

COURT OF APPEALS

Kyle Wisneski,
Appellant,

Case No.: 23-AC-003

v.

Date: March 7, 2024

Mark W. Powless and
Tsyunhehkwa,
Respondents.

FINAL DECISION

This matter has come before Appellate Judges Diane House, Michele Doxtator, and Chief Appellate Judge Patricia M. Garvey.

JURISDICTION

The Court of Appeals has jurisdiction over this matter per §801.8-2(a)(1) of the Oneida Judiciary Law which gives this Court exclusive jurisdiction to review appeals of final orders, sentences and judgments of the Trial Court.

PROCEDURAL HISTORY

This is an employment matter stemming from an appeal of a decision of the Oneida Trial Court (hereinafter “TC”), which upheld the termination of Kyle Wisneski (hereinafter “Wisneski”). On July 5, 2023, Wisneski filed his Notice of Appeal with this Court. On August 2, 2023, the appeal was accepted for review. On August 8, 2023, the briefing schedule began. On August 24, 2023, Wisneski filed a Motion for Extension of Time to file his brief due to his counsel’s medical emergency. The Motion was granted making his brief due on September 27, 2023. On September 22, 2023, Wisneski filed a second Motion for Extension for the same reason. The extension was granted making his brief due on October 27, 2023. On October 25, 2023, Wisneski filed a third Motion for Extension, citing his counsel’s continued medical emergency. An extension was granted with a due date of November 27, 2023. On October 26, 2023, the Respondent, Mark W.

Powless (hereinafter “Powless”) filed a Motion to Modify the Order to Extend Time, asking the Court to put a limit on the amount of back pay to be granted to Wisneski, due to all of the extensions causing this case to go beyond one hundred and eighty (180) days, pursuant to Rules of Appellate Procedure, §805.9-3. On November 9, 2023, this Court granted Powless’ Motion by limiting back pay to January 2, 2024, should Wisneski prevail. On November 22, 2023, after 4:00 p.m., Wisneski filed a fourth Motion for Extension of Time for the same reason as the others. The Oneida Nation, to include the Judiciary, was closed on November 23 and 24, 2023, because of the Thanksgiving holiday. On November 27, 2023, Wisneski’s Motion was denied, however, he was granted a grace period to submit his brief. Wisneski, *pro se*, timely filed his brief on December 8, 2023. The briefing schedule ended on January 11, 2024.

BACKGROUND

On December 13, 2022, Wisneski was terminated by his supervisor, Vanessa Miller, for violating several policies within the Oneida Personnel Policies and Procedures Manual (hereinafter “OPPP”) section V.D.2.c.(4) Personal Actions and Appearance subsections (b), Intimidating, interfering with, or using abusive language toward customers, clients, co-workers, or others; (j) Failure to exercise proper judgement and (k) Failure to be courteous in dealing with fellow employees or the general public; as well as violations of the Standard Operating Procedure: Food & Agriculture Code of Conduct, signed by Wisneski on August 30, 2022; and the Work Expectations Agreement, signed by Wisneski on July 28, 2022.

Wisneski filed an employee grievance with the Area Manager. The Area Manager recused herself and the case was assigned to the General Manager, Powless, to function as Area Manager. On January 20, 2023, Powless upheld Wisneski’s termination. Wisneski filed his Employee Grievance Complaint with the TC on February 3, 2023. The TC accepted Wisneski’s appeal on February 13, 2023.

Powless filed a Motion to Dismiss and the cause was set for pretrial/Motion hearing on March 14, 2023. On March 17, 2023, the TC denied in part, and granted in part, the Powless Motion to Dismiss. The TC denied the Motion to dismiss finding a procedural irregularity that was harmful to Wisneski and as to Powless’s decision being clearly against the weight of the evidence. The

Motion was granted as it relates to new evidence and new claims presented by Wisneski. The procedural irregularity acknowledged by the TC was the failure of Powless to interview all of the witnesses with knowledge of circumstances regarding the termination of Wisneski as required by a prior decision of the Oneida Personnel Commission.¹ The cause was set for trial.

