

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 14-0664

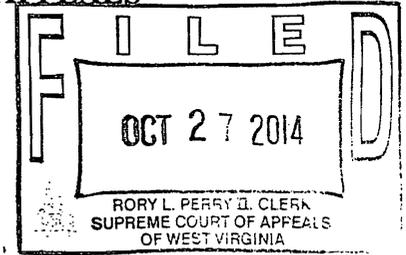
West Virginia Department of Health and Human Resources,
Bureau for Behavioral Health and Health Facilities,
Defendants Below,

Petitioners

v.

E.H., et al.,
Plaintiffs Below,

Respondents.



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

This case concerns an agreed order from 2009 concerning state psychiatric hospitals under the Department of Health and Human Resources. Under the order, the Department agreed to: (a) “provide for increased pay for direct care workers” via set raises; and (b) “use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.” App. 4, Agreed Order of July 2, 2009 at ¶ 10(a)-(b). Interpreting the five-year old order, the lower court here recently ordered the Department to raise the starting salaries of new direct care workers hired after January 1, 2013 and to give all staff *further* pay raises via a pay restructuring plan designed by the Court.

The assignments of error are:

(1) Under the separation of powers and this Court’s precedent, the lower court exceeded its authority when it imposed upon the Department an immediate pay raise restructuring plan and refused to let the Department and the legislature implement any alternate plan to comply with the agreed order’s requirement to reduce overtime and increase permanent staff.

(2) Because the agreed order says nothing about *new* hires’ starting salaries and because the Department reasonably believed it only agreed to raise *existing* employees’ pay, the lower court wrongly interpreted the agreed order to require the Department to increase the starting salaries for new employees.

INTRODUCTION

This appeal is about whether the judiciary may take over the legislative and executive branches’ responsibility for managing the state’s psychiatric hospitals. During this long-running institutional reform case, the Department and the legislature have spent decades of time and millions of dollars to improve patient care at the state’s psychiatric hospitals—going above and beyond what it has been ordered by the court to do. But, disregarding this long cooperative

history, the lower court dramatically expanded the scope of an agreed order to impose upon the Department a massive pay restructuring plan and precluded the Department from working with the legislature to devise alternate policies that could meet the agreed order's quality standards.

The separation of powers vests in the executive and legislative branches the responsibility for making the tough policy choices necessary to bring the Department into legal compliance. Under the state constitution, neither the Department nor the legislature can concede to the judiciary this duty. As this Court has long held, the courts' only role is to resolve legal questions *not* to exercise "perpetual judicial control over the decisions of the West Virginia Department of Health and Human Resources." *E.H. v. Matin (Matin II)*, 189 W. Va. 102, 105, 428 S.E.2d 523, 526 (1993). As a result, "[w]here there is a good faith difference of opinion" about the remedial plan necessary for hospitals to meet their legal obligations, "such differences should be resolved *by the director of the West Virginia Department of Health and not by the courts.*" *E.H. v. Matin (Matin I)*, 168 W. Va. 248, 259–60, 284 S.E.2d 232, 238 (1981) (emphasis added).

Exercising this discretion, the Department and the legislature had agreed earlier in this case to take certain specific steps asked for by plaintiffs. Under a 2009 mediated order, the Department agreed: (a) to "provide for increased pay for direct care workers" under an attached schedule of "proposed" raises for hospital workers; and (b) to "use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts." App. 4, Agreed Order of July 2, 2009 at ¶ 10(a)-(b). These two new benchmarks were agreed to by the Department and initially funded by the legislature on the good-faith understanding that this order, like each order preceding it, would respect the Department and the legislature's responsibility for devising and implementing the means for meeting each new standard of improvement.

At issue here is the lower court's failure to respect basic constitutional principles in interpreting this order. By over-reading the agreed order and imposing its own restructuring plan on the Department, the lower court took over policy decisions vested in the executive and legislative branches. It had no power to order action or payments that the law does not require and to which the Department did not agree. Even less did it have the authority to decide which among many possible policy fixes the Department must make in order to satisfy an agreement to reduce overtime and increase permanent staff.

STATEMENT OF THE CASE

I. The Department agreed to raise pay for existing staff and to reduce overtime and non-permanent staff.

In 2009, after mediation, the Department agreed to improve the state's psychiatric hospitals in several specific ways. *See* App. 4, Agreed Order of July 2, 2009 at ¶ 10(a)-(b) ("Facilities") (Judge Louis Bloom, presiding). Relevant here are two among many standards of improvement. *First*, the Department agreed to "provide for increased pay for direct care workers" and attached a schedule of "proposed" raises. *Id.* at ¶ 10(a). *Second*, the Department agreed to "use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts." *Id.* at ¶ 10(b).¹

¹ The relevant paragraph, ¶ 10 reads in full:

(a) DHHR shall provide for increased pay for direct care workers at Bateman and Sharps in order to (i) be able to recruit staff and retain existing staff and (ii) preclude the practices of mandatory overtime and reliance on temporary workers (except in exceptional and infrequent contexts). (See Attachment B.)

(b) DHHR will use only full time employees working regular shifts or voluntary overtime except in exceptional and infrequent contexts.

Agreed Order at ¶ 10. Attachment B to the order is titled "Bureau for Behavioral Health and Health Facilities [sic] Proposed Salary Increase Bateman and Sharpe Hospitals." It is a chart of figures by classification, number of positions, proposed increase, and total funding.

As a policy matter, it is unknowable and disputed how much the quality of patient care is improved by simply increasing staff pay. That is because all hospital workers, however compensated or structured, are professionals with skills and training to meet general medical and institutional standards of care. Merely paying the same workers more money does not necessarily result in improvements to the care these workers provide.

However, as has been explained in previous filings in this long-running case, the 2009 order reflected the legislature's agreement at that time to provide a set sum to increase staff salaries to market rates that the state Division of Personnel would determine. *See* App. 15–18, DHHR/BHMF Response to Request for Resolution (Cir. Ct. Kanawha County Sept. 21, 2012).

Consistent with the legislature's commitment, the Department took steps in the months after the entry of the 2009 order to improve pay at the state's psychiatric hospitals. For each worker category deemed below market rates, "DHHR, in conjunction with the West Virginia Legislature and the West Virginia Division of Personnel, . . . provided recruitment and retention incentives by providing 3% raises." *Id.* For many workers, these raises went significantly higher than the proposed amounts listed in the agreed order. *See* App. 110, DHHR/BHMF Memorandum of Law in Support to Alter or Amend Judgment (Cir. Ct. Kanawha County Dec. 7, 2012) ("In some instances a higher amount was given that was listed in Attachment B."); App. 229 ("Where DHHR was paying less than the market rate, it increased salaries to the market rate even where the proposed salary increase amount was less. For example some RNs received \$5,000 to \$6,000 raise instead of the agreed upon \$4,000 amount."). The Department likewise undertook various efforts to recruit and retain permanent direct care workers so that the hospitals can reduce overtime and lessen the number of temporary and contract staff. App. 218–19, DHHR/BHMF's Response to Petitioner's Request for Resolution on Temporary Worker & Mandatory Overtime (Cir. Ct. Kanawha County Apr. 21, 2014).

Nevertheless, in 2012, the lower court determined that the Department had failed to comply with the agreed order's first provision, section 10(a). Though section 10(a) provides on its face for "proposed" increases, the court interpreted the provision to set mandatory amounts with required prospective application. App. 120–21, Order Regarding Petitioner's Request for Resolution Regarding Pay (Cir. Ct. Kanawha County Dec. 11, 2012). And so, even though the legislature and the Department had given many doctors and nurses even higher raises in 2009, they nevertheless were directed by the court to give all existing workers the proposed raises enumerated in the schedule, even workers whose salaries were already at market rates. *See id.*; App. 110. The Department did not appeal this decision and the case remained open.

II. Plaintiffs' recent claim that under the order the Department still relies on overtime and on temporary and contract workers.

In 2014, Plaintiffs turned to challenging the success of DHHR's four-year efforts under section 10(b) to reduce "temporary workers and mandatory overtime." App. 168, Plaintiffs' Request for Resolution on Temporary Worker and Mandatory Overtime (Cir. Ct. Kanawha County Mar. 27, 2014). Plaintiffs stated that "[r]ather than filling these vacancies with full time staff, both hospitals are relying on temporary and contract workers to meet staffing demands." App. 171. They suggested that "paying for large amounts of overtime is costly and certainly more expensive over time than increasing base salaries in order to attract and retain additional full time employees," but they did not ask the court to impose any specific changes on the Department. App. 172. Critically, neither Plaintiffs nor the Court Monitor asserted that the Department had failed to comply with section 10(a) of the agreed order, which directly dealt with pay raises. *Cf.* App. 162–67, Court Monitor's Report on Community Integration (Mar. 26, 2014) (merely recommending inquiring into the number of vacancies).

III. The Department objected and showed that staffing shortcomings stem from state-wide leave and hours rules, not merely hospital pay.

In response, the Department maintained that it was “in compliance with the Agreed Order.” App. 220, DHHR/BHHF’s Response to Petitioner’s Request for Resolution on Temporary Worker and Mandatory Overtime (Cir. Ct. Kanawha County Apr. 21, 2014). As the Department explained, while it “may be true” that “overtime is costly,” the plaintiffs “fail to recognize that [the hospitals] are actively recruiting full time employees as best as possible.” App. 219. Because the Department is unable to turn away patients—even when it is at capacity—if it cannot attract enough permanent workers, it must rely on contract or temporary workers or else it would have too few staff for direct patient care. App. 75, 228–29, 1083–84.

Moreover, the Department explained that there were several empirical flaws in Plaintiffs’ singular focus on increasing base salaries to attract full-time employees and reduce the amount of money spent on overtime. To begin with, state officials testified that the major driver of overtime was permanent employees calling off sick, which the state’s generous leave policies permit on a much more frequent basis than non-state employers allow. App. 269, 472–73, 512, Transcript of Hearing before the Honorable Louis H. Bloom, Judge (Cir. Ct. Kanawha County Apr. 24, 2014) (Testimony of Chief Executive Officer of Mildred Mitchell-Bateman Hospital Craig Richards and Commissioner for the Bureau for Behavioral Health and Health Facilities Victoria L. Jones). For example, “in the first two months of 2014, January and February,” the Department “had over 700 call-offs in nursing alone at Sharpe Hospital.” App. 512. As a result, even if the Department were to pay staff more money, as it had in 2009, overtime would not diminish unless the pay raises were tied to reduced leave. As the BHHF Commissioner explained, “what we have learned following salary increases is that unless there are other things that are incorporated into fixing the policies [that would] fix[] the attendance issues,” raising

salaries alone is like “putting a Band-Aid on a gunshot wound.” *Id.* “[I]t’s temporary, and it’s not the only solution there is.” *Id.*

State officials further explained that it was not merely pay that kept workers from seeking or remaining in permanent employment with the hospitals: an hours rule governing all state employees in all departments also precluded giving workers flexibility in their hours. Presently, the state only considers a 40-hour week full-time employment, unlike in the private sector, where employees can work 10% less under more flexible work schedules and still be considered full-time. App. 280–81, 297, 309–10, 316, 364–65, 499. Hospital staff has specifically brought this rule to the Department as a problem. *Id.*

Because of the twin effect of the state’s leave and hours rules, the Department believes that raising workers’ salaries alone would neither reduce overtime nor recruit and retain enough permanent workers. App. 329 (I “believe that offering a competitive salary would assist us in recruiting employees [but] I’m not certain if it would assist us in retaining employees.”); App. 401–02 (“I feel that this problem is—has more to do than just money. I don’t think throwing money at the problem is going to fix it.”); App. 511 (“I believe that our recruitment and retention issues go far beyond just salaries, quite frankly. [Salaries] are a temporary solution, at best.”). In addition, no evidence showed a necessary or even attenuated link between higher salaries for existing workers and *actual improvements to direct patient care*—this case’s ostensible point. The Department’s contract and temporary workers are neither less qualified nor less competent.

Nor did the Department believe that it should increase workers’ salaries without new legislative appropriations. App. 219. The legislature’s budget restrains the hospitals’ funds, which means that if the Department were to give large raises to direct-care workers it would only reduce the Department’s the ability to hire or pay other workers. App. 227, 230–31 (The “agency would have to have funding to pay for the incentives.”); App. 414–15, 435–36, 460–61;

App. 521, DHHR/BHMF Exhibit 1. Because of these trade-offs, the Department “cannot simply raise salaries” unless it *also* receives new appropriations, which is why any salary change should occur with “assistance from the Legislature.” App. 219, DHHR/BHMF’s Response to Petitioner’s Request for Resolution on Temporary Worker and Mandatory Overtime (Cir. Ct. Kanawha County Apr. 21, 2014). Nor can the Department change salary classifications without the Division of Personnel’s permission. App. 223–32, 344–45.

Finally, even though compliance with section 10(a) of the agreed order was not raised by plaintiffs or the Court Monitor, the Department explained under questioning why it was in compliance with this provision as well. App. 232. It stated that the plain text of section 10(a) did not extend to “employees who have yet to be hired” as opposed to employees who were then employed. *Id.* (“[T]his interpretation is solidified by examining Attachment B to the 2009 Agreed Order in which the Department unambiguously agreed to salary increases for existing employees as is denoted in the title of the document.”). The Department also argued that “there is nothing in the code section that directs DHHR and DOP to develop market rates in perpetuity.” *Id.* And, according to the state officials participating in the mediation giving rise to the agreed order, the Department did not believe it had agreed to create a new starting salary for future employees and instead believed it had only agreed to give raises to existing employees. *Id.*; App. 437, 440, 443–46, 487–88 (“[A]ll employees have been paid the appropriate amount agreed to in the 2009 Agreed Order. Neither proposed increases nor the Agreed Order addressed raising the hiring rates of these classifications, only salary rates.”). That is why the Department did not increase the starting salaries for new hires. App. 411–12, 494.

IV. To remedy overtime and a shortage of permanent staff, the court orders salary hikes and pay restructuring for all employees—but does not tie its pay raises to any reforms of employee leave and hours rules.

Despite this evidence, the lower court held that the Department was in violation of both provisions of the agreed order. App. 516–17; App. 244, Order of June 2, 2014, at ¶ 33. *First* and without discussion, the court held that section 10(a) of the agreed order required the Department to increase the starting salaries of new workers. App. 244, Order of June 2, 2014, at ¶ 33.² *Second*, under section 10(b) of the agreed order, the court found inadequate the Department’s current progress at reducing overtime and increasing the number of permanent staff. App. 245, Order of June 2, 2014 at 11.

With respect to the deficiency identified under section 10(b), the court departed from the usual and well-established course in institutional reform cases and determined for itself the contours of the state’s plan to regain compliance. To be sure, the court directed the Department to create the plan. *See* App. 244, Order of June 2, 2014, at 10 (ordering the Department to submit “a plan to (1) significantly reduce the number of staff vacancies at Sharpe and Bateman, (2) discontinue the practice of mandatory overtime except in exceptional and infrequent contexts;

² The Court therefore ordered the Department to immediately implement a special starting salary for the three categories of health service workers as reflected in Attachment B to the 2009 Agreed Order. Employees in those three categories who have been hired and/or promoted to a new position since January 1, 2013, and who did not receive the benefit of the increased base salary must be retroactively compensated. This additionally includes newly hired employees who were paid above the base salary as a result of prior experience; the percent to their increases based on prior experience must be increased to reflect the appropriate base wage. Moreover, the retroactive compensation must include changes to amounts paid in overtime (which should have been paid at 150% of the higher salary) and changes in amounts paid to retirement benefits on behalf of the employee.

App. 244, Order of June 2, 2014 at 11.

and (3) discontinue the reliance on temporary employees and contract workers.”). But beyond this formality, the Department retained no real control over the terms of the plan.

Rather than direct the Department to submit a plan outlining the steps *the Department and the legislature* believed would best solve this problem, the circuit court instead ordered the Department to document and implement a specific plan that *the circuit court* decided would best improve the hospitals. *See* App. 244–45, Order of June 2, 2014, at 10–11. Under this plan, the court ordered the Department to restructure its pay classifications and pay each worker special hiring rates and incentives, defined by the court as “market wages” well beyond the pay raises mandated under section 10(a) of the agreed order. *Id.* The Court ordered the Department to request the Department of Personnel to approve these retention incentives, as well as to schedule future proposals to maintain its preferred staffing incentives. *Id.* The Court refused to let the Department tie the pay raises to any other reforms, including to any modification of employees’ leave and hours rules.

Significantly, the court expressly refused to allow time for the legislature to be involved.

The court explained:

I want the Department to prepare and be prepared to present to the Court their plan to correct these actions, and they should consult with the governor’s office, the Division of Personnel and have an action plan ready for immediate implementation. Don’t come back and tell me, “Well, subject to legislative approval,” this, that and the other. I want to know what your plan is. Failure to do so, the Court may very well develop its own plan.

App. 516–17; App. 244–45, Order of June 2, 2014, at 10–11 (subsequently outlining a court-designed plan that it required the Department to submit); *see also* App. 589, Transcript of Hearing before the Honorable Louis H. Bloom, Judge (Cir. Ct. Kanawha County June 11, 2014) (“I wanted a plan presented to me that was going to comply with the Court order that could be implemented promptly and would not require legislative action.”).

In sum, rather than allow the Department to submit a plan including a full range of legislative *and* administrative policy changes geared toward reducing overtime and increasing permanent staff, the circuit court held that the Department must submit a plan that did *not* require new legislation and that would *only* work towards a solution by raising worker pay. *See* App. 244–45 (“[T]he plan should utilize the currently available options, as set forth in the policies of the Division of Personnel, to implement special hiring rates and incentives in order to recruit fulltime direct care employees.”). In the end, this plan was so specific that all that was left to the Department was formally writing down the steps the court described.

V. The Department has consistently maintained its objections, even incurring contempt in its opposition.

Since then, the Department has consistently objected to the court-ordered plan and has never waived its objections or acquiesced in this plan. Before the court had memorialized its oral ruling in writing, the Department noted its objections to the court-ordered remedy and moved the court to reconsider its decision. App. 219, 232 (DHHR “respectfully requests the Court to reconsider its prior rulings.”). At the next hearing, the Department repeated its objections to the court’s remedial plan and elaborated on other plans that the Department would prefer to the court’s plan. App. 585–694, Transcript of Hearing before the Honorable Louis H. Bloom, Judge (Cir. Ct. Kanawha County June 11, 2014); App. 695, 700–01, DHHR/BHHR’s Proposed Order Regarding June 11, 2014 Hearing (Cir. Ct. Kanawha County June 23, 2014) (identifying three different ways the legislature could grant the hospitals flexibility to reduce leave and hours but increase pay: *first*, total privatization of the hospitals; *second*, outsourcing staff entirely to a non-governmental vendor; or *third*, a quasi-governmental option, under which the hospitals’ employees would be exempt from the normal leave and pay scale restrictions).

Dissatisfied with this response and without warning, the Court denied reconsideration and held DHHR/BHHR in contempt for failing to adopt and submit the plan designed by the Court.

App. 710, Order to Show Cause on Contempt Sanctions ¶ 22 (Cir. Ct. Kanawha County June 27, 2014). Because the court indicated that it viewed its earlier ruling on this subject as final, the Department then filed this appeal. *See* DHHR’s Notice of Appeal of July 2, 2014 (W.Va.).

Later, in order to avoid sanctions for contempt, the Department submitted to the lower court a non-legislative plan under the court’s instructions. *See* App. 713, DHHR/BHHF Respondent’s Response to Order Dated June 27, 2014 (Cir. Ct. Kanawha County July 29, 2014). Although the Department submitted this court-designed plan, the Department did so *only* to avoid contempt sanctions *and* it simultaneously reiterated its objections. *Id.* at 719 (“[T]he proposal of this administrative plan in order to comply with the Court’s orders should *not* be construed as DHHR/BHHF acquiescence to this plan.”). It also expressly moved again to be permitted to submit a plan of its own choice. *Id.* (“[U]nder existing precedent and the separation of powers, DHHR/BHHF has the right and responsibility to propose and implement a remedial plan of its own choice so long as the plan will remedy the problems identified in the 2009 Agreed Order”); *see also id.* at 726 (“DHHR/BHHF respectfully requests that the Court enter an Order holding that . . . DHHR/BHHF may pursue either the plan submitted by this pleading or another plan that meets the goals identified by this Court’s June 3 and June 27, 2014, Orders.”).

As the Department stated again at the resulting sanctions hearing, “this plan was *not* the plan initially proposed and is *not* the plan preferred or that wants to be undertaken in that sense by the, by the Department. So in that sense its [sic] *not* our plan in that regard.” App. 1073–74, Transcript of Contempt Hearing before the Honorable Louis H. Bloom, Judge (Cir. Ct. Kanawha County Aug. 1, 2014 (emphasis added). The Department stressed it only submitted the court-designed plan “pursuant to the Court’s instruction” and “at the direction of the Court” in order to purge contempt and “to follow Court orders.” App. 1038, 1070, 1073–74. The court never ruled directly on the Department’s motion to allow it to submit an alternate plan, but instead merely

directed the Department to implement the court-designed plan the Department had “submitted.” App. 1267–71, Order on Plan and Contempt Sanctions at ¶¶ 17, 24 (Cir. Ct. Kanawha County Aug, 13, 2014). The circuit court then rejected a further motion from the Department for reconsideration. App. 1282–83, Order on DHHR/BHHF’s Reconsideration Motion (Cir. Ct. Kanawha County Aug. 20, 2014); App. 1272–73, DHHR/BHHF’s Motion For Reconsideration of the Court’s Aug. 14, 2014 Contempt Sanctions Order (Cir. Ct. Aug. 19, 2014).

The lower court’s plan is now being implemented over the objection of the Department. In early August, the Department moved to stay the court’s orders and enter an express final judgment on this issue. App. 1214, 1221, 1284–1309. But the circuit court and this Court both refused the stay. App. 1408–09, Order Denying Stay, No. 14-0664 (W. Va. Aug. 26, 2014) ; App. 1308, Order Denying Stay (Cir. Ct. Kanawha County Aug, 13, 2014); App. 1218, Order for Clarification on DHHR/BHHF’s Stay Request (Cir. Ct. Kanawha County Aug. 8, 2014) . Justice Ketchum would have granted the stay. App. 1408.

SUMMARY OF ARGUMENT

The agreed order did not bind the Department to the unexpected and transformative requirements ordered by the lower court. On its terms, the order’s first provision did not require higher pay for new hires and the second provision merely set forth a general requirement to reduce the use of overtime and non-permanent workers. Under well-established precedent from this state and courts across the country, if the Department failed to reach the second provision’s general standard for improvement, the proper course is to allow the Department to select the means of coming into compliance—*not* for the court to seize upon this partial shortfall as an excuse to restructure and increase hospital pay.

The separation of powers requires the courts to respect the legislative and executive branches’ lawmaking and administrative powers over the state’s hospitals. Under the separation

of powers, courts cannot decide which policies the legislative and executive branches should adopt to meet their legal obligations—not when many different policies could bring the hospitals into compliance with the law. *Cf. Syl. pt. 12, State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 590, 730 S.E.2d 368, 373 (2012) (“The only role of the Supreme Court of Appeals of West Virginia . . . is to assess the validity of the particular plan adopted by the Legislature under both federal and state [laws], rather than to ascertain whether a better plan could have been designed and adopted.”).

Where many different policies can remedy state legal deficiencies, courts must give the legislative and executive branches the first opportunity to devise and implement a remedial plan. The overwhelming weight of state and federal case law, including several opinions issued by this Court in this very case, shows that the courts’ role is limited to determining whether the executive and legislative branches’ proposed plan will remedy the legal deficiencies at issue. Even when other plans may seem wiser, the court must respect the plan of elected officials. To do otherwise is to usurp policymaking discretion entrusted by the voters under the state constitution to the executive and legislative officials.

Finally, this Court also may reach the merits of the appeal at the present time. The ruling on appeal is a final judgment. In the alternative, this Court may review the order under the collateral order doctrine. No prior order in this case precludes review, and the Department has not waived its right to appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Department requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because this petition raises issues of fundamental public importance to the separation of powers and directly implicates the Executive, Legislative, and Judicial Branch’s constitutional authority.

ARGUMENT

I. The lower court violated the separation of powers and this court’s precedent when it used section 10(b) of the agreed order to decide the best policy to restructure hospital staffing.

Article V, Section 1 of the Constitution of West Virginia prohibits any one department of our state government from exercising the powers of the others. W. Va. Const. art. V, § 1. Under the separation of powers, “[g]enerally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder.” *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 168, 279 S.E.2d 622, 631 (1981). “[W]henver a subject is committed to the discretion of the legislative or executive department,” the separation of powers therefore provides that “the lawful exercise of that discretion cannot be controlled by the judiciary.” *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S.E. 620, 622 (1933).

In this case, the separation of powers requires the courts to respect the legislative and executive branches’ respective lawmaking and administrative powers over the state’s hospitals. Picking the right plan—among many different options that could bring the hospitals into compliance—involves balancing policy considerations, a quintessentially *political question*. That is why this Court has repeatedly confirmed that lower courts should allow the executive and legislative branches to craft appropriate remedial plans in institutional reform cases. The courts’ role is only to identify the legal obligations state officials must meet and to decide whether the state’s efforts will satisfy its obligations.

This doctrine of “judicial non-interference” ensures that courts “exercise due restraint” and refrain from deciding questions entrusted to the legislative and executive branches, especially economic decisions. *Matin II*, 189 W. Va. at 105–06, 428 S.E.2d at 526–27. Indeed,

this Court has stressed the need to defer to the legislative and executive branches on the matter of remedy even in cases with a much more urgent need for widespread reform.

But here, the lower court took the Department's straightforward agreement under section 10(b) to work to reduce overtime and non-permanent employees to empower *the court* to order the Department to *further* increase hospital pay by unspecified but substantial "market" amounts and to simultaneously *restructure* hospital worker salaries and job classification rates. App. 244–45, Order of June 2, 2014, at 10–11. The court claimed that these bald pay hikes and different management policies were required by the second provision because they make the hospitals a more attractive place to work—thus purportedly reducing the hospitals' reliance on overtime and non-permanent employees. *Id.* But the court refused to let the Department tie any new pay changes to reforms to rules governing employees' hours and leave—problems which evidence established were the root cause of the hospitals' reliance on overtime and non-permanent employees. *See supra* 6–8. Further compounding the constitutional problems in this order, the court made its administrative pay restructuring plan mandatory and immediate, which cut out not only the *Department's* ability to devise the best plan, but also deliberately cut out the *legislature's* ability to select and enact alternate reforms that could solve the hospitals' overtime and non-permanent staffing issues.

The lower court was wrong to determine for itself the best policy and steps required for compliance with section 10(b) of the agreed order. DHHR/BHMF and the legislature have the right and responsibility to propose and implement a remedial plan of their own choice, so long as the plan will remedy the problems identified in the 2009 Agreed Order. App. 4, Agreed Order of July 2, 2009 at ¶ 10(b). Under the separation of powers, it is duty of the executive and legislative branches to select the policy best calculated to bring state hospitals into legal compliance. Accordingly, the lower court should have approved any plan proposed by DHHR/BHMF to

increase the number of permanent employees and reduce mandatory overtime and the number of temporary or contract workers.

A. This court has repeatedly held *in this case* that the Department and the legislature must propose and implement all remedial plans.

This Court has held four times *in this very case* that the Department and the legislature—not the circuit court—decides upon the remedial plan to bring state hospitals into legal compliance. As this Court stated when first it considered how to remedy the state hospitals’ deficiencies, “[w]here there is a good faith difference of opinion” about the necessary reforms, “such differences should be resolved *by the director of the West Virginia Department of Health and not by the courts.*” *Matin I*, 168 W. Va. at 259–60, 284 S.E.2d at 238 (emphasis added). As it explained,

In cases of this type it is important for courts to recognize that we are not experts in medicine, mental health, or *institutional management*. Furthermore, among the best trained professionals in the field of mental health there is an enormous divergence of opinion concerning *appropriate management of related institutions*.

Id. at 258, 284 S.E.2d at 237 (emphasis added). Because the court’s role is not to decide policy questions, instead of deciding *itself* how to fix the state’s mental health system, this Court remanded the case to the lower court for *the State* to “develop[] an appropriate plan for the entire reorganization of the mental health care delivery system in West Virginia.” *Id.* at 259–60, 284 S.E.2d at 237–38; *see also id.* at 261, 284 S.E.2d at 239 (requiring “the respondents”—DHHR—to “submit a plan to the Circuit Court”). To preserve the Department’s role, this Court limited the circuit court’s role to “approving the plan” and “handling all further proceedings necessary to insure implementation of that plan *by the appropriate officials.*” *Id.* (emphasis added).

What is more, the Court expressly allowed the State’s remedial plan to involve legislative cooperation, as opposed to the purely administrative remedy ordered by the lower court in this case. *Id.* at 260, 284 S.E.2d at 238. Instead of despairing of timely legislative action, this Court

applied the well-established rule that courts presume that all state officers will comply in good faith the law. *See Jarvis v. W. Va. State Police*, 227 W. Va. 472, 479 n.6, 711 S.E.2d 542, 458 n.6 (2010) (citing *State by State Rd. Comm'n v. Prof'l Realty Co.*, 144 W. Va. 652, 662–63, 110 S.E.2d 616, 623 (1959)). And here, that principle meant that the court “reasonably inferred that the Legislature will cooperate with the West Virginia Department of Health and the Circuit Court of Kanawha County in implementing an appropriate plan to accord inmates their statutory rights.” *Matin I*, 168 W. Va. at 260, 284 S.E.2d at 238.

Since then, this Court has continued to instruct lower courts in this case to respect the Department and the legislature’s roles in devising remedial plans for the institutional management of the state psychiatric hospital system. Twelve years after its initial decision, for example, this Court reaffirmed the right of the legislature and the Department to decide whether and how to construct new facilities to bring the hospital system into legal compliance. At that time, the Department and the legislature were set to build a brand-new, centrally-located large hospital but the lower court intervened and ordered the state instead “to develop a plan ‘based on a regionalized concept.’” *Matin II*, 189 W. Va. at 104–05, 428 S.E.2d at 525–26. This Court then rebuked the lower court for its interference. *Id.* As this Court remonstrated, “[w]here the legislature, through the budget process, expressly provides for funding to build a new public facility, absent some constitutional challenge or an express statutory provision to the contrary, the courts are not authorized to interfere with the legislative mandate.” *Id.* at Syl. Pt 1.

No earlier decision in this case, the Supreme Court explained, had authorized the lower court to decide for the State how to achieve compliance with its legal obligations *or* to require it to redirect funds in a new, court-determined way. Simply put, “[i]t was not our intention to have the circuit court operate as some type of a judicial super-secretary over the actions of the West Virginia Department of Health and Human Resources.” *Id.* at 105, 428 S.E.2d at 526. The

“earlier remand of this case to the circuit court was not designed to allow perpetual judicial control over the decisions of the West Virginia Department of Health and Human Resources.” *Id.* at 107, 428 S.E.2d at 528.

Nor was this the last this Court had to say on the lower court’s need to respect DHHR’s constitutional authority. Thirteen years later, the Supreme Court of Appeals was compelled to confirm these principles again, saying that “[t]his reasoning” still “applies to the present case” in full. *State of ex rel. Matin v. Bloom (Matin IV)*, 223 W.Va. 379, 381–82, 386, 674 S.E. 2d 240, 242–43, 247 (2009). And so, it took care to note that merely conducting new hearings on the hospitals’ current state of legal compliance did not *and* must not “encroach[] on executive branch authority” in hospital management. *Id.* at 385–86, 674 S.E. 2d at 246–47.

This Court’s most recent decision in this case—a 2011 memorandum decision—is not to the contrary. No. 35505, Memorandum Decision (W. Va. Apr. 1, 2011). In that order, *after* the Department had agreed in the 2009 Agreed Order to seek a Medicare waiver, this court considered whether the separation of powers precluded an order directing the Department to seek the waiver. In that case, there was a specific task that the Department agreed to pursue. Implementing the task was purely ministerial and required no interpretation or policy decisions, or was there any need for a comprehensive plan restructuring the Department’s hospitals.

Here, of course, the situation is different. The Agreed Order’s mandate to reduce overtime and increase the number of permanent workers does not admit of one ready ministerial solution. The order sets forth a standard of staffing, but does not purport to tell the Department how to achieve that goal. The lower court has nevertheless taken this basic agreement to work toward a target of staffing and construed it to give itself the power to decide how the Department must meet it. But DHHR did not agree to let the court decide these means of compliance, and indeed, DHHR *could not* under the separation of powers, which precedent requires DHHR to

have the opportunity to devise remedial plans. Nothing in the memorandum decision speaks to this very different situation present today.

B. This Court’s precedents from other institutional reform cases also instruct that the state executive and not the state judiciary should select the remedial plan.

In fact, the general rule in West Virginia institutional reform litigation is that the legislature or executive branches have the opportunity to devise any necessary remedial plans. In all such cases, “[t]he only role of the [court] is to assess the validity of the particular plan adopted by the [other branch] under both federal and state [laws], rather than to ascertain whether a better plan could have been designed and adopted.” Syl. Pt. 12, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 590, 730 S.E.2d 368, 373 (2012). When a court is “confronted with public pay disputes that offend some [legal] principle,” the court has repeatedly “given the legislature a reasonable period to correct the deficiency . . . to accommodate a legislative solution.” *State ex rel. Longanacre v. Crabtree*, 177 W. Va. 132, 137, 350 S.E.2d 760, 765 (1986) (litigation over magistrate salaries); *see also* Syl. pt. 7, *Jewell v. Maynard*, 181 W. Va. 571, 573, 383 S.E.2d 536, 538 (1989) (staying the court’s order “with regard to a remedy” “in order to afford the legislature an opportunity to solve the problem” of undercompensated court-appointed attorneys); *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 242, 366 S.E.2d 743, 750 (1988) (staying the case so that “the legislature [can] develop a statutory financing scheme which will pass constitutional muster” for public school teacher salaries).

And this judicial deference has been shown even when there is an urgent need for reform. *E.g.*, *State ex rel. Smith v. Skaff*, 187 W. Va. 651, 655, 420 S.E.2d 922, 926 (1992) (noting extreme delays in prison reform and yet “out of an abundance of fairness and forbearance” allowing “the Division of Corrections to develop a plan”); *Crain v. Bordenkircher (Crain IV)*, 181 W. Va. 231, 233–34, 382 S.E.2d 68, 70–71 (1989) (“[w]e are willing to defer again to accommodate another submission of a plan [so long as it] contain[s] specific proposals”).

This process is best illustrated by another long-running institutional reform case, *Crain v. Bordenkircher*, in which this Court repeatedly deferred to the legislative and executive branches in the choice and implementation of a remedial plan. That case centered on the creation of plans to bring the state prison into constitutional compliance, and it began with a lower court order for “*the Department of Corrections* to submit” to the court “a plan to remedy various deficiencies.” *Crain v. Bordenkircher (Crain I)*, 176 W. Va. 338, 341, 342 S.E.2d 422, 426 (1986) (emphasis added); *see also Crain v. Bordenkircher (Crain II)*, 178 W. Va. 96, 97, 357 S.E.2d 778, 779 (1987) (“[T]he *Department of Corrections* submitted a compliance plan.”) (emphasis added); *Harrah v. Leverette*, 165 W. Va. 665, 683, 271 S.E.2d 322, 332 (1980) (“we direct that *the Department* provide us a plan”) (emphasis added). Even when this Court ruled that the Department’s original plan would not bring the conditions into compliance, it nevertheless held that the plan “must be revised by *the Department of Corrections*,” and so it ordered “*the Department* to submit a revised Compliance Plan.” *Crain I*, 176 W. Va. at 363, 342 S.E.2d at 448 (emphasis added); *see Crain v. Bordenkircher (Crain IV)*, 181 W. Va. 231, 232, 382 S.E.2d 68, 69 (1989) (“[W]e appointed [a] Special Master to approve a revised compliance plan to be submitted by *the Department* within 120 days. *The Department* . . . submitted the plan.”) (emphasis added).

The court’s role and that of special masters appointed to assist the court, this Court made clear, was to identify whether each aspect of the plan, if enacted, would meet the constitutional standard—not to select the best plan itself. *See Crain I*, 176 W. Va. at 341, 342 S.E.2d at 426 (describing the issue for the court as “revers[ing] those portions of Judge Bronson’s order that approve the parts of *the Department’s Compliance Plan* that do not meet the requirements of the Final Order”) (emphasis added).

The need for urgent reform in *Crain* likewise did not push the court to transcend the boundaries of the separation of powers and take upon itself the task of planning specific reforms. In that case, the Court gave the executive and legislative branches *eight years* to devise and implement a plan to improve prison conditions but the executive and legislative branches failed utterly to devise or implement any plan to remedy the state's deficiencies. Only at that point did the court push the state to create a plan by ordering the current prison closed. *Crain v. Bordenkircher (Crain III)*, 180 W. Va. 246, 248, 376 S.E.2d 140, 142 (1988) (noting that the court acted "after more than eight years of waiting for the legislative and executive branches to act to solve the problem"). The court stated it was "not unmindful of the *extraordinary* nature of our order." *Id.* at 248, 376 S.E.2d at 142 (emphasis added). But, "action must be taken *now* by the Legislature and the Governor if the construction of a new penitentiary is to be completed." *Id.* at 250, 376 S.E.2d at 144.

Even so, out of deference to the separation of powers, the court nevertheless abstained from appointing a receiver to direct the other branches on how to *plan* a replacement prison. *Id.* The court explained that "[i]n the years since [the initial] order, this Court has deferred to the Governor and the Legislature to formulate an adequate proposal to rectify these deplorable conditions." *Crain IV*, 181 W. Va. at 233, 382 S.E.2d at 70. And the court stated that "[w]e are willing to defer again to accommodate another submission of a plan [so long as it] contain[s] specific proposals" about the site and architectural plans, financing plan, and planned construction timetable. *Id.* at 234, 382 S.E.2d at 71.

This extreme deference and patience extended to plan details, plan deficiencies, any plan delays, and party disagreements. For example, when further plans were necessary to "outline the security and personnel staffing," "personnel" for prison programs, and "the various operational policies and procedures at the penitentiary," it was again *the Department of Corrections* who the

Court directed to “provide” and submit the plan. *Crain v. Bordenkircher (Crain VI)*, 185 W. Va. 603, 605, 408 S.E.2d 355, 357 (1991) (“We conclude that such plans, policies, procedures, and arrangements should be submitted to the Special Master.”) (emphasis added); *Crain v. Bordenkircher (Crain V)*, 182 W.Va. 787, 392 S.E.2d 227, 230 (1990) (finding adequate progress “to comply with the mandates of the Court”). Even when plans were incomplete, the court allowed *the Division of Corrections* to make the plans more complete. *Crain v. Bordenkircher (Crain VIII)*, 187 W. Va. 596, 599, 420 S.E.2d 732, 735 (1992) (“[T]he respondents are ordered to submit to the special master a revised preliminary plan.”). When the division needed more time to implement the plan, the court repeatedly granted it. *Crain v. Bordenkircher (Crain IX)*, 188 W. Va. 406, 407, 424 S.E.2d 751, 752 (1992); *Crain v. Bordenkircher (Crain XII)*, 191 W.Va. 583, 447 S.E.2d 275 (1994); *cf. State ex rel. Smith v. Skaff*, 187 W. Va. 651, 655, 420 S.E.2d 922, 926 (1992) (noting extreme delays in prison reform and yet “out of an abundance of fairness and forbearance” still “direct[ing] the Division of Corrections to develop a plan within the next six months to provide some temporary arrangement to meet its obligation to house and detain all those lawfully sentenced to a state penal facility until such time as the new prison is completed”). Where there was disagreement with the plaintiffs about the plan’s content, the court ordered the special master to resolve the differences only after *the Division agreed*. *Crain v. Bordenkircher (Crain X)*, 189 W. Va. 588, 590, 433 S.E.2d 526, 528 (1993). And when challengers to the prison conditions contended that certain of their proposed remedies “properly fell within the scope of the lower court’s inherent equitable powers to fashion whatever remedy necessary to uphold the strictures of the” law, the court *rejected* their claims in a lengthy recitation of its decades-long deference to the executive and legislative branches. *Crain v. Bordenkircher (Crain XIV)*, 193 W. Va. 63, 65–70, 454 S.E.2d

108, 110–15 (1994). Overall, *Crain* shows the great lengths to which courts go to give executive and legislative branches every opportunity to devise and implement a remedial plan.

Other reform cases have followed a similar pattern of deference to executive policymakers. *E.g.*, *State ex rel. Reg'l Jail & Corr. Facility Auth. v. Cnty. Comm'n of Cabell Cnty.*, 222 W. Va. 1, 14, 657 S.E.2d 176, 189 (2007) (directing the regional jail authority to “promptly meet and formulate a proposed legislative rule . . . for review by the Legislature and faithfully pursue the promulgation of such a rule.”); *State ex rel. Sams v. Kirby*, 208 W. Va. 726, 731, 542 S.E.2d 889, 894 (2000) (“order[ing] the Commissioner of the Division of Corrections and the Director of the Regional Jail Authority to work with the new Special Master to create a complete, long-range plan for the transfer to DOC facilities those inmates lodged in regional and county jails”); *In re Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W.Va. 321, 328, 438 S.E.2d 501, 508 (1993) (directing “the Superintendent of the Division of Public Safety to file with the Clerk of this Court a report outlining the steps that are to be taken” to bring the state crime laboratory into compliance); Syl. pt. 7, *Jewell v. Maynard*, 181 W. Va. 571, 573, 383 S.E.2d 536, 538 (1989) (staying the court’s order “with regard to a remedy” “in order to afford the legislature an opportunity to solve the problem” of undercompensated attorneys in appointed cases); *State ex rel. Bd. of Educ. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 242, 366 S.E.2d 743, 750 (1988) (noting that “the legislature has the duty to take corrective action to amend the statute” financing public education and staying the case so that “the legislature [can] develop a statutory financing scheme which will pass constitutional muster”); *Smith v. W. Virginia State Bd. of Educ.*, 170 W. Va. 593, 601, 295 S.E.2d 680, 688 (1982) (directing “the State Board of Education to promulgate corporal punishment regulations not inconsistent with the [court’s] standards”); *Cooper v. Gwinn*, 171 W. Va. 245, 259, 298 S.E.2d 781, 795 (1981) (directing respondent prison officials to “submit a plan

to the circuit court through which the programs of education, rehabilitation, and treatment may be implemented”).

In sum, as all these cases show, the separation of powers requires courts to decline to resolve the political question of selecting the policies to achieve an agency’s legal compliance. When the legislature entrusts state executive officials with the choice of which policy is best, and no law directly requires the choice of one policy over another, it is well-established that courts “must assume, in the absence of evidence to the contrary, that the responsible executives, in their settled judgment and discretion, have determined that such [policies are] in the best interests of the state.” *State ex rel. League of Women Voters of W. Virginia v. Tomblin*, 209 W. Va. 565, 574, 550 S.E.2d 355, 364 (2001).

The lower court’s orders however rest on a contrary presumption: that DHHR and the legislature cannot be trusted to promptly pick and implement a remedial plan. This notion squarely contradicts the courts’ longstanding presumption that an elected public official will perform his duties in a fair and impartial manner. *See Jarvis v. W. Va. State Police*, 227 W. Va. 472, 479 n.6, 711 S.E.2d 542, 458 n.6 (2010) (citing *State by State Rd. Comm’n v. Prof’l Realty Co.*, 144 W. Va. 652, 662–63, 110 S.E.2d 616, 623 (1959)). It also threatens to have this court undertake administrative functions within the purview of the Department.

C. Federal courts agree that the executive and legislative branches, not the judiciary, are to select the remedial plan.

West Virginia’s long line of cases are moreover well within the mainstream of decisions from federal and other state courts on this issue. As the U.S. Supreme Court has agreed many times, in cases like these the “ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973).

In *Bounds v. Smith*, for example, where reforms were necessary to bring state prisons to constitutional standards, “[r]ather than attempting ‘to dictate precisely what course the State should follow,’ the trial court ‘charge(d) the Department of Correction with the task of devising a Constitutionally sound program’ to assure inmates access to the courts. *Bounds v. Smith*, 430 U.S. 817, 818–19 (1977). This “left to the State the choice of what alternative would ‘most easily and economically’ fulfill” its legal obligations. *Id.* The Supreme Court later ratified this procedure, holding that it “scrupulously respected the limits on” the court’s “role” versus state administrators. *Id.* at 832–33. This procedure wisely ensured that the court “did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation.” *Id.* As the Supreme Court later stated, *Bounds* “was an exemplar of what *should* be done.” *Lewis v. Casey*, 518 U.S. 343, 363 (1996) (emphasis added).

Before and after then, the Supreme Court has continued to respect the separation of powers by observing these principles in a wide variety of institutional reform cases. *E.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1946 (2011) (“Proper respect for the State and for its governmental processes require” the court to “*accord the State* considerable latitude to find mechanisms and make plans to correct the violations” in state prisons.) (emphasis added); *Horne v. Flores*, 557 U.S. 433, 444 (2009) (noting that the trial court *gave the State* repeated opportunities to provide legislative funding and decide upon how to restructure state school systems); *Milliken v. Bradley*, 433 U.S. 267, 286–87 (1977) (“the District Court in the case now before us did not break new ground *in approving the School Board’s proposed plan*” for desegregation) (emphasis added); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 24–25 (1971) (noting that the court was only empowered to devise a plan of its own after “the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the

patient efforts of the District Judge who, on at least three occasions, urged *the board to submit plans*” for desegregation) (emphasis added).

II. The circuit court erred when it held that section 10(a) of the agreed order required immediate pay raises for these employees.

The interpretation of a lower court’s order is a question of law, which this Court reviews de novo. Syl. Pt. 6, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 268, 719 S.E.2d 722, 738 (2011). “Where the [lower court’s] order is unambiguous the [court’s] intent must be discerned solely from the plain meaning of the words used.” *Id.* at 267, 719 S.E.2d at 737. If an order is ambiguous, this Court may consider extrinsic evidence from the time of the order’s creation. *Id.*

Here, the plain text of section 10(a) of the agreed order is unambiguous: it does not contemplate prospective permanent starting salary increases. App. 4, Agreed Order of July 2, 2009 at ¶ 10(a). Under this first provision, the Department agreed to “provide for increased pay for direct care workers” and attached a schedule of “proposed” salary increases. *Id.* at ¶ 10(a).³ This provision order only refers to increasing existing salaries for existing employees: it says nothing about increasing starting salaries for future hires. It thus did not give clear authority for the lower court to increase starting salaries for new workers. Nor did the lower court cite any authority besides this provision that could have justified the lower court’s order. App. 244–45, Order of June 2, 2014, at ¶ 33, 10–11. Applying this provision to new hires therefore exceeds the reasonable scope of the Department’s agreement.

³ The relevant paragraph, ¶ 10(a) reads in full:

(a) DHHR. shall provide for increased pay for direct care workers at Bateman and Sharps in order to (i) be able to recruit staff and retain existing staff and (it) preclude the practices of mandatory overtime and reliance on temporary workers (except in exceptional and infrequent contexts). (See Attachment B.)

Agreed Order at ¶ 10. Attachment B to the order is titled “Bureau for Behavioral Health and Health Facilites [sic] Proposed Salary Increase Bateman and Sharpe Hospitals.” It is a chart of figures by classification, number of positions, proposed increase, and total funding.

Plus, even if there were ambiguity about this provision, all extrinsic evidence on the agreed order's meaning supports the Department's limited interpretation. As its officials testified, the Department believed that it had only agreed in mediation to raise salaries for existing employees. The lower court conducted an evidentiary hearing during which it heard from the state officials who had participated in the original mediation giving rise to the agreed order: each official did not believe the Department had agreed to create a new starting salary for future employees as opposed to merely issuing raises for existing employees. *Id.*; App. 437, 440, 443–46, 487–88 (“[A]ll employees have been paid the appropriate amount agreed to in the 2009 Agreed Order. Neither proposed increases nor the Agreed Order addressed raising the hiring rates of these classifications, only salary rates.”). The plaintiffs did not offer any contrary witnesses or solicit their own evidence about the order's meaning. Where the evidence of an agreed order's meaning of is entirely on one party's side, as here, that meaning should prevail.

Finally, to the extent doubt exists over the meaning of section 10(a), constitutional considerations require resolving it in favor of the Department. Requiring the state to expend money—that neither the executive nor legislature believe that it agreed to spend—raises serious questions about whether the lower court has the power to order the appropriation of state funds and limit the legislature's decision-making authority over Department budgets. As this Court has long recognized, it “must interpret the law to avoid constitutional conflicts, if the language of the law will reasonably permit such an avoidance.” *W. Virginia Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 124, 468 S.E.2d 733, 739 (1996). That course is prudent here.

III. This court may hear the merits of this appeal.

A. The order on appeal is a final judgment.

An order is final and appealable when it “resolves the litigation as to a claim or a party.” *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991). Where an order

“completely disposes of any issues of liability,” the order is appealable so long as “this Court can determine from the order that the trial court’s ruling approximates a final order in its nature and effect.” *Id.* at Syl. Pt. 2; *see also* Syl. pt. 2, *Sipp v. Yeager*, 194 W. Va. 66, 67, 459 S.E.2d 343, 344 (1995) (same). That is the case here.

The June 2, 2014 order “approximates a final order in its nature and effect” in this institutional reform case’s context. App. 244–45. Because the lower court asserts continuing jurisdiction, this case’s pleadings and progress differ from the usual structure of a civil case, in which a complaint raises claims, a final judgment disposes of all claims, an appeal may proceed from a final judgment, and then the case is over. Instead, in this case, whenever the plaintiffs desire court action on a new issue, instead of filing a new complaint satisfying full pleading requirements, they file a “request for resolution” identifying new legal claims under the same docket number, the court next issues an order resolving any disputed issues in the request for resolution, and then the court provides for appropriate action by the parties while retaining continuing jurisdiction. That is what happened here: the June 2, 2014 order resolves the merits of the claims raised in the plaintiff’s request for resolution and it orders a specific form of remedy for immediate implementation. App. 244–45. It is therefore a final judgment or partial final judgment on these claims. The lower court made clear that it does not intend to revisit this or any other prior order on this subject. Nor did the order include any language indicating that the court would take future evidence on whether the Department was deficient under its past agreed obligations, and it would not make sense to do so, because the court had already resolved liability by concluding that the Department was deficient. That final determination of liability is then what prompted the court to order a specific remedy. And so, when the lower court enters a final order like this one, disposing of both liability and the necessary remedy, both the plaintiffs

and the Department should be able to appeal, just as they would be able to appeal from an order providing for a final determination of liability under claims raised in a complaint in a civil case.

Being able to appeal dispositive orders like this one makes particular sense here because, in a case like this, no other final judgment will be entered. The lower court has not yet entered any omnibus final judgment encompassing similar dispositive orders from the past several years, and in light of its continuing jurisdiction, the lower court appears unlikely to ever enter such an omnibus express entry of final judgment as to all issues and past requests for resolution. That is because even when all existing requests have been resolved, this case will remain open for further requests for resolution. And so, as a practical matter, each order deciding each request for resolution operates as a final judgment as to the claims raised in the request.

In contrast, interlocutory orders in this case are not appealable as a final judgment and are appealable only under an exception to the final-judgment rule. Examples of such interlocutory orders include, for example: an order finding a legal claim to be stated and ordering the parties to present evidence and arguments at a hearing or an order excluding or admitting evidence at a hearing under the rules of evidence. *Cf. Vaughan v. Greater Huntington Park & Recreation Dist.*, 223 W. Va. 583, 588, 678 S.E.2d 316, 321 (2009) (holding that an order resolving a motion in limine concerning the admissibility of testimony is “not a final judgment because it obviously is not dispositive of the entire suit, it does not conclude proceedings on a claim raised in the suit, nor does it release a party from all or part of the suit.”); *Gooch v. W. Virginia Dep’t of Pub. Safety*, 195 W. Va. 357, 363, 465 S.E.2d 628, 634 (1995) (holding that a court’s decision to proceed to trial and issue a “denial of summary judgment is interlocutory and not appealable unless it falls within one of the exceptions” (emphasis added)). Another type of interlocutory decision is when, prior to a conclusive determination of liability and deficiency, the court retained jurisdiction so that it may in the future examine questions of liability. *See Adkins v.*

Capehart, 202 W. Va. 460, 463, 504 S.E.2d 923, 926 (1998). The Department does not seek to appeal any interlocutory orders like these here. Instead, it seeks to appeal a dispositive order that fully resolves the merits of a request for resolution in a final manner.

Furthermore, even if other requests for resolution on other issues remain pending, a dispositive order entered on a request for resolution operates as a final judgment in this case. Because of the nature of continuing jurisdiction, many requests for resolution often are filed in the circuit court at overlapping times. That happens because when the court is resolving one request for resolution, the plaintiffs remain free to file new requests for resolution on other unrelated issues—unlike private litigants, who are limited in their ability to amend a complaint and add new claims. That is why it does not make sense to declare a final dispositive order on this case *non-final* due to the mere existence of other pending claims on other issues: a final order disposing of one request for resolution is not affected by what the court ultimately orders in other, unrelated requests for resolution. Indeed, if the mere existence of new requests for resolution could destroy the finality of the court's orders on other requests for resolution, no order—no matter how final and how immediately it must be implemented—would ever be appealable and manifest injustice would result for both sides. The far better course, contemplated by statute and rule, is therefore that an appeal may proceed from each order disposing of a request for resolution because it approximates a separate, final judgment in the circumstances of an institutional reform case like this.

And, at the very least, if the existence of other requests for resolution means that an individual dispositive order is *not* a final judgment as to *all* claims and issues pending in the case, each dispositive order is still at a minimum a *partial* final judgment as to the issues raised in that request for resolution. And, under the rules, a partial final judgment is immediately appealable providing there is no just reason for delay.

The fact that the lower court did not *call* its order a final judgment, denominated as such, is moreover of no moment. When a judgment is final in its *nature* and *effect*, the party is not required to ask that it be *labeled* so. It is already final. Under this Court's precedent, "an order is final 'if the order resolves the litigation as to a claim or a party' or "approximates" a final order in "its nature and effect". Syl. Pt. 1, *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 185 W. Va. 33, 36, 404 S.E.2d 425, 428 (1991). Its *nature* and *effect* makes the lower court's order appealable here, not a formalistic label that the circuit court later may add.

This court's precedent is moreover very clear: when a final order disposes of any claim, this Court can exercise jurisdiction *whether or not* the lower court makes an express finding that the partial order is a partial final judgment. *Id.* In this state, "the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that 'no just reason for delay' exists and 'directi[ng] . . . entry of judgment' will *not* render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling *approximates* a final order in its nature and effect." Syl. Pt. 2, *Durm*, 184 W. Va. at 563, 401 S.E.2d at 909 (emphasis added); *see* W.Va. R. Civ. P. 54 (b) (providing that "the court *may* direct the entry of a final judgment as to one or more but fewer than all the claims or parties" if it makes "an express determination that there is no reason for delay and upon an express direction for the entry of judgment."(emphasis added)).

A formal label of finality is unnecessary because, unlike in federal court, *in this Court*, "[t]he key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is *whether the order approximates a final order in its nature and effect.*" Syl. Pt. 1, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995) (emphasis added); *see* Syl. Pt. 2, *Sipp*, 194 W. Va. at 67, 459 S.E.2d at 344 (same); *Durm*, 184 W. Va. at

566, 401 S.E.2d at 912 (same); *see also Province v. Province*, 196 W. Va. 473, 480, 473 S.E.2d 894, 901 (1996) (proceeding to examine the merits of a partial final order even though other proceedings continued in lower courts and the lower court made no certification of finality). Consequently, under the “spirit of Rule 54(b),” a “practical interpretation” of finality requires that it be able to rule on “dispositive” motions even without the lower court’s certification language. *Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. at 775, 461 S.E.2d at 521.

That is why this Court does *not* “require an ‘express determination that there is not just reason for delay and . . . an express direction for the entry of judgment.’” *Sipp*, 194 W. Va. at 71, 459 S.E.2d at 348. When an order resolves liability, even if other claims and parties remain in the case, such an order “certainly is final in its ‘nature and effect’” and regardless of the lower court’s inclusion of language from Rule 54(b), “*must* be viewed as a final order subject to appeal.” *Durm*, 184 W. Va. at 567, 401 S.E.2d at 913; *Turner ex rel. Turner v. Turner*, 223 W. Va. 106, 112, 672 S.E.2d 242, 248 (2008) (holding that even without certification language, a court “finding had the nature and effect of ending the litigation between the appellants and City Hospital with regard to City Hospital’s reimbursement/subrogation claim” and “is properly appealable to this Court.”).

This Court has also explained the good reasons for these “liberal” rules permitting appeals. As it has explained, “[t]he liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had.” *Durm*, 184 W. Va. at 565, 401 S.E.2d at 911 (citing *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). Rule 54(b) and interpreting precedents therefore must “strike a balance between the undesirability of more than one appeal in a single action and the need for making

review available in multiple-party or multiple-claim situations *at a time that best serves the needs of the litigants.*” *Durm*, 184 W. Va. at 566, 401 S.E.2d at 912 (emphasis added) (citing 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2653 at 26 (1983)).

All these reasons counsel in favor of finding the lower court order appealable here: the lower court’s order disposes of all claims raised in a request for resolution, conclusively ruling on the parties’ liability and the necessary remedy. It operates as (or at the very least “approximates”) a final order “in nature and effect.” The order requires the Department to “immediately implement a special starting salary” for certain employees and submit a court-designed plan to reduce overtime and increase permanent hospital staff. App. 244–45. It acts as a final decision on liability and on what the Department must do to remedy these issues. There is moreover “no just reason to delay” designating this part of the case as final. The plan presented by the Department has been ordered to be implemented forthwith and the Department is doing so. No further matters will be held regarding liability or the choice of a proper remedy.

Finally, requiring a Rule 54(b) certification in this case makes particularly little sense in the circumstances of a case like this. Generally, if a certification is necessary, the proper course is to dismiss this appeal and give the Department a chance to request such a certification in the lower court, after which it will have a new window of opportunity to appeal. But here, if the Department had asked for such a certification under Rule 54(b), it would have been futile. Before bringing this appeal’s companion case, the Department, out of an abundance of caution, asked for such a certification on this final order, which was denied out of hand by the lower court for reasons having no foundation in law or fact. If such a certification is necessary, this Court should therefore immediately proceed to this case’s companion appeal, examine and reverse the lower court’s baseless denial of a certification, and then proceed to exercise jurisdiction under Rule 54(b) over the validity of the court’s order. *See* No. 14-0845 (appealing the circuit court’s

denial of an express entry of partial final judgment, the reversal of which gives rise to appellate jurisdiction as to all issues).

B. The collateral order doctrine provides a basis for review

What is more, to the extent this Court concludes that the order appealed is non-final, the order would then be appealable as a collateral order. The “collateral order” doctrine, first established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), permits appeal of an interlocutory order when three factors are met: “if it (1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.” *Credit Acceptance Corp v. Front*, 231 W.Va. 518, 523, 745 S.E.2d 556, 561 (citing *Durm v. Heck’s, Inc.*, 184 W.Va. 562, 566 n. 2, 401 S.E.2d 908, 912 n. 2 (1991)).

Cohen’s requirements are met here. *First*, the lower court’s order “conclusively determines the disputed controversy” because it ruled on each disputed issue. Its order is not tentative, informal or incomplete. Rejecting the Department’s arguments on the merits and on its preferred plan, the order required the Department to “immediately implement a special starting salary” for certain employees and directed the Department to submit a remedial plan of the court’s design. The court therefore fully resolved both the merits of whether the Department is in compliance as well as what it views as the remedy. This “disposes of the factual and legal issues” such that “there would be no likelihood of further appeal” on these same questions. *C & O Motors, Inc. v. W. Virginia Paving, Inc.*, 223 W. Va. 469, 474, 677 S.E.2d 905, 910 (2009) (citation omitted). And, because the lower court has no intention of revisiting these orders, its decision “conclusively determines” these issues.

Second, this order “resolves an important issue completely separate from the merits of the action.” To the extent this Court concludes that the orders are not a full or partial final judgment,

this prong is almost by definition satisfied. If the order is non-final, in whole or in part, then presumably some other, larger merits issue exists to which this order is separate and collateral.

Furthermore, under this factor, the Court also looks at whether “resolution of the [raised] question is important” because it may “resolves the foundational question of the manner in which the parties will resolve their dispute.” *Credit Acceptance Corp.*, 231 W. Va. at 525, 745 S.E.2d at 563. In past cases, this Court has held that appellate jurisdiction exists over the threshold question of who would resolve a dispute: the courts or arbitrators. *Id.*; *Crihfield v. Brown*, 224 W. Va. 407, 411, 686 S.E.2d 58, 62 (2009). Here, the June 2, 2014 order resolves an important question under the separation of powers about whether the Department and the legislature or instead the court will devise a remedial plan and restructure hospital staffing and compensation. App. 244–45. This “important question” is entirely separate from the question of whether any subsequently-proposed plan has merit and is likely to meet the terms of the agreed order.

Third, without this Court’s interlocutory review, this order “is effectively unreviewable on appeal from a final judgment.” If this June order is non-final, in whole or in part, that also presumes that a future final judgment at some point will come, and that that the lower court will not exercise continuing jurisdiction in perpetuity. But, as a practical matter, by the time this future final judgment is entered, there is no way to unscramble these eggs. The order requires immediate implementation of a special starting salary. The June order acts as a final decision on what the Department must do: give pay raises and follow the court-designed plan. Requiring the Department to wait to raise this question until after the lower court has required the Department to implement the court’s plan will deny the Department its right to resolve policy questions and select the best means by which the Department will come into compliance.

Finally, because of the exceptional gravity of the constitutional problems at issue in this un-stayed order, even if this Court doubts its jurisdiction, this Court should still review this order.

This Court has stated that in important cases it has discretion to address the merits even when appellate jurisdiction is questionable. See *McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 223, 681 S.E.2d 96, 108 (2009) (“[I]n extraordinary circumstances, this Court has addressed issues not properly before it.”); *State ex rel. Foster v. Luff*, 164 W. Va. 413, 419, 264 S.E.2d 477, 481 (1980) (noting that even though a collateral issue was not properly before the court, the Court nevertheless “accepted this issue under our original jurisdiction powers” “to resolve a substantial issue of considerable importance”).

C. No prior orders in this case preclude appellate review of these orders.

Despite this case’s long history, this Court has not ruled upon the orders below or held that the Department may not ask this Court to decide whether these orders exceeded the lower court’s authority under prior agreed orders and the state constitution.

Nothing in the 2009 Agreed Order precludes appellate review of future orders purporting to require compliance. To be sure, agreement to an order prevents the party from backtracking on the order itself and from re-disputing the issues resolved in the order. But absent an express waiver, that agreement does not waive the party’s ability to object to or appeal from a future order purporting to enforce the agreed order but in reality expanding the order beyond the parties’ agreement. Indeed, if that were the case, it would deprive the parties of due process.

D. No issues were waived because the Department noted its objections in the circuit court.

Once a party presents its objections and the court rejects them, there is no further need for the party to continue to present its objections in order to preserve them for appeal. W. Va. R. Civ. P. 46 (“Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party’s objection to the action of the court and the

grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.”).

Here, the Department noted its objections on the record orally and in writing and repeatedly moved for a contrary result: it has therefore never waived its objections and it preserved them for appeal. Before announcing its decision, the Court had not asked the parties for their views on a proper remedy. Nevertheless, the Department, on its own, repeatedly objected to any finding of deficiency under the agreed order and noted that it believed that any remedy should involve the legislature and tie pay changes to deeper reforms than unilateral pay raises. App. 219, 269, 329, 401–02, 450, 472–73, 509–10. It then moved for reconsideration multiple times, objected to the court’s plan at each subsequent hearing, and even *incurred contempt* in its opposition to the court. *See supra* 11–13.

The Department’s subsequent, court-ordered submission of a plan documenting the court’s already-decided remedy does not mean the Department acquiesced to the court-ordered plan—even the lower court belatedly and incorrectly implied DHHR had done the opposite. App. 1282–83, Order on DHHR/BHHR’s Reconsideration Motion (“Respondents did not object to the Court’s approval of the proposed plan at the August 1, 2014, hearing.”); App. 1304, 1308, Order Denying Stay at ¶¶ 17, 24 (same); App. 1315, 1318–19, Plaintiffs’ Response in Opposition to DHHR/BHHR’s Emergency Application For Immediate Stay (W. Va. Supreme Court Aug. 18, 2014) (“DHHR has not pointed to any place in the transcript from the August 1, 2014, hearing in which it objected to the circuit court approving or directing implementation of the plan.”).

Instead, in the face of contempt sanctions the Department merely asked for the circuit court’s *approval* of a plan, whose contours were pre-determined by the Court, as satisfying the court’s order to submit just such a plan. As the Department noted in its pleading submitting the plan, while it would submit the plan to purge itself of contempt, the Department objected to the

court's order to follow and submit such a plan. *See* App. 719 (“[T]he proposal of this administrative plan in order to comply with the Court’s orders should *not* be construed as DHHR/BHMF acquiescence to this plan.”); *id.* at 726 (again moving the court to be allowed to submit a plan of its own choice). Then, at the contempt hearing, the court directly responded to DHHR’s written “memorandum” objecting on the basis of the separation of powers and the court stated its reasons why it believed its orders did not violate the separation of powers. App. 1073–74. At that point, the Department again reiterated: “this plan was *not* the plan initially proposed and is *not* the plan preferred or that wants to be undertaken in that sense by the, by the Department. So in that sense its [sic] *not* our plan in that regard.” App. 1038, 1070, 1073–74. Indeed, counsel stated, DHHR was only meeting its “obligation to follow court orders.” *Id.*

Contrary to the lower court’s assumption, a party does not waive its objections to a court’s order when it complies with an order—over its noted objections—merely to purge contempt. W. Va. R. Civ. P. 46. Nor can compliance with an order issued over a party’s previously-stated objections waive the opportunity to appeal. Indeed, it is difficult to imagine what more the Department could do to object to the lower court’s ruling if the Department’s raft of objections, *plus incurring contempt*, is not enough.

Moreover, because the claims at issue here are constitutional, the Department *cannot* waive its objections even if it tried. This appeal is about the fundamental authority of the lower court to issue its order and “implies or imports the power of the court.” *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 178, 423 S.E.2d 560, 582 (1992) (internal quotations omitted). A lack of constitutional authority cannot be waived and must be addressed by a court even if not pressed by any party. *Id.*; *cf. United States v. Corrick*, 298 U.S. 435, 440 (1936) (“[T]he lack of jurisdiction of a federal court touching the subject-matter of the litigation cannot be waived by the parties, and the District Court should, therefore, have declined *sua sponte* to proceed in the

cause.”); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (“Subject-matter jurisdiction can never be waived or forfeited.”). That is why this Court will address on appeal “a constitutional issue,” including a claim like this one under “the separation of powers,” “that was not properly preserved at the trial court level” “when the constitutional issue is the controlling issue in the resolution of the case.” Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 84, 87, 622 S.E.2d 788, 791, 794 (2005); Syl. Pt. 4, *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 687 S.E.2d 768, 771–72 (2009) (same); Syl. Pt. 2, *Simpson v. W. Virginia Office of Ins. Com’r*, 223 W. Va. 495, 497, 678 S.E.2d 1, 3 (2009) (same); see also *In re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty.*, 223 W. Va. 14, 20, 672 S.E.2d 150, 156 (2008) (“[W]e nevertheless may consider [an assignment of error] for the first time on appeal to this Court insofar as it raises an issue of constitutionality that is central to our disposition of this case.”).

If, as precedent shows, the lower court *per se* lacks the power to resolve disputed policy questions for the Department, no approval by the Department can confer this power. And so, even if the Depart *had* waived its objections—which it vociferously did *not*—this Court would nevertheless be obligated to proceed to the merits of the constitutional questions raised.

CONCLUSION

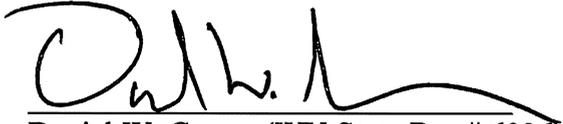
The lower court should be reversed.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR BEHAVIORAL HEALTH
AND HEALTH FACILITIES

By counsel

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A handwritten signature in black ink, appearing to read 'D. W. Greear', written over a horizontal line.

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Dated October 27, 2014

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0664

**West Virginia Department of Health and Human Resources,
Bureau for Behavioral Health and Health Facilities, Defendants Below,**

Petitioners

v.

E.H., et al., Plaintiffs Below,

Respondents.

CERTIFICATE OF SERVICE

I, Julie M. Blake, Assistant Attorney General and counsel for Defendants-Petitioners, verify that on October 27, 2014, I served a copy of *DHHR/BHFF'S Petitioner's Brief* upon all parties as indicated below by hand delivery:

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