

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Kyle Wisneski,
Petitioner

v.

CASE NO: 23-EMP-001
DATE: June 6, 2023

Oneida Nation Tsyunhehkw^,
Respondent

FINAL ORDER

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

Appearing in person: Petitioner, Kyle Wisneski. Respondent, represented by General Manager, Mark Powless and Attorney Peggy Van Gheem.

BACKGROUND

The Petitioner filed an employee grievance complaint with the Oneida Judiciary Trial Court on February 3, 2023, to appeal the Area Manager's decision upholding the supervisor's decision to terminate Petitioner's employment due to alleged violations of Oneida Personnel Policies and Procedures (OPPP) section V.D.2.c.(4) Personal Actions and Appearance subsections (b), (j) and (k), as well as violations of the Standard Operating Procedure: Food & Agriculture Code of Conduct and the Work Expectations Agreement. The Petitioner seeks to overturn his termination from employment.

The Trial Court accepted Petitioner's appeal on February 13, 2023. A motion to dismiss was filed by Respondent on February 28, 2023. A pre-trial motion hearing was held on March 14, 2023. During the hearing, the Court heard from both parties regarding Respondent's motion to dismiss. On March 17, 2023, the Court denied in part and granted in part, Respondent's motion. A contested hearing was held on May 23, 2023, and continued May 30, 2023.

ISSUES

1. Is the Area Manager's decision clearly against the weight of the evidence based on all information filed with the Court and testimony taken during the contested hearing from three employees that were not interviewed as a part of the Area Manager's investigation?
2. Were procedural irregularities exhibited during the appeal process were harmful to the Petitioner.

ANALYSIS

Is the Area Manager's decision clearly against the weight of the evidence based on all information filed with the Court and testimony taken during the contested hearing from three employees that were not interviewed as a part of the Area Manager's investigation?

The OPPP requires Petitioner to show the Area Manager's decision was clearly against the weight of the evidence. Here, Petitioner alleges the Area Manager's decision was clearly against the weight of evidence because the investigation was flawed in that it relied on responses from only certain employees and not all employees involved in in the matter. The failure of the Area Manager to interview all those involved in the matter, was determined to be a procedural irregularity. The Court previously decided that because the Area Manager did not interview all those involved in the matter, the Court was unable to determine if the Area Manager's decision was clearly against the weight of the evidence. As a result, the Court found the information from three employees, William Vervoort, Arlie Doxtator and Peter J. Skenandore, that was not gathered as a part of the Area Manager's investigation, needed to be brought forward during the contested hearing. These three employees were identified in the Immediate Supervisor's disciplinary action and the interaction between these individuals and Petitioner was, in part, used as a basis for the disciplinary action. Therefore, those three employees were found to be involved in the matter, in accordance with *Lloyd Powless v. Bruce Steinfeldt*, Docket # 09-AC-008 (Oneida Appeals 07/13/2009). That case held that the Area Manager must interview the employee being disciplined *and all those involved in the matter*. (*Emphasis added*).

Petitioner also claims all his direct reports should have been interviewed as a part of the Area Manager's investigation. The Court disagrees. In accordance with the *Powless* case, only those

involved in the matter need be interviewed. Here, William Vervoort, Arlie Doxtator and Peter J. Skenandore were found to be involved in the matter.

Petitioner continually asked witnesses about the Wisconsin Partnership Program (WPP) reorganization (reorg). The Court understands Petitioner took issue with the lack of communication to himself regarding the reorg. And that it caused confusion for Petitioner. However, the reorg was not used as a basis for his disciplinary action. Therefore, the Court will not address issues Petitioner had with the reorg.

During the contested hearing, the Court heard from each of the three employees identified above. The Court will address each of the three employees' testimony separately.

Mr. William Vervoort, OCIFS Coordinator

During the hearing, Mr. Vervoort testified he did not know his email communications were used as a part of Petitioner's termination from employment and that he did not file a formal written complaint against Petitioner. However, knowledge of an employee regarding another employee's disciplinary action is not something such employee would be privileged to. In addition, Mr. Vervoort testified that he did verbally discuss his concerns regarding Petitioner's behavior and communication with Petitioner's Immediate Supervisor, Vanessa Miller. As a result, Ms. Miller began investigating the interactions between Mr. Vervoort and Petitioner. Ms. Miller found an email exchange between Mr. Vervoort and Petitioner to be inappropriate. The testimony of Mr. Vervoort substantiated Ms. Miller's findings. Mr. Vervoort stated he was surprised by Petitioner's response to a survey he put together as the Oneida Food Integrated Systems (OCIFS) Coordinator because Mr. Vervoort "doesn't bring most small things to the board, just major things such as the Farmer's Market, activity books and things like that." Mr. Vervoort stated as a part of his duties, he "suggests projects and brings it to the OCIFS board." Petitioner sits on the OCIFS board as Tsyunhekw[^] Area manager. The purpose of the survey was to find ways to increase OCIFS board meeting productivity. Mr. Vervoort brought his concern about the OCIFS board productivity to Ms. Miller. The survey was the suggestion of Ms. Miller, however, the decision to do such survey and the development of the questions in the survey were the decision of Mr. Vervoort.

On December 6, 2022, a string of emails between Petitioner and Mr. Vervoort occurred regarding the above survey. Mr. Vervoort testified that Petitioner “was adamant, and that it did not make sense to him” why Petitioner was so adamant about who put the survey together and Ms. Miller’s involvement with OCIFS. Petitioner went on to state Ms. Miller “should be put on the OCIFS agenda to present the survey and that if she is not the boss of OCIFS, she does not have the right to make the board answer questions.” Petitioner then said Ms. Miller “should follow protocol to be put on the agenda and that she was causing confusion for him as to what her role is in OCIFS and who we report to or answer to.” Mr. Vervoort answered Petitioner’s emails by stating Ms. Miller “is not the boss of OCIFS and that it was his fault the survey was created.” Mr. Vervoort further stated Ms. Miller “merely suggested a survey to get all OCIFS board member opinions and suggested he would pull back the email if Petitioner wished.” Petitioner responded to Mr. Vervoort’s email by stating “I think we should retract and talk about it at our next meeting.” This email exchange as mentioned earlier, was found to be inappropriate by Ms. Miller and upheld by the Area Manager.

Next, Mr. Vervoort’s job duties include working with the OCIFS board. The working relationship between the OCIFS board and the OCIFS Coordinator is a two-way street where “sometimes the board suggests projects and sometimes, he suggests projects to the board.” In the event a project is agreed upon, Mr. Vervoort would then coordinate the project. As the OCIFS coordinator, Mr. Vervoort also facilitates OCIFS board meetings. Mr. Vervoort testified about an interaction that occurred during an OCIFS board meeting that he facilitated. That board meeting was held in February or March of 2022. That interaction was, in part, a reason why OCIFS board meetings were temporarily discontinued. Specifically, that there was “friction between the Tsyunhekw[^] Farm Manager (Petitioner) and the Oneida Nation Farm Manager.” That Petitioner “just started really verbally pounding the Farm Manager.” That interaction lasted approximately “3-5 minutes.” According to Mr. Vervoort, the issues that Petitioner had with the Farm Manager were with “cultural issues related to the buffalo” and Petitioner’s “dissatisfaction with GMO seeds.” Mr. Vervoort testified he “did not have an issue with the content of Petitioner’s message, but with the delivery of the message.” Mr. Vervoort further stated Petitioner’s behavior was “savage.” He went on to explain what he meant by savage. Mr. Vervoort further explained he

meant Petitioner “was for some reason attacking the Farm Manager. There is no other way of really saying it.”

