

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

**Gregory Roskom,
Petitioner**

v.

CASE NO: 22-EMP-002
DATE: July 21, 2022

**Oneida Division of Public Works (DPW),¹
Respondent**

ORDER

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

Appearing in-person: Petitioner, Gregory Roskom; Petitioner's advocate, Winnifred Thomas; Respondent, Ronald Van Schnyndel; Respondent's attorney, Peggy Van Gheem.

BACKGROUND

On March 17, 2022, Petitioner filed an appeal of the Area Manager's decision seeking to overturn the termination of his employment. On April 11, 2022, a notice of representation was filed by Petitioner's advocate, Mr. Wesley Martin, Jr. On April 26, 2022, a pre-trial hearing was held. On May 12, 2022, Petitioner filed a witness list. On May 13, 2022, Respondent filed a witness list and list of discoverable items. On May 20, 2022, at a second pre-trial hearing, the Court granted Mr. Martin's request to withdraw as advocate from this case and denied his request for a waiver of admission to allow Ms. Winnifred Thomas to substitute as advocate because Ms. Thomas was serving as an advocate under waiver in another case. On June 10, 2022, the scheduling order was modified which extended times to complete discovery and file motions. On June 20, 2022, discovery closed. On June 27, 2022, Respondent filed a motion for summary judgment. On June 30, the Court was notified that Ms. Thomas was admitted to practice. On July 7, 2022, Ms. Thomas filed a notice of representation as Petitioner's Advocate. Also, on July 7, 2022, Petitioner filed an untimely response opposing Respondent's summary judgment motion. On July 8, 2022, the Court heard oral arguments on Respondent's motion for summary judgment.

¹ The Court's convention is to name the employee's department or division as Respondent in employment appeals rather than the name of the individual who issued the Area Manager's decision.

ISSUES

Did the moving party show there is no genuine dispute as to any material fact and if yes, is the moving party entitled to a judgment as a matter of law?

ANALYSIS

This case arises out of Petitioner's appeal of the termination of his employment on February 18, 2022 as an Oneida Custodian. Petitioner is accused of removing an item from an office without authorization. Petitioner was issued a disciplinary action for allegedly violating the following rule in the Oneida Personnel Policies and Procedures Manual (OPPP), V.D.2.c.3.b. Use of Property:

Unauthorized possession, removal or willful destruction of Oneida Nation or another employee's property (including improper use of possession of uniforms, identification cards, badges, permits or weapons). (Willful destruction of property may subject the violator to applicable liability laws.)

(T)

On appeal, Petitioner sufficiently alleged the Area Manager's decision was against the weight of the evidence and Petitioner was harmed by procedural irregularities exhibited during the appeal process. A trial date was set where Petitioner bears the burden to prove by a preponderance of the evidence that the Area Manager's decision was against the weight of the evidence and/or procedural irregularities in the appeal process harmed Petitioner. After discovery closed, Respondent filed a motion for summary judgment arguing that a trial is not needed because Petitioner lacks evidence to dispute the violation or that he was harmed by procedural irregularities. Respondent's motion for summary judgment is supported by a statement of undisputed facts which relied on the materials in the record, including the following three exhibits: (1) a photo of the item that was wrapped in the tissue paper, (2) the Oneida Director of Surveillance's certification of a February 7, 2022 surveillance video of Petitioner exiting the office he cleaned from where he allegedly removed the item, and (3) a February 15, 2022 report of an investigator's interview with Petitioner about the incident. Petitioner offered no evidence to refute Respondent's evidentiary assertions. The Court agrees with Respondent and grants summary judgment for the reasons below.

Summary Judgment Standard

Under section 803.30-1 of the Oneida Rules of Civil Procedure, summary judgment is proper if the moving party shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The party asking for summary judgment bears the initial burden of showing there is no genuine dispute as to any material fact, and thus, a trial is not needed to resolve the dispute. A genuine dispute exists when the nonmoving party provides evidentiary support of the dispute. Each party bears the burden to show "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to

support the fact.” 8 O.C. 803.30-1(a)(2). The Court must determine whether a factual dispute exists, whether the dispute is material to the outcome of the case, and whether the dispute is genuine.

No genuine dispute as to any material fact

At the summary judgment stage, the party opposing a summary judgment must demonstrate they have evidence to support the material facts of their claims. Petitioner makes two claims: one, the Area Manager’s decision is against the weight of the evidence, and two, Petitioner was harmed by procedural irregularities in the appeal process.

Petitioner produces no evidence demonstrating the Area Manager’s decision is against the weight of the evidence. Because Petitioner claims he was authorized to take an item from an office he was cleaning, Petitioner claims his employment was wrongly terminated and the Area Manager’s decision is against the weight of the evidence. At the summary judgment stage, Petitioner must show there are material facts in dispute that would entitle Petitioner to a trial.

In this case, the material facts are identified by the OPPP rule allegedly violated by Petitioner. The first material fact is whether Petitioner removed and possessed another employee’s property. The second material fact is whether Petitioner was authorized to remove and possess the property. In this case, there is no dispute over the first material fact. The parties agree that on February 7, 2022, Petitioner removed from an office he was cleaning at the Norbert Hill Center an item wrapped in tissue paper that was on the floor in the office. The parties also agree that Petitioner was in possession of the item. The parties agree that Petitioner kept the item in the custodian work area in the Norbert Hill Center in a locker or on Petitioner’s cleaning cart. Finally, the parties agree that on February 9, 2022, Petitioner returned the item to an investigator after Petitioner was asked if he had the item. Thus, the material fact that Petitioner took the wrapped item from the office is not disputed.

On the second material fact, Petitioner claims he found a thank you note on the floor near or on the wrapped item and took the item because the note was addressed to custodial. The crux of whether there is a dispute over the second material fact hinges on the existence of the thank you note. According to the complaint, Petitioner claims there were two notes with the wrapped item, one on the outside of the wrapping with the words “Custodial, thank you for doing a [super] job,” and the other, a thank you card addressed to the item’s owner, inside the wrapping. Respondent argues the note addressed to custodial does not exist and Petitioner has no evidence of the note. To establish there was no note, Respondent cites the surveillance video showing Petitioner removing the item from the office and showing there was not a note attached to the item. To establish Petitioner did not have authorization to take the item from the office, Respondent cites the investigator’s report. According to the report, the investigation was in response to a report by the item’s owner of a “possible theft of a beaded medallion” that was slid under the office door by another employee.

Respondent argues that the owner, by making a claim that a theft possibly occurred, shows permission was not given to “anyone, including [Petitioner], to remove the item from the office.”²

Petitioner does not provide any evidence to refute Respondent’s assertions. Petitioner relies entirely on his allegations in his complaint and at the hearing. The day before the pre-trial hearing, Petitioner filed a written response objecting to Respondent’s summary judgment motion. Petitioner’s response was filed two days after the response was due. At the pre-trial hearing, Respondent made a motion requesting Petitioner’s written response be stricken because it was untimely filed and Petitioner did not request an extension of time or show the late filing was due to excusable neglect. 8 O.C. 803.6-2(a)(2). Because Petitioner did not dispute Respondent’s arguments, the Court granted Respondent’s motion to strike Petitioner’s response.

Even if Petitioner’s filing was taken as a response, Petitioner failed to respond specifically to Respondent’s assertions that the note did not exist because it was not visible in the surveillance video and the note was never produced. At the hearing, Petitioner admitted he does not have the notes. In a March 2, 2022 transcript of an interview between the Area Manager and Petitioner, Petitioner stated he threw away the cards included with the item. At the hearing, Petitioner asserted new allegations, claiming he was authorized under his job description to take the wrapped item out of the office as part of his responsibilities to pick up trash from floors in the offices he cleans and throw away that trash. Because Petitioner claims he thought the item was a cookie and not trash, Petitioner contradicts his own claim with his assertion that his job description authorized him to remove items that were trash from the offices he cleans.

At the summary judgment stage, Petitioner must demonstrate he has evidentiary support to back up his claims if and when his case goes to trial. Petitioner did not present evidence to support his claim. Thus, Petitioner admitted he took the item from the office he was cleaning after determining it was a cookie and not trash and provided no evidence of a thank you note he claims he found on the floor near or on top of the item. Therefore, Petitioner failed to show there are material facts in dispute that would entitle Petitioner to a trial on the claim that the Area Manager’s decision was against the weight of the evidence.

Petitioner produces no evidence of harm by procedural irregularities exhibited in the appeal process.

At the hearing, Petitioner stated several claims alleging harm and provided no evidence to support any of those claims. First, Petitioner claimed he was harmed by the decision to terminate his employment because he has been without work and ineligible for unemployment benefits because he was labeled a thief. Petitioner claims to have “letters from unemployment” to support his allegation of harm but did not provide that evidence before discovery closed or with his response to the summary judgment motion. Petitioner also claims he suffered harm because the Area Manager’s decision did not comply with OPPP requirements. According to the OPPP, section V.D.6.a.4., the

² See, “Respondent’s Brief In Support Of Motion For Summary Judgment,” June 27, 2022, page 3.

Area Manager's decision must include "a reason for the decision, an explanation of the decision and the action to be taken as a result of it." Petitioner does not identify or provide evidence of the harm he suffered by the decision's brevity because it consisted of two sentences. Finally, Petitioner claims he suffered harm because the Area Manager was biased, which impacted the Area Manager's ability to conduct a thorough investigation. At the hearing, Petitioner claims his supervisor and the Area Manager held a bias that Petitioner was a thief after receiving a complaint from the item's owner of a possible theft. Petitioner claims this bias impacted the ability of his supervisor and Area Manager to complete a thorough investigation. Petitioner provides no evidence to support his allegations of bias. Respondent argues Petitioner did not offer any evidence of harm resulting from procedural irregularities. The Court agrees. Thus, Petitioner failed to show there are material facts in dispute that would entitle Petitioner to a trial on the claim that the procedural irregularities were exhibited that were harmful to Petitioner.

Movant is entitled to judgment as a matter of law

Throughout the appeal process, Petitioner was provided the opportunity to compile and submit the evidence he needed to make his case at trial. The deadline to file witness lists was extended from May 13, 2022 to June 24, 2022. The deadline to complete discovery was extended from May 31, 2022 to June 20, 2022. When it would have been appropriate for Petitioner to identify any and all witnesses to support his claims, Petitioner lists the Area Manager as his only witness. Also, it appears Petitioner failed to use the discovery process to investigate the facts in his case. On April 27, 2022, Petitioner requested a copy of the surveillance video. Respondent provided a copy of the video to Petitioner on May 8, 2022 and a second copy on June 27, 2022 that was attached to the summary judgment motion. It would have been appropriate at this point for Petitioner to file an opposing affidavit from a person qualified to challenge the video's depiction. Petitioner did not provide any evidence. Petitioner asserts this case cannot be decided without a trial, but the Court disagrees because if this case went to trial, Petitioner would have no evidence to support his claims.

At the summary judgment stage, the parties must demonstrate they have evidence to support their claims. "The 'mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'"³ The Court's function is to determine whether there is a genuine issue for trial. A genuine issue for trial must be established by the non-moving party by providing evidentiary support of the dispute as required under 8 O.C. 803.30. Petitioner provided no evidence. Even by viewing the facts in the light most favorable to Petitioner, the Court is unable to make any factual inferences in favor of Petitioner to show he found a thank you note on the floor. Thus, Petitioner has failed to show the existence of a genuine dispute of material facts.

Finally, Respondent must be entitled to judgment as a matter of law. As the employee asserting an employment grievance, Petitioner has the burden at trial to prove by a preponderance of the

³ See, *Camacho v. Trimble Irrevocable Trust*, 756 NW 2d 596, 598 (Wis. Ct. of App. 2008).

evidence that the Area Manager’s decision is against the weight of the evidence and/or the existence of procedural irregularities in the appeal process were harmful to Petitioner. Under Oneida caselaw, to prevail by a preponderance of evidence means that:

“a petitioner must present evidence that has “the most convincing force” and “superior evidentiary weight. A petitioner meets this burden of proof by presenting physical and testimonial evidence to prove their case and the proposition that it is more likely to be true than not true that the respondent was wrong. The respondent does not have to do anything to prove or defend their case if the petitioner fails to prove their case by a preponderance of the evidence.”⁴

Thus, Petitioner failed to demonstrate the evidentiary support required to meet the burden by an employee appealing an Area Manager’s decision. Therefore, Respondent’s motion for summary judgment is GRANTED and the Area Manager’s decision is UPHeld.

PRINCIPLES OF LAW

803.4. General Provisions

803.4-3. *Other Rules of Procedure Used.* All matters and proceedings not specifically set forth herein shall be handled in accordance with reasonable justice, as determined by the Judiciary. Where this Law is ambiguous or does not address a situation, the Federal Rules of Civil Procedure or Section 801 of the Wisconsin Statutes may be used as a guide. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in Tribal law unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

803.4-4. At every stage of the proceeding, the Court may disregard any technical error or defect in a failure to comply with this Law as long as the error or noncompliance does not affect the substantive rights of the parties; particularly those not represented by an attorney.

803.30. Summary Judgment

803.30-1. *Motion for Summary Judgment or Partial Summary Judgment.* A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The Court shall state on the record the reasons for granting or denying the motion.

803.30-3. *Procedures.*

(a) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed shall support the assertion by:

- (1) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those

⁴ See, Deborah Thundercloud and Jacqueline Smith v. Cheyenne J. King, 20-AC-004 (June 1, 2021), pg. 6.

made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(2) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

803.30-5. *Failing to Properly Support or Address a Fact.* If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 803.30-3, the Court may:

- (a) Give an opportunity to properly support or address the fact;
- (b) Consider the fact undisputed for purposes of the motion;
- (c) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
- (d) Issue any other appropriate order

Oneida Nation Personnel Policies and Procedures Manual

Section V.D.6.a.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.6.d.1. Review of the Complaint

1) The Human Resources Department shall provide the information obtained to the Oneida Personnel Commission members selected to serve as the hearing body for the complaint, and the Oneida Personnel Commissioners shall review all the information submitted by the Petitioner and the Human Resources Department to determine if one or both 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 were harmful to one of the parties to the grievance.

3) If the Oneida Personnel Commission members find that neither condition exists, the Oneida Personnel Commission will deny the appeal for a hearing and affirm the decision of the Area Manager.

Section V.D.2. Disciplinary Actions

V.D.2.c.3.b. Use of Property. Unauthorized possession, removal or willful destruction of Oneida Nation or another employee's property (including improper use of possession of uniforms, identification cards, badges, permits or weapons). (Willful destruction of property may subject the violator to applicable liability laws.) (T)

Oneida Nation Definitions (last revised 2-11-21)

Authorization: The process of giving someone permission to do or have something. Page 2 of 23.

FINDINGS

1. The Court has subject matter, personal and territorial jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. On February 18, 2022, Petitioner was terminated from employment as a custodian in the Oneida Department of Public Works (DPW) for the following violation of the Oneida Personnel Policies and Procedures (OPPP):
 - V.D.2.c.3.b. Use of Property.** Unauthorized possession, removal or willful destruction of Oneida Nation or another employee's property (including improper use of possession of uniforms, identification cards, badges, permits or weapons). (Willful destruction of property may subject the violator to applicable liability laws.) (T)
4. Petitioner and Respondent agree to the following facts:
 - a. On February 7, 2022, while cleaning an office in the Norbert Hill Center,
 - i. Petitioner picked up an item wrapped in tissue paper that was on the floor near trash bins inside the office;
 - ii. Petitioner took the wrapped item out of the office and put it on his cleaning cart;
 - iii. Petitioner opened the wrapped item when Petitioner was on his break to find a thank you note inside the wrapping that indicated the item belonged to the employee whose office Petitioner took it from; and
 - iv. Petitioner left the item in the custodial work area inside the Norbert Hill Center.
5. On March 17, 2022, Petitioner timely filed an employee grievance with the Trial Court to appeal the Area Manager's decision upholding the termination.
6. On April 11, 2022, a notice of representation was filed by Petitioner's advocate, Mr. Wesley Martin, Jr.
 - a. On May 4, 2022, a notice of representation was filed by Respondent's attorney, Peggy Van Gheem.
7. On April 26, 2022, at a pre-trial hearing, the parties agreed to the following scheduling order:
 - a. Complete discovery on May 31, 2022;
 - b. File motions and responses to motions on or before June 21, 2022.
8. On May 8, 2022, Respondent provided Petitioner's advocate, Mr. Martin, with a copy of a February 7, 2022 surveillance video recording showing Petitioner exiting an office he was cleaning while carrying in his hands the wrapped item.

- a. On June 27, 2022, Petitioner received a second copy of the surveillance video when Respondent attached it to their motion of summary judgment filed with Petitioner and the Court.
9. Each party submitted a witness list.
 - a. On May 12, 2022, Petitioner filed a witness list identifying one witness:
 - i. Ronald Van Schyndel, Area Manager.
 - b. On May 13, 2022, Respondent filed a witness list identifying three witnesses:
 - i. Matt Green, Supervisor, Custodial Roving, Oneida Division of Public Works;
 - ii. Ronald Van Schyndel, Assistant Manager, Custodial, Oneida Division of Public Works; and
 - iii. James D. Martin, Jr., Investigator, Internal Security, Oneida Casino.
10. On June 1, 2022, Mr. Martin's request to withdraw as Petitioner's advocate was granted; his request for a waiver of admission to allow Ms. Winnifred Thomas to substitute was denied because Ms. Thomas was serving as advocate under a waiver in another case.
11. On June 10, 2022, the scheduling order was modified to extend deadlines for discovery and the filing of motions.
12. On June 27, 2022, Respondent filed a motion for summary judgment.
13. On June 30, 2022, the Court was notified that Ms. Thomas was admitted to practice.
 - a. On July 7, 2022, Ms. Thomas filed a notice of representation to serve as Petitioner's Advocate.
14. On July 7, 2022, Petitioner filed an untimely response to Respondent's motion for summary judgment. Petitioner's response was due July 5, 2022.
15. At the pre-trial hearing for oral arguments on the motion for summary judgment, the Court granted Respondent's motion to strike Petitioner's written response to the motion for summary judgment because the response was filed untimely without showing good cause.

ORDER

1. Respondent's motion for summary judgment is GRANTED.
2. The Area Manager's decision is UPHeld.

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 21, 2022.

[REDACTED]
Patricia Ninham Hoeft, Trial Court Judge

