U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

RHONDA KIRSCHMANN,

COMPLAINANT,

v.

HAMPTON ROADS TRANSIT,

RESPONDENT.

ARB CASE NO. 2023-0002

ALJ CASE NO. 2021-NTS-00006
ALJ PAMELA A. KULTGEN

DATE: February 14, 2024

Appearances:

***For the Complainant*:**
Rhonda Kirschmann; *Pro Se*; Chesapeake, Virginia

***For the Respondent*:**
Jeffrey A. Hunn, Esq.; *Pender & Coward, P.C.*; Virginia Beach, Virginia

Before HARTHILL, Chief Administrative Appeals Judge, WARREN and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

ROLFE, Administrative Appeals Judge:

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and the National Transit Systems Security Act (NTSSA) (collectively, "the Acts").[1] Complainant Rhonda Kirschmann (Complainant or Kirschmann) filed a complaint against

[1] 49 U.S.C. § 31105(a), as implemented by 29 C.F.R. Part 1978 (2023) (STAA); 6 U.S.C. § 1142(a), as implemented by 29 C.F.R. Part 1982 (2023) (NTSSA).

Hampton Roads Transit (Respondent or HRT), alleging it terminated her employment for engaging in protected activity. On September 29, 2022, a United States Department of Labor Administrative Law Judge (ALJ) granted summary decision for Respondent, holding that viewing the claim in the light most favorable to Complainant, she could not raise a genuine issue of material fact that would require a hearing and that Respondent thus was entitled to judgment as a matter of law.

Concluding Complainant has not met her basic burden on appeal to identify errors in the ALJ's decision and that, independently, Complainant cannot as a matter of law demonstrate she engaged in protected activity, the Board affirms the ALJ's decision.

BACKGROUND

On April 21, 2008, Respondent hired Complainant as a bus operator. On February 13, 2017, Respondent terminated Complainant's employment after she violated its policy on personal conduct and conduct toward passengers.[2]

Prior to termination of her employment, Complainant had accrued an extensive array of progressive disciplinary charges and escalating levels of discipline under HRT's Personal Conduct and Conduct Toward Passengers and Employees Policies, culminating in the violation of a last chance agreement. From October 27, 2008, through November 2012, Complainant received thirteen employee performance counseling notices, detailing numerous violations of HRT rules and policies, and repeated written reminders and reprimands.[3]

On December 6, 2012, Complainant received a six-day suspension and two-day refresher training for two Level IV violations of HRT's conduct policy when she failed to pick up passengers at a bus stop, aggressively ripped a piece of paper, and

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[2] Decision & Order (D. & O.) at 7, 10. HRT's Bus Transportation & Maintenance Rules & Regulations (Rules and Regulations) required employees to be respectful and civil at all times while on duty (Rule 1.6) and operators were required to be professional and courteous in both speech and manner toward passengers at all times (Rule 8.1). Respondent Hampton Roads Transit's Memorandum of Law in Support of Its Motion for Summary Decision (June 9, 2022) (HRT Memorandum of Law), Exhibits (Exs.) 4-7. The Rules and Regulations created an escalating level of discipline for different types of infractions with Level I offenses being the lowest level of progressive discipline and Level V being the highest level of progressive discipline (first offense is listed as termination). The Rules and Regulations provide that first Level IV violations, like those Complainant was charged with, result in a five-day suspension or termination, and second Level IV violations result in termination (Rule 13.4). HRT Memorandum of Law, Ex. 11.

[3] HRT Memorandum of Law, Ex. 12.

shoved a clipboard at a supervisor. Between December 6, 2012, and January 13, 2016, she received an additional eleven instances of discipline ranging from verbal to written warnings. In May 2016, Complainant received a five-day suspension for posting a picture of a passenger on her Facebook page with the caption: "Mouthy dude on the route 3. Friday the 13th brings out the cooks [sic] on the bus."[4]

In June 2016, Respondent suspended Complainant for five days and issued her a last chance agreement after receiving another customer complaint regarding inappropriate conduct. Despite the agreement, Complainant generated additional customer complaints on September 7, and September 26, 2016, respectively, resulting in a two-day suspension and written reprimand. Respondent terminated Complainant's employment after receiving another customer complaint on January 29, 2017, finding Complainant's conduct violated the last chance agreement.[5]

On March 4, 2017, Kirschmann filed a complaint with the Occupational Safety and Health Administration (OSHA) against HRT alleging unlawful discrimination in violation of the STAA and the NTSSA. Complainant's OSHA complaint outlined five instances of alleged protected activity:

1. Transit passengers were interfering with operator's 10-39 break at the end of the line two incident dates: September 7, 2016 and January 29, 2017;

2. Operators were operating while sick, even though sick time was available;

3. Safety vests were distributed inequitably;

4. There was a route change without the planning process and that Respondent was not facilitating the safe transfer of passengers, incident date January 29, 2017; and

5. "Linda's tire on the 23."

On April 22, 2021, OSHA issued its findings, determining no reasonable cause existed to believe Respondent violated the STAA or the NTSSA.[6]

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[4] The references in this paragraph are to HRT Memorandum of Law, Exs. 13-15.

[5] The references in this paragraph are to HRT Memorandum of Law, Exs. 17-20, 24.

[6] The references in this paragraph are to HRT Memorandum of Law at 2-3; D. & O. at 10-11.

On May 21, 2021, Complainant requested a hearing before the Office of Administrative Law Judges. Upon the ALJ's issuance of a scheduling order, both parties filed cross-motions for summary decision and responses: Complainant argued the five incidents identified in her OSHA complaint constituted protected activity; Respondent countered they did not -- but even if they somehow could be viewed as protected activity, Respondent argued they indisputably played no role in her discharge for violating the last chance agreement.[7]

After viewing the parties' submissions on summary decision in the light most favorable to Complainant, the ALJ found as a factual matter it was not reasonably disputable that HRT's "decision to terminate Complainant's employment was based on [anything other than her] violation of the Last Chance Agreement and [her] disciplinary history, which included multiple Level IV violations in the previous year[.]" In addition, the ALJ found it indisputable that Complainant "did not provide any specific information regarding the existence of a hazardous safety or security condition" to HRT, and that any complaints of an OSHA violation or "misappropriation of funding" to HRT solely occurred in an email Complainant sent to her union and HRT management "after she was terminated."[8]

Turning to whether any of the incidents she identified could legally amount to protected activity, the ALJ rejected Complainant's argument that the STAA and NTSSA inherently protect the simple act of taking a break. The ALJ found taking a break -- or complaining about passengers interfering with her taking a break -- "not tantamount to reporting a hazardous safety or security condition," or that either activity could reasonably be believed to be a violation of law regarding public safety.[9]

Regarding Complainant's assertion that she worked with bronchitis on January 29, 2017, the ALJ acknowledged that under certain circumstances, an operator working while sick could constitute a hazardous safety condition, and reporting that condition would qualify for legal protection. But in this case, the ALJ found Complainant failed to put forth any evidence that she subjectively believed, or that a reasonable person in her situation could believe, that operating a bus with bronchitis posed such a condition.[10]

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7 The references in this paragraph are to D. & O. at 1-3, 10-11.

8 The references in this paragraph are to *Id.* at 10-11, 16.

9 The references in this paragraph are to *Id.* at 13-14. The ALJ noted that Complainant's filings were very difficult to read and follow and she did not connect her complaints or the disciplinary actions taken against her to protected, or potentially protected, activity. *Id.* at 13, n.3.

10 The references in this paragraph are to *Id.* at 15-16.

The ALJ further found Complainant never raised any complaints regarding safety vests, route changes, or "Linda's tire" to any decisionmaker prior to her termination. The ALJ thus concluded Respondent could not have terminated her employment for raising these issues with OSHA even if they amounted to protected activity.[11]

Finally, though not referenced in her OSHA complaint, the ALJ assessed whether any of Complainant's references to reporting wrongdoing to federal authorities could create the perception in Respondent that Complainant engaged, or was about to engage, in protected activity. On October 11, 2016, Complainant met with HRT representatives and stated she was "going to the federal building." Without more, the ALJ held, HRT had no reason to believe she intended to report a hazardous safety condition or to provide information about a violation of law.[12]

Similarly, the ALJ considered the perception of protected activity as it related to comments on a video played at a February 13, 2017 disciplinary hearing. In the video, Complainant stated to a passenger, "we can have someone call OSHA," "I'll be talking to OSHA," they may "take our funding," and "you'll be blessed when they take our funding." The ALJ found simply raising "OSHA" to a passenger could not automatically give rise to a perception in Respondent that Complainant engaged in protected activity, and that Complainant did not otherwise meet her burden to establish the element.[13]

The ALJ thus concluded Complainant's response to Respondent's properly supported motion for summary decision failed to raise a genuine issue of material fact that would entitle her to a hearing, and she granted Respondent's motion. On October 9, 2022, Complainant filed a timely petition for review of the ALJ's order.[14]

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[11] The references in this paragraph are to *Id.* at 16-17.

[12] The references in this paragraph are to *Id.* at 17.

[13] The references in this paragraph are to *Id.* at 18.

