INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Amanda D. Taylor,
Claimant Below, Petitioner

vs.) No. 22-ICA-81

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

REPLY BRIEF OF PETITIONER AMANDA D. TAYLOR

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REPLY BRIEF OF PETITIONER AMANDA D. TAYLOR

This Reply Brief is filed on behalf of the Petitioner, Amanda D. Taylor, in response to the Brief on Behalf of Respondent Workforce West Virginia ("Respondent's Brief").

I. RESPONDENT'S BRIEF CONTAINS MISREPRESENTATIONS AND INCORRECT STATEMENTS OF THE FACTS AND THE PROCEDURE FOLLOWED IN THIS CASE.

Respondent's Brief contains misrepresentations of the record and numerous errors of fact. Respondent does not even correctly state the procedure followed. These errors range from the trivial to the egregious.

Respondent correctly stated a telephonic hearing *was* to take place on December 7, 2021. (D.R. 0011) Respondent then says: "A hearing took place on this date..." Respondent's Brief, pp.4-5. The hearing actually took place in person on December 14. (D.R. 0012) (Petitioner's Brief, p.3.) It should be noted that the Transcript of the hearing (D.R. 0022-34) was not taken by a court reporter and itself contained numerous omissions and errors. It was prepared by persons unknown from a simple cassette tape only after the ALJ Decision was appealed to the Board of Review.

Of more significance is this statement: "A corrected decision was issued by Administrative Law Judge (ALJ) Trent A. Redman on May 16, 2022, and mailed the same date." (Respondent's Brief, p.5.) This statement is false. The original ALJ Decision was issued on May 16, five months after the hearing, and it was not included in the Designated Record. (That Decision is attached hereto as Attachment A.) The first appearance of a "Corrected Decision" was in the Designated Record (D.R. 0013-16) filed on October 13. (See Petitioner's Brief, p.3.) It is unknown who made the "corrections" to that document.

The Respondent's discussion of the facts of this case is deliberately misleading. In the first paragraph on page 8 of Respondent's Brief, Respondent inserts an edited quote from the testimony of Mr. Sands, characterizing "as a response to the question as to whether Petitioner received the emails from January 11, or August 20, 2021..." This is incorrect. The full exchange that contains the quote used by Respondent is as follows:

> Q Let me ask first about (unintelligible) marked as Exhibit 1, the January 11th email. That appears to be a document that going from a guy named Ray (phonetic) White (phonetic) to a guy named Ray White. Do you know did-did this email go to Amanda Taylor?
>
> A That is yes and no.
>
> Q I'm—

A Every—I'll explain. Every Dismas employ has a Dismas email. Now, most of our staff don't bother to activate it but every single Dismas employee does have an email. Her email address is ataylor@dismas.com. Now, I don't necessarily push employees to activate their email, but that's why I always put stuff on the-the staff bulletin board.

Q Okay. You didn't understand my question.
A Okay.
Q Did Amanda Taylor get this email? Yes or no?
A No.

(D.R. 0026; Tr. p.20.)

Later, Mr. Sands was asked about the August 20 email and testified as follows:

Q And, did Amanda Taylor receive this [August 20] email?
A She received these documents from me in a text message which has been entered into evidence.
Q All right. That wasn't my question though. Did she get the [August 20] email?
A She didn't get the [August 20] email.

(D.R. 0027; Tr., p.24)

Ms. Taylor's testimony regarding the January 11 email was as follows:

Q... We marked as the Employer's Exhibit 1, a January 11th email, that on the face of it is saying Mr. White to a Mr. White (unintelligible) contractual obligations and stuff. Did you ever see that document before?
A I do not recall seeing that email (unintelligible).
Q And I guess I should ask-- Mr. Sands talked about having every-every employee could have-could have a Dismas email account. Did you have one?
A No. I was never aware that we had an email account.
Q Did you ever have any kind of email from Dismas?
A Not from Dismas. I have received emails from Mr. Sands and (unintelligible).

(D.R. 0031; Tr. p.38.)

Later in Respondent's Brief, Respondent again discusses the emails. Respondent falsely claims that Ms. Talyor "denied having access to her email at work," and that Mr. Sands testified Ms. Taylor had a "working email address with the Dismas domain name." (Respondent's Brief,

p.14) Respondent cites page 20 of the Transcript to support this claim. (D.R. 0026; p.20.) This is contradicted by the quotes above from Ms. Taylor and Mr. Sands. Nowhere did Mr. Sands say that Ms. Taylor had a "working" email account. Ms. Taylor did not know she had a Dismas email address, and Mr. Sands did not "push employees to activate their email..." Mr. Sands stated that "most" of the employees did not activate their email accounts, so Respondent's implication that Ms. Taylor had some nefarious purpose behind not activating hers is ridiculous, especially since she didn't know it existed.

At page 16 of Respondent's Brief, Respondent claims that the fact that Ms. Taylor did not receive the emails in question should be disregarded because "...she did not receive them because she chose to not activate her work email account." (Respondent's Brief, p.16) Yet again, this is a false statement. Ms. Taylor clearly testified that she did not know that she had a Dismas email account. (D.R. 0031, Tr., p.38)

In fact, it appears that blaming Ms. Taylor for not "activating" her Dismas email account, as "most" of her fellow employees did not activate theirs (according to Mr. Sands), is Respondent's primary argument, as it is mentioned in Respondent's Brief at pp.14, 16 (twice) and 17. Likewise, having something put in her "box," which, like posting, is not delivery to the individual employee, is argued at pp.14, 16 and 17.

Respondent quotes from an online questionnaire at p.15 in an attempt to prove a qualifying prior written warning. This argument ignored the fact that it was admitted over objection that she did not have counsel at that time, did not understand that a "qualifying prior written warning" is a term of art and that it must contain certain elements and be personally directed to her. Ms. Taylor testified that she "...did not understand the significance of a few of the questions." (D.R. 0023; Tr., p.7) It is not mentioned in the Decision.

Since the online questionnaire excerpt it does not even specify what Ms. Taylor was referring to, and is not identified to any document in the record, it should be disregarded.

The Respondent's Brief, at pages 14 and 16 makes an argument based on a text message with an illegible attachment. Text messages are an inherently unreliable form of communication, sometimes being received by the addressee, sometimes not. Text messages do not qualify as a written warning. The Supreme Court indicated that a "written letter of warning in the record..." was determinative in *Courtney v. Rutledge,* 177 W.Va. 232, 235, 351 S.E.2d 419, 422 (1986). In ruling that posting a warning was insufficient in *Federoff v. Rutledge*, 175 W.Va. 389, 332 S.E.2d 855 (1985), the Court said this about what was a qualifying prior written warning: "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 395 (Footnote 4, in part.) Thus, the statute contemplates a warning on paper directed to an individual employee. That did not occur in this case. Just as posting is insufficient, merely putting something in an employee's "box" is insufficient.

II. RESPONDENT'S BRIEF FAILS TO MAKE ANY ARGUMENT DIRECTLY SUPPORTING THE BOARD OF REVIEW'S DECISION IN THIS CASE.

As noted above, the Decision in this case was rendered by the ALJ on May 16, 2022, five months after the hearing. It contained a number of typographical and other minor errors. The document referred to by Respondent as the "Corrected Decision" fixed some typographical errors. However, it was never served on the Claimant or counsel until it was filed with the Designated Record in this case on October 13, 2022. Respondent's Brief distorts that fact at page 5.

Respondent does not discuss what part of, if any, the Decision supports the result of finding Ms. Taylor guilty of gross misconduct. The Decision only considers the false claim that Ms. Taylor was given notice through email on January 11, 2021, which Respondent contends was a qualifying prior written warning. Finding of Fact 3. (D.R. 0014) As noted above, Ms. Taylor never received that email. The Decision does not rely on the August 20 email, or any text message. Therefore, Respondent's discussion of the August 20 email and the text messages is irrelevant to the Court's consideration of this appeal. Even if the Decision did rely on them, Ms. Taylor did not receive the August 20 email and the text message (if text messages can even be a qualifying prior written warning) had an illegible attachment, which does not qualify. (D.R. 0047-48)

Respondent does not address the contents of the Decision anywhere in its Brief. The Respondent spends a good bit of its Brief discussing evidence that was not relied on in the Decision. Administrative agencies are required to clearly explain in their decisions the reasons they have taken the action under review. The Supreme Court has held:

> We have also said that in requiring an order by an agency in a contested case to be accompanied by findings of fact and conclusions of law, "the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which led the agency to its conclusion..." Syl. Pt. 2, in part, *Citizens Bank v. W. Va. Board of Banking and Financial Institutions,* 160 W.Va. 220, 233 S.E.2d 719 (1977).

Muscatell v. Cline, 196 W.Va. 588, 598, 474 S.E.2d 518, 528 (1996). Neither the ALJ or the Board of Review met this standard, so their denial of unemployment benefits to Ms. Taylor was unsupported by reference to record evidence.

The only justification for denying Ms. Taylor's unemployment benefits stated in the Decision are based on the January 11 email, which was not a qualifying prior written warning.

Both Ms. Taylor and Mr. Sands agreed that Ms. Taylor did not receive that email. She denied having ever seen it and no evidence was offered to contradict her testimony.

III. RESPONDENT'S CLAIM THAT MS. TAYLOR'S CONDUCT CONSTITUTED "OTHER GROSS MISCONDUCT" IS CONTRARY TO SUPREME COURT OF APPEALS CASES ADDRESSING THAT ISSUE.

In Petitioner's Brief, at pages 17-19, Petitioner argued that, since there was no qualifying prior written warning, the general catch-all provision of "other gross misconduct" must be considered, as held in *Dailey v. Board of Review,* 214 W.Va. 419, 589 S.E.2d 797 (2003) in which Syllabus Point 6 held that "...in the absence of a qualifying prior written warning, the employer is required to furnish evidence that the act in question rises to the level of seriousness equal to or exceeding that of the other specifically other enumerated items, and the resolution of matter brought under this subdivision must be analyzed under a case-by-case basis." Those specifically enumerated items are all criminal offenses: Destruction of employer's property, assault, intoxication, faking an alcohol or drug test, arson, theft, larceny, fraud and embezzlement. These acts all also show a wanton and malicious motivation and attitude toward the employer's interests. Thus, Ms. Taylor's conduct decision is not misconduct under *Dailey* and *Kirk v. Cole,* 169 W.Va. 520, 524, 288 S.E.2d, 549 (1982).

All Respondent has by way of argument against Petitioner on this issue is that declining the vaccine is as serious as a felony, is it might reduce the exposure of Petitioner and her co-workers, and the inmates in the facility, even though the vaccine does not prevent infection or transmission. This is not at the same level of seriousness as a felony. Respondent quotes from *Dailey* the passage stating that to be gross misconduct, and active misconduct must be "particularly dangerous, shocking, or egregious ..." Respondent goes on to include a statement

from *Dailey* demonstrating that characterizing Ms. Taylor's declining the vaccine as gross misconduct "...should be carefully reviewed and should not be undertaken unless it is clear that such acts constitute gross misconduct as defined by the legislature." *Dailey*, 214 W.Va. at 427, 589, S.E.2d. at 810) This principle is fatal to Respondent's argument attempting to characterize declining a vaccine as gross misconduct.

As an example, in *Ohio Valley Medical Center v. Gatson*, 202 W.Va. 507, 505 S.E.2d 426 (1998), the Supreme Court held that the conduct of a nurse in repeatedly making errors administering medication and failing to administer medication, which resulted in her receiving a written warning that similar errors in the future would result in her termination, after which she made more potentially life-threatening errors, was not gross misconduct, nor even simple misconduct. Ms. Taylor's conduct certainly does not rise to the level established in *Dailey*, especially in light of cases such as *Ohio Valley Medical Center*. It is not sufficient to find Ms. Taylor guilty of gross misconduct.

IV. RESPONDENT'S DISCUSSION OF *PEERY v. RUTLEDGE*, WHICH COMPLETELY FAILS TO ADDRESS THE HOLDING OF THAT CASE, DEMONSTRATES ITS CONTROLLING AUTHORITY IN THIS CASE.

Petitioner also argues that the Board of Review should have but did not apply the Supreme Court's holding in *Peery v. Rutledge*, 177 W.Va. 548, 355 S.E.2d 41 (1987). (Petitioner's Brief, pp.19-22) In that case, the Court held that an employee is not guilty of disqualifying misconduct when he or she refuses to perform a job assignment or follow a work rule because he or she reasonably and in good faith believes that performing the assignment or following the rule would jeopardize his or her own health or safety is not guilty of disqualifying misconduct. *Peery* is discussed in Petitioner's Brief in pages 19-22.

Respondent replies to this argument at pages 18-20 of its Brief. Respondent does not discuss any of the legal principles established by the Supreme Court in *Peery*, and ignores the four syllabus points in that case, which are quoted in full at page 20 of Petitioner's Brief. The employee in *Peery* refused to drive a truck over winding roads because he was exhausted. This, Respondent claims, constituted "...concrete concerns that anyone can readily understand." Respondent's Brief, p.19. It appears that this is the standard advocated by Respondent for judging arguments made pursuant to *Peery*. Petitioner's concerns about adverse reactions to vaccines, based on her personal experience, and her observation of others' experiences, were made in good faith and justified by her reasonable fear to harm of her own health. This is the standard established in Syllabus Point 3 of *Peery*, which then provides that the burden shifted to the employer to rebut the reasonableness of Ms. Taylor's apprehension of possible personable harm. The employer in this case completely failed to meet that burden and the Respondent does not argue otherwise.

All the Respondent's Brief does in response to Ms. Taylor's meeting the burden under *Peery* and the employer failing to meet its burden, is to claim she did not act in good faith and then argue matters irrelevant to the *Peery* issue. Respondent ignores the fact that Mr. Sands vouched for Ms. Taylor's honesty: "I feel Ms. Taylor is honest, hardworking and dependable. (D.R. 0053; D.R. 0028, Tr., p.28) Thus, the Employer here supported her credibility.

Ms. Taylor cited other reasonable fears of harm to taking the COVID vaccine. She cited the fact that the vaccine did not go through normal testing protocols, in that it came with a severe risk of developing other health issues such as heart disease, and that she knew people who had suffered adverse reactions. Tr., pp.40-41. (D.R. 0031-32) Mounting numbers of medical

studies have shown her belief to be well founded, in that reports of increased cases of myocarditis and heart attacks continue to be published.

Ms. Taylor's decision was justified, made in good faith, and reasonable. No evidence was offered by the Employer to prove otherwise, therefore, under the holding in *Peery*, Ms. Taylor is not guilty of any misconduct.

V. CONCLUSION

The issue in this case is not whether Ms. Taylor knew that her employer was going to require employees to receive the COVID vaccine. The issue is first, whether the employer provided a sufficient qualifying prior written warning to Ms. Taylor, that was specific and directed and delivered to her, that she had to receive the vaccine, thus disqualifying her from unemployment compensation benefits. This did not happen.

The second issue is whether, without a qualifying prior written warning, Ms. Taylor's conduct rises to the level of that outlined in the statute in its seriousness as gross misconduct. In other words, is it at the level of a criminal offense? The answer to that is no. Therefore, she is not guilty of gross misconduct.

The third issue is, under the Supreme Court's holding in *Peery*, did Ms. Taylor meet the test therein established, and did the employer rebut it? The answers are yes, she met the *Peery* test, and no, the employer did not rebut it.

Therefore, Ms. Taylor should be awarded full unemployment compensation benefits.

AMANDA D. TAYLOR
By Counsel

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VII. CERTIFICATE OF SERVICE

I, James D. Kauffelt, counsel for Petitioner, Amanda D. Taylor, do hereby certify that I have served the foregoing "Reply 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 6th day of February, 2023.

James D. Kauffelt

Board of Review
WORKFORCE West Virginia
1900 Kanawha Boulevard East
Building 3, Suite 300
Charleston, West Virginia 25305
304-558-2636/1-800-635-0189

AMANDA D TAYLOR
573 JEFFERSON STREET
ELKVIEW, WV 25071 0000

Case No. R-2021-4361 (R-1-C)

IN THE MATTER OF:

Claimant: AMANDA D TAYLOR
S.S. No. : XXX XX XXXX
Address :

Employer: DISMAS CHARITIES, INC.
Address : 113 EDJAR ST ST ALBANS, WV 25177

This case came on for telephonic hearing before Trent Redman, Administrative Law Judge, on December 07, 2021.

APPEARANCES:

Claimant appeared telephonically with James Kauffelt, Attorney. Employer appeared telephonically by James Sands, Director of Residential Reentry Center.

ISSUE:

The Claimant appealed from the decision of the deputy at Charleston, West Virginia, dated November 09, 2021, which held: "Claimant disqualified beginning October 10, 2021 to indefinite; discharged for act of gross misconduct. Disqualified until claimant returns to covered employment and has worked therein at least thirty working days."

FINDINGS OF FACT:

1. The claimant was employed by the above employer as a relief cook from February 20, 2019 until October 15, 2021, earning $18.31 per hour and working every other weekend.

2. The employer is a re-entry program for in mates newly released from prison.

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 20, 2021 or have received a medical or a religious exemption from the employer.

4. The claimant refused to get any available form of the COVID-19 vaccine because of both her religious beliefs and certain medical issues that she had suffered from previously.

5. The employer's policy requiring employees to get vaccinated or to have received their exemption, either medical or religious by August 20, 2021 was extended to September 03, 2021.

6. The medical exemption request went before the medical exemption committee, a third party provider for the employer, and was ruled upon on an individual basis. The religious exemption also went before a separate religious exemption committee which was a corporate provider.

7. The claimant requested both exemptions, however, provided no documentation for either exemption.

8. The claimant continued to refuse to be vaccinated which was considered direct insubordination for a universal policy.

9. The claimant still refuses to be vaccinated for personal reasons, however, she offered to continue to wear Personal Protective Equipment (PPE), namely masks and gloves as well as being tested every two weeks.

