15-0221

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2015 FEB -6 PM 1:37

GINGER MCLAUGHLIN,
Petitioner,

v.

Civil Action No. 14-AA-98
Judge Tod J. Kaufman

UHM

WEST VIRGINIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, and WEST VIRGINIA DIVISION OF JUSTICE AND COMMUNITY SERVICES,
Respondents.

FEB 10 2015

FINAL ORDER

Before the Court is Petitioner Ginger McLaughlin's Petition for Appeal filed on October 15, 2014. Petitioner is appealing the Unemployment Compensation Board of Review affirming the prior decisions of the Workforce West Virginia deputy and appeal tribunal. The decision of the Board of Review affirmed and incorporated all findings of fact and conclusions of law made by Administrative Law Judge Truman Sayre in affirming the deputy's decision denying Petitioner's unemployment benefits. The decision denying benefits was made on the grounds that Petitioner was terminated for "gross misconduct" under the catch-all "other gross misconduct" provision in W. Va. Code 21A-6-3(2).

Factual and Procedural History

Petitioner, Ginger McLaughlin, age 34, began her employment as an accountant and auditor with the West Virginia Division of Justice and Community Services ("DJCS") on April 26, 2010 and was involuntarily terminated nearly four years later on April 22, 2014. In her position, Petitioner wore "many hats," including processing grant payments that came into the office, analyzing grants that came into the office, requesting funds from various grants, and communicating with various grantees. ALJ Hearing Transcript, page 81-83. At no time during her employment were there any issues with possible misuse or misappropriation of funds, and further, the record as a whole does not indicate any other disciplinary issues during this time. *See* ALJ Hearing Transcript, pages 86-88.

On or about January 17, 2014, Petitioner went on unpaid Family and Medical Leave Act ("FMLA") medical leave from the DJCS due to fibromyalgia (a disorder characterized by widespread musculoskeletal pain accompanied by fatigue, sleep, memory and mood issues) and chronic back pain. The Petitioner was on unpaid Family and Medical Leave when the instant complaint caused her to be fired.

Between 12:00 a.m. and 2:00 a.m. on February 18, 2014, while still on leave, Ms. McLaughlin was detained by the Charleston Police Department at a residential block in North Charleston and transported by ambulance to the Emergency Department at CAMC General Hospital. She was subsequently charged with misdemeanor marijuana possession stemming from the February 18, 2014 incident. At the time of her dismissal, that charge was still pending. To this date, it has still never been adjudicated.

The police report from February 18, 2014, which was admitted into the record on the appeal from the deputy's decision despite Petitioner's objections on the grounds of hearsay, and with no reliability asserted, at all, by either affidavit or information, indicated that the complainant that evening, an alleged acquaintance of Petitioner, reported that Petitioner was "attempting to break into houses" or "attempted to walk into . . . houses", not his own, and appeared to be under the influence of drugs. Petitioner continued to be on an unpaid leave of absence from the DJCS at this time, checking herself into a rehabilitation program. *See* Grievant's Fact Finding Statement, May 2, 2014.

Prior to April 7, 2014, Petitioner contacted the deputy director of the DJCS and indicated to him that she was ready, able, and willing to return to work from her unpaid medical leave. On or about April 7, 2014, Petitioner was involuntarily terminated (fired) from her employment with the DJCS, though termination was not effected until April 22, 2014. *See* Notification of Discipline, April 7, 2014. *The reason given by the employer for her termination was that her conduct on the February 18, 2014, described in the police report, violated the DLCS Employee Conduct Policy*

promulgated on March 9, 2009. See Notification of Discipline, April 7, 2014.

On April 27, 2014, Petitioner applied for unemployment benefits, to which the DJCS objected. The matter then came before the Deputy of the Unemployment Compensation Division, Mona Reed, who denied Petitioner's application on the grounds that *Petitioner was terminated for conduct that Ms. Reed held amounted to gross misconduct. See* Deputy's Decision, May 19, 2014. Petitioner appealed her denial to the Board of Review on May 27, 2014. At the hearing on Petitioner's appeal, Leslie Boggess, a DJCS representative served as the only witness other than Petitioner. Ms. Boggess's testimony included discussion of the Incident Report filed the night of Petitioner's arrest (objected to as hearsay by Petitioner), an unnotarized "timeline"/statement of Bonnie Beavers that was not given to Ms. Boggess directly (objected to as hearsay by Petitioner), the DJCS's interpretation of their Employee Conduct Policy, the grounds for Petitioner's termination, and Ms. Boggess's recollection of the predetermination conference that led to Petitioner's termination.

In her testimony, Ms. Boggess made clear that Petitioner was terminated for allegedly violating the "criminal activity" provision of the DJCS Employee Conduct Policy. *See* ALJ Hearing Transcript, pages 29-40; 65-68. Ms. Boggess also contended that her termination was supported by the more vague provisions in the preamble of Section II of the policy prohibiting acts that would "discredit" the Agency, "tend to . . . jeopardize public trust and fidelity in the Division," or "create suspicion with reference to the Division's capability in discharging its duties and responsibilities." ALJ Hearing Transcript, pages 77-79; *see also* DJCS Employee Conduct Policy, ¶ 2.

In a decision dated July 2, 2014, the Board of Review's Administrative Law Judge ("ALJ") affirmed the Deputy's decision. The ALJ held that Petitioner's alleged "drug abuse" and her "arrest for possession of marijuana while on FMLA medical leave of absence [involved] a violation of the employer code of conduct policy and gross misconduct." ALJ Decision, Findings of Fact, ¶ 9; *see also* ALJ Decision, Conclusions of Law and Discussion ("The claimant's drug abuse and criminal

activity is gross misconduct.")[1] On September 15, 2015, the Board of Review summarily affirmed the decision of the ALJ and incorporated the ALJ's findings of fact and conclusions of law.

On October 15, 2014, Petitioner filed this timely appeal of the Board of Review's decision asserting the following assignments of error:

1. The ALJ and Board of Review erred in finding that Ms. McLaughlin's alleged "drug abuse and criminal history" described in the police incident report amounts to gross misconduct under W.Va. Code §21A-6-3-(2);
2. The ALJ and Board of Review erred in finding that Petitioner's alleged conduct constitutes "criminal activity" within the meaning of the DCJS Employee Conduct Policy promulgated on March 9, 2009.
3. The ALJ and Board of Review erred in finding that Petitioner was attempting to break into houses on February 18, 2014.

Standard of Review

The Court's review is governed by the West Virginia Administrative Procedures Act, W.Va. Code §29A-5-1 *et seq*. W.Va. Code §29A-5-4(g) states:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews

[1] Still, to date, there has been no conviction or disposition of her charges.

those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d 518, 525 (W.Va. 1996).

Discussion

I. The relevant issue before the Court is whether or not Petitioner was discharged for gross misconduct and therefore disqualified from unemployment compensation benefits when she was off on unpaid Family Medical Leave Act leave and fired, as a matter of law.

Petitioner's petition and assignments of error propose the issue of whether Petitioner's termination was for gross misconduct. As discussed more in depth below, Respondents no longer allege that Petitioner committed any "criminal activity" as defined by their own Employee Conduct Policy, however, they allege that there are alternate grounds under which Petitioner was "determined to have violated the code of conduct." Response to Petition, pg. 9. The alleged violation the Respondents refer to is based broadly upon the preamble to Section II of the DCJS Employee Conduct policy, which states that "[e]mployees shall not engage in activities that would tend to disrupt, diminish, or otherwise jeopardize public trust and fidelity in this Division, or create suspicion with reference to the Division's capability in discharging its duties and responsibilities." DCJS Employee Conduct Policy, §II. The application of this Preamble to the facts of this case is an overbroad extension such that due process rights are violated when it is applied to this dismissal.

II. The ALJ's decision states that the grounds for termination were violations of the "criminal activity" and did not conclude that her activity violated the provisions of the preamble.

In the decision below, the ALJ makes a one finding of fact in regards to the basis for termination, stating that "[d]ue to the employer business involving criminal justice, and the claimant's position as an accountant and auditor, the claimant's drug abuse and arrest for possession of marijuana while on FMLA medical leave involves a violation of the employer code of conduct policy and gross misconduct. There is a nexus or relationship between the claimant's drug abuse and criminal activity . . . and employment." ALJ Decision, Findings of Fact ¶ 9.

Though this finding may arguably be considered vague enough to cover the causes listed in

the preamble, the Court finds that the ALJ clarifies this finding in the Conclusions of Law and Discussion when stating that the claimant's "criminal behavior" violated the code, by making the conclusion regarding the behavior's "nexus" with her employment (something only listed in the Employee Code of Conduct's criminal activity provision, by stating that the drug abuse occurred during the criminal activity, and that the drug abuse and criminal activity were the alleged "gross misconduct" for which Petitioner was fired.

Therefore, Respondent's continued focus on the grounds for which Petitioner was fired does not comport with the decision of the ALJ, affirmed by the Board of Review.

III. Petitioner's alleged conduct on February 18, 2014 does not rise to the level of gross misconduct.

The central issue in the instant petition is whether, assuming, *arguendo*, that the officer's description of events in the police incident report[2] from February 18, 2014 is accurate, the conduct described in that incident report amount to "other gross misconduct" for purposes of total disqualification from unemployment benefits under the "gross misconduct" provisions of W.Va. Code §21A-6-3(2). W.Va. Code §21A-6-3(2) specifically sets forth nine reasons for finding that a claimant was terminated for "gross misconduct" and is therefore totally disqualified from receiving unemployment benefits, reading in relevant part:

> If he or she were discharged from his or her most recent work for one of the following reasons, or if he or she were discharged from his or her last thirty days employing unit for one of the following reasons: [1] Gross misconduct consisting of willful destruction of his or her employer's property; [2] assault upon the person of his or her employer or any employee of his or her employer; if the assault is committed at the individual's place of employment or in the course of employment; [3] reporting to work in an intoxicated condition, or being intoxicated while at work; [4] reporting to work under the influence of any controlled substance, as defined in [W.Va. Code §60A-1-1-1 et seq.] without a valid prescription, or being under the influence of any

[2] The officer's testimony alone cannot form the basis of the gross misconduct for criminal offenses because the officer is an agent of the State for criminal prosecutions and not an expert of the State concerning what constitutes civil gross misconduct absent a criminal conviction. Therefore, any trier of fact, in order to rely on hearsay testimony of this officer, must first qualify him as an expert in this civil case, which the hearing examiner did not do that. For the examiner to rely on unreliable and unsubstantiated hearsay alone to make findings of gross misconduct is clearly erroneous as a matter of law.

> controlled substance, as defined in said chapter without a valid prescription, while at work; [5] adulterating or otherwise manipulating a sample or specimen in order to thwart a drug or alcohol test lawfully required of an employee; [6] refusal to submit to random testing for alcohol or illegal controlled substances for employees in safety sensitive positions as defined in [W.Va. Code §21-1D-2]; [7] arson, theft, larceny, fraud or embezzlement in connection with his or her work; [8] any other gross misconduct, he or she is disqualified for benefits until he or she has thereafter worked for at least thirty days in covered employment: Provided, That for the purpose of this subdivision, the words "any other gross misconduct" includes, but is not limited to, [9] any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from the act or acts.

If an employee is terminated for any of these nine enumerated reasons, the employee is deemed ineligible for unemployment compensation benefits. Eight of these reasons for finding gross misconduct are specific and do not involve any element of interpretation, discretion, or case-by-case analysis. The first seven reasons involve the commission of specific crimes or wrongful acts in specific circumstances. The ninth reason specifically enumerated reasons for denying these benefits involves an "act or acts of misconduct where the individual received prior written warning that termination may result from the act or acts" Only the eighth reason, "any other gross misconduct," is left open to any interpretation, discretion, or case-by-case analysis.