[14] The references in this paragraph are to *Id.* at 13; *see generally* Petition for Rehearing by the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the STAA and NTSSA and its implementing regulations at 29 C.F.R. Part 1978.[15] The ARB reviews de novo an ALJ's grant of summary decision by the same standard that governs the ALJ's initial decision: summary decision is appropriate if "the pleadings, affidavits, [and other discovery materials] show that there is no genuine issue as to any material fact" and a party therefore is entitled to judgment as a matter of law.[16]

For a moving party like HRT to prevail it must show "the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[17] A moving party thus may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[18] The party opposing the motion, in turn, may not rest upon mere allegations or denials of such pleading; rather, it must set forth specific facts establishing a rational trier of fact could determine the existence of a genuine issue of fact for determination at a hearing.[19]

DISCUSSION

1. Complainant Has Failed to Meet Her Burden to Adequately Brief her Appeal

As a threshold matter, a petition for the Board's review must identify "the legal conclusions or orders to which [a petitioner] object[s]."[20] Further, once the Board accepts the appeal, the parties in their briefs must establish the factual basis of their claims and defenses with citations to the record and relevant legal authority in support of the relief they request. Where a party completely fails to meet these minimum briefing requirements, and instead relies upon bare conclusions, the party

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15 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

16 *Strohl v. YRC, Inc.*, ARB No. 2010-0116, ALJ No. 2010-STA-00035, slip op. at 2 (ARB Aug. 12, 2011) (citation omitted).

17 *Menafee v. Tandem Transp. Corp.,* ARB No. 2009-0046, ALJ No. 2008-STA-00055, slip op. at 4 (ARB Apr. 30, 2010) (citing *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986))).

18 *Id.* (citing *Bobreski v. U.S. EPA*, 284 F. Supp. 2d at 73).

19 *See* 29 C.F.R. § 18.72(c); *see Scott v. Harris*, 550 U.S. 372, 380 (2007).

20 29 C.F.R. § 1978.110(a); 29 C.F.R. § 1982.110(a).

forfeits its position on appeal.[21] And while the Board enforces relaxed briefing standards for unrepresented litigants such as Complainant, those standards are not nonexistent: "Despite the fact that pro se filings are construed liberally, the Board must be able to discern cogent arguments . . . ."[22]

As Respondent points out, Complainant has submitted a fifty-page brief, little of which appears to relate to the ALJ's decision. Complainant does not coherently support her assertions with citation to record evidence or relevant legal authority. Complainant's pleadings thus are per se insufficient to support her burden to demonstrate that the ALJ erred. Nevertheless, given Complainant's unrepresented status, the Board in this case will still independently review the ALJ's decision to determine whether it accords with the law.

For the following reasons, we find that it does.

2. The ALJ Properly Granted Summary Decision Concluding Complainant Failed to Raise a Genuine Issue of Material Fact that She Engaged in Protected Activity

To prevail on a claim of retaliation, the complainant must prove that (1) she engaged in protected activity under the STAA and NTSSA; (2) Respondent subjected her to an unfavorable personnel action; and (3) her protected activity was a contributing factor in the unfavorable personnel action.[23]

We conclude, as a matter of law, that Complainant has not, and cannot, establish the first element with regard to her allegations of protected activity.

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[21] *Shah v. Albert Fried & Co,* ARB No. 2020-0063, ALJ No. 2019-SOX-00015, slip op. at 7 (ARB Aug. 22, 2022); *Pajany v. Capgemini, Inc.*, ARB No. 2019-0071, ALJ No. 2019-LCA-00015, slip op. at 3 (ARB Jan. 25, 2021); *Hasan v. Sargent & Lundy*, ARB No. 2005-0099, ALJ No. 2002-ERA-00032, slip op. at 8-9, 9 n.39 (ARB Aug. 31, 2007) (quoting *Cruz v. Am. Airlines, Inc.*, 356 F.3d 320, 333-34 (D.C. Cir. 2004) (citations omitted)) ("Although we may discern a hint of such an argument after a close reading of plaintiff's reply brief (albeit not a hint supported by both citations to authority and argument, as is required by Federal Rule[s] of Appellate Procedure 28(a)(9)), plaintiff was required to present, argue, and support this claim in his opening brief for us to consider it. We are not 'self-directed boards of legal inquiry and research, but essentially . . . arbiters of legal questions presented and argued by the parties.'").

[22] *Hasan*, ARB No. 2005-0099, slip op. at 8 (citations omitted).

[23] 29 U.S.C. § 31105(a), (b)(1) (incorporating the AIR21 legal burdens of proof); 6 U.S.C. § 1142(a), (b), (c)(2)(B)(iii) (a determination that a violation has occurred may only be made "if the complainant demonstrates that any behavior described in subsection (a) or (b) was a contributing factor in the unfavorable personnel action alleged in the complaint.").

