

IN THE MATTER OF
ALL STATE PLUMBING, INC.

* BEFORE THE
* COMMISSIONER OF LABOR
* AND INDUSTRY
* MOSH CASE NO. 08571-055-05
* OAH CASE NO. DLR-MOSH-
* 05-33273
*

* * * * *

DECISION AND ORDER

Pursuant to the Order entered on June 28, 2007 by Circuit Court Judge Shirley M. Watts in *All-State Plumbing, Inc. v. Department of Labor, Licensing and Regulation*, Case No.: 24-C-06-003761AA, Circuit Court for Baltimore City, the above-styled case has been remanded to the Commissioner of Labor and Industry (“Commissioner”) for a determination regarding the issue of “whether the appearance of counsel at the hearing of March 7, 2006 satisfied COMAR 09.12.20.13F (3) (a).” Upon consideration of the relevant laws and regulations, the Commissioner hereby holds that COMAR 09.12.20.13F (3) (a) required the presence of All State Plumbing, Inc. (“employer”) at the March 7, 2006 hearing, and that the appearance of counsel only at the hearing did not satisfy the requirements of that regulation.

The Court of Appeals of Maryland has consistently held that an executive agency’s interpretation of its own regulations must be given “a great deal of deference.” See e.g., *Maryland Transp. Authority v. King*, 369 Md. 274, 288, 799 A.2d 1246, 1254 (2002), cited in *Adventist Health Care, Inc.*, 392 Md. 103, 120, 896 A.2d 320, 330 (2006). In fact, “an agency’s interpretation of an administrative regulation is ‘of controlling

weight unless it is plainly erroneous or inconsistent with the regulation,” *Maryland Transp. Authority*, 369 Md. at 288, 799 A.2d at 1254, citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217 (1945).

The Commissioner finds that the only reasonable interpretation of the plain language of COMAR 09.12.20.13F and H is one that requires the party who files the notice of contest to appear at a hearing such as the one in this case, regardless of the appearance of his or her counsel. COMAR 09.12.20.13F (3) (a) and (b) states:

- (3) Representatives of Parties.
- (a) A party may appear in person or through a representative.
- (b) An affected employee represented by an authorized representative may appear only through the representative.

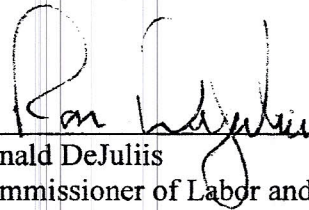
When read together, these provisions clearly demonstrate the agency’s intention to require a party at the hearing. If appearing “through a representative” is interpreted to mean that the representative appears without the party, then subsection (b) would *prohibit* an affected employee from attending a hearing, as it states that an “employee represented by an authorized representative may appear *only* through the representative.” This constitutes an unreasonable interpretation. However, the plain language of the regulations assumes that the party will be present for the proceedings, but may elect to have a representative control all matters on its behalf during the hearing. Furthermore, COMAR 09.12.20.13H(1)(b) states that “if a party filing a notice of contest fails to appear at a hearing...the failure is considered...a withdrawal of the notice of contest.” By referring to a “party” and not to a “party or his or her representative,” the regulation again makes clear the requirement of a party’s attendance at a hearing, regardless of the attendance of a representative. The Commissioner also notes that this interpretation of the agency’s regulations is consistent with State Government Article, § 10-206.1(a)(3),

Annotated Code of Maryland, which precludes an agency from “prohibit[ing] any party from being advised or represented at the party’s own expense by an attorney or, if permitted by law, other representative.” COMAR 09.12.20.13F(3)(a) does not prohibit the party from being represented at a hearing, but does insure that the party who requested the hearing by filing the notice of contest is also present at the hearing. Based upon the legal determination above, the Commissioner finds that the Administrative Law Judge correctly granted MOSH’s Motion that the Petitioner’s failure to appear constituted a waiver of the hearing and a withdrawal of the notice of contest pursuant to COMAR 09.12.20.13H(1)(a) and (b).

Having made this determination, the Commissioner turns to the issue of the employer’s request for reinstatement, filed pursuant to COMAR 09.12.20.13H(3). The Commissioner denies the Request for Reinstatement on the basis that the employer has failed to establish good cause. Under COMAR 09.12.20.13H(3)(b), the Commissioner may grant a request for reinstatement of a hearing *only* upon a finding of good cause for failure to appear at the hearing. The only explanation offered by the employer’s counsel for the party’s failure to appear at the hearing was that he “just forgot about it.” See ALJ Transcript, at 3. The Commissioner finds that simply “forgetting” about the hearing does not constitute good cause.

For the forgoing reasons, the Commissioner of Labor and Industry on this 31 day of January, 2008, hereby finds that the appearance of counsel at the March 7, 2006 hearing did not satisfy COMAR 09.12.13F (3) (a), and therefore holds that that the Administrative Law Judge correctly granted MOSH’s Motion that the employer’s failure to appear at the hearing be considered a waiver of the hearing and a withdrawal of the

notice of contest pursuant to COMAR 09.12.20.13H(1)(a) and (b). The Commissioner further orders that the employer's request for reinstatement is DENIED. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

A handwritten signature in black ink, appearing to read "Ron DeJuliis", is written over a horizontal line. The signature is cursive and somewhat stylized.

Ronald DeJuliis
Commissioner of Labor and Industry