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WALTER BLANC V. BROWN & ROOT
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~177

After notice to the parties a hearing on the merits was held in Grand Junction, Colorado on November 3, 1982.

Complainant elected not to file a post trial brief.
Respondent filed a post trial brief.

ISSUE AND SUMMARY

The issue on the merits is whether respondent discriminated against complainant, a safety supervisor, in violation of the Act.

The evidence is generally without substantial conflicts. Complainant's evidence seeks to prove he was fired because he detected and required the abatement of substandard mining practices by Gilbert Western, (Gilbert), a subcontractor. Respondent's evidence seeks to establish a business justification for discharging complainant. The proffered justification arises from incidents of unprotected activity.

COMPLAINANT'S EVIDENCE

Walter Joe Blanc testified on his own behalf:

He was employed by B&R on September 24, 1981 (Tr. 8). Wayne Pierce, a B&R supervisor, offered him the position of safety supervisor at \$2400 a month (Tr. 9, 12). Pierce also offered Blanc additional employment incentives (Tr. 9). Blanc had 10 years experience as an MSHA coal mine inspector (Tr. 13, 14, 16).

Blanc was, in fact, hired as a safety inspector at \$14.50 an hour (Tr. 52-53, R1). After two or three weeks he was told he would not receive the safety supervisor's position (Tr. 20, 54). Blanc was terminated on November 3, 1981 (Tr. 8).

Blanc's duties included the inspection of the work areas of Tectonic Construction, Summit Construction, and Gilbert at the Colony Shale Oil project. These companies were all subcontractors of B&R, the general contractor (Tr. 19, 20, 22).

After he started Blanc found explosives and dynamite scattered around the Gilbert area (Tr. 22). Prior to this time Blanc detected many unsafe conditions (Tr. 23, C1). He kept a daily list of these substandard conditions which he gave to William Minton, his supervisor, when he was terminated (Tr. 24).

Gilbert personnel would become outraged on almost every substandard condition Blanc would point out to them (Tr. 25). Blanc discussed such conditions with Gilbert supervisors Reseigh, Schnopp, Burkey, or Neff (Tr. 26). At least five substandard conditions would be corrected each day (Tr. 27).

After he was terminated Blanc prepared an additional list of these substandard conditions. The list, only partially complete, contains fewer

~178

conditions than the list he gave to his supervisor when he was terminated. The list, as supplemented by the testimony, shows the following substandard conditions were detected by Blanc:

1. No berm along the elevated haulage road for a distance of about 40 feet (C1). This condition was discussed with Reseigh or Schnopp. Blanc could not recall their reaction (Tr. 28).

2. Various pieces of mobile equipment were parked unblocked and unattended (C1). Blanc discussed this condition with Reseigh or Schnopp. They would "get mad" about having to abate but they would eventually do it (Tr. 3, 28).

3. Inoperative overwind device on the crane (C1). This condition was discussed with Reseigh or Schnopp (Tr. 28).

4. Safety equipment check card not filled out on the triple boom drill (C1). This was discussed with Reseigh or Schnopp but they didn't get too upset (Tr. 29).

5. Battery lid cover loose and unsecured on triple boom drill (C1). This would have been discussed with Gilbert's mechanic, Minton. He didn't get upset like the rest of them (Tr. 30).

6. No fire extinguishers on triple and double boom drills, two air compressors, and oil storage station (C1). This condition was discussed with Schnopp (Tr. 30).

7. Inoperative backup alarm on crane (C1).

8. Broken roof glass in crane (C1). This condition and the preceding one were discussed with mechanic Minton who didn't get out of hand (Tr. 30, 31).

9. From October 19, 1981 to November 3, 1981 tagline was not used on suspended equipment (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31). They got upset and aggravated (Tr. 31).

10. October 19, 1981 to November 3, 1981 workmen were observed below suspended load (C1). This practice was discussed with Reseigh or Schnopp (Tr. 31).

11. Paper, aluminum cans, and other trash was scattered throughout the area (C1). Reseigh and Schnopp were not upset over this condition (Tr. 32).

12. The truck carrying explosives: it lacked a cover lid for detonators, it was not identified as one carrying explosives, and it was not blocked to prevent motion. Smoking was observed within ten feet of the truck (C1). This was discussed with Reseigh. He was angry and upset but took care of it right away (Tr. 32).

13. On two separate days two sticks of damaged explosives were observed outside of and in the tunnel. A detonator cap was found in the back of the explosives truck. Truck was not blocked to prevent motion (C1). This condition was discussed with Schnopp (Tr. 32). He got upset and aggravated but took care of it right away (Tr. 33).

14. No smoking signs were not placed on the truck carrying diesel fuel (C1). This was discussed with Schnopp or Bill Milton (mechanic)(Tr. 33). Blanc didn't think this was abated (Tr. 33).

15. Diesel fuel was stored in two 5 gallon containers (C1). Blanc discussed this with Schnopp but couldn't recall his reaction (Tr. 33).

16. A backhoe and front end loader were taken into the tunnel without emissions control for the diesel exhaust (C1). This situation was discussed with Reseigh or Schnopp who tried to convince Blanc that the equipment had emissions controls (Tr. 33).

17. The lunchroom was cluttered with tin cans and paper trash (C1). This condition was discussed with Schnopp who didn't seem to get too upset (Tr. 34).

18. The roof in the tunnel was not supported in an area about six feet wide and ten feet in length (C1). Blanc discussed this with Reseigh who became outraged. Blanc had a copy of the ground support plan. Reseigh through up his hands, replied with an obscenity, and left the property like a wild man (Tr. 34, 43). Schnopp with whom Blanc also discussed this was upset because they'd have to put in ground support (Tr. 34). The roof support incident happened the same day Blanc was terminated (Tr. 43, 61).

In the three and one half weeks Blanc was on the Gilbert site the only conditions not abated were the roof support problem [No. 18] and the broken glass in the crane [No. 8] (Tr. 60). Blanc didn't know if the roof supports were installed since this incident occurred on the day of his termination (Tr. 61).

Minton terminated Blanc on November 3, 1981 between noon and 3 p.m. (Tr. 35). Minton said he was terminating Blanc for his failure to get along with the contractor. Minton said he couldn't go around "putting out fires" (Tr. 30). At this meeting no statements were made about Blanc's safety complaints issued against Gilbert nor was there any discussion about Blanc's job activities (Tr. 38, 40, 41). At the termination conference Hohon said Blanc was in his hair and he (Hohon) had only been there a week (Tr. 41).

On two prior occasions Blanc's supervisor, Minton, had told him to take it easy on Gilbert because they had a hard money contract (Tr. 41-42). Hard money, according to Blanc, means they don't want any slowdown (Tr. 43).

~180

On one occasion Blanc was riding the mantrip van down the mountain. When riding the van everyone must sign his name to a piece of paper. Except for the driver only Gilbert employees were present. When the paper was returned from the rear of the van someone had written "sucks" by Blanc's name (Tr. 62). Blanc stated if any one was man enough to admit it he'd stop the van, get out, and take care of the situation (Tr. 62). By that Blanc meant he was going to "knock him on his ass" (Tr. 62-63). This was not Blanc's normal approach to problems although he did get upset with safety director Dave Allen over a flagrant violation (Tr. 63).

On another occasion, after the van incident, Blanc noticed part of his lunch was missing from his lunchbox. Blanc didn't say anything until he checked with his wife (Tr. 65). The next morning he held his only safety meeting. At the meeting he told the Gilbert employees that whoever got into his lunchbox would need an ambulance, i.e., Blanc was going to "knock them on their ass" (Tr. 65, 66).

RESPONDENT'S EVIDENCE

Respondent's witnesses were William Minton (B&R safety director), Walter Saunders (Blanc's immediate supervisor), Gary Bates (Exxon's mine superintendent and client's representative), and Bob Reseigh (Gilbert project manager).

Witness William Minton testified as follows:

As B&R's safety director, he was responsible for safety and health at Colony Shale Oil Project (Tr. 94, 95). Blanc was responsible for the mine bench area (Tr. 96). Blanc was hired as a safety inspector at \$14.50 per hour because of his knowledge about MSHA and mining practices (Tr. 106).

Minton explained to Blanc that he shouldn't shut down Gilbert for non-serious violations (Tr. 111). B&R could be back charged for this and it would affect productivity (Tr. 111). Blanc was counselled on two different occasions because of complaints by Reseigh (Gilbert project manager) and Gary Bates (Exxon manager) (Tr. 111).

Minton first heard about the middle of October from Vance English that Gilbert was being shut down for improperly marked gas cans and for workers being on top of a trailer (Tr. 112, 113). Minton went up to the mountain and didn't see anything that would cause a shutdown (Tr. 113-114).

It is B&R policy that if a safety inspector sees employees in a situation of imminent danger he has the authority to shut down the operation (Tr. 115). Various remedies are available to the inspector (Tr. 116-117). Minton did nothing about this particular complaint (Tr. 117-118).

It was over two weeks later when Reseigh came to Minton and said they were being harassed by Blanc and shut down for no

reason at all (Tr. 118, 119). Minton's investigation showed nothing serious that should cause a shutdown (Tr. 119). Minton counselled with Blanc. He explained that B&R was subject to back charges if a shutdown occurred and the situation was not one of imminent danger and life threatening (Tr. 120, 121). Minton

~181

explained that Gilbert had a "hard money contract" that is, a unit price contract (Tr. 122).

Gary Bates (Exxon) complained to Minton about an incident that arose when Blanc, Bills, and Reseigh were talking. Bills brushed against Blanc who automatically took offense. He put his fists up and told Bills he better never touch him again (Tr. 122). Minton talked to Bills and Reseigh, but not Blanc, about this incident (Tr. 123).

About November 3 Gates came to Minton about a shutdown (Tr. 124-125). Minton felt Blanc was abusing his authority as an inspector (Tr. 125).

At his termination meeting Minton told Blanc he had no alternative but to terminate him for failure to get along with the subcontractor (Tr. 125). Blanc was quiet. He did not deny the lunchbox, the van, and the Bills incidents (Tr. 125). Blanc's discharge slip reads that he was fired for failure to get along with the subcontractor (Tr. 145-146).

Minton's first counselling session with Blanc was after Reseigh complained about Blanc shutting Gilbert down. The second session was over what hours Blanc was to work. The fourth session was after the Bills incident. This was on the date of termination (Tr. 128). There were five counselling sessions before Blanc was terminated (Tr. 129). The fifth and final session was on the day Blanc was fired (Tr. 129). Minton never threatened Blanc's job nor did he at any time tell him not to note or correct violations or defects (Tr. 129, 133-134).

Minton learned of the incident involving roof supports in the tunnel on November 3 after Blanc had been terminated (Tr. 135). Bates and Reseigh came to Parachute (Colorado), after Blanc had left, and explained they had put in additional bolts (Tr. 135). Reseigh said this was not an imminent danger situation although bolts were required in the drawings (Tr. 135). Blanc hadn't talked about the bolts at the termination meeting (Tr. 135). Prior to Blanc being terminated Minton didn't have any knowledge of the unsafe conditions for which Gilbert was cited (Tr. 158-159).

Blanc never told Minton he was having problems with the subcontractors (Tr. 161).

Blanc's termination on November 3, 1981 was triggered by the complaints of the subcontractor, the client, and the [disregard by Blanc of the] counselling sessions. The final straw was the lunchbox incident (Tr. 159).

Witness Walter Saunders testified as follows:

He was Blanc's supervisor (Tr. 163). Saunders returned from leave about October 26. At that time Minton informed him that there were some problems on the mine bench. Some animosity had developed between Gilbert personnel and Blanc. Gilbert was

complaining they were being shutdown unnecessarily. Allen and Schnopp said the same thing (Tr. 165-166). Saunders did nothing but he intended to keep his eye on the situation (Tr. 166).

~182

Saunders was asked by Minton to investigate the lunchbox incident. He interviewed most of the people who had been at the safety meeting (Tr. 167, 168). The only topic at the safety meeting was Blanc's lunchbox (Tr. 168). Saunders related this information to Minton (Tr. 168).

Saunders was present at the November 3 termination meeting. Blanc's defense, in essence, was that this was the only way he knew how to do it (Tr. 169, 170).

B&R procedure is for an inspector to note violations and report them to his supervisor (Tr. 170). Blanc mentioned explosives lying around (Tr. 171). The problems Blanc related to Saunders were the lunchbox and the van incidents as well as the lack of communication with Gilbert (Tr. 171).

Saunders never threatened Blanc for shutting down the job when there was no imminent danger (Tr. 173).

Dave Allen's complaints were that Blanc was either shutting down the operation or threatening to do so when it wasn't justified (Tr. 177).

Blanc was terminated because of his inability to talk with subcontractors and because he was abrasive (Tr. 179, 180). It is improper for an inspector to threaten someone with bodily harm (Tr. 182).

Witness Gary Bates testified as follows:

He was the representative for Exxon USA, and as such he was responsible for the day to day operation of the Colony Shale Oil Project (Tr. 184).

Joe Blanc first came to Bates' attention shortly after Gilbert mobilized (Tr. 188). A series of statements were made to Bates which he considered to be overzealousness on Blanc's part (Tr. 189). It was not so much what Blanc said but how he stated it (Tr. 189). Blanc was using abusive language and a tough guy attitude (Tr. 190). Bates asked Minton to straighten this out (Tr. 190).

About a week later the Bills incident (when Bills brushed against Blanc) was brought to Bates' attention (Tr. 191). Bates contacted Minton because he was concerned about a fight (Tr. 191). Minton told Bates he'd talk to Blanc (Tr. 191).

Another matter brought to Bates' attention was the lunchbox incident which Bates describes as Blanc "lining up" the Reseigh group and saying he'd send them off the hill in an ambulance if it happened again (Tr. 192). Bates told Minton this conduct is "completely unacceptable and we can't have that" (Tr. 192). Minton said he'd look into it and try to get it resolved (Tr. 192).

Bates never made any recommendation concerning Blanc's

personnel status (Tr. 192).

~183

Bates learned of the roof bolts incident after Blanc had gone (Tr. 193).

Bob Reseigh testified as follows:

He was Gilbert's project manager, and he started on the project on October 26, 1981. By November 5, 1981 the tunnel extended 60 to 70 feet (Tr. 211-213). Gilbert had a fixed price contract where Gilbert was paid in lineal feet of tunnel (Tr. 213).

Reseigh and Blanc disagreed over the way things should be done. Blanc would note violations and bring them to Reseigh's attention (Tr. 214, 215). Basically Blanc wanted it corrected now (Tr. 215). It was Gilbert's policy to correct, if possible (Tr. 215).

On several occasions Blanc shutdown several pieces of equipment for not having fire suppressors. MSHA did not require such suppressors (Tr. 215-217). Reseigh complained to Bates (Tr. 216-217).

About a week or 10 days later they were about 40 to 50 feet into the access tunnel (Tr. 219). Blanc wanted ventilation. Reseigh hesitated because subsequent blasting would blow it up (Tr. 219). Reseigh went to Bates and told him they could legally advance 100 feet (Tr. 219). Bates agreed. Reseigh didn't know if Blanc had shut down the tunnel (Tr. 219).

Blanc called a safety meeting and threatened to carry some people off of the mountain because a sandwich was missing from his lunchbox. Reseigh told Saunders about it. Reseigh felt they couldn't have that kind of animosity on the site (Tr. 220).

On one occasion [November 3] Blanc said Gilbert couldn't drill. The plan called for rock bolts in back of the rib (Tr. 221). Normally such bolts are installed behind the Jumbo (Tr. 222). The Jumbo was pulled out, muck brought in, and Gilbert installed the roof bolts (Tr. 222). Reseigh went down and talked to Bates and after lunch they both went to Minton in Parachute, some 16 to 20 miles from the job site (Tr. 222).

Reseigh said something had to be done about Blanc (Tr. 222-223). He was told that something had been done (Tr. 222-223).

Reseigh's workers were instructed to get along with Blanc (Tr. 223-224).

On one occasion Bills was talking with his hands and he touched Blanc, who got "stiff". Blanc told Bills not to touch him again, that he did not like to be touched. He was not belligerent but there was no question he didn't want to be touched (Tr. 226-227). Bills is 5 foot, 7 inches tall and 68 to 75 years old (Tr. 227). [At the hearing the Judge observed that Blanc appears taller and younger than Bills].

On one occasion Blanc wanted all work to cease in the tunnel face during blasting operations (Tr. 230). When Gilbert blasts in a tunnel they

~184

remove the workers out but they do not remove them during the charging process (Tr. 230).

As a rule Gilbert was given time to correct [a defect] before they were shut down (Tr. 231).

It is very possible that Blanc brought up five safety or health violations every day (Tr. 243).

Reseigh only complained twice about Blanc. The first instance was that Blanc was inspecting them unnecessarily for trivial problems. On the day Blanc was no longer assigned to the mine bench Reseigh wanted to be sure the problem had been taken care of so he went to see Minton (Tr. 247).

DISCUSSION

The Commission established the general principles for analyzing discrimination cases under the Mine Act in Secretary ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Marshall, 663 F 2d 1211, (3d Cir. 1981), and Secretary ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases the Commission ruled that a complainant, in order to establish a prima facie case of discrimination bears a burden of production and persuasion to show that he was engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Pasula 2 FMSHRC 2799-2800; Robinette, 3 FMSHRC at 817-818.

At this point it is appropriate to consider the status of Blanc's activities. The vast majority of discrimination claims arising under the Act are generated by miners engaged in duties other than those of a safety inspector. I find nothing in the text of the Act or in the legislative history that indicates Congress intended to exclude a safety inspector from the protection of the discrimination portion of the Act. An operator's safety inspector bears an important function in helping fulfill the purposes of the Act since his duties will ordinarily seek to promote safety and health. Under Pasula and Robinette and their progeny I conclude that good faith complaints of unsafe and unhealthy conditions by a safety inspector in the ordinary course of his duties are protected under the Act.

Having resolved Blanc's status we will go to the Commission's further ruling in Robinette: to rebut a prima facie case a operator must show either that no protected activity occurred (in view of the ruling as to Blanc's status B&R cannot establish that defense) or that the adverse action was in no part motivated by protected activity, 3 FMSHRC 817-818 and N. 20. If an operator cannot rebut the prima facie case in the foregoing manner it may nevertheless defend by proving that it was also motivated by the miner's unprotected activities and that it would have taken the adverse action in any event for the unprotected activities alone, Pasula, 2 FMSHRC 2799-2800.

The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. The Commission made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 n. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

In *Sec. ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), the Commission affirmed the Pasula-Robinette test, and set out the following proper criteria for analyzing an operator's business justification for adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. *Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. *R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, the Commission first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext.

Second, the Commission held that once it is determined that a business justification is not pretextual, then the

~186

judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

By a "limited" or "restrained" examination of the operator's business justification the Commission does not mean that an operator's business justification defense should be examined superficially or automatically approved once offered. Rather, the Commission intends that its Judges, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As the Commission recently stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

With the Commission directives in mind we will examine the defense asserted by B&R. The defenses are succinctly stated by Blanc's supervisor Minton. Blanc was terminated because of complaints by the subcontractor (Gilbert), the client (Exxon), and the counselling sessions. The final straw was the lunchbox incident (Tr. 159). B&R in its post trial brief also argues that the Bills and the van incidents support B&R's business justifications.

We will examine the record. Gilbert's complaints: Manager Reseigh complained twice. Once was over being unnecessarily inspected over trivial problems (Tr. 247). The second time was apparently when Reseigh went to see Minton himself (Tr. 247). At that point Blanc had already been terminated.

The client's complaints: Exxon, through its manager Gary Bates, asked Minton to "straighten out" Blanc's attitude. Bates dislikes an attitude of "I am not here to help your safety program, I'm here to shut you down" (Tr. 190).

Further complaints by the client arose from the Bills incident. Bates was concerned about a fight and again contacted Minton (Tr. 191).

Bates describes the lunchbox incident as Blanc "lining up" Reseigh's group (Tr. 192). Bates admonished Minton stating "that type of behavior is completely unacceptable and we can't have that" (Tr. 192).

Three complaints by a client-owner in less than a three week period would motivate Minton to fire Blanc. A miner's unsatisfactory past work record is one of the criteria discussed in *Bradley v. Belva Coal Company*.

On the basis of the Commission directives I conclude that the business justification is not pretextual and the reasons were enough to have legitimately moved B&R to take adverse action against Blanc.

I have carefully examined Blanc's evidence. A cursory review might indicate that his facts establish a claim of retaliatory conduct. The scenario: Blanc has been overzealous in enforcing safety regulations

~187

against Messers Reseigh, Schopp, Burkey, and Neff of the Gilbert Company. The culmination comes when Blanc requires that roof bolts be installed in the tunnel. This delays production. Reseigh storms out, goes to Exxon's Bates, and in turn they go to Minton who immediately fires Blanc for his overzealous enforcement of the safety regulations.

For several reasons the evidence does not support this theory of the case.

Blanc testified that he never advised Minton of the problems he was having with Gilbert (Tr. 67, 68). Minton confirms this fact (Tr. 161). Further, concerning the two hour termination meeting Blanc testified there was no discussion about safety complaints Blanc has issued against Gilbert (Tr. 38). This evidence combines with Minton's uncontroverted testimony that he didn't learn of the roof bolts incident until after he had terminated Blanc (Tr. 135).

Since Minton generally did not know about Blanc's disagreement over safety conditions with Gilbert personnel nor about the roof bolt incident these factors could not have motivated Minton to fire Blanc.

Since the evidence fails to establish a case of discriminatory conduct in violation of the Act it is unnecessary to consider Blanc's claim of lost wages and expenses.

Based on the foregoing facts and conclusions of law I enter the following:

ORDER

The complaint of discrimination is dismissed.

John J. Morris
Administrative Law Judge