A. Bathroom breaks

Among other things, the STAA generally prohibits discrimination against employees who make complaints related to commercial motor vehicle safety or security, refuse to operate unsafe vehicles, and accurately report of hours of duty.[24] Among other things, the NTSSA similarly prohibits discrimination against employees who report or provide information relating to public transportation safety or security.[25] NTSAA also prohibits discrimination against employees who report or provide information relating to fraud, waste, or abuse of federal funds intended to be used for public transportation safety or security.[26]

Taking a break can in some instances implicate the sort of safety issue that may constitute protected activity under the STAA or NTSSA. For example, the Fourth Circuit, in which jurisdiction this case arises, has recognized under the STAA the "driver fatigue rule," which prohibits a driver from operating a commercial motor vehicle while suffering from an unsafe level of fatigue.[27]

But this is not a driver fatigue case. Before the ALJ, Complainant did not contend that she was suffering from fatigue, nor did she contend that her hours on the road exceeded safety protocols, nor did she allege it raised any other safety concern. Instead, Complainant simply contended the mere act of taking a break was protected activity. We agree with the ALJ, however, that merely taking a break or complaining about passengers interfering with a break without more, do not, as a matter of law, raise the type of safety concern the STAA or NTSSA are designed to protect or that Fourth Circuit precedent recognizes under the STAA.[28]

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[24] 49 U.S.C. § 31105(a).

[25] 6 U.S.C. § 1142(a)(1).

[26] *Id.*

[27] *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993).

[28] *Id.* at 984, 985 (finding the STAA is designed, in part, to encourage "safer driving by prohibiting discipline of drivers who refuse to operate their vehicles under dangerous or illegal conditions" and that a violation occurred where the Secretary determined a long-haul trucker stopped his truck "for reasons of fatigue," that his employer disciplined him for taking the break, and that the employer's policies encouraging drivers to take a break did not protect the employee.). By comparison, Complainant has not alleged or established similar behavior by HRT. In its absence, she cannot establish that taking a break alone constitutes a protected activity under the statute and precedent.

B. Operating a bus while suffering from bronchitis

Complainant's allegation that on January 29, 2017, she operated a bus while suffering from bronchitis which she later reported during her February 13, 2017 termination meeting fairs no better. Complainant contended before the ALJ that she engaged in protected activity under the STAA and NTSSA because her behavior constituted a "hazard" and she believed that "if she had called in sick on January 29, 2017, she would have been fired."[29] Except HRT vetted the decision to terminate Complainant in the weeks prior to the meeting and as such its determination predates her disclosure she worked while sick.[30]

Moreover, as the ALJ correctly found, the allegation similarly lacks a fundamental transportation safety (whether commercial motor vehicle safety under the STAA or public transportation safety under the NTSSA) concern. While the ALJ noted that there could be certain circumstances where working while sick could pose a safety risk under the STAA or NTSSA (and we again agree), we further agree Complainant in this case failed to put forth any actual evidence that she subjectively believed, or that a reasonable person in her situation could believe, operating a bus with bronchitis posed such a hazardous safety condition.[31]

Indeed, Complainant's entire theory of liability on this ground remains wholly speculative. It is undisputed that Complainant did not refuse to drive because she was sick, and that she did not complain she was too sick to drive or complain that driving would be dangerous in her condition. In response to HRT's properly supported motion for summary decision, Complainant did not put forth any evidence beyond her bare allegations to support her assertion HRT would have acted against her for calling in sick. The allegation thus remains entirely hypothetical. And ARB caselaw has long recognized that such "rank speculation" of retaliatory behavior cannot "support a claim of protected activity" under similar

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[29] Complainant's Deposition Transcript at 98.

[30] March 6, 2017 Letter. It is axiomatic that, to constitute actionable retaliation, the alleged action must post-date the protected activity. *See Nieman v. Se. Grocers, LLC*, ARB No. 2018-0058, ALJ No. 2018-LCA-00021, slip op. at 14 n.85 (ARB Oct. 5, 2020) (citing cases for the proposition that adverse action occurring before protected activity cannot be caused by the protected activity).

[31] Notably, the plain text of the NTSSA mandates a consideration whether public transportation safety is at issue. 6 U.S.C. § 1142(a). The NTSSA is not a general remedy for employment grievances unrelated to public safety such as an employee's suspicion sick leave will not be honored, as the Board has held with similar whistleblower statutes it administers. *See e.g. Forrand v. Fedex Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 3 n.8 (ARB Jan. 4, 2021) (AIR21 "is not a general remedy for employment grievances unrelated to air safety.").

whistleblower statutes.[32] Moreover, as a procedural matter, "conclusory allegations or denials, without more, are insufficient to preclude granting [a] summary judgment motion."[33]

C. Safety vests, route planning, and "Linda's tire"

Complainant's allegations regarding safety vests, route planning, and "Linda's tire" suffer similarly fatal flaws. The ALJ again properly found it indisputable that Complainant did not provide any information regarding these allegations to any decisionmaker prior to her termination.[34]

But even if she had, those complaints would succumb to the same lack of readily recognizable transportation safety concern and lack of proof that belie her other allegations of protected activity. On their face, we agree with the ALJ that they do not suggest the type of activity that warrants protection under either the STAA or NTSSA.[35] As Respondent notes regarding NTSSA, Complainant's subjective concern about these issues does not inherently transform HRT's garden-variety business decisions into matters of public transportation safety or in any way suggest a misappropriation of public funds.[36] Because Complainant did not -- and under our review of the summary decision pleadings cannot -- further support her allegations demonstrating she engaged in a protected activity, we affirm the ALJ.

D. Going "to the federal building" and "going to OSHA"

Finally, we further affirm the ALJ's conclusion, viewing the evidence in the light most favorable to the Complainant, that the record does not support a finding that Respondent perceived Complainant as about to engage in protected activity. The STAA prohibits a person from discriminating against an employee because the person "perceives that the employee has filed or is about to file a complaint . . . related to a violation of a commercial motor vehicle safety or security regulation, standard, or order."[37] The NTSSA similarly protects an employee who is "perceived

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[32] *See, e.g.*, *Johnson v. Oak Ridge Operations Off. U.S. Dep't of Energy,* ARB No. 1997-0057, ALJ Nos. 1995-CAA-00020, -00021, -00022, slip op. at 12 (ARB Sept. 30, 1999) (rejecting a "theoretical" argument a person's background is a likely indicator of their future behavior and holding "a claim of retaliation" . . . "must rest upon a firmer foundation[.]").

[33] *Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020).

[34] D. & O. at 16-17.

[35] *Id*. at 13.

[36] HRT Memorandum of Law at 18.

[37] 49 U.S.C. § 31105(a)(1)(A)(ii).

by the employer" to have engaged in protected activity.[38] Because the statutes specifically prohibit retaliation because of a perception of protected activity, it is immaterial whether a complainant actually engaged in protected activity (or was going to) and the focus must necessarily be on the employer's perception of the employee's actions or potential future actions.

Complaining to OSHA or federal authorities about a misappropriation of funds could conceivably give rise to a cognizable claim under the NTSSA.[39] But the content and context of Complainant's specific communications remove any reasonable possibility Respondent would have perceived Complainant had, or was about to, engage in such action. Complainant did not set forth any specific facts regarding Respondent's perception, let alone show a genuine issue of material fact -- she merely set forth her own statements.[40]

While Complainant obliquely mentioned "going to the federal building" in a meeting with Respondent, the ALJ correctly found it not reasonably disputable that in the same meeting Complainant "never made any specific complaint or provided any other detail indicating the existence of a hazardous safety or security condition."[41] And without it, no reasonable factfinder could conclude there was anything that could qualify as protected activity for Complainant to prospectively report -- indeed any such conjecture would necessarily be pure speculation, as the ALJ found.[42]

We conclude as a matter of law no reasonable factfinder could determine Complainant's communications about going to the federal building, standing alone, created a perception of protected activity in HRT. Likewise, the ALJ correctly determined Complainant's mere reference of going to OSHA to a passenger she accused of interfering with her break was too vague to support a reasonable perception Complainant was about to engage in protected activity. ARB caselaw similarly supports that conclusion.[43]

Complainant has not meaningfully challenged these conclusions on appeal. Thus, we further affirm the ALJ's conclusions regarding the perception of protected activity.

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38 6 U.S.C. § 1142(a).

39 *See* 6 U.S.C. § 1142(a)(1); 29 C.F.R. § 1982.102(a)(1).

40 29 C.F.R. § 18.72(a).

41 D. & O. at 8-9.

42 *Id.* at 17.

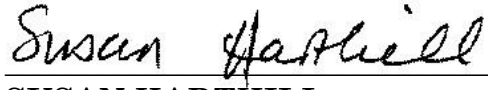
43 *See, e.g., Menefee*, ARB No. 2009-0046, slip op. at 8.

CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's Order Granting Respondent's Motion for Summary Decision and Denying Complainant's Motion for Summary Decision.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge