

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**DOCKET NO. 22-ICA-54**

**ICA EFiled: Jan 17 2023  
03:13PM EST  
Transaction ID 68906574**

**YMCA OF PARKERSBURG,  
Plaintiff Below, Petitioner**

**vs.**

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,  
Respondent 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**

---

**RESPONSE BRIEF ON BEHALF OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

---

**Counsel for Petitioner**

**Robert L. Bays, Esq.  
W.Va. State Bar No. 274  
Bowles Rice LLP  
United Bank Square, Fifth Floor,  
501 Avery St.  
P.O. Box 49  
Parkersburg, WV 26102-0049  
P-304-420-5530  
F-304-420-5587  
rbays@bowlesrice.com**

**Respondent**

**West Virginia Department of Health and  
Human Resources  
by PATRICK MORRISEY,  
ATTORNEY GENERAL**

**Chaelyn W. Casteel, Esq.  
Assistant Attorney General  
W.Va. State Bar No. 7828  
416 Adams Street, Suite 307  
Fairmont, WV 26554  
Direct extension: (304) 333-0014  
Fax: (304) 367-2743  
Chaelyn.W.Casteel@wv.gov**

## TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR .....	1
II. STATEMENT OF THE CASE.....	1
III. STANDARD OF REVIEW .....	1-2
IV. SUMMARY OF ARGUMENT .....	2
V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	3
VI. ARGUMENT.....	3
Response to Assignment of Error No. 1 .....	3-4
Response to Assignment of Error No. 2 .....	4
Response to Assignment of Error No. 3 .....	4-5
VII. CONCLUSION/PRAAYER FOR RELIEF.....	5

## TABLE OF AUTHORITIES

### Cases

<i>Perrine v. E.I. DuPont du Nemours and Company</i> , 225 W.Va. 482 (2010) .....	2
<i>Sayre v. Roop</i> , 205 W.Va. 193 (1999) .....	3

### Statutes

#### West Virginia Code

W.Va. Code §29A-5-4(g) .....	1-2
------------------------------	-----

### Rules

Rev. R.A.P. 21 .....	3
----------------------	---

## **I. ASSIGNMENTS OF ERROR**

Now comes the Respondent, the West Virginia Department of Health and Human Resources, hereinafter referred to as “WVDHHR”, by Chaelyn W. Casteel, Assistant Attorney General, as counsel of record and submits the following Responses to Petitioner’s Assignments of Error.

**Response to Assignment of Error No. 1** The Decision of August 3, 2022, made by Todd Thornton, State Hearing Officer, is supported by the evidence, clearly correct in view of reliable, probative and substantial evidence, and therefore should be upheld;

**Response to Assignment of Error No. 2** The actions of the WVDHHR in suspending the YMCA’s stabilization payments for a first offense or Strike One were proper and supported by law and the authority of the Agency; and

**Response to Assignment of Error No. 3** The actions of the WVDHHR were proper and lawful pursuant to the WV Child Care Stabilization Program, do not constitute an excessive fine or penalty, and therefore should be upheld.

## **II. STATEMENT OF THE CASE**

The Department agrees generally with the facts set forth in Petitioner’s Statement of the Case and further adopts the findings of fact set forth in the August 3, 2022, decision issued by Hearing Officer Todd Thornton. *Appendix 106-109.*

## **III. STANDARD OF REVIEW**

The standard of review for contested administrative cases is set forth in West Virginia Code §29A-5-4(g), as follows:

(g) 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; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedures; (4) Affected by other error of law; (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.

An excessive fine or monetary penalty is reviewed *de novo*. See *Perrine v. E.I. DuPont du Nemours and Company*, 225 W.Va. 482 (2010).

#### IV. SUMMARY OF ARGUMENT

Following the presentation of evidence and testimony at the consolidated grievance hearings held in this matter, the Hearing Officer correctly upheld the WVDHHR's decision to issue strikes to each of the two YMCA facilities and to cease the stabilization payments. The weight of the evidence supports the decision of the Hearing Officer, and the decision was properly rendered. Next, Petitioner argues that WVDHHR suspended payments to it, a child care provider, as a form of penalty without basis to do so; however, by receiving a strike at each of its two facilities which are the subject of this appeal, Petitioner was no longer in good standing with its Provider Services Agreement and therefore was no longer eligible to receive the stabilization payments. Finally, WVDHHR properly ceased payment of the stabilization funds from the Federal Government because Petitioner was no longer eligible to receive those funds and is not a type of fine or penalty, nor was it clearly excessive.

## **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner's arguments are not supported by the evidence and Petitioner fails to identify any prejudicial error. Consequently, oral argument is not necessary, and a memorandum decision affirming the ruling below is appropriate. *See* Rev. R.A.P. 21.

## **VI. ARGUMENT**

### **Response to Assignment of Error No. 1**

The Decision of August 3, 2022, made by Todd Thornton, State Hearing Officer, is supported by the evidence, clearly correct in view of reliable, probative and substantial evidence, and therefore should be upheld. This appeal is a consolidation of two cases that were consolidated for hearing and, ultimately, for this appeal. The evidence clearly supports that the WVDHHR properly terminated federally funded stabilization payments to the Parkersburg YMCA following the YMCA's termination of child care for Child LG and Child LW without a two-week notice and upon WVDHHR's proper issuance of a first offense "Strike One" corrective action against the YMCA.

The State Hearing Officer, as the trier of fact in the matter below, heard the testimony of each witness presented at the hearing and considered all evidence before rendering a written decision to uphold the WVDHHR's cessation of further stabilization payments to the YMCA. This instant case can be distinguished from *Sayre v. Roop*, 205 W.Va. 193 (1999) on its facts. In *Sayre*, the West Virginia Supreme Court of Appeals upheld a trial court's decision to grant a new trial to the Plaintiff below, a correctional officer, against his former employer, the Regional Jail Authority and Defendant below, when there was clear evidence that the only reason Plaintiff was denied a transfer of employment to another correctional facility was due to his worker's compensation claim rather than not meeting the definition of an employee in "good standing". *Id.* In this matter,

Petitioner does not seek or request a new trial, but seeks to have the decision of the State Hearing Officer set aside and the judgement of the appellate court substituted for that of the trier of fact. The trier of fact, in this instant matter, listened to all the testimony presented and reviewed all the evidence presented and credibly found that the WVDHHR had met its burden of proof; therefore, the State Hearing Officer properly upheld the decision of the WVDHHR to cease stabilization payments to Petitioner based upon Petitioner no longer being eligible to receive those federally funded payments. Accordingly, the Decision of the Hearing Officer below should be affirmed.

### **Response to Assignment of Error No. 2**

The actions of the WVDHHR in suspending the YMCA's stabilization payments for a first offense or "Strike One" were proper and supported by law and the authority of the Agency. In this matter, in order for Petitioner to receive the federally funded stabilization payments pursuant to the *American Rescue Plan Act, Child Care Funding*, it had to have a Provider Services Agreement that was in good standing pursuant to Chapter 2.2.4 of the West Virginia Child Care Stabilization Payment Policy & Procedure Manual. See *Petitioner's Brief*, Exhibit 1, p. 3. In the case of the stabilization payments, having a "Strike One" caused Petitioner to no longer be in good standing in its Provider Services Agreement and, therefore, not eligible for further stabilization payments for a period of one (1) year. As a result, the WVDHHR properly ceased federally funded stabilization payments to Petitioner.

### **Response to Assignment of Error No. 3**

The actions of the WVDHHR were proper and lawful pursuant to the WV Child Care Stabilization Program, do not constitute an excessive fine or penalty, and therefore should be upheld. The federal funds in question, granted through the *American Rescue Plan Act, Child Care Funding*, were never intended to be a long-term funding source and were payments made to child

care providers as a stop-gap during the COVID-19 pandemic. In this matter, Petitioner received a "Strike One" for its termination of two children without a two-week notice, a violation of its Provider Services Agreement. Although Petitioner was allowed to continue and be paid for its child care services via child care subsidy payments and its license was neither suspended nor terminated, this "Strike One" made Petitioner ineligible for federally funded stabilization payments pursuant to the policy developed for this specific federal grant. Contrary to the arguments of Petitioner and the cases cited in support of its argument, withholding stabilization funds was in compliance with the terms of the *West Virginia Child Care Stabilization Payment Certification Agreement* that Petitioner entered into with the WVDHHR and was neither a monetary fine nor was it excessive. *Petitioner's Brief*, Exhibit 2.

#### CONCLUSION/PRAYER FOR RELIEF

Based upon the arguments set forth above, the Department respectfully requests that this Honorable Court affirm the Decision of the State Hearing Officer.

Respectfully Submitted,

WEST VIRGINIA DEPARTMENT  
OF HEALTH AND HUMAN  
RESOURCES, Respondent

By Counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL

/s/ Chaelyn W. Casteel  
Chaelyn W. Casteel, Esq.  
Assistant Attorney General  
W.Va. State Bar No. 7828  
416 Adams Street, Suite 307  
Fairmont, WV 26554  
Direct extension: (304) 333-0014  
Fax: (304) 367-2743  
Chaelyn.W.Casteel@wv.gov



## CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, West Virginia Department of Health and Human Resources, hereby certifies that on this 17<sup>th</sup> day of January, 2023, a copy of the foregoing **Response Brief on Behalf of West Virginia Department of Health and Human Resources** was electronically serviced, via File & ServeXpress, upon all counsel of record:

Robert L. Bays, Esq.  
W.Va. State Bar No. 274  
Bowles Rice LLP  
United Bank Square, Fifth Floor,  
501 Avery St.  
P.O. Box 49  
Parkersburg, WV 26102-0049  
P-304-420-5530  
F-304-420-5587  
[rbays@bowlesrice.com](mailto:rbays@bowlesrice.com)

/s/ Chaelyn W. Casteel  
Chaelyn W. Casteel, Esq.  
Assistant Attorney General  
West Virginia State Bar No. 7828