CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

DEJANAY T WASHINGTON
Claimant-Appellant

Precedent Benefit
Decision No. P-B-510

THE TACHI PALACE HOTEL
c/o EQUIFAX WORKFORCE SOLUTIONS
Employer

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

MICHAEL ALLEN

ROBERT DRESSER

ELLEN CORBETT

Pursuant to section 409 of the California Unemployment Insurance Code, AO-379222 REMAND is hereby designated as Precedent Decision No. P-B-510.

Adopted as Precedent: February 24, 2016

Case No.: AO-379222
Claimant: DEJANAY T WASHINGTON

REM

The claimant appealed from the decision of the administrative law judge that held the claimant disqualified for benefits under section 1256 of the Unemployment Insurance Code.[1] The employer's reserve account was relieved of benefit charges.

ISSUE STATEMENT

The issues before us are as follows: Was the claimant discharged for misconduct connected with her most recent work within the meaning of code section 1256 and should the employer's reserve account be relieved of benefit charges pursuant to code sections 1030 and 1032? What is the effect of an employer's "no fault" attendance policy upon the adjudication of the unemployment insurance claim of a claimant who was discharged for exceeding the maximum points allowed under that policy?

FINDINGS OF FACT

Prior to filing her claim for unemployment insurance benefits, the claimant was last employed by the subject employer as a gift shop clerk earning $9.38 per hour. The claimant had been so employed for approximately one year and eight months when she was discharged on June 23, 2015.

The claimant was discharged because her late arrival at work on June 23, 2015 caused the claimant to incur a five point penalty under the employer's "No Fault Attendance System" and thereby exceed the ceiling of ten points allowable under that system within a twelve month span. Pursuant to that system, an employee who receives ten attendance points in any twelve month period is separated from employment. That system was instituted in December, 2014 and the claimant concedes that she was aware of the terms of the system.

Under the employer's attendance point system, a failure to notify the employer by two hours into an employee's scheduled work shift that the employee would be late or absent for that shift is considered an instance of "no-call, no-show" and results in a five point penalty. That penalty was imposed on the claimant because the claimant on June 23, 2015 arrived at work at 8:08 a.m. for a work shift that

[1] Unless otherwise specified, all code references are to the Unemployment Insurance Code.

was scheduled to start at 6:00 a.m. without providing the employer with any advance notice that the claimant would be tardy. The employer's attendance system requires an employee who will be unable to arrive at work as scheduled to notify the employer of that fact at least two hours before that scheduled start time. The record does not reflect whether the employer, before discharging the claimant, inquired of her as to the reason for her tardiness on June 23, 2015 and the reason for her failure to promptly notify the employer in advance that she would be tardy.

When the claimant on June 30, 2015 opened her claim for unemployment insurance benefits, the claimant gave the Employment Development Department (EDD) the following explanation for her separation from employment: "I was 2 hours late due to personal reasons[.] I wasn't able to make it to work on time [.] I been homeless for a month [.] I barely got a place[.]"

A representative of EDD interviewed the claimant on July 15, 2015 concerning the claimant's benefit claim. That representative's record of that interview indicates that the claimant attributed her tardiness on June 23, 2015 to a "personal problem" that the claimant did "not wish to disclose." Both the record of that interview and the documentation of the claimant's June 30, 2015 description of the reason for her separation from employment were in the case file prior to the hearing and were admitted into evidence during the hearing on August 26, 2015.

At the hearing, the claimant conceded both that she arrived at work at 8:08 a.m. on June 23, 2015 and that she failed to notify the employer prior to that late arrival that she would be tardy that morning. During the hearing, the claimant did not offer any explanation for either that tardiness or her failure to provide the employer with advance notice that she would be tardy. The administrative law judge did not ask the claimant for any explanation concerning those two matters.

The employer is a hotel and casino that operates 24 hours per day. The gift shop clerk who was on duty prior to 6:00 a.m. on June 23, 2015 was scheduled to be relieved of duty by the claimant when the claimant reported for her work shift at 6:00 a.m. Due to the claimant's tardiness, that gift shop clerk remained at his work station until the claimant arrived at 8:08 a.m. The claimant's manager was unaware of the claimant's tardiness on June 23, 2015 until that manager observed the other gift shop clerk preparing to finally leave the work premises subsequent to the claimant's late arrival.