The above email exchange and experience Mr. Vervoort had in the facilitation of the OCIFS board meeting played a role in Mr. Vervoort’s concern. Enough so that he brought it to the attention of Ms. Miller. When Mr. Vervoort was asked if everything he testified to, would have been what he would have told the Area Manager, had he been interviewed during the Area Manager’s investigation, he answered, “yes.” Based on all information presented, the Court finds Petitioner did not meet his burden of proving the Area Manager’s decision was clearly against the weight of evidence regarding the interaction between Mr. Vervoort and Petitioner.

Mr. Arlie Doxtator, WPP Community Outreach Coordinator

Mr. Doxtator testified during the hearing. Before the WPP reorg, Mr. Doxtator was supervised by Petitioner. Mr. Doxtator stated he did not know his interactions were used as a part of Petitioner’s termination from employment and that he did not file a formal written complaint against Petitioner. However, knowledge of an employee regarding another employee’s disciplinary action is not something such employee would be privileged to.

On December 5, 2022, at 11:34 a.m., Petitioner sent an email in which Mr. Doxtator was a recipient. Also included in the “To” section was Peter Skenandore and Vanessa Miller with a “Cc” to Nicole Rommel. The email stated, “Good Morning, I hope you all had a great weekend. Starting 12/05/22, Please send any updates or requests regarding WPP and TSY (Tsyunhehkw^ to my office. I will be sure that requests or updates will get to my staff at weekly staff meetings. Please do not contact my employees with information, requests or updates. Thank you for following the chain of command. Have a wonderful day. Yaw^ko, Kyle Wisneski.” Mr. Doxtator testified there was confusion as to why the Dec 5, 2022, email was sent by Petitioner. Ms. Miller responded to Petitioner’s email by asking him to “clarify his email.” Petitioner responded by email on Dec 6, 2022, at 10:58 a.m. In that email, Petitioner indicated his confusion around the reorg in an accusatory tone toward Ms. Miller. Petitioner then requested “the chain of command be followed to prevent further confusion and miscommunication.” Petitioner claims the Dec 5, 2022, email was sent because Mr. Doxtator and Mr. Skenandore showed up to the Tsyunhehkw^

unannounced for a tour. This resulted in Crystal Danforth being pulled away from work to help with the tour during a time she should have been in a meeting with Petitioner. However, Ms. Miller found the email was “directed to PS (Peter Skenandore), AD (Arlie Doxtator), and me (Ms. Miller) specifically due to your (Petitioner) displeasure with the reorg of the staff.” Meaning, Ms. Miller found it to be retaliatory in nature because of Petitioner’s displeasure with the reorg. Additionally, Mr. Doxtator testified, the Dec 5, 2022, email “disrupted his efforts at collaboration with Ms. Danforth.” Mr. Doxtator further testified that “for the Food and Ag area, he does not go through a supervisor to reach an employee. That it was very unusual to go through a supervisor to reach an employee. And that, at that time, it effected the efficiency of his work to go through a supervisor to reach Ms. Danforth.”

Next, on August 26, 2022, a meeting was held with Mr. Doxtator, Mr. Skenandore, and Petitioner. Mr. Doxtator stated, Ms. Danforth was at the meeting as well, but “only for a couple parts of the meeting.” Mr. Doxtator testified he “remembered the meeting very clearly,” but not why the meeting was called. Mr. Doxtator stated Petitioner was “asking them questions about the fruit tree and wild rice events.” He stated, “the meeting went very wrong.” It went wrong by Petitioner “questioning their abilities, the questions asked, Petitioner’s voice and tone was raised, nearly yelling.” He further stated he and Mr. Skenandore were “constantly interrupted when they tried to answer questions.” Mr. Doxtator described the meeting as “very unprofessional and very disrespectful in the way it was handled. That there was no dialog allowed and when he (Mr. Doxtator) was finally allowed to finish his answer, that he (Petitioner) sat back, folded his arms, and stared at his computer screen. It appeared to him (Mr. Doxtator) that what he had to say didn’t seem important.” According to Mr. Doxtator, Ms. Danforth “was brought in to refute their answers, but that that did not happen.” Mr. Doxtator shared his displeasure with the meeting with Ms. Miller.

