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**Appellate Court**

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Oneida Bingo and Casino,  
Appellant

v.

Docket No. 03-AC-018

Date: December 8, 2003

Lisa Van Egeren,  
Respondent

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**Final Decision**

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This case has come before the Oneida Appeals Commission Appellate Court. Judicial Officers Winnifred L. Thomas, Mary Adams, Linda Cornelius, Kirby Metoxen, Leland Wigg-Ninham presiding.

**I Background**

The respondent was issued a written warning after a coworker filed a complaint against her. The complaint centered upon a confrontation between the respondent and the coworker and the respondent was disciplined under the Personnel Policies and Procedures Handbook for intimidating behavior.<sup>1</sup>

The Area Manager affirmed the written warning and the respondent contested the disciplinary action to the Personnel Commission. The Personnel Commission reversed the written warning. The Personnel Commission found that there were irregularities in the disciplinary process, and that the complaining coworker reacted in an unreasonable manner.

The appellant appeals the findings of the Personnel Commission, arguing that the Personnel Commission has improperly substituted its judgement for that of the coworker and that the decision is arbitrary and clearly erroneous.

**II Issues**

Did the Personnel Commission erroneously find that the respondent's actions did not reasonably warrant a reaction of fear or intimidation?

Did the Personnel Commission erroneously find that procedural irregularities in the disciplinary process warranted reversal of the discipline?

**III Analysis**

The Personnel Commission heard testimony and reviewed evidence regarding the confrontation between the respondent and her coworker. The appellant argues that the finding that the coworker could not have reasonably been intimidated is erroneous and a substitution of judgement.

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<sup>1</sup> V.D.IV.b. Intimidating, interfering with or using abusive language toward customers, clients, co-workers, or others.

The Personnel Commission's finding in this case is not a substitution of judgement. That act, improper for a judge or judicial hearing body, is done when the judge places his, her or their judgement in terms of discretion in the place of a person or entity that is authorized to exercise such discretion.

For example, the Personnel Commission hearing body could have held that they, under the circumstances, would have issued a suspension rather than a written warning, when a suspension is authorized and under the discretion of the decision maker. That is a substitution of judgement. Or, for example, if the Personnel Commission commented upon or invalidated a piece of employment legislation on the grounds that they would not have voted in favor of it if they had been a part of the body that passed it, that is a substitution of judgement.

In this case, the Personnel Commission evaluated conflicting testimony and found that the appellant could not persuade the Personnel Commission that events occurred in a way that was depicted by the appellant. The coworker's complaint stated that she felt intimidated and backed against the wall. The Personnel Commission found that the later part of this complaint was a figure of speech, and not a literal statement of what actually occurred. The Appellant argues that this is an erroneous finding, and that the coworker was in fact backed against a wall.

The Personnel Commission serves as both a finder of fact and trier of law when it acts as a hearing body in employment grievances. As such, it must evaluate the testimony of witnesses and assess the credibility of asserted facts. The Personnel Commission heard conflicted testimony and determined that it was not persuaded that the coworker was placed physically against a wall. This is supported by the testimony of the respondent, and is therefore not clearly erroneous. It is a finding of fact, which will not generally be disturbed on appellate review unless it is found that there is substantially more evidence to support a contrary finding, such that the finding of the original hearing body was unreasonable. The Personnel Commission finding that no physical intimidation or literal "backed against the wall" action occurred is a finding of fact supported by testimonial evidence and is therefore affirmed.

The Personnel Commission additionally reversed the written warning because of what it considered procedural irregularities in the disciplinary investigation and process. In addition, these irregularities contributed to the Personnel Commission's finding that the coworker could not have reasonably been "intimidated" to the point that disciplinary action was warranted. The coworker did not file her complaint immediately following the confrontation between her and the respondent. The supervisor, while aware of the confrontation after discussing the matter with both the respondent and coworker, did not initiate any official investigation into the matter until the coworker submitted a written complaint. The Personnel Commission found that the lack of immediate response to the confrontation diminished the level of intimidation felt by the coworker. The Personnel Commission found that had the coworker truly felt intimidated or threatened by the respondent's actions, she would have filed a complaint immediately. In addition, the Personnel Commission reasoned that the supervisor would not have waited for a written complaint if it was felt that a true threat occurred or that the respondent presented a danger. The supervisor should have begun an investigation immediately if it was felt that the respondent's actions were that egregious. This court can find no

significant flaws in the Personnel Commission's reasoning. The basis for the Personnel Commission's decision is found in its inference of the coworker and supervisor's actions. The Personnel Commission assessed what it considered to be a reasonable response to the respondent's actions, and found that the coworker and supervisor did not act in a reasonable manner. That finding will be affirmed. It is not a substitution of judgment, but an assessment of what a reasonable person would do or how that person would react under a set of circumstances.

#### **IV Decision**

The decision of the Personnel Commission is affirmed. The written warning issued against the respondent is overturned.