

ONEIDA JUDICIARY
Tsi nu téshakotiya?tolétha?

TRIAL COURT

Tim D. Ninham,
Petitioner

v.

CASE NO: 23-EMP-012

Surveillance Department –
Oneida Casino,
Respondent

ORDER

This case came before the Oneida Trial Court, the Honorable John E. Powless III presiding.

Appearing In-Person: Petitioner, Timothy D. Ninham, and Respondent, Tamara Van Schyndel.

Background

On October 9, 2023, Petitioner was terminated from employment as a Surveillance Supervisor at the Oneida Casino. On October 23, 2023, Petitioner filed a written appeal to the Area Manager. On November 14, 2023, Petitioner received the Area Manager's decision upholding the supervisor's decision to terminate Petitioner's employment. On November 30, 2023, Petitioner filed an employee grievance complaint with the Trial Court, appealing the Area Manager's decision to uphold the supervisor's decision to terminate Petitioner's employment due to alleged Oneida Personnel Policy and Procedure Manual (OPPP) and Surveillance Department Standard Operating Procedures (SOP) violations. Petitioner seeks to overturn the termination.

The Trial Court accepts an employee grievance complaint if it is timely filed and sufficiently alleges the existence of one or both of the following conditions: a) the Area Manager's decision was clearly against the weight of the evidence and/or b) procedural irregularities exhibited during the appeal process were harmful to Petitioner. Upon thoroughly reviewing all the information, the Court determined it was appropriate to hold a hearing to gather more information from the parties to decide if (a) or (b) were sufficiently alleged.

Issues

1. Did Petitioner file his employee grievance appeal in accordance with the OPPP?
2. Did Petitioner sufficiently allege the existence of one or both of the following conditions:

- a. The Area Manager's decision was clearly against the weight of the evidence, and/or
- b. Procedural irregularities exhibited during the appeal process were harmful to Petitioner.

Principles of Law

Oneida Nation Personnel Policies and Procedures Manual (OPPP)

D. Complaints, Disciplinary Actions, and Grievances.

2. Disciplinary Actions

c. The actions listed below are examples of unacceptable work performance and do not constitute a comprehensive or exhaustive list. The actions in parentheses are guidelines for a supervisor to use in administering disciplinary actions. (W = written warning; S = suspension; T = Termination):

1) Work Performance

- c) Unauthorized disclosure of confidential information or records. (S/T).

3) Use of Property

- a) Unauthorized or improper use of Oneida Nation property or equipment (for example, Oneida Nation vehicles, telephone, mail services, etc.) (W/S/T).

4) Personal Actions and Appearances

- j) Failure to exercise proper judgment. (W/S/T).

5. Disciplinary Procedures.

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.

6. Grievances.

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.

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

c. Collection of Information

1) The Human Resources Department shall collect all information the Area Manager used in making the decision to uphold the disciplinary action.

Analysis

In this case, the Court must first determine if Petitioner filed his employee grievance complaint with the Trial Court within the timeframe identified by the law. Second, in the event Petitioner complied with the filing requirement, Petitioner must then sufficiently allege the decision of the Area Manager is clearly against the weight of the evidence and/or procedural irregularities were exhibited during the appeal process that were harmful to Petitioner.

Filing of the appeal.

In accordance with the OPPP, an employee shall file an employee grievance complaint within ten (10) working days from receipt of the Area Manager's decision.

Here, the Area Manager submitted a receipt of her delivered decision to Petitioner via U.S. Certified mail on November 14, 2023. Petitioner filed his employee grievance complaint with the Trial Court on November 30, 2023. November 23-24, 2023, were Oneida Nation observed holidays and do not count as working days for the purpose of determining if an employee timely filed an employee grievance complaint. As a result, Petitioner complied with the filing timelines.

Was the Area Manager's decision clearly against the weight of the evidence?

Petitioner alleged that the Area Manager's decision was against the weight of the evidence due to the following: violation of Petitioner's due process rights, the Surveillance Department Guideline SOP is not a valid document nor did the Immediate Supervisor identify the alleged infraction in the SOP, and the Area Manager breached the Code of Ethics by violating Petitioner's protection of privileged information or distribution of confidential information. The Court will address each claim individually.

Violation of Due Process Rights.

Petitioner argued his due process rights were violated during the appeal process because the Area Manager, Tamara Van Schyndel, failed to recuse herself from hearing the appeal after having firsthand knowledge of the Community Education Center (CEC) event. Petitioner stated Tamara Van Schyndel knew about the event because she was filling in for Surveillance Director, Jason King, who was on pre-approved vacation at the time of the event. Petitioner further alleged Tamara Van Schyndel “had firsthand knowledge of the incident, investigated, and acted on the situation which led to the termination of the Petitioner.” Petitioner also claimed Tamara Van Schyndel reviewed this case based on her own knowledge of the incident, which is a conflict. Tamara Van Schyndel allegedly reviewed Petitioner’s Appeal and upheld her own decision on appeal, which was alleged to be a fundamental violation of Petitioner’s due process rights. Petitioner concluded that the dual involvement of Tamara Van Schyndel harmed him as it resulted in a direct violation of his due process rights.

In response to Petitioner’s claim, Tamara Van Schyndel stated that during an in-person discussion with Petitioner regarding the appeal, she reminded Petitioner that on the date of the incident, his immediate supervisor was on pre-approved vacation. This resulted in Tamara Van Schyndel’s awareness of the incident as she was next in the chain of command. Tamara Van Schyndel stated she did not investigate any part of the CEC incident, but instead, Digital Technology Services (DTS), the Oneida Casino Internal Security Investigator and the Oneida Police Department investigated the incident. Tamara Van Schyndel stated she did not have any role in the immediate supervisor’s decision to terminate. Tamara Van Schyndel also stated it was her responsibility, as the Oneida Gaming Commission Executive Director to notify the Oneida Gaming Commission (OGC) of the CEC incident due to another individual downloading and sharing sensitive data with other surveillance employees. Tamara Van Schyndel believed it was imperative that the OGC be advised of the potential cybersecurity data breach.

The Court agreed it was vital that Tamara Van Schyndel communicated the CEC incident to the OGC. As a result, Petitioner did not sufficiently allege that Tamara Van Schyndel violated Petitioner’s due process rights.

Is the Surveillance Department Guidelines Standard Operating Procedure (SOP) a valid document?

Petitioner alleged two claims. First, that the Surveillance Department SOP is invalid because it lacks an effective date due to missing signatures and dates. Petitioner acknowledged the SOP contains electronic signatures but argued some signatures were not dated. Second, Petitioner’s Immediate Supervisor failed to identify the specific infraction that Petitioner allegedly violated in the Surveillance Department Guideline SOP.

In response to these claims, the Area Manager first explained that the electronic digital signature contains the date. Further, the Human Resource Department (HRD) Manager signed this SOP on February 3, 2022, and was last signed by the Surveillance Director on February 4, 2022, which made the SOP effective on that same date. Second, the Area Manager believed that Petitioner contradicted himself by stating “Jason King cites the Surveillance Department Guideline SOP”, specifically referencing 3.11.2 and 3.30 in the SOP, in Petitioner’s appeal.

The Court provided the parties the opportunity to speak to their position regarding the validity of the SOP. In doing so, Petitioner’s only argument is that sections in the SOP did not contain a date. Petitioner did not argue nor provide support that it is a requirement that each approved section in the SOP is signed and dated. Also, Petitioner did not object to Tamara’s reasoning which supports that it is a valid document, therefore, Petitioner did not sufficiently allege that the Area Manager’s decision was clearly against the weight of the evidence. Regarding the second claim, the Court agreed that when Petitioner cited the exact information he claimed his Immediate Supervisor failed to identify, he acknowledged his Immediate Supervisor identified the alleged violations. As a result, Petitioner did not sufficiently allege that the Area Manager’s decision was clearly against the weight of the evidence.

Alleged Failure to follow the Code of Ethics.

Petitioner alleged that his termination is privileged information and is therefore confidential. As a result, he believes that his confidential employment information cannot be shared with anyone. Petitioner acknowledged that at the time of the CEC incident, Surveillance Director, Jason King, was on pre-approved vacation. Therefore, Tamara Van Schyndel filled in to cover Jason King’s duties during his approved absence. Petitioner alleged that Tamara Van Schyndel received the initial complaint, therefore, she was aware of the incident and shared the information with the Oneida Gaming Commission and others creating a breach of confidentiality. Petitioner also identified in his appeal that a Surveillance co-worker approached him on Saturday, August 12, 2023, and expressed that he knew of the CEC incident. Petitioner argued this was another example that Tamara Van Schyndel failed to maintain confidentiality and implied his termination was discussed with others outside the chain of command.

The Area Manager stated she was transparent with Petitioner in that his Immediate Supervisor was on approved vacation the day of the CEC incident. As a result, due to the surveillance, gaming, and tribal data sensitivity, it was imperative the Gaming Commission be advised of the cybersecurity data breach implications. The Area Manger further stated that because another individual downloaded and shared sensitive data with other Surveillance employees, that does not mean the issues of discipline including termination were discussed.

The Court agreed with the Area Manager as there was no evidence presented that persuaded the Court to find that the Code of Ethics was violated, or that privileged or confidential information was inappropriately shared.

Were Procedural Irregularities exhibited during appeal process that harmed Petitioner?

Petitioner alleged procedural irregularities were exhibited during the appeal process that were harmful to him. This section will focus on whether Petitioner sufficiently alleged the following occurred during the appeal process: failure to timely address Petitioner’s appeal; failure to adhere to OPPP Section V – Employee Relations, D. Complaints, Disciplinary Actions, and Grievances; failure to identify alleged policy violation infractions; and a failure to follow the progressive discipline outlined in the Surveillance Department Guidelines SOP.

Failure to timely address Petitioner’s appeal.

The OPPP states that when an employee receives a disciplinary action that they feel is unfair, they may grieve that action. The grievance process takes due process into consideration.

Petitioner alleged that his Immediate Supervisor failed to investigate and determine if disciplinary action was warranted in a timely manner, therefore, resulted in a procedural irregularity that harmed Petitioner. Petitioner asserted on August 9, 2023, that his Immediate Supervisor became aware of the CEC incident and did not bring this to Petitioner’s attention until September 18, 2023, forty (40) days later. Next, on October 6, 2023, the Immediate Supervisor spoke to Petitioner again regarding the incident, then issued the disciplinary action of termination on October 9, 2023. In response to Petitioner’s claims, the Area Manager provided a timeline of events that support her reasoning as to why the decision took as long as it did.

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| August 9, 2023 | Data breach reported to the Area Manager by Surveillance Director, Jason King upon notification while on vacation. Oneida Gaming Commission Executive Director, Tamara Van Schyndel followed up with Surveillance Technician Supervisor who reported to the scene after receiving information from the Surveillance Lead on Duty, who received screen shots of confidential surveillance information from a surveillance employee on duty (the significant other of the person who accessed and downloaded files). |
| August 9-11, 2023 | Approved time off for Petitioner. |
| August 14, 2023 | Jason King returns to work from approved vacation. |
| August 16, 2023 | Medical incident occurred to Petitioner; resulting in hospitalization. |
| August 18, 2023 | Petitioner Medical Leave of Absence (MLOA) started August 16, 2023, signed and dated August 28, 2023. |
| Sept. 10, 2023 | DTS investigation completed. |
| Sept. 11-15, 2023 | Jason King approved work travel. |

Sept. 11, 2023 Petitioner's MLOA ends.
Sept. 18, 2023 Jason King returns from approved work travel; discussed the CEC incident with Petitioner regarding his failure to log out of computer.
October 2, 2023 Internal Security Investigation report completed; approved and signed October 3, 2023.
October 6, 2023 Jason King spoke to Petitioner about the CEC incident.
October 9, 2023 Jason King issued disciplinary action of Termination to Petitioner.

In response to Petitioner's claim that his immediate supervisor took too long to investigate and determine if a disciplinary action was warranted, Tamara Van Schyndel stated the timeline provided explanations that addressed Petitioner's claim. The Area Manager contributed the time it took the Immediate Supervisor to investigate and enter a decision was due to the following: approved time off for Petitioner, as well as, Petitioner's twenty-five (25) day medical leave of absence following hospitalization due to a medical incident, approved work travel and vacation for the Immediate Supervisor. Additionally, the Surveillance Director considered placing Petitioner on investigative leave, however, with the data breach contained and Petitioner on MLOA, an investigative leave was unnecessary.

The Court finds that based on the provided reasoning; Petitioner did not prove his claim that his Immediate Supervisor failed to comply with OPPP guidelines regarding timeframes. Therefore, Petitioner's alleged procedural irregularity is not sufficiently alleged.

Failure to adhere to OPPP Section V – Employee Relations, D. Complaints, Disciplinary Actions, and Grievances.

The OPPP, in sections V, Employee Relations, and D. Complaints, Disciplinary Actions and Grievances states the following disciplinary procedures shall be followed when a disciplinary action is taken. First, when the supervisor becomes aware of a violation, the supervisor must investigate the alleged violation through a meeting with the employee and determine whether disciplinary action is warranted. Second, if a 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 the alleged violation occurred, and the specific policy section under which action is being taken. Next, the disciplinary action form will be discussed with the employee and a corrective action will be identified.

Petitioner alleged his immediate supervisor failed to follow the OPPP, specifically sections V – Employee Relations, and D. Complaints, Disciplinary Actions, and Grievances.

In this case, the Immediate Supervisor became aware of the alleged violations on August 9, 2023. Upon the Immediate Supervisor's return to work on August 14, 2023, he proceeded to investigate the alleged violations. On September 18, 2023, the Immediate Supervisor held an

initial meeting with Petitioner regarding the alleged violations and a subsequent meeting was held on October 6, 2023. The Immediate Supervisor determined a disciplinary action was warranted on October 6, 2023, and as a result, the Immediate Supervisor filled out and reviewed the disciplinary action form with the employee on October 9, 2023. In this case, the Immediate Supervisor deviated from progressive discipline due to the seriousness of the alleged violations. The Immediate Supervisor issued the disciplinary action of termination; therefore, a corrective action was not identified as it was not applicable. The Court agreed. Petitioner did not sufficiently allege that his immediate supervisor failed to follow the OPPP and as a result, harmed Petitioner.

Failure to provide specific infractions to the alleged policy violations.

Petitioner alleged his Immediate Supervisor failed to identify the specific infractions associated with the cited policy violations as required in the OPPP.

In response to this claim, the Area Manger identified Petitioner's allegation is not sufficiently alleged, because the infraction violations are specified within the Disciplinary Action Form, Memo of Corrective Action, and an attached document outlining (section) 2. Reason for Disciplinary Action.

Use of Property; unauthorized or improper use of Oneida Nation property or equipment.

In the Area Manager's review of Petitioner's appeal, it was determined that due to the Petitioner's assumption that he logged off the computer and stated "my inadvertent failure to close my account" resulted in the violation of Petitioner improperly using Oneida Nation property or equipment by not properly signing out of the computer.

Personal actions and appearances; failure to exercise proper judgment. The Area Manager determined that by Petitioner not properly signing out of the computer translates to carelessness and a lapse in judgment.

Work Performance; Unauthorized disclosure of confidential information or records. The Area Manager made the finding that even though Petitioner admitted that his failure to close his account was inadvertent, it still resulted in confidential information being disclosed and, as a result, the disciplinary action of termination is applicable and relevant to the noted violations.

The Court agreed. The court record reflects that the Immediate Supervisor identified the specific infraction violations multiple times. As a result, Petitioner failed to sufficiently allege the Immediate Supervisor failed to provide the specific policy infraction violations to Petitioner, resulting in a procedural irregularity, harmful to Petitioner.

Petitioner also noted that his Immediate Supervisor mistakenly held Petitioner accountable for the actions of another. The Area Manager responded that she finds the infractions are applicable and relevant to the noted violations. The improper use of property and not signing out reflects carelessness and a lapse in judgment. Petitioner did not sufficiently allege the Area Manager failed to identify the specific infractions associated with the cited policy violations, resulting in a procedural irregularity harmful to Petitioner.

Failure to follow Progressive Discipline in the Surveillance Department Guideline SOP.

In accordance with section 3.11.2 of the Surveillance Department Guidelines SOP, any confirmed breach of confidentiality *may* result in a progressive disciplinary action.

In this case, Petitioner alleged his Immediate Supervisor failed to follow progressive discipline, as described in the Surveillance Department Guideline SOP, instead, deviated from progressive discipline. To address this claim, the Area Manager stated section 3.11.2 in the SOP provides that any confirmed breach of confidentiality *may* result in progressive discipline. The use of the word *may* does not require progressive discipline when there is a confirmed breach of confidentiality, as in this case. Petitioner further stated the OPPP required the supervisor to justify when deviating from a recommended progressive disciplinary action. The Area Manager justified her decision to uphold the disciplinary action of termination, because of the infraction violations, the consequence considerations, and consultation with HRD are sufficient and support the decision to deviate from progressive discipline. The Court agreed with the Area Manager's justification for deviating from progressive discipline. Therefore, Petitioner did not sufficiently allege that this procedural irregularity occurred during the appeal process, and harmed Petitioner.

Petitioner alleged personal harassment by his Immediate Supervisor.

Petitioner stated in addition to the disciplinary action of termination, he has also been subjected to continuous harassment by his Immediate Supervisor in the form of his Annual Performance Evaluation and that his Immediate Supervisor failed to approve his Kronos week ending September 16, 2023. The Court finds Petitioner's allegations regarding his Annual Employee Performance Evaluation and his supervisor's alleged failure to approve his Kronos week ending September 16, 2023, are not relevant to Petitioner's employee grievance. Instead, the appropriate action would be to follow the internal grievance process for both allegations.

Findings

1. The Court has subject matter and personal jurisdiction over this matter.
2. Notice was given to all those entitled to notice.
3. On October 9, 2023, Petitioner was terminated from employment with the Oneida Casino Surveillance Department for allegedly violating the following sections of the OPPP:
 - a. Use of Property; unauthorized or improper use of Oneida Nation property or equipment (e.g., Oneida Nation vehicles, telephone, mail services, etc.) (W/S/T).


- b. Personal Actions and Appearances; Failure to exercise proper judgment. (W/S/T).
 - c. Work Performance; Unauthorized disclosure of confidential information or records. (S/T).
4. On November 14, 2023, Petitioner received the Area Manager's decision.
 5. On November 30, 2023, Petitioner timely filed his employee grievance complaint with the Trial Court.
 6. On January 15, 2024, the Court provided the parties an additional opportunity to provide additional information related to the allegations.
 7. The Area Manager's decision was not clearly against the weight of the evidence.
 8. Procedural irregularities were not exhibited during the appeal process that were harmful to Petitioner.

Order

1. The Decision of the Area Manger 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 February 5, 2024.


John E. Powless III, Trial Court Judge