

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-ICA-54

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YMCA OF PARKERSBURG,
Plaintiff Below, Petitioner

vs.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
Plaintiff Below, Respondent

West Virginia Department of Health and Human Services
Office of Inspector General Board of Review
Todd Thornton, State Hearing Examiner
1900 Kanawha Boulevard East
Building 6, Room 817B
Charleston, West Virginia 25305

**REPLY BRIEF ON BEHALF OF THE PETITIONER,
YMCA OF PARKERSBURG**

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Respondent

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REPLY BRIEF ON BEHALF OF THE PETITIONER, YMCA OF PARKERSBURG

Now comes the Petitioner, the YMCA of Parkersburg (hereinafter referred to as “YMCA”), by Robert L. Bays, its attorney of record and submits the following Reply Brief.

INTRODUCTION

The Petitioner stands on its Brief in Chief, previously filed in, as the basis for its reply to the WVDHHR’s Response Brief and hereafter notes only a few matters raised in the Response Brief which should be brought to the Court’s attention.

REPLY TO STATEMENT REGARDING ORAL ARGUMENTS

Petitioner believes its position is supported by the evidence and it has been prejudiced by the Hearing Officer’s failure to adhere to the evidence adduced. More importantly the legal issues raised by the Petitioner concerning the authority of the WVDHHR to impose a civil penalty and the severity of that penalty are significant not only to Petitioner, but to other child care providers and merits oral arguments.

ARGUMENT

Reply to Response to Assignment of Error No. 1. The Court should take note that the WVDHHR does not dispute that the written evidence adduced at the hearing clearly indicated that both children were suspended and not terminated. Further, the discussion of *Sayre v. Roop*, 205 W. Va. 193 (1999), was not cited to the Court for purposes of factual similarities, but rather cited for a principal of law.

Reply to Response to Assignment of Error No. 2. The WVDHHR does not cite to any requirement of the federally funded Stabilization Program, either by statute or administrative rule that requires funding under the program to be withheld because of the issuance

of a strike one. Further, the only authority cited by the WVDHHR, under West Virginia law, is not a West Virginia statute or a West Virginia legislative rule, but rather a policy and procedure manual created out of whole cloth by the WVDHHR. As indicated in the Petitioner's Brief, a strike one, prior to the federally funded Stabilization Program, contained no monetary penalty and was, in essence, "a warning". Now, the WVDHHR argues that it is entitled to create a category of provider that is "not in good standing". Hypothetically, the WVDHHR is taking the position that should a claim arise from a child, attending either of the two facilities in question, against the WVDHHR that they were funding an organization for child care while at the same time concluding that they are not in good standing. This contradictory position makes no sense in any context other than to attempt to justify the WVDHHR's in this case in withholding the stabilization funds. In fact, under the prior system, prior to the Stabilization Act funding, there was no category for "in good standing" or "not in good standing". The only mechanisms available to the WVDHHR were essentially a warning procedure, which would result in a child care facility being denied subsidy payments from the WVDHHR after a third strike was properly administered. Clearly under the West Virginia statute and under the West Virginia Legislative Rules, the WVDHHR has the right to determine whether or not a child care facility should continue to receive subsidy payments. However, the WVDHHR points to no Federal statute, Federal Administrative Rule, State statute or State Legislative Rule which gives them the authority to withhold payments for services as a civil penalty. Further, the WVDHHR does not cite for any authority in either the West Virginia statutes or the West Virginia Legislative Rules that permits the WVDHHR to issue a penalty against a child care services provider by virtue of the West Virginia Child Care Stabilization Payment Policy & Procedure Manual created by the WVDHHR.

Reply to Response to Assignment of Error No. 3. It goes without saying that an action, that was initially categorized and defined by WVDHHR personnel as merely a warning

prior to federal Stabilization Funding Program and that afterward, only through the issuance of a policy of the WVDHHR, not supported by West Virginia statute or State Legislative Rule, resulted in a \$250,000.00 penalty, is on its face an excessive fine in penalty.

CONCLUSION

Based upon the arguments set forth above and in the Petitioner’s Brief, the YMCA respectfully requests that this Honorable Court set this matter for oral argument and reverse the decision of the State Hearing Officer rendered on the 3rd day of August 2023 and find that the YMCA was not guilty of violating its Provider Services Agreement because the children in question were merely suspended and not terminated and reinstate the stabilization payments withheld by the WVDHHR. In the event that the Intermediate Court of Appeals determines that the issuance of the first strike was appropriate, it is still respectfully submitted by the YMCA that the penalty to the YMCA was contrary to law and excessive and that the issuance of the first strike, under the stabilization program, should have the same effect as the issuance of a first strike with respect to the WVDHHR subsidy program and that there be no financial impact to the YMCA, and that the YMCA be awarded its previously withheld stabilization payments.

YMCA OF PARKERSBURG, Petitioner

By counsel,

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CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioner, YMCA of Parkersburg, hereby certifies that on the 20th day of January 2023, a copy of foregoing ***Reply Brief on Behalf of the Petitioner, YMCA of Parkersburg*** was electronically served, via File & ServeXpress, upon all counsel of record:

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