The trial began on May 23, 2023. Wisneski was *pro se* and Powless was represented by an attorney for the Oneida Nation Law Office. Three (3) witnesses the Area Manager did not initially interview were subpoenaed by Powless. The witnesses were William Vervoort; Arlie Doxtator; and Peter Skenandore. The witnesses were questioned by both parties.

The TC upheld the termination of Wisneski holding the procedural irregularity was overcome by the testimony of the three witnesses and therefore there was no harm to Wisneski when the Area Manager failed to interview as required by the prior precedent. In addition, the TC stated “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 the evidence.”

Final Order June 6, 2023, p. 9.

ISSUE PRESENTED

Whether the TC abused its discretion when it failed to follow the principles of “Yonikúhlihsa?ahnú”² pursuant to §801.3-1(p) of the Judiciary Law, where the TC recognized a procedural irregularity caused harm to Wisneski because the Area Manager failed to interview witnesses involved in the termination as required by *Lloyd Powless v. Bruce Steinfeldt*, 08-AC-008 (Oneida Appeals 07/13/2009).

ANALYSIS

The primary focus of this decision is whether the dictates of the Judiciary Law were ignored and

¹ BC Resolution 04-25-18-H required the Trial Court to utilize prior decisions of the Personnel Commission as precedent.

² The Judiciary Law, §801.2-6 states: 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 Yonikúhlihsa?ahnú (a decision is made) shall apply to all matters before the Judiciary.

the prior precedent was not applied. The OPPP requires, when reviewing a complaint, the hearing body must determine whether a) 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 one of the parties to the grievance. **OPPP 6.d.1.**

Powless had filed a Motion to Dismiss. A hearing was held on the Motion where both parties testified. Powless argued the decision of who the Area Manager must interview as part of his investigation is up to the discretion of the Area Manager, citing, **Oneida Bingo and Casino-Blackjack Department, et al, v. Cherie O'Rourke**, 4 O.N.R. 3-125 (Appellate Court, 9/30/98). The TC disagreed with the unfettered discretion of the O'Rourke decision. Instead, the TC cited, **Lloyd Powless v. Bruce Steinfeldt, 09-AC-008** (Oneida Appeals, 07/13/2009), which held the Area Manager must interview the employee being disciplined *and all those involved in the matter. (Emphasis added)*. In addition, the TC made a finding in the Motion decision that Mr. Skenandore, Mr. Doxtator and Mr. Vervoort are persons involved in the matter and should have been interviewed as part of the Area Manager's investigation. The TC also found Wisneski sufficiently alleged harm from the procedural irregularity during the appeal process.

Instead of applying the **Steinfeldt** case to Wisneski, and remanding the case to the Area Manager, pursuant to OPPP V.D.6.f.3)a)b)c), the TC set the case for trial and allowed the Area Manager to call the three witnesses involved in the termination at trial. In interviewing the three witnesses, their statements would have been considered new evidence as defined in the OPPP. The Area Manager would have had to consider the new evidence in deciding whether he would uphold the termination. Although Wisneski had told the TC there was no new evidence he was presenting during the Motion to Dismiss hearing, Wisneski was *pro se*. Wisneski had no legal background and would not have realized the Area Manager's failure to interview the three witnesses would have been new evidence under the OPPP. The three witnesses testified they would have given the Area Manager the same testimony they provided at trial if he would have interviewed them.

In the final decision, the TC found the procedural irregularity of not interviewing the three employees was not harmful to Wisneski 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 the evidence. In summary, the TC discarded the procedural irregularity that caused harm to Wisneski and made a finding the decision of the Area Manager, in upholding the termination of Wisneski, was not clearly against the weight of the evidence.

