

**ONEIDA JUDICIARY**  
Tsi nu téshakotiya?tolétha?

---

**TRIAL COURT**

---

**Gregory Roskom,  
Petitioner**

v.

**CASE NO: 22-EMP-003**

**DATE: July 5, 2022**

**David Larson, Area Manager/Continuum of Care Director  
Anna John Resident Centered Care Community (AJRCCC)  
Respondent**

---

**ORDER**

---

This case came before the Oneida Trial Court, Honorable Patricia Ninham Hoeft presiding.

**BACKGROUND**

Petitioner filed an adverse employment action complaint on March 17, 2022 with the Oneida Judiciary Trial Court claiming he was wrongly excluded from the list of Oneida Comprehensive Health Division (OCHD) employees eligible to be paid a \$4,000.00 Staff Retention Incentive Award in December 2021. On March 31, 2022, the Court determined Petitioner's complaint sufficiently alleged a required process or policy was not followed or was inappropriately followed and the decision of the Area Manager is clearly against the weight of the evidence or procedural irregularities exhibited during the appeal process were harmful to Petitioner.

On April 12, 2022, Respondent filed a motion to dismiss and attached a standard operating procedure (SOP) governing payment of the incentive award, an organizational chart of the OCHD and an affidavit signed by Jill Caelwaerts, Dietician Supervisor at the Anna John Resident Centered Care Community (AJRCCC). Petitioner filed a response to the motion to dismiss on April 20, 2022. Respondent did not submit a reply to Petitioner's response.

At the May 23, 2022 pretrial hearing on the motion to dismiss, the Court postponed hearing the motion to consider a request from Petitioner's Lay Advocate, Wesley Martin, Jr., to withdraw from this case and Petitioner's request for a waiver allowing Petitioner's new advocate to appear before the Judiciary for this one particular case. The Court set a new briefing schedule for the motion to dismiss requiring the parties to file briefs with the Court on or before June 13, 2022. The briefs were required to contain a concise, chronological statement of admission of facts to which both parties have stipulated. The Court received Respondent's brief on June 13, 2022. The

Court did not receive a brief from Petitioner. On June 22, 2022, Petitioner filed a motion for continuance requesting more time to file their brief. Respondent filed a response to the continuance motion on June 27, 2022 arguing the motion must be denied. Petitioner filed a reply to Respondent's response on June 29, 2022.

### ANALYSIS

**Failure to file a response.** In this case, Petitioner failed to file a pre-trial brief due on June 13, 2022. Petitioner filed a motion for continuance on June 22, 2022 asking for additional time to file their brief. In determining whether to grant Petitioner more time, the Court considers requests on a case-by-case basis<sup>1</sup>; the circumstances at the time of request;<sup>2</sup> and if the request for more time is filed after the missed deadline, an order granting more time must be based on a finding of excusable neglect.<sup>3</sup> Denial of the motion for more time may result in a default judgment in favor of the Respondent.<sup>4</sup>

Here, Petitioner and Petitioner's advocate claim a death in their immediate family on June 11, 2022 is the reason they failed to file a brief that was due on June 13, 2022. Petitioner failed to file anything or provide any notice until June 22, 2022 when they filed their motion for continuance. In the motion, Petitioner requested more time based on the death, attending a funeral on June 17, 2022, and because both Petitioner and Petitioner's Advocate were without power June 15 to 19, 2022 due to a storm on June 15, 2022. The Court acknowledges the tragic nature of the circumstances facing both Petitioner and Petitioner's advocate and takes judicial notice of the storm on June 15, 2022 causing the emergency closure of the Oneida Judiciary on June 16 and 17, 2022; however, Petitioner was noticed and consulted with at the May 23, 2022 hearing about the brief and its due date. A written order with the requirements of the brief and deadline were issued May 25, 2022. Petitioner provided no explanation showing how each reason caused their inability to file their brief on time. The reasons, while difficult, do not excuse Petitioner's failure to file their brief on time or to request an extension of time before the due date. Thus, Petitioner's motion for continuance is denied.

A default judgment may be granted when a party fails to file a required response.<sup>5</sup> Because Petitioner's former advocate timely filed their initial response to the motion to dismiss on April 20, 2022, the Court finds a response was submitted and therefore not subject to default.

---

<sup>1</sup> See, Oneida Trial Court Rules, #1, §1.6-3. A request for a continuance shall be decided on a case-by-case basis considering the circumstances present at the time of the request.

<sup>2</sup> Id.

<sup>3</sup> See, Oneida Judiciary Rules of Civil Procedure, §803.2. *Extending Time.* (a) When an act may or shall be done within a specified time, the Judge presiding over the matter may, for good cause, extend time: (2) On motion made after the time has expired if the party failed to act because of excusable neglect.

<sup>4</sup> See, Oneida Judiciary Rules of Civil Procedure, §803.29-3. *Plaintiff.* When a party has filed a claim fails to appear, plead, or prosecute said claim as provided in this Law or elsewhere, a dismissal may be granted by the Court, on its own or on a party's motion, dismissing the claim. For purposes of this section, dismissal shall be treated as default.

<sup>5</sup> Id.

**Motion to Dismiss.** Respondent argues in its motion to dismiss that Petitioner was not eligible to receive the incentive award and failed to follow the employee grievance procedure by filing an untimely appeal with the proper Area Manager in this matter. Because the Court finds the argument that Petitioner’s complaint was untimely filed to be dispositive, the allegation that Petitioner was not eligible for the incentive payment is not being considered in the Court’s decision.

On this motion to dismiss, the Court considers 8 O.C. 803.9-2(a)(6), which addresses the failure to state a claim upon which relief can be granted. To determine the legal sufficiency of this complaint, the Court considers only matters pleaded in the complaint, which includes materials referenced in the complaint or taken on judicial notice.<sup>6</sup> Factual allegations in the complaint must be taken as admitted, including any facts that would support the allegations if proven.<sup>7</sup>

The complaint in this case does not include an Area Manager’s decision. Petitioner alleges the Area Manager did not respond to Petitioner’s January 13, 2022 letter addressed to the Area Manager/David Larson, HRD Manager/Designee, and Mark Powless, General Manager. Respondent argues Mr. Larson is not the Area Manager in this matter and Petitioner failed to follow the employee grievance procedure by filing an untimely appeal with the proper Area Manager in this matter.

**Petitioner’s appeal not filed with the proper Area Manager.** Petitioner claims Mr. Larson is the Area Manager in this matter. Under Oneida Nation Definitions, last revised February 11, 2021, Area Manager is defined as “an employee’s supervisor’s supervisor, or, in other words, two levels of supervision in the chain of command above the employee.” To identify the position that is two levels of supervision above Petitioner, the Court took judicial notice of the OCHD organization charts attached to Respondent’s motion to dismiss in Exhibit A. Here, the position of cook is one of three positions listed on the organization chart. Petitioner admits he was employed as a cook at the AJRCCC. Dietary Aide Cooks are supervised by the Food Service Supervisor, which is supervised by the Dietitian Supervisor, which is supervised by Mr. Larson’s position, Continuum of Care Director/AJRCCC.<sup>8</sup> Because Mr. Larson’s position is three levels above the Dietary Aide Cooks, Mr. Larson is not the Area Manager in this matter. Thus, Petitioner failed to file his appeal to the proper Area Manager.

**Petitioner’s complaint is untimely filed with the Trial Court.** What the Court used to determine if Petitioner’s complaint is timely filed is the employee grievance procedure provided in the Oneida Personnel Policies and Procedures (OPPP) Manual. Under section V.D.6.b.1, an employee may appeal an Area Manager’s decision to the Trial Court by filing a complaint with

---

<sup>6</sup> See, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 2509.

<sup>7</sup> See, *Morgan v. Pennsylvania General Ins. Co.*, 275 NW 2d 660, 734-35 (Wis. 1979).

<sup>8</sup> See Exhibit A, page 9, of the organization charts attached to Respondent’s motion to dismiss filed on April 12, 2022.

the Court within 10 business days from the employee's receipt of the Area Manager's decision<sup>9</sup>. Here, the Court is unable to determine when Petitioner received the Area Manager's decision because Petitioner alleges an Area Manager decision was not issued in this case. Without an Area Manager decision, the Court is unable to determine when Petitioner's 10-day filing period starts. However, another way to determine the start date is by identifying when the Area Manager received Petitioner's appeal and counting 15 business days after that date to arrive at the date when Petitioner should have received the Area Manager's decision. Under the OPPP, section V.D.6.a.2, once an Area Manager receives an appeal, an employee must receive an Area Manager's decision within 10 business days, or 15 business days if granted an extension. Here, Mr. Larson received Petitioner's appeal on January 13, 2022, the date on Petitioner's letter to Mr. Larson. Fifteen business days after January 13, 2022 is February 3, 2022, the date when the Area Manager's investigation of Petitioner's appeal should have been completed and the decision issued to the Petitioner. Even though Petitioner did not receive an Area Manager decision, the lack of receiving the decision on this date trigger's the start of Petitioner's timeline to file a complaint with the Trial Court. February 4, 2022 is the start of Petitioner's 10-day timeline to file their appeal with the Trial Court; 10 business days later is February 17, 2022, the date when Petitioner's complaint must be filed with the Trial Court. Because Petitioner filed their complaint with the Trial Court on March 17, 2022, Petitioner's complaint was untimely filed. Even if Petitioner filed an appeal with the proper Area Manager, the Court would still find Petitioner's filing with the Trial Court untimely.

**Sovereign immunity.** Finally, an employee ceases to be an employee when an employee is separated from employment and the time to appeal expires. Petitioner, at the time he filed his complaint with the Court, was no longer an employee with the Nation subject to the OPPP because he missed the deadline to file with the Court, as discussed above. Because Petitioner was no longer employed with the Oneida Nation when his complaint was filed with the Trial Court, Petitioner's complaint must be filed as a civil complaint outside the OPPP's grievance procedure. Respondent argues that employment claims brought against the Nation outside the employee grievance procedure are barred by sovereign immunity unless expressly waived. Under 1 O.C. 112.6. Waiver of Sovereign Immunity, the sovereign immunity of the Nation may be waived by resolution or motion of the Oneida Business Committee. The Oneida Judicial System established that a petitioner must exhaust their administrative remedies before filing a claim with the Trial Court. *Lois Strong v. Todd Vanden Heuvel, Executive Human Resource Director*, Oneida Judiciary, Court of Appeals, Case No. 21-AC-006, p. 3 (November 19, 2021). Here, Petitioner filed his complaint with the Trial Court after he was no longer employed with the Nation. Because claims brought outside the grievance procedure are barred by sovereign immunity unless specifically and expressly waived by the Nation, the Court cannot hear this claim.

---

<sup>9</sup> The Court is exercising jurisdiction over employee grievances in accordance with Oneida Business Committee Resolution 03-13-19-C. This resolution gives the Court authority to hear employee grievances until the OPC is ready to resume it's hearing authority. To date, the OPC is not yet ready to resume it's hearing authority.

In conclusion, because the Court finds the argument that Petitioner's complaint was untimely filed to be dispositive, the allegation that Petitioner was not eligible for the incentive payment is not being considered in the Court's decision. Even if Petitioner proved he was eligible for the payment, Petitioner failed to file his appeal with the proper Area Manager and when he did not receive a response to his appeal letter, Petitioner failed to act until he was no longer employed with the Nation. Because claims brought against the Nation outside the employee grievance procedure are barred by sovereign immunity unless expressly waived, the Court cannot hear this claim. Therefore, Respondent's motion to dismiss for failure to state a claim upon which relief may be granted is GRANTED.

### **FINDINGS OF FACT**

The Court finds as follows:

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 worked as a cook for the Anna John Resident Centered Care Community (ARJCCC) from April 15, 2015 to October 4, 2021.
4. Petitioner submitted his two-week-notice to his supervisor, Felicia Brunette, on September 21, 2021.
5. Distribution of the incentive award payment is governed by the standard operating procedure, Oneida Comprehensive Health Division Staff Retention Incentive Award, effective on December 1, 2021.
6. Petitioner's spouse, Tina Roskom, was employed in the AJRCCC as a CNA when she signed the Employee Acknowledgement of Retention Award form on December 2, 2021.
7. Petitioner's letter of appeal to the Area Manager/David Larson, HRD Manager/Designee & Mark Powless is dated January 13, 2022.
  - a. Mr. Larson, Continuum of Care Director, AJRCCC, is not the proper Area Manager in this matter and is three levels of supervisor above the Dietary Cook Aides in the AJRCCC.
8. On March 17, 2022, Petitioner filed an appeal of the Area Manager's decision with the Trial Court.
  - a. On Petitioner's Employee Grievance Complaint form filed with the Trial Court, Petitioner checked the "No" box in response to question #4, "Did an Area Manager issue a decision on your case?"
  - b. Petitioner filed a Fee Waiver Request on March 17, 2022 with the Trial Court because he was not employed with the Oneida Nation when he filed this complaint.
9. On March 31, 2022, the Trial Court accepted Petitioner's complaint and scheduled a pre-trial hearing on April 14, 2022.
10. On April 11, 2022, Petitioner filed a notice of representation and a motion for continuance to reschedule the pre-trial hearing to give Petitioner's advocate time to prepare.
11. On April 12, 2022, Respondent filed a motion to dismiss and attached the standard operating procedure (SOP) governing payment of the incentive award; an organizational chart of the

OCHD; and an affidavit signed by Jill Caelwaerts, Dietician Supervisor at the Anna John Resident Centered Care Community (AJRCCC).

- a. On April 20, 2022, Petitioner filed a response to the motion to dismiss.
  - b. Respondent did not file a reply to Petitioner's response.
12. On April 13, 2022, the Trial Court entered a scheduling order.
13. On May 2, 2022, Respondent filed a notice of representation and a reply to Petitioner's response to Respondent's motion to dismiss.
14. On May 12, 2022, prior to the start of a pre-trial hearing this day on the motion to dismiss, Petitioner's advocate made a request by telephone to reschedule the hearing due to an emergency.
15. On May 20, 2022, Petitioner's advocate filed a motion to withdraw his representation in this case and requested to be replaced by a new advocate who needed a waiver from the Court's Rules of Admission.
- a. On May 23, 2022, a pre-trial hearing was held on Petitioner's request for a new advocate and the hearing on the motion to dismiss was continued. A hearing date on the motion to dismiss was not scheduled pending the filing of briefs by the parties on the motion.
16. On June 13, 2022, Respondent filed their brief on the motion to dismiss; Petitioner did not file a brief.
- a. On June 22, 2022, Petitioner filed a motion for continuance to seek additional time to file their brief.
  - b. On June 27, 2022, Respondent filed a response to Petitioner's motion for continuance.
  - c. On June 29, 2022, Petitioner filed a reply to Respondent's response.
17. The Court took judicial notice of a storm on June 15, 2022 causing the emergency closure of the Oneida Judiciary on June 16 and 17, 2022.

### **PRINCIPLES OF LAW**

#### ***Title 8. Judiciary – Chapter 804, Oneida Judiciary Rules of Evidence***

804.5. Judicial Notice.

804.5-2. *Facts that May Be Judicially Noticed.* The Court may judicially notice a fact that shall not subject to reasonable dispute because it:

- (a) is generally known within the Court's territorial jurisdiction; or
- (b) may be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

804.5-3. *Taking Judicial Notice.* The Court:

- (a) may take judicial notice on its own

#### ***Title 8. Judiciary – Chapter 803, Oneida Judiciary Rules of Civil Procedure***

803.6-2. *Extending Time.*

(a) When an act may or shall be done within a specified time, the Judge presiding over the matter may, for good cause, extend time:

(1) On its own motion or the motion of any party, with or without notice, if made before the original time or its extension expires; or

(2) On motion made after the time has expired if the party failed to act because of excusable neglect.

*803.9-2. How to Present Defenses.*

(a) Every defense to a claim for relief in any pleading shall be asserted in the responsive pleading if one is required, except those listed below. If a responsive pleading is not required, any defense may be asserted at hearing. A party may assert the following defenses by motion:

(6) Failure to state a claim upon which relief can be granted.

*803.29. Default; Default Judgment*

*803.29-3. Plaintiff.* When a party who has filed a claim fails to appear, plead, or prosecute said claim as provided in this Law or elsewhere, a dismissal may be granted by the Court, on its own or on a party's motion, dismissing the claim. For purposes of this section, dismissal shall be treated as default.

***Oneida Nation Personnel Policies and Procedures Manual (OPPP)***

***Section V.D. COMPLAINTS, DISCIPLINARY ACTIONS, AND GRIEVANCES***

*Section V.D.6.a.* For all disciplinary actions, regardless of severity:

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.

*Section V.D.6. b.* Filing a Complaint

1) An employee may appeal the Area Manager's decision to the Oneida Personnel Commission by filing a complaint with the Human Resources Department on behalf of the Oneida Personnel Commission.

a) The employee shall file the appeal within ten (10) working days from the employee's receipt of the Area Manager's decision.

***Oneida Nation Definitions (last revised 2-11-21), p.1 of 23***

**Area Manager (AM):**

1) An employee's supervisor's supervisor or, in other words, two levels of supervision in the chain of command above the employee, or,

2) An individual designated to be the Area Manager by a General Manager Level position

***Oneida Code of Laws Title 1. Government and Finances - Chapter 112 Sovereign Immunity***

112.4-1. The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or Tribal court, is hereby expressly reaffirmed. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against the Tribe unless the Tribe has specifically waived sovereign immunity for purposes of such suit or proceeding. No suit or other proceeding, including any Tribal proceeding, may be instituted or maintained against officers, employees or agents of the Tribe for actions within the scope of their authority, unless the Tribe has specifically waived sovereign immunity for purposes of such suit or proceeding.

**ORDER**

1. Petitioner's motion for continuance seeking additional time to file a pre-trial brief on the motion to dismiss is DENIED.
2. Respondent's motion to dismiss for failure to state a claim is GRANTED.

IT IS SO ORDERED.

By the authority vested in the Oneida Trial Court pursuant to Resolution 01-07-13-B of the General Tribal Council, this order was signed on July 5, 2022.

Patricia Ninham Hoeft, Trial Court Judge

