
ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Melissa Rose Skenandore,
Petitioner

v.

Jacqueline Smith,
Deborah J. Thundercloud,
Respondents

CASE NO: 20-EMP-009

DATE: June 21, 2021

FINAL ORDER

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

Appearing in person: Attorney Brian Stevens, representing Melissa Skenandore.

Appearing virtually: Attorneys Krystal John and Kelly McAndrews, representing Jacqueline Smith and Deborah Thundercloud.

BACKGROUND

On July 24, 2020, Petitioner filed an appeal seeking to overturn her termination from employment. Pre-trial hearings were held on September 1 and November 6, 2020. The final hearings were held on the following dates: November 30, 2020; December 11, 2020; December 18, 2020; February 11, 2021; February 12, 2021; March 2, 2021; March 19, 2021; March 26, 2021; April 9, 2021; April 23, 2021; May 07, 2021; May 14, 2021; June 01, 2021; and June 03, 2021. Written closing arguments were due on or before June 14, 2021.

ISSUES

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

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. On September 19, 2019, Jacqueline Smith became aware of an alleged violation of policies and procedures by Petitioner and began her investigation.
4. As a result of the vocational rehabilitation grant not being awarded to the Nation, Petitioner was laid off on September 30, 2019.
5. On November 19, 2019, Ms. Smith completed her investigation.
6. On November 21, 2019, at 3:10 p.m., Ms. Smith left a voicemail for Petitioner requesting a meeting on November 22, 2019, at 1:30 p.m. as a part of Ms. Smith's investigation.
7. On November 22, 2019, at 8:35 a.m. Ms. Smith left another voicemail for Petitioner regarding the meeting request for November 22, 2019, at 1:30 p.m.
8. Petitioner did not respond to the voicemail before the requested meeting time and Ms. Smith considered this a no show for the requested meeting.
9. Petitioner's employment with the Oneida Nation was terminated on November 22, 2019.
10. On November 24, 2019, at 9:18 a.m., Petitioner emailed Jacqueline Smith asking for dates and times that would work for the meeting or for Ms. Smith to send her questions by email that would be answered by email.
11. On November 25, 2019, Petitioner received her termination notification by mail.
12. Petitioner appealed her termination to the Area Manager, Deborah Thundercloud.
13. Deborah Thundercloud upheld Petitioner's termination.
14. Petitioner appealed the Area Manager's decision to the Oneida Judiciary Trial Court.

PRINCIPLES OF LAW

Oneida Nation Personnel Policies and Procedures Manual (OPPP):

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

Disciplinary procedures provide a systematic process for handling problem employees. Disciplinary procedures serve to correct unacceptable behavior and to protect the Nation. Personnel Policies and Procedures Grievance procedures provide a systematic process for hearing and evaluating job related disputes. Grievance procedures serve to protect employees from inconsistent and unfair treatment. In all cases of grievance and discipline, supervisors are enjoined to use common sense, discretion and judicious good sense to resolve complaints between employees, exercise disciplinary prerogatives, and handle grievances.

Section V.D.5. Disciplinary Procedure. The following procedure shall be adhered to whenever disciplinary action is taken.

- a. Supervisor becomes aware of unsatisfactory work performance or violation.
 - 1) Supervisor investigates through a meeting with the employees and determines whether disciplinary action is warranted.
- b. If disciplinary action is warranted, within five (5) working days the supervisor will fill out the five (5) part disciplinary action form stating the behavior for which the action is

being taken, the time and date of its occurrence, and the specific policy section under which action is being taken.

c. The form will be discussed with the employee and a corrective action will be identified.

Section 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.)...

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.d.1. Review of the Complaint.

- 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.

Title 8. Judiciary – Chapter 801 Judiciary

801.2-6. Case law precedent that has been established through a prior decision of the Oneida Appeals Commission/Oneida Tribal Judicial System shall remain precedent unless overturned or otherwise modified by a decision of the Judiciary, or by a law adopted by the Oneida Business Committee or Oneida General Tribal Council. The principles of Yonikuhlihsa?ahtu (a decision is made) shall apply to all matters before the Judiciary.

ANALYSIS

This case presents unique circumstances where the Oneida Vocational Rehabilitation (OVR) grant was not renewed and, as a result, the employees of the program, including Petitioner, were laid off. While Petitioner was laid off, an investigation was conducted, and Petitioner's employment was ultimately terminated.

Procedural irregularities exhibited during the appeal process that were harmful to Petitioner

The OPPP requires a supervisor who becomes aware of unsatisfactory work performance or a violation to investigate through a meeting with the employee to determine whether disciplinary action is warranted. If disciplinary action is warranted, the supervisor must fill out the five (5) part disciplinary action form and discuss it with the employee.

Here, Petitioner claims her supervisor, Ms. Smith, failed to meet with her as a part of her investigation, resulting in a violation of her due process rights. The Court agrees. A failure of the supervisor to meet with Petitioner as a part of the investigation is a violation of Petitioner's due process right to meet with the supervisor as a part of the supervisor's investigation. Here, Ms. Smith attempted to schedule a meeting with Petitioner on November 22, 2019 at 1:30 p.m. On November 21, 2019, at 3:10 p.m., Ms. Smith left a voicemail for Petitioner requesting a meeting on November 22, 2019 at 1:30 p.m. as a part of an investigation. A response from Petitioner was not received. Ms. Smith called and left another voicemail on November 22, 2019, at 8:35 a.m. A response from Petitioner still was not received until November 24, 2019, at 9:18 a.m. in which Petitioner emailed Ms. Smith asking for dates and times that would work for the meeting or for Ms. Smith to send her questions by email that would be answered by email. Additionally, Petitioner testified that even if she would have listened to the messages before the requested meeting time, she still would not have been available during that time. Petitioner did not attend the requested meeting and Ms. Smith considered it insubordination. As a result, that same day, Ms. Smith terminated Petitioner's employment and mailed the termination papers to Petitioner. Normally, this process may be appropriate. However, the Court must consider the circumstances that are rather unique in this case. Ms. Smith's meeting request provided less than 24-hours' notice for the meeting. This fact would likely carry less weight had Petitioner still been an active employee. Here; however, Petitioner was in layoff status and had been for approximately 8 weeks. Under these conditions, it would be both common and judicious good sense to allow for more than 24-hour's notice, especially when a response had not been received confirming Petitioner's availability. Additionally, Ms. Smith's investigation took approximately two months. With the length of the investigation, there was no good reason identified to give less than 24-hour's notice for the meeting. Furthermore, the Area Manager, Deborah Thundercloud, upheld this part of the decision, but testified that she is not always able to respond to meeting requests with less than 24-hour's notice.

Also, the meeting with Petitioner should have occurred as a part of the investigation, not after it was concluded. Ms. Smith claimed to have not met with the Petitioner as a part of the investigation because the investigation involved allegations of theft and she was worried about the employees colluding. This may have been a valid concern; however, it does not alleviate the requirement to meet with the employee as a part of the investigation. The concern about employees colluding would likely be present in any investigation but does not mean the supervisor does not have to comply with the OPPP requirements. There are steps a supervisor could take to alleviate that concern, such as meeting with the employees the same day and having them wait in separate rooms.

The Area Manager also decided not to meet with Petitioner as a part of her investigation. While there is not a specific section in the OPPP that requires the Area Manager to meet with the employee, it does require the Area Manager, for all disciplinary action investigations, to complete the investigation within ten (10) working days from the receipt of the employee's

appeal. Additionally, the Area Manager is bound by the OPPP requirements to use common sense, discretion and judicious good sense to resolve employee grievances. Here, the Area Manager's decision not to meet with the employee, especially when the immediate supervisor also did not meet with the employee, goes against both common and judicious good sense. This further denied Petitioner a chance to be heard in accordance with OPPP requirements especially when the grievance procedures serve to protect employees from inconsistent and unfair treatment. It is difficult to find a more inconsistent and unfair treatment of an employee when the employee is never given an opportunity to address the allegations against them during both the immediate supervisor's investigation and the Area Manager's investigation. The Area Manager claimed Petitioner had her chance for input by the filing of her appeal. However, an employee filing an appeal of a termination to the Area Manager is not the same as meeting with an employee as a part of an investigation. Furthermore, the Court is bound by case precedent from the former Oneida Appeals Commission/Oneida Tribal Judicial System. The parties did not address case precedent as it relates to the Area Manager's investigation. The Court; however, is aware of such case precedent and cannot ignore it. The Court believes both parties are also aware of such case precedent based on Attorney Stevens' and the Oneida Law Office's involvement in case no. 20-EMP-002. In that case, there was a considerable amount of attention put on the Area Manager's duty to investigate which included cases 12-AC-009, 01-AC-011 and 99-EP-045. Additionally, in *Lloyd Powless v. Bruce Steinfeldt*, Docket # 09-AC-008 (Oneida Appeals 07/13/2009), the Oneida Appeals Commission held that case law supports a requirement that the Area Manager must interview the employee being disciplined and all those involved in the matter. There is an exception to this requirement when the employee refuses to meet. Here; however, there was not a refusal based on the lack of efficient notice described above.

Therefore, the Area Manager's decision upholding the decision of the immediate supervisor to not meet with the employee as a part of the investigation and allowing for less than 24-hour's notice for an investigatory meeting when the employee is in layoff status is against the weight of evidence and resulted in a procedural irregularity that was harmful to Petitioner.

Additionally, Respondents claim the allegations are of a serious nature. The Court agrees. The OPPP requirements must be followed in every instance of a disciplinary action, not just when the allegations are serious. Furthermore, the OPPP does not provide an exception to meeting with the employee when a conflict of interest or money is involved. The only exception to meeting with an employee as part of a disciplinary investigation is when the employee refuses to meet. To hold otherwise would allow for supervisors to avoid OPPP requirements and case law precedent anytime the allegations are serious. Therefore, the decision of the Area Manager must be overturned.

While the Respondents may or may not have been justified in terminating Petitioner's employment, the procedural irregularity of not meeting with the employee as described above resulted in the inconsistent and unfair treatment of Petitioner. To not overturn the decision based on the procedural irregularity would be harmful to not only the Petitioner in this case but would

be an order that conflicts with the OPPP. For these reasons, the decision must be overturned and the justification for the termination is moot. Therefore, the Court will not address the appropriateness of the termination.

ORDER

1. The decision of the Area Manager to terminate Petitioner shall be overturned.
2. Petitioner shall be reinstated with full back pay for any lost time in accordance with the Back-Pay Policy.
3. All documents with personal identification information and any confidential documents shall be sealed in order to protect anyone from annoyance, embarrassment or oppression.
 - a. For any such documents, the parties must turn in their copy of such document to the Court or destroy such documents and shall not make or keep any other copies of such documents.

IT IS SO ORDERED.

By the authority vested in the Oneida Judiciary Trial Court pursuant to BC Resolution 03-13-19-C this Order is signed on June 21, 2021.

[Redacted Signature]

Layatalati Hill, Chief Trial Court Judge