Abuse of Discretion Standard of Review

Oneida Judiciary Law § 801.8-3(c) Scope of Appellate Review states that "[w]ithout limiting the appropriate standard of review, the Court of Appeals shall give due deference to the rule of harmless error and discretionary decisions of the Tribe or any Tribal agency." To interpret this, we look for guidance in determining how to review judicial rulings in discretionary matters. In *Koon v. United States*, the Supreme Court determined that a district or lower court by "definition abuses its discretion when it makes an error of law." 518 U.S. 81, 100 (1996). This leaves the Court with the understanding that the failure to apply the law correctly in reaching a decision is an abuse of discretion. Based upon this standard of review, we essentially review for legal error under a de novo standard. This means we independently determine whether the correct standard of law was applied, but uphold the trial court's findings of fact unless they are clearly erroneous. *Id.*

The question on appeal is whether the TC abused its discretion when, after determining the principles in the **Steinfeldt** case applied to Wisneski, it set the matter for trial to hear and consider the new testimony of three employees that the TC determined were required but omitted in the Powless' review (in his capacity as the Area Manager). When the TC made this determination that these three interviews were required but omitted pursuant to **Steinfeldt**, the TC failed to follow the OPPP by not remanding the case back to the Area Manager to consider this new evidence in accordance with V.D.6.f.3)a)b)c). Instead, the TC basically took it upon itself to hear and correct the interview or process deficiencies made by Powless in Wisneski's appeal.

Legal Error of Trial Court

In applying the standard of review, we find that the TC committed a legal error and abused its discretion and when it failed to apply the law as defined in the OPPP and the Judiciary Law. When the TC determined Powless, in his capacity as the Area Manager, failed to follow the mandates of **Steinfeldt** and did not interview all parties involved in the matter, the TC should have remanded

this matter back to the Area Manager to consider this new evidence, pursuant to OPPP V.D.6.f.3)a)b)c). Instead the TC found the procedural irregularity caused by the Area Manager was somehow cured by setting the case for trial and hearing testimony from the witnesses the Area Manager failed to interview. By finding there was no longer harm to Wisneski by “correcting” the existing procedural irregularity itself, the TC determined that it could uphold the decision of the Area Manager. This was an error in the application of the OPPP and the Judiciary Law. These laws do not allow for this bifurcation of duty to meet certain legal thresholds in the grievance process.

CONCLUSION

The TC should have followed the OPPP and the Judiciary Law, applied the prior precedence, and determined what form of decision they were going to apply.

The principles of Yonikúhlihsa?ahú (a decision has been made) shall apply to all matters before the Judiciary. This includes the precedent set by the Oneida Appeals Commission/Oneida Tribal Judicial System of accepting appeals from Personnel Commission decisions. §801.2-6.

The Personnel Commission was no longer a hearing body, so the TC had to apply a form of decision outlined in Oneida Judiciary Rules of Civil Procedure. §803.28-3 of the Rules of Civil Procedure cites “[t]he Court may issue decisions in the form of fines, orders, penalties, or others the Court deems appropriate...”. With that said, the TC should have remanded the case to the Area Manager giving the Area Manager the opportunity to interview the witnesses.

When reviewing the actions of the TC pursuant to §801.8-4, the Appellate Court will only remand or reverse a lower court if the decision: (a) Violates applicable provisions of the Constitution; (b) Violates provisions, substantive or procedural, of applicable Tribal law or applicable federal law; (c) Is an administrative decision that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with applicable law; or (d) Is not supported by the substantial evidence on the record taken as a whole. Based on the foregoing, this Court finds the TC committed legal error and abused its discretion and when it failed to apply the law as defined in the OPPP and Judiciary Law. As a result, this Court hereby reverses the Trial Court’s decision to uphold the Area Manager’s decision to terminate Wisneski.

ORDER

The decision of the Trial Court is reversed and Wisneski is to be reinstated to his prior position with back pay as determined in accordance with the Oneida Back Pay Law and the Order issued by this Court on November 9, 2023.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, the decision is reversed. Dated this 7th day of March 2024, in the matter of Case No. 23-AC-003, *Kyle Wisneski v. Mark W. Powless and Tsyunhehkwa*.

It is so ordered.