THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATRICIA DAWN KNIGHT,
Grievant,

v. **Docket No. 2008-0981-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Respondent.

D E C I S I O N

Grievant, Patricia Knight, is employed by the Department of Health and Human Resources ("HHR") at the Bureau for Child Support Enforcement ("BCSE"). She filed this grievance on December 21, 2007. Her Statement of Grievance states, "[o]n 12/13/07, Grievant was denied representation at investigatory interview." The relief sought is, "DHHR will make it a policy to allow representation on request and inform employees of their statutory rights."

This grievance was denied at Level One, and mediation was unsuccessful. A Level Three hearing was conducted at the Grievance Board's Charleston office on July 25, 2008. Grievant was represented by Gordon Simmons from the UE Local 170, and HHR was represented by B. Allen Campbell, Senior Assistant Attorney General. This matter became mature for decision on October 3, 2008, after the submission of the parties' proposals.

Synopsis

The parties agreed the issue before the undersigned Administrative Law Judge is a legal one. Grievant asserts she is entitled to representation at an investigatory interview, and this right is provided by statute. Grievant argues the Weingarten Doctrine, by analogy,

should apply to state employees given the language of the new statute. Grievant also seeks to require HHR to inform employees of their rights during investigations.

Respondent agrees Grievant has the right to representation at certain times, but this right does not extend to an investigatory interview. Respondent established that the West Virginia Supreme Court of Appeals and the Grievance Board had previously held the right to representation during an investigatory interview did not apply to state employees. Additionally, Respondent demonstrated the right to representation was originally included in the new proposed statute, but this phrase was removed. The statute enacted by the Legislature does not specify this right to a representative at an investigatory interview. Further, Respondent argues the plain language of the statute does not establish this right. For the reasons stated below, this grievance must be GRANTED, in part and DENIED, in part.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is classified as an Office Assistant 3. She works for BCSE and is responsible for processing payments.

2. In early December 2007, the BCSE realized that $700 was missing from the safe. As is its normal practice, the BCSE contacted Sharon O'Dell, the Director of the Office of Inspector General ("OIG"), to conduct an investigation.

3. The OIG is the investigatory arm of the HHR, but the BCSE and the OIG are separate entities within the HHR. The OIG conducts independent investigations into various types of misconduct and fraud committed by both recipients of benefits and HHR employees. In employee investigations, the OIG conducts an investigation and then sends a report to the requesting bureau with its findings. The OIG had no further involvement. This procedure was followed in this matter.

4. If criminal charges need to be filed, the OIG is the division that takes this action.

5. The OIG has no involvement in the discipline of the requesting bureau's employees and makes no recommendation about possible discipline. The requesting bureau decides on the proper course of action, including any possible discipline.

6. Grievant was directed by BCSE Commissioner Susan Perry to report to the OIG for an investigatory interview because she was one of several people who had access to both the key and the combination for the safe.

7. On December 13, 2007, Grievant reported for this investigatory interview and brought her representative. Director O'Dell, after consultation with her legal counsel, informed Grievant she was not entitled to representation during an investigatory interview.

8. Grievant was not pleased and felt she had been threatened, but agreed to be interviewed without her representative. She was not given a written or verbal statement of her rights during an investigation.

9. If an initial investigatory interview reveals evidence that could lead to criminal charges, the OIG terminates the interview. A second interview is scheduled, at which time the employee is entitled to legal representation, and the employee is read his/her Miranda rights. Testimony O'Dell & Respondent Exh. 1 (Responses to questions from Hearing Examiner at Level One.)

10. Through Grievant's cooperation, the OIG was able to identify possible suspects and correct flaws in BCSE's security policies and procedures. There has been no disciplinary action taken against Grievant, and no charges have been filed against her. The BCSE indicated at the Level Three hearing that it would not be filing any charges or taking any disciplinary action. Respondent Exh. 1.

11. The purpose of an OIG investigation is to obtain information and to write a report.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

For ease of understanding, the discussion will be divided into three sections.

I. General history and information

Swiger v. Civil Service Commissioner, 179 W. Va. 133, 365 S.E.2d 797 (1988), was decided under the old civil service statues before the advent of the grievance procedure. In *Swiger*, the West Virginia Supreme Court of Appeals held that the Weingarten Doctrine was not applicable to state employees. Swiger was a correctional officer/state employee, who was denied the presence of a union representative at a pre-disciplinary hearing. In *Swiger*, the Court held:

> Appellant would liken the facts of the present case to those in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). In Weingarten, during the course of an investigatory interview at which a private employee was being interrogated about reported thefts at the employer's store, the employee was denied the presence of her union representative at an interview. However, Weingarten is not controlling in the present case because it addressed the rights of a private sector employee who was compelled to appear at an investigatory interview. Furthermore, Weingarten is distinguishable from the present case because it dealt with the National Labor Relations Act as applied in the ***private*** sector. Therefore, Weingarten is irrelevant as the Civil Service Commission statutes are clearly different from the N.L.R.A.

Id. (Emphasis in original.)

The West Virginia Supreme Court of Appeals went on to note that various states have applied the Weingarten Doctrine to public employees in states depending on the

"scope and protection of each state's civil service laws." *Id*. at 138 & 802. The West Virginia Supreme Court of Appeals held the civil service laws of West Virginia "afford[ed] public employees more protection throughout the critical stages of investigation and disciplinary proceedings than private employees," and public employees "enjoy[ed] broad procedural due process rights that are strictly enforced." *Id*. The civil service statute in effect at that time stated that before termination an employee had the right to know the charges in writing, and must be given an opportunity to reply in writing or "upon request to appear ***personally*** and to reply to the appointing authority or his deputy." (Emphasis in the original).

The West Virginia Supreme Court of Appeals concluded that because the statute did not mention representation, but only said "personally," the presence of an attorney or union representative was at the discretion of the employer. The Court went on to state that "[i]f the Legislature wishes to provide due process rights to union representation before termination, it may amend the statute." *Id*.

The West Virginia Legislature did amend the statute, and W. VA. CODE § 6C-2-3(g), enacted in 2007, states:[1]

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

Before this statute was enacted, the grievance statutes only stated a grievant could have representation at each step of the grievance procedure.

II. Employees' rights during an investigatory interview

Tolley v. West Virginia Division of Natural Resources, Docket No. 94-DNR-629 (May 18, 1995), discussed the questioning of a public employee by his/her employer during an investigatory interview. In *Tolley*, the administrative law judge held that given adequate immunity, "the state may plainly insist that employees either answer questions under oath

[1]The grievance statutes were revised in 2008, but this language was unchanged.

about the performance of their job or suffer the loss of employment." *See Lefkowitz v. Turley*, 414 U.S. 70 (1973). *Tolley* noted that in a line of cases following *Garrity v. New Jersey*, 385 U.S. 493 (1967), the United States Supreme Court held a public employee may be compelled to answer questions if there is immunity from federal and state use of the compelled testimony or fruits of that testimony in connection with criminal proceedings against the person testifying. *See Gardner v. Broderick*, 392 U.S. 273 (1968).

Cox v. West Virginia Division of Corrections, Docket No. 03-Corr-144 (January 13, 2004), extensively discussed the rights of state employees during an investigatory interview, and the need for adequate information about the process. In *Cox*, the administrative law judge noted it was the practice of Corrections to give employees an Administrative Rights Warning prior to being interviewed. Cox signed and acknowledged this Warning. This Administrative Rights Warning stated, in pertinent part:

> You are hereby advised that you are about to be questioned as a part of an official internal administrative investigation or inquiry of the West Virginia Department of Public Safety, Division of Corrections, Anthony Correctional Center.
>
> You are entitled to all the rights and privileges guaranteed by all of the laws and the Constitution of West Virginia and the United States, including the right not to be compelled to incriminate yourself relating to a criminal matter. You will be asked questions specifically directed and narrowly related to the official performance of your duties as a member of the Division, or your fitness for office.
>
> Your answers to any questions, as well as any evidence or other information gleamed from this investigation or inquiry cannot, by law, be used against you in any subsequent criminal proceedings; however, your answers, subsequent evidence, and information may be used against you in relation to Division administrative charges for violations of rules, regulations, policies and/or procedures promulgated by the Department of Public Safety, Division of Corrections and/or Anthony Correctional Center.
>
> Refusal to answer questions in relation to any official Division investigation or inquiry; answering questions untruthfully; or intimidating or attempting to intimidate any other person in relation to this investigation or inquiry may result in disciplinary action, up to and including dismissal from employment.

As noted in *Tolley* and confirmed in *Cox*, it is improper to require an employee to respond to questions, and at the same time require the employee to waive immunity from

prosecution. Only in a proper proceeding is an employer warranted in dismissing a public employee upon his refusal to answer questions. *Cox, supra*. "Proper proceeding" means a proceeding in which the employee is asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choices. *Id.* In *Tolley*, the administrative law judge found the Grievant was not given sufficient information, and thus, was not offered adequate immunity.

Following the guidance of the above cases, it is clear Grievant was not afforded all the procedural due process rights to which she was entitled. She was not clearly informed of her rights, in writing, before the start of the interview, nor was she told the information gleaned from the investigatory interview could not be used against her in criminal proceedings. Accordingly, a portion of Grievant's relief must be granted - HHR is ordered to inform employees, in writing, of their rights, and of the inability of the agency to use the compelled testimony in criminal proceedings.

III. Right to representation

Grievant has also raised another issue and has requested additional relief. She asserts she is entitled, by the new statute, to have representation during an investigatory interview. Grievant alleges the new statute gave her the right to have a representative present, and her rights were violated by HHR when the agency refused to allow her representative to attend the investigatory interview.

Cox discussed this issue and stated:[2]

> The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our State Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977).

[2]Cox was decided under the old grievance statutes.

Cox, supra. *Cox* held that "if an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney." *Cox, supra*.[3]

Although the history is helpful in understanding what has happened in the past, the issue here is what does the current statute state. W. VA. CODE § 6C-2-3(g) statute addressing representation, and states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

This new Code Section gives employees the right to representation during pre-disciplinary conferences. Previously, under the old grievance procedure statute, employees only had the right to representation during the grievance process.

In order for the undersigned Administrative Law Judge to extend that right to investigatory interviews, she must find a clear indication from the plain language of the new statute that this was the intent of the Legislature. The undersigned Administrative Law Judge takes direction from *Swiger*. In that case, the West Virginia Supreme Court of Appeals found that because the statute did not mention an employee having the right to representation and only said the employee could meet "personally" with the appointing authority, "whether an employee can be accompanied by a representative . . . would clearly be within the discretion of the employer."

The plain language of the statute at issue says an employee is entitled to representation: 1) during every step of the grievance procedure, and 2) at any meeting held

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[3]In *Tolley*, the grievant stated he wished to have an attorney present, and the interview was ended at that point. *Tolley* did not directly address whether an employee has the right to the presence of an attorney, because it found the grievant could not be dismissed for failure to cooperate in an internal investigation when the agency had not advised him of his rights. *Tolley*, however, indirectly indicates that an employee who has been properly advised that his statements or the fruits thereof cannot be used in a criminal proceeding, cannot demand the presence of an attorney. *Cox, supra*.

for the "purpose of discussing or considering disciplinary action." Investigatory interviews are not specifically addressed in this Code Section, and as established in Finding of Facts 3 and 11, the purpose of an OIG's investigation is to gather information and write a report indicating its findings. No discussion or recommendation on discipline is included in this report. Using the guidelines given in *Swiger*, the absence of this language would indicate the presence of a representative during the investigatory interview would be at the discretion of the employer. It is unclear to the undersigned Administrative Law Judge how the presence of a representative could prevent an agency from conducting a proper inquiry, and the support of an advocate during questioning would certainly be of assistance to the employee.

An examination of the rules of statutory construction is also helpful in contemplating this issue. "'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657, n. 9 (W. Va. 1990), *citing Hodge v. Ginsberg*, [172 W. Va. 663,] 303 S.E.2d 245 (W. Va. 1983)." *Lasure v. Tyler County Bd. of Educ.*, Docket No. 90-48-330 (Mar. 26, 1992). It would have been a simple task to include the phrase "during investigatory interviews" in the statute. In fact, the initial bill submitted on February 13, 2007, before passage, included just such a statement. The initial bill submitted at that time read:

> A grievant may designate a representative who may be present at any step of the [grievance] procedure <u>as well as at any investigative meeting</u> or other meeting which is held with the employee for the purpose of discussing the possibility of disciplinary action.

(Emphasis added). Respondent Exh. 2. at Level Three at 29-6A-3(g) & 18-29-3(c). This language was removed before passage.

Without plain language to support Grievant's assertion that the right to representation during an investigatory interview is included in the new statute, the

undersigned Administrative Law Judge must conclude Grievant was not granted this right by the current statute. This conclusion is strongly supported by the removal of the "investigative meeting" language before final passage of the statute.

Further, the West Virginia Supreme Court of Appeals case of *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996), discussed another cardinal principle of statutory construction, "*inclusio unius est exclusio alterius*," which means "the inclusion of one is the exclusion of others." *Baker* stated "[t]his doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language." *See State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 656 S.E.2d 464 (2007). While this rule of statutory construction is usually applied to Code Sections with lengthier "lists," a review of the statute clearly states a grievant is entitled to a representative for "any the step of the [grievance] procedure" and "any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." Investigatory, fact-finding interviews are not included in this list and so must be excluded.

A major concern arises from this holding that requires clarification. W. VA. CODE § 6C-2-3(g) states an employee may have representation "at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." Thus, the agency must be careful to separate the investigation and investigators from the administrators who will make the decisions about disciplinary action. Here, there is no violation, as the OIG, a separate entity, wrote the report, had no further input, and made no disciplinary recommendation. But if the individual who conducts the investigatory interview or questioning is also involved in the discussion or consideration about discipline, the employee must be allowed representation according to statute.

III. Purpose of investigatory interviews

Grievant argues *Keating v. Department of Health and Human Resources*, Docket No. 07-HHR-153 (March 12, 2008), demonstrates that the OIG does have the authority to impose discipline, as Keating was terminated based solely on an OIG report. *Keating* is not applicable to the instant case.

In *Keating*, HHR established and Keating, a probationary employee, admitted he had committed welfare fraud prior to his employment with the HHR. This misconduct was not investigated, established, or admitted until after Keating began employment with the HHR. The HHR established it was not in the best interest of the agency, or the clients it served, to employ an individual who had defrauded the agency. The HHR also proved that if Keating's welfare fraud had been known to the agency, he would never have been hired.

As noted in Finding of Fact 4, the OIG has a dual role. It investigates welfare fraud as well as employee matters. In *Keating*, as here, the OIG conducted an investigation, but it did not decide upon any discipline regarding Keating. Instead, Keating's employer, the Bureau for Children and Families, imposed discipline. In essence, Grievant wishes to bootstrap the right to representation during an investigatory interview by asserting the result of an investigatory interview could lead to disciplinary action. As these two cases demonstrate - it might or it might not. In *Keating*, the probationary employee admitted he committed welfare fraud, and the agency he worked for did not want an employee who had committed welfare fraud to decide eligibility for welfare. In this case, Grievant's information was helpful in correcting security issues, and there was no disciplinary action.

The above discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v.*

Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. W. VA. CODE § 6C-2-3(g) states:

> An employee may designate a representative who may be present at any step of the [grievance] procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

No changes were made to this statute in the 2008 revisions.

3. The Weingarten Doctrine is not applicable to West Virginia state employees. *Swiger v. Civil Serv. Comm'r*, 179 W. Va. 133, 365 S.E.2d 797 (1988).

4. West Virginia public employees' statutes "afford public employees more protection throughout the critical stages of investigation and disciplinary proceedings than private employees" and public employees "enjoy broad procedural due process right that are strictly enforced." *Swiger, supra*.

5. When a statute does not mention representation, the presence of an attorney or union representative is at the discretion of the employer. *Swiger, supra*.

6. When an employee is given adequate immunity, "the state may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment." *Tolley v. W. Va. Div. of Nat'l Res.*, Docket No. 94-DNR-629 (May 18, 1995). *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

7. It is improper to require an employee to respond to questions, and at the same time require the employee to waive immunity from prosecution. Only in a proper proceeding is an employer warranted in dismissing a public employee upon his refusal to answer questions. "Proper proceeding" means a proceeding in which the employee is

asked only pertinent questions about the performance of his duties and is duly advised of his options and the consequences of his choices. *Cox v. W. Va. Div. of Corr.*, Docket No. 03-Corr-144 (Jan, 13, 2004); *Tolley, supra*.

8. Grievant was not afforded all the procedural due process rights to which she was entitled. She was not clearly informed of her rights, in writing, before the start of the interview.

9. "The right to an attorney arises out of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination, and in West Virginia, out of Article III, § 14 of our State Constitution. These constitutional rights specifically apply only to criminal proceedings. See Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); and Committee on Legal Ethics, Etc., v. Pence, 240 S.E.2d 668 (W. Va. 1977)." *Cox, supra*.

10. "[I]f an employee is assured that his answers, or any evidence discovered as a result of his answers, cannot be used against him in a criminal proceeding, the employer may require the employee to answer pertinent questions posed in an internal investigation, without the presence of an attorney." *Cox, supra*.

11. "'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657, n. 9 (W. Va. 1990), *citing Hodge v. Ginsberg*, [172 W. Va. 663,] 303 S.E.2d 245 (W. Va. 1983)." *Lasure v. Tyler County Bd. of Educ.*, Docket No. 90-48-330 (Mar. 26, 1992).

12. The plain language of the statute at issue says an employee is entitled to representation: 1) during every step of the grievance procedure, and 2) at any meeting held

for the "purpose of discussing or considering disciplinary action." W. VA. CODE § 6C-2-3(g).

13. There is no mention of investigatory interviews in W. VA. CODE § 6C-2-3(g). Accordingly, the undersigned Administrative Law Judge cannot conclude Grievant is entitled to representation during these events. *Swiger, supra; Hodge, supra; Lasure, supra*.

14. A cardinal principle of statutory construction is, "*inclusio unius est exclusio alterius*," which means "the inclusion of one is the exclusion of others." *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996). "This doctrine informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language." *Id.*; *See State ex rel. Baker v. Bolyard*, 221 W. Va. 713, 656 S.E.2d 464 (2007).

15. Investigatory interviews were not included in the short list given in W. VA. CODE § 6C-2-3(g). Since this phrase was removed before the statute was enacted, the undersigned Administrative Law Judge cannot conclude this right was the intent of the Legislature. *Swiger, supra; Stone, supra*.

16. The roles/duties of an investigator must be kept separate from the roles/duties of the individual who considers whether disciplinary action should or will be taken. If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview.

17. The OIG's purpose is to investigate, and it does have the authority to impose discipline. *Keating v. Dep't of Health and Human Res.*, Docket No. 07-HHR-153 (Mar. 12, 2008).

Accordingly, this grievance is **GRANTED,** in part, and **DENIED**, in part. The HHR is directed to inform employees of their right during investigatory interviews pursuant to the

directions given in this decision and the cited cases. Additionally, the HHR is directed to ensure the roles of the investigator, who conducts the interview, and the administrator, who considers discipline, do not overlap and do remain separate.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 6, 2009

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Janis I. Reynolds
Administrative Law Judge