10. The claimant understood that if she refused the vaccine that she could not continue to work for the employer, and as such her refusal is paramount to being discharged for an act of gross misconduct as the request, requirement, and deadlines were all in writing.

CONCLUSIONS OF LAW and DISCUSSION:

Since the claimant was discharged, the issue in this case is whether the claimant was discharged for an act of misconduct. Section 21A-6-3(2) of the West Virginia Code provides that an individual shall be disqualified for benefits for the week in which he or she is discharged for gross misconduct and shall remain disqualified until he or she has thereafter worked for at least thirty working days in covered employment. "Gross misconduct is defined in this section to include "...any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from such act or acts."

Since the claimant was discharged, the issue is whether the claimant was discharged for misconduct, and if the claimant did commit misconduct, whether the claimant committed simple misconduct or gross misconduct. did commit misconduct, did the claimant commit simple misconduct of gross misconduct.

The issue herein is clear. That is to say that the claimant was responsible to do one of two things in order to maintain her employment. The claimant, as well as all other employees for this national employer, were all notified that they needed to receive the COVID-19 vaccine or apply for and receive an exemption. It is clear that the claimant refused to be vaccinated and even testified that she still refuses to be vaccinated.

However, the claimant had every opportunity over an almost eight month period to apply for an exemption, either medical or religious. The claimant argues that she should have received a medical exemption based upon her previous allergic reaction to the influenza vaccine. Even by the claimant's own admission, she did not procure and attach any documentation that would suggest further allergic reaction concerning her receiving the COVID-19 vaccination. If the claimant would have provided the necessary documentation to the committee, she would have had a chance of receiving an exemption, but with no documentation to support her claim the claimant's application for exemption was denied.

The other exemption available to the claimant was a religious exemption. The second exemption available was based on one's religion and in order to be eligible for this exemption, certain documentation needed to be provided to the employer on or before August 20, 2021, but the claimant provided no documentation in order to suggest her "sincere belief in the penance of her religion." It is not the duty of this Administrative Law Judge to question the claimant's sincerity of her faith.

The claimant's attorney takes great strides in arguing first that the universal policy is unlawful. This is unfounded in the State of West Virginia, at the time of this hearing. However, any and all private business are able to establish rules that control the workplace. Each employer also has a responsibility to protect its employees as well as those it serves.

The claimant's attorney's second argument is based merely on syntax as he quotes the statue herein attempting to redefine the word "act". The claimant's attorney skillfully attempts to argue that the claimant not receiving the vaccination is actually not an act under the law as the definition provided by Merriam-Webster dictionary. The section that he quotes says that an act is the "doing of a thing", or the process of "doing of a thing". This argument has no merit as the "thing" that was done was in fact an act of refusal and noncompliance.

The claimant was warned multiple times in writing, despite the argument that she did not know about the universal policy initially as well as being uninformed concerning the exemptions. Therefore, because multiple warnings were promulgated in writing and the employer even allowed extensions of deadlines, the claimant was discharged for acts of gross misconduct per the prior written warning that termination of employment may result from such act or acts.

DECISION:

The decision of the deputy is affirmed. The claimant was discharged for gross misconduct. The claimant is disqualified until claimant returns to covered employment and has worked therein at least thirty working days.

If West Virginia is in an Extended Benefit Period when your regular benefits are exhausted, this decision, if it becomes final, will have the effect of denying entitlement to Extended Benefits in accordance with the West Virginia Unemployment Compensation Law [§21A-6A-1(12)(G)].

This, the 16th day of May, 2022.

TRENT A REDMAN
ADMINISTRATIVE LAW JUDGE
BOARD OF REVIEW
WORKFORCE West Virginia

TAR/cf
Date Mailed: 05/16/2022
By: cf

RIGHT OF FURTHER APPEAL: This decision is final unless a party appeals to the Board of Review within EIGHT DAYS. If any party in this decision desires to take a further appeal, such appeal must be filed in writing within EIGHT DAYS from the date the decision was mailed to you, or not later than * 05/24/2022 at the local office where the claim was filed. The appeal may also be mailed directly to the Board of Review, 1900 Kanawha Boulevard East, Building 3, Suite 300, Charleston, WV 25305, and must be **postmarked** no later than the above *date, unless such date falls on a weekend or holiday, at which time the Board of Review will accept the appeal if it is filed on the next working day.

CC: James D Kauffelt 300 Capitol St Ste 803 Charleston, WV 25301
Benefits Admin 9733
Benefits Tech Support 9733