
ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Deborah Thundercloud,
General Manager
Petitioner,

v.

CASE NO: 20-EMP-002

Oneida Human Resources Department-
Equal Employment Opportunity Division,
Respondents

FINAL ORDER

This case has come before the Oneida Trial Court, Honorable Layatalati Hill presiding.

BACKGROUND

Petitioner filed to overturn Respondent's decision to void the terminations of Cheyanne King, Melissa Skenandore, and Kristine Hill. The three cases, 20-EMP-002, 20-EMP-003 and 20-EMP-004 were consolidated into case number 20-EMP-002. A stay of the terminations was ordered, protecting the three employee's right to appeal their terminations until all appeals in this matter have concluded. The three employees, who were previously listed as Respondents in this matter, were removed as parties because the Petitioner is challenging Respondent's authority to void disciplinary actions. Attorney Peggy A. Schneider was also removed from the case due to a conflict of interest.

A hearing was held on March 11, 2020. At the hearing, the parties agreed that there are no genuine disputes as to any material facts in this case and that the parties are entitled to a judgment as a matter of law without trial. The Court issued a briefing schedule¹. Attorney Brian Stevens submitted a brief in support of his client, Kristine Hill, which was accepted by the Court.

STATEMENT OF THE CASE

Petitioner is seeking to overturn Respondent's decision to void the terminations of three employees. Petitioner claims that Respondent's decision to void the terminations did not comply with Oneida law and is outside the scope of Respondent's authority, which resulted in a procedural irregularity that was harmful to Petitioner.

¹ Briefs by both parties were late. All briefs were submitted within four days of the due date. However, neither party objected to the untimeliness of the briefs and no new arguments or evidence was presented in the briefs that were not already provided to the Court in other filings or during pre-trial hearings. Furthermore, the briefing schedule had due dates that were during the Covid-19 pandemic. Therefore, the Court is not sanctioning either party for the untimeliness of the briefs.

FINDINGS OF FACT

1. The Court has subject matter, personal, and territorial jurisdiction over this matter.
2. Notice was provided to all those entitled to notice.
3. There are no genuine disputes as to any material facts in this case.
4. The following are the relevant facts for this matter:
 - a. The Area Manager upheld the terminations in a timely manner.
 - b. The Area Manager did not meet with the employees during her investigation of the appeal.
 - c. The EEO deemed the Area Manager's failure to meet with the employees as a procedural irregularity in the grievance process.
 - d. The EEO voided the terminations based on the EEO's position that it was a procedural irregularity for the Area Manager to fail to meet with the employees as a part of her investigation of the appeal.
5. The parties agreed to move this case forward by use of a briefing schedule for summary judgment.
6. The questions presented for briefing purposes were:
 - a. Does the EEO have the legal authority to void terminations, given the facts of this case?
 - b. Does the EEO have the authority to void the termination of a grievance appeal that was timely decided by the Area Manager?
 - i. If so, how is that reconciled with the fact that under the Oneida Nation Personnel Policies and Procedures Manual, it is the Oneida Personnel Commission's duty to make the determination of whether or not procedural irregularities were exhibited during the appeal process that were harmful to one of the parties to the grievance?
7. The EEO does not have authority to determine if procedural irregularities or errors exist in an employee grievance appeal.
8. The EEO does not have authority to void disciplinary actions.

PRINCIPLES OF LAW

Oneida Nation Personnel Policies and Procedures Manual section V.D.6. Grievance.

V.D.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.

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- a) The employee may seek the assistance of a spokesperson or advocate at any time after the disciplinary action has been issued in order 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.

V.D.6.d. 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.
- 2) If Oneida Personnel Commission members selected to serve as the hearing body for the complaint find one or both conditions exist, the Human Resources Department shall convene the Oneida Personnel Commission to hear 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.

ANALYSIS

Does the EEO have the legal authority to void terminations, given the facts of this case? Specifically, does the EEO have the authority to void the termination of a grievance appeal that was timely decided by the Area Manager? If so, how is that reconciled with the fact that under the Oneida Nation Personnel Policies and Procedures Manual, it is the Oneida Personnel Commission's duty to make the determination whether or not procedural

irregularities were exhibited during the appeal process that were harmful to one of the parties to the grievance?

Respondent supports its argument that it has authority to void disciplinary actions, including terminations, according to case law from the former Oneida Tribal Judicial System's Appellate Court, case number 97-EP-016, Human Resources Department and Oneida Social Services v. Vicky Kochan (February 3, 1998). Respondent points to the part of the decision that states, "The EEO Office does not have a veto power over decisions to discipline an employee, although that office *may* be authorized to void a discipline that shows clear procedural errors." (*Emphasis added*). The first part of that statement is certainly true. The EEO does not have veto power over decisions to discipline an employee. The second part; however, is incorrect. The EEO is not authorized to void disciplines that show clear procedural errors. In fact, the EEO has no role in determining if procedural irregularities exist during the employee grievance appeal, even if the procedural irregularity is clear. The Oneida Nation Personnel Policies and Procedures Manual (OPPP) requires the Oneida Personnel Commission (OPC) to determine if procedural irregularities were exhibited during the appeal process. Nowhere does the OPPP give the EEO the authority to determine if a procedural irregularity existed during the appeal process. If the EEO did have authority to do so, it could render section V.D.6.d.1.b of the OPPP useless as the EEO may have already made the determination that a procedural irregularity existed. But that determination would have been made by an employee of the EEO without the use of a hearing body, the OPC, as required. If the OPC finds that a procedural irregularity existed, then it is for the OPC to conduct a hearing and determine what to do with the grievance complaint, not the EEO. Therefore, because the EEO has no authority to determine if a procedural irregularity existed, the EEO has no authority to void a disciplinary action due to a procedural irregularity, even if it was clear.

Respondent also supports its argument that it has authority to void disciplinary actions, including terminations, by citing a memo drafted by that EEO and the second "BE IT FURTHER RESOLVED" in OBC Resolution 5-12-93-J, which states and was reiterated in OBC Resolution 7-25-12-B, "that the interpretation, notification, and enforcement of the Personnel Policy and Procedures will be the responsibility of the Oneida Tribal Human Resources Department... ." While it is true that the EEO has the responsibility to interpret and enforce the OPPP, the memo drafted by Matthew J. Denny, EEO, dated June 16, 2015, is interpreting case law. While the cases relied on in the memo, 12-AC-009, 01-AC-011 and 99-EP-045, all discuss the OPPP, those are court cases and not the OPPP. Therefore, the memo is interpreting case law, which is not what OBC Resolution 5-12-93-J gives EEO the responsibility to do. The resolution gives the EEO the responsibility to interpret the OPPP. Furthermore, the sections in the three cases relied on in the memo all discuss the Area Manager's role. Specifically, the Area Manager's responsibility to use common sense, judicious good sense, and the utmost consideration for due process when investigating an employee's grievance appeal. Those cases suggest the section of the OPPP addressing the Area Manager's roles and duties when investigating grievance appeals should be amended. The OPPP; however, has not yet been amended and the Court is not a legislative body with the ability to amend the OPPP. Additionally, GTC Resolution 2-28-04-A, in the 6th "WHEREAS" states, "the Oneida Personnel Policies and Procedures is considered a law which can only be permanently amended by the General Tribal Council." Therefore, even though the EEO has the authority to interpret the OPPP, it does not have the authority to amend the OPPP. Black's Law Dictionary, ninth edition (2009) defines interpretation as the process of

determining what something means. In this case, determining what investigate means. According to Black's Law Dictionary, investigate means to inquire into a matter systematically. That would be one way to interpret what investigate means. EEO's interpretation, however, goes further and resembles more of an amendment rather than an interpretation. Adding additional requirements or procedures to the OPPP, such as systematic procedures for Area Managers on how to conduct an investigation would be an amendment that needs to be approved by the General Tribal Council. The OPPP does allow Oneida Nation departments to have specific and additional procedures enhancing the general policies stated in the OPPP. These, however, are specific to each department and would not apply to all the Nation's employees, like the OPPP. Therefore, neither the resolution nor the case law relied upon in the memo gives the EEO the authority to void disciplinary actions or amend the OPPP.

There was a considerable amount of attention in this case put on the Area Manager's duty to investigate. It is Respondent's position that Area Managers must, at a minimum, meet with the employee, the immediate supervisor and any new witnesses as a part of the investigation. This is based on the memo discussed above and the flow chart, Area Manager Level Grievance Procedure Flowchart, created on November 30, 2016, as a result of the memo. If the Area Manager does not meet with the employee, immediate supervisor and any new witnesses, the EEO considers this to be a procedural error and will void the disciplinary action. However, as discussed above, the EEO does not have any authority to determine if a procedural error or irregularity existed. As a result, the EEO cannot void a disciplinary action, one, because it does not have the authority to do so and two, because a determination on whether a procedural error or irregularity existed has not yet been made and can only be made by the OPC. The flow chart also indicates that the EEO will void disciplinary actions if the appeal is untimely filed by the employee to the Area Manager and if the Area Manager's decision is filed untimely to the employee and HRD. As a basis for the EEO's authority to void for untimeliness, the EEO relied upon case, 12-AC-009, that stated, "The Personnel Policies and Procedures identify that the Area Manager must request a five (5) day extension from the Human Resources Department. Because the request must be submitted to the Human Resources Department, it is reasonable that department has the authority to deny a disciplinary action based on untimely review by the Area Manager." This reasoning, however, is incorrect. Under the OPPP, the Area Manager can request an extension to complete the investigation. The request must be made to the HRD Manager (or designee). The HRD Manager (or designee) can grant the request at his or her discretion. This only gives the HRD Manager (or designee) the authority to grant or deny an extension requested by the Area Manager. It does not give authority to void a disciplinary action. Granting an extension to complete an investigation and voiding a disciplinary action due to untimeliness are two completely different matters. HRD performs the administrative task of collecting all the information used by the Area Manager in making their decision. There is no authority to take action to affirm, deny, or void the decision of the Area Manager. If something is filed untimely, it is for the OPC to determine if that is a procedural irregularity and if it was harmful to one of the parties to the grievance. Therefore, neither the memo nor the flow chart gives the EEO authority to determine if a procedural error or irregularity existed. Nor does it give EEO authority to void disciplinary actions for procedural errors or irregularities, clear or not, including those for untimeliness.

Because the EEO does not have the authority to void disciplinary actions, the EEO's decision to void the terminations of the three employees, Cheyanne King, Melissa Skenandore and Kristine

Hill, must be overturned. Therefore, the terminations must be reinstated. As a result, because the stay of the terminations that was ordered, those employees may now appeal those terminations, individually, if they so choose. As a result of this case and in fairness to the employees, the employees may file, in accordance with the Oneida Nation Personnel Policies and Procedures Manual, an appeal within ten (10) working days from day the employee receives this decision.

As discussed above, it is the OPC's responsibility to determine if procedural irregularities were exhibited during the appeal process that were harmful to one of the parties to the grievance. It is not the EEO's responsibility to make that determination. In fact, the EEO does not have the authority to do so. Therefore, the EEO's position that it has authority to determine if procedural irregularities exist and to void disciplinary actions as a result of that determination is not reconciled with the fact that under the Oneida Nation Personnel Policies and Procedures Manual, it is the Oneida Personnel Commission's duty to make the determination whether or not procedural irregularities were exhibited during the appeal process that were harmful to one of the parties to the grievance. For the reasons discussed above, the EEO cannot determine whether procedural irregularities or errors exist. Furthermore, the EEO cannot void disciplinary actions, for any reason, including untimeliness.

ORDER

1. The EEO's decision to void the disciplinary actions of Cheyanne King, Melissa Skenandore and Kristine Hill is **OVERTURNED**.
2. The status of the employees shall be returned to **TERMINATED**.
3. The employees may file, in accordance with the Oneida Nation Personnel Policies and Procedures Manual, an appeal contesting their termination within ten (10) business days from date the employee receives this decision.
4. Pursuant to 8 O.C. 801.2-6, case law precedent established through a prior decision of the Oneida Appeals Commission/Oneida Tribal Judicial System that supports the EEO's ability to void disciplinary actions or is otherwise inconsistent with this decision shall be **OVERTURNED**.

IT IS SO ORDERED.

By the authority vested in the Oneida Judiciary pursuant to BC Resolution 09-26-18-F an Order was signed on July 2, 2020.


Layatalati Hill
Trial Court Judge