The West Virginia Supreme Court, in *Dailey v. Bd. of Review, W. Va. Bureau of Empl. Programs*, 214 W.Va. 419, 589 S.E.2d 797 (2003), interpreted the phrase "any other gross misconduct" and placed significant limitations on the extent to which the provision can be used in disqualifying employees from benefits:

> Where the catch-all provisions of "other gross misconduct" in §21A-6-3 is utilized as a basis for denial of all unemployment compensation benefits in the absence of a prior written warning that continues violation will result in employment termination, an employer is required to furnish evidence that the act in question rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items, and a resolution of matters brought under this subdivision must be analyzed on a case-by-case basis.

Syl. Pt. 6, *Dailey*, 214 W. Va. 419, 589 S.E.2d 797 (2003).

As an analysis of the record before the ALJ reveals that Petitioner has not been accused of

committing any of the specifically enumerated acts of gross misconduct in W.Va. Code §21A-6-3(2), the question is whether or not her conduct "rises to a level of seriousness equal to or exceeding that of the other specifically enumerated items."

a. Alleged drug abuse and possession of marijuana while on FMLA leave are not as serious as the specifically enumerated acts in W.Va. Code §21A-6-3.

The ALJ specifically found that Petitioner's alleged "drug abuse and arrest for possession of marijuana while on FMLA medical leave of absence involves . . . gross misconduct." ALJ Decision, Findings of Fact ¶ 9. It appears from the ALJ decisions that this alleged "drug abuse" and alleged "arrest for possession of marijuana" are the two activities upon which the finding of gross misconduct is based. In his the Conclusions of Law and Discussion, the ALJ's states that Petitioner's "drug abuse and criminal activity is gross misconduct." This conclusion fails to specify what "criminal activity" is at issue, given that Petitioner did not commit any act which falls under the "criminal activity" provision of the employee conduct policy. DCJS Employee Conduct Policy, §II(A). Furthermore, the conclusion that Petitioner committed or suffered from "drug abuse" is not supported by the findings of facts, nor are any medically sound criteria for reaching such a conclusion mentioned within the entirety of his decision.

Alleged, and alleged is the operating word with-any, of drug abuse and marijuana possession that occur outside of work, while an employee is on FMLA leave, clearly does not rise to the level of seriousness as the specifically enumerated acts in W.Va. Code §21A-6-3(2). IT flatly amounts to little, if any, usable evidence by the State. It is self-evident from the legislature's inclusion of drug abuse "while at work" within the specifically enumerated acts of gross misconduct. *See* W.Va. Code §21A-6-3(2) ("[R]eporting to work under the influence of any controlled substance . . . without a valid prescription, or being under the influence of any controlled substance . . . without a valid prescription, *while at work*" is gross misconduct.)(Emphasis added). If the legislature had intended drug abuse or mere *allegations* of misdemeanors, including misdemeanors for or drug possession

outside of work, to be deemed gross misconduct, the lawmakers would have said so by omitting the words "while at work" from the statute.

As for the simple marijuana possession, an allegation based on hearsay no less, which could be a misdemeanor crime that does not carry the possibility of incarceration, it is clearly not as serious as "arson, theft, larceny, fraud or embezzlement," all of which *do* carry the possibility of incarceration. The plain language of the law states that even these more serious offenses are statutorily defined as gross misconduct *only* when committed "while at work." *See* W.Va. Code §21A-6-3(2).

b. Petitioner has not been accused of committing any other acts as serious as the specifically enumerated acts in W.Va. Code §21A-6-3(2).

While Petitioner was accused by the complainant on the night of February 18, 2014, of attempting to "walk into several . . . homes." that unsubstantiated allegation of attempted simple trespass, occurring off work and not during the course of employment, is clearly not as serious as committing the crimes of "arson, theft, larceny, fraud or embezzlement" while at work. Moreover, there is no evidence in the record to support any finding that Petitioner even committed those acts or had the requisite intent to be charged with such a crime. The original report that Petitioner was "attempting to break into houses" is not supported by the evidence. *See* §5, *infra.*

c. The prior decisions of the West Virginia Supreme Court and other jurisdictions do not support disqualification of benefits under circumstances where the off-duty, off-premises misconduct does not involve a co-worker, a felony charge, or any kind of conviction.

The West Virginia decision concerning the disqualification from unemployment benefits for off-duty, off-premises misconduct is *UB Services, Inc. v. Gatson,* 207 W.Va. 365, 532 S.E.2d 365 (2000), which is far-fetched and distinguishable from the facts at hand. The facts of that case, unlike the present case, were particularly gruesome. Zickafoose savagely beat a *co-worker*, with whom he had a personal relationship, while off-duty and off-premises. The woman was so badly beaten that she was hospitalized for five days and unable to work for six months as a result of the beating.

Zickafoose eventually pled no contest to a felony assault charge and was *convicted* of that offense.

The West Virginia Supreme Court surveyed the cases and standards applied by other jurisdictions concerning disqualification of benefits for off-duty, off-premises misconduct and determined that unemployment benefits could be denied for such conduct where "the effects of the gross misconduct extend substantially into the work area." Because Zickafoose's conduct "shocks the conscience" and because "such a vicious assault on a co-worker would have inherently created an atmosphere of fear and distrust on the job site." the Supreme Court held that unemployment benefits should be denied in the case before it.

Zickafoose's conduct is clearly distinguishable from the present Petitioner's on several grounds: (1) Zickafoose's victim was a co-worker; (2) was a felony; (3) the assault was savage, it had the potential to result in death, and it did result in serious bodily injury; and (4) Zickafoose was convicted. All of the cases discussed by the West Virginia Supreme Court in support of its decision involve facts of some combination of one or more of the above factors that were present in *US Services* but are not present in the instant case: a co-worker as victim, behavior that risks death or bodily injury (such as a shooting at a house), felony behavior and felony charges, or conviction. The decision of the ALJ and Board of Review to deny all unemployment benefits as the result of off-duty, off-premises misconduct that does not rise to the level of a felony, does not involve a co-worker in any way, did not endanger the lives of anyone, does not create an atmosphere of fear and distrust on the job site, and has not resulted in any kind of criminal conviction appears to be completely unprecedented and too devoid of support from any other jurisdiction.

That is to say that, it appears based on the reported decisions of 50 states, that not one has ever been completely disqualified from unemployment benefits for off-duty, off-premises under these circumstances. Respondent's continued assertions equating the Zickafoose decision and the Petitioner's case are, at best, exaggerative and hyperbolic, and are not based on any evidence and are clearly prejudiced.

IV. The Administrative Law Judge erred in finding that Petitioner's alleged conduct constitutes "criminal activity" within the meaning of the DJCS Employee Conduct Policy and violated the Policy.

The ALJ found that the "claimant's criminal behavior [on] February 18, 2014 violated the employer policy." ALJ Decisions, Conclusions of Law and Discussion. Elsewhere, the ALJ's decisions notes that the DJCS Employee Conduct Policy "provides under criminal activity, that employees found to have committed a criminal act will be subjected to disciplinary actions, up to and including dismissal." ALJ Decision, Findings of Fact ¶ 7. Finally, the ALJ's decisions found that Petitioner's "drug abuse and arrest for possession of marijuana while on FMLA medical leave of absence involves a violation of the employer code of conduct policy." ALJ Decision, Findings of Fact ¶ 9.

Since there was never any conviction for any crime, the ALJ's decision in finding that the allegations against Petitioner amount to criminal activity, is therefore reversible error as a matter of law. Petitioner was charged with a crime (simple marijuana possession), but had not been found by a court of law to be responsible for a crime at the time of her termination. Therefore, Petitioner was terminated on grounds that are, again, clearly erroneous as a matter of fact and of law since she had not yet violated any written policy of the DJCS (and DCJS is not an at-will employer).

V. The Administrative Law Judge erred in finding (ALJ Decision, Findings of Fact ¶ 8) *that Petitioner was attempting to break into houses in February 18, 2014.*

According to the police incident report, the initial report to the police officer who responded at the scene was that Petitioner was "attempting to break into houses." This report was apparently attributed to the complainant but could have been the result of a misunderstanding between the complainant and the dispatcher or 911 operator.

In any event, the investigating police officers investigated that initial report of attempted breaking and found that there was no evidence to support it, and she has not been charged with it or any other crime besides simple marijuana possession.

VI. The ALJ committed reversible error by using hearsay evidence presented by the Respondent as the sole basis for his decision denying Petitioner's benefits.

Within the hearing transcript below, the ALJ stated that "[h]earsay evidence is admissible in these administrative proceedings and given appropriate weight [and that] a party may not rely solely upon hearsay evidence to prove an issue that [the] party has the burden of proving." ALJ Hearing Transcript, page 19.

The only testimony at the hearing below was the testimony of Leslie Boggess, a DJCS representative containing discussion of the Incident Report filed the night of Petitioner's, an unnotarized "timeline"/statement of Bonnie Beavers that was not given to Ms. Boggess, the DJCS's interpretation of their Employee Conduct Policy, the grounds for Petitioner's termination, and Ms. Boggess's recollection of the predetermination conference that led to Petitioner's termination.[3]

Petitioner's alleged conduct is described only in the Police Incident Report, the unnotarized "timeline"/statement of Bonnie Beavers, and the testimony of Ms. Boggess. The Petitioner objected to the use of the Incident Report below as hearsay, and though this objection was sustained, the ALJ himself agreed that such evidence was hearsay. ALJ Hearing Transcript, page 19. The unnotarized "timeline"/statement of Bonnie Beavers was also rightfully objected to as hearsay. Ms. Beavers was not present and did not testify, the "timeline"/statement is not a sworn affidavit, no one present witnessed her sign it, and it was given originally to Jeff Estep, who was also not present at this hearing. ALJ Hearing Transcript, pages 53-54. This is clearly hearsay. The testimony of Ms. Boggess does not contain any direct evidence proving the issues assert by Respondents. Firstly Ms. Boggess discusses the Incident Report and the unnotarized "timeline"/statement of Bonnie Beavers, which are both hearsay. Secondly, Ms. Boggess recounts the predetermination hearing, which reached its conclusion based on this same evidence.

[3] Respondent additionally submitted five documentary exhibits: (1) The Employee Conduct Policy, (2) The Drug and Alcohol-Free Workplace Policy, (3) Petitioner's Notification of Discipline, (4) Police Incident Report, and (5) Ms. Beaver's an unnotarized "timeline"/statement of Bonnie Beavers; emails between Petitioner and Jeff Estep, Chief Deputy Director of the Division of Justice and Community Services.

Ruling

After carefully reviewing decisions below, the petition, and the relevant law, the Court hereby **REVERSES** the decision of the Board below because the evidence clearly does not support the findings and conclusions of law. The claimant/Petitioner is therefore not disqualified from receiving benefits to which she is entitled and thus it is hereby **ORDERED** that Petitioner be paid all unemployment benefits to which she is entitled, beginning on the date of her termination for employment, within 30 days of the date of this Order. This case is **REVERSED, DISMISSED** and **STRICKEN** from the docket of the Circuit Court.

The Circuit Clerk shall distribute copies of this Order to all counsel of record and petitioner below:

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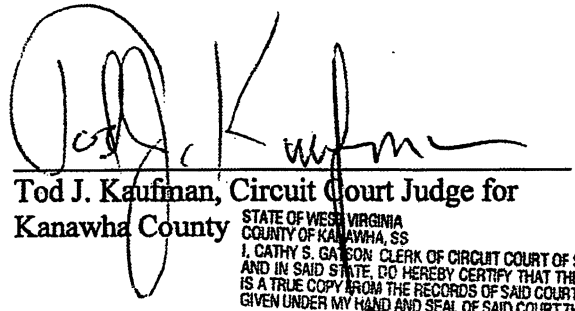
Enter this Order the 6th day of February, 2015.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 9th
DAY OF February 2015
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA