THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA JEAN KOBLINSKY,

Grievance,

v. **Docket No. 2010-0824-PutCH**

PUTNAM COUNTY HEALTH DEPARTMENT,

Respondent.

DECISION

By letter dated December 9, 2009, Grievant Barbara Koblinsky was suspended without pay from her employment with the Putnam County Health Department ("PCHD"). Grievant is employed by the PCHD as a Registered Sanitarian. The suspension was for three working days and was based upon Grievant allegedly failing to follow the PCHD Rabies Surveillance, Management and Control Policy. Ms. Koblinsky filed a grievance on December 23, 2009, contesting her suspension. As relief Grievant seeks "back pay for the three days in question, and removal of the record of disciplinary action from [her] record in all files." Because the grievance involves a suspension without pay, Grievant filed directly at level three and waived levels one and two.[1]

A level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on January 29, 2010. Grievant was present at the hearing and was represented by her colleague, Rick Hertges. Respondent was represented by Jackie Fleshman, Administrator of the PCHD. At the close of the hearing, the parties made oral arguments and submitted the grievance on the record that had been

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[1] *See* W. VA. CODE § 6C-2-4 (a) (4).

developed at the hearing. The grievance became mature for decision on January 29, 2010.

Synopsis

Grievant was suspended for insubordination by failing to comply with the PCHD Policy for Rabies Surveillance, Management and Control. Grievant was accused of causing undue stress to patrons by giving them the option to quarantine a kitten rather than having it euthanized after the animal had been turned over to the animal shelter for euthanasia. The PCHD alleges that the policy required that the kitten be put down because it was a stray and it bit a person. Grievant argues that the kitten was no longer a stray because the family had found the kitten and were willing to keep it. While the parties disagree on the interpretation of the policy, the interpretation of the agency charged with administering the policy must be given significant weight unless it is arbitrary and capricious. Respondent proved that Grievant violated its policy in two distinct ways. One of the violations was based upon legitimate confusion about a policy interpretation. However, in the second violation, Grievant chose to ignore a clear instruction from her employer to strictly apply the Rabies Policy. That action did constitute insubordination. Accordingly, the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Barbara Koblinsky is a Registered Sanitarian and has been employed by the PCHD in that capacity for approximately one and one half years. She has

previously been employed as a Sanitarian in Jefferson and Berkeley Counties, West Virginia and Loudon County, Virginia.

2. On November 26, 2009, a family found a stray kitten in their garage. While they were attempting to catch the kitten, it bit the sixteen year old daughter on her finger.

3. Three days later the family took the kitten to a veterinarian because it seemed to be suffering from a respiratory infection. During the visit, the veterinarian suggested that it might be best for the kitten to be euthanized.[2]

4. Two days after the visit to the veterinarian, a family member delivered the kitten to the Putnam County Animal Shelter to be euthanized. A staff member from the animal shelter contacted Grievant to obtain a "kill order."[3]

5. As required by policy, Grievant called the family to inform them that the animal would be put down the next morning and would be tested for rabies. Grievant spoke to the mother of the girl who had been bitten and explained that Grievant was required to inform the family that they should seek a physician's advice as to whether the daughter should receive post rabies exposure vaccinations.

6. The mother asked Grievant how the kitten would be tested and Grievant explained that the animal's head would be cut off and sent to a laboratory so the brain could be tested for the rabies virus.

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[2] It is unclear why the veterinarian made this suggestion. It may have been because there was a chance the kitten had feline leukemia which could be transferred to the family's other cat. It was inferred that the testing for this ailment was expensive and the veterinarian may have suggested that it might be best to put the kitten down.

[3] This document was not specifically explained, but from the context of the testimony, it appears to be an authorization from the PCHD to euthanize an animal involved in specified incidents such as possible rabies exposure.

7. When the mother expressed concern for the kitten, Grievant told the mother that the kitten could be quarantined for ten days and if the animal showed no signs of the disease in that time, her daughter could not have contracted rabies and the kitten would not have to be destroyed. Grievant also told the mother that five days of the quarantine had already passed since the family had kept the animal in their custody during that period and had observed that it was friendly and its health was improving.

8. That afternoon, Grievant received a call from a staff person at the animal shelter. The staff person told Grievant that he had received a call from the mother who said she wanted the cat placed in quarantine rather than be destroyed.

9. Later that day, Grievant received another call from the animal shelter and was told that the father had called the shelter and told them he wanted the animal euthanized. Grievant returned to the office and faxed a kill order for the cat to the Putnam County Animal Shelter. The animal was put down and the head was sent for rabies testing.

10. When the test results were reported to the PCHD, Grievant again called the mother who indicated that she was busy working at home and did not want to talk to Grievant. Grievant told the mother that the animal's head came back negative for rabies. The mother thanked her and the conversation ended. Grievant was required to notify the family of the test results.

11. On December 4, 2009, Jackie Fleshman, PCHD Administrator, received a telephone call from the father of the family complaining about Grievant's handling of the situation involving the hapless kitten. The father accused Grievant of putting the needs of a stray kitten ahead of the health of his daughter. He complained that Grievant was

needlessly descriptive of the process by which the animal would be tested for rabies and then she gave his wife the choice of quarantining the cat rather than euthanasia. He alleged that Grievant had forced him to "be the bad guy" with his family by deciding that the kitten should be put down. Finally, he alleged that Grievant compounded the situation when Grievant reported the results of the rabies test to his wife by, once again, noting that the kitten's head was cut off.

12. A predetermination meeting was held with Grievant on December 8, 2009, to determine if any disciplinary action would be taken against Grievant. The conference was conducted by PCHD Sanitarian Supervisor, Carey Eden. Ms. Eden memorialized Grievant's explanation of the situation, and she and Grievant signed that document. Respondent's Exhibit 2. On December 9, 2009, Grievant submitted a more lengthy recitation of the events in question to Administrator Fleshman as a follow-up to the predetermination meeting held the previous day.

13. The PCHD Rabies Surveillance, Management and Control Policy July 2009, ("Rabies Policy") requires that the quarantine of animals who have bitten a person "shall take place at the Putnam County Animal Shelter or at an approved Veterinarian's office at the owner's expense." The same policy also requires that if the animal responsible for the bite has no known owner, "the local health officer shall direct the county humane officer, dog warden or sheriff to euthanize the animal immediately." On July 9, 2009, Grievant received a copy of this policy and signed a statement acknowledging that she understood the policy and would follow it. Respondent's Exhibit 4.

14. Previously, Grievant received a written reprimand dated August 13, 2009, for, among other things, questioning the methods and policies of the PCHD related to the

Rabies Policy. Grievant was instructed to follow the policy and practices rather than exercise what she believed to be her professional judgement as the circumstances dictated. Respondent's Exhibit 8.

15. The PCHD Policy Formulation Policy allows the Physician/Director or the Administrator to implement a policy before the County Board of Health approves it, as long as the policy is reviewed and approved by the Board at the next scheduled meeting. Respondent's Exhibit 12.

16. The PCHD Rabies Policy was implemented in July 2009 and approved by the Putnam County Board of Health at their public meeting on August 25, 2009. Respondent's Exhibit 11. The Rabies Policy was in place when the incident related to the ill-fated kitten took place in late November and early December 2009.

Discussion

Since this grievance involves a suspension without pay, the employer carries the burden of proof. The employer must meet its burden by proving the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the employer has not met its

burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Respondent avers that Grievant violated the Rabies policy in two ways. First, PCHD notes that its policy requires the following:

> Any person who owns or harbors any dog, cat or ferret, whether licensed or unlicensed, which bites any person, shall confine and quarantine the animal for a period of 10 days for rabies observation (West Virginia Code 19-20-9a). **Furthermore the quarantine shall take place at the Putnam County Animal Shelter or at an approved Veterinarian's office at the owner's expense. . . .**

(Emphasis in original) Respondent's Exhibit 4.

Grievant told the mother that the kitten could be quarantined rather than be destroyed and the five days that the family had kept the cat after the bite would count toward the ten day quarantine. This statement was clearly contrary to the policy that requires all quarantine time is required to take place at the animal shelter or in a veterinarian's office. Respondent contends that this was an intentional violation of PCHD policy.

Second, Respondent points out that the rabies policy provides the following:

> If the dog, cat or ferret responsible for the bite and/or exposure has no known owner (i.e. no one in the community who harbors or maintains the animal), the local health officer shall direct the county humane officer, dog warden, or sheriff to **euthanize the animal immediately.**

(Emphasis in original) Respondent's Exhibit 4.

Respondent points out that when the kitten bit the girl the kitten was a stray and the fact that the family harbored the kitten thereafter did not change that fact. PCHD argues that the policy created a clear and unambiguous duty for Grievant to provide the kill order

for the stray animal when it was requested from the animal shelter. Instead, Grievant gave the mother the option of quarantining the animal after it had been surrendered to the shelter for euthanasia.

PCHD argues that these policy violations were not the result of Grievant being unaware of the rules. Respondent notes that Grievant has signed a copy of the Rabies Policy in July 2009, agreeing to follow it. Respondent alleges that Grievant has resisted strictly following the policy and has interpreted it as she chooses in spite of being directed not to do so.

Grievant does not deny that she is familiar with the Rabies Policy and how it is interpreted by Respondent. Rather, she argues that the policy was not valid in December 2009, and that it conflicted with the State policy. Further she argues that the PCHD applies the policy in a way that is inconsistent with the State Rabies Policy and that the PCHD policy leads to needless destruction of animals.

First, Grievant points to WEST VIRGINIA CODE § 16-2-11 which sets out the powers and duties of local health boards. In part, the statute provides that a local board of health may:

> Adopt and promulgate and from time to time amend rules consistent with state public health laws and the rules of the West Virginia state department of health and human resources, that are necessary and proper for the protection of the general health of the service area and the prevention of the introduction, propagation and spread of disease. All rules shall be filed with the clerk of the county commission or the clerk or the recorder of the municipality or both and shall be kept by the clerk or recording officer in a separate book as public records.

W. VA. CODE § 16-2-11 (b) (3).

Grievant avers that the PCHD Rabies Policy was not filed with the Putnam County Clerk and therefore the policy was not valid.

It was not clear whether the PCHD Rabies Policy had been recorded with the Putnam County Clerk at the time of the incidents leading to Grievant's suspension. It had been filed at the time of the level three hearing. The obvious purpose for such filing is to give the public notice of and access to such policies. Grievant had notice of the policy. She had been given a copy of it by her employer. Grievant signed a statement acknowledging that she understood the policy and agreed to follow it.

The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

The Putnam County Board of Health had adopted the Rabies Policy in an open public meeting, and provided a copy to employees charged with implementing it. Grievant is not excused from following the directives of her employer by the mere fact that those directives had not been filed with the Putnam County Clerk.

Grievant argues that the State rules allow an animal to be quarantined at the owner's premises and her actions were in compliance with those rules. Administrator Fleshman testified that the State Department of Health and Human Resources leaves it up to local health boards to decide how to conduct quarantines. The Putnam County Board of Health decided that the safest course of action was to exclude quarantines at homes. W. VA. CODE § 16-2-11 (b) (3) gives the local board the authority to adopt such local rules. Therefore, the rule that the quarantine must take place at the animal shelter or a veterinarian's office was within the PCHD's statutory authority. Grievant violated the plain language of that rule by telling the mother that the five days that the kitten had been in the family's custody would count toward the ten day quarantine period.

Grievant further argues that the kitten was no longer a stray when it was taken to be euthanized. She reasons that when the cat was surrendered to the animal shelter to be destroyed it had been adopted by the family and therefore she was acting within the PCHD guidelines. The Grievance Board has regularly held that deference will be given to the agency's interpretation of its own policy. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999)*; Dyer v. Lincoln County Bd. of Educ.* Docket No. 95-22-494 (June 28, 1996)*; Edwards v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998).

See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees,* Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

In this situation, the kitten was a stray when the bite occurred. The fact that the family did not take the cat to the Animal Shelter for destruction until five days after the bite does not change the animal's status when the bite took place. Nobody knew the origin of the kitten, where it had been and what it may have been exposed to prior to it biting a person. Respondent argues that the policy is clear and Grievant violated the policy when she gave the mother the option of quarantining the kitten instead of euthanasia.

Respondent's interpretation of the PCHD Rabies Policy must be judged by the arbitrary and capricious standard. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-074 (July 19, 1999). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Given the facts of the grievance, Administrator Fleshman's interpretation is consistent with the policy language and is not arbitrary or capricious.

While neither party uses the term, the PCHD is alleging that Grievant is guilty of insubordination for failing to follow the PCHD Rabies Policy. Insubordination "includes,

and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. In other words, there must be not only a refusal to obey a reasonable and valid order, but the refusal must be wilful. *Id*. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990). *Lilly v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-387 (June 6, 2008).

In this matter, it is clear that Grievant violated the PCHD policy in two ways. First,

she did not consider the kitten a stray and gave the family the option of quarantining the kitten rather than euthanasia. Second, Grievant told the mother that the five days the family had the kitten in custody, after it had bit the daughter and before they took it to the shelter, would count toward the ten day quarantine. The only question remaining is whether Respondent proved that these policy violations were "sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination."

It was not obvious that the kitten was a stray when Grievant became involved in the situation. The kitten had been adopted by the family and the mother of the family indicated that they were willing to keep the kitten if it did not have to be destroyed. Even though the PCDH's interpretation of the term stray in the policy is controlling, Grievant was not aware of that interpretation when she made her initial determination that the kitten was not a stray. Consequently, there is no evidence that Grievant intentionally violated the Rabies Policy when she made that determination.

The second violation is more troublesome. Grievant previously signed a copy of the PCHD Rabies Policy acknowledging that she understood the policy and agreed to follow it. The policy states all quarantines have to take place at the animal shelter or at a veterinarian's office. She knew, or reasonably should have known, that the five days that the family had custody of the kitten could not count toward the ten day quarantine. Additionally, Grievant had been previously admonished for not strictly following the county policy. Instead of following the plain language of the PCHD policy she gave the mother incorrect information about how the quarantine should be conducted. With regard to this second policy violation, Grievant chose to ignore clear instruction from her employer to strictly follow the PCHD Rabies Policy. That action was insubordinate. *Reynolds*, *supra;*

Lilly, supra.

Respondent proved by a preponderance of the evidence that Grievant was insubordinate by not complying with clear instructions to strictly follow the PCHD Rabies Policy. Therefore, the grievance is Denied.

Conclusions of Law

1. Since this grievance involves a suspension without pay the employer carries the burden of proof. The employer must meet its burden by proving the charges against the employee by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). Where the evidence equally supports both sides, the employer has not met its burden. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Deference will be given to the agency's interpretation of its own policy. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999)*; Dyer v. Lincoln County Bd. of Educ.* Docket No. 95-22-494 (June 28, 1996)*; Edwards v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees,* Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993).

3. Respondent's interpretation of the PCHD Rabies Policy must be judged by the arbitrary and capricious standard. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-074 (July 19, 1999). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Given the facts of the grievance, Administrator Fleshman's interpretation is consistent with the policy language and is not arbitrary or capricious.

4. Respondent proved by a preponderance of the evidence that Grievant violated the PCHD Rabies Policy.

5. An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

6. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d

456 (2002)(*per curiam*). *See Riddle v. Bd. of Directors, So. W. Va. Community College*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1, 1989). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*. "[F]or a refusal to obey to be 'wilful,' the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order." *Id.*

7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." *Reynolds v. Kanawha-Charleston Health Dep't*, Docket No. 90-H-128 (Aug. 8, 1990); *Lilly v. Dep't of Transp./Div. of Highways*, Docket No. 07-DOH-387 (June 6, 2008). Respondent proved by a preponderance of the evidence that Grievant was insubordinate by not complying with clear instructions to strictly follow the PCHD Rabies Policy.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 (2008).

DATE: MAY 4, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE