INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Amanda D. Taylor,
Claimant Below, Petitioner

vs.) No. 22-ICA-81

Workforce West Virginia,
and Dismas Charities, Inc.,
Respondents Below, Respondents

BRIEF OF PETITIONER AMANDA D. TAYLOR

James D. Kauffelt
Kauffelt & Kauffelt
WV State Bar ID# 1964
P. O. Box 3082
Charleston, WV 25331-3082
(304) 345-1272
jkauffelt@wvdsl.net

Counsel for Petitioner, Amanda D. Taylor

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This case is an appeal of a Decision of the Workforce West Virginia Unemployment Compensation Board of Review denying unemployment benefits to Amanda D. Taylor, on the ground that she was guilty of gross misconduct for declining the COVID-19 vaccine. (D.R. 0062-64; 0013-16)

I. ASSIGNMENTS OF ERROR

THE BOARD OF REVIEW ERRED IN FINDING THE PETITIONER COMMITTED GROSS MISCONDUCT BY DECLINING TO TAKE THE COVID VACCINE AND DISQUALIFYING HER FROM RECEIVING UNEMPLOYMENT COMPENSATION BENEFITS.

THE PETITIONER DID NOT RECEIVE A QUALIFYING PRIOR WRITTEN WARNING THAT DECLINING THE COVID VACCINE WOULD RESULT IN TERMINATION, SO THAT IT WAS ERROR FOR THE BOARD OF REVIEW TO FIND SHE COMMITTED GROSS MISCONDUCT.

IN THE ABSENCE OF A QUALIFYING PRIOR WRITTEN WARNING, PETITIONER'S CONDUCT DID NOT RISE TO THE LEVEL OF GROSS MISCONDUCT.

THE BOARD OF REVIEW ERRED IN FINDING PETITIONER COMMITTED ANY MISCONDUCT UNDER THE HOLDING IN *PEERY V. RUTLEDGE.*

II. STATEMENT OF THE CASE

This is an appeal of a Decision of the Respondent Workforce West Virginia Unemployment Compensation Board of Review ("Board") denying unemployment benefits to Petitioner Amanda D. Taylor ("Ms. Taylor" or "Petitioner"), on the ground that she was guilty of gross misconduct for declining the COVID-19 vaccine required by her employer, Respondent Dismas Charities, Inc., ("Dismas" or "Employer"). This case was decided in a three–page Administrative Law Judge's Decision issued May 16, 2022 (D.R. 0013-16), five months after the hearing, which was summarily affirmed by the Board in a one-page Decision issued August 4, 2022. (D.R. 0062-64) They will be collectively referred to herein as the "Decision" or the "Board's Decision."

A. PROCEDURAL HISTORY

Petitioner Amanda D. Taylor was employed by Dismas part time from February 20, 2019 to October 15, 2021. She was discharged for declining the COVID vaccination (D.R. 0050). She then filed a claim for Unemployment Compensation benefits. In a Deputy's Decision, dated November 9, 2021, Ms. Taylor's claim was denied because she was found to have been given a

prior written warning, and was therefore found to have committed gross misconduct. (D.R. 0003) The Deputy's Decision did not explain what document constituted the prior written warning. Ms. Taylor timely appealed the Deputy's Decision.

Ms. Taylor's claim was then subject of an in-person hearing before an Administrative Law Judge on December 14, 2021. (The original ALJ Decision erroneously stated that this case was the subject of a telephonic hearing on December 7. The original ALJ Decision was not made part of the record. Rather, the Board submitted what it labeled a "Corrected Decision," which correctly states that there was an in-person hearing on December 14. (D.R. 0013) the "Corrected Decision" made at least 16 alterations to the original Decision.)

Pursuant to Rule 3.8 of the *UC Board of Review Administrative Rules* (84 C.S.R. §84-1-3.8) the ALJ should have issued a Decision within 21 days, that is, by January 4, 2022. At the hearing the ALJ stated that a Decision would "be issued within the next 30 days." Tr., p.10 (D.R. 0024) Despite repeated requests, the ALJ did not issue a Decision until May 16, 2022, over five months after the hearing. (D.R. 0013-16) That Decision contained errors of fact, statements that were not in the record, and failed to discuss any of the cases cited by Petitioner at the hearing, The ALJ Decision was timely appealed to the Board of Review.

On July 29, Ms. Taylor submitted to the Board a Brief in Support of Appeal of Amanda D. Taylor. (D.R. 0109-0124) On August 4, the Board issued a Decision summarily affirming the ALJ Decision and adopting the findings and conclusions of the ALJ by reference, in their entirety. (D.R. 0062-64) This Decision does not correct the factual errors in the ALJ Decision or address the legal argument made by Petitioner at the hearing or in her Brief. Petitioner timely appealed that Decision to this Court.

B. STATEMENT OF FACTS

At the December 14 hearing, two witnesses testified: James Sands, Director of the Dismas facility (D.R. 0022-30), and Ms. Taylor (D.R. 0030-47) and each offered four Exhibits, all of which were admitted into evidence.

Petitioner Amanda D. Taylor was employed as a Relief Cook/Relief Resident Monitor by Dismas at its half-way house for federal inmates newly released from prison, from February 20, 2019, until October 15, 2021. (D.R. 0050) When she was terminated for declining the COVID vaccine, she was given a glowing recommendation by her supervisor, James Sands, which included this statement: "I feel Ms. Taylor is honest, hardworking, and dependable." (D.R. 0053).

Mr. Sands offered Employer's Exhibit 1, which was an email from "Ray Weis (Corp)" to "Ray Weis (Corp)" dated January 11, 2021. (D.R. 0044) Ms. Taylor was not a recipient of this email. Ms. Taylor did not even know she had an email account. Tr., p.38. (D.R. 0031) This email was posted by Mr. Sands on two staff bulletin boards. Tr., pp.12-13. (D.R. 0024-25) The email was not sent to Ms. Taylor, as acknowledged by both Mr. Sands, Tr., p.20 (D.R. 0026), and Ms. Taylor, Tr., p.38 (D.R. 0031). Mr. Sands admitted that the January 11 email does not say that employees would be fired if they did not get the vaccination. Tr., pp. 22-23 (D.R. 0027)

Employer's Exhibit 2 was an email dated August 20, 2021, from Ray Weis to Jan Kempf, Chuck Ferraro and Ray Weis. (D.R. 0045-46) Mr. Sands stated that Ms. Taylor did not receive the August 20 email, and that it did not say that employees who did not get vaccinated would be discharged. Tr., p. 24 (D.R. 0027)

Mr. Sands texted Ms. Taylor on August 23. This text had an illegible copy of the August 20 email attached. (D.R. 0047-48) Mr. Sands confirmed on cross examination that the text

message does not state that if Ms. Taylor did not get the vaccination that she would be fired. Tr., p.25 (D.R. 0028) In any event, the Board did not rely on either of the text messages as prior written warnings.

Mr. Sands vouched for Ms. Taylor's credibility. As noted above, he prepared a letter of recommendation dated October 5, 2021, in which he said the following about Ms. Taylor: "I feel Ms. Taylor is honest, hardworking and dependable." (D.R. 53); Tr., p.28 (D.R. 0028)

Ms. Taylor stated that there was no requirement to be vaccinated when she took the job in 2019. Tr., p.37. (D.R. 0031) Her primary reason for not wanting to have the COVID vaccination was a severe allergic reaction she experienced to a previous vaccination. Tr., p.39. (D.R. 0031) Mr. Sands testified that Ms. Taylor came to him and told him that she had a medical reason for not taking the vaccination, but was unable to document it. Tr., pp.24-25, (D.R. 0027-28) Ms. Taylor explained why she was unable to provide medical documentation: She had previously had a severe allergic reaction to a vaccination when she was under the care of Dr. Sandra Lewis. Tr. pp. 38-39 (D.R. 0031) When Dr. Lewis retired, Ms. Taylor asked that her medical records be forwarded to her new (and current) treating physician, Dr. Temple, at Family Health Associates. However, that office either never received Ms. Taylor's medical records, or lost them. Unfortunately, the physician who administered and treated her for that allergic reaction, Dr. Lewis, was no longer practicing and, Ms. Taylor believed, had since died. Tr., pp.38-39 (D.R. 0031) Thus, Ms. Taylor could not comply with the requirement to provide documentation of her medical condition through no fault of her own.

She also objected to the COVID vaccine due to a belief that there were severe risks of developing other health issues such as heart disease from taking the vaccine. Tr., p.41 (D.R. 0032) Ms. Taylor further objected to the vaccine on the basis that the vaccine "...was rushed

through and did not go through all the protocols of any other vaccine that is available." Tr., p.40. (D.R. 0031)

Ms. Taylor declined the vaccine because she thought it would jeopardize her own health given the reaction she had previously. She was aware of cases of people who "...have now developed other health issues such as heart disease and other." She testified that she personally knew someone that had that reaction to the vaccine. Tr., p.41. (D.R. 0032)

Ms. Taylor testified she was willing to accept an accommodation from Dismas, and believed that her work location and duties would not present a risk to the Dismas inmates, because there is barrier between her and the inmates that come through the cafeteria line. The Transcript has it this way: "My exposure is they come through the line and there's a (unintelligible) that we serve and there's at least a 6-foot distance between myself and the resident to serve food though." Tr., p.41. (D.R. 0032)

Her secondary reason for declining the vaccination was for religious reasons in that the COVID vaccine contains or was developed with aborted fetal tissue and she is completely against abortion. Tr., pp.39-40 (D.R. 0031)

Ms. Taylor did not believe that there would be any risk to her employer for her failure to be vaccinated Tr., pp.40-41 (D.R. 0032-52) and that she did not do any act that would harm her employer. Tr., p.43 (D.R. 0032) Ms. Taylor testified that the fact that she was not vaccinated would not jeopardize her own health or safety or the health or safety of others. She was separated from the residents of this facility (who are not required to be vaccinated) by glass partitions between the kitchen, where she worked, and the dining room, and would wear such protective gear as was necessary to shield her from exposure to infection by the residents. Tr., p.40-41 (D.R. 0031-32)

Ms. Taylor never got either email and did not get any kind of document that said, "Amanda Taylor, if you don't get the vaccine by such and such a date you will be terminated..." Tr. pp.41-42 (D.R. 0032)

The hearing concluded with counsel for Ms. Taylor making an argument on her behalf. Tr., pp.48-52 (D.R. 0033-34) In this argument, counsel cited to the ALJ five specific West Virginia cases in support of her position.

III. SUMMARY OF ARGUMENT

Ms. Taylor did not commit gross misconduct under *W.Va. Code* §21A-6-3(2) and the relevant decisions of the Supreme Court of Appeals. The Board found in Finding of Fact 3 that a January 11, 2021, email amounted to a qualifying prior written warning to Ms. Taylor that termination of her employment may result from her failure to take the vaccine. (D.R. 0014) This ignored the substance of those emails and testimony of both parties that Ms. Taylor did not receive either email. Ms. Taylor so testified. (D.R. 0031) James Sands ("Mr. Sands"), her supervisor agreed Tr., p.20. (D.R. 0026) Therefore, Ms. Taylor's conduct cannot be considered gross misconduct based on the proviso at the end of §21A-6-3(2) since she did not receive a qualifying prior written warning.

Find of Fact 3 stated: "3. The employer gave notice through email as well as posting the same notice on the employees bulletin board on January 11, 2021 that the employer was instituting an universal vaccination against the COVID-19 virus policy where in everyone had to be vaccinated by August 23, 2021 or have received a medical or a religious exemption from the employer." (D.R. 0014) The Decision does not cite or rely on any other document as a

qualifying prior written warning. Both the employer and Ms. Taylor testified that the she did not receive the emails stating the Employer's policy. The Board erred in making Finding of Fact No. 3.

The Board also ignored the West Virginia precedent that states that posting a notice does not qualify as a prior written warning under *W.Va. Code* §21A-6-3(2) sufficient to elevate simple misconduct to gross misconduct. In *Federoff v. Rutledge,* 175 W.Va. 389, 332 S.E.2d 403 (1985), the employer argued that the prior written warning requirement was satisfied by a written policy that was posted at the workplace. The Court addressed this argument in Footnote 4, which states, in part, the following: "...we think posting on a bulletin board is neither contemplated nor sufficient under the statute. Mere posting does not prove receipt. The statute contemplates individual receipt of a written warning issued because of past or anticipated specific acts of misconduct." 175 W.Va. at 389 (Footnote 4, in part.). Thus, the claimant's discharge there was not gross misconduct.

Under this holding, Employer's Exhibits 1 and 2 were insufficent. Those emails were not sent or delivered to Ms. Taylor, and thus there was no individual receipt of a prior written warning to Ms. Taylor established by those Exhibits. Therefore, it was error for the ALJ Decision and the Board to find that the emails constituted a qualifying prior written warning.

If the Board's Decision is argued to find Ms. Taylor guilty of gross misconduct in the absence of a qualified written warning, it is in error on that ground as well. In *Kirk v. Cole*, 169 W.Va. 520, 288 S.E.2d (1982) and *Dailey v. Board of Review*, 214 W.Va. 419, 589 S.E.2d 797 (2003), the Supreme Court of Appeals defined and then expanded on the meaning of the terms "simple misconduct" and "gross misconduct." Those cases make it clear that gross misconduct

in the absence of a qualified prior warning must rise to the level of the types of misconduct specifically enumerated in *W.Va. Code* §21A-6-3(2). *Dailey* specifically holds that the employer must offer evidence that the alleged act in question rises to a level of seriousness equal to or exceeding those items specifically listed in the statute, which are mostly criminal offenses. Ms. Taylor's declining to receive the vaccine does not amount to that level of seriousness, and the employer did not offer any evidence to show that it did.

