THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARTIN A. FALVO,
Grievant,

v. **Docket No. 2020-1111-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Martin A. Falvo, was employed by Respondent, Division of Highways, as a probationary employee. On March 30, 2020, Grievant filed this grievance against Respondent stating, "I was unjustly fired from my job several days before the end of my probationary period. My service had been excellent. Pretext for my firing was a single January incident when I bowed down in exaggerated respect to a co-employee who claimed we would all bow before him because of his connections in the District Office. He repeatedly bragged about getting us fired, that he'd be our boss one day, but since he's somebody's favorite nothing was done." For relief, Grievant seeks "[r]einstatement, back pay, and attorney's fees."

The grievance was properly filed directly to level three pursuant to W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on December 14, 2020, before the undersigned at the Grievance Board's Charleston, West Virginia office via video conference. Grievant was represented by counsel, John W. Feuchtenberger, Feuchtenberger & Barringer Legal Corporation. Respondent was represented by counsel, Jesseca R. Church. This matter became mature for decision on February 1, 2021, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a probationary Transportation Worker 1, Equipment Operator. Grievant and a coworker both alleged harassment against the other. Grievant was terminated from his probationary employment for the alleged misconduct of making a sexual gesture towards the coworker. Respondent did not properly investigate or discipline the coworker for his alleged harassment of Grievant. Respondent's decision to terminate Grievant's employment was arbitrary and capricious because Respondent failed to prove that the gesture was sexual in nature and the decision constituted discrimination and/or favoritism due to the failure to properly investigate or discipline the alleged harassing coworker. The Grievance Board does not have the authority to award attorney's fees. Accordingly, the grievance is granted, in part, and denied, in part.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a probationary Transportation Worker 1, Equipment Operator.

2. Grievant was first employed by Respondent as a temporary summer employee in May 2019 and was hired into his probationary position in September 2019, with a six-month probationary term.

3. Grievant worked on a crew with another probationary employee, Tyler Masters.

4. Mr. Masters' mother was employed at the district headquarters and worked with District Engineer Alan Reed.

5. On January 29, 2020, Grievant, Bryan Gilley, and Clyde Kinser went to their crew chief, Earl Halstead, and reported that Mr. Masters was harassing them by threatening that he could get them fired with a phone call. Several other employees complained about Mr. Masters on the same date.

6. On January 30, 2020, Mr. Halstead wrote a signed statement relaying the complaint by Grievant, Mr. Gilley, and Mr. Kinser that Mr. Masters told them he could get them fired with "one phone call" and also relaying the statement of Mr. Kelly that Mr. Masters had been telling other employees he could get them fired with one phone call.

7. Mr. Halstead gave his statement to his supervisor, James Sampson, Mercer County Supervisor.

8. Upon receipt of the statement from Mr. Halstead, Mr. Sampson told Mr. Masters to write a statement about the harassment Mr. Masters had alleged he had received regarding his mother having an alleged sexual relationship with Mr. Reed.

9. Mr. Masters' statement alleged that Mr. Gilley and Mr. Kinser had been saying to him that Mr. Masters' mother "sucks" Mr. Reed to get Mr. Masters special privileges and that Mr. Gilley called him "Tyler Reed."

10. On January 30, 2020, Kristen Shrewsbury, Human Resources Manager, received the written statements from Mr. Halstead and Mr. Masters.

11. Upon reviewing the two statements, Ms. Shrewsbury, along with Mr. Sampson and Samuel Gardner, Maintenance Assistant, conducted investigatory interviews with Crew Chief Halstead, Grievant, Mr. Masters, Mr. Gilley, Mr. Kinser and

five other employees. Although Mr. Kelly was named in Mr. Halstead's statement as complaining about Mr. Masters telling employees he could get them fired, Mr. Kelly was not interviewed.

12. Ms. Shrewsbury took notes of the interviews, which she later compiled into a typed document, but did not record the interviews or collect written statements from the persons interviewed.

13. During the level three hearing, the only evidence Respondent presented to prove the alleged misconduct was the testimony of Ms. Shrewsbury and Mr. Sampson regarding the investigatory interviews they conducted and Ms. Shrewsbury's notes of the same.

14. According to Ms. Shrewsbury's notes, in his interview, Mr. Masters alleged that several employees had been making statements about Mr. Masters' mother having a sexual relationship with District Engineer Reed and that it was upsetting to him and his mother. He named Mr. Gilley as the most frequent perpetrator. He also alleged that, in front of other employees, Grievant "dropped to his knees acting like my mom was doing a sexual favor for Alan."

15. Mr. Masters was not questioned regarding Grievant, Mr. Gilley, and Mr. Kinser's allegations that Mr. Masters had threatened he could get them fired with a phone call.

16. Following his interview, Mr. Masters submitted a second statement alleging that Grievant had shouted at him multiple times, "call Daddy Reed."

17. According to Ms. Shrewsbury's notes, in his interview, Grievant admitted to getting down on his knees and saying, "is that how you are if you don't get your way to

Alan?" Grievant denied that the gesture was regarding Mr. Masters' mother. Grievant repeated his allegation that Mr. Masters had been threatening Grievant and others that he could get them fired with a phone call. Grievant did not state or admit that his gesture was sexual in nature.

18. According to Ms. Shrewsbury's notes, in their interviews, Mr. Gilley and Mr. Kinser repeated their allegations that Mr. Masters had been threatening that he could get them fired with a phone call. Mr. Kinser corroborated that he had heard Mr. Masters threaten the same to Grievant and Mr. Gilley. They denied Mr. Masters' allegations that they had been making statements about Mr. Masters' mother.

19. According to Ms. Shrewsbury's notes, in their interviews, Jeremy Faulkner and Jody Dehart both stated that Mr. Masters had himself stated or insinuated that his mother was sleeping with Mr. Reed.

20. On February 28, 2020, Mr. Reed approved the West Virginia Department of Transportation Notice to Employee recommending Grievant's non-retention as a probationary employee for "harassing and/or threatening behavior towards coworkers" stating Grievant "[d]ropped to [his] knees and acted as though [he] were doing sexual favors to another individual" and that Grievant "then stated to another employee, 'Is that how you are if you don't get your way to Alan, (District Engineer).'"

21. Mr. Sampson attested to the notice on March 2, 2020, and presented it to Grievant.

22. Mr. Sampson erroneously immediately removed Grievant from his position. When it was discovered Grievant had been immediately removed in error, he was retroactively charged annual leave for his absence.

23. By letter dated March 13, 2020, H. Julian Woods, Executive Director Human Resources Division, terminated Grievant's probationary employment stating, "On January 30, 2020 an internal investigation was conducted on inappropriate gestures you made toward your coworkers. You dropped to your knees and acted as though you were performing sexual favors to another individual. You then stated to another employee 'Is that how you are if you don't get your way.'" No other reason was given for the termination of Grievant's employment.

24. No other employee was disciplined as a result of the investigation.

25. The standards of conduct in Respondent's Administrative Operating Procedures require employees to "[maintain] a high standard of personal conduct and courtesy in dealing with . . . fellow employees" and to refrain from engaging in "insulting, abusive, threatening, offensive, defamatory, harassing, or discriminatory conduct."

26. The Division of Personnel's Prohibited Workplace Harassment policy prohibits "nondiscrimatory hostile workplace harassment," which is defined as

> A form of harassment commonly referred to as "bullying " that involves verbal, non-verbal or physical conduct that is not discriminatory in nature but is so atrocious, intolerable, extreme and outrageous in nature that it exceeds the bounds of decency and creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing her or his work.

27. The policy further describes "nondiscrimatory hostile workplace harassment," as:

> [U]nreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of

intimidation, humiliation, and sabotage of performance which may include, but is not limited to:

1. Unwarranted constant and destructive criticism;
2. Singling out and isolating, ignoring, ostracizing, etc.;
3. Persistently demeaning, patronizing, belittling, and ridiculing; and/or,
4. Threatening, shouting at, and humiliating particularly in front of others.

Discussion

Although the termination letter states that Grievant's probationary employment was terminated for "failure to meet performance standards" it is clear Grievant was fired due to Respondent's finding of misconduct, as the single act of alleged misconduct was the only thing discussed in the termination letter. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). "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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

The Division of Personnel's administrative rule discusses the probationary period of employment, describing it as "a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency." W. VA. CODE ST. R. § 143-1-10.1.a. (2016). The same provision goes on to state that the employer "shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work." *Id*. A probationary employee may be dismissed at any point during the probationary period that the employer determines his services are unsatisfactory. *Id*. at § 10.5(a). Therefore, the Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to either dismiss the employee or simply not to retain the employee after the probationary period expires.

Hammond v. Div. of Veteran's Affairs, Docket No. 2009-0961-MAPS (Jan. 7, 2009) (citing *Hackman v. W. Va. Dep't of Transp.*, Docket No. 01-DMV-582 (Feb. 20, 2002)).

"[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard

of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 was 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

Respondent terminated Grievant's employment for one incident of alleged misconduct stating, "You dropped to your knees and acted as though you were performing sexual favors to another individual. You then stated to another employee 'Is that how you are if you don't get your way.'" The only evidence Respondent presented to prove the alleged misconduct was the testimony of Ms. Shrewsbury and Mr. Sampson regarding the investigatory interviews they conducted and Ms. Shrewsbury's notes of the same. The investigatory interviews were not recorded nor were written statements collected from witnesses other than Mr. Masters and Mr. Halstead.

The notes of the investigatory interviews and the statements from Crew Chief Halstead and Mr. Masters show that Grievant, Mr. Gilley, and Mr. Kinser had accused Mr. Masters of harassing them by threatening that he could get them fired with a phone call and that Mr. Masters had accused Grievant, Mr. Gilley, and Mr. Kinser of harassing him by stating that Mr. Masters was being favored because his mother was having a sexual

relationship with the district engineer. According to Mr. Sampson's testimony, he received Crew Chief Halstead's written statement about Grievant's complaint first and asked Mr. Masters' to provide a written statement of his complaints. Despite this, the investigation notes indicate that both allegations were received at the same time. Regardless, the interviewers failed to question Mr. Masters regarding the complaint of Grievant, Mr. Gilley, and Mr. Kinser that Mr. Masters had harassed them by threatening their jobs and asked only questions regarding Mr. Master's allegations of harassment. Although Mr. Masters' initial written statement did not mention Grievant at all, during the interview Mr. Masters stated Grievant had "dropped to his knees acting like my mom was doing a sexual favor for Alan [Reed]."

In interviewing Grievant, Grievant detailed harassment he had received from Mr. Masters and admitted to kneeling before Mr. Masters. Ms. Shrewsbury's notes from the investigatory interview quote Grievant as saying, "I got down on my knees and said, is that how you are if you don't get your way to Alan, Tyler?" The notes state that Grievant denied Mr. Masters' allegation that the kneeling was about Mr. Master's mother performing oral sex on Mr. Reed. Importantly, the notes do not say that Grievant admitted his gesture was sexual.

In his testimony, Grievant again admitted that he dropped to his knees but denied that he made any sexual gestures or comments and denied he said the quote from Ms. Shrewsbury's notes. Instead, Grievant testified that the gesture of dropping to his knees was in response to Mr. Master's comments that Mr. Masters would be the boss one day and they would all bow down to him. Grievant testified he dropped to his knees and said, "Is this how you want me to bow down?"

Following the investigation, only Grievant was disciplined. In explaining why only Grievant had been disciplined, Ms. Shrewsbury and Mr. Sampson testified that Grievant had admitted his misconduct, everyone else had denied the allegations, there were no witnesses to the allegations, and that only Mr. Masters had filed a written complaint. Grievant essentially argues that the decision to terminate his employment was arbitrary and capricious because it constituted discrimination and/or favoritism.

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism'" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

Grievant and Mr. Masters were similarly situated as they were both probationary employees accused by each other of harassment.[1] Grievant and Mr. Masters were treated differently. Although it was actually Grievant, Mr. Gilley, and Mr. Kinser who had complained about Mr. Masters' alleged harassment, Mr. Sampson essentially told Mr. Masters to file his own complaint of harassment against them in response. Then Mr. Masters was not even interviewed about Grievant's complaint of harassment. Instead of questioning Mr. Masters about the allegation during the investigation, Mr. Sampson and Ms. Shrewsbury testified that Mr. Sampson simply said that he had asked Mr. Masters

[1] Grievant also asserts he was treated differently than Mr. Gilley and Mr. Kinser, who were not probationary employees. As Grievant is not similarly situated to them that assertion will not be further discussed.

about the allegation and he had denied it. Ms. Shrewsbury and Mr. Sampson stated that no other discipline was issued because there were no witnesses. Yet Grievant and Mr. Kinser corroborated that they had heard Mr. Masters threaten each of them and Mr. Gilley. Further, in Mr. Halstead's original written statement, another employee, "J. Kelly" had reported that Mr. Masters had told other employees that he could make a phone call and have them fired but Mr. Kelly was not interviewed in the investigation. Two other employees stated in their interviews that Mr. Masters had made statements or insinuated that his mother was sleeping with Mr. Reed, which, although not a direct corroboration of the threats to get employees fired, does corroborate Mr. Masters insinuating that he had undue influence with the district office.

While it is true that Grievant's behavior was not appropriate, Grievant did not admit to making sexual gestures as Respondent alleged and Respondent has failed to prove that Grievant's gesture was sexual in nature. Given the much less serious nature of Grievant's misconduct than was alleged and the discrimination/favoritism between Grievant and Mr. Masters, the decision to terminate Grievant's employment in this case was arbitrary and capricious.

As relief, in addition to reinstatement and back pay, Grievant seeks attorney's fees. "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred

relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv*., Docket No. 2011-0171-MAPS (Sept. 23, 2011).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. If a probationary employee is terminated on the grounds of misconduct, the termination is disciplinary, and the Respondent bears the burden of establishing the charges against the Grievant by a preponderance of the evidence. *See Cosner v. Dep't of Health and Human Resources/William R. Sharpe, Jr. Hospital*, Docket No. 08-HHR-008 (Dec. 30, 2008); *Livingston v. Dep't of Health and Human Res.,* Docket No. 2008-0770-DHHR (Mar. 21, 2008). *See also* W. VA. CODE ST. R. § 156-1-3 (2018). *See also Lott v. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

2. "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). If the evidence is equally balanced, the party with the burden of proof has not met that burden. *See Leichliter v. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

3. The Division of Personnel's administrative rules establish a low threshold to justify termination of a probationary employee. *Livingston v. Dep't of Health and Human Res.*, Docket No. 2008-0770-DHHR (Mar. 21, 2008).

> A probationary employee is not entitled to the usual protections enjoyed by a state employee. The probationary period is used by the employer to ensure that the employee will provide satisfactory service. An employer may decide to

> either dismiss the employee or simply not to retain the employee after the probationary period expires.

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4. "[W]hile an employer has great discretion in terminating a probationary employee, that termination cannot be for unlawful reasons, or arbitrary or capricious. *McCoy v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-399 (June 18, 1999); *Nicholson v. W. Va. Dep't of Health and Human Res.*, Docket No. 99-HHR-299 (Aug. 31, 1999*)." Lott v. W. Va. Div. of Juvenile Serv.*, Docket No. 99-DJS-278 (Dec. 16, 1999).

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 was 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

7. "'Favoritism'" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

8. Respondent's decision to terminate Grievant's employment was arbitrary and capricious because Respondent failed to prove that the gesture was sexual in nature and the decision constituted discrimination and/or favoritism due to the failure to properly investigate or discipline the alleged harassing coworker.

9. "[A]n ALJ for the Grievance Board is not authorized by law to grant attorney's fees. W. VA. CODE § 6C-2-6; *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996); *Cosner v. Dep't of Transp.*, Docket No. 2008-0633-DOT (Dec. 23, 2008). West Virginia Code § 6C-2-6 states in part, '(a) [a]ny expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense.' W. VA. CODE § 6C-2-6." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011).

10. Grievant's request for attorney's fees must be denied as the Grievance Board lacks authority to grant attorney's fees.

Accordingly, the grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent shall immediately reinstate Grievant to his position with back pay from the date his employment was terminated until the day he is reinstated plus statutory interest and restoration of all benefits. Respondent shall further restore any annual leave charged

and pay back pay, with statutory interest, for the period of time Grievant was removed from his duties prior to his termination. Grievant's request for the award of attorney's fees 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: March 16, 2021

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Billie Thacker Catlett
Chief Administrative Law Judge