *See id.*

Similar to the arbitrary and capricious standard of review, where an appellate court reviews a decision for abuse of discretion, it is inclined to affirm the decision. *See Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 828 (Fed. Cir. 1989). When a lower court makes a discretionary ruling, that decision will be reviewed for an abuse of discretion. It is difficult for appellants seeking a reversal because the abuse of discretion standard reflects appellate judgment that some decisions are best left to the lower hearing body. *See J.P. Stevens Co. v. LexTex Ltd.*, 822 F.2d 1047, 1051 (Fed Cir. 1987).

In this case, Somers' contention that the OTC's actions in upholding her termination were arbitrary and capricious, or an abuse of discretion are wholly unsupported. Through testimony from several witnesses including the Respondents and Somers herself, the OTC found that: 1) the Respondents met with Somers on March 22, 2017 as part of their investigation of five (5) separate complaints; 2) at the meeting, Somers refused to answer any questions asked by the Respondents because she did not receive a copy of the complaint; 3) Respondents attempted to meet with Somers at her office on March 23, 2017 to discuss her discipline, which is part of the disciplinary process; however, when the Respondents arrived at her office, Somers immediately left and said she would not meet with them.

After the March 22, 2017 meeting with Somers had ended, the Respondents contacted Danforth. It was mutually determined by Danforth and the Respondents that Somers' refusal to cooperate with an investigation qualifies as insubordination. Danforth then indicated that the Respondents had justification to deviate from progressive discipline and terminate Somers for insubordination. Ultimately, Somers was terminated because she refused to cooperate with her supervisor's investigation pertaining to the complaints against her.

Somers argues that the Respondents did not justify their deviance from progressive discipline in terminating her in violation of OPPP Section V.D.2.b. However, Danforth testified that due to the level of management Somers was at and due to the magnitude of the complaints against her, her

refusal to cooperate in the investigation justified her immediate termination. (OPC Gr. Hr'g Tr. Vol. 3 at 483). According to Danforth and the Respondents, the severity of issues affecting the Governmental Services Division were so significant that when Somers refused to participate in the investigation, it was unconscionable, and they had no choice but to terminate her employment. This Court agrees.

Somers also asserts she was fired in part because of what was contained in the five (5) complaints being investigated by the Respondents. However, all three Respondents, other members of the BC, and Danforth all testified that the reason Somers was terminated was because she refused to cooperate in a workplace investigation. Progressive discipline is a guide for repeated infractions, however when an infraction is egregious it may be addressed, as here, immediately by the supervisor. Therefore, the Respondents were justified by the circumstances of this action in deviating from progressive discipline in terminating Somers.

Insubordination

The process of disciplinary termination was followed and based upon the facts related to Somers' insubordination, to wit: Somers refused to discuss the investigation of the complaints with her supervisors, the Respondents.

Insubordination is defined as: "A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment." BLACK'S LAW DICTIONARY 953 (11th ed. 2019). When Somers refused to follow her supervisor's directive that she answer questions regarding the complaints, she acted insubordinately. It was at that point her supervisor then invoked the disciplinary process. The issue was no longer about the complaints but her insubordinate refusal to discuss them with her supervisor.

Somers' efforts to diminish her responsibility in failing to cooperate with an investigation is unavailing. Somers' lack of cooperation obstructed the BC in efficiently carrying out its assigned task. A large enterprise such as the Oneida Nation cannot be managed effectively if employees, especially high-ranking directors, do not participate in workplace investigations. By refusing to cooperate in the investigation while serving as a Division Director of Governmental Services,

Somers insubordination caused harm to critical administrative communication channels between the BC and the Nation's workforce supervisors. The Respondents were justified in not tolerating Somers' insubordinate actions.

1982 General Tribal Council Resolution

Somers alleges that the BC acted outside its scope of authority when it disciplined her. More specifically, Somers asserts that by disciplining her and acting as her supervisor, the BC violated the day to day involvement prohibition that was placed upon the BC pursuant to Oneida General Tribal Council (hereinafter "GTC"). Resolution #2-25-82. This is not an accurate reading of that resolution. The "day to day" language has been recited for years in meetings of the GTC and in decisions of the former Oneida Appeals Commission. However, the operative resolution that was passed in 1982 does not precisely use that language.

The resolution that was adopted by the GTC in 1982 set forth a directive to the BC to "hire a general manager to be directly responsible for the programs and enterprises of the Tribe along with the Personnel Office and the Accounting Office." *GTC Resolution No. 2-25-82*. After this resolution was adopted, the OBC requested that the Oneida General Counsel at the time, Francis Skenandore, answer the question of whether the action taken by the GTC in adopting #2-25-82 was constitutional. *Atty. Skenandore's Memo Re: GTC Resolution 2-25-82*. In his memo addressing why #2-25-82 is constitutional, Skenandore defined the GTC as the ultimate governing body of the Tribe under the Constitution and that the BC "exists only under the authority of the GTC." *Id.* at 8. Skenandore stated that the 1982 Resolution did "not appoint a general manager; it merely direct[ed] the [BC] to hire such a person." *Id.* at 3. He further opined that "the power to hire carries with it the power to fire." *Id.*

The import of the legal memorandum was that the GTC delegated to the BC the responsibility of devising an orderly system of administration of the Nation's departments and programs separate from their legislative governing duties. The BC was directed to hire a general manager who would administer the departments and programs of the Tribe so that the BC could focus on the governing policies. The relationship between the GTC and the BC is one of cooperation. The GTC has oversight of the BC and the procedural means to hold the BC accountable at any given time.

When the BC dissolved the OPC with BC Resolution #04-11-18-A, it took only four (4) months for the GTC to rescind the BC's actions and reinstate the OPC. *BC Resolution No. 09-26-18-F*. However, it has been nearly five (5) years since the BC adopted the 2014 Direct Report resolution and eight (8) years since the GM was removed from the Nation's hierarchy and the GTC has taken no action at all to rescind those resolutions. *BC Resolutions Nos. 10-22-14-A & 09-28-11E*. This inaction by the GTC demonstrates their tacit acceptance of the Direct Report resolution.

Somers' argument that the BC acted outside its scope of authority is an attempt to shift the issue away from the uncontroverted facts of her insubordination. This matter is not about the BC acting in defiance of the directives of the GTC. It is about the insubordinate acts of Somers.

Somers' Disciplinary Suspension

We are also presented with the question of whether the OTC's decision to uphold Somers' suspension was correct. On March 24, 2017, Somers was suspended for violating OPPP §V.D.2.1, due to her violating the HIPAA confidentiality of an employee. At her hearing, Somers presented evidence that a procedural violation occurred when she received her disciplinary form for her suspension. Under Part II of the disciplinary form, the *required* time, date, and description of the incident were all missing. Although Part II of the form contained the instruction to "see attached memo," there was testimony from Somers, Denny, and Danforth that the referenced memo did not specifically cite the time, date, and description of the incident. Furthermore, Denny and Danforth both testified that the discipline should have been voided out due to the procedural error of the missing time, date, and description. We agree and therefore, overturn Somers' disciplinary suspension.

CONCLUSION

The OTC did not err in upholding Somers' termination. Somers offers no legal reason as to why the Court of Appeals should overturn her termination. Furthermore, as the appellant, Somers has the burden of persuasion. §801.8-3(b) – *Burden of Persuasion*. This means it is Somers' duty to produce evidence that will prove her claims. Somers has failed in this respect. But even if Somers had offered some proof to support her allegations, it would not constitute conduct that is arbitrary

and capricious or an abuse of discretion that would lead to us overturning the OTC's decision to uphold her termination.

The Respondents were Somers' interim supervisors as set forth in the BC Resolution establishing Direct Reports. Nothing can be adduced from the record of the proceedings to support Somers' contention that the Respondents intentionally obstructed either the complaint or disciplinary processes. Somers severely hindered the Respondents' investigation process and then refused to speak with them regarding her discipline. Because Somers has not established any legal basis to review the complaints as a condition for her lack of participation in the investigation, there are no constitutional rights at issue in this appeal. This means employees are not immune from discipline when they refuse to participate or cooperate with legitimate directives of their supervisors, including investigations.

DECISION

The Decision of the OPC is affirmed in part and reversed in part pursuant to §805.13-1 (a) and (b) (1), (3), and (4).

Based upon the foregoing, we hereby affirm Somers' disciplinary termination. We also reverse the decision to uphold her disciplinary suspension. The findings of the OTC are based upon the record to which this Court defers in the absence of contrary facts, or clearly erroneous interpretations of law, particularly Oneida precedents. To the extent that the findings of the OTC are contrary to this opinion, such findings are vacated as harmless error.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, the decision of the Oneida Trial Court is **AFFIRMED IN PART** and **REVERSED IN PART**. Dated this 23rd day of August 2019, in the matter of Case No. 18-AC-007, *Elizabeth Somers, v. Oneida Business Committee Officers, Melinda Danforth, Vice-Chairwoman, Patricia King, Treasurer, and Lisa Summers, Secretary.*

It is so ordered.

