U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

TINA DIERKES, **ARB CASE NO. 02-001**

COMPLAINANT, **ALJ CASE NO. 00-TSC-002**

v. **DATE: June 30, 2003**

WEST LINN-WILSONVILLE SCHOOL DISTRICT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thad Guyer, Esq., ***T.M. Guyer and Friends, PC,*** **Medford,** ***Oregon,***

For the Respondent:
Peter R. Mersereau, Esq., ***Mersereau & Shannon, LLP, Portland, Oregon.***

FINAL DECISION AND ORDER

Tina Dierkes filed a complaint against Respondent, the West Linn-Wilsonville School District, under the employee protection provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998). She alleged that the school district retaliated against her and created a hostile work environment due to her contacts with state and federal agencies and her complaints, expressed internally and at public meetings, about the possible presence of PCBs (polychlorinated bi-phenyl), asbestos, and other toxic substances in her workplace. The Administrative Law Judge (ALJ) found that Dierkes had failed to establish a hostile work environment and that the school had established that its adverse action in imposing a performance goal was not motivated by Dierkes' environmental advocacy. Dierkes appealed to the Administrative Review Board (ARB). We affirm the denial of Dierkes' complaint.

BACKGROUND

In 1992 Dierkes began teaching kindergarten at Willamette Primary School, one of six primary schools in the district, which consists of approximately 7,300 students. TR at 550-51.[1] In October 1994, chemicals in a school boiler began leaking, which prompted Dierkes to notify the Oregon Occupational Health and Safety Administration (OR-OSHA). The agency fined the school for failing to inform its teachers about the chemical hazards, CX 10-11, and Dierkes transferred to Wilsonville in August 1995. TR at 73.

In the fall of 1997, Dierkes and a co-worker named Mary Renne became embroiled in an ongoing conflict over how to divide the time of an instructional aide. By mid-October the principal, Glenn Gelbrich, intervened to precipitate resolution of the dispute. Dierkes subsequently attended a professional growth workshop on conflict resolution and anger management. CX 12, RX 10.

Gelbrich initially commented in Dierkes' 1998 performance evaluation[2] that she needed to work on managing conflicts and the anger accompanying such conflicts, but praised her proactive action in taking a workshop on anger management. RX 15. Dierkes responded by e-mail that she felt he had broken his word to her to keep her attendance at the workshop confidential. Gelbrich testified that Dierkes' March 17, 1998 e-mail to him illustrated an emerging behavior pattern in which Dierkes would become upset, communicate in an angry or judgmental fashion, later admit that her reaction was unprofessional, apologize, and promise to improve her behavior. TR at 357-58. However, at Dierkes' insistence Gelbrich removed all references to anger management from the evaluation. RX 15, CX 15, TR at 360.

In the fall of 1998, Dierkes was again involved in an instructional aide time issue, and sent several e-mails to Gelbrich and the first-grade teachers, to whom Gelbrich had allocated more aide time. RX 17-18. Dierkes, who had chastised the teachers for their lack of response and then refused to meet with them, apologized to them in the spring of 1999. RX 20.

At a June 16, 1999 staff meeting, Dierkes learned of a PCB leak in the florescent lighting of a classroom and informed Gelbrich that the school should check into other potential hazards, such as lead and asbestos, air quality and the water supply. TR at 102-18, CX 22, 24. Gelbrich agreed to investigate the safety issues, but Dierkes did not trust the school "to do the right thing" and notified the Environmental Protection Agency (EPA). CX 15.

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[1] The following abbreviations will be used: hearing transcript, TR; Complainant's exhibit, CX; Respondent's exhibit, RX; Recommended Decision and Order, R. D. & O.

[2] Dierkes is a contract teacher, subject to renewal every two years, and is evaluated on a two-year cycle. TR at 349-51.

After EPA testing confirmed problems, the school began removing PCBs, CX 25, and held three informational meetings to discuss the situation with parents and staff.[3] Dierkes attended the meetings and sent e-mails to Gelbrich expressing her concerns about her own safety and that of the children. CX 28-29. Dierkes repeatedly requested to look at the EPA's testing results from its PCB inspection and also asked that the ceiling in her classroom be tested for asbestos. CX 31-33.