The claimant admits that prior to June 23, 2015 she had been warned about her attendance. The claimant also admits that she had incurred six attendance points before June 23, 2015. The employer contends that the claimant left work early on

April 7, 2015 and April 16, 2015, was tardy on April 4, 2015 as well as April 9, 2015, was absent on January 30, 2015, February 12, 2015, and March 10, 2015, and issued a final written warning on April 18, 2015 due to her attendance deficiencies. No further details concerning those incidents prior to June 23, 2015 were offered by the parties or elicited by the administrative law judge during the hearing. On one occasion the employer ultimately agreed to delete an attendance point that had been charged to the claimant because the employer conceded that the claimant had not been afforded an adequate break between assigned work shifts.

The employer's "No Fault Attendance System" essentially requires an employee to obtain advance approval for taking time off from work. Unapproved absences from work result in the employee being assessed attendance points, except in limited circumstances. The employer's attendance system does not assess points for absences due to a documented on-the-job injury, pre-approved scheduled time off, jury duty, bereavement leave, approved personal leave and approved military leave. The employer reserves the right to review each attendance infraction on a case-by-case basis, but otherwise the fact that an employee may have had good cause for any instance of tardiness, absence, early departure from work, or failure to provide the required advance notice is not necessarily relevant to the assessment of points under the employer's system.

The number of points assessed under the employer's attendance system for each incident of tardiness depends upon the extent of the tardiness and the timing of the employee's notification, if any. Thus, a late arrival within two hours of the start time results in a one-half point penalty, whereas a late arrival of more than two hours past the start time with notice to the employer results in a one point penalty. The employer's system also specifies the range of points to be assessed in a number of other attendance scenarios.

REASONS FOR DECISION

Many employers have adopted strict liability or "no fault" attendance policies similar to the system instituted by the employer in this case. Under these policies, the reason for the attendance infraction that generates the penalty point or points is often irrelevant and employers frequently impose points for absences, incidents of tardiness, or early departures that are for good cause. The Appeals Board has thus far not issued a decision that specifically addresses the relevance of such a "no fault" attendance policy to the adjudication of the unemployment insurance benefit claim of a claimant who was discharged for exceeding the maximum points allowed under the policy. Our review of this case has convinced us to remedy that omission.

The Elements of Claimant Fault, Employer Injury, and Proximate Cause in Unemployment Insurance Law

An individual is disqualified for unemployment benefits if he or she has been discharged for misconduct connected with his or her most recent work. (Unemployment Insurance Code, section 1256.)

The employer's reserve account may be relieved of benefit charges if the claimant was discharged for misconduct. (Unemployment Insurance Code, sections 1030 and 1032.)

Code section 100 affirms that the unemployment insurance program has been established to provide benefits to persons "unemployed through no fault of their own." "Accordingly, fault is the basic element to be considered in applying the code sections on unemployment compensation." (*Rowe v. Hansen* (1974) 41 Cal. App. 3d 512 at p. 521.) Thus, disqualification under code section 1256 generally requires a showing of fault on the part of the claimant.

The type of fault that constitutes misconduct for purposes of code section 1256 was defined in Precedent Decision P-B-3. Precedent Decision P-B-3, citing *Maywood Glass Co. v. Stewart* (1959) 170 Cal. App. 2d 719, described misconduct as being a substantial breach by the claimant of an important duty or obligation owed the employer that is willful or wanton in character and tends to injure the employer. The same decision established that mere inefficiency, unsatisfactory conduct, poor performance as a result of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion do not represent misconduct.

In *Amador v. California Unemployment Insurance Appeals Board* (1984) 35 Cal. 3d 671, the California Supreme Court confirmed that an employee who establishes good cause for failing to comply with a reasonable employer rule or directive has only made a good faith error in judgment that does not amount to misconduct. In *Paratransit v. Unemployment Insurance Appeals Board* (2014) 59 Cal. 4th 551, the California Supreme Court held that a claimant who was discharged for refusing to comply with a reasonable employer directive had good cause for that refusal and was therefore discharged for reasons other than misconduct. The claimant's refusal was attributed to a reasonable and good faith error in judgment rather than behavior that was sufficiently culpable to embody misconduct. In so holding, the Court observed that "one cannot determine whether an employee's action is misconduct within the humanitarian purpose of the unemployment compensation statutes without judging the reasonableness of his act from his standpoint in light of the circumstances facing him and the knowledge possessed by him at the time." (*Ibid*. at p. 559.)

Significantly, in *Paratransit, supra,* 59 Cal 4th at p. 564, the Court also declared that "a single act of disobedience without prior reprimands or warnings generally is not misconduct unless the act is substantially detrimental to the employer's interest." We believe it can be safely posited that in referring to "prior reprimands or warnings" the Court intended to reference only those prior reprimands or warnings that were justified.

On the question of what actions will injure or tend to injure an employer's interest, much less be "substantially detrimental" to that interest, limited guidance exists and the answer will depend upon an analysis of the facts presented. Yet it is clear that such analysis need not be limited to economic or easily quantifiable factors and may include the intangible injury to an employer's authority that results when that authority is openly defied. In *Rowe, supra,* 41 Cal. App. 3d 512 the claimant was discharged for refusing to obey a supervisor's order to go home following the claimant's failure to comply with a reasonable rule. The claimant had previously received numerous warnings concerning a wide variety of rule violations. The claimant's refusal to comply with the supervisor's directive was held to represent misconduct. The claimant's conduct was characterized as manifesting "a persistent and enduring intractability." (*Ibid.* at p.522) Although the record was devoid of evidence that the claimant's recalcitrance had harmed the employer's economic interests, created an obvious disturbance in the workplace, or resulted in a loss of business, the claimant's contention that the employer had not been harmed by the claimant's insubordination was rejected: "However, such harm as [claimant] contends must be shown cannot reasonably be limited to immediate and direct economic consequences. When the authority of those in whom the employer has confided responsibility for the day-to-day operation of the business is flouted, the interests of the employer suffer." (*Ibid.* at p. 523)

In addition to the principles set forth in the above-cited authorities, two other fundamental precepts have been established in the unemployment insurance law with regard to cases involving a claimant who was discharged from his or her most recent employment. First, it is the employer's burden to prove that the claimant was discharged for reasons that constitute misconduct. (*Prescod v. California Unemployment Insurance Appeals Board* (1976) 57 Cal. App. 3d 29.) Second, a direct and proximate relationship must be established by the employer between the specific acts of misconduct and the discharge. (Precedent Decision P-B-192.)

In Precedent Decision P-B-192, the Appeals Board explained the requirement that an employer show a "direct and proximate relationship" between acts that comprise misconduct and the discharge itself. In that case, a claimant whose only acts of misconduct had occurred approximately one year before his discharge and who was discharged merely because his coworkers did not like

him was found to have been discharged for reasons other than misconduct. It is thus an employer's obligation to show that the claimant's acts that actually triggered the employer's decision to terminate the employment relationship represented misconduct and absent such a showing the claimant will not be disqualified for benefits.

Attendance Deficiencies as Misconduct

The same requirements of proximate cause for the discharge, fault by the claimant, and harm to the employer apply in cases in which a claimant has been discharged for attendance deficiencies.

Prior precedent decisions by the Appeals Board demonstrate a consistent application of the rule that holds fault by the claimant is generally necessary in order for an attendance shortcoming to represent misconduct that will result in a disqualification for unemployment insurance benefits.[2] In Precedent Decision P-B-216, a claimant who was discharged for being absent from work due to illness was held to have been discharged for reasons other than misconduct. In Precedent Decision P-B-213, a claimant who was discharged due to a two-day absence from work without notice to the employer was held to have been discharged for reasons other than misconduct on the ground that the claimant's preoccupation with the serious illness of her hospitalized child during that time period supplied the claimant with good cause for those attendance derelictions.

By comparison, recurring and unjustified tardiness that persisted after at least one warning and reflected an intentional disregard for the employer's interest was held to constitute misconduct in *Drysdale v. Department of Human Services Development* (1978) 77 Cal. App. 3d 345 and Precedent Decision P-B-143. The claimant in Precedent Decision P-B-143 received one warning about tardiness prior to the final incident of tardiness that caused the discharge, and the claimant in *Drysdale (Ibid*.) received at least two reprimands about tardiness prior to the final incident of tardiness that caused the discharge. In Precedent Decision P-B-215, an unjustified failure to comply with a reasonable employer rule requiring advance notice of an absence was held to represent misconduct despite the fact that good cause existed for the absence itself.

[2] The role of the Appeals Board is limited to deciding whether a claimant was discharged for reasons that disqualify the claimant for unemployment insurance benefits and entitle the employer's reserve account to relief from benefit charges. It is not the function of the Appeals Board to decide whether the discharge was lawful or appropriate .The mere fact that an employer might have had understandable business reasons for terminating the claimant's employment does not necessarily warrant the conclusion that the claimant was discharged for reasons that constitute misconduct connected with the work.

California Code of Regulations, title 22, section 1256-31 provides, in pertinent part:

> …(c) Unexcused Absences. Except for an isolated instance of a short period of unexcused absence for the first time due to an employee's good faith error in judgment, and except as provided in subdivision (d) of this section, an employee who is discharged by the employer due to the employee's absence from work without prior approval of the employer is discharged for misconduct if any of the following conditions exists:
>
> (1) The employee did not have a real, substantial, and compelling reason for, and continuing during the period of, the absence from work of such nature that a reasonable person genuinely desirous of retaining employment would have been absent from work, and the employer has not condoned the employee's absence by failing to warn or reprimand the employee if prior similar unexcused absences from work have occurred.
>
> (2) The employee has not, personally if reasonably possible or by a reliable agent and with reasonable promptness under the circumstances, notified the employer of the employee's absence from work and the reasons for the absence, where notice to the employer is reasonably feasible, and there is no real, substantial, and compelling reason to excuse the failure to give such notice.

This regulation, enacted in 1980 under code section 1256, further endorses the principle that fault on the part of the claimant is an important component for finding that a discharge based on attendance deficiencies is a discharge for misconduct. In other words, if a claimant can establish good cause for an absence, incident of tardiness, or other attendance shortcoming, that attendance deficiency will not represent misconduct.

While the above-described authorities focused on the question of the claimant's fault for the attendance deficiency involved, the impact of that attendance infraction on the employer's interest is an additional element that must be considered. Even a claimant who is at fault for the attendance deficiency that caused the discharge might be held to have been discharged for reasons other than misconduct if that deficiency does not tend to injure the employer. In Precedent Decision P-B-186, an incident of unjustified tardiness consisting of only a few seconds was held not to represent misconduct on the ground that it had not been shown that such minimal tardiness had in any way interfered with the employer's operations.

As Precedent Decision P-B-186 and *Paratransit, supra,* 59 Cal. 4th 551 reveal, the effect of the claimant's attendance deficiency on the employer may be pivotal

in deciding whether the claimant should be disqualified for benefits. An attendance infraction that is so minor or inconsequential as not to be truly injurious to the employer will not represent misconduct, whereas a single attendance transgression that is sufficiently momentous as to be substantially detrimental to the employer's interest will constitute misconduct that, in itself, disqualifies the claimant for benefits. The resolution of this issue concerning the impact on the employer's interest will depend upon a careful analysis of the pertinent circumstances involved in each individual case.

Those circumstances may include, but are not limited to, the nature of the employer's business, the extent to which the claimant's attendance deficiency was disruptive of that business or damaged the employer's productivity, the responsibilities associated with the claimant's position, the extent to which the claimant's actions may have had a negative financial effect on the employer, the extent to which the claimant's attendance transgression affected the morale and productivity of other employees, the impact of the claimant's actions upon the employer's relationship with other employees, whether the claimant's attendance violation may have been reasonably perceived as defying or undermining the employer's authority, whether the claimant had been previously warned about the behavior involved, the extent to which similar attendance deficiencies may have been previously accepted or condoned in the workplace, the number of prior occasions when the claimant engaged in similar behavior, and the extent to which the claimant's actions were either harmful to the employer's relationship with customers and clients or damaging to the employer's reputation.

The "No Fault" Attendance Points Policy

As we have noted, misconduct was defined in Precedent Decision P-B-3 as consisting of a substantial breach by the claimant of an important duty or obligation owed the employer that is willful or wanton in character and tends to injure the employer. In this case, the important duties involved are the employee's duty to render punctual attendance at work as scheduled by the employer and the employee's duty to promptly provide advance notice to the employer if the claimant will not be in attendance at work as required.

In recent years, many employers have chosen to codify such attendance duties in policies or systems similar to that instituted by the employer in this case. These policies typically provide that an employee will be assessed points for each instance of absence or tardiness regardless of the reason for that attendance incident. While such "no fault" attendance policies or systems may serve legitimate employer business objectives, the power of employers to

enforce these policies has been limited by the Labor Code.[3] More importantly, such policies do not limit or control this agency's decision as to whether the facts surrounding a claimant's discharge warrant the claimant's disqualification for benefits.

The decision as to whether a claimant's attendance policy violation represents misconduct under code section 1256 must hinge upon the facts of the case rather than the points and consequences allocated to those facts by the attendance policy formulated by the employer. That decision will chiefly depend upon the claimant's fault for the violation and there is no justification for basing that decision on a "no fault" policy that largely excludes the claimant's fault as a factor to be considered. Many employers have implemented extensive attendance policies that impose penalties for a wide variety of attendance infractions, but those policies should never be permitted to deter or distract this agency from our duty to ascertain all the pertinent facts and then apply the existing unemployment insurance law to those facts. That responsibility requires us to proactively develop a comprehensive evidentiary record with regard to all the relevant facts rather than merely passively accept a point tally offered by an employer.

In a case in which a discharge is based upon an excess accumulation of attendance points under an employer's "no fault" attendance policy, pursuant to the principles set forth in Precedent Decision P-B-192 we must first examine the final attendance incident that proximately caused the employer's decision to discharge the claimant. It is the employer's burden to prove that the final attendance incident represented a breach by the claimant of an important duty owed to the employer and that such incident injured or tended to injure the employer. If the employer fails to satisfy its burden of proof on each of these necessary elements, the claimant will have been discharged for a reason other than misconduct. If the employer satisfies its burden of proof on these elements, it is then the claimant's burden to prove that good cause existed for that final

[3] The following represents a general overview of various Labor Code provisions that relate to an employee taking time off from work for the purpose of attending to important personal matters: Labor Code section 230 prohibits employers from discharging, discriminating against, or retaliating against an employee for taking time off from work to serve on a jury or seek relief from domestic violence, sexual assault, or stalking; Labor Code section 230.2 prohibits employers from discharging or discriminating against an employee for taking time off from work in order to attend judicial proceedings related to that employee or an immediate family member of that employee being a victim of a crime; Labor Code section 230.8 prohibits employers with 25 or more employees at the same location from discharging or discriminating against an employee for taking limited time off from work to participate in activities at the school or child care provider of the employee's child; Labor Code sections 233 and 246.5 prohibit employers from discharging, demoting, suspending or in any manner discriminating against an employee for using accrued sick days for the diagnosis, care, or treatment of an existing health condition of, or preventive care for, the employee or the employee's family member.

attendance deficiency and that the claimant was thus without fault for that incident. If the claimant shows good cause for that final attendance incident, then the claimant will have been discharged for a reason other than misconduct and the claimant will not be disqualified for benefits under code section 1256.

If the claimant was at fault for that final attendance breach of duty and that attendance deficiency tended to injure the employer, pursuant to the principles set forth in *Paratransit, supra*, 59 Cal. 4th 551 that single breach of duty will disqualify the claimant for benefits if (1) that final attendance deficiency was so consequential as to be substantially detrimental to the employer's interest or (2) the claimant had received at least one prior, justified reprimand or warning concerning a similar attendance deficiency. A warning for a prior attendance deficiency would not be justified if good cause was established for that deficiency. Given the nature of attendance policy infractions and the holding in Precedent Decision P-B-143, we have concluded that, in cases concerning discharges for attendance policy violations, the prior reprimand or warning referenced in *Paratransit (Ibid.)* must concern an attendance deficiency similar to the attendance deficiency that prompted the discharge.

Insufficiency of the Record

The record developed in this matter is inadequate to support a proper decision on the issue of whether the claimant was discharged for reasons that constitute misconduct within the meaning of code section 1256. The record is insufficient to ascertain all the relevant facts concerning the June 23, 2015 incident that prompted the claimant's discharge.

California Code of Regulations, title 22, section 5062(m), provides, in pertinent part, that the taking of evidence in a hearing shall be controlled by the administrative law judge in a manner best suited to ascertain the facts and safeguard the rights of the parties.

A fundamental requisite of due process of law is the opportunity to be heard. At a minimum, this requires that a party have timely and adequate notice of the proposed action and the issues to be discussed at the hearing, as well as an effective opportunity to present one's own evidence, confront or cross-examine adverse witnesses and make final arguments. (*Goldberg v. Kelly* (1970) 397 U.S. 254.) "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." (*Ibid.* at p.268.)

In order to provide due process in "no fault" attendance policy cases, it is the responsibility of the administrative law judges of this agency to first ascertain all of the relevant facts concerning the final incident that proximately caused the

claimant's discharge. Inasmuch as the claimant's admitted June 23, 2015 tardiness and admitted failure to provide advance notice to the employer proximately caused her discharge, it was the responsibility of the administrative law judge hearing the appeal to develop a comprehensive evidentiary record as to the reasons for that tardiness, the reasons for the claimant's failure to provide the employer with the required advance notice of that tardiness, and the impact of that incident on the employer. Unfortunately, an adequate record concerning these matters was not developed at the hearing. In this regard, it is noteworthy that information in the documentary record of the case that was compiled before the hearing and admitted into evidence during the hearing indicated that the June 23, 2015 incident of tardiness might have been attributable to the claimant becoming homeless.

The existing record is inadequate to support a decision as to whether the claimant had good cause for both her failure to arrive at work on time on June 23, 2015 and her failure to promptly provide advance notice to the employer that she would be late on that day. Given the proximity in time of those failures, they will be treated as a single incident notwithstanding the fact that they involve separate duties. The record is also less than adequate concerning the effect on the employer of those failures by the claimant. A further hearing is therefore necessary on this case. At such hearing, it will be the claimant's burden to establish good cause for both that tardiness and lack of notice, whereas it will be the employer's burden to establish both that those actions by the claimant tended to injure the employer and the extent of any such harm to the employer's interest.

If the claimant is successful in establishing good cause for both that tardiness and the failure to promptly provide advance notice of that tardiness to the employer, then the claimant would be without fault for those shortcomings and the claimant must be held to have been discharged for reasons other than misconduct. If the effect of those infractions on the employer was so inconsequential as not to be truly injurious to the employer, then the claimant must also be held to have been discharged for reasons other than misconduct regardless of whether the claimant was at fault for those lapses.

If the claimant is unable to establish good cause for both her June 23, 2015 tardiness as well as her failure to promptly provide the employer with advance notice of that tardiness and it is also established that those actions tended to injure the employer, then such transgression would represent a single incident of the claimant breaching an important duty that she owed the employer. Pursuant to the analysis required by *Paratransit, supra,* 59 Cal. 4th 551, that single incident would not constitute misconduct under code section 1256 unless it was either (1) substantially detrimental to the employer's interest or (2) preceded by at least one justified reprimand or warning concerning a similar attendance deficiency.

Accordingly, in addition to ascertaining whether good cause existed for both the claimant's tardiness on June 23, 2015 and the claimant's failure to promptly provide the employer with advance notice of that tardiness, the administrative law judge assigned to conduct the next hearing on this matter should also develop a comprehensive evidentiary record as to both (1) the impact of the claimant's June 23, 2015 actions on the employer's interest and (2) the relevant facts concerning the claimant's prior attendance deficiencies and the reprimand(s) or warning(s) that she received concerning those prior attendance deficiencies. With regard to the claimant's attendance deficiencies prior to June 23, 2015, it will be the employer's burden to prove the claimant received a warning for an attendance deficiency similar to the incident on June 23, 2015, that warning was due to a breach by the claimant of an important duty owed the employer, and that breach injured or tended to injure the employer. It will be the claimant's burden to prove that good cause existed for any such breach of duty prior to June 23, 2015.

For the reasons described above, this case will be remanded for a further hearing and the issuance of a new decision.

DECISION

The decision of the administrative law judge is set aside. The case is remanded to another administrative law judge for a further hearing and a new decision on the merits. The hearing audio recording, exhibits, and other documents previously produced in the course of these proceedings shall remain a part of the record.