This email exchange and past experiences between Mr. Doxtator and Petitioner played a role in Mr. Doxtator’s concern about the exchange. Enough so that he brought it to the attention of Ms. Miller. When Mr. Doxtator was asked if everything he testified to, would have been what he would have told the Area Manager, had he been interviewed during the Area Manager’s investigation, he answered, “yes.” Based on all information presented, the Court finds Petitioner

did not meet his burden of proving the Area Manager's decision was clearly against the weight of evidence regarding the interaction between Mr. Doxtator and Petitioner.

Mr. Peter J. Skenandore, WPP Project Manager

During the hearing, Mr. Skenandore testified he did not know his email communications were used as a part of Petitioner's termination from employment and that he did not file a formal written complaint against Petitioner. However, knowledge of an employee regarding another employee's disciplinary action is not something such employee would be privileged to. In addition, Mr. Skenandore testified that he did verbally discuss his concerns regarding Petitioner's behavior and communication with Petitioner's supervisor, Ms. Miller. In addition, Mr. Skenandore forwarded the below email exchange to Ms. Miller. As a result, Ms. Miller began investigating interactions between Mr. Skenandore and Petitioner.

Mr. Skenandore is the Project Manager of the WPP grant. He has held the position for approximately one year, with approximately a decade of experience as a project manager. On November 30, 2022, at 8:15 a.m., Mr. Skenandore emailed Petitioner asking for "context for a December 1 meeting request." On December 1, 2022, at 9:55 a.m., Petitioner responded by email, stating, "Good Morning Pete, yes, I can share in this instance. I had an employee share concerns around another employee, branding and data collection. See you this afternoon, Yaw^ko, Kyle Wisneski Tsyunhehkw^ manager." Mr. Skenandore responded by asking for the "concerns in writing" and that he and Mr. Doxtator "would not be attending the meeting." He also stated regarding financial reporting, that "due to structural changes, access to these is limited," but that "the accounting department has kept all financial requirements of this grant up to date." Petitioner responded by email, stating, "Hi Pete, Thank you for your email and your thoughts. I did receive your email. I am your supervisor and have not been made aware of an official change in employee structure. Since that is the case, I will see you here for the 1pm meeting. Your email 1.5 hours before the meeting starts and the information you are providing is not sufficient to not make a meeting your supervisor requested. If you choose to not attend the meeting, your non presence may result in disciplinary action due to not providing sufficient data to me for not attending. Yaw^ko Pete and I will see you at 1pm. Kyle Wisneski, Tsyunhehkw^ Manager."

Mr. Skenandore felt the email “came across as a threat” due to previous experiences with Petitioner. Previous experiences with Petitioner included the August 26, 2022, meeting described above with Mr. Doxtator. Mr. Skenandore described that meeting as “being really, super hostile.” This caused Mr. Skenandore to feel like “it wasn’t an environment where his expertise or abilities were respected, wanted, or needed.” “That it did not seem possible at that time to get to a positive place with him (Ppetitioner).” He felt it was “a rageful event” on Petitioner’s part because “he felt threatened, not knowing when it would stop.” Mr. Skenandore shut down as a result to get out of the meeting.

Mr. Skenandore was also sent the December 5, 2022, email described above with Mr. Doxtator. Mr. Skenandore described the email as “inappropriate to not be allowed to communicate with other Oneida Nation employees.” He also thought Petitioner was “isolating Ms. Danforth or targeting Ms. Danforth based on the history between Ms. Danforth and Petitioner.”

The above email exchanges and past experiences between Mr. Skenandore and Petitioner played a role in Mr. Skenandore’s concern about the exchange. Enough so that he brought it to the attention of Ms. Miller. When Mr. Skenandore was asked if everything he testified to, would have been what he would have told the Area Manager, had he been interviewed during the Area Manager’s investigation, he answered, “yes.” Based on all information presented, the Court finds Petitioner did not meet his burden of proving the Area Manager’s decision was clearly against the weight of evidence regarding the interaction between Mr. Skenandore and Petitioner.

Were procedural irregularities exhibited during the appeal process that were harmful to the Petitioner?

The OPPP requires the Area Manager to investigate all disciplinary actions. (See OPPP, Section *V.D.6.a.(2)*). 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. (Emphasis added.)* For Area Manager decisions, the statement, “all those involved in the matter,” means all individuals that were, in some way, involved with or identified in the Immediate Supervisor’s decision to issue a disciplinary action. Here, the Area Manager’s

decision identifies all parties the Area Manager interviewed. Notably missing from the persons interviewed as a part of the Area Manager's investigation were William Vervoort, Arlie Doxtator, and Peter J. Skenandore. These three employees were identified in the Immediate Supervisor's disciplinary action and the interaction between these employees and Petitioner was, in part, used as a basis for the disciplinary action. Therefore, the Court found it was a procedural irregularity by the Area Manager to not interview William Vervoort, Arlie Doxtator, and Peter J. Skenandore as a part of the Area Manager's investigation.

Next, Petitioner must show how the procedural irregularities were harmful to himself. Here, in Petitioner's Employee Grievance Complaint, Petitioner states the procedural irregularities were harmful because the Area Manager failed to consider the information or any evidence the Area Manager would have discovered if he interviewed the three employees listed above as a part of his investigation. As a result, the Court allowed those three employees to be called as witnesses. However, for the reasons discussed above, the procedural irregularity of not interviewing those three employees was not harmful to Petitioner because, after receiving the information those three employees would have provided to the Area Manager, the Court found the decision of the Area Manager was not clearly against the weight of evidence.

Other Issues

Petitioner argued if one incident in his disciplinary action was found to be unfounded, that the termination should be overturned. The Court disagrees. The test is whether the Area Manager's decision was clearly against the weight of evidence and were procedural irregularities present that were harmful to Petitioner. For the reasons described above, the Court found Petitioner failed to meet his burden of proving the Area Manager's decision was clearly against the weight of evidence and that procedural irregularities existed but were not harmful to petitioner.

Petitioner claimed the unavailability of witnesses on his witness list was the doing of Respondent's attorney. The Court disagrees. Petitioner was responsible for issuing subpoenas for any person he wanted to call as a witness. Petitioner did properly issue subpoenas for a May 2, 2023, hearing. However, that hearing had to be rescheduled. On May 2, 2023, during the rescheduling, which was on the record, Petitioner was informed he would need to reissue

subpoenas with the new court date. In fact, Petitioner stated he would do so. Therefore, the Court finds the unavailability of his witnesses was the doing of Petitioner's failure to issue new subpoenas to his witnesses. As a result, he was not able to call witnesses in the order he wanted to. The Court also ruled several of Petitioner's witnesses were not relevant based on the Court's order dated, March 17, 2023. In that order, the Court found Peter J. Skenandore, Arlie Doxtator and William Vervoort are persons involved in the matter and should have been interviewed as a part of the Area Manager's investigation. This was ordered so that the Court could receive all information, had the Area Manager interviewed all persons involved in the matter. The information gathered from the testimony of those three employees was needed to address the procedural irregularity of not interviewing all those involved in the matter. The information from those three employees was also needed to determine if the decision was clearly against the weight of evidence. For the reasons described above, the Court found Petitioner failed to meet his burden of proving the Area Manager's decision was clearly against the weight of evidence and that procedural irregularities existed but were not harmful to petitioner.

Petitioner claims his Immediate Supervisor failed to consult with the Oneida Human Resources Department (HRD) regarding his termination. The Court finds otherwise. The Disciplinary Action Form indicates Ms. Miller consulted with HRD on 12/13/22. In addition, the Area Manager sent an email to HRD on January 20, 2023, at 11:43 a.m. requesting verification that Ms. Miller consulted with HRD regarding Petitioner's disciplinary action. On January 20, 2023, at 3:00 p.m., HRD replied, confirming Ms. Miller was working with their office. Therefore, Petitioner's claim fails.

Petitioner also complained that witnesses did not remember or know the answers to a lot of his questions but could remember and answer questions from the Respondent. The Court finds, based upon all witnesses' body language, facial expressions and the difference between the questions asked by Respondent and Petitioner, that the witnesses were truthful in their answers.

General Manager, Mark Powless, acting as Area Manager for this disciplinary action was called as a witness. However, the Court finds his testimony was not relevant to the issues above and that even if any parts of his testimony were relevant, such testimony does not overcome

Petitioners failure to meet his burden of proving the Area Manager's decision was clearly against the weight of evidence.

Immediate Supervisor, Vanessa Miller, was called as a witness. However, the Court finds her testimony was not relevant to the issues above and that even if any parts of her testimony were relevant, such testimony does not overcome Petitioners failure to meet his burden of proving the Area Manager's decision was clearly against the weight of evidence.

Other issues presented by Petitioner during the hearing and in his appeal to this Court were not relevant to Petitioner's termination from employment and/or were not raised on appeal to the Area Manager. As a result, such issues cannot be addressed by this Court.

FINDINGS

1. The Court has subject matter and personal jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. The Petitioner timely filed with the Trial Court on February 3, 2023.
4. The testimony of Mr. Vervoort substantiated the decision of the Area Manager.
5. The testimony of Mr. Doxtator substantiated the decision of the Area Manager.
6. The Testimony of Mr. Skenandore substantiated the decision of the Area Manager.
7. The Petitioner failed to clearly show that the Area Manager's decision was against the weight of the evidence.
8. The Petitioner failed to show that the procedural irregularities exhibited during the appeal process were harmful to the Petitioner.

PRINCIPLES OF LAW

Oneida Nation Personnel Policies and Procedures Manual (OPPP)

Section V.D.2.c.(4) Personal Actions and Appearance

(b) Intimidating, interfering with, or using abusive language toward customers, clients, co-workers, or others,

(j) Failure to exercise proper judgment, and

(k) Failure to be courteous in dealing with fellow employees or the general public.

Section V.D.6.a.

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...

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.

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.

Section V.D.6.f. Hearing Procedure

ds4) The Oneida Personnel Commission's decision shall be based solely on the information presented to them before the appeal hearing, the record of the prior proceedings, and any new evidence if introduced appropriately.

Work Expectations Agreement – signed by petitioner on July 28, 2022.

Behavior Expectations

- 1. You must always be courteous, kind, respectful and professional when speaking with co-workers, managers/supervisors, community members, and other people.*
- 2. Intimidating or bullying behavior that results in a hostile, offensive, or ineffective work environment will not be tolerated.*
- 3. You will be expected to contribute to a collaborative team effort within the area.*

Food & Agriculture Code of Conduct – signed by Petitioner on August 30, 2022.

2.2 Respectful Treatment: *All employees shall treat all people with respect, courtesy, dignity and conduct themselves in a professional and cooperative manner at all times in order to promote the best interest of the Food and Agriculture Area.*

2.4 Language and Behavior: *Employees agree to refrain from engaging in any behavior that may impair the ability of the Area to provide quality service and/or otherwise create a hostile or intimidating work environment.*

2.4.1 This includes behavior that interferes with the ability of others to effectively carry out their duties or that undermines the customer, community, and organization's confidence in another member of the department or the Area.

2.5 Prohibited conduct includes, but is not limited to, the following:

2.5.4 Criticizing other employees in front of customers, or other staff in inappropriate forums or locations.

2.5.8 Acting in a rude, intimidating or otherwise unprofessional manner.

2.5.10 Hostile, condemning or demeaning communications.


2.5.15 Behavior or actions that undermines or sabotages the efforts of the Area and Division.

ORDER

1. The decision of the Area Manager 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 an order was signed on June 6, 2023.


Layatalati Hill, Chief Trial Court Judge