DISSENTING OPINION

I respectfully dissent from the majority decision for the following reasons. It is my opinion that the primary matter in this case is not about Somers being insubordinate resulting in her being terminated by the Oneida Business Committee, it is about the OBC ignoring Common Law which was established by precedent.

Edward Delgado, Geraldine Danforth and Cristina Danforth v. Dale Wheelock, Docket Number 14-AC-004, November 21, 2014. The Oneida Appeals Commission rendered an opinion on GTC Resolution #2-25-82 and it remains solidly in place. This GTC Resolution has stood the test of time, it has directed the Oneida Business Committee to refrain from day to day activities...the General Tribal Council had on more than one occasion, placed Motions from the floor and Resolutions addressing the involvement of the OBC in day to day activities resulting of Resolution #2-25-82. *“When the OBC place themselves as the supervisor over all directors, they violated a direct order from the General Tribal Council, therefore acted outside their scope of authority.”* *The Oneida Personnel Commission pointed out there is a vast difference between the political arm of the Oneida Tribe and the departmental functions of the tribe.”*

According to this precedent setting decision, I confirm the Oneida Tribal Judicial System hearing body opinion that the OBC did in fact act outside the scope of their authority by enacting Resolution 11-26-14-C which placed them as supervisors over the Division Directors and thus circumventing GTC Resolution 2-25-82. Furthermore, GTC Resolution 2-25-82 reaffirmed GTC Resolution 2-14-76, directing the OBC to implement a management system for maintaining a separation of legislative and administrative responsibilities and was very specific in what areas the OBC could be involved in and none of them were operations/management of the Oneida Nation. The GTC’s intent historically was to keep the legislative and administrative responsibilities separate to provide a check and balance of power with the GTC as having the ultimate power. The purpose of this Appellate Court, in my opinion, is to protect the integrity of the Oneida Nation and its citizens by providing them equitable justice. By the majority focusing on the termination part of this case they are essentially disregarding precedent cases which have addressed the very same issues that are present in this case. It is my opinion the General Tribal Councils’ goal, in the past and presently, was/is; To keep the OBC out of “Day to Day” business of the Oneida Nation to

maintain a separation of powers and thus would have avoided this very situation which we're adjudicating presently. As I write my dissent the OBC has hired a General Manager and thus resolved situations like this to occur in the future.

Leland Wigg-Ninham, Appellate Judge – Dissenting

COURT OF APPEALS

Elizabeth Somers,

Appellant,

v.

Case No. 18-AC-007

Oneida Business Committee Officers
Melinda Danforth, Vice-Chairwoman,
Patricia King, Treasurer, and
Lisa Summers, Secretary,

August 29, 2019

Respondents.

CORRECTION OF CITATION IN FINAL DECISION

This matter has come before Appellate Judges Chad Hendricks, Sharon House, Leland Wigg-Ninham, and Chief Appellate Judge, Gerald L. Hill

BACKGROUND

On August 23, 2019, this Court issued a Final Decision in the above-captioned case. On August 29, 2019 it was noted that a sentence with a typo/error was included in our ruling which stated under the subtitle "DECISION," p.9, "The Decision of the **OPC** (emphasis added) is affirmed in part and reversed in part pursuant to §805.13-1 (a) and (b) (1), (3), and (4)."

ORDER

The citation of OPC rather than OTC (Oneida Trial Court) in the Final Decision is hereby acknowledged and corrected by this Court pursuant to §801.8-1(b) and §805.4-1. The Final Decision sentence referred to is corrected to read; "The Decision of the OTC is affirmed in part and reversed in part pursuant to §805.13-1 (a) and (b) (1), (3), and (4)."

The corrected citation does not change the findings or conclusion of the Final Decision. This correction is appended to the Final Decision issued on August 23, 2019.

By the authority vested in the Oneida Judiciary, Court of Appeals, by Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, the citation in the Final Decision issued on August 23, 2019, is corrected as stated above. Dated this 29th day of August 2019, in the matter of Case No. 18-AC-007, *Elizabeth Somers v. Oneida Business Committee Officers, Melinda Danforth, Vice-Chairwoman, Patricia King, Treasurer, and Lisa Summers, Secretary.*

It is so ordered.