In *Dailey v. Board of Review*, 214 W.Va. 419, 589 S.E.2d 797 (2003), the Supreme Court discussed at length the distinction between simple misconduct and gross misconduct. In that case, the duties of the claimant included driving a motor vehicle. However, he did not have a valid driver's license, and concealed this fact from his employer. The Board of Review held that this was gross misconduct, and the Circuit Court affirmed. The Supreme Court reversed.

"Where the catch-all provision of 'other gross misconduct' in West Virginia Code § 21A-6-3(2) is utilized as a basis for denial of all unemployment compensation benefits in the absence of a qualifying prior written warning, the 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. at 421, 589 S.E.2d at 799. Since, as discussed above, there was no qualifying prior written warning provided to Ms. Taylor, general principles of misconduct apply.

The Court stated that gross misconduct generally refers to criminal activity or a far more egregious form of simple misconduct. Thus, "other gross misconduct" is of the nature of criminal or otherwise dangerous activity: Destruction of property, assault, intoxication (alcohol or drug), faking or avoiding and alcohol or drug test, arson, theft, larceny, fraud and

embezzlement. These are all acts evincing a wanton and malicious motivation and attitude. No such characterization can be assigned to Ms. Taylor's declining the vaccine.

The Employer in this case failed to offer persuasive evidence as to what harm might come to it from Ms. Taylor's decision to decline the vaccine. Thus, the Employer's case here fails to establish another element necessary to prove gross misconduct, and the Board was in error in not recognizing that fact.

The Decision by the Board also ignored the evidence and misapplied the law regarding even simple misconduct, and was directly contrary to the holding in *Peery v. Rutledge,* 177 W.Va. 548, 355 S.E.2d 41 (1987).

Peery sets forth a procedure for evaluating an unemployment compensation claim when a worker refuses to comply with a workplace rule on the grounds that she reasonably and in good faith believes that complying with that rule would jeopardize her own health. The procedure outlined in *Perry* required Ms. Taylor to present evidence that she was justified or at least acted in good faith in not complying with the ruling. Ms. Taylor did that. (D.R. 0031) Ms. Taylor presented evidence of a reasonable fear of harm to her health and her inability to provide documentation supporting that reasonable fear. *Peery* then requires the employer to rebut the reasonableness of Ms. Taylor's apprehension. This, the employer, Dismas Charities, Inc. ("Dismas") completely failed to do. *Peery* makes it clear that there is no misconduct.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In regard to the criteria for oral argument stated in Rule 18A, Petitioner has not waived oral argument, her appeal is not frivolous, although the dispositive issues in this case have been

decided, they were ignored and/or misapplied by the Board. Therefore, oral argument may aid the Court in deciding the case. Therefore, Petitioner considers oral argument necessary.

In regard to whether the case should be set for a Rule 19 or Rule 20 argument, Petitioner believes that this case is suitable for Rule 19 argument as the Board erred in the application of the law, made findings and conclusions contrary to the evidence, and this case presents a narrow issue of law. This case does not meet the criteria for Rule 20 oral argument. This case may not be appropriate for a Memorandum Decision, as it calls for reversal of the Board's Decision and entry of an award of Unemployment Compensation benefits to Petitioner.

V. ARGUMENT

Petitioner's argument will use the term "Decision" to refer to the ALJ Decision (D.R. 0013-16) and the Board's Decision (D.R. 0062-64) but citations will be to the ALJ Decision since the Board summarily affirmed the ALJ without discussion or analysis.

A. STANDARD OF REVIEW

The standard of review of decisions by the Board of Review is well-settled:

> The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo.* Syllabus Point 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994)

Syllabus Point 1, *Constellium Rolled Prods. Ravenswood, LLC v. Cooper*, 245 W.Va. 731, 865 S.E.2d 473 (2021).

B. THE BOARD OF REVIEW ERRED IN FINDING THE PETITIONER COMMITTED GROSS MISCONDUCT BY DECLINING THE COVID VACCINE AND IN DISQUALIFYING HER FROM RECEIVING UNEMPLOYMENT COMPENSATION BENEFITS.

The primary error in the Decision is the finding that Ms. Taylor's declining to take the vaccine was "gross misconduct" under *W.Va. Code* §21A-6-3(2), which completely disqualifies her from unemployment benefits. That statute provides, as to "gross misconduct," as follows:

> Gross misconduct consisting of **willful destruction of** his or her employer's **property**; **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; reporting to work in an intoxicated condition, or **being intoxicated while at work;** reporting to work under the influence of any controlled substance, as defined in chapter 60A of this code without a valid prescription, or **being under the influence of any controlled substance**, as defined in said chapter without a valid prescription, while at work; adulterating or otherwise manipulating a sample or specimen in order to **thwart[ing] a drug or alcohol test** lawfully required of an employee; **refusal to submit to random testing for alcohol or illegal controlled substances** for employees in safety-sensitive positions as defined in §21-1D-2 of this code; **violation of an employer's drug-free workplace program; violation of an employer's alcohol-free workplace program; arson, theft, larceny, fraud,** or **embezzlement** in connection with his or her work; or **any other gross misconduct**, he or she is disqualified for benefits until he or she has thereafter worked for at least 30 days in covered employment: *Provided,* That for the purpose of this subdivision, the words "any other gross misconduct" includes, but is not limited to, 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. [Emphasis supplied.]

1. THE PETITIONER DID NOT RECEIVE A QUALIFYING PRIOR WRITTEN WARNING THAT DECLINING THE COVID VACCINE WOULD RESULT IN TERMINATION, SO THAT IT WAS ERROR FOR THE BOARD OF REVIEW TO FIND THAT SHE COMMITTED GROSS MISCONDUCT.

The Decision's Finding of Fact No. 3 states: "The employer gave notice through email as well as posting the same notice on the employees bulletin board on January 11, 2021 that the

employer was instituting an universal vaccination against the COVID-19 virus policy wherein everyone had to be vaccinated by August 20, 2021, or have received a medical or religious exemption from the employer." (D.R. 0014) There is no citation in the Decision to any other specific document that qualifies as a prior written warning.

Finding No. 3 is incorrect and irrelevant. It is incorrect in that the employer did not give the Petitioner a warning through email. She testified that she didn't know that she had an email account, and thus never saw any email from her employer. Tr., p.38 (D.R. 0031) Mr. Sands, for the Employer, agreed she never got that email. (Tr., p.20 (D.R. 0026) It is irrelevant in that the Supreme Court of Appeals held that posting a warning does not satisfy the requirements of *W.Va. Code* §21A-6-3(2). *Federoff v. Rutledge,* 175 W.Va. 389, 332 S.E.2d 403 (1985) (Footnote 4). Both the Employer's witness, Mr. Sands, and Ms. Taylor agreed that she did not receive the emails, so they do not constitute qualifying prior written warning.

Finding of Fact No. 4 implies that the Petitioner's reason for declining the vaccine was first her religious beliefs and only second, medical issues. This is clearly wrong. Petitioner explained that her medical reasons for declining the vaccine were her primary concern and she also explained her inability to provide documentation of those issues.

Then the Decision contains a section entitled "CONCLUSIONS OF LAW AND DICUSSION." In the first paragraph of this section, the ALJ cites §21A-6-3(2), provisions regarding gross misconduct including something for which a Claimant has "received prior written warning." It is not specified in the Decision when Ms. Taylor received it, other than in Finding of Fact 3, discussed above. The Decision also fails to discuss *any* of the cases cited to the ALJ at the December 14 hearing setting standards for what is a *qualifying* prior written warning.

At the beginning of Page 3 (D.R. 0015), the Decision states that Ms. Taylor could have received a medical exemption due to a previous severe allergic reaction to a vaccine, but makes no mention of her explanation why she could not provide documentation to support such a request, saying: "Even by the claimant's own admission, she did not procure and attach any documentation which would suggest further allergic reaction concerning her receiving the COVID-19 vaccination." This is a gross distortion of her testimony. She testified she *could not* get the relevant medical records, despite trying to do so, not that she "did not" as the Decision puts it. Tr., pp.38-39 (D.R. 0031) Ms. Taylor clearly explained that her treating physician at the time of the allergic reaction had closed her practice and, she believed, had since died. Her records were supposed to have been forwarded to her new physician, but were never received or subsequently lost. The Decision's characterization that she made no effort to obtain her medical records is unfair and misleading regarding Petitioner's inability to provide documentation to support a medical exemption, in that it suggests that she chose not to provide medical documentation. In fact, she attempted to do so, but her records were lost.

In regard to the religious exemption, the Decision says "...the Claimant provided no documentation in order to suggest her 'sincere belief in the penance of her religion.'" It is unknown what this terminology means or what this element of the Decision was referring to. She did explain her religious objections. Tr., p.40 (D.R. 0031)

The Decision errs in claiming, in Finding of Fact 3, "The employer gave notice through email...," and the only other support for there having been a qualifying prior written warning is "posting the same notice on the employees bulletin board..." (D.R. 0014) However, the Supreme Court of Appeals has held that posting is insufficient to constitute a prior written warning.

In *Federoff v. Rutledge,* 175 W.Va. 389, 332 S.E.2d 403 855 (1985) the claimant was a coalmine foreman, with a reputation of having a drinking problem. The mine superintendent orally warned him that such behavior would subject him to discharge. He came to work one morning smelling of alcohol, but denied drinking that morning. He was not fired for that incident.

In a subsequent incident, the claimant showed up for work five hours late, and again smelled of alcohol. He again admitted to have been drinking the night before, but not before coming to work. He was nonetheless fired.

He applied for unemployment benefits and was denied, the ALJ finding he was discharged for gross misconduct. The Board of Review and Circuit Court affirmed. The Supreme Court stated that the issue was whether his misconduct was simple or gross. The Court found that just having the smell of alcohol on one's breath was insufficient to prove intoxication, an enumerated ground constituting gross misconduct. Therefore, the issue became whether the "other gross misconduct" provision was sufficient to disqualify the claimant. The record was clear that any warnings received by the claimant were oral.

The employer in *Federoff* argued that the prior written warning requirement was satisfied by a written policy that was posted at the mine. The Court addressed this argument in Footnote 4, which states, in part, the following: "...we think posting on a bulletin board is neither contemplated nor sufficient under the statute. Mere posting does not prove receipt. The statute contemplates individual receipt of a written warning issued because of past or anticipated specific acts of misconduct." 175 W.Va. at 389 (Footnote 4, in part.). Thus, the Claimant's discharge was not gross misconduct.

Under this holding, the January 11, 2021, email in this case does not qualify as a prior written warning. It was not sent or delivered to Ms. Taylor, and thus there was no individual receipt of a written warning to proven by the employer. It was not directed to Ms. Taylor and did not say she would be terminated if she failed to get the vaccine.

Employer's Exhibit 3, a text message with the August 23 email attached, similarly does not constitute a qualifying prior written warning. The email attachment is illegible, and the text message itself does not contain the specificity required by the Supreme Court in written warnings. Employer's Exhibit 4 is similarly deficient. Text messages are not a reliable form of communication, for which there is not proof of receipt. They are not a "written warning," and should not under any circumstances be held to qualify as a prior written warning sufficient to establish gross misconduct. Since text messages did not exist when the "prior written warning" provision was adopted in 1981, it could not have been contemplated that they would qualify as a "written warning." The statute certainly contemplates individual receipt by the employee of a warning on paper that contained the specific elements outlined in the Court's decisions.

The Supreme Court held in *Courtney v. Rutledge*, 177 W.Va. 232, 351 S.E.2d 419 (1986), that a certain specificity is required in written warnings. Similarly, Employer's Exhibit 4, another text, does not contain the required elements: It does not say that Ms. Taylor would be fired if she did not get the vaccine. In *Courtney,* the employee was disqualified from receiving benefits for gross misconduct, that ruling was affirmed by the Board of Review and the Circuit Court. The Supreme Court reversed, finding that the employee was only guilty of simple misconduct. Mr. Courtney worked at Union Carbide, where his duties included feeding material into a reactor. He fed the material into the reactor too rapidly. He had been given both verbal

and written instructions about how to perform the job, but they did not mention that he might be terminated for failing to follow those instructions.

The Deputy's Decision found he had not been discharged for misconduct of any kind. The employer appealed, and the ALJ reversed and found that the claimant was guilty of gross misconduct. The Board of Review, and the Circuit Court affirmed.

The Supreme Court said: "There is nothing in the record to indicate that the appellant was given 'prior written warning' that a mistake during a technical project would result in termination of his employment although he was told on numerous occasions, in writing, that certain other behavior would do so." The Court reversed the finding of gross misconduct, and held that he was in fact guilty of simple misconduct for his reactor error. 177 W.Va. at 235-6.

In this case, none of the Employer's Exhibits contain the elements required under West Virginia law, and thus there was no qualifying prior written warning given to Ms. Taylor. The Decision erred in holding otherwise.

2. IN THE ABSENCE OF A QUALIFYING PRIOR WRITTEN WARNING, PETITIONER'S CONDUCT DID NOT RISE TO THE LEVEL OF GROSS MISCONDUCT.

The Supreme Court of Appeals first defined "misconduct" in *Kirk v. Cole*, 169 W.Va. 520, 524, 288 S.E.2d 547 (1982), where the Court established a basic definition, noting that it had not previously considered the meaning of the term in 21A-6-3(2). The Court quoted *Carter v. Michigan Employment Security Commission*, 364 Mich. 538, 111 N.W.2d 817 (1961), in holding that misconduct is "conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards or behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to

show an intentional or substantial disregard of the employer's interests or of the employee's duties or obligations to his employer." 169 W.Va. at 524, 288 S.E.2d at 549.

In regard to Ms. Taylor's claim, she did decline to get the untested vaccine, but that was certainly not a case of "wanton disregard of an employer's interests..." The term "wanton" has several definitions, with the most applicable to this case being the following:

> "Reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness, recklessly disregardful of the rights or safety of others or of consequences. [Citations omitted.] *Black's Law Dictionary, Revised Fourth Edition* (p. 1753, West Publishing Co.: 1968)

The Decision in this case did not make any finding or cite any fact or consequence to Ms. Taylor's employer that would fit the *Kirk* requirement of "willful and wanton disregard." Thus the ALJ Decision's finding of gross misconduct fails at the initial step by not recognizing that Ms. Taylor's choice did not meet the basic definition of misconduct.

In *Dailey v. Board of Review*, 214 W.Va. 419, 589 S.E.2d 797 (2003), the Supreme Court discussed at length the distinction between simple misconduct and gross misconduct. In that case, the duties of the claimant included driving a motor vehicle. However, he did not have a valid driver's license, and concealed this fact from his employer. The Board of Review held that this was gross misconduct, and the Circuit Court affirmed. The Supreme Court reversed.

"Where the catch-all provision of 'other gross misconduct' in West Virginia Code § 21A-6-3(2) is utilized as a basis for denial of all unemployment compensation benefits in the absence of a qualifying prior written warning, the 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, 214 W.Va. at 421, 589 S.E.2d at 799.

The Court stated that gross misconduct generally refers to criminal activity or a far more egregious form of simple misconduct, noting that W.Va. Code §21A-6-3 contains the catchall definition of conduct that the employee has received "prior written notice" that continued acts of misconduct may result in termination.

Thus, "other gross misconduct" is of the nature of criminal or otherwise dangerous activity: Destruction of property, assault, intoxication (alcohol or drug), faking or avoiding and alcohol or drug test, arson, theft, larceny, fraud and embezzlement. These are all acts evincing a wanton and malicious motivation and attitude. No such characterization can be assigned to Ms. Taylor's declining the vaccine.

The Employer in this case failed to offer any evidence as to what harm might come to it from Ms. Taylor's decision to decline the vaccine. Thus, the Employer's case here fails to establish another element necessary to prove gross misconduct or misconduct of any kind, and the Board's Decision was in error in not recognizing that fact. Ms. Taylor's declining the vaccine does not qualify as gross misconduct under the statute, and it was error for the Board to hold otherwise.

C. THE BOARD OF REVIEW ERRED IN FINDING PETITIONER COMMITTED ANY MISCONDUCT UNDER THE HOLDING IN PEERY V. RUTLEDGE

In *Peery v. Rutledge*, 177 W.Va. 548, 355 S.E.2d 41 (1987), the Supreme Court of Appeals addressed a situation similar to that now under consideration, in that the claimant there had failed to follow a work directive because of a good faith and reasonable fear of harm to his health. Mr. Peery was employed as a truck driver, and was directed to drive a truck from Nitro to Lewisburg and back, after a day of working in the warehouse. He told his supervisor that he was too tired and not alert enough to make that trip over winding mountain roads. He was fired the next day. He applied for unemployment benefits and was found eligible but disqualified for

six weeks because he was guilty of simple misconduct. The ALJ affirmed, as did the Board of Review and the Circuit Court.

The Supreme Court began its consideration of Mr. Peery's conduct by quoting the basic misconduct definition from *Kirk v. Cole*, 169 W.Va. 520, 524, 288 S.E.2d 547, 549 (1982), that it is "conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee..." 177 W.Va. at 550-1 The Court summarized its holding in *Peery* in four syllabus points:

> 1. Disqualifying provisions of the Unemployment Compensation Law are to be narrowly construed.
>
> 2. A claimant for unemployment compensation benefits is not guilty of disqualifying "misconduct" when the claimant refuses to perform a job assignment because he or she reasonably and in good faith believes that performance of the job assignment would jeopardize the claimants own health or safety or the health or safety of others.
>
> 3. If the former employer establishes that the unemployment compensation claimant has violated and ordinarily reasonable job assignment directive or work rule, the burden of going forward with the evidence shifts to the claimant to show that he or she was justified, or at least exercised good faith, in not complying with the directive or rule. If the claimant then introduces evidence of his or her reasonable fear of harm to the claimant's or others' health or safety, the former employer must rebut the reasonableness of the claimant's apprehension.
>
> 4. A claimant for unemployment compensation does not necessarily waive the right to raise the issue of his or her reasonable and good faith apprehension of harm to the health or safety of the claimant or others by accepting employment with the knowledge that the working conditions involve a health or safety risk.

177 W.Va. at 549, 355 S.E.2d at 42.

Syllabus Point 3 states that the burden of proof on this issue shifts at several points. When the employer establishes that there was a violation of a work rule or directive, the claimant

must establish that the refusal to follow the rule was made in good faith. "Not every such refusal, however, constitutes such 'misconduct.'" 177 W.Va. at 551, 355 S.E.2d at 44. Then the employer may rebut the reasonableness of that belief. The Court states that the claimant's belief should not be merely subjective but "...objectively based upon his or her experience or the experience of other workers under similar circumstances." 177 W.Va. at 552, 355 S.E.2d at 45. (citations omitted). The Court found that Mr. Peery had committed no misconduct and was eligible for benefits.

In this case, Ms. Taylor had to show that her fears that harm to her health would result from following the vaccine work directive are objectively based upon her experience or the experience of other workers under similar circumstances. She met this burden Tr., p.38-39 (D.R. 0031-32).

The employer in this case offered no rebuttal to Ms. Taylor's good faith belief, and, in fact, vouched for her honesty. "I feel Ms. Taylor is honest, hardworking and dependable." (D.R. 0053) Ms. Taylor met that test, and it was error for the Board to hold otherwise.

Ms. Taylor testified that she had previously had a severe allergic reaction to a vaccination, but was unable to provide documentation because her doctor at the time had retired years before, and that her medical records, which she was told would be sent to her new physician's office, were lost in the transition. Thus, through no fault of her own, she was unable to provide them to the employer in this case. Therefore, the Board should have accepted Ms. Taylor's uncontradicted testimony that a past allergic reaction to a vaccination was a reasonable and objective reason, based on her past experience, for her to decline the vaccine. This is especially true since Mr. Sands vouched for Ms. Taylor's honesty. Therefore, her declining to take the vaccination was reasonable and objectively based upon her experience, and does not

constitute any form of misconduct under *Peery*. The Board should have awarded Ms. Taylor Unemployment Compensation benefits without and period of disqualification.

VI. CONCLUSION

It was error for the Board to find that Ms. Taylor was terminated for gross misconduct for two reasons. First, she did not receive a qualifying prior written warning that failure to take the vaccine would result in her termination. None of the elements of such a warning were satisfied: She got no written document specifically addressed to her, none existed that was directed specifically to her, and the January 11 email, relied upon by the Board, was not sent to her.

Second, since there was no written warning, the Employer was required to show that her conduct rose to the level of assault, destruction of property, coming to work drunk or on drugs, theft, embezzlement and the like. The Employer presented no such evidence.

Further, even if Ms. Taylor's decision could be characterized as misconduct of any sort, it was clearly not gross misconduct. None of the communications that the Employer appears to claim are qualifying prior written warnings contained all of the elements required by the decisions of the Supreme Court of Appeals. The emails were not sent to Ms. Taylor, did not contain the required elements of a prior written warning, and posting them is insufficient under *Federoff*. Text messages are not a reliable form of communication, were not contemplated as a "written" warning when the statute was modified in 1981, and, like the emails, do not contain the elements required by the Supreme Court.

Petitioner here demonstrated that she had a reasonable and good faith fear of harm to her health from receiving the vaccination, based on her own prior experience with a previous vaccination and her observation of others' experience. The Employer offered no evidence to

rebut the reasonableness and good faith of that belief. Thus, under the holding in *Peery*, she is not guilty of any type of misconduct.

Therefore, the Petitioner should be awarded the Unemployment Compensation benefits to which she is entitled without any period of disqualification.

AMANDA D. TAYLOR
By Counsel

James D. Kauffelt
Kauffelt & Kauffelt
WV State Bar ID# 1964
P. O. Box 3082
Charleston, WV 25331-3082
(304) 345-1272
jkauffelt@wvdsl.net

VII. CERTIFICATE OF SERVICE

I, James D. Kauffelt, counsel for Petitioner, Amanda D. Taylor, do hereby certify that I have served the foregoing "Brief of Petitioner Amanda D. Taylor" upon counsel for Respondent Workforce West Virginia, Kimberly A. Levy, Esquire, by E-Service and by depositing a true and exact copy thereof in the United States Mail, First Class postage prepaid, addressed as follows:

Kimberly A. Levy, Esquire
WORKFORCE West Virginia
1900 Kanawha Boulevard East
Building 3, Suite 300
Charleston, WV 25305

and upon Respondent Dismas Charaties, Inc., by depositing a true and exact copy thereof in the United States Mail, First Class postage prepaid, addressed as follows:

James Sands
DISMAS CHARITIES, INC.
113 Edgar Street
St. Albans, WV 25177

this the 2nd day of December, 2022.

James D. Kauffelt