Several days later, the ceiling in Dierkes' classroom was tested–a small amount of residual asbestos was found but no airborne particles–and Dierkes sent Gelbrich another e-mail informing him of her mistrust and dissatisfaction with the school's handling of her environmental concerns. CX 34. Dierkes followed up with other e-mails accusing Gelbrich of lying to her and demanding that she be involved in the clean-up of the asbestos. CX 35-36, 39, 45, 48.

In the fall of 1999, the issue of the division of instructional aide time arose again and Gelbrich added three hours of time to the kindergarten team to develop essential literacy skills. RX 22. However, his later assignment of the kindergarten aides to lunch duty prompted more e-mails from Dierkes questioning his integrity. RX 23-24.

Gelbrich testified that many of Dierkes' communications to him throughout 1999 were inappropriate and unprofessional and he decided to address the issue during the goal-setting process for her spring 2000 evaluation. TR at 401-15. He asked her to volunteer to include in her goals one of "communicating consistently in a professional manner" or he would direct her to do so. RX 26. Dierkes omitted any mention of this goal so Gelbrich wrote it for her and called it Goal Three. RX 27-28; CX 50-51, 54, 58.

On March 15, 2000, Gelbrich completed Dierkes' evaluation, stating that she had made progress on all three of her goals, and recommended an extension of her contract. RX 32. Dierkes was not pleased with the evaluation, stating that Gelbrich's comments about the improvement in her communications skills were inaccurate because she had never had a problem with communication. TR at 276-79, CX 69.

Several weeks later, a controversy arose at Wilsonville over the environmental activism of another teacher who had written a press release criticizing the application of pesticides at the school. TR at 620-21. The result was an exchange of e-mails over three days between and among the teachers, Dierkes, and Gelbrich, and a letter to the editor (from another member of the instructional staff) stating that the school was "being held hostage" by a couple of staff member "extremists" who had an "unreasonably high sensitivity to environmental issues." CX 75-77, 79-84, 86-87, 89, 97, 95. The controversy prompted a meeting organized by the staff's union representative to discuss the issues. Dierkes was invited but did not attend. TR 493-94.

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[3] Dierkes alleged that at one of the meetings, the school district superintendent, Dr. Roger Woehl, told her to sit down. TR at 119. 175-76.

At the end of the school year, Dierkes requested a transfer to another school, which was granted. She testified that she had been exposed to a hostile work environment throughout the year 1999-2000 by her colleagues and Gelbrich, and was "emotionally exhausted." TR at 776-80, 891. At the new school, Cedaroak Park, Goal Three was initially removed from Dierkes' performance standards so that Dierkes could "start over." CX 102, TR at 925-27. Subsequently, however, Dierkes asked that Goal Three be reinstated "to [honor] the evaluation document as it was written" and informed her new principal that her actions in the goal-setting process were "discriminatory." RX 45, TR at 925-27. The evaluation made by the principal at Cedaroak was favorable. CX102.

PROCEDURAL HISTORY

Dierkes filed a complaint (initially submitted on December 15, 1999, and subsequently amended on December 27) with the Occupational Safety and Health Administration (OSHA) alleging that Respondent had discriminated against her and had created a hostile work environment because she had expressed concerns over the health and safety of herself and others and had contacted state and federal agencies regarding environmental hazards in the workplace. CX 1.

Following its investigation, OSHA found on May 16, 2000, that the Respondent had violated TSCA and ordered it to pay damages to Dierkes. CX 3. Both parties appealed, and a hearing was held on February 27-March 1, 2001. R. D. & O. at 2.

In his recommended decision dated September 21, 2001, the ALJ found that Dierkes had failed to establish that "verbal admonitions and warnings" from Gelbrich and from Woehl, the superintendent, constituted adverse actions. The ALJ noted that Woehl denied he had told Dierkes to "sit down" at the August 5, 1999 meeting held to discuss the PCB situation, and two other witnesses corroborated his statement. R. D. & O. at 25.

Further, the ALJ determined that three statements from Gelbrich to Dierkes (he told her to report her environmental concerns internally before going outside the district, noted her "continued accusations and characterizations of my integrity" in an e-mail, and informed her of the need to include the communications goal in her evaluation) were not adverse actions because they had no tangible job consequences. R. D. & O. at 25.

While the communications goal was not part of any disciplinary process, the ALJ found that imposition of this goal had tangible job consequences for Dierkes and was, therefore, an adverse action. R. D. & O. at 26. He further found that Dierkes' spring 2000 performance evaluation was highly complimentary and could not be considered an adverse action. *Id*. Finally, the ALJ concluded that Dierkes had not established a hostile work environment because no intentionally discriminatory acts took place. Rather, Dierkes' co-workers disagreed with her environmental actions and expressed their opinions in e-mails, at a meeting, and in a letter to the editor. R. D. & O. at 28. The ALJ also found that these activities were insufficient to establish pervasive and regular discrimination severe enough to cause a reasonable person distress. R. D. & O. at 28.

Having found that Dierkes had established an adverse action and that the school was well aware of her protected activities, the ALJ reviewed the history of Dierkes' interactions with her colleagues and supervisors to see if her protected activity motivated Respondent, in whole or in part, to take the adverse action. The ALJ found that Dierkes had had recurring problems with her professional interpersonal communications. R. D. & O. at 29. He discussed the plethora of e-mails from her concerning school issues, including those attacking former and current co-workers and supervisors.

The ALJ observed that, with the exception of her first teaching year, Dierkes engaged in disputes with Gelbrich or fellow teachers regarding instructional aides every year of her tenure at Wilsonville Primary. On several occasions she attacked her colleagues' character and integrity and questioned their interest in "the good of the children" when she disagreed with their actions or positions. In the fall of 1999, she informed her principal that he demonstrated no integrity or honesty in his division of instructional aide time. The ALJ pointed out that Gelbrich had noted Dierkes' unprofessional communications starting in 1998, more than a year before she participated in environmental activism at Wilsonville Primary. R. D. & O. at 29-30.

The ALJ concluded that Respondent had established that it would have taken the same action in imposing Goal Three even if Dierkes had not engaged in protected activity. R. D. & O. at 32. Therefore, Dierkes had failed to establish a violation of the TSCA.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's recommended decision to the Administrative Review Board (ARB). 29 C.F.R. § 24.8 (2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision governed by whistleblower statutes. The ARB engages in de novo review of the recommended decision of the ALJ. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

ISSUES PRESENTED

(1) Whether Dierkes established that the imposition of Goal Three was in retaliation for her protected activities.

(2) Whether Dierkes established that the school created a hostile work environment in retaliation for her protected activities.

DISCUSSION

Section 2622 of TSCA provides that:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; testified or is about to testify in any such proceeding; or assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

15 U.S.C.A. § 2622(a). Subsection (b) provides that:

> Any employee who believes that the employee has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 30 days after such alleged violation occurs, file (or have any person file on the employee's behalf) a complaint with the Secretary of Labor (hereinafter in this section referred to as the "'Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.

15 U.S.C.A. § 2622(b).

To establish retaliation under the environmental whistleblower statutes, a complainant initially must show that the employer is subject to the statutes, that the complainant engaged in protected activity of which the employer was aware, that she suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *Jenkins*, slip op. at 18; *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995). *See also*

Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1573 (1997) (retaliation for protected activity need be only a contributing factor in the unfavorable personnel action, construing 42 U.S.C.A. § 5851(b)(3)(C) of the Energy Reorganization Act). The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that point, the inference of retaliation disappears, leaving the complainant to prove intentional retaliation by a preponderance of the evidence. *Jenkins*, slip op. at 18. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Where a complainant establishes that an unlawful reason was a motivating factor in the employment decision ("mixed motive"), the employer must prove by a preponderance of the evidence that it would have made the same decision absent the unlawful reason. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion). *See Desert Palace, Inc., dba Caesars Palace Hotel & Casino v. Costa*, ___ U.S. ___, No. 02-679, slip. op. at 8 (June 9, 2003), *aff'g sub nom. Costa v. Desert Palace, Inc.*, 299 F.3d 838 (2000) (direct evidence of discrimination is not required in mixed-motive cases under Title VII of the Civil Rights Act). *See also Combs v. Lambda Link*, ARB No. 96-066, ALJ No. 95-CAA-18 (ARB Oct. 17, 1997).

In this case, our review of the record convinces us that the ALJ correctly summarized the genesis of the Respondent's actions–Dierkes consistently demonstrated a great deal of difficulty in communicating with her colleagues and supervisors. Although Dierkes testified that she have a problem with communication, nor had she ever had one, TR at 279, the record reveals that at least from the fall of 1997 through November 1999 when Goal Three was imposed, Dierkes' written communications to other teachers and Gelbrich presented a pattern of unprofessional behavior.

On appeal, Dierkes argues that the ALJ erred as a matter of law in failing to apply the mixed motive analysis because the case is replete with entanglement of motive. Dierkes contends that all the actions the ALJ found not to be adverse should have been found to be just that because they had the effect of "intimidating, threatening, restraining, coercing, and otherwise punishing her." Complainant's Brief at 4; 29 C.F.R. § 24.2(a).

We agree with the ALJ's findings to the contrary on (1) Woehl telling Dierkes to sit down in a public meeting on August 4, 1999; (2) Gelbrich asking Dierkes to contact him before going to outside government agencies regarding her environmental concerns;[4] (3) Gelbrich noting that Dierkes was again accusing him of a lack of integrity; (4) Gelbrich explaining in November 1999 memoranda the reasons for the imposition of Goal Three; and (5) the 1999-2000 performance evaluation, which Dierkes contended contained "backhanded compliments." R. D.

[4] As the ALJ pointed out, Gelbrich never indicated that he would discipline Dierkes if she failed to come to him first with her concerns, no discipline ever took place, and no notation was placed in her personnel file as a result of his statements. R. D. & O. at 25. Moreover, Gelbrich never indicated that Dierkes should not continue to contact outside government agencies as she deemed appropriate.

& O. at 25-27. The ALJ properly determined that none of these statements or the evaluation had any tangible job consequences, *id.*, and that only the imposition of Goal Three could be considered an adverse action.

Dierkes argues that Gelbrich directed her to include Goal Three in her performance standards because of her communications and activities in trying to promote environmental safety in the school. Complainant's Brief at 15-16. Although there is a temporal proximity between Dierkes' communications about the PCB and asbestos problems at the school in the summer and fall of 1999 and the imposition of Goal Three in November 1999, the record evidence does not support her assertion that Goal Three was imposed as a result.

Rather, as the ALJ found, the record contains a plethora of e-mails authored by Dierkes whose contents demonstrate recurring problems in her interpersonal communications with her colleagues and her principal. R. D. & O. at 29; *see e.g.*, RX 1, 6-8 (colleague accused of "being incredibly selfish" and Dierkes wished to "discontinue our personal relationship"); RX 11 (Gelbrich "broke [his] word" and Dierkes "[felt] a bit betrayed"); RX 12 (Dierkes referred to a past problem in communicating with Gelbrich "when your actions don't match your words"); RX 17 (referring to the dysfunctional school district and stating that "I am really struggling with how to maintain my own integrity within a system that has none"); RX 18 (telling four colleagues that their behavior was "inexcusable and unfortunate" and that she was "very upset"); RX 20, (acknowledging that her comments and messages to one teacher were "especially cruel and heartless" and that she should have apologized sooner); RX 21 (thanking Gelbrich for his patience and promising to help things "get better"); RX 23-24 (criticizing Gelbrich for "breaking a promise" and telling him why his teachers do not trust him).

Dierkes' e-mail to Gelbrich in November 1999 regarding the imposition of Goal Three is equally telling. She asked Gelbrich "what percentage" of her alleged communications difficulties he attributed to her activism regarding the PCB spill and the asbestos problems the previous summer. RX 25. Gelbrich responded in a November 8, 2000 memo that while Dierkes' concerns and questions about environmental issues were important in removing PCBs and asbestos from the school, her "demeanor and tone [had] vacillated between calm inquiry and angry outbursts," and he still would have encouraged her to improve in communicating professionally even if the events of the summer had not occurred. CX 51.

The fact that the unprofessional communications encompassed Dierkes' environmental concerns as well as her employment and career issues does not make this a dual motive case. No mixed motive analysis is required because Dierkes has not proven that there was a discriminatory reason for imposing Goal Three.[5]

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[5] We note that, consistent with the legitimate non-discriminatory reason proffered for imposing Goal Three (i.e., Dierkes' unprofessional pattern of communication), the goal focused on the form of her communications with others, not the content. Dierkes has not shown that the Respondent's rationale was pretextual.

However, we agree with the ALJ that even if Dierkes had demonstrated that her protected activity was a contributing factor in the imposition of Goal Three, the Respondent demonstrated by a preponderance of the evidence that it would have imposed Goal Three absent Dierkes' protected activity. In fact, the precipitating factor for Gelbrich's imposition of Goal Three was the choice of language, tone, and tenor of Dierkes' September 1999 e-mails excoriating him for, she charged, reneging on his promise of more instructional aide time for the kindergarten teachers. RX 22-24. *See* RX 15-16 (revised 1998 performance appraisal deleting references to anger management issues); TR at 360, 399-421; CX at 50-51.

Further, Dierkes argues that the ALJ erred by not taking into account all of the activity relevant to evaluating whether Respondent created a hostile work environment. Complainant's Brief at 18. As Dierkes notes, the ALJ correctly cited the legal standards, R. D. & O. at 27; *see generally Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (ARB Nov. 13, 2002), when he found that Dierkes had failed to establish the occurrence of any intentionally discriminatory acts. Complainant's Brief at 17.

When we apply the hostile work environment criteria,[6] taking into account the activities cited by Dierkes, we nonetheless come to the conclusion that Dierkes has failed to demonstrate the existence of a hostile work environment. While there was considerable tension among the staff over environmental activism and Dierkes did leave the school at the end of the 2000 term, the record evidence does not establish any of the hostile work environment elements.

Dierkes asserts that the ALJ erred in isolating the harassment to a few days in April 2000 and should have also considered Woehl's "intimidation" and Gelbrich's "restraint" order, what

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[6] The ALJ noted correctly that the Secretary has adopted the analysis developed in Title VII race and sex discrimination cases, citing *Smith v. Esicorp, Inc.*, 93-ERA-16 (Sec'y Mar. 13, 1996), which quoted *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995). R. D. & O. at 27. In *Williams*, slip op. at 12-13, we stated that a complainant must establish, by a preponderance of the evidence, the following elements:

> 1) that he engaged in protected activity;
>
> 2) that he suffered intentional harassment related to that activity;
>
> 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;
>
> 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

Dierkes characterizes as a "disciplinary" memo about her "angry outbursts" in public meetings, and references to Goal Three in Dierkes' performance appraisal to find that the harassment was pervasive enough to constitute an abusive working environment. We disagree.

The factors cited by Dierkes were properly found to be either not established as adverse or part of the normal feedback between supervisor and employee. R. D. & O. at 25. The combination of these factors with the flurry of e-mails, her colleagues' heated expressions of disagreement with Dierkes' viewpoint, and Gelbrich's refusal to call a staff meeting does not demonstrate that there was regular or pervasive-enough activity to alter the conditions of her employment and create an abusive work environment. These activities were not regular or frequent in occurrence. Nor was there evidence that they changed the working environment for any prolonged period. *Cf. Beckman*, slip op. at 17-20 (employer's hostile actions against the complainant affected his work environment and were pervasive and regular).

Dierkes also contends that that the "e-mail and letter" barrage in April 2000, which encouraged staff members to "gang up" on Dierkes and show the "true voice" of the school, was sufficiently severe to alter her working conditions and cause her distress. Complainant's Brief at 19. The record does not contain evidence that Dierkes' working conditions were significantly affected by the brouhaha that ensued after media reports of the environmental problems at Wilsonville Primary.

The staff e-mails were not abusive, physically threatening, or humiliating. CX 75-76, 77, 79-86, 89. Her fellow teachers and Gelbrich expressed strong disagreement with Dierkes' position and actions, both in writing and at a public meeting called by the union, but they did not encourage each other to ostracize Dierkes and said nothing about her personally. Dierkes failed to demonstrate that the activities she cited had any "severe" negative impact on her working environment.

Thus, we agree with the ALJ that none of these incidents rose to the level of severe harassment. *Cf. Williams*, slip op. at 56-67 (discussing the level of both direct and second-hand harassment that were experienced by each of six Complainants in establishing a hostile work environment). Therefore, we conclude that Dierkes failed to establish that she suffered intentional discrimination which was severe or pervasive enough to alter her conditions of employment and affect a reasonable person detrimentally. She also failed to demonstrate that the school district should be held accountable for the viewpoints of her co-workers and supervisors concerning the environmental problems at Wilsonville.

Finally, we have carefully reviewed the record and find that it supports the ALJ's findings of fact. We adopt the findings of fact and conclusion of law in the ALJ's recommended decision, attached and incorporated herein, as supplemented by the additional findings and conclusions above. In sum, we determine that Dierkes failed to prove that her protected activity motivated, in whole or in part, the imposition of Goal Three, that a preponderance of the evidence established that Respondent would have imposed Goal Three absent Dierkes' protected activity, that Dierkes has not established the existence of a hostile work environment, and, therefore, that Respondent has not violated the TSCA. Therefore, we **AFFIRM** the ALJ's

decision and **DENY** Dierkes' complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge